JUDICIAL RESPONSE TO THE REPRESENTATIVE PARTIES RULE IN ENGLAND AND AUSTRALIA

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ABSTRACT

Use of the representative parties rule in England and Australia has been stifled by restrictive interpretation of the circumstances in which it is available. Chapter 1 demonstrates that the predominant test in England for the 'same interest' required by the rule would, if consistently applied, defeat any claim to use the rule. The recent change of test in Australia widens the rule's potential scope but does not appear to have resulted in significantly more liberal interpretation. Chapter 2 discusses the rule's operation, including *res judicata*, the enforcement of judgments, and the protection of the interests of those represented and of the named parties. It concludes that the rule diverges from the traditional model of individual voluntary civil litigation, and is characterised by uncertainty. Chapter 3 argues that this uncertainty may have encouraged a defensive posture by the courts, limiting use of the rule and avoiding the need to address those issues which demand resolution. Chapter 4 notes that various features of the rule undermine a number of principles commonly associated with procedural fairness. It is argued that judicial response to these features often pays insufficient attention to two issues. The first is whether the purpose which the principle is expected to promote is in fact protected by the rule, even if the principle itself is undermined. The second is the need to balance the rule's limitation of some principles against its particular benefits. It is further argued that some successful representative claims exemplify circumstances in which the primary purpose of procedural law (accurate application of the substantive law) is served by the rule. Chapter 5 identifies other successful representative claims, particularly against representatives of the members of unincorporated associations, which, it is argued, ought to be viewed not as supporting accurate application, but rather as facilitating development, of the substantive law.

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LIST OF ABBREVIATIONS

General

'The rule'	The representative parties rule.
'The original rule'	Rules of the Supreme Court 1883 Order 16 rule 9, set out in full in Appendix A; and its Australian equivalents.
'The 1962 rule'	Rules of the Supreme Court 1965 Order 15 rule 12 (introduced by the Rules of the Supreme Court (Revision) 1962), set out in full in Appendix A; and its Australian equivalents.
'The current rule'	Civil Procedure Rule 19.6, set out in full in Appendix A.
'Australian equivalents'	Rules of Court in the Federal and State jurisdictions of Australia, which are in substantially the same form as either the original rule or the 1962 rule. These are listed in Appendix B, and their text is collated against the English rules.
'The Queensland rule'	Queensland, Uniform Civil Procedure Rules 1999, Rules 75-77, and Supreme Court of Queensland Act 1991, s 82; set out in full in Appendix C.
RSC	Rules of Supreme Court (or Supreme Court Rules, as the case may be in different jurisdictions)
NSW	New South Wales
Qld	Queensland
SA	South Australia
Vic	Victoria
WA	Western Australia

Law Reports (E&W)

BCLC	Butterworths Company Law Cases
Com LR	Commercial Law Reports
LT	Law Times Reports
LTJ	Law Times Journal
SJ	Solicitors' Journal
TLR	Times Law Reports
WN	Weekly Notes

Law Reports & Legislation (Aus)

ACSR	Australian Corporations and Securities Reports
ALT	Australian Law Times
ATPR	Australian Trade Practices Reports
CSCLC	CCH Consumer Sales and Credit Law Cases
FCA 1976	Federal Court of Australia Act 1976 (Cth)
Part IVA	Part IVA of the Federal Court of Australia Act 1976 (Cth)

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Bollinger v Goldwell	*J Bollinger SA v Goldwell Ltd* [1971] FSR 405
the *LAPT* case	*London Association for Protection of Trade v Greenlands, Ltd* [1916] 2 AC 15 (HL)
the *Markt* case	*Markt & Co, Ltd v Knight Steamship Co, Ltd; Sale & Frazar v Knight Steamship Co, Ltd* [1910] 2 KB 1021 (CA)
the *MMSA* case	*Mercantile Marine Service Association v Toms* [1916] 2 KB 243 (CA)
the *Pan Atlantic Insurance* case	*Pan Atlantic Insurance Co Ltd and Republic Insurance Co v Pine Top Insurance Co Ltd* [1988] 2 Lloyd's Rep 505; [1989] 1 Lloyd's Rep 568 (CA)
the *Prudential Assurance* case	*Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229
the *Taff Vale* case	*Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL)
Re Waring (No 1)	*Waring, Re; Westminster Bank, Ltd v Awdry* [1942] Ch 309; [1942] Ch 426 (CA)
Re Waring (No 2)	*Waring, Re; Westminster Bank v Burton-Butler* [1948] Ch 221
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the *CBS/Sony* case	*CBS/Sony Hong Kong Ltd v Television Broadcasts Ltd* [1987] FSR 262
Radcliffe v Coltsfoot	*Radcliffe v Coltsfoot Investments Ltd* [1984-86] Manx LR 386
Cases (Aus & NZ)	
the *APRA* case	*Australasian Performing Right Association Ltd v Miles* (1961) 3 FLR 146
Cameron v National Mutual	*Cameron v National Mutual Life Association of Australasia Ltd* [1991] 2 QdR 601
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Carnie v Esanda	*Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398
Carnie v Esanda (No 1)	*Carnie v Esanda Finance Corp Ltd* (1990) CSCLC ¶55-983

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Evans v Waitemata	*Evans v Waitemata District Pony Club, East Coast Bays Branch* [1972] NZLR 773
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INTRODUCTION

This thesis examines the post-Judicature Acts[1] representative parties rule in England and Wales, and in Australia.[2] While the rule does vary somewhat in the different jurisdictions considered, all formulations essentially enable a party to represent others in an action where those to be represented are 'numerous', or exceed a particular number, and where the party and those represented have the 'same interest'.

The judicial interpretation of the 'same interest' required by the rule has been considered to be 'restrictive'[3], and has attracted criticism for excluding claims which some commentators regard as appropriate for use of the rule.[4] Nevertheless, the rule was retained in the reform of the Civil Procedure Rules in 1998.[5]

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[1] The rule has its origin in the Court of Chancery, and was preserved in the merger of law and equity. Its pre-Judicature application is comprehensively considered in SC Yeazell 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77 Columbia L Rev 866, 'From Group Litigation to Class Action Part I: The Industrialization of Group Litigation' and 'From Group Litigation to Class Action Part II: Interest, Class, and Representation' (1980) 27 U California Los Angeles L Rev 514 and 1067, 1067-1087. Stoljar (1954) 479-480 suggests that there is evidence that the idea of representative classes was not unknown to the common law of the seventeenth century. I have tried to state the law as it was available to me at 31 August 2001.

[2] The rules considered are set out in Appendices A, B and C. There is also reference to New Zealand decisions, and a number of cases are drawn from other jurisdictions where they have particular relevance to the argument being advanced. Reference to 'England' is understood to include reference to 'Wales'. The legislation and rules referred to are English, unless indicated otherwise.

[3] Aronson (6th edn) 99; ALRC *Report No 46* (1988) 18, 20.

[4] See, for example, R Alkadamani 'The Beginnings of "Class Actions"' (1992) 8 Australian Bar Rev 271, 273.

[5] Interest in promoting representative claims continues with the Lord Chancellor's Department's publication of *Representative Claims: Proposed New Procedures Consultation Paper 1/01* in February 2001 (although the proposals contained in that paper are intended to supplement the current rule, and while it refers to representation by individuals and organisations, the focus appears to be on the latter). Recent reform of the Rules of the Supreme Court of Queensland also retained the representative parties rule in essentially the same form, UCPR 75-77 and Supreme Court of Queensland Act 1991 (Qld) s 82.

However, the reasoning which has been relied upon to deny claims to use the rule has rarely been examined in any detail.[6] This thesis undertakes an examination of the judicial response to the rule with reference to the purposes which procedural law generally, and the representative parties rule in particular, are expected to serve.

A PURPOSES AND PRINCIPLES OF PROCEDURAL LAW

1 Representative Parties Rule: Substantive or Procedural Law?[7]

The current rule is made under the authority of section 2 of the Civil Procedure Act 1997. That section provides that the power to make such rules extends to matters of procedure only.[8]

Procedure is 'the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product'.[9] Most

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[6] C Hodges *Multi-Party Actions* (OUP Oxford 2001) 122-124 provides a recent example, re-iterating the view that the representative parties rule has been restrictively interpreted, and dealing with it only very briefly.

[7] The term 'procedural law' here refers to civil procedural law, and its adoption, in contrast to the broader term 'adjectival law', excludes the law of evidence.

[8] Langan (3rd edn) 14-15.

[9] *Poyser v Minors* (1881) 7 QBD 329 (CA) 333, 336. Adopted in *Re Shoesmith* [1938] 2 KB 637 (CA) 648, and *Minister of State for the Army v Parbury Henty and Co Pty Ltd* (1945) 70 CLR 459, 489; and cited in Holland (13th edn) 358, JA Jolowicz (ed) *Lectures on Jurisprudence by the late HF Jolowicz* (Athlone Press London 1963) 361, and Jolowicz (1990) 263.

commentators adopt a similarly general formulation of the distinction between the two, taking the view that substantive law defines the rights and liabilities of persons, irrespective of whether these rights or capacities can be enforced or recognised in a court. Procedural law governs the process of litigation and regulates the steps which must be taken by parties in litigation from the time that the claimant commences proceedings to the time when (if successful) he or she wishes to enforce the judgment obtained.[10] Procedural law is the means by which claims in civil matters can translated from assertions into binding determinations.[11]

The distinction between substantive and procedural law is not always clear cut.[12] It has been pointed out that to define 'procedure' as a 'mode of proceeding' does not offer significant assistance in distinguishing procedural from substantive law in difficult cases.[13] The conclusion that it is not possible to formulate a definition which dictates whether a given law is either substantive or procedural in the abstract and that such a distinction can only be made with regard to the particular terms of any law and the purpose for which the distinction

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[10] *Salmond on Jurisprudence* (12th edn) 461; Langan (3rd edn) 1; Andrews (1994) 3; *Halsbury's Vol 37* (4th edn) 19; Jacob (1987) 55; Bayles (1990) 3; Galligan (1996) 50. Holland (13th edn) 358-359 includes the definition of the limits within which self-help is permissible within procedural law.

[11] Jacob (1987) 55; *Salmond on Jurisprudence* (12th edn) 464. It may be found in legislation, rules, practice notes, practice and in the court's exercise of its inherent jurisdiction, Andrews (1994) 5-6; Jacob (1987) 50-63; *Halsbury's Vol 37* (4th edn) 12-24.

[12] See, for example, Langan (3rd edn) 1 on the difficulty classifying rules concerning limitation periods.

[13] *Cheshire & North* (13th edn) 70.

is to be made is compelling.[14] The concern here is to determine whether the enactment of the representative parties rule is a valid exercise of the rule-making power.[15]

The validity of the enactment of the representative parties rule has never been challenged.[16] The rule does seem in its nature to be 'procedural' - it is only relevant to the process of litigation and does not grant any rights in itself. It offers a particular method of enforcement of pre-existing rights - by representation.[17] Moreover, in *Poyser v Minors* it was noted that the fact that the rule there under consideration had been framed by judges of some experience, adopted by the Lord Chancellor, and accepted and acted upon for a number of years without objection carried great weight, and that 'nothing short of strong conviction that the Act has been strained, and that it will not bear such a construction' would justify the court in declaring the rule to be *ultra vires*.[18] Similar considerations apply to the representative

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[14] *Cheshire & North* (13th edn) 70-71; *Dicey & Morris* (13th edn) 157-158; *Re Shoesmith* [1938] 2 KB 637 (CA) 652. Jolowicz (1990) 262-263 notes that rules of evidence are considered to be procedural for the purposes of conflict of laws but are not considered to fall within 'practice and procedure' for the purposes of rule making powers. Given that the distinction between substantive law and procedure drawn in theory may not always be easy to draw in practice, it is not surprising that there may be, over time, movement between the two categories, *Salmond on Jurisprudence* (12th edn) 462-463 and *Dicey & Morris* (13th edn) 157.

[15] Civil Procedure Act 1997 ss 1, 2.

[16] *Halsbury's Vol 37* (4th edn) 19 comments that it is comparatively rare for any of the Rules of the Supreme Court to be challenged as *ultra vires*. Note, however, *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Australia Ltd* (Supreme Court of Victoria Court of Appeal 8 June 2000) where it was argued that the enactment of rules equivalent to Part IVA was invalid because, *inter alia*, those represented could be affected without knowing of the proceedings, and without being served by conventional means. Ormiston JA (Phillips and Charles JJA agreeing) rejected the argument, and referred to 'the "traditional" representative suit' having noted that 'for many centuries the courts have permitted ... parties to sue (and be sued) by representatives'.

[17] In *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (CA) 563-564 it was noted that, in regard to a rule enabling a court to make a declaration of right that 'if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is ... only dealing with procedure and practice'. In the *Zentahope* case (1991) ATPR ¶41-120, 52,778 the former ss 34 and 35 of the Supreme Court Act 1986 (Victoria), which enabled representation with the consent of those represented, were described as 'wholly procedural in nature'.

[18] (1881) 7 QBD 329 (CA) 333.

parties rule, and its nature, its judicial acceptance, and its continued inclusion in the rules of court[19] all point to its being procedural, and a valid exercise of the rule-making power.[20] The issue which then arises is the purposes which procedural law, and this rule in particular, are intended to serve.

2 Purposes and Principles of Procedural Law

(a) Accurate application of law to facts

There is considerable consensus in the jurisdictions considered as to the primary purpose of procedural law. Procedures are to support the substantive law, and to enable accurate application of the substantive law to the facts.[21] This view of the role of procedural law assumes that it is desirable that promulgated laws be accurately applied, leaving the question of the justification of the content of those laws to separate jurisprudential enquiry.[22]

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[19] The Full Court of the Federal Court of Australia in *Femcare Ltd v Bright* (2000) 172 ALR 713, 725-728, 733 in fact relied, in part, on the history of judicial acceptance of the representative parties rule to deny the appellant's arguments that Part IVA is inconsistent with the judicial process (as required by the Australian Constitution) because it does not ensure individual notice to group members and compromises their autonomy.

[20] Delegated legislation must be presumed to be valid unless and until declared invalid, Bennion (3rd edn) 185.

[21] Zuckerman (1995) 160; Galligan (1996) 5, 10; Lever (1999) 297; Walker (1988) 19; Aronson (6th edn) 6. American jurisprudence takes a similar view, Grey (1977) 184; Resnick (1977) 217; Redish (1986) 476.

[22] As James (3rd edn) 3 succinctly points out, the competing notions of justifiable law range over natural law concepts, arguments based on economic efficiency, or reference to the prevailing community sense of fairness.

While it is widely accepted that procedures should facilitate accurate outcomes, Rawls observes that it is unlikely that a procedure can be devised which will guarantee an accurate outcome. He describes perfect procedural justice as existing where there is an independent criterion for the desired outcome and a procedure which is sure to give the desired outcome. Imperfect procedural justice exists where there is an independent criterion for the correct outcome but no procedure which is sure to lead to it. His conclusion that perfect procedural justice is rare, if not unattainable, seems unavoidable.[23] Therefore, any assessment of the representative parties rule and its interpretation on this basis cannot sensibly ask whether the rule will deliver accurate results; it can only ask whether it is more or less likely than other possible procedures to deliver accurate results.[24]

(b) Other purposes of procedural law

While procedural law is primarily concerned with advancing accurate application of the substantive law to the facts,[25] it may also serve other purposes. The proposition that procedural law is not limited to facilitating the accurate application of law to the facts is generally accepted[26] and is particularly convincing when attention is drawn to those procedural rules

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[23] Rawls (1972) 84-85. See Bayles (1990) 4-7; Galligan (1996) 42, 114. A 'fair procedure' is, therefore, distinguishable from a 'fair result', the latter being determined by reference to the substantive law and the facts, insofar as they are known, Zuckerman (1994) 353, 355.

[24] Bayles (1987) 17.

[25] Insofar as that is possible.

[26] Bayles (1987) 19-20; Galligan (1996) 8; Aronson (6th edn) 6; Redish (1986) 481-482; Saphire (1978) 124; Summers (1974) 11-12; Rawls (1972) 239; Resnick (1977) 217-219.

which are widely supported but in fact inhibit the accurate application of the law to facts. For example, in *The Ampthill Peerage* Lord Simon assumed that procedures may serve purposes other than the accurate determination of the dispute at hand, and that these other purposes may in fact conflict with that goal, when he referred to a 'fundamental principle of English law' that '[i]t is in the interest of society that there should be some end to litigation.' His Lordship went on to acknowledge that '[t]ruth may thus be shut out; but society considers that truth may be bought at too high a price, that truth bought at such expense is the negation of justice.'[27]

While there are some core additional purposes of procedural law which enjoy considerable judicial and academic support,[28] there remains considerable room for disagreement as to what further purposes, if any, might also be served by procedural law,[29] how such further purposes are to be identified and justified,[30] and whether they are uniquely procedural.[31]

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[27] [1977] AC 547 (HL) 575. Another example commonly cited is the protection afforded to confidentiality and privileges in legal rules, Bayles (1990) 6; Andrews (1994) 19; Galligan (1996) 35.

[28] Such as that disputes should be resolved peacefully, and that there should be an end to litigation.

[29] Galligan (1996) 37, 74-75; Summers (1974) 19. R Dworkin *A Matter of Principle* (Harvard UP Cambridge, Mass 1985) 102-103 takes the view that 'we do have intuitions' that such values exist, but that more work needs to be done to establish the relevant values. Suggestions as to what further purposes are served by procedural law range across broader values such as autonomy and self-respect (Saphire (1978) 124), participatory governance, process legitimacy, process peacefulness, humaneness and respect for individual dignity, privacy, legality and rationality (Summers (1974) 20-27). Contrast Andrews (1994) 12 questioning whether a principle protecting privacy has clear support in England at this time.

[30] The fact that many of the values suggested are said to be compatible with the goal of accuracy leads some to argue that, whatever the justification for their broader social value, their 'procedural' justification or relevance lies in their contribution to accurate outcomes, Redish (1986) 482-487. Although it might be argued that promotion of a non-outcome value in addition to the accuracy value gives a principle greater weight than principles which are only concerned with accurate outcomes, Galligan (1996) 132.

[31] Summers (1974) 3, 14-15 uses the term 'process values' and Bayles (1987) 28 refers to 'process benefits'. Galligan (1996) 50-51 is uncomfortable with the terms 'procedural values' or 'process values' insofar as they suggest that the values nominated are uniquely protected or promoted by procedures, a connotation expressly denied by Summers (1974) 14-15.

(c) Balance

As already indicated, while some of the various purposes which procedural law is expected to advance may be compatible, this is not necessarily the case. As pointed out in *The Ampthill Peerage*,[32] the concern for accuracy may be inhibited by the concern to protect other purposes,[33] such as the desire that litigation be brought to an end. Therefore, examination of a particular procedure by reference to the purposes of procedural law must consider the balance achieved between the relative likelihood of facilitating accurate decisions, and the extent to which other relevant procedural purposes are either protected or infringed.[34]

(d) Principles of procedural law

Given the breadth and potential ambiguity of the purposes which procedural law is intended to serve, principles which are understood to advance those purposes are commonly relied upon.[35]

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[32] [1977] AC 547 (HL).

[33] Galligan (1996) 125-126; Marshall (1977) 70, 80; Grey (1977) 183.

[34] Galligan (1996) 123-124.

[35] Galligan (1996) 49. It is clear that further empirical evidence to support the assumptions contained in the formulation of such principles would be useful, Galligan (1996) 359, 361 and Lever (1999) 268; although the methodological difficulties of gathering such evidence are also undeniable, Galligan (1996) 160. Saphire (1978) 124 n24 acknowledges the absence of empirical support for a proposition he advances. Zuckerman (1994) 357 notes that for the purposes of his discussion of the principle of treating litigants as equals he does not need to investigate 'whether it does or does not assist the court in arriving at the truth.'

The use of the term 'principles' here may require some further clarification. Whether there is any meaningful distinction between principles and rules is a matter for debate but it is not a debate which will be taken up here. This thesis accommodates the approach which distinguishes between rules and principles on the basis that rules are determinative, while principles are not necessarily determinative and therefore may be balanced against each other;[36] the approach denying the distinction between rules and principles on the basis of compulsion, but acknowledging a distinction between the two based on the degree of specificity;[37] and the approach denying any distinction at all.[38] The principles referred to are arguably sufficiently general and insufficiently determinative to satisfy those who would distinguish between rules and principles on either or both of these grounds that they are properly called principles.[39]

The distinction is drawn in this thesis because, it is argued, the principles which are understood to promote the broader purposes of procedural law have been primarily developed in the context of traditional individual voluntary litigation, and the representative parties rule is not compatible with them. Reliance on them in claims to use the rule is likely, therefore, to result in resort to the rule being denied. However, the fact that the rule is incompatible with a particular principle does not necessarily mean that the purpose which the principle is intended to serve is denied. It is suggested that interpretation based explicitly on the purposes which

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[36] R Dworkin *Taking Rights Seriously* (Gerald Duckworth & Co London 1977) 22-28.

[37] Raz (1972) 830-839. Some commentators amalgamate the two concepts, accepting both that principles may be balanced against each other and that principles are more general than rules, Andrews (1994) 11-13; Bayles (1987) 11-12; and Bayles (1990) 9-10.

[38] W Twining and D Miers *How To Do Things With Rules* (4th edn Butterworths London 1999) 125-127 questions the feasability of separating norms neatly into either classes of compulsion or precision.

[39] Especially given that a number of those who distinguish between rules and principles also describe the 'principles' set out below by that name. Those who question the utility of the distinction at all should nevertheless appreciate the convenience of calling the relevant principles by some name.

procedural law, and the representative parties rule, are intended to promote would offer greater clarity than the tests currently employed.

Just as there is scope for disagreement over the values which might be served by procedural law in addition to promoting accurate outcomes, so there is scope for debate in determining which principles are generally accepted as promoting accurate outcomes or the other purposes served by procedural law.[40] Nevertheless, as with the purposes of procedural law, there are a number of principles which enjoy general acceptance in the jurisdictions here considered. For example, the principle that disputes ought to be determined by an independent and impartial tribunal enjoys considerable support,[41] as does the principle that disputes should be determined in a public hearing.[42]

(e) Application of purposes and principles to the representative parties rule

This thesis does not undertake the jurisprudential enquiry necessary to justify or define the purposes and principles of procedural law in general. Rather, it adopts those widely accepted

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[40] Bayles (1987) 31; Andrews (1994) 16 n27 (distinguishing those principles which are clearly identified and recognised by lawyers, those which are not clearly identified by a conventional name but are nevertheless regularly invoked by the courts, and those which are disputed and for which there is not yet regular judicial support, 12).

[41] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL); Finnis (1982) 271; Bayles (1987) 32; Zuckerman (1994) 357-358; Walker (1988) 17, 19; Summers (1974) 26; Redish (1986) 457, 479-480.

[42] Amos (1924) 343; Rawls (1972) 239; Marshall (1977) 80-82; Finnis (1982) 271; Jacob (1987) 17, 19, 21, 66; Galligan (1996) 72-73; Walker (1988) 5, 17; Summers (1974) 27 n 60; Resnick (1977) 219.

purposes and principles of procedural law, and analyses the judicial response to the representative parties rule with reference to them.

The representative parties rule is consistent with a number of the purposes and principles of procedural law, in the sense that it offers no particular advantage or disadvantage over other rules. For example, there is no sense in which the rule has any particular advantages with regard to the principle of publicity or that it necessarily involves some derogation from that principle. The following sections will focus on those purposes and principles which the rule is widely understood either to support or to deny.[43]

3 Purposes and Principles Supported by the Representative Parties Rule

(a) Finality

The principle that, as a general rule, all disputes and issues between the parties should be tried together at the same time in order that any decision should finally dispose of a dispute is widely accepted.[44] The principle underlies a number of procedural and substantive rules, including

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[43] It is acknowledged that the rule might be considered to promote, or to deny, purposes other than those focused on here. In addition to the purposes supported by the rule considered below, Emerson (1989) 188-189 separately identifies resource effectiveness and prevention of unjust enrichment; and Basten (1996) 45 argues that the rule promotes equal treatment, ensuring that claims on a limited fund are dealt with equitably.

[44] Supreme Court Act 1981 s 49(2); *The Ampthill Peerage* [1977] AC 547 (HL) 575-576; *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 (CA) 260; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) 229; *Johnson v Gore Wood & Co* [2001] 2 WLR 72 (HL) 90; Amos

joinder of parties and of causes of action,[45] consolidation of different causes of action,[46] issue estoppel,[47] and limitation periods.[48] The principle might be justified in a number of different ways, including the desirability that disputes should come to an end,[49] the preservation of judicial authority, and the economic use of court resources.[50]

The representative parties rule is widely considered to offer particular benefits in this regard.[51] Moreover, if many potential claims are determined in a single proceeding then not only is finality served, but the possibility of conflicting decisions is avoided, promoting consistency and certainty.[52]

(1924) 341; Jacob (1987) 82, 146; Andrews (1994) Ch 17; Summers (1974) 27; James (3rd edn) 3; Bayles (1987) 33.

[45] *Spencer Bower* (3rd edn) 123, noting that the rules as to joinder of parties are intended to prevent such inconsistent interpretations of, for example, the provisions in a will.

[46] Jacob (1987) 80, 82.

[47] Andrews (1994) 503-507.

[48] Andrews (1994) 510-511, other applications of the principle are discussed at 507-510.

[49] *The Ampthill Peerage* [1977] AC 547 (HL) 576: 'the clamouring voices must be stilled, ... the bitter waters of civil contention (even though channelled into litigation) must be allowed to subside'; Jacob (1987) 24.

[50] *Johnson v Gore Wood & Co* [2001] 2 WLR 72 (HL) 90, Lord Bingham referring to the interest in finality being 'reinforced by the current emphasis on efficiency and economy in the conduct of litigation'. The perception that the desire to avoid, where reasonably practicable, a multiplicity of proceedings 'now receives more emphasis than in the past' was noted in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 524.

[51] Hawke (1998) 69; J Kellam and P Long 'Product Liability and Class Actions: A Review' (1998) 9(5) Australian Product Liability Reporter 61, 69.

[52] Andrews (1994) 511 (noting that consistency might contribute to the preservation of judicial authority); Donnan (2000) 84; Morabito (1997) 380; Hawke (1998) 69; Basten (1996) 45; Morabito (1994) 627-628.

(b) Access to justice

The access to justice referred to here is not formal access to the court[53] but rather the reduction of costs in order that the courts might be more effectively accessible. Long recognised as a necessary feature of natural justice,[54] the need to enable effective access continues to be acknowledged. The Civil Procedure Act 1997 section 1(3) requires the power to make civil procedure rules to be exercised with a view to ensuring that the civil justice system is, *inter alia*, 'accessible, ... and efficient'; and Civil Procedure Rule 1.1(2) provides that '[d]ealing with a case justly includes, so far as is practicable - (b) saving expense'.[55]

The most attractive feature of the representative parties rule to many commentators is its potential to deal with a large number of claims at once. It is widely assumed that this makes efficient use of court time and resources,[56] enables the represented class to pool their

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[53] Indeed, if the rule precludes those represented from bringing independent claims while the representative claim is on foot (Ch 2, 108-109) it might be argued that it in fact inhibits formal access, discussed below, 18.

[54] Finnis (1982) 271; Jacob (1987) 123; Walker (1988) 40.

[55] Lord Woolf *Interim Report* (1995) 3 articulates the assumption that a civil justice system should be fair by ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights. *Golder v UK* Series A No 18 paragraphs 34-35, (1979-80) 1 EHRR 524, 534-536 refers to the general understanding that access to justice is an essential feature of the rule of law; while *Airey v Ireland* Series A No 32, paragraphs 24-28, (1979) 2 EHRR 305, 316-317 affirms the importance of an effective right of access. See also James (3rd edn) 3 and Summers (1974) 25. Andrews (1994) 28-29 includes a discussion of 'access to justice' not as a principle but as an ideal, incapable of being fully attained.

[56] *CP 1/01* 22 cites, as an example of the potential savings, the estimate in the Supreme Court Procedure Committee *Guide for Use in Group Actions* (1991) 18 that £70,000 would be saved in court fees for the claims forms alone, if one claim could be served on a representative on behalf of 1001 claimants.

resources,[57] and saves an individual party the expense of multiple suits. However, the expectation that representation will in fact deliver these benefits is not universal.[58]

(c) Justice not to be evaded

It has also been suggested that representative claimant actions, by confronting defendants with the 'true' consequences of their wrongful conduct, support the principle that justice is not to be evaded.[59]

This appreciation of the true consequences of the wrongful conduct may also serve to deter future wrongdoing, insofar as deterrence is a feature of civil liability.[60] So, for example, Morabito refers to the 'behaviour modification' function of the representative parties rule but

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[57] Which, it is also argued, has advantages for those who would not, for social or psychological reasons, pursue their claims, Morabito (1994) 628 and Morabito (1997) 381.

[58] Jolowicz (1988) 8-9; Emerson (1989) 187; Zuckerman (1995) 157, 177; Hawke (1998) 69. SR Gross 'The American Advantage: The Value of Inefficient Litigation' (1987) 85 Michigan L Rev 734, 752-755 goes further, arguing that increased efficiency may not be desirable on the basis that inefficiency may create room for the development of divergent norms not based on the central legal order.

[59] Jolowicz (1983) 310. Andrews (1994) 20-21 cites a number of other procedures which support this principle, such as the provision for substituted service, judgment by default, securing of evidence by an Anton Piller order, Mareva injunctions and sanctions for failure to comply with judicial order or injunction. The principle is arguably justified by the value attached to peaceful resolution of disputes and the corresponding need to make legal resolution of disputes attractive and effective. It is not obviously conducive to more accurate decisions.

[60] Jolowicz (1983) 309-310 considers that deterrence has a role to play in civil ligation but notes that greater use of the rule would increase its role. Hawke (1998) 70 concedes that there is 'an element of truth' in the 'paradigm' of individuals facing multinational mining or manufacturing giants via class action and accepts that 'it may be one factor that will help to keep some companies honest'; while Donnan (2000) 84, 86 argues that deterrence in securities fraud cases is desirable in order to raise confidence in the integrity of the market.

notes that whether this is considered desirable 'will depend on one's views as to the proper function of civil litigation'.[61]

Confrontation with the consequences of wrongdoing may encourage settlement which may, in turn, be perceived to be desirable, whether because it is consistent with the essentially voluntary nature of civil litigation or with the peaceful resolution of disputes, or because it is likely to be faster and cheaper than pursuing a dispute to its legal conclusion. Under the Civil Procedure Rules 1998 the court is required to further the overriding objective by actively managing cases, and this includes 'helping the parties to settle the whole or part of the case'.[62] A number of commentators acknowledge the potential benefits of settlement but caution against unqualified enthusiasm,[63] while others go further and argue that it amounts to 'collective bullying'[64] or 'legalised blackmail'.[65]

It is noteworthy that support for a number of the purported benefits of the representative parties rule is not unconditional. Some commentators doubt the value of the suggested purpose altogether, others are sceptical of the representative parties rule's ability to achieve a nominated purpose. Proof of the benefits of representation is beyond the scope of this thesis - it

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[61] Morabito (1997) 381. Emerson (1989) 188 also cites behaviour modification as one of the benefits of an extended class action. KE Scott 'Two Models of the Civil Process' (1975) 27 Stanford L Rev 937, 950 argues that, in general, the 'powerful and consistent underlying rationale' of the 'Behaviour Modification Model' of civil litigation warrants 'more careful consideration'.

[62] CPR 1.4(2)(f).

[63] Andrews (1994) 25-27; Jolowicz (1988) 8-9. The association of settlement with compromise, and potentially with confidentiality, fosters suspicion that it inhibits the accurate settlement of disputes. For a more positive view, see Jacob (1987) 19, 114-116.

[64] Andrews (2000) 16 notes this concern.

[65] Emerson (1989) 189-190 acknowledges this view but argues that there is no empirical evidence to support it.

is rather concerned to discover the extent to which these purposes[66] have influenced judicial reasoning when faced with a claim to use the rule.

4 Opt out/Opt in Models

It is submitted that, in order to offer these advantages, an essential feature of the representative parties rule is the fact that those represented do not need to 'opt-in' to the proceedings.[67] There is considerable consensus that if consent to representation is required, the rule is transformed from one permitting representation of unidentified but identifiable persons, with its particular benefits, into a form of joinder.[68] The finality desired is not achieved if some only of those who might be entitled to bring claims are represented, and the potential for inconsistent decisions remains. While judicial efficiency may be furthered by joining many claims together, it is greater if all possible claims are represented in the proceedings, as are the anticipated savings to an individual claimant or defendant. The same comment might be made about any deterrent value the proceedings might have.

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[66] Or, indeed, the uncertainty that the representative parties rule will fulfill it.

[67] Ch 2, 135.

[68] ALRC *Report No 46* (1988) 50; Morabito (1997) 373; and Morabito (1994) 629-635, citing a Committee on Commerce of the United States Senate study finding that opt-in procedures significantly reduced class sizes, in comparison to opt-out procedures; Basten (1996) 48; Emerson (1989) 204-205. This is not to suggest that support for opt-out representation is universal, see Glenn (1984) 248 and *CP 1/01* 9 which proposes that '[w]here practicable the applicant should provide the court with the names of those they represent and demonstrate that they consent to being represented'. While it is clear that the rule does not require those to be represented to consent to their representation, it is not clear whether it permits them to opt-out, Ch 2, 138-141.

However, the fact that those represented do not consent to their representation is arguably also the feature which operates to deny a number of other purposes and principles of procedural law.

5 Purposes and Principles Undermined by the Representative Parties Rule

In contrast to those goals which the rule arguably promotes or supports there are a number of fundamental principles of a 'fair hearing' which it is generally understood to undermine.

(a) Certainty and consistency

It is widely accepted in the jurisdictions considered that all laws should be reasonably certain, in order that they may be capable of guiding behaviour.[69] As the discussion in Chapter 2 makes clear, a number of significant features of the rule remain unclear.

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[69] Raz (1972) 841; J Raz 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 198-199; Marshall (1977) 82-84; Walker (1988) 21, 25.

(b) Access to justice

It might be argued that the rule inhibits the access to justice [70] of those represented if they are unable to bring individual actions while the representative claim is on foot.[71] However the right to access to justice is not absolute,[72] and in the jurisdictions considered access is limited in different ways for a variety of reasons. Representation would not seem, of itself, to constitute a denial of the right of access to justice[73] although it may be that the circumstances of the representation[74] constitute an unwarranted limitation on access to justice.[75]

(c) Finality

Where the representative claim seeks only a declaration upon which it is anticipated that members of the represented class will rely in further proceedings, it might be argued that the

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[70] Described as a constitutional right in *R v Lord Chancellor, ex p Witham* [1998] QB 575.

[71] Discussed in Ch 2, 108-109. It may be that it is not impossible but, given the *res judicata* effect of any order made, potentially futile.

[72] *Golder v UK* Series A No 18 paragraphs 38-39, (1979-80) 1 EHRR 524, 537; *Ashingdane v UK* Series A No 93 paragraph 57, (1985) 7 EHRR 528, 546-547; *Stubbings v UK* Reports 1996-IV No 18 1487, 1501-1502, (1997) 23 EHRR 213, 233-234.

[73] Representation might be intended to achieve a range of goals including avoiding the unnecessary duplication of effort necessarily involved in multiple actions arising out of the same set of circumstances, considered to be a legitimate aim in *Lithgow v UK* Series A No 102 paragraph 197, (1986) 8 EHRR 329, 394-395.

[74] Discussed in Ch 2.

[75] In *Lithgow v UK* Series A No 102 paragraph 196, (1986) 8 EHRR 329, 394 the European Court of Human Rights held that a collective system for the settlement of disputes regarding compensation following nationalisation under the Aircraft and Shipbuilding Industries Act 1977 did not, in the circumstances, so impair the rights of those represented as to constitute an unjustifiable limitation on the right to access to justice.

rule offends against the principle of finality, a principle which would otherwise be viewed as one of the particular benefits of a representative claim.

However, like the other principles considered here, the principle of finality is not absolute and, in addition to being subject to the inherent limitations on the extent to which any litigation can finally resolve a dispute,[76] it may be perceived as desirable not to resolve a whole legal dispute but rather to determine a single point of fact or law in isolation.[77] Views may differ as to when it will be desirable to determine an isolated issue in a representative claim.[78] It will be argued that that determination will be informed by reference to the purposes which is intended will be served by that principle, and to other competing purposes which may be served by the rule.

(d) Entitlement to be heard

The importance of the principle that parties are entitled to be heard by the decision-maker is generally accepted.[79] In *Re First Express Ltd* it was considered to be 'a basic principle of justice that an order should not be made against a party without giving him an opportunity to

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[76] MP Golding 'On the Adversary System and Justice' in R Bronaugh (ed) *Philosophical Law: Authority, Equality, Adjudication, Privacy* (Greenwood Press Westport, Conn 1978) 102-104.

[77] Jacob (1987) 146; *Civil Procedure 2000* 1431.

[78] Basten (1996) 48 agrees that judicial efficiency supports the principle that all relevant issues should be raised in one claim, but suggests that the principle be applied 'with circumspection' in representative actions.

[79] Jolowicz (1983) 301, 313; Andrews (1994) 16-17; Galligan (1996) 70, 348; Walker (1988) 17; Emerson (1989) 202; Bayles (1987) 32.

be heard.'[80] The notion of a hearing is often taken to include notice of the impending decision, guidance as to the basis on which it will be made, disclosure of the relevant facts and material, and an opportunity for the parties to present their cases.[81] It has also been understood to include all reasonable facilities for exercising the right.[82] It is clear that the representative parties rule limits the entitlement to be heard. There is no requirement that those represented be notified of the proceedings brought on their behalf, or against their representative, nor are they entitled to be heard.[83]

The representative parties rule is not unique in affecting the rights of persons without their necessarily being notified. *Ex parte* orders or injunctions, for example, are regularly made without the person against whom the order is directed having been notified or given an opportunity to contest the order.

However, such orders can be distinguished from the representative parties rule in that they are limited by the need for the party seeking the order to convince the court that the case is one of great urgency, or one requiring secrecy so as to prevent frustration of the injunction before it can take effect, by the ordinarily temporary nature of any order made, and by the likelihood that the party seeking the *ex parte* order will be required to give an undertaking as to damages.[84] Moreover the grant of an injunction *ex parte* before process is issued is generally

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[80] [1992] BCLC 824, 828. See also *Wiseman v Borneman* [1971] AC 297 (HL) 310, 314-315.

[81] Galligan (1996) 348, 356-357. *Spencer Bower* (3rd edn) 66 notes the need to demonstrate that there was notice and hearing if relying on the *res judicata* of a foreign judgment.

[82] *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260 (CA) 284-290.

[83] Ch 2, 94.

[84] Sheridan (1999) 149-150, 152-153; Bean (6th edn) 36-37, 66-67.

conditional on the applicant undertaking to issue a writ, originating summons or counterclaim forthwith.[85] Even given these restrictions, no equivalents of which apply to the representative parties rule, such *ex parte* orders are intensely controversial.[86]

The entitlement to be heard is generally perceived to be conducive to accurate outcomes. It is assumed that if both litigants present evidence and challenge the evidence presented by the other, then it is more likely that an accurate decision will result.[87]

The suggestion that individual litigation is more likely to be accurate than representative litigation is not unchallenged. There are those who would argue that the greater effort and information available in a representative claim may result in a more accurate result than would otherwise be achieved.[88]

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[85] Sheridan (1999) 151.

[86] Andrews (1994) 17. The 'effective finality' of such orders, despite their temporary appearance, might be influential in this assessment, Bean (6th edn) 25-26.

[87] Galligan (1996) 131-132, 349-352; Summers (1974) 20-21; Redish (1986) 476. There are also those who argue that being heard or participating in the legal process has value independent of its contribution to more accurate outcomes, Saphire (1978) 163-166, 174. Bayles (1987) 31 argues that this principle independently contributes to dispute settlement because those who have participated are more likely to accept a decision and comply with it. Galligan (1996) 159 suggests that this assumption demands further consideration following a study of tort litigants which did not find any correlation between participation and satisfaction.

[88] Morabito (1997) 380 n54 citing N Francey (1989) 27 L Society J 56, 59. Resolution of this question is beyond the scope of this thesis and, indeed, may not be possible. The concern here is to identify the role the principle plays in the judicial response to the rule.

(e) Voluntariness[89]

Even insofar as those represented do have some knowledge of the proceedings, it might be argued that the representative parties rule offends against the principle of voluntariness, whereby claimants in civil cases are not compelled to bring their grievances to law.[90]

Jolowicz refers to the voluntary nature of civil procedural law as a basis on which it can be distinguished from substantive law. He extends its voluntary nature to the defendant's ability to concede a claim.[91] However, it is submitted that the characterisation of the defendant's position as 'voluntary' on this basis is not convincing, and that a more accurate description of the defendant's role is the comment in *CT Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* that the 'defendant ... has no choice in the matter. He is compelled to litigate or submit to the plaintiff's demands.'[92]

However, it is possible to conceive a modified principle of voluntariness for defendants in the context of representative claims. While the participation of defendants in litigation

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[89] Or 'individualism', Morabito (1994) 620. The appellants in *Femcare Ltd v Bright* (2000) 172 ALR 713, 721 argued that Part IVA infringes the 'autonomy' of group members because, *inter alia*, they might be unwillingly 'dragged by others into public legal processes'. The Full Court of the Federal Court of Australia noted that there no foundation for a free-standing principle of 'autonomy' was identified but dealt with the argument on the basis that it may be that legislation which infringes an individual's autonomy confers functions on a court inconsistent with judicial power or judicial process, 732. The challenge was dismissed.

[90] *CT Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567 (CA) 577; Andrews (1994) 56; Bayles (1987) 31; Summers (1974) 24.

[91] Jolowicz (1990) 267. Summers (1974) 24 takes the same view of the defendant's position.

[92] [1994] 2 Lloyd's Rep 567 (CA) 577.

cannot be voluntary, their representation can be, and so the representative parties rule may be perceived to inhibit the ability of those represented to choose whether or not to be represented, either at all or by the representative selected.[93]

(f) Adversarial freedom

Finally, there is also a view that a representative claim demands a level of judicial direction at odds with the traditional perception of the adversarial principle,[94] which characterises the relationship between the court and the parties as one of judicial passivity and party control.[95] However, the Civil Procedure Rules 1998 seek to alter this relationship. They contain a range of provisions facilitating greater management by the court of the content and progress of litigation.[96] The representative parties rule does not undermine this new view of the relationship between the court and the parties, and, indeed, may benefit from it.

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[93] The appellants in *Femcare Ltd v Bright* (2000) 172 ALR 713, 721 made a similar argument, saying Part IVA infringes the autonomy of group members as they have no say in the lawyer representing them.

[94] Glenn (1984) 268-269.

[95] Jolowicz (1983) 302-304; Jacob (1987) 5-19, 115; Andrews (1994) 28, Ch 3.

[96] Andrews (2001) 3-10 contains a comprehensive discussion of the court's new role, and of relevant case law.

B PLAN OF THESIS

Chapter 1 examines the approaches to 'same interest' which have been adopted, arguing that the traditional approach would deny the rule any utility at all. It is noted that a number of recent decisions, such as *Carnie v Esanda*[97] in the High Court of Australia, take a more liberal approach to the test of 'same interest'. However, indications are that this liberalisation of the test of 'same interest' has not increased or broadened use of the representative parties rule. While liberalisation of the test is a necessary condition for expanded use of the rule, it seems not to be, of itself, sufficient. It is also necessary to identify the underlying judicial concerns which, it is argued, gave rise to the restrictive test and which continue to inhibit development of the rule.[98]

The thesis argues that the traditional restrictive test is in fact a symptom of broader judicial dissatisfaction with the rule. This conclusion depends on a more detailed examination of the features of the representative parties rule, which is carried out in Chapter 2.[99] This examination reveals that there is considerable uncertainty in the rule's application, and significant divergence from the traditional individual voluntary model of civil litigation. It is argued in Chapter 3 that there is some evidence that the uncertainty surrounding the rule has

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[97] (1995) 182 CLR 398.

[98] It is clear that even if the judicial concerns identified are addressed, there are extra-judicial factors which will be relevant to rule's use. The importance of these extra-judicial factors, such as financial support for representative claims and costs rules, is acknowledged, but they are not the focus of this thesis.

[99] One result of the predominantly restrictive interpretation of the rule is that claims to use it are commonly rejected, and so there have been few opportunities for detailed consideration of it. Both judicial and academic commentary on the defining features of the rule is limited.

influenced its restrictive interpretation. It is submitted that it is not clear that these uncertainties can or should be resolved by *ad hoc* judicial innovation.

In Chapter 4 it is noted that a number of claims have been denied on the basis that the rule, or its operation in particular circumstances, is unfair.[100] Support for this conclusion tends to be based on principles or other rules of procedure with which the representative parties rule is incompatible. It is argued that this approach fails to consider whether the purposes which these rules or principles are intended to serve are protected in some other way by the representative parties rule. It is submitted that explicit reference to the purposes which underlie the rules and principles referred to is to be encouraged for a number of reasons. As noted above, not all purposes of procedural law are compatible, and some balancing of purposes and principles is essential. Failure to balance competing principles against each other means that relying on a principle or rule with which the representative parties rule is incompatible necessarily results in its use being denied. Morabito makes this point, referring to arguments against use of the rule based on the expectation that everyone should have his or her own day in court and saying that these arguments 'are inadequate as they ignore the existence of other significant and competing interests which are involved in the modern class action.'[101] This thesis argues that open consideration of the purposes which lie behind the principles relied on is necessary to afford some scope for the rule, or, if use of the rule is denied, at least makes the reasoning behind the denial clear. Direct reference to the purposes which procedural law, and the rule in particular, are intended to serve would promote clearer consideration of the need to

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[100] A perception possibly underlying the traditional test for 'same interest' which, it is argued in Ch 1, necessarily defeats any claim to use the rule.

[101] Morabito (1994) 636.

strike a balance between competing purposes,[102] and of the circumstances which will influence that balance. It is further argued that a number of those few representative claims which have proceeded, often without comment on the representative nature of the action, can be accommodated within this analysis.

Finally, Chapter 5 acknowledges that there are some representative claims which have proceeded which do not conform to this interpretation. In those cases it is not clear that the purposes of procedural law have been adequately served by the rule. Rather it appears that these claims conflict with one of the primary concerns of procedure - accurate application of the substantive law to the facts. It is submitted that these cases may be read as a judicial assessment that, in the circumstances, accurate application of the substantive law is not desirable and that a broader notion of justice is served by enabling the representative claim to proceed.

C TERMINOLOGY

This thesis refers to claims brought under the representative parties rule as representative actions, claims or proceedings, and to those represented as class members. The potential for ambiguity in the terms 'class actions' and 'representative proceedings' was noted in the joint

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[102] Basten (1996) 45 identifies some goals which representative claims are understood to promote but notes that none of them is 'an absolute norm.'

judgment of Mason CJ, Deane and Dawson JJ in *Carnie v Esanda*,[103] and this thesis adopts their conclusion that whether or not the case before them 'was or was not a class action is not the critical question. More than that, it is not a question which is susceptible of a precise or an instructive answer.' As their Honours noted, 'class action' might be used to describe any procedure allowing the claims of a number of individuals against the same defendant to be brought by a single representative,[104] or, given that for a time it was understood that the representative parties rule excluded claims for damages,[105] any representative procedure allowing such a claim, or might refer specifically to the procedures prescribed in the United States, such as Rule 23 of the Federal Rules of Civil Procedure.[106] The terms 'representative proceeding' or 'representative action' are used here in order to focus attention on the particular rule with which this thesis is concerned. Those represented are, however, referred to as 'class members' in order clearly to distinguish them from 'group litigants' subject to a Group Litigation Order under Civil Procedure Rules Part 19, Section III, and from the 'group members' represented under the Federal Court of Australia Act 1976 (Cth) Part IVA.[107]

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[103] (1995) 182 CLR 398, 403-404, in response to suggestions that there was a meaningful distinction between the two phrases, relevant to the case at hand, in the decision on appeal before the High Court of Australia, *Esanda v Carnie* (1992) 29 NSWLR 382, 388 (Gleeson CJ), 390-391 (Kirby P).

[104] Or brought against a representative defendant.

[105] Ch 1, 37-38.

[106] Similarly, Emerson (1989) 184 responds to the argument that class actions and representative actions 'are different devices', by saying that '[a]lthough different in form, these rules are of identical nature', and that what are commonly referred to as 'class actions' are 'merely specialised developments of the more general class action concept'.

[107] C Hodges *Multi-Party Actions* (OUP Oxford 2001) contains a comprehensive discussion of CPR 19 section III (Chs 3-8); and covers the essential features of Part IVA, 275-287.

CHAPTER 1 JUDICIAL INTERPRETATION OF 'NUMEROUS PERSONS' AND 'SAME INTEREST'

A INTRODUCTION

Chapter 1 examines judicial interpretation of the elements necessary for resort to the representative parties rule. The original statutory provision for representative proceedings was, and in some jurisdictions still is, very brief, essentially requiring that there be 'numerous persons' with the 'same interest in the cause or matter'. These two elements remain central to the more recent statutory provision for representative actions, the latter being the most likely basis for challenging the suitability of a representative proceeding. The issue of numerosity is briefly dealt with in Part B. The focus of this chapter is an analysis of the interpretation of 'same interest', dealt with in Part C.

Part C argues that this analysis reveals three types of representative claim. The first group consists of those actions where the nature of the claim itself is considered to demonstrate the necessary 'same interest'. The second comprises those actions which are defeated by the 'same interest' requirement. The third comprises those relatively few actions where sufficient 'same interest' is found, or is not denied. Comparison of the claims in each group challenges two basic assumptions of procedural justice: that any test identified for 'same interest' should be both consistently applied and clear. The reasoning relied upon in the second group of cases to deny the existence of the necessary 'same interest' would, if

consistently applied, defeat all claims to use the representative parties rule. The reasoning is not, however, consistently applied and some representative claims are permitted to proceed. This might suggest that there is some other reasoning, not explicitly articulated by the courts, which distinguishes those claims which demonstrate the necessary 'same interest' and those which do not. What distinguishes the two is not clearly identified in the decisions, nor can it be found by comparison of those cases where 'same interest' is denied and those where it is found, or assumed. Finally it is noted that there has recently been some reform of the test for 'same interest'. While these reforms overcome the inevitable defeat of any claim to use the rule, they do not seem to have either increased or broadened resort to the rule. Possible explanations for the, until recently, generally restrictive interpretation of the 'same interest' requirement, for the continuing restrictive approach in the face of the liberalisation of the test for 'same interest', and for those claims which have been permitted to proceed are considered in Chapters 3, 4 and 5. Part D examines the role which the court's residual discretion plays under the various formulations of 'same interest'.

B 'NUMEROUS PERSONS'

The current rule requires only that there be 'more than one person' with the same interest in a claim.[1] Most other representative parties rules require that there be 'numerous

[1] CPR 19.6(1).

persons' with the same interest in a claim.[2] This requirement is rarely a difficult one to fulfil and indeed is rarely mentioned. In one of the few decisions to address the matter directly, *Re Braybrook*,[3] Sargant J permitted a representative defendant to defend on behalf of only four others, all hospitals and residuary legatees under the will in issue. His Lordship took the view that four representees were not numerous enough 'unless the amount in question was very small or unless the Court was satisfied that all the other parties wished the question to be determined in the presence of the one.' He is reported to have said that if he had 'felt any considerable doubt what his decision in the case would be, he should have ordered the summons to stand over for the four other hospitals to be added as parties', but that in the result he was of the opinion that 'the gift to the wife was absolute and decided in favour of the residuary legatees under her will accordingly.'

A number of Australian decisions have also permitted use of the rule where those represented were few in number. In *Eighth Union Building Society v Carnegie*[4] Williams J, although expressing doubt whether the case came within the rule, made an order in chambers that three defendant executors should represent a fourth. This decision was followed in like circumstances in *Trustees Executors and Agency Co Ltd v Sparling*.[5] However, Griffith CJ

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[2] Including the 1962 rule and the original rule. The exceptions among the rules considered here are the High Court of Australia and Tasmanian rules which require there to be 'seven or more persons' with the necessary community of interest, as did RSC(SA) 1937 Ord 16 r9. The High Court Rules (NZ) R78 refers to 'two or more persons' with the same interest.

[3] [1916] WN 74. *Janson v Property Insurance Co (Ltd)* (1913) 19 R of Commercial Cases 36 is another of the few instances where numerosity is mentioned.

[4] (1893) 19 VLR 388.

[5] (1894) 16 ALT 34.

refused to allow three joint tenants to represent a fourth who could not be located in *Allen v Allen*,[6] suggesting that in such a situation an order for substituted service should be obtained.

These decisions, although concerned with the traditionally less controversial element of the representative parties rule, raise the central concern of this thesis, which will be dealt with in the discussion of the prevailing judicial interpretation of the 'same interest' requirement and its possible explanations. This concern is which factors are taken into account in determining the meaning of inherently ambiguous phrases such as 'same interest' and, perhaps to a lesser extent, 'numerous persons'.[7] For example, the report of *Re Braybrook* suggests that Sargant J's decision to make a representative order was based either on the small amount involved, or on his being satisfied that those represented wished the matter to be dealt with in the presence of one,[8] or on the fact that his Lordship had no doubt as to the ultimate outcome of the claim, or on the basis of a combination of any or all of these features of the claim. As these decisions make clear, finding that the claim is appropriately brought as a representative one may result in the denial of some procedural entitlements to one or other of the named parties. So, for example, in *Eighth Union Building Society v Carnegie*[9] the representative parties rule enabled the plaintiff to avoid the usual need to serve a defendant outside the jurisdiction. Conflict between the rule and usual procedural guarantees is

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[6] [1902-03] St R Qd 306.

[7] Emerson (1989) 201 notes the ambiguity of the word 'numerous' and prefers the New Zealand rule, which requires 'two or more persons'.

[8] In contrast, it is clear that the defendants opposed the plaintiff's application for a representative order in *Eighth Union Building Society v Carnegie* (1893) 19 VLR 388.

[9] (1893) 19 VLR 388.

inevitable, and this thesis goes on to argue that the purposes of procedural law in general, and of the rule in particular, are relevant to the resolution of this conflict.

Those decisions which have considered whether the persons represented were sufficiently numerous to fall within the ambit of the rule were clearly made with full knowledge of the identity of those represented. However, the representative parties rule does not require that any of those represented be identified.[10] Therefore, the question arises as to the basis on which the court determines whether there are in fact 'numerous persons'. It appears that it must at least be sworn that those to be represented are 'numerous'.[11] Where the representative is acting on behalf of an unincorporated association, the group membership may be cited to demonstrate that those represented are 'numerous'.[12] Alternatively, the description of those represented may necessarily imply that they are numerous, such as an action 'on behalf of all the freemen of the borough' or 'on behalf of the inhabitants of the parish'.[13] Where the size of the class cannot be demonstrated, or where it is not clear from the description of those represented that they are numerous, the requirement that there be 'numerous persons' must be reconciled with there being no need to identify members of the class represented. In these circumstances the courts appear to be prepared to consider whether

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[10] *Leathley v Robert McAndrew and Co* [1875] WN 259. Discussed in Ch 2, 94.

[11] See *Fraser v Cooper, Hall, & Co* (1882) 21 ChD 718, 720; contrast *Wilson v Church* (1878) 9 ChD 552, 558-559 where Jessel MR noted that the applicant wished to be joined as a defendant and as representative of others who disagreed with the representative plaintiff's conduct of the action but that 'as he has not proved that there is anybody who dissents but himself, it is quite clear that I cannot make him a party in a representative way'.

[12] See, for example, *Marrs v Thompson* (1902) 86 LT 759 (CA); *Walker v Sur* [1914] 2 KB 930 (CA); the *MMSA* case [1916] 2 KB 243 (CA); *Barker v Allanson* [1937] 1 KB 463 (CA) 470; *A-G v Carter* (1969) 113 SJ 108.

[13] See *Prestney v Mayor and Corporation of Colchester and the Attorney-General* (1882) 21 ChD 111 and *Wyld v Silver* [1963] 1 QB 169 (CA) respectively.

the nature of the claim or the allegation is such that those represented are likely to be numerous.[14]

None of the rules considered contemplates an upper limit on the number of represented persons, so long as they demonstrate '[t]he essential condition of a representative action', that is, they 'have the same interests as the plaintiff in one and the same cause or matter.'[15]

C 'SAME INTEREST IN A CLAIM'[16]

'Same interest in a claim' is the crux of the representative parties rule and construction of those words has 'given rise to not a little perplexity.'[17] The courts have consistently refused to confine the potential ambit of the rule but its application is uncertain beyond situations where those represented share a joint beneficial right or where the claim is brought on behalf of those with a joint interest in the action. In particular, no unifying principle emerges from those

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[14] *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA); *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597 (CA).

[15] The *Markt* case [1910] 2 KB 1021 (CA) 1039.

[16] Same interest 'in a claim' is the formulation adopted by the current rule, replacing 'same interest in the cause or matter'. This appears to be a simplification of expression, not a change of substance, *National Bank of Greece SA v RM Outhwaite* (16 January 2001) paragraphs 29, 30. While the phrase 'in a claim' is generally adopted in this thesis, use of either phrase is intended to refer also to the other. There are representative parties rules which adopt wording that might support a substantively different interpretation of their scope, and they are considered below, 36-37. *CP 1/01* 6 proposes that organisations be permitted to bring proceedings 'on behalf of persons whose collective interests they support', eliminating the need for them to have an interest in the claim.

[17] Lloyd (1949) 413.

cases which have sought to extend its application to the enforcement of individual private rights. On the one hand, such claims have usually been defeated by the application of a test which, if consistently applied, would arguably deny all representative claims.[18] This restriction runs contrary to the unlimited ambit of the statutory formulation of the rule and to express judicial statements that its use is not limited to any particular class of claim. On the other hand, those claims which have proceeded have done so without any useful test being articulated or in circumstances where the representative nature of the claim is not referred to at all. There is no obvious basis in the existing case law for distinguishing those claims which proceed from those which are denied.

1 The Availability of the Representative Parties Rule

Courts have endorsed an expansive approach to the rule. In *Bedford v Ellis* Lord Macnaghten noted that it was 'a rule of convenience',[19] and in the *Taff Vale* case Lord Lindley thought that the rule 'ought to be applied to modern life as occasion requires.'[20] One result of this approach is a reluctance to impose any general limitations on the availability of the

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[18] A number of more recent decisions might be understood as proposing alternative tests, asking either whether separate defences are probable, or whether there is a common question of fact or law arising out of same or similar circumstances. These alternatives are considered below, 69-72 and 72-79.

[19] [1901] AC I (HL) 8, 13, 22-23.

[20] [1901] AC 426 (HL) 443. See also the *Markt* case [1910] 2 KB 1021 (CA) 1028; *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 225; *John v Rees* [1970] Ch 345, 370; *The Irish Rowan* [1991] 2 QB 206 (CA) 239, 241; *Esanda v Carnie* (1992) 29 NSWLR 382, 396 (Kirby P, dissenting) and even Gleeson CJ in that case while adopting the position that the rule's 'history suggests a narrower, rather than a wider, understanding of the concept of an "interest in any proceedings"' accepted that the rule 'is to be treated as "a flexible tool of convenience in the administration of justice"', 387.

representative parties rule. So, for example, in *Bollinger v Goldwell*[21] Megarry J foresaw great difficulty in basing a representative claim on estoppel but was not prepared to say that it was impossible for such a claim to be brought in a representative capacity.

There were early suggestions that the representative parties rule's use should be confined to its pre-Judicature role. In *Temperton v Russell*,[22] Lord Lindley, delivering the judgment of the Court of Appeal, limited 'having the same interest in one cause or matter' to claims seeking equitable remedies in the assertion or defence of a joint beneficial proprietary right. This limitation of the rule's ambit was soon rejected.[23] For a time it was not clear whether the criticism of *Temperton v Russell* was limited to its restriction of the use of the rule to those claiming or defending a beneficial proprietary right, leaving its rejection of claims in tort intact.[24] However, such actions were eventually subjected to the same tests for suitability as any other, rather than being treated as necessarily excluded.[25]

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[21] [1971] FSR 405, 420. Only two claims are excluded from the use of the representative parties rule: (a) where an order for foreclosure is sought, all those interested in the equity of redemption must be before the court, *Griffith v Pound* (1890) 45 ChD 553; and (b) where suing as cestuis que trust and the claim is for breach of trust, all must be before the court, *Watters v May Brothers Ltd* [1932] SASR 418.

[22] [1893] 1 QB 435 (CA), 438. The claim alleged interference with contract and conspiracy.

[23] *Bedford v Ellis* [1901] AC 1 (HL) 8, 10; *Mundy* v *Cunningham* [1973] 1 NZLR 555, 561, affirmed [1973] 2 NZLR 654. Nevertheless, some attempts to specify the limitations of the rule give it a role similar to the pre-Judicature one, see *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA), 699 and *Geddes v Australian Meat Industry Employees' Union* (1917) 17 SR (NSW) 119.

[24] *Wood v McCarthy* [1893] 1 QB 775, 778, and the *MMSA* case [1916] 2 KB 243 (CA) 247, 248 despite the *Taff Vale* case [1901] AC 426 (HL) 438-439, 442-443. In *Brown v Lewis* (1896) 12 TLR 455 the action brought against the committee members as representing all the members of a football club alleging negligence in the repair of a football stand was amended by the court and the committee members were held personally liable.

[25] *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA) 696, 699; *Campbell v Thompson* [1953] 1 QB 445, 451; *Serbian Orthodox Ecclesiastic School Community 'Saint Nikolas' Queensland v Vlaislavljevic* [1970] QdR 386, 391.

Whatever its earlier role, modern authoritative pronouncements on the limits of its ambit are clear - courts must look to the language of the rule and not to past practice to define the conditions for its use.[26] In some of the jurisdictions considered the wording of the rule is arguably open to the interpretation that it is only available to those asserting or defending a common beneficial interest. In *Barnes & Co Ltd v Sharpe*, Higgins J in the High Court of Australia took the view that the effect of the requirement in the former Queensland rule that the interest be 'in the subject matter of a cause or matter',[27] was to narrow the scope of the procedure to those with a beneficial interest in property the subject of the litigation.[28] However Griffith CJ seems to have taken a more liberal view of the rule, saying that he was 'not at all sure' that it was so limited.[29] Subsequent cases followed the latter approach. Master McLaughlan QC in *Cameron v National Mutual* noted the different wording of the rule but considered that no difference from the scope or effect of the English rule was intended.[30] On appeal, Dowsett J did not directly address the difference between the wording of the then Queensland rule and the English rule, but approved of the Master's reasoning.[31] His Honour went on to apply English authorities without qualification, as did McPherson SPJ in the Court of Appeal, and Williams J in *Re McAndrew's Application*.[32] The different wording did not seem to have been viewed as significant in any other decisions under the former Queensland

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[26] The *Markt* case [1910] 2 KB 1021 (CA) 1038, 1039 (Fletcher Moulton LJ) and *Bedford v Ellis* [1901] AC 1 (HL) 8 (Lord Macnaghten).

[27] RSC (Qld) 1900 Ord 3 r10, repealed 30 June 1999 (Supreme Court of Queensland Act 1991(Qld) s 118B).

[28] (1910) 11 CLR 462, 483, 484. See also *Fearnley v Berry* [1924-25] St R Qd 280, 295.

[29] (1910) 11 CLR 462, 469, 478.

[30] [1991] 2 QdR 601, 605.

[31] [1991] 2 QdR 601, 610.

[32] [1992] 1 QdR 133, 136 and [1972] QWN 51 respectively.

rule.[33] Prior to 1987, the Supreme Court Rules of South Australia also required that the interest be in the 'subject-matter of a cause or matter'. In *Hancock v Scattergood* Reed J noted that the rule was in 'slightly different terms' from the English rule but thought that cases upon the latter were equally applicable, and other South Australian decisions rely on English authorities without commenting on the differences between the two rules.[34] Similarly, in *RJ Flowers Ltd v Burns*,[35] McGechan J noted that the recent amendment of the representative parties rule in the High Court Rules of New Zealand required the same interest to be in the 'subject-matter of the proceedings' rather than 'in an action'. He regarded the change as a 'little puzzling' and thought its object 'difficult to discover' but did not consider it to be relevant to the issue at hand, or to affect what his Honour perceived as the prevailing liberal approach to the rule's application. The possibility of limiting the ambit of the rule based on its wording in these jurisdictions was not taken up, and 'interest in the subject-matter of a cause or matter' was treated as equivalent to 'interest in a cause or matter'.

It has been accepted that the rule is available to all causes and matters. The most enduring restriction was that actions claiming damages were universally excluded from resort to the representative parties rule. The general acceptance of this view stemmed from the opinion of Fletcher Moulton LJ in the *Markt* case[36] that a claim for damages was personal

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[33] *Serbian Orthodox Ecclesiastic School Community 'Saint Nikolas' Queensland v Vlaislavljevic* [1970] QdR 386, 391; *Tydeman v Roberts* [1985] 2 QdR 144; *Foster v Caboolture Shire Council* [1986] Qld Planning LR 491, 492.

[34] [1955] SASR 1, 20. See *Watters v May Brothers Ltd* [1932] SASR 418, 424; *Struthers v Chiropractic and Osteopathic College of SA Inc* (1980) L Society Judgment Scheme 36, 38; and *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470, 483, affirmed (1970) 44 ALJR 434 although without comment on the representative nature of the action.

[35] [1987] 1 NZLR 260, 271.

[36] [1910] 2 KB 1021 (CA) 1035, 1040-1041.

only, and while the named plaintiff was free to combine a personal claim for damages with claims for declarations and injunctions on behalf of the class,[37] damages could not be sought on behalf of the class. Somewhat different approaches were adopted by the other two members of the Court of Appeal. For Vaughan Williams LJ the failure of the claim depended more on the absence of a 'common purpose'.[38] Buckley LJ considered that those represented had a common interest and although agreeing that their damages were several, thought that it was possible to use the representative action to expedite the recovery of such damages to which they each were entitled. His Lordship conceded that further separate proceedings would be necessary to enable those represented to claim their individual damages but thought that this was a hazard of every representative action.[39] Despite these differences of opinion, Fletcher Moulton LJ's position was generally considered to have prevailed.[40] However, consistent with the general refusal to restrict the rule's availability, the suggestion that it is not possible to award damages in representative proceedings has since been rejected,[41] and there is no absolute restriction on any particular remedy.

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[37] The *Markt* case [1910] 2 KB 1021 (CA) 1041 (providing of course that the rules regarding joinder of claims are satisfied: *Stroud v Lawson* [1898] 2 QB 44 (CA)). The position was the same in tort, the *Prudential Assurance* case [1981] Ch 229, 255.

[38] [1910] 2 KB 1021 (CA) 1030, 1032.

[39] [1910] 2 KB 1021 (CA) 1044, 1047-1048. This approach is discussed in Ch 4, 200-201. Fletcher Moulton LJ objected to this course being adopted on the basis of its novelty, and on the basis that it would not aid those represented in the case before him due to the effect of the Statute of Limitation, 1042. Limitation periods are discussed in Ch 2, 124.

[40] *Wing v Burn* (1928) 44 TLR 258 (claiming general damages flowing from an alleged *ultra vires* decision to expel an association from the national affiliated body); *Watters v May Brothers Ltd* [1932] SASR 418, 424 (claiming damages for alleged fraudulent misrepresentation). See also the reference in *Dillon v Charter Travel Co Ltd* [1988] ATPR ¶40-872, 49,435.

[41] *The Irish Rowan* [1991] 2 QB 206 (CA) 227; *EMI Records Ltd v Riley* [1981] 1 WLR 923, 926; *RJ Flowers v Burns* [1987] 1 NZLR 260, 268-269.

While some decisions have expressly confirmed that use of the representative parties rule is appropriate for some claims, decisions categorically denying the rule's availability to any particular class of claim,[42] or articulating the principles which might determine when the rule is available to other causes or matters are rare. Courts have approached 'same interest' in the claim on the basis that a single test can determine whether there is sufficient 'same interest', regardless of the nature of the claim before the court, or the remedy sought. It will be argued that the tests applied thus far offer insufficient guidance as to when use of the rule will be appropriate. At the other extreme, to accept that there are no general principles at all and that each case must be decided on its own facts alone is to accept a degree of uncertainty at odds with the demands of procedural justice.

The only requirement is that those represented have the 'same interest'.[43] Clearly, this demands further clarification. The phrase 'same interest in a claim' does not have a single fixed meaning. The meaning of 'interest in proceedings' must be governed by its context. It may range from a direct financial interest to 'nothing more than the ordinary human interest which everybody has in the outcome of proceedings in which he is likely to be a witness.'[44] Emphasising that the interest is to be 'in the litigation' provides little assistance.[45] Nor does

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[42] The cases noted in n21 above are unusual in this respect.

[43] It was noted in *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484, 494-495 that claims brought under the 1962 rule assume that a representative defendant needs to have the 'same interest' as those represented whether the proceedings are commenced against the defendant as a representative, or whether the claimant applies for an order that the defendant represent others (RSC 1965 Ord 15 r12(1) and (2)) despite the suggestion, open on the wording of that rule, that 'same interest' is not necessary in the latter scenario. On considering the question, Waller J agreed that consistency would suggest that 'same interest' was necessary in both cases, and his view was relied upon to reach the same conclusion in *BT Australasia Pty Ltd v NSW* (Federal Court of Australia 24 December 1997) paragraph 80. The current rule cannot support the same implication, CPR 19.6(1).

[44] *Bearmans, Ltd v Metropolitan Police District Receiver* [1961] 1 All ER 384 (CA), 391. See R Cross and JW Harris *Precedent in English Law* (4th edn Clarendon Law Series Oxford 1991) 180.

[45] The *CBS/Sony* case [1987] FSR 262, 271.

the fact that the representative parties rule refers to 'same' interest and not a 'similar' interest[46] offer any clarification. 'Same' may be understood to mean 'similar', 'like' or 'corresponding to' in certain circumstances.[47]

The phrase 'same interest in a claim' may be invested with some settled meaning by judicial interpretation, and it is to the judicial application of the phrase in claims to use the representative parties rule that this Part now turns.

2 Same Interest: 'Common Interest, Common Grievance and Relief in its Nature Beneficial to All'

The judicial elaboration of the circumstances in which 'same interest in a claim' might be found most often referred to is that set out in *Bedford v Ellis*.[48] Lord Macnaghten, after saying that the rule was intended to apply the practice of the Court of Chancery to all divisions of the High Court, went on to say that '[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.'

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[46] Lloyd (1949) 413.

[47] *Kingsbury v Martin* (1901) 1 SR(NSW) 272, 278, 279; *Avondale Motors (Parts) Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1971) 124 CLR 97, 107.

[48] [1901] AC 1 (HL) 8.

The formulation of the interest required as 'a common interest, a common grievance and relief in its nature beneficial to all', has been cited in representative claimant actions ever since, and has regularly been treated as a tripartite test.[49]

This means that the attempt to clarify 'same interest' yields 'common interest' as a starting point. Given that 'common interest' does not indicate with any greater certainty what exactly is required, it is not a significant advance on the statutory formulation. 'Common grievance' suffers from a similar defect and is rarely considered in any detail, if at all, by the courts. Restrictive application of the test of 'common interest' has often rendered consideration of 'common grievance' unnecessary and, where it is referred to, it is generally used either to support a finding that there is no 'common interest' or that the relief sought is not 'beneficial to all',[50] or is conceded to exist where the proposed group has already failed to satisfy the test of 'common interest'.[51] The final element of the three part test focuses on the nature of the remedy sought. While representative actions claiming damages were excluded, this element offered the most concrete, if restrictive, guidance on when members of a class would not have the 'same interest' required by the rule. The relaxation of that restriction without explicit clarification of the circumstances in which such an action might be allowed

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[49] The *Markt* case [1910] 2 KB 1021 (CA) 1035, 1044-1045; *Janson v Property Insurance Co (Ltd)* (1913) 19 R of Commercial Cases 36, 42; *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA) 677; *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 220-221; *Bollinger v Goldwell* [1971] FSR 405, 408; *Haarhaus & Co GmbH v Law Debenture Trust Corp Plc* [1988] BCLC 640, 647; and the *Pan Atlantic Insurance* case [1989] 1 Lloyd's Rep 568 (CA), 571.

[50] See, for example, *Banfield v Wells-Eicke* [1970] VR 481, 485.

[51] The *Markt* case [1910] 2 KB 1021 (CA) 1029-1030. *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) provides a rare example of reliance on 'common grievance' to reject the claim to use the representative parties rule, and was followed in *Hirst v Housing Commission of Victoria* (Supreme Court of Victoria 15 February 1979).

to proceed as a representative one leaves 'relief in its nature beneficial to all' just as ambiguous as 'common interest' and 'common grievance'.

The inherent ambiguity in these phrases can be demonstrated by reference to a number of cases which adopt different interpretations of 'relief beneficial to all'.

The decision in *Smith v Cardiff Corp*[52] raises the issue of what exactly is meant by the phrase 'relief in its nature beneficial to all' in the context of declaratory relief. The action challenged the defendant's proposed rent scheme and was brought on behalf of all those who paid rent to the Corporation - including both those who would pay more under the scheme and those who would pay less. The court was of the opinion that because the effect of the declaration sought might be to strike the rent scheme down, and because this would adversely affect those who were able to benefit under the scheme, then the relief sought was not 'beneficial to all'. This decision might be contrasted with two earlier cases where the validity of an administrative decision was challenged.[53] In neither was there any suggestion that the relief sought was not 'in its nature beneficial to all', even though in both cases the representative plaintiffs' arguments were unsuccessful and, therefore, all those represented were bound by the unfavourable results.

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[52] [1954] 1 QB 210 (CA) 217 and 227 (Morris LJ).

[53] *Price v Rhondda UDC* [1923] 2 Ch 372 and *Blythe v Birtley* [1910] 1 Ch 228. However, the right of the representative to bring the claim as a representative action appears not to have been challenged in either case.

The approach in *Smith v Cardiff Corp*[54] defines 'relief in its nature beneficial to all' as requiring that the relief, if granted, should, in fact, in the circumstances of each individual represented, result in a positive overall result. Such an approach requires an inquiry into the individual circumstances of each member of the class represented and arguably denies any claim to use the rule. The failed attempt in the Victorian decision of *Hirst v Housing Commission of Victoria*[55] to define more closely the claimant class so as to avoid the charge that the relief claimed was not 'beneficial to all' demonstrates the difficulty. In that claim, in similar circumstances, those represented were confined to those whose rents would increase but 'same interest' was again denied - there might be those who despite the increase in rent would nevertheless benefit from the increased services offered and hence striking down the rent rise would not 'benefit all'.

If the concept of the benefit conferred by a declaratory order is altered, however, the question of whether it benefits all those represented changes. The later case of *John v Rees*[56] appears to have taken the view that the benefit conferred by declaratory relief is not the consequences which flow from the declaration but is knowledge of the true position in law. This position was clearly adopted by the minority judge, Kirby P, in the NSW Court of

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[54] [1954] 1 QB 210 (CA).

[55] Supreme Court of Victoria 15 February 1979, 7a. The possibility of further refining the definition of the class represented is considered below, 50-51, 56-57.

[56] [1970] Ch 345, 371. Megarry J did, however, return to the idea that those who would in fact benefit from the scheme being struck down could not represent those who would in fact suffer detriment from such a course, 374. While the interests of the tenants in *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) who supported the scheme would have been protected by the defendant's arguments, neither that nor the possibility that a representative of those tenants could have been appointed to defend the case seems to have been considered.

Appeal decision of *Esanda v Carnie*[57] where his Honour said that he failed to see 'how it can *not* be in a person's interest, still less contrary to their interest, to know their true legal position.' He went on to ask

> How can it not be to a person's advantage to have that issue determined authoritatively so that their legal rights and liabilities are known and revealed to them? The argument might be ventured that such knowledge could lead to disadvantageous action on the part of a lender, or upset associated arrangements. But this is to use the words "advantage" or "benefit" in an artificial sense, and to interpose questions of causation which are not strictly relevant. To put it another way, it would be absurd to disallow what would otherwise be a proper and permissible procedure because the true, legal position might thereby become known. It is not permissible to fashion legal principles or judicial procedures on the basis that it *may* be in someone's interest to be kept in the dark, to be shielded from knowledge of their true legal position.

While arguments might be advanced preferring one or other of these interpretations of 'benefit', this would only resolve the issue of one limb of the three stage test for one type of relief in the context of representative claimant claims.

Given that 'common interest, common grievance and relief in its nature beneficial to all' cannot be used to exclude, or positively to endorse any particular type of claim, it does not

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[57] (1992) 29 NSWLR 382, 400. See also *Gaspet Ltd v Elliss (Inspector of Taxes)* [1985] 1 WLR 1214, 1220 where Peter Gibson J, while considering the meaning of the phrase 'by or on behalf of', refers to the *Markt* case [1910] 2 KB 1021 (CA), saying that the 'primary connotation' of the phrase in the representative parties rule is not '[t]he concept of benefit'.

provide any useful test for determining whether members of the proposed class have the 'same interest' for the purposes of bringing or defending a representative action. It is most accurately described as an elaboration of the requirement that the 'same interest', that is, the common interest, required must be 'in a claim', that is, there must be a common grievance and the relief claimed must be beneficial to all. It is a paraphrase which does not serve to elucidate the circumstances in which the rule will be available.[58]

This conclusion is reinforced by consideration of claims brought against representative defendants. The phrases 'a common grievance' and 'relief in its nature beneficial to all' cannot have the same relevance to these actions as they do to actions brought by a representative claimant. Lord Macnaghten was considering a representative plaintiff action in *Bedford v Ellis* and his Lordship's explanation was expressed to be applicable to those 'whom the plaintiff proposed to represent.' Decisions considering representative defendant actions do not apply this formula.[59] Reference is sometimes made in those authorities to a requirement of 'common interest' or 'community of interest'.[60] As with the test for plaintiff representative actions, 'common interest' and 'community of interest' are little more than synonyms for

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[58] HLA Hart 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37.

[59] However, a number of commentators treat the test in *Bedford v Ellis* [1901] AC 1 (HL) as one applicable to representative actions generally; see, for example, A Lockley 'Regulating Group Actions' (1989) 139 NLJ 798. K Uff 'Class, Representative and Shareholders' Derivative Actions in English Law' (1986) 5 Civil Justice Q 50, 53 suggests that revising the third requirement to 'any judgment was binding upon all represented defendants' renders the test appropriate to representative defendant claims. Arguably this amendment is simply a restatement of the effect of a successful action against a representative defendant.

[60] *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 530.

'same interest' and do not in themselves offer useful clarification of what type of actions might suitably be defended by a representative.[61]

It is necessary then to examine the case law to determine if the phrase 'common interest, common grievance and relief in its nature beneficial to all' is in fact a label which describes identified circumstances in which resort to the representative parties rule is permitted.

3 Same Interest: Accepted Categories

Case law has affirmed that there is sufficient 'same interest' where those represented are claiming or defending a joint beneficial entitlement to property.[62] In those unusual circumstances where the law recognises the proprietary rights of a fluctuating body, any claim or defence of such rights is appropriately brought as a representative action. This is so whether the rights are enjoyed by custom or are held by a corporation on trust for the body.[63] In such actions the courts have been prepared to make orders ranging from declarations and

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[61] RSC (Tasmania) R335 refers to 'the same or common right' against the defendant, or 'the same or a common interest or the same rights in, to, or in respect of a fund or other property', or 'a common interest in any matter', and R336 refers to those subject to the 'same or a common obligation'.

[62] *Harrison v Abergavenny* (1887) 3 TLR 324; *Re Lead Company's Workmen's Fund Society* [1904] 2 Ch 196.

[63] Discussed in RJ Smith *Property Law* (3rd edn Longman Law Series London 2000) 455-456.

injunctions,[64] to accounts of profits and damages.[65] The action for money had and received brought by the trustee of an unincorporated association on behalf of the members of the association in *Marrs v Thompson*[66] might be justified on this basis. Similarly, it has been considered to be clear that a representative action may be brought on behalf of all the beneficiaries under a trust to enforce the terms of the trust[67] and that an administration action may be brought on behalf of legatees interested in an estate, or in an appropriate case, against a defendant as a representative of the executors of an estate.[68]

Despite the denial that use of the rule is restricted to those asserting or defending joint beneficial interest in property, its accepted application beyond these situations is very limited. It has been treated as clearly available where the claimant represents joint contractors, deriving their common interest from a single contract.[69] It seems likely that this is the basis on

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[64] *Wyld v Silver* [1963] 1 QB 169 (CA); *Mercer v Denne* [1905] 2 Ch 538 (CA) (an action on behalf of all persons carrying on the trade or business of fishermen in the parish of Walmer alleging a customary right to dry nets on the land in dispute).

[65] See *Prestney v Mayor and Corporation of Colchester and the Attorney-General* (1882) 21 ChD 111 where the 'freemen of the borough of Chestney' claimed the rents and profits of three properties held by the Corporation and *Walker v Murphy* [1914] 2 Ch 293 where resident freemen and their widows defended the right to depasture cows on the Town Moor of Newcastle-upon-Tyne.

[66] (1902) 86 LT 759 (CA).

[67] *Re Calgary and Medicine Hat Land Co, Ltd* [1908] 2 Ch 652 (CA), or, alternatively, against a representative of the beneficiaries, *Trustees Executors and Agency Co Ltd v Urquhart* (1896) 21 VLR 713.

[68] *May v Newton* (1887) 34 ChD 347, 349; *Re Braybrook* [1916] WN 74; *Re Wilson's Will* (1899) 25 VLR 193, 199; *Trustees Executors and Agency Co Ltd v Sparling* (1894) 16 ALT 34; *Wyburn v Corporation of Canterbury* (1892) 19 VLR 302; *Eighth Union Building Society v Carnegie* (1893) 19 VLR 388; *Elms v Glen* (1897) 23 VLR 376 (although it is not clear from the report whether the action was to administer an estate or a trust, or which interested class was represented). However, specific provision is made for these types of claim in CPR 19.7, and the rule which preceded it, RSC 1965 Ord 15 r13 (discussed in Ch 4, 218).

[69] *De Hart v Stevenson* (1876) I QBD 313; *Janson v Property Insurance Co (Ltd)* (1913) 19 R of Commercial Cases 36, 42-43. A preliminary difficulty may arise in showing that a contract was indeed made by, or with, a group which has no legal identity: *Bradley Egg Farm, Ltd v Clifford* [1943] 2 All ER 378 (CA); *Carlton Cricket & Football Social Club v Joseph* [1970] VR 487, 497.

which representative actions on behalf of the members of an unincorporated association[70] seeking declaratory and injunctive relief against those alleged to be in breach of the association's rules have been accepted.[71] Moreover, there have been indications that it would be appropriate for a representative to bring an action on behalf of a class whose members have a joint action in tort.[72]

In addition to the very few types of claims which have been positively endorsed by the courts as appropriately brought as representative actions it is possible to identify particular types of cases which are more likely to be successfully brought as representative claims than others.[73] These cases can be distinguished from the accepted categories of claim described in this Part by virtue of the fact that they have not been specifically recognised as types of claim for which the representative parties rule is suited. Their unusually high level of acceptance as representative claims, given the ordinarily restrictive approach to the rule, is an identifiable

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[70] Here referring to members' clubs. Proprietary clubs should not raise any issue of common contract between the members *inter se* or of a contract purportedly made by outsiders with the group, since contracts will be made with, and property owned by, the club's proprietor, Josling (6th edn) 11-13.

[71] *John v Rees* [1970] Ch 345, 371, 373; *Blythe v Birtley* [1910] 1 Ch 228; *Struthers v Chiropractic and Osteopathic College of SA Inc* (1980) L Society Judgment Scheme 36; *Thellusson v Valentia* [1906] 1 Ch 480; *Wolfe v Matthews* (1882) 21 ChD 194. There is some uncertainty over whether it is necessary to show a proprietary right to obtain an injunction, although Warburton (2nd edn) 73 notes that injunctions preventing wrongful exclusion have been granted without inquiry as to the members' proprietary rights; and *Chitty* (28th edn) 532-533, concludes that the court's power to intervene is based on its jurisdiction to protect rights of contract, not property rights.

[72] The *Prudential Assurance* case [1981] Ch 229, 247, 254; *Esanda v Carnie* (1992) 29 NSWLR 382, 404. The decision in *Foster v Mountford* (1976) 29 FLR 233 to grant a representative of the Pitjantjara people an *ex parte* injunction to restrain the breach of confidence which would arise out of sale of a book detailing information about Aboriginal customs given to the author in confidence might be explained on this basis. See also *Taittinger SA v Allbev Ltd* [1993] FSR 641 (CA).

[73] For example, claims brought by and/or against insurers or underwriters on the same risk: *Balfour v Beaumont* [1982] 2 Lloyd's Rep 493, [1984] 1 Lloyd's Rep 272 (CA); the *Pan Atlantic Insurance* case [1988] 2 Lloyd's Rep 505, [1989] 1 Lloyd's Rep 568 (CA); *Ventouris v Mountain* [1990] 1 WLR 1370, [1991] 1 WLR 607 (CA); *The Irish Rowan* [1991] 2 QB 206 (CA); *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484; *National Bank of Greece SA v RM Outhwaite* (16 January 2001).

pattern but not one which has been so identified by the courts. One approach to these claims would be to classify them as additional accepted, albeit impliedly, categories. However the approach taken here is that it is possible to identify features common, but not necessarily confined, to these cases and to the accepted categories of claim considered above which have led to their acceptance as representative claims. These features, which are discussed in Chapters 3 and 4, have relevance beyond these particular classes of claim and it will be argued that, rather than dealing with these claims as discrete 'types', it is better to view them as examplifying general principles applicable to all claims which might seek to take advantage of the rule. They are, therefore, considered in this broader context.

4 Same Interest: The Possibility that Separate Defences will be Defeated

As noted above, judicial discussion has denied that use of the rule is confined to those with a joint proprietary interest in the subject matter of the litigation, or those who are joint contractors or tortfeasors. Nor has use of the rule in practice been confined to these circumstances, although its extension beyond them has been limited. The most that can be said is that such a joint interest is a sufficient but not a necessary requirement for bringing or defending a representative action. It is therefore necessary to determine whether there are any general principles which govern whether or not a claim brought by or against those who do not have a joint legal interest should proceed as a representative one. The reasoning most often applied by the courts is what will be referred to as the 'separate defences' test. This test focuses on whether there is any possibility that the defendant would be denied the opportunity

to raise separate defences against individual members of the class by the form of the proceeding.[74] Similarly, common interest may be denied if the defendant could raise a defence which would demand different responses from different members of the represented class.[75] Likewise, a claim against a representative defendant may be defeated by reference to the possibility of individual defences within the represented class. In the *LAPT* case Lord Parker of Waddington observed that 'there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule.'[76] Generally, where the representative action brought does not fall into one of the categories set out above where 'same interest' is conceded, the 'separate defences' test has been relied upon to defeat the action.

To use the possibility that defences might be denied as the test for 'same interest' effectively limits the availability of the rule to those cases where the class represented is defined only in terms of the elements of the claim brought. Such a class will inevitably demonstrate the necessary 'same interest'. However, the representation is meaningless because proof of membership of the class, in effect, proves the claim. It is equivalent to bringing a claim for judicial review on behalf of 'those with standing'. A similar result could be achieved with almost any claim. An example is provided by *EMI Records Ltd v Kudhail*[77] where the defendants were sued on behalf of all other persons selling cassette tapes bearing

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[74] The *Markt* case [1910] 2 KB 1021 (CA) 1030, 1040; the *Prudential Assurance* case [1981] Ch 229, 254.

[75] *Dillon v Charter Travel Co Ltd* [1988] ATPR ¶40-872, 49,435.

[76] [1916] 2 AC 15 (HL) 39. See also the *MMSA* case [1916] 2 KB 243 (CA) 246-247; *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA) 699; *Barker v Allanson* [1937] 1 KB 463 (CA) 473-474; *A-G v Carter* (1969) 113 SJ 108; *Roche v Sherrington* [1982] 1 WLR 599, 610.

[77] [1985] FSR 36 (CA).

the trade name 'Oak Records'. The evidence showed that such tapes were pirated, and that the name had been adopted to avoid detection. Sufficient 'common interest' for a representative claim to proceed was found, but this was inevitably going to be the case. Proof of membership of the class as defined would prove commission of the tort.[78] Vinelott J's discussion in the *Prudential Assurance* case[79] of the attempt to rely on the representative parties rule in *Churchill v Whetnall*[80] makes the same point. In the latter case, the plaintiff sought to recover the monies subscribed to a fraudulent appeal for funds, on behalf of all subscribers. Vinelott J argued that limiting the claim to relief to a declaration that any subscriber who had been induced by a misrepresentation to contribute to the fund was entitled to recover 'would have accomplished nothing. Each plaintiff would still have had to establish in separate proceedings that he had been so induced in order to rely on the judgment in the representative action.'

Apart from these cases, allowing the possibility that defences may be denied to defeat the representative action should defeat all representative actions. Even in the 'accepted categories' discussed above, it is possible that separate defences could have been defeated by the form of the action. In *Wyld v Silver*,[81] for example, a representative of the 'inhabitants of parish of Wraysbury' proved a right to hold a fair or wake on wasteland and was awarded an injunction. The defendant lost the opportunity to argue that any one of the inhabitants of the parish of Wraysbury did not come to court with clean hands. Where the action is brought on

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[78] This is especially the case given that the tort alleged was passing off, so that neither deception nor resulting damage need be proved, JG Fleming *The Law of Torts* (9th edn LBC Information Services Sydney 1998) 783.

[79] [1981] Ch 229, 250-251.

[80] (1918) 87 LJ Ch 524.

[81] [1963] 1 QB 169 (CA).

behalf of joint contractors, as it was in *De Hart v Stevenson*[82] or *Janson v Property Insurance Co (Ltd)*,[83] it is theoretically possible that the defendant would be denied an opportunity to raise a defence against one of the creditors which may or may not have defeated the contract.[84] It is therefore not surprising that the rule's pre-Judicature Act use accommodated claims where the denial of separate defences was a possibility.[85] Examination of the case law bears out the assessment that reference to the hypothetical possibility that separate defences will be defeated is a 'self-defeating interpretation'.[86] Wherever attention has been focused on the possibility that separate defences will be denied by the form of the action, the representative claim has been rejected.

(a) Representative defendant actions

Claims alleging the existence of a contract with a number of persons and seeking to enforce it against a representative defendant have been struck out where the 'separate defences' test has been applied. In *Barker v Allanson* the plaintiff sought to recover moneys owed for goods supplied to a branch of the Durham Miners' Association. Greer LJ noted that some members of the branch would have been 'entitled to prove that the goods were not ordered by them or

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[82] (1876) 1 QBD 313.

[83] (1913) 19 R of Commercial Cases 36.

[84] GH Treitel *The Law of Contract* (10th edn Sweet & Maxwell London 1999) 535.

[85] Gillespie (1981) 217.

[86] Stoljar (1954) 492-493.

with their authority, ... others might have been able successfully to plead the Statute of Limitations'. He then made reference to the 'separate defences' test as set out in the *LAPT* case,[87] and decided that the representative action could not proceed.[88] A claim of undue influence against defendants representing the members of Opus Dei in *Roche* v *Sherrington*[89] failed for similar reasons.

Claims brought in tort follow this pattern. In *Winder v Ward*,[90] the plaintiff claimed damages for trespass against the members of the Essex hunt. The Court of Appeal refused to make a representative order and Sellers LJ is reported to have noted that each member of the Hunt could have a defence to the action for trespass, which might range from 'that in excitement of the hunt they did cross the plaintiff's field and tendered nominal damages' to that they 'had not hunted for years'. In *Re McAndrew's Application*[91] the plaintiff alleged nuisance against the defendant as a representative of all the members of a bowling club and sought an injunction and damages, and in *A-G for Victoria v City of Brighton*[92] the plaintiff alleged nuisance and sought an injunction against the representative of the members of a boat club. Both representative actions were struck out by reference to the 'separate defences' test. The courts considered the possibility that some members of the represented class may not have been members at the time that the tort was alleged to have occurred, or that others, while

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[87] [1916] 2 AC 15 (HL) 39.

[88] [1937] 1 KB 463 (CA) 473-474. Scott and Eve LJJ agreeing, 475 and 477.

[89] [1982] 1 WLR 599, 610.

[90] The Times 27 February 1957 (CA).

[91] [1972] QWN 51.

[92] [1964] VR 59.

members at the time, might wish to deny their involvement. The possibility that the members of the represented class might be denied the opportunity to raise individual defences was relied upon in *Hardie and Lane, Ltd v Chiltern*,[93] and the representative claim alleging conspiracy and fraud was rejected. The actions for nuisance, interference with contract and intimidation brought against the defendants as representatives of London Central, London Machine and the Clerical Branch of SOGAT were dismissed in *News Group Newspapers Ltd v SOGAT '82*, with Stuart-Smith J referring to the possibility that some members of the branches may not have taken an active part in the commission of the torts, and others may have disapproved of the activities.[94] Similarly in the *MMSA* case the plaintiffs' application that the defendants in the libel action defend as representatives of some 15,000 members of the Merchant Service Guild was dismissed. Swinfen Eady LJ referred to the fact that the members of the management committee of the guild might argue that the words were not defamatory, or did not refer to the plaintiffs, while the members of the association might argue that they did not authorise the publication, that they 'were on the high seas and knew nothing about the matter'.[95] A representative action to prevent persistent breach of the law by members of a society offering home transfers alleged to be in breach of the Solicitors Act 1957 was defeated on the basis a member might claim 'that he had no idea that the society intended to flout the law or that he was not a party to the breach or that he had joined the society two days before the issue of the writ'.[96]

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[93] [1928] 1 KB 663 (CA) 699.

[94] [1986] IRLR 337, 354.

[95] [1916] 2 KB 243 (CA) 246-247, Pickford LJ was of the same opinion, 248. See also the *LAPT* case [1916] 2 AC 15 (HL).

[96] *A-G v Carter* (1969) 113 SJ 108.

Even where the 'separate defences' test is not specifically applied, a number of decisions have used the same reasoning to defeat a representative action. In *United Kingdom Nirex Ltd v Barton*,[97] Henry J discharged the *ex parte* injunctions granted against defendants representing the members of two local organisations formed to protest against nuclear dumping restraining them from preventing, obstructing, restricting or otherwise interfering with entry upon the plaintiffs' land. While the 'separate defences' test was not explicitly referred to, his Lordship was concerned that each of the associations sought to be represented in the action was 'a broad church' and conceivably encompassed not only those whose activities were tortious but also those who would never contemplate unlawful activity.

(b) Representative claimant actions

Although representative claimant actions are nominally judged on the basis of the threefold test set out in *Bedford v Ellis*,[98] the reasoning which defeats such claims is closely related to the 'separate defences' test. If the defendant might be denied an opportunity to raise different defences against different members of the represented class, then there is not the necessary 'same interest'. Not only is the reasoning substantially the same, the theoretical possibility of individual defences being defeated is just as inevitable.

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[97] The Times 14 October 1986.

[98] [1901] AC 1 (HL) 8.

In *Smith v Cardiff Corp*,[99] four tenants brought an action on behalf of themselves and all other tenants of houses provided by the defendant, seeking a declaration that the corporation's decision to raise rents on a differential, rather than a uniform, basis was *ultra vires* and an injunction to prevent the scheme being put into operation. The Court of Appeal relied on the test expounded in *Bedford v Ellis* and held that the class did not have a common grievance, pointing to the fact that the proposed class included both those whose rents would increase under the scheme and those whose rents would not. It followed that the relief claimed, which in effect demanded that rents be increased for all tenants on a uniform basis, would not have been beneficial to those tenants whose rents did not increase under the differential scheme. This was, in essence, a decision that the defendant would be denied the opportunity to argue that some members of the class would not have had standing. It seems clear that this argument would have succeeded against some of those represented.[100] Assuming that the proposed increases in rent could constitute interference with private rights, and that an increase in rent would be sufficient special damage, there was no such interference or damage for those members of the class whose rent would not be increased.

This does not mean that a representative action would necessarily be allowed to proceed if the class was confined to those whose rents were to be increased. Even in such a case it is hypothetically possible that what seems to be a disadvantageous decision may in fact work to someone's benefit. Such a hypothetical possibility was in fact relied on in *Hirst v*

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[99] [1954] 1 QB 210 (CA).

[100] PP Craig *Administrative Law* (3rd edn Sweet & Maxwell London 1994) 484 discusses the requirements for a claim for a declaration in an action for judicial review prior to 1978, noting the uncertainty over the precise ambit of 'private right', and over whether special damage is sufficient.

Housing Commission of Victoria,[101] where an action challenging rent increases was brought on behalf of each of the tenants who was subjected to such an increase. However, the defendant's publicity stated that the extra revenue would go towards improving its housing and King J went on to differentiate the members of this class, relying on the fact that some tenants, 'especially those whose rents are only slightly affected', might favour the increases because they might expect to get benefits at the expense of others who would pay even higher rentals. Clearly it is possible to deny representative claims on this basis regardless of the specificity with which the class is defined. Even if the class were further limited to those who would be liable for increases above a certain amount, it could equally well be argued that, within that class, there may be those for whom the increased rental would be less than the benefits they would expect to receive. Obviously it would be possible to meet this objection and bring the action on behalf of 'those able to demonstrate that the increase in rent caused them special damage'. However, at this point, one is defining the class in terms of the action itself.[102]

In *Banfield v Wells-Eicke* a claim was made on behalf of the members of St Kilda Cricket Club to enforce an agreement entered into with the St Kilda Football Club. It was held that there was no common interest or common grievance between members at the time of the agreement and new members, nor could any relief claimed be beneficial to all represented. While Gowans J agreed that new members might have an interest in enforcing the agreement similar to the interest of those who were members at the date of the agreement, the interests

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[101] Supreme Court of Victoria 15 February 1979, 7.

[102] And, as was argued above (50-51), the benefits of representation are thereby lost, as, in order to prove that a person is a member of the class, the claim must be proved either by or against him or her.

were not the 'same', in the sense that while some current members may have been parties to the agreement, new members were not, and the 'defences available to the claim of the new members could, and no doubt would, be quite different from the defences available to the claims of the surviving members'.[103] Representative claims based on a number of individual contracts with a single defendant, while apparently possible,[104] are obviously also vulnerable to the separate defences reasoning.[105]

Representative actions alleging negligence on the defendant's part causing damage to the members of the class have been defeated by this reasoning. Clearly, in these cases, reference to possible defences will defeat the representative claim - a duty of care can only be owed to an individual claimant.[106] Moreover, each claimant must be able to demonstrate on the balance of probabilities that the defendant's breach caused the damage suffered,[107] and any defences upon which the defendant relies may demand individual responses.[108]

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[103] [1970] VR 481, 484-485. The same reasoning could arguably have been used to defeat some 'accepted categories' of representative claim, see, for example, *Marrs v Thompson* (1902) 86 LT 759 (CA).

[104] Fletcher Moulton LJ was prepared to deny use of the rule to such claims in the *Markt* case [1910] 2 KB 1021 (CA) 1040, see also Vaughan Williams LJ (1029-1030, 1032). Contrast however Buckley LJ (1044) and, more recently, *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 225.

[105] *Esanda v Carnie* (1992) 29 NSWLR 382, 388, 390.

[106] WVH Rogers (ed) *Winfield & Jolowicz on Tort* (15th edn Sweet & Maxwell London 1998) 113-115. See for example the *Markt* case [1910] 2 KB 1021 (CA) 1030, 1040 (Vaughan-Williams, Fletcher-Mouton LJJ). Buckley LJ was prepared to allow the action to proceed, and his reasoning is considered in Ch 4. See also *Radcliffe v Coltsfoot* [1984-86] Manx LR 386, 407, 408.

[107] RFV Heuston and RA Buckley (edd) *Salmond & Heuston on the Law of Torts* (21st edn Sweet & Maxwell London 1996) 240.

[108] See, for example, *Dillon v Charter Travel Co Ltd* [1988] ATPR ¶40-872, 49,436.

Whatever the claim, the result is the same where the court turns its attention to the possibility that separate defences will be denied. The 'separate defences' reasoning has defeated representative claimant actions alleging breach of copyright[109] and passing off.[110] Reliance on estoppel is also susceptible to this reasoning.[111] Claims by a representative that all members of a class have been defrauded have been rejected on the basis that it is an element of the action that each claimant prove inducement. Again, the concern is that otherwise the defendant will be denied the opportunity to contest reliance by any member of the represented class.[112] Similarly in claims alleging defamation of a class, the requirement that each claimant must have been identified (and the corresponding right of the defendant to contest that the claimant was so identified) defeats a representative action.[113]

(c) Remedies

If the 'separate defences' reasoning is applied, any claim for equitable or discretionary relief also fails. Many of the grounds for objecting to such relief are inherently individual in nature

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[109] The *CBS/Sony* case [1987] FSR 262, 270-271.

[110] *Consorzio del Prosciutto di Parma v Marks & Spencer Plc* [1990] FSR 530, 535, 536, [1991] RPC 351 (CA) 368.

[111] *Bollinger v Goldwell* [1971] FSR 405, 408-411.

[112] *Churchill v Whetnall* (1918) 87 LJ Ch 524; *Clarkson v Davies* [1923] AC 100 (PC), 112; *Morgan v Taranaki Farmers' Meat Co Ltd* [1925] NZLR 513, 515, 517; *Radcliffe v Coltsfoot* [1984-86] Manx LR 386.

[113] *EETPU v Times Newspapers Ltd* [1980] QB 585. Note also *London Motor-Cab Proprietors Association v Twentieth Century Press (1912) (Ltd)* (1917) 34 TLR 68 where the interim injunction sought was no longer necessary but Younger J noted that the representative action 'appeared to be wrongly framed'.

and a representative action denies, for example, a defendant the opportunity to argue that a class member is not entitled to the relief sought for necessarily individual reasons. There is some suggestion of this reasoning in the *Prudential Assurance* case.[114] Vinelott J was hesitant about the availability of injunctive relief to a representative plaintiff acting on behalf of a class made up of persons each having a separate cause of action in tort against the defendant. His Lordship said that

> No order can properly be made in such a representative action if the effect might in any circumstances be to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in such separate action. .... It is not clear how far the grant of injunctive relief is consistent with this principle in that for any member of the class represented to establish a right to injunctive relief in separate proceedings he would have to show a present apprehension of injury and might be faced with a defence of laches or acquiescence.[115]

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[114] [1981] Ch 229, 254-255. There may be something of the same reasoning in *Columbia Picture Industries Inc v Robinson* [1986] FSR 367, 371, 431. Scott J permitted the plaintiffs to sue on behalf of the approximately fourteen other members of the Motion Picture Association of America Incorporated (MPAA) but refused to grant an injunction restraining the defendants from knowingly infringing the copyright belonging to any member of the MPAA or in respect of which any of them held the exclusive licence. He said that he was 'prepared to grant an injunction protecting the copyright or exclusive rights of any of the present plaintiffs in the films in respect of which their respective titles have been established in this action' but was 'not prepared to extend this protection to ... future M.P.A.A. members' or to other films (the discussion of this issue is not included in [1987] Ch 38, 68). It may be however that Scott J was not concerned by the representative issue but rather by the breadth of the order sought.

[115] However, he was also of the view that '[n]ormally, therefore, if not invariably the only relief that will be capable of being obtained by the plaintiff in his representative capacity will be declaratory relief', even though that relief is also discretionary and may also be objected to on the grounds of waiver, laches or inequitable behaviour, *Zamir & Woolf* (2nd edn) 116.

Vinelott J noted that injunctions were granted in *J Bollinger v Costa Brava Wine Co Ltd (No 2)*[116] and in *HP Bulmer Ltd v J Bollinger SA*[117] but went on to say that 'that may have been justifiable in the particular circumstances of those cases on the ground that there was both a joint and several cause of action in tort.'

The now discredited view that it was not possible to claim damages in a representative action was based on an extension of the separate defences reasoning. While some cases cited the *Markt* case[118] in support of the decision to reject a representative claim for damages, many later decisions rejecting representative claims for damages did so without reference to Fletcher Moulton LJ's judgment, or to that case at all.[119] The representative claims for damages in those cases were rejected on the basis that damages required separate assessment for each member of the represented class. The reasoning behind the rejection of claims for damages is entirely consistent with the separate defences reasoning; that is, damages may give rise to individual considerations for each member of the class and the defendant will be denied the opportunity to raise defences against each claim. The rejection of the prohibition on representative claims for damages has not prevented such claims being defeated by reference to the separate defences reasoning.[120]

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[116] [1961] 1 WLR 277.

[117] (1977:2) 20 CMLR 625 (CA).

[118] [1910] 2 KB 1021 (CA).

[119] *Jones v Cory Brothers & Co Ltd* (1921) 152 LTJ 70 (CA); *Churchill v Whetnall* (1918) 87 LJ Ch 524; *EETPU v Times Newspapers Ltd* [1980] QB 585, 601; *Hermitage Court Owners' Association v Clyftville Properties Ltd* (1979) 251 EG 261 (CA) 265. *Radcliffe v Coltsfoot* [1984-86] Manx LR 386, 402, 409, 411 considers the *Markt* case [1910] 2 KB 1021 (CA) but notes that more recent cases suggest that it may be possible to claim damages.

[120] *Cameron v National Mutual* [1991] 2 QdR 601, 605, 606, 607 and 611.

(d) Test not consistently applied

If the 'separate defences' test is applied to all claims seeking to take advantage of the rule other than those where there is a joint legal interest, then the rule would not be available to such other claims. The assertion that it is available to all claims would be demonstrably false. However, the consistent rejection of representative claims where the 'separate defences' test has been referred to does not mean that the test has been consistently applied to all representative actions. There are a number of representative actions which proceed, either by not referring to the possibility of separate defences being denied in circumstances where that is clearly a possibility, or by not referring to the representative nature of the proceedings at all. How the 'separate defences' test was satisfied or why it did not apply is, in these cases, a matter for speculation.[121] What it is that distinguishes these successful representative claims from those defeated under the 'separate defences' test might be explained on some other basis, but if so, it is not found in the decisions themselves. A number of these cases have been the type of actions which reformers have hoped that the representative parties rule would support, but while welcoming these decisions as part of a liberal trend, there has been some acknowledgment that the decisions were not accompanied by principles defining their scope.[122]

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[121] Chs 3, 4 and 5 go on to propose possible explanations for both the generally restrictive approach and for those representative claims which have proceeded. In this section it is intended only to demonstrate that the dominant reasoning is not consistently applied, resulting in apparently conflicting decisions.

[122] B Hough '"Standing" for Pressure Groups and the Representative Plaintiff' [1991] Denning LJ 77, 78.

Some representative actions have proceeded where the possibility of separate defences being denied is not referred to at all, and sufficient 'common interest' is simply declared to exist. *Ideal Films, Ltd v Richards*[123] provides a rare example of a plaintiff successfully claiming against all the members of an unincorporated association in a representative action for payment of hire out of the association's funds. A representation order had been obtained against the committee members to defend on behalf of all members of the association. The reported decision concerns the plaintiff's application to join the trustees holding the association's property in the action. On the facts of the case, it is possible that those represented were denied the opportunity to argue that they had not authorised the particular transaction or were not members when the contract for hire was entered into. The possibility that such defences would be denied by the form of the action was relied upon in the later decision of *Barker* v *Allanson*[124] which distinguished *Ideal Films, Ltd v Richards*[125] on the ground that it was not argued by counsel for the defendants that any of the class would have different defences, suggesting that the clear possibility of different defences was overcome by counsel's concession.[126]

Similarly, claims in tort against representative defendants have been allowed to proceed in circumstances where the clear possibility of separate defences within the group was

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[123] [1927] 1 KB 374 (CA). Another is the *APRA* case (1961) 3 FLR 146, where a representative order was obtained against a representative of all members of a club in a claim based on a contract to engage an orchestra.

[124] [1937] 1 KB 463 (CA) 474.

[125] [1927] 1 KB 374 (CA).

[126] The potential relevance of the representative's acceptance of the form of the action is considered in Ch 4, 254-255.

overcome. In contrast to *Hardie and Lane, Ltd v Chiltern*,[127] where Sargant LJ was of the view that a tort based on conspiracy was 'the least capable' of being properly defended by a representative defendant, the possibility of separate defences being denied was not considered in *Amos Removals & Storage Pty Ltd v Small*[128] and the claim of conspiracy to interfere with contractual relations proceeded as a representative one. The former case was distinguished in the later Australian decision on the basis that the class in *Hardie and Lane, Ltd v Chiltern* was a fluctuating one, whereas the order in *Amos Removals & Storage Pty Ltd v Small* would be confined to those who attended the stop work meeting impugned in the action, some 800 persons. Given that voting for the impugned resolutions seemed to be treated as evidence of intention to injure and combination for the purpose of establishing a conspiracy, it is interesting that Hunt J was prepared to make an order against those who attended the meeting, on the basis that the resolutions were passed by 'nearly all' of those present. Had the 'separate defences' test been applied to this class, it could have been argued that some of those encompassed by the order were denied the opportunity to argue that they had not in fact voted for the resolutions.[129]

In *M Michaels (Furriers) Ltd v Askew*,[130] there was no reference to 'separate defences'. Sufficient common interest was found to grant an interlocutory injunction against the national

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[127] [1928] 1 KB 663 (CA) 699.

[128] [1981] 2 NSWLR 525. Indeed the change of the plea to one of conspiracy was treated as decisive in favour of the representative order, 530.

[129] If voting for the impugned resolutions was sufficient evidence of intention and combination for conspiracy, an order directed against only those persons who were recorded to have passed the resolutions would have been one against a representative of joint tortfeasors, and within one of the 'accepted categories' of representative claim, discussed above 48. However, as noted, it does not seem that the order was so limited, [1981] 2 NSWLR 525, 530, contrast 527.

[130] (1983) 127 SJ 597 (CA). See also *Amey Roadstone Corp v Purdey* [1986] Current L Digest 2654.

organiser of Animal Aid as representing all other members of that organisation restraining the class from, *inter alia*, picketing and committing nuisance in relation to the plaintiff furrier's premises. The concern that the order might encompass those who had not been involved in, or had not even contemplated, tortious activity[131] did not trouble the Court of Appeal sufficiently for it to refuse to allow the action to proceed against the representative defendant.

Claims against representative defendants in negligence seeking damages have proceeded where there has been no reference to the possibility that separate defences might thereby be denied. In *Campbell v Thompson*[132] the plaintiff was an employee of an unincorporated members' club who slipped on some stairs and was injured. The court ordered that the honorary secretary and the chairman of the committee defend on behalf of all the members of the club, although the order was limited to those who were members at the time of the accident. In the judgment it seems to have been assumed that all members of the club were both occupiers and employers of the plaintiff. It would clearly be possible for any one of the 2500 members to argue that he did not have the requisite control of the premises to be an 'occupier', and it certainly was possible that one of the members might wish to argue that he was not the plaintiff's employer or had not authorised her employment.[133]

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[131] Which prompted the decision not to allow a representative claim to proceed in similar circumstances in *United Kingdom Nirex Ltd v Barton* The Times 14 October 1986 (no reference is made to *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597 (CA) in the report of that case).

[132] [1953] 1 QB 445.

[133] See also *Tydeman v Roberts* [1985] 2 QdR 144; *Evans v Waitemata* [1972] NZLR 773, affirmed on appeal [1974] 1 NZLR 28; *White v Glass* The Times 18 February 1989 (CA); *Murray v Hibernian Dance Club* The Times 12 August 1996 (CA).

Claims brought by representatives in tort follow a similar pattern. The grant of an *ex parte* injunction to a representative plaintiff alleging breach of copyright in *EMI Records Ltd v Riley*[134] was criticised in the Australian decision *Cameron v National Mutual* on a number of grounds, including that the facts pleaded 'did not exclude the possibility' that some members of the class represented by the plaintiff may not have been the owners or licensees of the copyright works infringed by the defendant.[135] Unlike the *CBS/Sony* case[136] there was no mention of any need for each plaintiff to establish goodwill damaged by the passing off, nor was the possibility that the defendant might be denied the opportunity to raise defences against some members of the represented group considered.

In *Barnes & Co Ltd v Sharpe* the High Court of Australia allowed a decision awarding damages for defamation to a representative plaintiff to stand. All three members of the court agreed that the objection to the form of the action was made too late, and that no injustice had been done to the defendants.[137] Griffith CJ was uncertain about the propriety of the representative action but was 'not sure that advantage might not be taken' of the rule in an action alleging defamation.[138]

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[134] [1981] 1 WLR 923.

[135] [1991] 2 QdR 601, 608. While the Master's other criticisms were re-examined in the light of later authority by Dowsett J, the argument that separate defences reasoning should have defeated the claim seems to have been approved by his Honour, 610.

[136] [1987] FSR 262.

[137] (1910) 11 CLR 462, 470, 478 and 484. The 'injustice' which might be done by the rule is explored in Ch 4.

[138] (1910) 11 CLR 462, 469. Higgins J's view that the rule was inappropriate seems to have been based on the wording of the former Qld rule, ie that the common interest be in 'the subject matter of a cause or matter', 483, 484 (36-37 above).

Other representative actions have proceeded with little or no reference to the representative nature of the claim in the reported decision. Two such actions proceeded as claims against representative defendants seeking to enforce liability owed by those represented under individual contracts. In *Balfour v Beaumont* the action claimed that an indemnity was owed by the members of the syndicates represented by the individual defendants to the syndicate represented by the plaintiff.[139] In *Ventouris v Mountain*[140] the defendant was sued as representing himself and all other underwriters who subscribed to the marine war risks policy on which the plaintiff claimed.

In *Stone v Bolton* the plaintiff brought an action against the defendants as representing all the members of the Cheetham Cricket Club, alleging that their negligence had caused her to be injured by a cricket ball which had been struck out of the club grounds. A majority of the Court of Appeal awarded the plaintiff damages. There was no mention of the representative nature of the claim, nor any consideration of the possibility that some members of the club might be denied an opportunity to raise separate defences by the form of the action.[141] Declarations and injunctions have been granted without comment against representative defendants in claims alleging nuisance,[142] and interference with contractual relations and business.[143]

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[139] [1984] 1 Lloyd's Rep 272 (CA), affirming [1982] 2 Lloyd's Rep 493 holding that the plaintiff syndicate was not entitled to be indemnified.

[140] [1991] 1 WLR 607 (CA) reversing [1990] 1 WLR 1370 on an issue of legal professional privilege.

[141] [1950] 1 KB 201 (CA). The plaintiff was ultimately unsuccessful, but no issue was taken with the form of the proceedings in the House of Lords, [1951] AC 850 (HL). The plaintiffs were awarded damages in *Miller v Jackson* [1977] QB 966 (CA), a claim of nuisance also against the representative of members of a cricket club.

[142] *Kennaway v Thompson* [1981] QB 88 (CA).

[143] *Greig v Insole* [1978] 1 WLR 302.

In *Meade v Haringey London BC*[144] the plaintiff alleged that the defendant's failure to keep borough schools open during strike action was a breach of its statutory duty. He was permitted to proceed with a claim for declarations and an interlocutory injunction brought in his own right as a parent and on behalf of about 1,000 people who had formed the Haringey Schools Trust Association and the ratepayers of Haringey. In these circumstances the defendant could have argued that it was denied the opportunity to argue that individual members of the classes represented had not suffered loss as a result of its breach, or were for some other reason not entitled to an injunction.[145]

Courts have relied on the 'separate defences' test to defeat most claims to use the representative parties rule, without conceding that if it is consistently applied virtually any representative claim would be denied.[146] Those representative claims which have proceeded have, therefore, done so in the face of the possibility of separate defences being denied, resulting in apparently conflicting authorities. They have generally proceeded as representative claims in either of two ways. The first is where sufficient common interest is asserted, but the possibility of separate defences is ignored and the basis on which the necessary 'same interest' is found is not articulated. Alternatively, the representative nature of the claim has not been addressed or in issue at all.

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[144] [1979] 1 WLR 637 (CA) 648, 651-652. See also *Belcher v Reading Corp* [1950] Ch 380 and *Price v Rhondda UDC* [1923] 2 Ch 372 (although the representative nature of the claim was considered on the issue of costs, [1923] WN 228). For support for the propriety of a representative claimant in negligence, see Lord Denning in *Moon v Atherton* [1972] 2 QB 435 (CA) 442.

[145] MA Jones *Textbook on Torts* (7th edn Blackstone Press London 2000) 405.

[146] Except where the class members are defined by reference to their entitlement or liability.

Any expansion in the use of the rule will therefore require, at the very least, the formulation of a new understanding of the 'same interest' required. There have been two judicial responses which have implicitly acknowledged the difficulties of determining the question of 'same interest' on the basis of the possibility that separate defences will be denied by the form of the proceedings. The first is drawn from the decision in *The Irish Rowan*[147] and, it is argued, is concerned not with the possibility but with the probability that separate defences will be denied by the form of the proceedings. The second was articulated by the High Court of Australia in *Carnie v Esanda*[148] and asks whether there is a substantial common question of law or fact.

5 Same Interest: The Probability that Separate Defences will be Defeated

It is submitted that the decision in *The Irish Rowan* can be interpreted as looking not to the possibility but instead to the *probability* that there will be separate defences. In that case an action was brought by shipowners against the defendants as the representatives of seventy-seven insurers on a policy taken out by charterers of the plaintiff's ship. Each insurer's liability was based on a separate contract.[149] Staughton LJ noted that while it was theoretically possible that any one of those represented might raise separate defences, there was no indication that such a contention would be made. His Lordship continued that he would

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[147] [1991] 2 QB 206 (CA).

[148] (1995) 182 CLR 398.

[149] [1991] 2 QB 206 (CA) 227, 231, 240.

disregard 'theoretical possibilities', and deal with what were likely in practice to be the issues.[150] Similarly, his reference to *Roche v Sherrington*[151] noted that Slade J's rejection of that representative claim was based on an assessment that 'separate defences might be open to some members of the class' and went on to express the view that '[i]ndeed it was highly probable that a large number would wish to take separate defences'.[152]

Representative claims were not, prior to *The Irish Rowan*, explained by reference to the probability or improbability of separate defences being raised. Nor is it clear, given the relatively frequent factual similarity of claims which have proceeded as representative ones and those which have not, that they all could have been distinguished on this basis.[153] Nor have subsequent cases treated *The Irish Rowan* as altering the test for 'same interest'.[154] However, the fact that most cases have not been distinguished by reference to the probability

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[150] [1991] 2 QB 206 (CA) 222-223. Sir John Megaw also noted the suggestion that injustice might be done since those represented might wish to dispute the existence of any valid or binding contract with the plaintiff, or to raise the possibility of fraud or misrepresentation and responded by saying that there was 'no suggestion that in fact any such contention exists in the present case', 232.

[151] [1982] 1 WLR 599.

[152] [1991] 2 QB 206 (CA) 225. It is possible that *The Irish Rowan* does not advance any general principle but merely adds another category to those discrete situations where common interest is accepted, that of insurers or underwriters on the same risk, 235. In *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484, 496 Waller J held that such claims can proceed in the absence of a leading underwriter clause, and Andrew Smith J agreed with his reasoning in similar circumstances in *National Bank of Greece SA v RM Outhwaite* (16 January 2001) paragraph 31(1).

[153] Although decisions in different jurisdiction, comparison of *A-G for Victoria v City of Brighton* [1964] VR 59 and *Kennaway v Thompson* [1981] QB 88 (CA) provides a striking example. Both were claims for nuisance brought against a representative of the members of a boating club seeking an injunction to prevent noise arising out of use of the boats. The representative claim was rejected in the former case, but went ahead in the latter.

[154] Indeed, most claims to use the rule since *The Irish Rowan* [1991] 2 QB 206 (CA) do not refer to it all. The reference to it in *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484 does not treat it as having altered the test for 'same interest'; rather Waller J is concerned to discover whether the leading underwriter clause in *The Irish Rowan* was crucial to the decision to permit the representative claim to proceed, as there was no such clause in the facts before him. *National Bank of Greece SA v RM Outhwaite* (16 January 2001) paragraph 32 may be an exception. There Andrew Smith J contrasts, with reference to *The Irish Rowan* [1991] 2 QB 206 (CA), 'theoretical' and 'realistic' possibilities.

that separate defences will be defeated thus far[155] is not in itself an answer to an argument that use of the representative parties rule should be determined on this basis.

Unlike reference to the possibility that separate defences may be defeated by the form of the action, looking to the probability of separate defences does not result in the inevitable defeat of any claim to use the representative parties rule. Therefore, insofar as it anticipates some role for the rule, it must be considered to be an improvement on the dominant test for 'same interest'. However, simply to say that the rule will be available unless separate defences are probable does not indicate whether there are particular claims or circumstances where the defeat of separate defences by the form of the action will be perceived to be probable. As a test for the availability of the representative parties rule, it requires further elaboration. The judgments in *The Irish Rowan*[156] suggest that a number of features particular to the circumstances of that case were relevant to the determination that separate defences were not probable. It is argued in Chapters 3 and 4 that it is possible to identify general principles relevant to whether or not a representative action is appropriate, and that the particular features identified in *The Irish Rowan* can be accommodated in this broader context.

It is further argued that reference to the 'probability' of separate defences might be understood as a reference to a judicial assessment of the court's ability accurately to determine the issues placed before it in the absence of the participation of those represented. A determination that 'separate defences' are not probable would, therefore, amount to a finding

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[155] In *Consorzio del Prosciutto di Parma v Marks & Spencer Plc* [1990] FSR 530, 536 Morritt J refers to evidence suggesting 'at least an arguable defence' against some class members, which might be viewed as demanding more than a 'possible' defence.

[156] [1991] 2 QB 206 (CA).

that a substantively accurate decision is possible, and lead to an inference that the limitations on accuracy (if any), finality, and voluntariness are offset by the savings offered by the representative parties rule. If this understanding of the effect of this test is accepted, it is arguably very similar to the test for 'same interest' adopted by the High Court of Australia in *Carnie v Esanda*,[157] that is, that there be a common question of law or fact.

6 Same Interest: Common Question of Law or Fact

In *Carnie v Esanda*, the High Court of Australia was given the opportunity to examine what constitutes 'same interest' for the purpose of the representative parties rule. Until this decision Australian cases followed the English authorities on the subject of 'same interest'.[158] The plaintiffs (appellants in the High Court) sought various declarations regarding the defendant's failure to comply with the statutory regulation applicable to one of its standard form loan contracts. The action was brought on behalf of everyone who had entered into a loan or credit sale contract with the appellant after the date upon which the relevant legislation came into force.

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[157] (1995) 182 CLR 398.

[158] *Hancock v Scattergood* [1955] SASR 1, 19; *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470, 483; *Banfield v Wells-Eicke* [1970] VR 481, 485; *A-G for Victoria v City of Brighton* [1964] VR 59, 62; *Serbian Orthodox Ecclesiastic School Community 'Saint Nikolas' Queensland v Vlaislavljevic* [1970] QdR 386, 391; *Re McAndrew's Application* [1972] QWN 51, 117; *Clark v University of Melbourne* [1978] VR 457, 475, 476-477.

Given this chance to review the representative parties rule[159] the High Court appears to have rejected the traditional test of 'common interest, common grievance and relief in its nature beneficial to all', and any question of the possibility or probability of separate defences, in favour of asking whether there is a community of interest in a substantial or significant question of law or fact.

All of the judgments agreed that the action was one which, *prima facie*, satisfied the conditions for a representative action.[160] McHugh J explained that, in his opinion, a plaintiff and those represented have the 'same interest' in proceeding when they have a 'community of interest in the determination of any substantial question of law or fact that arises in the proceedings.'[161] The other judgments take a similar approach to 'same interest'. Mason CJ, Deane and Dawson JJ in their joint judgment were somewhat more hesitant, taking the view that '[i]t may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings.' Toohey and Gaudron JJ were of the opinion that the class concerned had the 'same interest' in the proceedings 'in the sense that there is a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the appellants seek.'[162] The test of substantial or significant

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[159] The rule in issue was RSC(NSW) Part 8 r13, an Australian equivalent of the 1962 rule.

[160] (1995) 182 CLR 398, 403 (Mason CJ, Deane and Dawson JJ), 408 (Brennan J), 421 (Toohey and Gaudron JJ) and 427 (McHugh J). Kell (1993a) discusses the action.

[161] (1995) 182 CLR 398, 427, 430. Brennan J agreeing, 408. Presumably the same test will apply to claims brought against representative defendants.

[162] (1995) 182 CLR 398, 421.

common questions of fact or law has been consistently applied in claims to use the representative parties rule since the High Court decision.[163]

It is arguable that Vinelott J's decision to allow a representative action in the *Prudential Assurance* case[164] was made on the basis that 'same interest' depended on there being common questions of fact or law. The claim alleged conspiracy and was brought on behalf of the shareholders of a company at the date of a meeting where an allegedly misleading circular was relied upon to procure the passing of a resolution. The plaintiff sought a declaration that the plaintiff, and those represented were 'entitled to damages against the defendants ... for conspiracy.' Vinelott J commented that the

> practical effect of such a declaration would, it seems to me, be no greater and no less than the effect of declarations, first, that the circular was tricky and misleading; secondly, that the individual defendants conspired to procure its circulation in order to procure the passing of the relevant resolution; and thirdly, that in so doing they conspired either to injure the plaintiff and the other shareholders at that date or to commit an unlawful act, or to induce a breach by the first defendant company of its contractual duty to the shareholders.

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[163] *Shepherd v Australia and New Zealand Banking Group Ltd* (1996) 20 ACSR 81, 97-98; *Rugby Union Players Association Inc v Australian Rugby Union Ltd* (Supreme Court of NSW 30 July 1997); *National Mutual Life Association of Australasia Ltd v Reynolds* (Federal Court of Australia 8 March 2000).

[164] [1981] Ch 229. The plaintiff's action for personal damage, to which the representative action was linked, was struck out on appeal on the basis that the rights of shareholders had not been affected, [1982] Ch 204 (CA).

In effect, he spells out questions common to the class identified, and indeed continued that he thought it would 'be better that those declarations, which constitute the common element of any claim by any member of the class for damages for conspiracy should be so spelt out.'

(a) Relationship with joinder

The prospect of determining 'same interest' on the basis of a shared interest in a common question of law or fact has been raised, and rejected, in the past. This rejection has, on occasions, been based on the assumption that the reference to a 'common question' blurs the distinction between joinder and representation.[165] The reason for this objection is not, however, immediately apparent. The rule is intended to accommodate the situation where those interested in the claim are too numerous for them conveniently to be joined.[166] The necessary implication that joinder would be possible in law but inconvenient in practice supports the argument that the test for each rule will be similar, if not identical. There is some recognition of this by Buckley LJ in the *Markt* case[167] when his Lordship noted that the question before the court concerned the representative parties rule (then Order XVI rule 9) and

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[165] The *Markt* case [1910] 2 KB 1021 (CA) 1030, 1035-1039; *Cameron v National Mutual* [1991] 2 QdR 601, 606-607, 608; *Cameron v National Mutual (No 2)* [1992] 1 QdR 133, 142-143; *Morgan v Taranaki Farmers' Meat Co Ltd* [1925] NZLR 513, 515; *Radcliffe v Coltsfoot* [1984-86] Manx LR 386, 397-399. Gillespie's argument that some alternative test is possible seems to be based on concern to distinguish the two procedures, but no alternative formulation is offered, (1981) 215.

[166] *Bedford v Ellis* [1901] AC 1 (HL) 8.

[167] [1910] 2 KB 1021 (CA) 1043.

not the rule for joinder (then Order XVI rule 1) but went on to say that 'considerations with reference to Order XVI., r. 1, are, in my opinion, not irrelevant.'

Indeed there is, of necessity, a common question of law or fact in any representative claim. However, this is not to say that establishing a common question of law or fact will necessarily be sufficient to support resort to the representative parties rule. It is argued here that the 'commonality' of the question put before the court arguably depends upon an assessment that it can accurately be answered without the participation of those represented. The question of whether or not it is desirable that the common question be answered depends on, *inter alia*, the other goals of procedural law.[168] Imposing as a further requirement the need to show 'common purpose' or 'common grievance' is incapable of illuminating the issue.

(b) 'Substantial' or 'significant' common question of law or fact

All the judgments in *Carnie v Esanda* referred to the need for there to be a substantial[169] or significant[170] common question of law or fact in order for there to be the 'same interest' required by the rule. Moreover, they all accepted that the claim was *prima facie* one which

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[168] This issue is considered further below in the discussion of the court's residual discretion, 85-89.

[169] (1995) 182 CLR 398, 408 (Brennan J), 427 (McHugh J).

[170] (1995) 182 CLR 398, 404 (Mason CJ, Deane and Dawson JJ), 421-422 (Toohey and Gaudron JJ). Toohey and Gaudron JJ suggest that in addition to 'a significant question common to all members of the class', 'same interest' also requires that the members of the class 'stand to be equally affected by the declaratory relief which the appellants seek', 421. Whether this an independent requirement is not discussed, nor is the question of how it might differ from the need for the question to be 'common'.

could appropriately be brought as a representative action, and therefore presumably accepted that substantial or significant common questions were presented to the court. However, what is meant by a 'substantial' or 'significant' common question is not discussed in any of the judgments.

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The meaning of 'substantial' or 'significant' common question of law or fact has not yet been addressed in the context of the representative parties rule, but the High Court of Australia has dealt with the question in the context of the expanded Federal Court procedure for representative proceedings, Part IVA. In *Wong v Silkfield Pty Ltd*[171] the High Court rejected earlier suggestions that the phrase 'substantial question of law or fact' required that common issues predominate, or that the common issue presented was of particular importance to the claims of those represented. During the course of the decision, the High Court refers to the qualifications of 'common question of law or fact' adopted in *Carnie v Esanda*[172] and expresses the view that the purpose of the enactment of Part IVA clearly 'was not to narrow access to the new form of representative proceedings beyond that which applied under regimes considered in cases such as *Carnie*'. Their Honours continued that this indicated that the use of the term 'substantial' in its threshold context in Part IVA indicated that it was intended to mean simply 'real or of substance', and did not require any assessment of the significance of the common question.[173] While not stated explicitly, the implication is that a similar interpretation applies to the use of words 'substantial' or 'significant' in *Carnie v*

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[171] (1999) 165 ALR 373.

[172] (1995) 182 CLR 398.

[173] (1999) 165 ALR 373, 381.

Esanda, particularly given that 'substantial question of law or fact' is, as it is in Part IVA, a threshold issue, subject to a broad residual discretion.

(c) Relationship with goals of procedural law

In common with other procedures, the representative parties rule should, primarily, facilitate a balance between the accurate application of the law to the facts and the other goals of procedure, such as efficiency. A test for 'same interest' which asks whether or not there is a common question of law or fact responds to this need for a balance between competing goals. It is submitted that the reference to the need for a 'common question of law or fact' focuses judicial attention on whether there is a question, common to a number of persons, which the court can accurately answer without their participation in the proceedings. The conclusion then follows that it would be more efficient to answer it in a single representative claim than in multiple individual claims.[174] It is anticipated that, any derogation from accuracy being minimal, the promotion of the goal of efficiency justifies any limitation of the principles of finality or voluntariness.

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[174] It is argued below that there is an opportunity to challenge this assumption in the court's residual discretion to disallow the representative proceedings, 85-89.

Attempts to articulate some other meaningful test for the 'same interest' required by the rule have either denied the rule any utility at all, or have restricted its availability to a very narrow class of claims, or have been so broad as to be nothing more that a synonym for 'same interest in the claim', incapable of providing any guidance as to when the rule is available.[175]

A number of commentators in the wake of *Carnie v Esanda* continue to assert that there is a distinction between 'actions being maintained by persons who have the "same interest" in the proceedings, and ... actions being maintained by persons where there is a "common question of law or fact" at stake'.[176] Emphasising the distinction continues the implication that 'same interest' is something quite different from a common question of law or fact. However, the nature of the distinction asserted is either not explained[177] or is confined to a distinction based on the fact that the existing representative parties rule offers the court little guidance as to the conduct of such representative claims, in contrast to more comprehensive statutory reform.[178]

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[175] The fact that 'common question of law or fact' and some reference to the significance of the common question and/or judicial discretion are ordinarily adopted as the test (in some form or another) by reform of the representative procedure in common law jurisdictions supports the suggestion that other tests are inadequate. See, for example, Part IVA s 33C(1); RSC(SA) 34.01(1); Act respecting Class Proceedings 1992 (Ontario) s 1.

[176] Doyle (1999); Donnan (2000) 83; Cairns (4th edn) 337.

[177] Doyle (1999); Cairns (4th edn) 337, 343.

[178] Such as Part IVA, Donnan (2000) 83.

D RESIDUAL DISCRETION

1 Discretion to Disallow Representative Action

Even if the essential elements of the representative parties rule, that there are 'numerous' persons with the 'same interest', are found, there is a residual discretion to disallow the representative action. *Re Braybrook* suggests that the court can exercise its discretion to excuse non-compliance with an element of the procedure.[179] However, that case was decided under the original rule and it seems clear, at least in relation to the 1962 rule, that the discretion is negative, to be exercised when there are 'numerous persons' with sufficient 'same interest' to support a representative action, but that, nonetheless, the court considers that the action should not continue as a representative one. In *Bollinger v Goldwell*[180] Megarry J noted that while suitability will normally be established where 'common interest, common grievance and a remedy beneficial to all' is found, he did not think that 'this necessarily suffices in every case'. He went on to refer to the 1962 rule, noting that it provided that representative proceedings '"may be begun, and, unless the court otherwise orders, continued" as, in effect, representative proceedings' and continued that the phrase 'unless the court otherwise orders' seemed to him 'to contemplate that even if the numerous persons have the

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[179] [1916] WN 74. That case and *Eighth Union Building Society v Carnegie* (1893) 19 VLR 388 (discussed above, 30) seem to assume a discretion to relax the requirement that there be 'numerous persons' in the circumstances of the cases before the courts. The possibility that the circumstances referred to exemplify principles capable of more general application is discussed in Ch 4.

[180] [1971] FSR 405, 411.

same interest, the court has a discretion to refuse to permit the proceedings to be continued in the form of a representative action'.[181]

The current rule is in somewhat different terms, saying that '[w]here more than one person has the same interest in a claim - (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the interest as representatives of any other persons who have that interest'.[182] This phrasing arguably does not carry the same negative connotation as the earlier wording. It does not, however, necessarily suggest a discretion to dispense with compliance with one of the elements of the procedure. Rather it suggests that a claim not commenced as a representative one might, if sufficient 'same interest' is demonstrated, be transformed into a representative action with the court's permission. The ability to discontinue a representative claim which demonstrates the necessary 'same interest' may be preserved by the unqualified provision in paragraph (2) that '[t]he court may direct that a person may not act as a representative.'[183] An effect similar to discontinuing the representative nature of the claim might also be achieved by reference to the provision, introduced in the current rule, for judgments or orders to be binding on those represented '[u]nless the court otherwise directs'.[184]

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[181] The original rule does not suggest that the court has any discretion, permissive or restrictive.

[182] CPR 19.6(1).

[183] CPR 19.6(2).

[184] CPR 19.6(4).

2 Relationship to 'Same Interest'

What remains unclear, on existing case law, is what factors might be relevant to the court's exercise of this residual discretion to disallow the representative proceedings, and whether they differ from the factors relevant to the determination of 'same interest'. Given that the 'separate defences' test for 'same interest' is necessarily sufficient to dispose of any representative action, there are few decisions which refer to the residual discretion under the rule, let alone articulate the factors relevant to it.[185]

In *Carnie v Esanda* the High Court of Australia noted that while the existence of a class of numerous persons and a substantial or significant common question of law or fact is sufficient to activate the court's jurisdiction, it is not the only consideration in determining whether a claim may proceed as a representative one. All of the judgments emphasise that the judicial inquiry does not end with determining whether or not an action falls within the requirements for a representative proceeding, but must go on to ask whether or not, within the terms of the representative parties rule, the court should order that the proceeding not continue as a representative one. For example, McHugh J noted that '[o]ther factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter

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[185] The court's residual discretion has been referred to on occasions to reinforce a decision not to allow a representative action to proceed on the grounds that the necessary 'same interest' did not exist, and some of those decisions do refer to particular procedural rules, or to features of the rule or of the case at hand, which reinforced the decision to reject the claim. Chs 3 and 4 rely on these references as evidence of the argument that the restrictive approach to the rule is best explained as a judicial assessment that it is both unclear and unfair; with fairness being judged with reference to the traditional individual model of litigation, to the inevitable detriment of the representative parties rule.

for the exercise of discretion, not jurisdiction.'[186] Four of the seven judges in *Carnie v Esanda* remitted the matter to the NSW Court of Appeal for consideration of the question whether the court should 'otherwise order'.[187]

This raises the question of what these other factors might be. There was little explicit discussion of this issue in the judgments in *Carnie v Esanda*. The joint judgment of Mason CJ, Deane and Dawson JJ referred to the view expressed by Gleeson CJ in the NSW Court of Appeal that legislation was necessary to deal with a number of procedural issues if expansion of the representative parties rule to accommodate claims like the one before him was to be viable.[188] Despite rejecting the argument that legislative reform was the only means of resolving these procedural difficulties, they went on to say that some of the concerns expressed by Gleeson CJ were relevant to the court's exercise of its discretionary power to make an order that the action should not continue as a representative one. Their Honours referred specifically to 'such important matters as: (1) whether or not consent is required from group members; (2) the right of such members to opt out of the proceedings; (3) the position of persons under a disability; (4) alterations to the description of the group; (5) settlement and discontinuance of the proceedings; and (6) the giving of various notices to group members,' but acknowledged that '[t]he question of the importance of those matters, in the context of the particular case, in

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[186] (1995) 182 CLR 398, 427 and 405 (Mason CJ, Deane and Dawson JJ), 408 (Brennan J) and 415 and 426 (Toohey and Gaudron JJ).

[187] (1995) 182 CLR 398, 405 (Mason CJ, Deane and Dawson JJ) and 410-411 (Brennan J). Toohey and Gaudron JJ and McHugh J were in favour of ordering that the action continue as a representative action, unless circumstances arose making it appropriate that the trial judge order that the action not continue as a representative claim, 426-427 and 431. The matter was then referred by the NSW Court of Appeal to the NSW Supreme Court. That decision is reported in (1996) 38 NSWLR 465.

[188] *Esanda v Carnie* (1992) 29 NSWLR 382, 390.

determining whether an order should be made that the action not continue as a representative action is by no means free from difficulty.'[189]

It is not made clear how this list of unresolved procedural questions might be useful in the discretionary judgment which the court will be asked to make. Most of the matters which their Honours mention are issues which would need to be resolved if a representative claim was permitted to go ahead, rather than issues which would assist in a discretionary judgment of whether or not it should proceed. So, for example, in any representative claim the question of whether or not those represented are able to opt out of the proceedings would have to be settled but it is difficult to see how noting that this is not as yet clear in regard to the representative parties rule assists in a determination whether or not to permit any particular claim to use the rule.[190]

Brennan J also raised a number of issues which he considered to be relevant to the court's exercise of its residual discretion under the representative parties rule. His Honour noted that if the Carnies were successful in obtaining the declaration sought, that would activate a provision in Credit Act 1984 (NSW) enabling the defendant to apply to the Commercial Tribunal 'for an order increasing the liability of the debtor to the credit provider' and that the discretionary powers of the Tribunal would be exercised according to the individual circumstances of the case. He queried whether it is appropriate to permit the action when 'the ultimate benefit of the litigation to [a member of the represented class] will depend

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[189] (1995) 182 CLR 398, 405 (Mason CJ, Deane and Dawson JJ).

[190] Ch 3 considers the possibility that the reference to these procedural uncertainties indicates a preference for legislative reform, despite their Honours' rejection of Gleeson CJ's argument that such reform is necessary.

on the prospect of the defendant's obtaining an order ... increasing the liability of the particular debtor?'[191] This would seem to introduce, as an element of the court's discretion the notion of the 'ultimate practical benefit' of a decision to those represented beyond resolution of the legal or factual question before the court. It was argued above that such a consideration is as likely as the 'possibility of separate defences' test to result in the rejection of any claim to use the representative parties rule.[192]

It has been submitted that the 'common question of law or fact' test for 'same interest' articulates the expectation that wherever there are numerous persons with an interest in a question which it is anticipated can be accurately determined in their absence, then the savings offered by representation justify any derogation from the principles of substantive accuracy, finality and voluntariness.[193] If this is right, a finding that there is sufficient 'same interest' makes a judgment that a representative proceeding is, in the circumstances, a fair balance between the competing goals of procedural law.

It is conceivable that the rule's benefits might be disputed where there are members of the class outside the jurisdiction. It was anticipated in *The Irish Rowan*[194] that this issue could be relevant to the court's residual discretion. The savings offered might also be questioned in those jurisdictions where, rather than requiring there to be 'numerous' persons, the rule

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[191] *Carnie v Esanda* (1995) 182 CLR 398, 410.

[192] 42-43. The other factor to which Brennan J referred is considered in Ch 4 (200-201) where it is argued that it suggests a continuing reluctance to embrace the differences between a representative action and the traditional individual model of litigation, despite acceptance of a more liberal test.

[193] 78.

[194] [1991] 2 QB 206 (CA) 228.

requires a particular number. So, for example, if the rule requires there to be 'two or more' persons with the 'same interest', it might be argued that where there are only four persons with an interest in the question, the particular benefits of the procedure do not outweigh the limitations on accuracy and voluntariness.

It is difficult, however, to imagine other principles or considerations relevant to the exercise of this discretion which are separate and distinct from those relevant to the determination of whether or not sufficient 'same interest' exists, and also difficult, therefore, to imagine other circumstances which would displace the judgment, inherent in the finding that there is sufficient 'same interest', that an appropriate balance between the various goals of procedural law has been achieved.

There is some evidence in representative claims since *Carnie v Esanda*[195] that the factors relevant to the court's discretion will be similar to the considerations which prompt the conclusion that the goal of efficiency is served by determining a question common to a number of people in a single claim. When the matter was referred back to the NSW Supreme Court for consideration of the question whether the court should, in its discretion, order that the claim not proceed as a representative one, Young J said that he thought his 'main task was to consider the most efficient method of conducting the trial of the present proceedings and that if the trial of a representative action would involve delay and expense and prejudice over and above other ways of handling the problem, then probably the Court should "otherwise

[195] (1995) 182 CLR 398.

order"'.[196] Bryson J in *Shepherd v Australia and New Zealand Banking Group Ltd*[197] refers to the fact that a decision to allow representative proceedings to continue will sometimes 'commit the court to an elaborate task of managing the litigation' but continues that '[t]he complexities of such a task should be balanced with the complexities involved in the alternative course, which would require the represented persons to bring their own proceedings'.

The conclusion that the relevant factors under 'same interest' and under the court's residual discretion will be similar and that, therefore, a claim found to demonstrate sufficient 'same interest' is unlikely to be discontinued by reference to the court's residual discretion is supported by consideration of the residual discretion under Part IVA. Section 33N gives the court the power to order that proceedings not continue as representative proceedings,[198] and refers specifically to the access to justice goals of representation as the grounds on which such an order might be made. The court may order that representative proceedings not continue where it is satisfied that it is in the interests of justice to do so because the costs of the representative proceeding are likely to exceed the costs of individual claims by the group

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[196] *Carnie v Esanda (No 2)* (1996) 38 NSWLR 465, 469. However, Young J's reference to 'prejudice' might be thought to suggest a comparison of the relative accuracy of the representative proceeding with an individual claim, and his Honour's decision and reasoning do provide an example of the continuing restrictive interpretation of the rule despite the adoption of a more liberal test for 'same interest', discussed below 89-92.

[197] (1996) 20 ACSR 81, 98-99. While Bryson J appears to be discussing the court's residual discretion in this passage, he goes on to deal with 'discretion' as a separate consideration and the approach he adopts, like that of Young J in *Carnie v Esanda (No 2)* (1996) 38 NSWLR 465, demonstrates a preference for the individual voluntary model of litigation, and the representative claim is denied.

[198] On application by the respondent or of its own motion (contrast the Supreme Court Act 1986 (Vic) s 33N(1) which provides for such an order to be made only on application by the defendant). S 33P enables the proceeding to be continued by the representative on his or her own behalf and, on application by a group member, the court may order that he or she be joined as an applicant in the proceeding.

members,[199] because the representative proceeding will not provide an 'efficient and effective means of dealing with the claims of group members', because 'all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this part',[200] or if it is 'otherwise inappropriate that the claims be pursued by means of a representative proceeding'.

The threshold question of 'substantial common question of law or fact arising out of the same similar or related circumstances' and the court's discretion to order that proceedings not continue as representative proceedings are clearly distinguished in Part IVA.[201] However, it will, presumably, be an unusual case[202] which disproves the assumption that determining a question common to a number of people in individual proceedings is 'likely to exceed the costs' of a representative claim, and that representative claims are therefore an 'efficient and effective way of dealing with claims of group members'. Morabito notes the coincidence thus far under Part IVA between, on the one hand, permitting a representative claim and not ordering that it be discontinued as a matter of discretion, and, on the other hand, denying a claim and also saying that would not be allowed as a matter of discretion. He concludes that the residual discretion provisions in Part IVA 'do not appear to constitute an additional

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[199] Similarly, where the relief claimed includes payment of money to the group members (other than costs) and, on application by the respondent, it appears to the court that the costs of identifying the group members and distributing to them the amounts ordered to be paid would be excessive having regard to the likely total of those amounts, the court may order that the proceedings not continue under Part IVA or stay them insofar as they relate to that relief, s 33M.

[200] S 33N(1)(b). Morabito (1997) 404 n200 criticises this provision as allowing the court to terminate the class action on the basis that those represented could be joined, or could bring individual claims. An alternative view is that the reference to 'a proceeding' is understood to operate as a basis to deny resort to Part IVA only where some other representation procedure is available, and so in this way is equivalent to CPR 19.6(5) of the current rule, and Ord 15 r12(1) of the 1962 rule.

[201] And is also noted in decisions under Part IVA such as *Wong v Silkfield Pty Ltd* (1999) 165 ALR 373, 382.

[202] Such as those suggested above, 85-86.

obstacle for litigants acting on behalf of classes. Once the representative plaintiff is able to convince the Court that the suit satisfies the prerequisites for the *commencement* of a class suit, the Court is then unlikely to be persuaded that there are grounds for the exercise of the Court's power to stop the *continuance* of such a suit.'[203] It might, therefore, be expected that this conclusion will apply equally to the relationship between 'same interest' and the residual discretion under the representative parties rule.[204]

E CONCLUSION

This Chapter has argued that use of the representative parties rule has been limited by the application of a restrictive test for 'same interest' - a test which, if consistently applied, would defeat all claims to use the rule. Expanded use of the rule therefore depends, in the first instance, on addressing the limitations inherent in this test. However, the aftermath of the High Court of Australia decision in *Carnie v Esanda* suggests that adoption of a more liberal test for 'same interest' is a necessary but not sufficient condition. The six years since that decision do not seem to have witnessed either increased reliance on the rule, or broader interpretation of it. Decisions considering the representative parties rule in Australia remain few in number, and in most cases, including the ultimate determination of the claim in *Carnie v Esanda* itself,[205] the

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[203] Morabito (1997) 405.

[204] However, it is argued in Ch 4, 246-251, 255-257, that subsequent decisions suggest that this expectation may not be justified.

[205] *Carnie v Esanda (No 2)* (1996) 38 NSWLR 465.

claim to use the rule is denied,[206] or its application is doubted.[207] Expansion of the test for 'same interest' appears to have been insufficient to overcome the generally restrictive approach to the rule.

One of the few decisions to consider the representative parties rule since then provides an example. In *Shepherd v Australia and New Zealand Banking Group Ltd* Bryson J acknowledged the significance of *Carnie v Esanda*,[208] noting that the approach to representative actions taken before the High Court's decision 'must now be discarded'.[209] The plaintiffs sought to bring a representative action on behalf of consumers who had pre-paid a company for kit homes and garages. Before the contracts were fulfilled, the company went into liquidation and the plaintiffs claimed that the defendants were liable as deemed directors under the Companies (NSW) Code for the debts which the company had incurred to the consumers prior to going into liquidation. Three issues had been referred to Bryson J to be tried as separate questions - whether the claim was appropriately brought as a representative action; if so, whether the court should exercise its discretion to order that it not continue as a

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[206] *Shepherd v Australia and New Zealand Banking Group Ltd* (1996) 20 ACSR 81; *BT Australasia Pty Ltd v NSW* (Federal Court of Australia 24 December 1997); *Rugby Union Players Association Inc v Australian Rugby Union Ltd* (Supreme Court of NSW 30 July 1997).

[207] In *SZ v Minister for Immigration and Multicultural Affairs* (2000) 172 ALR 172 Lehane J refused to make an order enabling expansion of the class of persons represented, and doubted whether the representative claim, which was commenced under the High Court of Australia rule, could have been commenced under the Federal Court of Australia rule. In *National Mutual Life Association of Australasia Ltd v Reynolds* (Federal Court of Australia 8 March 2000) the test set out in *Carnie v Esanda* (1995) 182 CLR 398 was adopted, and Spender J refused the respondents' motion to declare that the persons represented by the applicants did not have sufficient 'same interest' but the proceedings were stayed for other reasons and consideration of the representative issue was brief. In *Orbit Travel Services Pty Ltd v Trustees* (Supreme Court of NSW 4 June 1997) Hodgson J simply commented that while he did not think that a number of persons were necessary parties, if persuaded that they were, then the representative parties rule might be relied upon.

[208] (1995) 182 CLR 398.

[209] (1996) 20 ACSR 81, 97.

representative action; and whether the company had incurred a 'debt' to the consumers concerned. Bryson J held that where a contract wholly fails, the consideration paid is not a 'debt' until the payer elects to be entitled to repayment and that the plaintiffs had not so elected until they brought proceedings to recover the money, which occurred after the company had gone into liquidation and, therefore, after the period of time for which the defendants could be liable.[210]

Having answered the question of liability in the negative, his Honour went on to consider the questions concerning the representative nature of the proceedings. Bryson J accepted that the plaintiffs and those to be represented had a 'commonality of interest' in a 'large core of facts' and considered that any separate issues could be dealt with in subsidiary hearings or referred for inquiry, that it was possible for different plaintiffs to represent different classes of consumer,[211] and that the fact that 186 persons out of the 671 identified by the Department of Consumer Affairs did not respond to an initial letter from that department concerning the claim did not deny their 'interest' in the proceedings.[212] He rejected a contention by the defendant that the decision in *Carnie v Esanda*[213] supported the proposition that representative claims can only seek declaratory relief on the common question.[214] Nevertheless, his Honour concluded that the action was not appropriately brought as a

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[210] (1996) 20 ACSR 81, 92, 95-96, 102.

[211] There were four plaintiffs, each representing a different time frame as to when payment was made to the company, (1996) 20 ACSR 81, 83-84.

[212] (1996) 20 ACSR 81, 96-97, commenting on the latter point that interest 'refers to the effect of proceedings on the rights of a person and not to the person's wish or lack of wish to assert rights'.

[213] (1995) 182 CLR 398.

[214] (1996) 20 ACSR 81, 99.

representative one - that there was not sufficient 'same interest' to support the claim.[215] It would appear that this decision was made on the basis that the plaintiffs were not entitled to bring a claim at all. Given the common interest those represented were admitted to have in the question of whether or not a 'debt' had been incurred to them, it appears that his Honour took the view that answering the question in the negative denies the common interest. However, a negative answer to the common question must always be a possibility. If this possibility can, of itself, deny the 'same interest' required by the rule, then no claim will demonstrate sufficient 'same interest'. Reference to the possibility of detriment to those represented will, like the 'separate defences' test, inevitably defeat any claim to use the rule.[216]

Chapters 3 and 4 go on to argue that this restrictive approach to the rule may be a manifestation of the continuing uncertainty as to a number of its features, and/or of concerns as to its relationship with some generally accepted principles of procedural law. It was further noted in this Chapter that the 'separate defences' test has not been consistently applied and that there are, therefore, claims which have been permitted to proceed as representative ones, either on the basis that they fall within one of the explicitly accepted categories of claims appropriately brought as representative actions, or because the prospect that separate defences would be defeated was viewed on the basis of its probability rather than its possibility, or on

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[215] (1996) 20 ACSR 81, 102. Therefore, the determination that the plaintiffs were not owed a debt was made in respect of the named plaintiffs who brought the claim only. Denying the representative claim meant that the consumers whom the plaintiffs proposed to represent remained free (subject to limitation periods) to re-litigate the question whether a debt was owed, however unlikely it might be that they would do so in practice.

[216] The same argument was made above (84-85) in relation to Brennan J's suggestion in *Carnie v Esanda* (1995) 182 CLR 398 that the possibility of detriment to those represented is a relevant consideration in the court's exercise of its discretion. Bryson J in fact went on to consider the court's discretion to order otherwise, although his decision that there was no 'same interest' made this strictly unnecessary, and again referred to the fact that none of plaintiffs was entitled to succeed, saying that it was 'the overwhelming discretionary consideration', (1996) 20 ACSR 81, 99.

some other unarticulated basis. Chapter 4 will argue that those claims which have proceeded need not be viewed as discrete or isolated cases but rather can be viewed as demonstrating the relevance of those same principles which it will be argued have driven the generally restrictive approach to the rule. That is to say, the claims which have proceeded are arguably claims which avoid those areas where the procedure is most uncertain, or involve the least conflict with accepted principles of procedural law.[217] It will further be argued that by identifying the concerns which underpin the judicial response to the rule thus far any future attempts to use the representative parties rule can address these concerns directly rather than struggling with 'tests' which do not have any clear meaning[218] or which condemn any attempt to use the rule to failure.[219] Alternatively, reform which does not respond to the concerns identified seems likely merely to perpetuate, in addition to limited classes of claims clearly able to use the rule, a number of decisions inconsistent with a generally restrictive interpretation of its scope.

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[217] There are a number of claims which have proceeded (particularly against representatives of the members of unincorporated associations) which, it is argued, do not conform to this pattern and are discussed in Ch 5.

[218] Such as the reference to 'common interest, common grievance and relief in its nature beneficial to all' drawn from *Bedford v Ellis* [1901] AC 1 (HL) 8, discussed above 40-46.

[219] As does the reference to the possibility that separate defences will be defeated by the form of the action.

CHAPTER 2 DEFINING FEATURES OF THE REPRESENTATIVE PARTIES RULE

A INTRODUCTION

Chapter 1 examined the prevailing judicial response to the representative parties rule, arguing that the dominant test for determining whether a class has the 'same interest' required by the rule inevitably denies any claim to use it. Chapters 3, 4 and 5 go on to propose possible explanations both for the court having adopted such a restrictive test, and also for the limited number of representative claims which have been permitted to proceed. These explanations depend, to some degree, on an understanding of the defining features of the representative parties rule. It is therefore necessary to set out those features which characterise the rule, before going on to assess the manner in which they may have contributed to its restrictive interpretation.

The primary characteristics of the representative parties rule are that there is no requirement that those represented be notified of the representative action,[1] or that they be individually identified.[2] Although the members of the represented class need not be individually identified, it is not sufficient for an action to be brought by or against a representative 'on behalf

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[1] *National Bank of Greece SA v RM Outhwaite* (16 January 2001) paragraph 34; *The Irish Rowan* [1991] 2 QB 206 (CA) 222, 241; *Hancock v Scattergood* [1955] SASR 1, 20; *Struthers v Chiropractic and Osteopathic College of SA Inc* (1980) L Society Judgment Scheme 36, 38. Contrast CPR 19.11(3)(c) which provides that a group litigation order may give directions publicising the order; and s 33X(1)(a) of Part IVA requiring the court to give group members notice of, *inter alia*, the commencement of the proceedings (although the court may dispense with notice if damages are not claimed, s 33X(2)).

[2] Indeed, the rule may be used for the very reason that individual members of the class cannot be identified, as it was in *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597 (CA) and *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA).

of those who have the same interest in the claim'. The class must be defined with some certainty, and by a definition capable of distinguishing which individuals do, and which do not, fall within its ambit.[3] Lord Macnaghten explained the difference between the identification of class members and their being identifiable in *Bedford v Ellis*[4]

> It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed by that difficulty. It seems to me that the description of persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not.[5]

In *Barker v Allanson*[6] Scott LJ, before deciding whether to authorise a defendant to represent a class, said that 'it is necessary to consider two questions: (1.) What is the cause of action? and (2.) What is the precise class of potential defendants who are to be represented by the defendants on the record for the purpose of imposing liability on them if judgment is given for the plaintiff?'

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[3] The *Markt* case [1910] 2 KB 1021 (CA) 1033-1034; *The Irish Rowan* [1991] 2 QB 206 (CA) 240.

[4] [1901] AC 1 (HL) 11.

[5] See also *Mercer v Denne* [1905] 2 Ch 538 (CA) and *Wyld v Silver* [1963] 1 QB 169 (CA). Contrast the approach of the majority in *Esanda v Carnie* (1992) 29 NSWLR 382, 390 and see also the judgment of the minority judge, Kirby P, 392 and 398 on that point.

[6] [1937] 1 KB 463 (CA) 475.

Given that those represented need not be identified or notified of the proceedings brought on their behalf or against them, further questions arise as to the effect on the class of any orders made and as to the extent to which they may choose to be, or can be compelled to be, involved in the conduct of the litigation.

B *RES JUDICATA* AND THE REPRESENTATIVE PARTIES RULE

Res judicata binds the parties to an action and their privies.[7] Under the most recent formulations of the rule, it is difficult to argue that those represented are parties; and under the original rule it is, at best, not certain whether they are parties or not. While those represented might, if they have some knowledge of the representative proceedings, be treated as privies, such knowledge is clearly not a prerequisite for resort to the representative parties rule. Nevertheless, it is clear that those represented are bound by any judgment or order made in a representative action.[8]

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[7] *Spencer Bower* (3rd edn) 1. See also *Cross & Tapper* (9th edn) 80. Reference here is to judicial decisions *in personam*. As judicial decisions *in rem* bind all the world, those represented are not in a special position, and would be bound by the judgment as would any other person, *Spencer Bower* (3rd edn) Ch 9 and *Cross & Tapper* (9th edn) 79.

[8] Reference in the rules and the case law to those represented being 'bound' and to orders and judgments being 'binding' on them is understood to refer to those judgments and orders having *res judicata* effect on the class. Although the rules refer to 'judgment or order', the distinction between the two is not significant (see below, n57) and reference to either is taken to refer to the other as well, unless indicated otherwise.

1 Are Those Represented 'Party' to the Representative Proceedings?

A factor which has been important to the representative parties rule is the status of those represented. Attempts to define their interest in proceedings brought on their behalf (or against their representative) have been ambiguous and uncertain. Denial that they are parties while, at the same time, comparing their interest with that of a party to the proceedings has been common. Lord Denning MR attempted to explain the nature of their interest in *Moon v Atherton*, saying that they 'are not full parties because they are not individually liable for the costs. ... But they are parties because they are bound by the result.'[9] An attempt to stop those represented from meeting and discussing the action brought on their behalf failed in *Harrison v Abergavenny*[10] and Kay J is reported to have said that 'in point of form the action was to be treated as if all the persons having a community of interest were parties to it' and that the members of the club represented 'were to be treated as parties to the action' and were 'parties who were actually or substantially parties to the action'.[11] Nevertheless, it was some time before the question of whether or not those represented were actually 'parties' was directly addressed.

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[9] [1972] 2 QB 435 (CA) 441.

[10] (1887) 3 TLR 324.

[11] In *Shiels v Blakeley* [1986] 2 NZLR 262, 267 it was suggested that had an earlier action brought by a trade union been a representative one the court would have held that the plaintiff in the case before it, a member of that union, 'was bound as a party'.

(a) Definition of 'party'

Prior to the enactment of the Supreme Court Act 1981 'party' was defined in the Supreme Court of Judicature (Consolidation) Act 1925 and the relevant part of section 225 read: '"Party" includes every person served notice of or attending any proceeding, although not named on the record.'

This definition seemed to contemplate that a 'party' would be one who was named on the record or, if not named on the record, one who was served notice of or attended the proceedings. Section 1 of the Judicature Act 1876 (Qld)[12] was read in this manner in *Cameron v National Mutual (No 2)* with Ryan J dismissing the possibility that those represented were 'parties' as '[t]he persons in question were not "served with notice of or attending any proceeding although not named on the record"'.[13]

If the definition of 'party' is restricted to those served with notice of or attending the proceedings, then whether or not those represented are parties will depend on the circumstances. Given that the members of any represented class need not be individually identified, they will not, ordinarily, be named on the record, served with notice of or permitted to attend[14] the

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[12] The section has been relocated to the Supreme Court Act 1995 (Qld) s 241. The relevant part of the section is equivalent to s 225 of the Supreme Court of Judicature (Consolidation) Act 1925, providing that '"party" includes every person served with notice of or attending any proceeding although not named on the record'.

[13] [1992] 1 QdR 133, 141.

[14] In *Conybeare v Lewis* (1883) 48 LT 527, 528 it was held that it was not usual to allow a member of a represented class to attend. *Eden v Weardale Iron and Coal Co* (1887) 35 ChD 287 (CA) provides an example of a third party being put in the position of 'defendant' by virtue of being entitled, pursuant to an order of the court, to attend proceedings.

proceedings. They would not, therefore, be viewed as 'parties' under this definition. There is no reference in any formulation of the rule to service of the claim on those represented.[15]

There is, however, general provision for service by alternative methods, such as advertisement, which might be capable of accommodating service on unidentified persons.[16] There is not yet any case law on the use of the current rule on alternative service, Civil Procedure Rule 6.8, but under its predecessor, Rules of Supreme Court 1965 Order 65 rule 4, service by this method was not made 'save in an exceptional case', and required the applicant to demonstrate that there was good reason to believe that the advertisement would be seen by the person to whom it was addressed.[17] While these requirements might pose difficulties in the case of unidentified members of a represented class, they do not necessarily preclude service by an alternative method and so it is possible that members of a represented class served with notice by an alternative method could be considered to be 'parties'. However, service by, for example, advertisement does not seem ever to have been considered in the context of representative proceedings.[18]

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[15] The 1962 rule explicitly required applications for leave to enforce an order made against those represented to be made by summons served personally on the person against whom it was intended to enforce the order, RSC 1965 Ord 15 r12(4). Enforcement is discussed below, 118-129.

[16] CPR 6.8; RSC 1965 Ord 65 r4. There is also particular provision for service on unidentified persons in actions for possession of land, RSC Ord 113 r4(2). Cairns (4th edn) 119 refers to similar rules in Australian jurisdictions.

[17] *Supreme Court Practice 1999* 1292 and Cairns (4th edn) 120-122.

[18] *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 531 may provide an example. Hunt J permitted a claim alleging interference with contract to proceed against representatives of the members of the Sydney Shipping Section of the Federated Clerks Union of Australia (NSW Branch), some 800 persons. He awarded the interlocutory injunction sought and concluded by directing that 'notice of the injunction be given by way of a full-page advertisement in [a local newspaper] and by a commercial announcement [on a local radio station].' It is not, however, clear whether he was relying on an equivalent to the general provision discussed here, or on the court's inherent jurisdiction to make this order, discussed in Ch 3.

Whatever the possibilities, it is clear that failure to serve notice on those represented does not in any way affect the validity of a representative claim. Whether this holds true when those to be represented are outside the jurisdiction is not as clear. While use of the rule in these circumstances was permitted in *Eighth Union Building Society v Carnegie* Williams J expressed 'great doubt' whether the application came within the rule but decided to 'give the plaintiff the benefit of the doubt, and make the order'.[19] A representative order binding members of the class who were outside the jurisdiction was also made in *Trustees Executors and Agency Co Ltd v Sparling*.[20] However, in *Re Waring (No 2)* no representation order had been made binding Mrs Burton-Butler, one of two annuitants and not a party to earlier proceedings.[21] Although the reasons for the failure to make such an order are not discussed in the judgment, it is said in the statement of facts[22] that it 'was asked in those proceedings that a representation order should be made so as to bind the second tax-free annuitant Mrs Louie Burton-Butler but such order was refused. Mrs Louie Burton-Butler was then abroad in an enemy occupied country and could not be made a party'.[23] Whether therefore the refusal to make the representative order was based on her being overseas, or on being overseas and in enemy occupied territory is not clear.[24] More recently, in *The Irish Rowan* Staughton LJ rejected the submission that the rule should not allow

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[19] (1893) 19 VLR 388. His Honour's doubt seems to be based on whether allowing three defendant executors to represent a fourth satisfied the requirement under the relevant representative parties rule that those to be represented ought to be 'numerous', discussed in Ch 1, 30.

[20] (1894) 16 ALT 34.

[21] [1948] Ch 221, 227.

[22] Which is said to be taken substantially from Jenkins J's judgment, [1948] Ch 221.

[23] [1948] Ch 221, 223. There is no discussion of the refusal to allow a representative action in either of the two earlier reported decisions, *Re Waring (No 1)* [1942] Ch 309 and [1942] Ch 426 (CA). Resort to the rule was also denied in *Allen v Allen* [1902-03] St R Qd 306 where the whereabouts of one of five joint tenants was unknown and Griffith CJ held that an order for substituted service was the more appropriate course.

[24] It might also have been argued that there were not 'numerous' persons.

a plaintiff to avoid the need to obtain leave to serve out of the jurisdiction, on the basis that it does not contain any requirement that those represented should be capable of being served within the jurisdiction. His Lordship was of the view that the fact that some members of the class are outside the jurisdiction could be considered under the court's residual discretion.[25]

In the current definition of 'party' the phrase 'although not named on the record' is deleted, and the relevant part of the section now reads '"party", in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings'.[26] The implicit limitation of 'party' in the earlier definition to those named on the record and those not named but having been served with notice or those attending the proceedings may have been removed.[27]

Alternatively, it might be argued that section 151 of the Supreme Court Act 1981 opens with the words 'unless the context otherwise requires'[28] and that the special circumstances of the representative action provide such a context.

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[25] [1991] 2 QB 206 (CA) 228, discussed in Ch 1, 85-86. There is some consideration of conflicts of law implications of the decision in JJ Fawcett 'Multi-Party Litigation in Private International Law' (1995) 44 ICLQ 744, 754-755, 757-758.

[26] Supreme Court Act 1981 (c 54) s 151(1), in force 1 January 1982, s 153(2).

[27] Similarly, one might have argued that there was no such implicit limitation in the earlier definition and that as it read that party 'includes' those served with notice or attending the proceedings although not named on the record, 'party' was not confined to those named on the record, served with notice or attending the proceeding and did not, therefore, necessarily exclude class members who did not satisfy these criteria.

[28] Its predecessor, s 225 of the Supreme Court of Judicature (Consolidation) Act 1925 opened with the same phrase. S 1 of the Judicature Act 1876 (Qld) under consideration in *Cameron v National Mutual (No 2)* [1992] 1 QdR 133 also provides that the definitions set out shall apply 'unless there is anything in the subject or context repugnant thereto'.

Neither argument seems to have been raised in any representative action but either might be relied upon to provide the necessary support for the suggestion[29] in the *Pan Atlantic Insurance* case[30] and in the Queensland case of *Cameron v National Mutual (No 2)*[31] that class members in a properly constituted representative action are 'party' to the proceedings. In the *Pan Atlantic Insurance* case[32] Hirst J concluded that 'the representative proceedings in the present case are valid and properly framed, and it follows as a matter of general principle, and as is common ground between the parties, that all representative parties (i.e., all syndicate members) as well as the named plaintiffs, are parties to the proceedings.' In *Cameron v National Mutual (No 2)* Ryan J concluded that the proposed class did not have the necessary 'same interest' but his reasoning suggests that had the representative action been properly brought, then he would have considered those represented to be 'parties' for the purposes of the Supreme Court Rules.[33]

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[29] In neither case is the issue considered in any detail.

[30] [1988] 2 Lloyd's Rep 505.

[31] [1992] 1 QdR 133.

[32] [1988] 2 Lloyd's Rep 505, 511.

[33] [1992] 1 QdR 133, 141. Such alternative support is necessary to overcome the basis of his earlier denial that those represented were parties. The objection that those represented were not served with notice or had not attended the proceedings could equally apply to a validly constituted representative action, as to an invalid one. Moynihan J agreed 'that for the reasons given by my learned brothers the unnamed plaintiffs in the improperly brought representative action were not parties to that action', 144. However, the third member of the Court, McPherson SPJ, did not decide this question, 136. It is not clear whether Moynihan J agrees that those represented are not parties because the action is invalidly pursued as a representative claim, or because they are not 'parties' within the definition of the Act, or because of a combination of those factors.

(b) Wording of representative parties rule

There is, however, a potential difficulty, applicable to the current rule and to the 1962 rule, with deciding that those represented are parties, whether because the action is a properly constituted representative claim or on any other basis. Such a finding is vulnerable to reasoning based on the wording of the rule itself.[34] In those jurisdictions which have adopted a rule similar to the 1962 rule the question of whether or not those represented are 'parties' is simply answered. In *Ventouris v Mountain*[35] Saville J reached the conclusion, which appears unavoidable, that the wording of that rule denies that those represented are 'parties', at least for the purposes of rules of court. The defendant in that case was sued as representing himself and all other underwriters subscribing to the marine war risks policy upon which the plaintiff claimed. The question raised was whether the court could order the represented underwriters to make discovery of documents. His Lordship noted that the rule concerning discovery[36] made it clear that the court only had power to order a party to proceedings to make discovery of documents, and then took the view that it was clear from the 1962 rule that represented persons are not party to the proceedings. That rule provided that orders in representative proceedings should be binding on those represented but should 'not be enforced against any person not a party to the proceedings except with the

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[34] The 1962 rule was in force at the time the *Pan Atlantic Insurance* case [1988] 2 Lloyd's Rep 505 was decided. This difficulty does not apply to the decision in *Cameron v National Mutual (No 2)* [1992] 1 QdR 133 as the rule in force in Qld at the time was essentially equivalent to the original rule.

[35] [1990] 1 WLR 1370, 1371-1372. The appeal concerning the claim for discovery against those represented was abandoned before the Court of Appeal in *Ventouris v Mountain* [1991] 1 WLR 607 (CA), where Saville J's decision was reversed on other points.

[36] RSC 1965 Ord 24 r3(1) relevantly provided that 'the court may order any party to a cause or matter...to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter'. Discovery is dealt with below, 153-157.

leave of the court.'[37] The current rule adopts similar wording, providing that, unless the court otherwise directs, any order given in a representative claim 'may only be enforced by or against a person who is not a party to the claim with the permission of the court.'[38]

An argument based on the wording of the 1962 rule had been advanced by counsel for the defendant in *Moon v Atherton*.[39] Lord Denning MR's response is reported and makes the point that 'Section 225 [of the Supreme Court of Judicature (Consolidation) Act 1925] shows that "party" is not confined to those whose names are on the record'.[40] His Lordship reiterated the point in his judgment.[41]

It is submitted that while this is true, section 225 seemed, in its terms, to confine the inclusion of those not named on the record to 'every person served with notice of or attending any proceeding'. Even if this is not correct, the response does not answer the argument that the description of those represented as 'not a party to the proceedings' in the 1962 rule and in the current rule precludes their characterisation as parties.[42]

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[37] RSC 1965 Ord 15 r12(3).

[38] CPR 19.6(4)(b).

[39] [1972] 2 QB 435 (CA), an *ex tempore* decision.

[40] [1972] 2 QB 435 (CA) 439 and 440. That case was not cited to Saville J in *Ventouris v Mountain* [1990] 1 WLR 1370 or referred to in the judgment.

[41] [1972] 2 QB 435 (CA) 442. Roskill LJ agreed that those were represented were 'parties', 442. Lord Denning MR, 441, distinguished between 'parties' who are bound by the result in the action and 'full parties' who are liable for costs, Edmund Davies LJ agreeing, 442.

[42] JJ Fawcett 'Multi-Party Litigation in Private International Law' (1995) 44 ICLQ 744, 755-756 and 763 briefly considers the need to determine the status of those represented in the context of resolving conflicts of laws issues. Whether the clear indication in the rule that those represented are not 'parties' could be overcome by service by some alternative means has not ever been raised. However, whether or not those represented are 'party' to the proceedings is less significant since the relatively recent amendment of the rules concerning discovery and re-consideration of the question of non-party liability for costs (discussed below, 156-157, 159-163).

2 Are Those Represented 'Privies' to the Representative Proceedings?

Res judicata also operates for or against those privy 'in blood, title or interest'.[43] There are a number of accepted categories of privies. *Cross & Tapper* offers the examples of lessor and lessee, vendor and purchaser, ancestor and heir, testator and executor, and intestate and administrator.[44] *Spencer Bower* notes that those who succeed to rights and liabilities upon death or insolvency are included, as are assignees and assignors.[45] In some cases those represented have had a relationship with their representative which falls into one of these accepted categories,[46] but in many other cases they have not.[47] These categories are not, however, exclusive. They represent examples of the 'community or privity of interest' or the 'kind of interest in the previous litigation or its subject-matter' which must be demonstrated in order to find that a person was privy to a previous decision.[48]

Given that those represented are to have 'the same interest' in the claim as the party representing them, it might be argued that they have sufficient interest in the litigation to be

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[43] *Spencer Bower* (3rd edn) 119; *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853 (HL) 910. *Cross & Tapper* (9th edn) 80 n 2 refers to privity 'in estate', 'in blood' or 'in law'.

[44] *Cross & Tapper* (9th edn) 80 n2.

[45] *Spencer Bower* (3rd edn) 119-120.

[46] Such as the actions claiming or defending a joint beneficial entitlement to property, *Harrison v Abergavenny* (1887) 3 TLR 324 and *Re Lead Company's Workmen's Fund Society* [1904] 2 Ch 196.

[47] For example, *Spencer Bower* (3rd edn) 232-233 notes that it is not clear whether joint tortfeasors were privies of each other at common law but that legislation permitting successive action against joint tortfeasors probably removes any basis for arguing that they are privies.

[48] *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853 (HL) 936 (noting also that there was 'a dearth of authority' upon this question) and 910.

bound as privies to the earlier proceedings. However, it seems that extension of privies beyond the accepted categories will require, as a necessary (although not sufficient) condition, that the person argued to be privy to an earlier decision knew of the earlier proceedings.[49] As noted above, it is not necessary in representative actions that those represented have any knowledge that the litigation is proceeding at all.[50]

Nor have those represented been treated as parties or privies in academic commentary. *Spencer Bower* deals briefly with the issue of those represented under a broader heading of 'Deemed Parties'.[51] This category of deemed parties also includes those who, although not originally named as a party, intervene and take part in the proceedings or who obtain an order to be added as a party; those claiming an interest in an estate who stand by and allow another to conduct litigation concerning that interest;[52] and principals or employers who direct a servant or agent to raise a question of title.[53] Again it would appear that representative actions are

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[49] The decisions referred to in *Spencer Bower* (3rd edn) 120 all involve a privy with awareness of the earlier proceedings. In *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 (CA) 253-254 Stuart-Smith LJ noted that the appellant, who argued that he was not bound by an earlier judgment, 'was well aware of those proceedings'. *Shiels v Blakeley* [1986] 2 NZLR 262, 269 provides a further example. There a member of a trade union sought to re-litigate a point already decided in an earlier action brought by the trade union on its members' behalf, and was held to be a privy to the earlier proceedings. The plaintiff's knowledge of, and apparent involvement in, the earlier proceedings were viewed as being significant.

[50] The extent to which representative actions are influenced by circumstances which accommodate an assumption that those represented do know of the proceedings will be considered in Ch 4. In such situations it might be argued, under a broader interpretation of privies, that the class members are in fact bound as privies, whether represented or not.

[51] *Spencer Bower* (3rd edn) generally 112-116, the representative parties rule being considered at 114.

[52] The notion of 'standing by' depends on demonstrating that the person to be bound knew of the earlier proceedings and was entitled to intervene or be joined in them, *Re Lart* [1896] 2 Ch 788, 793-795; *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95 (PC) 101; *Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 403, 456.

[53] Representation of a common principal does not of itself lead to privity, *Cross & Tapper* (9th edn) 85.

distinguished from the other cases considered by the possibility that those represented may be bound without knowing that the representative litigation is proceeding at all.[54]

Also noted under the category of 'deemed parties' is the ability of those who are jointly liable with another to take the benefit of an unsuccessful claim against that other where the reason for the action failing is a ground common to both.[55] While knowledge of the earlier proceeding would seem not to be essential, it may be distinguished from the representative action on the basis that those represented may, in the absence of knowledge, not only have a benefit conferred upon them[56] but may also be adversely bound.

3 Those Represented Bound by Any Judgment or Order made in the Representative Proceedings

However unusual the position of those represented might be, the current rule and the 1962 rule are clear and decisions under the original rule are equally clear - those represented are bound by any order[57] made in the representative action.

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[54] *Spencer Bower* (3rd edn) 113 disapproves of the decision in *John v Mendoza* [1939] 1 KB 141 that a creditor who did not lodge a proof and so was not party to the bankruptcy, nor was a party to the annulment proceedings, was a party to the former proceedings and so bound by the decision taken in the latter proceedings, and questions whether it might operate against a creditor who did not have any knowledge of the bankruptcy. The decision was distinguished and doubted in *More v More* [1962] Ch 424, 430-431.

[55] *Spencer Bower* (3rd edn) 114.

[56] In the former situation it is incumbent on the person against whom it is sought to bring the action to demonstrate that they are entitled to take advantage of the failure of the earlier action (*Phillips v Ward* (1863) 2 H&C 717, 159 ER 297). It is not, however, clear what those represented need to demonstrate in order to take advantage of a representative order. Enforcement is discussed below, 118-129.

[57] It is noted in *Supreme Court Practice 1999* 757 that an order may be enforced in the same manner as a judgment, and that it is 'doubtful whether there is still any distinction between a "judgment" and an "order"'.

The most recent formulations of the representative parties rule make explicit provision for this binding effect. The current rule states that 'any judgment or order given in a claim in which a party is acting as a representative under this rule - (a) is binding on all persons represented in the claim'.[58] The current rule differs from the 1962 rule in providing that judgments or orders given in the proceedings shall be binding on those represented '[u]nless the court otherwise directs'.[59]

While the original rule did not specify the effect of an order made in a representative action, the case law on the question was clear. In *Leathley v Robert McAndrew and Co*[60] Lindley J noted that 'it has always been held that a defence to the plaintiff on the record is a defence to the suit.' In *May v Newton*,[61] Kay J commented, regarding those represented by a representative defendant, that 'I conceive the absent parties would be bound as though they had been present throughout.'

None of the representative parties rules considers explicitly the issue of whether or not those represented are entitled to bring their own individual actions while the representative action

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[58] CPR 19.6(4). The 1962 rule provided that '[a] judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued'.

[59] CPR 19.6(4). The Supreme Court of Queensland Act 1991(Qld) s 82(2) also provides that any order made is binding on those represented '[u]nless the court orders otherwise'. It seems to have been accepted under the 1962 rule that the court could distinguish between claims made on behalf of the representative personally and on behalf of the group, discussed below 111. However, there is some indication that courts were not themselves willing to make such distinctions, discussed in Ch 4, 255-258.

[60] [1876] WN 38.

[61] (1887) 34 ChD 347, 349. See also the *Markt* case [1910] 2 KB 1021 (CA) 1039, 1040.

is on foot.[62] However, the fact that those represented are bound by any order made in the representative action would seem to render any independent claim futile. In *Conybeare v Lewis* a member of the represented class had commenced his own individual action and it seems to have been assumed that, in order to avoid the *res judicata* effect of orders made in the representative claim, he would need to demonstrate that he was for some reason not bound by those orders.[63]

(a) Those represented entitled to dispute that they are bound

Early case law suggests that those represented are entitled to argue that they should not be bound by an order made in a representative action. In *Commissioners of Sewers of the City of London v Gellatly*[64] it is reported that Jessel MR acknowledged that, while those represented are bound by a decision, if there is 'fraud or collusion, or anything of that sort' or 'the Court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not', then those represented were entitled to rely on such circumstances in defence. In *Conybeare v Lewis*[65] Chitty LJ referred to Jessel MR's judgment, taking the view that the reference to fraud

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[62] In *Moon v Atherton* [1972] 2 QB 435 (CA) 442 (which concerned an application by a member of the class to be substituted as a new party after the representative proposed discontinuing the claim) Lord Denning MR expressed the concern that if the substitution were not made '[i]t might be too late for [those represented] to issue a new writ because of the Statutes of Limitation,' which may suggest that those represented cannot issue their own writs while the representative claim is on foot. The comment may, however, only have been intended to indicate that individual writs had not in fact been issued, rather than that they could not in law be issued.

[63] (1883) 48 LT 527. It was proposed to argue that he was not bound on the ground that those represented are not bound by consent orders, discussed below 118.

[64] (1876) 3 ChD 610, 615-616.

[65] (1883) 48 LT 527, 529. Presumably those represented under more recent formulations of the rule would be entitled to make the same argument, if only on the basis of a party's general entitlement to dispute any matters relied upon in a claim against him or her.

was by way of illustration only and that 'it would be perfectly competent to any person, who was alleged to be bound by a representative decree, to say that, by point of fact, or in point of law, by reason of something that had been done, he ought not to be held as being bound.'

It is not, however, clear whether an individual faced with a class member is able to dispute that class member's entitlement to rely on an order made in the class's favour. It would be surprising if a party against whom a member of a represented class was seeking to enforce an order made in favour of the class was not able to raise a defence similar to that available to class members,[66] but there does not seem to be any authority on the point.

The ability to contest liability or entitlement aside, it has never been doubted that those represented are bound by any order made, and this understanding is made clear in the current rule.[67]

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[66] Namely, that the particular individual was not, for some reason, 'bound' by the order and therefore not entitled to enforce it.

[67] No authority is cited for the suggestion in *Spencer Bower* (3rd edn) 114 paragraph 220 that in order for those represented to be bound, the representative must represent 'pursuant to an order of the court'. If intended to refer only to the possibility that the representative form of the action might be challenged and, if it is, the court will have to rule on whether it is appropriately continued as a representative claim, the qualification is unobjectionable. If, however, it is intended to suggest the class is bound only when it is represented pursuant to an order of the court, then it is open to doubt. Except with regard to representative defendants under the original rule and actions not commenced as representative actions (discussed below 130-132, 133-135), it has never been suggested that the representative needs an order of the court to represent, nor that the *res judicata* effect of a representative order or judgment is so limited.

(b) 'Any judgment or order'

The current rule provides that those represented will be bound by 'any judgment or order' given in a representative claim.[68] It has been assumed under the original rule and the 1962 rule that a representative could seek a personal order as well as representative orders.[69] It may be that the provision in the current rule for orders to be binding unless the court directs otherwise[70] provides explicit support for this practice. Assuming that the order is sought on behalf of the class and that the court does not otherwise direct, then the order will be binding on the class members.[71]

Given that those represented are bound only by a 'judgment or order', the representative cannot settle on behalf of those represented.[72] It would seem that an undertaking is not a 'judgment' or 'order'[73] and so when given by a representative party would not bind those represented.[74] Nonetheless, it is common practice to record undertakings in an order of the

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[68] The 1962 rule did not say that those represented would be bound by 'any' order but did say that '[a] judgment or order .... shall be binding', RSC 1965 Ord 15 r12(3). As noted earlier, no such specific reference was made in the original rule. Default and consent judgments are dealt with separately below, 117-118.

[69] The *Markt* case [1910] 2 KB 1021 (CA) 1045; the *Prudential Assurance* case [1981] Ch 229, 255.

[70] CPR 19.6(4). This provision might also provide an explicit basis on which members of the class can seek to be excluded from the class altogether, discussed below 139 n181.

[71] Subject to the qualification that any one of them may seek to argue that he or she is not, for some reason, bound, discussed above 109-110.

[72] *Collins v O'Reilly* (1940) 41 SR(NSW) 281 suggests that those represented are not bound by a decree made in terms of settlement filed in court, although Roper J is more concerned in his judgment to distinguish the rights of creditors where a decree for general administration is made from their rights where no such decree is made.

[73] An undertaking 'is enforceable and hence coercive even though it does not comprise a court order', Burrows (2nd edn) 1 n3.

[74] Although an admission of liability and an undertaking not to continue any further nuisance by a defendant representing all the members of a go-kart club was accepted in *Tetley v Chitty* [1986] 1 All ER 663. In *Camden London BC v Alpenoak Ltd* (1985) 135 NLJ 1209, 1211 Garland J held that a person may be liable for breach of

court[75], and given that those represented are, under the current rule, bound by *any* order given in a claim it would seem that, *prima facie*, they are bound by such an order.[76]

(c) Cause of action estoppel and issue estoppel

The extent to which those represented are bound by any order made is unclear.[77] The term '*res judicata*' may be used to refer to cause of action estoppel and issue estoppel.[78] A plea[79] of cause of action estoppel would prevent those represented from asserting the existence of a cause of action which was denied by the order in the representative proceedings.[80] Likewise members of a represented class would be unable to re-assert a successful cause of action.[81] In order for the

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an undertaking, given on his or her behalf and with his or her knowledge, but this principle does not seem ever to have been applied to a member of a represented class. Liability would, in any event, appear to turn on knowledge of the undertaking, not on representation. If those represented are bound by an undertaking given on their behalf, it can be enforced against them in the same manner as an injunction, Burrows (2nd edn) 386; *Arlidge, Eady & Smith* (2nd edn) 785; *Borrie & Lowe* (3rd edn) 578-582, discussed below 124-125.

[75] *Borrie & Lowe* (3rd edn) 578 n16; Fricker (1991) 7. While it is technically the undertaking and not the order which requires the giver of the undertaking to act in accordance with its terms (*Hussain v Hussain* [1986] 1 All ER 961 (CA), 963), if those represented are bound by the order alone, then enforcement will be subject to the constraints applicable to the enforcement of injunctive orders, discussed below 124-125.

[76] Subject to the court's ability 'otherwise' to direct and to the possibility of a class member successfully contending that an order should not, for some reason, apply to him or her, discussed above 108 and 109-110.

[77] CPR 19.12(1) also provides that an order on a group litigation order issue is binding on those claims on the group register unless the court orders otherwise but explicitly enables the court to give directions as to the extent to which the order is binding on any claims subsequently entered on the group register.

[78] Andrews (1994) 503.

[79] Estoppels operate only if they are pleaded, *Cross & Tapper* (9th edn) 77.

[80] *Cross & Tapper* (9th edn) 80; *Spencer Bower* (3rd edn) 89; Andrews (1994) 503-504.

[81] In order, for example, to claim a more favourable remedy, such as higher damages, Andrews (1994) 139. This is referred to as 'merger in judgment' in *Spencer Bower* (3rd edn) 89.

express provision that those represented are 'bound' by any order made to have any meaning at all, those represented must be subject to cause of action estoppel.

Issue estoppel operates to deny the re-opening of issues raised and determined in earlier proceedings between the same parties in later different proceedings.[82] Estoppel may apply not only to issues necessarily raised and determined in the earlier proceedings but also to issues which 'properly belong to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'[83]

Whether issue estoppel may be raised in later proceedings against those represented in an earlier representative action in relation either to issues decided in the representative claim or to issues which ought to have been raised in the claim and were not, or to both situations, has not been the subject of detailed consideration.[84] There are, however, judgments which suggest that issue estoppel will operate against those represented, at least insofar as issues necessarily raised and determined by the order are concerned. In *The Irish Rowan*[85] it was considered that there was 'nothing in the wording of the [1962] rule itself' which would restrict its ambit and that issues

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[82] *Spencer Bower* (3rd edn) 89; *Cross & Tapper* (9th edn) 82, noting that this is an extension of cause of action estoppel; Andrews (1994) 504.

[83] *Henderson v Henderson* (1843) 3 Hare 100, 115, 67 ER 313, 319-320. *Spencer Bower* (3rd edn) 93 treats this as issue estoppel and further identifies an 'extended doctrine of *res judicata*' operating to deny the litigation of issues which ought to have been raised in earlier proceedings on the basis of abuse of process, Ch 26. *Cross & Tapper* (9th edn) 80-81 deals with this estoppel in the section on cause of action estoppel and while not recognising any extended doctrine does identify abuse of process as the basis for the estoppel. Andrews (1994) 504 characterises this estoppel as '"extensions" of cause of action and issue estoppel' which 'rest on the abuse of process doctrine'. A recent decision, *Johnson v Gore Wood & Co* [2001] 2 WLR 72 (HL) 82, appears to affirm that the basis of the doctrine is abuse of process, discussed by Watt (2001).

[84] K Uff 'Class, Representative and Shareholders' Derivative Actions in English Law' (1986) 5 Civil Justice Q 50, 64.

[85] [1991] 2 QB 206 (CA) 238-239.

determined by the findings of a judgment in a representative action would be *res judicata* for the purposes of counterclaim or other process. The comment in the *Prudential Assurance* case that the effect of an order in favour of the plaintiff in its representative capacity will be that the issues covered by the order will be *res judicata* might be understood to support the application of issue estoppel to those represented in later proceedings.[86] However, if one considers the narrow construction of the requirements of identity of parties in *Carl Zeiss Stiftung v Rayner and Keeler Ltd*[87] then it could be argued that issue estoppel does not apply to those represented in later claims on the basis that the parties to the later proceedings are not the same parties acting in the same capacity.

It is also unclear whether those represented would be prevented from raising issues which ought to have been raised in the representative proceedings in later proceedings.[88] This was specifically raised as a concern in a representative claim in the Supreme Court of Canada, *General Motors of Canada Ltd v Naken*.[89] There an action was brought on behalf of people who had bought the 1971 or 1972 models of a particular make of automobile alleging breach of warranty and misrepresentations by the manufacturers. The claim sought a set amount on behalf of each member of the represented class. Estey J, delivering the judgment of the Supreme Court, expressed the fear that class members might be barred from bringing claims based on personal injuries caused by the alleged deficiencies in the vehicles. However Estey J's judgment was

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[86] [1981] Ch 229, 255.

[87] [1967] 1 AC 853 (HL).

[88] Whether classified as issue estoppel, cause of action estoppel or as the extended doctrine of *res judicata*, n83 above.

[89] [1983] 1 SCR 72. The representative parties rule under consideration was substantially the same as the original rule.

qualified by uncertainty - '*If* the effect of the ultimate judgment in this class action is *res judicata* on all rights of all members of the class with respect to the acquisition of a Firenza automobile, the result would be serious in such a circumstance.'[90] The decision of the Court of Appeal in *Barrow v Bankside Agency Ltd*[91] suggests that the rule in *Henderson v Henderson*[92] need not apply. That case did not concern a representative proceeding of the type under consideration here. Rather it concerned the formation of common issue action groups from the many claims arising out of the losses suffered in the Lloyd's insurance market. The common issues determined were binding on all members of the action group. The plaintiff in *Barrow v Bankside Agency Ltd*[93] was a member of a group which had had the question, in contract and in tort, of whether the underwriting had been negligent decided in its favour. It was however held that the members of the group were not entitled to recover all the damages claimed. After this decision, the plaintiff brought an independent claim alleging negligence by his members' agent in selection of his portfolio. The defendants argued that the issue should have been raised in the earlier proceedings. This argument was rejected on the basis that the group actions were specifically intended to deal only with the common issues presented.[94] It may be possible to raise a similar argument in relation to representative proceedings.[95]

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[90] [1983] 1 SCR 72, 100-101 (emphasis added).

[91] [1996] 1 WLR 257 (CA).

[92] (1843) 3 Hare 100, 67 ER 313.

[93] [1996] 1 WLR 257 (CA).

[94] The Court of Appeal took the view that the estoppel based on the failure to raise an argument, claim or defence in earlier proceedings 'is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability ... that litigation should not drag on for ever', [1996] 1 WLR 257 (CA) 260.

[95] Vinelott J's reference in the *Prudential Assurance* case [1981] Ch 229, 255 to 'the *only* effect' (emphasis added) of an order in favour of a representative plaintiff being that 'issues covered by that order will be res judicata' might also be read as limiting the *res judicata* effect of orders made in representative proceedings to issues raised and determined in the proceedings, denying the extension of estoppel to issues which could have been raised.

Even insofar as those represented might be subject to estoppels based on issues necessarily determined by the representative action, or issues which ought to have been raised in that action, such estoppels are not, unlike the narrow understanding of cause of action estoppel, an absolute bar.[96] In *Arnold v National Westminster Bank Plc*[97] it was noted that as one of the purposes of estoppel is to work justice between the parties 'it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result'. It has never been specifically raised but it could be argued that the fact that the earlier proceedings were representative in nature constitutes a 'special circumstance'.[98]

The adoption of the test of interest in a substantial common question of law or fact in *Carnie v Esanda*[99] arguably has implications for the understanding of the *res judicata* effect of orders in representative proceedings. It lends itself to the implication that the class represented is only bound with respect to the common issue presented to the court.[100] Nevertheless, concern was expressed in that decision that those represented might be bound not only on the common question presented but also on other issues which, in the circumstances of individual litigation, ought to have been raised in the proceedings. Toohey and Gaudron JJ were of the opinion that the action would not affect other rights those represented might have had against the respondent,

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[96] *Spencer Bower* (3rd edn) 94, 93, 98-99; *Cross & Tapper* (9th edn) 81-82. In *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72, 101 Estey J conceded that there 'is a discretion in the courts where the defence of *res judicata* is raised' but continued that 'such a discretion must be very limited in application'.

[97] [1991] 2 AC 93 (HL) 109.

[98] The reasoning which might support such an argument is discussed in Ch 4.

[99] (1995) 182 CLR 398.

[100] Insofar as *The Irish Rowan* [1991] 2 QB 206 (CA) introduces a test for 'same interest' based on the probability of separate defences (discussed in Ch 1, 69-72), that formulation does not so obviously suggest a similarly restrictive impact on the *res judicata* effect of orders made in representative proceedings.

but continued that '*[i]f* it did appear that other rights would be affected' then the court might exercise its discretion to order that the action not continue as a representative claim.[101] It would appear that the uncertainty as to the *res judicata* effect of orders in representative claims remains.

(d) Default and consent judgments

It was suggested by the Full Court of the Supreme Court of Victoria in *Brown v Fraser (No 3)*[102] that the binding effect of judgments or orders on those represented extends to default judgments. While this is consistent with the general position that such judgments are *res judicata*,[103] the extent to which default judgments are binding remains uncertain not only with regard to orders made in representative actions but more generally.

Spencer Bower[104] notes the potential for criticism of the view that default judgments are *res judicata* and the corresponding judicial concern that default judgments not be treated in the same way as judgments in contested litigation for the purposes of issue estoppel, if indeed issue estoppel applies to default judgments at all.

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[101] (1995) 182 CLR 398, 424 (emphasis added).

[102] (1896) 22 VLR 337. The Court held, *obiter*, that a plaintiff in an action who has a default judgment against a defendant authorised to defend on behalf of a class is entitled to judgment, but allowed an application to set aside the judgment upon an argument suggesting that there was a meritorious defence to the action, with the costs of the application and the costs of the plaintiff rendered useless by the application to be paid by the applicant.

[103] *Spencer Bower* (3rd edn) 24-25; Jacob (1987) 121.

[104] *Spencer Bower* (3rd edn) 25-28.

As a general rule, consent judgments and orders, while capable of creating cause of actions estoppels and causing a merger of any cause of action sued upon,[105] do not have any operation against any third person or any party not shown to have consented.[106] There is some authority suggesting that this general rule holds true for representative claims. In *Conybeare v Lewis* Chitty LJ took the view that a member of a represented class was entitled to raise the point that a representative order was obtained by consent and that, therefore, he was not bound by it.[107] In *Rees v Richmond*[108] at the trial, counsel for the representative defendants consented on behalf of the persons represented to judgment for the plaintiff, on the ground that there was no defence. The registrar took objection that the order did not include a power to consent, and the matter was brought before the court. Kekewich J is reported to have held that the order did not authorise such a consent.

C ENFORCEMENT BY AND AGAINST THOSE REPRESENTED

Although those represented are bound by any order made in the representative action, the more recent formulations of the rule impose limitations on enforcement of such orders.

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[105] Although their effect in relation to issue estoppels is still in doubt, *Spencer Bower* (3rd edn) 21.

[106] *Spencer Bower* (3rd edn) 23.

[107] (1883) 48 LT 527, 529. It seems to have been contemplated that the fact that the order was obtained by consent would be a valid ground for objection as the discussion of that point was followed by a statement that while there was authority that those represented might argue that they were not bound on the basis that the order in question was obtained by fraud, the reference to fraud was illustrative only. Although entitled to raise the question whether he was bound by the consent order, it was held that it should be raised in an independent suit brought by the person represented rather than in the representative action.

[108] (1890) 62 LT 427.

1 Permission of the Court Required

Under the current rule, although any order is binding on all persons represented, it 'may only be enforced by or against a person who is not a party to the claim with the permission of the Court.'[109] In contrast, the 1962 rule required that the leave of the court be obtained only where it was intended to enforce an order or judgment against any person not a party to the proceedings.[110] There are no provisions at all regarding enforcement in the original rule.

In the absence of specific provisions enabling enforcement, the general provision for enforcement by and against non-parties[111] might have been relied upon by those represented under the 1962 rule; and by and against those represented under the original rule. There is brief reference to the possibility of reliance on this general provision in *Bank of America v Taylor*,[112] where Waller J asked whether the plaintiff could 'obtain an enforceable judgment against each and every underwriter by suing one or even two as representatives, and then rely on O. 15, r.

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[109] CPR 19.6(4)(b).

[110] RSC 1965 Ord 15 r12(3).

[111] RSC Ord 45 r9 provides for enforcement by any person, not a party to proceedings, of any order made in his or her favour by the same process as if he or she were a party, and for enforcement against any person, not being a party to proceedings, against whom obedience to any order may be enforced as if he or she were a party. Permission of the court is not required, and *Supreme Court Practice 1999* 805 notes that orders by the Family Division under the rule 'may be summarily enforced without bringing a separate action'.

[112] [1992] 1 Lloyd's Rep 484, 491. There is, however, no indication of it ever having been relied on for this purpose. *Supreme Court Practice 1999* 805 notes that '[b]y its very nature, this rule is of very limited application.' The cases cited concern orders by the Family Division that trustees of a marriage settlement pay an annuity for the maintenance of a child of the marriage. Given the specific provision in the current rule for enforcement by or against any represented person with the leave of the court, it seem unlikely that RSC Ord 45 r9 will have a future role in enforcement of orders made in representative actions.

12(5)[113] and/or O. 45, r. 9, or must all be parties?' The relationship between the two rules is not referred to again in that decision.

This would seem to suggest that, under the 1962 rule, those represented could enforce an order made in their favour without permission, and that, under the original rule, permission of the court was not necessary either for those represented to enforce an order made in their favour, or for an order to be enforced against them.[114]

(a) 'Enforcement'

There has been little exploration of the precise content of the provision for disputing liability or for obtaining permission to enforce, due to so few representative actions proceeding. A preliminary question might arise as to what exactly constitutes 'enforcement'.[115] Given that those represented are explicitly bound by any order it seems likely that the reference to 'enforcement' is intended to include only actions to enforce, such as execution or proceedings for contempt.

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[113] His Lordship's reference to sub-rule (5) of the 1962 rule is somewhat puzzling, given that it enabled those represented to dispute liability, and so it is not clear why the individual plaintiff in that case would 'rely on' it. It is assumed that the reference was made to that paragraph in error, and that it was intended to refer to sub-rule (3), which enabled enforcement against those represented with the leave of the court.

[114] This appears to have been assumed in the Qld decision of *Tydeman v Roberts* [1985] 2 QdR 144, 150 where Williams J suggested that an order in a representative action under the original rule could, in effect, be rendered equivalent to one made under the 1962 rule, by being made subject to a condition that it would not be enforced against those represented without the further leave of the court.

[115] Andrews (1994) 149 notes that enforcement is not defined, and takes the view that it is arguable that injunctions are only enforced, for the purposes of the rule, if contempt proceedings arise. Comparison with the private international law distinction between recognition and enforcement fortifies the argument that enforcement is a formal process, *Dicey & Morris* (13th edn) 468-469 and W Kennett 'The Brussels I Regulation' (2001) 50 ICLQ 725, 732-735.

This seems to have been the approach adopted in *The Irish Rowan* where it was noted that the effect of the sub-rule requiring that leave be obtained to enforce under the 1962 rule was 'merely to protect the member of the class sued from having the judgment enforced against him' and went on to say that

> The judgment is still valid for other purposes such as a counterclaim or other process in which that person may wish to rely upon allegations which will be denied to him by the findings of the judgment, the issues being res judicata for such purposes. ... [T]here is nothing in the wording of the rule itself which would restrict the wide ambit in which the rule should operate.[116]

(b) Grounds for permission to enforce

One still unsettled question is when permission to enforce will be granted or denied. Under the 1962 rule, sub-rule (5) enabled the person against whom the application to enforce was made to 'dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.' While broad in its formulation, the sub-rule may have suggested that this was the only basis on which liability could be disputed, denying the person concerned the opportunity to dispute liability on grounds not particular to him or her, such as for example fraud or bias. Furthermore, the sub-rule

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[116] [1991] 2 QB 206 (CA) 238-239. Similarly, counsel for a number of the defendants in *News Group Newspapers Ltd v SOGAT '82* [1986] IRLR 337, 354 submitted that since judgment in a representative action creates an estoppel by record, the safeguard provided by the need to seek leave to enforce was not sufficient.

suggested that while it was for the party seeking to enforce the order against the member of the represented class to apply for leave, it was for the person against whom the leave is sought to demonstrate the reason why leave should not be granted. The current rule requires that permission be obtained before any order is enforced but does not retain any provision equivalent to the former Order 15 rule 12(5).[117] This avoids the suggestion that facts or matter particular to the individual concerned constitute the only basis on which liability may be denied but leaves open the question of what other circumstances might influence a court either to grant or to deny the permission sought.[118]

Nor is the burden of proof in any application for permission to enforce articulated. It might be expected that it will be for the person seeking permission to enforce an order given in a representative action to demonstrate either that he or she is a member of the represented class and therefore entitled to enforce the order, or that the defendant is a member of the class and therefore subject to the order sought to be enforced. Having demonstrated this *prima facie* entitlement, it may be that the onus then shifts to the person against whom the order is to be enforced to demonstrate that for some reason, he or she is not subject to the order, or that the claimant is not entitled to enforce it.[119]

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[117] CPR 19.6(4)(b).

[118] It may be that the judicial response to applications for permission to enforce will be influenced by the same circumstances which it will be argued have influenced the restrictive interpretation of 'same interest', and, more recently, the exercise of the court's residual discretion. The outcome of claims by those represented disputing that they are bound at all, or claims by parties disputing the entitlement of those represented to rely on an order made in the class's favour (discussed above 109-110) might also be affected by the concerns identified.

[119] In contrast, it might be expected that where a class member wishes to dispute that he or she is bound, (discussed above 109-110) the onus rests on the class member, either to disprove membership of the class, or to prove some other basis on which the binding effect of the order might be denied, such as fraud or bias. Similarly, if a party is able to dispute a class member's entitlement to rely on an order made in a representative action, it might be expected that the party will need to disprove the individual's membership of the class, or prove one of the other grounds on which the *res judicata* effect of the order may be denied.

2 Enforcement and Declaratory Judgments

As a declaration does not contain any order which can be enforced against a defendant,[120] it will not be subject to the requirement that permission be obtained before it is relied upon by or against those represented. It is not, however, 'a mere opinion devoid of legal effect: the controversy between the parties is determined and is *res judicata* as a result of the declaration being granted.'[121] If, therefore, a declaration establishing a right sought by a represented class is granted and then contravened, it would seem to follow that any member of the class would be entitled to return to court to seek damages in compensation for any loss suffered and to seek enforcement of the rights established by the declaration.[122] In the *Prudential Assurance* case, Vinelott J allowed amendment of a writ and statement of claim to permit the plaintiff to sue in a representative capacity and to seek a declaration that the defendants had conspired together in the distribution of a misleading circular and in doing so conspired to injure the plaintiff and those represented, or to commit an unlawful act or to induce a breach of contract. It was anticipated that those represented could then rely on any declaration made as *res judicata* in separate actions for damages.[123]

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[120] *Zamir & Woolf* (2nd edn) 1-2; *Arlidge, Eady & Smith* (2nd edn) 735, 871; *Borrie & Lowe* (3rd edn) 590; Burrows (2nd edn) 462.

[121] *Zamir & Woolf* (2nd edn) 4.

[122] *Zamir & Woolf* (2nd edn) 257-258 discusses the procedure for applying to the court for executory relief. Presumably the same result would follow if a negative declaration were to be granted, 166-174. Similarly, a declaration granted against a representative defendant could be relied upon in further proceedings against any member of the class.

[123] [1981] Ch 229, 255-257. This possibility was never realised as it was decided on appeal that the plaintiff's personal action (on which the representative action was based) was misconceived, [1982] Ch 204 (CA) 222-223. There was no consideration of the representative nature of the action beyond examining the propriety of the representative's personal claim. See Andrews (1994) 140-142 for discussion of this case.

However, reliance in a later individual action on a declaration made in a representative action is subject to a potential difficulty raised by limitation periods. In the *Prudential Assurance* case Vinelott J was clear that any action by those represented in reliance on the declarations made in the representative action to establish damage would have to be brought within six years from the date when the cause of action accrued.[124] The application of the relevant limitation period to the individual actions seems inevitable, and it is possible that the claims of individual class members may effectively be barred, if they rely on a representative action which is protracted or appealed.[125] The issue is not addressed in the current rule, and so is yet to be resolved.[126]

3 Enforcement and Injunctive Relief

Under the current rule, permission is required for enforcement of an injunction by, or against, a member of the represented class. Although leave seems not to have been required for enforcement by those represented under the 1962 rule or at all under the original rule, permission is required

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[124] [1981] Ch 229, 255. The same approach appears to have been taken by Fletcher Moulton LJ in the *Markt* case; and while Buckley LJ advocated amending the writ to seek a declaration only on behalf of the represented class and acknowledged the influence of the statute of limitations on the representative claim being brought, he did not address its effect on later separate actions to prove damage, [1910] 2 KB 1021 (CA) 1042, 1043.

[125] G Stillman 'Case Note - *Prudential Assurance Co Ltd* v *Newman Industries Ltd and Others*' (1980) 12 Melbourne UL Rev 580. This is likely to be particular problem in Australia, where the adoption of a test for same interest which refers to a common question of law or fact makes declaratory judgments upon which it is anticipated those represented will rely all the more likely.

[126] In contrast, s 33ZE provides that upon the commencement of a Part IVA representative proceeding, the running of any limitation period that applies to the claim of any class member is suspended. The limitation period runs again when the proceeding, and any appeals arising out of the proceeding, are determined without finally disposing of the group member's claim.

in any event to enforce an injunction by sequestration[127] and permission is required for any application to enforce by committal or by other remedy in a Divisional Court.[128]

Sub-rule (4) of the 1962 rule explicitly required applications for leave to enforce an order made against those represented to be made by summons served personally on the person against whom it was intended to enforce the order. There was no similar requirement in the original rule, and the requirement has not been retained in the current rule. However, an injunction cannot be enforced by committal proceedings or sequestration unless it has been served personally on the person to be bound.[129]

There do not seem to be any reported decisions concerning the enforcement of injunctive relief granted in a representative claim, either by, or against, any of those represented. It is submitted that the factors identified in, particularly, Chapter 4 as influential in the decisions whether or not to allow a representative claim to proceed, are also likely to influence decisions whether or not to enforce any relief granted.

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[127] *Blackstone's Civil Practice 2001* 865; RSC Ord 45 r5(1). There does not seem to be any inhibition on one of those represented making such an application, RSC Ord 45 r5(3) refers to 'application of the person entitled to enforce the judgment or order'.

[128] *Blackstone's Civil Practice 2001* 858; RSC Ord 52 rr2, 9. Application to a court other than a Divisional Court does not require leave, RSC Ord 52 r4. The extent to which the claimant's entitlement, or the defendant's liability, as a member of a represented class would be addressed in any application for such permission remains an open question.

[129] RSC Ord 45 r7. There is a general power to dispense with service of the order, and it has been suggested that this discretion is exercised most appropriately when the person to be bound by the order is present in court, or is represented by a solicitor or barrister when the injunction is granted, Fricker (1991) 12-13.

4 Enforcement and Monetary Awards

There is little authority on the effect of an order for the payment of money to a represented class because the courts have seldom made such awards in representative actions. It seems to have been assumed that the representative claimant would recover the total sum. This suggests that any enforcement would be by the named claimant and so the question of enforcement by those represented would not arise.

The nature of the representative claimant's responsibility to those represented for money received on their behalf remains in doubt. In a number of claims it has been clear that the representative and those represented have reached an arrangement between themselves as to the application of any damages received.[130] However, in the absence of agreement, it is not clear what obligations, if any, the representative has towards those represented. In *Wolff v Van Boolen*[131] Kekewich J suggested that although 'not a trustee of the action' a representative 'may become a trustee afterwards of the fruits of the action'. In neither of the reports of the other two English decisions where an award of damages was contemplated, *De Hart v Stevenson*[132] and *Janson v*

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[130] In *EMI Records Ltd v Riley* [1981] 1 WLR 923, 925, 926 for example, the statement of claim asserted that the members of the British Phonographic Industry Ltd (BPI), who were represented by the plaintiff, had consented to all sums paid in settlement of claims of breach of copyright being paid to the BPI 'to defray the expenses of detecting and suppressing the pirate and counterfeit record and like trades', and the order sought reflected the plaintiff's obligation to hold any sums received without prejudice to its obligation to hold or apply them 'in such manner if any as may be required of them at law or in equity.'

[131] (1906) 94 LT 502, 503-504.

[132] (1876) 1 QBD 313: a claim brought by one of several owners of a ship for freight and dues for its use.

Property Insurance Co (Ltd),[133] is there any mention of the nature of the representative plaintiff's responsibility for any monetary award. In *Barnes & Co Ltd v Sharpe* global damages were awarded to the members of an association in a representative action and it was assumed in the High Court of Australia that the plaintiffs were 'bound to treat the judgment as enuring for the benefit of the unnamed firm as well as the named persons, firms and companies.'[134]

More recently in New Zealand, in *RJ Flowers Ltd v Burns*,[135] McGechan J allowed a representative claim to proceed where an award of damages was sought. However, his Honour was not satisfied with the proposal that the court order that the plaintiff would hold any damages recovered on behalf of member growers and thought that that duty was one which the plaintiff should accept. McGechan J went on to doubt the court's jurisdiction to make such an order in the absence of clear acceptance. There is, therefore, some uncertainty concerning the representative's obligations to those represented where a monetary award is made.[136]

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[133] (1913) 19 R of Commercial Cases 36, a claim by one underwriter on behalf of eighteen others who were co-contractors in an agreement with the defendant where Horridge J held that the plaintiff was entitled to recover the money admittedly due, not just the plaintiff's proportion which had been paid into court by the defendant.

[134] (1910) 11 CLR 462, 470, 484-485. There was some doubt whether the action should have proceeded as a representative claim (478, 483) and the case was largely decided on the basis that objections for misjoinder cannot be taken after judgment where the point is one of form and not of substance, and no substantial injustice has been caused. The 'injustice' which might be done by the representative parties rule is considered in Ch 4.

[135] [1987] 1 NZLR 260, 273.

[136] The representative's claim failed in *Balfour v Beaumont* [1982] 2 Lloyd's Rep 493, [1984] 1 Lloyd's Rep 272 (CA), and the question of to whom moneys would have been paid was not discussed. Only declarations of liability were sought in the *Prudential Assurance* case [1981] Ch 229. Similar issues arise with regard to the obligations of a promisee awarded money on breach of a contract made for the benefit of a third party, *Chitty* (28th edn) 997, although the Contracts (Rights of Third Parties) Act 1999 renders the question less important in contract law. In addition to substantive solutions, procedural mechanisms (such as payment into court, or undertakings) might be employed to ensure that the representative is not unjustly enriched. In contrast Part IVA enables the court to make such orders as are just with respect to the distribution of any money paid into court or to provide for the constitution and administration of a fund to be distributed to group members (ss 33V, 33ZA).

Authority on the position where an order requires payment of money by the represented class is equally limited. Where a claim is made against a representative defendant for amounts due by the representative and those represented under separate contracts,[137] liability would seem likely to be several.[138] Presumably such an order could then be enforced[139] against each of those represented by the various means outlined in the Civil Procedure Rules.[140] Where the claim against the representative defendant is based on a single contract or on an allegation that those represented are liable for a tort, general principles would suggest that liability is joint or joint and several,[141] exposing the representative to liability for the full amount. If this were the case, it would seem to follow that the named defendant would be entitled to seek contribution from those represented, the amount of contribution recoverable from any person being such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.[142] However, there is no discussion of this issue except in relation to claims made against a defendant as the representative of all the members of an unincorporated association.

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[137] Although such actions were only recently considered to fulfil the requirement of 'same interest', Ch 1 37-38.

[138] It was noted in *The Irish Rowan* [1991] 2 QB 206 (CA) that the claim was against each of the insurers for its proportion of the loss, with none being liable for the proportion of any other. That decision was referred to in *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484, 495 in support of the court's ability to make such an order. The issue was not discussed in *Balfour v Beaumont* [1982] 2 Lloyd's Rep 493, [1984] 1 Lloyd's Rep 272 (CA) or in the reported decisions of *Ventouris v Mountain* [1990] 1 WLR 1370, [1991] 1 WLR 607 (CA).

[139] With the court's permission, under the current rule and the 1962 rule.

[140] RSC Ord 45 r1.

[141] GH Treitel *The Law of Contract* (10th edn Sweet & Maxwell London 1999) 527-533; *Street* (10th edn) 594-598; Glanville Williams *Joint Torts and Contributory Negligence* (Stevens & Sons London 1951) 21; H McGregor *McGregor on Damages* (16th edn Sweet & Maxwell London 1997) 1355-1356.

[142] Civil Liability (Contribution) Act 1978 s 2; CPR 20.2(1)(b); *O'Hare & Hill* (9th edn) 142. Such contribution would be subject to the terms of any relevant contract or the bankruptcy of any of those represented, GH Treitel *The Law of Contract* (10th edn Sweet & Maxwell London 1999) 532-533. Whether such a claim for contribution would be viewed as an 'enforcement' action requiring, under the current rule and the 1962 rule, permission of the court remains an open question.

It has been suggested that where a claim is brought against a defendant as the representative of all the members of an unincorporated association then the 'proper form' in which to seek judgment is not to seek an order for damages against the named defendant personally but rather to seek a declaration of right as between the plaintiff and those represented by the named defendant, and to seek an order that the trustees of the association's property pay the amount awarded (together with costs) out of the assets of the association. The latter order might be sought in the same proceedings, where convenient, by joining the trustees as defendants for this purpose only, or in an independent action against the trustees for the same purpose.[143] It may that this was the basis on which damages were awarded in *Evans v Waitemata*,[144] *Miller v Jackson*,[145] and at trial in *Kennaway v Thompson*.[146]

Therefore, those represented will be bound by any order made, whether favourable to the class or not, and it may be enforced against them. However, they do not become claimants or defendants 'to the same extent and with the same consequences' as if they had been named in the writ.[147] In particular, there are limitations on their ability to protect their individual interests in the proceedings, and on the possibilities for compelling their involvement.

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[143] *Ideal Films, Ltd v Richards* [1927] 1 KB 374 (CA) 377-379 and 380-381 relying on the *Taff Vale* case [1901] AC 426 (HL) 443. The former decision is distinguished at trial in *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA) 686-687 on the basis that the trustees were there joined. It was noted in *Harris v Raggatt* [1965] VR 779, 781 that the trustees of the association's property were not made parties to the action and in *Re McAndrew's Application* [1972] QWN 51, 117 that their names were not before the court.

[144] [1972] NZLR 773.

[145] [1977] QB 966 (CA), against the Lintz Cricket Club.

[146] Against the Cotswold Motor Boat Racing Club. The plaintiff was granted an injunction in the Court of Appeal, [1981] QB 88 (CA). The trustees of the associations' property do not seem to have been joined in the proceedings reported in any of these decisions but may, as was suggested in *Ideal Films, Ltd v Richards* [1927] 1 KB 374 (CA), have been pursued, if necessary, in independent proceedings.

[147] *Barker v Allanson* [1937] 1 KB 463, 470.

D PROTECTING THE INTERESTS OF THOSE REPRESENTED

The extent to which those represented will be able to protect their interests, either by seeking exclusion from the proceedings or by becoming involved in the conduct of the proceedings, depends, in the first instance, on whether they are aware of the proceedings at all. As those represented do not need to be identified or notified of the representative proceedings this may constitute a significant limitation.[148]

1 Authorisation of the Representative Action

(a) Judicial role where action commenced as a representative action

There is no reference in any representative parties rule to the representative claimant needing the court's permission to initiate a representative action, nor has there ever been any suggestion that permission is required.[149] In contrast to the representative claimant's unfettered liberty to

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[148] It is, of course, factually possible both that those represented will be aware of the proceedings brought on their behalf or against them, and that they will have some influence over the named representative. The effect of these possibilities on judicial response to the rule is considered in Chs 4, 237-241, and 5, 275-278.

[149] *SZ v Minister for Immigration and Multicultural Affairs* (2000) 172 ALR 172, 175. Contrast the proposal in *CP 1/01* 10 that applicants should demonstrate their suitability to act as representative.

commence representative proceedings, the original rule treated actions brought against a representative defendant differently.

The wording of the original rule was somewhat ambiguous as regarded representative defendants, apparently allowing a plaintiff to sue a representative defendant but requiring the court to authorise such a defendant to defend in the cause or matter.

Four early decisions in the Victorian Supreme Court focus on this distinction[150] and conclude that a court order was only required to authorise the defendant to defend the action. The apparent distinction between a plaintiff suing a representative defendant and the representative defending such an action also provoked comment from Buckley LJ in *Walker v Sur*[151] where he noted that if 'all can effectually be sued, it would be strange if all could not effectually defend' and wondered whether the rule could mean that 'they cannot defend unless the Court gives authority so to do?'

However, despite this potential for confusion, it was accepted in that case,[152] as it was in later decisions based on the original rule,[153] that an order authorising the representative to defend

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[150] *Trustees Executors and Agency Co Ltd v Urquhart* (1896) 21 VLR 713; *Elms v Glen* (1897) 23 VLR 376; *Re Wilson's Will* (1899) 25 VLR 193; and *Baxter v Baxter* (1898) 19 ALT 186. See also *Brown v Fraser (No 3)* (1896) 22 VLR 337.

[151] [1914] 2 KB 930 (CA) 935.

[152] [1914] 2 KB 930 (CA) 934.

[153] The *LAPT* case [1916] 2 AC 15 (HL) 38; *Campbell v Thompson* [1953] 1 QB 445, 450; *A-G for Victoria v City of Brighton* [1964] VR 59, 63. *May v Newton* (1887) 34 ChD 347, 349; *Andrews v Salmon* [1888] WN 102, 103; *Guardians of Tendring Union v Dowton* (1890) 45 ChD 583; and *Wood v McCarthy* [1893] 1 QB 775 provide earlier examples of the court requiring authorisation of the representative defendant.

in the action should always be sought where an action was brought against a representative defendant.[154]

Under the original rule, a representation order needed to be obtained before judgment if the class was to be bound.[155] In *Tydeman v Roberts*[156] the submission that the failure to obtain such an order before the issuing of the writ was fatal to the writ was rejected. The proposed representative defendant need not wait until a representation order is sought to challenge the representative nature of the action.

In contrast, the current rule does not require court authorisation to bring an action against a representative defendant.[157] Representative proceedings may be begun by, or against, a representative without distinction.

There is specific provision for challenging the representative in the current rule which provides that '[a]ny party may apply to the court for an order under paragraph 2', with paragraph 2 providing that '[t]he court may direct that a person may not act as a representative'. Other formulations of the rule do not make any specific provision for parties to apply for an order that

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[154] This interpretation was made explicit in two former original rule equivalents, which provided that 'the Court or a Judge may authorise one or more of such persons to be sued, or may direct that one or more of such persons shall defend', RSC(Qld) 1900 Ord 3 r10, RSC(SA) 1947 Ord 16 r9.

[155] *May v Newton* (1887) 34 ChD 347, 349; *Tydeman v Roberts* [1985] 2 QdR 144, 149-150. In the latter case, Williams J took the view that 'the necessary order should be sought promptly after the writ has issued', 149. See also *Wyburn v Corporation of Canterbury* (1892) 19 VLR 302.

[156] [1985] 2 QdR 144, 148. See also *A-G for Victoria v City of Brighton* [1964] VR 59, 63 (decided under the Rules of Procedure in Civil Proceedings (Vic) 1957 Ord 16 r9, which was equivalent to the original rule, NJ Williams *Practice of the Supreme Court of Victoria in its Civil Jurisdiction Vol 1* (Butterworths Melbourne 1964) 103, 227).

[157] Nor did the 1962 rule.

a person may not act as a representative, but it is clear that they could challenge the representative nature of the action on the ground that the represented class is not sufficiently numerous or does not consist of the required number of persons[158] or that the proposed class does not demonstrate the requisite 'same interest' in the claim,[159] or that the representative is not a member of the class represented,[160] or on the basis that, for some other reason, the court should exercise its discretion and deny resort to the rule.

The current rule is clear that such an order may be sought by a *party*, and this would seem to deny those represented the ability to seek such an order.[161] Even under the earlier formulations of the rule, it was never suggested that a member of the represented class could challenge the form of the proceedings.[162]

(b) Judicial role where action not commenced as a representative claim

The current rule provides for parties to apply for an order that a person no longer act as a representative, but there is no similarly specific provision for parties to apply for an order that a

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[158] Ch 1, 29-33.

[159] This is also the case where the action is brought against a representative defendant.

[160] *Hancock v Scattergood* [1955] SASR 1, 19, 21 (where the person purporting to represent the members of a union was shown to have been disqualified from membership and therefore could not sue).

[161] It is difficult to dispute the conclusion that those represented under the current rule are not parties, discussed above 103-104.

[162] Unless he or she was made a party to the proceedings. The methods by which this might be achieved are discussed below, 141-153.

claim not begun by or against a party as a representative be transformed into representative proceedings. In contrast, the 1962 rule provided that '[a]t any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings.'[163]

It seems likely however that the provision in the current rule that a representative claim may be begun 'or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest' would support an application to transform an individual claim into a representative one.[164] It would therefore appear that under the current rule it is possible to transform a claim not commenced as a representative one into either a representative claimant or representative defendant claim. The wording in the current rule might be contrasted to that in the 1962 rule which provided that claims were to proceed 'unless the court otherwise orders', suggesting only a power to deny representative claims, not a power to order that an individual claim be transformed into a representative one.[165] When considered in conjunction with the former Order 15 rule 12(2) it would seem that, under the 1962 rule, an action not begun as a representative plaintiff action could not, later in the proceedings, be transformed into such an action, whereas

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[163] RSC 1965 Ord 15 r12(2).

[164] CPR 19.6(1)(b). A narrower interpretation might argue that this merely empowers the court to deny an application (under CPR 19.6(3)) by a party for an order directing that a person not act as a representative (CPR 19.6(2)). A broader interpretation might argue that it enables the court to order on its own motion that a claim not originally brought as a representative one be continued by or against a person as a representative of others with the same interest. It is argued that the approach adopted and the exercise of discretion under CPR 19.6(1)(b) will be influenced by the factors identified in the following Chapters.

[165] RSC 1965 Ord 15 r12(1). The WA rule is in identical terms. The other Australian equivalent rules are to the same effect, with only minor differences in wording.

a claim not originally brought against a defendant as representative of a class could, on the application of the plaintiff, be transformed into such a claim.

(c) Authorisation by the class members

Given that those represented need not be identified, it is not surprising that there is no requirement that the members of a representative claimant class consent to their being represented in the proceedings,[166] or that the argument advanced in *Bank of America v Taylor*[167] that authorisation by the class was necessary for any member to act as representative defendant was tersely dismissed by Waller J, who accepted the submission that the cases cited for that proposition did not fully support the argument.[168]

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[166] *Cameron v National Mutual (No 2)* [1992] 1 QdR 133, 136-137, citing *Leathley v Robert McAndrew and Co* [1875] WN 259 (which held that there was no basis on which the court could order the provision of the names and addresses of those on whose behalf the action was brought) and the *Markt* case [1910] 2 KB 1021 (CA) 1039; *Haarhaus & Co GmbH v Law Debenture Trust Corp Plc* [1988] BCLC 640, 647.

[167] [1992] 1 Lloyd's Rep 484, 492.

[168] [1992] 1 Lloyd's Rep 484, 494. The cases cited were *Morgan's Brewery Co v Crosskill* [1902] 1 Ch 898 which was not strictly on point as it concerned the appointment of a representative shareholder under Ord XVI, r 32(b) (regarding the appointment of representatives of those interested in the administration and execution of a trust); and the *LAPT* case [1916] 2 AC 15 (HL) 39 which does not consider authorisation to defend by the class. In *Re McAndrew's Application* [1972] QWN 51, 117 Williams J suggests that authorisation by class members is necessary but authorisation was not directly in issue, and no authority was cited for the proposition.

2 The Representative and Control of the Action

Assuming that an action commenced or continued as a representative one, so long as it proceeded the representative claimant was understood to have complete control of the conduct of the action: the representative's position as *dominus litis* was unequivocal.[169] The extent to which this understanding will be altered by the increased emphasis on judicial management[170] of proceedings remains to be seen.[171]

Once sued as a representative defendant, or, under the original rule, authorised by the court to defend in that capacity, the courts have rarely remarked on the nature or the extent of the representative's control of the defence. By analogy with representative claimants it would seem to follow that the representative defendant is in control of the defence of the action. Considerable concessions have been made on behalf of the class represented, such as the acceptance by the representative defendant in *Kennaway v Thompson*[172] that there were no grounds for challenging the trial judge's finding that some of the club's activities caused a nuisance.[173]

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[169] *Handford v Storie* (1825) 2 S&S 196, 198, 57 ER 320, 321.

[170] Introduction, 23.

[171] Research reveals only one representative claim brought under the CPR 1998 (*National Bank of Greece SA v RM Outhwaite* (16 January 2001), an application for a declaration that the defendant was not a proper representative), and the court's management powers were not in issue in that case.

[172] [1981] QB 88 (CA) 90. Similarly significant concessions by representative defendants were also accepted in *Guardians of Tendring Union v Dowton* (1890) 45 ChD 583, 584; *Bolton v Stone* [1951] AC 850 (HL) 858; *Tetley v Chitty* [1986] 1 All ER 663 (the representative of the members of the Medway Kart Club admitted liability and undertook not to continue any further nuisance); and the *APRA* case (1961) 3 FLR 146 (an action alleging breach of copyright where the defendants were authorised to act as representatives of the members of a club after they had made admissions in the pleadings which presumably then bound all members).

[173] Again, subject to the court's powers under the CPR 1998 to manage the proceedings.

A corollary of the representative's control of the action is that he or she is entitled to withdraw the claim or settle at will.[174]

The representative's control of the claim or defence may give rise to a number of consequences from which those represented may desire to protect themselves. Applicable to both representative claimant and representative defendant actions are the possibilities that those represented will be bound by an order in the action against their will or that they will disagree with the representative's conduct of the claim or defence. Of more significance to representative claimant actions are the possibilities that the representative will withdraw or settle a claim, or will cease, for some other reason, to be a member of the represented class and unable to act as its representative in circumstances where those represented would prefer to see the claim pursued.[175] Finally, and also of significance to representative claimant actions in particular, even if those represented do not wish to avoid being bound and even if they are satisfied with the representative's conduct of the claim and it is brought to a successful conclusion, the nature of the order itself may create difficulties for the class. Although quite different consequences, the potential solutions for those represented are, in a number of cases, subject to similar constraints.

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[174] *Handford v Storie* (1825) 2 S&S 196, 198, 57 ER 320, 321. It is relevant to recall that any such settlement cannot bind those represented, discussed above 111. Contrast Part IVA which requires the representative to seek leave to settle, and to withdraw from the proceedings, s 33W(1) and (2).

[175] Contrast CPR 19.15 which provides for a claim on the group register to be substituted for a test claim which settles. Part IVA provides for substitution of a group member where the representative withdraws from the proceedings (s 33W(3)), and enables group members to contest the suitability of the representative, and, on the application of a group member the court may, if it appears that the representative party is not able adequately to represent the group members' interests, substitute another group member as representative party, s 33T.

3 Exclusion from the Proceedings

Until quite recently, it had never been suggested that a member of a represented class might apply to be excluded from the proceedings.[176] However, in *The Irish Rowan*, a claim brought against a representative defendant, Purchas LJ referred to the 1962 rule,[177] and read the phrase 'unless the Court otherwise orders, continued' as capable of supporting applications to the court 'from both sides of the proceedings to adjust those either appearing as parties or as members of the class represented, whether they be plaintiffs or defendants.' He went on to say that, on his reading of the order, 'it is open to ... a party to apply to be discharged from membership of the class'.[178] The interpretation is a plausible one given that the 1962 rule provided that 'the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or *all except one or more of them*'.[179] Whether it was anticipated that the right to opt out would be absolute, or dependent on the court's discretion is not made clear.[180]

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[176] CPR 19.14 permits a party to a claim entered on the group register to apply to have the claim removed from the register; and s 33J of Part IVA requires the court to fix a date before which group members can exercise their right to opt out of the proceedings (s 33X requiring that group members be notified of this right).

[177] RSC 1965 Ord 15 r12(1). His Lordship turns to this paragraph after accepting that r12(2) would seem to extend a right of application to adjust the parties to the proceedings only to the plaintiff and 'would, at first sight, not extend to protect a defendant discovering the existence of the proceedings and wishing to be excused', *The Irish Rowan* [1991] 2 QB 206 (CA) 240, discussed above 134-135.

[178] [1991] 2 QB 206 (CA) 240-241, 245. The suggestion that those represented by the defendant might opt out is an interesting application of the principle of voluntariness, and is considered in Ch 4, 251.

[179] Emphasis added. However, in *Carnie v Esanda* (1995) 182 CLR 398, 405, Mason CJ, Deane and Dawson JJ do not seem to think it clear that those represented have the right to opt out of the proceedings, including it in their list of factors requiring resolution.

[180] It is also, therefore, not clear what factors would be relevant to any application to opt out. *CP 1/01* 9 proposes that those represented 'where they can be easily notified ... could be given the opportunity to opt out', although their consent to representation is preferred.

The current rule involves a change in wording, stating that the court may order that the claim be continued 'by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.'[181] As the phrase reads 'as representatives of *any* other persons who have that interest' the current rule may also be capable of supporting an application for an order that one who is *prima facie* a member of either a claimant or defendant class is, nevertheless, not represented in the proceedings.

As noted earlier,[182] even if this option is accepted and the basis on which it may be exercised clarified, its utility depends on the member of the class knowing that the representative action is proceeding.

In contrast, it has been suggested that the reference to the proceedings being begun, 'and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or all except one or more of them' inhibits claims being brought under the 1962 rule on behalf of specified members of the class only. In *SZ v Minister for Immigration and Multicultural Affairs* an action seeking judicial review of decisions to remove persons from Australia or to deny them protection visas in particular circumstances was commenced as a representative claim in the High Court of Australia[183] and then remitted to the Federal Court of Australia. Lehane J in the Federal Court noted that, while an order permitting the representative claim was sought in the High Court application, it was not, in terms, made nor did it appear to be

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[181] CPR 19.6(1). The qualification in CPR 19.6(4) that judgments or orders are binding '[u]nless the court otherwise directs' (discussed above 108) may also provide a basis on which individuals or groups could be excluded from a class.

[182] 130.

[183] High Court of Australia Rules Ord 16 r12.

necessary so long as the class demonstrated sufficient 'same interest'.[184] However his Honour went on to doubt whether the claim could have been commenced as a representative proceeding under the Federal Court of Australia rule.[185] The applicant claimed to represent persons named in a 'Schedule of Represented Persons'.[186] Lehane J observed that in the claim before him the 'class of persons having the same interest in the proceedings includes, no doubt, a considerable number of persons who are not on either of the present lists of represented persons'. His Honour concluded, that in his view, commencing proceedings on behalf of specified persons 'who, in common with numerous others, have the same interest in the proceedings is not, unless one strains the language well beyond its ordinary meaning, to commence it as representing all those who have that same interest or "all except one or more of them"'.[187] Lehane J's suggestion that the wording of the 1962 rule enables representation of all those with the same interest except those specifically excluded but not representation of only those with the same interest who are specifically included is convincing.[188]

It would seem that the current rule does not exclude representation of only some specified persons of a broader class with the same interest. As the current rule permits in its terms

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[184] (2000) 172 ALR 172, 175, saying that those represented did appear to have the required 'same interest'.

[185] Federal Court of Australia Rules Ord 6 r13(1) is in the same terms as the 1962 rule in this respect.

[186] The motion before Lehane J sought leave to amend this schedule from time to time to add persons with the same interest.

[187] (2000) 172 ALR 172, 178-179.

[188] Indeed, given that the High Court of Australia Rules Ord 16 r12 (like the original rule) enables a claimant or defendant to sue or defend 'on behalf of, or for the benefit of, *all* persons so interested', it is not clear that the claim was properly brought under that rule either. The Queensland rule is in most respects equivalent to the 1962 rule except that it also refers to representation of 'all of the persons who have the same interest'.

representation 'of any other persons who have that [same] interest' it does not seem to confine representation to all persons with the same interest or to all except those who are excluded.

While the issue has not yet been explored, there would not seem to be any reason why representation of specified persons with the same interest would be treated differently from representation of all persons with the same interest - so that notification of the proceedings and their consent to their representation would not be required.[189]

4 Participation in the Proceedings

Prior to *The Irish Rowan*,[190] there were two generally accepted approaches to disagreement with the representative's conduct of the action.[191] In *Watson v Cave (No 1)*[192] one of those represented disagreed with the order made in the action and wished to appeal against it. James and Cotton LJJ refused to allow the appeal, agreeing that the proper course for the aggrieved class member is to apply to be added as a defendant[193] or to apply to take the conduct of the action out of the representative's hands. These options apply to those represented in both representative claimant

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[189] Although the circumstances in which they come to be specified may support an assumption that they are in fact aware of the claim, and of their representation in it.

[190] [1991] 2 QB 206 (CA).

[191] Neither of which is explicit in any formulation of the rule.

[192] (1881) 17 ChD 19 (CA), 21-22. The former option was also noted in *Haarhaus & Co GmbH v Law Debenture Trust Corp Plc* [1988] BCLC 640, 647.

[193] This possibility was also noted in *The Irish Rowan* [1991] 2 QB 206 (CA) 240-241, 245.

and representative defendant actions.[194] The first option embraces the possibility of making, in turn, the dissident a representative defendant for all who dissent,[195] so long as it is demonstrated that there are 'more than one' or 'numerous' dissentients,[196] with sufficient same interest.

Unlike applying to be excluded from the representative proceedings, both of these options demand continuing participation in the proceedings. Like exclusion from the proceedings, both are also dependent on knowledge of claim.

Those represented may also seek to be substituted for the named representative or joined in the proceedings where the representative withdraws or settles the claim or, for some other reason, ceases to be a member of the class and therefore unable to represent it in circumstances where a class member would prefer the claim to continue.[197] If the representative settles or discontinues the representative claim, or ceases to be a member of the represented class before any relevant limitation period expires, those represented remain free to bring an independent action.[198] However, the implications of the original representative withdrawing or settling the

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[194] In a representative defendant claim, a class member will apply to replace the representative or to be joined as an additional named defendant.

[195] *Wilson v Church* (1878) 9 ChD 552, 559; *Fraser v Cooper, Hall, & Co* (1882) 21 ChD 718, 719; *Hancock v Scattergood* [1955] SASR 1, 20.

[196] *Wilson v Church* (1878) 9 ChD 552, 559.

[197] This situation is likely to arise only with a representative claimant class. If a representative defendant settles, that settlement does not bind the class; a representative defendant is not in a position to withdraw the claim; and if the representative nature of claim is denied, members of the defendant class are unlikely to wish to join as defendants (although the claimant may seek an order that they should be so joined).

[198] This is not to ignore that it might be more convenient for an existing action to continue than for an entirely new action to be commenced.

claim are particularly important where the limitation period for the action brought has expired, when the option of bringing an independent claim is no longer available.[199]

The issue which then arises, whatever the reason, is the basis on which those represented might be joined in proceedings or substituted for the named representative, both before and after the expiry of any relevant limitation period.

(a) Amendment of the claim by a party

One response by courts to an application by a class member to be joined in the proceedings or substituted for the named representative was to rely on the general power to allow parties to amend.

This was one of the approaches adopted in *Moon v Atherton*[200] where Lord Denning MR expressed his concern that it must be open to any of those represented to take the place of the original representative, otherwise it might be too late for them to issue a new writ because of the statutes of limitation. Relying on the then Order 20 rule 5(1) which provided that the court could 'at any stage of the proceedings allow ... any party to amend his pleading', he took the view that

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[199] Subject to any provisions enabling extension or exclusion of ordinary time limits, Limitation Act 1980 Part II. The use of the rule may in fact be an attempt to overcome the imminent application of a limitation statute for all members of a class; see, for example, the *Markt* case [1910] 2 KB 1021 (CA) 1030, 1033.

[200] [1972] 2 QB 435 (CA) 441, 442. Edmund Davies LJ agreeing, 442. The application in that case would have been statute barred had it been issued as an original writ, 440 (counsel for the defendant) and 441 (Lord Denning MR).

those represented are parties, and on this basis, went on to say that if the representative withdraws for any reason, the court has the power the substitute one of those represented, as at the date of the original writ. Roskill LJ agreed that Mrs Art, a member of the represented class, could be substituted because she was a 'party' within the Rules of the Supreme Court.[201] The current Civil Procedure Rule also refers to the circumstances in which a *party* will be permitted to amend a statement of case.[202]

The primary difficulty with relying on the power to amend is that it depends on a finding that those represented are parties[203] and, as discussed earlier, this is a difficult argument to sustain since the introduction of the 1962 rule.

Even if that hurdle could be overcome, it is not clear that the application to substitute a class member for the named representative in *Moon v Atherton*[204] fell within the terms of the then rule concerning amendment. Although not referred to in the decision, the Rules of the Supreme Court 1965 Order 20 rule 5 went on to provide that an application to correct the name of a party which would in effect substitute a new party after any relevant limitation period has expired could be allowed (if the court thought it just to do so) where the court was satisfied that the mistake to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue, or as the case may be, intended to be

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[201] [1972] 2 QB 435 (CA) 442.

[202] CPR 17. Any permission is subject to specific provisions regarding amendments which effect a change in parties, addition or substitution after the expiry of a relevant limitation period, CPR 17.3(2)(a) and (b), discussed below 146-150.

[203] Or on the co-operation of the existing representative party in making the application.

[204] [1972] 2 QB 435 (CA) 442.

sued.[205] While replacing one person as representative party with another arguably would not mislead or cause doubt as to the identity of the person intending to sue or intended to be sued, it is not obvious that the need for such a substitution could properly be called a 'mistake' if it is driven by the decision of the existing representative to withdraw or settle, or by the class members' dissatisfaction with the representative's conduct of the action. Those applications which were allowed under the former Order 20 rule 5 were not obviously analogous to application by a member of a represented class to take the place of an existing representative.[206] Should the application of a member of a represented class to be substituted for the original representative not be viewed as a 'mistake', then it would seem likely that it would be denied by the line of cases stating that amendments should not be allowed which would deprive the defendant of the opportunity to rely on a relevant limitation period.[207]

The current rule on amendments after the end of a relevant limitation period, Civil Procedure Rule 17.4, is in similar terms to the former Order 20 rule 5. It allows 'amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question' and it is assumed that a similarly narrow interpretation will prevail.[208]

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[205] RSC 1965 Ord 20 r5(2) and (3).

[206] *Supreme Court Practice 1999* 386-387, also arguing (380) that the enactment of s 35 of the Limitation Act 1980 lends support to those judicial decisions which denied a wide discretion under RSC 1965 Ord 20 r5.

[207] *Supreme Court Practice 1999* 381; McGee (2nd edn) 365-366 (noting that before the 1962 revision of Ord 20 r5, the practice denying amendment where relevant limitation periods had expired was general).

[208] *Civil Procedure 2000* 234.

(b) Power to add a party

However, the decision in *Moon v Atherton*[209] did not depend solely on the general power to allow amendments. Finding that those represented were not parties would not have prevented the decision reached in reliance on the Rules of the Supreme Court 1965 Order 15 rule 6(2)(b)(i) to enable one of those represented to continue the action after the named plaintiff withdrew. Under Order 15 rule 6(2) the court had power '[a]t any stage of the proceedings' to add a person as a party where his or her presence was 'necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'.[210] Lord Denning relied primarily on this power to order that a person be added as a party where his or her presence is necessary for the determination of the action.[211]

Similarly, in the Queensland decision, *Cameron v National Mutual (No 2)*,[212] those represented were joined in the action by the trial judge after the action had been found to be invalidly constituted as a representative action and after the expiry of the limitation period. On appeal to the Full Court of the Supreme Court, Ryan J resolved the issue by treating the application simply as one seeking the joinder of 'persons who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and

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[209] [1972] 2 QB 435 (CA).

[210] It seems odd that the court both decided that those represented were 'parties' within the meaning of one of the Supreme Court rules and also decided that one of those represented could be added as a 'new party' under another rule. However, the ambiguity of the definition of 'party' has been the subject of comment, *The Vimeira* [1986] AC 965 (HL) 979, 972.

[211] [1972] 2 QB 435 (CA) 441. Roskill LJ also agreed with this basis for the decision as an alternative, 443.

[212] [1992] 1 QdR 133.

completely to adjudicate upon and settle all the questions involved in the cause or matter'.[213] Like the English rule in force at the time of the decision in *Moon v Atherton*[214] such an order could be made 'at any stage of the proceedings'.

While the former Order 15 rule 6(2) did not distinguish between the addition or substitution of parties in a pending action before or after the limitation period had expired, the rule of practice was that such amendments should not be made after the expiry of any relevant limitation period except 'in very peculiar circumstances'.[215] Ryan J referred to this rule of practice in *Cameron v National Mutual (No 2)* and found that such exceptional circumstances existed,[216] but the rule of practice was not adverted to in any of the judgments in *Moon v Atherton*.[217]

Since the decision in *Moon v Atherton*[218] the Limitation Act 1980[219] has come into force and the rules of court regarding addition or substitution of parties have been amended to deal explicitly with the situation where an addition or substitution is sought to be made in a pending action, which would otherwise be statute barred.

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[213] RSC(Qld) (1900) Ord 3 r11.

[214] [1972] 2 QB 435 (CA).

[215] *Weldon v Neal* (1887) 19 QBD 394 (CA).

[216] [1992] 1 QdR 133, 143. However, note *Tydeman v Roberts* [1985] 2 QdR 144, 151 doubting whether the rule in Qld was subject to this general principle.

[217] [1972] 2 QB 435 (CA). An earlier decision, *Mabro v Eagle, Star and British Dominions Insurance Co, Ltd* [1932] 1 KB 485 (CA) 487-488, suggested an even stricter view, ie, that leave to substitute a plaintiff would not be granted where it would prevent the defendant from relying on the statutes of limitation.

[218] [1972] 2 QB 435 (CA).

[219] Consolidating earlier statutes of limitation, McGee (2nd edn) 2.

The Limitation Act 1980 allows for the substitution of a new party only if the substitution of the new party is necessary for the determination of the original action, and such a substitution shall only be regarded as necessary if either the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name, or if any claim made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted for the original party.[220] While the former requirement does not obvious apply to a claim to be substituted as representative, the latter seems capable of supporting such a claim.[221] However, the rule which preceded the current Civil Procedure Rule on addition or substitution of parties seemed to exclude the possibility of substituting a member of a represented group for a representative who had withdrawn from the action. The former Order 15 rule 6, in accordance with the Limitation Act 1980, allowed the addition or substitution of a person as a party after the limitation period in pending proceedings where it was 'necessary for the determination of the action'.[222] However, the addition or substitution of parties was to be treated as necessary 'if, and only if'[223] the court was satisfied that the case at hand fell into one of five carefully defined situations, none of which obviously applied where a class member wished to take over a discontinued representative action.[224]

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[220] S 35(3), (4), (5)(b) and (6). S 35 of the Limitation Act 1980 replaced s 28 of the Limitation Act 1939 which did not consider the question of addition or substitution of parties after the expiry of a relevant limitation period, being confined to stating that 'any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which [it] is pleaded.'

[221] Clause 25(4) of the Law Commission's draft limitation bill is in substantially the same terms, Law Commission *Limitation of Actions* (Law Com No 270) (London 2001) Appendix A.

[222] RSC 1965 Ord 15 r6(5)(a), inserted by SI 1981/562.

[223] Inserted by SI 1982/1111.

[224] RSC 1965 Ord 15 r6(6), inserted by SI 1981/562. Both *Supreme Court Practice 1995* 202 and T Prime and G Scanlan *The Modern Law of Limitation* (Butterworths London 1993) 263, n 71 referred to *Moon v Atherton* [1972] 2 QB 435 (CA) as falling within paragraph (d) which applied where the new party was a company in which the plaintiff was a shareholder and on whose behalf the plaintiff was suing to enforce a right vested in the company. However the action was brought by Mrs Moon, on behalf of all but one of the twelve shareholders in a management

In contrast, Civil Procedure Rule 19.5[225] would appear to offer some scope for substituting a member of the represented class where the representative withdraws after the expiry of the limitation period. It substantially echoes the restriction contained in the Limitation Act 1980, enabling such a substitution where the limitation period had not expired when the claim was issued and 'the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant'.[226] The particular limitations in Rules of Supreme Court 1965 Order 15 rule 6(6) have been discarded.

However, it is arguable that Civil Procedure Rule 19.2(4) presents difficulties for a class member seeking to be substituted for the original representative within any relevant limitation period. Rule 19.2(4) enables the court to order that a new party be substituted for an existing one if the existing party's interest or liability has passed to the new party and it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.[227] Reliance on this rule will depend on an assessment that the existing representative's conduct of the claim or defence is such that it hinders resolution of the matters in dispute, or that the matters in dispute in the proceedings are not resolved if the claimant withdraws or settles the claim. Even

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company, and when she and nine others wished to withdraw the remaining shareholder, Mrs Art, applied to be substituted in her place. Paragraph (a) seemed to envisage the original plaintiff continuing as a party; (b) and (c) applied respectively where the relevant cause of action was vested in the new party and the plaintiff jointly but not severally, and where the new party was the Attorney-General; and (e) applied only to joinder of a new defendant.

[225] SI 2000/221. It is identical to the rule it replaced, former CPR 19.4.

[226] The other two circumstances where substitution is available do not seem to be relevant. They apply where 'the new party is to be substituted for a party who was named in the claim form in mistake for the new party' and 'the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party', CPR 19.5(3)(a) and (c).

[227] SI 2000/221. It is identical to the rule it replaced, the former CPR 19.1(4). The provision for addition as a new party within any relevant limitation period would seem to be capable of accommodating an application by a member of a represented class. It is permitted if it is desirable so that the court can resolve all the matters in dispute in the proceedings, or so that the court can resolve an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, CPR 19.2(1).

if these premises are accepted, it is not obvious that the existing party's interest or liability could accurately be described as having passed to the person to be substituted.

(c) Action 'brought by' those represented

The judgment of McPherson SPJ in the Queensland decision, *Cameron v National Mutual (No 2)*, offers another means to bring in those represented as named parties after the expiry of the relevant limitation period. His Honour preferred to decide the question on the terms of the Limitation Act itself.[228] He referred to *Moon v Atherton*[229] and noted that '[t]heir Lordships did not advert to the point that, with respect, I consider to be critical, namely, whether the action in that case was within the meaning of the Limitation Act "brought" by the unnamed plaintiff whether or not she was a "party" to the original action.' McPherson SPJ examined the former Queensland rule, Order 3 rule 10, and concluded that it applied to bringing an action 'on behalf of all persons ... so interested'. He went on to say that the rule

> makes no distinction between one or more named plaintiffs and unnamed plaintiffs. The action is brought by one or more persons on behalf of them all. In view of this, I do not think it possible to say that the action is brought by or on behalf of the named plaintiff or

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[228] The relevant phrase in the Limitation of Actions Act 1974 (Qld) (ie actions 'shall not be brought after the expiration of' the specified period) is the same in the Limitation Act 1980 ss 2, 5 as it also was in the Limitation Act 1939 s 2. Clause 1 of the Law Commission's draft limitation bill provides that it is a defence to a civil claim that the claim 'was not made before the end of' the specified period, Law Commission *Limitation of Actions* (Law Com No 270) (London 2001) Appendix A. The argument that a representative claim is 'made' on behalf of those represented is as plausible as the argument that it is 'brought' on their behalf.

[229] [1972] 2 QB 435 (CA).

> plaintiffs but not by or on behalf of those not named. In terms of the rule and of s. 10(1) of the *Limitation of Actions Act*, the action is 'brought' on behalf of all of them. On that view of the matter the plaintiffs, both those named and those represented but not named, brought this action when the writ was sealed on 22 December 1988.[230]

This suggests that an application to be joined in the action or substituted for the original named plaintiff need not be viewed as being made after the expiry of the relevant limitation period. If this is so, then whether or not one of those represented can be joined in the action or substituted for the named representative party will depend on the rules concerning joinder or substitution of parties within the relevant limitation period. It is not clear but it may be that McPherson SPJ's decision goes further and anticipates an entitlement to be joined in the action or substituted for the named representative by virtue of the action having been brought 'on behalf of' those represented.[231]

Ryan J's judgment in *Cameron v National Mutual (No 2)* does not disagree with McPherson SPJ's view of the action, indeed he makes no comment as to whether the action could be said to have been 'brought' on behalf of those represented. However, his Honour's repeated reference to the fact that the representative action was not properly brought, and could not justify treating those represented as parties, implies disagreement with McPherson SPJ's reasoning. Although Ryan J does not clearly accept it, he seems to have been influenced by the submission that where the action is not a properly brought representative action, insofar as the writ of summons purported to be brought on behalf of those represented, it is a nullity. Ryan J

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[230] [1992] 1 QdR 133, 137. Moynihan J agreed with this conclusion, 144.

[231] [1992] 1 QdR 133, 137.

distinguished the decision in *Moon v Atherton*[232] on the basis that there the original representative form of the action was not challenged while in *Cameron v National Mutual (No 2)* the application for joinder as named parties arose because the representative claim was not validly brought, and new claims by those represented might have been barred by the statute of limitations.[233]

Whether McPherson SPJ's approach treats an application by those represented to be joined in the action or substituted for the named representative as being made at the same time as the original application or whether it anticipates an entitlement to be joined or substituted[234] it arguably provides a realistic response to the problem posed by the withdrawal of a representative from a representative action. It corresponds with any view of the purpose of statutes of limitation; whether concern is for fairness to the defendant, or availability of reliable evidence, or that claimants should act promptly.[235] It is also compatible with the prevailing approach to procedural irregularity. McPherson SPJ made reference to the fact that 'few if any procedural defects nowadays result in nullity as distinct from irregularity' and took the view that the use of the representative parties rule in the case before him was merely an irregularity capable of being cured by giving those represented leave to be joined. His Honour concluded that the fact that the action 'ought not to have been brought on their behalf does not mean that it was not so brought.'[236]

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[232] [1972] 2 QB 435 (CA).

[233] [1992] 1 QdR 133, 141. Nonetheless he did find that the persons concerned had been properly joined on the basis that there were special circumstances permitting the joinder of new plaintiffs out of time, 143.

[234] Providing of course that the original application was made within the relevant limitation period.

[235] The policy of periods of limitation and judicial comment on it are discussed in McGee (2nd edn) 15-19; R Redmond-Cooper *Limitation of Actions* (Sweet & Maxwell London 1992) 1; T Prime and G Scanlan *The Modern Law of Limitation* (Butterworths London 1993) 1; and J Weeks (ed) *Preston & Newsom on Limitation of Actions* (4th edn Longman London 1989) 2-3.

[236] [1992] 1 QdR 133, 137-138.

As there is no specific provision in the representative parties rule itself for the addition of those represented, or for their substitution for the named representative, any such application would appear to be dependent on the general rules for addition or substitution of parties - rules which may not clearly accommodate the circumstances that might prompt such an application in a representative claim.[237]

E PROTECTING THE INTERESTS OF THE NAMED PARTIES

The representative form of an action does not only impact on those represented. The fact that the class members need not be notified or participate in the proceedings also has implications for the named parties.

1 Disclosure and Inspection of Documents

Until recently, orders for disclosure were generally only available against parties to the proceedings. The Rules of the Supreme Court 1965 Order 24 rule 3[238] enabled the court to make

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[237] Indeed, in *Carnie v Esanda* (1995) 182 CLR 398, 405 Mason CJ, Deane and Dawson JJ included the effect of settlement or discontinuance on a representative claim in their list of factors which required resolution. They also raised the questions of alterations to the description of the group and of protection of persons under a disability (Gowans J in *A-G for Victoria v City of Brighton* [1964] VR 59, 63 also notes the possibility that some of those represented may have been infants). However, while these issues were identified, there was no indication as to how they ought to be resolved.

[238] RSC 1965 Ord 24 rr7 and 10 enabled the court to make an order against a party for discovery of particular documents and one party to serve notice on another to produce for inspection any document to which reference is made in the pleadings, affidavits or witness statements.

an order for discovery against 'any party to a cause or matter'. The general rule was that discovery could only be ordered as between the parties to the action and there was no power to make such an order against non-parties.[239] Given this general rule, it was either assumed that, whatever their status, those represented were not 'parties' for the purposes of discovery[240] or, under the 1962 rule, explicitly held that those represented were not parties and could not therefore be subject to an order for discovery.[241]

There were some exceptions to this general rule, but none was explicitly or obviously applicable to representative proceedings generally.

While limited in number, representative proceedings concerning personal injuries may have been able to take advantage of the former sections 34 and 35 of the Supreme Court Act 1981[242] and of the Rules of the Supreme Court 1965 Orders 24 rule 7A and 29 rule 7A which enabled orders for inspection of documents or property which were not the property or in the possession of any party to the proceedings but which were the subject matter of the proceedings or as to which any question arises in the proceedings.[243] There is, however, no reference to the

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[239] Authorities for this general proposition are referred to in *Supreme Court Practice 1999* 452 and Andrews (1994) 306. Jacob (1987) 95 notes that in the 'ordinary way, the discovery of documents will take place only as between parties to pending actions'.

[240] The *Markt* case [1910] 2 KB 1021 (CA) 1039; the *CBS/Sony* case [1987] FSR 262, 271.

[241] *Ventouris v Mountain* [1990] 1 WLR 1370. The general power to order a party to disclose any documents which had been in his or her possession, custody or power but are now held by a third party does not appear to have been exercised against a representative party in relation to a member of the represented class. The duty to disclose documents which are or have been in a party's control is retained in CPR 31.8.

[242] Ss 34 and 35 of the Supreme Court Act 1981 were derived from ss 32, 33 and 35 of the Administration of Justice Act 1970, which were repealed by the Supreme Court Act 1981 Sch 7.

[243] Respectively added and amended by SI 1971/1269. Discussed in Style (6th edn) 62-63; P Matthews and HM Malek *Discovery* (Sweet & Maxwell London 1992) 66-68; Andrews (1994) 311; Jacob (1987) 95-96.

need for or the availability of discovery against those represented under these rules in those few reported representative actions which have concerned personal injuries.[244]

While the related provisions enabling inspection of property which is the subject-matter of the cause or matter or as to which any question may arise[245] might also apply to those represented, there, likewise, does not appear to have been any attempt to rely on them in those representative actions which have been reported.

The *Norwich Pharmacal* principle[246] enabling the court to order discovery against a non-party where that person has, through no fault of his or her own, become involved in the tortious acts of others so as to facilitate their wrong-doing does not have obvious application to those represented. The assumption that such a person is not at fault and will not incur personal liability but comes under a duty to assist by providing full information and disclosing the identity of the wrong-doers sits uneasily with the assumption that the members of the class represented are, for example, as liable as the defendant who represents them. Similarly it seems unlikely that a bank would be a member of a represented class in the circumstances contemplated by the Bankers

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[244] *White v Glass* The Times 18 February 1989 (CA); *Murray v Hibernian Dance Club* The Times 12 August 1996 (CA). The claim in *Campbell v Thompson* [1953] 1 QB 445 was brought before the enactment of the relevant sections of the Administration of Justice Act 1970.

[245] *O'Hare & Hill* (9th edn) 501; Style (6th edn) 50-52; Andrews (1994) 288. Insofar as these exceptions might have applied they are relatively recent innovations, and their influence on the development of the rule may have been limited.

[246] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL) 175, discussed in *O'Hare & Hill* (9th edn) 563-564; Andrews (1994) 307-310; Jacob (1987) 95; Simpson (2nd edn) 31-33. The principle is preserved in CPR 31.18.

Books Evidence Act 1879[247] and the exception contained in that Act is not obviously useful in representative proceedings.

Section 34 of the Supreme Court 1981 has since been amended[248] to enable orders for non-party disclosure to be made not only in proceedings in respect of personal injury and wrongful death but in any type of case. Civil Procedure Rule 31.17[249] requires that an order for disclosure by a person not a party be made only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary to dispose fairly of the claim or to save costs. The application must be supported by evidence. There is therefore now a general provision which might be utilised to order disclosure by those represented, should the relevant criteria apply.

In a number of Australian jurisdictions also there is specific provision for discovery against non-parties upon application in particular circumstances.[250] The order contemplated by such provisions is for particular and not general discovery although the documents may be described by class.[251] The provision for discovery against strangers to the litigation is intended 'not for the general run of case, but for cases which do have about them something outside of the

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[247] Andrews (1994) 311. There are similar provisions in the Australian jurisdictions considered, Simpson (2nd edn) 306-307.

[248] Civil Procedure Act 1997 s 8; SI 1998/2940.

[249] Discussed in *O'Hare & Hill* (9th edn) 557-558.

[250] Colbran (1998) 506-508; Cairns (4th edn) 411-414.

[251] *Richardson Pacific Ltd v Fielding* (1990) 26 FCR 188, 188-189; *Lebon v Lake Placid Resort Pty Ltd* [1995] 1 QdR 24, 32.

ordinary.'[252] Applicants must demonstrate that the stranger to litigation possesses or is likely to possess relevant documents[253] and, as the order is discretionary, it is for the applicant to show that the discovery is necessary. Under these provisions an order for discovery against a non-party who is a member of a represented class will turn on the question of whether that person has documents relevant to the proceedings rather than on the fact of his or her membership of the class.[254] In the *Zentahope (No 2)* case[255] Young CJ noted counsel's suggestion that such a provision could be relied upon to justify ordering discovery by those represented[256] on the assumption that they were not parties to the proceedings. His Honour responded that the rule 'would justify the making of such an order in an appropriate case, but it is a power to be used sparingly.'

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[252] *Richardson Pacific Ltd v Fielding* (1990) 26 FCR 188, 189. Applicants should exhaust other means of inspecting the documents before applying for an order, *Williams Aviation Pty Ltd v Santos Ltd* (1985) 40 SASR 272, 275-276, 280.

[253] See Simpson (2nd edn) 300-302.

[254] The reference in Simpson (2nd edn) 56 to the requirement that '[a] party suing or being sued in a representative capacity must discover all relevant documents in the possession, custody or power of those he represents and himself' is supported by authorities which refer to a trustee suing on behalf of *cestui que trusts*; an executor sued on behalf of an estate; a defendant sued on behalf of the Board of Trade; and the Public Trustee suing on behalf of another. These authorities are not, therefore, directly relevant to the representative parties rule. In *BT Australasia Pty Ltd v NSW* (Federal Court of Australia 24 December 1997) paragraph 28 Sackville J comments that counsel's replies suggested that the application for a representative order 'was prompted by the State's unwillingness to give discovery in respect of all agencies, a difficulty BT apparently assumes can be overcome by ensuring that the agencies are joined as parties'. The application was refused, and so the discovery question was not addressed, but his Honour's tone suggests doubt that the applicant's assumption was justified.

[255] [1991] ATPR ¶41-135, 52,969.

[256] Under the former ss 34 and 35 of the Supreme Court Act 1986 (Vic), which introduced a procedure whereby a plaintiff could represent those who had expressly consented to their being represented in the proceedings. This statutory reform is discussed in Ch 3, 176-178 and 180-181.

2 Liability for the Costs of the Action

The general rule in England[257] and in Australia[258] is that costs follow the event. It had long been accepted that those represented could not be made liable for the costs of the action,[259] and that therefore, in the event that a representative claim did not succeed,[260] the successful party could only recover any costs awarded from the named representative.

The view that those represented were not liable for costs seems to have been based on two propositions: that only parties are liable to pay costs and that those represented are not parties (at least for the purpose of costs). Neither proposition was the subject of detailed examination.

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[257] CPR 44.3(2)(a) (although in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 (CA) 1522 Lord Woolf MR explained that under the new Civil Procedure Rules 'the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart' in order to reflect more accurately the level of success achieved); *O'Hare & Hill* (9th edn) 671-673. RSC 1965 Ord 62 r3(2) was to the same effect.

[258] Cairns (4th edn) 610; Australian Law Reform Commission *Who should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13) (Sydney 1994) 7-9.

[259] *Price v Rhondda UDC* [1923] WN 228; *Scott v Pascall and Adams* (1847) 15 Sim 559, 561, 60 ER 736, 737, affirmed (1847) 2 Ph 390, 393, 41 ER 993, 995. *Conybeare v Lewis* (1883) 48 LT 527, 528 and the *Markt* case [1910] 2 KB 1021 (CA) 1039 provide *obiter* support, while *Collis v Amphlett* [1918] 87 LJ Ch 216 (CA) is an analogous case. Contrast *Andrews v Salmon* [1888] WN 102, 103 where Kay J concluded that the defendants '(including the persons on whose behalf they were now authorized to defend) must pay the costs of the action' and *Serbian Orthodox Ecclesiastic School Community 'Saint Nikolas' Queensland v Vlaislavljevic* [1970] QdR 386, 392 implying that class members might be liable for costs. Neither case cited authority for this view.

[260] Or in the event that a claim against a representative defendant was successful.

It has been argued that the latter proposition is true,[261] and after *John Fairfax & Sons Pty Ltd v EC de Witt & Co (Australia) Pty Ltd* there was clear authority for the former proposition.[262] However, that case was overruled by the House of Lords in *The Vimeira*[263] where Lord Goff drew attention to the wording of the former section 51 in the Supreme Court Act 1981 which relevantly provided that the costs of proceedings 'shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid' and took the view that there was no basis for implied limitation upon the express words of the statute.

The same wording is used in a number of Australian jurisdictions[264] and the High Court of Australia approved the decision in *The Vimeira*[265] in *Knight v FP Special Assets Ltd.*[266] The power to award costs under section 43 of the Federal Court of Australia Act 1976 is in a slightly different form, providing that 'the award of costs is in the discretion of the Court or Judge.'[267] Nonetheless in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty*

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[261] Clearly with regard to the current rule and the 1962 rule, and arguably with regard to the original rule.

[262] [1958] 1 QB 323 (CA). The Court of Appeal was there considering the Supreme Court of Judicature (Consolidation) Act 1925 s 50, which substantially reproduced the Supreme Court of Judicature Act 1890 s 5. S 50 was replaced by the Supreme Court Act 1981 s 51, which is in virtually the same terms. See, *obiter*, with regard to representative actions after this decision, *John v Rees* [1970] Ch 345, 372 and *Moon v Atherton* [1972] 2 QB 435 (CA) 441.

[263] [1986] AC 965 (HL) 975, 980, 972. There is a detailed discussion of the section's history in *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203, 210-216.

[264] Cairns (4th edn) 603.

[265] [1986] AC 965 (HL).

[266] (1992) 174 CLR 178, 192, 205, distinguished by McHugh J (dissenting) 215.

[267] This rule is similar to the RSC(Qld) (1900) Ord 91 r1. The discretion under that rule was also held not to be confined to the parties to the proceedings by the High Court of Australia in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 192-193, 203, 205.

Ltd[268] the Full Court of the Federal Court held that that section also confers upon the court jurisdiction to award costs against persons who are not parties.

The implication of these decisions for representative actions was made explicit in *Bank of America v Taylor*[269] where Waller J was of the opinion that it was strongly arguable that *Price v Rhondda UDC*[270] would now have to be reconsidered. Clearly, if liability for costs is not restricted to parties to the action, then it does not matter, so far as the question of costs is concerned, whether those represented are 'parties' or not. While Waller J in *Bank of America v Taylor* was in a position to restrict his conclusion to saying that 'it is arguable that the Court could have jurisdiction to order represented parties to contribute to the costs',[271] the Full Court of the Supreme Court of Victoria was asked specifically to deal with that very question in *Burns Philp & Co Ltd v Bhagat*.[272] The Court held that section 24(1) of the Supreme Court Act 1986 (Vic) is not subject to an implied limitation which prevents an award of costs being made against those who are represented in a proceeding brought under the former sections 34 and 35 of that Act or under Order 18 of the Rules of the Supreme Court (Vic).[273] It was held that the jurisdiction or

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[268] (1993) 117 ALR 253, 258, 259, following *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 and *The Vimeira* [1986] AC 965 (HL).

[269] [1992] 1 Lloyd's Rep 484, 495. The case concerned an application by the plaintiff for an order that one defendant underwriter be appointed to represent all underwriters of the policies upon which the plaintiff sued.

[270] [1923] WN 228.

[271] [1992] 1 Lloyd's Rep 484, 495.

[272] [1993] 1 VR 203.

[273] So far as is relevant s 24(1) of the Supreme Court Act 1986 (Vic) is identical to s 51(1) of the Supreme Court Act 1981. RSC(Vic) Ord 18 is equivalent to the 1962 rule. With regard to the former ss 34 and 35 of the Supreme Court Act 1986 (Vic), see n256 above.

power exists, and whether it should be exercised is a question of discretion.[274] Nonetheless, in *Carnie v Esanda* Toohey and Gaudron JJ said, with reference to the *Markt* case,[275] that 'the represented parties are not liable for costs.'[276] However, the decisions discussed here seem not to have been cited to their Honours, and it may be that this statement merely suggests that those represented are not by virtue of their representation alone liable for costs.[277]

The Court of Appeal laid down some guidelines for the exercise of the discretion to award costs against non-parties in *Symphony Group Plc v Hodgson*, emphasising that such orders would be exceptional, and that it would be even more exceptional for an order for costs to be made against a non-party in circumstances where that person could have been joined in the original proceedings.[278] It might be argued that those represented in many representative actions could have been joined in the original proceedings. In a number of cases the 'same interest' required by the representative parties rule would also have satisfied the relevant requirements for joinder. 'Same interest' appears to include those jointly entitled to a remedy and those who are jointly

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[274] [1993] 1 VR 203, 223, 204 and 225. Note however that the trial judge ought not to have dealt with the application for a determination of the liability of those represented for costs at all, 225. Although his Honour refers to RSC(Vic) Ord 18 and ss 34 and 35 of the Supreme Court Act 1986 (Vic), Abrahams (1996) 160 notes that the case was in fact brought under ss 34 and 35 and some of the reasoning is relevant to that Act in particular. He also notes that no application had been made for an order for costs against the represented persons and therefore the court's comments are *dicta*.

[275] [1910] 2 KB 1021 (CA).

[276] (1995) 182 CLR 398, 420, 424. This adherence to the traditional view is noted by Kell (1995) 99.

[277] In contrast to the uncertainty as to the potential liability of class members for costs, FCA 1976 s 43(1A) is clear - those represented under Part IVA cannot be made liable for the costs of determining the common issues. In contrast, CPR 48.6A(3) provides that, unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs (an order of this nature had been made in *Ward v Guinness Mahon Plc* [1996] 1 WLR 894 (CA)).

[278] [1994] QB 179 (CA) 192-193. Balcombe LJ also referred to the propriety of making a costs order against a person who has maintained or financed an action (192), a category which may also have particular relevance to representative claimant actions.

liable.[279] Insofar as other representative actions are concerned, it would seem that 'same interest' requires circumstances which would justify joinder as a necessary precondition[280] - in a number of claims use of the representative parties rule was denied but joinder permitted.[281] However, the court in *Symphony Group Plc v Hodgson*[282] approved of the costs order made against non-parties in *Davies v Eli Lilly & Co*,[283] suggesting that claims for such orders in cases involving multiple claimants or defendants will not be denied by the possibility of joinder alone.

The new section 51 of the Supreme Court Act 1981[284] relevantly provides that subject 'to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings ... shall be in the discretion of the court' and that the court shall have 'full power to determine by whom and to what extent the costs are to be paid'. Where the court is considering whether to exercise its power to award costs in favour of or against a non-party, Civil Procedure Rule 48.2(1) requires that the person concerned must be added as a party to the proceedings for

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[279] The former ought to be joined, CPR 19.3 and RSC 1965 Ord 15 r 4(2). The Civil Procedure Rules place no restriction on joinder of the latter beyond satisfaction of the test of convenience, CPR 91.1 and 7.3, while jointly liable defendants would have satisfied RSC 1965 Ord 15 r4(1).

[280] CPR 19.1 and 7.3 require only that the joinder be convenient, and RSC 1965 Ord 15 r 4(1) enabled joinder with leave or without leave where there was 'some common question of law or fact arising out of the same transaction or series of transactions'. This is especially the case given the direction to construe the rule in a liberal sense, *Payne v British Time Recorder Co, Ltd and W W Curtis, Ltd* [1921] 2 KB 1 (CA) 16.

[281] *Cameron v National Mutual (No 2)* [1992] 1 QdR 133, affirming [1991] 2 QdR 601; *Morgan v Taranaki Farmers' Meat Co Ltd* [1925] NZLR 513; *Churchill v Whetnall* (1918) 87 LJ Ch 524, 526; and the *Markt* case [1910] 2 KB 1021 (CA) 1035-1036, 1037-1038. In *The Irish Rowan* [1991] 2 QB 206 (CA) 222 use of the rule was permitted but it was noted that those represented would have satisfied the rule for joinder; and in *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462 the objection to the representative form of the action was held to have been taken too late, but it was suggested that joinder would have been the more appropriate procedure.

[282] [1994] QB 179 (CA) 192.

[283] [1987] 1 WLR 1136 (CA). However, the fact that the non-parties in that claim were identified and aware of the proceedings may distinguish that case from those represented under the representative parties rule. The potential relevance of the knowledge of those represented is considered in Chs 4, 237-241, and 5, 275-278.

[284] Substituted by the Courts and Legal Services Act 1990 s 4.

the purposes of costs only and must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.[285]

In the event that no order making those represented directly liable for costs is made, an order similar to that made in *Davies v Eli Lilly & Co* might be sought. In that case it was ordered that where the lead plaintiffs incurred costs, either personally or through the legal aid fund, every other plaintiff should contribute rateably.[286] Absent such an order being made,[287] the possibility that a representative made liable for the costs of the action might have some claim to contribution from those represented on a restitutionary basis was raised in *Bank of America v Taylor*.[288] In that case Waller J expressed the view that it would be 'strongly arguable that if a Court has made a representative order and if an order for costs were made against that representor, he would have a restitutionary remedy as against the underwriters whom he had been instructed by the Court to represent.'

Rather than seeking to make those represented liable for costs or leaving it to the representative to claim contribution from the class members, an order similar to a *Beddoe*

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[285] *CP 1/01* 13 notes the power to award costs against non-parties but seeks views on whether additional specific provisions are necessary in respect of costs in representative claims.

[286] [1987] 1 WLR 1136 (CA). Although not strictly necessary for the decision in *Ward v Guinness Mahon Plc* [1996] 1 WLR 894 (CA) 897-898, Sir Thomas Bingham MR was of the view that the order in *Davies v Eli Lilly & Co* was directed to the position of the plaintiffs among themselves rather than the position of the plaintiffs with regard to the defendants (Rose and Roch LJJ agreeing, 901).

[287] And assuming that the representative and those represented have not made their own arrangement regarding liability for costs.

[288] [1992] 1 Lloyd's Rep 484, 495. This comment was made in the context of an application for an order authorising a named defendant to represent others and does not consider the possibility that a representative claimant might seek a similar remedy. That possibility is addressed in Ch 4, 255.

summons might be sought.[289] Such an order usually enables payment of any costs awarded against a trustee bringing or defending a claim in which he or she has no personal interest out of the trust fund. However it has not been restricted to that case and in *National Anti-Vivisection Society v Beddington*[290] Mummery J identified a number of relevant factors including 'where a large unidentified class was interested in the fund, or where no party had a large enough interest to justify incurring the costs of litigation'. However, this order will only be of assistance in those representative claims where there is a pre-existing fund out of which costs can be paid.[291] Otherwise, while application of this principle to a fund that might come into existence as a result of the action (such as damages) may assist with costs which cannot be recovered from the losing party in the event of success, it will not assist where the representative party loses. In these circumstances, no fund will be created and the named party will, ordinarily, be liable for the costs of the winning party.[292]

Alternatively, the basic assumption that costs follow the event might be challenged. In *McDonald v Horn*[293] Hoffmann LJ thought the general rule that costs follow the event 'a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary

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[289] *Re Beddoe* [1893] 1 Ch 547 (CA), where such costs are properly incurred. Andrews (1994) 144 considers the rule in the context of the representative actions.

[290] The Times 16 November 1989.

[291] It may, therefore, be of some utility in claims brought by or against unincorporated associations which have such a fund available. Costs orders against unincorporated associations were contemplated in *Ideal Films, Ltd v Richards* [1927] 1 KB 374 (CA) 377-379 and 380-381 and the *Taff Vale* case [1901] AC 426 (HL) 443. The source from which it was expected that the damages and costs awarded to the plaintiff against a representative of the members of an unincorporated association by a majority of the Court of Appeal in *Stone v Bolton* [1950] 1 KB 201(CA) 213 is not averred to in that decision.

[292] An alternative to having costs paid out of a pre-existing fund would be to take out legal expenses insurance, *O'Hare & Hill* (9th edn) 44-46. Access to Justice Act 1999 s 29 enables recovery of the reasonable cost of insurance in any order for costs in the proceedings.

[293] [1995] 1 All ER 961 (CA) 969.

litigation.' The claim was not a representative one, and so whether such a claim would be viewed as 'ordinary litigation' was not in issue.[294]

3 Security for costs

In the *CBS/Sony* case Jones J was of the view that the representative nature of the action would 'deprive the defendants of their right to make an application for security for costs'.[295] However, the basis for this view is not indicated in the judgment. Civil Procedure Rule 25.13 relevantly provides that the 'court may make an order for security for costs ... if - (a) it is satisfied ... that it is just to make such an order, and (b) one or more of the conditions in paragraph (2) applies'.[296] Paragraph (2)(f) provides the condition that 'the claimant is acting as a nominal claimant, *other than as a representative claimant under Part 19*, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so'.[297]

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[294] *CP 1/01* 13 seeks comments on the suggestion that organisations should be able to apply for claims 'against the government or a plc' to be conducted 'on a no costs basis, or on the basis the if the action fails, the body is not liable for costs.'

[295] [1987] FSR 262, 271.

[296] The absence of a general statutory provision enabling the court to order security for costs (such as FCA 1976 s 56, relied upon in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* (Federal Court of Australia 27 July 2000) to order the representative to provide security for costs), suggests that the power to make such orders is confined to the circumstances set out in the CPR (unless the claimant falls within the Companies Act 1985 s 726(1) or the Arbitration Act 1996 s 38, *Cook on Costs 2000* 102-104, 110-111). V Morabito 'Security for Costs and Class Actions in Australia' (2001) 20 Civil Justice Q 225, 257 queries whether this will be the interpretation adopted in Victoria, which also has no general statutory provision, and a similar rule of court.

[297] Emphasis added. RSC 1965 Ord 23 r1(1)(b) was in similar terms. The other grounds justifying an order for security for costs raise issues irrelevant to the claimant's representative status, CPR 25.13(a)-(e), (g).

However, Civil Procedure Rule 3.1 sets out the court's general powers of management and enables it to make any order subject to conditions 'including a condition to pay a sum of money into court'.[298] While not limited to orders for security for costs, such orders are certainly possible.[299] It appears, therefore, to be true that security for costs will not be ordered if the only ground on which it is sought is that the claimant is a representative and appears to be impecunious. However, a representative may be asked to provide security for costs in the event of failure to comply with court orders or other obligations.

As with the change in the potential liability of those represented regarding costs, the introduction of Civil Procedure Rule 25.14[300] may have implications for their liability to provide security for costs. It enables the court to make an order for security for costs if it is satisfied that it is just to make such an order, and if, *inter alia*, the person 'has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings'.

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[298] CPR 3.1(3)(a).

[299] *Mealey Horgan Plc v Horgan* The Times 6 July 1999.

[300] There was no equivalent provision in RSC 1965 Ord 23, *Cook on Costs 2000* 109.

F CONCLUSION

Examination of the defining features of the representative parties rule demonstrates that members of the represented class may have an action conducted on their behalf and judgments or orders which bind them made without their having any knowledge of the proceedings at all. There are limitations imposed on enforcement of any order made,[301] and those represented are entitled to dispute that they are bound by an order made in the representative action, but the grounds on which enforcement might be contested or the binding force of an order denied remain uncertain. Furthermore, while it has relatively recently become possible for orders for disclosure, inspection and costs to be made against non-parties, such orders remain dependent on particular features of the claim at hand and are not generally available against those represented in representative proceedings. The combination of control of the action (or of the defence) by the representative and of the *res judicata* effect of any order made on all those represented is the crux of the rule. Chapters 3, 4 and 5 consider a number of possible explanations for the generally restrictive interpretation of the rule identified in Chapter 1, including the possibility that the particular features of the representative parties rule discussed in this Chapter are not compatible with those principles which are understood to define 'procedural justice'.

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[301] These limitations are found both within the rule itself, and in the general limitations on enforcement of judgments and orders.

CHAPTER 3 UNCERTAINTY

A INTRODUCTION

The representative parties rule has been declared a failure.[1] Chapter 1 noted that, apart from a number of specific situations in which it is accepted that use of the rule is appropriate, the circumstances in which it is available are uncertain. Chapter 1 went on to argue that the dominant 'separate defences' test would, if consistently applied, inevitably defeat all attempts to use the rule. The test is not, however, consistently applied and some representative claims do proceed. The change in test for 'same interest' by the High Court of Australia in *Carnie v Esanda*[2] makes it more difficult to deny use of the rule on the ground that the class does not demonstrate sufficient 'same interest'. However, as noted in the conclusion to Chapter 1, there has not been increased use of the rule since that decision. Chapters 3, 4 and 5 suggest possible explanations both for the generally restrictive approach set out in Chapter 1 and for those cases which have proceeded, with reference to the features of the representative parties rule set out in Chapter 2.

The original rule was very brief and while later formulations are more comprehensive, a number of significant questions are left to judicial interpretation. Chapter 2 noted a number of issues which were, and in a number of cases remain, unclear. Until the decision in

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[1] Jacob (1987) 81.

[2] (1995) 182 CLR 398, Ch 1 72-79.

Ventouris v Mountain[3] it was not clear what status those represented had in the litigation. In those jurisdictions with the equivalent of the original rule, uncertainty as to this issue remains. The important issue of the extent of the *res judicata* effect of an order made in a representative action remains unclear, as do the circumstances in which permission to enforce is required and, if required, the circumstances in which it will be granted. The nature of the representative's obligation to those represented in the event that any monetary award is made in favour of the class remains open to argument, as does the ability of those represented to challenge the representative's conduct of the proceedings, or to bring their own claims while the representative proceedings are on foot. Whether an order can be set aside, or whether those represented can opt out of the proceedings altogether remains unresolved.

Chapter 3 argues that one possible explanation for the restrictive interpretation of the representative parties rule is that the considerable uncertainty[4] as to the ambit of the rule and its effect on the parties and those represented gives rise to a defensive posture by the courts, aimed at restricting its use in order to avoid the need to confront and resolve these many and significant uncertainties.[5] This possibility has rarely been explicitly considered. The general reliance, until relatively recently, on the 'separate defences' test meant that application of that test alone was sufficient to dispose of any claim to use the rule. The continuing restrictive interpretation of the rule in Australia in the face of the liberalisation of the test for 'same interest' may reflect the continuing uncertainty as to the rule's ambit and operation.

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[3] [1990] 1 WLR 1370.

[4] The importance of certainty was considered in the Introduction, 17.

[5] *Zamir & Woolf* (2nd edn) 11 makes a similar argument in relation to early judicial reluctance to exercise the declaratory power.

B JUDICIAL REFERENCE TO UNCERTAINTY

Some judges have expressed concern regarding the uncertainty surrounding the application of the representative parties rule. The difficulties involved in managing the representative proceedings proposed were referred to in *Radcliffe v Coltsfoot*[6] and the limited amount of statutory guidance on the various features of a representative proceeding was significant in Gleeson CJ's decision to deny use of the representative parties rule in the NSW Court of Appeal in *Esanda v Carnie*.[7]

C RELIANCE ON EXISTING RULES OF COURT

It might be argued that there are sufficient means within the existing rules of court for courts to manage proceedings brought under the representative parties rule. So, for example, it was noted in Chapter 2 that the general provision for service of notice by alternative means could be usefully relied upon in representative claims.[8] Such an argument has, however, only very rarely been made. Kirby P, dissenting in *Esanda v Carnie*,[9] rejected the view that the

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[6] [1984-86] Manx LR 386, 413.

[7] (1992) 29 NSWLR 382, 388-390. Meagher JA agreed with the Chief Justice (403) but his brief reasons suggest that his concern was not so much the lack of procedural guidance but rather disagreement with the very idea of representation, 404. Concerns of this nature are considered in Ch 4.

[8] Ch 2, 99, where it was noted that a like provision may have been relied upon in *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 531.

[9] (1992) 29 NSWLR 382, 402.

representative parties rule itself 'must bear the whole weight of complex and uncertain procedures necessary for a particular case.' He went on to say that '[t]he Supreme Court has ample authority, under other rules, to determine and order other matters of procedure, including for example in relation to costs.' Insofar as those rules were insufficient to deal with the case at hand, his Honour considered that additional necessary orders could be made in reliance on the court's inherent jurisdiction.

D INHERENT JURISDICTION

It has been argued that it is within the inherent jurisdiction of the court to manage proceedings to resolve the uncertainties which surround the representative parties rule and to develop the means to manage representative claims.[10] The inherent jurisdiction referred to here is the jurisdiction to control process and proceedings.[11] It has been suggested that inherent jurisdiction is an incident of superior courts of records only.[12] However, it is submitted that

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[10] Dockray (1997) 131; Kell (1993a) 531; Kell (1993b) 308; Kell (1995) 98-99; *Esanda v Carnie* (1992) 29 NSWLR 382, 402 (Kirby P, dissenting).

[11] Jacob (1970) identifies, in addition to contempt cases, three classes of inherent jurisdiction - control of process, of persons, and of inferior courts and tribunals. He sub-divides control of process into regulating the process and proceedings of the court, abuse of process, and compelling observance of process. Mason (1983) 452, 453 and 456 classifies the functions of inherent jurisdiction as ensuring convenience and fairness in legal proceedings, preventing steps being taken that would render judicial proceeding inefficacious, preventing abuse of process, and acting in aid of superior courts and in aid or control of inferior courts, and identifies formulating rules of court and practice directions and controlling participation in and conduct of proceedings as discrete sub-categories of the first function, 449 and 450-451. Dockray (1997) 121 concludes that there are 'several inherent jurisdictions, not just one' and focuses on the inherent powers to regulate civil proceedings.

[12] Jacob (1970) 24 suggests that the source of a court's inherent jurisdiction is its nature as a *superior* court of law, but does not deny that inferior courts may have power to regulate procedures, considering only their power to punish for contempt and to control abuse of process, 49-50. Cairns (4th edn) 13 also refers to Supreme Courts in Australia deriving inherent jurisdiction from 'their status as superior courts of record' but does not consider

the argument that a court's inherent jurisdiction derives from its characterisation as a court and that, therefore, all courts have at least the inherent jurisdiction to control their own procedures is convincing.[13]

The argument that this inherent jurisdiction might be relied upon to resolve the uncertainties in the application of the representative parties rule is undermined by evidence of some judicial reluctance to rely on inherent jurisdiction to support the development of the rule.

1 Judicial Reluctance to Exercise Inherent Jurisdiction

There are indications of considerable reluctance to generate rules, either at all or which diverge from traditional models of litigation and are able, therefore, to support the particular benefits to be served by the representative parties rule.[14]

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inferior courts specifically.

[13] Mason (1983) states that the inherent power to formulate rules of court and practice directions 'is not confined to superior courts', and goes on to argue that given that inherent jurisdiction is derived from the characterisation of a body as a 'court' then, except for the jurisdiction to supervise inferior courts and tribunals, inferior courts should have, in principle, the same inherent jurisdiction as superior courts to control practice and procedures in court, 456-457. Dockray (1997) 125-126 also adopts the view that the authorities indicate that all courts have inherent powers to regulate their own procedures. Cairns (4th edn) 249 does refer more generally to inherent jurisdiction distinguishing 'a court from the other institutions of government.'

[14] The latter point is developed in Ch 4.

(a) Representative parties rule

As noted, the application of the 'separate defences' test is sufficient to deny any claim to use the representative parties rule and so there is little consideration of the possibility of reliance on the court's inherent jurisdiction to resolve the uncertainties which surround the application of the rule. However, the liberalisation of the test for 'same interest' in *Carnie v Esanda*[15] overcomes the inevitable defeat of claims to use the rule. It might, therefore, have been expected that this would involve more representative claims proceeding in Australia, with the consequent judicial innovation necessary to support those claims.

However, the few decisions which have considered the representative parties rule in any detail[16] in Australia since *Carnie v Esanda*[17] have not demonstrated judicial creativity in fashioning procedures to support use of the rule.[18] A number of commentators, while agreeing

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[15] (1995) 182 CLR 398.

[16] Contrast *National Mutual Life Association of Australasia Ltd v Reynolds* (Federal Court of Australia 8 March 2000) where the respondents' motion sought a declaration that the members of the groups represented did not have the 'same interest' required by Federal Court of Australia Rules Ord 6 r13. Spender J applied the broader test enunciated in *Carnie v Esanda* (1995) 182 CLR 398, finding that it was 'probable that different individuals will have different circumstances, particularly concerning reliance and damage', but there were 'a significant number of questions of fact and law common to all applicants' and the relief sought under the motion was refused. However, his Honour went on to order that the proceedings by the applicant against each of the respondents be stayed and so the future of the representative claim was not explored any further.

[17] (1995) 182 CLR 398.

[18] Insofar as they have been prepared to respond to the need to rely on inherent jurisdiction, they have expressed a preference for consent or authorisation by those to be represented. This model, considered in Ch 4, arguably defeats those purposes which representation is intended to serve - finality, consistency and access to justice.

that the High Court of Australia's decision in *Carnie v Esanda* is significant, question whether courts are likely to resolve several uncertain fundamental features of the rule.[19]

Even in *Carnie v Esanda*[20] itself, the joint judgment of Mason CJ, Deane and Dawson JJ rejected Gleeson CJ's view in the NSW Court of Appeal decision[21] that legislation was necessary to deal with a number of procedural issues if an expanded representative proceeding was to be viable. Nonetheless, they expressed a preference for detailed legislative prescription regulating the incidents of representative proceedings and went on to indicate that the range of issues on which the existing rule is silent would be relevant to the court's exercise of its residual discretion.

Shepherd v Australia and New Zealand Banking Group Ltd[22] provides an illustration of reluctance to innovate. Bryson J held that the plaintiffs had not elected to be entitled to repayment by a company until they brought proceedings to recover the money they claimed to be owed. The proceedings were brought after the company had gone into liquidation and, therefore, after the period of time during which the defendants could be liable. His Honour noted that evidence showed that fifteen of the represented persons had made demands for payment before the provisional liquidation. None of those fifteen was a named plaintiff, and Bryson J held that the existing plaintiffs could not represent those who did arguably have

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[19] Kell (1995) 98; Morabito (1997) 382; MR Liverani 'Marching on Goliath: Pressure Mounts for Easier Class Actions' (1996) 34(2) L Society J 41; Donnan (2000) 88.

[20] (1995) 182 CLR 398, 404, 405. The relevance of these issues to the court's residual discretion is discussed in Ch 1, 83-84.

[21] *Esanda v Carnie* (1992) 29 NSWLR 382, 388.

[22] (1996) 20 ACSR 81, 96. The facts of the claim are set out in Ch 1, 90-91.

claims against the defendants. The possibility of substituting one of the fifteen for one of the named plaintiffs or of adding one of the fifteen as a named plaintiff was not considered.[23]

This reluctance may be explained, in part, by the existence of rules committees which, it has been argued, have inhibited judicial willingness to exercise inherent jurisdiction to regulate proceedings, the courts preferring to refer any need for change to that body or to the legislature.[24] Whether this reluctance will be overcome by the requirement that courts 'must further the overriding objection by actively managing cases' remains to be seen. [25]

(b) Statutory reforms

The judicial response to legislative reform which fails to address the uncertainties that surround the rule provides some support for the assertion of judicial reluctance to exercise inherent jurisdiction to develop the representative parties rule.

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[23] S 33T of Part IVA does specifically provide for a group member to contest the suitability of the representative and empowers the court, upon such an application being made, to substitute another member of the group as the representative party. It is perhaps noteworthy that this is dependent on application by a group member.

[24] *CT Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567 (CA) 574-575, 580. See the vigorous dissent by Lord Denning MR referring to this tendency in *Associated Bulk Carriers Ltd v Koch Shipping Inc (The Fuohsan Maru)* [1978] 1 Lloyd's Rep 24 (CA) 30. By contrast, recent exercise of the inherent jurisdiction with regard to wardship and other *parens patriae* powers has been described as 'bold', Bennion (3rd edn) 78, and FAR Bennion *Statutory Interpretation: A Code - Supplement to the Third Edition* (Butterworths London 1999) S10.

[25] CPR 1.4(1), discussed in the Introduction, 23. There have been similar reforms in some Australian jurisdictions. The dispute as to whether such legislative reform will change judicial practice is noted in the Conclusion.

The Supreme Court Act 1986 (Vic) included new provision for representative actions, sections 34 and 35.[26] Victoria's equivalent to the representative parties rule was retained but these sections were understood to introduce more generous provision for representative claims.[27]

The sections applied when 'three or more persons' had the right to 'the same or substantially the same relief against the same person and if separate proceedings were brought ... in respect of that right, some common question of law or fact would arise'.[28] In those circumstances a proceeding could be commenced by 'one or more of those persons as representing some or all of them' so long as those to be represented had given their written consent, which had been filed in the Court at the same time as the process by which the proceedings were commenced was filed, and they were named in that process.[29] It expressly provided that a representative proceeding could be brought even if the relief to which all were entitled was or included damages, and even if those damages would need to be separately assessed.

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[26] In force 1 January 1987, Supreme Court Act 1986 (Vic) s 2.

[27] Aronson (6th edn) 92. Young CJ indicates in the *Zentahope* case [1991] ATPR ¶41-120, 52,778 that the sections were intended to overcome the limitations inherent in s 62(1C) of the Supreme Court Act 1958 (Vic) (introduced by the Supreme Court (Amendment) Act 1984 (Vic) s 5) as explained by Tadgell J in *Marino v Esanda Ltd* [1986] VR 735.

[28] Former Supreme Court Act 1986 (Vic) s 34(a).

[29] Former Supreme Court Act 1986 (Vic) s 35(1) and (2). Provision was made for persons to be represented in the proceedings after its commencement with their written consent, and the court's leave (former s 35(4)). The provisions were criticised for the limited guidance as to extent and effect of the consents required, *Zentahope Pty Ltd v Bellotti* (Supreme Court of Victoria Appeal Division 2 March 1992). The implications of requiring consent for the utility of representation are discussed in the Introduction, 16-17, and these provisions were characterised as constituting 'little more than a form of joinder', Basten (1996) 48.

Therefore, in terms of the threshold test, the former sections 34 and 35 of the Supreme Court Act 1986 (Vic) adopted the broader test of 'common question of law or fact'[30] and explicitly addressed the limitation of claims for damages and the possibility that damages might need to be separately assessed. However, in terms of the range of issues identified as unclear in Chapter 2, the former section 35 was very brief, providing that the court could 'in any particular case give directions concerning the conduct of the proceeding.'[31]

In contrast to an initially positive response,[32] the lack of guidance on procedural matters was the subject of considerable criticism in the Appeal Division of the Supreme Court of Victoria in *Zentahope Pty Ltd v Bellotti*.[33] Brooking J, after listing the many issues which the sections did not address, noted that '[b]eyond empowering the Court to give directions concerning the conduct of the proceeding the section is silent as to procedure.' Fullagar J said that 'the legislature should give careful and early consideration to the repeal of ss. 34 and 35'

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[30] It might be thought that this avoided the difficulty introduced by the requirement in *Carnie v Esanda* (1995) 182 CLR 398, 404, 408, 421-422, 427 that the common question be 'substantial' or 'significant' (discussed in Ch 1, 76-78). However, in one of the very few claims brought under the former ss 34 and 35, the *Zentahope* case [1991] ATPR ¶41-120, 52,779, Young CJ indicated that he thought that the 'predominance or otherwise' of individual issues over common issues was a relevant consideration. Moreover the ambiguity of 'the same or substantially the same relief' was the subject of considerable criticism in *Zentahope Pty Ltd v Bellotti* (Supreme Court of Victoria Appeal Division 2 March 1992).

[31] Former Supreme Court Act 1986 (Vic) s 35(5).

[32] Discussed below, 180-181.

[33] Supreme Court of Victoria Appeal Division 2 March 1992. The 'grave doubts' expressed in that decision were noted in *A & J Partitions Pty Ltd v Jolly* (Supreme Court of Victoria 16 February 1993), an application for joinder. *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203, 224 was only concerned with the liability of those represented for costs, and Brooking J noted that the scope of the sections would have 'to be worked out in other cases and on other appeals.' In contrast, Byrne J in *Dagi v Broken Hill Pty Co Ltd* (Supreme Court of Victoria 10 November 1995) noted the Appeal Division's concerns and those of Gleeson CJ in *Esanda v Carnie* (1992) 29 NSWLR 382 but did not think that they precluded the filing of amended consents, relying particularly on the view expressed by Mason CJ, Deane and Dawson JJ in *Carnie v Esanda* (1995) 182 CLR 398, 404 that the absence of procedural guidance should not dictate a narrow reading of the representative parties rule. Those proceedings were settled, although there is dispute as to the terms of the settlement, *Dagi v Broken Hill Pty Co Ltd* (Supreme Court of Victoria 22 November 2000).

and expressed the view that if the sections were not repealed then 'those for whose benefit one surmises it was enacted are likely to become its victims, as the Court strives by successive decisions to divine meaning from these overly brief and enigmatic provisions.'[34] The sections have now been repealed.[35]

The emphasis placed on the need for guidelines to clarify the procedural issues which surround a representative proceeding is especially significant given that the court was dealing with an identified class, all of whom were aware of the proceedings being brought on their behalf. The importance of clarity as to the incidents of a representative action is, presumably, likely to be viewed as even greater where those represented are identifiable rather than identified.

2 Judicial Willingness to Exercise Inherent Jurisdiction

The reference to those cases which suggest a reluctance to turn to the court's inherent jurisdiction is not intended to deny that there have also been some indications of judicial willingness to refer to the court's inherent jurisdiction to support the development of the representative parties rule.

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[34] The lack of procedural guidance had also been noted in academic discussion, Aronson (6th edn) 98; Morabito (1997) 376; Abrahams (1996) 161. Reference to the former ss 34 and 35 in Cairns (4th edn) 344 is very brief, commenting only that the rules 'do not descend into detail as to the conduct of a class action'.

[35] Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic) s 14.

(a) Representative parties rule

In *The Irish Rowan*[36] Staughton LJ noted that the rule 'does not in express terms' permit a judgment to be set aside against a member of the class who successfully relied on the provision to dispute liability by reasons of facts or matters particular to his or her case, but went on to say that 'it may be that the court would have inherent power to take that course if it were appropriate.' In *Esanda v Carnie*,[37] Kirby P responded to the argument that 'the Court should hold its hand and leave it to Parliament, or the Rule Committee of the Supreme Court, to introduce a detailed regime for representative actions' by saying that he found this argument 'completely unconvincing. Whilst it is true that one means of governing the incidents of representative actions would be by the passage of legislation, it is not the only means.'[38] His Honour was adamant that the existence of the rule demanded that it be given 'effective operation', and considered that the court's inherent powers were sufficient to dispose of particular problems presented by any individual case.

In the High Court decision in *Carnie v Esanda*,[39] Toohey and Gaudron JJ were quite positive about the court's ability to rely on its inherent jurisdiction to control the proceedings, saying that 'it is true that r. 13 lacks the detail of some other rules of court. But there is no

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[36] [1991] 2 QB 206 (CA) 223.

[37] (1992) 29 NSWLR 382, 401, 402.

[38] *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 531 may provide another example but it is not clear whether Hunt J relied on the court's inherent jurisdiction to direct that notice of the interlocutory injunction ordered be given to those represented, or on an equivalent of the general provision to serve notice by alternative means, discussed in Ch 2, 99.

[39] (1995) 182 CLR 398, 422.

reason to think that the Supreme Court of NSW lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned.' They continued that, in their view '[t]he simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice... . The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.'

(b) Statutory reform

There have also been indications that some judges are willing to rely on the court's inherent jurisdiction to fill gaps left by statutory reforms.

In an early decision under the former sections 34 and 35 of the Supreme Court Act 1986 (Vic), the *Zentahope* case,[40] Young CJ took the view that 'until the Court makes rules dealing with the matter, I think that the Court can protect itself by the giving of appropriate directions pursuant to the power granted in [section 35]'. His Honour reached tentative conclusions on a number of issues related to representative proceedings under those sections, including discovery.[41] In a later judgment in the same action, his Honour acknowledged that

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[40] [1991] ATPR ¶41-120, 52,776.

[41] [1991] ATPR ¶41-120, 52,779 holding that as those represented were not 'parties' they should not, in the first instance, be ordered to make discovery, although accepting in the later judgment in the same action, the *Zentahope (No 2)* case [1991] ATPR ¶41-135, 52,970 that an order for discovery might be made in an

the special considerations which apply to representative proceedings were 'somewhat cryptically indicated in sections 34 and 35' but was of the opinion that the sections 'should be liberally constructed to facilitate the conduct of class action which is the plain intention of Parliament. They allow the Court ample jurisdiction however to prevent injustice but it is more important to concentrate on the isolation of the common questions for determination than upon imagined procedural difficulties and remote possibilities.'[42]

In 1987 new Supreme Court Rules of South Australia came into force, introducing expanded provision for representative proceedings in Rule 34.01-34.06.[43] The rule provides that where numerous persons have common questions of fact or law requiring adjudication, one or more members of that group may commence an action on behalf of all or some of the group.[44] The representative party must apply for an order authorising the action[45] but such authorisation is not to be refused on the ground that there are separate contracts or transactions

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appropriate case if properly controlled but that unlimited discovery should not be ordered. In that later judgment he also anticipated dealing with the possible effect of limitation periods on those represented if the representative claim was disallowed by deeming any limitation period to have commenced on the day that the representative proceedings commenced, 52,969.

[42] The *Zentahope (No 2)* case [1991] ATPR ¶41-135, 52,968 and 52,975. The claim to use the former ss 34 and 35 was rejected on the basis that there was no question common to the plaintiff and those to be represented, 52,980. Byrne J in *Dagi v Broken Hill Pty Co Ltd* (Supreme Court of Victoria 10 November 1995), in the course of deciding whether the representative plaintiffs under the former ss 34 and 35 of the Supreme Court Act 1986 (Vic) could amend the statement of claim, also took a positive view of the court's ability to generate any necessary rules.

[43] On 1 January, S Williams 'A Class Act? Representative Proceedings in the Federal Court' (1992) 66 L Institute J 376.

[44] RSC(SA) 34.01(1).

[45] RSC(SA) 34.02. RSC(SA) 34.04 provides that an order that an action proceed as a representative one shall define the group on whose behalf the action is brought, and the nature of the claims made and relief sought on their behalf, and the common questions of law or fact.

between the members of the group and the defendant, or on the ground that the relief claimed includes claims for damages which would require individual assessment.[46]

However, beyond providing that questions which are common to the group are to be determined in common proceedings, and questions that require the participation of individual members of the group may be directed to be dealt with either in separate actions or by separate trials,[47] the only instruction regarding the procedural issues left uncertain by the representative parties rule is that an order that an action is to be maintained as a representative one shall 'make such other orders and give such directions as the nature of the proceedings may require'.[48]

In what appears to have been the first claim brought under the provisions, *Abrook v Paterson*,[49] Judge Burley noted that the rule's 'lack of detail is in marked contrast to the provisions contained in PtIVA of the Federal Court of Australia Act 1976'. However, his Honour had the benefit of the decision of the High Court of Australia in *Carnie v Esanda* before him, and so concluded that 'it is clear that, notwithstanding the lack of detail in the rule, the court is able to address the sometimes complex series of considerations any given representative action may give rise to', and referred to the provision in Rule 34.04 for the

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[46] RSC(SA) 34.03. Unlike the former ss 34 and 35 of the Supreme Court Act 1986 (Vic) or Part IVA s 33C(2)(b), this sub-rule does not expressly allow representative proceedings where the claim is based on separate acts or omissions.

[47] RSC(SA) 34.06.

[48] RSC(SA) 34.04. RSC(SA) 34.05 does also provide that an order that an action proceed as a representative one may be varied upon the application of any party at any time before judgment.

[49] Supreme Court of South Australia 12 April 1995, Judge Burley saying that as 'far as I am aware, there are no decided cases on the scope and operation of [RSC]34.01.'

court to make such orders as the nature of the proceedings may require. Judge Burley then proceeded to reject the defendant's application for an order that the proceedings not continue as representative proceedings. In so doing, he anticipated notice to those to be represented to enable them to opt out, and specified the form that notice should take; decided that, were the plaintiffs to seek to compromise or discontinue the claim, they would need to seek directions from the court; took the view that those represented were unlikely to be held liable for costs and that this was not, in his view, a significant detriment to the defendants who would be facing the costs of the plaintiffs' individual actions in any event, and that any concerns could be met by an application for security for costs; and suggested that potential difficulties raised in relation to assessment of damages should be met if they arose rather than defeating the representative claim in its initial stages.

While *Abrook v Paterson*[50] suggests an innovative approach to this statutory reform, it is difficult to read this decision as evidence of a general trend. It may be that this is the only claim which has sought to use this expanded provision in the more than fourteen years since it was introduced[51] - while there have certainly been two other representative claims since 1987,[52] research has not revealed any others.[53] Nor is it clear that these two rely on the

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[50] Supreme Court of South Australia 12 April 1995.

[51] The claim has since been transferred to the Federal Court of Australia, *Abrook v Paterson* (1996) 136 ALR 753, but there is no indication in that decision as to whether it continues as a representative claim and, if so, under which rules.

[52] *Danae Investment Trust Plc v Macintosh Nominees Pty Ltd* (1993) 10 ACSR 1 and 11, and (1993) 11 ACSR 523; and *Telfer v Flinders Ranges Council* (Supreme Court of Victoria 26 March 1999).

[53] Both Aronson (6th edn) 92 and Cairns (4th edn) 342-343 set out the rule without comment, or reference to any cases. Morabito (1997) 377 refers to *Abrook v Paterson* (Supreme Court of South Australia 12 April 1995) as the only claim to have been brought under the reformed provisions, relying on a paper presented by SP Charles (judge of the Court of Appeal of the Supreme Court of Victoria) at the 1996 Australian Bar Association Conference in San Francisco.

reformed rules, or on the equivalent to the representative parties rule, which is retained in the South Australian rules.[54] In any event neither discusses the representative nature of the claims in any detail and so it is difficult to make any judgment as to the judicial approach to development of the rule. The headnote in *Telfer v Flinders Ranges Council*[55] states that the action was brought by the plaintiffs against the defendants for damage sustained by them as a consequence of a fire and that 'the proceedings were brought as a representative action, intended to encompass similar claims by other persons across whose properties the subject fire progressed'. There is no discussion of the representative nature of the claim as the headnote indicates that '[s]hortly before trial the plaintiffs and the defendants arrived at a settlement on the issue of liability.' The question of quantum of damages, as to which the parties were not then ready to proceed, was stood over for a time, and the issue of liability arising between the Council and a third party proceeded to trial. There does not appear to be any further report of the claim on behalf of those damaged by the fire against the Council. Similarly in *Danae Investment Trust Plc v Macintosh Nominees Pty Ltd* the claim was brought on behalf of persons who purchased shares in one of the two defendants. Olsson J struck out the statement of claim on the ground that it did not disclose any cause of action, primarily on the basis that the effect of the Securities Industries (SA) Code did not extend to sales and purchases concluded in London,[56] and then refused an application to file a new statement of claim on the principle in *Weldon v Neal,*[57] that is, allowing the reconstituted claim would permit the

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[54] An equivalent to the 1962 rule is retained in Rule 34.08-34.12. This rule is expressed to be 'in addition to the rights and remedies given by the preceding sub-rules'.

[55] Supreme Court of Victoria 26 March 1999.

[56] (1993) 10 ACSR 1.

[57] (1887) 19 QBD 394 (CA).

plaintiffs to take advantage of the original summons to defeat the limitation period.[58] The Full Court of the Supreme Court of South Australia held that that principle had been substantially modified in South Australia by the enactment of the Limitation of Actions Act 1936 (SA) and that the appellants should be permitted to amend their statement of claim if they could do so in such a way as to disclose a cause of action in South Australia.[59] In none of the three reported decisions is the representative nature of the claim discussed, and there do not seem to be any further reports of the progress of the claim.

3 Reliance on Inherent Jurisdiction Desirable?

The judicial response to the need to look to inherent jurisdiction to support the representative parties rule is, at best, equivocal. Quite apart from the judicial reluctance to rely on inherent jurisdiction, there are a number of other problems with this approach.[60]

It is arguable that leaving the formulation of appropriate procedures to individual judges may itself offend against the principles of consistency and equality.[61] The variety of judicial responses to the lack of guidance detailed above provides some evidence for this

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[58] (1993) 10 ACSR 11.

[59] *Danae Investment Trust Plc v Macintosh Nominees Pty Ltd* (1993) 11 ACSR 523.

[60] This thesis is confined to considering whether judicial innovation in the context of the representative parties rule is desirable, as opposed to examining whether, as a constitutional issue, it is generally desirable, (there is an overview of the latter question in Andrews (1997) 18-20).

[61] Donnan (2000) 96 recommends that Australian States enact legislation equivalent to the Part IVA in order to 'promote certainty and consistency, and prevent anomalies arising from forum shopping'.

view. On a practical level, it has been suggested that it would be a 'brave plaintiff' who brought a representative claim given the apparent judicial reluctance to fashion the necessary procedures,[62] or, it might added, given the uncertainty as to the likely judicial response.[63]

These considerations support Dockray's conclusion that '[m]ajor innovations in procedural law should ... be recognised as an institutional responsibility, not a matter on which individual judges respond to the pleas of particular litigants.' The discussion of the features of the representative parties rule in Chapter 2 argued that the matters which remain uncertain are many and significant, and it is arguable that the 'scale and complexity of the proposed regulation' of the representative parties rule would be a 'major innovation',[64] suggesting that legislative intervention[65] is preferable to reliance on the *ad hoc* exercise of inherent jurisdiction.[66]

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[62] Abrahams (1996) 169 referring specifically to the Supreme Court of Victoria's response to the former ss 34 and 34 of the Supreme Court Act 1986 (Vic), discussed above 177-178. Donnan (2000) 96 accepts that the limited procedural guidance in the representative parties rule offers flexibility but concludes that it is 'ultimately undesirable because it fosters uncertainty and provides little protection for litigants'.

[63] Andrews (2001) 9-10 raises a similar argument in relation to the recent provisions encouraging judicial management of proceedings, noting that it confers a large element of discretion, and that '[v]ariations of style and even the element of whim can reduce the predictability of litigation.'

[64] Dockray (1997) 131; *Esanda v Carnie* (1992) 29 NSWLR 382, 390. See, for example, *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437 (CA) 459-460, 469 (rejection of the suggestion that the jurisdiction be exercised to found a rateable recovery scheme in the context of the Lloyd's litigation).

[65] Or comprehensive Practice Directions. However, even the introduction of more comprehensive, and hence more consistent, provisions by a rules committee may face claims that the power to enact rules of 'practice and procedure' has been exceeded. Such a challenge was defeated in *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Australia Ltd* (Supreme Court of Victoria Court of Appeal 8 June 2000), although the provisions in issue have subsequently been endorsed by legislative enactment, with Part 4A being inserted into the Supreme Court Act 1986 (Vic) by the Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic). This issue is discussed further in Ch 5, 299-300.

[66] However Dockray also advocates the value of inherent jurisdiction in areas 'only lightly touched by statute or rules', and suggests representative proceedings as an example of such area, Dockray (1997) 131.

Basten argues that developing procedures on an *ad hoc* basis is not fair to individual judges and that such an approach would seem likely to involve extensive use of the appeals process.[67] This suggests that relying on the court's inherent jurisdiction to develop the rule may in fact detract from the very judicial efficiency it is intended to support.

E CONCLUSION

It has been submitted that one factor which may have contributed to the restrictive interpretation of the representative parties rule is the uncertainty which surrounds significant features of its application. It might be argued that existing rules of court combined with the court's inherent jurisdiction to control civil proceedings are sufficient to support development of the necessary procedures. However, there is little to suggest judicial enthusiasm for creative application of existing rules or for reliance on inherent jurisdiction to resolve the existing uncertainties. There are, moreover, arguments which suggest that such an approach would run counter to a number of the particular advantages of the rule - consistency, certainty and efficiency. In any event, if such a course were adopted, any exercise of the court's inherent jurisdiction to control its own process must be done in such a way as to ensure that its process is not used as an instrument of injustice.[68] It is to the question of the judicial apprehension of the 'justice' of the representative parties rule that this thesis now turns.

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[67] Basten (1996) 48. Watt (2001) 101 makes a similar argument in relation to the apparent adoption of a 'broad balance of justice' approach to abuse of process, saying that it is 'as likely to multiple suits ... as to preclude them. Certainty breeds efficiency, broad discretion breeds litigation.'

[68] Cairns (4th edn) 249. The same point is made in Jacob (1987) 61-62.

CHAPTER 4 PURPOSES OF THE REPRESENTATIVE PARTIES RULE

A INTRODUCTION

The limited use of the representative parties rule thus far has inhibited express consideration of the basis of the judicial reluctance to expand its use, or the reasoning which has supported successful claims. Chapter 3 suggested that the restrictive approach adopted by the courts might be explained as a response to the uncertain ambit of the rule, enabling the court to avoid the need to resolve the many and significant issues which remain unclear. Chapter 4 argues that, alternatively or additionally,[1] it might be viewed as reflecting an assessment that, insofar as it is understood, the rule, or its use in particular circumstances, constitutes an unjustifiable limitation on a number of the principles commonly associated with a 'fair hearing'.[2] A restrictive interpretation of 'same interest' enables the court to avoid the possibility that rights will be affected without the benefit of what are perceived to be necessary procedural guarantees. However, this perception of what is 'necessary' often refers to principles with which the rule is incompatible without considering whether the purposes they advance are adequately protected by the rule even if the principles themselves are denied. Moreover, insofar as some of the purposes of procedural law are limited by the rule, there is no consideration of whether the purposes which are promoted by the rule do, in the circumstances, justify that limitation.

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[1] The two explanations are not mutually exclusive.

[2] These principles were outlined in the Introduction, 17-23.

Some of those cases which have proceeded have done so in circumstances where it is arguable that the purposes which the rule serves justify the necessary derogation from other accepted principles of procedural fairness.[3] For example, if the purpose of notifying those to be bound by the outcome of litigation and enabling them to participate in the proceedings is to maximise the accuracy of the court's decision, in a number of these cases a substantially accurate decision can be made without their involvement.

However, there has not been any explicit sustained objection to the representative parties rule on the ground that, either in its nature or in particular circumstances, it results in an unjustified limitation on particular established principles of procedure. Nor have those cases which have proceeded been consistently analysed with reference to the principles of procedure or the purposes those principles are intended to serve.[4] A number of decisions have commented on the incompatibility[5] of particular features of the rule, or of the case before the court, with other rules or principles of procedure. However, the case law has not generally appealed to the principles of procedure and their underlying purposes to support or to deny representative claims.

Focusing on the extent to which the representative parties rule serves or undermines these purposes and principles yields a clearer understanding of the dominant judicial response

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[3] However, the inevitable defeat of claims subjected to the 'separate defences' test, and of claims judged only by reference to principles with which the rule is inherently incompatible, means that the converse is not true. That is, it cannot be said that those representative claims which have been denied necessarily exemplify circumstances where the advantages of the rule outweigh its disadvantages, although some may do so.

[4] Indeed the general reliance on the restrictive approach discussed in Ch 1 has limited the opportunities for courts directly to confront the question whether, or in what circumstances, representative claims might properly proceed.

[5] Or less frequently, the compatibility.

to the rule thus far. Insofar as the explanation offered does illuminate the judicial concerns which have limited use of the rule in the past, it should provide useful insight into the factors relevant to successful reform and use of the rule in the future, enabling courts and legislators to deal more explicitly with the concerns which arguably underlie the 'tests' discussed in Chapter 1.

It may be that the success or failure of the representative claims considered is explicable on some other grounds altogether. Some alternative explanations, such as whether the consideration of the claim occurred in the course of an application to strike out, are considered below.[6] Again, as with the suggestion that the rule may have been restricted on the ground of uncertainty as to its operation, these alternative grounds may be compatible with the principled analysis which forms the main part of this Chapter. However, even if the compatibility of the case law thus far with the principled analysis proposed is coincidental, it is nevertheless argued that an approach to the rule which relies on the purposes that underlie procedural law generally, and this rule in particular, offers greater clarity and certainty than arguments which assert that the 'same' interest does or does not exist, or that separate defences will or will not be denied.[7]

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[6] 258-260.

[7] That this approach is also arguably consistent with much of the existing case law suggests that its implementation in practice is at least not precluded by existing authority.

B PRINCIPLES SUPPORTED BY THE REPRESENTATIVE PARTIES RULE

Despite the generally restrictive interpretation of the 'same interest' required for the representative parties rule it has never been denied that it may have some utility. One of the most significant features of the rule is its potential to determine in a single claim a number of otherwise independent actions. Avoiding this potential multiplication of suits supports a number of concerns of procedural law. It serves the goals of finality, consistency, access to justice and, insofar as it is a goal of civil procedure, deterrence.[8] There has been some judicial recognition of the purposes which the rule is intended to serve.

1 Finality, Consistency and Certainty

That the representative parties rule has the potential to serve the principle of finality[9] was noted in *Bollinger v Goldwell*[10] where it was said that the 'power to bring representative proceedings is a beneficial power, as tending to finality in disputes'. However, whether a representative claim brings litigation for all those interested in a dispute to an end in a single proceeding will depend on the extent of the *res judicata* effect of any order in the proceedings

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[8] Discussed in the Introduction, 11-16.

[9] And, therefore, promote consistency and certainty.

[10] [1971] FSR 405, 411. The representative claim was however denied due to the inclusion of an allegation that all members of the defendant class were estopped by their knowledge of the plaintiffs' use of the word 'champagne' from contending that the use was wrongful, discussed below 254 n213.

and the extent to which those represented are entitled to dispute the binding nature of any order made. It was noted in Chapter 2 that these questions remain open.[11]

2 Access to Justice

The saving of costs as a particular benefit of the rule has been made plain in a number of representative actions. In *Bedford v Ellis* Lord Shand commented that '[t]he rule has been framed and adopted for a useful and important object - the saving of the multiplication of actions with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. ... The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving of multiplication of suits'.[12] In the New Zealand decision *RJ Flowers Ltd v Burns*[13] McGechan J said that 'if injustice can be avoided, the rule can and should be applied to serve the interests of expedition and economy, both indeed the underlying reason for its existence.' The value of this feature of the representative parties rule is demonstrated by the plaintiff's

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[11] Furthermore, where the representative claim seeks a declaration in relation to a common question, anticipating that further litigation relying on that declaration by the class members might follow, the rule may in fact be criticised for offending against the principle of finality. This possibility is discussed below 198-203.

[12] [1901] AC 1 (HL) 14. In *The Irish Rowan* [1991] 2 QB 206 (CA) 241 Purchas LJ thought the 'benefits of a representative action ... in a multiple contractual arrangement ... are too obvious to require statement', continuing that 'the convenience and expedition of litigation is far better served with a wide interpretation of the rule.'

[13] [1987] 1 NZLR 260, 271. Rule 4 of the High Court Rules of New Zealand in force at the time required that the rules be interpreted to ensure the 'just, speedy, and inexpensive determination of any proceeding'.

willingness in *Equitable Life Assurance Society v Hyman*[14] to pay the costs of the nominated representative defendant in order that the question as to the validity of the plaintiff's means of calculating bonuses under particular policies could be determined for all such policy-holders in a single action.[15] The desire to limit the expense of litigation may be especially acute where the total amount in question is small,[16] or the amounts which would be sought by each member of the represented class are small. McHugh J noted the latter benefit in *Carnie v Esanda*[17] where his Honour said that '[t]he cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done effectively and efficiently on their behalf by one person with the same community of interest as other consumers.' He also adverted to the potential savings for judicial resources, saying that '[n]or should the courts' lists be cluttered by numerous actions when one action can effectively determine the rights of many.'

As noted, the potential to pool resources is perceived to be a benefit to the representative and those represented, and the avoidance of possibly many individual suits to represent a saving for the individual party and also for judicial resources. However, even these apparent advantages of the rule have, on occasions, been viewed as disadvantages.

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[14] [2000] 3 WLR 529 (HL).

[15] Andrews (2000) 9.

[16] Sargant J's finding in *Re Braybrook* [1916] WN 74 that five persons were not 'numerous' as required by the original rule 'unless amount in question was very small' suggests the influence of this concern, discussed in Ch 1, 30.

[17] (1995) 182 CLR 398, 429-430.

Where a representative claimant action is brought, the perception that the rule offers a saving to the defendant is not universal. If the representative claim fails, a number of decisions before *The Vimeira*[18] expressed the concern that, as it was thought, those represented could not be liable for costs and therefore the individual defendant would be unable to recover potentially inflated costs arising out of the nature of the action from anyone but the named claimant,[19] in circumstances where the defendant was unable to apply for security for costs.[20]

Kell argues that the position adopted by the courts was due to a perceived lack of jurisdiction to make an order for costs against those represented, 'rather than any disinclination to exercise a potential discretion to make represented persons so liable.'[21] Therefore, the determination that non-parties can be liable for the costs of an action may address the concern that defendants could only recover costs from the named representative. This will, of course, depend on the circumstances in which it is perceived that a costs order might be made against non-parties,[22] and on whether apparent prohibition on seeking security

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[18] [1986] AC 965 (HL), holding that the power to award costs is not limited to awards against parties to the proceedings, discussed in Ch 2, 159.

[19] The *Markt* case [1910] 2 KB 1021 (CA) 1039; *Radcliffe v Coltsfoot* [1984-86] Manx LR 386, 412.

[20] The *CBS/Sony* case [1987] FSR 262, 271.

[21] Kell (1994) 233. See *Price v Rhondda UDC* [1923] WN 228, relying on *Scott v Pascall and Adams* (1847) 15 Sim 559, 561, 60 ER 736; affirmed in (1847) 2 Ph 390, 41 ER 993.

[22] It has not yet been suggested that representation alone would be sufficient, but maintaining or financing the action was considered in *Symphony Group Plc v Hodgson* [1994] QB 179 (CA) 192 to be 'undoubtedly' a 'proper case for the exercise of the discretion' (discussed in Ch 2, 161-162, where it was also noted that financing an action may also subject those represented to an order to provide security for costs, 166). Basten (1996) 47 considers that recourse to the power to award costs against those represented is unlikely but that, in his view, the 'danger is not minimal', referring to the possibility that 'where legal aid is not available, group members sometimes ... seek to raise money to support the representative plaintiff', and concluding that '[s]uch conduct might well render group members at risk of an adverse costs order.'

for costs against a representative claimant remains.[23] However, the power to award costs against non-parties may give rise to a disincentive for courts to allow representative actions to proceed, insofar as there is any concern that allowing a representative claim to proceed might expose those represented to costs liability without their having been notified of the proceedings or having consented to their representation.[24] If those represented may be liable for costs there is also a 'danger that ... persons will take steps studiously to avoid being represented'.[25] In the Appeal Division of the Supreme Court of Victoria decision of *Burns Philp & Co Ltd v Bhagat*, those represented in the litigation had given the consents required by the former Supreme Court Act 1986 (Vic) representative procedure on the understanding that no order for costs would be made against them if the action failed.[26]

Moreover, the considerable uncertainty as to the representative's ability to recover costs from those represented raises a question as to why a claimant would voluntarily undertake exposure to a possibly higher costs order than if an individual claim had been brought.[27] Financial support for the litigation from those represented[28] and avoiding claims for security for costs[29] may explain the decision to act as a representative in some cases.

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[23] CPR 25.13(2)(f), discussed in Ch 2, 165-166.

[24] These features of the representative parties rule are concerns in their own right and are discussed further below, 203-207. Potential exposure to a costs order may serve to magnify these concerns.

[25] Kell (1994) 238. Insofar as those represented are able to exclude themselves from the litigation, *The Irish Rowan* [1991] 2 QB 206 (CA) 240-241, 245, discussed in Ch 2, 138-141.

[26] [1993] 1 VR 203, 205.

[27] Kell (1993b) 309. Andrews (2000) 10 notes that there is as yet 'no clear guidance as to how the courts will in fact exercise their undoubted discretion' to make costs orders against those represented, and that this 'cloudiness is a strong disincentive against bringing representative proceedings'.

[28] Or from groups interested in supporting an action.

[29] Discussed in Ch 2, 165-166.

Presumably the voluntary nature of the exposure to this risk explains why this question has not troubled the courts but it will be of interest to those who would promote reform and greater use of the representative parties rule.[30]

Even if the representative claimant action succeeds and the individual defendant is not entitled to seek costs, those represented have, on occasions, been perceived to receive thereby an unjustified advantage - to benefit from the litigation without being subject to its burdens.[31] Kirby P, dissenting in the NSW Court of Appeal decision in *Esanda v Carnie*,[32] took the view that it is 'impossible to underestimate' the effect which the reluctance to offer this advantage to those represented has had on the course of the representative action. It was his opinion that, in addition to the concern for the rights of the individual defendant, there also appeared to be 'an aversion on the part of some to dispensing "free justice"'. In *Radcliffe v Coltsfoot* Hytner JA commented that 'victory would leave it open to large institutions ... to bring much cheaper proceedings without having incurred initial financial risks.'[33]

Moreover, so long as use of the rule is routinely rejected or is uncertain, then rather than representing a saving for courts and litigants, it is more likely to be viewed as an unjustifiable expense. If a claimant seeks to bring an action as a representative one, and is

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[30] This principle of adversarial freedom (discussed below 255) may also explain why courts were not troubled by the fact that claimants who chose to bring actions against representative defendants were thought to be able only to recover costs from the named representative.

[31] This view is an interesting contrast to the suggestion in *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72, 100-101 (discussed in Ch 2, 114-115) that the operation of issue estoppel may mean that even a successful representative claimant action may be detrimental to those represented.

[32] (1992) 29 NSWLR 382, 402, 400; Kell (1993a) 535-536.

[33] [1984-86] Manx LR 386, 412. It is not clear whether class members who were financially supporting the litigation would be viewed differently.

challenged and fails, the exercise can only have added expense to the proceedings without there being any obvious gain.[34]

C PRINCIPLES UNDERMINED BY THE REPRESENTATIVE PARTIES RULE

In contrast to the limited reference to the purposes served by the rule, there has been considerable judicial criticism of its denial of other rules, and of principles of procedure. It is argued that examination of this criticism reveals two difficulties. First, much of this criticism focuses on principles which the rule denies without considering their underlying purpose and, therefore, without considering whether the relevant purpose might be adequately served even though the particular principle is denied. Second, there is a tendency to focus on the respects in which the representative parties rule is inferior to the traditional model of individual litigation without balancing those shortcomings against the particular benefits the rule is intended to offer.

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[34] The rule's potential to support the principle that justice should not be evaded does not appear to have been the subject of comment in representative claims.

1 Finality

It was noted in Chapter 1 that there has been resistance to a test for 'same interest' based on a 'common question of law or fact'[35] due to a perception that the test ought to be clearly distinguished from that for joinder.[36] Such a test might also be criticised on the basis that it leaves open the possibility for further and separate actions following the representative one.

Objections along these lines have occasionally been raised where the representative claim seeks a declaration anticipating that members of the represented class will rely on it in further proceedings. In *Radcliffe v Coltsfoot*[37] the Staff of Government were of the view that there is nothing in the rule itself[38] to bar a claim for declaratory relief where the purpose is to dispose of all issues in the case save quantification of damage, even where subsequent actions by members of the class would be necessary, but thought it a matter relevant to the court's discretion. Hytner JA then turned to 'issues of finality' and held that given that a declaration that the defendants, or any of them, owed a duty of care in the performance of their duties under the Banking Acts to the investors represented by the plaintiff would potentially leave

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[35] Such as that introduced by the High Court of Australia in *Carnie v Esanda* (1995) 182 CLR 398, discussed in Ch 1, 72-75.

[36] Discussed in Ch 1, 75-76.

[37] [1984-86] Manx LR 386, 409.

[38] The relevant rule was in substantially similar terms to the original rule, and is set out in the judgment, [1984-86] Manx LR 386, 394.

open questions other than quantification of damage, the representative claim did not demonstrate sufficient common interest and so should not proceed.[39]

However, the possibility of further separate actions is ever present under the representative parties rule. Even if all elements of the claim and the remedy sought can be substantially accurately answered in the absence of those represented, if class membership can be challenged, further and separate actions are an inevitable potential feature of representation. Any member of the class represented may challenge liability on the basis of circumstances particular to him or her.[40] Alternatively, a liable individual may challenge the person relying on an order made in a representative action to prove his or her membership of the class represented. For example, in *Bedford v Ellis*,[41] seven plaintiffs sued on behalf of themselves and all other growers of fruit, vegetables, roots and herbs within the meaning of the Covent Garden Market Act, 1828, seeking to enforce various preferential rights which they alleged they had been given by the Act. A grower demanding the rights established in that case may avoid, due to the earlier representative action, the need to demonstrate that such rights existed. Nonetheless, the defendant could require such an individual to prove his or her membership of the class. The possibility of further separate individual actions based on a finding in an earlier representative proceeding is, it seems, as inevitable as the possibility of separate defences, and as likely to defeat use of the rule.

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[39] [1984-86] Manx LR 386, 410, 415, referring to *Bollinger v Goldwell* [1971] FSR 405 as authority for the need for the representative action finally to dispose of the dispute. See also K Uff 'Recent Developments in Representative Actions' (1987) 6 Civil Justice Q 15, 16-17.

[40] Discussed in Ch 2, 109-110.

[41] [1901] AC 1 (HL) 11.

It is, therefore, surprising that Brennan J in *Carnie v Esanda*[42] appeared to view the potential need to demonstrate membership of the represented group as relevant to the court's discretion to disallow an otherwise valid representative claim. His Honour noted the defendant's objections that it would be necessary to demonstrate that each plaintiff had a relevant agreement and that the agreement contravened the Act in issue, but took the view that the objections were 'without substance so far as they challenge the availability of the representative procedure'. He then went on to say that '[h]owever, the defendant's objections are relevant to the second aspect of Pt 8, r. 13(1): should the action be permitted to continue as a representative action?' This raises the prospect that the need to prove membership of class as defined could be considered a reason to defeat a claim to use the representative parties rule. Allowing the possibility of further claims regarding membership of the class to defeat use of the rule results in the inevitable defeat of any representative claim.

This potential for further actions in any representative claim has been acknowledged on a number of occasions. There have been decisions which have recognised that orders made in representative actions are incapable of deciding anything but common questions, and cannot establish 'the personal rights of these representees, but establishes class-rights alone.'[43] Buckley LJ in the *Markt* case[44] was of the opinion that the firms represented by the plaintiff in that case could recover damages but that it would require further steps

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[42] (1995) 182 CLR 398, 410.

[43] Stoljar (1957) 61-62.

[44] [1910] 2 KB 1021 (CA) 1047-1048.

> such as are always necessary in a representative action to give to the represented parties the particular relief to which he is entitled in respect of the common relief which is for the benefit of all. Subsequent proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation he was for some reason personal to himself not entitled to recover. Such difficulties occur in every representative action.

In *Commissioners of Sewers of the City of London v Gellatly*[45] Jessel MR noted that 'all that was finally decided was the existence of a general right of common, and it was open to Mr. *Gellatly* to shew that he had special ground of exemption: the decree was not final against him for any other purpose except the establishment of the general right.'

Views may differ as to the circumstances in which it is desirable to determine an isolated issue of fact or law in a representative claim. *Radcliffe v Coltsfoot*, for example, takes the view, with reference to 'finality', that it is not desirable to do this in a representative claim where any issue other than quantification of damage is left open for determination in later proceedings, or where the recovery of damages is a primary, rather than a subsidiary purpose.[46] It is submitted that the circumstances when it is appropriate to derogate from the

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[45] (1876) 3 ChD 610, 616.

[46] The decision seems to have taken the view that the declarations sought in the *Bedford v Ellis* [1901] AC 1 (HL) and *Jones v Cory Brothers & Co Ltd* (1921) 152 LTJ 70 could be distinguished on this basis, [1984-86] Manx LR 386, 402, 409 (although Hytner JA's discussion of the latter case does suggest issues other than quantification of damages which might have arisen in later litigation, [1984-86] Manx LR 386, 402). Whether the declarations sought in the *Prudential Assurance* case [1981] Ch 229 could be so distinguished was not addressed directly as it was held that the determination of the question whether that decision would be followed in the courts of the Isle of Man was unnecessary for the purposes of the appeal, [1984-86] Manx LR 386, 409. The damages sought in *CBS Songs Ltd v Amstrad Consumer Electronics Plc (No 2)* [1988] Ch 61 (CA) 86 were also characterised as 'a quite subsidiary form of relief' by Sir Denys Buckley.

principle of finality in this manner are best determined by reference to the aims of procedural law and not by attempting to distinguish between the 'primary' and 'subsidiary' motivations in bringing a representative claim.[47]

Moreover, while it is theoretically true that presenting the court with a common question of law or fact necessarily leaves further questions unanswered and so raises the possibility of further claims, in fact resolution of a common question may achieve a significant degree of finality.[48]

Lastly, finality is only one of the principles of procedural law. To rely on 'finality' as a reason to defeat a claim to use the representative parties rule without acknowledging the need to balance it against the other purposes of procedural law is to grant it an absolute nature which is not warranted. It is not irrelevant but does need to be weighed against other goals.

There has been some considerable acknowledgement of the necessary limitations on the principle of finality inherent in the representative parties rule, and while there have been isolated objections on this basis, it has not been the most significant objection raised against claims to use the rule. One significant aim of procedural law is accuracy, and it will be argued

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[47] Hytner JA's judgment suggests that an appropriate 'primary' purpose of a representative claimant action is to force a defendant to comply with his or her legal obligations, [1984-86] Manx LR 386, 404-405. As noted below (215 n83) in the discussion of the construction of instrument cases, there may be little to recommend a representative proceeding over an individual action, from the perspective of those represented, in such circumstances. Moreover, it was suggested in Ch 1 that finding that there is a question common to a number of people which can be accurately determined in their absence suggests that it is desirable that it be answered in a representative claim, 85.

[48] There is arguably some suggestion of this view in McHugh J's references in *Carnie v Esanda* to the prospect that a representative claim can '*effectively* determine the rights of many', (1995) 182 CLR 398, 430 (emphasis added).

that the generally restrictive approach to the rule may be understood as primarily a perception that it is likely to generate inaccurate outcomes. Conversely, it is argued that the circumstances of many of the representative claims which have gone ahead were less likely to give rise to this concern. However, this concern for accuracy has rarely been explicitly cited as a reason either to deny, or to permit, a representative claim to proceed. Courts have been more inclined to refer to a particular principle of procedure, such as, for example, the right to be heard, to deny the claim. Reference to such a principle without any reference to its purpose creates the impression that the principle has independent and absolute force. The opportunity to examine more closely the purposes of the principle, and how those purposes might be best protected in a representative claim is lost.

2 Entitlement to be Heard

There is no suggestion in the cases that those represented need to be notified even that proceedings are pending.[49] Even if those represented are aware that litigation on their behalf or against their representative is proceeding, the representative is in control of the litigation and there is no provision for or requirement that the representative consult with those represented.[50]

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[49] The current rule and the 1962 rule provide that a judgment obtained in a representative action can only be enforced against or, in the case of the current rule, by a member of the class with the court's permission (Ch 2, 119-120). The possibility that this provision might fulfill the principle of notice and hearing is discussed below, 242-244. It remains true that there is no requirement to notify those represented of the representative action.

[50] Discussed in Ch 2, 135 and 136-137.

The fact that there is no need for those represented to authorise the named representative, or to even know that a claim is proceeding on their behalf or against them, has been the subject of comment in a number of decisions refusing resort to the rule. In the *Markt* case, for example, Fletcher Moulton LJ commented that he could 'conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him'.[51]

However, attention has more frequently been focused on the effect on a defendant faced with a representative claim. The fact that those represented will not participate in the proceedings has been viewed as an unwarranted limitation on the rights of the individual faced with a representative claimant. The fact that they need not be individually identified to the defendant and were not susceptible to orders for discovery has been seen both as an injustice to the individual defendant facing a class claim, and as an advantage to those represented.[52] While discussing the differences between the representative parties rule and joinder in the *Markt* case Fletcher Moulton LJ commented that '[t]he differences from the point of view of the defendant are equally striking. Those in whose behalf the action .... is brought ... are not subject to the ordinary liabilities of litigants in respect of discovery, &c'.[53] In the *CBS/Sony* case, Jones J held that the proceedings instituted by the plaintiffs on behalf

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[51] [1910] 2 KB 1021 (CA) 1040. In *Winder v Ward* The Times 27 February 1957 (CA) Jenkins LJ commented that if the representative claim seeking an injunction preventing the members of a Hunt from trespassing on the plaintiff's land were successful, then 'any member of the Hunt could be committed to prison for contempt of court if he went across the plaintiff's land, whether he had heard of the action or not.'

[52] As with the discussion of costs above (196 n30), such concerns have not been expressed in representative defendant claims. In these circumstances the individual claimant chooses to sue a representative and so chooses in effect to forgo knowledge of those represented and/or discovery against them. The principle of adversarial freedom is discussed independently below, 252-258.

[53] [1910] 2 KB 1021 (CA) 1039.

of all members of the International Federation of Phonogram and Videogram Producers were 'wholly inappropriate' to be continued as a representative action but went on to say that even if he were wrong, he would exercise his discretion to disallow the representative form of the action on the basis that it would be inconvenient and unfair to the defendants and, in particular, would deprive them of their right to make an application for an order for discovery.[54]

Those decisions which have referred to the denial of the defendant's right to discovery as a reason for disallowing the representative claim have rarely explained the basis for this concern. Merely to assert that it is the defendant's 'right' which is being denied is not sufficient. Until recently the defendant's entitlement under the rules was to seek discovery from the other parties to the proceedings. It is not clear that those represented could ever have been considered to be parties, and the more recent formulations of the rule deny that possibility altogether.[55]

Beyond the defendant's strict entitlement under the rules, denying the defendant discovery from those represented does not offend against the idea of a fair hearing as elaborated upon by reference to the need for equality between the parties.[56] Equality is understood to require that the court hear each party, and also that each party should hear the

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[54] [1987] FSR 262, 271. His Honour was also concerned that the nature of the proceedings would deprive the defendants of the ability to apply for an order for security for costs (Ch 2, 165). Similar comments were made in *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 273; *Radcliffe v Coltsfoot* [1984-86] Manx LR 386, 412.

[55] Discussed in Ch 2, 103-104. The fact that there is now provision for non-party disclosure does not change the position. Parties are not 'entitled' to disclosure from non-parties, nor does the fact that those represented need not be identified create an unusual difficulty - the provisions enabling disclosure from non-parties do not require either party to provide a list of names of persons from whom it might usefully be sought.

[56] Galligan (1996) 220.

arguments of the other and have an opportunity to respond to those arguments.[57] The defendant has always been able to seek discovery from the named representative. Those represented do not place material before the court.

It is argued that the references to the failure to notify those represented, their consequent inability to participate in the proceedings, and the defendant's inability to seek discovery from them as reasons to disallow resort to the rule, are more clearly understood by reference to the purposes which those principles and rules are intended to serve. It is undeniable that the rule conflicts with the principle of notification and hearing, and that those represented are not subject to orders for disclosure. If this conflict is sufficient, of itself, to render the rule 'unfair', then resort to the rule will always be denied.[58] If, however, these inevitable conflicts are acknowledged, and reference is instead made to the purposes of notification or of disclosure, an assessment can be made as to whether those purposes are adequately protected by the rule, even though it denies particular principles or procedures. Notification and hearing, and disclosure, are usually understood to serve procedure's instrumental role - to facilitate accurate decisions. That is, if those represented were able to participate, they may demonstrate that they should not, for reasons personal to them, be

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[57] *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272, 279-280; *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA) 508; Galligan (1996) 130, 219; Lord Woolf *Interim Report* (1995) 3; Andrews (1994) 17-18; Bayles (1987) 32; Summers (1974) 24-25.

[58] Similarly, in the *CBS/Sony* case [1987] FSR 262, 271 Jones J found that the representative claim before him did not demonstrate the necessary 'same interest' and continued that, if he was wrong in this assessment, he would nevertheless exercise his discretion to disallow the action in its representative form 'as it is both inconvenient and unfair to the defendants. In particular a representative action will deprive the defendants of their right to make an application for security for costs'. If it is the case that the rule has this effect (Ch 2, 165-166), that fact cannot necessarily mean that the rule is 'unfair', or any use of it would be thereby denied.

bound by an adverse finding.[59] Conversely, if the claim were successful, disclosure might reveal that some members of the class were not in fact entitled to benefit from the claim.

(a) Notification and participation, and accuracy

A number of those representative actions which have proceeded can be justified on the basis that notification of, and participation by, those represented would not have made a significant contribution to the accuracy of the outcome.

(i) Accurate determination of claim: class defined in terms of the claim

Where the class is defined by the elements of the claim brought, as in *EMI Records Ltd v Kudhail*,[60] there is no possibility that an order could be enforced against a person not liable[61] - in order to demonstrate that any individual is a member of the class, all elements of the action must be proved. In that case, the defendants were sued on behalf of all other persons selling cassette tapes bearing the trade name 'Oak Records'. The evidence showed that such tapes

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[59] Or by a finding in favour of the class insofar as that may also be perceived to be ultimately detrimental to their interests, discussed with reference to the Canadian decision *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72 in Ch 1, 114-115. Andrews (2000) 15 alludes to the potential for 'inaccurate' findings.

[60] [1985] FSR 36 (CA).

[61] Or relied upon by a person not entitled.

were pirated, and that the name had been adopted to avoid detection. Proof of membership of the class would also prove commission of the tort.[62]

(ii) Accurate determination of claim: admissions

Confidence that a substantially accurate decision can be reached in the absence of those represented might be based on admissions by the party faced with a representative claim. If a defendant admits liability to the represented class, the question of the accuracy of the court's finding that the defendant is so liable does not arise.[63] *EMI Records Ltd v Riley*[64] provides an example. In that case the plaintiffs, acting as the representatives of all members of the British Phonographic Industry Ltd (BPI), brought a claim alleging breach of copyright by the defendant. It is the legal owner of copyright who is entitled to sue for infringement, and, under the legislation then in force, ownership was presumed if claimed and not denied.[65] The statement of claim asserted that the members of the class represented were continually and frequently producing, making or distributing records embodying new sound recordings and that the member of the class responsible for each sound recording owned the copyright therein or was the exclusive licensee of the copyright. The defendant expressly did not deny

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[62] However, the possibility that it was 'inaccurate' to grant an injunction against a representative of unknown persons is considered in Ch 5.

[63] This is consistent with the principle of adversarial freedom, whose role in representative claims is discussed below, 252-258.

[64] [1981] 1 WLR 923.

[65] Copyright Act 1956 s 20(1)(b); H Laddie, P Prescott and M Vitoria *The Modern Law of Copyright and Designs* (Butterworths London 1980) 166.

the existence of copyright. She admitted authorising the production and sale of pirate records. estimating that the probable quantity affecting class members was 2,900 tapes. This admission was based on the assumption that her sales affected members of the class which the defendant disputed on the ground that her sales were too small to affect large record companies. Dillon J took this to mean that 'she is accepting that 2,900 out of the 2,980 tapes she admits selling were pirated versions of recordings made by members of the class'.[66] Without such admissions, the nature of the class represented arguably made it unlikely that an accurate determination could be made in the absence of those represented. Permitting the claim to go ahead suggests confidence that the rights of all members of the BPI had been infringed by the defendant. However, the understanding on which the claim proceeded was that 'nearly all records in this country, ..., are produced, made or distributed by the members of the B.P.I.' While this might support a presumption that all those whose rights had been infringed were members of the BPI, this is not the same as the presumption that all members' rights had been infringed. The number of members of the association[67] might have made it probable that the rights of some members must have been infringed. However, it also makes it improbable that the rights of all members, on whose behalf the action was brought, had been infringed by the defendant. The *CBS/Sony* case[68] provides an illustration. In that case the plaintiffs sued on behalf of themselves and all other members of the International Federation of Phonogram and Videogram Producers (IFPI) and alleged that the defendants had breached

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[66] On the motion for judgment on admissions, Dillon J granted the injunction and inquiry as to damages for breach of copyright sought, and ordered that the defendant pay the plaintiffs' costs. The 'accuracy' referred to here concerns only the defendant's express failure to contest the assertion of copyright and her admission of breach of that copyright. The accuracy of the orders made is considered below, 234-237.

[67] Dillon J commented that the BPI was not 'a case of a small number of manufacturers getting together', *EMI Records Ltd v Riley* [1981] 1 WLR 923, 926.

[68] [1987] FSR 262.

their copyright. The defendants filed a summons to strike out the plaintiffs' entitlement to sue in a representative capacity.[69] Jones J found that the defendants had established an arguable case that they owned the copyright in the sound recordings in respect of which the plaintiffs alleged infringement of copyright. He concluded that where infringement of copyright is alleged 'it will be necessary for the plaintiffs to establish that they are entitled to copyright in respect of each individual sound recording. A bare assertion that a large library of sound recordings has been infringed without any further particulars is embarrassing and cannot be sustained' and went on to note that 'during the hearing, the plaintiffs were reduced to a submission that only sixteen members had a common interest in these proceedings. Quite clearly all the members of the IFPI in various countries in the world cannot possibly have any interest in the result of the present action whilst they have no common grievance'.[70] He held that the proceedings were inappropriate to be continued as a representative action and distinguished *EMI Records Ltd v Riley*[71] on the basis of the defendant's admissions.[72] Although the dismissal of the representative claim was attributed to the lack of 'common interest' or 'common grievance', it is submitted that it is better explained by reference to the clear probability of inaccuracy. Permitting a claim that the defendants had infringed the copyright of all members of the IFPI would have been manifestly inaccurate.[73]

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[69] The plaintiffs also applied to amend their statement of claim, restricting their representation to phonogram members of the IFPI, some 685 persons.

[70] [1987] FSR 262, 270-271.

[71] [1981] 1 WLR 923.

[72] [1987] FSR 262, 269.

[73] This is not to say that groups of copyright holders could never be represented in the absence of admissions. It may be that convincing evidence of entitlement or reliance on the presumption of authorship where it appears on copies of the work as published contained in s 104 of the Copyright, Designs and Patents Act 1988 (H Laddie, P Prescott and M Vitoria *The Modern Law of Copyright and Designs* (2nd edn Butterworths London 1995) 359-360) may enable accurate determination of copyright entitlement even in the absence of each

Cases involving admissions aside, there are other representative claims which might be explained on the basis that the question put before the court was such that it was reasonable for the court to assume that participation by those represented would not enable a significantly more accurate resolution.

(iii) Accurate determination of claim: interpretation of a statute or instrument

Courts have been willing to allow representative claimant actions which depend upon interpretation of a statute. In *Wyld v Silver*[74] the Court of Appeal held that the plaintiffs were entitled to sue on behalf of themselves and all other inhabitants of the parish of Wraysbury to enforce the right granted to 'the inhabitants of the said Parish' under a private Act of Parliament to hold an annual fair upon certain wastelands of the parish. They were held to be entitled to the right and to an injunction restraining the defendant owner of the land from doing any act on the land which would prevent or hinder the carrying on of the fair.[75] In *Bedford v Ellis*[76] the plaintiffs were held to be entitled to sue on their own behalf and on

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individual copyright holder. In *Columbia Picture Industries Inc v Robinson* [1986] FSR 367, 417-419, the plantiffs' entitlement to sue in respect of eight out of the 104 films under consideration remained in issue after the other claims to copyright had been accepted or abandoned. Scott J examined the plaintiffs' titles without distinguishing between thirty-five named plaintiffs or the fourteen members of the Motion Picture Association of America Inc represented in the litigation, and found an exclusive licence in favour of Intervision Video Ltd, a 'plaintiff on whose behalf relief ... is sought', 418 (these remarks do not appear in the [1987] Ch 38 report).

[74] [1963] 1 QB 169 (CA) 183.

[75] The accuracy of the remedies granted is considered separately below, 225-229.

[76] [1901] AC 1 (HL). Further examples include *Jones v Cory Brothers & Co Ltd* (1921) 152 LTJ 70 (CA); *Meade v Haringey London BC* [1979] 1 WLR 637 (CA); *Mundy v Cunningham* [1973] 1 NZLR 555, affirmed on appeal [1973] 2 NZLR 654.

behalf of 'all others the growers of fruit flowers vegetables roots and herbs within the meaning of the Covent Garden Market Act 1828' in their claim for a declaration of the statutory privileges granted to that group of persons under the Act and an injunction restraining the owner of the market from doing any act contrary to such a decree. Although significant for its amendment of the test for 'same interest', the decision in *Carnie v Esanda* that the case was one which, *prima facie*, might appropriately be brought as a representative proceeding is not in itself very surprising in light of the history of interpretation of the representative parties rule, given that the plaintiffs essentially sought a declaration as to the meaning of an Act of Parliament.[77]

Similarly, courts have permitted representative actions to proceed where the dispute concerns the interpretation of an instrument other than a statute and those represented are all parties to or derive rights from that instrument. One group of cases which have proceeded are disputes between the members of unincorporated associations over the interpretation of the contract which constitutes the association. In such cases the parties to the proceedings and all those represented will be party to the contract.[78] For example, in *John v Rees*[79] Megarry J adopted the test conventionally applied, and found that there was clear common interest

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[77] (1995) 182 CLR 398. Cohen J's decision to allow the initial appeal from the Master's decision to strike out the statement of claim found that the representative claim was within established principles, *Carnie v Esanda (No 1)* (1990) CSCLC ¶55-983, 58,920. In the NSW Court of Appeal decision, *Esanda v Carnie* (1992) 29 NSWLR 382, 402 Kirby P also characterises the claim as one seeking 'a declaration as to the meaning of an Act of Parliament'.

[78] Warburton (2nd edn) 66. Aronson (6th edn) 99 refers to the rule being 'liberally' applied in such cases but does not consider the matter in any detail.

[79] [1970] Ch 345. Further examples include *Re Lead Company's Workmen's Fund Society* [1904] 2 Ch 196; *Thellusson v Valentia* [1906] 1 Ch 480; *Parr v Lancashire and Cheshire Miners' Federation* [1913] 1 Ch 366; *Clark v University of Melbourne* [1978] VR 457. In *Andrews v Salmon* [1888] WN 102 the plaintiff sought a declaration that his expulsion had been invalid against the defendants as representatives only of the members of the committee which had purported to expel him.

between the members of an unincorporated association in having an internal dispute resolved. Representative claims involving the interpretation of wills have also proceeded on behalf of and against representatives of prospective beneficiaries.[80]

An analysis of these cases with reference to the purposes of procedural law and the principles which support those purposes provides a clearer explanation of why they have been permitted to proceed as representative claims than an assertion that those represented have 'a common interest, and a common grievance' and that 'the relief claimed is beneficial to all.'

It is arguable that, in the majority of these cases, it makes little difference to the accuracy of the court's conclusion if the claimant sues as an individual or as a representative of the group. Insofar as notification and participation are understood to be important because they enhance the court's ability to reach more accurate outcomes, it could be argued that the participation of two parties with opposing views of the meaning of an instrument is sufficient to assist the court in its interpretation, and that the participation of more people would offer little in the way of further elucidation. The plaintiff in *John v Rees* sought a declaration that the continuation of a meeting after he purported to adjourn it was invalid and an injunction preventing the three defendants - being the secretary, new president and new treasurer - from dealing with the moneys or property of the association. He claimed to represent all members of the Pembrokeshire Divisional Labour Party except the three defendants. Over twenty affidavits were filed by members of the association stating that the members concerned did not wish to be represented by the plaintiff, and the defendants brought a motion seeking the

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[80] *Re Braybrook* [1916] WN 74; *Eighth Union Building Society v Carnegie* (1893) 19 VLR 388; *Trustees Executors and Agency Co Ltd v Sparling* (1894) 16 ALT 34. Contrast the decision denying use of the representative parties rule in *Allen v Allen* [1902-03] St R Qd 306.

striking out of the words of representation. Megarry J was of the opinion that so long as those named put forward every view then he could not see that 'any real harm' is done to a person who is represented by the plaintiff when his or her view is different from the plaintiff's, 'provided that there is a defendant who does stand for the cause espoused by the person being represented: actions are decided by reference to justice according to law, and not by counting heads. ...[A] mathematical precision in securing that each side is shown as representing the right number of supporters is of little moment.'[81] These comments were adopted by Kaye J in the Supreme Court of Victoria in *Clark v University of Melbourne*, noting that some members of the Students' Representative Council supported the making of all the payments from the Melbourne University Council to the Students' Representative Council in dispute, others supported some only, while others contested all the payments made. His Honour went on to say that

> the defence of those who supported all payments would therefore have been the same as the defence which was fully and meticulously presented ... on behalf of the secondnamed defendants. Those who were unfavourably disposed to the making of all payments would have had the reasons for their opposition advanced by counsel for the plaintiff. Finally, those who favoured some only of the payments would have shared the secondnamed defendants' defence to the extent that they were in agreement, while their opposition to other payments would have been placed before the Court by the

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[81] [1970] Ch 345, 371.

plaintiff. In the result all views of other members of the Students' Representative Council have been fairly presented in these proceedings.[82]

While the fact that the claim is representative may be viewed as making little difference to the information on which the court will base its decision or to the effect on those represented in many such cases, this is not to say that it has no effect at all. Insofar as it is possible that separate claims or appeals on the point may generate a different result, the view might be taken that the goals of consistency, certainty and finality outweigh the principles of notification and participation in these circumstances. The general judicial acceptance of such claims suggests an assessment, not explicit in the decisions, that it is preferable that those party to or dependent on a single instrument be denied the opportunity to re-open the question of its meaning. This saves the court the potential inconvenience and cost of multiple actions attempting to re-argue an earlier decision.[83]

Furthermore consistency and certainty are served if all members of the class either have or are denied the right claimed, and if the outcome of any appeal equally affects all members of the class. If the members of the classes represented in these cases were able to

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[82] [1978] VR 457, 476-477. Similarly in *Foster v Caboolture Shire Council* [1986] Queensland Planning LR 491 it was held that the members of the Caboolture and District Aero Club could be represented by one of their number in an appeal against the town planning consent granted to the club. The arguments which might be presented by any members who (for whatever reason) opposed the grant of the consent, would presumably be adequately forwarded by those bringing the appeal.

[83] While bringing the action as a representative one might add to the costs for either party it still may offer savings in finality for a defendant faced with the possibility of multiple claims. A claimant choosing to sue as a representative in these circumstances risked, until recently, personal exposure to higher costs without there necessarily being any benefit for either the claimant or the group (in that an adverse decision will mean that the question cannot be re-opened by those represented whereas a positive decision in favour of an individual will generate benefits for the class even if they are not represented). The decision to bring a claim as a representative of a class might be driven by funding from the class, the possibility of avoiding applications for security for costs, and/or by the perception that a defendant may be pressured into settlement by a representative claim.

bring actions seeking declarations as to the effect of the instruments concerned, the court could be embarrassed by conflicting interpretations of the relevant instruments. Separate claims might generate the unsatisfactory result that persons deriving their rights from the same instrument were held to have different rights. An example is provided by the cases of *Re Waring (No 1)* and *Re Waring (No 2)*,[84] which concerned two tax-free annuities given by a testator under his will. Only one of the two recipients was a party to the first case.[85] The Court of Appeal held that Section 25 of the Finance Act 1941 was applicable to a will executed and attested before 3 September 1939 containing a tax-free annuity, thereby reducing the amount payable to the annuitant to twenty twenty-ninths of the gross amount of the annuity.[86] In *Berkeley v Berkeley*[87] the House of Lords overruled that decision, holding that the wording of the section meant that it applied to benefits conferred before 3 September 1939, not to wills executed before that date. In the second case[88] the trustees sought a decision as between themselves and the annuitant who had not been joined in the first proceedings. The annuitant party to the first decision remained bound by that decision, but the annuitant party to the second case was able to take advantage of the decision in *Berkeley v Berkeley*.[89]

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[84] [1942] Ch 426 (CA) and [1948] Ch 221 respectively.

[85] The circumstances surrounding the failure to make a representation order binding the second annuitant are discussed in Ch 2, 100-101.

[86] *Re Waring (No 1)* [1942] Ch 426 (CA).

[87] [1946] AC 555 (HL).

[88] *Re Waring (No 2)* [1948] Ch 221.

[89] [1946] AC 555 (HL). *Spencer Bower* (3rd edn) 9 n43, in distinguishing *res judicata* and judicial precedent, makes the point that it is for this reason that 'Courts of Equity normally require all interested parties to be joined or represented in such proceedings' and refers to *Bedford v Ellis* [1901] AC 1 (HL) 8.

Insofar as notice and participation are viewed as conducive to more accurate decisions, it may not be viewed as very significant in such claims whether those represented know of the action or not, particularly given the corresponding benefits in terms of consistency and finality. Even those who argue that notification and participation have value beyond their contribution to more accurate outcomes do not argue that these are absolute rights. The approach to the representative parties rule in these cases suggests a judicial view that the denial of notice and hearing is, in these circumstances, justified. The potential savings for court resources and the potential advantages in terms of finality, consistency and certainty might be viewed as justifying the denial.[90]

However, the current rule specifically provides that it 'does not apply to a claim to which rule 19.7 applies'.[91] Under Civil Procedure Rule 19.7, where the claim concerns the estate of a deceased person, property subject to a trust, or the meaning of a document, including a statute, the court may appoint a person to represent other persons who, *inter alia*, have the same interest in a claim where the appointment of a representative would further the overriding objective.[92] Insofar as claims which depend on the interpretation of an instrument

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[90] This is not to deny that circumstances enabling the court to assume some knowledge of the proceedings by the group may increase the likelihood that the court will approve the representative nature of the proceeding. The potential relevance of assumed knowledge is discussed below, 237-241.

[91] CPR 19.6(5).

[92] The 1962 rule contained an equivalent provision, providing that representative proceedings may be begun where numerous persons have the same interest in any proceedings, 'not being such proceedings as are mentioned in rule 13', RSC 1965 Ord 15 r12(1). RSC 1965 Ord 15 r13 preceded CPR 19.7 and was in substantially the same terms. CPR 19.7(4)(c) makes explicit provision for notice of any application for an order appointing a representative to be served on the parties, the person to be appointed (if not a party) and 'any other person as directed by the court'. Even if those to be represented are not notified, there is provision for judicial control of these representative claims - they can only be commenced with the court's permission, and the court's approval is required to settle any such claim, CPR 19.7(3), (5) and (6). An application to represent may be made by a person seeking to be appointed or by any party to the claim, enabling defendants to take advantage of the finality benefits of representation, an option they do not have under the representative parties rule.

might be said to be an accepted category of representative claims, and justified on the basis that substantial accuracy can be each achieved in the absence of those represented, specific provision is made for them in Civil Procedure Rule 19.7 and they are not properly brought under the representative parties rule at all.[93]

(iv) Accurate determination of claim: general application

There are representative actions which are not concerned with construction of an instrument but have, nevertheless, been permitted to proceed and which might be explained on similar grounds. In a number of cases, it is arguable that it was reasonable for the court to assume, as with the construction of instrument cases, that participation by all members of the class represented would add little to the court's understanding of the question before it.[94]

A number of representative claimant actions alleging passing off might be explained on this basis.[95] Whether the misrepresentation alleged will reasonably foreseeably injure the business or goodwill of other traders may be capable of substantially accurate determination

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[93] Likewise, claims concerning estates or property subject to a trust (one of the few classes of claims to be positively endorsed as appropriate for the use of the representative parties rule, Ch 1, 46-47) must, since 1962, be brought under a separate rule (CPR 19.7, and prior to that RSC 1965 Ord 15 r13).

[94] Or insofar as their participation would aid understanding, an assessment is made that this contribution to understanding would not be sufficiently significant to justify the expense that it could entail.

[95] 'Passing off' requires that there be a misrepresentation made by a trader in the course of trade to prospective customers or ultimate consumers which is calculated to injure the business or goodwill of another trader, in the sense that this is a reasonably foreseeable consequence and that this causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so, *Street* (10th edn) 127.

in the absence of participation by all traders who would be entitled to bring the claim, as might the question of whether it will probably cause actual or probable damage to the business or goodwill of those traders. So in *J Bollinger v Costa Brava Wine Co Ltd (No 2)* a representative action by twelve champagne producing companies representing all persons who produce wine in the Champagne district and supply it to England and Wales alleging that the defendants' description of wine made in Spain from grapes grown there as 'champagne' or 'Spanish champagne' amounted to passing off was permitted to proceed. It could be argued that determination of the questions whether 'champagne' in the United Kingdom meant wine produced in a particular region rather than a type of wine, and whether a substantial portion of the public was likely to be misled by the description of wine as 'Spanish champagne', can be as effectively aired by twelve champagne producing companies acting on their own behalf, as by forty-six, or more.[96] Similarly Sir Denys Buckley thought it appropriate that the plaintiffs represent the members of associations of copyright holders in *CBS Songs Ltd v Amstrad Consumer Electronics Plc (No 2)*[97] in a claim that the production and sale of an audio system which included a double cassette-deck feature constituted an incitement to infringe copyright. The questions whether the plaintiffs and those represented were entitled to make such a claim, and, if they were, whether the defendants' actions amounted to the incitement alleged,

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[96] [1961] 1 WLR 277. Representative claims involving passing off also proceeded in *HP Bulmer Ltd v J Bollinger SA* (1977:2) 20 CMLR 625 (CA); *Taittinger SA v Allbev Ltd* [1992] FSR 647, [1993] FSR 641 (CA) (mention of their representative nature appearing only in the headnotes to these two reports) and *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1999] RPC 826 (CA) (the first plaintiff's claim, and claim to act in a representative capacity, were denied but the representative claims by the second and third plaintiffs went ahead).

[97] [1988] Ch 61 (CA) 85-87. See also Whitford J in the first instance, [1987] RPC 429, 444-445.

might, again, be considered capable of being resolved with considerable accuracy even in the absence of those represented.[98]

The same argument might be made in representative claims brought in negligence. It is conceivable that issues relevant to such claims might be established with reference to members of a class without their involvement. In *Dillon v Charter Travel Co Ltd* Yeldham J suggested that the action which the plaintiffs sought to bring on behalf of all passengers who suffered loss upon the sinking of a cruise ship might have properly proceeded as a representative one had it only sought a declaration as to whether or not the sinking of the vessel was due to negligence[99] for which either of the defendants was responsible.[100] This approach does therefore depend on the facts of the claim supporting the formulation of a question which can arguably be accurately answered in the absence of participation by the represented class. In *Radcliffe v Coltsfoot* the representative plaintiff claimed that the defendant institutions had breached the duty of care they were said to owe to the investors represented but the view was taken that reliance would be an essential feature of establishing

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[98] The other members of the Court of Appeal and the House of Lords did not find any basis for the claim to enforce the observance of the criminal law and so did not consider whether the claim was properly framed as a representative one, [1988] Ch 61 (CA) 76-78, 87 and [1988] AC 1013 (HL).

[99] Or breach of contract. Claims based on separate but similar contracts are discussed below, 221-224.

[100] [1988] ATPR ¶40-872, 49,435. The claim further alleged that the releases signed by members of the class, and relied upon by the defendants, should be set aside due to, *inter alia*, the application of legislation requiring consideration of the individual circumstances of each person signing a release. This arguably increased the potential for inaccuracy in the absence of the class members, and use of the rule was denied. Similarly in *Bollinger v Goldwell* [1971] FSR 405, 409-411 Megarry J indicated that had the claim in the second action been limited to seeking a declaration as to whether the use of the word 'champagne' as a prefix to 'cider' or 'perry' had ceased to deceive the public as to the maker of the article, it could have been dealt with as a representative question. The representative action was not however permitted to proceed because the claims that all those represented by the defendants were estopped by their knowledge of use of the expressions 'champagne cider' and 'champagne perry' and/or guilty of laches and acquiescence were held to be inappropriate for consideration in representative proceedings.

any such duty of care, and therefore arguably could not be sufficiently accurately established in the absence of the individual investors concerned.[101]

The argument that many of those representative actions which have proceeded might be better explained by reference to the purposes of procedural law, in particular, to its role in supporting the accurate application of the substantive law, might also be made in relation to those representative actions which have turned on the construction of identical or substantially similar terms in separate contracts. It may be assumed that judicial consideration of a term in one contract which is identical to terms in other contracts will be as reliable after the consideration of arguments in favour of, and against, a particular interpretation brought by parties to one contract as it would be if brought by parties to all contracts. The question in *Equitable Life Assurance Society v Hyman*[102] whether the plaintiff insurance company was entitled to adopt a particular interpretation of the terms of a pension policy would arguably be as fully canvassed in argument between the insurance company and a single representative policy holder as it would be if all policy holders were to bring claims or participate in the proceedings. In *Gaetjens v Arndale (Kilkenny) Pty Ltd*[103] it may have been reasonable to assume that the issues relevant to whether the defendant lessor's erection of stalls in the pedestrian area of the shopping mall where a number of rental units were located was a breach of the covenant for quiet enjoyment in each lease would be sufficiently dealt with in

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[101] [1984-86] Manx LR 386. However the finding that sufficient questions of law could be determined in an individual action by the plaintiff as would be 'highly beneficial' to the other depositors does somewhat undermine the denial that there was any question common to that group, 413-414. Other claims to use the rule have been defeated with reference to the remedy sought (remedies are discussed further below, 225-237).

[102] [2000] 3 WLR 529 (HL).

[103] [1969] SASR 470. See also *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 271-272.

the arguments put forward by the representative plaintiff lessees and that affording a hearing to the other lessees would add little to the accurate determination of that issue. A number of cases based on multiple insurance contracts have proceeded as representative actions, also in circumstances where the claims have turned on the construction of a term or terms common to all contracts.[104]

The assessment that hearing from the parties to all contracts will add little to the interpretation of the issue at hand will, of course, depend on the extent of the similarity between the terms in the individual contracts. In the *Pan Atlantic Insurance* case Lloyd LJ noted that 'the rights and liabilities arising out of the composite contract are precisely the same save as to quantum'.[105] In *Bank of America v Taylor*[106] Waller J said that the policies concerned were

> not suggested to be in any way in terms which could lead to different results on liability for the incident that is alleged to have occurred. They provided cover for loss and damage to the hull and machinery of the vessel. It is accepted that there is an exception in all policies to such liability in the circumstances where there has been a lack of due diligence by the assured owners and/or managers.

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[104] Cited in Ch 1, n73.

[105] [1989] 1 Lloyd's Rep 568 (CA) 571. See also [1988] 2 Lloyd's Rep 505, 510.

[106] [1992] 1 Lloyd's Rep 484, 486. See also *The Irish Rowan* [1991] 2 QB 206 (CA) 223, 227 and *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 263, 264.

Similarly, insofar as the decision in *Carnie v Esanda* was not concerned solely with the interpretation of the provisions of the Credit Act 1984 (NSW) but also with its application to a number of separate contracts, there was 'evidence that the respondent had distributed guidelines to its employees which involved other variation agreements being set out in the same way.'[107]

By way of contrast, in the *Markt* case the plaintiffs sought to claim on behalf of all owners of goods lost by the sinking of the Knight Commander by a Russian warship, alleging breach of the contract of carriage of goods by sea. Vaughan Williams LJ expressed some concern that the information before the court was not sufficient to show that 'the bills of lading and the exceptions therein were identical'.[108] In *Dillon v Charter Travel Co Ltd* the defendants indicated their intention to rely on releases signed by members of the represented class. Yeldham J noted that the representative plaintiff intended to contest the validity of the releases on various grounds, some of which depended on individual features of the signatories, such as failure to inform of the true effect of the release, or age or infirmity. His Honour continued that he would not grant the application 'because it is impossible to assess with any degree of accuracy the likely positions of the individual plaintiffs in relation to, in

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[107] (1995) 182 CLR 398, 412. See also the Court of Appeal decision in *Equitable Life Assurance Society v Hyman* [2000] 2 WLR 798 (CA) 803 where it is noted that the policies entered into by the defendant 'are accepted as being representative' of the class of policy under consideration.

[108] [1910] 2 KB 1021 (CA) 1026. It is worth noting that the majority's principal objection was not that the terms of the contracts concerned had not been shown to be sufficiently similar but rather that the claim was based on individual contracts which did not demonstrate a 'common purpose', 1032, 1040. Fletcher Moulton LJ also objected simply on the ground that damages were claimed. As a blanket exclusion from the ambit of the representative parties rule, this view no longer holds sway (Ch 1, 37-38) but the objection to claims for damages on the basis of accuracy remains and is discussed below, 230-231.

particular, their entitlement to relief under the Contracts Review Act, which depends so much on their own individual circumstances.'[109]

It was submitted in Chapter 1 that a test of common question of law or fact addresses directly the expectation that procedural law should, primarily, facilitate the accurate application of substantive law. Characterising a question as 'common' to a group of people arguably amounts to an assessment that it can be accurately resolved without the participation of all those interested in it. It is not, therefore, surprising that this test is capable of accommodating those earlier cases where sufficient 'same interest' has been found.[110] A significant number of claims which have proceeded have either asserted without further explanation that sufficient 'same interest' exists or have not referred to the issue at all. It is argued that many of those claims which did go ahead under earlier formulations were, in fact, claims which presented the court with a common question or questions. That is, the claims were framed as issues which the court was confident could be resolved without the participation of those represented, and in the particular circumstances, there was nothing to displace the assumption that the gains in terms of finality and efficiency justified the derogation from voluntariness and, if any, from accuracy.

So, for example, in *The Irish Rowan*[111] the insurers' argument that their obligations to the charterers had not transferred to the plaintiff shipowners could be characterised as a common question, as could the argument that England was not the appropriate forum for the

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[109] [1988] ATPR ¶40-872, 49,436-49,437.

[110] As well as some of those where sufficient 'same interest' was denied.

[111] [1991] 2 QB 206 (CA).

litigation. Those cases where a representative action was disallowed but leave given for those represented to join in the proceedings could clearly have continued as representative actions under such a test.[112]

It is not only the case that the issues before the court ought to be capable of substantially accurate determination in the absence of participation by those represented. The representative parties rule might also be considered to deny the court access to useful information in relation to any remedy sought.

(v) Equitable remedies

Both declaratory[113] and injunctive relief are discretionary remedies, and both have been granted in a number of representative actions. To grant this discretionary relief in favour of, or against, a class of persons suggests that an assessment that the inherently individualistic discretionary considerations which might be relied upon to deny the relief[114] do not apply in

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[112] *Cameron v National Mutual (No 2)* [1992] 1 Qd R 133, affirming [1991] 2 Qd R 601; *Morgan v Taranaki Farmers' Meat Co Ltd* [1925] NZLR 513; *Churchill v Whetnall* (1918) 87 LJ Ch 524, 526; and the *Markt* case [1910] 2 KB 1021 (CA) 1035-1036, 1037-1038. In *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462 the objection to the representative form of the action was held to have been taken too late, but it was suggested that joinder would have been more appropriate.

[113] It is acknowledged that *Chapman v Michaelson* [1909] 1 Ch 238 (CA) held that the declaration was not an equitable remedy but a statutory one, although there is criticism of this conclusion (*Zamir & Woolf* (2nd edn) 114). It is nevertheless a discretionary remedy, subject to many of the same objections and defences as are available with regard to equitable remedies, *Zamir & Woolf* (2nd edn) 116, although Burrows (2nd edn) 464 notes that authority on this is limited.

[114] The 'conduct-based' discretions (such as laches and clean hands) and 'result-based' discretions (such as hardship and futility) identified in Tilbury (1990) 290-298 all raise necessarily individualistic considerations.

relation to any of those represented can be accurately made in their absence.[115] Spry refers to the situation where there are several defendants against whom injunctions are sought and notes that 'in strictness the discretion of the court must be exercised separately in respect of each defendant.'[116] Presumably the same applies where there are multiple claimants.

However, where declarations and injunctions have been granted to representative claimants against an individual defendant,[117] whether or not those represented would be entitled to the relief granted is a moot issue. It would not aid a defendant to demonstrate that one of those represented would not be entitled to the relief sought, so long as the named representative is so entitled.

A claimant in such cases need not sue as the representative of the class. In *Wyld v Silver* Lord Denning MR noted that '[e]ven if they are in a minority in the parish they can sue, for the majority cannot overrule the minority in such a manner. The majority cannot excuse the wrong, nor deprive the minority of their remedy by suit'.[118] Should the claimant act

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[115] It is submitted that objecting to the grant of a declaratory judgment on the basis that it raises hypothetical issues (*Zamir & Woolf* (2nd edn) 117-121) does not demand individual responses from those represented, but rather considers the circumstances in which the relief is sought.

[116] ICF Spry *The Principles of Equitable Remedies* (5th edn LBC Information Services Sydney 1997) 393.

[117] Injunctions were awarded to representative plaintiffs against individual defendants in *J Bollinger v Costa Brava Wine Co Ltd (No 2)* [1961] 1 WLR 277; *HP Bulmer Ltd v J Bollinger SA* (1977:2) 20 CMLR 625 (CA); *EMI Records Ltd v Riley* [1981] 1 WLR 923, 925-926; and *Mundy v Cunningham* [1973] 1 NZLR 555 (denying the motion to rescind interim injunction granted to representative of the approximately 100 residents of Mahina Bay, affirmed on appeal [1973] 2 NZLR 654). In *John v Rees* [1970] Ch 345 a representative claim seeking an injunction was permitted to proceed but the injunction was ultimately not granted; and in *Meade v Haringey London BC* [1979] 1 WLR 637 (CA) the representative action seeking a declaration that union strike action constituted a failure of the local authority's statutory duty and an interlocutory injunction was permitted to proceed but the strike action ended on the day the case began so injunctive relief was, in the event, inappropriate. Sir Denys Buckley thought the claim for injunctive relief appropriate in *CBS Songs Ltd v Amstrad Consumer Electronics Plc (No 2)* [1988] Ch 61 (CA) 85-86.

[118] [1963] 1 QB 169 (CA) 183.

independently, a declaration as to whether or not the alleged right exists will be binding as precedent on all members of the class in any event.[119] It has been noted, with reference to a pre-Judicature decision on a customary right, that '[i]n such a world res judicata and stare decisis merge.'[120] Any injunction granted would, in effect, operate to protect the rights of the entire group. In the passing off cases, even if one of the named plaintiffs acted alone and was successful, an injunction preventing use of the word 'champagne' would benefit all champagne producers. In *J Bollinger v Costa Brava Wine Co Ltd (No 2)* Danckwerts J noted that the named plaintiffs were authorised to represent almost all champagne producers supplying that product to England and Wales in 1958 but went on to say that 'the point is not really important, as in my previous judgment I expressed the view that a passing-off action protected a property right of a trader in his goodwill ..., and it would appear that each of the plaintiffs is entitled to bring an action to protect such property right, so far as thereby affected'.[121] In *Gaetjens v Arndale (Kilkenny) Pty Ltd*[122] Bray CJ was 'comforted' in his decision to hold that the representative action was validly constituted by the thought 'that it makes not a straw of practical difference to the defendant whether I hold that the representative action is well constituted or not.'

A judicial review case illustrates the point. One person with standing can enforce the performance of a public duty equally well on his or her own, as he or she could as the

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[119] Indeed in *Wyld v Silver* [1963] 1 QB 169 (CA) the action was brought to protect a right under an inclosure award and any judgment may have been *in rem* in any event, *Spencer Bower* (3rd edn) 131.

[120] SC Yeazell 'From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation' (1980) 27 U California, Los Angeles L Rev 514, 518.

[121] [1961] 1 WLR 277, 281, citing *Bedford v Ellis* [1901] AC 1 (HL).

[122] [1969] SASR 470, 483.

representative of a group.[123] In *Smith v Cardiff Corp* Evershed MR noted that he was 'not sorry to reach the conclusion' that the claim could not proceed as a representative one as the consequences of permitting the representative claim to proceed were 'rather startling' in that the holder of a season railway ticket could bring an action to challenge the validity of an increase in the cost of the ticket on behalf of other ticket holders 'whether they liked it or not.'[124] However, were that same plaintiff to act alone and succeed in challenging the increase, then other season ticket holders would, in effect, be 'bound' by the action, a result Evershed MR had earlier acknowledged, commenting that he was 'entirely unconvinced that there is any substance whatever (as a practical matter) in the objection taken in this case by the defendants. It seems to me not to matter to the defendants a straw whether the form of action is at present constituted or whether it takes some other form.'[125] Commenting on that case, Stoljar notes that 'any person coming within a described class can enforce his class-rights, and this whether the other class-members like it or not.'[126]

The only difference the representative nature of the action makes is that all those represented will be entitled to enforce any injunction awarded against the defendant in the event of breach rather than just the named party.[127] However, under the current formulation of

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[123] Stoljar (1957) 62-64; JA Jolowicz 'Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law' (1983) 42 CLJ 222, 234.

[124] The claim was denied on the basis that there was no 'common grievance', discussed in Ch 1, 56.

[125] [1954] 1 QB 210 (CA) 222, 217.

[126] Stoljar (1957) 64.

[127] This is in addition to the more general *res judicata* effect of the order for those represented, but it is presumed that this effect is 'justified' by the very commonality of the question, and the accuracy of its determination. However, it is noted below (237-241) that knowledge by those represented of the claim may have been relevant in a number of successful representative claims.

the rule, judgment or orders 'may only be enforced by or against a person who is not a party to the claim with the permission of the Court.'[128] The defendant does, therefore, have an opportunity to contest the entitlement of the class member at the enforcement stage. Even though the 1962 rule only required that the leave of the court be obtained where it was intended to enforce an order or judgment against any person not a party to the proceedings,[129] judicial permission is required in any event to enforce an injunction by a writ of sequestration or committal for contempt, and the writ or application must be served personally on the defendant unless the court dispenses with the need for service. [130]

Insofar as injunctions have been awarded against representative defendants, it will be argued that these decisions are best viewed, not as based on assessment that an accurate decision can be made in the absence of those represented, but rather as a decision that the accurate application of the substantive law to the facts may involve some broader injustice. In these circumstances, it is submitted that the representative parties rule has enabled the court to develop the substantive law in a direction which better accords with this broader perception of justice.[131]

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[128] CPR 19.6(4)(b).

[129] RSC 1965 Ord 15 r12(3).

[130] With regard to writs of sequestration, see CPR Part 23 and RSC Ord 45 r7 and Ord 46 r5, and with regard to applications for committal, see Practice Direction Committal Applications and RSC Ord 52 rr2, 9.

[131] This argument and the cases to which it applies are considered in Ch 5.

(vi) Monetary awards

Representative claims seeking monetary awards on behalf of or against those represented have generally been denied. The rejection of these claims has been attributed to the possibility that separate defences will be denied by the cause of the action or to the need for those who will be bound to be notified and heard by the court although without any reference to the purpose of such a hearing. However, there are some decisions which suggest a judicial assessment that the participation of those represented would provide useful information which might otherwise not be before the court, and without which the court is not confident of reaching a substantially accurate decision. In *Hermitage Court Owners' Association v Clyftville Properties Ltd*[132] Eveleigh LJ noted that he did not need to express a view on the possibility that one tenant might have been appointed to represent the others, as it was not applied for and, in his Lordship's opinion, rightly not. The plaintiff in that case wished to pursue a claim for damages and it is reported that his Lordship noted that 'the claim for damages in respect of the various tenants of this block of flats will be very different in so far as the loss and damage is concerned'. In these circumstances, it might be argued that the damage suffered by members of the represented class cannot be accurately calculated without their participation.[133] The issue has rarely been presented as one of accuracy and it is argued

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[132] (1979) 251 EG 261 (CA) 265. Similarly, in the *Prudential Assurance* case [1981] Ch 229 Vinelott J took the view that the representative plaintiff could not claim damages on behalf of those represented but that the court could make a declaration of liability upon which class members could rely.

[133] Basten (1996) 46 takes issue with the argument that class actions are inappropriate for damages claims because of the inevitable individual issues, at least in relation to quantum, saying that it 'is more relevant in theory than in practice' and that '[i]t assumes that damages claims, when dealt with on an individual basis, involve a level of precision in relation to assessment. In fact, that view is usually overstated.'

that consideration of the question of damages in this way would offer greater clarity than the tests currently relied upon.

The fact that damages or amounts owing to members of the class are different does not necessarily mean that they can never be substantially accurately established in their absence. This conclusion is supported by an examination of those representative claims which have been permitted to proceed even though a monetary judgment in favour of or against the group represented is sought. The multiple insurance contract cases are characterised by knowledge of the total amount owing or owed, and by some pre-existing decision as to the proportion of the total to which each member of the class will be entitled or for which each will be liable. In these circumstances, the argument that participation by the members of the class in the litigation would not make a significant contribution to the relative accuracy of the court's decision remains convincing. In *The Irish Rowan*[134] Sir John Megaw noted that in the case before him there was 'no suggestion of any argument as to ... the respective proportionate shares' for which each member of the class would be liable were the plaintiff to succeed.[135] Additionally, even though the plaintiffs in *Carnie v Esanda*[136] sought a declaration, a number of passages in the decision have been interpreted as standing for the proposition that individual assessment of damages does not eradicate the required community

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[134] [1991] 2 QB 206 (CA) 231.

[135] See also *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484, 488, 495. Although the issue is not specifically referred to in the other multiple insurance contract cases, it is in the nature of subscription to an insurance syndicate that the proportion of potential liability would be pre-determined. Cohen J's decision to allow the initial appeal from the Master's decision to strike out the statement of claim in *Carnie v Esanda (No 1)* (1990) CSCLC ¶55-983, 58,919 noted that the claim, which alleged that a number of the defendant's customers had been overcharged in a manner which did not comply with Credit Act 1984 (NSW), 'would not require a separate enquiry as to damages but would require only that the defendant repay the amounts relating to charges which it has received or release customers from future liability'.

[136] (1995) 182 CLR 398, 419.

of interest.[137] Toohey and Gaudron JJ appear to approve of *Swift Canadian Co Ltd v Alberta Pork Producers' Marketing Board*[138] and *Shaw v Real Estate Board of Greater Vancouver*,[139] both of which permitted representative claims for monetary relief to proceed. The judgments do not purport to innovate in reaching these conclusions, and Toohey and Gaudron JJ, and McHugh J,[140] refer specifically to the English authorities of *The Irish Rowan*[141] and *Bank of America v Taylor*[142] in support.

One approach to the difficulty raised where it is suspected that the proportions of a total amount owed to, or payable by, those represented are not clearly ascertainable in their absence is to seek a declaratory order on an issue which a court might be persuaded can be confidently decided without any contribution from those represented, seeking only those damages to which the individual representative is entitled,[143] or only that proportion for which the individual representative is liable.[144] This approach leaves it to the class members to bring separate claims on those issues where their participation might be viewed as more significant

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[137] Donnan (2000) 93, although noting that subsequent NSW decisions remain reluctant to allow representative actions where the relief sought varies between the class members; Morabito (1997) 375.

[138] (1984) 9 DLR (4th) 71.

[139] (1973) 36 DLR (3d) 250.

[140] (1995) 182 CLR 398, 418, 430.

[141] [1991] 2 QB 206 (CA).

[142] [1992] 1 Lloyd's Rep 484.

[143] *Bedford v Ellis* [1901] AC 1 (HL) 17.

[144] In *Bank of America v Taylor* [1992] 2 Lloyd's Rep 484, 490, 487 it seems to be suggested that a claim could not be a representative action where only the representative defendant's proportion of the total damage was claimed. It is not clear from the judgment but it may be that no relief against those represented, such as a declaration of liability, was claimed at all.

(such as assessment of damages) but enables them to rely on the earlier declaratory order.[145] This approach to representative claims for damages was endorsed by Buckley LJ in the *Markt* case[146] and Vinelott J permitted such a claim to proceed in the *Prudential Assurance* case.[147] However, approval of proceeding in this manner has not been universal.

Those cases which have disapproved of such claims may be explained by early disapproval of declaratory relief generally.[148] In the *Markt* case Fletcher Moulton LJ responded to a proposal that the claim might be amended to seek a declaration that those who had shipped non-contraband goods with the defendants were entitled to damages by saying that, to the best of his knowledge, 'no declaration of this type has ever been made by English Courts, and it appears to me to be contrary to their practice. They do not permit a plain claim for damages to be split up by isolating out of it an abstract proposition of this kind. Each plaintiff has to prove the whole of his case.'[149] Scrutton LJ dissented in *Jones v Cory Brothers & Co Ltd* and after recording his dissent, the report continues that '[w]here the substantial object of an action was damages and not the ascertainment of a common right for future guidance, plaintiffs ought not to be allowed to split up a cause of action and first obtain a

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[145] Or leaves it to the individual claimant to bring claims against the individual members of the represented class, relying on the declaration.

[146] [1910] 2 KB 1021 (CA) 1047-1048. Buckley LJ was alone in the Court of Appeal in his unconditional approval of this approach to representative claims. Vaughan Williams LJ felt constrained by the authority of *Beeching v Lloyd* (1855) 3 Drew 227, 61 ER 890 to accept it as appropriate where the claim alleged fraudulent inducement of those represented to donate money for a common purpose, 1032.

[147] [1981] Ch 229. See also *Cameron v National Mutual* [1991] 2 Qd R 601, 608.

[148] *Zamir & Woolf* (2nd edn) 10-17.

[149] [1910] 2 KB 1021 (CA) 1042. Fletcher Moulton LJ noted that even if such an amendment were permitted, it would not assist those represented because the limitation period for the bringing of individual claims relying on the declaration would have expired (the relationship between representative claims and limitation periods is discussed in Ch 2, 124).

declaration, and then in a second action work out its result.'[150] In addition to these objections, which might be explained by the then relative novelty of the declaration, reliance on this approach may have been limited by the generally more restrictive approach to declaratory relief in original as opposed to supervisory jurisdiction.[151] In the context of these largely historical objections to this approach, the decision in the *Prudential Assurance* case[152] was viewed as making a valuable contribution to the development of the representative parties rule.[153] No such individual claims proceeded due to the Court of Appeal decision dismissing the plaintiffs' personal action, on which the representative claim was based,[154] nor is this an opportunity which has been taken up in representative claims since.

Alternatively, there may be uncertainty as to the proportionate entitlement of any individual class member but no uncertainty as to the total damage caused by the defendant or defendants. In these circumstances, the view might be taken that an accurate resolution can still be made in the absence of any contribution by the class members and that the known total sum can be awarded to their representative to be distributed in accordance with an agreement

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[150] (1921) 152 LTJ 70 (CA). The comment does not appear in the (1921) 56 LJ 302 (CA) report of this decision. In contrast, in the *Prudential Assurance* case [1981] Ch 229, 253 Vinelott J was of the view that those represented in *Jones v Cory Brothers & Co Ltd* could rely on declarations made in that case in any later claim for damages.

[151] *Zamir & Woolf* (2nd edn) 45-48, being limited to situations where the plaintiff can show that his or her private rights have been infringed or are threatened with infringement. In addition to objections based on the novelty or nature of declaratory relief *per se*, this approach has also been objected to on the basis that the necessary formulation of a 'common question' blurs the distinction between joinder and representation. This objection was addressed in Ch 1, 75-76.

[152] [1981] Ch 229.

[153] JA Jolowicz 'Representative Actions, Class Actions and Damages - A Compromise Solution?' (1980) 39 CLJ 237; A Lockley 'Regulating Group Actions' (1989) 139 NLJ 798.

[154] [1982] Ch 204 (CA).

reached within the group. This was the approach adopted in *EMI Records Ltd v Riley*[155] where Dillon J commented that '[t]he matter of substance that underlies this is that if the plaintiffs can only recover damages in respect of tapes in which they individually own the copyright they will have considerable difficulty in establishing which pirate EMI tapes were sold by the defendant among the 2,980 tapes which she admits having sold' and went on to say that it would be 'a wholly unnecessary complication' if the court were to insist that all members of the British Phonographic Industry Ltd should be joined or issue separate proceedings.[156]

This approach not only dispensed with the need for those represented to prove the loss for which each of them would have claimed damages had they brought independent actions, but expressly denied their ability to do so, and, therefore, the court's ability accurately to do so in their absence.

Whether the global assessment of the damage caused by the defendant in *EMI Records Ltd v Riley* is an 'accurate' application of the substantive law depends on the responses to two questions. The first is whether remedies are procedural or substantive. If procedural, it is within the court's ability to fashion new remedies, and so the issue of whether or not the substantive law is accurately applied does not arise. There is some

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[155] [1981] 1 WLR 923.

[156] [1981] 1 WLR 923, 926. In *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 (CA) 40 the Court of Appeal seems to approve of this approach, although the plaintiff's right to sue on behalf of all members of the BPI is expressly not decided on the ground that it would be inappropriate to do so on an *ex parte* application. In *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 273 McGechan J held that the claim for damages made by a representative of a number of kiwifruit growers who alleged that their fruit had been damaged in the defendant's cold store was 'potentially within the category of damages allowed in *EMI Records Ltd v Riley*.'

difference of opinion as to whether remedies are procedural,[157] or not.[158] However, even those who are of the view that remedies are procedural accept that any new remedy which affects the substantive law can only be created by Act of Parliament.[159]

This raises the second question - that of the definition of the substantive law. If a new remedy is a legitimate exercise of the court's inherent jurisdiction only insofar as it does not alter the substantive law, or if remedies are substantive, then the award of global damages in *EMI Records Ltd v Riley* is a legitimate exercise of the court's jurisdiction only if it does not alter the substantive law. This demands consideration of exactly what the substantive law permits. In the face of admissions by the defendant of her breach of the plaintiffs' copyright, it might be argued that the substantive law demands that there be some compensation of those affected and also that any deterrent value can only be served by requiring the defendant to make good the losses caused. However, remedies of this nature are not common[160] and Dillon J's judgment might instead be perceived as using the representative parties rule to circumvent an accurate substantive conclusion, rather than to support it. The possibility that the rule

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[157] JA Jolowicz (ed) *Lectures on Jurisprudence by the late HF Jolowicz* (Athlone Press London 1963) 369-370; Jacob (1987) 169-170; Andrews (1994) 3, 455-462. Insofar as it may be relevant, for the purposes of conflicts of laws, remedies are generally treated as procedural. Heads of damage and remoteness of damage are, however, treated as substantive, *Cheshire & North* (13th edn) 84-88; *Dicey & Morris* (13th edn) 159-160, 170-172.

[158] *Salmond on Jurisprudence* (12th edn) 461: 'To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available'; J Austin *The Province of Jurisprudence Determined* (2nd edn John Murray London 1861) cii; Tilbury (1990) 3: 'As a branch of substantive law, remedial law is distinguishable from procedural law.'

[159] Jacob (1982) 3; Jacob (1987) 170, 172.

[160] The Copyright, Designs and Patents Act 1988 s 96 provides that infringement of copyright 'is actionable by the copyright owner', suggesting that remedies are provided to individual owners and s 102 provides specifically for the situation where the copyright owner and exclusive licensee have their concurrent rights infringed. Damages are calculated on the same basis as for any other tort (D Bainbridge *Intellectual Property* (4th edn Financial Times Pitman Publishing Edinburgh 1999) 149), and the dominant view is that the claimant must prove that the defendant caused the claimant's damage, D Harris *Remedies in Contract and Tort* (Weidenfeld & Nicolson London 1988) 194; Tilbury (1990) 69.

might be used to support a vision of what the substantive law should be, rather than to promote the accurate application of the existing substantive law is discussed in Chapter 5.

It has been argued that while the representative parties rule involves a derogation from the principle of notice and hearing, a number of those representative actions which have proceeded might be explained as based on a judicial assessment that, in the circumstances, the participation of those represented was not necessary for the court to reach an accurate decision on the questions placed before it, or that insofar as accuracy has been compromised, this is justified by the potential benefits gained - finality, consistency and certainty. However, the circumstances of a number of these claims suggest some knowledge of the proceedings by the class. Failure to address explicitly the necessary balance between the various purposes of procedural law in claims to use the representative parties rule means that it is difficult to assess the extent to which knowledge by those represented was relevant, if at all.

(b) Assumption of knowledge of the representative action

A number of those representative claims which have proceeded have been brought in circumstances which suggest that the members of the class are aware, or have the means to be aware, that the litigation in which they are represented is proceeding. It is arguable that many of these cases have been allowed to proceed not only because of an assessment that a sufficiently accurate result can be reached in the absence of any contribution from those represented but also because the courts have assumed (or know) that those represented.

although not formally notified of the proceedings being brought on their behalf or against them, do in fact know that the action is proceeding, and the courts are effectively taking the view that this informal knowledge is sufficient to satisfy the purposes of the principle.

In those cases where there is evidence that the representative has been authorised by those represented, the court may rely on this authorisation as sufficient evidence of notice and participation by those represented.[161] In *J Bollinger v Costa Brava Wine Co Ltd (No 2)*[162] the plaintiffs, who sought injunctions restraining the defendants from applying the description 'champagne' or 'Spanish champagne' to wine made in Spain from grapes grown there, were twelve companies incorporated under French law and carrying on the business of production of wine in the Champagne region and its supply to England and Wales. The plaintiffs claimed to sue on behalf of themselves and all other persons who produce wine in the Champagne district and supply it to England and Wales. Danckwerts J noted that the 'plaintiffs were authorised to bring the action by a resolution of 46 growers and shippers in the Champagne district, and subsequently another 80 signed retainers authorising the plaintiffs' solicitors to act for them'.[163]

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[161] The influence of voluntariness (as an independent principle of procedural fairness) on the representative parties rule will be dealt with independently below, 244-251.

[162] [1961] 1 WLR 277. There is also evidence of knowledge on the part of those represented in *Re Heat Treated Bolt Association's Agreement* (1964) LR 5 RP 218 (where the court was concerned that the order should note that the association by its counsel had obtained express authority from each of the represented parties to give the undertaking) and *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (where those represented were named in a schedule annexed to the application to the court, and McGechan J noted that 'it appears that all persons represented do in fact consent', 264).

[163] Danckwerts J went on to note that 'The products of these represented 3,233,653 bottles of champagne out of a total of 3,234,594 bottles imported into England and Wales in 1958.' While this suggests that the plaintiffs did not have authorisation from all those they claimed to represent, they certainly had authorisation from a very substantial number. It might be argued, in these circumstances, that even insofar as the producer/s of the remaining 941 bottles did not authorise the plaintiffs, it was likely that they had informal knowledge of the action and so were in a position to protect their interests, if they so desired. A claim was brought against the same parties as the representatives of the same class in *HP Bulmer Ltd v J Bollinger SA* (1977:2) 20 CMLR 625

Even where there is not specific authorisation of the representative, the circumstances of the claim may enable the court to assume knowledge of the proceedings on the part of those represented. For example, in *The Irish Rowan* the plaintiff brought proceedings against the defendants as representatives of all insurers on a multiple insurer policy and the availability of notice of the proceedings to the class was referred to in each of the judgments in the Court of Appeal. Purchas LJ referred to the limitations on enforcement of any judgment or order made if any class member was not aware of the proceedings but went on to say that '[t]he overwhelming likelihood is, however, that they will know of the proceedings'. Sir John Megaw noted that 'it is hard to believe that all the other insurers on the self-same risk would not in fact be made aware of the proceeding' and Staughton LJ commented that it was not a case

> where the membership of the class represented is unknown, nor even where judgment may be given against a member without his having any opportunity to know of the action. It may well be true in practice that the others of the insurers will not know of the English action, if Commercial Union and Alliance choose not to tell them and they do not ask. But there is an organised channel by which they could obtain information - and stipulate for it - if they thought it necessary.[164]

While other decisions do not necessarily make such specific reference to the knowledge by those represented of the proceedings, the facts of the claim itself may suggest

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(CA), and therefore knowledge of the claim, and the subsequent counterclaim, might again be assumed.

[164] [1991] 2 QB 206 (CA) 245, 232, 222. Defendants were also sued as representing groups of underwriters subscribing to particular policies in *National Bank of Greece SA v RM Outhwaite* (16 January 2001); *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484 and *Ventouris v Mountain* [1990] 1 WLR 1370.

knowledge on the part of those represented.[165] In *Wyld v Silver*[166] it is reported that at a parish meeting 301 of the inhabitants voted to protect their rights under the Act, with 11 voting against and 18 abstaining. Such information may enable the court to assume some knowledge of the dispute and its progress on the part of those represented. In *Gaetjens v Arndale (Kilkenny) Pty Ltd*[167] the plaintiffs represented only six other persons and two limited companies, all of whom were lessees of premises in the same shopping centre and were named in a schedule attached to the statement of claim. Buckley LJ noted in the *Markt* case[168] that 'the plaintiffs sent to the defendants' solicitors a letter giving the names and addresses of all the persons and firms on whose behalf they claimed'. In *Barnes & Co Ltd v Sharpe*[169] the plaintiffs sued as representing themselves and 'all other members of the Queensland Farm and Dairy Produce Merchants and Agents Association' but only one member of that association was not in fact a named plaintiff. The representative claims brought by EMI Records Ltd were brought on behalf of the members of the British Phonographic Industry Ltd,[170] and it might be assumed that the existence of a common association created sufficient

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[165] As noted in Ch 2 (106 n50), where those represented do have some knowledge of the proceedings brought on their behalf, or against their representative, a broader perception of privies for the purpose of the doctrine of issue estoppel could result in their being bound as privies, whether the representative claim is permitted or not.

[166] [1963] 1 QB 169 (CA) 173. The headnote to the report of *Mundy v Cunningham* [1973] 1 NZLR 555 notes that the plaintiffs were the chairman and secretary of the Mahina Bay Residents Association which represented 35 households and 119 persons residing in the small area of Mahina Bay.

[167] [1969] SASR 470.

[168] [1910] 2 KB 1021 (CA) 1043.

[169] (1910) 11 CLR 462.

[170] *EMI Records Ltd v Riley* [1981] 1 WLR 923 and *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA), as was the representative claim brought by *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 (CA). Similarly, in *CBS Songs Ltd v Amstrad Consumer Electronics Plc (No 2)* [1988] Ch 61 (CA) the plaintiffs claimed on behalf of the members of the Mechanical Rights Society Ltd (the claim was denied on the basis that there was no claim in equity at all but Sir Denys Buckley dissented from that conclusion, and also considered that the claim was appropriately brought as a representative action. The latter issue was not considered at all by the other two members of the Court of Appeal).

opportunity for its members, those represented, to know of the proceedings brought on their behalf. A similar view might be taken of those claims brought to resolve conflicts within unincorporated associations. So, for example, in *John v Rees*[171] Megarry J's suggestion that the 'remedy for someone who is not consoled' by the solution he proposed was 'to apply to be joined as a defendant' seems to assume that the members of the association knew of the proceedings.

The relevance of the likelihood that those represented are aware of the proceedings has not been discussed in detail in any representative proceedings and so it is not clear whether it is in fact a significant feature of the decisions to allow the representative claims to proceed or, if it is a factor, why it is viewed as significant. Where there are grounds for the belief that those represented do have some knowledge of the proceedings, then a court might assume that the contribution that those represented could make to the accuracy of any decision is sufficiently served by this informal notice. The nature of the informal knowledge might suggest the possibility of influence over the conduct of the claim. Alternatively, those represented who know of the proceedings might be able to inform the court by opposing the proceedings in the case of a representative claimant, or by seeking to be joined as an additional defendant in a representative defendant claim.[172] It may also be that this informal notification is considered sufficient to fulfill any value that notification and participation have beyond their contribution to more accurate outcomes.

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[171] [1970] Ch 345, 371.

[172] Alternatively, those represented who have knowledge of the proceedings may seek to opt out of the proceedings altogether, Ch 2, 138-141.

(c) Delayed knowledge sufficient

It might be argued that the rule does provide sufficient opportunity for those represented to 'know' of the proceedings – both for the purpose of ensuring the accuracy of any decision made and for any other purpose which such knowledge might serve. There is specific provision in the current rule preventing enforcement of any judgment or order against any member of the represented group without the leave of the court - in effect delaying but still protecting the rights of notice and hearing,[173] and a number of decisions permitting representative claims have made reference to this provision.

In *John v Rees*[174] Megarry J referred to the similar provision in the 1962 rule and said that '[b]y r. 12(3)-(6), ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability.' The opportunity to dispute liability before enforcement under the 1962 rule was also referred to by the Master of the Rolls in *EMI Records Ltd v Kudhail.*[175] In that case the plaintiffs alleged copyright infringement and passing off and brought an *ex parte* application seeking an Anton Piller order. After agreeing to make the order sought, the Master of the Rolls concluded by referring to the provision made for any member of the class to ask for the order to be modified if he or she is able to provide evidence which would justify that course.

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[173] CPR 19.6(4)(b). This paragraph and its predecessor are discussed in Ch 2, 119, as is the possibility of disputing the application of an order made in a representative proceeding in any later proceedings.

[174] [1970] Ch 345, 370. Toohey and Gaudron JJ also drew attention to this sub-rule in *Carnie v Esanda* (1995) 182 CLR 398, 420.

[175] [1985] FSR 36 (CA), Ackner and Fox LJJ agreeing.

In *The Irish Rowan*[176] Sir John Megaw took the view that 'there is ample protection in Ord. 15, r. 12 against the risk that a judgment could be enforced against an insurer who was not liable, without its having been given a proper opportunity to have its objection heard.'

That this deferred notice and hearing has not prompted greater use of the representative parties rule may be attributed to a number of factors discussed in Chapter 2.[177] The first is the relative novelty of the explicit requirement that permission be sought before any order made can be enforced by or against a member of the class represented. The second is the uncertainty surrounding the meaning of enforcement and the suspicion that permission is only necessary in actions to enforce, with matters decided by the order being *res judicata* for all other purposes. Finally there is also uncertainty as to the circumstances in which leave to enforce might be granted or denied, and on whom the burden of proof lies.

Whether this delayed notice is sufficient to satisfy the purposes which notice and hearing might serve, it remains true that those represented need not know that the initial proceedings have been commenced on their behalf, or against their representative. It might, therefore, be suggested that the action also offends against an independent principle of

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[176] [1991] 2 QB 206 (CA) 232. Purchas LJ also referred to the 'longstop provision against enforcement of the judgment' and to the court's ability to deal with any special characteristics of a class member 'from time to time as evidence becomes available or as events occur' under this provision, 245 and 240.

[177] The factors considered here are in addition to the possibility that the representative proceeding will be disallowed due to application of the 'separate defences' test (Ch 1, 49-61), or by reference to rules or principles with which the representative parties rule is incompatible.

consent. A representative claimant is the 'self-elected representative' of the members of the represented class and 'has not to obtain their consent'.[178]

3 Voluntariness

It was noted in the Introduction that the representative parties rule derogates from the principle of voluntariness - that claimants in civil cases should not be compelled to bring their grievances to law. In *Esanda v Carnie*,[179] Meagher JA agreed with Gleeson CJ that the claim should not proceed as a representative one, saying that those represented 'may prefer to bring no action at all against the appellant; alternatively, if they do wish to sue the appellant they may wish to do so themselves.'

The limitation on the liberty of a member of a represented class to choose not to bring a grievance to law was especially significant before the suggestion in *The Irish Rowan* that those represented might opt out of the proceedings altogether. Prior to this, it was understood that a member of the represented class was compelled to be involved in the proceedings - either by representation or as a named defendant. This limitation was referred to in *Smith v*

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[178] The *Markt* case [1910] 2 KB 1021 (CA) 1039, contrasting joinder, saying that no plaintiff 'can complain, for he cannot be made a plaintiff without his consent, so that if he avails himself of the rule it is because he desires to do so', 1037.

[179] (1992) 29 NSWLR 382, 404. See also *National Mutual Trustees Ltd v Mirvac Funds Ltd* (Supreme Court of NSW 20 August 1993) paragraph 21where Hodgson J noted that those the defendant sought to represent in its cross-claim 'did not authorise Mirvac to bring the proceedings, ... [they] may prefer to bring no action at all or may wish to do so by themselves'.

Cardiff Corp[180] in response to the argument by counsel for the representative plaintiff that a representative proceeding does not involve too serious an infringement on the freedom of those represented because if they disagree with the conduct of the proceedings they can apply to be joined as a defendant. The Master of the Rolls commented that 'such a result involves a serious inroad upon the ordinary individual's liberty to make his own terms with some other party with whom he is under no obligation to make any contract at all, if he does not want to.'

However, even if the suggestion in *The Irish Rowan*[181] that those represented might opt out of proceedings were to be taken up, the question would then arise as to whether the need to 'opt out' would also be viewed as an unacceptable infringement upon the liberty of the individuals concerned.[182] There appears to be a tendency to this view in more recent Australian decisions.

It was argued in Chapter 3 that one possible explanation for the predominance of the restrictive 'separate defences' test may be the many incidents of the representative parties rule which remain unclear, and that there is evidence in decisions since *Carnie v Esanda*[183] of reluctance to exercise inherent jurisdiction to fill in these procedural gaps. Moreover, insofar as supplementary procedures are envisaged, the tendency appears to be to fashion procedures

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[180] [1954] 1 QB 210 (CA) 222.

[181] [1991] 2 QB 206 (CA) 240-241, 245. It was noted in Ch 2, 138, that this option would be available in both representative claimant and representative defendant actions.

[182] Andrews (1994) 140. The same objection could not be raised against representative defendant actions. If the interest of those represented is the same as the representative, the claim could have been brought against any one of them, and they would be required to take steps.

[183] (1995) 182 CLR 398.

which adhere to the traditional model of voluntary civil litigation even if this approach denies the rule its particular utility.

The outcome of the claim in *Carnie v Esanda* itself provides an example. The claim was, by a majority of the High Court of Australia, remitted to the NSW Court of Appeal for consideration of the question whether the court should, in its discretion, order that the proceedings not continue as representative proceedings.[184] In *Carnie v Esanda (No 2)*[185] Young J adopts the test for 'same interest' espoused by the High Court of Australia and appears to appreciate the 'balancing' necessarily required in any claim to use the representative parties rule. However, later in the judgment, his Honour went on to say that it seemed to him that 'the Court may only be able to determine whether it should otherwise order under Pt 8, r 13, after there has been an opportunity given to people to decide whether they wish to be involved in the proceedings or not'. It is not immediately obvious that the attitude of those to be represented will inform the court's consideration of whether or not the benefits of allowing the common question to be determined in a representative claim outweigh the necessary limitation on voluntarism and whatever limitations on accuracy the proceeding will entail.[186]

Having decided that notice to those represented was necessary before the court could even make a threshold decision as to whether or not the claim might proceed as a

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[184] Ch 1, n187.

[185] (1996) 38 NSWLR 465.

[186] Moreover, if the result of the notification to and indications from the class members is that the court does exercise its discretion to 'otherwise order', then the plaintiff, ordinarily, has been put to the expense of notification without the representative claim going ahead.

representative one, Young J then went on to consider whether the notification sent to the members of the represented class ought to be of an 'opt-in' or an 'opt-out' nature.[187] He found that because determination of the common question might result in detriment to those represented, it would be necessary for all those to be represented to consent to their representation in the action.[188] Any representative claim has the potential to result in detriment to those represented - should decision on the common question or questions go against the class, then the class members are bound by that decision. Whether the claims of those represented will be utterly defeated by an adverse determination of the common question presented to the court will depend on the question and its context. It is, however, always possible that those represented will suffer some detriment by virtue of the representative action, even if that detriment is confined to denial of a point of fact or law that the class members would otherwise have relied upon.[189] To find that this possibility demands the consent of all those to be represented is to demand consent in all claims to use the representative parties rule. It was argued in the Introduction that if consent to representation is required, the representative parties rule is transformed from a rule permitting representation of unidentified but identifiable persons, with its attendant procedural benefits, into a form of joinder.[190]

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[187] His earlier comment that consideration of whether the court should otherwise order might be assisted by those to be represented being given the opportunity to decide 'whether they wish to be involved in the proceedings' had already suggested a preference for some positive indication from potential class members.

[188] *Carnie v Esanda (No 2)* (1996) 38 NSWLR 465, 473, 474. It may be that his Honour's reference to whether or not the representative procedure would involve, *inter alia*, prejudice over and above that of any other form of proceeding (469) in setting out his understanding of the court's residual discretion foreshadowed this approach.

[189] In *Carnie v Esanda* (1995) 182 CLR 398, 424 Toohey and Gaudron JJ noted that in the argument before them 'nothing emerged to show that members of the class in question would be prejudiced by the outcome of this action other than in the obvious sense that they would be bound by a judgment acceding to or rejecting the claim for relief'.

[190] 16-17.

The decision, ultimately, resulted in the defeat of a representative claim which seven members of the High Court of Australia held was, *prima facie*, appropriately brought as a representative action and which three members of that Court would have permitted to proceed without the need for further argument.[191] The finding of sufficient 'same interest' but denial of the representative claim by reference to the court's residual discretion stands in contrast to the coincidence thus far between satisfying the threshold 'same interest' test and permission to proceed under the court's discretion under Part IVA.[192]

In *Shepherd v Australia and New Zealand Banking Group Ltd* Bryson J also considered the court's discretion to 'otherwise order' and said that he did not think 'the court should allow representative proceedings to continue except in the interest of persons who truly wish claims to be made for them' and that 'the court should not make any paternalistic assumption about its capacity to decide on behalf of others that proceedings are to be brought on their behalf. I would think that there would be few occasions when what was referred to as an "opt out" notice would be appropriate.'[193] Like Young J in *Carnie v Esanda (No 2)*[194] Bryson J seems to take the view that the question of whether the court should in its discretion allow a *prima facie* suitable representative action to proceed can only be resolved after

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[191] The plaintiffs could not afford to pay for the notice ordered and finally settled with the defendant with an agreement that required the plaintiffs to pay the defendant some A$45,000 and all costs, subject to existing costs orders, J Wilkin 'Representative Proceedings in Victoria: No Change in Contract Cases?' (1996) 70(8) L Institute J 36, 40.

[192] Ch 1, 87-89.

[193] (1996) 20 ACSR 81, 99-101. Bryson J's decision that the claim did not satisfy the threshold requirement of 'same interest', apparently on the basis that those represented may suffer detriment from the form of the action (Ch 1, 91-92), made this consideration of the court's discretion strictly unnecessary.

[194] (1996) 38 NSWLR 465.

consultation with those to be represented, and that representation can only proceed with their consent.

Young J's reasoning in *Carnie v Esanda (No 2)*[195] was adopted by Sackville J in the Federal Court of Australia in *BT Australasia Pty Ltd v NSW*.[196] The applicants, British Telecom Plc and its subsidiary BT Australasia Pty Ltd, sought an order that the first respondent, the State of NSW, represent all 'Agencies' as defined by the agreement between the applicants and the respondent in dispute. There were understood to be some 450 relevant agencies.[197] The dispute arose out of the management and development of an integrated telecommunications network for the NSW Public Sector. The applicants argued that their implementation of the agreement was dependent on their being granted access to a service provided by the second respondent to the proceedings, and that as this access had been denied, the applicants had validly terminated the agreement and were entitled to damages in respect of alleged misleading and deceptive conduct by the first respondent.

The claim that the first respondent and the Agencies had the necessary 'same interest' appears to have been based on a claim that the Agencies were also parties to the agreement, and Sackville J held that the statement of claim did not disclose the mechanisms by which the agencies had become parties or the material facts on which any misleading or deceptive conduct by any of them was based. Essentially, although not expressly, it would seem that the decision to refuse the order was based on an assessment that no adequate evidence in support

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[195] (1996) 38 NSWLR 465.

[196] Federal Court of Australia 24 December 1997.

[197] Federal Court of Australia 24 December 1997, paragraph 40.

of a common question had been pleaded.[198] His Honour, however, went on to refer to Young J's view in *Carnie v Esanda (No 2)*[199] that 'persons in respect of whom a representative order was sought should have the opportunity to decide whether they wished to be joined in the proceedings before a decision was made by the Court.' He continued that, it seemed to him, that 'before a representative order could be made (assuming this was ultimately considered to be the appropriate course) an appropriate effort should be made to ascertain whether the Agencies themselves consider it appropriate to be joined in the proceedings through a representative order and whether they accept that their interests are the same as the State and other Agencies.'[200]

As with Young J's decision in *Carnie v Esanda (No 2)*[201] it is not clear whether Sackville J was of the view that the attitude of those to be represented to their possible representation was simply useful information which would assist the court in reaching a decision as to whether or not, in the exercise of its residual discretion, it ought to order that the proceedings no longer continue as representative ones, or whether evidence that the weight of opinion was either for or against representation would be determinative of whether the representative proceedings continue on behalf of, or as against, all. Furthermore, whether or not the information provided by canvassing the views of those to be represented is intended to be determinative or merely of assistance, it is not clear whether, if the claim is permitted to

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[198] Federal Court of Australia 24 December 1997, paragraphs 81-86. The limited attention given to whether or not there was a substantial or significant common question of law or fact of interest to all those to be represented is somewhat surprising in light of the clarity and the unanimity of the judgments in the High Court in *Carnie v Esanda* (1995) 182 CLR 398.

[199] (1996) 38 NSWLR 465.

[200] Federal Court of Australia 24 December 1997, paragraphs 86-88.

[201] (1996) 38 NSWLR 465.

proceed as a representative one, only those class members who have responded positively to the prospect of being represented in the proceedings would be taken to have, in effect, 'opted in'. If, in accordance with Young J's approach in the particular circumstances of *Carnie v Esanda (No 2)*, it is assumed that only those who opt in will be represented, the very nature of the rule is altered, and its particular benefits arguably lost.

Sackville J's emphasis on the need for those represented to consent to their representation is particularly interesting given that the applicant sought an order to make the respondent a representative of other potential respondents. It supports the suggestion in the Introduction[202] that the rule may be viewed as incompatible with a modified principle of voluntariness applicable to representative defendant actions. It was argued that the usual understanding of the principle does not have obvious relevance to defendants (respondents) because they are compelled either to contest or to submit to the claimant's demands.[203] However, while the participation of defendants in litigation cannot be voluntary, their representation can be, and requiring that those to be represented consent to their representation supports an entitlement to refuse to be represented in the litigation, either at all or by the representative selected. It would not, it is submitted, be a surprising outcome if those liable to be represented by the defendant declined to consent.[204]

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[202] 22-23.

[203] So that a representative defendant's participation in the litigation is not less 'involuntary', in this sense, than the 'participation' of those represented. Indeed, defendants may be authorised (where that is necessary) to represent against their will, *Wood v McCarthy* [1893] 1 QB 775, 777-778, in answer to the argument of counsel, 776; the *APRA* case (1961) 3 FLR 146, 147.

[204] It might be compared to Purchas LJ's suggestion in *The Irish Rowan* [1991] 2 QB 206 (CA) 240-241, 245 that those represented by the defendant would be entitled to opt out of the proceedings.

4 Adversarial Freedom

It was suggested in the Introduction that the representative parties rule is understood to demand both a more activist role from the judiciary and limits on the traditional model of adversarial freedom.[205] However, judicial assumptions of adversarial freedom may in fact lie behind a number of successful representative claims.

Where the defendant accepts, or fails to challenge, an action brought by a representative claimant, there has been little concern that the nature of the claim compromises the defendant's right to discovery or to costs in the event that the claim is unsuccessful. In *Smith v Cardiff Corp* Evershed MR noted that a representative claim had proceeded in similar circumstances in *Belcher v Reading Corp*[206] but continued that in that case counsel for the defendant 'submitted that in strictness the case did not fall within the ambit of [the original rule], but stated that Reading Corporation were not disposed to object to the form of the proceeding' and concluded that if counsel for the plaintiffs in the case before him 'expected the defendants to be as accommodating as Reading Corporation, he is proved to have been mistaken.'[207] In *Moon v Atherton* Lord Denning MR noted that the trial judge thought that the case was not properly brought as a representative claim but that counsel for the defendant did not seek to pursue the point. His Lordship thought this concession proper, saying that '[i]f it

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[205] 23.

[206] [1950] Ch 380. Similarly, the ability of two of the plaintiffs to sue in a representative capacity was 'not in dispute' in *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1999] RPC 826 (CA) 831.

[207] [1954] 1 QB 210 (CA) 217, the defendant challenged the representative nature of the claim, and it was struck out.

were not a proper case for a representative action, the defendant ought to have applied to stay the action or to strike it out at the initial stage. By putting in a defence he waived any such point'.[208] The defendant also failed to challenge the representative nature of the claim until it reached the High Court of Australia in *Barnes & Co Ltd v Sharpe*.[209] Griffith CJ was of the view that the objection, when raised, was of a misjoinder of parties which could have been cured by amendment and held that the point was 'therefore, one of form and not of substance, and such a point cannot be raised for the first time after verdict, unless it is shown that some substantial injustice has been occasioned by it.'

Similarly in *Bollinger v Goldwell*[210] the defendant was permitted to amend its defence in an action brought against it by the plaintiffs as representatives of themselves and all persons who produce wine in the French Champagne District and ship such wine to England and Wales. The claim against the defendant sought to restrain it from using the word 'champagne' in connection with any beverage not being a wine produced in the region of France. The defence originally denied unlawful competition and the amendment sought was to plead also estoppel, laches and acquiescence. The defendant did not, however, claim that allowing the amendment of the defence called the validity of the representative claim into

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[208] [1972] 2 QB 435 (CA) 442. There is no suggestion in *EMI Records Ltd v Riley* [1981] 1 WLR 923 that the defendant (who appeared in person) contested the form of the claim - she did, in fact, admit breaching the copyright of those represented, the latter point discussed above, 208-210. There is also reference to the filing of a defence to the representative claimant action in *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 271-272. Nor does the representative nature of the claim appears to have been challenged in, for example, *Blythe v Birtley* [1910] 1 Ch 228, *Price v Rhondda UDC* [1923] 2 Ch 372 or *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.

[209] (1910) 11 CLR 462, 469-470, holding that, if there had been an error, no such injustice had been occasioned. O'Connor and Higgins JJ, 478 and 484.

[210] [1971] FSR 405, 414-415.

question.[211] This effect is alluded to by counsel for the plaintiffs who sought to argue that the defendant could not plead estoppel 'because that plea, in its very nature, is a personal one.'[212] It is submitted that the fact of a representative claim does not deny the right to plead estoppel, rather accepting that there are grounds on which estoppel might be claimed defeats the representative claim.[213] However the validity of the representative claim in the circumstances was not raised by the defendant, and so was arguably treated as accepted by it.

These decisions might be contrasted with the statement in the *LAPT* case[214] that whether or not there is sufficient 'same interest' is a question of substance 'and not mere technical matters which could be waived if the parties so elected.' However, the circumstances of the *LAPT* case are distinguishable from the claims considered above - in that case the claim was brought against not an individual defendant but a representative defendant.[215] It is clearly arguable that waiver of the rights of those represented by the

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[211] Nor was the issue raised by Megarry J who allowed the amendment, primarily on the basis that the injunction sought by the plaintiffs was wide and he could 'see no reason why the defendant should not be at liberty to amend the defence in the matter sought in order to meet a wide claim by a wide defence', [1971] FSR 405, 414-415.

[212] [1971] RPC 412, 414 (the arguments of counsel are not reported in [1971] FSR 405).

[213] Indeed, it is interesting to note that in the other claim reported with *Bollinger v Goldwell* [1971] FSR 405, *HP Bulmer Ltd v J Bollinger SA*, Megarry J disallowed the representative plaintiff claim on the basis that it sought to plead estoppel, saying that estoppel 'raise[d] what is essentially an individual type of issue; and without saying that the presence of a plea of estoppel makes it impossible for those putting forward the contention to do so in a representative capacity, I can see great difficulty in most cases', [1971] FSR 405, 411. Similarly in *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470, 482, Bray CJ noted that the defendant to the representative plaintiff action did not raise a 'plea of estoppel or acquiescence or the like' but thought that they would not have affected the cause of action relied upon in any event; affirmed by the High Court of Australia without comment on the representative nature of the action, (1970) 44 ALJR 434.

[214] [1916] 2 AC 15 (HL) 38-39.

[215] There are a number of claims against representative defendants which do appear to rely on the representative's response to the form of the proceedings, and these are discussed in Ch 5, 291-295.

representative is not comparable with an individual defendant's waiver of his or her personal rights when faced with a representative claimant.

Likewise, there has been little concern for the inability of the claimant who brings proceedings against a representative defendant to seek discovery, or costs, from those represented.[216] This can also be explained by the principle of adversarial freedom - the claimant in these circumstances in effect chooses not to avail himself or herself of these procedural opportunities.[217]

However, it is also clear that this same assumption of adversarial freedom can operate to defeat what might otherwise be considered legitimate reliance on the rule.

It was suggested above that the claim to use the representative parties rule in *Carnie v Esanda* was ultimately defeated by reference to the possibility that those represented would suffer detriment due to the nature of the proceeding.[218] It was argued that referring to the possibility of detriment to those represented will inevitably result in the defeat of any claim to use the representative parties rule but it is acknowledged that the anticipated detriment in

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[216] Andrews (1994) 144 refers to the suggestion in *Bank of America v Taylor* [1992] 1 Lloyd's Rep 484 that representative defendants might have a restitutionary remedy against those represented for any costs in the context of representative proceedings generally. Advocating such a claim for representative claimants involves a departure from the traditional model of adversarial freedom.

[217] Acceptance of the form of the action by the individual claimant or defendant does not, of course, resolve the issue of the protection of the rights of those represented. It is suggested that, in most of the representative claimant actions which have proceeded, their rights are protected by the likelihood that an accurate decision can be made in their absence, by the necessary notification of any enforcement proceedings, and, in some cases, by the assumption that they do in fact know of the representative proceedings. The rights of those represented in representative defendant actions might also be protected on these grounds but, it is argued in Ch 5, many are better viewed as focused not on the accurate application of the substantive law, but on its development.

[218] 246-248.

Carnie v Esanda (No 2)[219] was of an unusual kind. The defendant's argument appears to have been that, as things stood, it was barred by limitation periods from proceeding to recover any money due to it under the contracts it had with those to be represented. If, however, the representative proceeding 'confirmed the cause of action' within the meaning of the Limitation Act 1969 (NSW) s 54 then the limitation period would run from the date when the cause of action was confirmed and the defendant would again be in position to enforce the contracts. It may well have been, therefore, that his Honour's anxiety to have those to be represented consent to their representation was based on the particular nature of the detriment alleged.

However, in accepting this argument Young J provides a demonstration of the general reluctance to adapt rules to the particular context of the representative proceeding. His Honour assumed that the defendant could raise this argument as a counterclaim without subjecting it to the same test of common question of law or fact which the plaintiffs were required to satisfy.[220] In the absence of any statutory guidance as to whether or not the defendant could counterclaim against the represented class, and whether any counterclaim could go beyond responding to the common questions isolated for determination, Young J made assumptions about the defendant's entitlement so to do, consistent with the traditional model of litigation which assumes freedom on the part of the parties to conduct their cases.

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[219] (1996) 38 NSWLR 465.

[220] In the *Zentahope (No 2)* case [1991] ATPR ¶41-135, 52,969 Young CJ addressed the issue of counterclaims in the context of the former ss 34 and 35 of the Supreme Court Act 1986 (Vic) and took the view that if the counterclaim was asserted against the class, then it would be a 'defendant class action' for which the sections in issue did not provide but which was catered for by the representative parties rule. His Honour did not consider whether the defendants might rely on the rule but assumed that those represented against would have to become parties, 'at least to the extent that they became defendants to the counterclaim'.

The defendant's ability to counterclaim was not examined in the light of the fact that the proceedings were representative. Nor was the argument itself examined in the context of the nature of the proceedings in which it was to be made. Whether it was right to say that the commencement of a representative claim 'confirmed the cause of action' within the meaning of the Limitation Act 1969 (NSW) not only for the named plaintiff but also for those represented is a proposition which arguably requires close consideration. However, it is clear from Young J's judgment that 'the cogency of the point about confirmation of a cause of action under s 54 of the *Limitation Act*' was not argued before him at all.[221]

The rejection of the representative claim by HP Bulmer Ltd against J Bollinger SA, heard with *Bollinger v Goldwell*,[222] arguably provides another example. The plaintiff argued that the use of the word 'champagne' as a prefix to 'cider' or 'perry' had ceased to deceive the public as to the maker of the article and also that those represented by the defendants were estopped by their knowledge of use of the expressions 'champagne cider' and 'champagne perry' and/or were guilty of laches and acquiescence. Megarry J thought that the former issue was appropriate to be dealt with as a representative question but that the latter was inappropriate for consideration in representative proceedings. He went on to ask what the position is 'when part of the claim is appropriate to a representative action and part is not. I have been referred to no authority on the point, but I think that there can be only one answer. In my judgment, a representative action cannot be brought unless the whole of the claim is appropriate to that form of action.' There is no suggestion in the report that there was any

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[221] *Carnie v Esanda (No 2)* (1996) 38 NSWLR 465, 474.

[222] [1971] FSR 405, 411.

application to amend by the plaintiffs, and therefore, the possibility that the claim might be amended was not canvassed.

There has not yet been any indication that the provision in the current rule for judgments or orders to be binding unless the court otherwise directs might be viewed as a basis for adjusting the claims made on behalf of, or against, those represented. Nor has there yet been an opportunity to consider whether the shift of emphasis to judicial management of proceedings[223] has overcome, at least in the context of representative proceedings, the perception 'that, in an adversarial system, latitude in the conduct of one's case is a requirement of justice.'[224]

D NATURE OF APPLICATION

It is acknowledged that the decision whether to allow a representative claim may be influenced by the circumstances in which the question comes before the court. In a number of the claims considered above, the representative nature of the claim is considered in the context of an application to strike out the representative claim. The interim nature of the application before the court has been referred to in a number of decisions. In *Mundy v*

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[223] Introduction, 23. There appears to have been only one representative claim under the current rule thus far, *National Bank of Greece SA v RM Outhwaite* (16 January 2001).

[224] Zuckerman (1995) 158.

Cunningham[225] the defendant brought a motion to rescind an interim injunction restraining excavation on the headland of Mahina Bay. Haslam J acknowledged that the defendants objected to the plaintiffs' claim to sue on behalf of a substantial number of the residents of Mahina Bay but commented that '[w]ithout an examination of the full facts which I cannot make on the restricted material before me, I am unable adequately to investigate the plaintiffs' assertion', and declined to 'prejudge the question of whether the plaintiffs might not ultimately fail', anticipating that 'a different conclusion may be reached if the facts are more thoroughly canvassed and the case argued on the full merits.'

Similarly in *RJ Flowers Ltd v Burns*,[226] the plaintiff made an interim application for an order that it be entitled to bring the claim as the representative of those other kiwifruit growers who, it was alleged, had suffered damage due to a drop in temperature in the defendant's cool store. McGechan J allowed the representative claim to go ahead, noting that the defendant denied the contracts alleged and also contended that some growers did not in fact have fruit in the store but saying that 'the reality is that at this early interlocutory stage I am in no position to make a factual finding on that point . ... Unless I am to elevate a mere expression of contest by a defendant into an automatic barrier to a representative action, I cannot regard these contentions as decisive.' He went on to anticipate that the proceedings 'may need to be reshaped' if more information was to emerge suggesting that the representative claim was not appropriate.

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[225] [1973] 1 NZLR 555, 561, affirmed on appeal [1973] 2 NZLR 654.

[226] [1987] 1 NZLR 260, 271-272, 273. In *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 (CA) 40 the plaintiffs were granted the interlocutory relief sought but their right to sue on behalf of all members of the British Phonographic Industry Ltd is expressly not decided on the ground that it would be inappropriate to do so on an *ex parte* application.

It might be argued that these representative claims proceeded, not because of any positive decision that the claim was appropriately brought as a representative action, but rather because the court did not feel it had sufficient information to deny the claim. However, even if this is the case, the fact that these claims cleared this initial hurdle is itself noteworthy, given how many other representative claims do not, and it is submitted this fact might be explained by the particular features identified above.

E CONCLUSION

The generally restrictive interpretation of the requirement of 'same interest' might be understood to be a judicial reaction against the rule's restriction of a number of accepted principles of procedural law. It was argued that assessment of the representative parties rule on this basis also ought to examine the purposes which the principles relied on are intended to serve, and to balance any limitation of those purposes or principles by the rule against its potential advantages. It has also been argued that some of those representative cases which have proceeded have done so in circumstances where the primary purpose of procedural law, accurate application of the substantive law, has not been unduly threatened by the form of the action.[227] However, the general failure to analyse these claims with reference to the purposes of procedural law[228] means that the significance, if any, of the knowledge which it can often be assumed that those represented had of the proceedings remains unclear. The fact that the purposes of procedural law were arguably adequately protected in some of those

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[227] However, some representative claims cannot be explained on this basis; these cases are discussed in Ch 5.

[228] Or, in some of the claims which proceeded, to refer to the representative nature of the action at all.

representative claims which were successful does not, however, mean that all those decisions refusing resort to the representative parties rule exemplify circumstances where those purposes were necessarily under threat. The failure to consider applications to use the rule with explicit reference to the purposes of procedural law which underlie familiar principles may have resulted in many such applications being defeated by the 'separate defences' test,[229] or by reference only to those principles which the rule, of necessity, contradicts.

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[229] Which, it was argued in Ch 1, necessarily defeats any claim to use the rule.

CHAPTER 5 THE REPRESENTATIVE PARTIES RULE AND DEVELOPMENT OF THE SUBSTANTIVE LAW

A INTRODUCTION

Chapter 4 argued that the generally restrictive interpretation of the requirement of 'same interest' is more clearly analysed with reference to the commonly accepted purposes and principles of procedural law. It also argued that those representative claims which have been permitted to proceed might be understood as situations where the purposes which the principles of procedure serve were adequately protected even if particular principles, or other procedural rules, were denied. It was also suggested that some of the claims which did not proceed might also be understood in the same way - that is, that the purposes which the principles of procedure are intended to serve would, in the circumstances, be seriously undermined without corresponding benefit.[1]

A significant number[2] of representative claims were not dealt with in Chapter 4 because, it will be argued, they suggest a quite distinct explanation of why some representative claims might proceed. It is submitted that, for example, a number of representative claims against members of unincorporated associations have gone ahead not because of a perception that a

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[1] It was noted that the inevitable denial of the representative claim which follows application of the dominant 'separate defences' test means that not all claims which were denied conform to this principled analysis.

[2] In comparison to how many representative claims do proceed.

substantially accurate decision can be reached in the absence of participation by those represented but, rather because of a perception that the rule enables the court to reach a 'just' decision in circumstances where the relevant substantive law is not viewed as 'just'.

B PURPOSES OF PROCEDURE AND CLAIMS AGAINST MEMBERS OF UNINCORPORATED NON-PROFIT ASSOCIATIONS

The prevailing substantive law concerning the liability of members of unincorporated non-profit associations[3] means that any finding that all the members are liable in contract or in tort is likely to involve the court in a manifestly inaccurate decision, in the absence of clear rules of the association affirming their liability. It might be argued that the nature of unincorporated associations is such that this inaccuracy is overcome by the knowledge that members can be assumed to have of the proceedings brought against them and their implied authorisation of their representation in those proceedings, in the event that they take no steps to dispute it. If this argument, which would be consistent with the analysis in Chapter 4, does explain those representative claims which have gone ahead against members of unincorporated associations, it has not been specifically relied upon in those decisions. Nor is it clear that all those claims which have proceeded could convincingly be explained on this basis.

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[3] The difficulties of defining such associations are not explored here. A full discussion of this issue is found in Rideout (1996) 189-193, which concludes that unincorporated associations are distinguished from other social associations by a system of organisation.

1 Substantive accuracy

It was argued in the Introduction[4] that one of the primary purposes of procedural law is to determine the relevant facts of any dispute and to enable the accurate application of substantive law to those facts. Denial of the use of the representative parties rule might, therefore, be based on an assessment that its use would result in a manifestly inaccurate decision. A number of the claims against defendants representing the members of unincorporated associations make reference to the particular difficulties with this type of claim which inhibit the court's ability to reach a substantially accurate decision in the absence of those represented.[5]

(a) Authorisation and ratification

It is clear that it is not possible to enter into a contract with, or bring a claim against, an unincorporated non-profit association - such an association is not a legal entity.[6] Likewise, the

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[4] 5-6.

[5] *Hardie and Lane, Ltd v Chiltern* [1928] 1 KB 663 (CA) 696; *Barker v Allanson* [1937] 1 KB 463 (CA), 473, 476-477; *United Kingdom Nirex Ltd v Barton* The Times 14 October 1986; *Harris v Raggatt* [1965] VR 779, 781.

[6] Lloyd (1938) 133; Ford (1959) 51; Josling (6th edn) 4. This assumes that there has not been express or implied statutory recognition of the association, Rideout (1996) 194-195.

association cannot commit a tortious act.[7] Any claim must be against some or all of the members of the association, and depends on the general law of agency.[8]

The prevailing view of agency in the context of unincorporated associations is a narrow one, requiring that a member authorise the particular transaction or activity concerned in order to be liable as principal.[9] This suggests that the court ought to presume, in the absence of evidence to the contrary, that all members of an association do not authorise transactions or tortious activity. Without such evidence, proceeding in the absence of the members of the association involves the court in manifest inaccuracy.

Therefore, a claim which proceeds against a defendant as the representative of 'the members of an unincorporated association' relies on acceptance of a number of assumptions. Where such a claim is based on a contract, it assumes that all members of the association are party to the contract,[10] or that all members of the association authorised or ratified it.[11] If authorisation or ratification is relied upon,[12] this might be shown to the satisfaction of the court

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[7] Warburton (2nd edn) 80.

[8] Lloyd (1949); Ford (1959) 51; Keeler (1971).

[9] Ford (1959) distinguishes the 'particular transaction' test for agency from the 'management authority rule', and from the 'quasi-partnership' view of agency, 51-52, 57. In *Baker v Jones* [1954] 1 WLR 1005, 1011, for example, Lynskey J noted that the members of the British Amateur Weightlifters' Association would not be liable for the tortious acts of a particular member 'except insofar as they had individually authorized such acts.'

[10] Claims made on behalf of or against joint contractors are considered to be an appropriate use of the representative parties rule, Ch 1, 47-48.

[11] Such authorisation might found in the rules of the association, or on the particular facts of the case, Lloyd (1938) 134; Josling (6th edn) 92; Warburton (2nd edn) 87.

[12] It is most unlikely that a claimant will be able to demonstrate that all members of an unincorporated association of any size are parties to a contract. Indeed, if it is possible to show that all members are parties, it may be considered to be equally convenient to join them in the proceedings, Rideout (1996) 195.

in the absence of evidence from those represented by, for example, reference to the rules of the association or to the record of attendance and minutes of a meeting at which entry into the contract was approved.[13]

Similarly, where a claim proceeds against a defendant representing the membership of an unincorporated association with regard to the commission of a tort, it presumes that all members of the group jointly committed the tort,[14] or that the tort was authorised by the members of association. This hurdle is likely to be even more difficult to demonstrate than it is in claims brought in contract against members of unincorporated associations - authorisation of a tort will not be lightly implied.[15]

Those representative claims against the members of unincorporated associations which have directly addressed the liability of the represented members have adopted this narrow view of agency and have, accordingly, rejected the claim to use the representative parties rule. In the *LAPT* case[16] a claim alleging libel was brought against the London Association for Protection of Trade, an unincorporated association comprising over 6,000 members and formed for the purpose

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[13] However, the participation of those represented seems likely to be viewed as more significant if more informal ratification, such as the knowing use of goods ordered, is relied upon, Warburton (2nd edn) 88.

[14] As with joint contractors, it also seems to be accepted that the rule is appropriately used by those who have a joint action in tort or an action against joint tortfeasors, Ch 1, 48.

[15] Rideout (1996) 202-203. Express authority is clearly even more unlikely. Contrast however *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 529-530 where the defendants were appointed to represent only those members of the Sydney Shipping Section who had attended a meeting at which a decision was taken to obstruct delivery of shipping containers, a decision held to be 'one of the principal overt acts involved in the conspiracy alleged'; and *Prudential Assurance Co Ltd v Lorenz* (1971) 11 Knight's Industrial and Commercial R 78, 80 where those represented (the members of the national executive council of a union) passed a resolution that the details of the industrial action recommended be communicated to union members. On a motion for interlocutory injunctions, those communications were held to constitute incitement to commit a breach of the duty of union members to account to the plaintiff.

[16] [1916] 2 AC 15 (HL) 39.

of making inquiries as to the commercial standing and credit of traders. The secretary had sent an untrue and defamatory report prepared by a third party on the state of the defendant to a member of the association. Both sides agreed that the association had to be struck out from the pleadings as it could not be sued as a legal entity. However, an appearance was entered by an official and member of the association on behalf of himself and all other members of the association. Lord Parker said that 'it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort was committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him'. Similarly in the *MMSA* case the plaintiffs brought an action for an alleged libel in a journal owned and managed by the Imperial Merchant Service Guild, an unincorporated association of approximately 15,000 members.[17] Their application for an order that the chairman, vice-chairman and secretary defend on behalf of all members of the guild was denied and Swinfen Eady J noted that 'the plaintiffs must prove who published the libel, and prima facie only those who have published it ... or have authorized its publication are liable. ... The members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorize their publication; they were on the high seas and knew nothing about the matter.' Again, knowledge that the guild published a journal appears to be insufficient to fix the members with liability for the libel it contained - knowledge of the publication of the libel was required.

Those claims against defendants as the representatives of the members of unincorporated non-profit associations which have proceeded do not do so with reference to particular rules of the association, or to particular circumstances on which the necessary authorisation of the members is based.

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[17] [1916] 2 KB 243 (CA) 246-247.

Moreover, a claim brought against a defendant as the representative of 'the members of the association' also depends upon accepting the assumption that the membership of the association has not changed, or that new members have also ratified the contract, or become liable for the tort.

The fact that membership has not changed might be accurately determined in the absence of participation by those members in the proceedings.[18] If, however, this is not shown, the assumption will be that membership of associations does change[19] and that finding 'the members of the association' liable would involve the court in the probability, rather than the possibility, of an inaccurate decision. In these circumstances, only a claim against the defendant as the representative of 'the members of the association who were members at the time the contract was authorised' would satisfy the demands of accuracy.[20]

Alternatively, it might be argued that the membership has changed but that new members have ratified the contract, or the tort. A rule of the association specifically providing that admission as a member entails ratification by the new member of any contracts authorised by the members of the association before the new member's admission might demonstrate such

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[18] By, for example, production of registers of membership for the relevant dates.

[19] *Walker v Sur* [1914] 2 KB 930 (CA) 937; *Harris v Raggatt* [1965] VR 779, 780. In *A-G for Victoria v City of Brighton* [1964] VR 59, 62 Gowans J commented that 'it would be unreal to assume that the membership [of the Brighton Aquatic Club] remained unchanged'.

[20] In *Campbell v Thompson* [1953] 1 QB 445, 451 Pilcher J thought it 'clear' that the representation order sought, and made, could only refer to 'those persons who were members of the club at the time of the plaintiff's accident'. The representation order sought in *Tydeman v Roberts* [1985] 2 Qd R 144, 151was limited to those who were members at the date of the accident. Limiting the claim in this way may, however, have implications for enforcement against the association's common property, discussed below, 271-273.

ratification to the court's satisfaction without the participation of those represented.[21] However, absent this unlikely circumstance, it is not assumed that new members impliedly ratify all earlier contracts upon their admission to an unincorporated association. In *Barker v Allanson*[22] a claim was brought against a number of defendants as representatives of the members of the Chiltern Colliery Lodge for outstanding sums owing on goods supplied to the Lodge in 1921. The majority of the members of the Lodge were not members when the goods were ordered and Greer LJ notes that the majority of those represented 'would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority, as they were not members of the Lodge in 1921'. The appeal from an earlier decision to set aside the representation order was dismissed.

So far as torts are concerned, new members of an unincorporated association might become liable for a tort committed prior to their membership by ratifying the particular tortious act.[23] This improbable scenario aside,[24] there is some dispute even in the general law of agency as to whether ratification of an earlier act of an agent would involve ratification of any tort arising out of that act. *Bowstead & Reynolds* suggests that ratification 'in so far as it makes one person

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[21] Lloyd (1949) 417-418 questions whether such a provision would assist a claimant in any event, arguing that it could only be used as evidence of ratification of transactions entered into before the new member joined and doubting that such a term could satisfy the need for the principal to be ascertainable at the date of the contract and for the principal to have ratified with full knowledge of the facts. He is similarly sceptical of the ability of such a term to operate as a novation. Keeler (1971) 616 appears to agree with this hesitation. Rideout (1996) 195 assumes that such a rule would generate sufficient 'same interest' to support a representative claim, but does not examine the question in any detail, or refer to any authority in support of that conclusion.

[22] [1937] 1 KB 463 (CA) 473. Scott LJ (476-477) noted that the Lodge's rules did not authorise the distribution of goods or specify that the cash cost of goods was to be treated as a charge upon the general fund of the changing body of members. As to the effect of the latter rule in particular, see n21 above.

[23] Markesinis (4th edn) 181; GHL Fridman *The Law of Agency* (7th edn Butterworths London 1996) 315.

[24] It would seem unlikely that it could be assumed that a particular tort has been ratified by any new member of an unincorporated association, let alone by all.

liable for the torts of another ... normally applies only to conversion, and possibly also to trespass to goods, where the fields of contract, tort and property overlap and liability is strict; and that in torts requiring personal fault it should not be regarded as significant.'[25] Stone accepts that these are the most frequent examples but argues that '[o]nce it is accepted that there can be liability on this basis, however, there is no reason for it to be limited to such situations.' He argues that ratification of an unauthorised service which turns out to have been delivered negligently would make the principal liable for the negligence.[26]

Even if the broader approach is adopted, clear evidence of ratification of the act concerned would be needed to overcome the assumption that new members do not, by virtue of membership alone, ratify all acts undertaken prior to their becoming members or, therefore, any torts arising out of them. So, in the *LAPT* case,[27] in addition to the difficulties Lord Parker anticipated the plaintiffs would have showing authorisation of the libel by all members in any event, he went on to say that 'if an order could have been made at all it must have been confined to authorizing Sir Samuel Scott to defend on behalf of himself and those who were members of the association at the date of the alleged libel. Those who had become members since that date could not be liable at all.'

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[25] *Bowstead & Reynolds* (16th edn) 66. Markesinis (4th edn) 181 also contrasts the vicarious liability of an employer for torts committed within the course of an employee's employment with the liability of a principal for acts of an agent; suggesting that the latter is liable 'for any torts involving representations which the agent may have committed whilst acting within his actual or ostensible authority.'

[26] R Stone *Law of Agency* (Cavendish Publishing London 1996) 30. GHL Fridman *The Law of Agency* (n 23 above) 315 also submits that the principal is liable if the authority of the agent extends to cover the acts committed by the agent.

[27] [1916] 2 AC 15 (HL) 39.

(b) Enforcement of liability: claims in contract

One advantage of finding the defendant liable as the representative of 'the members of the association' is that the claimant will be entitled to seek enforcement against the common fund of the association. If all members of an unincorporated association are liable, either personally or as principals, then a claimant will be able to gain access to any funds or property held by the association.[28] As noted earlier, demonstrating that all current members of an association authorised or ratified a contract in the face of the likelihood of changes in membership is likely to present difficulties.[29]

However, a claim against the defendant as the representative of those members of the association who were members at the date that the contract was entered into, or authorised, or as representative of those who were members at the relevant time, whether or not they are still members of the association, cannot, if successful, be enforced against the common fund. Such a claim would seek to make those members personally liable. However, the authority given by the members of an association to an agent to contract on their behalf is restricted to the funds of

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[28] Ford (1959) 93; Lloyd (1949) 418; Keeler (1971). Whether the association's funds can also be relied upon by way of indemnity wherever expenses are 'properly incurred' regardless of changes in membership is surprisingly unclear. Some commentators simply say that a liable individual 'may' or 'is likely to be' entitled to an indemnity from the common fund, without citing authority or detailing the circumstances in which this entitlement will arise, Warburton (2nd edn) 90 and Rideout (1996) 202. Keeler (1971) 616 argues for such an indemnity; and Keeler (1995) 12 claims that it is 'a necessary and assumed, if not well-established' concomitant of the likely liability of those with authority to manage an association's affairs. The traditional position does not anticipate any recourse to the common fund without demonstrating the liability of all current members of the association, Ford (1959) 93; Lloyd (1938) 135.

[29] Lloyd (1949) 418 commenting on the decision in *Barker v Allanson* [1937] 1 KB 463 (CA) concludes that 'it does not seem to matter to what extent the membership has changed between the date of the contract and the writ in the action: even a change of one member might possibly suffice'.

the association, and does not, in the absence of specific rules to the contrary, extend to authority to commit the members' personal funds.[30]

(c) Enforcement of liability: claims in tort

As with claims in contract, a claim in tort against all the members of an association enables recovery against the funds or property of the association. Again this depends on the membership remaining the same between the commission of tort and the claimant's action, or the claimant being able to demonstrate that all new members have ratified the tort. The difficulties involved with this were considered in the discussion of authorisation and ratification above. In *Harris v Raggatt*[31] the plaintiff claimed for injury against the defendants both personally and as representatives of the members of the Tongala Bush Nursing Association on the date the injury occurred. The Association administered the hospital where the plaintiff was injured. Scholl J noted that the plaintiff did not make any claim against the present members of the Association,[32] 'although apparently relief is claimed out of the current assets of the association,' and continued

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[30] Warburton (2nd edn) 88; Ford (1959) 56-57, criticising the development of this general principle, 52-56; Keeler (1971); Lloyd (1938) 137, 140.

[31] [1965] VR 779, 781.

[32] A representation order against the members of the association generally at the date of the injury had earlier been refused, [1965] VR 779, 780. In *Campbell v Thompson* [1953] 1 QB 445, 454 the representation order was made against the members of the City Livery Club at the date of the plaintiff's injury, but it was held, on the facts, that the plaintiff failed to make out her case, so there is no discussion of the likely source of any damages which might have been awarded (whether the common fund, or those members personally), although the court does refer to a relevant insurance policy, n76 below .

> How the present assets, or the assets existing at the time of any judgment, could be reached in an action in which the representative parties represent only the committee of management of seven years ago (and representation of the whole membership of seven years ago would not improve the position) and in which there is no representation of the present committee or membership, or of the trustees or any other persons in whom the present assets are vested, I am unable to understand. Without a representative order even the interests of the then members generally in the then funds could not have been reached.

Even if the common fund of the association can be relied upon to indemnify a liable individual,[33] claims in tort would seem likely to give rise to some particular difficulties. The plaintiff may have difficulty identifying any liable individual at all. If such an individual is found, the plaintiff may have difficulties, given the predominantly narrow view of agency, demonstrating that either the act or tort was one carried out for the association's purposes. Finally, it may be that the common fund of the association is in fact insufficient to meet the damages claimed.

If, however, it can be demonstrated that some or all of the members of an association did authorise a tort, it is uncertain whether there is the same implied limitation of liability to the extent of the common fund as generally applies in contract claims. Lloyd argues that the reasoning which supports the limitation of the members' liability in contract does not apply equally to claims in tort.[34] His argument assumes that the members are held to be liable as 'employers' and notes that vicarious liability 'is imposed by the law irrespective of any

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[33] The uncertainty surrounding the availability of the common fund to indemnify agents of the association even where there have been changes in membership was noted above, n28.

[34] Lloyd (1938) 153-154.

limitations, express or implied, ..., so long as the particular act was in fact within the scope of authority'. This reasoning may therefore extend the liability of members to their personal funds. However, he goes on to acknowledge that this would depend on characterising the individual who commits the tort as a servant of the members.[35] In circumstances where the claim is brought against the defendant as representative of 'the members of an unincorporated association' this would demand an assumption that all members were employers of the individual who committed the tort, an assumption which would be subject to the same considerations which were noted in the discussion of authorisation or ratification of contracts generally.[36]

However, despite the difficulties presented by the dominant view of agency to claims brought against representatives of members of unincorporated associations, several representative actions have proceeded against such defendants.[37] This tendency has been noted by a number of commentators, although usually without any detailed explanation being offered.[38] Moreover, the

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[35] Lloyd (1938) 154. Rideout (1996) 203 agrees that the suggestion that liability could be limited to the association's funds is 'rightly' rejected although notes that an express limitation in the rules of the association could restrict the amount of damages a member could claim. Contrast *Harris v Raggatt* [1965] VR 779, 781 where Scholl J doubts whether a representation order against the members of the association 'could have led to a judgment available against the other members' personal assets'.

[36] It is argued below that assuming that all members are 'employers' is better characterised as a substantive legal development, 283.

[37] *Ideal Films, Ltd v Richards* [1927] 1 KB 374 (CA); *Bolton v Stone* [1951] AC 850 (HL); *Campbell v Thompson* [1953] 1 QB 445; *Miller v Jackson* [1977] QB 966 (CA); *Greig v Insole* [1978] 1 WLR 302; *Kennaway v Thompson* [1981] QB 88 (CA); *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597 (CA); *Tetley v Chitty* [1986] 1 All ER 663; *Murray v Hibernian Dance Club* The Times 12 August 1996; *White v Glass* The Times 18 February 1989 (CA); *Monsanto plc v Tilly* The Times 30 November 1999 (CA); the *APRA* case (1961) 3 FLR 146; *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525; *Tydeman v Roberts* [1985] 2 Qd R 144; *Evans v Waitemata* [1972] NZLR 773.

[38] Aronson (6th edn) 99 notes that the rule is interpreted 'liberally' in such claims but assumes that all are properly viewed as joint contractual or tortious liability without considering the matter in any detail. Cairns (4th edn) 335 after discussing the difficulties involved, goes on to say that '[d]espite all this, unincorporated associations are frequently sued' but the basis on which 'the necessary common interest is made out' is not explored in any detail.

majority of these successful claims to use the representative parties rule do so in tort, which would appear to present the greatest substantive difficulties.

It may be that these decisions, which apparently offend against the primary instrumental purpose of procedure, are in fact compatible with it on the ground that it is assumed, not that the members of the association are liable, but that they know of the proceedings. This knowledge might be construed as authorisation of the named defendant to defend. Alternatively, as with any claim to use the representative parties rule, the courts may be relying on the inevitable knowledge of, and opportunity to participate in, any enforcement proceedings to ensure a substantively accurate outcome.

2 Knowledge

(a) Authorisation

It was argued in Chapter 4[39] that the principle protecting the entitlement to be heard might be satisfied by authorisation. If those represented authorise the representative to act on their behalf, the court may assume that any contribution they might have made to an accurate decision will be conveyed to their representative, and so to the court. Even if those represented do not inform the court in this manner, reliance on their authorisation might still be justified with reference to a

[39] 237-241.

modified principle of voluntariness. The principle of voluntariness assumes that claimants should not be compelled to bring their grievances to law. In the same way, the principle might also be understood to support an assumption that potential litigants are free to authorise another to represent them.[40] It might, therefore, be argued that those representative claims which have proceeded against members of unincorporated associations can be explained by reference to their authorisation of the representative. That is to say, the nature of unincorporated associations in general or of some unincorporated associations in particular may be such that informal knowledge of the proceedings is assumed and so authorisation is implied from failure by members of the association to seek to replace the nominated defendant and challenge the form of the proceedings.

If this authorisation is assumed from the fact of membership alone it would constitute a significant departure from the 'particular transaction' view of agency which prevails in decisions concerning unincorporated associations. If authorisation is assumed in the circumstances of any particular claim, it depends on finding that the members of the association had the requisite knowledge of the proceedings and on accepting the members' inaction as authorisation. The former finding may be dependent on the nature of the association before the court. For example, in the *MMSA* case[41] the court noted that the association which the plaintiff sought to have the defendant represent had some 15,000 members, some of whom may have been on the high seas. It may be that it was difficult in these circumstances to assume knowledge of the proceedings and,

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[40] Introduction, 23 n93.

[41] [1916] 2 KB 243 (CA). The comment that some members may have been on the high seas was made in connection with the likelihood of their having authorised the alleged defamation, but the point is equally applicable to concern for their knowledge of the proceedings, and their ability to participate, either formally or informally.

therefore, implied authorisation. Similarly, in *United Kingdom Nirex Ltd v Barton*, Henry J refused to grant an injunction against representatives of associations set up to prevent the dumping of nuclear waste at particular sites and described the associations concerned as 'loose in the extreme'.[42] The latter proposition does not sit easily with the general law of agency, which assumes that 'where one person purports to act on behalf of another, the assent of that other will not be presumed merely from his silence, unless there is further indication that he acquiesces in the agency.'[43]

Moreover, if informal knowledge of the proceedings by those represented has been assumed and relied upon to establish authorisation of the nominated defendant to represent in those claims which have proceeded, this assumption and reliance has not been explicit. *Parr v Lancashire and Cheshire Miners' Federation*[44] might be read as an example of reference to the assumed knowledge of those represented. In that case the plaintiff's claim was brought against, *inter alia*, the president, vice-president, treasurer and secretary of the Miners' Federation of Great Britain. Neville J addressed the argument that the defendants selected did not adequately represent that association and that its executive committee and trustees were the proper defendants, saying that if they had wished to be added as defendants they could have been and that there was 'no question ... that they were through their officers perfectly well advised of the

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[42] The Times 14 October 1986.

[43] *Bowstead & Reynolds* (16th edn) 52-53. Markesinis (4th edn) 82 notes that conduct can amount to ratification but considers that whether 'silence can amount to ratification is a different matter' and refers to a Canadian decision which accepted that 'an intention to ratify can by no means be automatically read into someone's inertia.'

[44] [1913] 1 Ch 366, 375.

case'.[45] Generally, however, the informal knowledge of those represented, or their lack of such knowledge, and the purpose which such knowledge might serve has not been directly addressed in the claims which have proceeded against representatives of unincorporated associations.

(b) Delayed knowledge sufficient

A related argument explaining those decisions which have proceeded in a manner consistent with the analysis proposed in Chapter 4 is to rely on the later knowledge which is guaranteed by the need to seek permission before any representative order is enforced. Purchas LJ made reference to 'the safeguards incorporated in the present ord 15, r 12' when agreeing with Dunn LJ to grant an interlocutory injunction restraining an unidentified group from picketing and committing any nuisance in relation to the plaintiff's premises in *M Michaels (Furriers) Ltd v Askew*.[46] Similar reasoning could, however, be relied upon to explain why any representative claim has been permitted to proceed. While, therefore, it might explain why particular judges have been content to allow particular representative claims to go forward, it does not explain why claims against representatives of members of unincorporated associations have, in particular, successfully relied upon the representative parties rule.

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[45] The members of the Miners' Federation of Great Britain were all trade unions ([1913] 1 Ch 366, 368) and arguably the assumption that the executive committee members and the trustees were informed of the proceedings assumes that the Federation's corporate members were also so informed.

[46] (1983) 127 SJ 597 (CA). Contrast *United Kingdom Nirex Ltd v Barton* The Times 14 October 1986 where Henry J referred to the relief available under RSC 1965 O15 r12(3)-(5) but went on to discharge the *ex parte* interim injunctions granted against fifty named defendants sued on behalf of all persons belonging to organisations set up to protest against the dumping of nuclear waste at various sites.

Another explanation for those claims which have proceeded against the representatives of members of unincorporated associations is that those decisions have taken a different view of the substantive law regarding the liability of members of such associations - views which enable the courts to reach a substantially accurate outcome in the absence of the participation of those represented.

C DEVELOPMENT OF THE SUBSTANTIVE LAW: UNINCORPORATED NON-PROFIT ASSOCIATIONS

There have been occasional judicial references to the difficulties faced by claimants unable to establish the liability of all members of an unincorporated non-profit association - they may be left with a defendant with limited ability to satisfy any award made, or with considerable difficulties in identifying any defendant at all. Lord Macnaghten referred to the potential difficulty in the *Taff Vale* case.[47] He noted that counsel for the respondents was 'bold enough to say that if a wrong was committed by a body of persons, acting in concert, who were too numerous to be made defendants in an action, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands were actually doing the wrong'. After recording that counsel for the respondents maintained this position in response to a hypothetical situation assuming an unincorporated body poisoning a stream, or polluting the atmosphere and injuring its neighbours, Lord Macnaghten continued that he 'should be sorry to

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[47] [1901] AC 426 (HL) 439.

think that the law was so powerless' and that it seemed to him 'that there would be no difficulty in suing a trade union in a proper case if it be sued in a representative action.'[48]

It is submitted that in response to the perceived injustice generated by the narrow interpretation of agency in the context of unincorporated associations,[49] the representative parties rule has, on occasions, presented courts with an opportunity to achieve that justice which the substantive law appears to deny.

1 Members of Association Liable as 'Occupiers'

Warburton suggests that some of the representative cases brought against the members of unincorporated associations turn on the fact that they concern liability arising out of the occupation of premises as opposed to liability arising out of the activities of members. She notes that the question who is the 'occupier' is a matter of fact and goes on to say that it is 'arguable, however, that all the members collectively are the occupiers'.[50] In only one of the authorities cited for this proposition is the issue discussed. *Smith v Yarnold*, a decision of the NSW Court of Appeal, concerned an appeal by committee members against a finding that they were liable for the damage caused by the collapse of a stand at the club premises. The decision's inclusion in

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[48] In *Stone v Bolton* [1950] 1 KB 201 (CA) 213 Jenkins LJ referred to the fact that if the members of the Cheetham Cricket Club were not liable the plaintiff would have to be 'able to identify, trace, and successfully sue the particular batsman who made the hit' in order to recover.

[49] Or by the difficulty of identifying a particular liable individual.

[50] Warburton (2nd edn) 80-81.

support of Warburton's proposition may be justified by Herron CJ's comment, while discussing potential liability, that 'there is no distinction between a member of a committee and an ordinary member of the club'. However, the Chief Justice, with whom Walsh JA agreed, went on to note that it was likely that any contract would be found to be between the plaintiff and the members of the committee only.[51] The third member of the Court of Appeal, Jacobs JA, accepted the argument that even if all members were party to the contract or were occupiers of the premises it would not assist the defendants. However, his Honour went on to say that he did 'not wish it to appear that I accept the argument that all the members of the club were shown to be either the contracting parties or the occupiers or could have been made parties'.[52]

Some support for this approach might be found in *Bolton v Stone* where Lord Normand seems to assume that the committee and members of the Cheetham Cricket Club were liable as 'occupier' of the ground, and Lord Porter found that the appellants were 'in control' of the field,[53] and in *Campbell v Thompson* where Pilcher J held that the potential liability of the members of the City Livery Club to a cleaner who had been injured on the premises was based, *inter alia*, on their status as 'technical occupiers of the club premises'.[54]

In the other authorities cited by Warburton, the claim against a representative of all the members of an unincorporated association proceeds in circumstances where there is little or no

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[51] [1969] 2 NSWR 410, 414, 415.

[52] [1969] 2 NSWR 410, 416.

[53] [1951] AC 850 (HL) 860, 858. Similar assumptions were made in the Court of Appeal decision, [1950] 1 KB 201 (CA) 207, 210, 211, 214.

[54] [1953] 1 QB 445. The issue was not the subject of discussion, nor was any authority cited for the point in either case.

discussion of the means by which the difficulties noted above in regard to such claims were overcome on the facts of the case. In none of the cases which have proceeded is there any reference to any specific rule of the associations concerned imposing liability on all members for torts arising out of the association's occupation of premises, whether or not the tort was committed before the member joined the association. If it was assumed that there is a substantive rule of general application that members of unincorporated associations are liable in these circumstances, the articulation of the rule is not explicit but can only be inferred from the fact that the representative claim was permitted to proceed. Obviously, a further difficulty with this approach is that it leaves open the question of those cases which cannot be explained by reference to occupation of premises.[55]

Similarly, Lord Porter's assumption in *Bolton v Stone*[56] that the members of the Cheetham Cricket Club were trustees of the field from which a ball was hit, injuring a member of the public, sits uncomfortably with the general view that property cannot be held by a fluctuating body of members.[57] If his Lordship understood that members of unincorporated associations constitute an exception to this general view, this understanding was not made explicit.[58]

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[55] Such as, for example, *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597 (CA). Because the issue has not been discussed in the cases referred to, it is unclear whether the members' collective status as occupiers also involves collective liability for breach (if so, the broader concept of agency discussed below is arguably a more convincing explanation). Nor is it clear how this approach accommodates changes in membership.

[56] [1951] AC 850 (HL) 858.

[57] *Jarrott v Ackerley* (1916) 85 LJ Ch 135.

[58] Likewise, if there was a particular rule of the association enabling this conclusion, it was not referred to.

2 Members of Association Liable as 'Employers'

In *Campbell v Thompson* Pilcher J held that the members of the City Livery Club 'as employers of the plaintiff' had the same common interest in resisting her claim.[59] Again, if it is the case that all members of unincorporated associations are *prima facie* 'employers' of anyone who works for the association's purposes, and therefore liable for any injury suffered, then that would enable the court to reach a substantially accurate decision in the absence of the members of the association. However, the suggestion that it is 'improbable' that she was the employee of all 2,500 members[60] is consistent with the constraints on finding a contract made with or on behalf of all members of an association. As with the explanation that members may be liable as occupiers, this decision fails to address how the predominantly narrow concept of agency in the context of unincorporated associations discussed above was overcome, nor does it explain all those cases which have proceeded.

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[59] [1953] 1 QB 445, 451.

[60] Lloyd (1953) 361.

3 Members of Associations Liable as 'Quasi-Partners'[61]

A possible explanation for those cases which have been permitted to proceed is that they represent a different judicial view of the circumstances which will support a finding that the members are liable as principals. Adopting a quasi-partnership view of agency - whereby membership alone is sufficient to imply authorisation of acts done in the furtherance of the association's purposes - would arguably enable the court to make the opposite presumption from that which it was suggested applies under the prevailing narrow interpretation of agency in unincorporated associations. That is, rather than a finding that the members of the association had authorised a particular transaction appearing, without further information, to be inaccurate; an interpretation of agency which required only membership and that the act be carried out for the purposes of the association would enable such a finding to be accurately determined in the absence of those represented.[62] Lord Porter's reference in *Bolton v Stone*[63] to the responsibility that the members of the Cheetham Cricket Club bore for 'the negligent action of those who use the field in the way intended that it should be used' is suggestive of this reasoning. Likewise in *United Kingdom Nirex Ltd v Barton*[64] Henry J discharged the *ex parte* interim injunction

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[61] A quasi-partnership view fixes liability on the members 'merely because of their common membership and common adherence to a group aim' and suggests a liability akin to that in partnerships, Ford (1959) 51. It is submitted that the 'management authority' view of agency (Ford (1959) 52) is not a convincing explanation of those representative cases which have proceeded against members of unincorporated associations, as the courts have rarely referred to any grants of authority in the associations' rules, let alone interpreted them widely.

[62] Given that it is only representative defendant claims which are under discussion, the presence of the claimant means that calculation of his or her damage would not present any difficulties different from those experienced in any claim. Any detriment which the claimant might suffer by virtue of the nature of the action was considered in the discussion of adversarial freedom in Ch 4.

[63] [1951] AC 850 (HL) 858.

[64] The Times 14 October 1986.

restraining the defendants, as representatives of all those belonging to, or associated with, or affiliated with, associations formed by local residents to protest against the dumping of nuclear waste in their areas. The report of his decision raises doubt whether the claim had any prospect of succeeding,[65] an issue which must ultimately raise the probable inaccuracy of holding that all those bound by the injunction had individually committed unlawful acts. However, he noted that the associations concerned were 'loose in the extreme', made up of those who were law-abiding and also of experienced protestors, 'used to going to the limits of the law or beyond it', and concluded that '[i]f some members of the association broke the law, it should not be too readily assumed that that was the policy of the association'. This suggests that had there been grounds to assume that law-breaking was the policy of the association, he may have been prepared to uphold the injunctions granted. The same reasoning appears to have been the basis of the Court of Appeal's decision to uphold the interlocutory injunctions awarded against, *inter alia*, a defendant as the representative of all members of Animal Aid in *M Michaels (Furriers) Ltd v Askew*.[66] Dunn LJ commented that 'where a number of unidentifiable persons were causing injury and damage by unlawful acts, and there was an arguable case that they belonged to a single organisation or class *which encouraged actions of the type complained of*, and their actions could be linked to that organisation, the rule enabled the court to do justice in the particular case.'[67]

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[65] A necessary element in the claim for interlocutory relief, *O'Hare & Hill* (9th edn) 468-469.

[66] (1983) 127 SJ 597 (CA) (emphasis added). This decision was not referred to in *United Kingdom Nirex Ltd v Barton* The Times 14 October 1986.

[67] See also *Monsanto plc v Tilly* The Times 30 November 1999 (CA) where the defendants were sued for trespass 'on their own behalf, and on behalf of Genetix Snowball', an unincorporated association opposed to the development of genetically modified plants. The Court of Appeal allowed the plaintiff's appeal against a decision that the defendants should have unconditional leave to defend. Stuart-Smith LJ noted that there was nothing unlawful in the defendants trying to persuade others of 'the rightness of their views' but that '[t]he problem was that the central method of advancing the association's campaign was by pulling up GM crops.'

This approach to those cases which have proceeded accommodates the view that members of a club may be liable as 'occupiers' or 'employers'. If membership alone is sufficient to imply authorisation of acts done in the furtherance of an association's purposes, and, in pursuance of its purposes, an association occupies premises, then it could be assumed that all members had authorised any acts done or omitted to be done in relation to control of the premises. The adoption of a quasi-partnership view of agency has the advantage that it can explain those claims which do not depend on occupier's liability. It can therefore avoid the development of precedent permitting claims by 'visitors' to the premises, while denying recovery to members injured on the association's premises because they are not visitors, and so cannot be owed the occupier's common duty of care.[68]

However, it is not clear that the quasi-partnership theory is the best explanation of the approach which the court is adopting in these representative claims. Insofar as this approach suggests personal liability of the members,[69] it does not sit easily with the general reluctance to find members personally liable - a reluctance which is reflected in the tendency in those claims which have gone ahead to anticipate recovery from the common or some other fund. Moreover, if the substantive law is viewed not only as supporting a presumption that the members are liable as quasi-partners but also as imposing this liability on the funds of the association regardless of changes in membership, then it is submitted that it involves a development which goes beyond finding the members of the association liable. It is argued that such an understanding of the substantive law is more accurately described as finding not the members but the entity liable.

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[68] The emerging divergence between these two classes of claimant is discussed in D Capper 'Negligence Actions against Unincorporated Associations' (1993) 44 NILQ 388.

[69] Ford (1959) 51.

4 Corporate Liability of the Unincorporated Association

Some of those cases which have proceeded may represent a judicial view not that those represented are liable in the circumstances placed before the court but rather a view that the association of which they are members should be liable where the contract or activity in question falls within the usual purposes of the association.[70] This would explain the tendency for representative actions to proceed where there is insurance or a common fund available to meet any claim for damages, and the failure to address the effect which any change in membership has on liability. It is acknowledged that such an approach would run counter to clear substantive law - unincorporated associations do not have legal personality and cannot be liable.[71] Using the representative parties rule to reach such a conclusion would not compromise but would contradict one of the fundamental aims of procedure - the aim of reaching as accurate a decision as is possible, with accuracy being measured against the existing substantive law. However, while this is the accepted view of procedure's role, it has been argued that there are occasions when procedure has been, or should be, used to subvert or to alter the substantive law to achieve an

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[70] Stoljar (1957) 71 argues that the decisions in *Ideal Films, Ltd v Richards* [1927] 1 KB 374 (CA) and *Barker v Allanson* [1937] 1 KB 463 (CA) can be distinguished by reference to whether the contract in question was incidental to the purposes of the association.

[71] *R v Darlington BC ex p Association of Darlington Taxi Owners* The Times 21 January 1994; L Glennon 'Questioning the Legal Status of Unincorporated Associations' (2000) 51 NILQ 120; Warburton (2nd edn) 80; Lloyd (1949) 410 noting that the fact that judgment had been obtained against the association in its own name in the *LAPT* case [1916] 2 AC 15 (HL) was a point of substance, not a mere procedural technicality which could be waived or resolved by having an officer enter an appearance, as this would require an application for leave under the original rule. Contrast SJ Stoljar *Groups and Entities: An Inquiry into Corporate Theory* (Australian National UP Canberra 1973) 38-63 arguing that the law can and should support legal personality for such associations, concluding that 'it is utterly absurd to maintain that [they do] not legally exist or that the law is powerless to proceed against [them].'

outcome which is perceived to accord with a notion of a 'just' result that does not find expression in the substantive law.

This argument necessarily depends on an inference from the number of claims which have proceeded against defendants representing members of unincorporated associations, and from identifiable patterns within those claims which have proceeded, as well as those which have not. Williams J's comment, prior to granting the representative order sought in *Tydeman v Roberts*,[72] is suggestive of this reasoning. His Honour said that

> [i]n many cases it will be correct to sue the members of the Executive only and not all members of the Association, because it is only the former who are liable and have the necessary "same interests"; ... . In this case it is now asserted that the "club" is liable as employer, and therefore a representative order is sought in respect of all the members thereof as at the relevant date.

However, references to the 'club' as an entity are not typical. It is argued that the source from which it is expected any monetary remedy will be paid, and the limitations imposed on who is an appropriate representative defendant, both suggest that it is in fact 'the club' which is viewed as liable.

It is true that there are a number of successful claims against defendants representing the members of an unincorporated association which anticipate some monetary remedy that are

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[72] [1985] 2 Qd R 144, 151. Jacobs J in the *APRA* case (1961) 3 FLR 146 also makes repeated reference to 'the club' authorising acts, and employing servants.

unclear as to the expected source of any such remedy. In the New Zealand decision of *Evans v Waitemata*[73] the first defendants were sued 'in a representative capacity on behalf of the Pony Club' following the escape of a competitor's horse at a gymkhana which caused injuries to a number of paying spectators. Damages were awarded but it is not clear from the judgment whether these were awarded as against the two named defendants personally, or as against the two named defendants either as representatives of all members of the Pony Club at the date of the incident or as representatives of all current members. Insofar as the two named defendants would be held liable for the total amount awarded, there is no indication as to whether they would be indemnified out of the association's assets.[74]

However, a number of those claims for damages which have proceeded against representative defendants have done so with the court making explicit reference to its understanding that any damages awarded would not be paid by the members personally[75] or by their common fund, either because they would be met out of insurance taken out on behalf of the unincorporated association[76] or, as in the Queensland case of *Tydeman v Roberts*, out of a

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[73] [1972] NZLR 773; affirmed [1974] 1 NZLR 28.

[74] Nor was this issue made clear in the decision to award damages in *Stone v Bolton* [1950] 1 KB 201 (CA), overruled on the issue of breach of duty, [1951] AC 850 (HL). The representative nature of the action is not discussed at all in the report of *Miller v Jackson* [1977] QB 966 (CA) so there is no consideration of the expected source of the £400 awarded. The earlier decision of the trial judge awarding £174.14 is not reported; nor is the decision to award the plaintiff damages reversed in *Kennaway v Thompson* [1981] QB 88 (CA).

[75] The *APRA* case (1961) 3 FLR 146, 150 may be an exception to this tendency to avoid personal liability for the members, with Jacobs J ordering that the 'defendants ... should pay the plaintiff's costs of this suit' although it may be that the reference to 'defendants' is to the named defendants. Whether it was anticipated that they would be entitled to an indemnity from the club funds is not clear from the report.

[76] In *Campbell v Thompson* [1953] 1 QB 445, 449 it was held, on the facts, that the plaintiff failed to make out her case, but Pilcher J was 'very properly informed ... that the City Livery Club was in fact insured under some appropriate policy by Lloyd's underwriters' against claims of the type in issue. The transcript (but not The Times 12 August 1996 report) of *Murray v Hibernian Dance Club* (CA) reports Hutchison LJ's reference to 'the insurance position (though from one point of view insurance is not a relevant matter)'. *White v Glass* The Times 18 February 1989 (CA) does not consider the liability of the members of the club but it is noted that the club was insured, and that the claim was of a type covered by the insurance policy.

statutory compensation scheme. In the latter case, Williams J referred to the plaintiff's intention to recover any damages from a fund administered by the Workers' Compensation Board 'without seeking to enforce judgment against all or any of the members of the Mount Isa Race Club.'[77] These cases assume that a representative action brought against a defendant representing 'all members of the association' is the appropriate way to proceed and enables access to the association's insurance or indemnity from a statutory scheme. Indeed in *White v Glass* Kerr LJ noted that the original writ named the defendant as the Corby Hazeltree Football Club and commented that that was 'not a permissible way of suing an unincorporated association of an aggregate number of persons' and commented that the 'correct procedure is to be found in O 15 r 12(1)',[78] the representative parties rule. What exactly turns on the difference is, in the circumstances, difficult to discern.

Other cases have assumed that it is appropriate for the association's trustees to be joined in the proceedings so that any award of damages or order for costs can be enforced against the common fund, without any enquiry into whether the membership of the association has remained the same.[79] In *Ideal Films, Ltd v Richards* the Court of Appeal allowed an application to join the trustees of the association so that the declaratory judgment that the debt was owed by the defendants as representatives of all the members of the association, and any order for costs, could be enforced against the association's assets.[80] The court did not discuss the basis on which the

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[77] [1985] 2 Qd R 144, 150. The plaintiff sought and was granted an order that the defendant represent all of the members of the club at the relevant date.

[78] The Times 18 February 1989 (CA).

[79] The discussion of the representative parties rule in Ford (1959) proceeds 'for the purposes of discussion' on the basis that 'there is no change of membership between the material dates', 93.

[80] [1927] 1 KB 374 (CA). See also the *Taff Vale* case [1901] AC 426 (HL) 443 and *Walker v Sur* [1914] 2 KB 930 (CA) 936-937.

members of the association were liable on the contract for hire of films, nor did it say whether there had been any change in the membership.[81] The requirement that all current members be liable if the common fund is to be accessed is not addressed. Contrary to the substantive legal position that the unincorporated association has no separate legal capacity, this approach treats the fund as though it were the property of the association, available for its purposes.

By way of contrast, in *Walker v Sur*[82] the plaintiff sued for money owed for work done by him as an architect for the Brotherhood of St John of God. He sought an order authorising a number of the members of the Brotherhood to represent all members, which was refused. Kennedy LJ noted that it was 'not pretended that, as was the case in the *Taff Vale Case*, there are any funds vested in trustees.' Similarly in *Hardie and Lane, Ltd v Chiltern*,[83] in considering whether the case came within the representative parties rule, the trial judge said 'I attach importance to the fact that there are no trustees in whom the funds of the Association are vested'.

Further support for this explanation of why these claims against representatives of unincorporated associations have been permitted to proceed might be found in the fact that even

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[81] Although the case was distinguished in *Barker v Allanson* [1937] 1 KB 463 (CA), 474 on the ground that there was 'nothing in the facts as pleaded ... inconsistent with the defendants by representation having all been members of the unincorporated Society at the times the films were supplied. It was not suggested by ... counsel that the defendants by representation were not members at the time the films were ordered'. Nor was there any reference to the possibility of changes in membership, or the effect of any such changes on the finding that 'the members' of the club authorised a breach of copyright in the *APRA* case (1961) 3 FLR 146.

[82] [1914] 2 KB 930 (CA) 936 (footnote omitted). It seems that the plaintiff was suing the members of the Brotherhood of St John in the hope of executing against property owned by the Brotherhood in Yorkshire, which was vested in two of the four named defendants, along with others, as joint tenants (930-931, 935). Execution against this property is not considered by Vaughan Williams and Kennedy LJJ. Buckley LJ asserts that judgment would only permit execution against that share of the property held by the four named defendants, but his Lordship's reasoning is not explained in any detail, 935.

[83] [1928] 1 KB 663 (CA) 681, with Lord Hanworth MR in the Court of Appeal associating himself with that reasoning, 696.

though the representative need not be authorised by the group to represent it and even though the interests of the representative and the group are to be 'the same', mere membership of the group has on occasions been considered insufficient qualification for a potential representative.[84] In claims brought against a representative member of an unincorporated association, the weight of authority is that representatives should 'be persons who, from their position, may be taken fairly to represent the body.'[85] Although some decisions suggest that the manager of an association or those in charge of the association's finances are the appropriate representatives,[86] other authorities suggest that the selection of responsible office bearers is sufficient.[87]

Furthermore, the significance attached to the defendant's view of the propriety of the representative nature of the claim also suggests that the defendant is viewed as the representative of the unincorporated entity rather than as the representative of a collection of individuals. It was noted in Chapter 2 that once authorised or nominated to defend as a representative it would appear that the defendant's control of the defence of the claim is complete, unless challenged by one of those represented.[88] Insofar as the interests of those represented have been determined to be sufficiently the same for a representative claim to proceed, then permitting the defendant to have such control over the defence of the claim is not necessarily unjustifiable. However, a number of those claims which have proceeded have also treated the defendant's view that the

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[84] *Walker v Sur* [1914] 2 KB 930 (CA) 934.

[85] The *Taff Vale* case [1901] AC 426 (HL) 438.

[86] The *Taff Vale* case [1901] AC 426 (HL) 439, citing *Temperton v Russell* [1893] 1 QB 435 (CA) as an example of the selection of inappropriate representatives; *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525, 530; *Re McAndrew's Application* [1972] QWN 51, 117.

[87] *Parr v Lancashire and Cheshire Miners' Federation* [1913] 1 Ch 366, 375; *Re Pritt (decd)* (1915) 31 TLR 299; *Campbell v Thompson* [1953] 1 QB 445, 453; the *APRA* case (1961) 3 FLR 146.

[88] 136. Subject to the shift of emphasis to judicial management of proceedings in the CPR 1998.

claim was properly brought as a representative one as important, or have not, in the absence of any challenge by the representative, considered the issue at all.

This might suggest that those claims proceeded because the nominated defendant accepted, or did not adequately contest, the representative nature of the proceedings. In *News Group Newspapers Ltd v SOGAT '82* Stuart-Smith J considered that the decision to uphold the interlocutory injunction awarded against the defendant representing all members of Animal Aid in *M Michaels (Furriers) Ltd v Askew*[89] turned on the Court of Appeal's acceptance 'no doubt on the very limited material advanced by the defendant sought to be made a representative, that there was no real possibility of divergent defences for members of the association known as Animal Aid'.[90] In claims brought under the original rule, the named defendant's support for the plaintiff's application for an order that the defendant defend as representative, or concession that such an order would not prejudice the content of the defence, appears to have been relevant to the court's decision to make such an order in, respectively, *Campbell v Thompson*[91] and the Queensland decision *Tydeman v Roberts*.[92] The apparent failure of the defendant in *Ideal Films, Ltd v Richards*[93] to challenge the representative nature of the claim was relied on to distinguish that decision in *Barker v Allanson*[94] where it was noted that it was not suggested by counsel in the former case 'that the defendants ... or that any of them had defences different from the others'.

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[89] (1983) 127 SJ 597 (CA).

[90] [1986] IRLR 337, 354.

[91] [1953] 1 QB 445, 450.

[92] [1985] 2 Qd R 144, 148.

[93] [1927] 1 KB 374 (CA).

[94] [1937] 1 KB 463 (CA) 474.

In other cases the representative nature of the claim is not discussed.[95] The failure to refer to the nature of the claim may be explained by early concessions made by the representative defendant, or by the defendant's failure to raise the issue at all. The latter proposition is especially plausible since the enactment of the 1962 rule after which representative actions may be commenced by or against representatives without distinction.[96] It may be that this change, combined with earlier emphasis on adversarial freedom,[97] limited judicial opportunity to examine the procedural propriety of the representative claim. It is, however, acknowledged that it is difficult to draw conclusions as to the reasons for decision in those cases where the representative nature of the proceedings is not discussed at all.

While waiver of procedural rights in the context of representative actions by an individual claimant or defendant is entirely consistent with the principle of adversarial freedom, waiver or concession by the representative defendant amounts to a waiver or concession on behalf of persons who will not necessarily have authorised the waiver or even know of the proceedings in which it is offered. If the nominated defendant's view of the form of the action is relevant, it places considerable reliance on an individual nominated by the claimant to represent the interests of others – by appreciating the possible bases on which the representative form of the claim might be challenged and raising the issue before the court. Even if such a defendant does appreciate the grounds on which a challenge to the rule might be based, there is a further assumption that the

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[95] *Miller v Jackson* [1977] QB 966 (CA); *Kennaway v Thompson* [1981] QB 88 (CA).

[96] Discussed in Ch 2, 132. Under the original rule, a plaintiff had to apply for an order authorising the defendant to defend as a representative, thereby ensuring judicial scrutiny of the nature of the proceedings.

[97] Introduction, 23.

defendant is entitled not to make such a challenge, not only on his or her own behalf but also on behalf of others.

Stoljar asks why the selection of the representative is so important 'since any defendant, whoever he was, merely represented the members as a whole?'[98] The court's approach might be explained by reference to the argument that, although contrary to substantive law, in these cases, the association itself is seen as the 'true' defendant and should, therefore, be represented by someone with a position of some responsibility within the association. This would justify judicial reliance on acceptance of the form of the proceedings by such a representative. This understanding is consistent with the argument that the court in these cases is viewing the unincorporated association as an independent entity and not as a collection of individuals whose personal liability must be established and who could, therefore, be adequately represented by any one of their number.[99]

The argument that the representative parties rule has been used to confer corporate personality on associations which do not have that status in law has been made before, with varying degrees of approval. Stoljar's reference to the convenience of the representative parties rule being 'a necessity, if unincorporated or unregistered associations with no other suable status are at all to be liable in contract or tort', suggests some support for the use of the procedure for this purpose.[100] Wedderburn notes that reliance on the representative parties rule to resolve[101]

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[98] Stoljar (1957) 70.

[99] In *Parr v Lancashire and Cheshire Miners' Federation* [1913] 1 Ch 366, 375 reference is made to the defendants representing the Miners' Federation 'acting on behalf of that association' in the defences raised.

[100] Stoljar (1957) 73. SC Yeazell 'From Group Litigation to Class Action Part I: The Industrialization of Group Litigation' (1980) 27 U California Los Angeles L Rev 514, 561-562 argues that 'groups', such as friendly societies and joint-stock companies, were accommodated by the representative suit in the nineteenth century

substantive difficulties may deliver justice 'in particular cases', but takes the view that reform by legislation 'after a study of the policy issues involved would have untold advantages ... over the veiled manoeuvres which make for changes of social policy in the case law.'[102]

It is, therefore, submitted that representative claims have, on occasions, been permitted to proceed not because of a perception that a substantially accurate decision of substantive law can be reached without the notification and participation of those represented but rather because of a perception that accurate application of the substantive law would lead to an unjust result, and that the use of the representative parties rule can enable the court to avoid the need specifically to address the substantive law concerned.

D DEVELOPMENT OF THE SUBSTANTIVE LAW: REMEDIES

While the argument that the representative parties rule has influenced the development of the substantive law is particularly relevant to claims brought against the members of unincorporated

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until Parliament intervened, and so substance 'displaced procedure, much to the relief of the judges.'

[101] Or, perhaps more accurately, to avoid.

[102] KW Wedderburn 'Corporate Personality and Social Policy: The Problem of the Quasi-Corporation' (1965) 28 MLR 62, 71. Warburton (2nd edn) and L Glennon 'Questioning the Legal Status of Unincorporated Associations' (2000) 51 NILQ 120 also advocate statutory incorporation. Glennon discusses the various forms that reform might take at some length, as does Ford (1959) Part II. Cairns (4th edn) 335 refers to rules enacted in South Australia and Tasmania to facilitate proceedings involving unincorporated associations and submits that 'they provide a simple and adequate means of proceeding against voluntary associations, and at the same time they confer a corresponding advantage on the association.'

associations, it is not necessarily limited to such claims. Another example where it is arguably relevant is remedies.

It was noted in Chapter 4 that the plaintiffs in *EMI Records Ltd v Riley*[103] brought a claim alleging breach of copyright as the representatives of all members of the British Phonographic Industry Ltd. The defendant admitted authorising the production and sale of pirate records, and estimated that the probable quantity affecting members of the class was 2,900 tapes. Dillon J ordered an inquiry into damages, anticipating that a sum representing the total damage caused to the class would be awarded to the representative in accordance with an agreement reached within the group. This order was made in the face of uncertainty as to the proportionate entitlement of any individual class member but no uncertainty as to the total damage caused by the defendant. It was noted in the earlier discussion of this decision that it might be viewed as a substantially accurate determination, on the basis that it is a remedy which does not alter the substantive law. However, if the approach is taken that remedies are not procedural,[104] or that this remedy in fact involves alteration of the substantive law,[105] then this decision provides a further example of circumstances in which the representative parties rule may have enabled the court to develop the law in accordance with some broader notion of justice which does not find expression in the existing substantive law.

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[103] [1981] 1 WLR 923; the inquiry ordered was 'as to what damages the members of the class have sustained by reason of the defendant's infringements of copyright and conversion of infringing copies', 925-926.

[104] *Salmond on Jurisprudence* (12th edn) 461: 'To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.'

[105] Jacob (1987) 170, 172 and Jacob (1982) 3.

In the face of admissions by the defendant of her breach of the plaintiffs' copyright, it might be argued that justice demands that there be some compensation of those affected and also that any deterrent value can only be served by requiring the defendant to make good the losses caused. However, whether this perception of justice is reflected in the substantive law is not clear,[106] and Dillon J's judgment might instead be perceived as using the rule to circumvent an accurate substantive conclusion, rather than to support it.

There is some indication in the decision itself of concern that application of the substantive law might lead to an unjust result. Dillon J commented that '[t]he matter of substance that underlies this is that if the plaintiffs can only recover damages in respect of tapes in which they individually own the copyright they will have considerable difficulty in establishing which pirate EMI tapes were sold by the defendant among the 2,980 tapes which she admits having sold'. The comment acknowledges the usual substantive law position that, in order to recover, plaintiffs must prove their individual damages. This was the approach adopted in *Columbia Picture Industries Inc v Robinson.* Scott J permitted Columbia Pictures Industries Incorporated to sue on behalf of the approximately fourteen other members of the Motion Picture Association of America Incorporated in circumstances similar to those in *EMI Records Ltd v Riley*[107] but said in relation to the claim for damages

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[106] Abrahams (1996) 163 understands ss 33C(2)(a)(iii) and 33ZF of Part IVA as allowing the court 'to override traditional precepts that damages can only be assessed and awarded on an individual basis'. Emerson (1989) 196-197 notes that the 'fluid recovery approach', adopted in an American decision in response to a claim that a taxi-company had overcharged passengers over a specified period making individual assessment of damages impossible, 'has met with little judicial acceptance'. Basten (1996) 45 assumes that 'there should be a mechanism *to permit* the court to order payment *cy pres*' (emphasis added). *CP 1/01* 12 also assumes that primary legislation would be necessary to support a number of suggested innovations in monetary awards.

[107] [1981] 1 WLR 923. The defendants in *Columbia Picture Industries Inc v Robinson* [1986] FSR 367 did not admit breach of copyright, although they were found liable and any question of agreement between the class members as to distribution of any damages awarded did not, in the circumstances, arise.

> The plaintiffs' entitlement to damages is not a joint right. The plaintiffs have properly combined as parties in this action but for the purposes of an inquiry as to damages the entitlement of each plaintiff will have to be separately considered. Many of them, perhaps most of them will not be entitled to damages at all.[108]

Dillon J's conclusion in *EMI Records Ltd v Riley*[109] that the fact that the plaintiffs and those represented would have difficulties proving their individual claims of damage justified dispensing with the need for them so to prove is not clearly supported by existing case law.[110]

Whether remedies are procedural, and whether this particular remedy alters the substantive law are questions beyond the scope of this thesis. What is argued is that the remedy formulated in *EMI Records Ltd v Riley*[111] is not clearly compatible with the substantive law, and that the representative parties rule facilitated avoidance of direct confrontation with these questions. The difficulty of the issue may be illustrated by reference to the divergence of opinion in *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Australia Ltd*,[112] which concerned the introduction of Order 18A into the Supreme Court (General Civil Procedure) Rules 1996[113] of

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[108] [1986] FSR 367, 371, 431. Scott J does not refer to *EMI Records Ltd v Riley* [1981] 1 WLR 923.

[109] [1981] 1 WLR 923. In contrast, in *Columbia Picture Industries Inc v Robinson* [1986] FSR 367 the material alleged to be in breach of copyright had been seized from the defendants' premises and so the same difficulties with proof may not have been anticipated.

[110] [1981] 1 WLR 923, 926. In *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 (CA) 40 the Court of Appeal seems to approve of this approach, although the plaintiff's right to sue on behalf of all members of the BPI is expressly not decided on the ground that it would be inappropriate to do so on an *ex parte* application.

[111] [1981] 1 WLR 923.

[112] Supreme Court of Victoria Court of Appeal 8 June 2000.

[113] Ord 18A was equivalent to Part IVA, and was made by the judges of the Supreme Court of Victoria, pursuant to the s 25(1) of the Supreme Court Act 1986 (Vic) which empowers them to make rules of court 'for or with respect to ... any matter relating to the practice and procedure of the Court'. The rules came into force

Victoria. The defendant challenged the new rules on the basis, *inter alia*, that they permitted an aggregate award of damages, so long as a reasonably accurate assessment could be made of the total amount to which the group members would be entitled.[114] Brooking JA[115] was of the view that the provision permitted an aggregate award to be made even though the accuracy of the assessment would be less than would be achieved if each group member brought an individual claim, and that it was therefore a departure from substantive law not authorised by the rule-making power. In contrast, Ormiston JA[116] did not consider the provision to be an unauthorised exercise of the rule-making power. However, he does not directly address the question of whether the reference to a 'reasonably accurate assessment' entitles the court to make an aggregate award in circumstances where it is likely to be less accurate than awards which would be made in individual claims. Indeed, a number of his comments suggest that his approval of the provision is based on the assumption that an aggregate award would only be made if it would be as accurate as individual assessments.[117]

EMI Records Ltd v Kudhail[118] may provide a further example of reliance on the rule to develop novel remedies. There the defendants were sued on behalf of all other persons selling

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on 1 January 2000. Ord 18A has since been replaced by Part 4A of the Supreme Court Act 1986 (Vic), inserted by the Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic).

[114] The same provision is made in Part IVA, s 33Z(3).

[115] With whom Winneke P agreed.

[116] With whom Phillips and Charles JJA agreed.

[117] For example, he considers that it is not necessary to express any final opinion about the 'broad-brush approach' to the Part IVA equivalent adopted in *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 but continues that he 'would not read it as endorsement of the making of the awards which are insufficient to enable group members to recover their full damages. If it were, I would respectfully disagree with it.'

[118] [1985] FSR 36 (CA).

cassette tapes bearing the trade name 'Oak Records'. The evidence showed that such tapes were pirated, and that the name had been adopted to avoid detection, and an injunction was granted. The decision exemplified the problem raised by vendors selling counterfeit memorabilia outside concerts - the vendors were a shifting group, 'quite impossible to identify, let alone serve, before obtaining an order for delivery up of the counterfeit article.'[119] Hoffmann notes that the problem was dealt with 'in a makeshift way by what was probably an illegitimate use of the representative order.' The claimant would name a person likely to be selling, and an *ex parte* injunction would be granted against that person as representative of all such vendors, upon which the claimant would rely to seize the goods. Hoffmann refers to the decision of the Court of Appeal in *EMI Records Ltd v Kudhail*[120] approving these orders, to the 'astonishment of [the trial judge] who had expressed the orthodox view that one could not use the representative procedure to make an injunction enforceable by committal against a person unknown and not a party to the action.' He continues that he himself made several of these orders, 'although somewhat doubtful about their legality', until the substantive law was amended by the enactment of section 100 of the Copyright Designs and Patents Act 1988 giving copyright owners the right to self-help.[121] It would appear that the injunction granted against the members of the Sydney Shipping Section of the Federated Clerks Union of Australia (NSW Branch) in *Amos Removals & Storage Pty Ltd v Small*[122] was also intended to overcome a particular difficulty. Injunctions had been ordered in earlier decisions against individual members of the Sydney Shipping Section, restraining them from committing

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[119] L Hoffmann 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297, 299.

[120] [1985] FSR 36 (CA).

[121] L Hoffmann 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297, 299-300.

[122] [1981] 2 NSWLR 525, 527. The order was in fact limited to those members of the Sydney Shipping Section who had attended a meeting where the decision to obstruct delivery of the containers was taken, although it is clear that not all those who attended that meeting voted in favour of that action, 529-530.

the tort of interference with contractual relations. Hunt J noted that the 'plaintiffs say, however, that as soon as such orders are made the arrangements for the release of the containers in question are then handed over to other members of the Section against whom no orders have been made and by whom the tort is repeated.'

Similar issues might be raised with regard to the award of injunctions against members of unincorporated associations. As noted in Chapter 4, to grant this discretionary relief against a class of persons suggests that an assessment as to whether the inherently individualistic discretionary considerations which might be relied upon to deny the relief[123] apply in relation to any of those represented can be accurately made in their absence. Spry refers to the situation where there are several defendants against whom injunctions are sought and notes that 'in strictness the discretion of the court must be exercised separately in respect of each defendant.'[124] Moreover, little attention has been paid to the effect of changes in membership on injunctive relief granted against 'the members of an unincorporated association'. Commentators[125] focus on the personal liability of individual members, the circumstances in which an individual member will be entitled to an indemnity from the funds of the association and other means by which that common fund may be reached. The representative nature of the proceedings is not considered in

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[123] Such as the 'conduct-based' discretions (for example, laches and clean hands) and 'result-based' discretions (for example, hardship and futility), Tilbury (1990) 290-298.

[124] ICF Spry *The Principles of Equitable Remedies* (5th edn LBC Information Services Sydney 1997) 393. *Kennaway v Thompson* [1981] QB 88 (CA) and *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA) are both referred to in a footnote in support of the proposition that in 'appropriate circumstances injunctions may be directed against defendants on a representative basis' but there is no consideration of what may constitute 'appropriate circumstances'. The latter case is similarly briefly referred to in a footnote in the discussion of Anton Piller orders, ICF Spry *The Principles of Equitable Remedies* 563.

[125] Lloyd (1938) 153; Ford (1959) 93; Warburton (2nd edn) Ch 8.

considered above are desirable is not in issue. What is suggested is that the form of the action enables the court to reach what is perceived to be a just result in the circumstances of the case, without directly confronting substantive difficulties which may stand in the way of that result.

There are those who would argue that this is an inevitable feature of the relationship between procedural and substantive law, and of use of the representative parties rule in particular. Donnan accepts that it is 'technically correct' that the representative action is only procedural but considers that 'this view fails to appreciate the significant impact on substantive law that class actions generate when courts interpret existing law to accommodate claims brought on behalf of massive numbers of people'. He goes on to argue that 'modification of the substantive law should be seen as a natural outcome of judicial interpretation and Parliament may always intervene if the results are detrimental.'[128] However natural or inevitable this influence, it might, nevertheless, be suggested that open consideration of the substantive issues involved would be preferable.

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[128] Donnan (2000) 87. GB Hazard 'The Effect of the Class Action Device Upon the Substantive Law' (1973) 58 Federal Rules Decisions 307 also takes a positive view, going so far as to say that 'procedure's very function is to modify the substantive law', and that the question 'in the relation of substance and procedure is one of pace and role: How quickly and how far should the courts go in using procedural devices that are in their disposal?'

CONCLUSION

Use of the representative parties rule has been stifled by restrictive interpretation of the circumstances in which it is available. The predominant test for the 'same interest' required by the rule, namely whether separate defences might be denied by the representative nature of the action, would, if consistently applied, defeat any claim to use the rule. However, the expectation that the change of test in the High Court of Australia decision of *Carnie v Esanda*[1] would widen the scope of the rule[2] has not been borne out by subsequent practice. Although reform of the test for 'same interest' is a necessary step if the rule is to be used more often, it would seem not to be a sufficient step. This thesis argued that judicial resistance to the rule is best explained by reference to the purposes and principles of civil procedural law; and that, conversely, some representative claims which have proceeded are also best explained by reference to the same matters.

It was argued that the uncertainty which surrounds fundamental features of the rule encourages a defensive posture by the courts, aimed at limiting use of the rule and avoiding the need to address the various issues which demand resolution. Moreover, the desirability of legal certainty suggests that resolution of the unclear features of the rule by the *ad hoc* exercise of the court's inherent jurisdiction is inappropriate.

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[1] (1995) 182 CLR 398.

[2] For example, Colbran (2000) 90 notes that the representative parties rule was retained in the recent review of the civil procedure rules in Queensland and concludes that '[p]resumably the High Court decision in *Carnie v Esanda Corporation Limited* ... has sufficiently widened the scope of representative proceedings to obviate the need for a Queensland class action.'

It was then suggested that judicial response to the representative parties rule might be more clearly analysed by reference to the purposes which the rule is intended to serve. In addition to those claims which have been defeated by application of the dominant test for 'same interest', there have been indications that some have failed because attention was focused on particular principles of procedural law, or other procedural rules, which are undermined by the rule. It was submitted that although reference to principles can help to clarify the broader purposes of procedural law, such reference can be positively misleading in the case of the representative parties rule. As Basten asserts, 'by its nature, a group action tends to undermine certain assumptions involved in the paradigm of individual justice.'[3] Reference, therefore, to those 'assumptions', such as, for example, the right to be heard, without considering the purpose which the principle is intended to serve, or the particular competing benefits of the rule,[4] results in the inevitable defeat of any attempt to use the rule. It was further submitted that some of those representative claims which have proceeded have done so in circumstances where the primary purposes of procedural law are promoted. For example, in these claims the issue before the court is one which it can accurately answer without participation by those represented. Courts and commentators when considering the representative parties rule have seldom referred explicitly to the purposes and principles of procedural law. It was argued that greater attention to the purposes which procedural law in

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[3] Basten (1996) 45. In *Femcare Ltd v Bright* (2000) 172 ALR 713, 730, 728 the Full Court of the Federal Court of Australia, in the context of a challenge to the validity of Part IVA, also refers to 'the balancing process' necessary and to the fact that '[t]he price of providing a mechanism for the vindication of rights held in common with others may be departure to some extent from the procedures ordinarily applicable in litigation inter partes.' The detailed legislative provisions of Part IVA may have facilitated this acknowledgment of the necessary 'balancing process', considered below, 308.

[4] Basten (1996) 48 notes that '[a]rguments which support high levels of procedural fairness for group members will tend to subvert' the principles promoted by the rule and comments that, '[i]nterestingly, these arguments are usually pursued by defendants.' Morabito (1994) 621 notes the paradox of relying on individualism to argue against representative claims, given the expectation that they will, *inter alia*, address the fact that those represented are not in a position individually to assert their rights.

general, and the rule in particular, are intended to serve is essential if resistance to the rule based upon its incompatibility with particular principles of procedural law is to be overcome.

So far as those claims which have proceeded are concerned, it would be better if the courts were to consider overtly the circumstances affecting the balance necessarily being struck between different purposes, rather than the courts continuing, as they often have, to assert that there is sufficient 'same interest'. For example, in some successful representative actions where the issues before the court could be accurately determined without those represented being notified of the action and participating in it, it could, nevertheless, be assumed that those represented had informal knowledge of the claim. But it is unclear to what extent this knowledge was relevant to the decision to permit the representative claim to proceed. Finally, it was argued that there are some successful claims which ought to be viewed not as supporting accurate application, but rather as facilitating development, of the substantive law. Again, it was suggested that, however desirable such substantive developments might be, they would be better carried out explicitly.

Therefore, if the rule is to be used more often in England, it will be necessary first to reform the test for 'same interest' along the lines of the Australian decision in *Carnie v Esanda*.[5] However, the aftermath of that decision suggests that there will also need to be clarification of the many uncertain incidents of the rule. While progressive judicial development of existing rules may be possible, it was argued that it would be better if there were detailed legislative intervention.

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[5] (1995) 182 CLR 398.

Whether legislative intervention can overcome judicial resistance to the rule thus far is beyond the scope of this thesis. There are those who are sceptical about the ability of legislative reform to overcome the judicial preference for the traditional individual voluntary model of civil litigation, both generally[6] and in relation to the representative parties rule in particular.[7] An early assessment of Part IVA concluded that the procedure 'remains largely untried. Few final hearings have taken place and trial practice is still in its formative stage.'[8] Whether the years since that review justify greater optimism has not been closely examined. However, recent enactment of measures equivalent to Part IVA in Victoria[9] may indicate confidence in the future of that expanded representative procedure. It is difficult to predict whether a similar procedure would be greeted with similar enthusiasm in England.[10] But it is clear that failure to amend the test for 'same interest', to address the many uncertain incidents of the rule, and to acknowledge the need to balance its benefits against its shortcomings will mean that the representative parties rule continues to be underused and not fully understood.

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[6] For example, Colbran (2000) 86-87 is pessimistic about the extent to which legislative change can alter judicial practice, noting that the philosophy of the new Qld rules 'is to prevent undue delay, expense, and technicality in civil litigation' and that sanctions may be imposed on both sides for undermining it. He continues '[i]t will be interesting to see how far judges will be prepared to promote and enforce this philosophy. Studies overseas have suggested judges continue in much the same way they always have in the face of such significant changes.'

[7] Glenn (1984) 261, 264-265, 277; Glenn (1986) 271-274. In contrast, Andrew Smith J did rely on CPR 1.2(b)'s instruction to further the overriding objective by saving expense in his decision to allow the representative claim to proceed in *National Bank of Greece SA v RM Outhwaite* (16 January 2001) paragraph 31(2). It is, however, difficult to read too much into this one decision, particularly as it could be explained by the line of authority permitting representative claims by or against representatives of insurers on the same risk (Ch 1, n73).

[8] M Wilcox 'Representative Proceedings in the Federal Court of Australia: A Progress Report' (1997) 8 Australian Product Liability Reporter 77, 82.

[9] Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic) inserting Part 4A into the Supreme Court Act 1986 (Vic). Introduction of equivalent legislation is also under consideration in NSW, Aronson (6th edn) 91.

[10] Indeed, it is not clear that there is enthusiasm in England to encourage representation of unidentified persons. CPR Part 19.III, introduced in 2000 (SI 2000/221), deals with the management of claims giving rise to common or related issues of law or fact and so is concerned only with identified parties. Similarly, *CP 1/01* 9 expresses a preference for those represented to be identified, rather than identifiable, and to have given their consent.

APPENDIX A: REPRESENTATIVE PARTIES RULES IN ENGLAND AND WALES

1 Current Rule

Civil Procedure Rule 19.6[1]

(1) Where more than one person has the same interest in a claim -
(a) the claim may be begun; or
(b) the court may order that the claim be continued,
by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule -
(a) is binding on all persons represented in the claim; but
(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

(5) This rule does not apply to a claim to which rule 19.7 applies.

2 1962 Rule

Order 15 rule 12 was introduced by the Rules of the Supreme Court (Revision) 1962.[2] It was retained in the same form in the Rules of the Supreme Court 1965,[3] and in Schedule 1 to the Civil Procedure Rules[4] until the introduction of Civil Procedure Rule 19.6.

Order 15 rule 12

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

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[1] SI 2000/221, in force 2 May 2000.

[2] SI 1962/2145, in force 1 January 1964.

[3] SI 1965/1776, in force 1 October 1966.

[4] SI 1998/3132, in force 26 April 1999.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

3 Original Rule

Order 16 rule 9 of the Rules of the Supreme Court 1883[5] preceded Rules of the Supreme Court (Revision) 1962 Order 15 rule 12.

Order 16 rule 9

> Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

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[5] In operation on 24 October 1883, *Halsbury's Vol 37* (4th edn) 16. It was preceded by Ord XVI r9 scheduled to the Supreme Court of Judicature Act 1875, in force from 1 November 1875 (38 & 39 Vict c77, ss 2 and 16). That rule differed only in minor respects. It referred not to 'persons' but to 'parties', not to 'cause or matter' but to 'action' and to authorisation by 'the Court' only, not 'the court or a judge'. It was identical to, and replaced (38 & 39 Vict. c77, s 16) paragraph 10 in the Schedule 'Rules of Procedure to the Supreme Court of Judicature Act 1873, 36 & 37 Vict. c66; 37 & 38 Vict. c83.

APPENDIX B: REPRESENTATIVE PARTIES RULES IN AUSTRALIA

This Appendix sets out the current forms of the representative parties rule in Australian jurisdictions, which are (with the exception of the Queensland rule, Appendix C) equivalent in effect to either the 1962 rule or the original rule. In each case, any substantive variation from the 1962 rule or the original rule is noted as follows: the text of the English rule is given, and variants are noted in italic script in square brackets, using the abbreviations set out below.

1 Rules Equivalent to the 1962 Rule

Current rules of court in Australian jurisdictions that are of equivalent effect to Rules of the Supreme Court (Revision) 1962, Order 15 rule 12:

FC	Commonwealth, Federal Court Rules (SR 1979/140; in force 1 August 1979), Order 6 rule 13
NSW	New South Wales, Supreme Court Rules (Supreme Court Act 1970, Sch. 4; in force 14 October 1970), Part 8 rule 13
NT	Northern Territory, Supreme Court Rules (SR 1987/44; in force 1 November 1987), Order 18
SA	South Australia, Supreme Court Rules (Gazettal 18 September 1986; in force 1 January 1987), Rule 34.08-34.12
VIC	Victoria, Supreme Court (General Civil Procedure) Rules (SR 1996/19; in force 1 March 1996), Order 18
WA	Western Australia, Rules of the Supreme Court (Gazettal 18 November 1971; in force 14 February 1972), Order 18 rule 12

1962 rule (1)	*FC* Ord 6 r13(1), *NSW* Part 8 r13(1), *NT* Rules 18.01-18.02, *SA* 34.08, *VIC* Rules 18.01-18.02, *WA* Ord 18 r12(1)

[*In addition to the rights and remedies given by the preceding subrules, SA*]
[*This Order applies NT, VIC*]
Where numerous persons have the same interest
in any proceedings [*in any proceeding FC, VIC; in a proceeding NT*],
not being such proceedings as are mentioned in rule 13, [*phrase repeated in WA, but FC, NSW, NT and VIC have separate exclusions noted below; the remainder of the text is in a separate rule in NT, VIC.*]
the proceedings [*the proceeding FC; A proceeding NT, VIC*]
may be begun [*commenced FC, NSW, NT, VIC; brought SA*],
and, unless the Court otherwise orders, continued, by or
against any one or more of them [*against one or more persons having the same interest NT, VIC*]
as representing all or as representing all except one or more of them [*as representing some or all of them NT, VIC*].

[The 1962 rule excludes proceedings mentioned in Order 15 rule 13. The relevant proceedings are those concerning (a) the administration of the estate of a dead person, or (b) property subject to a trust, or (c) the construction of a written instrument, including a statute. Similarly, *WA* Ord 18 r12 excludes proceedings mentioned in Ord 18 r13: these comprise proceedings described in identical terms to (a) and (b) above, as well as '(c) the construction of a written instrument, including a statute or regulation, rule or by-law made under a statute.' *NSW* Part 8 r13(7), *NT* Rule 18.01, and *VIC* Rule 18.01(b) exclude proceedings covered by (a)-(b), in identical terms. Similarly, *FC* Ord 6 r13(7) states 'This rule does not apply to a proceeding concerning property subject to a trust or included in a deceased estate.' Moreover, *VIC* Rule 18.01(a) provides that the rule does not apply to a proceeding under Part4A of the Supreme Court Act (this is the new form of group proceeding, introduced in 2000).]

1962 rule (2) — *FC* Ord 6 r13(2)-(3), *NSW* Part 8 r13(2)-(3), *NT* Rule 18.03(1)-(2), *SA* Rule 34.09, *VIC* Rule 18.03(1)-(2), *WA* Ord 18 r12(2)

At any stage of proceedings [*a proceeding FC, NT, VIC*]
under this rule [*pursuant to this rule FC, NSW; under rule 18.02 NT, VIC; under Rule 34.08 SA*]
[*against one or more persons having the same interest NT, VIC*]
the Court may,
on the application of the plaintiff [*applicant FC*], [*phrase omitted in NT, VIC*]
and on such terms, if any, as it thinks fit, [*phrase omitted in FC, NSW, NT, VIC*]
appoint any one [*appoint one NT*] or more of the defendants [*respondents FC*]
or other persons [*or the persons NT, VIC*]
as representing whom the defendants [*respondents FC*] are sued [*as representing the defendants who are sued SA*]
to represent all, or all except one or more, [*to represent some or all NT, VIC*]
of those persons in the proceedings [*proceeding FC, NT, VIC*];
[*remaining text is contained in a separate subrule in FC, NSW, NT, VIC*]
and where, in exercise of the power conferred by this paragraph [*Rule SA*],
[*Where, under subrule(2), FC, NSW; Where NT, VIC*]
the Court appoints a person
not named as [*who is not FC, NSW, NT, VIC*] a defendant [*respondent FC*],
it [*the Court FC, NSW, VIC*] shall make an order
under rule 6 [*under rule 8 FC, NSW; under rule 9.06 NT, VIC; phrase omitted in SA*]
adding that person [*the person NT; him FC, NSW, VIC*] as a defendant [*respondent FC*].

1962 rule (3) — *FC* Ord 6 r13(4), *NSW* Part 8 r13(4), *NT* Rule 18.04(1)-(2), *SA* Rule 34.10, *VIC* Rule 18.04(1)-(2), *WA* Ord 18 r12(3)

A judgment [*A judgment pronounced FC; A judgment given NT, VIC; A judgment entered NSW*]
or [*or an FC*] order given [*order made FC, NSW, NT, VIC*]
in proceedings [*in a proceeding FC, NT, VIC*]
under this rule [*pursuant to this rule FC, NSW; under Rule 34.08 SA; to which this Order applies NT, VIC*]
shall be binding on [*shall bind VIC; binds NT*] all the persons [*the parties and all persons NT, VIC*]

as representing whom
the plaintiffs [*applicants FC*] sue or, as the case may be, the defendants [*respondents FC*] are sued, [*the parties sue or are sued, as the case may be. NT, VIC (both supply remainder of text in separate subrule)*]
but shall not be enforced [*The judgment or order shall not be enforced NT, VIC*]
against any person [*a person VIC; a person who is NT*] not a party
to the proceedings [*proceeding FC; phrase omitted in NT, VIC*]
except with the leave [*by leave NT, VIC*] of the Court.

1962 rule (4) — *FC* Ord 6 r13(5), *NSW* Part 8 r13(5), *NT* Rule 18.04(3), *SA* Rule 34.11, *VIC* Rule 18.04(3), *WA* Ord 18 r12(4)

An application for the grant of leave [*for leave FC, NSW, NT, SA, VIC*]
under paragraph (3) [*under subrule (4) FC, NSW; under Rule 34.10 SA; phrase omitted in NT, VIC*]
must [*shall FC, NSW, NT, SA, VIC*] be
made by summons [*motion FC, NSW*] [*phrase omitted in SA*]
[*notice of FC, NSW*] which must [*shall FC, NSW*] be [*phrase omitted in NT, SA, VIC*]
served personally on the person [*or persons SA*] against whom
it is sought to enforce the judgment or order [*enforcement of the judgment or order is sought NT, VIC*].

1962 rule (5) — *FC* Ord 6 r13(6), *NSW* Part 8 r13(6), *SA* Rule 34.12(1), *WA* Ord 18 r12(5); no equivalent in *NT*, *VIC*.

[*Any person served with an application under Rule 34.11 may, SA*]
Notwithstanding that a judgment or order to which any such application [*an application under subrule (5) FC, NSW*] relates is binding on the person against whom the application is made, [*notwithstanding the binding nature of any order made under Rule 34.10, SA*]
that person may [*phrase omitted in SA*]
dispute [*his SA*] liability to have the judgment or order enforced against him
on the ground that by reason of facts and matters [*or matters SA*] particular to his case
he is entitled to be exempted from such liability [*from the liability FC, NSW; from liability SA*].

1962 rule (6) — *SA* Rule 34.12(2), *WA* Ord 18 r12(6); no equivalent in *FC*, *NSW*, *NT*, *VIC*.

The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable [*Any question which arises as to whether a judgment or order made or sought to be made under Rule 34.10 is or ought to be enforceable SA*]
against the person [*the person, or any of the persons, SA*] against whom the application is made
to be [*may be SA*] tried and determined in any manner in which any issue [*an issue SA*]
or question in an action may be tried and determined [*or determined SA*].

2 Rules Equivalent to the Original Rule

Current rules of court in Australian jurisdictions that are of equivalent effect to Rules of the Supreme Court 1883, Order 16 rule 9:

ACT	Australian Capital Territory, Supreme Court Rules (SR(Cth) 1937/85; in force 1 January 1938), Order 19 rule 10
HC	Commonwealth, High Court Rules (SR 1952/23; in force 1 January 1953), Order 16 rule 12
TAS	Tasmania, Supreme Court Rules (SR 2000/8; in force 1 May 2000), Rules 335-336.

Where there are numerous persons [*seven or more persons HC*] having the same interest
in one [*in the same ACT*] cause or matter, [*phrase omitted in HC*]
one or more of [*any of ACT*] such [*those ACT, HC*] persons
may sue or be sued, or may be authorised by the court
or a judge [*Justice HC*] [*phrase omitted in ACT*]
to defend
in such cause or matter, [*phrase omitted in HC*]
on behalf of [*on behalf ACT*] or for the benefit of all persons so interested.

[*TAS* provides two separate rules of equivalent effect to the original rule, which are set out in full below:
Numerous plaintiffs
Rule 335. In any proceeding in which 7 or more persons -
(a) have the same or a common right against another person; or
(b) have the same or a common interest or the same rights in, to or in respect of a fund or other property; or
(c) otherwise have a common interest in any matter -
one or more of the persons may sue or apply on behalf, or for the benefit, of all persons having the right or interest.
Numerous defendants
Rule 336. In any proceeding in which 7 or more persons -
(a) are subject to the same or a common obligation; or
(b) have the same or a common interest in or in respect of, or are under the like obligations in respect of, a fund or other property; or
(c) otherwise have a common interest in any matter -
one or more of those persons may be sued or made respondent or may be authorised by the Court or a judge to defend the proceeding with respect to the obligation or interest on behalf, or for the benefit, of all persons subject to the obligation or having the interest.]

APPENDIX C: REPRESENTATIVE PARTIES RULE IN QUEENSLAND

Queensland, Uniform Civil Procedure Rules 1999 (SL 1999/111; in force 1 July 1999)

Representative party
Rule 75. A proceeding may be started and continued by or against 1 or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

Order for representation
Rule 76. (1) At any stage of a proceeding brought by or against a number of persons who have the same interest under rule 75, the court may appoint 1 or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.

(2) However, when making an order appointing a person who is not a party, the court must also make an order under rule 62 including the person as a party.

Enforcement of order against representative party
Rule 77. (1) An order made in a proceeding against a representative party under this division may be enforced against a person not named as a party only with the court's leave.

(2) An application for leave to enforce an order must be served on the person against whom enforcement of the order is sought as if the application were an originating process.

Supreme Court of Queensland Act 1991

Order binds persons who are represented
Section 82.(1) This section applies to an order made in a proceeding started and continued by or against 1 or more persons (the "representative party") who have the same interest in the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

(2) Unless the court orders otherwise, in addition to binding the parties to the proceeding the order binds the persons who have the same interest as the representative party and could have been parties in the proceeding.

(3) The order may be enforced against a person not named as a party only with the court's leave.

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