



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SOUTHERN RESPONSE EARTHQUAKE SERVICES LTD v BRENDAN MILES ROSS
AND COLLEEN ANNE ROSS

(SC 105/2019) [2020] NZSC 126

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Introduction

Mr and Mrs Ross brought a claim against their insurer, Southern Response Earthquake Services Ltd, alleging that they agreed to settle their insurance claim on a less favourable basis because Southern Response gave them incomplete information about the cost of remedying damage to their home caused by the Canterbury earthquakes. They also say many other policyholders settled their insurance claims with Southern Response in similar circumstances. Mr and Mrs Ross applied to the High Court for leave to bring their proceeding as a representative claim of the class of some 3,000 policyholders who settled in these circumstances.

Although Southern Response did not oppose the claim being brought on a representative basis, it did oppose Mr and Mrs Ross bringing the claim on an opt out basis. This meant the claim would be brought on behalf of every member of the class of policyholders apart from those members who expressly chose to opt out. Southern Response contended that the claim should be brought on an opt in basis, where a member of the class would have to complete a form electing to opt in to the proceeding in order to be included in the claim.

Issue

The main issue on this appeal is whether the representative proceeding in this case, and in such proceedings more generally, should proceed on an opt in or opt out basis. Up until this case, opt in has been the approach adopted in New Zealand. Consistent with that approach, the High Court granted leave for an opt in claim. The Court of Appeal took a different view

and allowed Mr and Mrs Ross's appeal from the High Court. The Court of Appeal held that opt out should generally be the norm and made an order that Mr and Mrs Ross's claim proceed on an opt out basis. Southern Response was granted leave to appeal to the Supreme Court from that decision. The New Zealand Law Society, the New Zealand Bar Association and LPF Group Ltd intervened.

Extent of the court's powers

Rule 4.24 of the High Court Rules 2016 makes provision for representative proceedings but is silent as to the procedure to be used, including whether such proceedings can be brought on an opt in or opt out basis. There is no legislative regime governing class actions in New Zealand, but this is currently under consideration by the Law Commission. By contrast, in comparable overseas jurisdictions there are comprehensive legislative regimes or rules regulating representative or class actions like that in this case.

Nonetheless, the parties agreed that New Zealand courts had jurisdiction to order the proceeding to be brought on either an opt in or opt out basis. But Southern Response contended the jurisdiction to make opt out orders should not be exercised without a comprehensive legislative regime which would clarify the court's powers regarding a number of procedural issues. Southern Response emphasised that opt in has developed to be the usual procedure in New Zealand and that uncertainties arising from opt out mean the benefits of such an approach are not established.

Decision

The Supreme Court has unanimously dismissed the appeal.

First, the Court held that representative actions have three objectives: improving access to justice, facilitating the efficient use of judicial resources and strengthening incentives for compliance with the law. It was also necessary to be guided by the objectives of the High Court Rules, namely, to secure the just, speedy and inexpensive determination of proceedings. The Court held that an opt out procedure is generally consistent with those objectives and has particular advantages in improving access to justice.

Second, the Court did not consider it necessary to wait for comprehensive legislation before allowing for opt out claims. In the absence of legislation, the court should fill the void with a flexible application of existing rules of court to develop procedures concerning representative actions, including in an opt out context. The Court also noted there was an armoury of High Court Rules that can be drawn on to deal with procedural complexities arising from opt out claims and to ameliorate any injustice to the defendant. Some uncertainty was inevitable, but a number of complexities would remain whether or not the status quo was retained. Rule 4.24 had to continue to be interpreted to meet modern requirements, and the advantages of opt out meant it should not be seen as off the table pending the law reform exercise.

Next, the Court considered the specific concerns Southern Response raised regarding opt out claims. In doing so, the Court said concerns about "absent plaintiffs", who have no knowledge of the proceedings and therefore become effectively bound to funding and settlement terms they have not agreed to, can be addressed by ensuring there is provision for adequate notice to class members with an explanation of their right to opt out.

The Court also rejected Southern Response's argument that there was no power for courts to approve settlements and discontinuances. Absent such supervision, class members not directly involved in the proceedings could be prejudiced. But relying on examples of New Zealand courts exercising similar powers, and drawing an analogy with the court's protective jurisdiction when dealing with infants or persons with disabilities, the Court held that New Zealand courts have the power to approve settlements in representative proceedings. Further, the Court said that, as a general rule, a requirement for court approval of a settlement or discontinuance should be a condition of giving leave under r 4.24(b) to bring proceedings on an opt out basis.

In response to concerns about the difficulty of managing tensions arising from litigation funding in an opt out context, the Court said such issues would arise in opt in claims as well. Further, the court's ability to supervise settlements and the provision for notice, in addition to the court's role to ensure litigation funding arrangements do not amount to an abuse of process, would go some way to addressing concerns.

Finally, the Court provided some guidance as to when a representative proceeding should be allowed to proceed on an opt in or an opt out basis. The Court said that generally the procedure sought by the applicant, whether that be opt in or opt out, should be adopted unless there is good reason to do otherwise. In doing so, the court should consider all the relevant factors in light of what best meets the permissible objectives of the representative action in the particular case.

Applying these principles, the Supreme Court held that the Court of Appeal was correct to say an opt out order was appropriate in this case. Opt out was the course preferred by the applicant and nothing advanced by Southern Response satisfied the Court that there would be any real disadvantage to class members.

Contact person:

Kieron McCarron, Supreme Court Registrar (04) 471 6921