IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000530
[2016] NZHC 245

IN THE MATTER OF	an application for leave to bring proceeding as a representative action
BETWEEN	SOUTHERN RESPONSE UNRESOLVED CLAIMS GROUP SUING BY ITS REPRESENTATIVE CAMERON JAMES PRESTON Plaintiff
AND	SOUTHERN RESPONSE EARTHQAKE SERVICES LIMITED Defendant

Hearing: 16 December 2015

Appearances: FMR Cooke QC, M S Smith and N Shah for Plaintiff
M D O'Brien QC, D J Friar and K M Venning for Respondent

Judgment: 24 February 2016

JUDGMENT OF MANDER J

Introduction

[1] The Southern Response Unresolved Claims Group (the Group) is an unincorporated body of 46 persons, the members of which have unresolved insurance claims with Southern Response Earthquake Services Limited (Southern Response). A statement of claim has been filed alleging breach of contract by Southern Response for failing to meet its obligations under the insurance policy and for breach of what are described as process rights, and duties of good faith owed by Southern Response to members of the Group.

[2] The Group makes application for leave to bring the proceeding as a representative action in the name of its nominated representative, Mr Cameron

Preston, together with associated orders to facilitate the progress of the proceeding in that form. The application is opposed by Southern Response.

Background

[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.

Leave to bring a representative action

[8] Leave to bring a representative action is provided by r 4.24 of the High Court Rules (the Rule):

> **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—
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> (a) with the consent of the other persons who have the same interest; or
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> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[9] The identification of a sufficient common interest has been observed in case law to be relatively low.[1] An overarching consideration guiding the application of the Rule is the Court's need to take an approach which is consistent with the "just, speedy, and inexpensive determination" of proceedings, which is the objective of the High Court Rules.[2]

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1 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 at [6]; *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [12], citing *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC).

2 High Court Rules, r 1.2; *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 (SC) at [8], [61] per Elias CJ, and [130] per Glazebrook J [*Credit Suisse*]; *Saunders v Houghton*, above n 1 at [12] and [17].

[10] The community of interest required by the Rule is that persons have "the same interest in the subject matter of [the] proceeding". This will be satisfied if there is a common interest in "the determination of some substantial issue of law or fact".[3]

[11] The approach to be taken in New Zealand was summarised by Elias CJ in *Credit Suisse* as follows:[4]

> (a) the [representative] order cannot confer a right of action on a member of the represented class who would not otherwise have been able to assert a claim in separate proceedings and cannot bar a defence otherwise available in a separate action;
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> (b) there must be a common issue of fact or law of significance for each member of the class represented; and
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> (c) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.

[12] In *Credit Suisse*, the Supreme Court rejected an argument that a representative claim is limited only to the determination of issues common to all those represented. In that case, the appellants contended that for the purposes of the application of the Limitation Act 1950, the representative order only applied to the extent of their common interest. This was confined to the issue of whether there had been a breach of common law and statutory duties, and could not extend to individual claims for damages, which it was argued would have to be the subject of separate proceedings and would thereby sit outside the statutory limitation period.

[13] Elias CJ, in delivering the reasons of herself and Anderson J, considered this argument to be inconsistent with settled authority that representative claims may be brought under the rule where some substantial question is common to a number of litigants, or the claims of a number of potential litigants arise out of the same transaction or series of transactions. Requiring additional separate proceedings for consequential issues which are limited to an individual or a subgroup of those

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3 *Credit Suisse,* above n 2, at [51] per Elias CJ and Anderson J citing *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J, and at 430 per McHugh J; *R J Flowers Ltd v Burns,* above n 1.

4 At [53].

represented would not be consistent with the "just, speedy, and inexpensive determination of proceedings".[5]

[14] In approaching the application of the rule, the Group rightly emphasised the liberal and flexible approach to representative actions endorsed by New Zealand Courts. Once common issues have been resolved, the balance of issues relating to the hearing and determination of the individual aspects of members' claims within the representative proceeding become a matter of case management.[6]

[15] The Supreme Court endorsed the approach of McGechan J in *R J Flowers Ltd v Burns* that the scope of the rule may legitimately be developed to ensure the overall objective of the High Court Rules is achieved. Subject to ensuring that representative actions not be allowed to work injustice to deprive a defendant of a defence upon which it could have otherwise relied in a separate proceeding, or to enable a person within the representative class to succeed where they would not have otherwise been able to bring an individual claim, the rule should be applied and developed to meet modern requirements.[7]

[16] Southern Response did not dispute the facilitative approach that a Court is required to take to the application of the rule. However, it emphasised that sufficient commonality of interest must first be established. It is necessary for there to be a common question of fact or law of significance to each member of the class represented before the statutory threshold of common interest can be made out. That question needs to be a substantial one which is shared by the membership of the group seeking to take the representative action.[8] The identification of the common issue or issues of significance for each member of the group will effectively define membership of the group able to be represented in the proceeding.

[17] In an earlier round of the so called *Feltex* litigation, the Court of Appeal examined the requirements of the rule.[9] Its approach, which was substantially approved by the Supreme Court in *Credit Suisse* in a later strand of that litigation,

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5 High Court Rules, r 1.2.
6 *Credit Suisse,* above n 2, at [61].
7 At [130] per Glazebrook J citing *R J Flowers Ltd v Burns*, above n 1, at [267]-[271] and [152].
8 *Credit Suisse*, above n 2, at [8].
9 *Saunders v Houghton*, above n 1.

emphasised the need to keep in mind the "threefold test" of achieving the objective of the rules, and that the more the parties have in common the more the same interest component of the rule is likely to be made out. [10] However, the identification of the likely issues was stressed as a "vital inquiry" essential to determining the practicability of a representative order.[11]

[18] It is therefore necessary to closely examine what the issues are that bind the Group and provide the common interest in the subject matter of the proceeding. That commonality of interest requirement ought ordinarily to be apparent from the pleadings.

Pleadings

The statement of claim

[19] The plaintiff is described in the statement of claim as the Group "who sues by their representative Mr Preston" (the Group). The names of the members of the Group are listed in a table annexed to the statement of claim. Relevant parts of the insurance policy are set out, together with the Group's interpretation of how the policy is to operate.[12]

[20] The first allegation contained in the statement of claim is that Southern Response mischaracterised policy options available to members of the Group when claimants received a "decision pack". This communication required them to elect options as set out by Southern Response in the information provided. In particular, it is alleged Southern Response misrepresented the options under the policy when a home was beyond economic repair.

[21] Other allegations of misrepresentation or mischaracterisation are cited as including a requirement that a claimant agree in writing to reimburse Southern Response for costs incurred by it to implement an initial option if the claimant

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10 *Credit Suisse*, above n 2, at [19].

11 At [20].

12 The great majority of the Group had insurance under the AMI Premier House Cover Policy at the time of the Canterbury earthquakes. There are some members of the Group, however, who held insurance under a different policy. For the purposes of the present application, any differences between the policies were not pursued by Southern Response as being material.

wishes to change to a different option under the policy; requiring claimants to sign a memorandum of understanding as a condition precedent to Southern Response discharging its duties under the policy; and in relation to homes that were not beyond economic repair, a representation by Southern Response that it had the right to conduct the repair through its contractor, Arrow International.

[22] The second allegation made is that additional conditions set out in the decision packs were inconsistent with the terms of the policy. The Group alleges that contrary to requirements specified by Southern Response, it had no right under the policy to determine who the builder would be to repair or rebuild a claimant's house; the policy did not require exact replication of the former house; and there was no right under the policy to control the ability of the claimant to choose the design of the rebuilt house.

[23] A third allegation is that an option not set out in the Southern Response letters or decision pack was subsequently adopted by it. This was described as "self-managed builds" and contemplated the claimant managing their own rebuild. This option was made subject to a series of conditions before it was available to the claimant. The Group alleges that such conditions were not within the policy and were inconsistent with it. In particular, the Group alleges that Southern Response purported to impose the following requirements under this option:

(a) to retain the right to decide whether to permit a self-managed build;

(b) any costs already incurred by it towards the claimant's original plans to build with it were to be reimbursed or deducted from the cash settlement;

(c) the claimant was to provide it with the building contract with their builder, so that Southern Response could confirm the claimant was doing the building work;

(d) the entry into a full and final compromised settlement agreement;

(e) detailed compliance and design costs were to be itemised and agreed by Southern Response before they were incurred; and

(f) its agreement to pay for the foundations of a new house would require its specific agreement, and contemplated Southern Response making only a contribution to such foundation costs, based on its alleged approach to foundations.

[24] The Group pleads that Southern Response's approach to the policy significantly reduced its obligations by wrongly assuming control of the contemplated repairs and rebuilds.

[25] The Group's next lot of allegations all relate to policies adopted by Southern Response which, allegedly, systematically understated the cost of a rebuild or repair required by the policy and resulted in a misrepresentation of the claimant's entitlement. These allegations relate to the assessment of the required costs to repair or rebuild contained in a document described as a Detailed Repair/Rebuild Analysis (DRA).

[26] The first of these allegations is that Southern Response, while undertaking an assessment of demolition, design, administration and contingency fees for its own internal purposes, did not include these costs in the version of the DRA sent to claimants and thereby failed to include such costs in the calculation of the claimant's entitlement. Further, that Southern Response's costing of new or replacement foundations, or the cost of the repair to foundations, did not meet the policy requirement that the cost of repair or rebuild be to an "as new" condition. The Group alleges that Southern Response's assessment of the required work was limited to compliance with the Building Act and not the terms of the policy.

[27] Secondly, in a further breach of the policy, it is alleged Southern Response erroneously sought to employ inadequate repair techniques in respect of foundations. These included "jacking and packing" piled foundations; attempting to re-level concrete slab on ground foundations using mechanical jacking or low mobility grout injection and lifting techniques; repairing or rebuilding the foundations to a lower,

and more flood-prone height, notwithstanding that land and foundations had sunk as a consequence of the earthquakes; and not meeting the conditions required for a new foundation, including raising the height of the foundations to comply with new flood-prone requirements. It is alleged these repair techniques or strategies did not meet the required policy standard.

[28] Thirdly, the Group alleges that Southern Response reduced the level of the costs of repair and replacement calculated in the DRAs by using rates for goods and services which were not open market rates but discounted closed market rates, in breach of the insurance policy.

[29] Fourthly, it is alleged the DRAs were prepared following inspections undertaken by Southern Response that did not involve complete or detailed evaluations of the work required to repair or reinstate the building. As a result, the scope of the work was underestimated and its cost undervalued. Further, that such inspections were undertaken by persons not qualified to undertake such a task. These inspections were undertaken a long period after the damage had occurred and the filing of the associated claim. The elapse of time has made it more difficult for claimants to prove the damage to be earthquake related, when issue has been taken by Southern Response.

[30] The Group alleges Southern Response limited the briefs of persons instructed to undertake these inspections, which resulted in damage either not being properly identified; a failure to assess the work required to remedy that damage; or failure to provide the appropriate reinstatement strategy to return the property to an "as new" condition.

[31] The Group repeats its allegation there has been a systematic underestimation of relevant costs. As a consequence, the standard industry basis for determining whether a house is damaged beyond economic repair, if the estimated costs of repairs total more than 80 percent of the estimated cost of rebuilding, was not properly determined. When costs are properly assessed, the claimants' houses are beyond economic repair under the policy.

[32] Relying on these matters, the Group pleads, as its first cause of action, that Southern Response has acted in breach of contract for failing to meet its "substantive promises in the policy". It is further alleged that Southern Response is in breach of the insurance policy which requires the fair settlement "of its substantive payment obligation as quickly as circumstances allow". It is alleged Southern Response is in breach of essential terms of the insurance policy within the meaning of the Contractual Remedies Act 1979, in respect of which the claimants reserve their position.

[33] The Group claims that as a result of the pleaded breaches each of the claimants have suffered loss. Reference is then made to the particulars of individual claims being provided in a schedule of claims. The Group seeks declarations that Southern Response has acted and is acting in breach of the policy in the manner identified; damages for each claimant for the amount of their claim; and interest on such amounts.

[34] As a second cause of action, it is alleged Southern Response breached the process rights of the claimants and duties of good faith owed to them. In particular, it is alleged Southern Response failed to deal with the claims in good faith, to act with reasonable promptness during each stage of the claims process, to pay claims in a timely manner, to ensure the claims were handled professionally, and ensure the settlement of the claims was fair. It is alleged that none of the insurance claims have been satisfied or that Southern Response delayed in taking initial steps when claims were first made. Further, that its underestimation of costs and the inadequacy of inspections and assessments identifying the necessary scope of work to achieve reinstatement has caused disputes which have resulted in delay.

[35] Other pleaded particulars in relation to the allegation of breach of process rights and duties of good faith include the failure to have effective procedures to assess whether the claimant was over the EQC cap, or to deal with EQC; a lack of continuity of personnel in handling the claimants' claims; continuing changes in stance taken by Southern Response to claims; failure by Southern Response to advise claimants of changes in its approach to insurance policies, notwithstanding decisions of the Courts relating to the interpretation and application of the policies;

and unjustified time delays. The Group alleges that Southern Response intentionally delayed the settlement of claims to reduce its liability, "knowing that this would cause distress to an increasingly vulnerable group of claimants".

[36] It is alleged the claimants have incurred costs and suffered loss, including significant emotional distress, to be particularised in the schedule of claims. As a result, the Group seeks declarations that Southern Response has acted, and is acting, in breach of the policy rights and duties of good faith. They seek damages for each claimant, interest on such amounts and general damages of $25,000 per claimant.

The statement of defence

[37] The statement of claim identifies the plaintiff as an unincorporated body of persons, each of whom has an unresolved insurance claim with Southern Response who sue by their representative, Mr Preston. In its statement of defence, Southern Response admits that each of the claimants listed in the table annexed to the statement of claim have an unresolved insurance claim with Southern Response. However, it queries whether all the claimants are intended to be plaintiffs, or whether Mr Preston alone is intended to be the plaintiff suing on behalf of the claimants as contemplated by the rule.

[38] Southern Response contends that, from its knowledge of the claimants' policies, claims and circumstances, not all of the allegations and claims made in the statement of claim, of which there are very many, can apply to all claimants. It pleads that it is not apparent which allegations and claims are said to apply to which claimants, nor what allegations, if any, are common to the group as presently constituted. Southern Response expressly responds to the statement of claim on the basis the allegations and claims are made by and for Mr Preston, reserving its right to respond in relation to the remaining claimants when particulars relating to their claims have been filed.

Identification of a common interest

[39] The statement of claim does not provide any factual particulars of Mr Preston's claim, nor the circumstances which give rise to the allegations

contained in the pleadings. As contemplated by the statement of claim, "schedules of claims" have been filed which, in a tabulated and summarised form, provide particulars of each claimant's involvement with Southern Response. Under a heading "Heads of Claim applicable to Claimant Circumstances", alleged actions by Southern Response in relation to the individual claimant are listed as referable to allegations contained in the statement of claim. These relate to alleged breaches by Southern Response of its obligations under the insurance policy. An example is that of the representative himself, Mr Preston and his wife:

E.	**Heads of Claim applicable to Claimant Circumstances**
1)	Southern Response sent a letter and/or decision pack that misrepresented the policy terms (paragraphs 8-16 of the Statement of Claim) (See letter in Box C).
2)	Southern Response required the entry into an MOU on terms it outlined which were inconsistent with the policy terms (paragraphs 17-19 of the Statement of Claim).
3)	Southern Response imposed additional conditions inconsistent with the policy terms by which it determines the identity of the builder, requirements for the build, and required a further build and design election to be made (paragraphs 22-23 of the Statement of Claim).
4)	Southern Response excluded demolition, design, administration and contingency fees and redacted them from the assessments (paragraphs 30-33) of the Statement of Claim).
5)	It is anticipated based on a consistent approach taken by Southern Response that it will incorrectly assess foundation costs (paragraphs 34-37 of the Statement of Claim).
6)	Southern Response has used discounted non-market rates in the assessments (paragraphs 38-39 of the Statement of Claim).
7)	Southern Response has systematically underestimated the work required for the repair or rebuild (paragraphs 40-43 of the Statement of Claim).
8)	Southern Response has failed to deal with claims consistently with clause 2a of the Policy and in breach of its obligations of good faith (paragraph 55 of the Statement of Claim).

[40] These "Heads of Claim" are common to a number of the claimants' schedules of claim. For example, the allegations that Southern Response sent a letter and/or decision pack that misrepresented the policy terms or that Southern Response imposed additional conditions inconsistent with the policy terms are shared by many.

However, while reference is made to the relevant part of the statement of claim concerning misrepresentations made in a letter and or decision packs, the particular misrepresentations of the policy upon which the member relies as bearing on their circumstances or as having been made in relation to their claim is not specified.

[41] Insofar as these "Heads of Claim" allege misrepresentation of the terms of the policy or misapplication of the policy as a result of Southern Response failing to properly interpret the insurance contract, such allegations may potentially be capable of constituting issues of significance to a number of the claimants. However, I have not been provided with any detail or analysis of how, or the extent to which, for example, determining the "Heads of Claim" cited by Mr Preston as it relates to his claim as the nominated representative, will resolve or substantially advance the claims of the Group as a whole. More fundamentally, I am not presently able to assess with any confidence how the resolution of these issues in the circumstances of Mr Preston's case will have application to the circumstances of other members' claims. Even then, I have been provided with no information to gauge how resolution of these issues will materially or substantially advance the resolution of other members' claims.

[42] Some of the schedules describe heads of claim as being "anticipated based on a consistent approach taken by Southern Response". One of Mr Preston's heads of claim in relation to foundation costs is framed in that way. Effectively, the claimant is not alleging that any breach of the policy has yet occurred, only that it is anticipated that such breach will occur based upon Southern Response's approach to date. Such a claim in the context of a representative action would appear to fall foul of the caveat that a representative action should not confer a right of action on a member of the represented class who would not otherwise be able to assert a claim in a separate action.

[43] Some of the heads of claim which are specifically referenced to allegations made in the statement of claim refer to the use of "discounted non-market rates in the assessments" and the systemic underestimation of work required for a repair or rebuild. Ultimately, an examination of whether the correct rates have been applied and an accurate assessment of the costs of repair or rebuild will need to take place in

the circumstances of each individual case. There may, however, be issues relating to the interpretation and application of the policy standard which have influenced these assessments and costings and which are common to many of the claimants.

[44] Similarly, loss or damage that may have resulted from the misrepresentation of policy terms as alleged against Southern Response, or the imposition of additional requirements inconsistent with the terms of the policy, will vary as between claimants. As with issues of delay, it is inevitable that the individual handling of a claim by Southern Response will be required to be examined before any determination of breach of process rights and duties of good faith can be determined. Such issues are quintessentially claims which turn on their individual circumstances.

[45] The Group, in addressing the identification of a significant common issue shared by its 46 members, did not seek to nominate a specific allegation made in the statement of claim or in the heads of claim listed in the schedules. The Group took a broader approach to demonstrating that they have the same interest in the subject matter of the proceeding and for that purpose, to the identification of a substantial common issue. In contrast, Southern Response focused on specific potential issues raised in the statement of claim. It focused on pleaded allegations of misinterpretation or misapplication of the policy from the statement of claim for the purpose of examining the degree to which such issues, if any, were common to the Group, or at least on its view, no longer in issue.

The Group's argument

[46] The Group acknowledges that each claimant's insurance claim will ultimately depend on the damage caused to each of their homes, and will turn on specific factual issues in relation to the assessment of the damage and valuation of the cost to repair, replace or rebuild. In that respect, each of the insurance claims is factually different. However, the Group submitted the requirement of common interest is satisfied by the claimants having the same type of insurance policy with the same insurer, in respect of which each has a disputed claim under that policy arising from the same insured events. Further, that the delay in resolving their claims centres on the alleged failures by Southern Response to fulfil its obligations under the policy

which arise from common issues relating to the interpretation and application of the insurance policy.

[47] The Group submitted the issues raised in the statement of claim relate to the interpretation and application of the policy, and that determining the correct approach to these questions is a necessary prerequisite to settlement of the claims. The Group anticipates these questions being addressed by way of separate questions under the type of procedure provided for by the High Court Rules.[13]

[48] The Group relied upon what they described as the common issues pleaded in the statement of claim. In submissions before me, emphasis was placed on various examples. These included an issue relating to the alleged stipulation imposed by Southern Response that it was entitled to insist on undertaking a rebuild through its contracted partner, Arrow International. Reliance was placed on representations to this effect made in the decision packs relating to rebuilds. While there has more recently been a perceived change in approach by Southern Response to self-managed rebuilds, it was submitted on behalf of the Group that for those now signed up for an Arrow managed rebuild, Southern Response's approach continues to have important implications. Another example relied upon was the policy standard for remedying damage to foundations and whether it was sufficient to meet the current building code requirements, or whether the policy standard "as new" requires something more. By determining the policy standard, it was submitted, difficulties regarding the briefing of experts and the application of standards of repair could be avoided.

[49] Other identified issues included:

(a) Does the claimant actually have to engage in the reinstatement/repair before being entitled to receive payment under the Policy?

(b) Does Southern Response have a right to elect to make the repair as opposed to making a payment covering the cost of repairs to the Policy standard?

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[13] High Court Rules, r 10.15.

(c) Does the reinstatement involve exact replication of the former dwelling (or a budget set by exact replication) or more flexible concepts?

(d) Can the costs of repair and reinstatement be based on Southern Response's ability to access discounted rates by virtue of its greater market power (ie bulk purchasing) or is it to be assessed by the rates in the market that can be accessed by the claimants?

(e) Does Southern Response have the right to control the builder who will undertake the repair/reinstatement under the Policy?

(f) Can Southern Response require the entry of further agreements such as compromise agreements and MOUs before meeting the claims?

(g) Is the correct measure of a building's market value the depreciated replacement cost?

(h) What is the test for determining whether a home is beyond economic repair under the Policy?

[50] The Group submitted the representative action will allow claimants access to the Court which would otherwise be unavailable to them. Each of the members of the Group have experienced a long period of delay and accompanying distress as a result of their insurance claims remaining unresolved. That is not to be underestimated. It is submitted that individually they cannot afford to bring proceedings before the Court, and that a normal proceeding listed for hearing in the Earthquake List is not an alternative available to them. However, they have been able to arrange funding to bring a representative action through a litigation funder. The procedural flexibility recognised by the Court in the modern approach to representative actions is stressed. There is also a significant public interest in persons who may otherwise not be able to progress their insurance disputes having access to the Courts.

[51] The Group proposes that, through other processes provided by the Rules, the representative proceeding can be advanced by the identification and determination of a number of issues relating to the interpretation and application of the policy. Once those issues have been ruled upon, the correct interpretation can be applied to the individual case. It is anticipated that at that stage other mechanisms, including the appointment of independent experts, the conferencing of expert witnesses and other directions, may lead to the resolution of individual claims or groups of claims. Other processes, including mediation or judicial settlement conferences, are also raised as possible avenues of progressing the representative action in relation to the individual disputes of members after the determination of the questions of interpretation and application of the policy. That some form of trial may ultimately be required in relation to some individuals or groups of claims is acknowledged.

Southern Response's opposition

[52] Southern Response's opposition is based on the submission that the Group has failed to meet the threshold of a common or "same" interest in the proceeding. While the proposed class of litigants are all claimants who hold insurance policies with Southern Response, there has been a failure to identify a significant issue common to the claimants. This, it is submitted, is because there is a wide diversity in the individual circumstances of each member. The Group has been unable to sufficiently identify itself as a group which shares an identified substantial question common to all the proposed members.

[53] Southern Response submitted that Mr Preston is not an adequate representative, and the trial of his action will not resolve a common issue of significance shared by each member of the Group. As the nominated representative, Mr Preston must fairly and adequately represent the Group, however, it is submitted he is not in a position to advance the interests of all class members.[14] Southern Response submitted that Mr Preston and the issues arising on his claim are far from typical and not representative of the Group as a whole.

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[14] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* HC Wellington CIV-485-2003-2724, 6 December 2005 at [176] and [182]; *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC) at [16](C).

[54] Southern Response argued that, leaving to one side whether the threshold of common interest contained in the rule has been met, whether to make a representative order is a matter of discretion. It stressed that a factor which must weigh heavily with the Court is the commonality and divergence of circumstances between class members. Having regard to the objective of achieving the "just, speedy, and inexpensive" resolution of proceedings, whether to make a representative order will necessarily be influenced by the strength of the commonality of the cases sought to be represented in the one proceeding. [15] As noted by Elias CJ and Anderson J, the divergence between cases sought to be included in a representative action may lead a Court, as a matter of assessment, to decline to permit a representative claim, or allow it to continue in that form.[16]

[55] Associated with that concern is the extent to which a representative order may resolve much or most of the members' individual claims. Baragwanath J observed in an earlier tranche of the *Feltex* litigation that the more likely determination of common issues will resolve most or much of the proceeding, the more likely the Court will be minded to grant the representative declaration.[17] Similarly, Dobson J in *Strathboss Kiwifruit Ltd v Attorney-General* noted that not all aspects of liability need to be capable of determination on a common basis, so long as there is an "identified initial issue, the success or failure of which is likely in practice to determine the result of the case".[18]

[56] In the absence of the Group being able to identify a significant issue, the success or failure of which is likely to determine or resolve the outstanding issues between the Group and Southern Response, the justification for a representative order is likely to be severely diminished. Southern Response submitted that any identifiable common issues shared by some members of the Group are not likely to significantly advance the resolution of their claims.

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15 *Sanders v Houghton*, above n 1, at [19].
16 *Credit Suisse*, above n 2.
17 *Saunders v Houghton*, above n 1, at [14].
18 *Strathboss Kiwifruit Ltd v Attorney-General*, above n 1, at [58] citing *Saunders v Haughton,* above n 1.

[57] Southern Response considered the type of staged proceeding anticipated by the Group, involving firstly the determination of generic common issues before engaging in the factual issues particular to each claim will result in many individual claims of members of the Group being made subordinate to others and further delayed, if not sidelined. The priority given to addressing individual claims will depend on the relevance of the identified issues to their claim and the priority given to those issues which may affect them.

[58] Southern Response argued the proposed representative action offers little which is advantageous to the individual claimant which is not available on the Christchurch Earthquake List. Cases on that list are subject to timetabling orders for the provision of expert reports and, from the outset, are concerned to identify the vital issues of damage, scope and cost. This requires the parties to immediately focus on the key issues central to the determination of the claim.

[59] Insofar as the establishment of a precedent in relation to a particular issue, or the framing and determination of separate questions regarding issues of interpretation of the policy, Southern Response flagged a willingness to cooperate to give priority to particular cases to enable rulings to be obtained which may have wider application.

[60] In relation to some of the issues raised by the group, Southern Response submitted there is in fact no longer any disagreement between the Group and itself. An example is the exclusion of fees and contingencies from DRAs. Southern Response submitted this issue has already been addressed by the Supreme Court in *Southern Response v Avonside Holdings Ltd*.[19] It submitted that following that decision, Southern Response announced that all settlements from a certain date will include professional fees and contingencies when calculating rebuild and repair costs. The Group disputes the communication of that position to them, and there may no doubt be various issues arising regarding the application of the Supreme Court judgment in individual cases. However, as an issue of law, the matter would appear to have been decided at the highest level.

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[19] *Southern Response v Avonside Holdings Ltd* [2015] NZSC 110, (2015) ANZ Insurance Cases 62-079.

[61] Southern Response submitted there were other issues which it considers to be no longer controversial. These are said to include the ability of a policyholder to undertake a self-managed rebuild or repair and to choose their own builder; that Southern Response no longer requires a memorandum of understanding before settling claims; that market rates are used when calculating DRAs; and that the timing of Southern Response's obligation to cover the cost of rebuilding or restoring a property has been resolved by the Court of Appeal in *Medical Assurance Society of NZ Ltd v East*.[20]

Discussion

[62] The Group vigorously disputed Southern Response's analysis of whether the issues it maintains as having been resolved remain live as between themselves and the insurance company. The short point, however, relevant to the present application is whether the Group has identified one or more such issues as being common to the Group as a whole.

[63] Southern Response carried out an analysis of what it discerned to be 39 issues raised by the statement of claim. Based upon its analysis, Southern Response submitted that none of these issues apply to all the proposed members of the Group. It assessed them as applying only to a handful of policyholders, and only in relation to a small number of particular issues.

[64] I do not intend to review Southern Response's analysis, which was not accepted by the Group. However, absent a similar analysis by the Group of the relevance of the issues as they relate to each of the 46 claimants, it is difficult for the Court to conclude with any confidence that resolution of any one or a number of the issues identified in the statement of claim, at least as presently framed, will result in the advancement of all members' claims against Southern Response, or at least a significant number of the Group as presently constituted.

[65] This is further emphasised by Southern Response's criticism of Mr Preston as an adequate representative. That critique extended to observations as to the nature of

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[20] *Medical Assurance Society of NZ Ltd v East* [2015] NZCA 250, [2015] 18 ANZ Insurance Cases 62-074 at [20] and [29].

Mr Preston's engagement and conduct towards Southern Response. Doubts arise as to whether that background should bear on the adequacy of his nomination as the representative of the Group. Of potentially greater relevance is Southern Response's submission that no common issues arise in respect of Mr Preston's individual claim. From Mr Preston's schedule of claim it is clear this submission is contested. Southern Response informed the Court that Mr Preston's house has been deemed capable of repair and therefore, insofar as issues that are sought to be raised involving the rebuild or replacement of a house, Mr Preston's claim cannot be representative of those claimants who fall into that category of policyholder.

[66] It is apparent from affidavit evidence filed by Mr Preston that whether his house can be economically repaired or whether it needs to be rebuilt remains in dispute. I am not in a position to judge whether the stance Southern Response has adopted in relation to Mr Preston's claim is correct. That conclusion, however, highlights a difficulty which extends across the membership of the Group. Whether particular issues are central or have a direct bearing on individual claims and whether their determination would substantively advance the resolution of that member's claim remain relatively opaque.

[67] Southern Response has identified the key issues that require resolution for a customer's claim to be the extent of the earthquake damage to the relevant property; the scope of the appropriate repair or rebuild method to remedy that damage; and the cost of the repair or rebuild. It has emphasised that the individual circumstances of the members of the Group differ significantly and in material respects. These differences, it is submitted, will substantially impact on the resolution of their claims. Such factors are said to include the nature of the construction of the house in question, its location and land condition, the nature of the earthquake damage to the house, the scope of the rebuild or repair, and the methodology to be employed.

[68] Presently, some claims are under cap and therefore involve a third party, the EQC. Many of the claims are at different stages, with some having only just recently gone over cap. Some have been advanced to varying degrees towards an ultimate resolution, and others in respect of which building work has already begun.

[69] A recognised consideration in favour of allowing representative actions is the need to avoid the clogging of the Courts with a multiplicity of actions covering the same subject matter.[21] However, the 46 claims that presently make up the proposed representative action are intrinsically different. The claimants' situation is not comparable with that of the position of the shareholders in the *Feltex* litigation, the account holders in the bank fees representative actions, nor the kiwifruit growers in their action against the Crown for failing to discharge their statutory obligations. Inevitably, the individual merits of each claim will have to be examined.

[70] The Group acknowledges that final resolution of members' disputes will invariably require individual assessments and it is recognised that their individual circumstances are different. However, they submit that should not be an influential factor when deciding whether a representative action should be permitted having regard to the more fundamental issues of policy interpretation and application, which they submit will materially bear on how individual claims will be resolved. There is some force in that proposition.

[71] Individual factual questions are no doubt integral to resolving policyholders' claims which will necessarily depend on a case by case assessment of individual circumstances. However, if there are controversial issues regarding the interpretation of the insurance policy and its application which are a component part of members' disputes with Southern Response and bear upon their resolution, the determination of those questions should assist to advance the resolution of disputes between the policyholder and Southern Response.

Decision

[72] The current application is clearly distinct from the circumstances of other cases where leave has been granted under the rule. The *Feltex* litigation involved the determination of an issue fundamental to the litigation, namely whether statements and omissions in a prospectus issued for the purpose of a public offering of shares

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[21] *Credit Suisse,* above n 2, at [147].

had been made negligently, or in breach of statutory duties. In *Strathboss Kiwifruit Ltd v Attorney-General* the representative action centred on whether duties of care were owed by the Crown to kiwifruit growers in the discharge of their functions and responsibilities to maintain New Zealand's biosecurity and, in particular, to prevent the importation of a pathogenic bacterium.[22] In *Cooper v ANZ*, a representative proceeding was brought by the plaintiffs on behalf of thousands of past or present customers of a bank disputing whether fees were charged in breach of the common terms of their savings or credit card accounts.[23]

[73] In each of these cases the prime essential issue of liability was readily identified as being one that was common to each member of the group sought to be represented by the named plaintiff in the proceeding. Issues of reliance, loss, and the extent of recoverable damages would remain to be determined having regard to the individual circumstance of each member. However, the determination of the identified discrete common issue would substantially advance the resolution of the litigation and the individual claim of each member. The Court's ruling on the common issue was an essential prerequisite to any of the members of the Group succeeding in the litigation.

[74] It is necessary that the group sought to be represented in the representative proceeding can be identified by the common issue that unites them. The Group has pointed to a number of issues relating to the interpretation of the insurance policy and the way it has been applied and managed, as being relevant to some members of the group and potentially to others. Presently, however, the application has not nominated the issue or issues of significance capable of juridical determination which can be identified as the "spine" of the representative action common to the currently constituted 46 member group. As is apparent from previous cases, the Group needs to be able to be defined by reference to the common issue or issues, the resolution of which will substantively advance the determination of the members' claims. It has not been demonstrated to me how that will occur in the representative action as currently proposed.

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22 *Strathboss Kiwifruit Ltd v Attorney-General*, above n 1.
23 *Cooper v ANZ* Bank New Zealand Limited [2013] NZHC 2827.

[75] Neither the statement of claim nor the schedules of claims presently allow for the identification of the question or questions that define the Group. The statement of claim would suggest that each of the allegations is common to all members of the Group, although, I do not understand that is what is being contended for. The pleading does not limit those issues to the circumstances of Mr Preston's claim. Where a statement of claim includes a raft of allegations said to give rise to contractual breach and obligations of duties of process and good faith, the Court should at least be able to discern prime issues of liability in respect of which the Group's membership can be aligned. I have found myself unable to do that.

[76] Similarly, the "Heads of Claim" identified in the schedules incorporate various allegations identified in the statement of claim. I could not discern from the description of those allegations the central or overarching common issue or issues which the Group's membership share and which have application to the Group as a whole. On the face of the schedules there are individuals who clearly are in a different position from other members of the Group including some whose insurance claim is still under the statutory cap. As I understand the position, Southern Response has not accepted any liability in respect of these claims, and no DRAs have been issued. Some of the "heads of claim" are unsatisfactorily couched as being "anticipated".

[77] In both written and oral submissions examples of potential common issues were traversed, however, these were only identified as issues potentially common to a number of the group. It did not provide me with a basis upon which I could conclude the Group as presently constituted share an overarching common issue, other than the fact that they are in dispute with the same insurance company in relation to the same type of insurance policy.

[78] In examining whether leave should be granted, it is essential to consider whether the proposed representative action provides the best mechanism to achieve the objectives of securing the just, speedy, and inexpensive determination of the members' claims.[24] The Group proposed, as a first step in the progression of the representative proceeding, that there be a conference at which issues required to be

[24] *Saunders v Houghton,* above n 1, at [17].

the subject of determination under the separate question procedure would be identified. There would be an exchange of views as to the scope of matters to be determined by preliminary questions, what those questions might be, and the processes to be followed.

[79] In proposing this course it is apparent that the Group sought to adopt the approach taken by Dobson J in *Strathboss Kiwifruit Ltd v Attorney-General*.[25] There, the scope of common issues was to be determined as a first stage of the representative proceeding and was to be the subject of determination. Notably, the Court cautioned that it would be concerned to confine those issues to those that are common to all plaintiffs, or defined subsets of the plaintiffs.[26] In that case the Court was concerned to ensure that the Crown's entitlement to challenge any component of the claims where it asserted material differences in the position of different claimants was protected. The Court, however, did not consider that the existence of a range of subsets of growers was sufficient to deny the claimants' resort to a representative action.[27]

[80] The difficulty for the Group, at least at this stage, is that Dobson J's approach was premised on the acceptance that there was an identified initial question common to the litigants, the success or failure of which was likely in practice to determine the result of the case.[28] The central issue common to those sought to be represented, and therefore bound by the result of the representative action, was whether a duty of care was owed by the Crown to the growers. The tenability of making out such a duty was the subject of some focus in the hearing of the application. After accepting that there were sufficient prospects of establishing such a duty, Dobson J considered that it was not necessary that all aspects of liability be capable of determination on the same footing for all those within the represented class and that the majority of differences that had been identified by the Crown only impacted on the assessment of quantum, rather than in establishing whether a duty of care was owed and if so, whether it was breached.

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25 Above n 1.
26 At [91].
27 At [60] and [91].
28 At [58].

[81] Having accepted the central issue which bound the group and provided the basis for the representative proceeding, Dobson J turned to the organisation of the hearing of the representative action and the definition of the first stage of questions to be determined under the umbrella of the central plank of the litigation, whether a duty was owed and whether it was breached.

[82] That is not the situation in the present case. In my view, it would be a premature step to proceed to such an exercise until the Group has identified the central issue or issues common to its membership and which binds each member to of the Group. Given the present diverse nature of the litigation, until that is done I cannot recognise the Group as presently constituted as having the same interest in the subject matter as required by the rule.

[83] In coming to this conclusion, I reject the submission made by the Group in the course of oral submissions that it is a sufficient common interest that the members of the Group are persons who have not been indemnified pursuant to their policies of insurance with Southern Response. Such a wide formulation is little narrower than the present qualification for a case to be listed on the Christchurch Earthquake List and if taken to its logical conclusion could result in that list being divided into a handful of representative actions involving each of the main insurance companies. While it is undisputed that policyholders are in conflict with Southern Response, the range of issues that potentially arise as between the policyholder and the insurance company vary as widely from a denial by Southern Response of any liability in the absence of the policyholder's claim being over the statutory cap, to disputes regarding the scope of works and standard and value of reinstatement, repair or replacement.

[84] It is clearly not necessary that all issues arising from members' claims be common between them. A theme of recent authorities is the need to adopt a flexible approach and to case manage the proceeding when it progresses to the stage of dealing with the individual aspects of a members' claim. However, a representative proceeding cannot be expected to manage such a wide range of different issues of fact and law as proposed in the present case in the absence of the identification of the core or predominant and overriding question or questions in dispute between the

parties which is common to the Group's membership and will materially advance each of the members' claims.

[85] This does not preclude there being potential issues central and common to a subset of claimants that are of sufficient significance to bind the members in a representative action into a smaller grouping. While the Group has suggested potential issues, it does not appear to have confronted the need to clearly articulate the unifying foundation issue or issues upon which the representative action is to be based and which links the Group's members.

[86] In my view, there is a responsibility on the Group to undertake that analysis and from the outset to identify the common issue of significance shared by each member of the Group. Further, that any such issue or issues arise on the nominated representative's claim and are shared with and can be aligned with the claims of the other members of the Group. Presently the Group has not sufficiently addressed itself directly to the identification and articulation of the common issues of policy interpretation and application which arise on each policyholder's claim which would provide definition to the membership of the group.

[87] In *Saunders v Houghton*, the Court of Appeal observed that in some cases if may be appropriate to identify an initial issue (although, one likely in practice to determine the result of the case) in respect of which an initial representation order may be limited, reserving the question whether at a further stage the order will be extended, with the parties left to continue the case as individuals[29]. The making of a representative order does not therefore preclude the Court from, at some later stage in the proceeding, varying or rescinding such an order if the point is reached in the proceeding where the continuation of the litigation in the form of a representative action is no longer necessary or desirable.[30]

[88] The Supreme Court has similarly recognised that the Court retains the power to review whether a claim should be allowed to continue in a representative form, being part of the flexibility of approach to be taken to the representative procedure

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29 *Saunders v Houghton,* above n 1.

30 *Saunders v Houghton,* above n 1; *Cooper v ANZ Bank New Zealand Ltd,* above n 23, citing *R J Flowers Ltd v Burns*, above n 1.

and the need to deal with individual claims at some later stage.[31] The efficiency or effectiveness of the representative procedure can therefore always be reviewed at some later stage in the proceeding, no doubt depending upon whether there are other processes which can accommodate the individuality of each member's claim or identified sub-groupings; and which will allow refined issues common to that set of claims to proceed to determination in that form.

[89] I am acutely aware of providing an opportunity to the claimants to have access to the Court to advance the resolution of their current disputes with Southern Response. It appears that can only be facilitated by resort to a representative action with the aid of a litigation funder. Enabling access to justice which would otherwise be unaffordable is a recognised advantage of proceeding by way of a representative action and one the Court would not wish to unnecessarily make any more difficult than necessary. I am also mindful the Supreme Court has endorsed an approach to the rule which allows for its development to meet modern requirements.

[90] However, it remains a fundamental requirement to identify with some clarity the predominant central issue or issues common to the Group's membership which the proceeding gives rise to in order to justify proceeding under the rule on a representative basis. Further, analysis or clarification of which discrete issues of interpretation and application of the insurance policy common to each member's claim and how resolution of those issues will advance that member's current dispute is required. That may result in the identification of a number of groups or subgroups of members who share the common substantial issue of significance to each member and which would warrant the making of not one but a number of representative orders. In my view that type of analysis is yet to be done.

[91] Because of the flexibility available to the Court to case manage the representative action, or, indeed, at some later stage to review the appropriateness of continuing the proceeding in that form, it is not apparent that Southern Response would be prejudiced by initially embarking upon some form of representative action, if only for the purpose of determining common issues of interpretation and application of the policy. It has expressed a willingness to identify such issues and

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[31] *Credit Suisse,* above n 2 at [52] and [55].

facilitate their determination by way of identified separate questions. It is difficult to perceive any disadvantage to Southern Response by allowing such an initial course.

[92] However, as I have already concluded, the threshold of commonality under the rule still needs to be satisfied. For the reasons already discussed, I do not consider the criteria to have been met. Importantly, I am not satisfied the objectives of the rules in terms of the just, speedy, and efficient determination of the members' claims will be achieved by granting leave to bring a representative action in its current form.

[93] For the reasons canvassed, the application is therefore declined. This ruling does not preclude and is without prejudice to any further application addressing what I consider to be the present deficiencies.

Litigation funding

[94] One of the grounds of opposition relied upon by Southern Response to the Group's application for a representative order is that neither Mr Preston, nor the Group, has sought approval of the funding arrangements entered into between individual members of the Group and LLS (NZ).

[95] The Group's response is that, while the application is made on the basis that the proposed representative action is being funded by a litigation funder and the funding arrangements have been put before the Court, an application under the rule is not dependent upon the Court's approval of the litigation funding agreement. Southern Response submitted the Group should be seeking the approval of the Court of the funding agreement and that such approval should not be given on the current terms of the agreement.

[96] In *Saunders v Houghton*, the Court of Appeal observed that while the issues concerning the making of a representation order and litigation funding are distinct, where the representation order is largely premised upon the involvement of a third party litigation funder (as in the present case), the Court should retain supervision of the funding proposal to ensure there are appropriate arrangements in place. These would extend to include ensuring that accurate communication with the group is

taking place, and that those represented are informed of all steps, consulted about those steps and that no misleading information is provided to encourage new participants.[32] Approval of the funder and the funding arrangement was viewed by the Court of Appeal as one part of a package of orders relevant to the consideration of the initial representation issue and the achievement of the objectives of the rules by proceeding in the manner proposed.[33]

[97] In *Waterhouse v Contractors Bonding Ltd*, the Supreme Court held that in ordinary litigation it is not the Court's role to give prior approval of litigation funding arrangements, noting that whether the Court has a wider supervisory role in a representative action was an issue that was not before it, and upon which it made no comment.[34] It being apparent the Supreme Court specifically declined to address the role of the Courts in relation to applications under the Rule, the approach taken by the Court of Appeal in *Saunders v Houghton* continues to have application.

[98] Dobson J, in *Strathboss Kiwifruit Ltd v Attorney-General,* followed the approach taken by the Court of Appeal and examined the involvement of a litigation funder as part of his assessment of the merits of bringing an action on a representative basis.[35] This required some examination of the arrangements of that funding, the steps taken to ensure that it did not create an imbalance of interest between plaintiffs and defendants, and did not lead to any abuse of the facility of representative actions.[36]

Southern Response's Concerns

[99] The concerns expressed by Southern Response regarding the arrangements involving the litigation funder are focused on the calculation of remuneration for the funder and solicitors acting on behalf of the Group. Southern Response submitted that participants would have to pay the funder and solicitors in total 20 per cent of the full amount of any settlement or judgment obtained in their favour. Southern Response submitted that, on its interpretation of the funding agreement, participants

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32 *Saunders v Houghton*, above n 1 at [21], [32]-[34] and [63].
33 *Saunders v Houghton*, above n 1, at [38].
34 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28].
35 *Strathboss Kiwifruit Ltd v Attorney-General*, above n 1.
36 At [9].

would additionally have to pay a share of costs relating to the investigation and advertising of the claim, a share in the costs of senior counsel, operational costs and disbursements of their solicitors and expert fees.

[100] An initial concern voiced by Southern Response was that it would be unfair if the litigation funder and the Groups' solicitors were able to receive a share of settlement sums already offered by Southern Response. It is undisputed between the parties that some $16.5 million in total has already been offered by Southern Response to members of the Group before the filing of proceedings. Southern Response submitted that this sum was already on the table before the involvement of the funder and should not form part of the calculation of any percentage the funder and solicitors receive after the commencement of the action.

[101] After this concern was raised in Southern Response's written submissions, the Group filed further material, including a letter written to members of the group by LLS (NZ) confirming that fees payable to it and the solicitors acting for the Group will not exceed a sum which would result in the claimant receiving a total distribution of settlement monies or judgment monies less than the figure contained in any DRA members had received. The Group therefore proceeds on the basis that the litigation funder has provided an assurance that in bringing the action its members will be in no worse position than the position they have presently reached with Southern Response in respect of their disputed individual claims.

[102] Notwithstanding the furnishing of this further information, Southern Response continues to express concerns regarding the funding arrangement. It maintains that an adverse effect that will impede settlement is the need for members of the Group to effectively achieve at least a 20 per cent increase in any settlement figure tendered to date in order to claim any success in the litigation and more so for the funder and solicitors. It cites a concern that this may impede proper and reasonable settlement of claims.

[103] A further concern expressed by Southern Response relates to participants who have only recently gone over cap with EQC and have not yet received an assessment of the amount of damage payable under the insurance policy. By signing

up to the litigation agreement and committing themselves to paying 20 per cent of whatever settlement figure may be achieved as a result of the litigation it is submitted they are prematurely at risk of receiving a lesser settlement figure and a disadvantageous outcome.

Background of funder

[104] The managing director of LLS (NZ)'s parent company, Litigation Lending Services Limited (LLS), filed an affidavit outlining the history and background of the company as an established litigation funder. LLS was established in Australia in 1999 and has since that time provided litigation funding both in Australia and New Zealand for 178 claims for commercial and corporate disputes, insolvency cases and class actions. LLS (NZ) is a wholly owned subsidiary of LLS. The two companies between them have provided funding for five representative actions including the present claim. LLS (NZ) is currently providing the funding for the bank fees representative action referred to earlier in this judgment.[37]

[105] The affidavit evidence refers to established processes followed by LLS and LLS (NZ) to assess whether claims meet funding criteria and the involvement of independent lawyers to review a claim before being placed before its Board for approval. The company considers its due diligence process to be comprehensive. Reference was made to LLS's conflicts policy required by Australian regulations and which, while not mandatory for its New Zealand subsidiary, it adopts for the purposes of identifying, managing and dealing with any conflicts of interest that may arise.[38]

Preliminary view of arrangements

[106] Because of the decision I have already reached regarding the Group's application it is not necessary for me to come to any detailed or concluded view regarding the Group's proposed funding arrangements. The affidavit evidence filed on the eve of the hearing of the application addresses some of the issues raised by Southern Response in its written submission. It is sufficient, having regard to the

[37] *Cooper v ANZ Bank of New Zealand Ltd*, above n 23.
[38] Corporation Regulations 2001 (Cth).

decision I have reached on the substance of the application, to observe that the disclosed funding arrangements would not have prevented the granting of leave to commence the proceeding as a representative action.

[107] If the Group is to renew its application, the arrangements can be further reviewed. It is to be anticipated that, on further details being provided by the Group, particularly regarding the process and nature of communications with its members, both current and prospective, any particular concerns can be addressed and, if not, the arrangements proposed revisited.

Security for Costs

[108] Because the application has been declined it is not necessary to address this issue. However, I record that the parties had reached agreement that there was to be a payment in the sum of $150,000 to be lodged by way of initial security with leave for Southern Response to bring application to seek additional amounts if the initial amount was no longer sufficient.

Result

[109] The application by the Group to bring the proceeding as a representative action under the Rule is declined. That ruling is without prejudice to any modified application based on a reformulation of the proposed proceeding which meets the concerns expressed in this judgment.

[110] I also observe the possibility of dialogue between the parties to identify appropriate sub-groupings of members' claims according to agreed heads of issues relating to the interpretation and application of the policy. This may provide the basis for the determination of an initial issue or issues likely to advance the resolution of members of that sub-group's claims before proceeding to the individual circumstances of a member's case. The feasibility of proceeding to examine issues particular to a member's claim within a representative proceeding can be reserved for determination at a later stage.

Costs

[111] Costs are reserved.

Mander J

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