IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 105/2019
[2020] NZSC 126

BETWEEN	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Appellant
AND	BRENDAN MILES ROSS AND COLLEEN ANNE ROSS Respondents

Hearing:	15 and 16 June 2020
Further Submissions:	15 July 2020
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	T C Weston QC, K M Paterson and E D Peers for Appellant P G Skelton QC, K M Quinn and C B Pearce for Respondents T C Stephens and M R G van Alphen Fyfe for New Zealand Law Society as Intervener K G Davenport QC and S E Wroe for New Zealand Bar Association as Intervener D M Salmon for LPF Group Limited as Intervener
Judgment:	17 November 2020

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellant must pay the respondents costs of $35,000 plus usual disbursements. We certify for second counsel.**

REASONS
(Given by Ellen France J)

Table of Contents

	Para No
Introduction	[1]
The nature of the claim	[7]
The approach in the Courts below to the availability of opt out orders	[11]
The High Court	[12]
The Court of Appeal	[14]
The case on appeal	[19]
Representative actions	[25]
History and objectives	[27]
Comprehensive legislation necessary?	[43]
The approach in Australia and Canada	[44]
"Absent plaintiffs" and other issues	[53]
Workability	[64]
Settlement and discontinuance	[64]
The position in Australia and Ontario	[67]
The New Zealand position	[76]
Funding issues	[84]
Supervision more generally	[87]
Some guidance as to the approach to the discretion	[90]
Submissions on the proposed guidelines	[91]
The relevant principles	[94]
This case	[102]
Court of Appeal judgment	[102]
Submissions	[106]
Our assessment	[108]
Result	[109]

Introduction

[1] The respondents, Brendan and Colleen Ross,[1] brought a claim against the appellant, Southern Response Earthquake Services Ltd, their insurer.[2] Their claim is that they agreed to settle their insurance claim on a less favourable basis than otherwise would have been the case. They say that is because Southern Response gave them incomplete information about the cost of remedying damage to their home caused by

---

1 Mr and Mrs Ross are trustees of two family trusts which each owned an undivided half share of their residential property. Mr and Mrs Ross sue in their capacity as trustees.

2 Mr and Mrs Ross were originally insured with AMI Insurance Ltd. AMI could not meet its obligations to policyholders after the second major earthquake in Canterbury on 22 February 2011. Southern Response, a Crown-owned company, has responsibility for dealing with claims by AMI customers for damage resulting from the Canterbury earthquakes.

the earthquakes in the Canterbury region between 2010 and 2012 (the Canterbury earthquakes). Mr and Mrs Ross also say that a considerable number of other policyholders settled their insurance claims with Southern Response in similar circumstances. They applied to the High Court for leave to bring their proceeding as a representative claim of the class of some 3,000 policyholders who settled with Southern Response in these circumstances.

[2] Southern Response did not oppose the claim being brought on a representative basis. It did however oppose Mr and Mrs Ross's application that the representative claim be brought on an opt out basis. That meant the claim would be brought on behalf of every member of the group of policyholders, apart from those members who expressly chose to opt out. Southern Response said the claim should be brought on an opt in basis, which has, up until this case, been the usual procedure adopted in such claims. If the claim was brought on an opt in basis, a member of the group of policyholders would have to complete a form electing to opt in to the proceeding and send that form to the High Court by a fixed date in order to be included in the claim.

[3] In the High Court, Associate Judge Matthews granted leave for the representative claim to be brought on an opt in basis.[3] Mr and Mrs Ross appealed with leave from the High Court to the Court of Appeal arguing, relevantly, that their representative claim should be allowed to proceed on an opt out basis.[4] The Court of Appeal allowed the appeal and made an order that the claim proceed as an opt out claim.[5] The Court also said that proceeding on an opt out basis should generally be the norm for such representative actions. Southern Response appeals from that decision.[6]

[4] Whether an opt out approach should be adopted in this case or in such proceedings more generally raises questions about the scope of r 4.24 of the High Court Rules 2016. Rule 4.24 makes provision for representative proceedings,

---

3 *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288 [HC judgment]. The High Court also dealt with issues about membership of the represented group.

4 *Ross v Southern Response Earthquake Services Ltd* [2019] NZHC 495 (Associate Judge Matthews).

5 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 (Miller, Courtney and Goddard JJ) [CA judgment].

6 *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140 [Leave judgment].

but is silent about the procedure to be used, including whether such proceedings can be brought on an opt in or opt out basis. By contrast, in other comparable jurisdictions there are comprehensive legislative regimes or rules regulating group or class actions like that brought in this case.[7] It is nonetheless common ground that there is jurisdiction to order that a representative proceeding be conducted on an opt out basis. But Southern Response contends that it is not appropriate to exercise that jurisdiction until there is a legislative framework in place governing such actions. The question of the approach to class actions in New Zealand is now being considered by the Law Commission and Southern Response says that a shift to the use of opt out procedures should await that law reform exercise.[8]

[5] Because the appeal raises questions about the principles applicable to deciding whether such claims proceed on an opt in or opt out basis, the New Zealand Law Society and the New Zealand Bar Association were invited to intervene.[9] Both organisations intervened. In addition, leave to intervene was granted to LPF Group Ltd, a litigation funder, so that the Court had the benefit of hearing the practical experience of a litigation funder.[10]

[6] To put the questions raised on the appeal in context, it is helpful to begin with some background.

The nature of the claim

[7] The nature of the claim and Southern Response's defence are set out in some detail in the judgment of the Court of Appeal.[11] We need not repeat any of that material save to note the following brief points.

---

7 A draft Class Action Bill and associated amendments to the High Court Rules were prepared by the Rules Committee in 2008 but not progressed. The Committee also produced draft rules relating to representative proceedings for consultation in September 2018. (The Rules Committee has responsibility for making rules of procedure for the Supreme Court, Court of Appeal and High Court: Senior Courts Act 2016, ss 148 and 155. At the time of the 2008 draft Bill, the relevant provision was s 51C of the Judicature Act 1908.)

8 Te Aka Matua o te Ture | Law Commission "Class Actions and Litigation Funding" <www.lawcom.govt.nz>. See also the terms of reference of the Commission's project available on that page.

9 Leave judgment, above n 6, at [1].

10 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 20.

11 CA judgment, above n 5, at [8]–[37].

[8] First, the claim is brought on the basis of misleading conduct in breach of s 9 of the Fair Trading Act 1986; misrepresentations; a mistaken belief on the part of Mr and Mrs Ross, of which it is said Southern Response was aware, as to the estimated cost of rebuilding or repairing their home; and a breach of the duty of good faith. The claim is for damages for the difference between the amount Mr and Mrs Ross received under their settlement agreement and the higher figure for rebuilding costs set out in a document not disclosed to Mr and Mrs Ross which was prepared for Southern Response in respect of this claim and other similar claims.[12]

[9] Second, the parties agree that the representative proceedings would need to be heard in two stages. Stage one would deal with issues common to all members of the class, and Mr and Mrs Ross have identified a number of issues which it is said are likely to be dealt with as common issues at stage one. If those claims are unsuccessful, that would bring the proceedings to an end for all claimants. If the claims succeed in whole or in part, then there would need to be a stage two, at which questions of relief are addressed in relation to other claimants. For example, in denying the allegations Southern Response says that there will be issues of reliance where, as was the case for Mr and Mrs Ross, policyholders obtain their own advice about the cost of rebuilding.[13] Further, Southern Response says there will be issues about how to quantify the loss that the policyholders say they have suffered.

[10] Finally, it was also common ground that if the proceeding reaches stage two, then it will be necessary for all of the claimants represented to take active steps – that is, to opt in – if they wish to establish their individual claims.

---

12 Southern Response's obligations under similar policies have been considered in other recent proceedings, namely, *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433; *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483, (2014) 18 ANZ Insurance Cases ¶62-040; *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141; *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases ¶61-965; and *Southern Response Earthquake Services Ltd v Shirley Investments Ltd* [2017] NZHC 3190. See also *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395.

13 Mr and Mrs Ross had a report from a quantity surveyor.

The approach in the Courts below to the availability of opt out orders

[11] The Courts below, like us, had the benefit of a considerable amount of material about representative actions and the advantages and disadvantages of opt in and opt out proceedings.

The High Court

[12] In determining that the claim should proceed on an opt in basis, the Associate Judge placed reliance on the High Court judgment in *Houghton v Saunders*.[14] In that case the High Court concluded that, without legislative change, the Court had to operate within the existing High Court Rules, which only contemplate an opt in procedure. The Associate Judge said that decision was "highly persuasive" and continued:[15]

> Whilst New Zealand may be out of step, in a sense, with other comparable jurisdictions in not preferring opt-out orders, opt-in orders have been made in all cases in this country. A notable example is found in the James Hardie litigation, which is comparable to the present case as the represented parties are a group with no prior social or business connection, and a common interest only as defined in the case. Indeed, they are likely to be spread over the whole country rather than focussed on the Christchurch region as in this case.

[13] The High Court then addressed the various factors advanced by Mr and Mrs Ross in support of their argument that an opt out approach was preferable in this case. Those factors included the absence of any natural or pre-existing community of interest, the fact that the plaintiffs did not have access to a register of potential claimants as that information is held by Southern Response, and the absence of deterrence to wrongful conduct. The Associate Judge did not see any of those factors as sufficiently cogent to warrant a departure from the position taken in *Houghton*.

The Court of Appeal

[14] The starting point for the Court of Appeal was that there was no jurisdictional barrier to making an opt out order under r 4.24 of the High Court Rules. The Court also saw r 4.24 as providing jurisdiction for the court to give directions as to the way

---

14 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).
15 HC judgment, above n 3, at [67].

in which a representative claim was pursued. The Court rejected the argument for Southern Response that the court should not make opt out orders without an appropriate legislative basis, noting that similar arguments have been rejected in Australia[16] and in Canada.[17]

[15] The Court identified three purposes of r 4.24: improving access to justice, facilitating the efficient use of judicial resources, and strengthening incentives for compliance with the law. In determining whether the jurisdiction should then be exercised in favour of an opt out order, the Court considered that the purposes of r 4.24 would "in most cases be better served by adopting an opt out approach".[18] In that respect, the Court considered that the opt out procedure had the advantage of "significantly" enhancing access to justice.[19] The Court also saw an opt out procedure as improving the incentives for insurers and other large entities dealing with members of the public to comply with the law. That was because it "increases the prospect that they will be held to account for any breaches of their obligations to large numbers of individuals in circumstances where individual claims may not otherwise be pursued".[20]

[16] The Court took the view that efficiency factors were, however, "finely balanced".[21] But many of the issues around efficiency arose under either an opt in or an opt out procedure. The Court said that a legislative framework would be preferable but, in the meantime, the courts would have to approach the range of procedural issues that would arise on a case by case basis "in a liberal and flexible manner, seeking to achieve a balance between efficiency and fairness".[22]

[17] The Court also made the point that it was still open to the High Court in a particular case to direct that a claim be brought on a universal basis; that is, "on behalf of a defined class of claimants without their prior consent, and without any opt in or

---

16 *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398.
17 *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534.
18 CA judgment, above n 5, at [97].
19 At [98].
20 At [99].
21 At [100].
22 At [106].

opt out order being made".[23] But it was said that, "in most cases, respect for the freedom of class members to choose to bring their own claims, or to decline to participate in the proceedings, will justify providing an opportunity to opt out".[24] As to when an opt in claim might be appropriate, the Court identified the following circumstances:[25]

> … the number of claimants is small, and they have a pre-existing connection which makes it reasonable to seek their positive consent to participation in the proceedings. It will also be appropriate if for example there is a real prospect that participation in the proceedings could lead to an adverse outcome for a represented claimant. Represented claimants who are not named plaintiffs are not exposed to the risk of an adverse costs award. But in some cases — likely to be rare — the result of the plaintiffs succeeding with their claim might be that some represented claimants risk being worse off.

[18] The Court concluded that in "most cases" there would be "compelling access to justice reasons for making an opt out order".[26] In terms of the present case, the Court considered that the reasons identified for preferring opt out orders were applicable. Representation orders on an opt out basis were made with the addition of a term requiring discontinuance to be approved by the Court.

The case on appeal

[19] While accepting there is jurisdiction to make an opt out order, the position for Southern Response is that the court should not seek to develop an opt out regime in the absence of a statutory framework.

[20] In developing its case, Southern Response says that the application of an opt out approach raises a number of problematic aspects. The absence of a statutory framework exacerbates those problems, which are difficult for courts to deal with without such a framework. As we will discuss, Southern Response contends that an opt out approach raises issues of natural justice for potential plaintiffs and other problems, including an impact on the rule of law. Other difficulties identified by Southern Response relate to the process for notice and settlement approval, problems arising from the involvement of litigation funding, and problems in the supervision of

---

23 At [82].
24 At [107].
25 At [108] (footnotes omitted).
26 At [111].

class actions generally. In sum, Southern Response says that given the uncertainties arising, the benefits of an opt out process are not established. Finally, Southern Response submits the Court of Appeal was wrong to make an opt out order in the present case.

[21] Mr and Mrs Ross support the approach of the Court of Appeal, both as to the use of opt out orders generally and in this case. They say that an opt out procedure is consistent with access to justice and efficiency considerations. Whether the claim is pursued on an opt out or opt in basis, there will be steps that need to be taken and issues that arise, but the court in the exercise of its case management powers can supervise those matters.

[22] The interveners all favour the enactment of legislation to provide a framework for class actions. Where they part company is as to the way in which the courts should proceed in the absence of a legislative framework. On the latter point, the Bar Association agrees with the Court of Appeal's conclusion that the considerations underpinning class actions – that is, access to justice, expediency or efficiency and deterrence – support adopting an opt out procedure, and the Law Society agrees that access to justice considerations favour that procedure. Both organisations consider the courts have the necessary powers to address the issues arising from opt out processes. LPF agrees the court has jurisdiction to manage these issues. But LPF considers that, given the size and depth of the litigation environment in New Zealand, practical considerations favour maintaining the current opt in approach. It says, for example, that New Zealand is a small market with smaller classes. LPF also argues that there is some certainty now in New Zealand about the way in which opt in actions work. It also draws on its own experience, which is that it has been workable to build a book of fully-advised and aware plaintiffs.[27] LPF's case is that there should therefore be no change until there is legislative reform. The uncertainty created by a shift to opt out creates opportunities for defendants to add cost and cause delay.

---

[27] In *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [91] per Kiefel CJ, Bell and Keane JJ, the process of book-building was described as involving "identification [of group members], contact, awareness creation and enrolment". See also at [133] per Gordon J; and John Walker, Susanna Khouri and Wayne Attrill "Funding Criteria for Class Actions" (2009) 32 UNSWLJ 1036 at 1044.

[23] On the effectiveness of an opt out regime, the Law Society and the Bar Association submit access to justice favours an opt out approach. By contrast, LPF says the cost to the parties in developing a body of case law to provide certainty, absent a legislative framework, militates against the provision of access to justice.

[24] These submissions need to be considered in light of the provisions for representative actions, their history and their objectives.

Representative actions

[25] Representative actions are provided for in r 4.24 of the High Court Rules. Rule 4.24 reads as follows:

> **4.24 Persons having same interest**
>
> 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 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.[28]

Rule 4.24 accordingly expressly contemplates that such claims may be brought without first obtaining the consent of all those having the same interest. Rule 4.24(b) provides that representative claims can be brought "as directed by the court". As the Court of Appeal said, r 4.24(b) itself therefore expressly envisages "that the court may give directions in relation to the manner in which a representative claim is pursued".[29]

[26] In construing r 4.24, the objective of the High Court Rules is also relevant. Rule 1.2 states that the objective is to ensure the just, speedy and inexpensive determination of any proceeding or interlocutory application.

---

28 Reference should also be made to r 5.35 of the High Court Rules 2016, which provides that a person who sues or is sued in a representative capacity "must show in what capacity the party sues or is sued in the statement of claim".

29 CA judgment, above n 5, at [83].

History and objectives

[27] In setting r 4.24 in its historical context, the first point to note is that proceedings which would now fall within r 4.24 have long been a feature of litigation in this country brought by Māori where a chief has represented the plaintiffs.[30] In *Proprietors of Wakatū v Attorney-General*, Elias CJ gave the following as examples:[31] *Te Heuheu Tukino v Aotea District Maori Land Board*;[32] *Korokai v The Solicitor-General*;[33] and *Parata v The Bishop of Wellington*.[34] Elias CJ also noted that in *Tamaki v Baker*, to which we were referred in this case:[35]

> … the Privy Council took the view that there was unlikely to be "any serious difficulty" in a plaintiff's suing on behalf of the other members of [their] iwi in order to enforce their collective rights where the iwi members were "too numerous to be conveniently made co-plaintiffs".

[28] Proceedings brought in this way to enforce collective interests accordingly are well-established.

[29] Second, as the Court of Appeal observed, the genesis of r 4.24 itself dates back to procedural rules adopted in England in the late 19th century.[36] By the 19th century, the Court of Chancery practice of permitting representative actions was

---

30 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [494]. Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 146 refers to class actions brought by Māori against the government appearing "steadily" once every decade in the 1990s and 2000s. That study appears to underestimate the number of such cases but underscores the point that such claims are not new.

31 At [494], n 604. See also, for example, proceedings brought by Nganeko Minhinnick, such as *Minhinnick v The Historic Places Trust* CA280/97, 18 December 1997.

32 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC). The Court in that case described the appellant as "the Chief" of Ngāti Tūwharetoa and noted that he "instituted the present proceedings on behalf of the tribe and as representing the owners of the said lands against the respondent Board": at 591.

33 Commonly cited as *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA).

34 Commonly cited as *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

35 *Wakatū*, above n 30, at [494], n 604, referring to the case commonly cited as *Nireaha Tamaki v Baker* (1901) NZPCC 371. The other sets of reasons in *Wakatū* make a similar point to Elias CJ at [494]: see [804]–[805] per Arnold and O'Regan JJ and [669]–[670] and [669], n 880 per Glazebrook J. See also the case commonly cited as *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC) [*Tamaki* (SC)] at 102 where, following the decision of the Judicial Committee, Stout CJ and Edwards J both accepted that the new plaintiff Rewanui Apatari represented her iwi (Rangitāne) in relation to the proceeding. See further the discussion below at [76].

36 See also the discussion of the historical origins of the rule in Andrew Beck "Opt Out Is In: The New Class Action Regime" [2019] NZLJ 356 at 356–358.

well-established. The origins of the practice in the Chancery courts were summarised by Lord Macnaghten in *Duke of Bedford v Ellis* in this way:[37]

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[30] The common law courts did not have the same powers until 1873 when the Supreme Court of Judicature Act 1873 (UK) (the 1873 UK Act) merged the jurisdictions of the common law and equity courts in the new High Court of Justice. Under the 1873 UK Act, the equity practice of allowing representative claims was extended to the common law courts. Rule 10 of the Rules of Procedure, included as a schedule to the 1873 UK Act, provided that:

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

[31] A rule along these lines providing for representative actions has remained a feature of the English rules of civil procedure since then.[38]

[32] In *RJ Flowers Ltd v Burns*, McGechan J noted that the "general approach to interpretation and application of the English rules" showed "increasing liberality over the years".[39] The Judge referred in this context to the observation in *John v Rees*, in which the representative procedure was described as one "being not a rigid matter of principle but a flexible tool of convenience in the administration of justice".[40] However, the way in which the procedure has subsequently been used in England and Wales has not seen the development that may have been anticipated in this

---

37 *Duke of Bedford v Ellis* [1901] AC 1 (HL) at 8.

38 Civil Procedure Rules 1998 (UK), r 19.6.

39 *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 266.

40 At 266, citing *John v Rees* [1970] 1 Ch 345 (Ch) at 370. See also *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] 1 Ch 229 (Ch) at 245. In *RJ Flowers*, McGechan J at 266 referred to *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) as being one important "deviation" in this liberal trend in relation to representative actions to recover damages.

observation.[41] Rather, what the authors of *Class Actions in England and Wales* describe as a "strict approach" to the "same interest" test has been adopted.[42] As a result, the authors of that text suggest the representative action is not often used in that jurisdiction.[43]

[33] New Zealand adopted a representative action rule based on the English provision in 1882,[44] which was then re-enacted in almost identical terms in 1908 as r 79 of the Code of Civil Procedure in the Supreme Court.[45] Rule 79 provided that where there were "numerous persons having the same interest" in a proceeding, "one or more of them may sue or be sued, or be authorised by the Court to defend, in such action on behalf of or for the benefit of all persons so interested". As the Court of Appeal noted, the rule remained in broadly the same terms until 1985. At that point the rule was redrafted and renumbered as r 78 of the High Court Rules.[46] Rule 78 read as follows:

> **Persons having the same interest**—Where two or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.

[34] Rule 78 became the current r 4.24 following the re-enactment of the High Court Rules in the Judicature (High Court Rules) Amendment Act 2008.[47] The substance of this version was unchanged from r 78. We add that, by contrast to the position in England and Wales, since the decision in *RJ Flowers* in 1986 there has been a growth in the use of representative proceedings in New Zealand.[48]

---

41 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 83–84. For a recent illustration of the approach, see *Lloyd v Google llc* [2019] EWCA Civ 1599, [2020] QB 747, applying *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345.

42 Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at 11.

43 At 11.

44 Supreme Court Act 1882, ss 30 and 40; and the Code of Civil Procedure in the Supreme Court r 79 included in sch 2 of the 1882 Act.

45 Set out in sch 2 to the Judicature Act 1908. See also s 51 of the 1908 Act.

46 Judicature Amendment Act (No 2) 1985, s 10 and sch 1.

47 Judicature (High Court Rules) Amendment Act 2008, s 8 and the Schedule to the Act.

48 See Chamberlain, above n 30, for a helpful survey of representative proceedings in New Zealand. See also Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZ L Rev 73.

[35] Rule 4.24 was considered by this Court in *Credit Suisse Private Equity LLC v Houghton*[49] as well as in a number of Court of Appeal decisions.[50] In *Credit Suisse*, the Court was addressing the interrelationship between the making of a representation order under r 4.24 and the limitation periods under the Limitation Act 1950 and the Fair Trading Act. The majority in *Credit Suisse* endorsed the following observation in *RJ Flowers*:[51]

> The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept constantly in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements.

[36] The majority said the approach in *RJ Flowers* was consistent with "the objectives of the High Court Rules and the goal of representative proceedings: the promotion of expedition and efficiency of litigation".[52]

[37] As we have said, the Court of Appeal in the present case saw a representative action as having the objectives of improving access to justice, facilitating efficient use of judicial resources and strengthening incentives for compliance with the law. The Court described access to justice as the main objective. Southern Response suggests the pre-eminence given to access to justice does not fit well with the approach in *Credit Suisse*. The submission is that the Court in *Credit Suisse* made the point that the purpose of representative actions is to promote efficiency and economy of litigation.

[38] The majority in *Credit Suisse* saw the need to be guided by the objective of the High Court Rules; namely, securing the just, speedy and inexpensive determination of proceedings as r 1.2 provides. Ensuring access to justice, as well as facilitating the efficient use of resources, fall readily within that objective. Further, in delivering the reasons of the majority, Glazebrook J said that it is "legitimate for the scope of representative action rules to continue to adapt to ensure that the overall objective of the High Court Rules as outlined in r 1.2 is achieved".[53] Similar observations were made in the reasons of the minority. In delivering the minority reasons, Elias CJ noted

---

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

50 Most recently, apart from the present case, in *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582.

51 *Credit Suisse*, above n 49, at [130], citing *RJ Flowers*, above n 39, at 271.

52 At [152]. See also at [158].

53 At [130].

that in *RJ Flowers* the High Court "emphasised that 'the rule should be applied and developed to meet modern requirements', subject only to keeping in mind '[t]he traditional concern to ensure that representative actions are not to be allowed to work injustice'".[54]

[39] The third of the objectives identified by the Court of Appeal may less obviously fall within the objective of the High Court Rules, but as the Supreme Court of Canada said in *Western Canadian Shopping Centres Inc v Dutton* in relation to class actions, such proceedings "serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public".[55]

[40] Against this background, we are content to adopt the Court of Appeal's description of the three general objectives of r 4.24 as set out in [37] above.[56] We too consider that an opt out procedure is generally consistent with those objectives.[57] In particular, an opt out approach has advantages in improving access to justice.[58] Indeed, the desire to enhance access to justice featured as an important consideration in the adoption of opt out approaches in the class action regimes in Australia.[59] As the Court of Appeal in this case said:[60]

> Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with an assessment of whether or not it is in their interests to participate in the proceedings. Some class members will not receive the relevant notice. Others

---

54 At [61].

55 *Dutton*, above n 17, at [29]. Matthew Good "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47 Alta L Rev 185, describes *Dutton*'s definition of "behaviour modification" (deterrence) as echoing its definition of access to justice: at 211.

56 See also above at [15].

57 This observation is subject to the points we make later about the situations in which an opt in or a universal order may be appropriate: see below at [95]–[101].

58 See, for example, Rachael Mulheron "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70 MLR 550 at 552, 556 and 580.

59 See Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) [ALRC 1988 Report] at [107]. See also at [108], [126]–[127], and cls 8(1) and 19 of the proposed Federal Court (Grouped Proceedings Bill) 1988 in Appendix A of the ALRC 1988 Report and the accompanying explanatory note at 171–172 and 177. The Commission's opt out recommendation was accepted and implemented through Part IVA of the Federal Court of Australia Act 1976 (Cth): see Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (2nd ed, Thomson Reuters, Pyrmont (NSW), 2012) at 284–285. See also Vince Morabito "Opt In or Opt Out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421 at 436–437. For Canadian examples, see Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [242]; and Manitoba Law Reform Commission *Class Proceedings* (R100, 1999) at 66.

60 CA judgment, above n 5, at [98] (footnotes omitted).

> will not understand the notice, or will have difficulty understanding what action they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated. If there is some potential advantage for class members in participating in the proceedings, and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate. The courts should be slow to put unnecessary hurdles in the path of class members, depriving those who fail to take active steps to participate in the proceedings of the opportunity to have their claims determined by the courts, and of the possibility of obtaining some form of relief if their rights have been infringed.

[41] We also note that the concern not to work injustice on a defendant is met at least in part by the requirement that applicants under r 4.24 have to satisfy the court as to the requisite common interest. Further, the usual armoury provided by the High Court Rules will apply. For example, the proceeding can be struck out or stayed upon filing but before service or before trial if it is an abuse of process or likely to cause prejudice and delay.[61] Further, as discussed below at [88], a variety of High Court Rules can be invoked to manage competing class actions. Finally, the rules regarding discovery, inspection and interrogatories in Part 8 of the High Court Rules can also be used.

[42] Given the wording of r 4.24, its historical background and its objectives, it is not surprising that it is common ground that there is a basis in r 4.24 for proceedings to be brought on either an opt in or opt out basis.[62] But Southern Response says that, pending legislative reform, the status quo (an opt in procedure) should be maintained. We turn now to consider that argument before addressing the practical problems with adopting an opt out regime which Southern Response submits make that change premature.

Comprehensive legislation necessary?

[43] One of the differences between the parties is the extent to which the modern class action, particularly that brought on an opt out basis, differs from a more traditional representative action. Southern Response sees r 4.24 as an inadequate

---

61 High Court Rules, rr 5.35A–5.35B, 15.1(1)(b) and (d) and 15.1(3).

62 The majority in *Credit Suisse*, above n 49, at [163]–[168] refers to the interrelationship between limitation periods and both opt out and opt in procedures. That is consistent with both procedures being available. See also Wicks, above n 48, at 101.

foundation for supervision of a modern opt out funded class action, whereas Mr and Mrs Ross maintain a class action brought on an opt out basis readily fits within the purview of r 4.24 and can be adequately managed using associated court rules and inherent powers. In assessing the argument that any change should await legislative reform, we are assisted by the consideration, and rejection, of similar arguments in Australia and in Canada as we now discuss.

The approach in Australia and Canada

[44] In *Carnie v Esanda Finance Corp Ltd*, the High Court of Australia dealt with r 13(1) of Part 8 of the Supreme Court Rules 1970 (NSW), the equivalent to r 4.24 in New South Wales.[63] A majority of the New South Wales Court of Appeal had held that the rule did not provide sufficient footing for a modern class action regime, noting the need for a legislative framework or appropriate rules of court.[64] The High Court of Australia unanimously allowed the appeal. The matter was remitted back to allow the Court of Appeal to decide whether an order should be made that the action not continue on a representative basis.[65]

[45] The relevant part of the discussion in *Carnie* for present purposes is the Court's approach to the absence of detailed rules relating to the incidents of a representative action. On this topic, Mason CJ, Deane and Dawson JJ said this:[66]

> Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice.

---

63 *Carnie*, above n 16.
64 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 (CA).
65 Three members of the High Court would have made the representative order sought.
66 *Carnie*, above n 16, at 404.

[46] In a passage endorsed in *Credit Suisse*,[67] Toohey and Gaudron JJ, with whom Mason CJ, Deane and Dawson JJ generally agreed, put the point in this way:[68]

> … it is true that r 13 lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires". The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

[47] Subsequently, in New South Wales, the position changed first with amendments to the Uniform Civil Procedure Rules 2005 (NSW) in 2007 and 2009, and then with the introduction of a statutory class action regime via Part 10 of the Civil Procedure Act 2005 (NSW) in 2010.[69] Nonetheless, the approach in *Carnie* is useful as it illustrates a generous view of the width of the power under an equivalent provision to r 4.24 and the flexibility offered by the rule.

[48] A similar approach to that in *Carnie* was taken by the Supreme Court of Canada in *Dutton*.[70] To put that decision in context, judicial development of the class action procedure between 1881 and 1980 in Canada was described as "glacial" despite the existence of rules of court permitting representative actions.[71] In 1983, in *General Motors of Canada Ltd v Naken*, the Supreme Court of Canada dealt with an application for a proceeding to be brought on a representative basis under r 75 of the Rules of Practice and Procedure of the Supreme Court of Ontario, which equates with r 4.24.[72]

---

67 *Credit Suisse*, above n 49, at [131] per McGrath, Glazebrook and Arnold JJ. See also at [49] per Elias CJ and Anderson J.

68 *Carnie*, above n 16, at 422 (footnote omitted). See also at 408 per Brennan J, who referred to the flexibility of the rule.

69 See Grave, Adams and Betts, above n 59, at 67–74 and 83–88. Part 10 of the Civil Procedure Act 2005 (NSW) establishes an opt out regime. Other Australian jurisdictions have also established similar opt out regimes: see Federal Court of Australia Act (Cth), Part IVA; Supreme Court Act 1986 (Vic), Part 4A; Civil Proceedings Act 2011 (Qld), Part 13A; and Supreme Court Civil Procedure Act 1932 (Tas), Part VII. Opting in is however required by group members who are the Commonwealth, a state or territory, a Minister, a body corporate established for a public purpose and officers of the state in their official capacity: see for example Federal Court of Australia Act (Cth), s 33E(2).

70 *Dutton*, above n 17.

71 Michael A Eizenga and Emrys Davis "A History of Class Actions: Modern Lessons from Deep Roots" (2011) 7 Canadian Class Action Review 3 at 13.

72 *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72.

The case was seen as providing an "opportunity to address" the inadequacies of the equivalent to r 4.24 in Ontario.[73] But the Court did not do so, preferring to leave change to the legislature.

[49] The issue came before the Court again in *Dutton* in the context of considering the equivalent to r 4.24 in Alberta, which at that point did not have comprehensive class action legislation. After discussing the history and function of class actions and their advantages, the Court took the view that in the absence of comprehensive legislation, "the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them".[74] The Court continued, stating that procedural complexities would have to be addressed on a case by case basis and that such questions should be approached "in a flexible and liberal manner, seeking a balance between efficiency and fairness".[75] In so holding, the Court rejected the defendant's argument that the Court's earlier decision of *Naken* precluded a generous approach to class actions. Instead, *Naken* was distinguished as a product of its time where the modern class action was still "an untested procedure in Canada".[76]

[50] The decision in *Dutton*, along with that in *Rumley v British Columbia*[77] and *Hollick v Toronto (City)*,[78] have been described as showing a "radical shift" from *Naken* in the context of jurisdictions without class action legislation.[79] Importantly, for the present case, *Dutton* provides a helpful precedent for proceeding to utilise the opt out procedure without awaiting a legislative framework.[80]

[51] Finally, it is useful to mention the recent decision of the Prince Edward Island Supreme Court in *King v Government of Prince Edward Island*.[81] Prince Edward

---

73 Eizenga and Davis, above n 71, at 14.
74 *Dutton*, above n 17, at [34].
75 At [51].
76 At [46].
77 *Rumley v British Columbia* 2001 SCC 69, [2001] 3 SCR 184.
78 *Hollick v Toronto (City)* 2001 SCC 68, [2001] 3 SCR 158.
79 Eizenga and Davis, above n 71, at 23.
80 The issue of whether an opt out procedure was appropriate was not before the Court. But the judgment proceeds on the assumption that the representative action would be on an opt out basis: see *Dutton*, above n 17, at [49]. See also at [32].
81 *King v Government of Prince Edward Island* 2019 PESC 27, (2019) 34 CPC (8th) 20.

Island does not have a legislative framework for class actions.[82] Rule 12.01 of the Prince Edward Island Rules of Civil Procedure essentially reflects r 4.24.[83] The Court in *King* relied though on "the direction in *Dutton* that, 'absent comprehensive legislation, courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them'".[84] Pursuant to that direction, the Court set out quite detailed guidance as to various procedural issues, including notice requirements and settlement and discontinuance.[85] This detailed guidance was in the context of an opt out scheme.[86]

[52] These authorities suggest a willingness to see rules equating to r 4.24 as embodying a degree of flexibility as well as enabling some development of procedures concerning the incidents of a representative action, including in an opt out context. We turn then to discuss the specific matters Southern Response raises to support its case.

"Absent plaintiffs" and other issues

[53] The first of the concerns advanced by Southern Response is encapsulated by its references to the problem of "absent plaintiffs". This is a reference to class members who have not received notice of the class action. Southern Response says that in opt out proceedings, absent plaintiffs who have no knowledge of the proceedings would not have taken active steps to opt out and therefore are effectively bound to the terms of funding agreements and of settlement when they have not agreed to either. This concern can be variously described but essentially appears to embody

---

82 Contrast the position in the other Canadian provinces where comprehensive legislation now exists: Alberta (Class Proceedings Act SA 2003 c C-16.5); British Columbia (Class Proceedings Act RSBC 1996 c 50); Manitoba (The Class Proceedings Act CCSM 2002 c C-130); New Brunswick (Class Proceedings Act RSNB 2011 c 125); Newfoundland and Labrador (Class Actions Act SNL 2001 c C-18.1); Nova Scotia (Class Proceedings Act SNS 2007 c 28); Ontario (Class Proceedings Act SO 1992 c 6; and Rules of Civil Procedure RRO 1990, reg 194 r 12); and Saskatchewan (The Class Actions Act SS 2001 c C-12.01). The legislation in these provinces is "[b]roadly similar" and proceeds generally on an opt out basis: see *Halsbury's Laws of Canada* (2017 Reissue) Civil Procedure at [HCV-69]. Quebec, a civil law jurisdiction, also has a statutory class action regime: Act respecting the Fonds d'aide aux actions collectives CQLR c F-3.2.0.1.1; and Code of Civil Procedure CQLR c C-25.01, ss 571–604.

83 Rule 12.01 provides as follows: "Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf of or for the benefit of all, or may be authorized by the court to do so".

84 *King*, above n 81, at [13]. See also at [5].

85 At [13]. The guidance is found in Appendix A and forms a part of the judgment: at [14].

86 See cl 19 of Appendix A.

concerns about individual autonomy and associated rights to natural justice as reflected in s 27(1) of the New Zealand Bill of Rights Act 1990.[87] At a conceptual level, these types of concerns were encapsulated in the observation in *Houghton* that "[t]he notion that someone can become a party to a Court proceeding without their consent is somewhat alien to our way of thinking".[88]

[54] Southern Response says that the issue of absent plaintiffs does not arise on an opt in procedure. In developing this submission, it is argued that in a proceeding brought on an opt in basis in New Zealand, the usual assumption is that the class member not only opts in to the litigation but also commits to the representative plaintiff's legal and funding arrangements. The submission is that the absent plaintiffs issue does not arise on this full opt in approach because the class members have actively committed to joining the litigation and have made commitments around legal representation and funding. In response, Mr and Mrs Ross say that opt in cases do not necessarily entail complete commitment to the representative plaintiff's legal and funding arrangements and refer to the "open class" basis on which this proceeding is being funded as an example of this.[89]

[55] We take the view that Southern Response's conceptual concern and the practical implications of it on members of a class have to be considered in light of the express wording of r 4.24 and the reasons for providing for representative orders. In addition, as we have said, New Zealand has a long history of representative claims brought by individual rangatira on behalf of their hapū or iwi. Where necessary, the rule should be construed consistently with the tikanga that underpins this history.[90]

---

87 Section 27(1) of the New Zealand Bill of Rights Act 1990 provides that "Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law".

88 *Houghton*, above n 14, at [157].

89 That means, as we understand it, claimants may enter the class but do not have to enter into the litigation funding arrangement or accept the representative plaintiffs' legal representatives in order to remain in the class. See also Rachael Mulheron "Opting in, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers" (2011) 50 CBLJ 376 at 379 and following, where Professor Mulheron notes the various mechanisms by which the class in a multi-party proceeding can be comprised.

90 This point was helpfully developed by the Law Society in its submissions. We prefer however to leave the question of when and how these tikanga might be relevant to a case in which these issues are squarely raised.

[56] As to the natural justice concerns, they are addressed by ensuring there is provision for adequate notice to members of the class with an explanation of their right to opt out. Provision for adequate notice ensures the least impairment of protected rights.[91] We adopt the approach taken by the United States Supreme Court in *Phillips Petroleum Co v Shutts*, in which the Court rejected a similar argument that due process requires class members to affirmatively opt in.[92]

[57] On the question of notice, we do not agree with Southern Response that the High Court[93] and the Court of Appeal[94] to date have disavowed any role in approving notices in opt in proceedings. In the first of the cases relied on, *Cooper v ANZ Bank New Zealand Ltd*, the High Court did in fact "review and comment" on the plaintiffs' notice, albeit reserving the position as to whether or not this was an appropriate course.[95] What the Court was not prepared to do was to "check the content of the notice for accuracy as to matters such as the funding arrangements" in place.[96] That was seen as something for which the plaintiffs' legal advisers were responsible. In *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, the Court of Appeal's disavowal of a role in "approving" materials was directed to marketing materials and funding arrangements.[97] Finally, in the *Houghton* litigation, the High Court reviewed the draft opt in notice.[98]

[58] Nor do we consider that allowing an opt out procedure is contrary to the rule of law. The observations in the cases relied on by Southern Response as to the limits

---

91 New Zealand Bill of Rights Act, s 5.

92 *Phillips Petroleum Co v Shutts* 472 US 797 (1985) at 811–813. See also *Mobil Oil Australia Pty Ltd v The State of Victoria* [2002] HCA 27, (2002) 211 CLR 1 at [50]–[51] per Gaudron, Gummow and Hayne JJ.

93 *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 3116.

94 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312.

95 *Cooper*, above n 93, at [15].

96 At [16].

97 *Southern Response Unresolved Claims*, above n 94, at [79].

98 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 19 May 2010 at [25]–[73].

on the court's ability to implement "[m]ajor innovations in procedural law"[99] were, as Mr and Mrs Ross submit, made in different contexts.[100]

[59] Southern Response also identifies a risk that under an opt out process, a class member may end up a party to litigation that is run badly, have adverse findings made against the class, and run the risk of a counterclaim. As we shall discuss, we agree that if a counterclaim is a real risk, that may well favour the adoption of an opt in approach.[101]

[60] Next, Southern Response says the Australian experience of class actions shows this is an area that is not without its problems and that experience also highlights the need for safeguards. Southern Response refers in this context, first, to the report of the Australian Law Reform Commission, which recommends some changes to Australia's federal class action regime.[102] Second, Southern Response relies on the recent decision of the High Court of Australia in *BMW Australia Ltd v Brewster* as illustrative of the types of problems that will arise in New Zealand absent a more detailed legislative framework.[103] In that case, by a majority, the Court held that the relevant provision of the Federal Court of Australia Act 1976 (Cth) and Civil Procedure Act (NSW) did not authorise the making of common fund orders at the outset of a representative proceeding. Common fund orders are one of the techniques used to try and respond to what is referred to as the problem of "free riders"; that is, those who take the benefit of the claim without shouldering any of the burden.[104]

---

99 MS Dockray "The inherent jurisdiction to regulate civil proceedings" (1997) 113 LQR 120 at 131. Southern Response relies on this article, which it notes was endorsed by Lord Dyson in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [21] and the majority judgment in *Gillespie v Manitoba (Attorney General)* 2000 MBCA 1, (2000) 145 Man R (2d) 229.

100 *Al Rawi*, above n 99, dealt with whether the court was entitled to order the adoption of a closed material procedure for an ordinary civil claim under its inherent powers; and *Gillespie*, above n 99, addressed whether a judge could make an order directing the continued operation of a court perimeter security program, raising questions about the scope of inherent powers to make orders.

101 See below at [97].

102 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) [ALRC 2018 Report].

103 *BMW*, above n 27.

104 A common fund order was described in *BMW* as providing for "a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered": at [1] per Kiefel CJ, Bell and Keane JJ.

[61] The point to note about the Australian Law Reform Commission's report is that the Commission does not suggest there should be a move away from opt out procedures. As Southern Response accepts, the opt out procedure remains the procedure generally favoured in the class action legislation in Australia, Canada and in the United States. That said, it has to be acknowledged that even with a legislative regime, there will be questions arising about the scope of the court's powers in a particular case, as the decision in *BMW* illustrates, and room for debate about the adequacy of particular safeguards. In that respect, the experience here with an opt out procedure may be of assistance in the law reform exercise.[105]

[62] Mr and Mrs Ross have made an application for a common fund order. That application has not yet been dealt with by the High Court so we make no comment on the availability of that order. Nor do we comment on the availability of the other technique commonly used to ensure costs of litigation funding are distributed across all claims, namely, funding equalisation orders. The latter order allows deductions from the amounts payable on settlement to unfunded class members equating to the funding commission payable if they had entered into the litigation funding agreement.[106]

[63] We turn now to consider some particular practical problems identified by Southern Response.

Workability

Settlement and discontinuance

[64] First, Southern Response raises a number of questions about the court's role concerning the settlement and discontinuance of opt out claims.

[65] Southern Response emphasises that settlements are a key part of representative or class action claims but that the High Court is given no guidance or framework for supervising them. It is said that r 4.24 does not give the High Court a supervisory

---

105 See above at [4].

106 See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [5].

jurisdiction or power over commercial settlements which may involve a compromise of rights. In developing this submission, Southern Response argues that approving a settlement is not an adjudicative function. It is also noted that the jurisdiction underlying r 4.24 is res judicata-based, so it arises from a judgment that is binding on the represented persons. Finally, Southern Response also questions the authority of the representative plaintiff to settle on behalf of the class at stage one in relation to matters that would otherwise be the subject of stage two proceedings. LPF similarly emphasises the commercial nature of the arrangements entered into and says that the size of the task of approving settlements should not be underestimated.

[66] In assessing these submissions, it is helpful to begin by considering the approach in comparable jurisdictions.[107]

The position in Australia and Ontario

[67] Prior to the introduction of the class action regime in the Federal Court of Australia Act (Cth), the Australian Law Reform Commission (whose recommendations are largely reflected in the Act) noted this issue had been approached on an ad hoc basis.[108] In terms of how settlement approval should be dealt with in a class action regime, an earlier discussion paper of the Commission saw courts as having "an important role in checking possible abuses of the procedure by rules which require judicial approval of settlements".[109] The Commission considered that "successful management of a class action … requires an extent of judicial involvement … which goes beyond what has to date been the usual experience of judges in Australia".[110]

---

107 We focus on the position in Australia and in Ontario as the most helpful examples. Because of the limited class action regimes in England and Wales, the approach there is not of assistance. A recommendation by the Civil Justice Council for the introduction of a generic class action regime in the United Kingdom was not adopted: John Sorabji, Michael Napier and Robert Musgrove (eds) *"Improving Access to Justice through Collective Actions": Developing a More Efficient and Effective Procedure for Collective Actions* (Civil Justice Council, November 2008). The Council recommended that both opt out and opt in procedures be available: at 5 (Recommendation 3).

108 ALRC 1988 Report, above n 59, at [63]. See also at [57].

109 Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at [65].

110 At [65].

[68] The provisions relating to court approval of settlements are in substantially similar terms across each of the Australian jurisdictions with statutory class action regimes.[111] The relevant provision in the Federal Court of Australia Act (Cth) is as follows:

> **33V Settlement and discontinuance—representative proceeding**
>
> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

[69] In addition, s 33ZF(1) provides that in any class action proceeding:

> … the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

[70] The key point to note for present purposes is that these sections are silent as to how courts are to implement the requirement of approval. The courts have nonetheless made orders to regulate and supervise a number of matters. Those matters include making "class closure" orders (a mechanism through which members must positively indicate their wish to advance a claim or participate in a potential settlement).[112] Courts have also exercised control, to varying degrees, over communication with group members.[113] Further, s 33X(4) provides that unless the court considers otherwise, an application for approval of a settlement must not be determined unless notice has been given to group members.[114] Again, courts have taken different

---

111 These are contained within the Federal Court of Australia Act (Cth), s 33V; Supreme Court Act (Vic), s 33V; Civil Procedure Act (NSW), s 173; Civil Proceedings Act (Qld), s 103R; and Supreme Court Civil Procedure Act (Tas), s 82. These provisions do not apply to the settlement of claims of individual group members (at least where the settlement does not have the substantive effect of resolving the entire representative proceeding). But a representative party may only settle their individual claim with the leave of the court: Federal Court of Australia Act (Cth), s 33W; Supreme Court Act (Vic), s 33W; Civil Procedure Act (NSW), s 174; Civil Proceedings Act (Qld), s 103S; and Supreme Court Civil Procedure Act (Tas), s 83. See Grave, Adams and Betts, above n 59, at 549.

112 See, for example, *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 (FCA) at 4; and *King v AG Australia Holdings Ltd* [2003] FCA 980 at [7].

113 *King v AG Australia Holdings Ltd* [2002] FCA 872, (2002) 121 FCR 480 at [28]; and *Courtney v Medtel Pty Ltd* [2002] FCA 957, (2002) 122 FCR 168 at [52]. See also Grave, Adams and Betts, above n 59, at 568–570.

114 The equivalent provisions in the state legislation are the Supreme Court Act (Vic), s 33X(4); Civil Procedure Act (NSW), s 175(4); Civil Proceedings Act (Qld), s 103T(4); and Supreme Court Civil Procedure Act (Tas), s 82(3).

approaches where, depending on the circumstances, notices have been ordered to be given via specific mediums or with a heightened level of detail or sometimes dispensed with.[115]

[71] The other point that can be drawn from the Australian experience is that although the legislation does not set out the matters that must be taken into account in approving a settlement, the courts have developed the tests to be applied.[116] The main task is seen as assessing whether the settlement is a fair and reasonable compromise of the claims.[117] The court will also consider whether the settlement is undertaken in the interests of the members as a whole. The court can have regard to a broad range of factors, including the settlement sums, prospects of success and likely outcome of litigation vis-à-vis the proposed settlement, legal and other expert advice, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.[118] The courts have also referred with approval to the "nine-factor test" used by the United States courts in determining whether a settlement is fair, reasonable and adequate, which addresses similar issues.[119]

[72] In terms of the Canadian provinces, the experience in Ontario is a useful one. Until recently, the position there had been the same as that in Australia. That is, the court's approval was required for both discontinuance and settlement, but the section was silent about the criteria or standard to be applied. Section 29(1) of the Class Proceedings Act 1992 (pre-2020 amendment) provided that a class action could only be discontinued "with the approval of the court, on such terms as the court considers appropriate". Further, s 29(2) stated that a settlement was not binding without court

---

115 See the authorities discussed in Grave, Adams and Betts, above n 59, at 598–610.

116 ALRC 2018 Report, above n 102, at [5.4]. In its 1988 Report, the Australian Law Reform Commission recommended that the legislation set out the matters to be taken into account (ALRC 1988 Report, above n 59, at [222] and cl 28(3) of the proposed Federal Court (Grouped Proceedings Bill) 1988 in Appendix A), but in its 2018 Report the Commission did not consider this was necessary: ALRC 2018 Report, above n 102, at [5.7].

117 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5(a)]. *Camilleri* provides a useful summary of the test for settlement approval that has developed: at [5]. See also *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 at [13].

118 *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, (2000) 180 ALR 459 at [19]. See Grave, Adams and Betts, above n 59, at 625–626.

119 *Williams*, above n 118, at [19]. A practice note was later issued setting out similar factors in an attempt to centralise the practical considerations relevant to settlement approval: see Federal Court of Australia "Class Actions Practice Note (GPN-CA)" (December 2019) [Federal Court Practice Note] at [15.5] for the most recent iteration of the practice note, first issued in 2010.

approval. Once the settlement was approved, that bound all class members.[120] Finally, the court was also required to consider whether notice should be given to "protect the interests of any class member … to ensure the fair conduct of the proceeding".[121]

[73] As in Australia, the courts in Ontario determined the standard to be applied in approving a settlement (that it was "fair, reasonable and in the best interests of the class")[122] and the criteria to be considered.[123] As to the criteria, Sharpe J in *Dabbs v Sun Life Assurance Co of Canada* listed a number of factors to be considered in assessing the reasonableness of a settlement.[124] These factors, commonly referred to as the *Dabbs* factors, have remained largely constant since first articulated in *Dabbs*.[125] The criteria include matters such as the likelihood of recovery or of success, the recommendations and experience of counsel, and future expense and likely duration of litigation.[126] Similarly, absent statutory standards, case law developed to guide the approach taken to settlement distributions.[127]

[74] The position in Ontario has changed recently following on from a report, published in July 2019, by the Law Commission of Ontario. The Commission undertook an empirical analysis of class actions in Ontario under the 1992 Act and expressed some concerns about "the adequacy of, and barriers to claiming,

---

120 Class Proceedings Act SO c 6 (as enacted), s 29(3).

121 Sections 19(1) and 29(4). The Act was enacted following a report by the Ontario Law Reform Commission: Ontario Law Reform Commission *Report on Class Actions* (1982) [Ontario Law Commission 1982 Report].

122 This standard has been widely adopted by parties and courts: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms: Final Report* (July 2019) [Ontario Law Commission 2019 Report] at 55.

123 At 54.

124 *Dabbs v Sun Life Assurance Co of Canada* (1998) 40 OR (3d) 429 (CJ). This aspect of Sharpe J's decision was not in focus on appeal to the Court of Appeal for Ontario (*Dabbs v Sun Life Assurance Co of Canada* (1998) 41 OR (3d) 97 (CA)) and leave to appeal to the Supreme Court of Canada was declined (*MacLean v Dabbs* [1998] SCCA No 372).

125 Additional criteria have been articulated subsequently: see Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 93–95.

126 *Nunes v Air Transat AT Inc* (2005) 20 CPC (6th) 93 (ONCJ) at [7(h)]. See also JA Prestage and S Gordon McKee "Class Actions in the Common Law Provinces of Canada" in Christopher Hodges *Multi-Party Actions* (Oxford University Press, New York, 2001) 223 at 232; and Ontario Law Commission 2019 Report, above n 122, at 54. At the time of writing, Prestage and McKee noted that almost all proposed settlements were approved, albeit the court occasionally imposed conditions or indicated approval would follow if identified changes were made: at 232.

127 Section 26(1) of the Class Proceedings Act SO c 6 provided for the court to direct "any means" of distribution considered "appropriate". See also s 26(7) and the summary of the approach in the Ontario Law Commission 2019 Report, above n 122, at 60.

compensation".[128] The Commission saw a need to improve the settlement approval process. The Commission's recommendations were directed primarily at improving the consistency and quality of the information available to the court in approving a settlement.[129] On settlement distribution, the Commission considered class members' interests "can and should be more consistently and sufficiently protected".[130]

[75] Many of the Commission's recommendations were reflected in the Smarter and Stronger Justice Act 2020,[131] which amended the 1992 Act.[132] The new s 27.1(5) of the 1992 Act provides that the court "shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be", which codifies the standard that had developed in the case law. The Act also includes requirements for full disclosure to the court, including material as to the settlement approval criteria, the risks associated with ongoing litigation, the range of possible recoveries, and a plan for distribution.[133] There are also requirements for greater notice.[134] In terms of settlement distribution, the court's supervisory role is codified, with the court tasked with supervising "the administration and implementation of the settlement".[135]

The New Zealand position

[76] Mr and Mrs Ross refer to *Tamaki v Baker* as an example of a case which shows that the court can set aside a notice of discontinuance that prejudices class members and substitute a representative plaintiff.[136] In that case the action brought by the representative plaintiff had sought to restrain the Commissioner of Crown Lands for the relevant district from disposing of land that the plaintiff said belonged to him and other members of the Rangitāne iwi. After a decision of the Privy Council in the

---

128 Ontario Law Commission 2019 Report, above n 122, at 7. See also Kalajdzic, above n 125, at 91.

129 As in the ALRC 2018 Report, above n 102, at [5.7], the Law Commission of Ontario did not think it necessary to enumerate the *Dabbs* factors in the statute: Ontario Law Commission 2019 Report, above n 122, at 55.

130 Ontario Law Commission 2019 Report, above n 122, at 8.

131 Smarter and Stronger Justice Act SO 2020 c 11, sch 4.

132 The Commission did not, however, support the Bill on which the Act was based because of the changes it made to the certification test: Law Commission of Ontario "LCO responds to Bill 161" <www.lco-cdo.org>.

133 Class Proceedings Act SO c 6, s 27.1(7).

134 Section 27.1(8) and (12).

135 Section 27.1(13). See also s 27.1(14)–(16).

136 *Tamaki* (SC), above n 35.

matter, legislation was passed providing for the settlement by the Crown of the claims of those interested in the land on the basis that the plaintiff, Nireaha Tamaki, discontinued the litigation. A notice of discontinuance was filed. Rewanui Apatari applied to have the discontinuance set aside. The Supreme Court granted her application and she was added as a representative plaintiff and given conduct of the suit.[137] These orders were made on the basis she had interests in the land which were recognised in the statement of claim, and the plaintiff had dealt with her on the basis she was a person interested and those interests would be prejudiced by discontinuance. Edwards J said that the predecessor to r 4.24 could not be read as allowing the representative plaintiff "to prejudice or alter the rights of those whom he represents".[138]

[77] Southern Response accepts there is power to substitute one plaintiff for another as occurred in *Tamaki*, but the submission is that approval of a settlement involves a great deal more and this case does not establish the proposition that the courts have the power to approve settlements. Southern Response queries whether there are any cases that establish that power. In contrast, Mr and Mrs Ross rely on a number of authorities for the proposition that New Zealand courts have approved settlements in representative actions brought on a universal basis.[139]

[78] The first two cases reflect their particular contexts where there is specific subject-matter legislation. In *Harding v LDC Finance Ltd (in rec)*, Messrs Eaton and Marshall were appointed as representatives under r 4.24(b) to bring claims on behalf of the depositors in Finance and Investments, a lending partnership.[140] But Messrs

---

137 This was done under r 90 of the Code of Civil Procedure in the Supreme Court. The equivalent provision today is r 4.56(1)(b) of the High Court Rules. See also above at n 35.

138 *Tamaki* (SC), above n 35, at 103.

139 Compare Chamberlain, above n 30, at 153 who says "[t]here is currently no case law to provide a guide to counsel" on the "rules about judicial review of settlement amounts". See also Vicki Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)" (2018) 24 NZBLQ 109 at 112.

140 *Harding v LDC Finance Ltd (in rec)* HC Christchurch CIV-2008-409-1140, 19 November 2009.

Eaton and Marshall were subsequently appointed as trustees.[141] It was in that trustee context that the settlement was approved, relying expressly on the application of s 64 of the Trustee Act 1956,[142] which empowers the court to authorise dealings with the trust property.[143] The plaintiffs in *Ranchhod v Auckland Healthcare Services Ltd (No 2)* had been permitted to bring a claim in a representative capacity in the Employment Court on behalf of some 3,500 resident medical officers.[144] The Employment Court accepted that it had a supervisory role in a representative action, such as the action before it, and made a consent order approving the terms of the parties' settlement agreement. Again, the case appears to reflect the specific context; namely, employment contracts and the Employment Court's equity and good conscience jurisdiction.[145]

[79] The next two cases on which Mr and Mrs Ross rely have more general application. The first of these, *Stirling v Attorney-General*, involved claims against the Crown by Māori owners of a block of Māori land known as Haparangi A4.[146] In the initial stages of the litigation, various representation orders were made, along with an order by consent that settlement or the distribution of proceeds of a successful

---

141 *Eaton v LDC Finance Ltd* [2013] NZHC 1242 [*Eaton* final judgment]. The Court said Messrs Eaton and Marshall were trustees even without any formal appointment (at [25]), but they were formally appointed as trustees under s 51(1) of the Trustee Act 1956 (at [44]). See also *Eaton v LDC Finance Ltd* [2013] NZHC 728. There are some oddities in these proceedings in that representation orders were made on the basis Messrs Eaton and Marshall had "the same interest" in the claim as the depositors: *Harding*, above n 140, at [28], [32] and [48]. However, as noted in the *Eaton* final judgment at [17], neither Mr Eaton nor Mr Marshall were depositors. Mr Eaton's father was a depositor. This suggests that, at least by the time of the final judgment, this was a case about the application of the Trustee Act.

142 The depositors' right to sue Finance and Investments, as a chose in action, was treated as trust property over which the Court could make an order authorising dealings (by approving the settlement compromising the chose in action) under s 64: *Eaton* final judgment, above n 141, at [33] and [50]–[51].

143 The Judge in *Eaton* final judgment, above n 141, said that "[a]pproval" in this context "should be understood as seeking a clearance from the Court that the [trustees' decision] is a prudent one": at [41]. *The Saragossa and Mediterranean Railway Co v Collingham* [1904] AC 159 (HL), on which Mr and Mrs Ross also rely, is similarly confined. The approval in that case was made under the then r 9A of order 16 of the Rules of Supreme Court 1883 (UK), which empowered the court to approve compromises binding absent parties in proceedings concerning the estate of a deceased person, property subject to a trust, or the construction of a written instrument. See also *Collingham v Sloper* [1901] 1 Ch 769 (CA).

144 *Ranchhod v Auckland Healthcare Services Ltd (No 2)* [2001] ERNZ 771 (EmpC).

145 Employment Contracts Act 1991, s 104(3). The original order allowing the plaintiffs to bring the claim in a representative capacity appears to have been on the basis of s 140 of the Employment Contracts Act "by analogy" to what is now r 4.24 of the High Court Rules: *Ranchhod v Auckland Healthcare Services Ltd* EmpC Auckland AEC161/99, 16 December 1999 at 4. The Act has since been repealed.

146 *Stirling v Attorney-General* HC Wellington CP161/96, 27 May 1998.

outcome in the proceedings required the sanction of the Court.[147] When, some years later, the parties reached agreement as to settlement, the Court's approval was sought. In approving the terms of settlement and the distribution proposal for the settlement proceeds, Miller J in the High Court had the benefit of a detailed memorandum from counsel for the plaintiffs recording, amongst other matters, counsel's view that both the settlement and the distribution proposal were appropriate and that the latter was supported by all of the owners. The orders of the High Court approving the settlement and distribution proposal were made upon the grounds, amongst other matters, that the settlement was "appropriate" and the distribution proposal was "a proper basis for allocating the proceeds".[148]

[80] The second of these cases is *Mawson v Auckland Area Health Board*.[149] The case related to claims by resident medical officers for free meals. Again, the High Court in that case approved the settlement between the parties as "fair and reasonable" and approved the method of distribution proposed.[150]

[81] These cases can all be seen as examples of courts exercising an adjudicative power in their protective or supervisory jurisdiction.[151] It can be said that there is, similarly, a need for the exercise of that jurisdiction in the current context. The Supreme Court of Victoria in *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* also saw the court's protective jurisdiction when dealing with infants or persons with disabilities as analogous to the power under s 33V of the Federal Court of Australia Act (Cth) to approve settlements.[152] The Court said this:

> [4] The principles upon which s 33V is based might be said to be those of the protective jurisdiction of the Court, not unlike the principles which lead the Court to require compromises on behalf of infants or persons under a disability to be approved. In a group proceeding, ex hypothesi, there may be

---

147 At 3. The requirement for Court approval appears to have been a condition of settlement.

148 After the hearing we obtained copies of counsel's memorandum, the distribution proposal and the formal orders made by the Court from the High Court registry. The orders made were recorded in orders sealed on 15 October 2004. No judgment was issued.

149 *Mawson v Auckland Area Health Board* HC Auckland CP2018/87, 8 July 1993.

150 After the hearing we obtained copies of the formal orders from the High Court registry.

151 Courts are also called upon to approve settlements involving certain matters where legislation provides court approval is necessary: see for example s 41 of the Financial Markets Authority Act 2011; and s 95 of the Criminal Proceeds (Recovery) Act 2009. See also in the competition law context: *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426 at [11]–[12]; and *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [1] and [18].

152 *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457. See also *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

> persons, in the community who can be affected by such settlement but know nothing of it, despite extensive advertising, et cetera … .

[82] Accordingly, we consider the court has power to approve settlements in cases such as the present and to address the various issues Southern Response raises under this head. It is also clear that the representative plaintiff can settle on behalf of the class.[153] Further, the fact that the court has power to approve settlements means that Southern Response's concern about the ability of a representative plaintiff to bind other claimants to a settlement incorporating stage two matters falls away.[154] In deciding whether to approve a settlement, courts can consider the extent to which the settlement prejudices individual class members. We add that it may be that to meet some of the concerns expressed about the court's role in approving settlements, the court will draw on the assistance of independent experts. An example of this approach is found in the Federal Court of Australia's practice note governing class actions.[155]

[83] Finally, we consider that, as a general rule, the need for court approval of a settlement or discontinuance should be a condition of giving leave under r 4.24(b) to bring the proceedings on an opt out basis.[156]

---

153 See David Foskett *The Law and Practice of Compromise* (4th ed, Sweet & Maxwell, London, 1996) at [4-11].

154 Southern Response relies on *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395. But read in context, *Dillon* does not hold that a representative party's authority to settle is confined to common issues. The point being made there was rather that the representative plaintiff could not settle a class member's individual and distinct claims that were not subject to the class action: see at [50] and [60]. See also Michael Legg and Samuel J Hickey "Finality and Fairness in Australian Class Action Settlements" (2019) 41 Syd LR 185 at 190. Professor Legg and Mr Hickey conclude that in Australia, the court's case management powers under ss 33Q and 33ZF of the Federal Court of Australia Act (Cth) permit a settlement to include matters that touch on stage two issues (the authors call this "Category Two"): at 203 and 212. There is no legislative equivalent in New Zealand, but in *Credit Suisse* the Court envisaged New Zealand courts utilising similar powers to manage representative proceedings under the High Court Rules and the inherent jurisdiction: *Credit Suisse*, above n 49, at [55] and [59] per Elias CJ and Anderson J and [129], [132] and [133] per McGrath, Glazebrook and Arnold JJ.

155 Federal Court Practice Note, above n 119, at [15.5(j)]. In Ontario, one of the relevant factors is the recommendation of neutral parties (if any): see *Nunes*, above n 126, at [7(h)(vi)]. See also Vince Morabito "Lessons from Australia on Class Action Reform in New Zealand" (2018) 24 NZBLQ 178 at 206–207; Vince Morabito "An Australian Perspective on Class Action Settlements" (2006) 69 MLR 347 at 380; and Michael Legg "Class Action Settlements in Australia – The Need For Greater Scrutiny" (2014) 38 MULR 590 at 608 and 611.

156 Where proceedings are brought on an opt in basis, consideration should also be given to making court approval a term of giving leave under r 4.24(b).

Funding issues

[84] Southern Response also raises issues as to the impact of litigation funding. The submission is that, in an opt out situation, it is harder to manage the tension arising from the fact that litigation funders effectively assume control over settlements whilst having different economic incentives from the interests of the class. A number of examples are provided of the ways in which this tension may manifest itself. Southern Response also says that a recent report of the Australian Law Reform Commission and the judgment of the High Court of Australia in *BMW* suggest that the Court of Appeal's confidence the High Court had the "tools to address any real unfairness in this context" is misplaced.[157]

[85] Questions about the interrelationship between the interests of members of the class and litigation funders will arise under other arrangements. There may be differences of degree in terms of their management between an opt in or opt out approach, but not to such an extent as to automatically exclude proceeding on an opt out basis. The ability of the court to supervise settlements and provision for notice, as we have discussed, go some of the way to meet these types of concerns. In addition, as the Court of Appeal said in this case, the court has a role in ensuring that the arrangements with the litigation funder do not amount to an abuse of process. In *Waterhouse v Contractors Bonding Ltd*, this Court said that a stay on abuse of process grounds should only be made for abuse of process "on traditional grounds or where the funding arrangement effectively constitutes" an impermissible assignment of a cause of action.[158]

[86] We accept that it seems likely in practical terms that the issue of "free riders" will be more problematic in an opt out proceeding. It may be that the court will have to play a greater role in representative proceedings than is currently the case in relation to these issues. While the Court in *Waterhouse* said it was not the courts' role "to act as general regulators of litigation funding arrangements",[159] the Court left open the

---

157 CA judgment, above n 5, at [110].

158 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [76(e)]. See also at [56]–[57] and [61].

159 At [28]. Nor was it the courts' role to assess the fairness of any bargain between a funder and a plaintiff: at [48] and [76(f)].

scope of the courts' supervisory role for litigation funding arrangements in relation to representative proceedings.[160] That said, we consider it would be premature to say there is an expectation that any litigation funding agreement should routinely be provided to the court as part of an application under r 4.24(b), as the Law Society submits.[161]

Supervision more generally

[87] We have addressed specific problems identified by Southern Response in relation to the court's supervision; namely, notices to class members, supervising settlement, and the impact of funding arrangements. Other issues identified arise under an opt in procedure as under an opt out procedure. For example, Southern Response and LPF refer to the difficulties created by the potential for competing class actions on behalf of the same class. Both Southern Response and LPF also refer to the difficulties for a defendant with pressure for an early settlement in the situation where the extent of the class is not known.

[88] The potential for a "race to the court" is an issue in relation to opt in claims as well. The Law Society in its submissions gave as an example two competing opt in proceedings against the directors of the failed CBL Corporation Ltd, each funded by different litigation funders.[162] Further, as the Law Society also notes, managing competing claims has created difficulties even in those jurisdictions with detailed statutory regimes.[163] For example, in Australia's federal jurisdiction, absent a statutory mechanism to deal with competing class actions, the Federal Court has used

---

160 At [28], [28], n 29 and [76(f)], n 92.

161 The Court in *Waterhouse* said litigation funding agreements should be disclosed "where an application is made to which the terms of the agreement could be relevant": at [73]. See also [75] and [76(c)]–[76(d)].

162 See Law Commission "Competing class actions as a 'beauty parade'" (17 August 2020) <www.lawcom.govt.nz>. See also CBL Class Action "FAQ's" <www.cblclassaction.co.nz>; and Omni Bridgeway "CBL Corporation Ltd Shareholder Class Action" <www.portal.omnibridgeway.com>.

163 The Australian statutes do not provide mechanisms for managing competing class proceedings: ALRC 2018 Report, above n 102, at [4.58]. In Ontario, a "carriage motion" is used to decide which lawyer will carry the proceeding. A successful carriage motion stays all other class actions concerning the same legal claim: see Class Proceedings Act SO c 6, s 13.1. The current s 13.1, inserted into the Ontario legislation in the 2020 amendment, largely reflects recommendations from the Ontario Law Commission 2019 Report, above n 122, at 29. The Commission saw the system for determining carriage immediately prior to the amendment as "inefficient and unpredictable": at 23.

its case management powers to deal with these issues.[164] In New Zealand the courts can draw on the ability to provide for notice under r 4.24(b), the ability to consolidate proceedings under r 10.12, and the ability to stay proceedings under r 15.1. Finally, r 1.6 addresses the situation where the High Court Rules do not make provision for a case. In those situations, r 1.6(2) provides that the court is to proceed in a manner that the court considers is "best calculated to promote the objective" of the Rules; namely, to secure the just, speedy and inexpensive determination of any proceeding. The court in exercising its supervisory powers can also draw r 1.6(2) in aid.

[89] In terms of the court's supervision of these matters more generally, we accept that absent a more detailed regulatory framework, there will inevitably be some uncertainty as issues proceed through the courts. LPF submits in this respect that given the small size of the jurisdiction, the cost of resolving such matters through litigation will be disproportionate. We accept it is not an ideal situation for either plaintiffs or defendants.[165] But a number of these issues will need resolution whether or not the status quo is retained and, so long as the concern not to work injustice is kept in mind, r 4.24 should continue to be interpreted to meet modern requirements. The question of proportionality of cost to the size of the claim and burden on the defendant will be relevant in terms of the objective of the Rules; namely, to secure the just, speedy and inexpensive determination of proceedings. Further, opt out orders have advantages that mean those orders should not simply be seen as off the table pending the law reform exercise. The Court of Appeal was correct to conclude that given these advantages, opt out orders should be made in appropriate cases.[166] We turn then to consider the approach to be taken to the discretion to make such orders.

Some guidance as to the approach to the discretion

[90] Mr and Mrs Ross put forward some suggested guidelines as to the approach to be taken to the discretion to order that proceedings be advanced on an opt out rather than an opt in basis. As these submissions were made for the first time in submissions

---

164 ALRC 2018 Report, above n 102, at [4.58]. The Australian Law Reform Commission recommended amendment to the Federal Court of Australia Act (Cth) to give the court an express statutory power, but noted this power would simply "augment" existing case management powers: at [4.63]–[4.64].

165 A point made by Andrew Beck, above n 36, at 359 and 369.

166 The advantages are summarised in the CA judgment, above n 5, at [98]–[99] and [101].

filed at the hearing, we gave the parties and the interveners the opportunity to provide written submissions in response after the hearing.

Submissions on the proposed guidelines

[91] Mr and Mrs Ross advocated that the starting point should be the approach sought by the party applying for the direction under r 4.24. They submit a departure from that approach should only occur where the applicant's preferred approach is clearly inappropriate. The submissions then set out some factors that, if present, would favour a particular approach as we shall discuss.

[92] On the basis opt out orders were available, Southern Response submitted the guidelines proposed by Mr and Mrs Ross were not sufficiently clear and, in any event, were too prescriptive. It was said that the Court should be slow to prescribe guidelines that would fetter the High Court's discretion or favour one approach over another. At best, the Court might list factors that could be relevant to the exercise of the discretion under r 4.24 but without attempting to weigh those factors.

[93] The Law Society and the Bar Association, broadly, supported the approach advanced by Mr and Mrs Ross, albeit with some qualifications. We address the key qualifications later. LPF considered the approach advanced by Mr and Mrs Ross was so general and/or lacking in precision as to be unhelpful. For example, on the question of class size, the submission on behalf of Mr and Mrs Ross was that a "large" class favoured an opt out approach and that a "small" class was a neutral factor. LPF, like Southern Response, queried how these epithets were to be applied.

The relevant principles

[94] We agree with Southern Response that there is a limit to how far this Court can go at the present time, especially absent any legislative framework, in providing guidance as to the exercise of the discretion under r 4.24. As we have indicated, there are a number of procedural and other matters that will simply have to be worked through as the issues arise in a particular case. That said, we consider we can make the following comments, which are intended to assist in the exercise of the discretion.

[95] First, generally, the court should adopt the procedure sought by the applicant unless there is good reason to do otherwise. We see no basis in policy or practical terms for not adopting that course so long as the court turns its mind to all of the relevant factors. But it is not necessary to characterise the situations in which the court may depart from an opt out order as rare, as Mr and Mrs Ross submit. Rather, it is a question of considering the relevant factors in light of what will best meet the permissible objectives of the representative action in the particular case.[167] We consider that approach meets the Law Society's concern that requiring claims to proceed on an opt out basis may have the unintended result of creating a barrier to justice because some litigation funders may be less willing to fund open class claims absent a legislative framework that deals with funding equalisation or common fund orders.

[96] LPF asks how this starting point fits with the situation where the applicant files stating a preference for an opt in approach, and subsequently another plaintiff files a competing claim on an opt out basis. As we have noted, there are ways of dealing with the situation of competing class actions and the court will simply have to address that situation as it arises.

[97] Second, in terms of departures from this starting point, where there is a real prospect some class members may end up worse off or adversely affected by the proceeding, that favours an opt in approach.[168] Cases where there is a counterclaim or the potential for one to emerge would fall into this category.

[98] Given the objectives of a representative proceeding, class size will have some relevance. In particular, an opt in approach may be the preferable option where the class is small. By that we mean where the number of members in the class is small relative to other claims and there is a natural community of interest, or, as the Court of Appeal put it, a "pre-existing connection".[169] The Bar Association queries how helpful it is to rely on an assessment of class size, as the real question is the economic viability of the claim for an individual taking into account that member's economic

---

167 Considering which options will best meet the objectives of r 4.24 will capture concerns arising from, for example, vulnerabilities of members of a particular class.

168 The same point is made in *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465 (SC) at 473.

169 CA judgment, above n 5, at [108].

situation. The Bar Association notes that the court may not have information about the financial means of the class members. That is true, but where the class is small and there is a natural community of interest, these factors are likely to make contacting class members easy, which goes some way to address the objectives of the representative action. That said, class size will not necessarily be determinative.

[99] We agree with the Bar Association, contrary to the submission for Mr and Mrs Ross, that participation at stage two may be a relevant consideration warranting a departure from an opt out approach if persisting with an opt out approach at that point lessens the benefits of the representative proceeding, or increases any unfairness or prejudice.

[100] Third, as Mr and Mrs Ross submit, a universal approach may be appropriate where the only relief sought is declaratory or injunctive and where the outcome will affect all class members identically.[170] That is because in those cases it may be impractical, and indeed sometimes almost impossible, to provide the necessary notice for either an opt in or opt out approach.[171] Mr and Mrs Ross give the example of *Duke of Bedford*, in which case sending opt in or opt out notices to all "growers of fruit, flowers, vegetables, roots or herbs" would be difficult and pointless.[172] A similar problem would have arisen in *Ankers v Attorney-General*,[173] a case cited by Anthony Wicks as an example of a universal proceeding, in which the plaintiff who was successful in a judicial review action against the Department of Social Welfare was authorised to claim relief on behalf of herself and 65,000 others affected by the same error of law.[174] In these types of claims, opt in or opt out orders will be neither necessary nor conducive to a speedy and inexpensive determination.

---

170 LPF queries the need to identify the universal approach as a distinct category of representative proceeding. But a universal approach is anticipated by r 4.24's reference to proceedings brought on behalf of "all persons" with the same interest.

171 See Mulheron, above n 41, at 31–32. Professor Mulheron also refers to the Ontario Law Commission 1982 Report, above n 121, vol 2 at 472–473 and 472, n 23 where the Commission cited "Developments in the Law – Class Actions" (1976) 89 Harv L Rev 1318 at 1487: "the grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment".

172 *Duke of Bedford*, above n 37.

173 *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC).

174 Wicks, above n 48, at 81.

[101] Finally, applications under r 4.24 should include proposed conditions as to the court's supervision of settlement and discontinuance. We agree with the Law Society that settlement or discontinuance may operate unfairly to either absent plaintiffs in an opt out claim or to a subset of plaintiffs under either option. As we have noted, the Court of Appeal in this case added a requirement that the plaintiffs seek the court's leave to settle the claim or to discontinue it. As we have indicated, we endorse that approach.[175]

This case

Court of Appeal judgment

[102] In determining that an opt out order should be made in this case, the Court of Appeal said that the factors favouring an opt out approach were present here. Those factors were the large size of the class (some 3,000 members) and the fact that many more of that number would have their claims heard and determined by the court and their rights effectively preserved until determined if an opt out order was made. The Court also considered there were "compelling access to justice factors" pointing towards an opt out approach.[176]

[103] The Court could not see any factors peculiar to the case that would justify an opt in order. This was not a claim by a small group where early identification of the members was feasible and offered significant efficiency gains. Nor was there a disadvantage to a class member from being included as a represented claimant during stage one. Class members would mostly be individual homeowners rather than large and sophisticated commercial entities. The "social, economic and psychological factors" causing individuals not to take active steps to protect their own interests were seen as likely relevant in this claim.[177]

[104] In terms of potential disadvantage to claimants, the Court saw the prospect of any counterclaim as "somewhat speculative".[178] But in any event, that prospect did

---

175 Above at [83].
176 CA judgment, above n 5, at [112].
177 At [113].
178 At [115].

not arise at stage one. No other disadvantage for class members had been identified by Southern Response.

[105] Finally, the Court considered that the case for an opt out approach was stronger than in many other representative proceedings because of the fact claimants would need to opt in at stage two if they wanted to obtain compensation. An election to opt in would be needed if and only if the claimants had succeeded. At that point the relevant advantages and disadvantages of pursuing the claim would be clarified and more apparent.

Submissions

[106] Southern Response submits there should be no opt out order at stage one in circumstances where the class members are sufficiently well placed to make decisions and will need to opt in at stage two, in any event, to vindicate their individual claims. Southern Response also challenged the Court of Appeal's assessment of the balance between stages one and two particularly where, as Mr Weston QC put it, the decision on the same insurance policies in the recently-determined *Southern Response Earthquake Services Ltd v Dodds* is a "reasonable proxy" for the stage one decision.[179] Finally, it is submitted that with an opt out procedure, there may be pressure to settle at stage one in a situation where Southern Response will not know the extent of its real exposure.

[107] Mr and Mrs Ross on the other hand say that an opt out approach will best protect access to justice by class members in this case and there is no good reason to use an opt in approach instead.

Our assessment

[108] For the reasons given by the Court of Appeal, we agree that an opt out order is appropriate in this case. That is the course preferred by the applicant and nothing is advanced by Southern Response to satisfy us that there will be any real disadvantage to members of the class. While members of the class will need to vindicate their

---

[179] *Dodds*, above n 12. Leave to appeal to the Supreme Court has not been sought.

individual claims at stage two, they will be able to do so on a better informed basis. Finally, given the nature of the claims and the fact that the class members will have been policyholders with Southern Response, it is difficult to see any force in Southern Response's submission about a lack of awareness of the possible parameters of liability.

Result

[109] For these reasons, the Court of Appeal was correct to allow the appeal from the High Court decision. We accordingly dismiss Southern Response's appeal from the Court of Appeal decision.

[110] Costs should follow the event. We make an order that Southern Response must pay Mr and Mrs Ross costs of $35,000 plus usual disbursements. We certify for second counsel.

Solicitors:
Buddle Findlay, Christchurch for Appellant
GCA Lawyers, Christchurch for Respondents
B A Jones, New Zealand Law Society, Wellington for New Zealand Law Society as Intervener
Tompkins Wake, Auckland for LPF Group Ltd as Intervener