IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000361
[2021] NZHC 2451

BETWEEN	BRENDAN MILES ROSS and COLLEEN ANNE ROSS Plaintiffs
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Defendant

Hearing: 15 February 2021

Appearances: P G Skelton QC and C B Pearce for Plaintiffs (Respondents)
T C Weston QC, K M Paterson and E D Peers for Defendant (Applicant)

Judgment: 23 February 2021

Reasons: 20 September 2021

JUDGMENT OF OSBORNE J
(on defendant's communications)
[Reasons]

This judgment was delivered by me on 20 September 2021 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] In this proceeding Brendan and Colleen Ross,[1] bring (by leave under r 4.24 High Court Rules 2016) a representative claim against Southern Response Earthquake Services Ltd (Southern Response).[2] An issue arose as to communications which Southern Response proposed to initiate with individual potential members of the class represented by the Rosses.

[2] I heard Southern Response's proposed application for directions which would permit it and its legal advisors to communicate directly with individual potential class members in relation to the settlement of their claims.

[3] On 23 February 2021, I issued a Result Judgment by which the directions sought by the defendant were refused.[3]

[4] I recorded that a full reasons judgment would follow. This is that judgment.

Mr and Mrs Ross's substantive claim

[5] Mr and Mrs Ross's claim relates to a settlement agreement they entered into with Southern Response in relation to their insurance claim for damage to their house caused in the Canterbury Earthquake Sequence. They say that Southern Response provided them with incomplete or misrepresented information about the cost of remedying earthquake damage to their home (remedial costs). As a result they settled on a less favourable basis than they otherwise would have.

The litigation to date

[6] Mr and Mrs Ross commenced this proceeding on 25 May 2018. To this point, it remained the subject of interlocutory issues, including this issue resolved by the

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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 insured with AMI Insurance Ltd. AMI could not meet its obligations to policyholders after the second major earthquake in Canterbury on 22 February 2011. AMI's name was changed to Southern Response Earthquake Services Ltd, now a Crown-owned company. It deals with claims by AMI customers for damage resulting from the Canterbury earthquakes.

3 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 [Result Judgment].

Result Judgment. Three further interlocutory applications were heard on 12–14 April 2021, and are the subject of separate judgments being delivered today.[4]

[7] Before this present group of interlocutory proceedings, the two-and-a-half year period following commencement of the proceeding was taken up with interlocutory issues over the basis upon which Mr and Mrs Ross would have leave to pursue a representative claim.

[8] Initially (13 December 2018), leave to pursue a representative claim was granted by this Court on an opt in basis.[5] The Court of Appeal (on 16 September 2019) allowed Mr and Mrs Ross's appeal, substituting an opt out procedure for the opt in procedure.[6] The Supreme Court (on 17 November 2020) dismissed Southern Response's appeal against the opt out procedure.[7]

[9] During the period of the appeals, the hearings of other interlocutory applications of Mr and Mrs Ross were necessarily deferred. In their original interlocutory application to bring this proceeding as a representative action, Mr and Mrs Ross had also sought ancillary orders. The first were notification orders, that is orders settling the form and details relating to an opt out notice. The second was a common fund order (that is, an order entitling Mr and Mrs Ross to be reimbursed from any resolution sum (received from Southern Response) their costs and expenses incurred in the proceeding).

[10] The (amended) application for notification orders was one of the applications heard in April 2021. The parties have agreed that it remains premature to allocate a

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4 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452; *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453; and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454.

5 *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288 [*Ross HC*].

6 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 [*Ross CA*].

7 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 [*Ross SC*].

hearing date for the application for the common fund order. The remaining two applications heard in April 2021 were:

(a) Southern Response's (amended) application for directions as to offering a settlement package; and

(b) the Rosses' application for an order setting aside part of any settlement funds received through settlements reached outside this representative proceeding between Southern Response and any class members.

Both of these applications having been filed since the Result Judgment.

Progress of other litigation and claims

[11] In 2018, a Mr and Mrs Dodds commenced their own proceeding against Southern Response (the *Dodds* litigation). The Dodds' claim was based on similar circumstances to those of the Rosses. The Dodds did not bring their claim representatively. Following a trial in March 2019, the Dodds obtained a High Court judgment largely in line with their claim.[8] Southern Response unsuccessfully (except as to a relatively minor item of damages) appealed the High Court judgment, the Court of Appeal delivering its judgment in September 2020.[9] Southern Response has not appealed the Court of Appeal judgment and has in fact paid the judgment sum (as determined by the Court of Appeal) to Mr and Mrs Dodds.

[12] Southern Response's General Manager, Casey Hurren, has deposed that Southern Response has settled claims with a group of around 20 policyholders represented by another lawyer, Grant Shand. Each of those policyholders had commenced proceedings on a basis similar to that of the Dodds. Those claims were settled in 2019.

[13] In addition to such claims already settled, there is a significant number of unsettled claims where the claimants are represented by lawyers other than GCA

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8 *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016, [2019] 3 NZLR 826.
9 *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395, [2020] 3 NZLR 383.

Lawyers (Mr and Mrs Ross's lawyers) or non-legally qualified representatives. In terms of Mr Hurren's evidence, that includes:

(a) five sets of plaintiffs with existing District Court proceedings which were stayed, pending the outcome of the Dodds' appeal, all represented by Grant Shand;

(b) two other sets of clients, without existing proceedings, also represented by Grant Shand;

(c) claimants representing themselves in an existing claim in the Canterbury Earthquake Insurance Tribunal (CEIT), with the claim stayed pending the outcome of the Dodds' Court of Appeal hearing and the Supreme Court hearing in relation to Mr and Mrs Ross;

(d) a claimant with an existing claim in the CEIT, represented by Anthony Harper;

(e) a number of other claimants also represented by Anthony Harper; and

(f) a claimant who has sought to engage directly as to settlement with Southern Response through a representative, David Townshend (not a lawyer).

[14] Mr Hurren further deposes that Southern Response has had unsolicited contact from around 30 other policyholders who consider themselves to be in the same position as Mr and Mrs Dodds.

[15] Mr Hurren refers also to correspondence received from Canterbury Legal, representing Claims Resolution Service (2015) Ltd (CRS). CRS's intention is to "offer its services as an advocate for and potential funder" of claimants within the class represented by the Rosses.

Southern Response's application for directions

[16] By its present application, Southern Response sought directions that:

(a) Southern Response, including its employees, officers and directors, be at liberty to communicate, engage, negotiate, and/or settle claims directly with individual potential class members in this proceeding; and

(b) Southern Response's legal advisors be at liberty to communicate directly with individual potential class members in this proceeding, except those potential class members that have retained GCA Lawyers.

[17] In support of its application, Southern Response relied upon the following matters covered by Mr Hurren's evidence or matters of record:

(a) potential members of the class in the proceeding held a policy of insurance with Southern Response and settled their claims for earthquake damage with Southern Response prior to October 2014;

(b) in *Southern Response Earthquake Services Ltd v Ross* (*Ross SC*) the Supreme Court determined that this proceeding will proceed on an opt out basis and that this Court has jurisdiction to supervise representative proceedings so conducted;[10]

(c) there is, pending for hearing, the application of Mr and Mrs Ross for orders settling the form of an opt out notice to be given to class members (since heard in April 2021);

(d) through the *Dodds* litigation, it has been determined that Southern Response was liable to the Dodds for misrepresentation in relation to undisclosed remedial cost allowances;

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[10] *Ross SC*, above n 7.

(e) the circumstances of many policyholders of Southern Response that cash settled prior to October 2014, including those of Mr and Mrs Ross, are materially similar to those of Mr and Mrs Dodds;

(f) in September 2019, the Crown (as Southern Response's shareholder) announced that (subject to obtaining clarity by way of appeal to the Court of Appeal), Southern Response would respond to other policyholders who are in similar situations as Mr and Mrs Dodds with a proactive solution based on the outcome of the *Dodds* litigation;

(g) following the Court of Appeal judgment in *Dodds*, Southern Response (with the Crown's support) now wishes to advertise and communicate with policyholders affected by the *Dodds* decisions with a view to putting affected policyholders who cash settled before October 2014 effectively in the same position as those who settled after that date, with additional allowances (the Package);

(h) policyholders eligible to apply to participate in the Package include (but are not limited to) potential class members in this proceeding;

(i) Mr and Mrs Ross, and GCA Lawyers as their legal representatives, have told Southern Response (through its solicitors) that neither Southern Response nor Southern Response's legal advisors should communicate directly with potential class members;

(j) Southern Response understands that up to 300 potential class members have entered into formal terms of engagement with GCA Lawyers. In relation to those potential class members who have retained GCA Lawyers, Southern Response intended to engage with GCA Lawyers and conduct any settlement negotiations with them;

(k) Southern Response has had direct contact from other policyholders in relation to settlement and is involved in dealings with legal and other

representatives of other policyholders (some with filed proceedings and others with proceedings not filed);

(l) potential class members in this proceeding have not yet had an opportunity to opt out of the proceeding and therefore may not ultimately become class members in the proceeding — Southern Response will require any policyholder who enters into a settlement under the Package to opt out of this proceeding;

(m) GCA Lawyers does not have a solicitor/client relationship with potential class members where those persons have not retained GCA Lawyers. Southern Response rejects a contention of GCA Lawyers to the effect that GCA Lawyers represents all potential class members in terms of r 10.4 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Conduct and Client Care Rules);

(n) even if a solicitor/client relationship existed between GCA Lawyers and potential class members who have not retained GCA Lawyers (which is denied), Southern Response is not legally restricted from itself communicating, engaging and settling with potential class members who have not retained GCA Lawyers;

(o) Southern Response is ready to proceed with receiving and considering applications for the Package; and

(p) it is in the interests of justice generally that Southern Response be permitted to communicate directly with and settle individual claims of policyholders.

[18] In its notice of application, Southern Response recorded that it does not seek the Court's approval in relation to the Package, as that package will be offered to individual policyholders. Southern Response explained that it does not seek to settle this proceeding nor does the Package affect the rights of potential class members who do not wish to participate in the Package.

The opposition of Mr and Mrs Ross

[19] Mr and Mrs Ross opposed both directions sought by Southern Response. Mr and Mrs Ross identified the following grounds of opposition:

(a) the proceeding is brought on an opt out basis;

(b) the effect of the orders as amended by the Court of Appeal is that all members of the class are currently represented by Mr and Mrs Ross in this proceeding, but they may opt out of the proceeding if they wish;

(c) the reference by Southern Response to "*potential class members*" is inapposite given that Mr and Mrs Ross have obtained a court order granting leave to bring the claim representatively;

(d) GCA Lawyers, as solicitors for Mr and Mrs Ross as representative plaintiffs, represent all class members and are required to act in the best interests of the class as a whole;

(e) communication between Southern Response's legal advisors and class members would be in breach of the "no contact" rule in the Conduct and Client Care Rules (r 10.4);

(f) Southern Response, in its arguments in the Supreme Court, sought clear guidance as to how the High Court should supervise aspects of the proceeding in the event it were to be on an opt out basis and the Supreme Court granted such clear guidance. This guidance indicated that the High Court should be closely involved in supervising the conduct and resolution of the proceeding;

(g) Southern Response now seeks to set up a process that is entirely contrary to the Supreme Court's guidance;

(h) the class members notice, which will flow out of the application of Mr and Mrs Ross for notification orders, heard in April 2021, is the

proper medium for providing class members with information about the proceeding. Class members will therefore be able to make informed decisions whether to participate or opt out — the notification will be neutral, impartial, and approved by this Court;

(i) the communications proposed by Southern Response, on the other hand, are one-sided and unsupervised and carry the potential to be misleading and/or coercive. These communications should therefore not be permitted during the opt out period when class members are required to make their opt out decision;

(j) Southern Response's proposal would create a serious risk of injustice in that:

(i) the Package appears to be designed primarily to bypass the High Court's supervisory role in relation to notices and settlements;

(ii) the Package will undermine the representative proceeding and therefore the goals of representative proceedings;

(iii) Southern Response's intended communications will likely create confusion among class members if they occur at or around the same time as the court-approved notice; and

(iv) the Package is likely to create inequity between different groups of class members, the avoidance of which is one of the key reasons for court supervision of settlements.

(k) the Southern Response Package, if put into effect, would amount to an abuse of the Court's processes.

Southern Response's intended approach

Development of the Package through the Dodds litigation

[20] Mr Hurren deposes that Southern Response viewed the *Dodds* litigation as "something of a test case". Southern Response has paid the full legal costs incurred by Mr and Mrs Dodds in the High Court and the Court of Appeal.

[21] Mr Hurren refers to Southern Response's decision (in September 2019) to appeal the High Court decision in *Dodds*. The Crown at the time made an announcement that it would look for a proactive solution to the issues arising out of the *Dodds* litigation. It stated its intention to use the clarity that would come out of this litigation to enable the Crown to work with Southern Response to provide a soundly based and proactive solution to affected people. Southern Response made a similar statement at the time.

[22] Following the release of the Court of Appeal judgment in the *Dodds* litigation, the Crown and Southern Response both reiterated their intentions, indicating that they were working closely to formulate their response to other affected policyholders.

[23] Mr Hurren deposes that out of that process Southern Response has now reached a point where it is able to offer its Package to policyholders in a similar position to Mr and Mrs Dodds. The Package is to be implemented by Southern Response but with the Crown overseeing implementation and delivery of the Package through an Independent Oversight Committee.

[24] Mr Hurren refers to a 10 month process through which Southern Response has collated every file for over-cap claims that could raise the same issues as involved in the *Dodds* litigation. It is intended that any people who believe they fall within the parameters of the Package would apply to Southern Response through its website, whereupon a preliminary assessment would be carried out to determine eligibility. If eligibility is established, each insurance claim file would then be reviewed in terms of the Package.

Package principles

[25] Mr Hurren explains the purpose of the Package in this way:

> The overarching objective of the Package is to put policyholders who cash settled prior to 1 October 2014 (without receiving professional fees and contingency) in the same position as policyholders who settled immediately after that date and therefore did receive those allowances. It is Southern Response's intention effectively to pay eligible policyholders the same cost components that the Dodds received.

[26] Mr Hurren refers to a number of additional extensions to eligibility for those who held a Premier Policy with Southern Response.

[27] Mr Hurren identifies in more detail the components involved in any settlement under the Package. He confirms that payments under the Package will include interest and an allowance for the costs of policyholders obtaining independent legal advice about the Package.

[28] It would be a condition of settlement within the Package that policyholders opt out of this proceeding (and any similar proceeding) or authorise Southern Response to do so on their behalf.

[29] Mr Hurren deposes the timing of the Package was driven by the Court of Appeal decision in the *Dodds* litigation and was unrelated to the release of the Supreme Court's decision in this (the Rosses') proceeding. Subject to Crown support, Southern Response intended to roll out the Package whether or not the Supreme Court had released its decision and, if it had, regardless of whether the decision required an opt in or opt out procedure.

The Rosses' opposition to Southern Response's communication with policyholders

[30] Mr Hurren exhibited correspondence between the Rosses' solicitors and Southern Response's solicitors which had been initiated by GCA Lawyers in October 2020. GCA Lawyers opposed any step by Southern Response to directly communicate with class members, stating:

> As a Crown entity, Southern Response should not attempt to divide the class, nor undermine the Rosses' role as Court-appointed representatives. Nor should Southern Response subvert what should be a neutral notification process, overseen by the Court,[11] by communicating directly with class members who are currently represented by the Rosses. Any attempt to do these things will be strongly opposed.

[31] In subsequent correspondence GCA Lawyers asserted that Southern Response did not need and should not try to negotiate individual settlements directly with policyholders. GCA Lawyers asserted that all class members are "persons represented by a lawyer" because the policyholders in the class are represented by the Rosses who are in turn represented by GCA Lawyers. GCA Lawyers reiterated the proposition that Southern Response's lawyers should not communicate directly with class members.

[32] Southern Response's solicitors, Buddle Findlay, rejected the contentions of GCA Lawyers.

[33] Southern Response then chose to bring this interlocutory application. As Mr Hurren explained, Southern Response (faced with the correspondence from GCA Lawyers and a lack of procedural rules as to how opt out proceedings should be conducted on a day-to-day basis) considered it prudent to seek directions from the Court as to whether it was entitled to proceed to communicate directly with affected policyholders.

Submissions for Southern Response

Introduction

[34] For Southern Response, Mr Weston QC explained that Southern Response asserts a right to communicate directly with policyholders and to offer individual settlement payments. Southern Response therefore brings the present application out of an abundance of caution in the light of objections made by the Rosses.

[35] In bringing the present application Southern Response asserts that court approval is not required of the substance of the (settlement) Package — Southern Response accordingly does not seek such approval. Southern Response asserts that

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[11] GCA Lawyers referred to the Court of Appeal's judgment in *Ross CA*, above n 6, at [103].

any settlement by individuals in terms of the Package will not resolve the plaintiffs' representative proceeding.

[36] Southern Response, in applying for these directions, invokes the High Court's jurisdiction to supervise representative proceedings conducted on an opt out basis. Mr Weston submitted that by this application Southern Response is in essence asking the Court to define the parameters of the representative proceeding in order to confirm that Southern Response is not precluded from communicating with individual class members in relation to the Package.

Entitlement to deal directly with those separately represented or self-represented

[37] Mr Weston identified the starting point of Southern Response's legal entitlements as lying in the New Zealand Bill of Rights Act 1990 (NZBORA) and in particular the freedoms of expression and association recognised therein.[12] Also relied upon is the right of freedom of contract (including to enter into settlement agreements).[13]

[38] Mr Weston invited the Court to reject any outcome which provides Mr and Mrs Ross or their lawyers with an exclusive right or monopoly over the pursuit of claims, communications or dealings with group members. Taking the example of class members already represented by and pursuing claims through lawyers other than GCA Lawyers, Mr Weston asserted that Southern Response (and its lawyers) must be entitled to communicate and deal directly with those representatives. A similar entitlement should apply in relation to those policyholders who have contacted Southern Response of their own volition or who wish to deal with Southern Response directly.

[39] Mr Weston referred to the judgment of the Federal Court of Australia in *Capic v Ford Motor Co of Australia Ltd* (*Capic v Ford*).[14] In that case Ford had not actively sought out group members to persuade them to surrender their rights as group members, but had instead received complaints from customers. Perram J accepted the

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[12] New Zealand Bill of Rights Act 1990, ss 14 and 17.
[13] *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [66]–[74].
[14] *Capic v Ford Motor Co of Australia Ltd* [2016] FCA 1020 [*Capic v Ford*].

defendant's submission that Ford, as the defendant, was entitled to deal with such complaints. He rejected the suggestion that there was anything exploitative in that situation when, as a collateral aspect of Ford's taking up the opportunity, Ford required the particular group member to settle their rights at the same time.[15]

[40] Mr Weston submitted that the need to uphold Southern Response's entitlement to have such dealings is heightened when class members have not yet had the opportunity to opt out of this proceeding and remain only potential or putative class members.

Relationship between the plaintiffs, the plaintiffs' lawyers and the class members

[41] The background to Mr Weston's submissions as to the relationship between Mr and Mrs Ross, their lawyers and the other class members lay in GCA Lawyers' stated position in correspondence. That is both that Mr and Mrs Ross are the duly recognised representative plaintiffs for the full class of approximately 3000 policyholders, and (because GCA Lawyers act for Mr and Mrs Ross) all class members are "represented by a lawyer" for the purpose of the Conduct and Client Care Rules.

[42] Southern Response accepts that the 300 or so class members who have signed contracts of retainer with GCA Lawyers (and have entered into funding arrangements with the litigation funder) are represented by GCA Lawyers in this proceeding. In relation to its presentation of the Package, Southern Response has agreed not to communicate directly with those 300 class members but to do so through GCA Lawyers.[16]

[43] Mr and Mrs Ross by their notice of opposition first relied upon r 4.24 High Court Rules (the representative proceeding leave rule). Mr Weston observed that leave granted under r 4.24 of itself neither constitutes potential class members as parties to the proceeding nor appoints GCA Lawyers as their counsel for the representative proceeding. The leave granted GCA Lawyers no particular status. Mr Weston

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15 At [26]–[30].

16 Southern Response, in making this concession, maintains that Southern Response (as against Southern Response's lawyers) would strictly have been entitled to communicate directly with all class members, r 10.4 of the Conduct and Client Care Rules not preventing direct party-to-party contact.

submitted that neither the Rosses nor their counsel have exclusive rights to group members or a monopoly in pursuing claims. Mr Weston referred to submissions made by Mr Skelton QC for Mr and Mrs Ross in the Supreme Court by which Mr and Mrs Ross recognised that potential members of the class do not have to appoint GCA Lawyers or sign onto the litigation funding agreement.[17]

Communication as affected by r 10.4 of the Conduct and Client Care Rules

[44] Mr Weston next turned to the ground of the Rosses' opposition by which it was asserted that direct communication between Southern Response's lawyers and class members would be in breach of r 10.4 of the Conduct and Client Care Rules (formerly r 10.2). That provides:

> A lawyer acting in a matter must not communicate directly with a person who the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.

[45] Relevantly, in Mr Weston's submission, the Conduct and Client Care Rules in r 10.4.4 further provide:

> A lawyer may recommend to a client that the client make direct contact with any other party.

[46] Mr Weston submitted that r 10.4 cannot be read as having application beyond the traditional lawyer/client paradigm. The dynamics of a modern representative proceeding were not contemplated by those drafting the Conduct and Client Care Rules — the heading to r 10.4, being "Communicating with another lawyer's client" points to the traditional client/lawyer relationship.

[47] Mr Weston submitted Southern Response's direct dealings with class members other than Mr and Mrs Ross and the 300 class members who have entered into formal terms of engagement with GCA Lawyers will not involve the mischief which r 10.4 aims to prevent. He identifies this mischief as being that a lawyer may, by their legal knowledge and position, secure damaging admissions, access privileged

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17 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC Trans 18 at 106. See similarly *Ross SC*, above n 7, at fn 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".

communications or undermine the trust of a client in their lawyer.[18] Mr Weston noted the proposition that lawyers acting for the representative plaintiffs should not be considered the lawyers for all potential class members in any meaningful sense was precisely a submission of the New Zealand Law Society in *Ross SC,* when intervening in the Supreme Court hearing.[19]

[48] Mr Weston submitted that, even were this Court to find that GCA Lawyers represents all class members (in terms of r 10.4 Conduct and Client Care Rules), that would leave Southern Response itself free to communicate directly with potential class members (subject only to Southern Response's concession in relation to those now retained by GCA Lawyers).

Analogy between "certification" and leave under r 4.24?

[49] The representative proceeding regimes in a number of jurisdictions require a representative proceeding to be certified by the Court before it can proceed.[20] In New Zealand, under r 4.24(b) High Court Rules, the Court's leave to bring a representative action is required unless all class members give consent. The Rosses, in opposing this application, invite this Court to draw an analogy from the North American class action regimes when considering the ethical rules which apply to lawyers. In particular the Rosses invite this Court to conclude that, once leave was granted to the Rosses to represent the class, their lawyer also "represents" the class.

[50] For Southern Response, Mr Weston submitted that an analogy with (some) certification jurisdictions should not be drawn. Mr Weston observed there is not a uniform approach even in the United States. He referred to some cases and commentaries which take the position that a lawyer-relationship does not arise until after *both* certification and the expiry of the opt out period have occurred.[21]

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[18] Referring to Dal Pont, *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017).

[19] New Zealand Law Society "Submissions on behalf of New Zealand Law Society | Te Kāhui Ture o Aotearoa as intervenor" 16 March 2020 in *Ross SC* at [60]–[61], referenced in Law Commission *Class Actions and Litigation Funding | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* (NZLC IP45, 2020) at [12.48].

[20] Law Commission, above n 19, at [10.4].

[21] Citing *re Wells Fargo Wage & Hour Empl' Practices Litig*, 18 F Supp 3d 844 (SD Tex 2014) at 851; and *Bobryk v Durand Glass Mfg Co* WL 5574504 (United States District Court 2013) at 658: "[T]he attorney-client relationship with putative class members does not begin until the class has

[51] Mr Weston also submitted there are fundamental differences between the North American certification process and the granting of leave under r 4.24. He described the former as involving "a complex and lengthy process" typically occurring after full discovery has taken place and often involving factual and expert evidence, as against the "low threshold" approach required under r 4.24 High Court Rules.[22] Mr Weston submitted that the certification stage is seen as the chief battle of the litigation and has often become more complex and time consuming than the hearing of the substantive issues.[23]

[52] In relation to the North American regimes (and citing Ontario as a particular example), Mr Weston noted that the process of certification there involves the appointment by the Court of class action counsel.[24] In *Ward-Price v Mariners Haven Inc*, Nordheimer J observed that the Court thereby has, in effect, imposed the selection of counsel on class members.[25] That is a situation which does not arise under the opt out process applying here.

[53] Mr Weston submitted that if an analogy is to be drawn from North American regimes the more appropriate analogy is with the pre-certification situation. The generally accepted position in North America is that plaintiffs' counsel does not represent absent class members and that no specific restrictions apply to communications between defendants and potential class action members.[26]

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been certified and the time for opting out by a potential member of the class has expired." (internal quotations omitted); In 2007 the American Bar Association issued a formal opinion recording that the lawyer-client relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by the potential members of a class has expired: ABA "*Coram on Ethics and Professional Responsibility*", Formal Opinion 07-445 (2007) at 3.

22 Citing *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(g)]–[11(h)]; and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2] and [129].

23 Citing Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 24–25.

24 Referring to *Ward-Price v Mariners Haven Inc* (2004) 71 OR (3d) 664 (ONSC) at [14]–[15].

25 At [15].

26 Citing Hollis Salzman, Meegan Hollywood and Noelle Feigenbaum "Between a Rock and a Hard Place: Communicating with Absent Class Members" (2017) 32 Antitrust Law J 45 at 47 and Danyll W Foix *Ethical Considerations in Class Action Settlements – What In-House Counsel Need to Know: Pre-Certification Communications and Settlements with Absent Class Members* (BakerHostetler 2014) at 1: " ... the overwhelming majority of courts now hold that plaintiffs' counsel does not represent absent class members prior to certification and Rule 4.2 generally does not apply to pre-certification communications with those members."

[54] Mr Weston submitted, in conclusion on this point, that in the absence of a certification requirement in New Zealand and of specific rules regarding representation as in North America, the North American regimes do not provide reliable guidance on the relationship between the Rosses' solicitors and class members who have not entered into contracts of retainer with them.

The Australian regimes

[55] Mr Weston noted that at federal level in Australia, class actions are governed by Pt IVA Federal Court of Australia Act 1976 (Cth) (Federal Court Act). No requirement for certification exists.

[56] Mr Weston submitted that the consensus of Australian judicial and academic commentary recognises that representative plaintiffs owe fiduciary duties to the class and that plaintiffs' counsel owe at least a base-line duty to conduct the proceedings in a way that is consistent with the interests of unrepresented group members.[27] Commentaries recognise that plaintiffs' counsel may assume some fiduciary obligations to class members including unidentified members, although the extent of those has yet to be settled:[28]

> The scheme of Pt IVA is that the applicant has the conduct of proceedings on behalf of the class members and has fiduciary obligations to them. The applicant's lawyers also owe obligations to class members but how far those obligations extend is not settled.

Rule 13.2 of the Conduct and Client Care Rules

[57] While the Rosses did not by their notice of opposition rely upon the provisions of r 13.2 of the Conduct and Client Care Rules, GCA Lawyers had in earlier correspondence suggested that r 13.2 is "pertinent". The rule, concerned with the "Protection of Court processes", precludes a lawyer from acting in a way that undermines the processes of the Court. There is therefore a relationship to the Rosses' abuse of process ground of opposition.

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27 Citing Michael Legg "Class Action Settlements in Australia — The Need for Greater Scrutiny" (2014) 38 Melb Uni Law Rev 590 at 596.

28 Citing *Dyczynski v Gibson* [2020] FCAFC 120 at [209] (citations omitted).

[58] GCA Lawyers in its correspondence asserted that, because the process for notification to class members must occur under Court supervision, any attempt to undermine, circumvent or sabotage that process will amount to an abuse and may constitute an ethical breach if lawyers are involved.

[59] Mr Weston recognised the absence of any jurisprudence in New Zealand relating to when conduct in an opt out representative proceeding might be said to undermine the processes of the Court. But he submitted that it is fallacious to suggest that Southern Response in communicating its Package and dealing directly with members of the class would be undermining the purpose of the supervisory jurisdiction. He identifies the purpose of the supervisory jurisdiction as being particularly focussed on the recognition that in a representative claim there are absent claimants who will be affected by the actions of the representative plaintiff. The Supreme Court in *Ross SC* (citing the decision of the Supreme Court of Victoria in *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* (*Tasfast*)) identified an analogy between the Courts' protective functions on behalf of infants or persons under a disability.[29] Mr Weston observed that the purpose of the Court's supervision will not be engaged in the context of Southern Response's Package. Only those who actively consent and wish to be part of the Package will engage with Southern Response in relation to it. The Package has no effect on absent class members who do not engage with Southern Response.

[60] Mr Weston submitted that there is an inconsistency between the position now adopted for the Rosses and that which they and GCA Lawyers have adopted in relation to previous communication with potential class members. Mr Weston referred to the plaintiffs having communicated with potential class members and advertised extensively for book-building purposes without seeking any approval from the Court in terms of a supervisory role. Mr Weston observed the distinction drawn by the Court of Appeal in the *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* case (the *Unresolved Claims* case), that distinction being

[29] *Ross SC*, above n 7, at [81], citing *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457 [*Tasfast*].

between communications and the formal class members notice process.[30] In relation to communications generally (as opposed the formal class members notification process) Mr Weston noted that the Court retains its supervisory jurisdiction to determine and, if necessary, correct misleading or improper communications.[31] Mr Weston submitted that such an approach must apply equally to plaintiffs and defendants.

Southern Response's ability to offer individual settlements

[61] Mr Weston submitted that, in the absence of New Zealand jurisprudence, it is instructive to consider jurisprudence from Australia, Canada and the United States on the issue of individual settlements in a class action context (taking care to recognise the varying legislative contexts). The focus of the submission was the Rosses' invoking of r 13.2 of the Conduct and Client Care Rules and in particular to consider whether individual settlements have been viewed elsewhere as undermining the processes of the Court. Mr Weston referred to the analysis of Professor Vince Morabito in his 2003 article *Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States*.[32] Mr Weston submitted that the context in which Southern Response's entitlement to pursue individual settlements falls to be considered is the Court's recognition that there is an overriding public interest in favour of the settlement of the litigation.[33]

[62] Mr Weston then invited the Court to consider the case law (and legislative regimes) in Australia, Canada and the United States, respectively. He submitted that the case law indicates that in Australia Southern Response would be permitted to proceed with the Package and there would be no basis for the Court to intervene unless the communications associated with the Package were shown to be misleading, incomplete or in any way coercive or unfair. He submitted that a similar position

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30 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 [the *Unresolved Claims* case] at [79]; cited with apparent approval in *Ross SC*, above n 7, at [57].

31 Citing *Paine v Carter Holt Harvey Ltd* [2019] NZHC 1614.

32 Vince Morabito "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 Tex Int Law J 663.

33 Citing *Sparling v Southam Inc* [1988] 66 OR (2d) 225 (HCJ); *Cutts v Head* [1984] Ch 290 (CA) at 306; and *Specialized Bicycle Components Inc v Sheppard Industries Ltd* [2011] 2 NZLR 242 (HC) at [76].

applies in both the United States and Canada, certainly in the pre-certification period and arguably even in the post-certification period. Mr Weston said that the Court's protective or supervisory function is recognised through the ability of the Court to intervene when communications by a defendant to potential class members are shown to be misleading or unfair. The case law does not, in his submission, justify a blanket prohibition on communications.

Australia

[63] Mr Weston referred to case law from the federal jurisdiction in Australia, pre-dating the Class Actions Practice Note issued by the Chief Justice of the Federal Court of Australia on 20 December 2019 (set out at [65] below).[34]

[64] Mr Weston referred to five decisions in three cases in particular:

(a) *Courtney v Medtel Pty Ltd*[35] — a proceeding giving rise to a number of judgments. Mr Weston identified that in *Courtney 1* the Court refused the application of the representative plaintiff for an order that neither the defendants nor their lawyers communicate with class members (in relation to settlement offers) except with leave of the Court.[36]

(b) *King v AG Australia Holdings Ltd* (*King 1*)[37] — a proceeding which gave rise to a number of judgments. Mr Weston identified *King 1* as a decision in which the Court, having regard to the needs of case management given the size of the represented group (approximately 50,000 at that point of the litigation), assumed a role in the regulation of general communications (not relating to settlement) between the defendant and members of a class represented under a proceeding

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[34] Federal Court of Australia "Class Actions Practice Note (GPN-CA)" (December 2019) [FCA Practice Note].

[35] *Courtney v Medtel Pty Ltd* [2001] FCA 1365, (2001) 113 FCR 512 [*Courtney 1*].

[36] At [39].

[37] *King v AG Australia Holdings Ltd* [2002] FCA 872, (2002) 121 FCR 480 [*King 1*]; *King v AG Australia Holdings Ltd* [2002] FCAFC 230 [*King 2*]; *King v AG Australia Holdings Ltd* (*formerly GIO Australia Ltd*) [2002] FCA 1560 [*King 3*]; and *King v AG Australia Holdings Ltd* [2003] FCA 980 [*King 4*] at [7].

brought under Pt IVA Federal Court Act. The defendant proposed to communicate directly with unrepresented shareholders who had not opted out of the proceeding, possibly to obtain settlement. The Court, in the interests of case management and in the administration of justice generally, found it appropriate to exercise control over such communication, ordering the defendant and its lawyers to forward in advance to the class solicitors a draft of any correspondence proposed to be sent and directing that there be no offer of settlement sent to any member without the leave of the Court. The Court was required to consider s 33V(1) Federal Court Act (which precludes settlement or discontinuance of a representative proceeding without the approval of the Court). The provision was found to potentially apply where individual offers were made directly to and accepted by all group members, as that would have the effect of settling the whole of the representative proceeding itself. Mr Weston noted that the outcome was that the plaintiff's solicitors would have an opportunity to seek judicial intervention if there was any concern about the defendant's proposed correspondence.

(c) *Courtney 2*[38] — a case in which Sackville J held that no provision in Pt IVA Federal Court Act prevents a defendant from communicating with or making a settlement offer to a group member in a manner which is not misleading or otherwise unfair, and that prior approval of the Court is unnecessary.[39] Mr Weston identified that in so determining, Sackville J observed that the Court in *King 1* did not suggest that s 33V(1) applies to the settlement of claims of individual group members where the settlement does not effectively dispose of the proceedings.[40]

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38 *Courtney v Medtel Pty Ltd* [2002] FCA 957, (2002) 122 FCR 168 [*Courtney 2*].

39 At [52]–[53].

40 At [45]. The Court noted the specific requirement of s 33W Federal Court of Australia Act 1976 (Cth) [Federal Court Act] (requiring a representative party to obtain the leave of the Court to settle their individual claims) indicates Parliament's intention that the same requirement would not apply to the settlement of the individual claims of group members: *Courtney 2*, above n 38, at [45].

(d) *King 3*[41] — Mr Weston noted that Moore J, in *King 3*, agreed with the observations of Sackville J in *Courtney 2* as to a defendant's right, without prior Court approval, to communicate directly with individual group members in order to settle their claims.[42]

(e) *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (*Davaria 1*)[43] — Mr Weston noted that in this more recent (2018) decision, the Federal Court adopted the conclusions in *Courtney 2* as an accurate statement of the law.[44] Middleton J dismissed the plaintiffs' application for the imposition of a communications protocol as between the defendant and class members. He found there to be no evidence that the defendant had or would communicate with class members in a misleading or unfair manner and that the defendant's offers (if accepted) would not resolve the class action or even a part of the class action.

[65] Finally, in relation to the practice of the Federal Court, Mr Weston referred to the Class Actions Practice Note which now governs the position in federal courts. The objectives of the Practice Note include to indicate the Court's expectations regarding the management of practical issues which arise in class actions and to ensure that class actions are not unnecessarily delayed by interlocutory disputes. The subject of "Communications with the Class Members" is specifically addressed in paragraph 11 of the Practice Note in these terms:[45]

> 11.1 Unless leave is granted by the Court, if a class member is a client of the applicant's lawyers then any communication with the class member by the respondent or the respondent's lawyers or agents in relation to the proceeding shall only be through the applicant's lawyers. However, there is no intention to limit the respondent's communication with class members in the ordinary course of business. Where the respondent's lawyers are uncertain as to whether the class member is a client of the applicant they should liaise with the applicant's lawyers to clarify the status of the class member, before any communication takes place. In an appropriate case, the Court may make an order that the applicant's lawyers inform the other parties whether class members are clients of those lawyers.

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41 *King 3*, above n 37.
42 At [14]–[15].
43 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984 [*Davaria 1*].
44 At [12].
45 FCA Practice Note, above n 34.

> 11.2 The Court may make orders concerning communications with class members who are not clients of the applicant's lawyers, including establishing a protocol for such communications. Where class members are not clients of the applicant's lawyers then the respondent and its lawyers or agents should use reasonable endeavours to ensure that any communications with class members in relation to the proceeding are in writing.
>
> 11.3 Where a respondent and/or its lawyers or agents communicate with a non-client class member suggesting that the class member do or not do something, the communication should, in plain language, explain the consequences of following the suggestion and encourage the non-client class member to obtain legal advice.

[66] Mr Weston notes (correctly) that the Practice Note contains express recognition that a defendant may have direct contact with class members. The single set of requirements is that contained in paragraph 11.3, requiring explanation of consequences and encouragement to take legal advice, both to be expressed in plain language.

Canada

[67] Mr Weston referred to the legislative and procedural framework which applies in the federal jurisdiction in Canada and consistently through the provinces (with the exception of Prince Edward Island). He noted that Ontario appears to have produced the preponderant jurisprudence in this area. Ontario (in common with the federal and other provincial jurisdictions) has a certification process, similar to that in United States jurisdictions, with requirements set out in the Class Proceedings Act SO 1992 c 6.

[68] Mr Weston identified *Lewis v Shell Canada Ltd* (*Lewis*) as the guiding judgment.[46] In *Lewis*, the plaintiffs in an intended class proceeding moved for an injunction or an order under the Class Proceedings Act that the defendants deliver a notice prior to the settlement of any claim (following direct communication made by the defendant with members of the intended class). The Court did not totally ban pre-certification communications but concluded that, for Shell's intended settlement process to ensure the claimants "are expressly aware of all their rights"[47] — to be regarded as fair — Shell needed to disclose to class members the existence of the

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46 *Lewis v Shell Canada Ltd* (2000) 48 OR (3d) 612 (ONSC) [*Lewis*].
47 At [13].

intended class proceeding prior to settlement. The requirement Cumming J imposed (through approval of a form of memorandum to be delivered by Shell to any potential class member) was specifically for full disclosure of the class proceeding. Mr Weston invoked particularly the Judge's conclusion:[48]

> A fair process would be for Shell to make full disclosure to claimants of the class proceeding before entering into settlements with releases. If a claimant wants to settle with Shell after knowing his/her rights as a putative class member then the claimant should, of course, have that freedom of action.

[69] Mr Weston referred in addition to seven other cases from Ontario:

(a) *Vitelli v Villa Giardino Homes Ltd*[49] — a case in which the Superior Court of Justice, on the plaintiff's opposed certification motion, certified the action as a class proceeding. In doing so, Perell J had to consider the defendant's compensation plan, which the defendant promoted as a preferable procedure. Perell J observed:[50] "…under proper circumstances, it is necessary for the court to intervene in order to ensure the integrity of the litigation process." While finding sufficient evidence of inappropriate conduct to warrant imposing two conditions on communication, Perell J found that it would not be appropriate to place a blanket ban on all contact between the defendant and the putative class members.[51]

(b) *1176560 Ontario Ltd v The Great Atlantic & Pacific Co of Canada Ltd* (A&P)[52] — where the Superior Court of Justice was hearing both the proposed representative plaintiffs' motion for certification of their action as a class proceeding and a second motion by which they sought to restrict the defendant's communications with class members. Mr Weston observed that Winkler J, in granting the extraordinary relief

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48 At [12].
49 *Vitelli v Villa Giardino Homes Ltd* (2001) 54 OR (3d) 334 (ONSC).
50 At [31], citing *Lewis*, above n 46.
51 At [47].
52 *1176560 Ontario Ltd v The Great Atlantic & Pacific Co of Canada Ltd* (2002) 62 OR (3d) 535 (ONSC) [*A&P*].

sought, did so because he found the defendant to be acting in an intimidatory and coercive manner.[53]

(c) *Blair v Toronto Community Housing* (*Blair*)[54] — Mr Weston noted that Perell J, in observing that the defendant's compensation plan did not appear to have been motivated by a desire to avoid a class action, indicated that there would have been concern had it appeared that the defendant was attempting to secure cheap releases.[55] Mr Weston suggested, that in the light of Mr Hurren's evidence, no concern arises here as to a motivation to obtain "cheap releases".

(d) *Lundy v Via Rail Canada Inc* (*Lundy*)[56] — Mr Weston referred to this further decision of Perell J in the Superior Court for his Honour's recognition that a defendant's communications to putative class members may be not only appropriate in the normal course of business, but may advance the purposes of the Class Proceedings Act, the ultimate purpose of which is to obtain access to justice for the putative class members;[57]

(e) *Smith v National Money Mart Co* (*National Money Mart*)[58] — a case in which the Superior Court of Justice had to consider the appropriateness of defendant's communications to class members both during the opt out period and after certification. Hoy J referred extensively to case law, including *A&P*. Mr Weston noted in particular the finding (in accordance with *A&P*) that there is no absolute prohibition on communication by the defendants to class members during the opt out period and that the Class Proceedings Act does not require prior court approval for every communication.[59] Mr Weston referred also to the Judge's conclusion the Court will intervene in

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53 At [76] and [92].
54 *Blair v Toronto Community Housing Corporation* 2011 ONSC 4395 [*Blair*].
55 At [68], [71].
56 *Lundy v Via Rail Canada Inc* 2012 ONSC 4152, (2012) 111 OR (3d) 628 [*Lundy*].
57 At [8]–[9].
58 *Smith v National Money Mart Co* (2007) 156 ACWS (3d) 1001 ONSC [*National Money Mart*].
59 At [31(1)].

relation to communications in "extra-ordinary" circumstances (citing *A&P*), examples being where the defendant's communication during that period is inaccurate, intimidating or coercive, or for some other improper purpose aimed at undermining the court's process;[60]

(f) *Berry v Pulley*[61] — Mr Weston noted this further decision of Perell J as one in which it was recognised that once certification had occurred and a putative class member has not opted out, then that class member does not have the right to accept a settlement offer until the action reaches the individual issue stage (that is while it is in its common/communal issues stage).[62] In that period, with the right to accept settlement offers resting exclusively with the relevant representative, it follows that class members ought not to receive notices and be "tantalised" by settlement offers which they cannot accept, and which are opposed by their representative.[63] Perell J recognised that a different or modified analysis may apply in the pre-certification stage, citing *Lewis*.[64]

(g) *Durling v Sunrise Propane Energy Group Inc* (*Durling*)[65] — Mr Weston referred to this decision of the Superior Court, given that it was the single Canadian authority cited in the Rosses' notice of opposition. This was a case in which the Court had approved, as part of certification, the plaintiff's notification programme. A letter was sent to putative class members on behalf of the defendant which Horkins J found to amount to an attempt to gain control of the litigation, requiring the class members to opt out of the class action.[66] Mr Weston submitted that *Durling* is accordingly distinguishable on its facts, and is in fact further authority that orders restricting communication are extra-ordinary and that there is a general reluctance to intervene in communications unless they are inaccurate, intimidating or coercive, or

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60 At [31(2)–(3)].
61 *Berry v Pulley* 2011 ONSC 1378, (2011) 106 OR (3d) 123.
62 At [47].
63 At [47]–[48].
64 At [49].
65 *Durling v Sunrise Propane Energy Group Inc* 2012 ONSC 6328 [*Durling*].
66 At [68].

are made for some other improper purpose aimed at undermining the Court's process.[67]

United States

[70] Mr Weston referred to the jurisprudence in the majority of United States' jurisdictions as holding that there is not a lawyer-client relationship between the representative plaintiffs' solicitors and the class members prior to certification. He submitted that potentially that is so until the end of the opt out period.

[71] Mr Weston made specific reference to federal case law, to r 23 of the current Federal Rules of Civil Procedure which regulate class actions, and to the Federal Judicial Center's Manual for Complex Litigation.[68]

[72] Mr Weston identified the decision of the Supreme Court in *Gulf Oil Co v Bernard* (*Gulf Oil*) as the governing United States authority on the issue of communications with putative class members.[69] Justice Powell delivered the unanimous opinion of the Court. The *Gulf Oil* appeal evolved from an order of the District Court prohibiting the plaintiffs and their counsel from communicating with potential class members without court approval, but is cited in relation to communications between any parties and the potential class members. Mr Weston identified as the most relevant passage in Justice Powell's opinion:[70]

> …an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.

[73] That recommendation was made against the Court's recognition of the opportunities, in the context of class actions, for abuse.[71]

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67 At [42], citing *National Money Mart*, above n 58; *Lundy*, above n 56; and *A&P*, above n 52 .
68 *Manual for Complex Litigation Fourth* (Federal Judicial Center 2004).
69 *Gulf Oil Co v Bernard* 452 US 89 (1981) [*Gulf Oil*].
70 At 101.
71 At 100, the Supreme Court citing *Waldo v Lake Shore Estates Inc* 433 F Supp 782 (ED Lou 1977) where the Court referred to the "heightened susceptibilities of non-party class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding" and observing that "[unapproved] communications to class members that misrepresent the status or effect of the pending action also have an obvious

[74] Mr Weston referred also to *Kerse v W Telemarketing Corp*, in which the Court identified as communications which may be abusive those which "[misrepresent] facts about the lawsuit, [discourage] participation in the suit, or [undermine] the class' confidence in, or cooperation with, class counsel".[72]

[75] Mr Weston submitted that United States' federal practice, since the Supreme Court's decision in *Gulf Oil*, has not been consistent, with some cases allowing unrestricted pre-certification settlement negotiations without Court approval while in other cases the Courts have prohibited defendants from proceeding with settlement plans during the pre-certification process.[73] Mr Weston noted the existence of a middle band of cases in which the courts have allowed pre-certification settlement negotiations subject to safeguards and restrictions such as the disclosure of the existence of the class action and class members' rights in relation to it, with proposed communications provided in advance to the Court and the plaintiffs.[74]

[76] Mr Weston acknowledged that there is a recognised lawyer-client relationship between the representative plaintiffs' solicitors and all class members once certification has occurred. But, in his submission, there has been a range of judicial responses to the settlement of individual claims and not an invariable rejection by the Courts of post-certification settlement communications.[75] The focus of the case law appears to be on ensuring class members have complete and accurate information.

[77] Turning to the provisions of r 23 Federal Rules of Civil Procedure, Mr Weston recognised that under r 23(e) the claims of a certified class may be settled only with the Court's approval. Mr Weston submitted that it appears that the rule concerns only settlement of the representative party's claim or the claim as a whole, and does not apply to settlements entered directly with defendants by individual class members.[76] A recognised exception to that is that r 23(e) would apply to individual settlements

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potential for confusion and/or adversely affecting the administration of justice", at 790-791. See also *Manual for Complex Litigation,* above n 68, at 248.

72 *Kerse v W Telemarketing Corp* 575 F Supp 2d 1354 (SD Ga 2008) at 1367.

73 Referring to Morabito*,* above n 32, at 717–718.

74 At 718.

75 At 719–720.

76 *Manual for Complex Litigation,* above n 68, at 308–310.

where such settlements affect the rights of non-settling class members[77] or the settlement of individual claims would otherwise represent an abuse of the class action process.[78]

[78] Finally, in relation to the United States' jurisdiction, Mr Weston observed that *Gulf Oil* remains the guiding decision as indicated by the following passage in the *Manual for Complex Litigation* (citing *Gulf Oil*):[79]

> Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3).

Does Southern Response require Court approval of the Package?

[79] Mr Weston emphasised that the intention of Southern Response is to offer individual settlement payments to policyholders in terms of the Package. He rejected a contention made on behalf of the Rosses that Southern Response would in practical terms be "settling the representative proceeding" or resolving the representative proceeding, albeit by doing so on a "piecemeal basis via many individual settlements".

[80] Mr Weston observed that Southern Response's offering of the Package is outside the representative proceeding, noting that eligibility for the Package is wider than the representative proceeding itself and will in any event not resolve the representative proceeding. (The Package is to be offered to policyholders who did not receive a Detailed Repair/Rebuild Analysis, as well as those who did).

[81] Mr Weston submitted there is not a reason in principle to impose a general requirement for approval of a settlement package offered by a defendant to individual class members. He submitted that it is only exceptionally — or "extra-ordinarily" in terms of the Australian and United States authorities — that the Court will intervene in communications as to such a settlement. Mr Weston referred to *Lenehan v Powercor Australia Ltd* as an example of judicial intervention, in circumstances where

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77 See *Weight Watchers of Philadelphia Inc v Weight Watchers International Inc* 455 F 2d 770 (2d Cir 1972) at 775.

78 *Manual for Complex Litigation*, above n 68, at 312.

79 At 249 (footnotes omitted).

the offer may have been misleading and unfair because it failed to identify the relationship between the offer and the existing group proceeding.[80]

Approval of the substance of the Package?

[82] Mr Weston emphasised that Southern Response by this application does not seek approval of the Package, as Southern Response rejects the proposition that the Court's approval of the Package is required. Mr Weston submitted that settlement of individual claims with affected policyholders is not itself settlement of the representative proceeding and that Southern Response's settlement Package falls outside the representative proceeding.

The best interests of class members

[83] Mr Weston submitted that the best interests of class members, particularly those who are unrepresented, should be the predominant consideration of the Court when exercising its supervisory jurisdiction. Class members have not yet had an opportunity to opt out and therefore cannot be held liable to contribute to a proceeding which they have a right not to participate in. He submitted that unrepresented class members' interests are likely to be best served if the Court does not preclude Southern Response's direct communication with policyholders — to do so would give GCA Lawyers an effective monopoly over communication. Mr Weston submitted by reference to *Capic v Ford* that the Court's supervisory focus in relation to communications is not based on protecting those running the representative proceeding — its focus is on promotion and protection of the interests of class members generally.[81]

Submissions for Mr and Mrs Ross

Introduction

[84] For Mr and Mrs Ross, Mr Skelton submitted that the effect of Southern Response's application, if granted, would be to have the Court abdicate rather than exercise its supervisory jurisdiction.

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80 *Lenehan v Powercor Australia Ltd* [2018] VSC 579 at [19].
81 *Capic v Ford*, above n 14.

[85] Mr Skelton observed that a representative proceeding is usually settled through a global settlement negotiated between plaintiff and defendant. The settlement is carefully scrutinised by the court to ensure that it is fair to individual class members and also fair as between class members. Mr Skelton submitted that a global settlement is both efficient and more likely to ensure fairness than the alternative involved in Southern Response's approach, involving hundreds or thousands of individual settlements with "none of the usual protective mechanisms".

[86] Mr Skelton noted the following points of agreement between the parties:

(a) settlement of litigation is desirable both generally and in this case;

(b) the dynamics of a representative proceeding complicate matters, and so the courts typically review and supervise representative proceeding settlements;

(c) the Court has jurisdiction to supervise representative proceedings, including controlling communications with class members and overseeing settlements; and

(d) the Court's focus is on the best interests of the class members, which requires the Court to look at the interest of the class as a whole.

The concerns of Mr and Mrs Ross as to the Package

[87] Mr Skelton identified the Rosses' concern with Southern Response's Package as falling into three categories:

(a) circumventing the Court's supervisory role;

(b) risking unfairness to individual class members; and

(c) risking unfairness as between class members.

The litigation to date

[88] Mr Skelton referred to the Supreme Court's judgment in *Ross SC* as providing the context for consideration of this application.[82]

[89] The Supreme Court identified that representative proceedings are provided for in r 4.24 High Court Rules.[83] The Court concluded (notwithstanding Southern Response's submission to the contrary) that an opt out order was appropriate in this proceeding.[84]

[90] Mr Skelton submitted that, in relation to the Court's exercising its supervisory role in the present application, the key passages in *Ross SC* are at [81]–[82]. There the Court identified the Court's protective function by analogy with those in relation to infants or persons with a disability (citing the Victorian Supreme Court decision in *Tasfast*).[85] This led the Supreme Court to consider that Southern Response's concern as to the ability of the representative plaintiff to bind other claimants to a settlement fell away given that the Court has power to approve settlements of the class action.[86]

[91] Mr Skelton confirmed that Mr and Mrs Ross object to Southern Response's intention to negotiate individual settlements rather than negotiating through Mr and Mrs Ross as representatives of the class. He explained that Mr and Mrs Ross consider Southern Response is attempting to evade the proper supervisory role of the Court and the role of Mr and Mrs Ross as the court-appointed representatives. In his oral submissions, Mr Skelton described Southern Response as trying to do a "work-around".

[92] Mr Skelton referred to the "free-rider issue" — implicitly identifying any claimants who might settle individually and directly with Southern Response as "potential free-riders". The free-rider issue was touched on in the judgment of *Ross SC*, leading the Supreme Court to recognise that it may mean the court will have to

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82 *Ross SC*, above n 7.
83 At [25].
84 At [108].
85 At [81], citing *Tasfast*, above n 29, at [64].
86 At [82].

play a greater role in representative proceedings than is currently the case in relation to the funding issues.[87]

Purpose of the supervisory jurisdiction

[93] Mr Skelton rejected Mr Weston's characterisation of the focus of and primary reason for the Court's supervisory role (that there are absent claimants who will be impacted by the actions of the representative plaintiffs). Mr Skelton submitted that the case law clearly establishes the jurisdiction is to protect class members' interests generally, illustrated in two Australian decisions in particular:

(a) *Lenthall v Westpac Banking Corp (No 2)*[88] — the Court there exercising its protective and supervisory jurisdiction in relation to the interests of group members by ensuring that notices to members contained full information in a non-misleading way; and

(b) *Capic v Ford*[89] — where Perram J recognised that the categories of situations in which communications may generate unfairness or injustice are not closed.

[94] Mr Skelton referred to the American text *Newberg on Class Actions*.[90] It is there recognised that, while the parties, including the defendant, may have legitimate reasons to communicate with class members, parties may also have "less honorable reasons" for communication with potential or absent class members. Examples include procuring a favourable resolution of claims with an uninformed individual or undermining the class action (such as by reducing numbers so as to impact on numerosity requirements).

[95] Mr Skelton referred to the decisions of United States federal courts in *Kleiner v First National Bank of Atlanta* (*Kleiner*) as a "classic example" of the Court's

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87 At [86].
88 *Lenthall v Westpac Banking Corp (No 2)* [2020] FCA 423.
89 *Capic v Ford*, above n 14, at [21].
90 William B Rubenstein, Alba Conte and Herbert B *Newberg on Class Actions* (5th ed, Thomson Reuters, 2013) at 367.

intervention where a defendant's conduct was inappropriate and undermined the opt out process.[91]

[96] *Kleiner* involved a class action against a bank in which there were approximately 8,600 potential members of the class.[92] The action had recently been certified but the opt out period had not expired. In that situation, the defendant conducted "a massive telephone campaign"[93] to convince potential class members to opt out, thereby "reducing its potential liability and quelling the adverse publicity the law suit had spawned".[94] As Mr Skelton noted, the bank upon the advice of its lawyer had considered its approach would be legal "as long as the conversations were truthful and noncoercive"[95] and the court, even were it to disagree with the campaign, "had no power to enjoin communications in the absence of evidence of prior or threatened abuse" (relying upon *Gulf Oil*).[96] Judge Evans, in the District Court (*Kleiner DC*), rejected the bank's contentions, granting the plaintiffs an order that all exclusion (ie opt out) requests received by the Clerk of Court were voidable at the election of the individuals who excluded themselves after judgment.[97] The Court of Appeals (*Kleiner CofA*) affirmed the District Court judgment in that regard.[98] Vance J (delivering the judgment of the majority) observed that "[a] unilateral communications scheme … is rife with potential for coercion" and that "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal".[99]

[97] Mr Skelton noted the emphasis in the exercise of the court's supervision of representative proceedings upon efficiency and fairness. He referred to the Court of Appeal's judgment in *Ross v Southern Response Earthquake Services Ltd (CA)*.[100]

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91 *Kleiner v First National Bank of Atlanta* 102 FRD 754 (US District Court, ND Ga 1983) [*Kleiner DC*]; aff'd 751 F 2d 1193 (11th Cir 1985) [*Kleiner CofA*].
92 *Kleiner CofA*, above 91, at 1196.
93 *Kleiner DC*, above 91, at 756.
94 *Kleiner CofA*, above 91, at 1197.
95 At 1197.
96 *Kleiner* (DC), above 91, at 762, citing *Gulf Oil*, above n 69.
97 At 775.
98 *Kleiner* (CofA), above 91, at 1203.
99 At 1202–1203.
100 *Ross CA,* above n 6.

There Goddard J, delivering the judgment of the Court, explained the role the courts would have:[101]

> The courts will need to grapple with a range of procedural issues that arise in relation to opt out claims, addressing these on a case by case basis. These issues should be approached in a liberal and flexible manner, seeking to achieve a balance between efficiency and fairness.[102]

Is Southern Response settling the representative proceeding?

[98] Mr Skelton noted the confirmation in Mr Hurren's evidence that all members of the plaintiff class in this proceeding will be eligible to apply for the Package. He submitted that it matters not that the Package may also be offered to others outside the plaintiff class. In substance, he suggested this is an offer to settle the "whole lot", with acceptance of the Package being conditional upon signing a release and opting out.

[99] Mr Skelton referred to decisions of the Federal Court of Australia (applying s 33V Federal Court Act), which have recognised that the statutory requirement for approval of the Court to settle a representative proceeding may apply in situations where the settlement of individual claims (if given effect to in a particular way) may have the effect of settling the whole of the representative proceeding itself. Such a situation was recognised by Moore J in *King 1*.[103] Subsequently, in *Courtney 2*, *King 1* was distinguished upon the basis that the defendant's offers, if accepted, were not going to have the effect of settling the entire representative proceeding so as to require Court approval.[104]

An analogy with North American certification?

[100] Mr Skelton submitted that there is an analogy to be drawn between the leave process under r 4.24(b) High Court Rules and the process of certification which occurs in North American jurisdictions. Certification is the procedure through which the courts in North America grant leave for a case to proceed as a class action.[105]

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[101] At [106].
[102] See also *Credit Suisse Private Equity LLC v Houghton*, above n 22, at [49] and [131]; and *Carnie v Esanda Finance Corp Ltd*, [1995] HCA 9, (1995) 182 CLR 398, at 404 and 422.
[103] *King 1*, above n 37 at [42]. See also *Courtney 2,* above n 38, at [45].
[104] *Courtney 2*, above n 38, at [46].
[105] United States Federal Rules of Civil Procedure, r 23; and Class Proceedings Act SO 1992 c 6 (as enacted 1 December 2020).

[101] Mr Skelton submitted that the correct analogy to apply to Southern Response's intended communications in this case is with the post-certification period in North America. He submitted that Southern Response's reliance on case law dealing with the pre-certification period is misplaced. Whereas in pre-certification cases, the courts talk of "proposed" class actions and "potential" or "putative" class members, the Rosses have an established class action (by leave) and the class members have been identified.

[102] Mr Skelton addressed in particular the decision of the United States Supreme Court, as invoked by Mr Weston (above at [72]). Mr Skelton noted that *Gulf Oil* dealt with a pre-certification action and a question of communication with *potential* class members, the Court holding that such communications should not be restricted in the absence of evidence of abuse.[106] Mr Skelton submitted that *Gulf Oil* is not authority for the proposition that opposing counsel are free to communicate with established class members after certification.

[103] Mr Skelton contrasted the North American procedural requirements with the Australian situation in which no leave is required and a class action may be commenced as of right.[107] For the North American procedure, Mr Skelton particularly referred to the New Zealand Law Commission Issues Paper 45 at Chapter 10. There the Commission explored the "certification and threshold legal test", through a comparative analysis, observing:[108]

> Almost all jurisdictions with a class actions regime require a class action to be certified before it can proceed with Australia as a notable exception.

[104] Mr Skelton observed that, under r 4.24, a New Zealand representative action requires leave in all circumstances other than where all class members give consent.[109]

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[106] *Gulf Oil*, above n 69, at [104].
[107] Federal Court Act, s 33(c) (imposing three criteria, without a leave requirement).
[108] Law Commission, above n 19, at [10.4] citing Vince Morabito and Jane Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia" (2013) 61(3) Am J Comp Law 579 at 582 (noting Australia and Sweden as jurisdictions without certification).
[109] High Court Rules 2016, r 4.24(a)–(b).

[105] Mr Skelton submitted that, while the criteria for certification in North America[110] may differ from those which apply under r 4.24 in New Zealand, the difference in the criteria is of degree, not of kind — the criteria and the court's discretion in both jurisdictions involve a decision as to whether a case is suitable to be brought as a class action.

[106] Mr Skelton took issue with Mr Weston's basis of distinguishing the American certification process from New Zealand's r 4.24 process, Mr Weston having identified the difference as being between a "complex and lengthy process" and an approach based on a "low threshold". Mr Skelton referred to situations in the United States where the certification procedure has not been overly complex (sometimes there being discovery only in relation to certification issues, sometimes without a hearing based on submissions and uncontested affidavit evidence, and sometimes by consent).[111]

[107] Mr Skelton suggested that there is the potential for a similar range of variations in the leave process under r 4.24(b) High Court Rules. He referred to this proceeding where the leave was largely by consent (the issues being over class definition and the opt out approach). He contrasted that relative simplicity with the approach taken by the defendant in the separate proceeding in the *Unresolved Claims* case, in which Southern Response (in successfully opposing leave at first instance) analysed issues of the nature arising under North American tests such as commonality and typicality, with a large amount of affidavit evidence filed.[112]

An analogy with the North American "class counsel"

[108] Under r 23(g) Federal Rules of Civil Procedure, courts are required to "appoint" class counsel upon certification. Mr Skelton observed that is a relatively recent amendment added in 2003 in part to address the situation where competing class actions had been filed.[113] Mr Skelton observed that before 2003 the Federal Rules said

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110 Requirements of numerosity, commonality, typicality, and adequacy of representation under r 23(a) United States Federal Rules of Civil Procedure.

111 Citing *Manual for Complex Litigation*, above n 68, at 255–256 and 267.

112 *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 and *Unresolved Claims*, above n 30.

113 Robert H Klonoff *Class Actions and Other Multi-Party Litigation in a nutshell* (5th ed, West Academic Publishing, 2017) at 33–34.

nothing about appointing class counsel.[114] Yet, Mr Skelton submitted that decades of case law had uniformly held that members are "represented" by the plaintiff's lawyer just as the plaintiff represents a class.

[109] Mr Skelton, turning to Canadian practice, referred to case law as establishing that, upon certification, the Court has in effect imposed the selection of the plaintiff's counsel on the members of the class.[115]

[110] Mr Skelton referred to the affidavit evidence filed in support of the Rosses' leave application in relation to the class action experience and expertise of the Rosses' lawyers. He submitted that, against that background and by analogy with North American practice, once the Rosses were found to be appropriate persons to represent the class on an opt out basis, it followed that GCA Lawyers also represent the class.

Ethical standards for Southern Response's lawyers

[111] The Rosses, on this application, invoke r 10.4 Conduct and Client Care Rules, as set out at [44] above.

[112] Whereas Mr Weston identified certain mischiefs which r 10.4 aims to prevent (at [47] above), Mr Skelton submitted that r 10.4 is also intended to address the risk that a lawyer will directly and unfairly secure a settlement with a person who does not have access to or seek legal advice. He submitted that such risks exist in a representative proceeding where many class members may have little direct involvement in the litigation.[116]

[113] Mr Skelton submitted that New Zealand courts should regard r 10.4 Client Care Rules as materially equivalent to rules in the United States,[117] and Canada,[118] whose courts have (consistently and consequentially) held that the defendant's lawyers should not contact class members directly and should instead direct communications

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114 Citing Mulheron, above n 23, at 300–301.
115 Citing *Ward-Price v Mariners Haven Inc*, above n 24, at [14]–[15].
116 Citing *Resnick v American Dental Association* 95 FRD 372 (US District Court ND Ill 1982) at 377.
117 Citing American Bar Association, *Model Rules of Professional Conduct*, r 4.2.
118 Citing Law Society of Ontario *Rules of Professional Conduct*, r 7.2–6.

to the plaintiff's lawyers.[119] Mr Skelton submitted that practice in the Australian courts — which had permitted a direct communication between defendant's lawyers and class members — should not be followed. He observed that the relevant Australian ethical rules prevent communication with persons identified in the rules as "the client or clients" of another practitioner, rather than in terms of (what he submitted is the broader concept) of "a person … *represented* by another lawyer".[120]

[114] Mr Skelton detected in Mr Weston's submissions a proposition that the "no contact" rule applies in North America only because a lawyer-client relationship is created when the class action is certified. Mr Skelton submitted that is incorrect, because there is no consensus on the precise nature of the relationship between class counsel and class members. He identified in the United States' case law a number of different approaches:

(a) a full lawyer-client relationship arises on certification;[121]

(b) a relationship exists during the opt out period involving "some but not all aspects of the [lawyer-client] relationship";[122]

(c) a "limited attorney-client relationship" exists;[123]

(d) there is a relationship in which the status of counsel "cannot be stated with precision";[124] and

(e) a lawyer-client relationship arises only once the opt out deadline has passed.[125]

[115] Mr Skelton submitted that, notwithstanding the uncertainty in the case law, there is nearly universal agreement that non-client class members are "represented"

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119 Citing *Manual for Complex Litigation*, above n 68, at 300; and *Durling*, above n 65.
120 Citing Australian Solicitors' Conduct Rules 2015, r 33.1 and *Courtney* 1, above n 35, at [36].
121 *Ward-Price v Mariners Haven Inc*, above 24, at [14]–[15].
122 *Kleiner DC*, above n 91, at 769.
123 *Tedesco v Mishkin* 629 F Supp 1474 (SD NY 1986).
124 *Impervious Paint Industries Inc v Ashland Oil* 508 F Supp 720 (WD Ky 1981) at 722.
125 Referring to cases and commentaries cited by Mr Weston, including *Bobryk v Durand Glass Manufacturing Co*, above n 21, at 29.

by class counsel during the opt out period for the purpose of the ethical rules. He cited the Manual for Complex Litigation which states:[126]

> Once a class has been certified, the rules governing communications apply *as though each class member is a client* of the class counsel … Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation.

[116] Mr Skelton observed that there is no doubt as to certain basic duties owed in any event by class counsel — referring to North American and Australian case law. He noted the obligation to act in the best interests of the entire class as a whole.[127] Mr Skelton identified also an overriding duty to the Court to draw attention to circumstances which may prejudice class members (whether or not those class members have entered into a retainer with class counsel).

[117] Bringing these submissions together, Mr Skelton suggested there is no legitimate reason for Southern Response's lawyers to contact class members directly, rather than through GCA Lawyers, and the Court should therefore not condone direct communication.

[118] Mr Skelton submitted that the "no contact" rule should apply equally to Southern Response's legally-qualified personnel, which includes Mr Hurren. Mr Skelton observed that, while Southern Response takes the position that Mr Hurren is not acting as the company's legal advisor, his background (including as General Manager of Legal and Strategy) directly implicates him in Southern Response's legal strategy. He referred to the United States' District Court decision in *Tedesco v Mishkin* as authority for the proposition that the "no contact" rule applies even where the lawyer in question is personally involved in a class action.[128]

[119] Mr Skelton acknowledged that r 10.4 Conduct and Client Care Rules does not prevent the parties themselves from speaking to each other but, in his submission, the rule is not a licence for lawyers (in circumvention of the rule) to assist their client to

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[126] *Manual for Complex Litigation*, above n 68, at 300 (emphasis added).

[127] Citing *Berry v Pulley*, above n 61, at [83]; *King 1*, above n 37, at [27]; and *Parker v Anderson* 667 F 2d 1204 (5th Cir 1982) at 1211.

[128] *Tedesco v Mishkin*, above n 123, at 1483.

communicate with an opposing party in a way which would disadvantage that party and or obtain an unfair advantage for their own client.[129]

[120] Mr Skelton submitted that in this case the Court's supervisory jurisdiction — extending to control over communication between parties as well as their lawyers, so as to prevent potential abuses — reinforces the ethical "no contacts" rule.[130]

The Rosses disavow any monopoly rights

[121] Mr Weston, in his submissions, had rejected any entitlement on the part of the plaintiffs in the nature of a monopoly over the conduct of the claims.[131] Mr Skelton rejected that as a straw man argument for two reasons — while it is the Rosses' position that GCA Lawyers represents all class members (under r 10.4 Client Care Rules), each class member remains entitled to retain their own lawyer. But, Mr Skelton submitted, so long as GCA Lawyers is representing the interests of all class members, Southern Response's lawyers are bound by the "no contact" rule. (Mr Skelton also confirmed that the plaintiffs do not regard policyholders who have filed individual proceedings against Southern Response as part of the representative proceeding, regarding them as having informally and effectively opted out of the representative proceeding).

Mr Skelton's problem 1: Evading the Court's supervision

[122] Mr Skelton then turned to what he identified as three problems which would flow if the Court in its supervisory role were to condone Southern Response's intended communications and settlements, those being:

(a) evading the Court's supervision;

(b) prejudicing class members; and

(c) creating unfairness between class members.

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[129] Citing Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.4].
[130] Citing *Gulf Oil*, above n 69, at [104].
[131] Above at [38].

[123] Mr Skelton observed that the Supreme Court judgment in *Ross SC* establishes that this Court, in its role concerning the settlement and discontinuance of opt out claims, must consider a number of elements, including:

(a) whether the settlement is a fair and reasonable compromise of the claims;

(b) whether it is in the best interests of the class as a whole; and

(c) whether it prejudices individual class members.[132]

[124] Mr Skelton submitted that, if Southern Response were permitted to deal directly with class members in relation to the Package, it would violate at least the spirit if not the letter of the Supreme Court's judgment in *Ross SC*. Given Southern Response's decision not to seek Court approval of the Package, Mr Skelton submitted that the "usual process" of approval will be circumvented.

[125] Mr Skelton submitted that the Court, particularly by reference to the post-certification cases in North America, should find that Southern Response's Package, if offered and accepted, will settle all or nearly all of the representative proceeding albeit in piecemeal steps. Upon the basis that this proceeding is effectively at a post-certification stage, he submitted that, at least the United States case law, indicates that individual settlement offers must be communicated to class counsel (as well as any other lawyer retained by the class member).[133] This allows class counsel to express views, give advice and refer any issues to the Court.

[126] Mr Skelton referred to his submission (at [98] above) as to the Package being an offer to "settle the whole lot".

[127] Mr Skelton referred also to his further submission (at [99] above) as to Australian authorities relating to situations where the settlement of individual claims

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132 *Ross SC*, above n 7, at [71], [73] and [82].

133 Citing Rubenstein, Conte and Newberg, above n 90, at 409–411. See also *Re Shell Oil Refinery* 152 FRD 526 (US District Court ED La 1989).

has the effect of settling the entire representative proceeding. Such a situation was recognised by Moore J in *King 1*[134] and *Courtney 2*.[135]

[128] Mr Skelton suggested the North American cases referred to by Mr Weston involved individual settlement offers at the pre-certification stage. Mr Skelton submitted that most of the cases were in any event distinguishable from this case on the facts because they involved (adopting the characterisation of Perell J in *Lundy*), the defendants being "responsible corporate citizens doing the right thing".[136] The feature of cases such as *Lundy*, he submitted, is that the defendant took immediate steps to remedy a wrong before the class action had even got off the ground.[137]

[129] Mr Skelton submitted that the Australian cases referred to by Mr Weston involved settlement offers to a few class members or to a sub-group, and that it is in relation to such offers that the Australian Courts have taken a "light-handed approach" to the regulation of offers.[138]

[130] By reference to the Court's equitable jurisdiction, Mr Skelton observed that equity looks to the substance, not the form. He submitted that here Southern Response is in substance trying to settle the representative proceeding, the piecemeal nature of settlements notwithstanding. Mr Skelton cites the judgments in *King 1* and *Courtney 2* as containing obiter suggestions that the Court would exercise its supervisory jurisdiction so as to require Court approval of settlements where the outcome in substance would be to settle the representative proceeding.[139]

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[134] *King 1*, above n 37, at [42]. See also *Courtney 2*, above n 38, at [45].

[135] *Courtney 2,* above n 38, at [46].

[136] *Lundy*, above n 56, at [9].

[137] Citing also *Lewis*, above n 46; and *Blair v Toronto Community Housing Corp* 2011 ONSC 4395.

[138] Citing *Courtney 1*, above n 35, at [5]; *Courtney 2*, above n 38, at [45]–[46] (offer only to the remaining group members whose pacemaker had not been removed); and *Davaria 1*, above n 43, at [21] (offers made to a limited number of franchisees the subject of a wage claim).

[139] *King 1*, above n 37, at [42]: "If, for example, GIO itself directly made an offer of settlement to all group members and Mr King … and they all accepted the offer and signed releases, it could effectively settle the representative proceeding without Court involvement and in spite of s 33V." *Courtney 2*, above n 38, at [45].

Mr Skelton's problem 2: Prejudice to class members

[131] Mr Skelton noted that representative proceedings are normally resolved through a settlement negotiated between a plaintiff and defendant. He observed that, as in the federal jurisdiction in Australia, the proposed settlement is then scrutinised by the Court at a settlement hearing, often with the assistance of independent experts. Such a process was envisaged by the Supreme Court in *Ross SC*.[140] Under the Australian model, class members are given notice of the proposed settlement and the hearing and there is the opportunity for submissions (through counsel or personally). In *Ross SC*, the Supreme Court cited the Federal Court of Australia's practice note governing class actions as containing an example of this approach.[141] The Supreme Court observed that the courts can then consider the extent to which the settlement prejudices individual class members.[142]

[132] Mr Skelton referred to the central question on settlement, as identified by the Federal Court of Australia in *Evans v Davantage Group Pty Ltd (No 3)*, where Beach J observed in relation to the settlement hearing:[143]

> The central question is whether the settlement is a fair and reasonable compromise of the claims of the group members. That entails consideration of whether the proposed settlement is fair and reasonable, first, as between the applicant and group members on the one hand and the respondent on the other hand, and, second, as between the group members inter-se.

[133] Mr Skelton observed that the Court also scrutinises, for fairness and reasonableness, any legal fees and funding commissions to be paid under the settlement.[144]

[134] Mr Skelton observed that the purpose of the Court's approach to approval of settlement is to protect the interests of class members. In a situation where the substantive claims against Southern Response arise from its own misleading and deceptive behaviour, Mr Skelton submitted that the risks of the Package are obvious. The opportunity arises for Southern Response to (again) mislead policyholders, take

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140 *Ross SC*, above n 7, at [82].
141 At [82], referring to FCA Practice Note, above n 34. See [14]–[15].
142 At [82].
143 *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, at [15].
144 See FCA Practice Note, above n 34, at [15.4].

advantage of them, or put them under unfair pressure to settle, in a situation where class members may have inadequate or no legal advice. Mr Skelton submitted that a sum of $2,000 which Southern Response has indicated it would pay class members to take legal advice "does not buy one much legal advice".

[135] Mr Skelton referred to Southern Response's concept of a "Independent Oversight Committee" which it has said would oversee implementation and delivery of the Package. Mr Skelton suggested the detailed nature of the Committee is unclear and that it would in any event be no substitute for judicial review and scrutiny.

[136] Mr Skelton submitted that the Court should be disquieted by the fact that Southern Response intends to advance the promulgation of the Package during the very time when class members will have to decide whether to opt out, observing that the risk of improper communications is at its most acute during the opt out period.[145] Mr Skelton referred to United States case law as establishing that defendants must not try to induce class members to opt out.[146] Mr Skelton submitted that Southern Response's requirement of an opt out if the money available under the Package is to be accepted constitutes the most effective inducement to opt out.

[137] Mr Skelton also suggested that a requirement to opt out when a class member wishes to receive any settlement money will create confusion given that the usual class action notice states that a class member, upon opting out, will not receive money from a settlement but will be free to bring a separate law suit (citing sample notices from the United States Federal Judicial Centre and the Federal Court of Australia).

Mr Skelton's problem 3: Unfairness between class members

[138] Mr Skelton then focused on matters arising from the funding of the representative claim. The prospect of free-riders is inevitably of concern to the representative plaintiffs and their funders. On the appeals previously heard in this proceeding, submissions were presented to both the Court of Appeal and to the Supreme Court on the issues which might arise through free-riders. Both Courts

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145 Citing *Durling*, above n 65, at [39].

146 Citing *Kleiner* (*CofA*), above n 91, at 1202–1203; and *Impervious Paint Industries Inc v Ashland Oil*, above n 124, at 723. See also Rubenstein, Conte and Newberg, above n 90.

recognised the issue of free-riders may be problematic or difficult in an opt out proceeding, the Supreme Court observing that it may be that the Court will have to play a greater role than previously in relation to such issues.[147]

[139] Mr Skelton submitted that any outcome by which class members accept the Package and opt out will leave the funded class members "on the face of it" bearing all the costs of the litigation. That would be an unfair outcome, in his submission, because the unfunded class members have obtained the benefits generated by the representative proceeding. Mr Skelton describes this as an issue which was long ago recognised by the courts of equity which developed techniques by which successful plaintiffs could recover their reasonable costs in full from the recovered fund. The courts may have available to them similar cost spreading orders today, both in the form of a common fund order (for which Mr and Mrs Ross have an adjourned application) and a funding equalisation order.[148]

[140] Mr Skelton submitted that the Rosses' application for a common fund order provides the means by which, under the Court's supervision, the Rosses will be able to be reimbursed for their legal costs and funding commissions to the extent the Court considers reasonable.

[141] Mr Skelton submitted that Southern Response's approach to negotiating individual settlements, with consequential opting out, could have the effect of frustrating any common fund order this Court ultimately makes, by concentrating all of the costs on to the funded class members who have actively supported the proceeding.

[142] Mr Skelton submitted that the Court should reject Mr Weston's suggestion that it would be unfair to unrepresented class members to be sharing in the burden of costs when their opportunity to opt out has not arrived. Mr Skelton observed that, but for the appeals to the Court of Appeal and Supreme Court, the opting out period would long ago have expired, with class members required to make their election up front.

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[147] *Ross SC*, above n 7, at [86].

[148] At [62]. See also, Vince Morabito and Michael Duffy "An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions" [2020] NZ L Rev 377 at 394–401.

By opting out, class members disassociate themselves from the representative proceeding, an election which (through the occurrence of appeals) they have not yet had to make. Mr Skelton submitted that any settlement with class members which occurs here will have been prompted by the proceeding (or the threat of it) and any policyholder who settles now should not be treated in the same category as persons who had opted out at the commencement of a particular proceeding, when the substantive outcome was uncertain. Mr Skelton said there are fruits which have been generated by this proceeding which the class members are about to share, as a result of which they should all be treated as members for the purposes of sharing the costs.

Concluding submissions

[143] Mr Skelton submitted in conclusion that the Court would be abdicating its supervisory and protective role in overseeing communications and approving settlements were it to permit Southern Response to put its Package directly to class members and to negotiate settlement with them.

Analysis

The Court's supervisory jurisdiction in representative proceedings

[144] Southern Response invokes what it asserts to be the Court's supervisory jurisdiction in relation to the conduct of representative proceedings conducted on an opt out basis. The Rosses accept that such jurisdiction exists. I also find that to be so.

[145] The Supreme Court's decision in *Ross SC* establishes that such a jurisdiction exists.[149] The jurisdiction may be traced to the jurisdiction exercised (in equity) by the Court of Chancery.[150] It has been characterised as a protective jurisdiction.[151] The New Zealand courts will need to address the procedural issues which arise in relation to opt out claims on a case-by-case basis.[152]

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149 *Ross SC*, above n 7, at [81]–[82], [85] and [88]–[89], citing *Tasfast*, above n 29, at [4]; and *Ross CA*, above n 6, at [105]–[106]. See also *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [34]. In New Zealand, the High Court in exercising its supervisory powers may also draw on r 1.6(2) High Court Rules: *Ross SC*, above n 7, at [88].

150 *Ross CA*, above n 6, at [81]. *Duke of Bedford v Ellis* [1901] AC 1 (HL). See also *Manual for Complex Litigation*, above n 68, at 243; and *Courtney* 2, above n 38, at [50].

151 *Ross SC*, above n 7, at [81]. See also, the *Unresolved Claims* case, above n 30.

152 *Ross CA*, above n 6, at [106].

[146] The Supreme Court in *Ross SC*, in considering how settlement approval should be dealt with in a representative proceeding, identified the Australia and Ontario positions as the most helpful examples.[153] In the course of the Supreme Court's discussion of the position in Australia, and particularly in the Federal Court, the Court referred also (with implicit approval) to the practice of the Federal Court in relation to communication.[154] The Court footnoted references to decisions in *King 1*, *King 4* and *Courtney 2*.[155] This appears to be the most specific New Zealand authority touching upon the Court's jurisdiction as exercised in relation to communication in the course of representative proceedings.

[147] While jurisdictions such as that of the Federal Court of Australia and the Superior Court of Ontario exercise their supervisory role under statutory and/or regulatory frameworks, this Court (in the absence of legislative or regulatory intervention in New Zealand) has the responsibility, in its inherent jurisdiction, of developing the principles which will apply. The fact that the other jurisdictions have enacted rules provides a helpful considered resource when determining the practices the New Zealand courts should apply.

A defendant's communications with class members — the competing positions

[148] In applying for directions, it is Southern Response's position that it (both by itself and through its legal advisors) is entitled to communicate, engage, negotiate and/or settle claims directly with class members. It therefore sought directions that both it and its legal advisors are at liberty to so conduct themselves.

[149] Mr and Mrs Ross, through a combination of their notice of opposition and Mr Skelton's submissions, reject any such right of communication. Their argument is at two levels:

(a) in relation to Southern Response's legal advisors specifically — direct communication with class members would be in breach of the "no

[153] *Ross SC*, above n 7, at fn 107 and [67]–[75].
[154] At [69]–[70].
[155] At [70] citing *King 1*, above n 37, at [28]; *King 4*, above n 37, at [7]; and *Courtney 2*, above n 38, at [52]. See also, *Courtney 1*, above n 35.

contact" rule (r 10.4) Conduct and Client Care Rules as GCA Lawyers in terms of that rule "represent" every class member;

(b) in relation to both Southern Response and its legal advisors — as a matter of appropriate practice Southern Response should not be allowed to directly communicate and negotiate the Package because:

(i) the granting of leave under r 4.24 High Court Rules is equivalent to (the North American) certification of a proceeding, and GCA Lawyers has effectively become the legal representatives of all class members and/or;

(ii) Southern Response's intentions in relation to the Package if successful will effectively settle the representative proceeding, a situation which requires Southern Response to seek the Court's prior approval of the content and the offering of the Package; and/or

(iii) the way in which Southern Response intends to communicate the Package creates the potential for prejudice to class members, such as through misleading conduct, unfair pressure to settle and/or lack of adequate legal advice, all this during the period during which class members must make their opt out decision; and/or

(iv) Southern Response's Package creates a risk of unfairness between class members because of an inherent "free-rider" problem.

Ethical obligations of Southern Response's legal advisors

[150] By reason of the conclusion I reach under the next heading (in relation to communications whether from Southern Response or its lawyers) it is unnecessary that I determine whether r 10.4 of the Conduct and Client Care Rules applies to Southern Response's intended communications. The Australian case law to which

counsel have referred establishes that in the Federal Court, under the applicable ethical rules, the defendant's legal advisors do not have to communicate only through the representative plaintiffs' lawyer unless that lawyer has entered into a lawyer/client relationship specifically with the class member in question.

[151] I do not accept Mr Skelton's submission that the ethics rules in Australia are materially different to those under r 10.4 Conduct and Client Care Rules. Equally I do not accept the submission that the rules as applied in the United States and Canada are those which should be applied in the present context.

[152] Mr Skelton draws a distinction in particular between the terminology under the Australian Solicitors' Conduct Rules 2015 regarding communication with "the client or clients of another practitioner" and the identification of "a person represented by another lawyer" adopted in Ontario and in United States.[156]

[153] My review of the North American authorities to which counsel have referred does not indicate there is, in relation to the various ethical rules involved, a substantive distinction turning on whether the rule speaks of communications with the *client* of another lawyer or a *person represented* by another lawyer. Case law in both the United States and Canada indicates that, in those jurisdictions which have a certification regime, the Court upon certification imposes the relationship of client and lawyer upon the entire class. Before certification, that relationship does not exist. That distinction was observed by Perell J in *Lundy*, where his Honour (having reviewed the ethical rules) concluded:[157]

> [28] While there is no doubt that, after certification, there is a lawyer and client relationship between the plaintiff's lawyer and the class members before certification there is, strictly speaking, no lawyer and client relationship between putative class members, and putative class counsel.
>
> [29] If there is no certification … there will be no class of claimants for the lawyer to have a relationship with, and it is hardly fair or even feasible before certification to impose the full complement of tort, contract and fiduciary responsibilities on a lawyer …

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[156] Law Society of Ontario *Rules of Professional Conduct*, r 7.2–7.6; and American Bar Association, *Model Rules of Professional Conduct*, r 4.2.

[157] *Lundy*, above n 56 (citations omitted).

[154] It was against that background that Perell J, in *Lundy* went on to recognise that the courts in both Canada and the United States have found at the pre-certification stage, absent an ethical bar on communication, the Court has power to make extra-ordinary orders restricting communication between defendants and putative class members. But such intervention is restricted. Perell J observed the situation where the defendant's communication is: "inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process".[158]

[155] The current (New Zealand) Conduct and Client Care Rules were developed in a jurisdiction which had no tradition of representative claims brought on an opt out basis. Rule 10.4 of the Conduct and Client Care Rules does not naturally speak into that situation.

[156] If one approaches the construction of r 10.4 of the Conduct and Client Care Rules on its plain meaning (and not subject to the Court-imposed characterisation of the relationship arising from the North American certification processes), then the policyholders with whom Southern Response and its lawyers wish to communicate directly are not "persons… represented by another lawyer in that matter".

[157] There is no relevant distinction to be drawn from the fact that the makers of the Conduct and Client Care Rules adopted the terminology of "a person represented by another lawyer" rather than "a client of another lawyer". The heading to r 10.4 ("communicating with another lawyer's client") is a relatively clear indication of that.

[158] It is unsurprising that the Law Commission, in an Issues Paper made observations consistent with this construction, observing:[159]

> …absent legislative and regulatory reform, group members who have not engaged with the lawyers acting for the plaintiff should not be considered clients of the lawyer in any meaningful sense. Rather … group members would need to be protected by a combination of the lawyer's duties to the Court and the Court's supervisory role in representative actions.

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158 At [35].

159 Law Commission, above n 19, at [12.48] (footnote omitted) citing New Zealand Law Society "Submissions on Behalf of New Zealand Law Society | Te Kāhui Ture o Aotearoa as intervenor" 16 March 2020 in *Ross SC*.

[159] I am not persuaded that there is such similarity between the certification regimes in North American jurisdictions and the leave regime under r 4.24 High Court Rules to make it appropriate for the New Zealand Courts, by analogy, to impose as between plaintiff's lawyers and class members a solicitor/client relationship for the purposes of the ethical rules.

The Court's supervisory jurisdiction — applied to the defendant and its lawyers

[160] The Court may exercise its supervisory jurisdiction in relation to the form and content of information to be provided to class members, the means of providing such information and matters such as the opt out date.[160] In this proceeding, the Rosses have applied for the Court's approval of those very matters upon the basis that the Court's approval should (in the particular circumstances) be obtained.[161]

[161] The rationale for the exercise of this jurisdiction (exercised under the Federal Court Act) was explained by Goldberg J in the Federal Court in *Williams v FAI Home Security Pty Ltd (No 3)*:[162]

> The nature of class actions brought pursuant to provisions of PtIVA of the Act [1976 (Cth)] are such that it is imperative that any communications made to group members, in whatever form, be accurate especially in relation to the rights which they have in relation to class actions of which they are a group member and the rights which they have to opt out of such proceedings.

(In the Australian federal jurisdiction, s 33ZF(1) in Pt IVA of the Federal Court Act empowers the Federal Court to impose constraints on communication to ensure justice is done.)[163]

[162] In *Courtney 2*, Sackville J recognised:[164]

> Where intervention is considered appropriate, the form of intervention must depend on the circumstances of each case.

[160] *Ross SC*, above n 7, at [56]–[57] and [70].
[161] Amended notice of interlocutory application dated 4 December 2020.
[162] *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438 at [24]. See also *Courtney 1*, above n 35, at [20].
[163] *Courtney 2*, above n 38, at [52]. See also, *Ross SC*, above n 7, at [69]–[70].
[164] *Courtney 2*, above n 38, at [54].

[163] *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* is an example of a proceeding in which the Court found it appropriate to intervene in communications between the defendant and unrepresented class members.[165] Moore J in *King 1* first ordered that no offer of settlement be made (by GIO) to any group member without leave of the Court.[166] A Full Court (*King 2*) dismissed GIO's application for leave to appeal.[167] Subsequently, Moore J (*King 3*) dismissed an application to restrain GIO from sending a letter to group members but imposed a condition that any letter GIO sent had to be on (amended) terms as specified by the Court and that the letter was not to be sent to any group member represented by the solicitors acting for the representative party.[168]

[164] In *Courtney 2*, Sackville J found there was no reason to prevent the defendant communicating a settlement offer to group members provided the defendant's conduct was not misleading and the offer was not communicated in circumstances unfair to the recipients.[169] Sackville J found it inappropriate to set out exhaustive guidelines in advance as to the form of a settlement offer but identified a number of "standards".[170] His Honour considered that it might be appropriate to require a defendant that proposed to make such a settlement offer to advise the plaintiff's solicitor in advance of the offer so as to give them an opportunity to apply to the Court for further orders should they consider there to be a misleading or unfair aspect to the offer.[171]

[165] The courts in Ontario appear to adopt an approach consistent with that of the Australian Federal Court. I have referred (above at [153]–[154]) to the judgment of Perell J in *Lundy* identifying the (limited) circumstances to which those courts will (extra-ordinarily) intervene in a defendant's direct communication with class members. The decision of the Superior Court of Justice in *Lewis* illustrates that power of intervention.[172] Following the commencement of an intended class action, the defendants established a claims centre for the purpose of settling claims directly,

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165 *King 1*, above n 37; *King* 2, above n 37; and *King 3*, above n 37.
166 *King 1*, above n 37, at [44].
167 *King 2*, above n 37.
168 *King 3*, above n 37, at [27].
169 *Courtney 2*, above n 38, at [52] and [58]. See also *Davaria 1*, above n 43, at [9].
170 At [64].
171 At [62] and [65]. Such a course was also adopted in *Lundy*, above n 56.
172 *Lewis*, above n 46. See also *A&P*, above n 52, at [19].

without advising the claimants about the intended class proceeding. The Court found there was a danger of misleading and coercion through the claimants' not knowing about their rights through the class proceeding. The Court concluded:[173]

> [19] The court must engage in a weighing and balancing exercise. In my view, the advantage in the achievement of a transparent process that ensures greater fairness to claimants through full disclosure by Shell far outweighs the cost of a minimal intrusion upon Shell's otherwise freedom of action through the requested court order.

The Court made an order that the defendants deliver to potential class members a memorandum in terms annexed to the judgment.

[166] The Federal Court of Australia (Sackville J in *Courtney 2*) has recognised that the courts do not have a role in approving a settlement offer made by a defendant to a group member.[174]

[167] The Court's restraint as identified by Sackville J in *Courtney 2* was followed and explained by Middleton J in *Davaria 1* when his Honour stated:[175]

> [20] Neither ss 33Z(1)(g) or 33ZF of the FCAA would allow the Court in the proper exercise of its discretion to prohibit or limit communications between a respondent and an individual group member that are otherwise lawful and not subject to any ethical constraint, and where those communications are not misleading and do not involve any unfairness. The ability of a respondent to communicate with individual group members is an important feature of the individual rights of a respondent and a group member to enter into negotiations without inhibition. Unless there is a basis upon the evidence for the Court to intervene to prevent or cure the effects of improper conduct on the part of a respondent, the Court should not do so in the pretext of some guardianship role to protect individual unrepresented group members. Further, there is no provision in the FCAA which would invalidate a settlement reached between an individual group member and a respondent without the prior approval of the Court, unless ss 33V(1) or 33W are applicable. Of course, if an individual settlement is ultimately reached in circumstances where the Court comes to the view that there has been misleading or unfair conduct that settlement may be set aside.

[168] In *Davaria 1*, the Court found nothing misleading or otherwise unfair in the communication the defendant was making to group members regarding proposed

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173 *Lewis*, above n 46, at [19]. See also *Lundy*, above n 56, at [39]; and *National Money Mart*, above n 58.
174 *Courtney 2*, above n 38, at [63].
175 *Davaria 1*, above n 43.

settlements.[176] His Honour declined to impose the "generalised communications protocol" sought by the plaintiff.[177]

Comparative law summarised

[169] There is not a specific, detailed New Zealand authority in relation to a defendant's communications with claimants in the context of a representative proceeding which adopts an opt out procedure. That said, the Supreme Court has referenced as relevant the practice adopted in the Federal Court of Australia. And, in relation to representative proceedings generally, the Supreme Court has cited the practices in Australian and Ontario as the most helpful.[178]

[170] Practice in those overseas jurisdictions recognises the general freedom of a defendant to communicate settlement offers directly to claimants (other than the representative plaintiff), but with the Court prepared to intervene where the defendant's conduct is misleading, coercive or similarly unacceptable. The jurisdiction to intervene is exercised protectively, but otherwise recognising the defendant's freedom of action. Circumstances in particular cases may mean that a prudent defendant will provide its settlement offer to the solicitor acting for the representative plaintiff in advance, to enable that party to seek directions from the Court in the event there is an unacceptable aspect. Extra-ordinarily, the Court may prohibit a defendant's communications other than in a form and manner approved in advance by the Court.

[171] Offers to the representative plaintiff (and any other claimant who is a client of the plaintiff's solicitor) must be made through that solicitor and not directly to that claimant. The Court will intervene to prohibit direct contact as a matter of its protective role in representative proceedings (and also, if applicable, in accordance with the rules of professional conduct applying in the jurisdiction).

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176 At [21].
177 At [1]–[2] and [23].
178 *Ross SC*, above n 7, at fn 107 and [67]–[75].

The appropriateness of supervisory intervention in this case

[172] The authorities to which I have referred (above at [161]–[168]) indicate that at least in some overseas jurisdictions the Court's supervisory jurisdiction will in appropriate cases be exercised in relation to the content of communications between the defendant in a class action and class members who have not retained the plaintiff's lawyers to represent them. The most frequent example of such supervision either being exercised or considered relates to situations where the defendant's conduct is misleading, coercive or similarly unacceptable. The categories of conduct which may attract the Court's intervention, however, are not closed.

[173] Here, the proposed communication of the defendant (and/or its lawyers) with unrepresented members of the class comes at the very time the plaintiffs are awaiting the hearing of their application for notification orders. The outcome of that will be to determine the information which is to be provided by direct notice and by newspaper advertisement to class members, setting out details as to the proceeding, class membership, the right to stay in or opt out of the representative proceeding and the consequences of each of those options. It happens that the plaintiffs are able to seek notification orders only now, almost three years after commencing this proceeding, because of the interlocutory steps and appeals which have occurred in the meantime.

[174] It also happens that in that intervening period there has become available to Southern Response, through the *Dodds* litigation, legal outcomes which have led Southern Response to formulate the Package which it wishes to put to policyholders including class members.[179] The form of directions sought by Southern Response did not identify the content of any communication which Southern Response would (at least initially) have with class members. In its evidence, Mr Hurren identified the principles which he said would underpin the Package but he did not provide evidence as to the particular content of any communication by which the Package would be promoted to class members.

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179 *Dodds v Southern Response Earthquake Services Ltd*, above n 8; and *Southern Response Earthquake Services Ltd v Dodds*; above n 9.

[175] The parties are now in the situation in which notices sought by the plaintiffs will be going to class members around the same time as any Southern Response communications to class members about its Package (unless constrained by the Court in its supervisory role). There is potential for confusion unless the Southern Response communication is independently scrutinised. The two sets of communications need to be capable of being read by class members with a clear understanding of the contents not only in the sense that the communication standing alone is clear but also in the sense that each set of communications, when read around the same time as the other, does not thereby give rise to potential confusion or misunderstanding.

[176] It is this unusual feature of the timing of this application that called for the Court's supervisory intervention on this occasion and is why the directions sought by the defendant were refused.

Osborne J

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