IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000361
[2021] NZHC 2454

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

Hearing: 14 April 2021

Appearances: P G Skelton QC, K M Quinn and C B Pearce for Plaintiffs
T C Weston QC, K M Paterson and E D Peers for Defendant
S M Grieve for B & L Vickers and others (Intervening)

Judgment: 20 September 2021

JUDGMENT OF OSBORNE J
(setting aside application)

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 Service Ltd (Southern Response).[2] 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 Southern Response provided them with incomplete or misrepresented information about the cost of remedying earthquake damage to their home. As a result they cash-settled on a less favourable basis than they otherwise would have.

[2] It has been estimated there may be approximately 3,000 policyholders similarly affected. This judgment, one of four interlocutory judgments issuing today, deals with the Rosses' application for a "setting aside order".

[3] The Rosses have before the Court an (adjourned) application for a common fund order, a means by which the costs of the proceedings otherwise borne by the plaintiffs would be ordered to be shared by other class members.

Application for a setting aside order

[4] The setting aside order sought by the Rosses would require Southern Response, in the event it reaches settlement with any class member, to establish an interest-bearing escrow account and to set aside and pay into the escrow account 15 per cent of the agreed settlement sum. The plaintiffs seek a further order that no payment be made from the escrow account unless and until approved by the Court following determination of the plaintiffs' common fund application.

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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.

[5] Southern Response opposes the setting aside order, as do Brandon and Leonie Vickers (and others) who, as policyholders, were granted leave to intervene in this and associated applications.[3]

The litigation to date

[6] Mr and Mrs Ross commenced their proceeding on 25 May 2018. To this point, it remained the subject of interlocutory issues. Three 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 Mr and Mrs Ross's other interlocutory applications were necessarily deferred. In their original interlocutory application to bring their proceeding as a representative action, Mr and Mrs Ross 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

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3 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 684 at [15]–[19].
4 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 [Notification Judgment]; and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 [Communications Judgment (No 2)].
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*].

(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 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 between Southern Response and any class members.

Both of these applications have been filed since I provided a Results judgment on the notification application.[8]

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.[9] Southern Response unsuccessfully (except as to a relatively minor item of damages) appealed and the Court of Appeal delivered its judgment in September 2020.[10] Southern Response has not appealed the Court of Appeal judgment and has paid the judgment sum (as determined by the Court of Appeal) to Mr and Mrs Dodds.

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8 More details at [19].

9 *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016, [2019] 3 NZLR 826 [*Dodds HC*].

10 *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395, [2020] 3 NZLR 383 [*Dodds CA*].

[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 the settled claims, there is a significant number of unsettled claims where the claimants are represented by lawyers other than GCA Lawyers (the Rosses' 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*' litigation, all represented by Grant Shand;

(b) two other sets of clients, without existing proceedings, also represented by Mr 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 Rosses' Supreme Court hearing;

(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.

Discussion

The plaintiffs' litigation arrangements

[16] The Rosses have retained GCA Lawyers as the solicitors to represent them in this proceeding. They accordingly have contractual obligations to GCA Lawyers.

[17] The Rosses have also obtained litigation funding. In April 2019 they entered into an arrangement with Claims Funding Australia Pty Ltd (CFA). To date an additional (approximately) 300 class members have entered into funding agreements with CFA, obliging those "funded" class members to contribute to the costs of the representative proceeding out of any damages or compensation they receive from Southern Response if the proceeding is a success. The unfunded class members have no such contractual obligation to CFA.

The (Southern Response) Package

[18] 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 in similar situations to Mr and Mrs Dodds with a proactive solution based on the outcome of the *Dodds* litigation.

[19] Following the Court of Appeal's judgment in *Dodds CA*, Southern Response (with the Crown's support) then wished to advertise and communicate with policyholders affected by the *Dodds* litigation. Southern Response says it proposes to put 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). The Rosses objected to either Southern Response or its legal advisors having direct communication with class members concerning the Package. This led to Southern Response earlier this year making an opposed interlocutory application

for directions which would have permitted it and its legal advisors to communicate directly with individual potential class members in relation to the settlement of their claims. On 23 February 2021, I issued a Result Judgment by which the directions sought by Southern Response were refused.[11] The reasons for that decision are the subject of a judgment (Reasons Judgment) being released today.[12]

[20] The two-and-a-half year period taken up with the interlocutory application and appeals concerning the opt out basis of the Rosses' representative claim was sufficient to see the Dodds' parallel claim litigated through to a final outcome before the Rosses were in a position to have their application for notification orders heard. The Rosses had been unable to have a class members notice issued relatively soon after commencing their claim (as would normally occur in an opt out representative proceeding).

[21] As a consequence of there being two parallel proceedings, the Court has come to consider several interlocutory applications at the same time. Those have included the terms of the class members notice (on the plaintiffs' application) and the terms of Southern Response's proposed communication of its Package (formulated after the liability outcome of the *Dodds* litigation).

[22] It was common ground at the hearing that the (stage 1) liability findings on common issues which would have been necessary failing settlement in this proceeding will no longer be required (by reason of the *Dodds* litigation outcome). The class members notice in this proceeding will therefore be distributed in the unusual circumstance that liability is no longer in issue. Issues as to what information should be included in the class members notice and as to whether (and if so, in what terms) Southern Response should be able to communicate its Package at this time are the subject of the Notification Judgment[13] and the Communications Judgment (No 2),[14] being delivered today, alongside this judgment in relation to the plaintiffs' application for setting aside orders.

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11 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 [Result Judgment].
12 Reasons Judgment, above n 4.
13 Notification Judgment, above n 4.
14 Communications Judgment (No 2), above n 4.

Common fund orders, fee equalisation orders, and other orders

[23] In November 2019, the Rosses filed their (amended) application for a common fund order. Southern Response oppose the application both on the basis there is either no jurisdiction or no justification for such an order and, that in any event, the application should be determined at a later date. The intervenors whom Ms Grieve represents are also opposed to a common fund order.

[24] The Rosses' application for a common fund order was subsequently adjourned while the appeal process in relation to the opt out procedure was on foot.

[25] In the course of that appeal process, the availability of common fund (and other) orders was touched upon in relation to how the costs of a representative proceeding would be met. Goddard J, in *Ross CA* observed:[15]

> The Australian courts have developed a range of techniques for addressing the perceived unfairness of a subset of claimants bearing all of the costs of the proceedings while others receive the same benefits from those proceedings, including making orders closing the class before relief is provided, making funding equalisation orders, and making common fund orders.[16] We make no comment on the availability of such orders under r 4.24: that would not be appropriate in circumstances where an application by Mr and Mrs Ross for a common fund order remains to be determined in the High Court. But we are confident that the Court has the necessary tools to address any real unfairness in this context, whether under the High Court Rules or in the exercise of its inherent powers.

[26] Until that time (the Court of Appeal delivering its judgment in September 2019), the Australian courts had granted common fund orders, characteristically at an early stage of a proceeding (commencement common fund orders).[17] The case law in Australia has subsequently moved on — commencement common fund orders are no longer made but similar orders may be made at the end of the representative proceeding as part of final settlement approval.[18]

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15 *Ross CA*, above n 6, at [110].

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

17 See *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [1] per Kiefel CJ, Bell and Keane JJ.

18 *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [49]–[55]; *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 at [77]–[80]; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, (2020) 385 ALR 625 at [14]–[20]; and *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [49].

[27] In his submissions filed on this application, Mr Skelton QC for the Rosses recorded that the Rosses now intend to seek a common fund order at the end of this proceeding.

[28] While the only order sought by the plaintiffs in their funding application is a common fund order, Mr Skelton recorded in his submissions for the purpose of this application that the Rosses are entirely agnostic as to whether the cost-spreading order ultimately made is a common fund order or a fee equalisation order. Southern Response, by its notice of opposition, had identified a fee equalisation order as a device which ensures an equitable spread of costs and commission amongst class members (in contrast to a common fund order).

[29] For the purposes of this judgment, I proceed on the basis that at the conclusion of this proceeding the Rosses will bring on their application for a common fund order or will seek in the alternative a fee equalisation order, and the making of either order will be opposed by Southern Response and the intervening class members.

The detail of the Rosses' application and grounds

[30] By their application, the Rosses seek an order in terms set out in an annexure or in such other terms as the Court thinks fit, setting aside part of any settlement reached between Southern Response and class members on or after the date of the application (12 March 2021) to ensure that if the Court subsequently makes a common fund order or any other form of cost-spreading order, funds are available to give effect to the Court's order.

[31] The annexure setting out the specific terms of the proposed setting aside order reads:

> 1. Within 10 working days from the date of this order the Defendant shall establish an interest-bearing escrow account (the **Account**), to be maintained until further order of the Court.
>
> 2. The following orders apply in respect of class members in this proceeding who, by the date of this application, have neither given notice of opting out of the proceeding, nor filed or become party to a separate proceeding against the Defendant that relates to the matters at issue in this proceeding (**Individual Class Members**).

3. From any payment that the Defendant makes (or agrees to make) to an Individual Class Member in connection with the matters at issue in this proceeding, the Defendant shall set aside and pay into the Account 15% of the total monetary value of such payment.

4. No amounts shall be paid from the Account unless and until approved by the Court following determination of the plaintiffs' application for a Common Fund Order.

[32] When the Rosses' application was filed, Mr Skelton at the same time filed a memorandum. The memorandum signalled a concession (clearly intended to be an undertaking) as to how the Rosses would limit their application for any common fund order or similar order subsequently to be pursued. In particular, it was stated that the Rosses would not ask the Court to apply the common fund order to any class member who has opted out or given notice of their intention to opt out prior to 12 March 2021 (being the date the setting aside application was filed). There was subsequently, in the course of submissions, discussion as to the effectiveness of such a concession, given that the Court has yet to make directions as to the opting out regime and given that class members who fall either side of the Rosses' stipulated (and arguably arbitrary) cut-off date might well argue for a different approach.

[33] The grounds of the Rosses' application (summarised) are:

(a) a "free rider" issue arises because:

(i) any payments made by Southern Response to class members are at least in part the result of the Rosses' proceeding;

(ii) the Rosses have incurred significant costs and expenses (including the cost of obtaining litigation funding);

(iii) there is a common fund order application before the Court for the equitable spreading of such costs and expenses; and

(iv) Southern Response's Package would frustrate any common fund order subsequently made;

(b) the evidence establishes that Southern Response intends to enter into individual settlements with class members with the purpose of preventing the spreading of costs and expenses onto such class members;

(c) the Court's supervisory jurisdiction in relation to representative proceedings extends to ensuring that, in relation to settlements, all class members are treated fairly and one group of class members is not advantaged at the expense of another; and

(d) the nature of a setting aside order is interim, leaving determination of entitlements to the hearing of the common fund order application.

[34] The application was supported by an affidavit of Grant Cameron, the principal of GCA Lawyers. Mr Cameron adopted contents of three previous affidavits filed in this proceeding.

[35] Mr Cameron explained the importance of bringing the proceeding on an opt out basis, stating:

> That was done for three reasons: (1) so that all policyholders who (the Plaintiffs allege) have been harmed as a result of Southern Response's conduct would have the best possible opportunity to participate in the claim if they wish; (2) so that the costs of the proceeding could be spread across a larger group of people, lowering the per capita cost to class members; and (3) so that the defendant, if found liable, will have to account for all or at least a very substantial part of the loss cause by its conduct.

[36] Mr Cameron then identified work carried out from 2016 to 2021. Matters he referred to included:

(a) filing the proceeding in May 2018 partly to stop time running for limitation purposes, Southern Response having previously announced it would not rely on limitation defences for claims filed before 4 September 2018 — however, there was an argument that claims under the Fair Trading Act 1986 were subject to a three-year limitation period which could expire on 28 May 2018;

(b) a direct overture by GCA Lawyers to Southern Response after the proceeding was filed to seek early resolution (without litigation funding) came to nothing;

(c) given the inability of both the plaintiffs and GCA Lawyers to bear the costs and risk of the litigation, litigation funding was then pursued;

(d) over that preceding period, GCA Lawyers and counsel had acted on a "no win, no fee" basis;

(e) since CFA agreed to become the litigation funder in March 2019, the Rosses' legal team have been paid 75 per cent of their normal fees with 25 per cent treated as deferred costs; and

(f) through the Rosses' successful appeal to the Court of Appeal in *Ross CA*, they obtained the (opposed) extension of the class definition to include policyholders whose homes were deemed to be "repairs" (rather than limited to "rebuilds") and the opt out regime meant that all persons within the class definition were included in the class unless they opted out.

[37] Mr Cameron referred to the *Dodds* litigation (commenced shortly before this proceeding in February 2018).[19] Mr Cameron stated the Rosses' legal team became aware of the *Dodds* litigation some time in mid-2018 and had "various discussions of a cooperative nature" with the Dodds' legal team (privilege being claimed over those discussions).

[38] Mr Cameron deposed the outcome of the *Dodds* trial (March 2019) was of great importance to this proceeding. The Rosses' legal team considered it a test case and gave assistance to the Dodds' legal team at trial, particularly with providing junior counsel to assist the legal team and preparing closing submissions (at no cost to the Dodds). Mr Cameron deposes the cost of such assistance to the Dodds was seen as part of the cost of securing a successful outcome for the class members in this

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19 *Dodds HC*, above n 9; *Dodds CA*, above n 10.

proceeding. The cost has been borne by CFA and will ultimately be borne by class members if this proceeding is successful.

[39] Mr Cameron deposed that the Rosses' legal team again gave assistance, at no cost, to the Dodds' legal team in the subsequent hearing in the Court of Appeal.

[40] Mr Cameron, while noting that Southern Response has paid the Dodds' legal costs in the High Court and the Court of Appeal, observed that Southern Response's offer to pay those costs arose only after Southern Response lost the High Court case.

[41] In his evidence, Mr Cameron responded to two particular aspects of Southern Response's position:

(a) *Southern Response's desire to see settlement funds not go to a litigation funder.*

Mr Cameron stated, in the face of a "delay, deny, defend" approach to this litigation, the plaintiffs would have been unable to get to this point without the financial support of a litigation funder. He says there would be an obvious inequity if Southern Response is able to "settle the proceeding" in a way that heaps all the financial burden of the representative proceeding onto a small minority of class members. Mr Cameron's estimate is that there are currently 1,800 to 2,800 persons in the class. As against that, Mr Hurren notes there are some 300 class members who have retained GCA Lawyers.

(b) *Eligibility of "out of scope" claimants for the Package*

Mr Hurren had provided evidence that Southern Response was offering the Package not only to policyholders who fell within the class defined for this representative proceeding but also to policyholders who had "out of scope" claims (being claims for insured damage, not covered by EQC, such as to pathways and fences). Mr Cameron first explained why it is difficult to understand how a package based on the outcome

in the *Dodds* litigation would include such policyholders. Secondly, and in any event, Mr Cameron noted that an offer to a wider class does not alter "the fact" that Southern Response would not be making settlement offers to anyone in the class had it not been moved to do so by this proceeding.

Southern Response's opposition and grounds

[42] Southern Response opposed the application for a setting aside order. Its grounds of opposition (summarised) are:

(a) *The autonomy of potential class members*

Given the orders permitting this representative claim to proceed on an opt out basis, a setting aside order would be inconsistent with the individual autonomy of potential class members to decline to participate in the proceeding. The right to opt out is rendered nugatory if potential class members remain liable for costs, commission percentages and lawyers' fees payable to the Rosses' solicitors and the litigation funder.

(b) *The significance of the Dodds litigation*

The Package was specifically developed as a result of the outcome in the *Dodds* litigation. Those class members who opt out will not have derived any benefit from the work carried out in this representative proceeding.

(c) *The common fund order to be protected by the setting aside order*

The only costs recovery order at present sought by the plaintiffs, the common fund order, would not "spread the costs and expenses of the proceeding" among class members. In contrast, a fee equalisation order would ensure "an equitable spread of costs and commission amongst class members". There is doubtful jurisdiction in New Zealand to make

common fund orders. There is no jurisdiction to make such orders against those who have opted out of the proceeding. It would be inappropriate to make interim preservation orders in favour of the plaintiffs when they have unilaterally chosen not to bring their common fund order application (filed in May 2018) on for hearing.

(d) *Prejudice to class members wishing to opt out*

Setting aside orders would be prejudicial to potential class members who wish to opt out and not be represented by GCA Lawyers or enter into arrangements with the litigation funder.

(e) *The amounts proposed to be set aside*

If a setting aside order were to be made, the 15 per cent proportion of settlement sums is excessive and unjustified. The Court in that event should award only such sum as it considers necessary to protect the position of the solicitors and funder.

(f) *Backdating to 12 March 2021?*

Southern Response, in the event the Court makes a setting aside order, opposes any backdating of the order to 12 March 2021 or otherwise.

[43] Southern Response's evidence in opposition was provided by Mr Hurren. He provided a fresh affidavit as well as referring to the evidence he had filed in support of Southern Response's initial application for directions in relation to its communications and in opposition to the plaintiffs' application for notification orders.

[44] Mr Hurren observed he was not in a position to comment on much of the information referred to by Mr Cameron as to the "behind the scenes" work undertaken by the Rosses' legal team, but he did not doubt that the lawyers would have undertaken a lot of work.

[45] Mr Hurren then turned to what he viewed as the Rosses' implied assertion that Southern Response's Package is a direct response to this proceeding and the work the Rosses' team has put into pursuing it.

[46] Mr Hurren referred to a number of events:

(a) the outcome of the litigation in *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*,[20] (culminating in the Supreme Court's decision on 22 July 2015) which confirmed items of cost that were covered by the insurance policies. This led Southern Response to include those costs in settlement calculations, backdated to 1 October 2014 (the date of the Court of Appeal's decision in *Avonside Holdings*);

(b) subsequent challenges by policyholders who had settled claims before 1 October 2014, commencing with proceedings filed by Grant Shand in 2016 (and subsequently) and then followed by the *Dodds* litigation commenced by Anthony Harper in February 2018;

(c) the Crown's election to take over the conduct of the *Dodds* litigation in February 2019 as a test case to determine Southern Response's liability, with other proceedings (except this proceeding) stayed; and

(d) the Crown's intention to offer the Package regardless of whether this proceeding was to be conducted on an opt out or opt in basis.

[47] Mr Hurren then turned to the motivations behind the Package, responding particularly to Mr Cameron's suggestion that Southern Response is embarking on an individual settlement programme as it does not wish settlement funds to go to a litigation funder. Mr Hurren stated that is an incomplete and incorrect statement for a number of reasons:

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[20] *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433; *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483; and *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141.

(a) it is correct that Southern Response would prefer to see the full extent of settlement funds it pays to eligible policyholders paid into their hands and available for their full benefit;

(b) it is the Crown's initiative, publicly stated, to find a fair and enduring resolution for the outstanding claims from the Canterbury Earthquake Sequence;

(c) important reasons for the decision to pursue settlement with individual policyholders are:

(i) the Crown and Southern Response wish to take responsibility for implementing any settlement — with the calculations being complicated, the process under the Package allows reviewing and processing in a principled and consistent way;

(ii) Southern Response and the Crown wish to ensure the integrity of the settlement process, hence the supervision of a Crown-appointed Independent Oversight Committee;[21]

(iii) a settlement directly with policyholders, as against one decided upon by a third party, avoids the prospect of class members remaining dissatisfied and later approaching Southern Response for further payment;

(iv) with the Package fully developed, Southern Response will be able to see funds distributed to eligible policyholders as quickly as possible; and

(v) settlement through the Package will see Southern Response bearing all costs of administering the settlement fund (provided by the Crown), whereas resolution through a third party will

[21] See Communications Judgment (No 2), above n 4, at [39]–[43].

involve administrative (including legal) costs which would need to be met out of the settlement fund.

[48] Mr Hurren summarised these matters by stating that securing the cheapest resolution of this matter has not motivated Southern Response or the Crown.

[49] Mr Hurren then turned to Mr Cameron's assertion that Southern Response would be "heap[ing]" the cost of the plaintiffs' representative proceeding on to a small number of class members. Mr Hurren rejected that criticism for six stated reasons:

(a) Southern Response's Package responded to issues raised in at least 20 separate claims before the decision was made to pursue a test case through the *Dodds* litigation;

(b) the approximately 300 class members who have signed retainers with GCA Lawyers must be taken to have willingly agreed to the terms at the time they signed retainers;

(c) while the Rosses' application for a common fund order has yet to be determined, it is unknown whether the 300 class members will be worse off by having to meet all the costs of the representative proceeding to date;

(d) the Crown publicly announced after the High Court decision in *Dodds HC* that it would provide a proactive solution once clarity was provided by the Court of Appeal;

(e) since the misrepresentation claims were first made against Southern Response (in 2015/2016) it is not only GCA Lawyers' clients who have engaged lawyers and met costs; and

(f) the Package includes provision for an allowance of up to $2,000 for policyholders (with an over-cap claim) to obtain legal advice about any payment offer under the Package.

[50] Finally Mr Hurren responded to Mr Cameron's evidence in relation to "out of scope" claims, stating that a sampling of such claims to date suggests less than one per cent of out of scope claims would fall within the class definition for this proceeding.

Position of the intervening policyholders

[51] Mr and Mrs Vickers and other policyholders obtained leave on an urgent basis, shortly before the hearing. The intervenors' position in relation to the interlocutory applications was to be contained in written submissions, filed before the hearing.[22]

[52] The intervenors filed affidavits from five deponents:

(a) Leonie Vickers — she and her husband had cash-settled with Southern Response in 2012 and wished to settle their claim themselves directly with Southern Response with the help of their advocate, David Townshend. They have never engaged with the Rosses or their solicitors and do not wish to be involved in paying for services through being "opted in" without their knowledge or agreement.

(b) Alison Allsop — with her husband she cash-settled with Southern Response in 2014 and they wish to be able to settle the claim themselves with the help of Mr Townshend. Her concerns are very similar to those of Mrs Vickers.

(c) Lindsay Fergusson — with her husband she cash-settled with Southern Response in July 2012 and they wish to settle their claim by themselves with the help of Mr Townshend. Her concerns are again very similar to those of Mrs Vickers.

(d) David Townshend — an engineer, who practises as an insurance claims advocate. He has been representing claimants who are within the class covered by this representative proceeding but who do not wish to be part of the proceeding. His clients have decided not to retain legal

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22 *Ross v Southern Response Earthquake Services Ltd*, above n 3, at [19].

assistance. Mr Townshend deposes that, in relation to the Vickers, he presented a claim to Southern Response in October 2020 which was based directly on the Dodds' success in the Court of Appeal. He has not been able to advance other negotiations with Southern Response because Southern Response has advised (in the light of this Court's rulings in relation to its communications) it cannot discuss these claims further at this time. Mr Townshend refers to the distress that his clients have been suffering through the delay in settlement of their claims and through the prospect that an "unrelated party", who they choose not to represent them, might be taking a percentage of what they are owed. Mr Townshend deposes that the Rosses and their lawyers have done nothing that benefits any of the people he represents.

(e) Grant Shand — Mr Shand is a principal in his own law firm. He believes he has been involved in more earthquake cases for homeowners than any other person. He acted for the plaintiffs in *Avonside Holdings* which determined Southern Response's liability to pay additional sums beyond the cash settlement figures. Because Southern Response then denied liability to compensate policyholders who had cash-settled before 1 October 2014, Mr Shand commenced individual proceedings for homeowners in the District Court (four in 2016 and 21 in 2018). All but three of the proceedings have been resolved. Mr Shand continues to represent the plaintiffs with unresolved claims, each of whom has issued a "notice opting out" in relation to this proceeding. Mr Shand rejects Mr Cameron's statement that Southern Response only contemplated settling with all class members because of the Rosses' success in the Court of Appeal in 2019. Mr Shand states that Southern Response had been settling similar claims since 2016 and that, as a result of the decision in *Dodds HC* (mid-August 2019), Southern Response looked at settling everybody under a package. Mr Shand responded to Mr Cameron's evidence as to assistance GCA Lawyers had rendered to the lawyers acting for the Dodds by noting he (Mr Shand) had also provided assistance and advice to those lawyers, for which he did not charge. Mr Shand understands

that Southern Response does not intend to rely on any limitation defence. Mr Shand opines that this present proceeding has not had a positive effect on the claims of other policyholders. He views the settlements he has achieved as having been the result of his personal direct dealings with Southern Response on each claim, addressing the issues in relation to each separate claim. He refers to the differences which arise in relation to the calculation of contingency and professional fees in each case (both contingencies and professional fees varying from zero per cent to 17.5 per cent).

Mr Shand states that this proceeding has actually had a negative effect on claimants by postponing settlements between policyholders and Southern Response. Southern Response refused to finalise and implement settlements which had been agreed in principle.

Mr Shand rejects the proposition that this proceeding or the lawyers acting for the Rosses have done anything to advance the interests of his clients.

[53] Ms Grieve, on behalf of the intervenors, presented succinct submissions. She identified the intervenors' grounds of opposition to a setting aside order. The grounds, unsurprisingly, are close to those identified by Southern Response but with some elaboration and addition.

[54] The intervenors particularly object to the interference with their protected rights to freedom of choice and individual autonomy. They assert a property right in relation to their insurance and litigation claims, invoking s 27 New Zealand Bill of Rights Act 1990 for the principle of legality, which includes the protection of such rights. The intervenors adopt Southern Response's grounds relating to the doubtful jurisdiction in relation to common fund orders and assert that, if such jurisdiction exists, this is a case where it should not be exercised because:

(a) cost-spreading orders are generally made in respect of those who have not opted out but have equally not signed funding agreements or have

opted out but have obtained a benefit from work done for the representative proceeding (being the people often referred to as "free riders"). The setting aside orders here are sought before the class members have had an opportunity to opt out;

(b) there has not been a tangible, concrete benefit to other members of the class as defined for this proceeding;

(c) cost-spreading orders are more appropriately made at the conclusion of a representative proceeding when the actual benefit to all class members can be assessed; and

(d) the intervenors will be significantly prejudiced by setting aside orders which immediately strip them of 15 per cent of their settlement funds, on the basis of a presumed benefit at an embryonic stage of the proceeding,[23] with consequential delay and expense if the intervenors at the conclusion of the proceeding wish to recover the balance of their settlement.

[55] For the intervenors, Ms Grieve then identified the following special features of the policyholders' claims and entitlements:

(a) there are significant differences between these claims and those in an "ordinary representative proceeding", in that here the policyholders had a contractual relationship, with the contract defining Southern Response's liability and extent of that liability;

(b) whether this proceeding created or will create any additional rights for the entire class is a matter of evidence which will be assessed by the Court when determining whether there should be cost-spreading orders. The intervenors point to *Avonside Holdings* and *Dodds* as establishing Southern Response's liability in terms of the approach to quantification,

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[23] Ms Grieve characterised the present stage of the proceeding as "embryonic" because, while procedural aspects of the proceeding are well advanced, the substantive subject-matter has not been advanced in this proceeding.

with the evidence indicating Southern Response has been settling such cases from 2016. Additionally the Crown had already decided on the Package approach following *Dodds*;

(c) the funder here must have assessed its risk in a landscape where there were alternative routes for policyholders and the advantage of joining the class was not clear. Ms Grieve referred to the oral submissions made on behalf of the litigation funder, CFA, in its unsuccessful intervention application on 30 March 2021. There it was acknowledged that CFA had never before had a scenario where a defendant has attempted to settle before a representative proceeding had commenced and there were potentially a large proportion of class members wanting to exit the class, meaning the funder may not be able to recover from them;

(d) CFA therefore became involved as the funder of this litigation at a time when there were significant procedural risks in the litigation with the consequential further risk that the entitlements at issue would be resolved before this proceeding reached its substantive stage.

[56] Ms Grieve identified as a further ground of opposition the requirement for the Court to consider justice for the entire class, not just the plaintiffs (or the funder). In particular, the interest of the class as a whole is that Southern Response make settlement offers as soon as possible, minimising the cost to policyholders and enabling them to finally settle and move on.

[57] Ms Grieve rejected the plaintiffs' proposition that Southern Response (and/or the policyholders who would deal directly with Southern Response) are somehow seeking to abuse the Court's processes. In particular, she submitted:

(a) Southern Response's offering of the Package is in the policyholders' best interests (and was embarked upon prior to any substantive outcome in this proceeding); and

(b) the intervenors view the proposed settlements as occurring outside the representative proceeding and are entitled to place their confidence in the Crown's involvement as the funder of the insurer and Southern Response's duties of good faith and under the Fair Insurance Code.

[58] Ms Grieve identified a need for the Court to conduct a balance of convenience assessment by analogy with the Court's assessment of interim injunctive relief. The intervenors say the prejudice to them and other affected policyholders is clear in terms of delay, cost, effort and further stress.

[59] Focused upon the interests of the intervenors (as against Southern Response) Ms Grieve invoked case law (Australian, American and New Zealand) in support of the grounds of opposition relating to the class members' personal autonomy and property rights.[24]

What this judgment will not determine

[60] This is an interlocutory application in which the plaintiffs seek interim relief. It is an unusual application for interim relief in that it is based on an asserted ultimate entitlement to recover costs (from non-parties) rather than relief in relation to property or funds that are the subject-matter of the substantive proceeding.

[61] In seeking such relief, the plaintiffs make two fundamental assertions:

(a) first, they will ultimately obtain a common fund order as applied for (or some other form of costs sharing order which is not at present the subject of an application); and

(b) secondly, this Court has jurisdiction to make setting aside orders.

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[24] In relation to personal autonomy: *In Re Linerboard Antitrust Litigation* (2003) 292 F Supp 2d 644; and *In Re Chicago Flood* 682 NE2d 421 (1997). Principle of legality: *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [31]; also *Legislation Design and Advisory Committee* "Legislation Design and Advisory Committee Guidelines" (http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/) at ch 4. Property rights: *BMW Australia Ltd v Brewster*, above n 17.

[62] Both those fundamental propositions were keenly contested by Mr Weston and Ms Grieve. All counsel presented detailed submissions in relation to both propositions, including extensive reference to overseas case law.

[63] I will not rehearse the detailed submissions as I have come to the clear view that, in the exercise of the Court's discretion, the application for setting aside orders must be dismissed. I come to this view even assuming the Court has jurisdiction both to make common fund orders (or similar costs sharing orders) and, by way of interim relief, to make setting aside orders.

[64] It is inappropriate here to determine the likelihood of the Rosses obtaining a common fund order (or similar costs sharing order) for two reasons. First, it will be at the time the Rosses apply for the common fund order that the Court will definitively determine whether it has jurisdiction to make such an order. Secondly, the Court at that time will do so in light of substantially more factual information than is currently before the Court. That information will include precisely what order is sought (both in terms of recovery of legal costs and disbursements and in terms of the litigation funder's recompense) and the extent to which the recovery of class members was brought about (if at all) through the representative claim.

The approach to interim relief

The various concerns in relation to a setting aside

[65] At the start of his submissions, Mr Skelton asserted that a setting aside order would preserve the Court's ability to address the "free rider" issue in a timely and orderly way (ahead of a common fund order or other cost-spreading order).

[66] Mr Skelton identified the particular concern for the Rosses. It is that, if they are ultimately left, after the making of a common fund order which binds individual class members who have opted out, to chase those individuals for payment of their share of costs it may prove to be a difficult, time consuming and uneconomic process. That is to be contrasted, in Mr Skelton's submission, with the situation of those individuals who would suffer no prejudice as a result of the setting aside order. The money set aside would not come from class members' pockets. Instead it would

simply be a share of the sums which Southern Response agrees to pay through individual settlements.

[67] There are then the concerns of the intervenors to be considered as it is their settlement funds that will be affected by any setting aside order. Ms Grieve identified the balance of convenience considerations. Contrary to Mr Skelton's submission, she submitted the intervenors (and other affected policyholders) will be prejudiced in terms of delay, cost, effort and further stress. The purpose of the insurance policies was to give the policyholders the ability to repair their homes or rebuild. The intervenors filed succinct affidavit evidence about wishing to opt out and settle with Southern Response directly and asserting they had received no benefit from the Rosses' litigation.

[68] The evidence of both the intervenors and their representatives (one a lawyer, the other an advocate) identifies the delay and distress suffered by such claimants in not obtaining and not knowing when they will obtain their insurance entitlements.

[69] Ms Grieve emphasised that the intervenors have (informally) opted out at the earliest point. She contrasted any erosion of the class members' autonomy by a final or interim costs order with the acceptance of risk that the Rosses' litigation funder must have knowingly assumed when they became involved in this litigation, including risks as to the extent of recovery. She submitted it is the litigation funder (rather than the policyholders who happen to be members of the class) that should bear the delay and cost involved in any later recovery.

[70] On the costs issue, Southern Response was to some extent the party in the middle, in that the Rosses are seeking retention of funds for their ultimate benefit and the intervenors are resisting deduction from their entitlements. Understandably, Southern Response's concern in relation to a setting aside order had a somewhat different perspective. Southern Response (with the Crown's support) wishes to resolve without delay the claims of such policyholders as are prepared to consider the Package and opt out of this proceeding. In opposing both the common fund order application and this setting aside application, Southern Response wishes to see the

settling policyholders receive a settlement sum which is not reduced on account of costs of the Rosses' proceeding.

Applicable principles

[71] There is no New Zealand case law, let alone legislation, establishing the principles that might guide an application for an (interlocutory) setting aside order (assuming the jurisdiction exists to make such an order).

[72] Of counsel, Ms Grieve alone made submissions as to the particular principles which might be adopted by analogy. In her submission (summarised at [58] above), she submitted an appropriate analogy lies in applications for interim injunctions. The general principles in that regard are well-established.[25] The Court must have regard to:[26]

(a) whether there is a serious question to be tried in the proceeding;

(b) where the balance of convenience lies; and

(c) ultimately, the overall justice of the case.

[73] Mr Skelton touched on such principles in submitting that no party would suffer prejudice as a result of the order. In support of that proposition, he went on to observe that, assuming Southern Response's position in relation to common fund orders is vindicated either on jurisdiction grounds or on the facts, then "all of the set-aside funds would be released".

[74] On my assessment of this case, it is sufficient to apply the interim injunction principles to reach a just determination of this application.

[75] In relation to applicable principles, I will add these observations. The interim injunction principles arise in the context of protecting substantive outcomes. The

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25 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1974] 1 All ER 504 (HL); *Consolidated Traders Ltd (in rec) v Downs* [1981] 2 NZLR 247 (CA).

26 *Harvest Bakeries Ltd v Klissers Farmhouse Bakers Ltd* [1985] 2 NZLR 129 (CA).

setting aside order is in the nature of an (interim) pre-emptive order to secure from a non-party (out of a sum the defendant accepts ought to be paid to that non-party) a sum to go towards the costs or other sums a plaintiff is liable to pay to its solicitors and/or litigation funder. This is not the situation covered by the High Court Rules whereby one party being sued by another may (in advance) obtain security for costs or may (in advance) have a stakeholding created by the other party as security for costs.[27] Yet even in that situation, the defendant must establish there is reason to believe the plaintiff, if unsuccessful, will be unable to pay the defendant's costs.[28] Similarly, this is not a situation where a party seeks a pre-judgment charging order against a "liable party".[29] It is not suggested here that the type of considerations giving rise to those interlocutory orders — impecuniosity in the case of security for costs and concealment or disposal of property with intent to defeat creditors in the case of pre-judgment charging orders — are present in this case. Essentially, here, the proposed setting aside of funds would be a measure for the convenience of the plaintiffs and their funder.

Assessment of the competing interests in this case

Serious question to be tried

[76] Having regard to the incipient state of the law in New Zealand in relation to proceedings conducted on an opt out basis, there are clearly serious questions to be determined in this proceeding, both as to the jurisdiction to make common fund orders (or similar orders) and (if so) whether the facts of the case justify the making of such an order. Because of the time taken to date on interlocutory issues (including appeals) and the resolution of issues through other proceedings (culminating with the outcome in the *Dodds* litigation), there is significant scope for both Southern Response and class members who choose to opt out to challenge the Rosses' underlying proposition that opting out class members have benefited from the representative proceeding in a way that justifies requiring them to contribute to the costs in this litigation. But there is a sufficient basis, such as in relation to limitation issues, to make the Rosses' claim to entitlement to a cost-spreading order (or similar) seriously arguable. The

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27 High Court Rules 2016, r 5.45.
28 Rule 5.45(1)(b).
29 Rule 17.41.

determination as to whether such an order will be granted is for another day, on complete evidence, and once all those affected (including policyholders who have opted out of this proceeding) have the opportunity to provide full evidence and be heard.

[77] On the basis the Rosses' claim to entitlement to a cost-spreading order (or similar) is seriously arguable, the next issue is whether the application for an order setting aside 15 per cent of any settlement funds obtained by policyholders who intend to opt out is seriously arguable. For the purposes of this judgment, I will assume the jurisdiction to make such an interim order exists. In this context, in the absence of legislative requirements or guidelines, the Court's inherent jurisdiction is invoked. It would be a most unusual outcome if the Court found it had no jurisdiction in an otherwise appropriate case to provide interim protection in relation to a substantive remedy which is demonstrated to be seriously arguable.

The balance of convenience

[78] In the traditional assessment of balance of convenience in an injunction setting, the Court is focused on the relative convenience or inconvenience to the parties. The Court takes into account any inconvenience to non-parties as part of its overall assessment.

[79] Here, while the traditional term "balance of convenience" is rendered somewhat inapt, it is appropriate to consider matters of convenience as between not only the parties themselves but also members of the class who have indicated or may in the future indicate that they choose not to be part of the proceeding.

[80] The Rosses' interest in obtaining a setting aside order (and ultimately a common fund order) is straightforward — they want (subject to the concession which they have made in relation to those who "settled and/or opted out" before 12 March 2021) all class members who may settle directly with Southern Response (and who therefore opt out of this proceeding) to immediately contribute 15 per cent of their settlement funds to the stakeholding. The setting aside order the Rosses seek would achieve that by requiring Southern Response to set aside that portion for as long as the Rosses' application for a common fund order remains undetermined.

[81] There will be a consequence for the Rosses (and other class members who have retained GCA Lawyers to act for them in this proceeding) if the setting aside order is not granted but the Court ultimately makes a common fund order (or similar). At that point there would need to be a recovery made from such class members as have settled directly with Southern Response and opted out of this proceeding. I did not understand Mr Cameron, in his evidence for the Rosses, to identify any particular consequences for the Rosses or GCA Lawyers in that event. The Rosses' notice of application did not identify any particular facts relating to balance of convenience considerations other than to state that the setting aside order is purely interim in nature, in that no amounts will be paid from the set aside funds unless and until ordered by the Court, following the determination of the plaintiffs' common fund order application.

[82] Nevertheless, it was clear from Mr Skelton's submissions that the Rosses and GCA Lawyers see a significant prejudice to them through, at a later date after the making of the common fund order (assuming one is made), having to pursue each of the individual policyholders who have settled directly with Southern Response. That may entail delay, expense and uncertainty of recovery.

[83] For the intervening policyholders, Ms Grieve rejected the Rosses' characterisation of them as "free riders". She referred to the evidence filed for the intervenors, particularly that of Mr Shand, who views the settlements he has achieved with Southern Response for policyholders since 2016 as the result of his personal dealings. He refers to addressing the issues in relation to each separate claim, having regard to the relevant judicial decisions as in *Avonside* and *Dodds*, with no benefit from any work done in this proceeding. Ms Grieve notes Mr Shand's evidence that this proceeding has had a negative effect on policyholders' settlements by postponing such settlements.

[84] Ms Grieve submitted that, against the background of "ten years of earthquake stress and trauma", the prejudice to affected policyholders is clear. Given the history of this proceeding to date, it is difficult to speculate exactly when issues relating to a common fund order will be ultimately resolved (whether at first instance or on appeal) and at what point, if such an order is refused, the affected policyholders would receive back their withheld (15 per cent) funds. There are, as Ms Grieve submits, implications

in terms of delay, cost, effort and further stress for individual policyholders having to argue later (almost certainly requiring legal assistance) another issue relating to their claim.

[85] The concerns of Southern Response, on the other hand, are not readily characterised in terms of a prejudice to Southern Response. The opposition of Southern Response to a setting aside order relates to the potential of such an order to cut across the desire of Southern Response (and the Crown) to proactively settle the claims of individual policyholders as soon as practicable. There is an obvious risk that, if the terms of settlement acceptable to both Southern Response and the policyholder cannot result in a 100 per cent payment, with the policyholder instead having a potential entitlement to the remaining 15 per cent deferred until after further litigation, that will discourage policyholders from reaching full and final settlement on the basis of a negotiation arising out of the Package.

[86] On my assessment of the balance of convenience, it is significant that, were the Court to grant a setting aside order, the only persons who will be out of funds for the period pending resolution of the common fund order application are the policyholders. Their funds, which represent insurance entitlements for the purposes of repair or rebuild, will not be available to them during the period pending resolution of this proceeding for the purpose of repairing or replacing their insured buildings. At a time of historically low interest rates, the gross return on the stakeholding funds will be limited to those low rates.

[87] I recognise there will be cost and inconvenience associated with respectively (for the plaintiffs) the attempts to enforce any common fund order or (for non-parties) the attempt to recover the withheld funds. Of the two, however, the plaintiffs with the benefit of their litigation funding are in the stronger position to mount the effective legal challenges to pursue their optimal outcome.

The overall justice of the case

[88] I am satisfied the balance of convenience lies strongly in favour of refusing the application for a setting aside order. That is in itself a good indicator of where the overall justice of the case (that is, the interlocutory application) lies.

[89] Here, however, there is the further factor emphasised by Ms Grieve, namely that this proceeding has not advanced substantively but has only just reached the point where the policyholders will be able to exercise freedom of choice and individual autonomy by opting out of the proceeding. On the peculiar facts of this case, the plaintiffs (and the litigation funder) have incurred significant costs which they will seek to have shared by all the class members (other than those who happen to have settled or "opted out" before 12 March 2021), with those costs relating solely to interlocutory steps. It will be debatable to what extent, if any, this representative proceeding has benefited the policyholders who opt out. The individual policyholders have yet to be able to exercise the autonomy involved in the opt out/stay in process which is the subject of the Notification Judgment being issued today.[30] The decision to opt out before a proceeding has advanced substantively could normally be expected to shield that policyholder from the need to assist the representative plaintiffs (or their funder) with their costs.

[90] On the other hand, the plaintiffs must be taken to have been properly advised in commencing this proceeding of the unsettled nature of aspects of the law in New Zealand concerning representative proceedings. That extends both to the opt out issue which has assumed such significance in the proceeding to date and to the novel, jurisdictional issues relating to common fund orders and the present application for a setting aside order. In that regard, the plaintiffs and their lawyers must be taken to have accepted, in deciding to pursue the claim on a representative basis, that there was a risk they would not obtain a cost-spreading order or an earlier setting aside order.

[91] If this present application is denied, the plaintiffs' application for a common fund order will still be heard and determined. In terms of the choices made or not made in relation to litigation, the broader interests of justice (in addition to considerations of balance of convenience) favour the intervening policyholders.

Outcome

[92] The application for a setting aside order is refused.

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[30] Notification Judgment, above n 4.

Orders

[93] I order:

(a) the application of the plaintiffs for a setting aside order is dismissed; and

(b) the costs and disbursements of the application (and opposition) are reserved.

Osborne J

Solicitors:
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