IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000530
[2016] NZHC 3105

BETWEEN	THE SOUTHERN RESPONSE UNRESOLVED CLAIMS GROUP Plaintiff
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Defendant

Hearing:	19 October 2016 Joint Memorandum from Counsel for the Parties - Received 11 November 2016
Appearances:	F Cooke QC and M Smith for Plaintiffs M O'Brien QC, D J Friar and N F Moffatt for Defendant
Judgment:	16 December 2016

JUDGMENT OF GENDALL J

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Introduction

[1] The plaintiffs are a group currently comprising 41 residential homeowners all insured through the defendant company (Southern Response) whose insurance claims arising out of the sequence of Canterbury earthquakes commencing in September 2010 have not as yet been resolved. The plaintiffs seek leave to bring this proceeding as a representative action under r 4.24 of the High Court Rules together with certain associated orders.

[2] This is the plaintiffs' second application for leave to bring this proceeding as a representative action.

[3] On 24 February 2016 Mander J in this Court declined the plaintiffs' first application, (the first decision) essentially ruling that the plaintiffs had failed to meet the threshold requirements for a representative proceeding and that the "just, speedy and efficient determination" objectives of the High Court Rules would not be achieved by allowing the application before him.[1] In doing so Mander J ruled that the plaintiffs' pleadings failed to identify any substantial issue of significance that was common to the representatives. In giving his overall ruling, Mander J however specifically allowed the plaintiffs to bring a modified application to obtain representative action status by re-casting their claim to meet the concerns expressed in his judgment. On 27 May 2016 the plaintiffs filed a first amended statement of claim which they say does just that. It is that first amended statement of claim which is the subject of the present leave application.

[4] It is the plaintiffs' contention that this first amended statement of claim meets the deficiencies identified by Mander J in the first decision in that it identifies the issues or claims common to all members of the group which provide a "spine" for this proceeding, and mean that it is appropriately the subject of a representative action. The defendant however disputes this. It contends that this renewed application is simply a re-run of the application which was the subject of the first decision, and it should be acknowledged as such and rejected. Southern Response says that still no real common interest has been identified by the plaintiffs here, the

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1 *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 at [92].

proposed representative action would not resolve the individual insurance claims of each of the group claimants but will just add further delay and, in any event, no real worthwhile remedy for those claimants can arise in light of their major insurance loss claims being "parked".

[5] In passing, at this point I note that the plaintiffs have also lodged an appeal against the first decision to the Court of Appeal and this has a fixture allocated for 7 March 2017. Notwithstanding this, the plaintiffs argue that in this first amended statement of claim they have properly reformulated their claims to meet the requirements enunciated by Mander J in the first decision. It is noted obviously that if the renewed application which is before me is successful, then that appeal to the Court of Appeal may become moot.

Background

[6] By way of initial background in this matter it is useful to set out here the facts identified by Mander J in the first decision at paras [3] – [7] to "set the scene" that prevailed at the time the first leave application was before this Court:

> [3] Some five years have elapsed since the first of the Canterbury earthquakes on 4 September 2010. The houses of the Group's members were insured under the same or substantially similar policies of insurance with Southern Response on a full reinstatement basis. Their insurance claims remain unsettled. It is the Group's position that Southern Response has failed to discharge its obligations to them under the insurance policy, and the intervention of the Court is required to have their claims resolved. Each claim has been the subject of a long period of delay, and there remain significant disputes between Southern Response and the policyholders.
>
> [4] The Group seeks to bring the proceedings as a representative action on the basis they share common disputed issues concerning the interpretation and application of the policy which require determination by the Court. It is envisaged that at a later stage in the proceeding a process will be put in place for resolving the individual claims based on the resolution achieved in relation to those generic issues. Several members of the Group have filed affidavits in support of the application which detail the history of their claims and their involvement with Southern Response.
>
> [5] A prime reason put forward in support of the representative action is that none of the members of the Group individually would be able to afford to bring separate proceedings against Southern Response to resolve their individual claims. The Group, however, has obtained the services of a litigation funder, Litigation Lending Services (New Zealand) ("LLS (NZ)") to fund a representative action. Each member has signed a litigation funding agreement with LLS (NZ).

> [6] Southern Response is an entity established for the singular purpose of settling claims by policyholders of the insurance company, AMI, as a result of damage caused by the Canterbury earthquakes. Following the second major earthquake on 22 February 2011, AMI considered it did not have sufficient reserve funds and reinsurance to cover its liability. Following an approach by AMI, the Crown agreed to provide a capital injection of $500 million pursuant to the terms of a Crown support deed. This resulted in a restructuring of AMI. Its ongoing day-to-day insurance business was sold and its liability arising from the Canterbury earthquakes transferred to a Crown owned company, Southern Response.
>
> [7] Southern Response became responsible for some 7,626 claims where the amount exceeded the Earthquake Commission (EQC) cap of $100,000 (plus GST). Of these overcap claims, 6,684 claims have been settled, although claims are still being passed to Southern Response from EQC, albeit at a reduced rate in recent times. The 46 claimants with an interest in the present proceeding are part of a group numbering some 2,587 whose claims have not been resolved with Southern Response.

[7] Since February 2016 when Mander J gave the first decision, the plaintiffs' group has changed slightly. As I understand it, two of the original claimants have settled with Southern Response and the Group's numbers have now been brought down to 41 (from the original 47). The plaintiffs at the hearing of this matter before me advised they had also nominated a second representative, Mr Kelvin Raymond Yeadon, to join Mr Cameron Preston and Ms Wendy Preston as a representative of the class. Then, as recently as 12 December 2016, counsel for the plaintiffs has filed in this Court a memorandum indicating that Mr and Mrs Preston have now resolved their insurance claim with the defendant. As a result, Mr and Mrs Preston have withdrawn from the present proceeding and are no longer group members. But counsel advise the parties agree this withdrawal does not necessitate the filing of a further amended statement of claim at this point. The present r 4.24 leave application is to continue with Mr Yeadon as the sole representative of the plaintiff group, although I do note also that in a memorandum dated and received by the Court only yesterday, 15 December 2016, counsel for Southern Response advises that settlement and resolution of the claims of several of the other group claimants are likely shortly. It seems also that the plaintiffs again propose a class consisting of Group members and all other policy holders who have not settled with Southern Response and who wish to join the proceeding.

Mander J decision on the plaintiffs' first r 4.24 application

[8] In the first decision Mander J summarised the plaintiffs' claim which had been outlined in their original statement of claim filed 26 August 2015 as follows:

(a) First, that Southern Response had allegedly misrepresented the options which were available to each of the plaintiffs under their AMI policies (given that Southern Response had effectively taken over those claims from AMI).

(b) Secondly, Southern Response had allegedly applied additional conditions to the individual claims that were not consistent with the insurance policy terms.

(c) Thirdly, Southern Response allegedly applied conditions in relation to self managed rebuilds that were not consistent with the insurance policies and as a result significantly reduced its obligations under those policies.

(d) Fourthly, Southern Response allegedly systematically understated the cost of a rebuild or repair, in a number of ways, including the fact that demolition, design and administration fees were excluded, by employing inadequate foundation repair techniques, using discounted market rates and undertaking inadequate property inspections.

[9] Mander J noted that the plaintiffs had pleaded two causes of action in their original claim. The first was for breach of "substantive promises" in the policy. The plaintiffs alleged that this was a breach of essential terms of the policy allowing them to reserve their right to cancel. They also sought payment of the amount of each plaintiff member's insurance claim. This was said to be particularised for each member in the schedule of claims attached to the statement of claim. The schedule, however, simply said that for each member "the true value of the insurance claim cannot be determined" until further work is done.

[10] The second cause of action noted by Mander J claimed against Southern Response for an intentional breach of "process rights" including good faith and the rights set out in the policy requiring prompt, professional and fair handling of all claims. The plaintiffs sought general damages arising from this alleged breach.

[11] In giving his judgment on 24 February 2016 Mander J identified a number of "deficiencies" in the plaintiffs' claim and declined their application for leave to bring a representative action. As I have noted above, to summarise his findings, Mander J ruled that the pleadings in the plaintiffs' original statement of claim failed to identify any substantial issue of significance that was common to the representatives and each proposed plaintiff class member and that would materially advance the resolution of each plaintiff's claim. Mander J also indicated he was not satisfied that the proposed representative action procedure would serve the objects of the High Court Rules in terms of the just, speedy and efficient determination of claims.

[12] These rulings however, were specifically in Mander J's words "without prejudice to any modified application based on a reformulation of the proposed proceeding which meets the concerns expressed in [this] judgment". Clearly it was envisaged that the plaintiffs might seek to reformulate their claims, as Mander J noted at [90] of his judgment, by identifying "a number of groups or sub-groups of members who share the common substantial issue of significance to each member and would warrant the making of not one but a number of representative orders".

[13] The plaintiffs contend here that this is precisely what they have done with their first amended statement of claim, but Southern Response disputes this.

[14] At this point it is important to note that what is before me is not an appeal. It is an entirely new application under r 4.24. Significantly too, under r 7.52 of the High Court Rules a party who fails on an interlocutory application (as the plaintiffs have done here with Mander J's first decision) may not apply again for the same or a similar order without first obtaining leave, which may only be granted in "special circumstances". This rule is consistent with the principles of res judicata and issue estoppel, namely an issue decided by an interlocutory ruling is not to be relitigated in the same proceeding. Here, Mander J gave leave to bring this second r 4.24

application, but only to the extent that it would "meet[s] the concerns expressed in this judgment". The plaintiffs were not otherwise entitled in effect to have a second go.

[15] Southern Response has filed an opposition to this second application. Southern Response says the plaintiffs have not met the deficiencies and concerns identified in the first decision. They have not identified subgroups of members with common interests in particular issues as anticipated by Mander J's decision. Instead, they have done little more than change the order in which their allegations appear, simply "reformatting" their claim. The amended claim is substantially the same as the original claim.

The test for leave to bring a representative action

[16] Rule 4.24 of the High Court Rules addresses this issue and provides:

> **4.24 Persons having same interest**
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> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding –
>
> (a) with the consent of the other persons of the other persons who have the same interest; or
>
> (b) as directed by the Court on an application made by a party or intending party to the proceeding.

[17] The general approach when applying r 4.24 was outlined recently by the Supreme Court in *Credit Suisse Private Equity LLC v Houghton.*[2]

[18] The issue to be decided in *Credit Suisse* was whether the limitation period ceased to run for all represented parties from when the original statement of claim was filed, or only from when a member joined the representative action. The Court divided on that question, with the majority saying that the limitation period ceased running for all members when the original statement of claim was filed, even for those who joined later (with Elias CJ and Anderson J dissenting).

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2 *Credit Suisse Private Equity LLC v Houghton* [2014] 1 NZLR 541.

[19] In the course of both the majority and minority judgments the Court addressed the requirements for obtaining leave to bring a claim as a representative action. There was no disagreement between them on that question. This was referred to in McGechan on Procedure at HR4.24.01 where the learned authors stated:

> **HR4.24.01 A liberal approach**
>
> The courts take a liberal approach to representative proceedings. This approach is consistent with the objective outlined in r 1.2 (securing the just, speedy and inexpensive determination of the proceeding) and the policy underlying r 4.1 (which limits the number of persons named or joined as parties to those whose presence is necessary or who ought to be bound by the judgment).
>
> In *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541, the Supreme Court considered r 4.24 in the context of limitation of actions. The following propositions may be extracted from the majority decision delivered by Glazebrook J:
>
> (a) The principal purpose of a representative proceeding is the promotion of efficiency and economy of litigation. The whole point of having a representative proceeding is to avoid clogging the courts with a multiplicity of individual proceedings covering the same subject matter, which would undermine the efficiency and economy of litigation: at [147] and [158].
>
> (b) Flexibility in how r 4.24 is applied accords with the modern approach to representative proceedings, and the rule should be applied to ensure that the overall objective of the High Court Rules as outlined in r 1.2 is achieved: at [129]–[130].
>
> (c) Where injustice can be avoided, the rules should be applied to promote the expedition and economy of proceedings: at [151].
>
> (d) The approach of McGechan J in the earlier decision of R J *Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) accords with the objectives of the High Court Rules and the goal of representative proceedings, but it should not be treated as the last word on the matter. As long as defendants are not compromised and the aims underlying representative proceedings are advanced, there is scope for continual development in this area: at [152].
>
> So long as the representative proceeding is not allowed to work injustice, it is now well established that r 4.24 should be applied liberally and developed to meet modern requirements: see *R J Flowers Ltd v Burns* (above) at 271 per McGechan J and *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442, (1988) 2 PRNZ 621 (HC) at 447, 626 per Barker J.

[20] McGechan on Procedure went on at HR4.24.04 to outline the principles involved in granting or refusing permission to bring a representative action in this way:

> **HR4.24.04 Principles governing the grant (or refusal) of permission to bring a representative proceeding**
>
> The general principles by which a court determines under r 4.24 whether to permit a representative party to sue or be sued on behalf of others with the same interest may be distilled from the judgment of the Court of Appeal in *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331, (2009) 20 PRNZ 215 at [10]–[14] and [42]:
>
> (a) A representative action may be brought where each member of the class is alleged to have a separate cause of action, provided three requirements are met:
>
> (i) The representation order may not confer a right of action on the member of the class represented who could not have asserted that right in separate proceedings. Nor may the order bar a defence that might have been available to the defendant in separate proceedings.
>
> (ii) There must be an interest shared in common by all members of the group.
>
> (iii) It must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.
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> (b) The phrase "persons with the same interest" is to be read more or less widely, and a relatively low threshold is preferred as consistent with the objective in r 1.2 of securing the "just, speedy, and inexpensive determination" of the proceeding. However, a higher threshold may be appropriate where the representative proceeding is brought pursuant to a funding arrangement.
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> (c) Having "the same interest" in the subject matter of the proceeding does not necessarily mean having the same cause of action or an entitlement to have or share the same relief.
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> (d) Careful consideration of the defendant's position is required. An application for a representation order may fail if the representative proceeding would leave an element of the defence unaddressed.
>
> (e) A representative proceeding for damages is not foreclosed. If the conditions for a representative proceeding are otherwise met, the proceeding may claim a declaration of liability. Individual claims to establish individual damage may then follow.
>
> (f) The more likely that the issues to be determined in the proposed representative proceeding would resolve most or much of the dispute for the persons being represented, the more likely a court would be minded to grant a representation order.

[21] Mander J properly noted too in the present proceeding, at para [9] of the first decision, that the identification by the Courts of a sufficient common interest has been seen in a number of cases to require a relatively low threshold – *Strathboss Kiwifruit Ltd v Attorney-General*,[3] *Saunders v Houghton*[4] citing *R J Flowers Ltd v Burns*.[5]

The present application

[22] Turning to the present application, Mr Cooke QC suggests this proceeding has been properly "reformulated", and noted one matter first. This was his suggestion that, in the original application for leave rejected by Mander J, considerable emphasis was placed on one particular aspect. This was the idea that this was an unusual representative action because the plaintiff applicants were essentially asking the Court to assist them to seek a resolution of their insurance claims, claims which had remained unresolved at that point for over five years. In doing so, Mr Cooke recognised that, in this Court's administration of what has been described as the "Earthquake List", the Court has said that it would endeavour to proactively assist parties to have their insurance claims resolved. He referred in this regard also to observations made by His Honour Miller J in 2014 (he being the High Court Judge in the early period in charge of the Earthquake List) in a paper he delivered to the New Zealand Insurance Law Association Conference 2014 entitled "Reflections on the Earthquake Litigation" where he remarked:

> We [the High Court in the Earthquake List] hope that we would see class actions"

and:

> The Courts recognise that class actions are sometimes needed if a large group of people sharing the same interest are to secure access to justice.

[23] And, in his submissions to me Mr Cooke emphasised that the main focus of the plaintiffs' initial leave application before Mander J was the fact that their individual insurance claims had not been resolved and the intervention of the Court

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3 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 at [6].
4 *Saunders v Houghton (No 2)* [2012] NZCA 545.
5 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC).

was required in order to achieve some individual resolutions. The plaintiff contends now that in this first amended statement of claim they have reformulated their claim such that this is not simply the case. Mr Cooke insists the claim now meets the requirements Mander J set out in his decision.

[24] In saying this, Mr Cooke explains the plaintiff in this amended pleading has reformatted a common litigation claim shared by all members of the group rather than focusing on their individual insurance claims. He maintains the reformulated litigation claim provides the common interest or "spine" here. It is the claim that Southern Response has engaged in a strategy to improperly minimise its overall financial exposure arising out of the Canterbury earthquake claims. This has been pleaded as a clear "strategy". The plaintiffs contend there are a number of elements to that "strategy", the key of which are said to be:

(a) Southern Response has asserted that it is in control of the undertaking of all required rebuilding and repair work under the parties' insurance policy rather than the homeowner claimants. It does so by having its partner Arrow International (Arrow) managing all such work. The plaintiffs say Southern Response was not entitled to take this stance.

(b) Southern Response has said that there were necessary delays involved in having such reinstatement or repair work undertaken and that plaintiff policyholders would simply need to wait their turn for the work managed by Arrow to be done. As a consequence, a number of years have gone by with all policyholders simply waiting.

(c) The cost of undertaking that work has been disclosed to the plaintiff claimants in the form of Detailed Repair/Rebuild Analyses (DRAs) prepared by Arrow which grossly understate the true cost of undertaking the required work to the standard set by the policy.

(d) Southern Response has stated it would only cash settle with individual policy claimants at amounts significantly discounted from the DRA figures within the policy, but it has indicated it was prepared to

negotiate "without prejudice" and "out of policy" responses on a cash basis, thereby inducing lower financial settlements.

[25] The plaintiff claimants say that, as a result, this strategy improperly reduces Southern Response's true policy liability at the expense of the individual claimants. In this respect, Mr Cooke suggested that Southern Response is in a different position from other insurance companies dealing with Canterbury earthquake claims. This is because Southern Response is no longer in business issuing new insurance policy cover. Its only business involves settling and paying out on AMI's Canterbury earthquake claims. As a result, it is suggested Southern Response had no incentive to maintain a business relationship with its policyholders or to attract any new policyholders and, with no reputation to protect, its only incentive was to minimise its exposure involved in relation to Canterbury earthquake claims. Therefore the claim is made that thereby Southern Response has been incentivised to adopt the strategy which the plaintiffs challenge here.

[26] The common interest which Mr Cooke contends is now pleaded in the amended statement of claim is broadly that Southern Response engaged in this deliberate "strategy", designed to deceive policyholders and delay claims, with a view to reducing the proper financial liability that Southern Response might have had to all its policyholders.

[27] The details of this "strategy", as I have noted, involve what Mr Cooke describes as the "litigation claim". It is this which gives the central or common issue which he maintains justifies the present r 4.24 representative claim. Linked to, but separate from, this "litigation claim" is what I have noted Mr Cooke describes as the individual "insurance claims" of each of the plaintiff policyholders. These are the insurance claims which each of the 41 plaintiff claimants have for specific earthquake damage caused to their individual homes.

[28] The plaintiffs contend the adoption of the "strategy" is in breach of Southern Response's obligations under the policy and its obligation of good faith as insurer. And, the plaintiffs say their pleaded claim for relief has also been changed to reflect the emphasis they now place on these allegations.

[29] On all these issues, before me Mr Cooke noted one further matter. This was his suggestion that this whole question of deception and delay, which forms the basis of the "litigation claim" here, is now very much out in the public and media arena. Therefore, he suggests a strong argument exists that it is in everyone's interests, including all the plaintiff claimants, other Southern Response policyholders and, indeed Southern Response itself, to have this matter properly ventilated and determined before the Court. It is argued this is perhaps a further reason why the representative action sought in the plaintiffs amended leave application should be approved and proceed.

[30] In opposition, Mr O'Brien QC for Southern Response contended that the present leave application was in effect a simple re-run of the earlier application rejected by Mander J in the first decision.

[31] In this area, a comparison between the plaintiffs' original statement of claim and their first amended statement of claim, and an identification of the differences relating to the plaintiffs' "strategy" alleged against Southern Response (said to provide the particular common interest of these parties), is useful here.

Comparison of significant relevant differences between the first amended statement of claim and the original statement of claim

[32] The first amended statement of claim at paras 3, 4, 5.1, 5.2 and 6.1 makes a new reference to the four relevant AMI Insurance policies in existence for house properties at the time of the Canterbury earthquakes. These were "Premier House, Market Value House, Premier Rental and Market Value Rental". Specific terms from the "Premier Rental" policy were added in cl 5.2, 6.2 and 8.2.

[33] Next, in section "C" at page 4 of the original statement of claim the plaintiff had referred to "Southern Response's Approach" and, at paras 28, 29, 55.3 and 55.5 of that statement of claim, set out additional matters. These pleadings provided:

> 9. Each of the claimants suffered damage to their homes covered by the policy as a consequence of the Canterbury earthquake sequence between September 2010 and 23 December 2011.
>
> 10. Each of the claimants made claims under the policy. Particulars of the claims made by the claimants will be provided in a schedule of claims to be filed herein.
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> …
>
> 28. The approach of Southern Response as described in paras 11 – 27 above, was to significantly reduce its obligations under the policy by it assuming control of the contemplated repairs and rebuilds and including for the reasons referred to in paras 29 – 46 below.
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> 29. In addition, Southern Response has adopted further policies in respect of the DRAs which systematically understate the true assessment of cost of the rebuild/repair required by the policy, and which accordingly further misrepresented the claimant's entitlement. Particulars of those policies are provided in paras 30 – 46 below.
>
> …
>
> 55.3 There has been a systemic underestimate of the payment to be made, and a failure to comply with the policy requirements as referred to in paras 11 – 46 above, leading to delays caused by the existence of disputes.
>
> …
>
> 55.5 Southern Response did not have effective procedures to allow it to assess whether the claimant was over the EQC cap, or for dealing with EQC in that context.

[34] In the plaintiffs' first amended statement of claim the equivalent section "C" at page 6 is headed "Southern Response's Strategy". It repeats as paras 10 and 11 what is noted at para [33] above as original paras 9 and 10 generally as follows:

> 10. Each of the claimants suffered damage to their homes covered by the policy as a consequence of the Canterbury earthquake sequence between September 2010 and 23 December 2011.
>
> 11. Each of the claimants made claims under the policy. Particulars of the claims made by the claimants are provided in the schedule of claims previously filed.

[35] The first amended statement of claim however goes on to amplify at paras 12 – 18.3 inclusive what are said to be new worded pleadings. In particular, the plaintiffs say paras 12, 13 and 14 set out the key new elements of their reformatted claim:

12. At a date or time unknown to the claimants, but prior to Southern Response responding to any of the claimants' claims Southern Response adopted a strategy which was designed to systematically reduce the cost of meeting the claims arising out of the Canterbury earthquakes below its true liability (the "strategy").

13. The strategy was applied by Southern Response to all claimants and involved:

    13.1 Misrepresenting the nature of Southern Response's obligations and the claimants' rights as particularised below.

    13.2 Understating the extent of the work required and the cost of undertaking that work as particularised below.

    13.3 Asserting that the claimants' rights to receive a cash settlement of their claims were for amounts significantly below the assessed cost of undertaking the work in question as particularised below.

    13.4 Assuming control of the rebuilding and repair work so that Southern Response could minimise the cost to it of the required work as particularised below.

    13.5 Unreasonably delaying in responding to and meeting the claims of the claimants as particularised below.

    13.6 Adopting various other stances designed to reduce its liabilities as particularised below.

    13.7 Inducing "settlements" of the claims made against it for significantly reduced amounts and through undertaking substandard repair work through the implementation of the strategy.

14. Southern Response adopted the approach summarised above in the knowledge and/or with the intention of reducing its liability to persons who could not afford to hire a lawyer, and who without a lawyer would not have the ability, including through not having access to all documents required (such as the unredacted DRAs that are only supplied through requests under the Privacy Act 1993 that a lawyer knows to make), to promptly realise their full entitlements under the policy without a need for legal assistance.

15. Each of the claimants' claims have been addressed by Southern Response in accordance with the strategy and Southern Response has failed to provide the claimants with their entitlements in a fundamental way as a consequence.

(C1) Overcap policy

16. In accordance with the strategy, Southern Response has taken no steps to assess a claim made on it unless and until the claim has been assessed as "overcap" by EQC.

17. This aspect of the strategy has been applied notwithstanding that:

17.1 Claims were made by the claimants when there had been earthquake damage to their homes.

17.2 A claim was payable by EQC when there was earthquake damage to the home.

17.3 EQC was systematically failing to properly and promptly address the extent of such claims to the knowledge of Southern Response.

17.4 Southern Response took no steps to assess the claim to be potentially met by it even when EQC accepted the claimant legitimately had a claim for earthquake damage.

17.5 In some cases Southern Response realised that it was likely that the claim would exceed the amount payable by EQC, but it still took those steps.

18. Southern Response's approach in this respect was in breach of the policy which required Southern Response:

18.1 To assess whether there was a claim against it, and the extent of that claim, whenever the house had been damaged by earthquake, or alternatively whenever it was assessed by EQC that a claim was "payable" by EQC.

18.2 To deal with that claim professionally, efficiently, and as quickly as circumstances allowed; and

18.3 To pay the difference between the amount payable by EQC, and any sum insured, irrespective of whether it had been assessed as overcap by EQC.

19. As part of the strategy, once it was accepted that a claim was overcap, each of the claimants received a letter in which Southern Response purported to identify the nature of the cover, and what the claimant's rights were. The letters included a Decision Pack which required the claimants to elect one of the options described by Southern Response when Southern Response assessed that the house was damaged beyond repair.

[36] In addition, extra paragraphs were added and certain amendments made to existing paragraphs of the plaintiffs' pleading as follows:

24.2 The advice referred to above misrepresented the terms of the Policy by:

…

24.2 asserting that the assessment of the cost of undertaking the required work was to be undertaken by Southern Response, which it was

doing in the DRAs, without advising of the claimants' right to have an assessment undertaken themselves for the purpose of their claims.

…

24.4 asserting that the cash payment contemplated by cl 1 civ was based on a depreciated replacement cost calculation on the basis described (with that amount based on the DRA figure with a further significant deduction for depreciation) rather than the market value of the house, which would mean that any cash option was always represented as significantly less than the rebuild cost assessment.

…

26. In cases of both rebuilds and repairs, Southern Response advised that there was a queue of claimants awaiting the availability of the contractors who would be needed for the repair or rebuild work, so that the claimants would need to wait their turn.

…

(C6) Control of Builders and Contractors

34. As part of the strategy, Southern Response advised that the builder for the rebuild or repair was to be determined by Arrow on Southern Response's behalf. The claimant was advised that there could be an objection to the proposed builder so chosen by Arrow, but that in call cases the builder needed to be accepted by Southern Response. Southern Response also advised that some engineering reports would not be accepted. Southern Response had no right under the policy to so control the identity of the builder, or other contractors.

…

(C7) Systemic Underestimation of Work

38. Southern Response limited the briefs to persons instructed to undertake inspections such that the inspections did not:

…

38.4 in relation to foundations, required the assessment to be made using DBH/MBIE guidelines that do not necessarily achieve an "as new" condition.

…

(C9) Deliberate Redaction of Costs

45. As part of the Strategy and in breach of its obligations, Southern Response have deliberately withheld disclosing the assessment of its calculation of the demolition, design and administration costs in dealing with the claimants, including by redacting the assessment of these costs from the internal DRAs in the version of the DRAs provided to the claimants.

…

(C11) Failure to allow for necessary project management.

50. In accordance with standard industry practice, in order to rebuild or repair the damage to a home of the type contemplated by the claimants' claims involves:

    50.1 The instruction of a project manager, usually an architect, who is responsible for the overall co-ordination of the project; and

    50.2 The project manager then co-ordinating the instruction of the other experts required to assess and quantify the cost of the damage, and to plan the work required to repair or rebuild the house, (including experts such as geotechnical engineers, structural engineers, surveyors, builders, and quantity surveyors.)

51. The procedure described above was required to be followed by Southern Response in order to satisfy the requirement that the claim be acknowledged and dealt with in a professional and efficient manner.

52. The costs of such experts are a necessary cost involved in repairing or rebuilding the house to the standard contemplated by the policy, and are accordingly recoverable under the policy.

53. In breach of the requirements of the policy, and in accordance with the strategy, Southern Response:

    53.1 Will only permit the piecemeal instruction of individual experts solely to assess the question of the damage caused by the earthquakes within that expert's expertise.

    53.2 Fully controls the instruction of such experts;

    53.3 Does not permit the instruction of a project manager to co-ordinate the project; and

    53.4 Will not allow the costs of co-ordinated project management and expert assistance to be included within the claims.

…

D Impact of strategy

…

59. When decisions of the Courts have demonstrated that Southern Response's approach has been inconsistent with the rights of those who had made claims, Southern Response had adapted its strategy prospectively only and;

59.1 It has not altered what it has paid to those who were induced to settle as a consequence of its earlier unlawful stance; and

59.2 It has not offered any compensation for the consequence of its previous conduct which was in breach of its obligations on the basis there has been no loss arising.

60. The strategy has successfully been deployed by Southern Response by causing and inducing:

60.1 Those who have made claims to enter full and final settlement agreements well below the true value of the insurance claim; and

60.2 Repairs to insured homes to be undertaken at a substandard level.

61. As a consequence of the strategy, Southern Response has derived substantial profit at the expense of those who have made claims upon it.

[37] Finally, in the prayer for relief in the amended statement of claim, additional remedies are now sought as follows:

…

(D) General damages of $25,000 for each claimant reflecting the damages to be paid as a consequence of the existence of the Strategy.

(E) General damages of $15,000 for each claimant for each year that satisfaction of the claimant's claims has been delayed as a consequence of the Strategy.

(F) Costs on a solicitor/client basis.

Discussion

[38] In responding to the plaintiffs' argument that there are significant differences in the first amended statement of claim, Mr O'Brien for Southern Response contends that the so-called "strategy" outlined in the plaintiffs' pleading is really nothing more than what was described in the 26 August 2015 statement of claim as Southern Response's "approach". He contends, as I note above that:

(a) The use of this new claimed "strategy" does not identify or provide any common interest to justify the representative action sought;

(b) None of this will in any event resolve the insurance claims with Southern Response affecting these 41 plaintiff claimants, but it will simply add a further delay; and

(c) In any event, no worthwhile remedy for these individual plaintiff complainants can arise if leave to bring this matter as a representative action is granted, in light of what is said to be the simple "parking" of their major individual insurance loss claims with Southern Response.

[39] Southern Response goes on to suggest that the present application is in effect a simple re-run of the earlier application rejected by Mander J. It maintains the so-called "strategy" referred to in the amended statement of claim is simply a label applied by the plaintiff to a raft of what are said to be unrelated allegations which can really only be determined on an individual basis. It is suggested that at most, a resolution of the various "strategy" allegations will only deal with part of the various plaintiffs' general damages claims against Southern Response. It will delay resolution of those individual claims.

[40] Further, it argues the rejection by Mander J of the alleged "approach" adopted by Southern Response here as a sufficient common issue is not in any way altered by changing this label to use the word "strategy" for what are said to be essentially the same claims.

[41] Lastly, Southern Response argues that the plaintiffs' proposed common issue here will not serve the objectives of just, speedy and effective determination of their customers overall insurance claims.

[42] Although there might be seen to be some merit in certain of these contentions advanced by Southern Response, overall at this point I need to say that, I disagree with the general position put forward on its behalf. As I see it, the emphasis of the plaintiffs' revised r 4.24 application before me differed to a reasonable degree from that put forward before Mander J in the original application. Furthermore, the amended statement of claim in its reformatted form in my view went somewhat further in material respects from that advanced before Mander J.

[43] The use in the first amended statement of claim of the words "Southern Response's Strategy" in place of the words "Southern Response's Approach" in the original statement of claim is no doubt deliberate, and at one level it may be seen as not entirely insignificant. The Chambers Dictionary[6] definition of the word "Strategy" includes:

> The art of conducting a campaign (and manoeuvring an army); any long term plan; artifice or finesse generally.

Further, the definition goes on to define "strategic position" as "a position that gives its holder a decisive advantage".

[44] This needs to be contrasted however, with the dictionary definition of "Approach". In the Chambers Dictionary,[7] "Approach" is defined relevantly here to include:

> …attitude towards, way of dealing with…

[45] Further, the "Strategy" alleged by the plaintiff in the first amended statement of claim is considerably amplified at para 13.5 to 18.3 of the first amended statement of claim. Some of these allegations involve elements which might be seen as involving newly pleaded complaints from those outlined in the original statement of claim. The tone, too, that these matters might comprise a "campaign" or "long term plan" which may well involve some degree of "artifice" additionally might be seen as new matters which could be of some concern if ultimately they are proved to be established.

[46] In giving the first decision Mander J recognised too that the plaintiffs could re-cast or reformat their claim in amended pleadings to establish this central common issue. In my view, but perhaps only by a rather fine margin, they have done sufficient here to establish this. This "spine" of the general damages claim, of an improper Strategy adopted by Southern Response to avoid its proper obligations to policy claimants, arguably constitutes a proper litigation claim as described by Mr Cooke for the plaintiff.

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6 Chambers Dictionary (11th ed)

7 Above n 6.

[47] It is not proper at this stage for any view to be expressed over the range of allegations advanced by the plaintiff in support of this "strategy" contention. There is enough, as I see it, in the strongly contested material which is before the Court at this early point for these matters to proceed to trial. In my judgment it is in the interests of all parties, including Southern Response, that these issues are properly addressed.

[48] Matters such as the exclusion at one point from Southern Response's provided DRAs of amounts for demolition costs, design fees, contingencies or administrative costs, (no doubt to be met with some explanation involving subsequent changes in the approach taken) may well require some consideration. Similarly, issues over self-managed rebuilds, overall project management issues, standards of work undertaken, control of rebuilds and repairs, cash payment options and the alleged "strategy" of Southern Response on each of these will be matters for further consideration. No views at this early point can be expressed even on a preliminary basis concerning any of these matters. They do provide, although perhaps on a reasonably tenuous basis, what is said to be the common thread for the claims from the individual plaintiffs comprising this group. It could transpire too that these might possibly be addressed here as a preliminary question. Then, individual claims from each of the 41 group plaintiffs which of necessity will relate to the particular circumstances of each home, could be case managed and addressed as part of the Earthquake List process in this Court.

[49] Turning again to Mr O'Brien's submissions for Southern Response here, in terms of the common interest requirement in r 4.24, he contends the plaintiffs' claims are significantly different to the types of claims in other recent cases in this country where leave has been given to bring a representative action. In this regard, the *Feltex* litigation in *Saunders v Houghton*[8] involved the determination of an issue fundamental to all claims, namely whether statements and omissions in a prospectus had been made negligently or in breach of statutory duties.

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[8] Above n 4.

[50] In the kiwifruit litigation, in *Strathboss Kiwifruit Ltd v Attorney-General*[9] the representative action centred on whether duties of care were owed by the Crown to kiwifruit growers in the discharge of its functions and responsibilities to maintain New Zealand's bio-security.

[51] And in the bank fees litigation in *Cooper v ANZ*[10] the representative proceeding concerned common types of fees charged to bank customers under the common terms of their accounts.

[52] Thus, it is clear from these cases, as Mander J noted at [73] of the first decision, that in each case "the prime essential issue of liability was readily identified as being one that was common to each member of the group", determination of the common issue would "substantially advance the resolution of the litigation and the individual claim of each member" and the "Court's ruling on the common issue was an essential prerequisite to any of the members of the group succeeding in the litigation".

[53] In the first decision Mr O'Brien noted that Mander J contrasted the matters noted above with the plaintiffs' claims before him in the initial statement of claim, which he said were "clearly distinct from the circumstances of other cases where leave has been granted under the rule". In saying this, Mander J observed that the plaintiffs' claim "includes a raft of allegations" from which he was unable to "discern prime issues of liability in respect of which the Group's membership can be aligned".[11]

[54] In my view, however, the situation which is before the Court as outlined in the plaintiffs' amended statement of claim is somewhat different. Southern Response essentially argues that in substance all the plaintiffs have done in their amended claim is to change the label from "Southern Response's approach" to "Southern Response's strategy" relating to their various complaints. I disagree.

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9 Above n 3.
10 *Cooper v ANZ* [2013] NZHC 2827.
11 Above n 1, at [75].

[55] As I note at para [43] above, the use of the word "strategy" may well provide some significant additional implication when the Southern Response claims processes are being considered.

[56] Further, clearly in the amended statement of claim at paras 12, 13 and 14 (as noted at para [35] above), the plaintiffs' complaints over actions taken by Southern Response under the "strategy" have been widened and more particularly identified. As best I can tell, new allegations as to the application of the "strategy" in this amended pleading include the following:

(a) "Unreasonably delaying in responding to and meeting the claims of the claimants as particularised below."

(b) "Adopting various other stances designed to reduce its liabilities as particularised below."

(c) "Inducing "settlements" of the claims made against it for significantly reduced amounts and through undertaking substandard repair work through the implementation of the strategy."

(d) "…[unrepresented claimants] not having access to all documents required [such as the unredacted DRAs that are only supplied under requests under the Privacy Act 1993 that a lawyer knows to make] to promptly realise their full entitlements under the policy without a need for legal assistance."

(e) Various other matters concerning Southern Response's over cap policy outlined in paras 16, 17 and 18 of the amended statement of claim.

[57] These additional pleadings emphasise the new importance placed by the plaintiffs on their targeting of Southern Response's "strategy". The impact of that strategy it is alleged assisted Southern Response but detrimentally affected the plaintiffs, in ways outlined at paras 59-64 of the amended statement of claim. Again

these are new pleadings not before Mander J when he considered the plaintiffs' original statement of claim.

[58] In general terms, the plaintiffs claim that Southern Response's co-ordinated approach exemplified in its "strategy" here by way of example, of redacting costs in DRAs provided to claimants, gaining control of the entire rebuild at costs even below those estimated by expert quantity surveying evidence, was all designed to reduce Southern Response's proper financial exposure to its policyholders. The plaintiffs say this provides the "spine" of an issue common to all the Group members without exception. I am satisfied these matters, if substantiated at trial (perhaps as I note by way of a preliminary separate question), might well constitute a breach of Southern Response's express obligations under each policy held by the plaintiff claimants. In this regard, I note in passing Southern Response's acknowledgment too at page 7 of the Premier House Cover Policy in these terms:

> 2. Your Rights
>
> (a) You (the claimant) are entitled to:
>
> (i) Have your claim acknowledged and dealt with in a professional and efficient manner; and
>
> (ii) Receive a fair settlement of your claim as quickly as circumstances allow; and
>
> (iii) Receive a clear explanation why any claim has not been met.

[59] As I understand it, there is a similar term too on page 8 of Southern Response's Premier Rental Property Cover Policy also in use here. The plaintiffs say, as I understand it, that Southern Response had an obligation of good faith as insurer and the adoption of the alleged "strategy" is a breach of that obligation. The claim for relief in the amended statement of claim pleaded by the applicants has been changed, it is said, to reflect the emphasis the plaintiffs now place on these allegations. In particular, as I note at [37] above in the first amended statement of claim the plaintiffs now seek:

> (a) General damages of $25,000 for each claimant as a consequence of the existence of the strategy.

(b) A new requirement for general damages of $15,000 for each claimant for each year that satisfaction of the claimant's claim has been delayed as a consequence of this strategy.

(c) Costs are also sought in the amended statement of claim on a solicitor/client basis which, for completeness I simply note, was not a specified form of relief in the original statement of claim.

[60] As I understand it, the reduced general damages claim of $25,000 for each claimant in the original statement of claim was not the primary thrust of the claim and was not emphasised before Mander J in the original leave application before him.

[61] In the amended statement of claim the first cause of action remains a claim in damages by each of the individual claimants for the amount of their substantive insurance policy claim. I accept that is inevitable. This is because the insurance claim for each claimant has not been met and it is alleged generally it has been delayed as a consequence of the existence and operation of what is now pleaded as the "strategy". Moreover, in the first cause of action each of the plaintiff claimants reserve their right to cancel their individual policy for fundamental breach as a consequence of the existence and operation of the "strategy". I accept here too that it is the very existence of the "strategy" which is the subject of the common interest claim shared by each of the individual plaintiff Group members here.

Conclusion on the leave application

[62] In conclusion, I find but perhaps only by a reasonably fine margin here, that the plaintiffs' pleadings have been satisfactorily reframed in their first amended statement of claim to meet the concerns expressed by Mander J in the first decision. I say this bearing in mind the comments of the Supreme Court in the *Credit Suisse* case where Courts were encouraged when considering the growing number of cases which might be the subject of representative actions to take a more liberal, flexible and not too technical approach. Those general comments in the Supreme Court, in particular from the Chief Justice, suggested that once there was some degree of common interest in the subject of a proceeding to satisfy r 4.24 then, all the rest is

essentially "case management". And, in terms of process, I am satisfied in the present case that there could be a separate question or questions posed for the Court in terms of the representative action to determine first and then each separate claim from individual claimants of which there are presently about 41 could be addressed separately. Again, these subsequent claims would be the subject of proper case management under the current Earthquake List.

[63] I accept that the common interest pleaded by the plaintiffs now that Southern Response engaged in a deliberate "strategy" designed to deceive policyholders and delay claims with a view to reducing the financial liability that Southern Response might have to its policyholders is a proper one for a r 4.24 representative action. I accept too that the substituted representative plaintiff Mr Yeadon in all the circumstances here is an appropriate representative of the plaintiffs' group. And, on this aspect, as I have mentioned above, this whole question of alleged deception and delay it appears is out in the public arena now. A reasonable argument exits, as I see it that it is in everyone's interests, including the plaintiffs' group, other parties, and indeed Southern Response, to have this matter properly ventilated and determined before the Court. This is perhaps a further reason why the present representative action should proceed.

[64] I note too that, in my view, adopting the words of the Chief Justice in the *Credit Suisse* decision:

> No injustice arises in the present case if the individual aspects of [the present] claims are brought on a representative basis [and] are addressed distinctly in the course of the same proceeding.

[65] Lastly, it is clear that representative actions under r 4.24 High Court Rules are a continually developing area to meet modern requirements. Given that these actions, like others, must always secure the just, speedy and inexpensive determination of proceedings, I am satisfied that the leave sought by the plaintiffs in their present amended application should be given. An order to this effect is to follow.

Litigation funding arrangement

[66] Southern Response maintains that this Court should not grant leave for the representative action sought by the plaintiffs in this case in light of the funding arrangements they have made.

[67] In the first decision Mander J said that, given his finding, the plaintiffs had not been able to allege a sufficient common issue, he did not need to "come to any detailed or concluded view regarding the Group's proposed funding arrangements". Instead Mander J said that "if the Group is to renew its application, the arrangements can be further reviewed".[12]

[68] In turning to consider those funding arrangements I note that the evidential record at the time of the first hearing has been supplemented by an additional affidavit from Mr Preston served shortly before the hearing of this matter. In addition, a second affidavit of Mr Rose has been provided. This contains a complete copy of the publicly accessible parts of the Class Action website.

[69] In his first decision at [96] Mander J observed:

> …Approval of the funder and the funding arrangement was viewed by the Court of Appeal [in *Saunders v Houghton*] as one part of a package of orders relevant to consideration of the initial [r 4.24] representation issue…

Indeed the Court of Appeal called this one of the "essential legs" for making a representative order – *Saunders v Houghton*.[13] It is also true that in three significant recent representative action proceedings before this Court, approval was sought of the funder and the funding agreement.

[70] Although there is some suggestion here from the plaintiffs that approval of the funding arrangements by the Court in this case is unnecessary, I proceed on the basis this is not the case. These matters are properly before the Court for approval here.

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12 Above n 1 at [106]-[107].
13 Above n 4 at [38].

[71] In undertaking this consideration I note that the present application has been brought on an "opt-in" basis. All claimants who belong to the plaintiff group are persons of full age and capacity and it is noted they have decided that it is in their interests to enter into the litigation funding arrangements which have been arranged for the plaintiff group. Also, as I understand the position, no present members of that group, as directly affected parties, have raised any "problems" with the present litigation funding arrangements through the Court or otherwise.

[72] McGechan on Procedure at para HR4.24.16 addresses this situation of a representative proceeding facilitated by a litigation funder and makes the following comments:

> **HR4.24.16 Representative proceeding facilitated by a litigation funder**
>
> Where a representative proceeding is being facilitated by a litigation funder, it is usual for the court to review and approve the litigation funding arrangements as a safeguard for the defendants and to ensure that there is no abuse of process.
>
> In *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331, (2009) 20 PRNZ 215, the Court of Appeal discussed in general terms (at [21]–[34]) when a court may grant a representation order involving a particular funder. Where there is a representative proceeding involving a funder, the Court considered (at [38]) that the judge managing the proceeding should consider as a "total package" (a) the terms of the representation order; (b) whether the funder and the funding arrangement should be approved; (c) whether security for costs should be granted; and (d) a provisional appraisal of the merits (to ensure that those being represented have an arguable case). See also French J's discussion in *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [74]–[75].
>
> The Court of Appeal also recognised at [36] that the making of a representation order along with the admission of a litigation funder so substantially alters the balance between plaintiffs and defendants as to justify ordering security for costs under the inherent jurisdiction, even though the represented persons include numerous natural persons (against whom security for costs cannot be ordered under r 5.45 where they are resident in New Zealand). In *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, Dobson J recognised at [79] that the "evolving practice" was for the funder of a funded representative proceeding to provide security for costs, which tended to be quantified on a "relatively generous" basis in favour of defendants.

[73] I now proceed to consider the plaintiffs' litigation funding arrangements here in light of the matters outlined above.

[74] Here Southern Response's criticisms of, and challenge to, the plaintiffs' funding arrangements focus generally on three matters:

(a) First, it alleges that certain communications were made to members of the plaintiff group in advance of them signing the Litigation Funding Agreement (LFA) which were misleading;

(b) Secondly, the remuneration payable to the funder and its lawyers under the LFA is said be unfair and unreasonable; and

(c) Finally, no existing claimant received "the required disclosure" under the Credit Contracts and Consumer Finance Act 2003 (the CCCFA), the LFA it is claimed being a contract subject to this Act.

[75] Before turning to consider these matters, it needs to be noted that Southern Response has not, in any submissions advanced before me, raised any concerns about the financial standing and repute of the litigation funding organisation as a funder in this proceeding. That funder, Litigation Lending Services Limited (LLS) was established in Australia in 1999 and since that time has provided litigation funding both in Australia and New Zealand. I understand this has been for 178 claims for commercial and corporate disputes, insolvency cases and class actions. LLS (NZ) is a wholly owned subsidiary of LLS and between them I am told they have provided funding for five representative actions (including funding for the current bank fees representative action in New Zealand) including the present claims. And, as to that financial standing issue, indeed LLS has agreed to provide security for costs for the first stage of this proceeding totalling $155,000. A direction to this effect is to follow.

[76] Also here, Southern Response has made no suggestion that the funding arrangements give LLS as the funder an impermissible amount of control over the course of this litigation.

[77] With these matters in mind I turn now to consider Southern Response's criticisms of the LFA outlined above.

Misleading communications

[78] Three allegedly misleading statements are identified in the opposition filed in this matter by Southern Response. Southern Response says that the Court should be particularly concerned to ensure that proposed class members of the plaintiff group are not misled into joining any representative action on the basis of misleading or inaccurate claims.

[79] In this area there are three main criticisms advanced by Southern Response:

(a) The website used to advertise this class action it is said repeatedly claims that "there is nothing to lose by joining" this action, "there is no downside to joining", that members will be "no worse off" and that "you pay nothing if the case is not successful". Southern Response maintains these statements are misleading and convey the impression that members will not lose any of their existing entitlement if they enter into the funding arrangements, which it says it not the case. Fees and payment to LLS would, of course, be deducted.

(b) The notional material, it is said, repeatedly stated that the proposed representative action has "very high prospects of success". Southern Response says this is not a balanced assessment as, in particular, any litigation carries risk and some is significant. It says that no realistic assessment of the practicalities and risks of the present action have been given to group members.

(c) Southern Response says that plaintiff group members have been mislead so far as the subject matter of the funding arrangements are concerned. They say group members have been led to believe the present action was one only about delay and that they would only be giving up a share of any general damages resulting from the delay claim (rather than giving up a share of their existing insurance entitlements).

[80] Mr Cooke in response for the plaintiffs maintained that these criticisms were all without substance. He suggested too that all members of the plaintiff group made their own individual decisions and, indeed, over 450 people accessed the Southern Response Class Action website before those who decided to join the group made their decision to do so. They, along with all other claimants, it is noted, were provided by the LFA with a 14 day "cooling off" period in which to reflect on and withdraw from the funding arrangements if they wished to do so.

[81] What appears clear is that two original members of the plaintiffs' group, the Kinghams and Ms Taylor, have now withdrawn from the group. Mr Cooke notes that Mr Kingham's own evidence on that aspect is that he failed to properly read the material available to him in relation to the LFA.

[82] On this issue of allegedly inaccurate communications having been provided to plaintiff group members, I am satisfied, but only by a small margin, that technically, group members may have been, to a limited extent, misled by some of the statements made on the Southern Response Class Action website and elsewhere in material provided. As I have noted, these comments may have contributed to minor misunderstanding on the part of members who have joined the plaintiff group. In my judgment this is able to be remedied by way of a further explanatory letter/memorandum (the terms of which are to be first approved by the Court) provided to existing and any future members of the plaintiffs' group, giving a further 21 day "cooling off" period to extract themselves from the LFA if required. In my view this will remedy any possible complaint as to those parties being misled by material provided to them to date. A direction relating to this aspect is to follow.

Unreasonable remuneration

[83] Southern Response's next complaint about the LFA concerns the remuneration that is provided for in those arrangements. In a second affidavit filed in this proceeding by Mr Stewart Price from LLS, he explains that the remuneration required accords with industry norms and is, if anything, more generous to the claimants as funded parties than the usual terms available on this general litigation funding market.

[84] On this:

(a) As Mr Price explains in his affidavit, LLS here has not charged a full percentage of entire recovery which is within the normal range for litigation funding of 20-30% but, rather, has charged only 10-15%. This is a less expensive amount because here Southern Response has admitted that it is liable to each of the individual plaintiffs to a point in the sense that it has accepted there is an insurance claim to be paid out, although it disputes the amount and settlement terms.

(b) Secondly, LLS and the complainants have had to deal with the additional difficulty here of identifying when the litigation can be regarded as having succeeded in circumstances where Southern Response accepts it has an obligation to claimants and owes to them an amount in terms of their individual policy. This, it seems, has led to the "no worse off" promise made by LLS reflecting the fact that its litigation funding success fee arises only once the claimant recovers more than the DRA that was in existence at the time that this funded litigation became known. It is said that seemed a fair way to deal with the situation which is inherently problematic when trying to identify the appropriate success fee obligation. I agree.

[85] As I understand it, Southern Response here has filed no evidence raising what it says are the "normal" litigation funding cost arrangements, nor has it in any real way criticised the evidence before the Court of Mr Price.

[86] And in a recent New Zealand decision, *PricewaterhouseCoopers v Walker*[14] a fee said to represent up to 42.5% of net proceeds was approved by the Court of Appeal. At para [31] of that decision the Court of Appeal said:

> [31] … we are not prepared to draw the inference that SPF will be paid too much, relative to its investment in the litigation. It simply is not possible to say so without knowing what will be recovered and what will be paid to recover it…

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[14] *PricewaterhouseCoopers v Walker* [2016] NZCA 338.

[87] I conclude that the suggestion from Southern Response that LLS's remuneration is unreasonable is not supported by any material before me.

CCFA issues – a credit contract?

[88] The final issue that Southern Response identifies is a problem with the LFA is an allegation that the documentation in this arrangement is subject to the CCCFA and that disclosure statutory requirements under this Act have not been met.

[89] But before me, in his submissions Mr O'Brien for Southern Response acknowledged that although he says the LFA appears to be a Consumer Credit Contract under the CCCFA, the Court at this point does not need to finally determine whether that Act does apply to the funding agreement. That is a matter which, if it arises at all, will be dealt with by negotiations and proceedings between LLS and the individual plaintiff group members.

[90] I do note at this point that cl 9.1 of the LFA provides that each group members grants the funder a first charge and purchase money security interest over his or her claim and, in addition, cl 9.2 provides that, if settlement of the claim involves a repair or a rebuild rather than a cash payment, the group member agrees to execute a mortgage in favour of the funder over the property. Disclosure issues are raised by Southern Response and Mr O'Brien contends that the Court here should be entitled to consider whether the material provided to potential participants falls short of meeting LFA's disclosure obligations set out in the CCCFA.

[91] Here, issues concerning the CCCFA do not need to be definitively resolved at this point. If that Act applies in this case its significance, as I see it, is that it gives plaintiff group members an additional right so far as their relationship with the funder is concerned. I need take that matter no further at this point.

Conclusion on litigation funding arrangement

[92] For all the reasons outlined above, I reach the following conclusions on the proposed litigation funding arrangement.

(a) The fee charged in all the circumstances here is a fair and reasonable one.

(b) The funding arrangement can be properly approved on the basis that the explanatory letter/memorandum outlined at [ ] above is provided to all existing and future plaintiff group members in terms approved by this Court, and giving the 21 day "cooling off" period noted.

(c) No issues at this point arise regarding the CCFA or disclosure issues to Group members.

Other orders sought

[93] The plaintiffs here seek other orders as part of their present r 4.24 application. These are:

(a) an "opt-in" direction requiring that there be a period of three months for further claimants to opt-in to the representative action;

(b) a discovery direction that Southern Response within 28 days provide the names and contact details of all unresolved Southern Response claimants (which I understand to be something in the region of 11,093 claimants).

I turn now to consider each of these additional matters.

"Opt-in" direction

[94] The plaintiffs seek an opt-in period of three months' duration which they say should operate from the time the solicitors for the plaintiff group are able to communicate with the unresolved Southern Response claimants.

[95] In my view an opt-in direction is appropriate here. It is usual in leave applications of this type. There was generally no opposition to such a direction being made. This direction is to follow.

Discovery

[96] A formal application by the plaintiffs for discovery of the names and addresses of Southern Response unresolved claimants was filed around 4 December 2015. It remains undetermined, however, given that Mander J in the first decision did not make the representation action order sought.

[97] As grounds for the discovery order sought, the plaintiffs say:

(a) Each claimant should be given a reasonable opportunity to decide whether they wish to join this representative action, given the potential implication the case has for each person.

(b) Direct communication to a potential claimant is preferable here rather than simply public advertising or comment as to the existence of the representative action.

(c) Southern Response has the names and contact details of all the possible new claimants and is itself able to communicate with them.

(d) Discovery orders are the more efficient and effective means by which such communication can occur.

[98] In bringing this application the plaintiffs rely on rr 8.12 and 1.12 of the High Court and refer to observations of the Supreme Court in the *Credit Suisse* case about the flexibility and need for efficiency with representative actions. Also in *Houghton v Saunders* French J declined an application that a defendant itself notify potential claimants of the representative action but referred to the need for that defendant to co-operate with informing them of it. The plaintiffs say the present order sought has been structured in a manner that is appropriate bearing in mind these comments.

[99] Although little argument was advanced to me on behalf of Southern Response regarding this discovery issue, a concern may well arise over any requirement imposed upon it to disclose a list of names and identifying details of other unresolved Southern Response claimants. That information of Southern

Response or AMI customers may well be seen as confidential with that confidentiality being able to be waived only by the individual policyholders in each case. If the discovery order sought by the plaintiffs here is granted, to comply with the order that confidentiality would immediately be breached. Individual policyholders would also receive an unsolicited communication directly from the plaintiffs or their advisors which might well prove to be unwelcome and intrusive. It is my view that the result sought to be achieved by the plaintiffs could be achieved in this case by a simple public advertising campaign through general media and website sources. The target group involved relate solely to Christchurch and Canterbury earthquake affected property owners and this campaign could be short-lived and significantly directed. It would avoid the need for any possible wholesale breach of confidentiality obligations held by Southern Response here.

[100] For all these reasons, I reject the discovery application advanced by the plaintiffs. In place of this, a possible advertising campaign can be brought by the plaintiffs to identify other possible members to join the Group.

Result

[101] For the reasons I have given, I grant the plaintiffs' application for leave to bring these proceedings as a representative action pursuant to r 4.24 of the High Court Rules and I approve the terms for the litigation funder LLS to fund this proceeding as presented to this Court.

[102] I direct that within 20 working days of the date of this judgment the plaintiffs are to provide to the Court for approval a draft of the terms of the explanatory letter/memorandum referred to at [82] above, (intended to be forwarded to existing group members of the plaintiffs and to any further intended group members to provide an appropriately qualified explanation of the representative action and the funding arrangements for this litigation to meet the concerns expressed in this judgment).

[103] I direct that the opt-in period (during which any additional claimants are to confirm that they are opting-in to these proceedings) is to end on 16 April 2017.

[104] The plaintiffs' litigation funder within 30 working days of this judgment is to provide security for costs on an initial basis in the sum of $150,000 in a manner approved by the Registrar of this Court. Additional security for costs awards are to be considered and, if appropriate, ordered as this proceeding progresses.

[105] Counsel for the parties are directed to confer and agree the scope of common issues to be determined as a first stage of the representative proceeding and to file a memorandum when this is confirmed. If agreement cannot be reached or there are any other matters arising, counsel may approach the Registrar to seek an appropriate directions telephone conference.

[106] I direct that Southern Response is to file and serve its statement of defence to the plaintiffs' amended statement of claim within 20 working days of today.

[107] I direct the Registrar to liaise with counsel and list this matter for a further case management telephone conference at the first available and convenient date after 15 February 2017.

[108] The plaintiffs' discovery application before me, as noted above, fails and is dismissed.

Costs

[109] As to costs, these are reserved at this point. In the event that counsel are unable to agree on the issue of costs between themselves then they may file memoranda (sequentially) which are to be referred to me and in the absence of either party indicating they wish to be heard on the matter I will decide the question of costs based upon the material then before the Court.

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Gendall J

Solicitors:
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Belly Gully, Auckland

Copy to
Mr Cooke QC, Wellington
Mr O'Brien QC, Wellington