

# CLASS ACTIONS IN HONG KONG: YES, NO, MAYBE



Gary Meggitt\*

*Although the Civil Justice Reform brought about many changes to the Hong Kong courts, multi-party claims are still governed by rules whose origins are over a hundred years old. In 2006, the Hong Kong Law Reform Commission (LRC) undertook the task of considering whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to make whatever recommendations were needed to bring this into being. The LRC eventually proposed the creation of a “class action regime”. This proposal has met with a mixed response from the legal profession, industry groups and the wider public. Its fate may soon be decided by a cross-sector working group chaired by the Solicitor General.*

## Introduction

The term “class action” can conjure up a variety of colourful and often contradictory images and personalities. On the one hand, there is Erin Brockovich, a “hero” who helped obtain a multi-million dollar settlement payment from the Pacific Gas and Electric Company (PG&E) of California for hundreds of victims of groundwater contamination in 1993.<sup>1</sup> On the other hand, there is Melvyn Weiss, who served over a year in prison after pleading guilty to the charge that his firm paid secret “kickbacks” to plaintiffs.<sup>2</sup> Suffice to say, such contrasting examples (more-often-than not from the US) have engendered far from dispassionate views on class actions and those lawyers who specialise in them.

Such views were evident in the response to the Hong Kong Law Reform Commission’s (LRC) November 2009 consultation paper on the possible introduction of a class action regime in the territory.<sup>3</sup> It was noted, in the LRC’s May 2012 final report, that the Hong Kong Bar

\* Assistant Professor, Department of Professional Legal Education, University of Hong Kong.

<sup>1</sup> Ms Brockovich has her own website, available at <http://www.brockovich.com/>.

<sup>2</sup> See Pettersson, E “Weiss Sentenced to 2 1/2 Years for Kickback Scheme”, (2 June 2008) Bloomberg, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGqfpC4ZjoAw&refer=home>.

<sup>3</sup> The consultation paper is available at <http://www.hkreform.gov.hk/en/publications/classactions.htm>.

Association (HKBA), the Law Society of Hong Kong, the Hong Kong Federation of Insurers and Hong Kong Federation of Trade Unions gave – sometimes qualified – support to such a move whereas the Hong Kong Institute of Certified Public Accountants, the Hong Kong Association of Banks and the Hong Kong General Chamber of Commerce (HKGCC) did not.<sup>4</sup> Indeed, the HKGCC was especially critical, stating in its August 2012 submission to the Secretary for Justice that “The Chamber is of the view that the Report provides no credible case for the introduction of a new class action regime in Hong Kong”.<sup>5</sup> By contrast, the HKBA “supports as a matter of principle any initiative that would allow greater access to justice and facilitate the pursuit of legitimate civil claims in the courts”.<sup>6</sup>

As a consequence of this mixed reaction, the LRC’s final report was referred by the Department of Justice to a cross-sector working group to be chaired by the Solicitor General in November 2012.<sup>7</sup> What this working group will conclude and when it will do so remain to be seen. In the meantime, this paper examines what is meant by “class actions”; their current status in Hong Kong; the LRC’s proposals; and the possible future regime. Given that the final report is over 300 pages long and this article is just over 20 pages in length, this examination will – of necessity – focus on the more significant aspects of this controversial subject.

### What is a ‘Class Action’?

The current discussion over the introduction of a class action regime in Hong Kong could be said to have started with the Hong Kong Civil Justice Reform (CJR) Working Party’s March 2004 final report,<sup>8</sup> which recommended that:

“In principle, a scheme for multi-party litigation should be adopted. Schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong”

<sup>4</sup> See the final report at pages 107–109 for a full list of the supporters and opponents of the proposals in the consultation paper. Available at <http://www.hkreform.gov.hk/en/publications/rclassactions.htm>.

<sup>5</sup> Available at <http://www.chamber.org.hk/FileUpload/201210191737103268/ClassAction.pdf>.

<sup>6</sup> See the footnote 133 on page 108 of the final report for the HKBA’s full comments.

<sup>7</sup> Press release at [http://www.news.gov.hk/en/categories/law\\_order/html/2012/11/20121127\\_153148.shtml](http://www.news.gov.hk/en/categories/law_order/html/2012/11/20121127_153148.shtml).

<sup>8</sup> Available at [http://www.civiljustice.gov.hk/eng/archives\\_fr\\_view.html](http://www.civiljustice.gov.hk/eng/archives_fr_view.html). Not to be confused with the LRC’s May 2012 final report. The overall CJR process is addressed in detail in G Meggitt, “Civil Justice Reform in Hong Kong – Its Progress and its Future” (2008) 38 HKLJ 89.

The LRC subsequently agreed, in September 2006, to look at the matter, with the following terms of reference:

“To consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to make suitable recommendations generally”

The 2009 consultation paper and 2012 final report are the fruit of the LRC’s work.<sup>9</sup>

It is worth noting, at this juncture, that the CJR Working Party and LRC both refer to “multi-party litigation” rather than “class actions”. Whilst there may not appear to be any difference between these two terms, it is important to appreciate that “class actions” are only one – albeit the most well known – form of “multi-party litigation”. The introductory chapter of the LRC’s final report refers to the Law Reform Commission of Ireland’s definition of “multi-party litigation” as follows:

“... instances where a collection or group of users [of courts] shares characteristics sufficient to allow them to be dealt with collectively. The central, common feature will vary with the group, but will militate in favour of a collective or group approach. This feature may be found in a question of law or fact arising from a common, related or shared occurrence or transaction. The definition of the combining force necessary to commence a multi-party procedure is intended to be as flexible a concept as the overriding principles of administrative efficiency and fairness will permit”<sup>10</sup>

The LRC’s final report also mentions Rachael Mulheron’s definition of a “class action”:

“A legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (‘representative plaintiff’) may sue on his or her own behalf and on behalf of a number of other persons (‘the class’) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (‘common issues’). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on

<sup>9</sup> A sub-committee under the chairmanship of Mr Anthony Neoh, SC, was appointed in November 2006 to consider class action reform and to make proposals to the LRC. The sub-committee’s membership is listed at pages 1–2 of the final report.

<sup>10</sup> Law Reform Commission of Ireland, Multi-Party Litigation (2005, Report LRC 76-2005) page 3. Cited at page 3 of the LRC’s final report.

the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation”<sup>11</sup>

The LRC’s final report does not actually distinguish between the two terms and, indeed, uses them interchangeably. Yet there is a distinction between “multi-party litigation” and “class actions”, as can be discerned from the reference to the fact that “Only the representative plaintiff is a party to the action” in Professor Mulheron’s definition of the latter. By contrast, group litigation under the English Civil Procedure Rules (CPR) is most certainly “multi-party litigation” within the definition above but differs from class actions in that it does not involve a single claim but a number of distinct claims which are administered by the court together. The common or related issues of fact of law are defined within a group litigation order (GLO) as the “GLO issues”. The court then establishes a register of claims which raise those GLO issues so that these claims may be “managed as a group”. A judgment or order in relation to one or more GLO issues is binding on all the parties on the register at the time which it is given, unless the court orders otherwise.<sup>12</sup>

It is not clear if the conflation or confusion of the two terms was a deliberate act on the part of the LRC, although the fact that both the consultation paper and final report have the title “Class Actions” suggests intent. The HKBA noted this narrowing of focus in its own response to the 2009 consultation paper and was critical of any ‘purported limitation’ of the LRC’s terms of reference.<sup>13</sup> Whatever the truth – intent or error – it appears that the LRC had class actions and not some other form of multi-party litigation in mind when it made its recommendations in the final report. This is unfortunate, given the ire (justified or not) raised in some quarters by the term “class action” and the fact that a “class action regime” does not represent the only possible way forward for Hong Kong.

The focus (narrowed or not) of the final report is also apparent from the fact that it proceeded to identify a number of particular features of class actions, being:

*Certification* – the process of court management starts with the authorisation of the class action which is commonly referred to as “certification”. Many of the jurisdictions which have adopted class action regimes have adopted this certification procedure.

*Opt-in or opt-out* – under an “opt-out” scheme, potential claimants in a class action are bound as members of the class and are subject to

<sup>11</sup> R Mulheron, *The Class Action in Common Law Legal Systems* (Oxford and Portland, Oregon: Hart Publishing, 2004) 3. Cited at page 4 of the final report.

<sup>12</sup> Group Litigation Orders are governed by CPR Part 19 and Practice Direction 19B. See the CPR website at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19>.

<sup>13</sup> HKBA submission available at <http://www.hkba.org/whatsnew/submission-position-papers/2011/201110728.pdf>.



any decisions (ie orders and judgments) in the proceedings unless they indicate that they wish to be excluded from both the class action and the effects of any judgment. Under the “opt-in” approach, potential class members must expressly join the proceedings by taking a prescribed step within a stipulated period.

*Cut-off date* – this is the date from which no potential party can be added to the class action. This is intended to prevent an unlimited accumulation of parties to the action.

*Notification* – class action regimes generally provide for the notification of the action to potential claimants to enable them to opt-out or opt-in. Subsequent notifications may be needed in respect of, for example, settlement proposals. Class action websites and pages set up in court websites have added to “traditional” means of notifying potential claimants, by way of the press, in recent years.

*Subgroups and lead or representative cases* – there may be a need, when there are distinct claims on the part of several claimants which may differ from those of others, to divide the general group into different subgroups. “Lead” or “test” cases may be suitable on other occasions.

*Role of the court* – it is generally recognised that the rules by which the class action is conducted need to be as flexible as possible to enable the court to exercise a high degree of discretion to manage the case effectively.<sup>14</sup>

It should be borne in mind that, as the final report acknowledged, the above features are not without controversy. For example, the “opt-out” process is castigated by some as one of the drivers of the much-criticised US class action regime.<sup>15</sup>

Having, to a certain extent, identified what it meant by “class actions” the final report sets out the features of, and shortcomings in, the current procedure in Hong Kong.

## The Current Status of Class Actions in Hong Kong

There is, as one would expect having read this article so far, no “class action” regime in the territory at present. Multi-party proceedings in Hong Kong are currently governed by RHC O.15, r.12 which provides:

<sup>14</sup> See pages 5–9 of the final report.

<sup>15</sup> One critic of class actions is the US Chamber Institute for Legal Reform (ILR), founded in 1998 by the United States Chamber of Commerce. Its views on the US “opt-out” approach can be seen at <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/optoutpaper.pdf>.



“Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them [author’s emphasis]”<sup>16</sup>

The court may also, upon the application of the plaintiffs, appoint a defendant to act as representative of any other defendants in the action.<sup>17</sup> In addition, any judgment or order given in such representative proceedings is binding on all the parties so represented, although it may not be enforced without leave.<sup>18</sup> It is also possible, however, for a defendant to dispute his liability to have a judgment or order enforced against him on the ground that “by reason of facts and matters particular to his case he should be exempted from such liability”.<sup>19</sup>

RHC O.15 r.12 is based upon the English RSC O.15 r.12, which was superseded by the introduction of the CPR in England in 1999. The “same interest” requirement that lies at the heart of RHC O.15 r.12 was set down by Lord Macnaghten in *Duke of Bedford v Ellis*:<sup>20</sup>

“[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”

In the subsequent English Court of Appeal decision in *Markt & Co Ltd v Knight Steamship Co Ltd*,<sup>21</sup> the “same interest” requirement was interpreted as a requirement that all class members had to demonstrate identical issues of fact and law. Thus, the plaintiff class members would have to show:

- (a) the same contract between all plaintiff class members and the defendant(s);
- (b) the same defence (if any) pleaded by the defendant against all the plaintiff class members; and
- (c) the same relief claimed by the plaintiff class members.

The strict “Edwardian” approach of *Duke of Bedford v Ellis* and *Markt* has been lessened over the subsequent century by such decisions as those in *Prudential Assurance Co Ltd v Newman Industries*,<sup>22</sup> where Vinelott J held that a “common ingredient” rather than the “same interest” was

<sup>16</sup> RHC O.15 r.12(1). Available at <http://www.hklii.hk/eng/hk/legis/reg/4A/s15.html>.

<sup>17</sup> RHC O.15 r.12(2)

<sup>18</sup> RHC O.15 r.12(3)

<sup>19</sup> RHC O.15 r.12(5)

<sup>20</sup> [1901] AC 1, 8.

<sup>21</sup> [1910] 2 KB 1021 (CA).

<sup>22</sup> [1981] Ch.229.

sufficient to bring a representative action. Further, in *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)*<sup>23</sup> where the English Court of Appeal held that a claim was validly commenced, as the defendant class had the “same interest” in defending the action, despite their separate contracts.<sup>24</sup> In addition, judicial attempts had been made to award damages in representative actions, contrary to the principle in *Duke of Bedford v Ellis* that the “same relief” had to be sought, which would rule out any award of damages to class members severally.<sup>25</sup>

Nevertheless, the Hong Kong High Court applied the *Markt & Co Ltd v Knight Steamship Co Ltd* criteria in *CBS/Sony Hong Kong Ltd v Television Broadcasts Ltd*,<sup>26</sup> and maintained that the plaintiffs had to establish “a common interest, a common grievance and a remedy which is beneficial to all the plaintiffs” but had failed to do so in this particular case. The LRC’s final report stressed that there had been few representative actions in Hong Kong and added:

“The reason for this lies in part with the fact that the judicial initiatives taken have been piecemeal and the landmark cases restricting the rule’s application, have never been expressly over-ruled by an Appellate Court in Hong Kong”

The final report also endorsed the findings of the CJR Working Party, in that RHC O.15 r.12 was “inadequate as a framework for dealing with large-scale multi-party situations” and that, in the absence of an appropriate procedure for multi-party litigation the courts “have had to proceed on an *ad hoc* basis ... and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases”.<sup>27</sup> This approach, in the view of the CJR Working party and the authors of the final report, was an inadequate one.

Of course, this analysis of RHC O.15 r.12 is based, in turn, on a view that multi-party litigation generally, and class actions specifically, are beneficial and should be more readily accommodated within the RHC. After a brief summary of the law on representative proceedings and class actions in a number of other common law jurisdictions, such as the US and England, and in the Mainland the final report set about looking at the advantages of a class action regime.

<sup>23</sup> [1991] 2 QB 206 (CA).

<sup>24</sup> A common leading underwriter clause in each contract of insurance provided that all settlements of claims undertaken by the representative defendants would be binding upon all class members.

<sup>25</sup> In *Prudential* a declaration of the class members’ entitlement to damages was sought. They were then subsequently able to claim damages individually.

<sup>26</sup> [1987] HKLR 306.

<sup>27</sup> CJR interim report paras 385–387 at pages 148–149.

### The Benefits of a Class Action Regime

The LRC considered the options for “group litigation”<sup>28</sup> in “the light of the following three overall policy objectives”:

- (a) promoting greater access to justice;
- (b) facilitating final resolution; and
- (c) promoting judicial efficiency.

These policy objectives were all described as being “reflected” in the underlying objectives set out in the CJR Working Party’s final report, and incorporated (in part) into RHC O.1A.<sup>29</sup> Yet, it should be recalled that the underlying objectives are a very close adaptation of the CPR’s overriding objective and were not intended to represent the proverbial “final word” on what was just and what was unjust.<sup>30</sup> Indeed, the overriding objective itself was not, in the words of Deirdre Dwyer, intended to be a “super-norm” even though it has had a significant effect on the work of the English courts.<sup>31</sup> It is, arguably, unwise to justify one’s proposals by reference to measures which were intended only to “make more systematic the approach to case management presently accepted as a matter of common law”<sup>32</sup> rather than serve as the basis of a new approach to the jurisprudence of civil procedure.

It is also the case that “promoting greater access to justice” and “facilitating final resolution” are not actually among the underlying objectives in RHC O.1A or those suggested by the CJR final report.<sup>33</sup> Whilst the former of these policy objectives was in the CJR Working Party’s terms of reference, RHC O.1A r.1(d) actually states that the aim is “to ensure fairness between the parties” and the CJR final report suggested that this should be “greater equality between parties”. There are, of course, many differences between these aspirations, not least the

<sup>28</sup> Note again the inconsistent language.

<sup>29</sup> The CJR final report refers to the following underlying objectives: (i) increasing the cost-effectiveness of the court’s procedures; (ii) encouraging economies and proportionality in the way cases are mounted and tried; (iii) the expeditious disposal of cases; (iv) greater equality between parties; (v) facilitating settlement; and (vi) distributing the court’s resources fairly, whereas RHC O.1A r.1 states that the underlying objectives are: (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court; (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable; (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings; (d) to ensure fairness between the parties; (e) to facilitate the settlement of disputes; and (f) to ensure that the resources of the Court are distributed fairly.

<sup>30</sup> A fact recognised by the CJR Working Party, among others.

<sup>31</sup> D Dwyer, “What is the Meaning of CPR r.1.1(1)?” in *The Civil Procedure Rules Ten Years On* (OUP, Ch.4, 2009).

<sup>32</sup> The CJR final report, para.109.

<sup>33</sup> Nor is “judicial efficiency”, although RHC O.1A refers to cases proceeding “efficiently” and “cost-effectiveness” on various occasions.

fact that “fairness” does not necessarily equate to “equality”. In turn, the latter policy objective (of “facilitating final resolution”) appears to be an amalgam of RHC O.1A r.1(b) “to ensure that a case is dealt with as expeditiously as is reasonably practicable” and (e) “to facilitate the settlement of disputes”. Again, these aspirations, whilst not mutually exclusive, are not the same as each other or the LRC’s policy objective. Nevertheless, having sought to link its proposals to the CJR and post-2009 RHC, the LRC then sets out the benefits and risks of a class action regime.

The LRC states that the prime (indeed only) benefit to plaintiffs of a class action regime is “improved access to justice”, which has several aspects. It is stated, quite rightly, that “Sophisticated jurisprudence on tort or contract” is of little benefit to ordinary members of the public if a legal system lacks “practical and economical ways to enforce deserving claims” by those individuals. In addition, the aggregation of claims by a plaintiff class could justify the potential costs of such claims. Moreover, there is less disparity between a group of plaintiffs facing a defendant public body or major corporation than a single plaintiff in the same position. A further, intangible, benefit was the psychological “safety in numbers” felt by groups of plaintiffs, especially in respect of the fear of sanctions by, for example, defendant employers against plaintiff employees.<sup>34</sup>

It is suggested in the final report that there would be three benefits to potential defendants. The first is the avoidance of multiple related lawsuits over the same factual or legal issues (by resolving them in just one action) with a consequential saving of time, expense and inconvenience. A second, related, benefit is the fact that class actions could “lead to finality and class-wide resolution of disputes, preferably through settlement” given that such outcomes would bind all class members. Finally, a “negotiated certification” could provide defendants with “the chance of influencing the nature of the class, limiting the claims and establishing an expeditious and cost-effective way for resolving the claims of the class members”.<sup>35</sup> A further advantage to both plaintiffs and defendants (and the courts) was stated to be “procedural certainty”.<sup>36</sup>

As with the benefits to defendants, the benefits to wider society of a class action regime were said to be threefold. Firstly, a class action regime saves judicial resources from being wasted on repetitive proceedings. The

<sup>34</sup> According to the Victorian Attorney-General’s Law Reform Advisory Council, *Report on Class Actions in Victoria: Time for a New Approach* (1997), para.2.8. Cited at page 65 of the LRC’s final report.

<sup>35</sup> Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, para.123, quoting the views of Jeffrey Goodman of Heenan Blaikie. Cited at page 67 of the final report.

<sup>36</sup> Para.3.17 at page 70 of the final report.

report noted, however, that some research suggested that class actions “consume more judicial resources than typical civil cases”.<sup>37</sup> Secondly, there is an “enhancement of justice” in society, not least by the reduction of “areas of dispute and increase[d] ... likelihood of reaching a fair and equitable ruling”. Finally, it was suggested that a class action regime could have a deterrent effect on potential wrongdoers “from committing wrongful acts, and prompting them to have a stronger sense of obligation to the public”.<sup>38</sup> It was pointed out that the US Supreme Court recognised the deterrence function of class litigation, whereas the Scottish Law Commission and Australian Law Reform Commission held that this deterrent effect was only “incidental to the main goal of facilitating access to justice”.<sup>39</sup>

The LRC also acknowledged that there were difficulties or risks associated with a class action regime. Among these was the danger of “promoting unnecessary litigation”. This was explained to be the inverse of the “safety in numbers” advantage of class actions to plaintiffs; namely, undeserving litigants would be prepared to sue as members of a large group (where, for example, their exposure to adverse costs orders would be ameliorated) in circumstances where they would not be prepared to bring a claim on their own. Related to this danger or risk was that of increasing the number of claims that lacked any intrinsic merit. Defendants in such circumstances may be obliged, as a matter of commercial good sense, to settle such claims rather than defend them even though the claims themselves were “weak”. A third danger was that posed by so-called “entrepreneurial lawyers” (such as Mr Weiss, perhaps) who would use the class action regime as “vehicles” to “obtain fees”. Further, there was a potential lack of protection for individual class members. Given that the large majority of such individuals play little part in the litigation, unscrupulous plaintiff lawyers had greater scope “to engage in questionable practices, serving their own financial ends rather than the interests of class members”.<sup>40</sup>

The focus of the final report was, again, on class actions rather than multi-party litigation or “group litigation”. Insofar as benefits of such

<sup>37</sup> Canadian class actions take two or three times as long from filing to disposition, and consume five times as much judicial time, as ordinary civil cases: TE Willging, LL Hooper and J Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), 9. Cited at page 67 of the final report.

<sup>38</sup> The Ontario Attorney-General’s Advisory Committee on Class Actions, *Report of the Attorney-General’s Advisory Committee on Class Action Reform* (1990), 17; Manitoba Law Reform Commission, *Class Proceedings* (1999), MAN LRC REP 100, 28, 30 and 35; Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, para.115 and Ontario Law Reform Commission, *Report on Class Actions* (1982), 140–146. Cited at page 68 of the final report.

<sup>39</sup> See paras.3.14–3.15 at page 69 of the final report.

<sup>40</sup> See pages 70–72 of the LRC’s final report.

a regime were concerned, the final report relied mainly upon the work of the Ontario Law Reform Commission, the Manitoba Law Reform Commission, the Alberta Law Reform Institute and that of Professors Mulheron and Prichard. There is no reference to any research in Hong Kong on these issues. As to that in other jurisdictions, the final report conceded that “statistics are incomplete and it has not been possible to undertake research by rigorous empirical standards” before asserting that “a general picture has emerged” that class actions bring greater access to justice and judicial economy. Further, it is suggested that whilst “No conclusions can yet be drawn as to whether societal behaviour has actually been modified by class actions” the publicity created by some actions would “be expected” to have had such an effect.<sup>41</sup> In the absence of evidence, it is difficult to justify such an “expectation”.<sup>42</sup>

Further, whilst there is much merit in looking at examples of good practice in other jurisdictions when deciding how to proceed at home, it is, as Lord Neuberger MR pointed out in his Upjohn Lecture in November 2012 “unwise for us to adopt a system which has developed in a legal, social, and political culture which, whilst similar to ours in some ways, is profoundly different in others”.<sup>43</sup> Whilst his Lordship may have been discussing legal education and training, the point is equally valid when applied to other reforms. It should not be forgotten that class action regimes were first developed to address perceived deficiencies in the US judicial system rather than those in Hong Kong (or England, upon which Hong Kong’s is based). Yet, in response to the contention by some respondents to the consultation paper that “there was no pressing demand for a class action regime” in Hong Kong, the LRC simply retorted that the types of cases that were identified by the LRC as suitable for class action proceedings<sup>44</sup> would be better dealt with by way of class actions. This, with respect, seems to be both a circular argument and fails to answer the question posed by the respondents.

The final report also contained a short passage addressing the differences between the Hong Kong and the US legal systems, such as contingency fees, juries in civil cases and punitive damages in the US, in an attempt to deflect some of the concerns raised about introducing

<sup>41</sup> See para.3.69 at page 93 of the final report.

<sup>42</sup> The HKBA suggested that a broader assessment of the “wider economic, social and legal contexts” may be required before deciding whether a class action regime was required in Hong Kong. The LRC countered with the UK MoJ’s observation that a “meaningful global impact assessment would be virtually impossible to achieve”. There are, however, other forms of empirical research – such as surveys of litigants and lawyers – that could, but were not, have been carried out by the LRC.

<sup>43</sup> Available at <http://www.supremecourt.gov.uk/docs/lord-neuberger-121115-speech.pdf>

<sup>44</sup> Listed in Appendix 1 of the final report.

class actions to Hong Kong.<sup>45</sup> It is, however, not only the case that the differences in the two jurisdictions that could make a class action regime less contentious in Hong Kong than in the US, they could make it more problematical to introduce a workable class action regime in the territory. For example, the absence of contingency fees in Hong Kong may prevent the rise of “entrepreneurial lawyers” but it also creates the funding difficulty identified in the report (and discussed further below).

It was noted in the final report that 35 of the respondents to the consultation paper were in favour of a class action regime, whilst 18 were against it or expressed reservations.<sup>46</sup> Those expressing opposition or reservations raised a number of the issues addressed above (and others) and took the view that “the risks in having a class action regime outweighed the benefits”. The LRC was “not persuaded that these concerns tip the balance against reform” although, in light of the same, they decided that it would be sensible to “phase in the implementation of a class action regime by starting with consumer cases”. Such an incremental approach would, it was suggested, also be sensible in the absence of “proper funding for representative plaintiffs of limited means”.<sup>47</sup>

## The Proposed Class Action Regime

Having concluded that a class action regime would be the right way forward for Hong Kong, the LRC proceeded to outline the features of such a regime.

### *Certification*

The LRC stressed that a certification stage was an “essential element” of any proposed class actions regime, with the process to take place – ideally – as early as possible in the case.<sup>48</sup> The final report did not, however, make any specific recommendations as to the nature of certification, other than that there should be such a process to “filter out unsuitable cases”. A set of five certification criteria identified by the UK Civil Justice Council<sup>49</sup> were, however, broadly endorsed by the LRC, these being:

- (a) a minimum number of identifiable claimants (the “numerosity” criterion);

<sup>45</sup> Pages 72–74 of the final report.

<sup>46</sup> Listed in the two tables at pages 107–109 of the report.

<sup>47</sup> Para.3.74 at page 96 of the final report.

<sup>48</sup> Recommendations 2(2) and 9(4) of the final report.

<sup>49</sup> See page 263 of the final report.

- (b) the claim discloses a genuine cause of action *and* has legal merit (the “merits” criterion);
- (c) there is sufficient commonality of interest and remedy among the proposed class members (the “commonality” criterion);
- (d) a class action is the most appropriate (or a superior) “legal vehicle” to resolve the dispute (the “superiority” criterion); and
- (e) a representative party (or representative plaintiff) will take the action forward on behalf of all the class members. In particular he should be able to represent the interests of the class both properly and adequately (the “representative” criterion).

Most of the respondents to the consultation paper agreed in principle with the introduction of some form of certification process for class actions, although some had their own views on the details of the same. For example, in respect of the “commonality” criterion, the Law Society suggested that the question to be answered should be:

“Whether if each member of the class is to commence a separate action instead of a single class action,

- (a) some common question of law or fact would arise in such separate actions; and
- (b) the rights to relief claimed in such separate actions are in respect of or arise out of the same transaction or series of transactions or transactions with substantially the same subject matter”

In the circumstances, it is understandable that the LRC decided to leave the details to be determined by others later.

Under the general subject of “case management” it was also felt by the LRC that active case management would be necessary; the CFI should have exclusive jurisdiction of the class action regime for the first five years “until a body of case law” had been established; and that ADR techniques such as mediation and arbitration should be “fully utilised”.<sup>50</sup>

### ***Consumer Claims Only***

Recommendation 1 of the final report was as follows:

“We believe that there is a good case for the introduction of a comprehensive regime for multi-party litigation so as to enable efficient, well-defined and workable access to justice. In the light of opposition and reservations

<sup>50</sup> See G Meggitt, “Mediation in Hong Kong – A Work in Progress” (2012) 6.2 Journal of Comparative Law 220 for a discussion of the development of mediation in the territory, and the changing attitudes of the judiciary and Hong Kong government towards it, over the past decade.

expressed in the consultation exercise, an incremental approach to implementing a class action regime merits consideration. For this purpose, a class action regime may start with consumer cases, and in the light of experience gained, the regime may be extended to other cases”<sup>51</sup>

What is meant by “consumer cases”? The approach favoured by the LRC was to follow s.4 of the Consumer Council Ordinance (Cap.216) so that the class action regime would cover “claims made by consumers in relation to goods, services and immovable property”.<sup>52</sup> In addition, both contractual and tortious claims could be brought under the class action regime. The authors of the final report also suggested adapting the definition of a “consumer” from s.3 of the Unconscionable Contracts Ordinance (Cap.458) for the purposes of the class action regime.<sup>53</sup>

This is a peculiar concession to the critics of class actions. Firstly, the final report identified a wide-range of types of cases that could be suitable for class action proceedings, including labour disputes and environmental cases. Yet, it was decided that these categories should be put on the proverbial “shelf” for the time being with no justification other than the “reservations” which had been raised in the consultation exercise – reservations which were in respect of a class action regime overall and the LRC had taken time to largely dismiss. This incremental approach sits oddly with the suggestion that the “mechanism” for a “full” class action regime should be “in place from the outset”.<sup>54</sup>

Secondly, it seems odd that the LRC should recommend an “incremental approach” by way of starting with consumer cases which the final report itself states “constitute a large segment (or probably the majority) of cases suited to class actions”.<sup>55</sup> If one accepts the final report’s description of consumer cases as the plurality or majority of potential class actions – although no

<sup>51</sup> All the recommendations are summarised at pages 270–274 of the final report.

<sup>52</sup> Section 4 sets out the Consumer Council’s functions thus “(1) The functions of the Council are to protect and promote the interests of consumers of goods and services and purchasers, mortgagors and lessees of immovable property by: (a) collecting, receiving and disseminating information concerning goods, services and immovable property; (b) receiving and examining complaints by and giving advice to consumers of goods and services and purchasers, mortgagors and lessees of immovable property; (c) taking such action as it thinks justified by information in its possession, including tendering advice to the Government or to any public officer; (d) encouraging business and professional associations to establish codes of practice to regulate the activities of their members; (e) undertaking such other functions as the Council may adopt with the prior approval of the Chief Executive in Council”.

<sup>53</sup> (1) A person (A) is a consumer in relation to a dealing with another person (B) if – (a) the dealing results in A – (i) receiving or having the right to receive goods or services; or (ii) acquiring or having the right to acquire immovable property as purchaser, mortgagor, chargor or lessee; and (b) A is not acting, or purporting to act, in the course of a business but B is so acting or purporting to so act. (2) It is for the person claiming that a person is not a consumer in relation to a dealing to prove that fact.

<sup>54</sup> Para.9.1 at page 243.

<sup>55</sup> Para.3.74 at page 96.

evidence was presented in the final report to support this point – there is an inherent contradiction in “limiting” the proposed regime to such cases. Even if one does not accept the final report’s description, the definition of both “consumer cases” and “consumer” is wide enough to suggest that a very large number of claims could be permitted under the new regime, defeating the “incremental approach”.

Thirdly, another justification which is given for this incremental approach is the need to avoid the encouragement of “unmeritorious litigation” and the importance of procedures “to ensure fairness, expedition and cost effectiveness”. Yet, surely such safeguards are the *sine qua non* of any civil justice system. It surely cannot be that the LRC was suggesting that such safeguards are absent in the RHC as it currently stands. Whilst there may be particular aspects of a class action, such as the need to ensure that the interests of class members are safeguarded vis-à-vis the representative plaintiff and vice versa, the inherent legal and factual merits of a claim do not depend upon how many plaintiffs there may be.

Perhaps the real reason for the concession lies in the recognition that there is a lack of “proper funding for representative plaintiffs of limited means”. The recommendation for an incremental introduction of the regime, starting with consumer actions, is posited on the basis that such claims could be funded by the use of the Consumer Council’s Consumer Legal Action Fund. The LRC repeated the call (first made in the 2009 consultation paper) that the scope of the Fund should be expanded “with the injection of new funds to finance suitable consumer class actions”. Such new funds would clearly be necessary given that the chief executive of the Consumer Council stated in September 2012 that the fund had HK\$18 million, which would arguably be insufficient to maintain even one or two sustained class actions over the typical lifetime of such litigation.<sup>56</sup> This issue is returned to below.

Whilst the final report recommends that the class action regime should cover only consumer cases in the immediate term, it added that the regime should eventually apply to public law cases (ie claims relating to the procedural lawfulness of an administrative decision that affects a class of plaintiffs).<sup>57</sup> That said, the LRC did not suggest any changes to

<sup>56</sup> A Wan, “Proposal by Law Reform Commission a Step Towards Class-Action Cases” (18 September 2012) South China Morning Post.

<sup>57</sup> Recommendation 4 reads: “We recommend that: (1) the new class actions regime should apply to public law cases, in addition to the current section 21K(1) of the High Court Ordinance (Cap.4) and Order 53 of the Rules of the High Court; and (2) an opt-out approach should be the default position unless the court orders otherwise in the interests of justice and the proper administration of justice”.

s.21K(1) of the High Court Ordinance (Cap.4) and RHC O.53 which govern public law cases. This is not to say that the current state of public law – or public interest – litigation in the territory is without its critics.<sup>58</sup>

### *Opting Out*

As has already been noted, the final report made extensive references to the work of Professor Mulheron. This is especially the case in respect of the choice between an “opt-out” and “opt-in” class action regime. For example, it listed the competing arguments in respect of the “opt-out” approach identified by Mulheron including the assertion (in favour) that an opt-out regime enhances access to legal remedies for socially, intellectually or psychologically disadvantaged people who would be unable actively to include themselves in the proceedings, whilst (against) there is the assertion that it is wrong that someone can pursue an action on behalf of others without their express mandate.<sup>59</sup> That said, it was clear which approach the authors favoured. In particular, in answer to the preceding argument (and similar ones) against the opt-out approach, the LRC stated that, with appropriate procedural safeguards, an opt-out system would comply with the “requirements of access to justice and protection of property rights” prescribed by arts.6 and 35 of the Basic Law.

In addition, there was an absence of any substantive exploration of the case for an “opt-in” system. By contrast, the final report cited the research of the Australian Law Reform Commission, the UK Civil Justice Council and the Law Reform Commission of Ireland in support of an opt-out regime. The LRC’s conclusion was that an “opt-out” system was preferable because it promoted greater participation on the part of class members; it avoided the logistical difficulties of identifying and naming all class members; and because such a system “achieves the closure of issues”. The LRC gave itself some “wriggle room”, however, by adding that the courts should have the discretion “to depart from the opt-out regime where there are strong reasons for doing so”. Another qualification to this general approach was that plaintiffs from outside Hong Kong would be required to opt-in to a class action in order to benefit from any outcome of the proceedings.<sup>60</sup>

<sup>58</sup> See K Kong, “Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?” (2009) 28 Civil Justice Quarterly 327–343.

<sup>59</sup> Annex 3 of the final report contains a detailed review of the human rights and Basic Law issues relevant to the “opt-out” approach.

<sup>60</sup> Recommendation 3 reads: “We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court

Interestingly, a majority of the respondents to the consultation paper (which contained the same discussion of the two alternatives) favoured the “opt-in” approach. Of particular note is the fact that the Consumer Council took the view that an opt-out procedure “might not be suitable in some circumstances” given that each case “turned on its own merits” and that, consequently, the courts should have the discretion to decide on the appropriate approach in each individual case. Nevertheless, despite the division of opinion among consultees, the LRC abided by the suggestion in the consultation paper that an opt-out system be adopted. The HKGCC took issue with this decision after the publication of the final report, stating:

“But if a claimant cannot be located or will not come forward at the outset of an action, why should they be any more likely to come forward or be found later when an award/settlement has been made? The answer implicit in the Report is: because they were not interested when there was no money on the table, but only legal bills and the risk of adverse costs; yet when victory is won, they suddenly want to share in the spoils”<sup>61</sup>

This is, perhaps, a somewhat intemperate interpretation of the motives of potential class action plaintiffs but it, nevertheless, contains a grain of truth. It is truth recognised by Mulheron and other advocates of the class action regime when they speak of the reluctance of individual plaintiffs to bring claims in their own names compared to their willingness to join a class of plaintiffs.

### *Choice of Plaintiff*

The LRC consultation paper identified what was described as a risk in class actions in that a successful defendant may not be able to recover its legal costs from an impecunious plaintiff acting as the class representative. This is exacerbated by the fact that, in many jurisdictions, class members other than the representative plaintiff enjoy immunity from costs orders. Given that a defendant’s costs could be considerable, this leads to a related danger of them being “blackmailed” into settlements rather than losing money in seeking what would be a pyrrhic victory. The LRC suggested that procedural safeguards should be put in place to prevent such abuses.

certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically considered to be bound by the litigation, unless within the time limits and in the manner prescribed by the court order a member opts out”.

<sup>61</sup> See the HKGCC’s August submission to the Secretary for Justice.

The LRC identified four such safeguards. Firstly, the choice by the class members of an impecunious representative plaintiff could be construed as vexatious and abusive conduct. Secondly, the financial adequacy of the representative plaintiff could be one of the criteria which would need to be satisfied during the certification process. Similarly, there could be “an explicit provision” that the representative plaintiff proves that there were “suitable funding and costs-protection arrangements” for the claim. Finally, the courts could be given the power to order security for costs to deter class members from selecting impecunious representative plaintiffs.

The LRC concluded, quite rightly, that the rules designed to address vexatious and abusive conduct would not be a satisfactory safeguard as “they are not aimed at tackling the problem of impecunious class representatives”. Instead, the LRC recommended a combination of measures comprising the requirement that a representative plaintiff prove to the court’s satisfaction that there were suitable funding and costs-protection arrangements at the certification stage and the availability of security for costs orders against representative plaintiffs.<sup>62</sup> The majority of the respondents to the consultation paper, which also laid out the four alternatives, supported the eventual recommendations for adequacy of representation at certification and security for costs. A minority, however, were concerned that the provision for security for costs could stifle meritorious claims.

There are, of course, a number of questions begged by this discussion of impecunious plaintiffs. Among them are what is meant by “impecunious” and what if all the class members are impecunious? A simple answer to the former question is that “impecunious” means someone who would be unable to pay the costs of the defendant if ordered to do so, as per one of the grounds for ordering security for costs (albeit this ground applies to nominal plaintiffs and limited companies only).<sup>63</sup> The LRC, however, also refers to “truly impecunious plaintiffs” who should be able to receive “discretionary funding” in order for them to “obtain legal remedies”. No further explanation of a “truly impecunious” plaintiff, nor how this measure would operate in practice, was given. Would this funding come from the Legal Aid Department? If so, what criteria would need to be satisfied by the representative plaintiff to obtain the necessary funds? Would these criteria be the same as those for ordinary plaintiffs bringing individual claims and, if not, how and why would they differ?

In the absence of funding from some outside source, the class members would have to find a representative plaintiff with sufficient financial

<sup>62</sup> This was Recommendation 5 of the final report.

<sup>63</sup> See RHC O.23 r.1(1). Available at <http://www.hklii.hk/eng/hk/legis/reg/4A/s23.html>

resources to be able to meet the certification requirements (and pay a sum into court as security for costs if such an order were made). Clearly, few class members would be willing or able to meet such a requirement. If this was the case, and all the class members were therefore “impecunious”, what hope would there be of them bringing a claim in the first instance, let alone any one of them satisfying the requirement for adequacy of representation at certification or complying with a security for costs order? Once again, an irresistible force – the desire for a class action regime – meets an immovable object – money ... or the lack thereof.

### **RHC O.15 r.12**

The consultation paper recommended that RHC O.15 r.12 would need to be replaced by a new set of procedures to cater for the class action regime. Given that the final report had pulled back from a wholesale change to the RHC in favour of an incremental approach, this raised the question of what should happen to the existing procedure for representative actions. The LRC came to the conclusion that RHC O.15 r.12 should be retained “at least until the proposed [class action] regime is extended to all cases” and its retention thereafter to be “reviewed at that time”.

It is unsurprising that the LRC decided against any changes to the existing regime for dealing with representative actions, given that it agreed with Professor Mulheron that “a comprehensive regime for class action litigation is more desirable” than even a “more liberal” implementation of RHC O.15 r.12. Presumably this means that, until the class action regime is extended beyond consumer cases, multi-party litigation in many circumstances will continue to be constrained by the existing procedural rules. If so, the LRC’s three stated policy objectives will remain unsatisfied.

### **Funding a Class Action Regime**

The LRC’s consultation paper correctly stated that little could be achieved by the introduction of a class action regime if there were no adequate means to support those plaintiffs who lacked the financial resources to bring and maintain claims. It was also recognised by the LRC that class actions were significantly more expensive than simple one-plaintiff-verses-one-defendant proceedings.<sup>64</sup> These facts, when combined with the general rule under the RHC that – in the words of the report – “costs

<sup>64</sup> The LRC’s final report referred to the empirical research carried out within Deborah R Hensler *et al.*, “Class Action Dilemmas – Pursuing Public Goals for Private Gain” (Executive Summary; RAND Institute for Civil Justice; Santa Monica; 1999), 22.

follow success”<sup>65</sup> constituted what the LRC considered to be “a major obstacle to commencing a class action”. It appears that the majority of the respondents to the consultation paper also acknowledged these linked difficulties.

### *The Costs Regime*

The LRC noted that the first difficulty, that of the costs regime, had been dealt with in two ways in other jurisdictions with class action regimes. For example, in the US there is a “No costs order rule”, by which the successful litigant is not ordinarily entitled to recover its legal costs from the loser. British Columbia had adopted a variation of this rule in that successful parties are not entitled to their costs, unless there has been, for example, “vexatious, frivolous or abusive conduct on the part of any party” or “there are exceptional circumstances that make it unjust to deprive the successful party of costs”.

The second method of mitigating the usual costs rule was described in the final report as the “Costs follow the event rule” under which the successful party is *prima facie* entitled to its costs. The explanation given for this approach, at least insofar as Ontario is concerned, is that the court is directed to consider whether the class action was a test case, raised a novel point of law, or involved a matter of public interest when it exercises its discretion as to costs.<sup>66</sup> Given that the Hong Kong courts have a discretion as to costs under RHC O.62 and that the general approach is for costs to “follow the event” and not “costs follow success”, the LRC’s choice of language is potentially confusing. That said, it appears that the LRC was suggesting that the scope of the discretion to make costs orders outside the usual approach may be greater in class actions than in other claims.

The final report also identified several “costs-shifting” measures in other jurisdictions by which the courts attempt to relieve some or part of the costs burden from the representative plaintiff and place it upon (one or more of) the defendant, class members, class lawyers or to a third party. For example, s.31(1) of the Ontario Class Proceedings Act – which is also referred to as a “costs follow the event” regime – is cited as an example

<sup>65</sup> The RHC does not actually use this language. RHC O.62, r.3(2) provides that: “[i]f the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to *follow the event*, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs”. Thus the unsuccessful party pays the successful party’s costs. Available at <http://www.hklii.hk/eng/hk/legis/reg/4A/s62.html>

<sup>66</sup> See para.8.5 at page 188 of the LRC’s final report.

of a costs-shifting regime. The LRC took the view that the “exceptional circumstances” in which the costs burden could be transferred to the successful defendant rendered this approach inadequate for addressing the problem “of funding class actions” and it did not recommend its adoption in Hong Kong.<sup>67</sup>

Another approach is to shift the costs from the representative plaintiff to the other class members, as under s.33ZJ(2) of the Australian FCA Act or the US “common fund” doctrine. The final report noted, however, a number of limitations with the Australian approach and, more widely, the reluctance of class members (other than the representative plaintiff) to contribute voluntarily to the expenses of the class action (NB in the absence of any sanction). In light of these problems, the LRC did not see this as a solution to the lack of funding for class actions in the territory.<sup>68</sup>

The third costs-shifting mechanism is to shift the costs of the litigation to the class lawyers by way of “conditional fees” or “contingency fees”. The former, which are permitted in England and Wales, involve the payment of the legal fees by client on the traditional (eg hourly rate) basis plus an additional “success fee” if the claim is successful. If the action is lost, the client pays no legal fees.<sup>69</sup> “Contingency fees”, as in the US, are based on the amount of compensation recovered from the action. If the claim is unsuccessful, no legal fees are charged, whereas if it is won, a percentage of the compensation recovered will be paid as legal fees to the lawyers. Following a further explanation of both types of mechanism, including the Scottish Law Commission’s views on the advantages and disadvantages of contingency fee arrangements,<sup>70</sup> the final report observed:

“Arguably, the most important benefit is that of increasing access to justice by removing or reducing some of the costs disincentives that currently deter the initiation of class actions. This is achieved by transferring some of the risk, and part of the cost, of litigation from the clients to their lawyers, who are better able to assess the risks involved and to bear those risks by spreading them over a large number of law suits”

<sup>67</sup> Para.8.19 at page 192 of the final report.

<sup>68</sup> Para.8.24 at page 194 of the final report.

<sup>69</sup> The client will still, however, be liable to pay any associated disbursements, such as an expert witness’ expenses. There are also so-called “shared risk” conditional fee agreements by which, in the event of losing the claim, the client pays a reduced fee to the lawyer.

<sup>70</sup> Para.8.34 at page 197 of the final report. The passage is repeated here as it contains a helpful summary of the issues: “The perceived advantages of contingency fees include the following: (a) Poor clients who are unable to pay lawyers’ fees can bring their cases to court. (b) Lawyers accepting cases on this basis will have a stake in winning the case and, therefore, will be more committed and more diligent in their preparation and presentation. (c) Lawyers may benefit by a simplification of the administrative procedures by which they are paid and by an increase in their earnings. On the other hand, the following are the perceived disadvantages of contingency fees: (a) It is said, on the basis of experience in America, that a contingency fee system leads to

Conversely:

“The contingent nature of the lawyer’s remuneration creates a strong financial incentive for the lawyer to accept a small settlement in order to ensure some fees, rather than risk losing at trial and recovering nothing”

The latter difficulty could be, and is, dealt with by a requirement that settlements (including the costs/fees) are to be approved by the court presiding over the claim. This, however, required a pro-active approach on the part of the courts to ensure that class members were adequately protected.<sup>71</sup>

The final report referred to the previous LRC report on conditional fees published in July 2007 and repeated its observations that, firstly, ATE insurance was “an integral component of a conditional fees regime” and, secondly, that “it was doubtful that ATE insurance would be available at an affordable premium and on a long-term basis in Hong Kong”. Consequently, other than the recommendation that representative plaintiffs should be ordered to pay security for costs in appropriate circumstances, the LRC made no suggestions on altering the current costs rules under the RHC. The 2009 consultation paper had stated that conditional fee agreements warranted further study but, as the majority of responses were against this possibility the LRC withdrew this “observation”.

### **Funding**

In the absence of any possible change in the costs rules, the final report turned to the possible methods of funding class actions under the existing “costs follow the event” rules.

The consultation paper had proposed extending the ordinary legal aid and supplementary legal aid schemes to class actions. It was, however, indicated in the final report that the Director of Legal Aid (“DLA”) had “made it clear that the current statutory framework only allowed the granting of legal aid on an individual basis”. Further, if an action was

excessive awards and an explosion in litigation. (b) They create a conflict of interest between the lawyer and the client to avoid the heavy expense of preparing for a trial (proof) the lawyer may encourage settlement when that is not in the client’s best interests. (c) Fees are excessive since lawyers can charge an unreasonable percentage (in the absence of arrangements to control excessive fees). (d) Lawyers are encouraged to use unethical tactics in the way they conduct cases. (e) The rule that expenses follow success reduces the attractiveness of contingent fees to litigants in the United Kingdom since if they lose they will still have to pay the other side’s costs. (f) They seem to offer little to those legally aided litigants who have no contribution to pay (unless there is a strong risk of the statutory claw back taking most of the award). (g) They are only applicable where a financial claim is being made and not, for example, in actions of [injunction or declaration] or in applications for judicial review”.

<sup>71</sup> Paras.8.35–8.36 at page 198 of the final report.

jointly commenced by legally-aided and non-legally aided plaintiffs, the DLA would pay only those costs attributable to the legally-aided plaintiffs. If the action failed, the DLA would be liable for the costs incurred by the legally-aided person but not the “additional costs otherwise incurred by the class action proceedings” nor the costs incurred by other class members. The DLA had also stressed that the underlying policy of legal aid was to help those who could not afford to get access to justice and that affluent class members would not receive a “free ride” from a legally-aided representative plaintiff.

Although a majority of the respondents did support the extension of the legal aid schemes to class actions the LRC concluded that a class action regime might be constrained if it operated “within the strait-jacket of the legal aid schemes” and withdrew the recommendation. Similarly, a “Conditional Legal Aid Fund” (CLAF) which would combine conditional fees and legal aid, also fell by the wayside in light of the lack of support by the DLA and the anticipated lack of finance from either the government or the legal profession.

Another suggestion in the consultation paper was for a “class action fund” (CAF), which would be supported by public monies and could be administered by the DLA. It was suggested that the CAF would operate in the following way:

- (a) a representative plaintiff would apply for funding to the CAF;
- (b) the CAF may be responsible for the representative plaintiff’s disbursements, legal fees incurred or an adverse costs order if the defendant wins (or a combination thereof);
- (c) to enable the CAF to be self-financing, representative plaintiffs may be required to reimburse the CAF for the sum it paid out and there may be a levy on the court award or the settlement sum;
- (d) the CAF would not fund individual class members who may bring individual proceedings after the determination of the common issues in their favour.

The LRC held that “the CAF concept offers a useful means of funding a modern class action regime”. The majority of the respondents to the consultation paper also supported the recommendation on establishing a CAF. Having said that, the LRC recognised that establishing a fully-funded CAF would be problematical. Accordingly, and in light of the suggested incremental approach to the implementation of the class action regime, it was suggested that the Consumer Legal Action Fund would be able to fund class actions in the interim.

Finally, the consultation paper had raised the possibility of permitting litigation funding companies (“LFCs”) to provide finance for class actions,

albeit conceding that this was a controversial suggestion. In the event, the majority of the respondents to the consultation paper were opposed to LFCs operating in Hong Kong, and the LRC therefore dropped the suggestion “as the community at large does not accept the idea of funding litigation for profit”.<sup>72</sup> The HKBA was, for example, wary of LFCs and saw little difference between them and “recovery agents”, who have attracted the ire of not only the HKBA but the Law Society.<sup>73</sup> Consequently, Recommendation 8 of the final report was:

- “(1) We conclude, as generally accepted, that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.
- (2) In the long term we recommend establishing a general class actions fund, that is a special public fund which can make discretionary grants to all eligible impecunious class action plaintiffs providing financial support for them to obtain legal remedies and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants.
- (3) Given the complexity and the difficulties of introducing a comprehensive funding mechanism in Hong Kong and our recommendation that the proposed class action regime should be implemented incrementally, starting with consumer cases, we recommend increasing the Consumer Legal Action Fund’s resources to make funding available for class action proceedings arising from consumer claims. If the scope of the Fund were to be expanded to cover class actions, it would be important to devise mechanisms to ensure that class members who are not assisted by the Fund should share equitably in the costs of the proceedings”

### *The Problem of Money*

As will have been appreciated by now, the fundamental problem faced by the LRC is that it was not merely seeking to address a procedural obstacle faced by potential plaintiffs, but a financial one. Simply put, those individuals who are unable to bring an individual claim because they lack financial resources are unlikely to be able to bring a “collective” or “group” claim for the same reason.

The US deals with this problem by way of contingency fees, whereby the compensation recovered by the plaintiffs becomes the source of

<sup>72</sup> Para.8.152 at page 241 of the final report.

<sup>73</sup> See the Law Society circular 05-261 (SG) of 17 May 2005.

the finance for the litigation and the lawyers, for all practical purposes, provide “free credit” to their clients up to the time that compensation is available. In England, conditional fee agreements play a similar role – although the lawyers fees are not derived from the compensation – and ATE insurance is the “hedge” against the risk that unsuccessful plaintiffs may have to pay the defendant’s legal costs.<sup>74</sup> The essence of both systems is the risk transfer from the client to their lawyers.

In Hong Kong, a solicitor may not enter into a conditional or contingency fee arrangement in respect of litigation work.<sup>75</sup> Barristers are similarly prohibited from engaging in work on a contingency fee basis. The prohibition has its origins in the torts of “maintenance”, which is the giving of assistance, encouragement or support to litigation by a third party who has no legitimate interest in the litigation and “champerty”, in which the third part supports the litigation in consideration of a promise by the actual litigant to give him or her a share in the proceeds of the claim.<sup>76</sup> It is, of course, permissible for solicitors to take on non-contentious work on a contingency fee basis and even waive their fees in the event that a transaction is not completed. Such practices, it seems, are not considered to be unduly “entrepreneurial”.

Unfortunately, as the LRC observed in both its final report on class actions and its earlier work on conditional fees, there was little support for conditional fee arrangements in Hong Kong – there was “the least amount of support” from professional bodies; very little support from the insurance industry; and only minority support among law firms and barristers’ chambers. The arguments against conditional fee arrangements included the old familiar “chestnuts” of the risk of conflicts of interest between clients and lawyers and the increase of frivolous claims.<sup>77</sup> It seems odd, in particular, that contingency fees for non-contentious business do not raise the spectre of conflicts of interest whereas those for litigation do. No matter how weak such arguments are, however, they are held by those who would operate – or regulate – conditional fee arrangements and, consequently, were fatal to their introduction and, by turns, using them to underpin a class action regime.

<sup>74</sup> In Australia, lawyers may also charge a fixed agreed sum and percentage uplift if the claim is successful in a manner similar to that in England and Wales. Canada, where class actions are well established, has a contingency fee system.

<sup>75</sup> The legislation, and Law Society regulations, on this issue refer to “contentious business”, which includes any business done by a solicitor in any court, whether as a solicitor or as an advocate. See s.2(1) Legal Practitioners Ordinance, available at <http://www.hklii.hk/eng/hk/legis/ord/159/s2.html>.

<sup>76</sup> See the LRC’s July 2007 final report on conditional fees for a detailed explanation of these torts. Available at <http://www.hkreform.gov.hk/en/publications/rconditional.htm>.

<sup>77</sup> See chapter 6 of the LRC’s final report on conditional fees.

Equally fatal was the fact that representatives of the 180-plus insurance companies in the territory were “sceptical as to the likelihood that ATE insurance could be offered in Hong Kong on a long-term basis at rates which were commercially viable, without being prohibitively expensive for the consumer industry”. Whilst it is true that ATE cover has been the subject of controversy and contentious satellite litigation in England and Wales, its existence has been crucial to the development of litigation since the introduction of conditional fee arrangements. It is hoped that the implementation of Lord Justice Jackson’s litigation funding and costs reforms in April 2013 will “remove unnecessary costs and to restore balance to the system”.<sup>78</sup> In the meantime, despite the LRC’s efforts, Hong Kong remains firmly stuck in the 1990s – or earlier – as far as litigation funding is concerned due to the reluctance of the legal profession to accept a share of the risk which litigants face when pursuing or defending difficult cases and the reluctance of the insurance industry to provide ATE cover. As a consequence, the LRC’s proposals for a comprehensive class action regime face little prospect of being realised.

### The Future Class Action Regime

Let us assume that the Solicitor General’s cross-sector working group endorses the LRC’s final report, which is far from certain, and sufficient public money is forthcoming to support an expanded Consumer Legal Action Fund or CAF. What will Hong Kong have acquired? In short, it will have something akin to a government-funded pilot scheme for a discrete category of potential plaintiffs. Purchasers of, say, a defective refrigerator or improperly labeled food product will be able to group together, select a representative plaintiff, obtain funding from the CAF and seek redress from the manufacturers or suppliers of the said products. By contrast, those wishing to bring, say, a claim in respect of the poor air quality in the territory or similar environmental issues will have to rely on individual actions or representative proceedings under an unreformed RHC O.15 r.12 and, in the absence of public money or a conditional fee arrangement, they will bear the entirety of costs burden themselves.

This is an unfortunate consequence of the bureaucratic and procedural *cul-de-sac* into which the LRC found itself when it focused – intentionally

<sup>78</sup> See details of the reforms see the UK Ministry of Justice website, available at <http://www.justice.gov.uk/consultations/566>. Also there is the MoJ’s timetable for implementation available at <http://www.justice.gov.uk/downloads/publications/policy/moj/civil-justice-reforms-full-package.pdf>. Lord Justice Jackson’s actual final report is available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>.

or otherwise – on class actions. Class actions are both politically controversial and raise procedural issues which are difficult to reconcile with Hong Kong's current civil court system. In the absence of any willingness on the part of the legal profession or other interested parties to entertain conditional or contingency fees – or any other radical costs-shifting measures – a comprehensive class action regime would require some form of public funding or the presence of wealthy and philanthropic representative plaintiffs to operate within the “costs follow the event” rules. By contrast, other forms of multi-party litigation, such as the English GLO, are not so hamstrung or, at least, not to the same extent.

GLOs are not without their faults and critics, not least the UK Civil Justice Council and Professor Mulheron, whose views apparently persuaded the LRC not to entertain them as a possible step forward for Hong Kong.<sup>79</sup> That said, GLOs have been used extensively since their introduction over a decade ago. There are 76 GLOs listed on the UK Ministry of Justice's group litigation register,<sup>80</sup> including those for such cases as the “toxic sofa litigation” against several furniture suppliers and more recently a GLO involving almost two thousand plaintiffs who brought a personal injury claim against the baby buggy manufacturer Maclaren.<sup>81</sup> A number of the respondents to the consultation paper, including Clifford Chance, expressed the view that something akin to GLOs would be an appropriate reform in Hong Kong.

Whilst it may be true that many common law jurisdictions already have a class action regime; that the EU began a consultation exercise in 2011 entitled “Towards a Coherent European Approach to Collective Redress”;<sup>82</sup> and that even the UK Government has decided to permit collective competition law claims on an “opt-out” basis,<sup>83</sup> this is unlikely to impress many in Hong Kong that we should do the same. It is worth recalling that the CJR took over nine years to be implemented; that the “new” Arbitration Ordinance (Cap.609) which abolished the distinction between domestic and international arbitrations had a similarly lengthy

<sup>79</sup> See also SMC Gibbons, “Group Litigation, Class Actions and Lord Woolf's Three Objectives—A Critical Analysis” (2008) 27 *Civil Justice Quarterly* 208–243; and QC David Hart, “Some Imperfections in the Group Litigation System: More Power to the Judges?” (October 2009) available at <http://www.lcor.com/1198/section.nc?startpoint1159i47=1200>.

<sup>80</sup> Available at <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>

<sup>81</sup> See Insley, J, “Maclaren agrees to compensate UK children injured by pushchair hinge” (6 May 2010) *The Guardian*, available at <http://www.guardian.co.uk/money/2010/may/06/maclaren-compensate-children-injured-pushchair>.

<sup>82</sup> See [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0054\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm)

<sup>83</sup> Consultation paper available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf).

gestation; and that, whilst solicitor corporations were legislated for in 1997, there are still none in existence. In Hong Kong “The wheels of justice grind slowly”. Given that fact, it may be worthwhile the Solicitor General’s working group giving some consideration to the introduction of GLOs, if only as an interim measure until a comprehensive class action regime, supported by appropriate private funding mechanisms, can be introduced. Perhaps, in addition, the working group could consider the possibility of the Hong Kong government contributing – in whole or part – to the payment of ATE insurance premiums. It is likely that such a step would be less costly, and therefore less contentious, than extending legal aid to class actions or creating a CAF. If nothing else, it may remove one obstacle to conditional fee agreements and hasten the introduction of a class action regime – if that is what Hong Kong truly wants.