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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 105/2019
[2020] NZSC Trans 18

BETWEEN **SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED**
Appellant

AND **BRENDAN MILES ROSS AND COLLEEN ANNE ROSS**
Respondents

NEW ZEALAND LAW SOCIETY
NEW ZEALAND BAR ASSOCIATION
LPF GROUP LIMITED
Interveners

Hearing:	15-16 June 2020
Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	T C Weston QC, K M Paterson and E D Peers for the Appellant P G Skelton QC, K M Quinn and C B Pearce for the Respondents T C Stephens and M R G van Alphen Fyfe for New Zealand Law Society as Intervener K G Davenport QC and S E Wroe for New Zealand

Bar Association as Intervener
D M Salmon for LPF Group Limited as Intervener

CIVIL APPEAL

MR WESTON QC:
May it please Your Honours. I appear together with Ms Paterson and Mr Peers for Southern Response, the appellant.

WINKELMANN CJ:
Tēnā koutou.

MR SKELTON QC:
May it please Your Honours. I appear with Mr Pearce and Mr Quinn for the respondents.

WINKELMANN CJ:
Tēnā koutou.

MS DAVENPORT QC:
Good morning Your Honours. Ms Davenport, I appear for the New Zealand Bar Association and with me Ms Wroe.

WINKELMANN CJ:
Tēnā korua.

MR STEPHENS:
E Te Kōti, tēnā koe. Ko Stephens tōku ingoa, kei kōnei māua ko van Alphen Fyfe, mō te Kāhui Ture o Aotearoa.

WINKELMANN CJ:
Tēnā korua.

MR SALMON:

May it please the Court. Salmon for LPF Group Limited.

WINKELMANN CJ:

Tēnā koe. That's it, everybody? Good morning. So Mr Weston, before we get under way, I'd just like to indicate that we do wish to hear from interveners, and we thought about 20 minutes each at the end of submissions from parties. Mr Weston.

MR WESTON QC:

Thank you Your Honour. I'm I getting ahead of myself?

WINKELMANN CJ:

No, I thought I had something else to say to you, but I now realise it's to say to Mr Skelton when he stands, which is to indicate, Mr Skelton, I suppose I should say it now, that we do want to hear a little bit about the practicalities of how the case would run in terms of the two stages. So sorry about that Mr Weston.

MR WESTON QC:

Just on that, would Your Honour wish to hear from me as someone who's lived through Feltex for the last few years, I have an insight or two as to how perhaps it shouldn't run, but at some point when we get to that I might be able to assist if there's questions on that.

WINKELMANN CJ:

Thank you.

MR WESTON QC:

So Your Honours perhaps a good start, I'm going to start with paragraph 1, and the plan that I have, subject obviously to questions, is to go through what I have here, follow the order of these submissions, step out from time to time where I can usefully address my friend's points in advance, some of his submissions, and I don't say this in any sense critically, are new for this Court,

so I didn't have a chance to address them, so I think I can usefully do that on the way through and where I can I will.

WINKELMANN CJ:
So have you discussed with counsel time allocation?

MR WESTON QC:
I think yes and no to that. We've discussed it without any useful resolution because I think until we have some sense of what the Court is interested in, and what questions we're getting, it's a bit hard to pick. So perhaps by morning tea we might have a better sense of that and can usefully assist at that point, if that's convenient to leave it until then?

WINKELMANN CJ:
Yes, thank you.

MR WESTON QC:
So as we start off at number 1, it's a decision day in the sense of where class actions go. Either we maintain the status quo, which is opt-in in New Zealand based on rule 4.24, or we embark upon what the Court of Appeal has signalled as the new normal, that is opt-out, and it's our submission, self-evidently, that we should stick with the status quo that moving into this brave new world is going to create, amongst other things, great uncertainty and should be avoided. And because this case ranges from both the procedural issue of opt-in/opt-out through what we say are jurisdictional issues that might lie down the line ahead of us, up to really the constitutional issue of what access to justice, or access to the Courts to seek justice, if we're to give it perhaps it's more accurate description, means in the context of class actions. So that range of issues lies behind our submission in paragraph 2, that ultimately the Law Commission should be left to do its work, complete the review, in the meantime New Zealand can operate very well, I would submit, with opt-in and perhaps the paradigm of that is the *Ross Asset Management* case, which was mentioned in a couple of the submissions before this Court where something like 92% of the class did opt-in, that's about 550-odd

claimants. So in New Zealand opt-in can work, even if overseas the experience is that opt-out is the better way through this.

In addressing my friend's submissions in advance, and I'm always conscious that doing so can get fairly unstructured, so I'm going to try and do it at the point that it relates to what my submissions are, give references so they are there. I'm also at that same time going to address some of the detail in footnotes that my friend has, even worse I'm afraid, but again I want to have that on the record so my friend has my objection and if necessary can deal with that, and I will be submitting that some of the footnotes in my friend's submissions don't directly support propositions that are in the text.

Just at this preliminary point also can I make a couple of points about the lawyer interveners. Three points. The Bar Association which addresses at some length the question of access to justice, in my respectful submission doesn't drill down enough into the more precise issue, which is the question of access to justice in the context of funded class actions, which is really going to be my focus. I'm not spending too much time on the rest of the world of class actions, it's the modern funded one that has particular consequences. So I will be addressing aspects of access to justice in that context. I will take you, for example, to the Australian Law Commission report from a couple of years ago where it's made clear that a fairly limited range of class actions, mainly investor class actions, or shareholder class actions, have developed and the poor, the halt and the lame really haven't been hugely assisted in the main by class actions. It's those where there's money to be made. That's the first point.

The second point is the Law Society, while identifying some of the difficulties that might lie ahead for us, nevertheless comes down on the side of the respondents in its submissions and I was expecting, with respect, a slightly more nuanced approach from it because once you acknowledge uncertainties that might lie ahead, in my respectful submission, you should be thinking of those also in the context of rule of law issues, ie, rule of law is about predictability and certainty, and I was expecting to see amongst other things in

their submissions acknowledgement from, and this is because Mr Beck is a senior member of the committees that are involved in this process, he wrote an article about the Court of Appeal decision which doesn't appear to be referenced, and we've handed up a new bundle. Can I just introduce it at this point? It came in –

WINKELMANN CJ:

Again there's no obligation for them to represent the views of all of their members, is there?

MR WESTON QC:

Absolutely none, Your Honour, but where you have been invited to intervene and you have a range of views, all I'm suggesting to this Court is one might have seen that referred to and Mr Beck sounded a caution in that article. It's in the bundle, in this fresh bundle, tab 72. Just while I'm mentioning that bundle, Your Honours…

GLAZEBROOK J:

Have we got this? Is this the additional authorities? No.

MR WESTON QC:

So there's two sets of additional. My friend put in a bundle some time ago and then last week we put in a bundle. The one we put in, appellant's additional bundle, and the tabs are 66 to 74.

GLAZEBROOK J:

Yes, we have it.

MR WESTON QC:

Yes. So the reason we put that in was to collect up a few of the authorities that are in the existing electronic documents bundles as part of the hyperlinking but also there's been a rash of cases coming out of Australia following the *BMW Australia Limited v Brewster* [2019] HCA 45*, Westpac v Lenthall* [2019] HCA 45 decision in the High Court of Australia so we wanted

to collect up a few of those. They are arranged alphabetically in this bundle, hence higgledy-piggledy in that sense but I'll come back to some of those.

I also just at the outset want to say too that in some respects the respondents and also the Law Society misstate what our case is. Our case is based on the word "should", not "cannot", so we're not submitting that in relation to the opt-in/opt-out decision that this Court, the High Court, cannot make an opt-out decision. As we have been at pains to express, the issue is one of "should not" in the range of circumstances that we put forward, and while that might seem an odd position to take on appeal I think I have to acknowledge that this is a policy issue that I am putting before the Court in my formulation of the "should-not".

WINKELMANN CJ:
I think the Law Society as I read it did not misstate what your case is. They understand what your case is but they said that the effect of your submission was that the jurisdiction would never be exercised.

MR WESTON QC:
Well, Your Honour, in paragraph 5, with respect, I think they go a little further but let's not quibble. I wanted to make it clear what our position is, that we are focusing on the word "should" rather than "could not".

WINKELMANN CJ:
But what do you say to the point that the effect of your submission is that the order would never be made because it flows from your opening gambit that this is best left to law reform as to the – the barriers and obstacles down the road are such that the jurisdiction shouldn't be exercised.

MR WESTON QC:
No.

WINKELMANN CJ:

So it is effectively saying the jurisdiction may exist but it should never be exercised.

MR WESTON QC:

So what I say to that, Your Honour, if I can refer, for example, there's an example, all examples are tricky but let me use it nonetheless. There's the Victorian case I'm going to come to that my friends mention, *Proude v Visic (No 3)* (2012) 118 SASR 444 (SASC), and I've just completely forgotten the second name, Australian case out of the bush fires, and in that decision which ultimately proceeded as an opt-out, reading the judgment the evidence is that it was, if not all, virtually all of the parties had consented and some, or perhaps all, were actually doing the funding as well. There wasn't an external funder. So a case like that, Your Honours, might well be an example where a case can proceed as an opt-out so I'm not ruling out the possibility –

WINKELMANN CJ:

So where everybody has consented?

MR WESTON QC:

Well in that case the Judge wasn't sure but everyone had consented. What he says at paragraphs 167 to 170 was that it appeared that all had consented, and if they hadn't certainly most of them had, and he says also –

GLAZEBROOK J:

What did he mean by "all"? Who was he talking about, all of the –

MR WESTON QC:

The class.

GLAZEBROOK J:

– actual parties or the underlying people?

MR WESTON QC:

Yes, the class that might be represented out of this bushfire case. So Your Honours I –

WILLIAMS J:

Well does that mean you can have opt-out as long as everyone has opted in?

MR WESTON QC:

What he, and as you read it through that same thought occurred to me. The reason he ordered it, and I'm happy to go to the paragraphs, it's just three quite short paragraphs where he's dealing with this, he says because he couldn't be certain that everyone had consented, he said he preferred to do the opt-out just out of an abundance of caution.

Now I accepted, Your Honour, that my formulation leaves not a lot of room for class actions to proceed as opt-out. I'm not trying to shy away from that but I'm certainly not saying cannot. I have formulated it quite deliberately, for better or worse, as should not, recognising that because these days most are funded that will close down most. But let me repeat my point, because the opt-out, in my submission, has worked sufficiently well in New Zealand, one shouldn't be dismayed by such an approach.

Can I also just say one other preliminary matter in relation to the US authorities of which there are an awful lot cited by each of us, perhaps my friend more than me, but we will look at some of the US Supreme Court decisions. The further down the hierarchy you go, particularly into State decisions, there's not only a huge number of cases, you can find just about anything you look for because of the diversity amongst the different States, and Ontario in its Law Commission report, which is that very substantial one back from 1982, used the expression that, "US jurisprudence is characterised by diversity," or Alberta said, "Gaining an accurate understanding of the American experience is not an easy matter," and I think that's certainly my experience and I will be respectfully suggesting to you a little care is needed in relation to some of those, particularly lower tier decisions. Also in relation

to American cases, bear in mind that since 1966, so quite a while now, there's been explicitly an opt-out environment there. So to the extent there are negative views expressed about opt-in that is explainable. Finally in relation to the US it's only been very recently that third party funding has emerged on that scene. Previously it was entrepreneurial lawyers who funded on a contingent basis, so the funding issues that I am raising here did not arise there.

So, Your Honours, back to my written outline, paragraph 3. So as I've already said rule 4.24 is the basis of what we have now, opt-in, let alone what is proposed, a slim foundation we suggest. The essential point of difference between opt-in and opt-out is the extent to which there is active consent. Now my friend has an argument that even in opt-in you can have less than full consent to a funding arrangement. That is certainly not the experience in New Zealand, in that New Zealand when you opt-in you sign up for the lot and that makes complete sense in my submission. As we say in 4 there's quite a history to this. Now paragraph 4 is the only direct reference to make to this history. My friend has multiple pages so what I am proposing to do is step through my number 4 and then just address some of the points that my friend has made in his more extensive elaboration of the history. So as we say in 4, rule 4.24 reflected and built upon the jurisdiction established, long time ago now, multiple persons, not all identifiable, common interest, individual claims for damages, could not be pursued by way of such a proceeding. essentially the jurisdiction was res judicata based. So can I just pause there? That is, if one thinks in terms of jurisdiction and power, the jurisdiction must be the jurisdiction of the Court to make orders that bind people who are not directly before the Court. The power aspect is then how you give effect to that jurisdiction. So it's an adjudicative jurisdiction, in my submission. So when I come later to the question of settlement, does the High Court have jurisdiction in order to address settlement, that's the difference that I'm going to be highlighting. So the jurisdiction, adjudicative, parties who are represented are bound by the judgment, although not formally joined, top of page, to such a proceeding. It was accurately called representative because it did represent all persons and that wording in rule 4.24, "all persons", reflected that. So the

Court of Appeal in its judgment at 81, for example, paraphrased that back to "other persons" but if we're going to be literal about it the rule, the old rule, is "all persons". What has come since then obviously is a development.

So stepping back, my friend has two points that he makes in more detail than that short paragraph. So first of all he says that "opt-out" is the modern evolution of, let us call it, the historic approach. That's his first point, and secondly he reviews some of the older style rules that have existed overseas and he makes a couple of points about those, one of which is that both opt-in and opt-out built on those particular rules. But he then goes further and suggests there was a preference towards "opt-out" and it's that second part of that that I'm just going to say something. So coming back to his first point –

WINKELMANN CJ:
I thought his submission was that from conception it's been an opt-out regime in England.

MR WESTON QC:
That's the first point that he talks about, it's a modern evolution, Your Honour. I don't think he's saying that 200 years ago there was an opt-out regime. He was – because –

WINKELMANN CJ:
It wasn't conceptualised in that way but it was that a person was appointed to represent a group, an interest.

MR WESTON QC:
And if someone objected they could be formally joined as a party but that was more the exception. The rule, the general rule is the *Duke of Bedford v Ellis* [1901] AC 1 (HL) case shows that everyone's swept up in it and issues of opt-in or opt-out don't arise at all. I think the cases are fairly clear that all of that's come later, Your Honour. Certainly the language of opt-in/opt-out has come as part of the US development of that.

WINKELMANN CJ:

So what are you saying has come later?

MR WESTON QC:

Well, originally, Your Honour, it was everyone, all persons who fell within the description, whether they are identified or not, were represented by the self-appointed plaintiff, and you can see that most easily in that *Duke of Bedford v Ellis* case where the barrow boys at Covent Garden had their case, and so talking about opt-in and opt-out doesn't emerge then. Where they –

WILLIAMS J:

Those cases are all no option at all.

MR WESTON QC:

Yes.

WILLIAMS J:

Once a representative order is made everyone's in as long as you can identify them, the law lords say.

MR WESTON QC:

Yes.

WINKELMANN CJ:

Subject to the ability to apply to be joined as a plaintiff.

MR WESTON QC:

Yes, but a lot of those early cases were, for example, seeking in effect a declaration or injunction, so it wasn't a case of seeking individual damages per all of these unidentified people. It's seeking an outcome from which they would all benefit. So again the *Duke of Bedford* case, the Covent Garden case, is a paradigm example of that where the relief sought was going to benefit everyone and it didn't really matter whether it was Joe Snooks or Mrs Snooks or whoever, it was everyone who fell within the description of the

class was going to benefit from this. So a lot of those early cases are concerned with that.

More recently there's been class actions brought in relation to discrimination issues and seeking to have orders that might apply across a range dealing with discrimination. So what we've come down to here is a damages claim with – and the US model really is the start of this opt-in/opt-out, at least as we know it now. So in the US 1938 they established the first class action in a formal way which was an opt-in process. 1966 it became the opt-out, and that language, opt-in/opt-out, doesn't appear in either of the rules that were then in place, but all the commentary that's around them, particularly the 1966 change, uses this language of opt-in and opt-out so initially opt-in, my friend submits, amongst other things, that the change in 1966 to an opt-out was because of dissatisfaction with opt-in. In part, yes, but it was a bigger concern. There were problems with categorisation of what fell within the different classes and that also was a large part of why there was a shift to opt-out. But in the US opt-in and opt-out as I apprehend it is largely a due process response i.e. how do you deal with due process concerns, because the problems that we have here of unserved plaintiffs are of a little different dimension in the US because under their rule 23 there's an obligation to do the best service practicable, and if you don't do that, and if you say have addresses and you can't serve people, those people are actually excluded from the class action, we can see that in the *Phillips Petroleum v Shutts* 472 US 797 (1985) case in the Supreme Court where 1500 people were excluded from the class because they couldn't be served. So the due process provisions in the States are a little different to what we have here where there may or may not be notice to everyone but there's a distinct possibility that whatever, that people will not learn of this class action.

So, Your Honour, going back to your question, the Chief Justice, you know, how do we get to opt-in/opt-out, I've tried to give a big picture there. Have I gone far enough for the moment or shall I…

WINKELMANN CJ:

No that's helpful thank you.

ELLEN FRANCE J:

Sorry Mr Weston, so in what sense in terms of the evolution of the historic approach are you disagreeing with the respondent?

MR WESTON QC:

Well what we have now, Your Honour, I don't think usefully can be characterised in evolution from anything. It obviously has an antecedent, which is the history. I mean all of law has history but what I'm trying to submit is that the structure that we have today with discussion about opt-in and opt-out, about the extent to which there needs to be the same interest, and the extent to which you can seek damages, all of those three things in particular are so divergent from the history that what we have now can't, at least helpfully, be said to be an evolution, other than the sense that it has developed from them. The class action has developed, obviously, from the *Duke of Bedford* type of situation.

WINKELMANN CJ:

So what we have now in terms of common interest, what we have now in terms of what can't be described as an evolution?

MR WESTON QC:

Well Your Honour previously there needed to be a complete commonality. Now a much lesser commonality is accepted, we can have a stage 1 and a stage 2 hearing is the way it tends to get referred to, so in the *Feltex* case for example, having had the stage 1 hearing, run the plaintiffs case right the way through to a judgment on everything including causation and damages, you then say we now move to stage 2 and we deal with the non-common issues. Now that is a completely new development. My friend, and I'll give you some references in a minute, argues in his submissions that historically there was something approaching this. He uses the label it was kind of, in his submissions, a kind of two stage hearing, but in my respectful submission

that's just not right. So what we have now is a much relaxed view of the common issues. It doesn't have to be a complete overlap, it can be a subset. So in *Feltex* it was the misrepresentation as represented by the prospectus, how much came out of that, and then Mr Houghton's case that his damages and so on, but then we came to this Court and we're now back in the High Court and it's bobbing along. So, and then not only is that difference then the damages, the modern view to damages. So those are the three things that I submit are quite –

GLAZEBROOK J:
Sorry, I think I've missed the third. Is the third just the opt-in/opt-out?

MR WESTON QC:
Well I think in my list it was the first Your Honour. So first was opt-in/opt-out; the second was same interest; third, damages.

GLAZEBROOK J:
That's right. That's what I had. I just worried I'd missed the third.

MR WESTON QC:
Yes.

WILLIAMS J:
Wasn't *Tamaki v Baker* (1902) 22 NZLR 97 case an opt-out?

MR WESTON QC:
Your Honour, yes, it was a very unusual case that one.

WILLIAMS J:
Not in those days it wasn't.

MR WESTON QC:
Well by our standards it was an unusual case, and I hesitate to draw any difference from Your Honour in this area as your expertise will be far greater than mine, but certainly reading the case it's a fair distance to what we do

now, and that's a discontinuance case where there was the political deal done, the plaintiffs going to be taken out, wants to get out, and one of the other class is unhappy with that and objects and is replaced. It's not clear to me what followed from that, Your Honour may know, but there don't seem to be further –

WILLIAMS J:
Well she said I want to be the plaintiff if he's out, and the Court of Appeal says, okay.

MR WESTON QC:
Yes. When I say I don't know what happened, I don't know beyond that case. I've obviously read the case, it's in the bundle Your Honour, but whether there was more beyond that I don't know, but –

WILLIAMS J:
Not that I know of.

MR WESTON QC:
No, and we certainly submit, as part of our submission, that this is a matter that's better to leave for the Law Commission is in our paragraph 26 we mentioned a couple of the fisheries cases that Your Honour will know about to suggest that some of the difficulties, the particular difficulties or issues that arise in relation to the cases that involve Māori interests, and the question of whether the collective overrides the individual or vice versa should be examined carefully before we just holus bolus jump into representative actions because those cases, in my respectful submission, certainly illustrate that there can be tensions and issues that are particular there and in that same footnote, just while I'm talking about that footnote, we also do refer to the Ontario Law Commission which said even though they strongly favoured an opt-out approach they said this is such a controversial and important decision that it should be debated by Parliament and so again all weight, I would suggest, to my submission that let's stick with what we've got. It works, *Feltex* aside, it works pretty well, and let the Law Commission get on and properly do

its job. Properly over things like the Māori issues that I mentioned in my footnote 26, et cetera, et cetera.

GLAZEBROOK J:

Sorry, I actually do have real difficulty understanding why the Māori interests would be a reason that you wouldn't go for what seems to be more of a collective model. That seems totally counterintuitive to me but…

MR WESTON QC:

Well Your Honour read in the cases, let me explain why I made that submission, and if you or Justice Williams disagree I'll have the debate, but the issue in particular was who should do the representing. Who was representing the group. That was the fundamental dispute. So the first of the two cases that we footnote are Justice Gallen's decision in the High Court was, well who, this is the *Ryder v Treaty of Waitangi Fisheries Commission* [1998] 1 NZLR 761 (HC), this party's claim to be the representative, and what the Judge said was that's the fundamental issue to be resolved in this. It's putting the cart before the horse. We actually need to work out who is going to represent the group. So that, as I apprehend it, is why that was a particular issue.

GLAZEBROOK J:

Well of course we do have these issues just in terms of Treaty settlement issues, and also in cases that we've had before the Court. I doubt that the class action rules are going to be any more help in that than anything else are they?

MR WESTON QC:

Well Your Honour I claim no expertise in the wider picture, so I don't want to bumble my way anymore beyond that than I am.

GLAZEBROOK J:

I'm just saying that that is a major issue throughout all of the settlement negotiations.

MR WESTON QC:

Yes. And the point I was endeavouring to make, Your Honour, I guess, is there's a range of problems that exist out ahead of us if we go down the opt-out route. Let's be aware of what they are. Do we willingly go down that road now, or do we leave it to the Law Commission to do the job properly so that if we go down the road there's legislation that tells us what's going to happen down the road. So I'm sorry there's a lot of road analogy there but…

GLAZEBROOK J:

Opt-in is going to have the same representation issues, isn't it, because it's going to say, well, this is an opt-in that isn't actually representing the collective. I actually, on the other hand, am representing the collective and it shouldn't be done the way it's supposed to be done. I'm just talking just specifically in terms of Māori issues.

MR WESTON QC:

That may well be the case and at the moment, for example, in the opt-in mechanisms there's two what we call competing class actions in relation to the one claim where two different claimant groups have been established and have their own proceeding under way. Mr Davies' submissions I think mentions this. Someone's does anyway, but I'm certainly familiar with it for myself in practice, and there the individuals make a positive decision to opt-in and if they don't they've got the alternative one and if they don't like that they can either create their own third or not opt-in, but it does have that issue of choice, Your Honour, that's –

GLAZEBROOK J:

It does but in the Māori context the argument would be they don't have any right to be suing as individuals and as representatives the only ability to do that is through the other side. So as an added dimension, it's not a choice issue. It's actually a lack of choice issue in a cultural sense.

MR WESTON QC:

Yes, and in the *Ryder* case that was met by the Judge refusing to allow the class action to proceed because he was not satisfied that those preconditions were satisfied, Your Honour.

So yes, there's no doubt that some of the problems that I talk about along the way to a greater or lesser extent arise either under an opt-in or an opt-out. It's my submission they are more significant under the opt-out for reasons I'll explain. So one can't always do a very bright line between the two but generally speaking opt-in has worked. My submission is opt-out is just going to cause us no end of difficulties and will diminish the predictability of the law.

WILLIAMS J:

One of the distinctive aspects of litigation in New Zealand is that Māori dimension which you'd expect I'd want to engage with you on, so let's do that. *Ryder* is a distinctive case because that was about the urban Māori interest in the fisheries allocation, so this was a person claiming to represent a class that were not related in the usual way, ie, by kinship. That's why it was highly controversial as to whether *Ryder* or the Waiparera Trust, I think it was, or the Manukau Urban Māori Authority, had sufficient representativity. But almost all traditional Māori litigation is run on a representative basis and no one even notices. You look at all the leading Māori cases really since the early twentieth century, they are all in the name of the chief. The famous case of *Te Heuheu v The Aotea District Māori Land Board*, well, Te Heuheu was the Chief. Nireaha Tamaki was the Chief, and the woman that wanted to be excluded was his niece, and there's another *Te Heuheu* just recently. You know, if you look at the fisheries allocation stuff, who were the named parties? *Latimer*, *Mahuika*, and so on. These are all the chiefs of their tribes, and no one is saying if you want to be in you've got to opt-in because no Court is going to have the temerity to say these people don't represent their kin groups.

MR WESTON QC:

Yes.

WILLIAMS J:

So in effect, you know, this is like the *Duke of Bedford*. There's no option.

MR WESTON QC:

And that may well still be the case, Your Honour. I haven't ruled out cases such as that because those would be what the Court of Appeal call the universal cases. They're all in, and probably the question of funding doesn't arise. There wouldn't be an external funder coming along saying to the iwi, "I'm going to take 30% of what you're" –

WILLIAMS J:

Actually, there was often the Crown Forestry Rental Trust but it didn't take a cut but it was an external funder. The tribes don't have any money.

MR WESTON QC:

Yes. Well, I had, wearing another hat, some experience in the Cook Islands with trying to get groups collected together under one name and my experience there was not always quite as straightforward as Your Honour's one because there tended to be a few people who held their own view as to who was the chief and so there could be those dimensions as well so…

WILLIAMS J:

But that's because they litigated the title in the Cooks. You don't do that here.

MR WESTON QC:

No, but Your Honour, you will out-run me and out-fox me on every part of this argument because you are an expert on it and I'm not. All I was hoping, in a footnote by reference to a couple of cases where this had been a specific issue, was to say this is a dimension that should be thought through carefully rather than rushed at now.

WILLIAMS J:

Right. Well, I've got no interest in out-foxing you, Mr Weston, even if that were possible, but I do want us to concentrate on how a class action regime

might affect what is, what has been a standard approach to Māori litigation really since 1840.

MR WESTON QC:
Yes.

WILLIAMS J:
And there was an article in here written by a New Zealand academic, a female whose name I can no longer remember.

MR WESTON QC:
Nikki Chamberlain?

WILLIAMS J:
That's it, yes.

MR WESTON QC:
She's present in court Your Honour.

WILLIAMS J:
Ms Chamberlain, welcome along, I enjoyed reading your article. I thought that it probably underrepresented by quite a margin the number of Māori representative cases that have run over the last 150 years, simply because the Courts don't even bat an eyelid when the plaintiff happens to be the Chief of the tribe that's running the case.

MR WESTON QC:
Well that may well be the answer, Your Honour, in which case my point collapses.

WILLIAMS J:
Okay.

MR WESTON QC:

I've probably taken that as far as I can anyway. So just going back to a few more points about the evolution that this opt-out is the modern evolution of the universal. So some points about that. The first one is my friends refer to the English Court of Appeal decision in *Lloyd v Google* [2019] EWCA Civ 1599, which has come in very recently and Sir Geoffrey Vos delivered the judgment to the Court, and I just want to refer to, it's in tab 70 of the physical bundle, but at paragraph 73 just a sentence to read out. "Moreover, the cases have not all spoken with one voice. I confess to not having derived much assistance from looking at the historical twists and turns." So sending that signal not only is the US jurisprudence not entirely easy to follow, some of the historical cases also have their own set of twists and turns as Sir Geoffrey identified. Then in relation to my friend's submission, this is his paragraph 10, that there was kind of a two-stage process historically. If you go and look at the cases that he footnotes, the six cases in one text, in my submission properly understood those are not cases where there, that are remotely like the damages one that we're talking about here. They're instances of claims in administration by creditors and legatees to basically a joint asset. So of a different dimension and the New Zealand authorities in his footnote 18 are much the same.

So then just moving on to my friend's paragraph 22 where he talks about the US and the Victorian, the state of Victoria that is, historic cases, where they had a more basic rule and what they managed to do on the foundation of a more basic rule. So he deals with the US. I've already explained that in the prior period to 1966 that the bigger problems was not so much opt-in but the categorisation. So that is a part answer to that in his paragraph 22. He then goes on to deal with the Victorian situation and refers to a number of cases. A couple of things to know about Victoria. Under sections 34 and 35 of their Supreme Court Act, which is the legislation that was in play –

WINKELMANN CJ:

Can you slow down a little bit Mr Weston.

MR WESTON QC:

I'm sorry.

WINKELMANN CJ:

So we've dealt with the US. So are we going through –

GLAZEBROOK J:

Actually if we are going to slow down a bit, can we go back to what you mean by categorisation and the other because I'm not entirely sure I got your point.

WINKELMANN CJ:

I was about to ask that, yes.

GLAZEBROOK J:

Which is I was going to go back and check a bit later and look at the transcript, but it's probably easier if you just make sure – if I'm not the only one.

MR WESTON QC:

I think my friend and I have read so many materials here we take a lot for granted.

WINKELMANN CJ:

So what is the issue of categorisation to which you refer?

MR WESTON QC:

Okay. So previously there were a number of different types of cases that enjoyed the names of spurious and hybrid and there was a third that I've forgotten, and that was the categorisation – true, thank you.

GLAZEBROOK J:

Sorry, I didn't catch that?

MR WESTON QC:

So spurious, hybrid and true were the three categories under the 1938 legislation, or rule I should say, and that was the problem and the reference that I had to the Ontario report, Law Commission report, so this is at the bottom of page 8, and it's physical tab 34. Does that, if I just give physical –

GLAZEBROOK J:

So actually now I remember what the submission earlier was that, was it that there was a requirement for an opt-in but nobody knew quite what that meant and there were a number of cases that went across boundaries and were difficult to fit into anything. Was that the submission or have I – and I'm probably putting it much worse than you did.

MR WESTON QC:

I don't think so Your Honour. There was an opt-in system under the 1938 rules, and there were three categories as I've mentioned, and the difficulties that were encountered were primarily in my submission because of the difficulties of working out which category you were in which had different consequences for what then followed. So when things –

GLAZEBROOK J:

Have we got the copy of that rule somewhere?

MR WESTON QC:

The old rules Your Honour?

GLAZEBROOK J:

Yes.

MR WESTON QC:

I think it's set out in part, can I take you to the Ontario report?

GLAZEBROOK J:

Certainly, I just think it might help me slightly that's all.

MR WESTON QC:

Yes, and I'm not sure I'm going to be entirely helpful for Your Honour, but I've got the best that I can immediately think of here.

WINKELMANN CJ:

What's the tab of the Ontario report?

MR WESTON QC:

Tab 34.

WILLIAMS J:

It's the whole volume.

MR WESTON QC:

I'm never quite sure whether the Court's version is the same as mine.

GLAZEBROOK J:

I've been on the electronics. I haven't been on these ones.

MR WESTON QC:

So under page, intrinsic page 8 of that document, you'll see a heading, "The American Development of Class Actions". So at page 8, the first paragraph is the background then you'll see in the second paragraph, "The first major revision… in 1938… Rule 23." Then the next paragraph, "In time, the three different kinds of class action authorized by Rule 23… came to be known as 'true', 'hybrid', and 'spurious'… 'True'… were those involving rights enjoyed jointly, 'hybrid' class actions involved rights to specific property that were several, as opposed to joint; and the 'spurious' class action described those actions where the rights claimed were several…"

So it's that third category that is the closest to our damages one, and then it goes on to say at the bottom of the page, "Rule 23, however, proved to be unsatisfactory. The need to fit a class action into one of these three categories soon behind highly conceptualized and 'baffled both courts and

commentators'. Efforts at classification…" and so on. Then the next paragraph the call for reform was answered in 1966 when a new rule 23 designed to correct the weaknesses was introduced.

WINKELMANN CJ:
How does changing from an opt-in to an opt-out answer that problem though?

MR WESTON QC:
Your Honour, that wasn't the only change made. Rule 23 in its current state is in the bundle before Your Honours.

WINKELMANN CJ:
Yes, but that doesn't – you're saying that the respondents are wrong, that this was responding to difficulties with the opt-in process.

MR WESTON QC:
Yes, my friend in his 22 –

WINKELMANN CJ:
I mean because if there are multiple changes, some of them might respond to the issues you're pointing out, and some might respond to the difficulties of the opt-in procedure.

MR WESTON QC:
All I was making the point was that it wasn't a simple binary, opt-in is a problem therefore we have to go to opt-out, and paragraph 22 of my friend's submissions on one reading is as binary as that. So I was simply trying to put context around that.

WINKELMANN CJ:
So are you saying that the opt-in, the opt-out responded to these classification problems, or not?

MR WESTON QC:

In part, Your Honour, there were a range of changes made, so it's not just a simple A equals B, that there were a range of changes, and I accept they made a deliberate change from opt-in to opt-out and part of the commentary that lies behind that says there's benefits in having opt-out because we can sweep up people who might not otherwise be involved and so on. So clearly they were seeking to have a broader categorisation than opt-in, it just wasn't a simple problem with opt-in that led to that change, that was my point.

GLAZEBROOK J:

But does it help much here because no one is suggesting you can't have opt-in.

MR WESTON QC:

No, well –

GLAZEBROOK J:

So I'm not quite sure why, from either side really, this makes that much difference?

MR WESTON QC:

Well I suppose Your Honour when you have, you meet a case, as I have, that says X, Y and Z and, which doesn't, which I with respect don't accept, I need to address, but at a certain point the whole issue of opt-in and opt-out is not really what my case is about, because I accept that either of those are starters for 10. Procedurally, this Court, the High Court, can make that order. What I'm endeavouring to say is, okay, where does that take you? Now one option is you can just say, right, we'll have those, as the Court of Appeal did, and all the problems that are in the future can get sorted out in the future, or we can do as I'm submitting we should, we cast an eye ahead and see do we want to do this or is what we presently have okay?

So, Your Honours, if you're content for me to proceed on the basis that I can leave any major historical issues for a reply then I can quickly move on.

WINKELMANN CJ:

Well, I think it might be an idea because at the moment dealing with the reply being so much a part of your submissions it's actually hard to see the shape of your submissions, for me anyway, so…

MR WESTON QC:

No, no, I was conscious that might occur so…

GLAZEBROOK J:

Can you just perhaps finish the Victorian point up because otherwise we mightn't come back to it and that might be…

MR WESTON QC:

Yes, Your Honour.

GLAZEBROOK J:

So you were saying under sections 34 and 35 of their Supreme Court Act.

MR WESTON QC:

35, yes.

GLAZEBROOK J:

And that's as far as I got on my notes so…

MR WESTON QC:

No, well, that's it, which is as far as I've got, Your Honour, and so quite precisely that was a, just finding my note, that was –

GLAZEBROOK J:

I didn't put down what those sections said.

MR WESTON QC:

No, and I wasn't telling you what they said other than there was quite a prescriptive opt-in mechanism, and so when my friend's quoted in the section of his text that an observation by a Judge that it was quite different from the

universal, the historic approach, well, yes, it was because the statute was quite precise and quite particular so it doesn't take you very far and, indeed, I'd identified in one of the cases that my friend had referred to in his footnote, a case called *Zentahope Pty v Bellotti* (unreported, VSCA, 2 March 1992), the Judge in that case said, "The attempt to found a complex representative proceeding on sections 34 and 35 of the Supreme Court Act resembles an attempt to break a butterfly upon a wheel: the gear is ill-fitted to the task, raising more problems than it can conveniently bear, yet offering greater torment than the subject deserves." So an observation that perhaps is not without some echo here.

Your Honours, there are other submissions I would make about whether in Australia historically there was a preference towards opt-out. In my submission certainly not. Some of the earlier cases, and even up to the *Jameson v Professional Investment Services* (2009) NSWLR 281 (NSWCA) case in 2009 questions of opt-in were regarded as normal. So there's a whole historic picture here of opt-in/opt-out. The message I would like to leave is it doesn't favour one or the other.

So trying now to get through the written outline and I'm back to paragraph 5. So in paragraph 5 it's a question of terminology. I explain why I've used the American label "class action". Whether or not that's a preference is a matter obviously for the Court but I've explained why I've done it, how the Law Commission and the Rules Committee has used similar labels, and we then in 6 acknowledge the power point, that the High Court has power to make either orders but, as we say in 6, that doesn't answer the "should" question as we go on to say.

In paragraph 7 then, Your Honours, I introduce the concept of what I have called "absent plaintiffs" and my friend cavils with that label because he says it's got different meanings at different times and that is completely –

WINKELMANN CJ:

He says you're using it differently to how it's used in literature.

MR WESTON QC:

Yes. What you find, Your Honour, is it's used variously in the literature. He's right that you can find the references that sometimes it is used to identify those who have received notice but simply haven't opted in. It's also used in the sense that I have. I've given the footnote references where it is used to that effect, and it's also used sometimes in the *Hoffmann-La Roche v Sperling* 493 US 165 (1989) case and America used it in another sense where it was those who might at some point in the future opt-in but hadn't yet done so. So it can be used in a range of senses. It probably doesn't matter what you call it other than I'm consistent in my use of it and so what I mean by it is those who fall within the class definition but for one reason or another do not learn of it. So there are various categories. Obviously there are some who will learn of it and do nothing, and in an opt-in they're, opt-out sorry, they're swept up in it. What I have in mind by using this label is those who do not learn of it in any shape or size.

GLAZEBROOK J:

Well in this case, assuming Southern Response knows the addressee, at least the last known addresses of the insured, then it will only be those people who have moved without any forwarding address, wouldn't it?

MR WESTON QC:

Yes, but in Christchurch there's just one or two of those Your Honour, because a lot of their houses fell down, so Southern Response had some addresses, yes, it's no certainty it's got –

GLAZEBROOK J:

Well if the house had fallen down presumably it was the address they were actually living in that you were communicating with them through.

MR WESTON QC:

Yes, that may well be Your Honour people were in temporary accommodation. I'm instructed that there's no certainty as to the addresses, certainly –

GLAZEBROOK J:

That's what I said, it would be the people you didn't know the, or the addresses that you had were not current and no ability for forwarding.

MR WESTON QC:

Yes.

GLAZEBROOK J:

Right. And you say that could be a reasonable number?

MR WESTON QC:

Yes, that's what I'm instructed Your Honour. I mean because some of these people obviously were housed in what was called the Red Zone and their houses no longer exist. Some were then in temporary accommodation and may have been there. Some bought another house, sold it –

GLAZEBROOK J:

And then we have to assume they don't read any newspapers or look at any notices on social media or on electronic news.

MR WESTON QC:

Yes, and –

WINKELMANN CJ:

About legal proceedings.

MR WESTON QC:

I'm sorry Your Honour?

WINKELMANN CJ:

Notices about legal proceedings in newspapers and on social media.

MR WESTON QC:

Yes, and as the *Ross Asset Management* shows –

GLAZEBROOK J:

And articles presumably on this case that will be appearing.

MR WESTON QC:

Yes and there's certainly been a lot of coverage in the Christchurch area so to the extent, both in media and radio and so on, so to the extent that people live in Christchurch, I'm sure chances are most will have heard of it, but a lot of people moved out of Christchurch. Some people are just so sick of the whole thing they have no interest, they just want to ignore earthquakes for the rest of their lives if they possibly can, and one sympathises with that. But who knows out of this potential class of around 3000 how many do not know of it. LPF, the funder who have got leave to intervene, suggest that in a small country like New Zealand most people actually do get to hear one way or another, because in a small community that's the way things work. That may be so, but it's common ground, I think Your Honours, the Court of Appeal thought it was, and my friends all in their submissions accept, there will be some people who just don't know about this stuff. I mean they may hear it but they may not register that it actually applies to them, they just may have no knowledge that there's potentially a claim to which they can put their name. So –

GLAZEBROOK J:

Can I just, because the concern is with those people, according to your submissions, that they might have wanted to issue their own proceedings and won't be able to now. It's just that the sort of people that you've just been describing would not seem to be the obvious candidates for issuing their own proceedings and…

MR WESTON QC:

Yes, and that's the argument that's put again me Your Honour, I suppose you can call it the "so what", it doesn't actually matter. Now my point is, well, that may ultimately be this Court's assessment on a proportionality assessment, but let's start at the point that if someone doesn't know of this, is then swept up in a class action, there's a settlement in their interests as a consequence of

that they are extinguished, their right to natural justice guaranteed under section 27 has been undermined. Now you might say on balance, by reference to section 5, we can live with that, but that assessment does need to be made, and that is part of what I respectfully submit our Bill of Rights argument requires is someone to step back and make that assessment. Some of the cases overseas –

WINKELMANN CJ:

Isn't that quite theoretical though, because if they wish to assert their right then they'll appear as a litigant. If they object to the proceeding they can take steps to opt-out, and otherwise they will just be people whose rights disappear because they're not asserted.

MR WESTON QC:

In the, there's litigation in Australia for example, what's called the *Timbercorp* litigation, the case is not in the bundle but obviously I've been thinking quite deeply about all of this, so the *Timbercorp* case was one, a bit like *Feltex* where the case didn't go happily at the stage 1 and the representative plaintiff lost, and it was part of a complex funding scheme of which there were loans made that lay outside the litigation directly in the action, and then there was separate litigation about, well, what happens with the loans that have been made that the *Timbercorp* entities were now trying to recover on, and there were issues about res judicata and so on. So suddenly emerging out of that first unhappy litigation, the class action where people had been swept up with the issue, well, what happens next? So you can't just say it's about people who mightn't learn of it, who might have otherwise brought a claim. There's also other consequences that might happen for people.

WINKELMANN CJ:

Well, there are two obvious adverse consequences. One is that the litigation is run and it's run badly and the outcome is adverse against them.

MR WESTON QC:

Yes.

WINKELMANN CJ:

The second obvious adverse consequence is the risk of counterclaim.

MR WESTON QC:

Yes, Your Honour, and we've raised that as a prospect down the line for some plaintiffs, or claimants I suppose I should call them, someone in the class. It doesn't arise in relation to Mr and Mrs Ross. There's not a counterclaim, so the Court of Appeal referred to it as speculative, so in the sense that it doesn't arise for them I suppose you could say that but it's certainly in the affidavit of Mr Hansen. It's set out why there might be conceivably counterclaims in some circumstances.

GLAZEBROOK J:

Can I just check? It might be the point to raise, the Chief Justice was going to raise I think with Mr Skelton. How do you see conceptually the stage 1 and stage 2? So stage 2, does that become opt-in at that stage or what's it become because, of course, if somebody, I think in some of the submissions, I can't remember who's indicated, if it's opt-in at the second stage then the risk of counterclaims doesn't actually affect anyone at all because if there is a risk of a counterclaim they just don't opt-in, if you like, at stage 2.

MR WESTON QC:

Yes, Your Honour, that's correct. So stage 2 would require an opt-in which is a broad term that is not particularly apt but requires some affirmative step to say, "Yes, we're here and we're going to put our case forward."

WINKELMANN CJ:

Simply because it requires proof.

MR WESTON QC:

Yes, and it may require proof on a wide range, Your Honour. *Feltex* is at one extreme where there was a three-month case examining a prospectus. This is not a case such as that. This is one where all the different claimants received a variety of letters in the main. Quite a few of those letters are

standard templates but they fluctuated from time to time, and quite a few had meetings and email communications and, for example, in this case some of those individualised issues are pleaded. So there may well be quite a wide range of matters at stage 2 as opposed to stage 1.

WINKELMANN CJ:

So you say it is. You said yes, it is an opt-in, but according to how you define "opt-in" it isn't strictly speaking opt-in because at the beginning of your submissions you defined "opt-in" as a process by which people agree to be bound by funding arrangements.

MR WESTON QC:

Yes, Your Honour. So that's why I said just a moment ago that to call it an "opt-in" at this stage, which is how everyone has as a shorthand characterised it, is not completely accurate. It's more it may require some consideration of funding. In Australia, for example, at the stage 2 point there can be issues of separate funding required. So the question of funding going forward would need to be addressed. In the *Feltex* case, for example, at stage 2 it was done collectively. So the funder was required to continue, well, the scheme was that the funder would keep funding and there's been a very large security for costs order made. But another possibility is that individual claimants are funding their individual claims, as it were, as well.

GLAZEBROOK J:

My question was really though if that's the case why does the risk of counterclaim stop an opt-out at stage 1?

MR WESTON QC:

Because the Court of Appeal's right that issue in and of itself can be postponed until stage 2. That is correct. My submission though is the decision whether to opt-in or opt-out is exactly the same for those people. So if they can make the decision at stage 2, they can make it at stage 1. That was my answer to that point. It doesn't go further than that.

GLAZEBROOK J:

Sorry, of course they can, and I don't have any problem with that, but what I don't understand is why a risk of counterclaim means that it should be opt-in at stage 1 and not at…

MR WESTON QC:

No I –

GLAZEBROOK J:

So just saying they can opt-in at any stage doesn't actually help me with that, but if you say it's unfair because there's a counterclaim, and the only reason it would be unfair would be at stage 2 when they have to opt-in, then why does that, why do you say that a risk of counterclaim means it shouldn't be opt-out at stage 1?

MR WESTON QC:

No, I think I answered Her Honour Chief Justice question badly. In our submissions we put it on the basis that I put it to you just a moment ago. It is correct, as the Court of Appeal said, that that decision can be postponed. Our answer to that was you can make a decision stage 1 just as easily, you're no better placed at stage 2, and we really focused elsewhere, Your Honour, to show –

GLAZEBROOK J:

So there's absolutely no reason. The risk of counterclaim is no reason why stage 1 should be opt-in or opt-out.

MR WESTON QC:

I can't presently advance anything beyond what I have Ma'am.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

But if you choose to opt-out at stage 2 you're presumably still bound, you can't, yes, you can't opt-out at stage 2 and not be bound by the finding at stage 1.

MR WESTON QC:

No, no Your Honour. There are some issues in the Australian cases of late opt-outs and the consequences of that but that's just further confusion that I don't need to get into. But as a broad proposition that's right.

GLAZEBROOK J:

Ad I'm assuming because you've still got stage 1 and stage 2, that people that don't opt-in at stage 2 would not be able to go off and start their own proceedings because they're still part, effectively, of the universal proceeding, is that, because I think one of your suggestions was that there could be this long tail of people who might suddenly come back and try and hop in at a stage 2 level? Much later.

MR WESTON QC:

I think that was my suggestion Your Honour.

GLAZEBROOK J:

Oh I might have misunderstood your submission.

MR WESTON QC:

If I've conveyed that I may have done that wrongly, but that was not my intention to suggest that. Certainly what we've learned in the *Feltex* is that while we blithely call it stage 2, when you're suddnely presented at stage 2 with 3000 claims and you have to do the individual damages, it gets a little more difficult than just blithely calling it stage 2, so in *Feltex* we tried to set up 15 individual claims that were thought to be representative of them all, with the view to running those and seeing what happened, but that left open the possibility there would then be a stage 3 or 4 beyond that. Sometimes overseas they've run different mechanisms. In Australia there's been very

little in the way of stage 2 activity, because most of these cases, as I hope to show you when I get to the law, the 2018 law reform report in Australia, all of them have settled, well at least the 2018 of the – it's settled at stage 1, so there's not a lot of experience, at least as far as I know, of stage 2. Stage 2 is, probably there's much more in the American jurisprudence about how that should work, but I wouldn't like to dive into that.

GLAZEBROOK J:
All right. I must have misread, I'll check what it was, but you're not suggesting there's a long tail afterwards, unless, there'll be a managed process at stage 2 and however that works that's the end of it?

MR WESTON QC:
Yes, so we would say that there would have to be an "opt-in" in inverted commas at stage 2. Those who are wanting to front up and prove their cases need to make that commitment. The question of funding would need to be addressed at that point, quite in what shape who knows, and then there would need to be a process set to hear those cases.

GLAZEBROOK J:
And those that don't opt-in, their case still comes to an end?

MR WESTON QC:
Yes, in Australia there are mechanisms to try and deal with what happens to those who at some point are not in, and their claims are brought to an end generally by one means or another, but that's part of the difficulty of what happens down the line.

I'm going to take you through, if I have time, one of the recent Australian cases which spells out in some detail how the settlement process works, and you can see, in my respectful submission, it very helpfully sets out how involved it is when notices have to be sent out. What the notices are saying, what people have to do, how they have to respond, and if they don't respond,

what happens and so on. You can see it's an extremely elaborate exercise. It's based on –

GLAZEBROOK J:
Which your friends would say not legislated for however…

MR WESTON QC:
Yes, and wrongly they would say that because section 33V of the Federal Court Rules is fairly short. My friend's refer onto to Part 1 of the section, not the second part which makes it clear that the Court has power to order distribution of monies from settlements. So it is very shortly expressed and it's absolutely the case that they've developed practice notes and so on as to what factors are to be taken into account in undertaking those assessments. But the fundamental jurisdictional point is created by section 33V of the Federal Court Act. Shall we have a look at that now and I'll explain?

GLAZEBROOK J:
So are you suggesting there isn't, there wouldn't be jurisdiction here or…

MR WESTON QC:
Yes Your Honour. That's' how I've put it.

GLAZEBROOK J:
So you say there's a constitutional issue, that it has to be done by legislation, in which case that would be one argument for saying that you can't have these cases on an opt-out basis, wouldn't it.

MR WESTON QC:
Yes.

GLAZEBROOK J:
Despite you saying you can.

MR WESTON QC:

No. It arises particularly in the case of approvals where there's a funder. That is the very pointy part of where the problem arises Your Honour.

WINKELMANN CJ:

Why does it arise particularly in the case of a funder?

MR WESTON QC:

Because you're, well, probably the easiest way to show you that would be to take you through this –

GLAZEBROOK J:

But if you don't have jurisdiction to make these orders, why does a funder – is it only if you have a funder you don't have jurisdiction?

WINKELMANN CJ:

Yes, so can you just answer my question before you take us to anything. Why is it different if there's a funder?

MR WESTON QC:

Well in New Zealand, Your Honours, where we have the existing opt-in approach, where people other than what my friend says here counts as an opt-in, but in all the other cases when people opt-in they sign up to a funding agreement, they make a commitment to the funding agreement. So if there's a settlement you have everyone, as it were, lined up and committed to the funding agreement already. In a situation where you have an opt-out where there's an open class approach, that is they have not had to make some sort of commitment to the funding, you then immediately have to address, let's say there's a settlement, you have to address how the monies are distributed. How the funding commission is paid and who does the paying because it comes out of the pool of monies that forms the settlement, the $35 million or whatever, so some large proportion of that may well be going to a funder, some will be going to the lawyers, and then the balance is distributed and as the Australian Law Commission report from 2018 on its statistic says, over the

period it assessed about 50% of settlement recoveries ended up going to the claimants, the other 50% went to the other various actors in the process. Now you have to have some mechanism whereby the Court can approve all of that because it's going to be binding on people who are not literally before the Court. It's not just my absent plaintiffs, it's those who are just drifting along in the wake of this. They haven't opted out, they know about it, they haven't done anything, they're not required to, but they are bound by that, and then as part of the difficulties of distribution that might emerge, you have, amongst other things, what's sometimes called the cypres problem, the old French C-Y-P-R-E-S, cypres problem, where you have unidentified claimants who are entitled to something but you can't find them still so what do you do with their share and so on. So these distribution schemes, and you can see it again from this Australian case, are reasonably complex because they try and cover all of these bases, and it all comes back in Australia to this section 33V which, as I say, is very shortly expressed but says A, that a court must approve a settlement, and B, in doing so it can make orders as to the distribution of the monies, and it's that second part, coupled with the first, that enables them to do the whole kit and kaboodle.

GLAZEBROOK J:

Can I just check, because under the old universal scheme you'd certainly have the cypres problem, with unidentified claimants, you know, the barrow boys who you couldn't find, so those problems of distribution must have been dealt with under those generic rules in the same way, or are you saying that…

MR WESTON QC:

Some of those cases, Your Honour, of course are declarations or so on, so they're not damages in the case that we have of individual damages here.

GLAZEBROOK J:

I understand that, which of course takes away a lot of these problems anyway, because…

MR WESTON QC:

Yes.

GLAZEBROOK J:

But leaving that aside, the unidentified claimants entitled to but don't have a distribution right must have arisen under the old universal claims and probably worse than now.

MR WESTON QC:

Yes, and I haven't found a lot of writing on how they carried through other than to acknowledge that that was a problem that had to be addressed. So you're absolutely right that it can arise, but where you're talking about a settlement which a court is approving, and is taking – wind back sorry, I'm rushing ahead of myself. Under the old system the jurisdiction was adjudicative. The Court would make orders. If there was then a cypres, it would issue a judgment. If there was then cypres problems my understanding is they were addressed by the Court subsequent to that judgment. The difference between that situation and the one we're in here is where there's a settlement we haven't had an adjudication. So my submission is that the Court's adjudicative jurisdiction does not go wide enough for it necessarily, for it to approve settlement and order distribution, which will, as I say, have these different dimensions.

GLAZEBROOK J:

So you're saying that they didn't settle things in the old days and then have the problem afterwards?

MR WESTON QC:

I'm sure they did Your Honour but because the Court had issued its judgment it was still seized of the matter and sometimes –

GLAZEBROOK J:

Well, no, if there was a settlement the Court wouldn't have issued its judgment, in the old days.

MR WESTON QC:

As I've been endeavouring to say, Your Honour, the jurisdiction in the so-called old days was an adjudicative one. You don't see a whole lot of, I haven't found any materials where there has been a settlement approved by a Court, and the Court structure set up –

GLAZEBROOK J:

Well there probably wouldn't but an argument about it afterwards presumably could have come before the Court.

MR WESTON QC:

Well if it did, Your Honour, I'm not aware of it.

GLAZEBROOK J:

All right.

WINKELMANN CJ:

So we're at I think…

MR WESTON QC:

All of page 3, but we've covered probably sort of about at least 15 pages one way or the other, but let me just as, for good order, let me go through it so I make sure I have covered it.

WILLIAMS J:

Mr Weston, it's a small thing, I'm not going to distract you off into, I hope, a lengthy conversation. You talked about in *Feltex* the construction of 15 representative cases, you said at what we would call stage 2 in this context.

MR WESTON QC:

Yes.

WILLIAMS J:

And indicated that there'd probably be at least a stage 3 unless those 15 cases satisfactorily provided the framework for all negotiations that followed. I read in the writing some concerns being expressed, it might have been in Mr Beck's, but certainly in other writing, concerns being expressed about plaintiffs constructing Frankenstein cases that cherrypicked the best of all of the cases and then presented that.

MR WESTON QC:

Yes.

WILLIAMS J:

So my question is, the 15 representative cases, were they put up by agreement between all sides?

MR WESTON QC:

No. They were, I think mainly no is the correct answer. They were put up by the claimant group. We looked at them and made some submissions as to whether we thought they were representative, but ultimately it was their call who they were. We were just as anxious to try and get some useful outcome from stage 2, so we had a vested interest as defendants to make submissions about that, but as to 95% it was the plaintiffs selection. But they also had the same interest as us, there was no point getting an outcome that wasn't going to be useful to try and solve the rest. So –

WILLIAMS J:

So even from the plaintiff's point of view, no point in gilding the lily?

MR WESTON QC:

By that stage, no, because stage 1 judgment was there, that was locked in, so after that it was really trying to get as useful an outcome from stage 2 as could be devised. That's certainly how we saw it on the defendant's side of the fence, I might be wrong, and we haven't yet managed to get the stage 2

hearing to the barrier. It's been adjourned twice and the plaintiffs are now subject to an unless order that expires in mid-July.

WILLIAMS J:

Yes. So the multiple-layered problem that you hinted at wasn't an insurmountable one once you got through stage 1. There was a bit more co-operation over the structure at stage 2 and beyond?

MR WESTON QC:

Feltex is not a case characterised by co-operation, Your Honour.

WILLIAMS J:

But you did say it was in your interests to get a representative.

MR WESTON QC:

We made submissions about the process because we thought it was in our interest to try and get some shape to it. So we've been actively – we've sometimes been taking a pretty lead role.

WINKELMANN CJ:

I think we've probably heard enough about *Feltex* actually because it's current litigation and we're hearing your side of things but not the other side of things, so perhaps we could move on, I think.

MR WESTON QC:

Yes. No, I'm happy to, Your Honour. So page 3, number 8, if I don't carry Your Honours with me on my overarching point that we shouldn't be going down this road, I do say in 8 that if you're going to endorse the Court of Appeal judgment in some shape or size then there does need to be some more assistance provided in relation to some of these key points and that's the reason why I've addressed them at some length below, and in 9 we identify the dicta both in the Court of Appeal and this Court that might need thinking about. We've set it out in extenso there and Your Honours will be familiar with those cases.

So that then takes us, Your Honour, top of page 4 of my submissions where I've already mentioned multiple times the Australian Law Commission Report from 2018. It is, in my submission, an important document. I have made submissions about it to Court of Appeal. Doesn't appear to have been referenced by them, and I say that there's some key insights about how class actions at the moment in Australia are problematic at the moment. So they are problematic with the legislative framework. Multiply by two the problems that we might encounter. That's why I'm drawing attention to those. I've also mentioned at the top of page 4 the *BMW* case, the recent decision of *BMV v Brewster*, which I'll come back to.

So ultimately, as we say in 10, let's stick with the opt-in. At least we know where we are.

So, Your Honour, paragraph 11 I summarise the argument. The four key steps (a) through to (d), (a) is the natural justice one that we've touched on already. (b) is the point that I made also about jurisdiction. If it's not jurisdiction then it must be power. I have put that in as the back-up as it were in relation to funding and settlements. (c) the Law Commission point and (d) an overarching point that although this is in one sense a procedural development, it's a very significant procedural development so in my submission should be done comprehensively via the Law Commission.

So coming in page 5, Your Honours, to the background, now I don't know how much I need to spend on the, ironically, on what is actually the claim in this case. Of course –

WINKELMANN CJ:
I think we've all read, so that's a good indication you probably don't need to spend much time, if any.

MR WESTON QC:

No. Well, I'm certainly happy to if anyone would feel assisted by understanding what the claim is or how this document called the DRA works and the information that's in it.

WINKELMANN CJ:

No.

MR WESTON QC:

Just before I leave that though can I just say something about the *Dodds v Southern Response Earthquake Services Limited* [2019] NZHC 2016 case? That's the one you'll see in my 19. It's mentioned there. That's the one that has advanced independently where Mr and Mrs Dodds had their own lawyers and advanced their own case. Justice Gendall has issued his judgment in the High Court and that largely favoured the Dodds. Some of their quantifying claim dropped out but by and large they succeeded. We argued it two weeks ago in the Court of Appeal. My friend in his submissions is critical of Southern Response and how it's keeping an eye on both the Dodds' case and this class action. In my submission, well, of course it has to. It's a defendant in each. All it's doing is defending the claims in each case. It has said though that it may have a response to this class action depending on how the Dodds' case turns out in the Court of Appeal. But that's entirely a matter for it and if plaintiff doesn't like what it says about that, well, the plaintiff in this case will ignore it.

O'REGAN J:

So the Dodds were eligible to be in this class, were they?

MR WESTON QC:

They were and in fact, Your Honour, they would be included in the definition and –

O'REGAN J:

Until they opt-out if it's an opt-out –

MR WESTON QC:

Yes, but conceivably they might say, well bother that, we're not going to opt-out so we might have the slightly odd position where, because they can't be forced to opt-out but technically they're swept up in it even though…

WINKELMANN CJ:

Well the Court could stay their participation, couldn't it, because they've already had a judgment notionally if they were unsuccessful in the Court of Appeal. Anyway it's not really that complicated though I think Mr Weston.

MR WESTON QC:

I'm not saying it is complicated, Your Honour, but there's a number of other cases that people have brought these claims that have been settled and so on, so there are others like that out there. I'm not trying to say it's complicated, I'm just saying there's –

WINKELMANN CJ:

Just something to be worked through.

MR WESTON QC:

Yes. So top of page 7 I think now. Your Honours, just something about the terminology, and I've probably covered a lot of this already as I'll explain, this language seems to have emerged out of the US work on this area, the Ontario Law Commission by the time it did its report in 1982 it certainly used it, and as we say in 23 when in New Zealand we've spoken of opt-in, it has always been in the basis that people have signed up to a funding agreement. My friend has come up here with language that says that that doesn't need to be done. Although he seeks an opt-out he also says what he's proposing here would work with an opt-in which has a registration system as a half-way house i.e. you haven't signed up to the funder, but you have announced your interest in a form of registration. Now we submit in our 23 that that cannot usefully be thought of in the New Zealand context as opting-in. The whole point of opting-in in New Zealand is that you're signed up to the lawyers and to the

funder and I'm joined in that, surprisingly it seemed to me, by LPF, their submissions were to that effect as well, and that's certainly how it's always worked in New Zealand thus far.

WINKELMANN CJ:

Half-way house is where you sign up to the claim but not to the funding arrangement?

MR WESTON QC:

Yes, so what my friend –

WINKELMANN CJ:

Which they currently have at the moment.

MR WESTON QC:

Yes that's right Your Honour. The language of open and closed classes emerges out of the Australian jurisprudence. It doesn't seem to be, lies beyond thatt. So in Australia under the opt-out mechanism they have there, they developed this language of open and closed. So open is where you don't have to make any commitment. Closed is where you do. So closed is a form of opt-in. So, for example, when you get close to a settlement in Australia, they close the class, which requires some affirmative act to be a party to it. So speaking of closing the class leads to that, and in Australia moreover the class definition can be shaped by reference to who has signed up to the funding agreement. So you can define the class that you represent as being those that have signed up to a funding agreement, and that's referred to as a closed class, and –

WINKELMANN CJ:

So if you went back to your original problem, if you allow opt-out, but combine it with closing the class at a point before settlement, before the Court is asked to approve settlement or whatever, that would answer that problem, wouldn't it because –

MR WESTON QC:

Yes, but what has emerged in Australia, Your Honour, is the issue now, as a result of the *BMW* case is closing the class cannot be done in advance now of the settlement. It's only an issue that can be considered as part of the settlement process under section 33V. So section 33V is at the heart of the difference, in my submission, between Australia and New Zealand which, at least so far as settlement goes, is an important consideration. Your Honours it's half past.

WINKELMANN CJ:

Yes, so we were at the point where you were saying – can I just clarify one thing. You say there's no half-way house where you sign up to the claim but not the funding arrangement, that's not opt-in?

MR WESTON QC:

In New Zealand, up to now my understanding is if you have opted in you have signed up to the funding agreement, assuming it's a funded proceeding.

WINKELMANN CJ:

Although there might be a very good administrative good sense in having, registering your interest without signing up to the funding agreement because those people might be in a situation where once the settlement is done they can then be easily notified and decide whether to opt-in to the funding arrangement.

MR WESTON QC:

Well I suppose there's always variations on a theme that are possible, just the way it's worked in New Zealand is the way I've suggested Your Honour.

WINKELMANN CJ:

Thank you. We'll take the morning adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

MR WESTON QC:

May it please Your Honours. So we've got to the bottom of page 7, top of page 8. I accept that generally speaking around the world it's opt-out. We haven't tried to shy away from that as a consequence. I then describe the High Court judgment in three lines, the Court of Appeal in a page and a bit. I'm apprehending I don't need to spend too much time going through that other than to note at my 31 the Court of Appeal did say something about competing class actions if there was an opt-out mechanism and said that it would hardly make sense that there should be such a thing but indeed in Australia that is now emerging as a very significant problem. How do you deal with two open class actions that purport to claim the same pool of people? And in Canada there's an issue of do you have a beauty parade? Do you…? How do you deal with it? And this Law Commission report from 2018, that is one of the big topics that it confronts and again my respectful submission is if we are to embrace an opt-out in New Zealand this is one of the things we would need to be thinking about.

Bottom of page 9 I come to the Bill of Rights argument which we've already had a flurry with and I gained the impression that to the extent there was thought to be a problem it wasn't a very big one. But let me nonetheless just persist with this for a little longer and endeavour to explain why I'm saying there is potentially a problem here that needs to be thought about. In and of itself this doesn't answer the case. It's just one of a series of issues that need to be addressed.

So if we go please to my 35 where I have section 27(1), every person has the right to the observance of the principles of natural justice by a tribunal and any other public authority. So this obviously bites in relation to rule 4.24. So a person in relation to a class action that's structured on that rule has this right. It's an individual right. So later in the submissions when we say there's a tension between what is the usual approach to litigation individual based and

class actions collective, this is where it emerges from because the right to natural justice is individual. So you have the right as a prospective plaintiff to bring your own claim, to have your own evidence. Historically, the universal class action has, as it were, overridden that obligation. Now we've probably become a little more focused on these rights in recent times but that in and of itself doesn't answer the point my friends make against me. They say, "Well, universal class actions by definition sweep everyone up. What is Weston complaining about?" and that in essence is the argument that I face.

So what we say is where there is someone who has not been served, is not aware of the class action, they have a right to natural justice that exists under section 27. If they are holus-bolus swept up into this class action, that right is subverted. It may be said, well, it's not a material right because it doesn't really matter. They wouldn't have done something and if they do do something they may have to sort it all out subsequently. Strictly speaking, their right under section 27 has been breached.

WINKELMANN CJ:
Can I just ask you to clarify? You concede the jurisdiction exists?

MR WESTON QC:
Your Honour, early in the submissions I explained what I thought the jurisdiction was and can I just restate that because it…

WINKELMANN CJ:
Yes. So I'm just going to ask you how does that fit the natural justice point?

MR WESTON QC:
So the jurisdiction under the universal class action is to make an adjudication that binds the class. That's the jurisdiction. It's a res judicata jurisdiction. That I think is the extent of – when we speak of jurisdiction in the area, that is as far as I think we can take jurisdiction. So jurisdiction and breach of the Bill of Rights Act are not necessarily one and the same things here. If we are now about to embark on opt-out, because we haven't gone there yet in

New Zealand, Your Honour. I know this Court in the *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 judgment spoke in terms of that it might be available but we haven't gone there, so we're about to go there. So having –

WINKELMANN CJ:
But as you can see we have been to universal before which opt-out is a step back from.

MR WESTON QC:
Well, Your Honour, we're about to do something that is different to the universal. The universal set up a certain state of affairs. I endeavoured to explain earlier the three principal divergences between that and where we are now and where we are now also we're about to embark upon opt-out. That is a new direction. You can in a very broad, historical sweep say, "Oh, it all leads back to there," and, of course, it does, but we're about to embark upon this new direction, in my submission. That is why we argue that the right to natural justice that exists is being breached potentially. That then brings into play sections 5 and 6 of the Act. Your Honours would be more well aware of those than I am. But they need to be assessed as part of this. But there is an issue there. It cannot just be swept under the carpet and said the historic proceeding answers all of this. We are in a different place now than that.

To step back, the fundamental constitutional position here is the rule of law. We're all subject to and governed by the rule of law. Natural justice is an aspect of the rule of law, the audi alteram partem rule, the right to a hearing, and then we speak of access to the Courts to seek justice. That is not a standalone right that exists as an end in itself. It is a means to the end of justice, of being – sorry, to the rule of law. We're all under the rule of law. So that's why we speak of access to justice because we are all under the rule of law and where the Bill of Rights specifically provides that there is this right to natural justice it's not possible as a – anyway, I'm repeating myself to sweep it under the carpet. So we would submit that that is a fundamental issue that this Court needs to address.

WILLIAMS J:

If you are really concerned about the people who know nothing about this aren't you really in danger of getting pretty close to saying there's a fundamental right to be left behind? What's the access to natural justice component –

MR WESTON QC:

I see what you mean.

WINKELMANN CJ:

– for someone who doesn't get the opportunity?

MR WESTON QC:

Let me see if I've got Your Honour's question. This is the tension that I suggest here is between the collective paternalistic we'll look after you and sweep you up into the class action against the individual right to chart your own course under the Bill of Rights Act. So what my friends say is well we will protect you along the way because you are swept up into the class action.

What I say and tell me Your Honour if I've missed Your Honour's point, that the Bill of Rights Act needs to be thought of in that context because the sweeping up without knowledge is the potential problem and that's why in the US the due process requirements of the Fourth and Fifth Amendments whichever numbers they are, we see it manifest in their rule 23 which requires a very active service requirement. So in the Supreme Court decision in the *Eisen v Carlisle & Jacquelin* 391 F.2d 555 (1968) case there was some two million plus claimants that could be identified and they were required to be served and the cost of that exercise in fact stymied the whole class action.

In the *Phillips Petroleum* case they were able to do that notification and 1500 were excluded because they couldn't be found so in the US alert to this issue of due process as they call it which presumably is pretty close to how we would have our section 27, they deal with a very explicit service.

In Australia the legislation there deals with the question of notice and it says unlike the American one the statute specifically provides that the Court will do a cost benefit analysis about how notice is to be given presumably alert to the problems that have emerged in the US because of the due process requirements that there should be notice given in that case. So in Australia the problem here is largely addressed by statute because the statue provides the mechanism, the US the due process provisions deal with it as well.

So although I feel stiff wind in my face on this argument it is, with respect, a real one here, it can't just be ignored it does exist and how one approaches is not straight forward.

WILLIAMS J:
You see I can probably better see your point in respect of parties who are aware and choose, even if for reasons of apathy or indolence, not to engage but your focus is on people who don't know. Do you say to deprive them of an opportunity is to provide them with natural justice, it just seems to me to be kind of intuitively problematic as a proposition?

MR WESTON QC:
Right, well I'm not sure why it's intuitively problematic because if you don't have notice you, as it were, are bound by this class action. So let's say the class action –

WILLIAMS J:
Yes I understand that point but mine is a more fundamental one.

MR WESTON QC:
Right, well I'm sorry I'm missing the point there, Your Honour.

WILLIAMS J:
Well let's leave it there.

MR WESTON QC:

Well feel free to come back to me on it because I certainly don't want to leave Your Honour thinking that it's not an important point.

WINKELMANN CJ:

So your submission, Mr Weston, is this is not – the requirements of natural justice don't mean there's no jurisdiction, the requirements of natural justice might mean it would have to be taken into account in how you exercise that jurisdiction?

MR WESTON QC:

Yes, Your Honour. It goes back to me putting this to you as a should question rather than a could question.

GLAZEBROOK J:

Well in in this case we take the view that there'd be very few people who would not get notice of this, would that be something that we can take into account in this natural justice submission or is that irrelevant?

MR WESTON QC:

No, indeed Your Honour it can take it into account. So sections 5 and 6 of the Act the proportionality one is section 5 and section 6 that you should interpret as close as you can in accordance with, in this case, the right to natural justice, mean that you can make those assessments by reference to those sections. Those sections are all in the same part in the bundle. The Bill of Rights ones are there.

WILLIAMS J:

Is your point met by the practical reality of opt-in at stage 2?

MR WESTON QC:

Well, we certainly come to that later on, Your Honour, the stage 2. Again I may have missed Your Honour's point but we submit in this case that the stage 2 will be out of balance to the stage 1. This is not a case where there's

a lot of efficiency in having a stage 1 because the stage 2 will have so many individual issues to be resolved for each of the claimants, but that comes later under the discretion point.

WINKELMANN CJ:
But that's also an argument about the representative proceeding per se, isn't it, which is not what you're –

MR WESTON QC:
As Your Honours will appreciate, right towards the end of our submissions we come to, page 25, that if Your Honours are against me on my primary "should" point we then have to drill down to the circumstances of this case as to whether, assuming Your Honours are open to an opt-out class action, whether this one on the particular facts of this case should be an opt-out class action, and there's three arguments that we mention at the end, one of which is this interrelationship between stage 1 and stage 2.

WINKELMANN CJ:
All right. You carry on, Mr Weston.

MR WESTON QC:
Yes. It's a complex jigsaw, this one. So, Your Honours, if that's convenient I'd be proposing now to move on at the bottom of page 10, issues of jurisdiction or power, and I have a bit of a chat over the next few pages about jurisdiction and power and Your Honours will be across pretty much all of that. I have another go, Your Honour, the Chief Justice, in 40, just talking about what our case – or what a class action is. This was your point a moment ago. What is the jurisdictional issue that we talk about in this case? So can I just read through 40 and then perhaps expand upon it?

While, for the reasons set out above, a class action may be thought of primarily as a procedural device or mechanism, it is arguable that at least some aspects, including funding and settlement, are better thought of as raising jurisdictional issues. The underlying jurisdiction to bind other claimants

by judgment (the adjudicative function lies at the heart of the Courts' jurisdiction) stems from equity – that's how all of this obviously developed in the Court of Chancery –and that must underpin the current rule. But we then go on to say but none of that, with respect, necessarily provides the Court with unlimited jurisdiction or power, which I think is the more correct way of looking at it for most instances of a class action, to undertake all the necessary steps. But we certainly say jurisdiction in relation to settlement. And so we then –

GLAZEBROOK J:
So just help me, why is it jurisdictional?

MR WESTON QC:
Because the jurisdiction of the Court obviously has its source back in the English Courts and what was assumed when New Zealand was established and so on. So we took then the jurisdiction in this case of the universal class action. So I've endeavoured to say, well, what actually, when we speak of jurisdiction in the course of a universal or truly representative action, what do we mean by jurisdiction, and it seems to me, reading as much as I have in this, the best I've been able to do is that the jurisdiction, as I've said, is the adjudicative one that by the process of res judicata binds everyone else. That, I think, is the prima facie jurisdiction that is established. It doesn't establish the power of the Court to sort out settlements and to do all the rest of it, but it's –

GLAZEBROOK J:
But if settlements could occur under the universal system then they were purporting by discontinuing those proceedings to bind everybody even though there were a whole pile of people who presumably in those days were less likely to know about it than in these days. The Court may not have supervised those but it did allow the discontinuances presumably.

MR WESTON QC:
All I can say is presumably because a lot of that information at least is not, my friends may know of it, I certainly don't, and we haven't come across a

recognised practice. Most of these seem to have been sorted out through the adjudicative jurisdiction. There's no discussion that I have seen in any substantial way of a jurisdiction associated with settlements, other than that case of *Tamaki* that the Court of Appeal referred to and Justice Williams mentioned earlier. But that was substituting one plaintiff for another, and plainly that power exists, but we say a settlement involves more than that, where there's a funder involved in particular –

GLAZEBROOK J:

No, I would rather leave funders out of it for the moment, because you're saying there's no jurisdiction for the Court to do anything in respect of settlements. Now the Court will in cases for instance where you've got trusts involved, actually say that it does need to supervise settlements, it assumes that jurisdiction.

MR WESTON QC:

And we footnote that –

GLAZEBROOK J:

And where there are people who might be interested in a settlement it assumes that jurisdiction as well. So why is there no jurisdiction here to look at settlements when settlements presumably happened under old ones, and if they didn't – and these are people who are being settled without their knowing about it, or having anything to do with it under the universal system.

MR WESTON QC:

Yes, bear in mind as I've said, again I'm sorry to keep repeating this, most of these universal cases were joint remedies. They had nothing to do with the sort of cases we're talking about here. They were declarations are some such –

GLAZEBROOK J:

But you're talking about jurisdiction. Jurisdiction has to apply more generally. It can't say we've got jurisdiction in these cases but no in other cases can it?

MR WESTON QC:

Well what I've tried to do Your Honour, and I'm probably not managing to convey it, is to say what is the historic jurisdiction, and it seems to be it's a res judicata base. I haven't come forward beyond that to say I accept there's a jurisdiction in relation to settlements. Now I immediately accept that in the case of trusts this Court does have supervisory jurisdictions in relation to people with disabilities it does. My point is that the jurisdiction as it has developed in relation to these historic class actions does not, on anything that I have seen, include a settlement function, particularly, and I know Your Honour doesn't want me to get into the modern class action, but that really highlights the fundamental problems about funding commission, what is the authority of the representative plaintiff to settle stage 2 claims at a stage 1 point. There are a number of areas there that are particularly difficult, that as soon as you get into a funder it drives those.

GLAZEBROOK J:

I can understand that but you're putting it as a jurisdictional issue and I'm trying to understand why there wouldn't have been jurisdiction under the universal to say no you can't just settle that, take the money and run Mr Representative Plaintiff, because you have been the representative of all of these people.

WINKELMANN CJ:

Is your point, Mr Weston, that there's no, there may be jurisdiction to allow opt-out, but the problem is you come to jurisdictional necessary jurisdictional hurdles down the road where for instance you have to authorise, the Court has to authorise the payment away of some of these settlement funds, people who aren't before the Court, to the litigation funder.

MR WESTON QC:

Your Honour, yes, yes Your Honour, and I appreciate my friend's criticism, he says well how can we know that now, because we don't have a facts of a particular case in front of us and we're also informed by the facts. Absolutely true. But if we're going to head down a road and we know there's

a pothole down the road, we are wise to think about it. So I'm putting it up on that basis, that these are potential problems, and I don't think this Court will be able to form an absolute view one way or the other because we don't have the facts before us. But it's part of my overall submission that the Court should not be doing this because the problems that lie ahead do not outweigh the benefits. We have a class action system with the opt-in that actually works not too badly in New Zealand, again the *Ross Asset Management* example. So that's why I'm putting these up. It –

GLAZEBROOK J:

I can understand the submission that there are practical difficulties down the road. What I was trying to get from you is why is there no jurisdiction to look at settlements at all. I can even understand that there might be jurisdictional issues where there are third party funders involved, but that's not the way you put your submission, as I understood it.

MR WESTON QC:

Okay, I'll give it another run, Your Honour. So the *Tamaki* case is the closest one that I'm aware of where an issue that might broadly fall under Your Honour's description of settlement has addressed this and it was done on a replacing the representative. I'm not aware of cases where there have been anything that remotely approaches the situation we are in now where the Court by reference to a universal proceeding has undertaken a settlement proposition, approved it and approved distribution of monies under that such that that is then binding on the parties. And now it is to the Court issuing a judgment which by a process of res judicata is binding on the parties. That I think is the distinction I'm trying to make which is why I keep coming back to section –

GLAZEBROOK J:

So you say if you're a representative plaintiff and that is the proceeding that everybody has been involved in and it's settled that that wouldn't be binding on everybody who was a plaintiff?

MR WESTON QC:

No. One of the issues I raise and that we come to it, Your Honour, is the authority of the representative to commit the rest of the class to a settlement and in Australia as I endeavour to explain that is done under the, if we just talk about the federal system there, ignore the states, under the Federal Court Rules or Federal Court, sorry, that's done under the statutory provisions that that occurs.

Primarily section 33V but a combination of the other sections as well that enable that to happen and that, in my respectful submission, recognises that some juris prudential basis needs to be found by it. Let's bear in mind too the Rules Committee back in 2008, one of the major postulates to use its language, said if any statutory regime needed to be the ability to ensure that settlement processes were properly approved and it didn't get into the detail of jurisdiction that we're talk about here but read in context it appears to be that the Rules Committee back then had this as a potential concern. What is the jurisdiction of the Court to approve and so where in stage 1, Your Honour, the representative plaintiff, self-appointed comes along and says, “I've reached a settlement,” and you then immediately say, well, what’s their power to reach a settlement. Is it just the common issues that they are representative of, stage 1 issues if we can call them that, or can they also bind to the stage 2 issues and there’s a decision of *Dillon v RBS Group (Australia) Property (No 2) [2018] FCA 395* that we refer to and there’s also an article by Professor Legg in our submissions that address the role of the plaintiff, the representative plaintiff in binding others and that's even in the context, Your Honour, where section 33V exists to close the Court with this. They are still saying, “Hang on, what can this person settle in front of us.”

GLAZEBROOK J:

I suppose the only thing, and perhaps I’ll just put it again. In a universal claim either the universal claimant could settle and discontinue and the Court had nothing to do with it and either that meant that everybody who was part of that representative claim couldn't then bring another claim because they'd be met by an abuse of process issue or everybody who wasn't the representative

plaintiff could bring their own claims assuming they were within the limitation period but there must have been something in the universal claim that enable one or other of those things to happen. Whether anybody had a fight about it or not is another matter.

MR WESTON QC:

There may well be. There's a large history, several hundred years of it and anything I guess is possible, Your Honour, but there hasn't been that I have seen a detailed analysis of that.

WINKELMANN CJ:

Right, so moving onto the bit about class actions in Australia, is this where you're going to take us to *BMW*?

MR WESTON QC:

Yes, Your Honour, and I would hope to do so reasonably quickly and let me signal that *BMW* is relative for a couple of reasons in this case in part because it deals with the common fund order issue which my friends have an outstanding application for but have now signalled that they may be rethinking that. It's also relevant in my submission because it signals a more cautious approach to expanding the class action jurisdiction than perhaps that earlier decision of *Carnie v Esanda Finance Corp Ltd* [1995] HCA 9, (1995) 182 CLR 398, *Carnie v Esanda Finance* (1996) 38 NSWLR 465 (NSWSC), which my friends rely on and which the Court of Appeal relied on, the High Court of Australia some 20 or so years ago, and so it's relevant for those two reasons. It's also relevant because it impacts on recent Australian jurisprudence about the difficulties of effecting settlement and how you close a class so that when you settle you actually know who you're settling with. So the process in Australia has been that you will close the class, there's a settlement and those who have signed up for it can participate. Those who don't are bound by the settlement but do not collect under it, so their rights are extinguished at that point. So that's the Australian process and it has been developing very rapidly in the last months, indeed weeks and days. There's a decision coming

out about at least once a week at the moment with the various Federal Courts, the State Courts, trying to grapple with the consequences of *BMW*.

So while I appreciate that the common fund order is not before this Court today and in that sense *BMW* is for another day, I think because it's a very recent decision of the High Court of Australia it would be sensible just to spend a moment or two stepping through it. So if I could ask you to pick it up, it's in the hard bundle at volume 1, tab 12, and so this is about airbags and the consequences of I think the Takata airbags from Japan being faulty and the…

WINKELMANN CJ:
There's two appeals. You'll have to give us a –

MR WESTON QC:
That's the primary one, the *BMW*, and the *Westpac* one was heard with it. So I gather from Your Honour, the Chief Justice's, comment that you're probably familiar with the judgment already so I will be relatively quick. So…

WINKELMANN CJ:
And the two dissenting judgments.

MR WESTON QC:
I'm sorry, Your Honour?

WINKELMANN CJ:
And the two dissenting judgments.

MR WESTON QC:
Yes, I'll have a look at those too, Your Honour. So the plurality, if we go to paragraph 3, so Her Honour, the Chief Justice, and two others, as the plurality, paragraph 3, "Properly construed, neither section 33ZF of the FCA," Federal Court Act or its equivalent in the State Court, the Civil Procedure Act, "empowers a Court to make a CFO," the common fund order. So there's the

fundamental ruling. Now my friend and I have a slight divergence which is a divergence that also exists in Australia as to whether this judgment rules common fund orders out in toto or whether it rules them out at the outset, and the recent cases show that the Courts really don't have a complete answer to that. Justice Gordon, her judgment later on, she probably does rule them out. So there's a variety of different approaches and even within paragraph 3, if you drop your eyes down, you'll see towards the bottom of that the plurality there talking about, four lines up, making an order at the outset. So there is a dispute that this Court obviously is in no position to resolve other than to note that it exists. So that's paragraph 3.

We can then flick forward to 44. "There can be little doubt that when Part IVA," which is their class action proceedings that came in in 1992, "the Parliament could not have been understood to contemplate that 33ZF," which is the general power, "might be invoked to support a CFO." At that time it was unlawful. So an acknowledgement here that modern day funding problems, not part of the provenance of the existing class action rules. So ultimately the High Court of Australia concludes that section 33ZF, that the broad powers are not enough to get us home. That's 44.

47, "While it's rightly acknowledged that 33ZF is broad, it's one thing for a Court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome, it's another thing for a Court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceedings, especially where the merits of the claims are to be decided by that Act. Whether an action can proceed is radically different from how it should."

So as we go on to see, this Court did not see access to justice considerations as justifying a third party funder. That wasn't the prompt that would authorise a third party funder. That's 47. Still within the pluralities judgment, we can flick forward to 82 and it's here that we find the discussion about access to justice or not and it's talking there about the 1988 report by the Australian Law Reform Commission, and it notes in 82 the access to justice benefit and the

efficiency benefit, first and secondly there. Then in 83, the defects in the law are targeted by the ARLC in order to improve access to justice simply did not include the absence of sufficient incentive for litigation funders to fund significant given that the ALRC was alive to the possibilities of that occurring, and so on. So the report did not avert to that.

Then still within this plurality, 88 and 89 we see in 88 that the common funder is not thus an obvious solution to the problem and in 89 acknowledging that FEO, a funding equalisation order, so a different concept where those who have signed up to a funding agreement, the amount of their share of the commission is then spread over everyone. So a common fund order, everyone shares in it, everyone who is in the class, that's the common fund, it sweeps through everyone. The FEO is just those who have signed up but spread over everyone else. But either way these two orders spread over the entire class, but obviously an FEO is generally a lesser sum of money than a CFO.

WINKELMANN CJ:
Yes, and if you would look at that from a public policy point of view I suppose, which is what's likely to encourage litigation, to encourage litigation which should be brought, to be brought when you have small amounts of claims but large numbers.

MR WESTON QC:
Yes.

WINKELMANN CJ:
A CFO is likely to be more encouraging of a third party funding it because it enables the amount of funding to lift up and an FEO is a lesser sum, it's effectively a low cap.

MR WESTON QC:
Yes.

WINKELMANN CJ:

And the majority aren't persuade that includes access to justice though?

MR WESTON QC:

No Your Honour and Your Honour has obviously read this closely and the two dissenting Judges have an entirely different view of that.

Now if we go to paragraph 91, Your Honour, you'll see a heading just above it, "Book building" so there's quite an issue now in Australia about book building, which is the opposite of what happens when you have an opt-out open class, because if you're an opt-out open class you discover there's some problem and you think, right, I'm going to issue proceedings. You rush to court, you get the proceeding, you're first in and your definition includes everyone. Under the New Zealand opt-in you have to build the book. In Australia historically there have been book building and there is seen to be merit in that because it, to some extent, slows the process down. You don't rush to court half-cooked, you make sure that there is something here that you're going to pursue. So there's another policy tension in the middle of all of this, of do we allow the race to the Court, or do we do something that enhances the book building and perhaps is more considered, and this whole issue of book building, which seems awfully mundane and administrative is actually quite a central and important part of how these things work, and the Australian Law Reform Commission was certainly alert to this, and indeed there are quite a few submitters, as recorded in that report, who said that book building is actually a critically important part of how you should go about class actions. So book building might seem, as I say, mundane but has that whole dimension to it, and you'll see in 91 that, I'm sorry, 93, that the Court is acknowledging, the third line, a desire to obviate the expense and difficulty in building a book Motivation understandable but while access to justice may be expected to be improved in a general way by the availability of the litigating funding it does not follow the making of CFO is necessary or appropriate to ensure justice is done in a particular proceeding in accordance with the Act. To the extent that a CFO may allow a litigation funder to avoid the burden by enlisting the Court's aid there is no warrant to supplement the legislative

scheme." And then at the end of that para, "A suggestion that book building is an exercise and wasted cost, ignores the reality that group members will have to take action at some stage to obtain the actual payment of any monetary relief," so the stage 2 or an opt into a settlement or however that may be. So there's the plurality. We then have –

WINKELMANN CJ:
Would you say the interest of this is that the Court's, the whole reasoning of the Court is based upon the view that without the section they can't do it really, that's an implicit thing, isn't it?

MR WESTON QC:
It's a statutory interpretation case this, Your Honour.

WINKELMANN CJ:
Yes, but we don't have the sections so wouldn't you say –

MR WESTON QC:
I see.

WINKELMANN CJ:
This is a point in your favour, Mr Weston.

MR WESTON QC:
Yes, my point was, Your Honour, that even with a statutory basis they're not going to go there. My written submission in these submissions here is this Court should not therefore feel that on the slim foundation of rule 4.24 one would wish to go there, that's my submission, Your Honour.

So Justice Gageler is part of the minority and he has about nine pages in this document. I'm happy to discuss it but we are probably going to run out of time. Justice Nettle and the majority, a couple of pages at page 41 and then Justice Gordon, she's also in the majority. A reasonably long judgment and she has a fairly dim view of common fund orders and I will just take you to her

135: “A common fund order, in general terms, is a set of court orders usually made,” so she doesn't say it has to be made so her orders against it seem to be much broader perhaps than the others arguably are, “Which impose on the representative party, and all group members, an obligation to pay a litigation funder a pro rata share and a funding commission specified rate. Such an order obliges all group members, including unfunded group members, to contribute to the legal costs *and* to pay the funder a commission. For the reasons that follow, Courts do not have the power to make a common fund order.” So as I submitted earlier, she appears to be the highwater mark.

Her judgment, as I say, is a lengthy one and then it's followed by Justice Edelman and you can find him starting at page 58 of the report and he has a lengthy and very learned analysis. I think the Law Society found it interesting and if they wish to address it by all means. There’s certainly interesting parts to that but just for my review purposes, can we just go to his conclusion at 231, and this is a problem I think that all of us here today would echo: “At times during these appeals, there was a heavy focus in submissions upon arguments of policy. For instance, on the one hand it was submitted that in open class actions a common fund order avoided inefficient costly "book building" should ultimately enrich only the lawyers and unnecessarily reduce the fund. On the other hand, it was submitted that it would be more "sensible and logical" for potential group members to be identified individually at an early stage and to be personally informed at that stage. These arguments, at heart, concern the extent to which and manner in which non-parties should intervene in another's litigation. The answers depend for their practical application on "large questions which vary with changing attitudes to litigation" and there may be doubt whether courts are the best forum to resolve that.”

So in my respectful submission, underpinning my paragraph 2 when I submitted to you let's leave this to the Law Commission some of this difficult material.

That’s *BMW* on a very quick skirmish, Your Honours. Can I also and even quicker ask Your Honour’s to go to the Australia Act which is volume 2 at

tab 25 in the physical bundle. So you will see 33C is the commencement of it. Parties authorised to commence it. We can see at 33E there's no consent required. 33J specifies the right of the group member to opt-out and how that is to be done and the date for that. 33N is a protective section that enables the representative plaintiff to be replaced if there's a problem with that person. Then 33Q and R deal with the stage 1 and the stage 2 issues and how the Court may determine the non-common issues and what the Court does when it effects a settlement, it assumes as part of its jurisprudential basis for that, amongst others, these two sections because that's how it is wrapping up the other issues. At least that's how I read the Australian cases.

We then come forward to 33V which is the settlement one and just before we read it you will note 33W which also provides for a mechanism where the representative plaintiff settles and then is replaced. But 33V as I say has two parts. First of all, a representative proceeding may not be settled without the approval of the Court, and then, secondly, and very much related to that, if the Court does give such approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into Court. So it relies on that power, that express power. Now it's absolutely the case that there's a whole superstructure that's built on this over time as to how the Court does this but that's the starting point for it.

Again in this very quick skirmish through this, if we go on to 33X, 33X and 33Y are the notice provisions. So 33X says when a notice is to be given and Y says how it's to be done, and you'll notice 33Y(2) the form and content must be as approved by the Court. So in Australia the notice is as approved by the Court, and then we drop down to sub (5) and we see the provision I mentioned orally this morning that the Court does a cost benefit analysis in effect as to whether notice is required in a given case, so that's specifically covered off in the statute.

Stepping on, 33Z and 33ZB deal with the powers of the Court on a judgment and the effect of a judgment, so they are spelled out. Now it's interesting that in Australia the adjudicative function is specifically addressed in the statute

but it does seem to me that at least in New Zealand there are, that is within jurisdiction. But you will see in 33ZB(b) it expressly mentions that the judgment binds all persons other than those who have opted out.

Then stepping forward to 33ZE we see a specific provision dealing with limitation, and then 33ZF which was right slap-bang at the heart of the *BMW* case, the general power and how broad that general power is, and I think it's fair to say before *BMW* this had been, if not the rogues' charter, it had certainly been the provision of last resort where everyone went to if they needed to sort anything out. That was the power and *BMW* said no, it's truly an ancillary power and one needs to be a little more careful about that.

Now there's a practice note. There's other provisions in existence, but that's the statute at the Federal level. At State level I think most if not all the states have now adopted their own provisions, their statutes, broadly similar to this. So in the *BMW* case that reference to section 183 of the Civil Procedure Act, 183 was a direct copy of section 33ZF.

So that's Australia. So Your Honours, I am very conscious of time but also that this is pretty chunky, but if it's convenient I would move on now to page 14, the Law Commission.

WINKELMANN CJ:
Yes.

MR WESTON QC:
So there's a brief mention there of what the Law Commission is doing and you'll see in 49 the italicised portion at the end there that the Law Commission, its terms of reference are very broad. They're not just how shall we do a class action. It's also shall we have a class action at all. So it's a root and branch investigation by the look of it. So we, of course, are here today assuming that we have an extant class action regime because of the opt-in process, which is true, but the Law Commission it seems is going to go behind that.

I then talk briefly about the Rules Committee. The earlier version, as we say in 50, had a Bill and draft Rules, and then perhaps, somewhat frustrated perhaps, more recently the Committee tried to reactivate it just by reference to Rules, that's paragraph 51, but now it's essentially said it's waiting to see how all of this stuff goes.

So that takes me to page 16, Your Honour, funding generally and common fund orders in particular. So Your Honours, I have promised, or threatened, that we need to have a look at the ALRC, so if you will bear with me I'm going to try and do this as efficiently as I can. It's a very substantial document but there's some paragraphs in it that I hope you will find useful. So we are stepping up from my 54. Just before I do that can I note, I'm not going to spend any time on this, not only are various concerns expressed by the ALRC in that report but in our new bundle that we've put in there's an extract of a Parliamentary terms of reference, the Australian Federal Parliament has initiated its own review now into funders because it is very concerned basically at the growth of this unregulated industry a lot of money has been extracted out of the economy and we will see when we get to the last chapter of the ALRC it actually addresses the economic consequences of these class actions talking about vast sums of money that are dropping into the pockets of funders and lawyers and saying, "Do we actually need to think about these?" And the last paragraph says, "Are these the unintended consequences of what we've got to.

So there's a real sense of caution now sounding in Australia. In New Zealand we're perhaps slightly behind, we're now trying to catch up but I'm suggesting we just need to be careful about that so can I ask you to pick up the tab 32 which I think is volume 3. So the terms of reference appear, it's an unnumbered page but its intrinsic page 4 just after the index and you will see that it is announced by one of the senators who is the Attorney-General and there's a series of bullet points that follow and all of these focus on the role of funders.

So the question of opt-out is taken as a given, we're not here rethinking opt-out, that's the Australian approach. What they are saying is we need to look at how funders work and they need to look at the amount down to the fourth bullet point, the rule that third party funding entities play in enabling the commencement and maintenance of class action proceedings, the role of funding entities enabling commencement of other classes. Down a few, the fact the third party funding entity is not bound by professional ethical obligations such as the lawyers duty, the absence and requirement that third party funding needs to satisfy character requirements and so on. And then as we see all of those points are referred to the Australian Law Reform Commission. So it's about funding.

We then see a whole series of recommendations. I draw attention on the way through to recommendation 14 that third party funding agreements are in force only with the approval of the Court. So it is recommended that in Australia the Court be closed with that. At the moment it does not have that, in Australia at the moment funding agreements are to be disclosed at the outset, there's a process for that but there's not an approvals process but what the ALRC is recommending is an approvals process.

So we then come forward chapter 1 framing the inquiry. Paragraph 1.7 under the heading "The Impetus for Reform" talks about some of the background leading to 1.11 and we see in 1.11 the first of multiple references to how in Australia this class action jurisdiction has really all become about shareholder and/or investor recovery actions so suing companies, shareholders in particular, so the company pays out the shareholders. The company's obviously assets diminish as a consequence or its insurance company pays but we will come to the consequences of that in a minute and you will see some of the proportions there are set out so down to the second and third line: Shareholder claims most commonly 34% out of those in the last five years. Such claims are usually based on breach of the continuous disclosure regime." Down a few lines: "None has proceeded to judgment and there has been relatively little judicial consideration of these provisions including the validity of market-based causation theory," and so on. Then 1.12: "It's unlikely

that back in ’88 the commission could have foreseen this development,” and that must be so because funding is such a recent issue.

Flicking through to 130, paragraph 1.30, we see an acknowledgement that over the last five years it has predominantly facilitated access to the Courts in a narrow range of claims, namely, securities and investor class. However, litigation funding is but one element in facilitating excess. So there’s a lot said by those arrayed against me about access to justice and I'm just putting this forward as a mild antidote. Let's be real about what access to justice is actually provided.

Then just in this chapter, 137 to 139 a little bit more about these trends and how there is now quite a large number of funders and you can see that in 1.39. As at 2018 25 currently active in Australia and I think the numbers are now even greater than that.

So flicking forward and this is by necessity very much a Cook’s tour through a much bigger report. Paragraph 2.13 and 14 and what we see in 2.13 and 2.14 again is of this access to justice point. Just how much these funders pick and choose and you will see 2.13 leads into 2.14, Clive Bowman notes further there is only about 5% of applications for funding are approved. IMF Bentham received 866, 302 for Australia, other funders require different rates of return and so on. So you get some sense of the numbers but it's clear that they are fairly picky about what they take and of course they would be it's the business but it's not done out of altruism.

Skipping forward to 266 we see under the heading there at 266 the impact of funding on modern class actions talking about *Fostif*, the *Campbells Cash and Carry v Fostif* case which this Court talked about in I think in each of Credit Suisse and Waterhouse in which modern day funding in about 2007 got the green light in Australia and there we see something of the numbers set out there. And again you will see through to 268 again how picky these funders are about what they fund and again you would understand that.

You will see in 268 about four or five lines down, “Third party litigation fund is necessarily drawn to those class actions that have the greatest degree of certainty of outcome,” and so on.

3.1 says this is a data paragraph and indeed it is. We see in 3.44 that the majority settle so that again is why I'm boring Your Honours rigid by going on about settlement down the line in this case because the reality is in Australia virtually all of these things do settle so we need to be ready to deal with that.

GLAZEBROOK J:
You'd probably expect that if only the best cases are taken, wouldn't you, because it would be idiotic for the defendant in those cases to continue to defend, wouldn't it?

MR WESTON QC:
Yes, and one always hopes that by jumping in quick and doing a settlement, Your Honour, you're going to get a bit of a discount if you're the defendant.

GLAZEBROOK J:
Absolutely, whereas without the funding there’s the incentive to carry them on and on and on to burn people off.

MR WESTON QC:
Indeed Your Honour, so there is more than one commentator who says not only has this levelled the playing field it's perhaps tilted it the other way reflecting the fact now that so many, if not all of these, are settling but, you know, commercially that's what’s happening, that's what the Australian Parliament wants someone to have a look at and it's what the ALRC is talking about so Your Honour if we jump forward to 3.49 you will see here some figures about outcomes.

So it's always hard to pick up a table quickly but the first horizontal line is 57% as we can see to the end overall finalised matters in that five year period went to class members but if you then break that down to funded and unfunded you

will see quite a marked difference. Funded 51% goes to the claimants and 85% for unfunded so a very marked difference and of course these are averages but it gives you some idea of the scale with the involvement of funders and so on in terms of outcomes.

WINKELMANN CJ:
The unfunded 85% goes to the claimants, who pays for the legal fees, do the claimants then pay for them?

MR WESTON QC:
Yes, like that *Proude v Visic* case, I've remembered the other side of that, the *Proude v Visic* that Australian case from Victoria where it seemed that they were funding, some or all of them were funding it themselves.

WINKELMANN CJ:
So out of that 85% they were going to have to pay their legal fees?

MR WESTON QC:
I think the 85%, Your Honour, is the net after payment of legal fees, that's what I've assumed but it's not clear to me from this table quite what they've taken into account in the assessment but it is what it is.

Just at the end of this chapter 3.65, perhaps this is the cynic in mean that wants to acknowledge this on the way through, a reference to the consultation process and pretty much saying here what the lawyers who were consulted with and what the other parties said depended on which side of the fence you sat. If you were a plaintiff you thought these were the best things since sliced bread, if you were on the other side you held a contrary view and maybe that's how things line up here today.

Now chapter 4, Your Honour, deals with powers. My friend puts a lot of weight on 4.1 as amounting to an endorsement of opt-out but, as I said, this is not a report about opt-out, opt-out is the given. What has been discussed in this section is an open class and the recommendation is that’s how in

Australia opt-outs should proceed. Open class, no commitment to funding. You just at best go for the ride. Perhaps you give a registration. If you want to you can enter into a funding agreement but you go for the ride in short, that's the open class and you will see in paragraph 4.5 that what is said there, look at the third line of 4.5, “The ALRC carefully considered whether a class action scheme should be designed on the basis of the active consent,” sorry the ALRC back in 1988.

WINKELMANN CJ:
Sorry, what paragraph?

MR WESTON QC:
4.5, third and fourth lines. So the ALRC carefully considered whether a class action scheme should be designed on the basis of the active consent by each group member, that is an opt-in, or alternatively whether the scheme should be open class and opt-out, that’s the dichotomy.

My friend has open class on both sides of it. At least as the Australians see it if you opt-in you are signing up for the lot on your side of the fence and certainly that in other paragraphs, in my submission, make the pretty clear but primarily this is not a report about opt-out it's a report about funding and it's talking here about open class funding.

GLAZEBROOK J:
Do you say that is talking about funding?

MR WESTON QC:
I'm sorry, Your Honour?

GLAZEBROOK J:
4.5, did you say that was talking about funding?

MR WESTON QC:
The whole report, Your Honour, the terms of reference –

GLAZEBROOK J:

I realise that but what did you say about 4.5, that they had to have a commitment to funding?

MR WESTON QC:

Your Honour, I was drawing from the sentence that starts in the third line that the dichotomy – if you have opt-in you're opting in to the funding agreement that's on one side of the ledger.

GLAZEBROOK J:

Well it doesn't say so, it's just talking about active consent.

MR WESTON QC:

Yes, but active consent, in my respectful submission, can only mean that.

GLAZEBROOK J:

Well I don't think it does there because I think it's just talking about active consent to – well anyway it doesn't really matter.

MR WESTON QC:

Yes, for them obviously that's not the material point but, Your Honour, if you read that in context I do respectfully submit, and obviously I'm skimming through this at speed at the moment, that you can properly draw from that that that's what has been assumed at this point. But obviously that doesn't provide the answer for this Court in any event, I'm simply pointing that on the way through.

So that's chapter 4. We find a bit further on at 4.19 a discussion about class closure prior to settlement and we will come back to that because that's now moved on, the cases in Australia have said that you can't now close the settlement class or it's restrictive as a result of the *BMW* case so that's moved on.

4.27 we see the common fund order and what the Australian Law Reform Commission is recommending is that they be given statutory imprimatur, i.e., not left to the common law to develop so they see benefit to them.

You will see interesting comments at 4.32 and 4.33 about book building which I have discussed and you will see at 4.33, for example, Maurice Blackburn who incidentally are behind the funder in our case now, outline the value of the book building process from their perspective including that it produced a culture of group member engagement which many class members are likely to be aware that proceedings affecting the legal rights were on foot before a settlement was reached and they receive a notice. Shareholder cases the book build process is a critical element of any proper analysis and so on.

Now at 4.42 we see an acknowledgement that things have moved on since the original 1982 report, primarily the question of funding, but interestingly Your Honours at 4.43 an acknowledgement that in Canada, see the second line in particular, “All Canadian provinces have enacted an additional leave requirement as a screening mechanism in respect of securities class actions,” so it appears that in Canada they are having the same problem of this rash of securities class actions and there needs to be some additional controls for those.

4.63 there’s discussion there, well in fact it starts at 4.49 but there’s a very lengthy discussion here about competing class actions and the problems of what you do about them. So in the perfect world I’d would take you through that, I obviously don't have time other than to draw your attention to about 10 pages or more and you will see, for example, at paragraph 4.102 under the heading “Race to the Court”. So there’s a real problem that if you have an open class opt-out it incentives first mover advantage so everyone rushes to the Court on a half cooked basis. You will see at 4.105 a list of potential criteria for determining out of competing class actions who gets carriage and then there’s quite a lengthy discussion about that.

We then flick forward to chapter 5, the settlement approval, and you will see a general concern expressed here about high fees and how they are to be dealt with and you can see, for example, at 5.9 discussion in relation to a judgment of Justice Lee who, he was active as counsel in a number of these cases earlier, he's now a Judge in the Federal Court and takes a fairly active role, and he's commenting on, as we see at the top of the next page, "This proceeding brings into focus a problem which bedevils representative proceedings of a certain type. The type to which I refer are those class actions which are commenced to recover what in absolute terms might be thought to be a considerable sum but, when judged against the relative costs of litigation and the amount required to be paid to a funder is not large, and in these types of cases it is necessary to be alive to the prospect that the settlement may be in the interests of the funders and sometimes the solicitors, but not in the interests of group members." And we'll see again at 5.13 a very similar observation made by Justice Murphy who seems to be – I think one of these is in Melbourne and one in Sydney, and they seem to be the two that do an awful lot of these, Justices Lee and Murphy, so you'll see their names, I think I'm right about that. But Justice Murphy then at 5.13 also commenting about his concern about the actual returns and he thinks you need at least $30 million to make the thing worthwhile, set out there.

And then, just before lunch, let me quickly take Your Honours through the last chapter, chapter 9, where the Commission looks at the bigger picture and says, Is this a good idea?" and the figures are set out in this, and perhaps just in the interest of time, jumping forward to 9.59, and you'll see at 5.59 and 5.60 various participants in the consultation process talking about the economic impact of class actions on the economic –

WILLIAMS J:
Sorry, Mr Weston, would you please give me the paragraph number? I've got a bit lost.

MR WESTON QC:
I'm sorry, Your Honour, 9.59.

WILLIAMS J:
Right, thanks.

MR WESTON QC:
Minter Ellison in economic impact and then the various problems identified, 9.60, four or five lines down, the "circularity problem" as it's described, "The consequence of the circularity problem was described in this way, 'Payments by the Corporation to settle a class action amount to transferring money from one pocket to the other with about half of it dropping on the floor for lawyers to pick up.'" And the final concluding observation at, 9.89, I think I mentioned earlier this morning the law of unintended consequences point that I made about double-edged reforms. So just saying that there are considerable issues there.

Now none of this in and of itself provides – in answer to Your Honours – it's part of an overall picture that I'm endeavouring to paint that opt-out class actions have a range of issues that will need to be resolved. There's going to be very considerable uncertainty until, over a period of time and at much expense, lawyers and Judges get to sort it out and in my respectful submission the benefits are not there.

So that would be my skirmish, Your Honours – and a quick skirmish indeed – through that report. So in large measure, Your Honours, we've made considerable progress. I'll be able to skim through much of the next few pages, which takes us page 19 and settlement, but I might just spend five minutes after lunch doing that, if that's all right.

Now in terms of timing, I haven't spoken with my friend in any substantive way because still at morning tea it seemed as though I wasn't getting very far, so I didn't have a real sense of how much longer I would be. But I think, Your Honours, as lot of what I say in the rest of this, one way or another I pre-figured, I will need to go through it. I think I will be perhaps an hour. Now I don't whether that's a problem for Your Honours, we've got effectively just

under two hours this afternoon. But I put that on the table in case that's an issue and my friend and I can talk about it if it is.

WINKELMANN CJ:
Yes. Well, we might start at two, I think, and then we can make sure that there's a decent time after you for counsel on the opposing side.

MR WESTON QC:
Right. Yes, may it please Your Honours.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.02 PM

MR WESTON QC:
May it please Your Honours. So we had got in a notional sense to page 16 of these written submissions of mine talking right at the beginning of funding. In large measure I have covered what follows. Can I give you before I pass to page 19 though a reference.

In paragraph 56 of my synopsis where I say, "Overseas opt-out regimes deal or attempt to deal with issues like these by requiring that funding arrangements either be approved by the Court at the commencement or disclosed later." And the disclosed later is the example given, section 33, so the Australian situation. The prior example approved the outset which is not footnoted and should have been, there's a reference to Ontario now which requires that to occur at the outset.

So unless there were any particular questions about funding that takes me to settlement at page 19 and again a lot of what I say here, one way or another, has been covered, as I say, in 63 and we've noted all right most class actions in Australia settle without adjudication so it's a real issue and in 64 I've given the section references which, as I understand the Australian cases, they generally rely on to establish jurisdiction in relation to settlement issues.

Over the page, page 20 of my outline, I discuss the *Tamaki v Baker* case at 66 and 67 and in large measure I think I've rehearsed that that the text is there.

Then in 68 and following I address the situation in Australia and again I've said something about this, about the role of the representative plaintiff in settling these cases. I've referred in 69 to the Federal Court in *Dillon*, not because the facts of the case have got anything to do with our situation but just because it's the case that's referred to in Professor Legg's text, which is at footnote 137 of ours, and then I've just expanded upon it in our footnote 138. So talking about the role of the lead plaintiff settling these cases and what they can and cannot commit other claimants to, and at the top of page 21 is the extract from the Judge's dicta in that *Dillon* case. "It should go without saying that an applicant is only entitled to deal with any other person's rights to the extent that the applicant is representing those rights. Indeed, it is simply wrong in principle for an applicant to presume to deal with the rights of third parties except to the extent that they are empowered by statute," so, of course, the statutory context explains why the language is of that nature, but the fundamental issue of who the lead represents and for what is a live issue. So I've raised jurisdiction for settlement. I've also raised this issue of what can the lead plaintiff actually do.

A couple of extra. So that takes me to the next section. Just before I go there, which under the heading "Supervision" in the main is a discussion about notices. Can I just give a couple of responses to some points that my friends make because as I read their submissions in relation to settlement, there's not an answer to the point made by Your Honour, Justice Glazebrook, about jurisdiction in the past. They'll correct me if I'm wrong as to my apprehension of that. But in their footnote 169 there's a reference to cases in New Zealand where they say the Courts have approved settlements in representative actions. There's a handful of them there. As it happens, only one is a High Court decision. That's the decision of *Eaton v LDC Finance* [2013] NZHC 1242 which is in the bundle at tab 51, but that was decided under the Trustee Act so that's not a case where – and Justice Fogarty was the first

instance Judge dealing with that and it was done under section 64 of the Trustee Act. There is a reference to a judgment of *In Re Haparangi A4* [2005] NZMLC 18 that Your Honour, Justice Williams, may be familiar that was a decision in the Māori Land Court but it cross-referred to the High Court but we haven't been able to locate any High Court judgment that corresponds with it, so when I say it's the only High Court judgment it's the only one certainly we can locate. So –

WILLIAMS J:
I think that's a settlement, from my vaguest memory, it's a treaty settlement in which land was returned to the Haparangi A4 Trust.

MR WESTON QC:
It would suggest that but we – and there is a reference to a High Court judgment which you can locate but it in turn refers to the one where the real work was done that we haven't been able to locate and it's not in the bundle as far as I know, so I raise the possibility there's two that are mentioned but certainly the one that we have identified, the *Eaton v LDC*, that is a Trustee Act case.

My friends also in this part of their submissions, footnote 165, refer to the *In re Norwich Provident Insurance Society (Bath's case)* (1878) 8 Ch.D. 334 (CA) case which is a reasonably old one. We have put it in the supplementary bundle that came in last week and this is cited by my friends. It's tab 71. It's cited by my friends for the proposition that the power to sue or be sued includes the power to settle. It's not clear to me, having read that judgment, how those conclusions are reached. It's about the powers of an insurance company, a body corporate, to enter into settlements. Can they do what a natural person can do? It's not any broader than that. The language of sue or be sued, the Joint Stock Companies Act 1844, which is referred to by my friends in the footnote, none of that appears obviously in the judgment. So at the moment I raise a question mark as to the extent to which *Bath's case* helps my friends, and no doubt they will help me see the error of my ways when they come to it, but I wanted to flag that that at the moment is certainly

not accepted by us as substantiating that conclusion they seek to draw from it…

1410

1410mw

… when they come to it, but I wanted to flag that at the moment. It's certainly not accepted by us as substantiating that conclusion they seek to draw from it.

Just on this question of sett I said there's an Australian case that steps through how sett works in Australia, and we've put it in this bundle and I will, if I may, take Your Honours through it. It can be found in the new bundle at tab 67. It's a decision in the Federal Court of Australia called *Fisher (atf Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579. Tab 67. So Your Honours, this is a very recent judgment, it's about five weeks old. You can see on the first page near the top under the Judge's name the date 4 May, and the format is the first half dozen pages or so are the formal orders, and then we can turn to the reasons for judgment a few pages on and I'll just step through paras 2, 3, et cetera because it gives you the timeline, which is useful. So you can see in 2 the applicant's commenced on 24 April, and that would have been done as an opt-out, and you can see that from 3, the proceeding was commenced as an open class representative proceeding, so open class opt-out. Pursuant to orders made on 21 May, so three weeks later, a notice is sent to group members and that states, "Subject to further order, participation in any settlement reached at or within six months of a proposed mediation was limited to… who registered by 13 August." So although it started on this open opt-out basis, there was a requirement to register pretty quick if you're going to want to be, benefit from the settlement, because as 3 says the notice stated that group members who did not register and did not opt-out would not participate but would be bound by it.

We then see in 4 the matter was mediated on 2 December and settlement is reached, that is paragraph 4 goes on to say that the defendant was going to pay $35 million in settlement of the claim. Then through to 6 a further notice is set out early in the New Year, February 2020, repeating the position that if

settlement is approved all group members, other than those who have opted out, will be bound. Then you see in 8 His Honour says he considers the proposed settlement to be fair and reasonable. Down four or five lines, in relation to the funding commission, for the reasons set out below, I consider it appropriate… to approve the… alternative proposal." So there were two proposals and he accepted the one that was the lesser of the two.

So in a sense these two pages capture everything in the overview but what you then find over the following pages, and conscious that time is marching by, I'm not going to step through it, but the whole process is then set out in its elaborate glory. Along the way you'll see in 17 that His Honour summarises the principles distilled from case law and so on as to what questions are asked by the Court in determining whether a settlement if fair and reasonable. So they run for several pages. You then, you will see that, for example, 29 and 30 His Honour sets out the numbers of people who have registered and when and so on and the notices are also set out in some detail but the summary at the front end basically summarises the position. We can then, because we're moving fast, go forward to paragraph 57 where the Judge deals with the unregistered group members, those who haven't responded and given notice they want to participate and that discussion then follows, and again it does bear reading rather than me just skimming through and picking the eyes out of it, and I don't have the time to take you through it at length, but Your Honours will see up to paragraph 60 the Judge is assessing it on reasonably orthodox terms. Then in 61 acknowledges that shortly before all of the case in front of the Court then came to the fore, the Court of Appeal of New South Wales issued the *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 judgment, you'll see that's mentioned, *Haselhurst* we've put into this bundle, so that's a State Court for, stating the obvious, and this is the Federal Court so obviously one doesn't bind the other but obviously again the Court of Appeal of New South Wales is taken seriously in the Federal Court. So the discussion then is to what does *Haselhurst* do and *Haselhurst* was about the issue of when you can close the class for settlement purposes. So the Judge in 61 and following is reviewing that and seeing what effect that has on the course proposed here and you will see half way through

61, eight or so lines from the bottom of the page, “In my view the judgment of the Court of Appeal is distinguishable,” so takes the view that *Haselhurst* for various reasons doesn't apply.

You then come forward to paragraph 64, you will see a heading there, “The Proposed Deduction.” So this is the point at which the Federal Court in approving the settlement is looking at what the lawyers get and what the funder gets and that discussion is then discussed and then you will see at 66 the high water mark of the claim as is made clear throughout the judgment is a CFO for $6 million but as you can see from 67, the alternative is a figure – you can see it just up from the bottom of the page – of just over $3 million which is the calculation if you have a funding an FEO, a funding equalisation order. And so the discussion that then follows is, well what did *BMW* tell us about CFOs. Can we have a CFO at this stage and that is then the discussion that follows. Large portions of the judgment from *BMW* is set out, for example, at 71. At 72, discussion of Justice Gordon and her view that CFOs are probably not good at any point and you will see at 73 really the Judge in this case and the Federal Court are saying, “Well, we can't really reach a concluded view as to what the High Court of Australia said,” but plainly they referred the FEO, the funding equalisation order and that's what I'm going to do and so that's the 3 million-odd figure that was then approved.

And the Judge makes it clear throughout this that the jurisdictional basis for this is section 33V, he’s not relying on other portions so I'm sorry it was a quick run but the judgment obviously bears greater consideration than that so that gives some illustration of a very recent decision dealing with the question of settlement.

Back to my submissions at page 21. So here we deal mainly with the question of notice saying that if there’s an opt-out then notices are important. With respect, we differ from the Court of Appeal who says it doesn't really matter which way you have this, they are important for an opt-in and an opt-out of course but the difference is that for an opt-out the notice needs to – it forms the basis of how the Court can make judgment concerning those who

are not directly before the Court and somewhere, and I've just lost it, there's a footnote that we've put in from an Australian case *Gagarimabu v The Broken Hill Proprietary Co Limited* [2001] VSC 304 which says just that, that how important the notice is for the opt-out and setting up everything that follows.

Now my friends are critical of Southern Response for the position it took in the High Court about notices and in the High Court we submitted that, of course as Your Honours appreciate, that this should be an opt-in case and as an opt-in case it was largely up to the plaintiff how they gave the notice. By the time we got to the Court of Appeal we're facing the strong argument that it should be opt-out and the chances of it being an opt-out were greater because in the High Court of course the Associate Judge had Justice French's judgment before him and that was likely to lead to a certain outcome in the High Court. By the time we're at the Court of Appeal we're into unchartered territory.

So in the Court of Appeal Southern Response stated this position about notice and what it would do to assist the giving of notice because again as I say my friends are critical and they don't mention this. So the submission that Southern Response made to the Court of Appeal was this, "As to the issue of notification to potential group members, if required by the Court and subject to overriding privacy obligations," which of course Southern Response is subject to, "Southern Response may have a role to play in dissemination of notices to potential class members," and so on, so we directly confronted that and acknowledged that that might be a role to be played. So I wanted that to be noted.

Page 22 of my outline, "Substantial procedural developments are best undertaken by legislative reform," and we have this discussion over the next few pages, high constitutional case mentioned, the *Al Rawi v Security Service* [2012] 1 AC 531 (UKSC) case. Obviously facts entirely different to what we're talking about here, closed hearings in a terrorist setting, and my friends make that point and of course they are right to do so, but we are not here because of the facts of that case but because amongst other things the Supreme Court

in that case dealt with Professor Dockray's article which is set out in ours at 78, which is that, well I'm sure Your Honours have read it, I don't need to take you through that again.

If I can just be forgiven for a few minutes dealing with why this is important. So the fundamental, as I said this morning, the fundamental constitutional principle is that we're all subject to the rule of law. It governs each and every one of us. The Courts are the guardians of that fundamental, constitutional principle but they're also subject to it, and I submit that it's in that respect that Professor Dockray needs to be read. He's saying there are limits to what the Court as guardian of the rule of law can do.

I mention in 80 the *Gillespie v Manitoba (Attorney-General)* 185 DLR (4th) 214 case from the Manitoba Court of Appeal. We've put that into this new bundle because there's a relatively short portion of that that does, in my respectful submission, reward reading. That was a case of where –

WINKELMANN CJ:
Where are you in your submissions?

MR WESTON QC:
Paragraph 80 Your Honour. So in Canada, Your Honour, the decision of *Gillespie* is mentioned there and it's now in the fresh bundle that we've handed up, tab 68. So that was a case of where the Chief Justice of the local court area set up a security system and the issue is whether that was viable and the Court discusses jurisdiction and powers, from paragraph 17 and follows, and rather than take time now I just draw that to your attention. At 26 Professor Dockray's caution is quoted. So our point is that if we're about to embark on a new direction under rule 4.24 then that caution should apply.

WILLIAMS J:
Is *Gillespie*, does it relate to our issues or is it like *Al Rawi*?

MR WESTON QC:
It's about security arrangements at the front door of the court Your Honour.

WILLIAMS J:
Right.

MR WESTON QC:
So people being searched and so on, so no these, none of these cases appear to be directly the same as a class action under an opt-out. There's three of these cases. There's the *Al Rawi* one. There's the *R (UNISON) v Lord Chancellor* [2017] 3 WLR 498 (UKSC) one that's mentioned that deals with these fundamental principles, and then there's the *Gillespie* case. Those are the three that I think the parties have put before this Court.

So Your Honours moving with speed that takes us to page 24, "Access to justice," and I've said quite a bit about that one way or the other thus far. I've noted already what we say at 87 that class actions fundamentally have a tension between providing access to justice collectively and the individual rights. I probably don't need to rehearse that again.

Now that then takes me at page 25 to the last part of my case, which is assuming that Your Honours, contrary to what I have submitted, are inclined to allow opt-outs in a funded case such as this. So I now come to the three reasons why I submit on the particular facts of this case that nonetheless you should not do so here, and needless to say I was unsuccessful in relation to these three in the Court of Appeal, and I summarise them at paragraph 92, and then rather than read them out there I'll just get to each one.

So we start at 93, which is the first argument, and the heading, "Will there be a better decision at stage 2?" So the Court of Appeal reasoned, "Well, let's defer things to stage 2 because by then there'll be a better decision." And we make the point here that if there are human frailties that operate at stage 1 they remain human frailties at stage 2, it might of course be suggested that

after there's been a stage 1 hearing and judgment they're better informed, and that is true, but in the present case, the *Dodds* case, is a reasonable proxy for that stage 1 decision, there it is, the plaintiffs were largely successful, and indeed on the website for this class action you can find the references to that judgment, so perhaps it's sentence in that way as well. So that if people are going to be better informed by having the stage 1 judgment and the rather unusual facts here because *Dodds* has been there and done that, that can be achieved.

We say in 94 that in any even these particular plaintiffs can be assumed to be reasonably competent at looking after their own interests. These are not people who might have what is sometimes referred to – you'll see towards the end of 94 – social economical psychological disadvantages, and some of the categories of the discrimination cases plainly fit that labelling, but these plaintiffs do not obviously fit that.

We then in 95 talk about a possibility of detriment, and I've mentioned how parties can be cut out of settlements if they don't participate…

WINKELMANN CJ:
Do you say there's a detriment to your client?

MR WESTON QC:
I come up to that, Your Honour, that's the next argument of – can I deal with that then?

WINKELMANN CJ:
Yes, sure.

MR WESTON QC:
So we explain that in 95, it's largely due to the sort of settlement issues I've already rehearsed at great length.

That then takes me to the second one, which is prejudice to the defendant. Is that what Your Honour had in mind in your question just a moment ago?

WINKELMANN CJ:
Yes.

MR WESTON QC:
So there's the issue that at the moment there appear to be some 200 or so claimants who have signed up with the plaintiff. We know that because every time something like that happens there's one or two or more Privacy Act 1993 requests that come over, so one gets a sense of how things are going, and the numbers were disclosed at earlier stages so these all appear to line up. So there are perhaps some 200 or so who are interested, out of the potential class of 3000.

So if my friends were proceeding on an opt-in basis, that would be, broad terms, the extent of what they represent, if they were allowed to proceed on an opt-out suddenly they speak or potentially speak on behalf of all 3000-odd. And if we are then in an environment where these cases settle for the reasons we discussed earlier, the benefits of trying to achieve a quick settlement because you might get a discount early on and generally, as all litigators know, the longer you litigate the worse things get for you, they don't generally improve, so people try and achieve an early settlement. So, Your Honour, a lengthy argument to support a submission that, yes, during the balance of the stage 1 proceeding there's pressure on Southern Response or any defendant in that position to settle against a large number of people, that if they are able to tough it out and get to stage 2 and are prepared to take the punt they might face a much smaller category of those who then, let me use that language of opt-in, although, as I've said earlier, it's not particularly apt if the class is closed at that point and we know actually who wants to litigate it.

Now I know Your Honours don't want to hear too much about *Feltex* and I hope I won't trespass beyond permissible grounds but *Feltex* is unusual in that it actually went to a stage 1 hearing. That is not common, as we have

learnt. So if defendants want to tough it out and take a huge amount of risk they can but the Australian experience is very much, “No, you won’t,” so that’s why I’ve made submissions about prejudice to the defendant. Yes, in that case that would amount to that. My friends say there’s no empirical evidence and that is quite right. There’s multiple references in the cases though to this, Your Honours, and earlier cases, and *Credit Suisse* and so on, talk about the risk of oppression to defendant, so it is well established. The Federal Court of Australia in the *Money Max v QBE Insurance Group* (2016) 245 FCR 191 (FCAFC) case at paragraph 106 says in fact there is no empirical evidence about the numbers that will opt-in at a stage 2 having floated along at stage 1. So there really is not much here that I can offer empirically other than the recognition that prima facie these circumstances can lead to prejudice. The third –

GLAZEBROOK J:

So the prejudice then is if you do settle at stage 1 you would actually, having decided that it was right to settle because Southern was in the wrong, you’d have to pay out more than you would if it was just a closed class, even though presumably in deciding to settle you’ve decided the case is actually either overwhelming or certainly too risky to run?

MR WESTON QC:

Well, of course, Your Honour, there may be cases that are overwhelming and that decision is made but there may not be. There may be cases where they are finely balanced but you make the call that you’re better to settle because potentially you can quantify your position at that point as against the unknowns of what might lie ahead. I mean what I’m submitting is as I read –

GLAZEBROOK J:

I’m just saying what the oppression is, that’s all. If it’s a –

MR WESTON QC:

It’s a pressure to settle, Your Honour.

GLAZEBROOK J:

Well, I can understand a pressure to settle and a greenmail for a case which isn't a very good case, but if it is a good case then I can't quite understand the submission as oppression. I can understand that as, "I am going to have to pay out more because there are more plaintiffs."

MR WESTON QC:

I think there's a real risk now with a funder well heeled, able to take this the distance, that you take a more cautious approach to assessment of merits. It's quite bold in a case that might involve hundreds of millions to assume that you're going to win when perhaps for 50, 60, 70 million you can get out now and that calculation is made in the various authorities or the – not the authorities, the various commentators and the Courts that have referred to this put it in that context, Your Honour.

WILLIAMS J:

But isn't that really the whole point in getting someone with deep pockets on the other side where the actual plaintiffs don't have them? It's supposed to even up the playing field in precisely that way?

MR WESTON QC:

Your Honour, that far is correct. What happens is when it tilts the other and the defendant in order to get quit of something settles. Now surely it can't be a coincidence that in Australia in the last five or so years virtually all of these have settled because that corresponds with the high point of funding, bearing in mind –

WILLIAMS J:

Well, that, who knows? It may be that litigation funders have good advice and make good picks and that the defendants in those cases also have good advice and settle. Who knows?

MR WESTON QC:

No, well, we don't know, Your Honour, and I can't offer you any empirical evidence and, indeed, as I say, the Federal Court in the *Money Max* case acknowledged there didn't seem to be any empirical evidence.

WILLIAMS J:

But what you do get is certainty.

MR WESTON QC:

And you do and certainty sometimes you will pay more than you think you need to in order to achieve certainty. It's a commercial assessment, Your Honour, I accept, but the pressure to achieve that certainty is of quite a dimension when you're a defendant facing a class action. It's a big call.

WILLIAMS J:

If you're an opt-in, you don't have any res judicata advantage in respect of the non opt-ins.

MR WESTON QC:

No.

WILLIAMS J:

So you've got uncertainty. You haven't bought any certainty at all.

MR WESTON QC:

That's right, Your Honour.

MR WESTON QC:

And that's fine by you?

MR WESTON QC:

Well, it's probably not up to me, Your Honour, but…

WILLIAMS J:

Well that's what your argument is you prefer the uncertainty of opt-in in terms of outcome rather than the certainty of opt-out?

MR WESTON QC:

Yes, the calculation that people – the other counsel tend to make in those circumstances indicate that that's how they make the calculation, Your Honour, because generally speaking – well I can't speak generally of how they've done that, Your Honour, because I'm not privy to their calculations but the authorities are fairly clear that the scope for prejudice to defendants from a class action is substantial and no senior Judges including some of Your Honours have made those comments, the High Court of Australia, Justice Dyson. Others have made observations about the brutal reality of litigation for a defendant and the costs of it and just defending a class action against a well heeled funder also is an expensive exercise. You look at some of the fees that are paid in that *Fisher* case. I think the fees might have been two or three million, I can't quite remember the figures but they are very large fees that are soon racked up and like some of the early cases the *Multiplex Fund Management v P Dawson Nominees* (2007) 164 FCR 275 (FCAFC) which dealt with closed classes, the settlement there was 110 million and I think the legal fees might have been 11 or something so these are very expensive exercises so pressure to settle comes early that's why they are settled so I think I probably can't take it any further than to say logically it must exist at some level but Your Honour's points are completely correct that I can't help you on individual cases.

My third argument then is balancing between the stage 1 and 2 hearings which is the efficiency issue, can we assume that it is going to be efficient in this case to run a stage 1 on the basis that it is going to help us with stage 2 and we've set out here an argument that it cannot be assumed because to take the *Dodds* case, that ran for four days in the High Court and that resulted in a judgment that there was a misrepresentation and then loss. So my friends in this case broadly have a misrepresentation claim, it's served up under four causes of action but at its heart it's a misrepresentation thing and

to a large extent it's based, as I said this morning, on standard form communications but there are individual representations and as the Southern Response affidavit from Mr Hansen says, there were individual circumstances that applied almost to each person so a four day hearing doesn't necessarily help us resolve the stage 2 hearings. If everyone comes forward and has to prove their cases there will need to be a review of the actual communications received, the meetings, the emails, so you may save a little bit of time but not a lot and the fact –

WINKELMANN CJ:
Is your point here really the certification of the class as opposed to methodology?

MR WESTON QC:
Sorry, the certification of the class?

WINKELMANN CJ:
Yes, of it being a common interest?

MR WESTON QC:
No, because there is plainly a common interest, it's not a very big one, in my submission, but the Courts haven't required a big one but what they've done then, Your Honours, we refer to various cases the *Hollick v Toronto City* [2001] 3 SCR 158 and so on where the Courts have then balanced these to decide whether its worth proceeding as a class action or not. We refer on our very last page, page 30 in the footnote to – I know these footnotes are very hard to read and small type but *Meaden v Bell Potter Securities Limited* [2012] FCA 418, (2012) 291 ALR 482 was a case where in Australia that calculation was made that there was just no efficiency grounds –

GLAZEBROOK J:
Well how does this help us for opt-in or opt-out because by stage 2 it's opt-in in that broad sense?

MR WESTON QC:

Yes, but we've assumed Your Honour that I'm now, in addressing these last few pages of my submissions, that I'm facing an opt-in decision and what I'm now submitting is whether Your Honours should be ordering that in the circumstances of this case.

GLAZEBROOK J:

Well I understand that but I'm not entirely sure why, in fact I'm not entirely sure why any of these relate to opt-out and opt-in, some do but not all but I can't see how this one does.

WINKELMANN CJ:

I'm also having difficulty following it.

MR WESTON QC:

Okay. Well that's always comforting to know.

WINKELMANN CJ:

Because it seems to me it's an argument about whether or not representative proceedings at all are appropriate –

MR WESTON QC:

Yes, but that feeds back into it Your Honour. I can't put it beyond where I have. In Australia this sort of calculation is undertaken in a decision at the front end of a case as to whether it should proceed and if it was –

WINKELMANN CJ:

But they are in New Zealand too.

MR WESTON QC:

Yes.

WINKELMANN CJ:

Because although it may be only a narrow crossover sufficient to justify a common interest for the purposes of rule 4.24, this Court still has to be satisfied that it is just as expedient for it to proceed in that fashion, doesn't it?

MR WESTON QC:

Yes Your Honour, though it's a very – well, in New Zealand it's unresolved, I think, as to whether there is anything you could call a certification threshold. Your Honour's judgment delivered in the *Unresolved Claims* case talks about that, whether there should be some sort of mini-trial and you, delivering the reasons, said no and left open, I think, the possibility that there is some sort of certification threshold, but it wasn't, as I read it, clearly defined quite in those terms. But I think what I'm putting forward here is that as the cases in other jurisdictions which do have opt-out regimes, like Australia, like Canada, these calculations have been made, if not exactly the front end, close to the front end, and if it's not thought that there's sufficient efficiencies to do it, that has been a factor in not allowing it to proceed as an opt-out proceeding. Probably beyond that I'm wasting everyone's time. That's as far as I can take that point Your Honours.

WILLIAMS J:

So is your point, so I get my head around it, that since you have to opt-in at stage 2 what's the point?

MR WESTON QC:

Yes, yes.

WILLIAMS J:

Right.

MR WESTON QC:

In part, and that flows through. As I say at the beginning, while I've broken it down to three arguments, in reality these, if there was a three-sided coin Your Honour, these would be different sides to that three-sided coin. They all

fit together but there's a certain artificiality in breaking them down as I have. But one has to serve up an argument as best one can so that's how I've put it.

ELLEN FRANCE J:

Mr Weston, is *Hollick* the best case to look at in terms of that point?

MR WESTON QC:

My friends certainly say it isn't. *Hollick* was a case, like all of these on its own facts, so in that sense, yes, you've got to read it on its own facts. But like the *Meaden v Bell Potter* these are just two examples of Courts doing it this way. Now in *Hollick* it's quite interesting at paragraphs 33 and 34 of that –

WINKELMANN CJ:

Is that Pollock or *Hollick*?

MR WESTON QC:

It's *Hollick*. It's a Canadian case Your Honour. It's in the main bundle.

WINKELMANN CJ:

Yes, I've got it.

MR WESTON QC:

And at paragraphs 33 and 34 of that there's a discussion of that issue, and it was interesting in that case that there were means for these various claims, through a sort of small claims tribunal process, and the Court weight that up and said, well why aren't you doing that? Now in Christchurch there are mechanisms, there's an earthquake tribunal being set up to resolve these sort of things and so on. So that sort of weighing exercise in *Hollick* can be said to be some distance from us, and I understand my friend's point, but if you take the broader principles from it, in my respectful submission, it's not a million miles from where we are.

So, I have a conclusion, it's probably pretty obvious what my conclusion is so I don't need to say it again. So Your Honours thank you for your patience, that's me done, unless there's anything…

WINKELMANN CJ:
Well done Mr Weston.

MR WESTON QC:
Well we'll see Your Honour.

WINKELMANN CJ:
You're 16 minutes early.

MR WESTON QC:
Well it's always good to be early, having taken so much time this morning. May it please Your Honours.

WINKELMANN CJ:
Thank you. Mr Skelton?

MR SKELTON QC:
Your Honours, I have taken the opportunity to prepare a short outline of my oral submissions, which I would like to hand up. It includes an appendix which sets out the procedural steps that the plaintiffs believe will need to be taken if this matter does proceed on an opt-out basis, which I understand Your Honour was wanting to consider. Because it is, of course, absolutely clear that the Court does have to be satisfied that there is the machinery or power under the High Court Rules to be able to deal with an opt-out case if opt-out is granted.

Your Honours, before turning to that schedule I just want to begin briefly by just commenting on what the key issue in this appeal is and, in particular, what this appeal is not about. I mean, in simple terms this whole appeal is about how class members in this case will choose whether or not to

participate in the proceedings. Does that choice matter? Well, Your Honours, it certainly does, and the key reason why it matters is set out in the Court of Appeal's judgment. And I'd like to begin, if I could just take Your Honours to the reasoning, and it's at paragraph 98 of the judgment.

So if Your Honours have that, the Court said that in particular an opt-out approach, "Is likely to significantly enhance access to justice," so that was the first and key reason they specify for saying that not only does the Court have the jurisdiction but should exercise it to order opt-out. And the Court says the default position matters. Now why is that? Well, then they set out the economic and social and psychological barriers that are referred to in the academic literature as to why people find it difficult to access the Courts.

WINKELMANN CJ:
What paragraph are you at, Mr Skelton?

MR SKELTON QC:
This is in 98, Your Honour, of the judgment.

"Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with the assessment of whether or not it is in their interest to participate," and then they mention the following matters: 1, "Some class members will not receive the relevant notice." Now that's a practical issue. It's the consequences of what do you do with a situation where someone doesn't get a notice? Now that's whether it's opt-in or opt-out. There may be that situation. "Others will not understand the notice or will have difficulty understanding what actions they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where class members consider that it is in their interests to participate in the proceedings the significance of inertia and human affairs should not be underestimated." Then what the Court did is at the next part of this quote, it's looking at the advantages and disadvantages of the particular choice here. "If there is potential advantage for class members in participating in the

proceedings and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate." Now the Court cites an article by Professor Cass Sunstein Deciding by Default – he's a professor from Harvard University. I won't take you to that – it's in the respondent's bundle of authorities – but it sets out the empirical studies as to why these economic and social barriers actually do inhibit access to justice. "The Courts should be slow to put unnecessary hurdles in the path of class member to deprive those who fail to take active steps to participate in the proceedings of the opportunity to have their claims determined by the Courts and of the possibility of obtaining some relief."

WILLIAMS J:
I think Professor Sunstein wasn't talking about class action funding in the article?

MR SKELTON QC:
No, that was part of it, but it's in a lot of decisions and policy decisions that are made, what is the default situation. For example, Your Honour, KiwiSaver, should the law say, you're automatically enrolled in KiwiSaver, but you can opt-out.

WILLIAMS J:
Right.

MR SKELTON QC:
Now if that's the default rule, you find that a lot of people end up enrolled in KiwiSaver. If the default rule is you have to take active steps, you have to opt-in, that has hugely different consequences. There's the same with union membership. The policy was we're not going to require compulsory union membership in New Zealand, but if you had a rule that said you're automatically enrolled in a union unless you choose to opt-out, you'll find union membership numbers will go up again.

WINKELMANN CJ:

And automatic enrolment on the electoral roll, automatic re-enrolment after you're released from prison, all those things.

MR SKELTON QC:

Exactly, so while it does preserve individual choice, because of course you can opt-out if you so wish, the default rule matters, and that's really at the essence of this case. If you are wanting to protect the class of people who potentially have a claim, then an opt-out regime does that because you are in the class, your cause of action is protected. If you don't want to be and you want to pursue your own claim, you can opt-out and do that, or if you just want to let it drop you can opt-out and do that. But the other way around, this is the cost benefit analysis the Court was saying, is it can lead to prejudice because if it's an opt-in and somebody who has a good claim, for whatever reason, fails to file a notice with the Court and opt-in, they potentially lose their rights, and so they're prejudiced. So if there's no disadvantage having an opt-out, or any real prospect of anyone being disadvantaged then opt-out would be favourable.

Now that was the key reason. The Court goes on to also talk about accountability, holding wrongdoers liable for the full amount of their losses that they've caused, and efficiency but they really found it on the access to justice issue. Now Your Honour this case isn't about common fund orders or class closures orders or competing class actions. We have heard a lot today from my learned friend about those matters, and I will touch on them briefly because they have featured in some of the case law, but there's no competing class action in this case. We're not dealing at the moment with any orders that have been made for common fund orders.

Now Your Honours –

WILLIAMS J:

But the argument is that –

O'REGAN J:

But you accept you'll have to though. Sorry, were you going to ask the same thing? Do you accept that you will have to do that though?

MR SKELTON QC:

Well I accept that there is a common fund application before the Court to deal with the free-rider issue that arises with opt-out, because unlike my friend, and this is fundamentally important, opt-in doesn't mean you have to sign on to a litigation funding agreement, but with opt-out, or opt-in, we are not, it's not a closed class, you're not signing onto a funding agreement, there will be some free-riders. So the Court will, have to deal with the situation. Is it fair that the Rosses or those people who have signed up funding agreements are paying for the litigation that others are benefiting from ?.

O'REGAN J:

I just wanted a yes or no answer. Do you accept you need it or not?

MR SKELTON QC:

It will be an issue, yes, that will arise in opt-out as to how you spread the costs in order to avoid free-riders. Whether it's common fund, whether it's fund equalisation, there's a number of ways of doing it. Now that will apply. It doesn't apply for closed classes. For closes classes where the definition of the class includes a requirement that you must sign on to a litigation funding agreement, you don't have free-riders in that situation, so that won't arise. It will arise in opt-in if the class definition doesn't require you to sign on to a litigation funding agreement.

Now the easiest way, Your Honours, just to illustrate this point is to actually look at the order that was made or amended by the Court of Appeal and it's set out at paragraph 138 of the judgment and at 138 you will see that the plaintiffs are granted leave under 4.24(b) to bring the proceedings on behalf of all persons who have the same interests, namely owned or owned residential dwelling that was covered by the policy, had a claim, received a DRA without

an office use section, did not receive a DRA that included the office use section and entered into a settlement agreement prior to 1 October 2014.

Now Your Honours, just to remind you, that date was the date after the *Avonside Holdings Limited v Southern Response Earthquake Services Ltd* [2013] NZHC 1433 was determined where Southern Response said, “Right, from now on we will agree to pay the contingencies and the professional fees in accordance with the Supreme Court’s version in *Avonside*,” but what they didn't do is they said well all those people that had already settled prior to that date, bad luck, you don't get anywhere.

Now the point I want to make here, Your Honours, is that class definition does not go on to say, “And you've signed on to the litigation funding agreement,” or it doesn't say, “You've engaged GCA lawyers as your lawyers,” so it's an open class, there’s no requirements for anybody who comes within the definition is within the group. They don't have to sign onto the litigation funding agreement, they might not agree with its terms, they don't have to appoint GCA lawyers, so that's an open class matter.

WINKELMANN CJ:
So if they don't sign onto the litigation funding agreement they sit there quietly but they're approving of the litigation but their reserving their position on the funding, is that the point?

MR SKELTON QC:
Well they are passive passengers, they just sit there, they don't have to take any active steps, they haven't agreed to any litigation funding but they do of course get the benefit or the burden of the judgment that comes out at the end of the day.

WILLIAMS J:
You'd be reasonably comfortable, wouldn't you, with the prospects of getting an FEO in due course to cover those people?

MR SKELTON QC:

Yes Your Honour.

WILLIAMS J:

So how much risk is there?

MR SKELTON QC:

I mean all the Courts seem to accept that it would be unjust enrichment if some class member gets the benefit of the judgment or the benefit of the settlement and doesn't pay their fair share. So really the argument on *BMW* was what was the appropriate cost sharing method, it wasn't that there shouldn't be one, the Judges all accepted that. The majority in BMW said you couldn't make a common fund order at an early stage of the proceedings under that section 33ZF, you couldn't do that but they've left open whether or not you can make a common fund order under 33V or in equity later..

WILLIAMS J:

Either way with an opt-in open class you're not going to end up with free-riders, are you, in practical terms?

MR SKELTON QC:

Well that certainly would be my submission in front of the High Court is that the Court has to have the power and the jurisdiction to be able to avoid the free-rider problem and to fairly share the costs of the litigation amongst the whole class not simply those that ended up funding it.

WILLIAMS J:

Your argument here is that there is not much difference because even with opt-in there’s an open class and the prospect of free-riders so you're having a bob each way.

MR SKELTON QC:

Well I'm asking Your Honours to keep clear in your mind there is a distinction between opt-in, open class and closed class. The opt-in all you have to do is file a notice with the Court saying, "I'm opting in." You don't have to sign up to litigation funding agreement.

Now in Australia which as you've heard the statutory regime was opt-out and you had to be able to opt-out. So what happened in the year 2000, so this is a case called *Multiplex* comes along and funders say, "Well, let's make the definition of the class as being like the Rosses have but we'll put another paragraph in saying you have to sign up to the litigation funding agreement." So that turned on its head the statutory scheme opt-out. It became a de facto opt-in and a closed class, and that's what the Australian Law Reform Commission recommendation 1 is about to outlaw that. The very thing that my friend says is happening in New Zealand. Outlaw that because it takes away the benefit of open class opt-out litigation. So that's what those recommendations are about.

But here this case was deliberately brought on an open class basis to cover the 3000-odd people who were settled before that particular date.

WINKELMANN CJ:

Can I ask you a question? So if you sign up but you don't agree to the funding agreement, can you then pull back out? So if there's a settlement and you look at the settlement, you look at the funding agreement, you think, "No, that's no good for me," can you pull out and if you do what happens to your rights?

MR SKELTON QC:

You don't pull out because you've decided to – you haven't opted out, so you're in there. You haven't signed the funding agreement so you're not contractually bound to do that.

WINKELMANN CJ:

So what's your possible pathways forward?

MR SKELTON QC:

Well, the pathway forward, in Australia where the Federal Court made these common fund orders was to say, "I can't impose contractual rights on these people. They haven't signed a funding agreement. But what they did was to say in terms of the common fund, that's being created out of the settlement or the Court judgment, we can order that everybody shares equally those costs." Now the Court has said, "I'm not going to impose the funding commission in the funding agreement." The funding agreement might say 25% goes to the funder. If you want a common fund order then the commission will be 15% or 10%. Now that, of course, still benefits the funder because they get 10% or 15% over the whole 3000 people rather than the 200 that have signed onto the funding agreement, and the evidence has been that the common fund order has significantly pushed down commission rates and that helps Mr and Mrs Ross. That's the focus of it here. It's not about funders but it certainly helps Mr and Mrs Ross. So it's not saying that the class members are contractually bound by a funding agreement, because the Court doesn't have a jurisdiction to impose those terms on anybody, but it does have the power to take an equal amount out. Now…

GLAZEBROOK J:

Given that Mr Weston says there's no jurisdiction to supervise settlements and therefore presumably no jurisdiction to take this out, is there something that you point to? Is it inherent jurisdiction? Is there something specifically in terms of that rule that you referred to that you point to or…

MR SKELTON QC:

For the settlement approval process?

GLAZEBROOK J:

Well, it's probably tied up with all of those approval processes. I think Mr Weston said the real issue with settlements was the third party's

involvement. I admit I didn't quite get an answer as to why there wasn't jurisdiction so it's probably a bit unfair to ask you to point to why there is jurisdiction but given we had that argument.

MR SKELTON QC:
Yes, Your Honours. I mean it's well recognised that when we're dealing with representative action that the Court has a supervisory jurisdiction. That first *Saunders v Houghton (No 1)* [2010] 3 NZLR 331 (CA) case in the Court of Appeal clearly sets that out and I can refer you to that. Your Honour, it's at tab 27, paragraph 40, *Houghton* in the Court of Appeal, (No 1).

So, Your Honours, at 15 the source of jurisdictional power to make opt-in or opt-out orders, that's rule 4.24 and the inherent jurisdiction of the Court. So paragraph 15, it refers to most jurisdictions, complex, and it's most jurisdictions, "England, Australia, South Africa and the US, complex representation questions are answered by additional detailed rules. The New Zealand Rules Committee has recently submitted proposals for legislation and rules in New Zealand, when a draft is available likely to provide a framework. But in the meantime the Courts must deal with applications under 4.24 and the inherent power of the superior Courts." The Court then cites Turner J about the inherent power of the superior Courts and *Western Canadian Shopping Centres v Dutton* [2001] 2 SCR 534, the "filling the void" under the inherent powers.

Then if we go to 40, paragraph 40, which is about the supervisory power of the Court. You'll see hallway down on 40, line 36, "If the representation order is granted, in whatever form, the Judge must maintain as the case develops a continuous appraisal of whether it should be sustained, varied or rescinded." So part of the source of power, the supervisory power, is the power to vary or amend or even rescind the representation order.

Now, Your Honours, examples of where –

ELLEN FRANCE J:

So, Mr Skelton, that relates to the representation order rather than some of the other sorts of matters that we're talking about here, doesn't it, like approval of settlement?

MR SKELTON QC:

Yes. I'll deal specifically then. That's just the general first point I want to make is representative actions, the Court does have a supervisory power, and of course that is, just like in the trustee situation we're dealing with, we have parties that are not actually before the Court and the Court needs to protect their interests.

Dealing then with the question of approving settlements and distributions, the High Court has done that in the past. My learned friend mentioned *Eaton v LDC Finance* and I want to take you to that decision, because it is a good example of that approval. Now it's –

WINKELMANN CJ:

He said it was a trust, didn't he?

MR SKELTON QC:

Well, he did, and I'd just like to take you through that in a little bit more detail, if I may. It's in tab 51 of the respondents' bundle of documents. Because this case not only involved approving a settlement, but they're also facilitating the distribution of the settlement sums after payments of costs, so it effectively is like a common fund order.

So, paragraph 1, "The plaintiffs succeeded in a claim that they had brought on behalf of a large number of depositors of an unincorporated finance company," so it was a representative action being pursued on behalf of a large number of depositors. 2, "A substantial sum of money," over $7.7 million, was paid into Court. The judgment was then appealed, parties to the Court of Appeal entered into a conditional settlement. So before the appeal was heard they settled. The plaintiffs negotiated a settlement sum of a

lesser amount, $5.8 million, it had to be divided amongst the depositors. And then at paragraph 7, the application is for various orders. It seeks orders on two alternative basis Eaton and Marshall, now they were the representative plaintiffs in the Court proceedings, be appointed as a trustee for the benefit of depositors of the right of action against LDC and be authorised to settle the case and dispense the funds.

Now the reason they were coming to the Court is because the powers upon which Eaton were appointed didn't expressly say there was a power to settle. Now at paragraph 11, almost all the depositors were given notice of this proceeding, this is the application to approve the settlement and distribute the money, it's at paragraph 14 and half way down it was the view – the Judge said it was his view that the law of equity already recognised that they were trustees of the interest of the unsecured depositors by reason of fiduciary obligations so they assumed at the general meeting of the depositors who appointed them and their role of conducting the litigation and at paragraph 16 the terms upon which Eaton were appointed are set out there.

We'll see under paragraph 2 that F&I had around 300 creditors so he was bringing the claim on behalf of 300. At 4, "As trustees, myself and Mr Marshall are to act on the creditor's behalf the aim of recovering the sums owing," and under 5(c), "To make decisions on behalf of the parties as to the conduct of the litigation," and under (d), "To meet the costs of the realisation of the assets, the cost of any litigation taken on behalf of the parties in reasonable remuneration of the trustees. Now there wasn't anything there, there was no expressed power to compromise the claims so the issue was, when you're appointed to sue of course impliedly, you have the right to sue you've got a right to compromise. This is to answer my friend's point about, well, is there any power to compromise.

Well that was the issue under paragraph 19, "Counsel before me agreed that the depositors and the trustees do not expressly address the power of the trustee to compromise the claim."

And then at 23, the last sentence of 23, “The fact that the dispositors did not anticipate and provide for the compromise of the claim does not mean that the trustees powers do not extend to a compromise of the claim.” And that's the point, you know, under 4.24 if you were authorised to bring a claim on behalf of all parties even though the rule doesn't say and you have the power to compromise that's implied by the power to actually be able to commence the proceedings.

Now Your Honours, if we go to paragraph 29 you'll see that there was a creditor who objected to the proposed settlement Mr Mytton and the reasons for his objection are set out in that letter, the second paragraph. “I would feel most uncomfortable about being bound by any agreement which would preclude me from taking an action or actions against anyone or all of those parties in the future.” So the settlement of course had a full and final settlement and he’s objecting to that.

Now 31, the settlement agreement is detailed included in the detail is an agreement that subject to two perceived reservations the party agree to settle all claims that all parties may have against each other arising out of and in connection with the High Court proceedings and at 40 the Court considered it was appropriate to seek approval from the Court, and this is the jurisdictional issue here, Your Honour. 40, “It is in the context that I approach 51.1, “In my view the section should be given a liberal meaning given the absence of an expressed power to compromise being included and the duties cast on the trustees. It is appropriate for the trustees to come to the Court for approval of the settlement.”

Now His Honour then made the point about approval, it should be understood as seeking a clearance from the Court that the decision of the trustees was entered into is a prudent one, not the function of the Court in this context to make the decision for the trustees,” and at 42 over the page the last sentence, “The task of the Court is to assess whether they have acted reasonably, carefully and prudently in this exercise. I think they have,” and that’s the same, Your Honours, in Australia 33V where you note my friend took you to

the power the Courts had to approve a settlement. They have to determine whether it's fair and reasonable.

Now at 44 the Court says to remove any doubt that might exist as to the existence or extent of their fiduciary obligations, they confirm that made, they were trustees of the whole fund. So Easton couldn't just keep the money, the settlement money, for themselves. They were holding the money for the benefit of all the creditors.

WINKELMANN CJ:
But the Judge purports to rely upon provisions of the Trustee Act giving him that authority?

MR SKELTON QC:
Well, Your Honours, that may well be the way through this in terms of jurisdiction. In a representative action, if Mr and Mrs Ross get the $65 million settlement sum for this matter, they are holding those funds for the group. It's not their money and it may well be that if need be the Trustee Act can be called in aid to assist in these purposes.

WILLIAMS J:
Wouldn't they be inherently fiduciaries anyway?

MR SKELTON QC:
I would say so, Your Honour. But if we then just turn to 49, "Since it is arguable as to whether the terms of the trust established at the F&I creditors meeting, or the representation order by Associate Judge Faire, or to be implied or construed from the context, address the power to settle the claim against LDC, it is appropriate that express authority to enter into the agreement be sought by the trustees." So here's the Court saying, well, it was appropriate for the representatives to actually come to the Court to make sure that, yes, the settlement was appropriate, and at the bottom of 50, "For these reasons, I am satisfied it is appropriate that this Court should, and now does, confer on the trustees the power to enter into this settlement…"

Now the final point I'd just like to take Your Honours to is the actual order which is attached as the last two pages to the judgment, and order 2, the plaintiffs be authorised and directed to enter into the settlement for the benefit of the F&I depositors. Authorise and direct the plaintiffs to disburse as part of the funds under the said agreement that remain available to them. And it says, "Such distributions to consist of," and there's an interim distribution, and then under 3(b), the balance after allowing for the legal fees and other disbursements in relation to the continuing conduct of the matter. So that's a common fund order. That's saying from the common fund that was recovered for these depositors you can deduct the legal fees and the disbursements in relation to the conduct of the litigation and then you distribute it so everybody shares it equally. It's just a...

ELLEN FRANCE J:

But Mr Skelton, that's in the context of section 64 which is the power of the Court to authorise a range of dealings with trust property. I'm not sure that it's directly applicable to the current situation.

MR SKELTON QC:

Well, Your Honour, I'll try another one of my cases to see if that assists Your Honour further. There's –

WINKELMANN CJ:

What you've said so far to us on that is that if necessary that is something we could have resort to.

MR SKELTON QC:

Yes, that's right, Your Honour. One, it says if you are authorised to sue on behalf of a group there's implied power to compromise, and saying it's appropriate in these circumstances to seek the supervision of the Court that the settlement is fair and reasonable and for the Court to approve the distribution scheme here which in this case included deducting fees and costs out before paying it out to everyone equally. Now –

GLAZEBROOK J:

Well of course in the context of a trust it may actually be more prudent, effectively it may actually be prudent always to seeks directions from the Court in terms of the scheme of the Trustee Act anyway.

MR SKELTON QC:

Well that is correct but we don't have like a trust deed or anything operating here. We had a meeting of 300 creditors who authorised Mr Marshall to go and file the proceedings and conduct them on their behalf to meet the costs out of it. Yes, that resolution did refer to them as being a trustee for the creditor, but that's all it was. It was just saying, yes, we vote for you guys to go and bring the claim. Another example which the Chief Justice may recall was *Ranchhod v Auckland Health Care Services (No 2)* [2001] ERNZ 771 (EmpC) this was a decision which Mr Manning was senior counsel and Your Honour was a junior counsel involved in for the senior medical doctors who –

GLAZEBROOK J:

Have we got this somewhere?

MR SKELTON QC:

Yes Your Honours, it's at the same bundle at 53.

WINKELMANN CJ:

Junior doctors?

MR SKELTON QC:

Junior doctors, yes. So you'll see at paragraph 1 of the judgment of JudgeTravis that the parties to the proceedings applied to the Court for its approval of an agreement reached to settle the proceedings. And at 2 the application had, as its background, orders made by Judge Colgan. These permitted the plaintiffs to sue in a representative capacity on behalf of 3500 resident medical officers. The relief sought in the proceedings filed with losses allegedly suffered by the plaintiffs since 1993, failure by the defendants

to provide them with free meals. Because the case is a class action the parties provided in a standard clause for each settlement deed, and they set out the terms of that. If we go to 13 the first meal case taken by the Resident Doctors Association was *Mawson* litigation and it proceed initially on a normal fee paying basis. There was some contingency arrangements made under which the solicitors would receive a percentage of any recoveries. Bear the costs and disbursements. Compensation levels were finally disposed of by a settlement in July 1993. Terms of the settlement were submitted to the High Court for approval. So that's another example, representative action, where terms of settlement are sent to the High Court for approval, and the application for approval is, proposed that the solicitors that the proceeds of settlement after deduction of any money, legal fees, would be distributed to resident medical officers.

Now the reasoning is at 23 Your Honours, if we turn there, Mr Manning properly observed that, "There was no statutory requirement for the approval of settlements, but this was a contractual term in each deed, which was consistent with the Court's supervisory jurisdiction in dealing with class actions. He argued if approval was withheld, the parties would be obliged to mediate… Mr Manning said there was no precedent for the exercise of the Court's jurisdiction, but that the overriding considerations for the Court," was arrangement which Court ought to approve. At 24 "He submitted the measure by which the latter judgment is to be made is whether the arrangement is fair and reasonable, having regard to all relevant matters."

So again it's relying on the Court's supervisory jurisdiction to deal with representative actions, and there was a debate over whether a particular fee was justified or not under the Champerty and maintenance rule But at 7, "By consent I enter final judgment approving the settlements of the parties on the terms contained in the deeds… reserve leave to the parties to make further application… under its supervisory role for the approval of the determinations," after there was a resolution.

So that was an example again of the Court saying in representative actions it's appropriate to seek and obtain approval and relying on that supervisory jurisdiction.

And the last case was a decision which Justice Williams was involved in as the Judge. That's the *Haparangi* case, it's at tab 52 and it was an example of the Court being asked to review and approve terms of settlement of major group litigation proceedings and the implementation details.

WINKELMANN CJ:
What tab, sorry?

MR WESTON QC:
Tab 52.

WILLIAMS J:
That really was a trust.

MR WESTON QC:
Yes. And you will see the bottom of the first page the application arises out of the settlement of major litigation against the Crown in respect of the acquisition of all but 14% of the shares in the block and on page 2 down at the bottom, “I'm satisfied therefore that it is in principle appropriate to terminate.” There was a trust to establish *Haparangi* number 4 in its stead. The issue in this case relate not to that underlying question but to the details of the implementation plant.

And at page 11 there’s reference to the High Court of Wellington having approved the settlement of the representative action. Like my learned friend I did try to get a copy of that judgment from the High Court but without success but again its representative action appears to have been approved by the High Court and the role of this Court and the Māori Land Court in paragraph 12, “The settlement of the various representative actions having now been approved by the High Court it falls to this Court to consider these applications

by way of practical implementation of those parts of the settlement that fall within its jurisdiction." And so it considered the implementation of the settlement and if we turn to 16 at the bottom of the page, "Accordingly, before I am prepared to approve the implementation steps required by the Court and to approve the trust I require a deed to be amended so that the trustee's remuneration for a given year is pre-approved."

So again this is the Court looking closely at terms of settlement that arose out of a representative action and requiring changes to be made and approving implementation terms. It's just another example of, yes, the Court does have, I submit, power and authority in representative actions to be able to do this sort of stuff it's not unusual, it happens. You don't need 33V to be able to act in that way.

Your Honours, I wanted to take you to the draft proposed procedural steps that Your Honour was interested in this morning about what is likely to happen if this case proceeds as an opt-out or if it proceeds as an opt-in and that's schedule A to my outline if Your Honours have that, schedule A.

So Your Honours, the next step that really needs to be resolved is security for cost. Now, Your Honours, just a little bit of history here. This case did not start as a funded piece of proceeding, this case was filed back in May 2018. There was no litigation funder involved. It was being bought on behalf of Mr and Mrs Ross and the group without funding being available but once Southern Response said they required security for costs then of course, you know, the solicitors involved, the lawyers involved could not fund what could be a significant amount of security for costs. So we were forced to go out and try to obtain litigation funding for this case. Now that's very unfortunate for Mr and Mrs Ross and for the claimants because it means that inevitably there's going to be quite significant costs for funding this litigation in terms of the funding commissions for – so it would have been nice to have not had to take that step. So it's not like my learned friend was saying some of the Australian shareholder or investor class action claims that are often initiated by the funder, who then go out and find a client who'll bring the claim on

behalf of the group, the funder was only involved here at a relatively late stage. And the funder has signed up on the basis that it is an opt-out class action, they know that this Court has not previously made, you know, a common fund order or a fund equalisation order in the same steps, but they're backing themselves that they'll be able to achieve that in the end. So –

WINKELMANN CJ:
In terms of that, it seems that they're picking quite a hard road, because they're going to be the test case and it seems likely that points will be taken.

MR SKELTON QC:
They were well aware that it was likely that this whole opt-out issue would end up in the Supreme Court, and the funder is associated with Maurice Blackburn. Maurice Blackburn is the largest plaintiff class action litigation firm in Australia, they've recovered something like $2 billion I think they say on their website. So as part of Maurice Blackburn's drive for legal reform around class actions they see this as an important issue in New Zealand for having the law resolved, because we're way behind, most of the world moved to opt-out years ago. It looked likely that we might have had it in 2008 but for whatever reason, and I can't speculate, the Rules Committee's very good work, and the Class Action Bill they had designed, based on Australia but solving a lot of the problems that had developed in Australia, would have been great, but it didn't proceed. But I'm not saying, Your Honour, that they're not doing this for commercial gain, they are, but that wasn't how this case came about.

But after security of costs then of course the issue of sending up the notices has to occur, so that's step two. But, you know, the Court's going to be asked to review an opt-out notice or it's going to have to review an opt-in notice and make directions as to service, so not difference. Likewise, opt-out notice will be distributed, an individual notice is then sent to class members at their last known physical address, the public notice is placed in the newspaper on the class action website, so again the same.

Now it was certainly pleasing to hear that perhaps Southern Response won't be opposing giving details of the addresses and email addresses for the policyholders. The claimants, Mr and Mrs Ross, don't have that information, they don't have access to it. All of that information will be held by Southern Response. But even today we heard that if the Court orders them to disclose that information and if there isn't any Privacy Act issues that could be provided, you know, the whole thing, whether it's opt-in or opt-out, the key concern is making sure people get the notice, and the best way to make sure they get the notice is if it is addressed to them individually. And so if Southern Response has that information, yes, it might be out of date, yes, people may well have moved on, but it's the best information available, and if they aren't prepared to voluntarily provide it then I suspect one of the steps will be seeking a discovery-type order. And Your Honour the Chief Justice will be aware that in the "Unresolved Claims" case the suggestion was made, well, if for privacy reasons it can't be ordered to be handed over to the plaintiffs the Court might have power to order the defendants to actually send out the notice. But that's an important issue, but again whether it's opt-in or opt-out, no difference.

Then there'll be a case management conference to settle the list of common issues. The Court of Appeal judgment sets out a list of common issues at 31 but that one may well be modified. Then we have the stage 1 trial in relation to the common issues, and the judgment will then be issued on the common issues. Court's findings on common issue are res judicata for all members who have not opted out. If it's an opt-in it's a res judicata for all members who have opted in but not for anyone else.

It's a point there at that point, Your Honour, and Justice Williams mentioned that "opt-out" actually has some benefits for defendants, and while defendants generally would prefer to have no one suing them, or if anyone is suing them just a smaller opt-in group, one of the key advantages of an opt-out is it gives that finality that Your Honour was referring to. If the Rosses are appointed as the representatives of all other than the few that might have opted out then they have the power to settle all of those claims and you get the finality,

whereas if it's an opt-in and there's only two or three hundred people have opted in, you don't get that finality.

Now if a case then proceeds to stage 2 on the individual issues, there'll be case management directions, full discovery, timetable exchanging of evidence, and that's the same whether it's opt-in or opt-out. There may be running of test cases.

The language isn't appropriate to say people have to opt-in at that point but it is common ground that they will have to be active participants at that point if they want to proceed because they'll have to prove their claim. So for the individual trials, if it doesn't settle, class members who haven't opted out, who wish to prove their individual claims, will need to take active steps to comply with the case management directions, and then we'll have the stage 2 hearing. Now likewise with opt-ins. So no difference.

Now if the plaintiffs and defendants agree to settle, the proposed settlement is submitted to the Court for review to determine whether it's fair, just and reasonable. Now that is required in this case because the Court of Appeal, on the suggestion of the Rosses, included order 2A in the order, the representation order, as a condition of making that order that leave to discontinue the proceedings would be required, and that was included by the Rosses because it is appropriate in a representative action to have that sort of Court approval. Rosses, it protects them but it also is to ensure that all class members are treated fairly. So the Court's role, certainly in Australia, is to say, number 1, is the settlement fair between the plaintiff and the defendant, but number 2, and importantly, is it fair amongst all the class members inter se so that one group of class members isn't getting a benefit? For example, the funded class members aren't getting more than the under-funded class members.

WINKELMANN CJ:

So just asking you about that opt-in, the first step 10, if it's opt-in and they're all signed up and they signed up to the funding agreement, that won't necessarily have come to the Court, will it?

MR SKELTON QC:

Well, in this case, yes, because of the order that was made in order 2A.

WINKELMANN CJ:

Well, that's not for approval of the agreement though, is it? It's approval to discontinue.

MR SKELTON QC:

Yes, but, Your Honour, it will be effectively the same, I submit, because the proceedings will need to, if it's settled, they will need to be discontinued.

GLAZEBROOK J:

Would you say it's part of the supervisory function of the Court and whether it's opt-in or opt-out to make sure that those people who haven't had a direct role in instructing lawyers, et cetera, have the ability to at least have their interests considered in a certain one?

MR SKELTON QC:

Absolutely, and notice of the hearing for the approval process would go out to everybody and anyone who objects to the terms of the settlement would have the right to front up in the Court and say why they object and whether they've got any grounds to do so.

Now at 12, if the Court determines the proposed settlement is fair, just and reasonable, the Court may deal with cost spreading issues by means of either a common fund or a fund equalisation order. Now I submit that that's the same even in an opt-in situation, because there's that group – because the free-rider issue may still arise in that situation. So it's not a closed class, there

will still be a free-rider issue, so there will need to be some cost-spreading mechanism, even in an opt-in situation here.

GLAZEBROOK J:
But not if everybody's signed up to the funding agreement presumably, because that's a contract that's…

MR SKELTON QC:
No, if it's a closed class and everyone has to sign up to someone's funding agreement, you're right, the funding agreement would make provision. But this isn't being brought as a closed class, the option is either opt-in or opt-out, you either file your form and say, "I'm opting in," you're not required to sign on to a funding agreement.

But let's put a funder to one side for a minute, let's just assume that Mr and Mrs Ross have deep pockets – I can assure you they don't – but if they paid all the lawyers' bills and they paid the experts and there's no funder involved and we get to the settlement stage, the approval of the settlement, and there's this class of people who benefit from the settlement, we're still going to be having to seek a cost-spreading order or some sought. So it's not linked to necessarily there being funders involved, it's just an unjust enrichment issue, and there is plenty of case law for another day. It goes back to the old Courts of equity, and so the jurisdiction comes from the Courts of equity which have over a longer period of time granted these sorts of issues, and it's not unusual, Courts often subject lawyers to tests to see are their fees that they have charged fair and reasonable, or lawyers who recover a fund on behalf of a whole lot of people are entitled to recover that.

WINKELMANN CJ:
Well, liquidators and their lawyers are often having to have their costs approved, aren't they?

MR SKELTON QC:
Exactly.

WINKELMANN CJ:

But here it would be different if it were not just Mr and Mr Ross, or if Mr and Mrs Ross had decided to do it on the basis that they wanted to get a profit as well. So that's more like this situation as opposed to just Mr and Mrs Ross sharing their legal costs.

MR SKELTON QC:

Well, it's the issue of someone has to fund this litigation if you want access to justice. So it's either class members put some money in themselves to fund it or often the lawyers are prepared to do it on a contingency basis, no win, no fee. But, you know, if the Ross's went to the bank and borrowed some money and they funded it, there's still that free-rider problem that would have to be addressed. Now with lawyers it's easy, it's always been said, that if the Court has jurisdiction to say what would a reasonable fee be in the circumstances, well, you'd go to the Law Society and they'll work that out. Is it any different when it comes to a funder to say, is the Court not going to be able to say, well, what is a fair and reasonable funding commission in these circumstances? Not the contractual funding agreement, but what is a fair a reasonable one?

WINKELMANN CJ:

There's already, there is in fact, there are in fact standard terms, aren't there? There's a standard percentage, range of percentages.

MR SKELTON QC:

No, not really, Your Honours. It's, like, in Australia the commission rates are coming down, which is fantastic –

WINKELMANN CJ:

Because I had that, a recollection of that, of an earlier case, that there was evidence about the range of percentages.

MR SKELTON QC:

Well, yes. I mean, the Court would be given evidence as to what the market for this type of action is. But I submit it's just like a quantum meruit-type claim,

it's not beyond the power of the High Court to be able to deal with these matters. Is there jurisdiction? Well, that will be an issue. In the application for a common fund order, which is at tab 11 of the case on appeal, there's the cases that the applicants rely upon there. But interestingly enough, Your Honours, and I can go back to this, *BMW* comes out because the Federal Court was saying we can make these common fund orders at an early stage of the proceeding and they did that to give funders certainty right from the start.

Now you can't do that anymore under that particular 33ZF because it wasn't to promote litigation it was what was necessary and appropriate, so it was more procedural, so the question for the Court in Australia is going to be well can they do it under 33V or in equity. While my learned friend took you to one case as he rightly says, these decisions are coming out regularly. There are others where the Court has made common fund orders post *BMW*.

Within days of *BMW* coming out the Federal Court of Australia issued guidance as to what they should do because they'd made common fund orders and, Your Honours, the guidance that was issued December 2018 – 2019, my junior might be able to find the reference here. Tab 26 of the appellant's bundle, volume 3, and this is the general practice note that the Federal Court of Australia issued on the 20th of December 2019 and it's at 15.4, it's on page 15, 15.4 is the paragraph, "Particularly in an open class action the parties' class members litigation funders and lawyers may expect that unless the Judge indicates to the contrary the Court will if application is made and this is just, fair and equitable in accordance with principles make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal cost, fees, other expenses including reasonable litigation funding charges or commission amongst all persons who have benefitted from the action." So that was the response of the Federal Court of Australia which of course does most of the class action work there.

WINKELMANN CJ:

Can you please give me that reference, I'm sorry Mr Skelton, but I had a technology meltdown?

MR SKELTON QC:

It's in the appellant's bundle volume 3 and it's tab 26, Your Honour, and it's 15.4.

WILLIAMS J:

So does that post-date –

MR SKELTON QC:

It post-dates *BMW*, that's the response of the Federal Court after *BMW* came out saying, "You can now expect that the Federal Court Judges will make an appropriately framed order to prevent unjust enrichment including litigation funding charges."

So it might be that some of the Judges have said, "Well in line with the majority in *BMW* it might be more appropriate to make a fund equalisation order as the cost spreading mechanism." Others have said, "Well it would be totally unjust in this case." Now why that is, Your Honour, is that sometimes there might only be three, four or five people who have actually signed a litigation funding agreement and hundreds of people who haven't. So if you are only spreading the commission on three or four funding agreements amongst the whole group the number is very, very small, that's why the Federal Court strongly favoured common fund orders over fund equalisation orders, there are real problems with them and that's why the Australian Law Reform Commission has said, "To avoid these problems let's make a statutory power to make a common fund order because they are so much preferable."

Now in our country under principles of equity that go way back a long period of time my submission will be in the High Court that there is power to make those types of orders, but there is a lot to be said of what the High Court of Australia said about the timing of making those orders because, you know, it's

appropriate to make those orders at the end of the process where there is a judgment or a settlement so that the Court can then have all the information as to what services were provided, what would be a fair and reasonable fee in relation to those matters. Whereas what had happened, like in *Money Max*, the way the Court had made a common fund order said, we'll give you a common fund order but we will fix the percentage at the end of the process, when the case is resolved, and it won't be more than the contractual amount of the funding agreement, but it could be less. So that's the way pre-*BMW* the Courts were dealing with it in Australia with *Money Max*.

So there is tension. Some of the Courts in Australia post-*BMW* are still making common fund orders, at the end of the process, not at the beginning. Some are making fund equalisation orders, but all of them are working on mechanisms that everyone accepts needs to be in place to ensure there's no free-riders and there is a cost spreading mechanism, one or the other.

WILLIAMS J:
What do you say for the broader point that this Court has picked up from *Fostif* and *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91, which is not about whether the fees of the funder and the lawyers are up to scratch, but whether the settlement itself is.

MR SKELTON QC:
On whether when a Court is reviewing.

WILLIAMS J:
Yes, how do you review the fairness of the settlement itself?

MR SKELTON QC:
Well, it's not so much the Court's role to sort of alter or amend settlement terms. It's to say whether it is fair between the various class members. So the concern the Federal Court Judges had, and there's guidelines, and in those guidelines they deal with some of these matters, but it's to say, well, we're concerned because by the time settlement approval happens both the

defendant and the plaintiff are aligned and so the Court is having two lawyers turning up, both asking the Courts to approve it, and our objective is how do we protect those people not before the Court. So they have to consider that issue. So, you know, why is it that the plaintiff's lawyers clients are getting a bigger share of the settlement rather than the clients who aren't represented by the plaintiff's lawyer. Those would be the sorts of issues that would have to be addressed. The approval for the fees, the Court there can appoint an amicus, and often does. Gets evidence as to the reasonableness of the fees, makes the call. But again these are sorts of powers that the High Court certainly I submit would be able to exercise, and they will arise, as I say, whether it's an opt-in or an opt-out.

The final issue is around claims administration because typically if there is a settlement it involves a claims distribution scheme and you have an administrator appointed. So the administrator has to ensure that each registered person is eligible to participate. So you see at this stage of the process it does become opt-in because, at this stage you have to actively do something. You've got to send in your claim form and say, yes, I had a house, I made a claim, it was before October 2009, therefore entitled. So the claims administrator then looks at it, assesses whether you're eligible. There's usually a process where you can ask to have it reviewed if there's any disagreement or argument. If they qualify then each class member is paid out their share of the settlement funds, less approved costs and funding commissions, and usually the claimant administrator would have to file a report with the Court, just like a liquidator, as to what's happened, and at that point the proceeding would be discontinued.

Now I've spent quite a bit of time taking you through that Your Honours, but it was to demonstrate that whether it's opt-in or opt-out there are steps that need to be taken and they are steps that the Court exercising its case management powers would be able to easily supervise, in my submission.

Now, Your Honours, the last few minutes before the end of the day, I've got a section in my outline at number 4 why an opt-out approach is preferable, and I

took Your Honours to 98 of the Court of Appeal judgment which was the key reason, enhancing access to justice.

The other two paragraphs, 99 and 100, talk about holding defendants to account for the full amount and the efficiency issues. I've got some references there to the Law Commission Reports that have looked at this issue of what is to be preferred and they're dealt with in some detail in the respondents' submissions, and I don't really propose to take you through all of that but I will take you to the Australian Law Reform Commission's Report that my learned friend showed you earlier on in the day and that's at tab 32, volume 3.

So Mr Weston took you through the terms of reference and it's worth noting this Commission did have an expert panel of judicial officers as well as an expert panel of academics. Justice Lee and Justice Murphy were on the advisory expert panel, as was Justice Beach who also features very highly in these cases. Professor Michael Legg and Professor Vincent Morabito were the academic expert panel. In the bundles of documents there were articles by Professor Morabito. I just mention those ones in particular to Your Honours because he approaches a lot of his research from an empirical basis and if you want to have a good understanding of some of the evidence of what's happening in Australia then that's a good source.

But the point I just want to take you to is the first recommendation which is that Part IVA should be amended so that all representative proceedings are initiated as open class. That's recommendation 1 and it's dealt with in chapter 4 of the report in detail, and 4.1, in order to improve access to justice, support the Court's management of class actions, the ALRC recommends amending the Act and the guidelines. In order to return the class action regime to its original design, recommends amending the Act to provide that class actions must be initiated as open classes. "This improves access to justice by enabling all victims of a civil wrong to participate in the class…and not just those who take active steps to join." Now that is a very strong recommitment to the opt-out philosophy of the Australian legislation.

Now my friend took you to paragraphs 4.4 and 4.5 where the original report by the Law Commission is mentioned and the reasons why opt-out was considered and the Australian Law Commission carefully considered whether a class action scheme should be designed on the basis of active consent or alternatively whether the scheme should be open class and opt-out, and ALRC considered this is to be preferred, the option, that's the open class, access to justice perspective as it meant that all people, not just those who took active steps in joining, enjoy the benefit.

Now what happens in the next part of the report, 4.6, 4.7, 4.8, they show how the original intent of opt-out was effectively circumvented and it happened with this case *Multiplex* that's referred to at 4.8 where lawyers said, "Right, if we've got an opt-out system but I'll define the class to mean all these people and they have to have signed onto the litigation funding agreement," so they effectively turned it into an opt-in even though the Act says opt-out, and that's *Multiplex*.

Now they could do that over there because there is an important distinction between the New Zealand rule and the Australian rule. In New Zealand the rule talks about being representative of all persons who have a common interest. The Australian rule says "all persons or some" and it was that difference in the Australian rules that meant that the *Multiplex* technique of defining the class as only some, i.e., those that signed up to the litigation funding agreement was in fact lawful.

WINKELMANN CJ:
Well do you say that it's not lawful in New Zealand because it says "all persons"?

MR SKELTON QC:
Well, no.

WINKELMANN CJ:

Are you saying your midway point is actually the correct point?

MR SKELTON QC:

No, I'm not saying it's unlawful to require – to go to the Court and seek approval for an opt-in on the basis of signing up to litigation funding agreement, that would be fine because the Court in New Zealand has a discretion. So they can make opt-in, they can make opt-out. I'm not suggesting the rule stops that, I will address you tomorrow on some proposed guidelines as to how – see the last page of the outline, some suggestions.

You see, Your Honour, the key issue there will be say a group comes along and they've got funding and the funder says, "I'm only prepared to fund this class action on the basis that you sign up to my litigation funding agreement. I'm not going to take any risks. Maybe the Court will grant a cost spreading order, maybe it won't, it's never happened. I'm not going to take the risk, you have to sign on."

Well then of course the Court has a choice, do I approve that opt-in class action or do I not. Well the choice is not between that and opt-out it's either approving the opt-in or the alternative which is lots of individual litigation or the case doesn't go ahead at all. So that might be one of those rare situations where the Court has to say, "Well okay, we'll approve it as an opt-in," if that's the choice and I will deal with that in a little bit more detail tomorrow, Your Honour, I appreciate it's now 4.03. To answer your question, I'm not saying the Court doesn't have power to make an opt-in order in appropriate cases, it certainly does and has in the past.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON TUESDAY 16 JUNE 2020 AT 10.03 AM

MR SKELTON QC:

May it please Your Honours, before I continue with the respondents' submission there's just a point of clarification counsel is seeking regarding the batting order for today.

WINKELMANN CJ:

Yes.

MR SKELTON QC:

I'm anticipating that the respondents' submissions will be completed certainly by lunchtime. Mr Quinn and I will share that. But after the luncheon adjournment is it proposed that the interveners will then deliver their submissions from, say, two to three and then there would be a right of reply from the respondent with Mr Weston having the final say so that we can cover any issues that might arise?

WINKELMANN CJ:

Yes. Yes, so I suppose you would wish a brief right of reply because at least one of the interveners makes submissions that you might wish to reply to?

MR SKELTON QC:

Yes, it would certainly be brief. Mr Quinn will be responding to some of the written submissions that have already been filed so that the interveners have an opportunity to comment on those submissions.

WINKELMANN CJ:

I was hopeful we'd get the interveners on before lunch.

MR SKELTON QC:

That may well be the case. Well, Your Honours, at the adjournment I was taking Your Honours to the Australian Law Commission Report, the 2018 report, and Your Honours may remember it was at volume 3, tab 32.

There's just one final matter that I want to touch upon from the Australian report, tab 32, and it's in response to Mr Weston whoreferred Your Honours to paragraph 4.33 in that report. It's on page 98, Your Honours. He referred you to the submissions that had been provided by Maurice Blackburn regarding the value of book building process and their submissions referred to book building producing a culture of group member engagement which many class members are likely to be aware of that proceeding affecting their rights. So the book building process was considered to be a critical element in the proper analysis and investigation of the quantum of loss, et cetera.

I just want to draw Your Honours attention to the next paragraph in the report which summarises Justice Lee's view regarding book building in the *Lenthall v Westpac Limited* matter and he described book building by a third party litigation funder, "As an endeavour conducive of wasted costs that the Court has sought to discourage since the advent of common fund orders." So there's quite a different perspective as to the utility of book building and Your Honours may recall if you've reviewed the *BMW* judgment that the Judges in that case also had quite different views as to whether book building was a good thing or an endeavour conducive of wasted costs. Now…

WILLIAMS J:
So is the implication there that the costs that are being wasted are ending up in Maurice Blackburn's accounts?

MR SKELTON QC:
No, no, this is the problem, and with respect to the majority judgments in the High Court, the costs of book building end up coming out of the pockets of the class members because –

WILLIAMS J:
Who's getting paid?

MR SKELTON QC:

The funder pays the book building costs initially up front but if the action is successful and there is a settlement or money recovered then all the costs of the litigation come out of that fund before the class members get their share. So the costs –

WILLIAMS J:

When you say the funder pays the book building costs, are these costs that are internal to the book builder or is there some independent contractor who's having to be paid to do it?

MR SKELTON QC:

Well, for example, in this case, Your Honour, to answer that, it's advertising costs of building websites, it's sending out notices, it could be television adverts, it can be hugely expensive.

WILLIAMS J:

Do you know what proportion is internal to the funder and external?

MR SKELTON QC:

It will vary from case to case, Your Honour, but it is clear that book building can be a hugely expensive exercise. Now the LPF intervener submissions say on New Zealand book building is a relatively simple exercise. With respect, there's no evidence to substantiate that. But the point I wish to make is that from Mr and Mrs Ross's point of view, yes, some book building is no doubt a good thing. We don't disagree with that. But they certainly don't want a litigation funder going out spending millions of dollars that at the end of the day they have to pay for, because when we stand back and we're talking about access to justice, all the counsel in this room say access to justice is a good thing, but what do we mean by that? Well, access to justice, it's recognising the fact that litigation costs for most average people are beyond them. They can't get to the Court because they can't afford to pay the cost of lawyers and the litigation costs involved. So adding up a layer of book

building costs to that process is something the Court, I submit, needs to guard against. Now what's happened in this –

GLAZEBROOK J:

Can I just check because obviously in an opt-out there will nevertheless be a measure of cost because some of the things that you were talking about in terms of notices and advertisements will depend, I mean it depends a bit on how many people wouldn't otherwise hear about it through a conventional process of emailing out notices or advertisements, but there will be an overlap of expense, won't there, between the two, so the argument is this more complicated procedure has greater costs?

MR SKELTON QC:

No. No, Your Honour, there is a balance there. Some book building is a good thing as Maurice Blackburn's submission suggests. Now, for example, in the facts of this particular case, GCA lawyers have built a website for the class action, it's about $50,000 for that. They have taken out some fairly cheap radio advertisements in Christchurch, but they have essentially been relying on the publicity that has been generated through the media and through, no doubt Stuff published this case yesterday on their website. So they've been relying on that type of information to generate interest. Now, so yes Your Honour, to answer your question, there will be some costs that add up but what they haven't done is they haven't gone and spent large amounts of money taking out ads or doing door-to-door knocking or trying to track down the 3000 people who were the policyholders here. Bearing in mind, Your Honour, that the Rosses don't have contact details for the class. They don't, they can't send out emails.

GLAZEBROOK J:

That's why I said that in this case it may be there's not that much to do over and above the emailing out, assuming that the issues with privacy et cetera can be dealt with, with Southern Response.

MR SKELTON QC:

Now the concern Justice Lee has is that with a closed class opt-in where you have to go out and get people to sign on to your litigation funding agreement, then of course the incentive on the litigation funder is to spend lots of money and build as big a group as you can and get as many people as you can to sign on to their funding agreement. In the open class – sorry in the closed class opt-in funders of necessity do spend large amounts of money on book building. Now that would be okay if it was coming out of the funders' pocket, but when it's coming out of Mr and Mrs Rosses pocket that's a problem whereas if you have open –

O'REGAN J:

It's not coming out of their pocket. It's never going to come out of their pocket, is it?

MR SKELTON QC:

Well it's coming out of the class members –

O'REGAN J:

Yes but if you advertise you get a bigger class so you spread the costs.

MR SKELTON QC:

But the costs of the advertising does come out of the fund recovered at the end of the day.

O'REGAN J:

But it might be a good investment, mightn't it, if you end up getting 3000 people instead of 200 people the advertising would pay off.

MR SKELTON QC:

Yes, that would certainly be so, but what justice Lee was saying was if you adopt the approach of open class opt-out, with a common fund order, you don't have to spend all of that money going and doing the book building

exercise. So it's not wasted costs. It can be avoided through that process of an open class opt-out action with common fund order. So that's the point.

O'REGAN J:
But as we know common fund orders are difficult to achieve and we don't have any legislative basis for them in New Zealand.

MR SKELTON QC:
No Your Honour but the Courts of equity have given common fund offers in the past, and I will go back to that just a bit later on, on the jurisdictional basis for it. But the whole –

O'REGAN J:
But doesn't that mean we're balancing the costs of the upfront advertising et cetera against the uncertainty in increased litigation costs of having, going into unchartered waters where we have no legislative basis to fall back on.

MR SKELTON QC:
Well that's so but it's just as a matter of principle Your Honour. We know that Australia is recommending enacting a statutory common fund process –

O'REGAN J:
But we also know we don't have one.

MR SKELTON QC:
We don't have a statutory one but we do have all of the powers of the Courts of equity back in the chancery days, and the old common fund doctrine that has its basis in the US is all based on common law, and that's –

O'REGAN J:
Do you accept we are having to build that from a standing start, so it will lead to a lot of uncertainty, probably appeals through the appellate system, and increased litigation costs?

MR SKELTON QC:

There will need to be a case run through, and it may well be this case, where the Court will have to grapple with whether under its equitable jurisdiction it has power to make a common fund order or if not then a fund equalisation order. There seems little doubt that there is going to be one mechanism that will work to spread costs, it's just what is the most appropriate mechanism that will achieve those objectives of access to justice, deterrents, et cetera, and that will be for another day. So yes Your Honour is correct, there will need to be either some litigation about that, or maybe the Law Commission may recommend that as part of its review, which would be helpful. But that's what –

WINKELMANN CJ:

So you're standing on what Justice Lee says, and we understand the point.

MR SKELTON QC:

I'm standing on what Justice Lee says, and also the minority Judges in the *BMW* case also were very much in favour for common fund orders for, that was one of the reasons. So Your Honours I was at –

ELLEN FRANCE J:

Sorry, just while we're on the Law Commission report, one of their recommendations is amending the Federal Court legislation to give the Court an express statutory power to resolve competing representative proceedings. Could you just remind me what your approach is to competing claims?

MR SKELTON QC:

Well the first position we take is that it's way more likely that you will end up having to deal with the problem of competing class actions with an opt-in closed class regime, rather than opt-out. That's the first point.

ELLEN FRANCE J:

Why is that?

MR SKELTON QC:

Well the reason for that is that the Court of Appeal said if you have an opt-out class action regime where everybody is covered other than those people who choose to opt-out, then you can't have two open class opt-out. It doesn't make sense, the Court of Appeal said. You can't have overlapping interests. You can, of course, have two opt-in class actions, so the example that's been mentioned is the CBL litigation that's on foot at the moment where –

WILLIAMS J:

I don't think the question is about whether you have Court sanctioned competing classes, it's whether you have a queue of people trying to get in the door to get cert. Isn't that a likely outcome? Which one the Court chooses is another question.

MR SKELTON QC:

Well it is certainly true that in Australia and in Canada that the Courts are having to deal with the question of how do you cope where there are two or more groups that turn up wanting to represent the class, and they deal with those matters. There's guideline judgments as to how you approach it. Now the point I make there, Your Honour, it's not the race to the Court, as my learned friend called it, that is given any significant weight. Nearly all the Judges that look at it say who gets the carriage of the case shouldn't turn on who files the proceeding first. It might be a factor but it's not given significant weight. So the prospect if we go opt-out in this country, that it's going to cause people to rush to the Court to file first, I submit, shouldn't be a deterrent for opt-out. It's not given weight.

WILLIAMS J:

Well it was a slightly different question to that. It's not whether the rule is first up best dressed, it's what the rule will be, because I think the gravamen of the question was, how does one deal with competition, does that introduce new uncertainty that wasn't there before.

MR SKELTON QC:

Well it's a question of case management and we have a High Court rule 10.12 which deals with how you handle these matters. 10.12 gives the High Court a very wide discretion to either consolidate proceedings, to have both proceedings tried together, or to stay one and allow the other to proceed, so there's existing power that deals with these matters. Now the rule doesn't give guidelines as to how the Court should exercise that decision where there are two or more class actions where people are wanting to be represented. As long as the claimants groups don't overlap there would not be a problem with two class actions being heard together, as long as it's before the same Judge so you don't end up having conflicting views. It would be possible under 10.12 to do that. Now do you consolidate, do you have them heard together, there's some very useful guidelines in Australia as to what is the best approach for that, but this is going to arise, Your Honours, whether it's opt-in or opt-out. As I say opt-in there's already an issue in the High Court at the moment in relation to the CBL litigation on that. There's two funded class actions on opt-in basis that are proceeding at the moment. But with opt-out the only issue is you can't have two sets of lawyers purporting to represent everybody in the class, as the Court of Appeal said, that would not make sense. So the Court would have to make a call as to which class is allowed to proceed and which one would be stayed, or whether they are ordered to be consolidated under 10.12. But –

GLAZEBROOK J:

Or till both turn to opt-in perhaps in certain cases would be another possibility.

MR SKELTON QC:

Well, that would be the case, but the case where you have an opt-in who've signed up to funding agreements, say there's 2000 people, shareholders, that have signed on to that, and an opt-out covering all the other shareholders in the group would work well because then some of the mums and dads who haven't signed on to the funding agreement, everybody would be covered, and that of course is the ideal outcome.

But my point is this issue of competing class actions is not a matter that should determine whether it's opt-in or opt-out. There is 10.12 that can deal with these matters, it is just a matter of case management and the Court has the machinery to deal with it. I'm not saying it's going to be easy in every case, because again the Courts in Australia don't like to say, "Well, we'll give the carriage of the case to this group because Mr Skelton is representing them whereas another lawyer in another group isn't as good at class action claims," that doesn't appeal to the Judges in Australia for obvious reasons. But likewise, you know, the rush to the Court argument doesn't work either. The focus of the choice always has to be what is in the best interest of the class as a whole, and that's the essence of the test on the carriage motions. And what's happening with the competing class actions in Australia, it's actually been a very good thing for class members because Judges have often said, "Well, all things being equal, the funder who has the lower commission rates, ie the class members don't get charged as much, they get the nod," and so it has caused the market commission rates to drop. So, you know, it's not a bad thing. But, as the Australian Law Commission Report indicates, it would be good to have some sort of statutory framework around it in the future. But we have 10.12 of the rules.

WILLIAMS J:
So the Court becomes the auctioneer.

MR SKELTON QC:
Well, it has to case manage it.

WILLIAMS J:
It's not necessarily a bad thing.

MR SKELTON QC:
It has to case manage it and if the test is " what is in the interest of the class members as a whole", if there's a funder prepared to do it at a lower rate than the next person, that's one of the factors that's taken into account. And so

funders know that, funders sharpen their pencils, and that is a good thing for people like Mr and Mrs Ross.

WINKELMANN CJ:
I think we've got that point, thanks, Mr Skelton.

MR SKELTON QC:
Now moving on then – I'm at point 4 of the outline as to why opt-out approach is preferable, and I've taken you to that Law Commission Report.

Just briefly to a couple of cases where they've had to grapple with this question, should it be opt-in or should it be opt-out, and the first one that I refer Your Honours to is the *Hypertouch v Superior Court* 128 Cal App 4th 1527 (Cal Court App 2005) decision, it's in the respondents' bundle of documents at 104.

WILLIAMS J:
Do you have…

MR SKELTON QC:
It's just in the electronic bundle of documents, Your Honour.

WILLIAMS J:
It's not in the paper ones?

MR SKELTON QC:
It's not in the paper ones, Your Honour, no, it's just in the hard…

WINKELMANN CJ:
What is the name again, *Hypertouch*?

MR SKELTON QC:
Yes, it's *Hypertouch* and it's a decision of the Californian Court of Appeal. Your Honours, just very briefly, in terms of the facts it's summarised in the head note, it's an unsolicited mail case, a receiver of unsolicited

advertisements to a telephone fax machine sued the sender alleging that the sender's action violated the Consumer Protection Act. The trial Court approved notice to a class, required that class members opt-in, reasoning that the requirement would confirm receipt of actual notice which a trial Court believed was constitutionally necessary. So the issue before the Court of Appeal was, was the trial Court right to order opt-in rather than opt-out.

Now, Your Honours, the relevant part of the judgment I refer you to is on page –

GLAZEBROOK J:
Can you please just wait a second because I'm having some trouble finding it.

MR SKELTON QC:
Sorry, Your Honour.

GLAZEBROOK J:
It's not your fault. Right, thank you.

MR SKELTON QC:
So Your Honour, it's page 1542 and it's the judgment of President Kline in the Court of Appeal in California. Your Honour, you will see that after referring to a case called *Cooper* the Court then says, "We had misgivings whether it had been shown in this case that a significant number of individual members of the certified class have such a substantial stake that they would likely want to litigate on their own but even if they do an opt-in requirement is not necessary to protect their interests. As *Shutts* explains, (that's the US Supreme Court case,) a class member with a substantial stake should be fully capable to exercising the right to opt-out and class members cannot be given better notice of the duty to opt-in and the right to opt-out. It's not clear that everyone's interests are protected by imposition the duty to opt-in prior to the establishment of liability. Requiring plaintiffs to affirmatively opt-in will inevitably and sometimes significantly reduce the size of the class and may

therefore be seen as simply another device by which a defendant could chip away at the size of the class through exclusion of named plaintiffs at the same time reducing the class to those who acknowledge receipt of the actual notice by opting in is not necessarily in the interests of defendants because it reduces the res judicata effect of the judgment for the defendant and opens the door to a greater deal of redundant litigation."

And, Your Honour, if we go to 1550, it's 1550, it's paragraph 16 His Honour says, "The principle purpose of notice to the class is the protection of the integrity of the class action process one of the functions of which is to prevent burdening the Courts of multiple claims. An opt-in procedure does not protect the integrity of the class action process either by increasing the likelihood members of the class will actually receive notice or in any other way. On the contrary as we've seen, because it inevitably decreases the number of class members bound by the judgment and thereby increases the likelihood of redundant litigation. The opt-in approach undermines the integrity of that process. And then Californian rule 1856must be liberally construed with the view to enhancing the use of class actions as a means of vindicating rights of absent members who are unable for one reason or another personally to prosecute. The overwhelming weight of authority teaches that the opt-in approach does not enhance but undermines the salutary effect of proper class actions."

And the final case on this point where the Courts have grappled with the choice between should it be opt-in or opt-out is the *Proude* judgment that my learned friend referred to yesterday and it's electronic bundle 49, hard copy 56. And, Your Honours, you may recall this was the Australian bushfire case. The facts are in paragraphs 1 and 2 of the judgment of Justice Blue,
His Honour says that Mr Proude is suing Mr Visic and the South Australian Country Fire Service for losses allegedly caused by bushfires as a result of their negligence, and Mr Proude applied for authorisation pursuant to rule 81, that's the equivalent of our 4.24, to bring the action as a representative of landowners, and then the background facts. The fire occurred, and if we go to 10, there's 257 landowners, approximately 70,000 hectares. There are or

may be additional landowners who Mr Proude seeks to represent who hold approximately 8000 hectares of land, and then the causes of action are pleaded as 12, various negligence claims against the fire service for the fires.

Now in terms of the reasoning about should it be opt-in or opt-out, that's summarised in one paragraph at 181 of the judgment. Page 486, Your Honours, will see the heading there, "Opt-in or opt-out process." "It is common ground that the authorisation order should encompass notice to be given to group members concerning the representative action and define a procedure for group members to elect whether or not they wish to 'participate' in the sense of continuing to be represented by Mr Proude. The parties have made submissions whether the procedure to be adopted ought to be an 'opt-out' or 'opt-in' procedure. In the circumstances, I consider that an 'opt-out' procedure should be adopted." Now it's the reasoning here, Your Honours, that I think is useful. "This is principally because I cannot be satisfied that every group member is aware of the existence of the representative action or will become aware of the action before the date for election." So because the Judge can't be sure everyone will get notice, he's saying it's better it should be opt-out because it preserves their rights. He then goes on, "Nor can I be satisfied that, if an opt-in procedure were adopted, every group member who did not opt-in had made a conscious and fully informed choice not to participate in the action." Now that reason is probably more important because if you do adopt an opt-in process for this case, what you're saying is by default if you don't file your opt-in notice you lose your protections and your rights under the action. So it's the fail-safe mechanism. Opt-out in this case.

WILLIAMS J:

You may have said this and I was running around trying to find the judgment, but if it's a bush fire case presumably people's homes were burnt and stock killed and so on so there was a lot of money at stake per landowner, is that…

MR SKELTON QC:

Well, it doesn't say in the judgment how many but yes, that would be a fair assumption. There were a lot of people involved in the bush fire. There were 80,000-odd hectares of land.

WILLIAMS J:

Sure, and there are 255 landowners?

MR SKELTON QC:

Well, he was representing 255 but there were more, so he was wanting a representation order.

WILLIAMS J:

How many more, do you know?

MR SKELTON QC:

Well, it doesn't say. He was wanting to represent everybody who had suffered loss in the bush fire who chose not to opt-out, so the whole class.

WILLIAMS J:

Just you'd think that the more money there is at stake the more likely the class will be individually engaged, and the more likely people will know about it and make choices.

MR SKELTON QC:

Well, that's a fair assumption but, of course, the more that's at stake the more they have to lose if it's an opt-in. If it's an opt-in and for whatever reason the social/economic barriers that we talked about or even if they were overseas and didn't get the notice and they don't opt-in they lose their rights. So that's what the Judge was saying. You know, what's the prejudice with making an opt-out order here? Nothing. What's the prejudice with an opt-in? Well, someone might not receive the notice.

WINKELMANN CJ:

So it's 257 landholders whose land represents approximately 70,000 hectares but there may be additional landholders who Mr Proude seeks to represent who hold approximately 8000 hectares. So he already represented by far and away the largest…

MR SKELTON QC:

Yes. There is a bit more information about the class at paragraph 167 of the judgment, in the affidavit evidence there was at least 257 landowners represented by Mr Proude. "The majority are individuals or couples but they include several companies, several business names in respect of which the nature of the underlying entity is unclear. The total claims by the group members are approximately $60 million and the total claims by Mr Proude are approximately $2 million. Of the total claims approximately 40% are for damages which have been paid out to group members by five insurers. I infer that, to the extent that the insurers receive recoveries as a result of the action, the monies will be payable to the insurers pursuant to rights of subrogation." So this case may well have been instigated in part by insurers who paid out money under the fires and were trying to recover under their subrogation rights from the Fire Service, who were allegedly liable. I think the case did settle and there was quite a significant payment that was made.

WILLIAMS J:

This would in the end have become an opt-out/opt-in case anyway, wouldn't it? There'd be a stage 1 and a stage 2, logically, because everyone's damage would be different.

MR SKELTON QC:

Well, a couple of points, Your Honour. This was under the old representative rules, so it's not under the Part 4A which says it has to be opt-out…

WILLIAMS J:

Sure.

MR SKELTON QC:

So it's under the old representative rule and, yes, there would be individual issues that would need to be dealt with, and it's my friend's point about, you know, here we've got issues of reliance, there'd be all sorts of stage 2 individual issues. This fire case is a good example of that, there would be a lot of individual issues that would need to be determined, but it did not stop the Court saying the common issue should be determined under a representative action and it should be on an opt-out basis.

Now, Your Honours, just turning then to my next point. Defendants prefer opt-out because it reduces the class, it produces a smaller class size, limiting the potential exposure if they're found liable and –

WILLIAMS J:

Sorry, can you just repeat that submission? They prefer opt-out procedures because it…

WILLIAMS J:

You meant "opt-in", didn't you?

MR SKELTON QC:

Oh, yes, sorry, I've made a mistake there. Yes, Your Honour, you're correct.

Defendants prefer opt-in because it produces a smaller class size, thus limiting their potential exposure if they are found liable.

WINKELMANN CJ:

So what you mean by that is it's likely to result in more claims falling by the wayside, good claims?

MR SKELTON QC:

Yes. So, you know, opt-in in this case, there's approximately 200 people who have signed on to GCA's terms of engagements and funding agreement. So, you know, if let's assume they recover a hundred thousand each, it's a

$20 million claim. On the other hand, if it's opt-out and there's 3000 people and not many opt-out, we're talking about a $300 million claim. So that's what I'm saying, that opt-in, that's why defendants like it because it usually leads to a smaller amount of liability.

Now, Your Honours, the next issue – I just want to take you to the Morabito article, which is, it's 38 of the hard copy, Your Honours.

GLAZEBROOK J:
Of which volume?

MR SKELTON QC:
Of the respondents' bundle. It's 139 on the electronic bundle, volume 5, tab 38 of the hard copy bundle. Now this was the article that appeared in the New Zealand University Law Review, it's the article by Professor Morabito who is a professor at Monash. *Opt-in or opt-out? A Class Dilemma for New Zealand*. So he was responding to the recommendation by the Rules Committee in 2008 that the country should have a discretionary system that allowed both opt-in or opt-out, and the introduction of his article he says, "The aim of this article is to provide a critical evaluation of one of the most important and unique features of the class action regime proposed by the Rules Committee, namely, the conferral on trial Judges of the power to decide, with respect to each class action proceeding, whether membership in the group of claimants represented in the litigation is to be determined via an opt-out or an opt-in device."

If Your Honours have had a chance to review that you'll see he's quite critical of that proposal and he says that it will lead to unnecessary interlocutory scraps and appeals and it will cause all sorts of uncertainty. Note Professor Morabito is absolutely correct on that, and it's something that the Court needs to be very guarded about, and certainly the Court of Appeal was aware of the problem where you have a discretion, is it opt-in or is it opt-out, it can lead to satellite litigation, like this case has, where two years goes on and we're nowhere nearer getting to the merits of the case. But

Your Honours I just want to take you just to the evidence issues that Professor Morabito refers to, and it's on page 437 of his article, it's a heading "Empirical evidence". Do Your Honours have that?

WINKELMANN CJ:
Yes.

MR SKELTON QC:
Page 437, "Empirical evidence." So he first of all just talks about the US situation. "Empirical evidence available from the United States demonstrates that the implementation of an opt-in requirement dramatically reduces the size of the represented class." He sets out there how the evidence as to class sizes being reduced very significantly. But further down the page on page 438 he then refers to what he calls, 'A vivid illustration of the impact that judicially imposed opt-in devise have had on the sizes of… classes." And he refers to the case of *King v Attorney-General Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*, the first successful shareholder class action matter. Just in passing, Your Honours, Bernard Murphy was the counsel for the plaintiff group in that case from the first class action, shareholder class action cases, that's the Justice Murphy that we've heard about, but in the proceeding Justice Moore of the Federal Court ordered that a form called form C be sent to 25,806 class members who hadn't specifically instructed the class representative solicitors to act on their behalf. So that was a form really wanting contact details to identify the class. Now they were the unrepresented class members. So the ones that weren't represented by Maurice Blackburn. So send them the form sending notice to those people who had not opted out from the proceedings. The legal effect of this form was, as His Honour himself later acknowledged, to create an opt-in process. So this class had started off as a usual Australian opt-out class action under Part IVA but by making that order, the please fill out to form with your name and contact details and send it back, the Judge had created an opt-in process. This is because class members who received this form were advised that they needed to fill out and return the form by a certain date in order to continue as a class member. Only 7.58% of the unrepresented class

members returned the form within the specified time. The class representative solicitors completed the form on behalf of the 21,142 class members who had entered into conditional fee arrangements with them. So no funder involved but the lawyers were funding it on a conditional fee basis.

WILLIAMS J:
So that 21,000 was in addition to the 25,000?

MR SKELTON QC:
Yes. The practical effect of this order was thus to dramatically reduce the number of unrepresented class members who would benefit from a successful outcome of the class proceeding while leaving unaltered the number of represented class members. Several months later a successful result was indeed achieved for the class as a result of a settlement agreement that was approved by the Court. So within a few months it settles. All of those people who didn't send back their form missed out on what was a multi-million dollar settlement, and it was because the Judge had converted it into an opt-in at that stage.

Now Professor Moribeto briefly talks about *Feltex* and how initially only 10% opted in. In, the respondents' submissions there is a graph that showed that over time that number did increase. Over the years more and more people did opt-in but that was only because the Court kept extending the opt-in date. If it had relied on that initial opt-in date, and that was it, only 10% of the people would have been in the class, and the article goes on, "The empirical data also confirms that the same non-economic factors that prevent claimants from filing individual proceedings also preclude the taking of other forms of affirmative action, such as opting-in." And American studies for instance have revealed instances of class members failing to comprehend the Court approved notices that they have received regarding class actions. Talks about confusion with respect to such matters, as whether class members are liable for costs. If you're an individual and you get a letter with a form with a High Court sign on it and say you've got to fill in this form and send it back

and opt-in, one of the first matters that might give you pause of concern is, am I going to be liable for any costs that occur here. I might not do anything today with that form, and so don't opt-in. Now I don't know whether that's the reason that only 7% of people returned the form or not, but that's one of the problems with the opt-in process and why, in my submission, the opt-out process if preferable.

WILLIAMS J:

I see the Danish law provides for options and explains why it's referred to in Morabito there, but Morabito doesn't refer to any statistics in respect of what's happened in Denmark. Do you know anything about that?

MR SKELTON QC:

I can't help Your Honour on that, I'm not sure what's happening there, but he certainly thinks that while the 2008 Rules Committee Report was a huge step forward, and in many ways addressed some of the problems that the Australian legislation had, he was critical of the discretionary choice issue. But Your Honours we are where we are. Our rule does provide a discretionary choice. So we do have that position and so Your Honours will need to give some guidelines, I submit, as to how that choice is to be exercised to try and avoid the interlocutory scraps that often happen around that matter.

WILLIAMS J:

What do you say to Morabito's reference to someone else's point, that the larger the individual claims the less beneficial an open class is because the taxation process is higher for them and that if they had run the case, if the number was big enough, individually they'd have got more. You see that at page 431, the bottom of the page there?

MR SKELTON QC:

Page 431 Your Honour?

WILLIAMS J:

Of the Morabito article. "… the holders of very strong individual claims are likely to receive less compensation in a successful class action than what they could reasonably expect to receive in an individual litigation, assuming that they would be able to (and it would be financially rational to) file individual proceedings." So the bigger the claim individually the less useful an open class is in terms of a final outcome because the funder takes so much.

MR SKELTON QC:

Well, Your Honour, with respect I'm not sure I agree with that analysis because –

WILLIAMS J:

You don't owe me any respect, I'm just reading what Morabito says.

MR SKELTON QC:

Yes, but if you're asking me to comment on it.

WILLIAMS J:

Yes.

MR SKELTON QC:

Then, you know, if you do have a very large claim, well yes you might be able to bring it individually because after paying the legal costs of doing so it might be economic for you to pursue an individual claim, whereas for others who had small claims clearly it's not a practical option, but whether you recover more net in your hand at the end of the day than pursuing it through a class action would be debatable. The whole benefit of class actions is it allows you to spread the cost of the litigation over a much wider group.

WINKELMANN CJ:

Well that's if it's not a fixed percentage but if you have a very large claim, say, if you have a million dollar claim and there's going to be a fixed percentage is paid to the funder that's their dream scenario, all these claims because of their

barriers to access to justice, poorly motivated to bring yet they are actually good claims, so that point may well stand in that scenario, mightn't it?

MR SKELTON QC:

That is so and, Your Honour, with opt-in you're protected because with opt-in that individual with the very large claim will say, "Well, I think I will opt-out and I will instruct my own lawyers and I won't sign onto the litigation funding agreement. So opt-out gives –

GLAZEBROOK J:

Actually probably piggyback on the class action claim and let them do the majority of the work in fact.

MR SKELTON QC:

Possibly, but opt-out gives them that choice so, you know, you don't have to be in the class, you can chose to pursue it yourself if you think you can negotiate a better settlement or you don't want to pay the commission you opt-out, so it's doesn't prejudice people who have large claims.

O'REGAN J:

Counsel yesterday took us to a case where I think there was 92% opted in, are you aware of that case, the case against the ANZ Bank and I think that's a recent New Zealand case, I just wondered whether you wanted to comment on that. That would seem to indicate it's not that hard to get people to opt-in.

MR SKELTON QC:

Well that's the *Ross* asset case I believe was what my friend was referring to. Shareholder class action case or investor class action cases, it is obviously going to be easier to be able to approach the class because, why? Well usually there's a share register or you've can get contact details. So it is possible to do that.

Where you're dealing with other types of class actions, like consumer class actions or in this case there's no community of interest here, people have their

houses were damaged, some of them have gone overseas, whatever reason, it's a lot harder to be able to build a case.

WINKELMANN CJ:

Ross Asset Management one assumes would be a level of sophistication plus a pretty well understood wrong in that case.

MR SKELTON QC:

Yes, and that might be an example where there's no downside of having opt-in but I put it the other way around, what is to be lost with making that an opt-out class action, what's the prejudice in that situation, you know, if there are some of that group, the 8% who don't want to be part of it they can opt-out and do what they like but, yes, Your Honour, we should not assume that all class actions are the same is my point.

O'REGAN J:

I think Mr Weston's point would be that they haven't had to come to the Supreme Court to get their case off the ground because they're going down a well-worn track where the position is clear.

MR SKELTON QC:

Yes, whether they would have gone down the same track if the Supreme Court had said that opt-in was available or not who knows. At the moment until this case was bought every, well not everybody but there was an assumption that Justice French had said opt-out couldn't be pursued in New Zealand until there was legislative change and so it's not surprising that since Justice French's judgment cases have proceeded on an opt-in basis but now if this opt-out approach is adopted I'm not saying there won't be cases like Asset Management where it might be just as easy to go down an opt-in approach, that's true. Shareholder class action claims may be a good example of that but consumer class action claims, claims like this where it's difficult to get contact details, opt-out is the failsafe that protects people from missing out on their claims.

ELLEN FRANCE J:

Mr Skelton, what do you say in terms of the empirical research about the notion that things are different here given New Zealand's much smaller size than, say, Australia or the United States?

MR SKELTON QC:

I'd say there's no evidence at all to say that the market here is different from Australia or US in that regard.

WILLIAMS J:

LPF says it is. Strictly speaking that's evidence.

MR SKELTON QC:

Well, it's a submission that is not based on any evidence, Your Honour.

WILLIAMS J:

No, it's not a submission. It's an affidavit.

WINKELMANN CJ:

They've experienced the market?

MR SKELTON QC:

Yes.

WINKELMANN CJ:

Yes, so I don't imagine they have. I don't know. I don't think there's any evidence they have experience of the American or Australian markets.

MR SKELTON QC:

No. The incumbent funders in these jurisdictions are quite amenable to opt-in type actions. You saw, for example, in Australia, and the reason for that is that they have machinery available to go about book building and going through those particular processes. So that may give them a market advantage compared to an opt-out regime where other funders come into the market and start competing against them.

ELLEN FRANCE J:

I'm interested in – you make a submission that lack of knowledge is a problem in terms of opting in and what I'm interested in is what there is to support the fact that in New Zealand this is a problem, such a problem that there should be a shift to opt-out.

MR SKELTON QC:

Well, the Morabito article, for example, cited *Feltex* as an example of that where, you know, only 10% opted in. Now as we say in our submissions, over many, many years the numbers did actually increase but still a very large number of shareholders didn't opt-in. So that's one example.

WINKELMANN CJ:

Is your point though that our market is an immature market and so we don't actually have that much experience yet?

MR SKELTON QC:

Yes, Your Honour, that is so.

WINKELMANN CJ:

And a lot of this research suggests it's basic human psychology as to why there is this different outcome.

MR SKELTON QC:

Correct. The socioeconomic barriers that have been identified, there's no reason to think that they don't exist in New Zealand as they exist overseas.

GLAZEBROOK J:

Would you say too that we don't necessarily look at it from the position of funders because class actions can happen in a number of ways, everyone chucking in 20 bucks or crowd-funded or whatever the issue may be in the future and, frankly, to be looking at it from the position of commercial funders may actually be blinkering us.

MR SKELTON QC:

I think that's a particularly strong point. The Court needs to have the focus not on funders. The Court needs to have the focus on the class membership. What is in the best interests of class members here, not funders. Yes, I'm sure from a funder point of view opt-in that requires them effectively, requires them, to sign on to the litigation funding agreement, a lot of funders would like that and then the choice of the class member is if I want to participate I have to sign on to their 25% funding agreement. You know, funders would like that but looking at it from the point of view of the class, opt-out, where they don't have to sign on to a litigation funding agreement, is superior. Now it's not to say that at the end of the day there won't be some cost-sharing mechanism where someone who benefits has to pay a fair share but you're not forcing class members to sign on to a funder's funding agreement as the only option of bringing their claim. So Your Honour's point is well made. It's the focus should be on what is in the best interests of the class members, not what is in the best interests of funders.

ELLEN FRANCE J:

But in that scenario the person who doesn't opt-out, doesn't sign up to the litigation funding agreement, doesn't know what their potential cost liability is because they have to wait until the end until the common fund order or whatever is made.

MR SKELTON QC:

That appears to be one of the outcomes of *BMW*. That's what the Federal Court was trying to avoid by having an early stage common fund order. But remember, even under the *Money Max* early stage common fund order what the Court was saying is, "I'm not going to say that you have to pay the fund commissioner's 25%." Quite the contrary. Under that process you will get funder a reasonable fee determined by the Court at the end of the process. But Your Honour's point –

GLAZEBROOK J:

And also you don't pay anything until the end of the process, it's just deducted from whatever you would have got, would not have got if you hadn't been part of the class, so you've got an advantage.

MR SKELTON QC:

Correct. The class members never pay anything unless they're success, so they're not exposed to anything. There has to be a recovery before anything is paid. But Your Honour's point is a good one, I mean, that is one of the advantages the full Court of, the Federal Court in Australia had for saying early common fund orders are preferable, because it give funders certainty, it's the point about, you know, are they going to get a commission, are they not? It mightn't give them certainty as to the exact percentage but the Court held that under that 33ZF provision there wasn't power to make that order, and whether that's the position in equity in New Zealand is another story. But –

WINKELMANN CJ:

So when the information's provided to enable claimants to opt-out are they given an indication about the level of percentage that the funder seeks?

MR SKELTON QC:

Yes, Your Honour, they are. There is a standard form that's been developed in the Federal Court of Australia for opt-out, it's in the guidelines to avoid a lot of scraps arguing over what should happen, there's just a standard form. But you have to describe those sorts of matters as part of your form that goes out so that they have a choice, "Do I stay and do I opt-out?"

Now, Your Honours, I'd like to perhaps move on to point 5 of the outline: should the Court permit an opt-out approach in the absence of detailed rules? Because I apprehend that this is my learned friend's main point, is that that, you know, while, yes, "The Court does have jurisdiction, to make an opt-out order, it should not in the absence of a detailed regulatory regime, we should do nothing and wait for the Law Commission to give us guidance." Of course

the Bar Association and the New Zealand Law Society set out the timelines in relation to the 2008 recommendation, it can take a lot of time, the Law Commission isn't going to report back until the end of 2021, then there'll be the pollical process, whether it will ever get enacted, who knows.

The first bullet point I've made under 5 is that the Court has jurisdiction to make opt-out orders under rule 4.24 and that's not being appealed and, Your Honours, I'm not proposing to set out the reasoning for that unless you would like me to address you, because I don't understand that being the – it's common ground that there are the jurisdiction to make opt-out orders. But I have set out there in the outline the passages from the judgment and the submissions that deal with those matters. So I'm proposing to move on unless there's any questions around jurisdiction? No.

So while most people anyway agree that a detailed legislative regime might be preferable, in its absence the Courts must apply the existing rules and to fill the gaps.

Now the key decision I want to take you to is the Supreme Court judgment, the Supreme Court of Canada in *Dutton* and I do that, Your Honour, because the Court of Appeal relied quite heavily on that judgment in terms of its reasoning in the decision. And it's in the represents' electronic bundle at 58 and it's tab 18, volume 2. So if Your Honours have that?

WINKELMANN CJ:
Is the first word in the case name *Dutton*?

WILLIAMS J:
Western Canadian.

MR SKELTON QC:
It's *Western Canadian Shopping Centres v Dutton*, yes.

WINKELMANN CJ:

Right. So just, our cases are just simply organised alphabetically.

MR SKELTON QC:

Oh, okay. Sorry, Your Honour.

Now, Your Honour, the facts are at paragraph 9 of the judgment, it's an investor class action alleging breach of fiduciary duties to investors by mismanagement of their funds. And at 10 Your Honours will see that the relevant Alberta Rules are set out, or the rule is set out there. It's even shorter than our 4.24. So not a detailed class actions 4 rule, it's based on the old common law rule. Numerous persons have a common interest in the subject of the intended action, one or more persons may still be sued or may be authorised to defend on behalf of all. No machinery provisions attached, just that simple rule. Now the defendant's application is at page 543 of the judgment and they applied to the Court of Queens Bench for a declaration, an order striking that portion of the amended statement of claim, in which the individual plaintiffs purported pursuant to rule 42 to represent a class of 231 investors. So the case was over whether it could proceed as a class action. The issues on appeal, that's at page 545, they're listed and then there is a detailed history and function of class action, that's page 545 to 549, which goes through the equitable origins of the rule, and the basis for it. The advantages of class actions are set out in 549, page 549, I won't go through those. They're the usual ones of judicial economy, access to justice, allowing the fixed litigation costs to be divided improves access to justice by making economical prosecution of claims that would otherwise be too costly to pursue individually.

At paragraph 29 at 550 is the general deterrence objective. Then if we go to page 551, this is the argument that Mr Weston was pursuing, now absence a comprehensive code the Court must fill the void under the inherent power to set the rules of practice. So the Court set out here again rule 42 and says that details of class action practice, however, are largely left to the Courts, nor does it specify how notice of suits should be conveyed to potential class

members, or how a Court should deal with the possibility that some potential class members may desire to opt-out. Clearly it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means the Courts are forced to rely heavily on individual case management to structure class proceedings. Then at 34, on the next page, absent comprehensive laws the Courts must fill the void under their inherent power to settle the rules of practice and procedure. As to disputes brought before them. So the Supreme Court of Canada is saying that's' the source of the power. It's the inherent jurisdiction to settle practice and procedure for cases brought before them, and of course that's the historical basis of the equitable developments of class actions. Then at the bottom of that paragraph, "However desirable comprehensive legislation or class actions may be, if such legislation has not been enacted the Courts must determine the availability of class actions and the mechanics of the class action practice.

Now if we then go to paragraph 44 on page 556, the Court there talks about the Court must balance efficiency and fairness, and Your Honours will recall that this is a theme that comes through in our Court of Appeal judgment. "Where the conditions for a class action are met the Court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner… the court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause." Must strike a balance between efficiency and fairness.

And then Your Honours, if we go to paragraph 49 on page 558, the rationale for opt-out notice is discussed there. "Other procedural issues may arise, one is notice. A judgment is binding on class members only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceedings. This case does not raise the issue of what constitutes sufficient notice, however, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve and of the right of each class member to opt-out and that this

be done before any decision is made that purports to prejudice or otherwise affect the interests of class members."

Another procedural issue that may arise is how to deal with noncommon issues, so this is the individual issues. "The Court retains discretion to determine how the individual issues should be addressed once common issues have been resolved and then the diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise in the absence of comprehensive class action legislation the Court must address procedural complexities on a case by case basis. Court should approach these issues as they do questions of whether a class action should be allowed in a flexible, liberal manner seeking to balance between efficiency and fairness."

WILLIAMS J:
I think Mr Weston said, I maybe misrepresenting him, I maybe completing misrepresenting him but I think he said that you've got to read this judgment in the context of a country with a culture of class action litigation in which in most cases provinces and Federal have actual rules and it's not surprising that Alberta follows suit in that context, I think that's what he said.

MR SKELTON QC:
Yes Your Honour, he may have but Alberta at that time did not have comprehensive class action rules.

WILLIAMS J:
No.

MR SKELTON QC:
And the point is that the Court –

WILLIAMS J:
But the point is it was a small jump for Alberta given what was going on around it.

MR SKELTON QC:

Well, yes, but the Court couldn't just stand back and do nothing, it had to fill the gaps and how did it do that? Under its inherent power and jurisdiction to regulate procedures before it and that's –

WILLIAMS J:

I would have thought you might be able to say that that dynamic is rather similar to the dynamic between New Zealand and the Australian states and the Federal situation.

WINKELMANN CJ:

I'm getting worried about your progress, Mr Skelton.

MR SKELTON QC:

I've covered a reasonable amount of the end of it already so we're actually not doing too badly, Your Honour. Moving on then –

WILLIAMS J:

So what do you say to that point?

MR SKELTON QC:

Sorry, Your Honour, I just lost that. Can you repeat the question?

WILLIAMS J:

Well I just wonder whether the dynamic there is rather similar to New Zealand's dynamic here.

MR SKELTON QC:

Well I certainly think that it would be desirable for New Zealand to align itself or have a similar regime to its neighbour with closer economic relations, particularly, you know, shareholder class actions. Often the shares are listed on both the Australian Stock Exchange and the NZX and it would be desirable but that said, our rule is a discretionary rule and –

WILLIAMS J:
Yes, you don't need to repeat that, you've said that several times already.

MR SKELTON QC:
Yes, we have to go down that process. Okay.

My junior tells me that back in 2000 in Canada only two provinces had class action rules at that stage, most of the other provinces were still working under the old rule.

Now moving on then to the issue of natural justice, procedural fairness, individual autonomy arguments. My learned friend puts this in the context of section 27 of the New Zealand Bill of Rights Act and the first response is to say that adopting opt-out does not breach section 27 of the Bill of Rights Act because class members still have the right to be heard albeit via their representative or they can, of course, opt-out and pursue their own class, their own case.

O'REGAN J:
What if they don't know about it?

MR SKELTON QC:
So my learned friend then has to fall back on the argument that there may be a group of people who don't in fact get noticed. This is his absent plaintiffs argument. Now in terms of the Act, I would say that section 5 of the Act is the answer because opt-out is demonstrably justified in a democratic society to ensure the objectives that have been identified for class actions on an opt-out basis, access to justice, efficiency and deterrence. So that's the first point.

The second point is to say that these arguments about natural justice or, as they call it in the cases, "due process", have been run in the US Supreme Court and in Australia, in the High Court of Australia, and they have both been soundly rejected as a basis for not allowing opt-out.

I can briefly deal with this matter by going to the US Supreme Court case, the *Phillips Petroleum* case and that's *Phillips Petroleum v Shutts* at 98 of the respondent's electronic bundle, 22 of the hard copy volume 2.

GLAZEBROOK J:
22 did you say?

MR SKELTON QC:
Do Your Honours have that? Tab 22, volume 2, or electronic 98.

GLAZEBROOK J:
No, I will be able to find it. So what's the name of the case again, sorry?

MR SKELTON QC:
Phillips Petroleum v Shutts. So Phillips Petroleum produced or purchased natural gas from leased lands located in 11 states and the respondents were the royalty owners possessing the rights under the leases and they brought a claim as a class action against the petroleum company in the Kansas State Court, seeking to recover interest on royalty payments and there were 33,000 royalty owners and those royalty owners were located right across all of the different states. So it comes to the Supreme Court on a jurisdictional issue as to whether the Kansas Court had jurisdiction over claimants who resided in other states and weren't personally residing in Canada and the allegation was that the due process provisions of the constitution meant that the opt-out approach that had been adopted by the Kansas Court wasn't appropriate.

Now page 812 of the judgment, the Chief Justice of US Supreme Court says, 812, it's about half way down, Your Honours, "We reject the petitioner's contention that the due process clause of the Fourteenth Amendment requires the absent plaintiffs affirmatively to opt into the class, rather than to be deemed members of the class if they do not 'opt-out'," and at the bottom, "We think that the procedure followed by Kansas, where a fully descriptive notice is sent by first-class mail to each class member…satisfies due process. Requiring a plaintiff to affirmatively request inclusion would probably impede

the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claims may be so small, or the plaintiff so unfamiliar with the law that he would not file suit individually nor would he affirmatively request inclusion in the class if a such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate on his own, he will likely have retained an attorney or have thought about filing suit and should be fully capable of exercising his rights to opt-out." And then further down, "We think that such results would show that the opt-out procedure provided by Kansas is by no means pro forma and that the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an opt-out form but whose claim is nevertheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so," and they therefore hold that the protection afforded the plaintiff class members by Kansas statute does satisfy due process.

And in the Australian case, Your Honour, the *Mobil Oil Australia v State of Victoria* (2002) 211 CLR 1 case that went to the High Court of Australia, which is tab 55, electronic copy 44.

GLAZEBROOK J:
Have we got that in the other version? As it really is difficult looking at this.

MR SKELTON QC:
It's, the hard copy, it's tab 55 in the hard copies, Your Honour, in the respondents' volume of documents.

GLAZEBROOK J:
For some reason the way it's set out makes it really difficult to find.

MR SKELTON QC:
So this was a –

GLAZEBROOK J:
Electronically, I mean, sorry.

MR SKELTON QC:
Do you have that, Your Honour?

GLAZEBROOK J:
Yes, I do now.

MR SKELTON QC:
So constitutional challenge to the validity of Victoria's state class action regime. So they were saying the class action regime in the state of Victoria is repugnant to the exercise of the judicial power in the constitution and therefore invalid, that was the issue that went to the High Court, and it's based on this argument that there may be these absent plaintiffs who don't get noticed and get swept in. And the relevant paragraphs are 44 to 51 of the judgments of Gummow and Hayne, it's on page 34.

So, "Mobil contended that it was necessary to decide in this case the extent of the territorial limitations on a state Parliament and that, so far as relevant to this case, those limitations stemmed from the nature of a federation," et cetera. "This is not an accurate representation of the operation of Part 4A. The provisions of Part 4A do not seek to make the Supreme Court of Victoria a national Court. They do not deny anyone the opportunity to institute proceedings in any other Court. A group member is not a plaintiff. It is right to say that a judgment obtained in the proceeding would bind those who had not opted out, but to say that such persons had 'no control' over their part in the proceedings falls well short of fully describing the way in which Part 4A works." So it's the fact that you have a representative plaintiff whose interest is aligned with yours who can bring the case on your behalf, that is the guarantee of your natural justice rights, that means that you have that opportunity to be heard before the Court, if you don't you can opt-out, no breach of the due process rights.

WINKELMANN CJ:

So on opt-out procedure the form of notice is critical, is it?

MR SKELTON QC:

Well, both opt-in and both opt-out are crucial that the form of the notice tells people what their rights are so they can make an informed choice. But the rubber hits the road in that, as the Supreme Court said, that rare species of case where someone with a large claim, economically able to pursue it themselves, might not get the notice for some reason. Are their natural justice rights infringed in that situation? Well, if it's a large claim it's likely that they will be aware of it and have attorneys and could pursue it individually. If they don't, what happens? Well, in practice what happens is they come to the Court. They say, "I didn't opt-out within the timeframe required. That's because I in fact didn't get the notice. I wasn't aware," and they ask the Court to have leave that they can opt-out and go their separate way, and unless there's any good reason to say no leave is usually granted. So in practice there's very little prejudice here. It's just like a default judgment entered against the defendant and then the defendant comes along to Court and says, "Oh, well, I wasn't aware of the Court proceedings." Well, usually it gets set aside.

Your Honours, I make the point that an opt-out approach does not deprive class members of autonomy. It protects the individual's autonomy by allowing the class member to opt-out.

The chance of any class member actually being prejudiced by an opt-out approach is extremely small and, Your Honours, I refer there to the respondent's submissions at paragraph 74. The risk that some may not receive notice cannot be entirely eliminated, we accept that, but it needs to be assessed realistically. A class member who does not receive notice falls into one of three categories. They either want to participate in the class action, in which case no harm is done to them, or they do not want to sue the appellant at all, in which case they can decline to take any further steps at stage 2. They just don't go ahead and seek their individual claims. Or if, 3, they

wanted to bring their own individual claim might being “swept in” could be a problem but anyone who is thinking about bringing a proceeding against Southern Response is extremely likely to have heard about the class action one way or the other, and should therefore be capable of opting out. Even if such person fails to learn about the class action until after the date for opting out, they would undoubtedly learn about it once they file their individual proceedings, at which point they could apply to the Court for leave to opt-out late, and such requests are routinely granted overseas. So from a practical standpoint, the real risk of actual prejudice is very small. It pales into insignificance when compared to the risks associated with failing to receive the notice (or to act on it in time) under an opt-in approach. That is particularly prejudicial, Your Honours, because you can then lose your rights.

So comparing the risks and consequences, where is the prejudice with the opt-out approach that’s being advocated for by the respondents in that case? That’s the question. Now Your Honours, is that a good time to take a break?

WINKELMANN CJ:
Yes. So where are we up to then?

MR SKELTON QC:
We’re up to point 7 of the outline, “Participation in stage 2.”

WINKELMANN CJ:
And when are you handing over to Mr Quinn?

MR SKELTON QC:
I’m handing over to Mr Quinn after I’ve dealt with the guidelines, Your Honour, at the end, suggested guidelines, and he’ll be briefly addressing the Court on the submissions by the interveners.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.48 AM

MR SKELTON QC:

Your Honours, I'm up to point 7. Participation at stage 2, this is the argument by Mr Weston that, well, class members have to opt-in at stage 2 so why shouldn't they have to opt-in at stage 1. Well the answer is succinctly recorded in the Court of Appeal's judgment at paragraph 118, and I will just rely on that reasoning where the Court said that, "If anything we consider that the case for an opt-out approach is stronger in this proceeding than in many other representative proceedings because of the acknowledged need for claimants to opt-in at stage 2 if they wished to obtain compensation. The need for an election to participate in the proceeding can be deferred until after stage 1. At that point the implications of a choice to participate in the claim and the potential advantages and any disadvantages of doing so will be clearer and more immediate. The class members will be better placed to make that choice, meanwhile their interests will have been protected by inclusion as representative claimants in stage 1 of the proceeding." So that's the key point that there's the opt-in at stage 2 in the sense that, yes, they will have to take active steps if they wish to prove their claim. They can be deferred and by that stage they will have the benefit of a High Court judgment, more information to make an informed choice as to whether they go ahead or not and that's the preferable option.

That point is made in the *Kern v Siemens* 393 F 3d 120 (2nd Cir 2004) which I have cited there. I won't bother taking you to it but it's a decision of the US Court of Appeal and it makes the fundamental point that there is a distinction between requiring class members to take active steps after the judgment on common issues or to participate in a settlement and requiring class members to opt-out or register prior to judgment and that was the GIO case I was telling you about where the Judge I think regretted at the end of the day that he required a notice to be sent out and returned and converted into opt-in and all those people missed out on their settlement share.

So moving on then to point 8, some of the specific procedural concerns that my friend has identified if opt-out is the correct approach. He talks about notice. Your Honours, the only point I want to highlight here is the judgment in the *Houghton v Saunders (Lifting of Stay for Limited Purpose)* (HC Christchurch, CIV-2008-409-0348, 19 May 2010) I've referred to, *Houghton* lifting the stay for limited purposes. Justice French was required to review the opt-in notice in that case and at paragraphs 25 through to 73 of that judgment you will see she goes through in some detail reviewing the opt-in notice and making adjustments as required. So if the Court has power to review an opt-in notice then I submit it also has the same power to review an opt-out notice if required.

Termination and substitution, yesterday Your Honour there was reference to the *Tamaki* judgment by my friend and you will recall that was an application to set aside a notice of discontinuance and to substitute Ms Apatari as the representative plaintiff in that case and the Court had power and jurisdiction to do that. I've cited also a decision of Lord Denning in *Moon v Atherton* [1972] 2 QB Birthday 435 (CA) where similarly the representative plaintiff wanted to discontinue the proceeding. The Court allowed a substitute plaintiff to step in for the class and to continue the process and we've got a High Court rule 4.56 that specifically gives the Court power to add and substitute parties in appropriate cases if it is necessary and that's the equivalent rule in the UK the Lord Denning used in the *Moon* case, so no difficulty with substituting plaintiffs if the justice requires it, I submit.

Settlements we discussed yesterday. There's just two points I wanted to follow up on in relation to that discussion. There was a suggestion yesterday that the *Eaton* case and the *Haparangi* case were trust cases not representative proceedings. Well Your Honours if in the bundle of authorities we have the actual decisions in the High Court where representation orders were made under rule 4.24. I won't take you to those but I will give you the reference. In the *Eaton* case the representation order was made in a case called *Harding v LDC Finance* HC Christchurch, CIV-2008-409-1140, 19 November 2009. It's in the respondents' bundle of documents, electronic

bundle at 14. The *Haparangi* judgment, the representation order was made in the judgment at that time called *Stirling v Attorney-General* HC Wellington CP 161-96, 27 May 1998 and that's in the respondents' bundle of authorities at 33. So clearly they were representative preceding cases.

WILLIAMS J:

Yes, but *Haparangi* was actually a trust. They might have got a representative order but they were all beneficiaries of the Haparangi A4 Trust, that was the point.

MR SKELTON QC:

Yes, but the action before the High Court was being pursued by plaintiffs on behalf of all of the beneficiaries in that Trust and…

WILLIAMS J:

Well, actually, on behalf of beneficiaries who had lost their shares by dint of the Crown, I guess, or the Māori Trustee, acquiring them compulsorily.

MR SKELTON QC:

Settling it, yes.

WILLIAMS J:

But in any event the asset was trust land.

MR SKELTON QC:

Yes.

WILLIAMS J:

And the Crown had acquired a whole pile of shares in it. So it's a little…

MR SKELTON QC:

Well, that –

WILLIAMS J:

This isn't your standard representative case.

MR SKELTON QC:

No, Your Honour, I certainly accept that by the time it came to your attention it was about implementation of the settlement that had been achieved and whether –

WILLIAMS J:

No, I mean it wasn't a standard representative case from the start because it was about the Crown's acquisition of shares in trust land.

MR SKELTON QC:

Okay.

GLAZEBROOK J:

I'm not quite sure why that makes it not a representative action if you have somebody representing all of them.

WINKELMANN CJ:

You're saying it wasn't – the orders weren't – they weren't acting as trustee? They weren't simply bringing the proceedings as trustee? They sought orders under rule 4.24?

MR SKELTON QC:

Yes, Your Honour, and that's the, that reference to the electronic bundle, respondents' electronic bundle, 44. The *Stirling* case is where the order was actually made, the representation order, in that particular case.

WILLIAMS J:

Can I delay you just briefly? Can you give me the number again of that in the electronic bundle?

GLAZEBROOK J:

33.

MR SKELTON QC:

Yes, I can, Your Honour. It's *Stirling v Attorney-General*, respondents' electronic bundle authority 33.

ELLEN FRANCE J:

Mr Skelton, could I just check, in terms of the overseas jurisdictions where there's opt-out, do any of those deal with approval of settlement under a rule equivalent to 4.24?

MR SKELTON QC:

My junior tells me there's a case called *The Saragossa and Mediterranean Railway Co v Collingham* [1904] AC 159 (HL) which is the English equivalent of rule 4.24 where the matter is dealt with. In fact, I can take you to that point.

ELLEN FRANCE J:

That's fine though. It's –

MR SKELTON QC:

I'll get to that now because this is the last issue I want to deal with under the settlement heading.

WINKELMANN CJ:

Mr Skelton, just before you do, I just looked at *Stirling* and it seems that the decision was taken not to bring the claim through the Trust because they only represented current owners, so it was – the proceedings were instituted on behalf of current and former owners.

WILLIAMS J:

By definition it was the former owners who'd lost their shares and they wanted to establish a charitable trust to represent the interests of those former owners and the representatives were all themselves trustees.

GLAZEBROOK J:
That runs into the same *Stafford* problem that we had in terms of new – so I can understand why they weren't representative in that case.

WINKELMANN CJ:
Right, you were taking us to something?

MR SKELTON QC:
Yes, it was the last point under the settlement power because yesterday there was discussion around where is the power or jurisdiction in order to distribute funds that are required under class actions, and I wanted to just go back to the *BMW* judgment that my learned friend took you to which is tab 12, Your Honours. Tab 12, the *BMW* judgment, and it's Justice Gageler's, paragraph 111. So Your Honours have that? It's half way down in paragraph 111. It refers there to the equitable jurisdiction to order expenses be paid out of the fund. It says the Court, as a Court of law and equity should have power to order the fair apportionment of those expenses is consistent with the power historically exercisable by a Court of equity in doing justice as between a party and the beneficiaries in the litigation."

And you'll see footnote 115, that's the reference there to that decision that my learned friend was referring to, *Sprague v Ticonic National Bank* (1939) 307 US 161 at 167. "The Court's discretion extends to ordering the expenses, including but not limited to legal costs, incurred by the representative party be paid out of funds distributable amongst the represented class. And there was no reason in principle why the Court could not make such an order prospectively in anticipation of funds distributable amongst the represented class coming into existence as a result of the representative proceedings." And of course, Your Honours, that's like Beddoe orders that are made in trust cases where proactively trustees can get orders that their costs are payable.

Now the cases that are referred to there, House of Lords decision, *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 (HL), again that's going back to the equitable powers of the Court to distribute funds

amongst class members, and that's the power that's relied on. Justice Edelman comments on that issue at 183 where he talks about the origins of the cost-spreading orders, “Not statutory but deprived from Courts of equity,” it’s 183, where he discusses the origins of the fund equalisation orders being derived from the Courts of Chancery, and again cites a House of Lords, an older House of Lords decision, to that effed.

So unless there’s any further questions that would be the –

GLAZEBROOK J:
You did mention a case in relation to settlement and then didn’t get round to telling us where it was, the English equivalent, *Sara* something or other?

MR SKELTON QC:
Yes, Your Honour, it’s cited at paragraph 111 of the *BMW* judgment – sorry Your Honour, I misled you there. It’s 79 in our electronic bundle…

WINKELMANN CJ:
What’s the name?

MR SKELTON QC:
The Saragossa and Mediterranean Railway Co v Collingham, it’s a House of Lords judgment.

GLAZEBROOK J:
And what does it say, exactly, that was approving a settlement, was it?

MR SKELTON QC:
It’s just approving a settlement and deducting litigation expenses out of a fund, and then it gave class members, bond holders, six months to come forward and opt-in if they wanted to share in the distribution.

GLAZEBROOK J:
It was stage 2, effectively?

MR SKELTON QC:
Well, the matter had settled and there was money due to bond holders, and it was the process that the Court was saying, “Well, you have to now come forward to claim your money if you want to participate in that process.”

And the other House of Lords judgment was *National Bolivian Navigation Company v Wilson*, it’s 73 of the respondents’ electronic bundle. Again, just an old House of Lords case relying on their equitable jurisdiction to deal with distributions.

GLAZEBROOK J:
Was that a settlement case as well or was that just a case making an order at the end of the litigation?

MR SKELTON QC:
Yes, Your Honour, that's right.

GLAZEBROOK J:
Well, I gave an alternative: settlement or just an order at the end of litigation.

MR SKELTON QC:
Oh, this was after judgment. Now, Your Honours, we dealt with the litigation funding issues yesterday, so that brings me to the last issue that I want to discuss, that’s the schedule B of the last page of the outline, “Proposed HCR 4.24(b) guidelines for lower courts.”

So Your Honours, I make the opening point that what is required is a process that minimising interlocutory disputes and appeals and produces outcomes in the best interests of class members. So there’s two aspects to that statement, Your Honours, the first is attempting so far as possible to minimise interlocutory disputes and appeals through having a set of guidelines that doesn't give scope for that. The Court of Appeal attempted to do so by saying that normally it should be opt-out although recognising that there may be rare cases that could still proceed as an opt-in.

But the second part of the statement is in the best interests of class members and that should be the focus. We should not be designing a process that's in the best interest of litigation funders who may well be very happy with opt-in requiring people to sign onto their litigation funding terms in order to participate and have to contractually pay large commissions, it should be what is in the best interests of the class members as a whole.

Now I submit that the starting point when considering whether opt-out/opt-in or the universal approach has to be what is being sought by the party who is bringing the application and the Court should only depart from the approach where the applicant's preferred approach is clearly inappropriate, i.e., not in the best interest of class members.

WINKELMANN CJ:
Well isn't there some tension with what you've just said though, you've said we have to make sure we're not acting in the interests of litigation funders but litigation funders might prefer opt-in?

MR SKELTON QC:
Well that is so but at the end of the day if the Court doesn't really have much of a choice because the Court is faced with an application say it's a Ross Asset Management case, for example, where there's a large number who have agreed to sign onto the litigation funding order and the applicant is saying I want an opt-in well the Court is not really going to say well it's got to be an opt-out in those circumstances, I would suggest, because there's not an option that's available. The option is either you won't get your opt-in order so that could lead to a whole lot of individual claims being filed which is not desirable.

WINKELMANN CJ:
So is that why the Australian rules have moved to making opt-out the standard?

MR SKELTON QC:

Well of course the original rules by statue they are all opt-out in Australia, all opt-out but the device after 2000 in the *Multiplex* case was to, you know, define the class to say opt-out but you have to sign onto the funding and that's what the Law Reform Commission is recommending a change to stop that because it subverts the whole intent of that scheme.

But in New Zealand yet the Court could say as part of the class definition issue we're not going to allow the definition to include such a thing as you must sign onto the litigation funding agreement or you must agree to the terms of engagement of the law firm, that's a possible option that the Court would have.

But I suppose my concern is that there will be some cases where a class comes before the Court saying, “I have got funding from a funder,” and they will only be prepared to fund it on a opt-in basis, what do you do in that situation if the choice is between the case going ahead or not going ahead. As I say, unless opt-in is clearly not in the best interests of class members it may be that the Court should approve it in that case. I mean I say the starting point is what the applicant wants because if the Court says no to what the applicant wants there is probably likely to be appeals or, alternatively, the case won't proceed. So starting point, what the applicant wants unless it is clearly not in the best interest of class members.

Now the example where that might be the case is a universal approach is appropriate where no individual relief is sought, it's simply a declaratory judgment that's required. If the outcome will affect all class members identically an opt-in or an opt-out process would be a waste of time and money. I mean if the case is, you know, a construction of a statue why would you waste time and money sending out notices to what could be many thousands of people in that situation where they are going to be bound by the Court’s determination anyway. A universal approach may well be appropriate or, as Justice Williams said, there may be cases which are bought on behalf of the chief of the whole group where it's not necessary to go through an in or

opt-out process either. So universal cases may be appropriate in certain circumstances and that is still an option that has to be considered.

However, where individual interests are at stake, damages claims, class members should be given the choice to be included or excluded and that's because the law should recognise the value of individual autonomy if at all possible.

So an opt-out approach is appropriate in most cases I submit where individual interests are at stake, however, there may be rare cases where opt-out approach would be inappropriate, not in the interests of class members and the example there is a genuine prospect that some class members may end up worse off but the qualification is important merely as a result of being included at stage 1. I mean, as the Court of Appeal in the judgment in this case rightly said around this issue of possible counterclaims, rejecting that is being an issue for refusing opt-out in this case. The counterclaim wasn't pleaded, it was speculative, parties weren't seeking to set aside the settlement agreement in this case and it's not a stage 1 issue, it could be dealt with at stage 2, but there could possibly be some cases where some class members might be worse off at stage 1 in determination of common issues. For example, interpretation of a statue or say a deed of lease, interpretation of a deed of lease, regarding a rental payment. If the outcome could mean that most class members get a lower rent but there’s a possibility that some class members might get a higher rent that could be, for example, a situation where it wouldn't be appropriate to go down the opt-out pathway because it's possible that some class members might be worse off.

Now in some circumstances opt-in maybe appropriate or, I should say, not obviously inappropriate. So there could a small class, easily contactable, forming a natural community of interest and the dangers of opt-in are less pronounced and Your Honours might recall the 2008 Rules Committee said the classic class action where opt-out should happen, large class numbers, small amounts at stake, whereas they say there possibly is justification for opt-in with seven to 10 people with claims of $150,000 $200,000 each. That

was the distinction in the 2008 report. So there might be that circumstance but opt-in the dangers are less pronounced but the question is what prejudice is there making you opt-out in that situation as well. There's none.

So if the plaintiff is only able to secure litigation funding on an opt-in basis that may mean that opt-in is appropriate. I've cited there the *Jameson* case because that was the situation that arose in *Jameson*, and Your Honours, it will be the last case I take you to today. It's in the respondents' electronic bundle of authorities at 42. Maybe not. It's paragraphs 121, where the Court held that the Judge at first instance had erred in another respect, "The party and the solicitors and litigation funder involved had undertaken the task of communicating with all persons who may have an interest in joining in the proceedings on the basis of the terms which the litigation funder required. There is nothing to suggest that an opt-out procedure is a practical option in the present circumstances. The choice, as Young CJ expressly contemplated is between the present proceedings and an array of individual proceedings in which each of the person affected, including all those who have in fact consented to the terms required by the litigation funder." So there wasn't really a choice in that circumstance and opt-out wasn't a practical option; opt-in was ordered. And that's probably understandable. It was again a shareholder/investor-type class action, a bit like *Asset Management*, Your Honours, where most of the investors had agreed to sign on to the funding agreement.

Now what about class size, is that a relevant factor? Well, large classes point strongly in favour of opt-out procedure. Small class size, I submit that's a neutral factor. There may be no problem with an opt-in, but neither is there any prejudice having an opt-out process. And, Your Honour, it's not going to be possible in most cases to say all claims fall within a large class or a small class. This case is a good example. There will be some class members where they will have claims that perhaps individually could be pursued through the Courts, like the Dodds have done, but there'll be others in the class that had very small claims, the repair category for example, where the claims wouldn't be economic, so there's a range of outcomes.

And that's the same with this concept of vulnerability. The literature in the case law says, you know, vulnerable class opt-out. The recent stolen wages judgment is a good example of that, the judgment that's just come out of the Federal Court in Australia, January 2020, where $190 million was recovered for the Aborigines and Torres Strait Islanders, where the state of Queensland had taken their wages and not paid them correctly. It was litigation funded and it was on an open class basis. But not all cases are going to be that clear, there may well be some sophisticated people in the Ross class but there will be a lot who aren't. And how a Court is to assess that at an interlocutory stage, Your Honour, would be, I submit, quite difficult. Again, if in doubt, you know, the opt-out approach is preferable.

Factors that aren't relevant. Whether active participation may be required at stage 2. And I've covered off my reasoning on that just previously, that the election should be delayed to stage 2. Defendants' preference, I submit, isn't relevant. Of course defendants would rather not be sued at all or, if they are being sued, they'd rather be sued with a smaller opt-in class than a larger class. So I submit that doesn't get you any further.

And difficult or marginal cases: the Court should fall back on first principles as the Court of Appeal did in this case, which procedure best achieves the three objectives of rule 4.24.

And then finally what is referred to in the cases as the "fail safe" approach in *Carnie* and in *Proude*: if in doubt opt-out because that's the weighing of the prejudice, what's the prejudice with opt-out versus what are the consequences if someone has to opt-in and fails to do and loses their rights? And applying that, Your Honour, to the case before you, the Rosses' class action is a relatively large class claim. Three thousand policyholders are estimated to be covered by the class definition. Claim size, some claims are large, some may be economic to pursue, others won't be.

WINKELMANN CJ:

Can I just clarify that? The 3000 policyholders are 3000 policyholders who've compromised their rights?

MR SKELTON QC:

Yes. All of the class settled their claims. This isn't a claim to set aside the settlement agreements. We're not doing that. It's a damages claim for misrepresentation under the Fair Trading Act. So they're not trying to cancel the settlement agreements and open up the insurance policy claims right from the beginning which would be a nightmare.

WINKELMANN CJ:

No, I was just seeking clarification of definition of the policyholders.

MR SKELTON QC:

So there's no community of interest here. That can be an important issue and in the *Feltex* case itself one of the reasons Justice French gave for making it opt-in was, well, there's a register. You can find out the names and addresses from the share register. You don't have that ability in this sort of case.

Respondent cannot identify and contact class members directly, and, you know, while my friend says with the Court orders, Southern Response to provide details, contact last known addresses, emails, et cetera, of course they would comply with that, the fact is the respondents can't write or contact them or easily book build. No disadvantage to class members in this case to be included at stage 1 and there's significant risk of not opting in in this case. So it comes down to the appellant, Southern Response, not prejudiced by an opt-out order but opt-out is the fail-safe option in this particular case and I submit should be upheld as the approach in this case.

Your Honours, unless you have any further questions I'll hand over to Mr Quinn.

MR QUINN:

May it please the Court. Before I get started I just want to check that we're all on the same page with what I'm about to do and that you're comfortable that this is the right time to do it because what I've been tasked with doing is replying by way of oral submissions to the written submission that have been filed by the interveners.

WINKELMANN CJ:

So, yes, I had understood Mr Skelton to seek a right of reply at the end to that.

MR QUINN:

Yes.

WINKELMANN CJ:

Is that right, because I'm just wondering if it's better if – how long were you intending to be at this point, Mr Quinn?

MR QUINN:

Probably something in the order of 30 to 40 minutes, I think, mostly focused on the LPF, almost entirely focused on the LPF submissions. So I do apprehend that things have developed a little bit differently this morning from perhaps what we have thought previously.

GLAZEBROOK J:

Well, I think the idea was really to give the LPF counsel notice of what was going to be said against them so they could address it.

WINKELMANN CJ:

All right. It just seems a very long time to reply to what are quite short and succinct submissions but you go ahead, Mr Quinn.

MR QUINN:

Thank you. I know we're on a timetable and I'll do my best to keep it as short and sweet as I can.

It will surprise no one, I imagine, to hear that the respondents gratefully adopt the submissions of the Law Society and Bar Association, both of which are pretty clearly in favour of the present availability of opt-out proceedings. There's one reservation that I want to raise and that's in respect of the New Zealand Bar Association's submissions and the suggestion at paragraphs 10.3 and again right at the end at 43(c), that the presence in a class of what they describe as an "economically viable claim" could be a cogent reason for ordering opt-in. So you see that, if you have their submissions, you see that's developed at 10(b) and again it's repeated right at the end. For our part we would submit that if it's accepted that opt-out offers improved access to justice then it does so for larger claims as well as for smaller claims. The need for opt-out and the protection that it offers might be less acute but there's a need there nonetheless, and if it protects for small claims it protects just as well for larger ones. You see, the –

GLAZEBROOK J:
Isn't the real issue that they can opt-out if they want to and want to go it alone?

MR QUINN:
That's quite right. But the premise on which this potential rationale for ordering opt-in is set, the underlying premise is – and you can see this at 10(b) – "That there may be class members with these economically viable claims who do not receive the notice," so they're unaware of the fact that the proceeding is on, they may be unaware of the fact that they even have a claim.

GLAZEBROOK J:
But hasn't Mr Skelton said they just make a late application to opt-out and those will be granted, wasn't that his answer to that question?

MR QUINN:

That is our answer to that question, that's right. If they come to knowledge within time, so that limitation hasn't passed, then they can still chart their own course, as it were, if they want and they're likely to be given leave by the Court to do so. But they're protected –

WINKELMANN CJ:

But they are not likely to get leave after they've obtained judgment or a settlement that they wanted.

MR QUINN:

No, that's going to be too late and there does, of course, eventually have to be a cut-off point, that's right, but the difference between the two schemes that we're considering is that with opt-in the cut-out point is going to be much earlier. With opt-out you at least have the default saving grace, if you like, that the claim is preserved for longer. It may come during that extra time to the notice of that party who has an economically viable claim, they can still make an election then even if they might be out of time, if they've got the qualifying circumstances that they were unaware of the proceedings, et cetera, they'll come to the Court and one can well imagine they will get to exercise the election they want, but they've been protected in the meantime, that's the difference. And so, with respect, we don't quite agree with the Bar Association's identification of that, that the mere fact of the existence of economically viable claims is a ground for, certainly not a cogent ground for ordering opt-in.

The better view, in our submission, is that the only really cogent reason for ordering opt-in as Mr Skelton said is in those circumstances where there is some obvious jeopardy to a class member or to a subclass within the class, most obviously that's going to be a counterclaim, something of that nature, or more commonly the ground for ordering opt-in, as you've just heard, would be if that's what the applicant seeks. Other than that it's our submission, of course as you know, that the default position should be opt-out.

This question, if I can just finish this point in this way, this question of economically viable claims and the supposed unfairness of having an opt-out regime imposed in respect to the members addressed in that article by Professor Morabito from 2011 which we looked at earlier this morning, and that's at tab 38. I won't take Your Honours to it but there's a question there raised by Professor Morabito referring to the argument that is sometimes made by people that this would be unfair to have a large individually economically viable claim sort of swept up as, this is as Southern Response would have it, swept up into this kind of a claim and Professor Morabito right at the top of page 432 asks a rhetorical question. He says, "Would the unfairly prejudiced test be satisfied if the Court expects that some of these claimants are unlikely to learn of the class action." And he leaves it at that because the answer is obviously, it is obvious that what you need in those circumstances is to follow the course that is best going to protect the class members and that includes class members who have got small claims or big claims. If they are not aware of it they are going to be better protected by –

WINKELMANN CJ:
What page was that?

MR QUINN:
I beg your pardon, that was at page 432.

WINKELMANN CJ:
Thank you.

MR QUINN:
From memory, it's right at the top of the page which is at tab 38 in volume 5 of the appellant's hard copy bundle.

So having dealt just with that, as I say, that reservation to our support for the Bar Association submissions, I'd like to move on, please, to LPF's submissions. LPF begins, and I hope that Your Honours can have, it may be useful to have, a copy of the LPF submissions available as I run through

them, LPF begins its submissions by accepting that opt-out should increase access to justice, that the jurisdiction exists and that the Court has the tools to manage such proceedings. So we find those four propositions just in the first few paragraphs on the first page of the submissions.

But then the submissions go on, notwithstanding the acceptance of those points, they go on almost unburdened really by references to authority or to any academic writing or anything of that nature, they go on to argue that opt-out orders in New Zealand should await legislative reform for essentially three different reasons and they're grouped together in the submissions. The first argument made is that New Zealand is somehow different and that's an argument that concerns mainly book building and the ability to communicate with class members and that's at paragraphs 9 to 16 of the submissions. Secondly, it is said that there are difficulties, sometimes called difficulties, challenges, et cetera, that are raised by opt-out claims, and there's a number of those spectres raised in paragraph 17 to 29. And then finally it is said against opt-out that there will be uncertainty over funding arrangements, and that's in paragraphs 30 to 36 of the submissions.

So let's begin with this assertion because really it's little more than that, that New Zealand is different and that opt-out is not really appropriate here. Beyond the brief affidavit filed by Mr Newland there's no evidence presented for the claim that New Zealand is different. It's just asserted. The evidence of Mr Newland is that LPF has been able to build a good book, earn a couple of class actions, but I would point out that there's an alternative view of the New Zealand scene, of course, provided by Mr Grant Cameron in his affidavit of 11 March and the relevant paragraphs there are 13, 21 and 22. Mr Newland, to be perfectly –

WILLIAMS J:
Sorry, can you just give me those numbers again, please?

MR QUINN:

Yes. 13, 21 and 22. The *RAM Asset Management* case obviously has been a success from a book building point of view. We're told that 92% of the class has signed up. In fact, we're not told exactly there whether that's 92% of all potential claimants or whether it's 92% by value of the investments. Of course, it may be the latter. We don't know. But on any view it's probably been a reasonably successful book build, but that's an unusual circumstance and one that's quite removed from our facts here. You've got people, and this point has already been made by the Chief Justice, I think, you've got class members in Ross Asset Management who, of course, were investors. They've lost money. They've now got someone telling them that a claim is going to be brought on their behalf. Do they want to be involved with that? It's no surprise that they're able to understand what's being offered to them and that they are willing to take up on the terms offered the possibility of recouping some of the loss they have suffered. But you see the *Strathboss Kiwifruit Limited v Attorney-General* matter, for example, which is also raised in evidence filed through LPF, is interesting, because as Mr Cameron notes in his reply affidavit, and this is at paragraph 22, that was an action in which we know from the reported decisions or the decisions issued in the proceeding that about 212 growers opted in from a class, Mr Cameron tells us, thought to be about 10 times that size. So it's an instance of the opt-in take up if you like being roughly what the overseas literature tells us to expect, something pretty low and in the order of only about 10% of the estimated potential class size, and that's in a class here in New Zealand where you're dealing with a particular identifiable industry group, an obviously linked group of people who are all making their money in exactly the same way, they probably share industry knowhow through magazines and so on, they've got those kind of business links in play, still only 212 growers signed up for that proceeding, so we say that Strathboss sort of makes our point really about opt-in proceedings generally.

At paragraph 13 of their written submissions, LPF says that New Zealand is a small market with smaller classes and scales involved, this is a point that was raised very briefly earlier today. I'd make this point first of all in response to

that, if you're looking at this, the bringing of class actions, if you're looking at it from a purely commercial point of view, the small classes or in the case of the small classes it may be just as important, perhaps sometimes even more so to have everyone included because otherwise, in simple terms, it's not going to be economic, it's not going to be worth the candle to bring the claim.

You see it's very likely in my submission that many claims are looked at and indeed Mr Newland gives this evidence, he says we look at countless claims each year and we pursue the ones that we think are viable and worth our while doing so. It's very likely that some claims are looked at with small classes and they are rejected as funding candidates despite having sound merits.

You see if one assumes a 10 or 20% signup and opt-in, as it were, consistent with what the literature tells us then a claim with only a 50 member class or perhaps a 100 member class is perhaps not going to be attractive, it depends on really the size of the individual claims within the class but you can see my point. If you're going to by contrast get all 50 or all 100 included because you've got an opt-out order then subject to a few opting-out that proposition is going to be instantly more attractive.

So the fact that LPF may have eked out a good living for itself in such a market running opt-in claims is beside the point, we would say. It doesn't tell you anything about who is being left behind and by that I mean, you know, what kind of claims are not being pursued. Overseas experience and the studies that are all referenced in the Law Society's submissions, Bar Association submissions as well, tell us that access to justice will be better served by opt-out, and we see that as well reflected in the determination of Australia recently to reconfirm its commitment to a pure opt-out model.

In our submission there is no reason to suppose that book building and communicating with class members is any easier here in New Zealand than abroad, really all you've got is the highly contestable evidence of Mr Newland

on that although even by way of quick reply Mr Cameron was able to disagree but it's not something that has been properly explored really and put before this Court but what we can say is there doesn't appear to be any academic support offered or anything in the way of independent reports that would back that kind of assertion up. Even if it were true, even if it were true that book building is somewhat easier here in New Zealand it still costs money and the proceeding will still benefit, this is an opt-in proceeding, will still benefit fewer members than under an opt-out. Finally on that point, if communicating is easier in New Zealand then informing people about their opt-out rights will be easier as well.

Still in paragraph 13, LPF says, in the second half of that paragraph, “It's very rare for representative proceedings to be brought,” this is here in New Zealand of course, “to be brought on behalf of plaintiffs widely dispersed throughout society or whose individual losses are so insignificant that there is no incentive for them to engage in an opt-in process,” as to which we would say well, yes, precisely. Small value claims or claims where class members are widely dispersed will typically require an opt-out approach to be viable, that's common sense in my submission but there’s actually high authority for it and that's the *Phillips Petroleum v Shutts* case of the United States Supreme Court which you've been taken to this morning. I won't take you to it again but there’s just a useful comment on that aspect at page 812 and over the page to 813.

O’REGAN J:
We seem to be getting a huge amount of detail here. We've given LPF 20 minutes, I think you've taken already 20 minutes telling us what they're going to say and responding to it.

MR QUINN:
Well I hope to be telling you why we disagree with it as well.

O’REGAN J:
Why don't you just do that, I mean, we just don't need this level of detail.

WINKELMANN CJ:

I must say I agree with Justice O'Regan, I think you can be just a little bit more succinct.

MR QUINN:

Right, I'm happy to do that.

WINKELMANN CJ:

So you were giving us a page reference in that case.

MR QUINN:

The *Shutts* case was 812 to 813, that you need opt-out to be able to make widely dispersed small value claims feasible and viable.

The next phase or part of LPF's submissions is this list of alleged difficulties that are going to be raised by opt-out claims from paragraph 17 onwards and the first thing that is suggested is that we're going to lose the filtering that happens before claims are commenced. We say again there's no evidence offered for that, there's no evidence that there are going to be shakedown tactics which is the wording that's used, that are going to develop as a result because there's been no evidence of that kind of thing happening in Australia, for example. It's worth, you know, taking oneself back to the evidence on these matters and the best place for that, in my submission, is the Professor Morabito article from 2018, lessons from Australia in a class action reform in New Zealand, and that's a review in that article. I think the Court has looked at it, that's a review of the past 25 or 26 years in Australia. Professor Morabito in that article sets out all the figures for what's been happening in Australia class actions in the last 25 years. He says, "Contrary to what is regularly claimed in the media these figures reveal a fairly modest employment of the country's class action regimes. He also talks elsewhere in that article about the complexity and cost of bringing class actions and says that they are not commenced lightly and of course this is in Australia which, as we've all heard, is opt-out.

I would emphasise also here in New Zealand, we have one critical difference from what happens in Australia and that is that in Australia under the federal scheme and the matching state schemes which are very, very close to it, the plaintiffs, representative plaintiffs or would representative plaintiffs have a right to commence their claims and start them as representative claims. Here leave is needed under 4.24 and so the Court has a gatekeeping role here in New Zealand in terms of assessing whether a particular claim should be permitted to proceed as a representative action.

The comments about supposed first mover incentives, the race to file, et cetera, are well off the mark. That has certainly not been the experience in Australia. Relatedly this supposed competition between funders and competing claims and problems that will arise with competing claims, first of all, opt-in makes it only more likely that you are going to have competing claims that work their way through the Courts together.

WINKELMANN CJ:
I think we've been taken through all of this by Mr Skelton.

MR QUINN:
Right. Well, can I just make this point though – I'll give Your Honours some reference to some high authority, recent authority from Australia, which shows how they deal with competing claims.

We have got competing opt-out claims, for example, so where parties have filed actions at or around the same time and there's a question mark over who gets certification, who gets carriage of the matter going forward. Because the cases are not in the bundle, Your Honours. The two cases I would like to just draw to your attention, the first is *Perera v Getswift Limited* (2018) 363 ALR 394. The citation for that, it's a decision of the full Court of the Federal Court, three Judges.

WILLIAMS J:
What's the page number?

O'REGAN J:
394.

MR QUINN:
I beg your pardon, 394, yes, so it's reported in the Australian Law Reports. The second one which I want to draw to your attention is a decision of the full Court, sorry, full Bench of the New South Wales Court of Appeal called *Wigmans v AMP Limited* (2019) 373 ALR 323*,* and the cite for that, it's 2019 373 ALR 323.

WINKELMANN CJ:
That's a decision of the full Bench of the New South Wales…

MR QUINN:
Yes, five-member Bench of the New South Wales Court of Appeal. And what happens in both of those cases, just very briefly, is that there's contest as to, as I say, who should have carriage of the matter. In the *Perera* one – the *Perera* case by the way is referred to in the ALRC Report of late 2018, so it does get referred to in that report – there were three actions commenced. The Perera fund itself commenced first. Another plaintiff, McTaggart, commenced second, and third was a plaintiff called Webb. Perera and McTaggart both had respectively a hundred and 200 people signed up on their funding agreements and were ready to go. Webb filed last, had no one else signed up but him, but ended up with carriage of the matter, and the way that was done at first instance, upheld in the New South Wales Court of Appeal, was that the Perera and McTaggart matters were stayed. The reason the Webb matter was given the go-ahead was simply this question of taking the view of what's best for the class. The commission rates and the way it was structured, how the commission rates would reduce over times, et cetera, what the cap would be, the ultimate cap, et cetera, was more favourable from Webb. All other matters basically speaking were equal, so that's the way it went ahead.

And you get something similar in *Wigmans*, which was in New South Wales just late last year, October. Again the –

WINKELMANN CJ:
You don't need to go through it in detail, we can just read it.

MR QUINN:
I'm not going to. The only point I'll make is to say that there's express disavowment there, as there was in *Perera*, of any suggestion that first filed means you've got some kind of advantage, and again in *Wigmans* it was not the first filed claim that ended up having carriage of the matter. There's reference within *Wigmans* to another matter being dealt with – this is at paragraph 10 of *Wigmans*, which is worth a quick read when you get to look at it, because that shows that these kind of competing class action issues are dealt with in a routine way in the Courts there. There's a description of what happened in a motions list on a Friday morning where a decision was made between three competing claims, all opt-out of course under the system there, where the Judge said, "Look, I've looked at all three actions, who's involved, what sort of terms are offered in terms of funding and so on, they're all much of a muchness, what I'm going to do is choose just this one, and the other two funders – I choose this one but on the condition that the other two funded actions have a right to participate on an equal basis in the funding of this action going forward and if they don't want to then they don't have to. So that was just dealt with almost – in fact it seems to have been dealt with virtually as a duty Judge list matter, something very routine.

The last section of LPF's submissions is to the effect that there's going to be uncertainty over funding created by following an opt-out regime now or allowing it here. The first point I would make there is that as a preliminary point the involvement of funders in class actions certainly shouldn't be assumed and if you go to that Morabito review article from 2018 what you will see is he explains that even as recently as the last five years, this is an article from 2018, the last five years 46% of class actions filed were funded, so just under half, slightly more than half under the Federal part 4A scheme.

In my submission, what LPF's approach seeks to entrench here is the closed class opt-in approach which is now very clearly out of favour in Australia. You know that from looking at the ALRC report also from 2018. The first recommendation is that the legislation be amended to permit only open class proceedings, and we heard all about that yesterday.

You will see further the extent to which the Australian Courts are pushing back on the closing classes in this kind of de facto opt-in approach. You will see that further in the *Haselhurst v Toyota* case which is in the hardcopy volume 6 of the appellant's authorities at tab 69. *Haselhurst* is one of seven cases or proceedings that are being heard together. It's part of the *BMW v Brewster* –

WINKELMANN CJ:
I must say, I feel that you're going over what Mr Skelton has taken us over here.

MR QUINN:
I see, well I apologise for that but I'm just trying to reply to what LPF has said that somehow going to opt-out is going to take us backwards. So I simply make the point then that –

WINKELMANN CJ:
Well I thought their point was it was going to create uncertainty.

MR QUINN:
Yes, well on that they say that we've had settled law here in New Zealand. In my submission that's overstated. What we've had since – all we've ever had is a High Court decision from 2008 which of course was not taken on appeal and seems to have been assumed to have laid out the lie of the land in the intervening years until we get to this case. It's not the case that one can say on the question of opt-in versus opt-out, for example, that the law has been settled and now we're already at a much more advanced stage in assessing that question.

WINKELMANN CJ:
Well what you can say surely is that even with the opt-in approach the procedural steps have been pretty hard fought and a lot of litigation.

MR QUINN:
Yes I mean that's dead right. It's hard to see that opt-in has smoothed the way to justice as it were for members of various classes nor that there's been really a great deal of such litigation at all. By comparison with Australia there's been remarkably little.

Let me make this final point then please in relation to the submissions of LPF because they do raise this spectre of supposed increased skirmishing and plaintiffs being held up and all the rest of it. They say that as a result of that to guard against that there should be an opt-in action and they do go so far in paragraph 16 of their submissions to say that this should be an opt-in action and the grounds for them saying that are that this proceeding has received significant general and social media attention and is well publicised among the Christchurch legal community, potential plaintiffs are part of that community and are very engaged in the issues involved. It's one that is easily advertised too.

In response to that we'd say well it's true. The case has been reasonably well publicised. John Campbell has done segments about it on his TV show and RNZ has done pieces on it, it's been in the press, but even so I direct Your Honours attention to the evidence of Grant Cameron in his March affidavit, and that's at paragraph 16 of his affidavit. Even at this stage nearly two years, in fact we are two years into the proceeding, he's only had registrations of interest from 340 people, this is sworn evidence, barely more than 10% of the estimated class and only about half of those or less than half I think have signed funding agreements with the funder CFA.

So Your Honours if class members are forced to opt-in at this stage we can reasonably expect that those numbers will increase a bit I suppose but all the evidence here in broad tells us there may not be many more, that's the reason

for the debate between opt-in and opt-out and it's for certain, it's absolutely for certain that we would not end up with anything like 100% of the class signing up to potentially benefit from the action that's being brought. So my question is, why should the Court assist that outcome particularly in circumstances where there's no dispute that opt-out should generally increase access to justice and the jurisdiction exists.

So those are my submissions.

WINKELMANN CJ:
Thank you, Mr Quinn. So it's just about lunchtime. We'll come back at 2.00.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.06 PM

WINKELMANN CJ:
Ms Davenport.

MS DAVENPORT QC:
Your Honours, I have got eight minutes to talk to you about the Bar Association's evidence and it occurred to me from the evidence that Justice France was asking that it might be of assistance to talk about some of the empirical data that the Bar Association has from mostly the Legal Issues Centre in Otago about access to justice and why people are not accessing justice when they could be. But I'm mindful of the time so I don't want to take the Court's time if that is not of interest to you.

WINKELMANN CJ:
You go ahead.

MS DAVENPORT QC:
So the decision of Justice French which provided that class action should proceed on an opt-in basis was 12 years ago. So there is very little empirical

data in New Zealand other than that put before the Court by the respondents about the take-up of opt-in compared with opt-out proceedings. We can't obviously assume that we know what opt-out would take us to but we assume it would be most of the class. The provisions for opt-in assume that people are motivated enough to take steps to join in something which might be for their benefit and the data that we have, first of all about the District Court, so the District Court's jurisdiction, the Court will recall, is 350,000. The data from the Chief District Court Judge received by the Bar Association today was that the figure remains steady at 5% of all of those cases which come before the Court, somewhere between 12 and 17,000 per annum. Only 5% of the civil proceedings are defended by defendants, so the other 95% of the cases proceed by default, and the Legal Issues material that we have put before the Court tries to come up with an answer as to why that is and essentially it's because access to justice is perceived to be beyond most people's reach. They don't understand what's being sent to them if it's an application for judgment or even a notice to say that they might get some money if they sign a form and return it. It's simply beyond most people's ability to cope with, to deal with and to process. So we have a justice gap. It's a justice gap because of the numbers which simply are too afraid or too uneducated or simply disinterested enough to sign any form which might bring them into an opt-in system.

So an opt-out system in the submission of the Bar Association is the one that most best achieves access to justice. It ensures that everybody who falls within the class and who doesn't actively seek to opt-out can be part of an action which may bring them some benefit up until the time when they have to themselves take action to prove the extent of their loss.

And this opt-out provision, in the submission of the Bar Association, is the approach which best fits the initial concept of class actions and that was the universal class action which was a process which was flexible and ensured that for most defendants the issue before the Court was able to be dealt with in one judgment, not in many, and in my submission we seem to have moved away from that flexibility which was highlighted in cases such as *Taff Vale*

Railway Co v Amalgamated Society of Railway Servants [1901] AC 426 (HL) and it's in the authorities if you want to read that.

And so the vulnerable are swept into a class action with opt-out where they may not have access to justice if opt-in remains, and the Court has long recognised its powers by way of supervision and oversight to take care of the vulnerable and less able before the Court and it's common ground that children, that beneficiaries, persons who are disabled and who need protection, all can look to the Court for assistance and yet we have resisted up until now the suggestion that we should be dealing with this difficulty by way of keeping the class as open as possible for as long as possible.

Now the barriers to an opt-in process are as I have described and as described in the authorities put before the Court by the Bar Association are ignorance, fear and lack of knowledge, but there was some judicial comment on this in the decision of Justice Katz in *Diners Club (NZ) Ltd v District Court at Auckland* [2017] NZHC 2616 which is the first authority in the Bar Association's casebook. That, the Court will recall, was a decision about the decision of a District Court Judge to decline summary judgment to Diner's Club and order that that decision proceed by way of formal proof, and the submission of Diner's Club to the Court was that the District Court had no power to look into the matter where there was no defence. It simply had to order that there be judgment entered, and I have set out at paragraph 22 of my submissions those things which the Commerce Commission identified for Her Honour as being barriers to people taking steps to protect their rights, and I don't propose to read them but they are there if the Court wants to refer to them and they do tie in very neatly with those which have been identified by Dr Toy-Cronin and others about people's inability to access justice, not just because of money but also because of ignorance, because English is not a first language, they have poor literacy or they have disabilities, and all of those people will be protected if we have an opt-out system.

And the Court may consider this ability to supervise and to take care of the vulnerable when considering whether or not the Court has power to supervise

the decisions of the funders or those running a litigation for those who are part of the class and the Court has been asking questions about where that authority might come from and in my submission if one considers that some, maybe many, of the class might fall within that group as being vulnerable then the Court could see its authority to come from its ability to protect those people and oversee what decisions are made on their behalf to ensure that they are in their benefit, as they do for children, for example, when considering changes in trust deeds.

Now unless the Court has any questions, I've had my eight minutes, and my learned junior, Ms Wroe, will address you on the issues of efficiency and deterrence, the other part of the Bar Association's submissions. Does the Court have any questions for me?

WILLIAMS J:
Just one thing from me. What do you say to the submission made against your basic thesis that in fact class actions aren't used by the vulnerable, at least not in Australasia? They're used by more savvy players. The vulnerable aren't the favourite client of funders.

MS DAVENPORT QC:
No, no, they're not, Sir, I quite agree with that and that because of our lack of ability to bring personal injury claims we're unlikely to get those who are the most vulnerable, but nonetheless, take this case for example, they are homeowners whose properties have been damaged by an earthquake, they're not lawyers, they're not people who would normally deal with the Courts, so to that extent they do display some vulnerability, and –

WINKELMANN CJ:
But it's not beyond the realms of possibility that it could be though, is it?

MS DAVENPORT QC:
No.

WINKELMANN CJ:
Because we have had in recent years litigants bringing public interest-type litigation and – the name of the woman escapes me – the equal pay litigation, it went through the Employment Court up to the Court of Appeal.

O'REGAN J:
Bartlett.

WINKELMANN CJ:
Bartlett, yes. And also the disability litigation.

MS DAVENPORT QC:
So I don't know that we can say definitively that a class action does not sweep with it all those who'd be disabled but, you know, those who have invested large sums of money in a finance company might not normally fall within that category, in which case maybe if they're of a defined number, large amounts of money, it may well be that an opt-in is the best option for that particular issue. Thank you, Your Honours.

MS STEPHENS:
May it please Your Honours, in the balance of our submissions we address expediency and deterrence to the extent that we adopt the respondents' submissions and then comment briefly on relevant principles or considerations for an opt-out or an opt-in order.

Unless Your Honours have any specific questions I propose to just highlight the main points of those submissions, and in so doing I will address Mr Quinn's submission in relation to the perceived point of difference between us.

Expediency, Your Honours, does not require much else in terms of submission. What I would like to highlight in relation to expediency is the importance of developing principles that will limit and minimise as much as we

can in a discretionary system interlocutory wrangling in relation to this question of opt-out or opt-in.

The starting point the Bar Association takes is the same as the respondent, namely that when an applicant seeks leave under rule 4.24 and in so doing applies for an opt-out process, that that should in the vast majority of cases be granted. The access to justice, expediency and deterrence considerations are so compelling the Bar Association submits that that will almost always prevail over other considerations.

The difficulty arises in determining, as we have attempted to do in our submissions, circumstances which might arise to cogent reasons, as the Court of Appeal put it, to allow an opt-in order. What might those considerations be that would displace the access to justice, efficiency and deterrence factors? And that has been quite a difficult exercise and we have tried to consider the various factors which come up in the journals and the case law, and we've heard much discussion around that this morning from Mr Skelton in relation to value of the claim, size of the class, sophistication of the parties, and the problem with each of those factors is that very often they cut both ways. The *Hypertouch* case that Mr Skelton referred us to this morning talks about large claims having a, claimants, plaintiffs, having a substantial stake in the proceedings. So then of course such people will be motivated to either opt-in or, one might presume, opt-out.

Ms Davenport and I have discussed Mr Quinn's submissions and considered the points that the respondent makes in relation to our suggestion that a large economically viable claim which is in a plaintiff who does not receive notice, in those circumstances it may be unfair to order an opt-out process, even when that's what the representative plaintiff seeks. But really I think that, given that we have put a rider on that – at paragraph 10.3 – namely that, "And it is unfair to proceed by way of opt-out," there really isn't a point of difference between the Bar Association and the respondent on that point. Because the ultimate question is is it unfair to proceed by way of opt-out, either for the majority, either for the whole of the class, or if a subset could be carved out.

Mr Skelton posed the question in several points in the course of his submissions as to whether or not it was to the prejudice of the plaintiff class, to the class members, to proceed in an opt-out basis, which is to say the same thing. The ultimate question for the Court in determining whether there are cogent reasons to order an opt-in against wishes of the representative plaintiff is is there unfairness or prejudice to those members who are not represented in the proceeding.

So Your Honour, that is really as far as the Bar Association can take it. We agree with the submissions of the respondent that the size of the class isn't really a determining factor. It may be a factor that causes the representative plaintiff to proceed by way of opt-in rather than opt-out because they know the views of all the parties and are confident that they will opt-in and also the situation of a litigation funder may mean that the funder insists upon an opt-in procedure.

The only factor that is a strong factor in favour of an opt-in is when there is an identifiable adverse outcome that the Court considers creates potential prejudice for those unrepresented class members, and Mr Skelton has also given further examples of that in terms of the deed of lease kind of dispute or the counterclaim dispute.

Your Honour, unless Your Honours have any further submissions those are my submissions that we have for the Bar Association.

WINKELMANN CJ:
Thank you.

MR STEPHENS:
If Your Honours please, I have three main points on behalf of the Law Society or we have three main points, two of which I will address and my learned friend, Ms van Alphen Fyfe will address the third.

WINKELMANN CJ:
Thank you, Mr Stephens.

MR STEPHENS:
The two that I'm going to address are first some submissions in relation to the role of the rule of law in this context, and the second is about access to justice and litigation funding in the context of opt-out and opt-in. And Ms Alphen Fyfe will address you briefly on the question of individual autonomy.

So starting first with the rule of law. This subject is addressed in paragraphs 9 to 20 of our written submissions and the key submission is that while comprehensive legislation is the preferred solution in this area the rule of law, in our submission, does not require the opt-out mechanism to be implemented by statute. And we explain in our written submissions that the Law Society itself has advocated for legislative reform for class actions for some time now and was in fact one of the drivers behind the Law Commission's current reference. But however the reality is that legislation in this area is very unlikely to happen for some years if it does eventuate. So the most recent timeline that I have seen from the Law Commission is that it is now May 2022 in which it can be expected to report.

WINKELMANN CJ:
In other jurisdictions has the development of the jurisdiction been purely statutory or has the statute responded to what the Courts were doing? I probably should have asked Mr Skelton that question or Mr Weston.

MR STEPHENS:
Yes, and perhaps he's the best person to ask but from recollection what you see, for example, in *Dutton* in Canada you see that there is some class action legislation at a Federal level and in I think one of the provinces, in Ontario, that it was on the cards in Alberta, for example, which is the *Dutton* situation, and that law reform responds in time to what has unfolded in the provinces. But the two aren't mutually exclusive and that the Courts are able to develop the law iteratively in the meantime to fulfil the procedural void and that law

reform bodies can and do respond to how the law has unfolded in the Courts. And as the laboratory of the Courts occurs that in itself is helpful to law reform bodies in terms of seeing how procedural matters develop.

So, as I say, in the meantime our submission is that the rule of law doesn't require class actions in New Zealand to remain in stasis pending, you know, at this point in the judicial development pending wholesale reform by Parliament following a Law Commission report.

My learned friend Mr Weston sought to characterise the current question of implementation of the opt-out device as embarking on a new journey and in my respectful submission the ship has essentially already set sail. And it set sail 11 years ago with a major procedural innovation, in the decision of *Saunders v Houghton (No 1)* where the Court of Appeal followed the Supreme Court of Canada in *Dutton* and the High Court of Australia in *Carnie* and endorsed the relaxation of the same interest test in representative proceedings. And it's that step which then sees the provision of a class action-type mechanism through a purposive and ambulatory approach to rule 4.24, and that really is the major procedural innovation that results in class action-type proceedings in New Zealand, and the opt-out device is one of the subsequent procedural questions that has to be answered in that context. And, as we say in our written submissions – and I would like to go to this briefly if Your Honours please, to the decision of the Court of Appeal which is at tab 7 of the hard copy bundle, but otherwise it's *Saunders v Houghton (No 1)* in the electronic bundle for those, such as me, operating just according to an alphabetical index, and the first paragraph I'd like to go to is paragraph 15 where this point is essentially made. Do you Your Honours have paragraph 15 of that case? In starts, "In most jurisdictions, such as England, Australia, South Africa and the United States, complex representation questions are answered by additional detailed modern rules providing for class actions. The New Zealand Rules Committee has recently submitted proposals for legislation and rules in New Zealand which, when a draft is available, are likely to provide a framework that will be useful for the Judiciary. But in the meantime the Courts must deal with applications in terms

of rule 4.24 and the inherent powers of the superior Courts (held directly by the High Court and derivatively by this Court) which are recognised by section 16 of the Judicature Act. Those powers were described by Turner J in *McKnight v Davis* [1968] NZLR 1164 (CA) at 1170, 'We think that the Court must always be the master of its own procedure and must, when necessary, use its inherent jurisdiction to ensure that justice is done. Due inquiry for the truth is not be stifled by outmoded procedural restrictions.' The statement applies –

WINKELMANN CJ:
Sorry, can you just tell me what paragraph you're at?

MR STEPHENS:
I'm at paragraph 15. Does Your Honour have that?

WINKELMANN CJ:
Yes.

MR STEPHENS:
So, that statement from *McKnight v Davis*, "Applies equally to due delivery of justice. In *Dutton* McLachlin CJ observed that a similar Alberta rule did not specify what is meant by the interest that the parties must have in common. At [34] she stated that, absent comprehensive legislation, the Courts must fill the void under their inherent power and determine the availability of the class action and the mechanics of class action practice." And, as we say in paragraph 15 of our written submissions, answers to an array of procedural questions have therefore unfolded iteratively in this country and the opt-out device is yet another one, or the availability of it. And none of that, in our submission, involves the subversion of the rule of law.

And while we are in *Saunders v Houghton* there are some observations about the rule of law and the role of the Courts at paragraph 69, and Justice Baragwanath speaking for the Court addresses in this context the Courts consideration of maintenance and champerty now that litigation funding is

available in a modern context. And His Honour says, or the Court says, “It is therefore arguable that, since Parliament has acknowledged the continuing existence of the common law torts…the Courts should leave any adjustment of the law to the legislature. We have noted that in 2001 the Law Commission recommended that the common law be left unchanged. The competing argument is that the common law elsewhere has moved on even since 2001 and to disregard its evolution would abdicate this Court’s responsibility for incremental refashioning of the common law of New Zealand in spheres where it has particular experience. New Zealand will develop its laws and practices according to the evaluation of New Zealand lawmakers. Those lawmakers are Parliament, with the plenary authority resulting from the legitimacy of its elected representatives, and the superior Courts, within their relatively narrow sphere – see for example,” and that’s a decision of Justice Henry. “Among the considerations relevant to whether and how the judicial lawmaking power should be employed is the practical administration of justice, and bearing on that is the important reality of our relationship with Australia,” which is the point His Honour Justice Williams was making this morning.

So that's what I wanted to say about the rule of law, that it's not subverted by the development of the opt-out device just as it was not subverted by the more significant procedural innovation of using rule 4.24 to supply a class action type mechanism.

Briefly then on the question of access to justice and litigation funding, this was obviously a key consideration of the Court of Appeal’s judgment below that opt-out orders are likely to significantly enhance access to justice and my learned friend Mr Skelton took you to paragraph 98 of the Court of Appeal’s decision in that regard.

So in my submission there’s two ways in which opt-out orders might improve or enhance access to justice and the first is in relation to a case that is going to be brought anyway. A case of that kind will have more class members participating so there is access to justice for them in the case of an action that will happen anyway.

And then access to justice might be promoted because the availability of opt-out orders means that cases can be taken that otherwise would not be taken because of the additional scale that increased class membership brings. And both of those questions, in my submission, involve associated questions of litigation funding and the manner in which the Court engages with the availability of litigation funding for opt-out orders.

So the first way is that a case that's going to be brought anyway will have more class members participating in it and for those people the default nature of opt-out provides access to justice for them, overcoming barriers to justice which would otherwise stand in their way, and that's the principal manner in which I think the Court of Appeal contemplates access to justice being promoted.

The one caveat to that, in my submission, is that it doesn't necessarily follow that the availability of opt-out orders means that they will be routinely taken up by litigation funders going forward. And it seems to me that there is a reason why *Houghton v Saunders* the High Court's decision hasn't been revisited since 2008 and that's because closed class opt-in orders typically suits the litigation funders business model because it only extends participation in the proceedings to those who take the affirmative step of accepting the terms of litigation funding and thereby eliminating the free-rider problem and at footnote 40 of our written submissions we cite an article by Michael Legg on that subject. And obviously in the present case, you know, the main incumbent in this country is advocating for the status quo until legislative reform.

So there was some discussion yesterday about whether we have closed class opt-in in New Zealand which is what my learned friend Mr Weston was saying or whether you can have open class opt-in as Mr Skelton was also saying. And I don't think there is a Court decision on that issue. I think the answer is that open class opt-in is theoretically available but it's just that it's never sought, there's no litigation funder who will present an application on the basis

of open class opt-in, they are all premised and all presented on the basis of closed class opt-in because the litigation funder wants to eliminate the free-rider problem understandably.

So where that takes you in my submission is that the uptake of opt-out will necessarily depend on the associated question of litigation funding and the manner in which the Courts engage with the free-rider problem. And Mr Weston, in my submission, rightly says that that's what's coming and it's that critical question that the Court will have to engage with in order to ensure that the mechanics of the opt-out device are supplemented and the Courts will need to engage with those questions.

That takes me to my second point which is essentially the same point that the availability of opt-out orders can increase the availability or can promote access to justice in the sense that more cases might be brought because of the addition of scale supplied by opt-out orders. But again, as we say in our written submissions, that depends on meeting the funders' incentives, and the Court's associated ability to ensure that funders can access the recoveries of the wider class in order to fund the litigation, because it's that which will make claims commercially viable where they otherwise might not be.

So unless Your Honours have any questions, those are my submissions on the rule of law and access to justice. I will briefly hand you over to Ms van Alphen Fyfe.

WINKELMANN CJ:
Ms van Alphen Fyfe.

MS VAN ALPHEN FYFE:
As Mr Stephens has mentioned I am going to be discussing the aspect of individual autonomy. It's been put to you in argument to Your Honours yesterday and today that opt-out is contrary to the principle of individual autonomy and as a consequence to natural justice. Te Kāhui Ture acknowledges that individual autonomy is important in New Zealand common

law, but emphasises that that is not the only value in the common law that may be applicable here.

We can see that individual dignity is an important value, it's reflected in the context of legal proceedings in section 27 of the Bill of Rights Act that's been mentioned earlier, and it is an important way in which dignity is protected. But there are other issues at play. Representative proceedings themselves have a source in administrative efficiency, but the underlying goal is to vindicate the claims of various parties. So vindicating individual's rights through a collective procedure. And rule 4.24 is, of course, a modern reflection of this, and it allows claims to proceed without the consent of all the representative parties. And an objection based on individual autonomy runs counter to the underlying concept of a representative proceeding itself. So any concerns based on section 27 of the Bill of Rights can also be countered in Te Kāhui Ture's submission by requiring an assessment of the merits at first instance. So that assessment itself will necessarily give effect to the section 27 and I note that what natural justice requires is itself a context-specific answer. And that specific context includes an increasing regard for access to justice, as we've heard from various parties today, and interveners, particularly with respect to a socioeconomic status, psychological factors and the lack of familiarity with legal proceedings. This is demonstrated in case law and we have several cases at footnote 2 to which we can also add *Hypertouch* and *Proude*, mentioned by my learned friend Mr Skelton, and of course the Court of Appeal decision in this case.

While there are examples of the importance of collective action, rather than individuals, and they include several cases mentioned yesterday by Your Honour Justice Williams, and by the context of collective settlements in Te Tiriti o Waitangi breaches as mentioned by Your Honour Justice Glazebrook yesterday.

Tikanga itself can also be relevant. Collective rights have a particular significance in Aotearoa, due to tikanga Māori, and as a preliminary points tikanga Māori can be a value that's recognised by the common law, and we

see that in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at, paragraph 164, per Justice McGrath writing for the majority, and also at 94, Chief Justice Elias in her minority judgment. And in some respects *Takamore v Clarke* is an example of where the common law grapples with conflicting values of individual autonomy and a collective response, but in this case the values are rather more aligned and they depend, again, on the facts of a particular case. Individual dignity can be best achieved through a communal or collective approach in certain circumstances.

So how does tikanga relate to this broader legal question? Well the primary submission is, as I said, that it counters the notion of the dignity of an individual, it being sourced solely in individual autonomy, and instead supports the notion that representative proceedings can instead give effect to an individual's dignity. And tikanga Māori suggests that indication of an individual's claim can be achieved through incorporating that claim into a community, that is the representative proceeding, because that community, through a representative party, is able to reflect, enhance and protect the mana of the individual and exercise kaitiakitanga over the claim.

Now I won't go through all of the principles and values of tikanga Māori that might be applicable here. We have touched on them in our submissions and I think at footnote 6 is where we have some suggestions of where further material can be sourced. I would add to the list that we had of whanaungatanga, kaitiakitanga and mana the principle of, well, I guess the –

WINKELMANN CJ:
The principle of what, sorry?

MS VAN ALPHEN FYFE:
The principle or the process of ahikāroa, keeping the fires burning for those who are not present.

So this actually stresses the importance of several matters, the initial assessment of whether there is a sufficient degree of the same interest

amongst those compromising the represented class, can import a whanaungatanga type principle, the assessment of the appropriateness –

WINKELMANN CJ:
Can you just slow down a tiny bit?

MS VAN ALPHEN FYFE:
Yes, sorry.

WINKELMANN CJ:
Well, that's a compliment because we want to hear what you're saying.

WILLIAMS J:
We've been telling everyone else to speed up.

MS VAN ALPHEN FYFE:
I often get told to slow down. My apologies, Your Honours.

WINKELMANN CJ:
You're not on your own.

MS VAN ALPHEN FYFE:
The initial assessment of whether there is a sufficient degree of the same interest amongst those who compromise the represented class can import a whanaungatanga type principle, an assessment of the relationship between those parties, and the assessment of the appropriateness of the representative party to ensure that person's capacity to fulfil obligations to the represented party, including those not present, can bring in obligations, kaitiakitanga and ahikāroa, and the assessment of any proposed settlements, for instance, such that those obligations are met by its terms is something that the Court can consider as well.

So in summary, opt-out can in fact protect individual autonomy. It does so by balancing the possibility that rights of those who would otherwise not have

their rights vindicated with the ability to have an independent voice in litigation for those who strongly wish to do so. And actually *Tamaki v Baker* mentioned yesterday is an example of that in operation.

GLAZEBROOK J:
And of course really as long as they get notice they actually are able to exercise their individual autonomy to opt-out.

MS VAN ALPHEN FYFE:
Precisely, Your Honour, and if they don't get that then the principles of a collective response can come into play to ensure that their rights are managed appropriately.

Now unless Your Honours have any further questions, that is the submissions for the Law Society.

WILLIAMS J:
So your argument is that kaitiakitanga, whanaungatanga, create obligations on the lead plaintiff in terms of taking care of the interests of those who haven't opted in or even perhaps those who have who have signed up?

MS VAN ALPHEN FYFE:
Indeed, yes, Your Honour. So kaitiakitanga or potentially even manaakitanga, whichever you think is more appropriate, depending on the relationship of the parties. Kaitiakitanga is an exercise of mana. If you look after the claim for both people who are present and people who are not then you enhance the mana of both that represented party and the representative person. So using both of, the whole breadth actually of the principles of tikanga, you can see how that could be relevant to the assessment of whether that person is an appropriate person to do the representing and whether there is a sufficient level of community interest to justify a class action, opt-in or opt-out.

WILLIAMS J:

So I guess the proposition is collectivism in tension with individual autonomy, and finding the correct point of balance between those two things.

MS VAN ALPHEN FYFE:

Precisely, but I think there is also a more fundamental point in that individual autonomy can operate within a collective. So individual dignity can be supported by the collective action as well as by individual autonomy. Sorry, is that making more sense?

WINKELMANN CJ:

In that point, your point is the collective actually preserves the individual's ability to have and assert their rights?

MS VAN ALPHEN FYFE:

Exactly, and I think that comes into the concept of mana as well because mana of a rangatira comes from the collective. Each individual person has their own mana. And they can choose to bestow it on the person who will be their leader or not be their leader. And if that person doesn't exercise appropriate kaitiakitanga then they can lose their mana. And the Court can have a mind to ensuring that they are doing so appropriately and use that supervisory jurisdiction to monitor that representative party.

WILLIAMS J:

Yes, that's what Ms Apatari thought in *Tamaki v Baker* that Mr Tamaki hadn't quite done the job properly.

WINKELMANN CJ:

Thank you Ms Alphen Fyfe. Mr Salmon. You can take a moment if you need to.

MR SALMON:

I'm mindful of the time and what I will seek to do is every four key points against a brief background setting out why LPF is here today with a particular

perspective on how things work in New Zealand and it seems to be almost complete common ground between the parties that properly regulated opt-out proceedings or class actions would be a positive boon for access to justice.

The question that LPF puts before the Court is whether that is the case, one, in New Zealand without regulation and, two, in particular on the facts of this case. In that context I will just begin by submitting that some caution is appropriate before seeking learnings from articles from other jurisdictions or cases from other jurisdictions and in particular those cases that are obviously more amenable to large opt-out class actions. The *BMW* case, for example, with 200,000 individually as the High Court called them, distinctly minor damages claims or Westpac with 80,000 also just too small to economically be run on their own. Those are in a, respectfully, a very different category from the subject case here and so too are those cases about rights or injunctions which could be seen as class actions of their own right, again ones that don't raise the many and complicated issues that are raised by larger individual damages claims of a far smaller number.

So in that context LPF has intervened as the Court knows, giving some evidence of its experience about the New Zealand specific ease of book building in cases that it has run to date and I will very briefly address a couple of those data points because they have been discussed by my friends.

One is the *Ross Asset Management* case in which there is a 92% uptake of subscription to the class. It was suggested that to some degree LPF had an advantage in achieving that degree of subscription because of its established infrastructure here and that that wasn't the case for the funder in the subject case today. Respectfully, that's probably a distinction that falls flat because a funder wanting to operate in New Zealand should be putting in place that infrastructure to be –

WINKELMANN CJ:
Yes but I mean are you going to suggest that it's possible to get 100% take-up? I mean is this a seriously contended point?

MR SALMON:

No, I'm not submitting that, Your Honour, I'm submitting that in New Zealand the levels of take-up that have prompted concerns about – the levels of take-up that have prompted concerns in other jurisdictions need to be read in light of, one, the type of cases they are, they are enormous classes and, two, the amount of value involved and the very different jurisdictions. So, for example, a Californian case, the seventh largest economy on earth in that state, in which individuals are not particularly engaged in the issue, it might be a product liability case where people don't even regard the damages as material.

WINKELMANN CJ:

Yes, but what about in New Zealand what about *Houghton v Saunders* and the *Strathboss* case.

MR SALMON:

Well *Strathboss* I was counsel.

WINKELMANN CJ:

I know you were counsel in *Strathboss*.

MR SALMON:

Yes Your Honour and was pretty closely involved in the establishment of that class. The numbers appear low that my learned friend has just recited but as is often the case the reason for that is not that there was a difficulty contacting growers, they were all engaged in a debate about whether the proceedings should be run. It's public knowledge that Zespri and a number of post-harvest operators were very opposed to the bringing of a claim against the Crown because of the closeness of that relationship, so the size of the class was governed really by the schism in the kiwifruit industry that dated back to the producible dates.

So that's an example that might sound like a datapoint to suggest it's difficult but having run that process and indeed having obtained a judgment within the

limitation period for most growers who hadn't joined almost no additional growers joined in seeking damages and the reason for that was not lack of awareness it was of course a small community of largely Te Puke growers, they know each other by name. It was that they were opposed in principle to suing the Crown given they had working relationships with Zespri.

WILLIAMS J:
So on Mr Skelton's analysis it wouldn't have mattered whether it was opt-in or opt-out because they'd all have opted-out?

MR SALMON:
Correct, correct. So that's just an example of a datapoint that on analysis proves to be more straight forward than it might seem. One other that's –

WINKELMANN CJ:
Well, on your submission, on a tiny database, like, a personal experience almost database, so, yes.

MR SALMON:
Yes. But I'm mindful, Your Honour, that what may appear evidence from the Bar is clarifying evidence from the Bar.

WINKELMANN CJ:
Yes.

MR SALMON:
So to some degree I'm responding to that. And if I just –

WINKELMANN CJ:
No, but your submission is actually though, isn't it, that the respondents' reliance on data is not appropriate in New Zealand? But you're basing that submission on a tiny database.

MR SALMON:

Correct, Your Honour. And if we were to approach the databases that everyone's put forward on the basis of the Evidence Act and the Daubert principles for that sort of quasi-scientific investigation of market data all of it would fall flat, including every article the Court's been referred to. So what I'm seeking to do is bring these before the Court, not as hard evidence, except to the extent Mr Newland's deposed to them, but rather as examples that will then enable me to talk briefly about the procedural problems that I submit will arise, and I'll do that having been both the plaintiff in class actions, including *Strathboss,* where the thresholds for getting a class together were much more rigorous and it much more difficult than in the current judicial environment where the path is well-trodden and panel beaten now for opt-in claims, but also being a defendant on several, including the leaky buildings claim, *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614, and indeed the CBL one that my friends have, for the main parties, have both mentioned. And just briefly on CBL, Mr Newland's affidavit notes that his company – so I'm against my client in this case in the CBL context – they've got over 50% of shareholders, I think it's over 60 now, but the affidavit says at that point over 50. My learned friend Mr Skelton was acting for the other funder there and they have a substantial chunk too, so I don't know, I understand it's well over 80% between them, but it's –

WINKELMANN CJ:

What are you saying though, Mr Salmon? We're going back into these personal experience…

MR SALMON:

I'm merely saying these are examples of – to the extent the Court wishes to have the data points contextualised that have been…

WINKELMANN CJ:

Yes. I thought you were moving on to procedural…

MR SALMON:

I am, Your Honour. So as I've set out there, those are two shareholder cases in which it is -1

WINKELMANN CJ:

Which are two shareholder cases?

MR SALMON:

CBL and *Ross Asset Management*, or shareholder investor cases. The product liability cases that have taken place against Carter Holt Harvey and against James Hardie are examples of home owner cases where parties have gone to the market without the ability to identify who is a potential plaintiff, if I can put it that way. So those are true public appeal ones.

In this case we have a plaintiff group that, if Southern Response co-operates or is ordered to co-operate, can be identified by name and are of, although 3000 might sound like a lot, are of a fairly finite number compared to any of the foreign jurisprudence on low uptake. So that's the first point. The second is –

GLAZEBROOK J:

Well, I mean, this is all very well, isn't it, but isn't it a matter of principle whether you go for one or the other, and the argument is that opt-out is the best as shown from offshore, and I'm not sure that just nickelling and diming and saying, well, it wouldn't be so bad here actually, assists very much.

MR SALMON:

Perhaps not. Where I'm leading to – I'll telegraph now my four key points and see if I can get through them in time, because they're fairly confined.

One is to just briefly discuss what access to justice actually means here –

WINKELMANN CJ:

Have you not got to your first point yet?

MR SALMON:

I am now, Your Honour. Let me just get straight into the first point.

Access to justice has been presented in particular by the respondent as being principally measured by the number of plaintiffs who uptake a claim, so what percentage of the 3000 will take up the claim and, respectfully, that's an incomplete picture and I would submit the biggest single hurdle to motivated home owners who feel they've been ripped off is cost, and time cost and actual cost matter in such context. And in that respect the Court is right to be questioning my learned friends about the, I would submit, inevitable cost of litigating the various issues that will arise in this case and in others if opt-out proceedings are adopted without regulation. The related point there is it's not just plaintiff costs, it's defendant costs, because it must be that access to justice means access both for plaintiffs to litigate their claim in a just and expeditious and speedy way, but defendants as well. And that might sound like a hollow point, but again experience shows in these cases, and in particular in, for example, building cases, a large open class is impossible for a defendant to deal with in even basic ways: not to inspect the buildings that claimed on, for example, not knowing who to join, and having time ticking on unknown plaintiffs' claims where, with the Supreme Court's decisions in the other *Carter Holt Harvey Limited v Minister of Education* case, limitation periods for joining third parties are closing. So although not this case where there aren't those particular building issues –

WINKELMANN CJ:

That can be dealt with at the approval stage, can't it, because that's one of the things you take into account, the prejudice to the defendant.

MR SALMON:

Yes, Your Honour, but that's an unknown prejudice where the class is unknown so if Your Honour follows.

WINKELMANN CJ:

Well you can have a pretty good go at working out when you're opposing the certification of the class the approval would be – the grant of leave to commence representative proceedings, can't you have a good go at saying these are the kind of issues and it's going to make it impossible to raise them.

MR SALMON:

Yes, one can although if the class is identified in number one could say, well, these particular regional councils might be joined if it's a leaky claim or this builder did them all whereas if it's a truly open class, if it's a truly full opt-out class it's every possible council in New Zealand and every possible builder, but that's just one point about defendant's perspectives. Whether Southern Response wishes to get to trial quickly or not it is in its interests to have a speedy trial and not have interlocutories on these issues as well.

The third point and this is I think where the access to justice issues are most acute perhaps in general terms as this: in most cases the defendant is not Southern Response but is a finite entity, it's Ross Asset Management with a limited pot or in most of these cases an insurer with a cap and expensive litigation comes out of any judgment sum so the plaintiffs shrink the pot the moment they've spent too much on litigation. But also defendants being pushed through all of that shrink the pot at the other end. So expensive litigation truly shrinks the pot in most of these cases and that too is a factor here.

Another point, and these are brief points on this aspect, uncertainty about recoveries and uncertainty about the sort of common fund orders my friend Mr Skelton has dealt with, do result or will result in less litigation being brought because, and this is my second point, funding is although we attempted to separate it out from the question of whether there should be opt-out claims, funding is always an aspect or a component of an opt-out claim and in the United States that's funding by lawyers on a contingency fee but here where success fees are prohibited it's by funders but in an opt-out claim

Justice Glazebrook is right there might be crowd funding and so on by the people who know their part of it. For an opt-out claim it will be a funder and so it also has implications for access to justice to have a market in which funders are unsure about the certainties of returns, unsure about class numbers, unsure about CFOs, unsure about how the Courts will, on an ad hoc basis, regulate, and LPF submits that that will result in a lower amount of claims being taken up and as in its written submissions, are race to the Court and all of those things.

The third point is –

WINKELMANN CJ:
But Mr Skelton suggested that the answer to that might be that if the funder says we're only funding this on an opt-in basis then that will just have to be supported by the Courts.

MR SALMON:
Then which part will have to be supported by the Courts?

WINKELMANN CJ:
The opt-in nature of the claim. Mr Skelton submitted that would be one of the categories where you would go for the opt-in rather than the opt-out. If a funder says, “I'm only funding this on an opt-in basis,” well so be it.

MR SALMON:
Yes, but maybe that funders, let's say, for example, in this case if the Court recognises that this case or allows this case to proceed on an opt-out basis another funder may choose to put its hat in the ring and decisions will have to be made as they are having to be made in Australia whether it's first in time, whether it's a beauty parade, as it's been called in Australian cases, whether it's cost based and those in themselves involve plaintiff waiting and defendants paying.

So my point is, is more. There will always be funding in an opt-out case and thus it is unfortunately relevant to think about how a funder might view the situation and in that context of course LPF is in this business but it is also in a business where it takes a particular approach to lawyer independence which I'm about to come to and to committee involvement and claims and it is concerned about having workable cases that don't just get started but get finished and get finished in time before people –

WINKELMANN CJ:
So your first point is access to justice.

MR SALMON:
First point is access to justice, not just numbers.

WINKELMANN CJ:
Have we finished that?

MR SALMON:
We've finished that, Your Honour.

WILLIAMS J:
Can I just test one point because your argument is really without regulation this is just too inefficient, too costly for both sides, throw it away, so your answer to inefficient access to justice is no access to justice. Isn't really the logic is do something while the legislator get around to providing a more efficient system?

MR SALMON:
And the submission I would make, Sir, is do something in the cases where it's the right thing to do.

WILLIAMS J:
Sure.

MR SALMON:

So if, for example, this was a case about 50,000 concert goers each of whom had $10 loss, I would be an open door on a suggestion that could be an opt-out claim.

WILLIAMS J:

There'd be a few of these with the last couple of months' experience.

MR SALMON:

There may be and we may have some more given today's news. But that would be one example, so too would the bit of extra money on the power bill. Those large ones I would readily accept are sensibly done as opt-out claims.

WILLIAMS J:

Right, so your point is really be careful about which ones you do it to and make them paradigm cases, not these ones that could go either way?

MR SALMON:

Correct, and my last two points relate to the "this case" aspect and I'm not sure how I'm going for time but I'll try and be efficient on those. The third point is to analyse exactly what is being sought by the plaintiffs in this case because they are proposing an opt-out case that becomes an opt-in case, and my learned friend, Mr Skelton, was –

GLAZEBROOK J:

I'm not sure it's usually proper for an intervener to be making comments on particular case.

MR SALMON:

I'm sorry, Your Honour, all I'm seeking to do –

GLAZEBROOK J:

Especially when it's an intervener that has a commercial interest in the market.

MR SALMON:

Yes. All I'm seeking to do, and it's the sort of tone in Mr Newland's affidavit, is identify the sort of practical hiccups that might happen –

WINKELMANN CJ:

Well, don't relate it to the facts of this case. I think as an intervener you should…

MR SALMON:

Certainly, Your Honour. If I can approach it on an abstract basis. If it's to be said in any case that come the, or before the damages component there will be an opt-in process and there will be a need to seek the Court's engagement on a CFO or an FEA, then the real question is not whether there's a benefit to be obtained from avoiding book building or from avoiding all of the costs issues that might unsettle people or low uptake because that is going to happen. It's just happening a little bit later. So in the abstract, a structure that involves kicking a can down the road a little bit in terms of book building doesn't really solve the menace that's being put up to justify this particular class action. To put that another way, if it's said that the reason to have an opt-out claim is not enough people opt-in then a structure that involves needing opt-in before we get past this fairly narrow stage 1 doesn't solve the problem.

And in that context, the last point I wanted to go to was just to identify, based on just practical experience of getting these things through, some of the issues that may arise in cases generally and which do unfortunately involve some interlinking of funding terms and fee terms and so on and the question of class structure. The first is as identified in paragraph 20 of our submissions. There are various issues that are normally dealt with in funding agreements now through I guess bitter experience of what works and what doesn't work, both in funded claims and in the extraordinarily detailed American class action contingency fee documents which have to deal with a bunch of issues that relate not least to how the claim runs but more importantly to how lawyers are required to operate. Who does one take

instructions from? What happens if there's conflict within that group? What happens if someone wishes to leave the claim and be separately represented having disclosed confidential information to a lawyer, and so on? These are more complicated issues than they sound and they have been litigated a lot. They fall to be litigated here, of course, without us having seen the terms of the agreement because only those who sign up to the claim here have them, so these are truly abstract points, but they're not small and they're difficult and they're particularly difficult in a situation where those who register still don't see the terms, as I read the website that's at the end of the case on appeal, but those who don't opt-out are flying blind on the issues and there's – Your Honour, the Chief Justice, noted in the Court of Appeal's decision in the other Southern Response matter, terms like that and getting into what they should and shouldn't say is the type of commercial judgment that Courts are cautious to make.

A related point to that is the settlement one and Mr Skelton's observations that settlement and the Court's intervention in it is likely to be less about what the headline number is and more about how it's divvied up. Two submissions there. One is that's the type of commercial judgment that's extraordinarily difficult to make and hard to put in the lap of the Courts and, secondly, somewhere between several hundred and several thousand people arguing about how to divvy up a pie is not a simple matter. That is a trial, and that's a trial that I think it's been said will be taking place just using the tools of rule 4.24 and possibly section 64 of the Trustee Act to decide which homeowner gets what. Now that's the sort of issue that's often dealt with in a funding agreement in which there's an agreement between all the participants how to arbitrate any differences between them in a workable way or a formula. The suggestion that this will come back before the Court, asking the Court to be Solomon about how to divvy up so much money is backloading an enormous task which should not be underestimated in my respectful submission. That's a truly large dispute.

GLAZEBROOK J:

So you say the Court has no role in looking at the fairness of funding agreements in the context of a settlement?

MR SALMON:

I'm more saying, Your Honour, the role that they would have. No I'm not saying that because as I'll come to this particular case appears, well it does involve on the face of the claimed website, a success fee which raises questions as Mr Newland's affidavit notes about compliance with the rules and the Lawyers and Conveyancers Act. That would have to be looked at and I haven't heard what it is exactly that –

WINKELMANN CJ:

Well you're straying into the facts of this case again.

MR SALMON:

Well I'm only referring to what Mr Newland has got in his affidavit in that sense Your Honour, and given no one else has I do regard it as incumbent upon me to note that both the rules and the Lawyers and Conveyancers Act does not allow for that type of success fee as described on the website. So that's an example of the sort of issue that the Court might inherit months or years from now where non-subscribing persons who have not opted in –

GLAZEBROOK J:

No, I'm talking about in the case of subscribing persons, because this is contrasting what might happen in an opt-out as against an opt-in, and you say this would be enormous if there was a settlement. I'm asking do you suggest if there's an opt-in with everybody signing up to a funding agreement that the Courts would not be able to say whether or not the settlement would be approved?

MR SALMON:

Which is a separate question from whether the Courts would intervene in the funding agreement itself. So if I can answer Your Honour this way.

Some funding agreements will take the issue away from the Courts, so the typically opt-in claim will have a mechanism that means no Court assistance is needed. Here the submission from my friend was, well the Court's assistance will be needed but it's not hard. I don't suggest the Court cannot, if it's being asked for assistance, look at all issues.

GLAZEBROOK J:

Well what say on its own notion it says I'm not, you say you're going to withdraw and the funder is taking 90% of the proceeds, and there's a whole pile of people whether they've opted in or not who are vulnerable in this circumstance.

MR SALMON:

Well for those who've opted in they have a contract and that will have some weight. They've signed up to terms –

GLAZEBROOK J:

Well it might have some weight but whether it has an overwhelming weight in the case of the settlement who knows.

MR SALMON:

Correct.

WINKELMANN CJ:

So if you had a case like this, Mr Salmon, would you say the funding agreement would have what, because here I suppose there's a factual issue about how much, what the size of the claim is. So if it's settle each individual, would the funding agreement have provision for arbitration or what would have to settle –

MR SALMON:

Some of the ones I've seen in other cases have that. I haven't seen what's in place where, but I understood my friend to be saying if the parties couldn't work it out, the Court would look at it. I know, and this is in a case of

Paine v Carter Holt Harvey, the fairly small action against Carter Holt Harvey for buildings with certain types of cladding, in the decision of Justice Downs various features of the agreement there included a real lack of control by class members at all. They had to follow legal advice and they fully delegated almost irrevocably decision making power to the representative person, and that too is a can of worms, respectfully, where we have a mix of those who've signed up to that, and we don't know if that's the case here, of course, but I rather take from my learned friend that there is no arbitration clause and no formula. There is a large question to be raised about dispersal of settlement funds, and indeed about funders terms so that common fund order issue at some point is going to be, in my respectful prediction, a difficult issue.

And just to pick up on one issue I hadn't put my mind to completely, which is the representative plaintiffs, they are, as things have ben put to this Court, taking on burdens akin to those of a trustee, and also possibly duties of kaitiakitanga. Now they may or may not have realised they were taking on those duties but those are ones that if correct in law have a bearing for what that agreement should say, and the Court doesn't have it before it. So again it sounds elegantly simple to say, well, in principle in many jurisdictions and for many claims an opt-in class action is the way to go. I'm sure, as the Court of Appeal said, one is sure that one can solve all the problems as they arise here, but solving the problems involves multiple problems that are expensive.

WILLIAMS J:
That's just a matter of requiring the disclosure to the Court of the funding agreement at the outset.

MR SALMON:
Yes and I when first intervening assumed it was in the case on appeal but it's not here, so the Court doesn't have that yet.

WILLIAMS J:
But, I mean, do you think –

MR SKELTON QC:

Your Honour, the funding agreement has been filed with the High Court and provided to the defendants.

MR SALMON:

I apologise, it wasn't –

GLAZEBROOK J:

Well, also the, just to be absolutely clear, the case is that the funder can't have control over the litigation otherwise they will fall foul in terms of the *Houghton* et cetera principles.

MR SALMON:

Yes, and those are right, Your Honour, but the way that they are being met in part – I won't spend time on it – but that *Paine v Carter Holt Harvey* case will show examples of how a relatively close group in a group will end up with complete control.

WILLIAMS J:

I'm just wondering whether you're over-stating the problem of inter –

WINKELMANN CJ:

– necine.

WILLIAMS J:

Internecine, that's the word – squabbling amongst winners in a class. You presumably have the lead plaintiff coming along with a proposal for disbursement, you might have some who don't agree with it, they'll turn up and argue that that disbursement should have been done a different way and a Judge will have to decide. I mean, it's pretty much bread and butter for a Judge.

MR SALMON:

It is bread and butter for a Judge where there's pleadings and evidence, that's my point, Your Honour. Here these aren't trustee decisions really about how much should go to each owner, it's openly stated that here it depends on the particular facts of each case, so each owner has a particular quantum and a particular shortfall based on the alleged non-disclosure. If we had a stage 2 trial, each of those would need to assessed and damages set for each of them, and my submission is merely saying, well, the Court can determine how to distribute, raises a question that is far more complicated than it might seem on first blush, because to determine how it should be distributed –

WILLIAMS J:

No, it won't be in the duty list, that's for sure.

MR SALMON:

No.

WILLIAMS J:

But it's not something the Court's unfamiliar with.

MR SALMON:

No, it's not unfamiliar with it, but it is taking on that –

GLAZEBROOK J:

Well, doesn't it happen with opt-in, from the beginning or opt-in later, it's just there's fewer people, which will suit the defendant. But there's also more people who are not going to get an ability to put their case later.

MR SALMON:

Yes, it does, Your Honour, and opt-in of course the parties, the modern practice is to prescribe in advance, it's always better to have a formula for how to distribute things before you know where you fall in it.

GLAZEBROOK J:

Well, they're not going to have any formula here because it's not possible to have a formula. I mean, there might be in a product liability case, you might be able to have a formula that you can work in advance, but here they can't. Because they actually say there are individual issues at stage 2…

MR SALMON:

Yes.

GLAZEBROOK J:

I'm not sure exactly how much. It's a bit like the *Houghton* case where there are actually reliance and counterclaims will be an issue at stage 2 of course, I suspect much less so than we're told at this stage.

MR SALMON:

Yes.

GLAZEBROOK J:

But nevertheless there will be differences depending upon whether they're repairs and whether the property was a million or a hundred

MR SALMON:

Yes. So the formula might, I accept, Your Honour, not be mathematical but it might involve expert determination or arbitration in a way that removes the problem the Courts would otherwise have, especially with a large class of how natural justice rights and participation rights are given to those who haven't been contacted because it's an open class or, if it's gone opt-in at that point prior, how they deal with those who are not happy with the way in which the funding agreement and costs were spent or even, for example, not happy with the fact that a lot of time was spent on the opt-out litigation that may follow when –

WINKELMANN CJ:

Some of it's your time, Mr Salmon.

MR SALMON:

Sorry, Your Honour?

WINKELMANN CJ:

Are we just about finished with your submissions?

MR SALMON:

We are, Your Honour, and I apologise for wearing you down. The only other points to make are these: one is that other funders may well intervene and that may well lead to problems and which the Court is again tasked with deciding these issues in an abstract way without regulation to guide the decision-making terms; another is that there will be, almost inevitably, if there are ructions within plaintiff groups that are so large who haven't signed an agreement, there will be recourse to the Courts about issues such as communications with lawyers and, as I read the website here, there'll be some website communication with those who register, there will be only real communication with the lawyers for those who sign up to the terms. So there will be those who are captured by the issues addressed by Your Honour the Chief Justice in the *Southern Response* Court of Appeal decision, those who don't necessarily feel that they were properly alerted to issues.

The final point on the can of worms is this: for defendants to settle cases they need to know how many people are in them. And if one just for a moment instead of considering the possible number of 3000 claims looks at those that have responded in a context where we have home owners who've lost, they are in my experience and practice the most motivated civil plaintiffs one can get just about.

WINKELMANN CJ:

I can see it will make it difficult to settle because they won't know the amount that's claimed to be settling.

MR SALMON:

Yes, that's right but there's an access to justice issue that again highlights the problem of only looking at the issue as my learned friend, Mr Skelton, does through the question of plaintiff numbers. There are so far somewhere around 200 registered plaintiffs who've opted in and they have no interest, financial or otherwise, in this case being slowed down by several years by interlocutories. They have an interest in settling. But making this an opt-out claim because it's said it's somehow hard to contact people as opposed to trying by Southern Response providing the data, means those 200 people are waiting because it must be that a defendant can't settle this claim when they don't know whether it's 200 or 3000 houses. So that is a real access to justice issue. We should be speedily having trials, of course, but we should if possible be settling and for a defendant not knowing how many buildings are clad in the alleged material or how many plaintiffs there are, things are impossible.

And so in that context, if it pleases the Court, I'll just round out by noting that all of this would be respectfully elegantly and easily dealt with in the lower Courts once regulations are passed that enable the Courts to measure common fund orders and to determine how and when opt-out arrangements should work but which is asking a lot of the Courts just by treating rule 4.24 and the Trustee Act as the vehicles for resolving these issues. So it's not to say these things won't help plaintiffs but here –

WINKELMANN CJ:

So if we had regulations and rules to address these two significant problems you've identified, dividing up the settlement pie and the ability to settle earlier, I mean what regulations or rules would answer? What answers would there be there?

MR SALMON:

The answers would be almost a checklist of the issues that have been panel beaten in various decisions about funding agreements to date and litigation agreements, extensive instruction abilities, the establishment of

committees. For example, my client follows the voluntary UK Code of Practice for funders which means everyone sees its funds on the website even if they're not members. It will not allow success fees for lawyers. It requires independence of them and a committee that's empowered that makes real decisions so there's a real client –

GLAZEBROOK J:

You suggest all of these were by regulation but now you're referring to guidelines. So frankly the stuff overseas has not gone into this sort of detail, has it? Maybe it should have and maybe our legislation will be it hasn't been the – for instance, the settlement power in Australia is basically saying, well, here it is, without any guidance whatsoever.

MR SALMON:

Yes, so that respectfully might be an imperfection in the Australian framework as it is. The –

GLAZEBROOK J:

Well, it might also be just an inability to anticipate all of the issues that might arise and therefore have a straightjacket for Courts which won't actually land up helping anybody because it will create litigation.

MR SALMON:

And that may be right although I would submit we can trust our reform authorities to think quite carefully about this, having heard what the Court has and seeing those issues. But to take probably the most clear example, our Courts routinely shy away from making the sort of commercial judgments that trustees make or liquidators make. The range of issues which the Court will engage on never involve those pragmatic commercial issues. Do I really want litigation in my life? How much should I settle for? And there's a reason for that. It's because they're not judicial decisions. They're commercial ones. And at the heart of the suggestion the Court will decide how much each party gets without getting into the merits is the submission that the Court should become the parties and the Court should take on a commercial role, and

that's why I submit it's not fearmongering for LPF to be in the odd position of saying that class action capabilities should be adopted more cautiously.

WINKELMANN CJ:

I can see the issues you're raising. I'm having difficulty following you to the point you were making because I'm not understanding what rules would help, how rules would help.

MR SALMON:

Well, for example, Your Honour, a reform proposal might require that all open classes be dealt with by the Courts based on the following principles or follow an accounts and inquiries approach in which there is a specialist appointed. There could be models for that. For example, we have the old accounts and inquiries process in the High Court Rules for certain things. That might be undertaken or it might be an arbitration default in the Act, for example, but as things stand it is a truly open question and the parties don't have an arbitration agreement so it would inevitably fall to the Courts, so I accept, Your Honour, I am not standing here with a well thought through reform proposal but equally nor should I be.

WINKELMANN CJ:

No, but what I'm saying is other countries have proceeded down this path and their reform proposals don't provide the solutions – their laws do not provide the regulatory answers to the problems you're raising.

MR SALMON:

Not to all of them but they do to some Your Honour. In Australia, of course, they have inadvertently disallowed common fund orders, which would seem to be undesirable in the sense that knowing what the fund is going to do earlier would be a good thing, but here we have all the best and the worst features of blank slate for the Courts. But the submission from LPF is the picture of an easy path with issues that can all be solved by the Courts, and of access to justice being about plaintiff numbers, doesn't match the reality of claims dying out and the risk that we end up in the world the United States have where

attorneys rush to file first and abandon claims. So it's about the quality of the result and getting to the result. It wholeheartedly adopts the concern with access to justice and always has. The submission is this particular case, LPF and Mr Newland's affidavit is saying is not hard to communicate with plaintiffs on, and my submission is where they are going to have to opt-in anyway. If they can opt-in and be communicated with then, they'll do it now, and so all that's been done is slightly delaying the opt-in decision at a cost, and LPF's focusing on what I hope are –

GLAZEBROOK J:
And what's the cost, because at stage 1 there's not going to be settlement of the individual claims at the least, is there?

MR SALMON:
No, the settlement won't arise then, but I would respectfully suggest there would be an argument about the common fund order that my learned friend is proposing, which would be retrospective –

GLAZEBROOK J:
Well they're now saying they might delay that argument, but what's it matter anyway?

MR SALMON:
Cost and delay Your Honour, given –

GLAZEBROOK J:
But cost and delay, that might mean that it's cost and delay in this case but in fact in every other case afterwards the matters are settled from then on.

MR SALMON:
That would be right if there were on reform proposal on the horizon Your Honour, but where it is incipient that –

WINKELMANN CJ:

It's nowhere near a horizon though is it Mr Salmon. I mean the Law Commission report is back again next year?

MR SALMON:

Yes that's right Your Honour, but this is, of course, my fault as a practitioner –

GLAZEBROOK J:

Look at the Property Law Act and how long it took to enact the Property Law Act.

MR SALMON:

True Your Honour. But think about how long it takes us to get a case here.

GLAZEBROOK J:

And the Limitation Act.

MR SALMON:

There'll be maybe one more class action that has this issue between now and then. So yes it is a while but in class action terms we are such a small market and such of a small economy. So the heavy lifting required in this case, or the next few, as parties work through how these are run, respectfully perhaps the balancing equation is to ask whether the cost of that, and the burden it places on those plaintiffs who have signed up, is worth it given that everything about this claim, as framed yesterday and today, shows that book building has to be done soon anyway, and fees have to be discussed and dealt with between all the parties anyway. So I can't predict, of course, exactly what issues Southern Response will take. It's true that defendants take issues, but it's true they're entitled to. We can expect that issues would arise here and that they will be fiercely litigated because that's what's happened in every other class action case as the rules have been formed.

So those really are submissions driven at quality of justice for plaintiffs, which is our obvious principal focus, and also observations about quality of justice

for defendants because defending the large and sprawling New Zealand scale of justice and economy is inefficient and costs are the big issue underlying access to justice.

I've gone over my 20 minutes. Unless Your Honours have any questions, those are my submissions.

WINKELMANN CJ:
Thank you Mr Salmon.

MR SKELTON QC:
Your Honours I'll be very brief, you've probably heard way too much from me already today, so just a couple of points - one in response to the New Zealand Bar Association's submission, it was in relation to the exchange between Justice Williams and the Chief Justice. Justice Williams was saying have the class actions really not been benefiting vulnerable people, but savvy players, and Your Honour the Chief Justice mentioned the public interest litigation that has been pursued. Perhaps the best example we have of public interest litigation, Your Honours, is *Pearson v State of Queensland* [2020] FCA 619. That's the 10,000 indigenous workers, the stolen wages case that recovered $190 million for them. Litigation funded.

So in terms of the New Zealand Law Society submissions, the Chief Justice asked whether the case law was driving the legislative reform or was it the other way around. Your Honours, the respondents' submissions do deal with that matter at paragraphs 33 to 37 of their submissions. At 35, for example, the *Dutton* case that I've taken you to where the Supreme Court permitted class actions, it was four years later after *Dutton* was decided that the Alberta state introduced more comprehensive class action statute, and there is some footnotes in those paragraphs to the US.

So probably it's both ways round, it's perhaps the legislator takes the lead in some cases but that Alberta example is the Court making that ruling and the legislation following afterwards.

Then just finally in relation to Mr Salmond's submissions, his point about uncertainty that would be created caused by opt-out and the difficulties with common fund orders may result in less applications being brought before the Court. Well of course Your Honours most jurisdictions around the world have opt-out jurisdictions. Funders have been funding opt-out cases all around the world and the facts of this case itself belies the submission that funders won't fund open class opt-out cases, we have a funder who is quite prepared to do so.

The point regarding disclosure of funding agreements, this Court in *Waterhouse* v *Contractor Bonding Ltd* has imposed a requirement of disclosure disclosing whether a case is litigation funded or not. So a plaintiff has to inform the Court and the defendant whether they are in receipt of litigation funding. They must also disclose whether the funder is amendable to the jurisdiction of the New Zealand Court and provide a redacted version of the funding agreement with commercially sensitive material redacted. That has occurred, the funding agreement in this case has been provided to the High Court and to the defendant.

The final point, Your Honours, is in relation to settlement, it being said by Mr Salmon that opt-out cases would cause more difficulty in relation to settlement because defendants may not know the number of people in the class who need to be – have to settle.

I will just refer Your Honours to *Haselhurst* which is at tab 69 of the authorities bundles at paragraph 16 where the President of the Court, Bell, deals with that issue. Of course in other jurisdictions that have opt-out cases settlement and we've heard Mr Weston say yesterday that most investor class action cases do settle and never go to trial so an opt-out approach to class actions doesn't avoid settlements taking place, it's not the problem that Mr Salmon has suggested it might be if this Court were to endorse an opt-out approach.

WINKELMANN CJ:

Would there not be a problem for you though with your particular class in which you don't actually know the size of the claim you'd be compromising?

MR SKELTON QC:

Well of course the defendant will have more idea than anybody as to the size of the claims. They will know how many members of the class there are who they settled with. They will be able to assess the extent of their exposure and in a mediation setting it would certainly be a requirement that that information was going to be made available.

WINKELMANN CJ:

I was just thinking you might not be able to, as the representative plaintiff you might not be able to reasonably compromise this claim until after opt-in part.

MR SKELTON QC:

Well, these cases tend to never get to stage two, most of them settle after the common issues have been resolved, and that's definitely the experience. And they settle on the basis of a mediation where the parties reach an agreement as to what the settlement sum is. Then the rubber hits the road, because you have to come back to the Court and seek approval that the settlement is fair and reasonable between the parties and also inter se between the class members. And so that's where the Court has that oversight to ensure that it is a fair settlement and that the plaintiff and defendant aren't settling at a lower sum that wouldn't be appropriate. So a plaintiff would normally require to be satisfied, for example, how many claims there are in that situation.

WINKELMANN CJ:

And so would you – just to take the detail – would you require the two documents, the customer document and the one that was held back, be disclosed, you can see the gaps between them and how many people are in that category? I mean, how could you simply assess it?

MR SKELTON QC:

There are a few variations but they're standard documents. The real question in this case will come down to which of those additional costs, demolition, administration, professional services, contingency – we know the Supreme Court has said the contingency one's in, there's debate over the others. So there will potentially be a compromise there. Then it would be a matter of a formula to be applied essentially to the class members and there may be some debate over that. But that's how a formula can be used to solve this matter: a settlement that says in relation to the class as a whole this is the formula. And then when it comes to implementing the settlement it may well be that the defendant has to provide discovery and class members have to go through that process, as opposed to saying here's a settlement sum of X dollars to be divided up. Because as the counsel involved for the group I have to be satisfied that the settlement is fair and reasonable compared to the alternative of going to Court and be able to provide that information to the Court so that the Court can review the settlement and ensure that it is fair

O'REGAN J:

How will the Court know it's fair?

MR SKELTON QC:

Well, what happens in the Australian jurisdiction is they don't just rely on the plaintiff and the defendant making submissions to the Court because they accept that at that point of time there can be an alignment which isn't necessarily in the interests, and the Australian Courts have appointed an Amicus to assist in those matters. In this case – just to tie back to the facts – there was independent senior counsel appointed to assist the Rosses in terms of the negotiation of the funding agreement, so see whether it was fair or not. So, going ahead, I would envisage that the Court would require some independent assessment from a senior counsel as to the settlement, whether or not it's fair that would be part of the evidence that would have to be produced to the Court to enable the Court to be so satisfied, that's the sort of thing that happens in Australia.

O'REGAN J:

But, I mean, if a settlement was based on a view that there was a better than even chance of persuading the Court that a particular item did have to be included in the amount paid under the policy, the Court wouldn't have any basis for determining whether that was a good assessment or not, would they?

MR SKELTON QC:

No, and it isn't the role of the Court to vary settlements that parties have negotiated between themselves, it's looking at the process of settlement, it's looking at whether the settlement is fair between the parties, you know, why is the plaintiffs who happen to be represented by the plaintiffs' lawyers getting a bigger share than the other unrepresented plaintiffs, it's those sorts of matters that the Courts in Australia look at in determining whether or not to approve the settlement. But the usual factors of discounts for litigation risk, avoiding time hassle costs of going to Court, all of those factors are taken into account and the Court will, to a large extent, be relying on counsel's assessment, but as I say usually an amicus or an independent counsel's view on these matters is provided, and then it is notified to the whole group. So if class members object, that say oh this settlement is way too light, you know, we object, they could come to the Court and they can set out why they think the settlement is not fair and should not be approved by the Court, and those matters are then taken into account in reaching the judgment.

WINKELMANN CJ:

Right.

MR SKELTON QC:

Thank you Your Honours.

WINKELMANN CJ:

Mr Weston.

MR WESTON QC:

Well Your Honours, at the end of a long day, I do have a few points just emerging out of what my friend has just addressed you on, I'll start with that. Disclosure of the funding agreement, yes that has happened comparatively recently. It has been disclosed to us under pretty strict terms of confidentiality and it really hasn't gone much further because that's all been taking place during terms of lockdown and while we're sorting this out, so that's perhaps material for another day. The second point, my friend said that we, if anyone, know the size of the claim and of course in theoretical terms that's absolutely so because if anyone holds the record, Southern Response holds the record. Mr Hansen's affidavit is in the bundle before you in volume 2 of the case on appeal under tab 3, and amongst other things there's an explanation in that of a sample file analysis undertaken I think of about 80 files-odd, explaining how big a task that was to try and sort just those out to get some sort of insight into what the problem here was. Getting all 3000 sorted is truly an enormous task, and it's not push a button in the computer type of material, it's going to back to hard copy files, some exist, some are thought not to exist now, and getting complete records is a large logistical exercise, and it's certainly an issue for litigation as to the extent of disclosure obligations on the part of Southern Response at stage 1 is it having to discover everyone, assuming this is an opt-out, overseas authority would suggest, no, the disclosure obligations would rely and would relate I'm sorry to the Ross' claim. It may be that Privacy Act requests are made of Southern Response, which of course lies outside the discovery process, and Southern Response has to deal with those, but they are for people who have actually, as it were, signed up because that then creates the basis for a Privacy Act request to be made. But related to that difficulty of getting that information in the files, this is not just a simple case then of a formula. While there's a lot of standard template documents and so on in all of this, it's not then just a matter of saying, contingency fees are all in therefore. The contingency fees, for example, are calculated as 10% of a whole bunch of things that lie ahead of them in a calculation, so if those alter the contingencies alter. So it's just not a straightforward extracting figures, adding them up and saying here's your

cheque. So that would be my immediate response to the matters raised by my learned friend.

I do have a couple of rather basic references to handover. I want to then come and talk about the question of settlement, get back into that, and particularly the suggestion I think that now has gained some currency, that a lead plaintiff might have some sort of trustee or fiduciary obligations, which I will be resisting fairly strongly and hoping to explain to you why one should resist that. So can I just start with these rather mundane references that have come out of the hearing today. Just five of them I think, so we'll get through that pretty quickly. Now the *Feltex* – so these are just in the order in which they happened. There's nothing more in priority than that. So you may recall that in my learned friend's submissions there's a graph showing timeframe for opt-in over the *Feltex* proceeding, and it's suggested that the longer you have the better you go and so on. My friend's deal with that at paragraph 60 of their submissions.

Just two points to remember about that. The first of those was that the proceeding which commenced in 2008 had various stumbles along the way and it wasn't until 2010, so two years later, that the opt-in notice was sent. So there's immediately a gap there, so it's a little artificial to ignore that, and then for the next year or so there was a stay in place so nothing happened again until sometime in 2011. So perhaps somewhat artificial to look at that graph and draw any conclusions about the efficacy of opt-in class actions. That was my first point.

The second, the *Dutton* case, and my learned friend has just touched on that again saying there were four years after the Law Reform Commission came out, but just to give references on that, Justice Williams, you said that I had covered it somewhere and yes, I have. Paragraph 75 of our submissions is where we deal with that, and the report that came in from the Alberta Law Commission, is in the bundle, and if we look at the hard copy it's volume 3, tab 33. The report is dated 2000. So it's not a detailed one like the Ontario, it

builds on the Ontario one, but you can get some sense of how the jigsaw fits together in and around *Dutton*. That's my second point.

The third is to go back to the US Supreme Court decision of *Phillips Petroleum v Shutts* which my learned friend, Mr Skelton, took you through this morning. I am going to ask you once again to pull that out if you'd be good enough to do that. Volume 2, tab 22 of the hard copy, and if you turn, please, intrinsic page 813 or 812 perhaps and you'll recall this morning my friend was taking you through 812, then 813, and half way down 813 you get to a new paragraph that starts, "In this case," and those two sentences were skipped over but they are the ones I would respectfully draw your attention to because the second of the two sentences is the basis of the submission I made to you that the inability to serve 1500 of these potential class meant that they were excluded because the notice and opt-out form was undeliverable. So this is the particular –

GLAZEBROOK J:
Can I just make sure I'm with you and what page you're actually on?

MR SALMON:
813. So there's numbering in the top-right at 813. Does that show, Your Honour?

GLAZEBROOK J:
Thank you.

MR SALMON:
And half way down a new paragraph, first sentence, "3400 members". It's the next sentence, "Another 1500 were excluded because the notice," et cetera. That's the reference that I based that on. So that reflects the US practice part of the due process tied to the opt-out mechanism. The price of that, as it were, is the requirement to give best possible service. In that case, because they couldn't be served, they were excluded. So what I have called the

absent plaintiff problem is of an entirely different dimension in the US because of that obligation.

And related to that, I have mentioned in oral submissions that there was a reference in our submissions to an Australia case called *Gagarimabu*, which is my pronunciation, no doubt in error, but one can find it at the bottom in our submissions of page 13 and it's tucked in –

WINKELMANN CJ:
Is that in the electronic record?

MR SALMON:
I imagine it is. With a G, *Gagari*, is that there, Your Honours?

WINKELMANN CJ:
Gagarimabu.

MR SALMON:
Yes. And we quote from Justice Hedigan at paragraph 9. "The notice is fundamental to the opt-out procedure because it is the notice that empowers the Court to regard the recipients as bound," and so on. So the point that we've made in our written submission is that for an opt-out proceeding notice is of a different dimension to an opt-in. So that's tied to the submission I have made in relation to the American decision of *Phillips Petroleum*. That's my third point.

Fourth point concerns *Jameson*.

GLAZEBROOK J:
I think I missed your point because I was looking for your reference. So what was the point?

WILLIAMS J:
So did I, so…

MR WESTON QC:

So the point about the US decision or the –

GLAZEBROOK J:

No, I understood that. The Australian one.

MR WESTON QC:

Related to that the importance of notice in relation to an opt-out as founding the basis for making decisions thereafter that may effectively exclude people.

GLAZEBROOK J:

So it's a different – it doesn't have anything to do with the previous point?

MR WESTON QC:

Well, it does, with respect, Your Honour. It's the importance of giving notice. So in the US the giving of notice is regarded as part of the due process. The Judge in *Gagarimabu* is saying that it's equally important. He doesn't use the language of due process but it has the same effect. It sets up the ability of the Court thereafter –

GLAZEBROOK J:

Why does that mean it should be opt-in rather than opt-out?

MR WESTON QC:

What I'm dealing with, Your Honour, is assuming that we're in an opt-out territory I'm addressing two provisions about two different ways of addressing notice. That was my intention. My friend raised it in the context of opt-out. I'm addressing it in the same context.

WINKELMANN CJ:

What does *Gagari* say about notice, because it talks about personal notice and what does it conclude? It says that there's a wide discretion, doesn't it?

MR WESTON QC:

Yes. In Australia there is, Your Honour, specifically under the statute there's a, as I said yesterday, what I called a cost benefit analysis under section 33Y(5). It was just a reference that had a similar basis to how due process in the US. It was in our footnote. I said yesterday it was there. I was drawing it to your attention because yesterday I hadn't found it for you. I have now found it for you.

WILLIAMS J:

I'm just trying to understand it, that's all. So in *Gagarimabu* the Judge said gone, no address, excludes that person from the class, as did *Phillips Petroleum*, or…

MR WESTON QC:

No, it doesn't have – because of the different statutory basis –

WILLIAMS J:

Yes, that's what I thought. So you're simply referring to this case because the Judge says notice is existentially important, that's your point?

MR WESTON QC:

Yes. Yes, exactly, Your Honour.

So two further references that come out of the discussion today I'm about to turn to. The *Jameson* case which is in the electronic bundle at 42. It's an Australian, New South Wales, Court of Appeal decision, *Jameson*, and you were referred to paragraphs 121 and 124 of it by my learned friend. If the case is to have any weight and importance for Your Honours, can I also draw your attention to 98 where the Court is saying that there's no preference as between opt-in and opt-out. There's good reasons that support either. So that is equally part of the reasoning and the Court should be aware that that is part of that judgment.

And then, Your Honours, moving on to my final point that emerges out of references that we have had today although it's a bigger point that leads on then to the question of powers of settlement and so on. So I'll start small as it were and get perhaps bigger. So my friend's submissions, perhaps the sensible place to start for this is dealing with this case of *Saragossa* that was discussed this morning and if you could turn in my friend's submissions to his paragraph 94, and at paragraph 94 the first sentence, he uses the Latin as in "dominus litis" and then a couple of sentences down, "It can also approve a settlement, and impose a time limit for class members to come forward and participate," and the footnote 168 leads us to the *Saragossa* case that my friend discussed, and I know Justice Glazebrook is particularly interested in older authorities, if I can call them that, that might support powers of settlement and the case which is a decision of the House of Lords is a rather brief two pages. So it's the record of a settlement.

We've drilled right back through to first instance in this, it's a trustee case and you'll see in the italicised heading to the decision, I don't immediately have in front of me but if I haven't managed to direct you accurately I will get my junior to show me on her screen but you will see the order reference at the top. That order is part of the rules dealing explicitly with settlement of trust claims and this was a claim by bond holders against a trustee. It was settlement of that by reference to that rule. So this is not a representative action – well, Your Honours –

WINKELMANN CJ:
Well we'll take a look at it.

MR WESTON QC:
Yes. Now we can, if it would assist, supply some of the background, we can supply the rule. My friend is saying to the left, it is a representative action but it is plainly a trust case on its face and by reference to that rule.

So what I propose to do having got into this issue of trusts, which is part of the discussion we've had about settlement, is do two things. One, is I would like

to discuss, if I may, the *Eaton v LDC* case that we've spent a little bit of time on and then perhaps just talk a little more generally about whether the lead plaintiff can have some sort of fiduciary role with the Court then using that as a means to address settlement issues.

WINKELMANN CJ:
Haven't you already taken us to *Eaton?*

MR WESTON QC:
Sorry?

WINKELMANN CJ:
Haven't you already taken us to *Eaton?*

MR WESTON QC:
In part, Your Honour, but you've been shown one decision. This morning you were shown the starting point of that by the Associate Judge. There's an intermediate decision that also needs now to be looked at to get the full picture and I was hoping to do that quickly if I might.

But can I just start by orientating us, Your Honour. In my learned friend's respondents' additional authorities, tab 51 in the hard copy, you can find the judgment that we started this inquiry with, the judgment of Justice Fogarty. Now you will see that this, amongst other things, I had a role to play in this so I had a degree of familiarity with it. When my friend took you through – so in my submission I didn't take you to the case, I said it was a trust deed case, I didn't take you to it. My friend then went to it. When he took you through it he stopped over paragraph 17 so can we go to paragraph 17. Your Honours may have noticed this on the way –

GLAZEBROOK J:
Sorry I need to catch up. Whereabouts is it?

MR WESTON QC:

Yes, so it's tab 51, Your Honour, in my friend's extra bundle. Are you looking for hard copy or electronic?

GLAZEBROOK J:

I think it's going to be easier for me to find hard at the moment.

MR WESTON QC:

Hard copy, yes, respondents' additional authorities, tab 51.

GLAZEBROOK J:

Thank you.

MR WESTON QC:

So tab 51 and I had said, Your Honour, that it was a case which I had some involvement but yesterday when I mentioned it I didn't take the Court to it. My friend then did and I had got to the point of saying that when he was taking Your Honours through this he stepped over paragraph 17, I'm not saying this in a critical way, but one needs to understand paragraph 17.

The two persons, Messrs Eaton and Marshall were not actually claimants in their own right, they did not have any claim. They had been appointed by the Associate Judge back in 2009 and what back then was articulated as being if not a full trustee analogous to a trustee position on behalf of these various claimants. My friends this morning have handed up the decision of the Associate Judge which indeed speaks in terms of rule 4.24 as being part of his consideration as he was making the representation order back in 2009. In passing I might respectfully observe that that seems to be pushing the boundaries of rule 4.24 because it contemplates that the representative plaintiff actually has a claim, because it speaks of the same interest and so on, but nonetheless that was the basis used back in 2009.

We then come forward some time and Justice Fogarty's decision is dated May 2013, so four years later, and a settlement is achieved. We also see if

we look at Justice Fogarty at paragraph 5, that he'd had a previous run at this in a judgment that he delivered on 11 April, a month or so prior to this one, and what is made clear, if one looks at that extra judgment, which is footnoted by him with footnote number 2, and we have copies here should the Court need them, is that an application had been made by my learned friend Mr Smith acting on behalf of Messrs Eaton and Marshall to approve the settlement that's referred to in paragraph 4 of Justice Fogarty's decision. And the reason, as it's made clear in Justice Fogarty's 11 April decision at paragraph 10, that that application was made was because it was common ground that the original order appointing Messrs Eaton and Marshall, did not authorise them to effect settlement. So they were under the application, and the application had two parts. One was to formally appoint them by reference to section 51 of the Trustee Act in relation to this settlement so they could carry it into effect, and then under section 64 that it could be approved by the Court. And that makes entire sense in the context that these two men had no skin in the game. They were literally trustees, as Justice Fogarty's judgment makes clear. They were not in any sense pursuing their own claims, they were pursuing claims on behalf of others. So although the starting point for this journey back in 2009 was at least in part rule 4.24, it fundamentally changed and developed as a trustee case and that, I respectfully submit, was entirely appropriate.

Can I then step from that to look at the proposition of whether we could make a lead plaintiff either a trustee or close them in some respects as a fiduciary, and it is my submission that that would be a radical development and place enormous pressures upon a lead plaintiff. At the moment they carry no such onerous obligations, and let us remind ourselves that the fundamental obligation in the fiduciary, as Lord Justice Millet taught us in *Armitage v Nurse* is the obligation of loyalty to avoid a conflict of interest.

GLAZEBROOK J:

Can I just – I understood that the trustee proposition just came about, if you have just an absolutely vanilla product liability type claim – actually that's probably a wrong thing. I'm thinking of the Aida fiasco perhaps in Auckland

where everyone had paid $100 for a ticket and nobody could see or hear. So if you had a class action for that and you had a lead plaintiff who managed to collect say $10,000, they obviously get their $100 but they must hold the rest on trust for everybody else. I thought that was the limit of the submission. That once you get the money in, then you're obviously holding it on trust for the other people and there'll be a mechanism for whereby the other people can claim. I didn't understand it to be going further than that.

MR WESTON QC:

Well if that's so then I, with respect, am pleased about that, but can I answer Your Honour's proposition as well, to say even that presents difficulties though because let us bear in mind who are the various actors in that assumed class action. Presumably there's a funder. The funder's interest is maintaining the funding commissioner at a as high a rate as possible.

GLAZEBROOK J:

Well actually probably in that case it's everybody sticking in two bucks and then seeing how they go. That would be a classic, you know, everybody stick in two bucks and see how you go.

MR WESTON QC:

Well most of the propositions that have been put to me, Your Honour, haven't been perhaps as straight forward as that, they've been –

GLAZEBROOK J:

Well this is because they're very, very small claims and people have a certain interest and they are very cross, speaking in respect of that particular issue because I still remember –

MR WESTON QC:

Yes, Your Honour is obviously a class member, are you?

GLAZEBROOK J:

And so the idea of sticking in a few bucks in order to see how everybody grouped together as against you individually are going to go with getting your money back might be.

WINKELMANN CJ:

But if we take a step back, what is said against you is that the Court has since the early 19 century have exercised the jurisdiction to appear as patriae jurisdiction to protect those who are vulnerable in any way and the trustee type jurisdiction, now statutory, is an example of that and there is no reason to limit the exercise of that jurisdiction.

MR WESTON QC:

Well Your Honour, what I'm trying to carve out at the moment is the trustee dimension to that so let me move on.

WINKELMANN CJ:

No that is not, as I think Justice Glazebrook said, that's not the force of the submission that's made against you.

MR WESTON QC:

And Your Honour, the reason I started with cases is because that is what is being put up as founding that jurisdiction, bearing in mind that I challenged it, I said yesterday to Your Honour Justice Glazebrook that we were not aware of any cases. It was then made clear to me that my friends were relying on these New Zealand cases such as *Eaton v LDC* and also the *Saragossa*. So what I've been endeavouring to do is actually front up to the cases that are said to provide the basis for this. Other than that though I have not been given anything concrete to push against other than a general statement that the Court has a supervisory jurisdiction in relation to certain categories of party and I accept that it does that, but that, in my respectful submission, does not provide any basis to close the Court with a general jurisdiction to take the role in relation to settlements that in Australia is founded on section 33V.

WINKELMANN CJ:

So you say the Court just can't assert the supervisory jurisdiction in a new area?

MR WESTON QC:

Well I'm not putting it as broadly as that, Your Honour, I'm trying to be quite specific about this case where we're talking about class actions in that area.

WINKELMANN CJ:

No, obviously in this new area then.

MR WESTON QC:

Yes, Your Honour, and I submit that it doesn't arise in relation to the opt-in as its run in New Zealand precisely for the reasons that my learned friend, Mr Salmon, was saying how that these funding contracts are structured.

GLAZEBROOK J:

So you're saying the Court couldn't exercise a supervisory jurisdiction if there's a funding contract in an opt-in case because I do have a certain concern about that as well.

MR WESTON QC:

Yes. Well –

GLAZEBROOK J:

And in fact it probably is counter to what *Waterhouse* says even though it does say that the Court is not going to get its fingers, as Mr Salmon would say, into commercial matters.

MR WESTON QC:

Yes.

GLAZEBROOK J:
And it's not going to be a regulator of funders, it certainly says that but it doesn't say that it's not going to get involved in that at all and especially in respect of costs orders against third party funders.

WINKELMANN CJ:
So you do say the Court could not exercise a supervisory jurisdiction in an opt-in funding agreement situation?

MR WESTON QC:
No, I think in this area only a fool would say never, Your Honour. I can't obviously contemplate all circumstances, so I wouldn't say that but the general run of how these are established and structured would mean it's unlikely but the example I think Your Honour Justice Glazebrook put was, "Well what say the funding commission is at 90%?" Well then questions of abuse of process probably arise but again who knows because let's say each individual claim in that case was a dollar and they said, "Well we're going to take 90 cents of your dollar because it's going to be awfully expensive to run." So I don't think you can just say in and of its 90% is bad or all you can say is that there may be cases where it amounts to abuse of process and –

GLAZEBROOK J:
Well it may be champerty.

MR WESTON QC:
Yes, and that's a really interesting issue in New Zealand with champerty and maintenance still alive and sitting out there on the margins. Quite how some of this is going to play out can't be foreseen in all respects. So it's tricky. I mean we've spent two days on this and to some extent we've scratched the surface of some extremely difficult issues. So Your Honours, those are those points that I make about trustees and so on, the supervisory jurisdiction.

Can I then, and I'm building to a finality pretty quickly, my friends anticipated case management steps, can I just take you through a couple of matters

about that. So this is his schedule A attached to his hand up. So Your Honours will have observed that much of what is set out here is fairly vanilla standard litigation steps that you would expect to be taking come what may. Can I just make a couple of comments where extra dimensions need to be thought about. So step 1, which yes needs to be resolved because there is an outstanding application for security for costs, that does come early on, but equally a decision needs to be made by my friends about whether they are going to pursue their common fund order application or not because that is extant. It has been timetabled to go next because it has been structured, at least at the moment, on the basis that the opt-out notice, as my friends want, would not go until the CFO order, as they requested, has been made, because that would be part of what is then notified to the class. Now that's the current plan of attack. My friends, I know, have signalled that they might be revising that in light of *BMW* but at the moment that is a question mark. My friends may well change tack, and obviously I'm not holding them to their current plan but that, at least, needs to be factored into this thinking. We then drop down to number 8, and number 8 is –

GLAZEBROOK J:
We don't have numbers, I don't have numbers.

WINKELMANN CJ:
Are you on the wrong page, schedule A?

GLAZEBROOK J:
Are we on the previous one. I thought we were looking at the guidelines.

MR WESTON QC:
Sorry Your Honour. So I've been talking about – I'm now done to number 8 which is in this outline we've stepped down to stage 2, so we've had a stage 1 hearing. Now there's no mention in 8 and following of what we have loosely called in this case the opt-in for stage 2. How that's actually going to occur, because that is a material matter. Will all persons at that point be required to make their election, irrespective of whether their particular case is going to be

litigated first, last or in the middle, assuming all 3000 were to be litigated, and related to that you have the issue of do you require each and every one of them to file a pleading and/or to give discovery. In the *Feltex* case stage 2 was structured on the basis that there would be pleadings, a form of pleading that was specifically designed to, it wasn't a statement of claim as per the High Court Rules, but it captured certain key steps that had to be set out by each of the 15 plaintiffs that were selected to go ahead and they had to make discovery. But if there is, bearing in *Feltex* is an opt-in case, so people have already made their election, but there would need to be a decision made as to how that process is to work out, is to be worked through. That's my second point.

The third point I would make, if we go over the page. This schedule assumes that any settlement is to occur in the stage 2 point. As my friend has repeatedly said, most settlements occur at stage 1, so to some extent this would then need to be rejigged and issues like number 11 and number 13, which identify class members, there would be potentially difficult issues as to what class members we're talking about. Are they the ones that have opted in. It seemed from my friend's characterisation here that he might be contemplating that anyone can still have a go later on, as it were, irrespective of whether they'd been required to opt-in. So what, my overarching submission in relation to this which looks reasonably anodyne has actually got some quite difficult and tricky little issues buried in it along the way.

So, Your Honours, that's all I'll be saying on that, and then just two short topics to go. One a quick response about where the position in Australia has got to and then a final word on security for costs. So in Australia my learned friend, Mr Skelton, yesterday gave the impression, at least as I heard him, of saying that in this flurry of cases that have emerged this year post the *BMW* case there are a number involving common fund orders that had been ordered. Now we've been monitoring these cases. We're not aware of a series of these other than one case, which is not to say that there aren't others but my learned friend did not identify them. The one that we have identified is a decision of Justice Murphy in a case called *Uren v RMBL*

Investments Ltd (No 2) [2020] FCA 647 that came out about four weeks ago, a very unusual case, and yes, it does seem he made a CFO against a background where it was a very small settlement, a $3 million settlement, and only one claimant had actually opted in in the sense of signing up to the funding agreement. So if there was to be a funding equalisation order it was not going to fairly spread the cost, so he said in those circumstances he would order 750,000 paid to the funder as a commission. That was presented to him as a consent order. And in the even more recent decision from the New South Wales Court of Appeal in the ongoing saga of the *Wigmans* case, my learned friend mentioned *Wigmans*, my learned friend, Mr Quinn, this morning mentioned *Wigmans*, it's got multiple arms and legs that case, but the New South Wales Court of Appeal came out a couple of weeks ago. They said of the *Uren* case that because it was a consent judgment it was of no precedential value and therefore one might think that it's perhaps regarded as an aberration. Who knows. But that was the characterisation that the New South Wales Court of appeal gave to it. So we're not aware of other cases. As I stress, though, that's not to say that there aren't others. It's not easy to keep up with the flood but that's all we know about.

That was the first point. The second point about Australia, my learned friend, Mr Skelton, yesterday said that the range of funding commissions in Australia was coming down and he mentioned again today that competition amongst funders is a good thing and might be pushing them down. I noted that he'd said that at least some of them might be as low as 10%. I'm not aware of any evidence before this Court or materials before this Court that would justify that. The most up to date empirical research that I know of, again this is a big field so one can always miss it, but what I know of is an analysis that Professor Morabito did last year that took us through for the five years to December 2018, so a bit past where the Australian Law Commission Report took us, and that calculated that the average funding commission over the last five years to December 2018 was 25.5%. So it may be that there's something that my friend had in mind. If there is I'm not aware of it.

That was my penultimate topic and then quickly my last one, Your Honours. Security for costs. My learned friend said yesterday that when his clients issued they did not have a funder and that is correct. He then went on to say, my words, not his, that they were forced to seek a funder when Southern Response sought security for costs. While that might sound quite anodyne, it is evidence from the Bar. There's quite a big story that lies behind that that equally we require evidence from the Bar.

WINKELMANN CJ:
It's not going to figure.

MR WESTON QC:
Yes. I just wanted to note that, Your Honour. I wasn't proposing to go there.

WINKELMANN CJ:
Yes, I understand.

MR WESTON QC:
So Your Honours, that's me done. Unless there's any further questions?

ELLEN FRANCE J:
Just one thing Mr Weston. Was there anything you wanted to say about schedule B?

MR WESTON QC:
Schedule B?

WINKELMANN CJ:
The guidelines.

ELLEN FRANCE J:
To the proposed guidelines?

MR WESTON QC:

Well I guess I could, Your Honours, but it might be quite a lengthy, because one can debate these. These are topics very much worth considering, I agree with that. My position, and my learned friends would probably differ in the obvious ways that would follow from my submissions, is probably the most sensible way –

WINKELMANN CJ:

It might be of assistance. If we were to reach, after having reflected on the great deal of information and argument we've received, if we were to resolve that, the appeal should be dismissed and opt-out should be the default, it would assist us to have some sort of pushback, or different points of view brought to bear on those.

MR WESTON QC:

Right Your Honour.

WINKELMANN CJ:

Which is not also to indicate that we will –

MR WESTON QC:

You appreciate that I don't think we had seen this before it was handed up yesterday so, you know…

ELLEN FRANCE J:

No, that was partly why I was asking.

MR WESTON QC:

Yes, so is Your Honour inviting us perhaps to come back in a more considered way rather than me trying to do it on the hoof?

WINKELMANN CJ:

I think that would be useful.

MR WESTON QC:

So perhaps my friend and I will have a talk about a process that enables everyone to be happy about what gets served up to Your Honours.

WINKELMANN CJ:

Well, can we suggest a process?

MR WESTON QC:

Well I would put something in and my friend perhaps have a right of response, or would you try to avoid that?

WINKELMANN CJ:

No, I think that's a sensible thing.

MR WESTON QC:

Yes, can we perhaps just formulate, because it will depend on timing commitments. I'm just about to start a nine week trial shortly so I'll sort it out with him.

WINKELMANN CJ:

Can you file a memorandum setting out an agreed timetable?

MR WESTON QC:

Yes, yes, we'll do that Your Honour. Sorry I can't answer that one straight away.

WILLIAMS J:

I wonder if there are any circumstances in which the Bar Association or the Law Society, not sure about LPF, might have some comment to make about what you two put up.

MR WESTON QC:

Would you like us to talk with them about it or… it could become bigger than Ben Hur. My friends at the Bar Association might have been thinking they

were finally out of here Your Honours, so they might not welcome more homework.

WINKELMANN CJ:
I mean that is the sort of thing I think that interveners, we might expect some assistance from the interveners on.

MR WESTON QC:
Perhaps we could think of some way of trying to set this out in a tabular way with different positions. I don't know, there must be like a Red Fern schedule or something in an arbitration perhaps. There must be some sensible way of trying to serve it up. We'll have a think.

WINKELMANN CJ:
Excellent.

MR WESTON QC:
Much obliged to Your Honours for your patience.

WINKELMANN CJ:
Thank you all counsel for your submissions. They were very helpfully put forward, and we will take some time to consider them, and also to consider the additional material to be filed.

COURT ADJOURNS: 4.18 PM