IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA150/2019
[2019] NZCA 431

BETWEEN	BRENDAN MILES ROSS AND COLLEEN ANNE ROSS Appellants
AND	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Respondent

Hearing:	13–14 August 2019
Court:	Miller, Courtney and Goddard JJ
Counsel:	P G Skelton QC, K M Quinn and C B Pearce for Appellants T C Weston QC, K M Paterson and O D Peers for Respondent
Judgment:	16 September 2019 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made by the High Court on 13 December 2018 are amended in the manner set out at [135] to [138].

C The respondent must pay costs to the appellants for a standard appeal on a band B basis together with usual disbursements. We certify for second counsel.

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REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] The main issue before us is whether this representative claim can proceed on an opt out basis. We conclude that it can, and should.

[2] In May 2018, Mr and Mrs Ross began these proceedings against Southern Response. The claim relates to the settlement agreement that Mr and Mrs Ross entered into with Southern Response in relation to their insurance claim for damage to their house caused by the Canterbury earthquakes (the settlement agreement). In short, they say that Southern Response provided them with incomplete information about the cost of remedying earthquake damage to their home. As a result, they settled on a less favourable basis than they otherwise would have.

[3] Mr and Mrs Ross say that many policyholders settled claims in similar circumstances, and as a result have the same claims against Southern Response. Mr and Mrs Ross applied to the High Court for leave to bring the proceedings as representatives of the class of around 3,000 policyholders who entered into settlement agreements in these circumstances.

[4] Mr and Mrs Ross sought leave to bring the representative claim on an opt out basis: that means they would bring the claim on behalf of every member of the group as defined, apart from any members who expressly chose to opt out of the proceeding. Southern Response did not oppose Mr and Mrs Ross bringing a representative claim, but said it should be brought on an opt in basis: a member of the affected group would need to complete an opt in election form and send it to the High Court by a date fixed by the Court in order to be included in the claim. Southern Response also objected to the definition of the group of claimants, saying it was too broad in a number of respects.

[5] The application for leave to bring a representative proceeding was heard in the High Court in November 2018. In a judgment delivered on 13 December 2018 (the High Court decision) Associate Judge Matthews held that the claim should be

brought on an opt in basis, and resolved a number of issues about the membership of the represented group.[1]

[6] Mr and Mrs Ross obtained leave to appeal to this Court.[2] They say that:

(a) the representative claim should be brought on an opt out basis, rather than an opt in basis; and

(b) the Associate Judge incorrectly limited membership of the class to rebuild customers. Repair customers who entered into settlements in similar circumstances should be included in the class.

[7] We allow the appeal on both issues.

Overview of the claim by Mr and Mrs Ross

The background to the claim

[8] At the time of the Canterbury earthquakes, the house owned by Mr and Mrs Ross was insured under a "Premier House Cover" policy with AMI Insurance Ltd (AMI). The policy provided that if the house suffered damage covered by the policy, AMI would pay to repair or rebuild the house to an "as new" condition. If the house could be repaired, AMI could choose to either repair the house to an "as new" condition itself, or pay the cash equivalent of the cost of repairs. If the house was damaged beyond economic repair, Mr and Mrs Ross could choose any of the following options: rebuilding the house on the same site; rebuilding on another site; buying another house; or being paid the market value of the house at the time of loss. If they chose to rebuild on another site, or to buy another house, the cost that AMI would meet was capped by the cost of rebuilding the house on its present site.

[9] The policy also provided that AMI would pay certain "additional costs": the reasonable cost of any architects' and surveyors' fees to repair or rebuild the house; the reasonable cost of demolition and debris removal; the reasonable cost of removing

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1 *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288 [High Court decision].
2 *Ross v Southern Response Earthquake Services Ltd* [2019] NZHC 495.

household contents from the house where necessary to carry out repairs or reinstatement; and the cost of any additional work required to comply with building legislation and rules.

[10] Where the house suffered damage covered by the Earthquake Commission (EQC), the cover provided by AMI was top-up cover for loss or damage not covered by EQC.

[11] AMI was unable to meet its obligations to policyholders following the second major earthquake on 22 February 2011. It entered into arrangements with the New Zealand Government which resulted in a restructure of AMI. The day-to-day business of AMI was sold to another company. Claims in relation to earthquake damage prior to 5 April 2012 remained with AMI, and AMI was renamed Southern Response. It became a Crown-owned company. The business of Southern Response is to manage and settle claims by AMI customers for damage resulting from the Canterbury earthquakes. It is required to do so consistently with normal commercial and financially prudent principles, though not on a profit making basis. It does not have any continuing insurance business.

[12] The claims brought by Mr and Mrs Ross arise out of the way in which Southern Response engaged with them in connection with the settlement of their insurance claim, and the information it provided to them about the cost of rebuilding their house.

[13] Southern Response engaged Arrow International Ltd (Arrow) to inspect damaged homes of policyholders, to recommend whether each home was able to be repaired or was beyond economic repair, and to prepare detailed estimates of the cost of repair or rebuild. Those estimates were set out in documents known as "Detailed Repair/Rebuild Analyses" (DRAs).

[14] Mr and Mrs Ross plead that two versions of the DRA were created simultaneously with the same number, one labelled "DRA-SR-Ross" and the other "DRA-Customer-Ross". They say both of these were supplied to Southern Response, but Southern Response only provided them with the "Customer" version. They

describe the "Customer" version that they received as an abridged version of the full "SR" version. They say the full "SR" version was not provided to them at any point before they settled their claim, and they were not made aware of its existence.

[15] Mr and Mrs Ross plead that the abridged DRA gave a total figure for the cost of rebuilding, preliminary and general costs, and obtaining regulatory consents, of $290,145.42. It set out a further figure for items "outside EQC scope" of $24,945, giving a GST exclusive total for estimated costs to rebuild the house of $315,090.42. The total estimated cost including GST was shown as $362,353.98.

[16] Mr and Mrs Ross plead that the full DRA prepared by Arrow contained a costs schedule which was nearly identical, except that it also contained an additional section. This section set out estimates for further items of costs for internal administration, demolition, and design. When these were added to the GST exclusive total in the "abridged" DRA, that resulted in a subtotal of $376,069.44. To that was added a project contingency sum of $37,607, giving a "Grand Total House (excluding GST)" figure of $413,676. The total figure inclusive of GST is then recorded as $475,727.40.

[17] After taking into account the additional items, the total house rebuilding cost in the full DRA is approximately $113,000 more than in the abridged version.

[18] After some negotiation Mr and Mrs Ross settled their claim with Southern Response for the figure of $362,355 (the figure shown in the abridged DRA, rounded up slightly). They were paid an amount equal to this figure less a deduction for the payment they received from EQC. This settlement was reached after considering further material provided to them by Southern Response described as a "Decision Pack". They signed a settlement form described as a "Settlement Election Form". Mr and Mrs Ross took the "Buy another house" option available to them under their policy. Mr and Mrs Ross say that before settling they obtained their own estimate of the likely cost of rebuilding, which was considerably higher than Southern Response's estimate in the abridged DRA. When this was raised with Southern Response it declined to adjust its settlement offer, and in the end Mr and Mrs Ross accepted that offer.

[19] After settling their insurance claim Mr and Mrs Ross learned for the first time of the existence of the full version of the DRA. They plead that Southern Response represented, expressly or impliedly, that the sum of approximately $362,355 identified in the abridged DRA on which they relied was Southern Response's genuine estimate of the cost of rebuilding their home, and that it was the sum to which Mr and Mrs Ross were entitled (and which Southern Response was obliged to pay) under the policy. They say that Southern Response was aware that was not a full estimate of the cost of rebuilding, and that in fact Arrow's full estimate of that cost was the higher figure contained in the full version of the DRA.

[20] The obligations of Southern Response under similar policies have been considered by the courts in other recent proceedings.[3] In *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* this Court held that the cap for payments for rebuild customers who wished to buy another house should include an allowance for professional fees, and for a contingency sum.[4] The Supreme Court upheld that decision.[5] Following the Supreme Court judgment in *Avonside Holdings*, Southern Response announced it would include an allowance for professional fees and a contingency sum in future settlements, and would backdate payment of those amounts to settlements entered into from 1 October 2014 onwards (the date of the Court of Appeal judgment in *Avonside Holdings*). Southern Response has not backdated that approach to apply to customers who entered into settlements before 1 October 2014, including Mr and Mrs Ross and the other customers in the class that Mr and Mrs Ross seek to represent (that is why there is a 1 October 2014 cut-off date for class member settlements in order 1(f) of the orders made in the High Court decision).

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3 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433; *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040; *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141; *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344, (2013) 17 ANZ Insurance Cases 61-965; and *Southern Response Earthquake Services Ltd v Shirley Investments Ltd* [2017] NZHC 3190. After the hearing of this appeal counsel also referred us to the recent decision of the High Court in *Dodds v Southern Response Earthquake Services Ltd* [2019] NZHC 2016: we do not consider that decision is relevant to the issues before us.

4 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*, above n 3.

5 *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd*, above n 3.

The four causes of action

[21] Against that backdrop, Mr and Mrs Ross have brought these proceedings in which they claim that:

(a) Southern Response engaged in misleading conduct, in breach of s 9 of the Fair Trading Act 1986. Mr and Mrs Ross claim damages in respect of the loss which they say they have suffered as a result of that conduct.

(b) Southern Response made misrepresentations which induced Mr and Mrs Ross to enter into a settlement agreement. They claim damages under s 35 of the Contract and Commercial Law Act 2017.

(c) As a result of the conduct of Southern Response, Mr and Mrs Ross were mistaken about the estimated cost of rebuilding or repairing their dwelling, about Southern Response's belief as to the estimated cost to repair or rebuild their dwelling, and about the sum recoverable under their insurance policy. They say that they were influenced by these mistakes in deciding to enter into a settlement agreement with Southern Response. They say that Southern Response was aware of these mistakes. They claim compensation or restitution under s 28(2)(d) of the Contract and Commercial Law Act.

(d) Southern Response owed Mr and Mrs Ross a duty of good faith. The conduct of Southern Response breached that duty of good faith. They claim damages for that breach.

[22] The damages claimed by Mr and Mrs Ross include:

(a) The difference between the sum they received under the settlement agreement, and the higher "Grand Total House" figure in the full DRA prepared in respect of their claim. That difference includes the professional fee and contingency figures considered in the *Avonside*

Holdings case, and the other components included in the full DRA but not in the abridged DRA.

(b) General damages for stress and inconvenience.

Southern Response's defence to the claim

[23] Southern Response has filed a statement of defence in which it denies the allegations made against it. It says that some of the cost items claimed by Mr and Mrs Ross were not payable to policyholders who did not rebuild their houses, so did not incur the corresponding costs. It says that at the time of dealing with Mr and Mrs Ross' claim it had a reasonable and honestly held belief that the other omitted items were not payable. The approach it adopted to entitlements under the policy had been upheld by the High Court in its July 2013 decision in the *Avonside Holdings* case.[6] It was not until the 1 October 2014 Court of Appeal judgment in *Avonside Holdings*, allowing an appeal from the High Court, that it was established that Southern Response's belief about policy entitlements was incorrect. Southern Response says that it did not mislead Mr and Mrs Ross or other policyholders in the proposed claimant class when it entered into settlements which predated that decision. Southern Response emphasises that it has included allowances for professional fees and a contingency sum in subsequent settlements.

[24] Southern Response says it entered into full and final settlements with its policyholders, and those settlements should not be reopened.

[25] Southern Response also says that issues of reliance will arise where — as in the case of Mr and Mrs Ross — policyholders obtained their own advice about the cost of rebuilding. And there will be issues about the quantification of the loss that Mr and Mrs Ross and other policyholders claim to have suffered.

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6 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd*, above n 3.

The representative claim

[26] Mr and Mrs Ross have pleaded their claim on their own behalf, and also on behalf of a class of persons who they say have the same interest in the proceeding, in that each of them:

> (a) Own or owned a residential dwelling in Canterbury that was insured with the Defendant under either a "Premier House Cover" or "Premier Rental Property Cover" policy (the **Policy**);
>
> (b) Lodged a claim or claims with the Defendant under the Policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (the **Claim**);
>
> (c) Received an Abridged DRA from the Defendant;
>
> (d) Did not receive the corresponding Full DRA from the Defendant;
>
> (e) Entered into a settlement agreement with the Defendant prior to 1 October 2014 in settlement and discharge of the Claim.

[27] Mr and Mrs Ross applied for leave to bring the proceeding as representatives of this class of policyholders under r 4.24 of the High Court Rules 2016. That rule provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[28] Plainly it was not feasible for Mr and Mrs Ross to obtain the consent of every member of the class to a representative claim: they do not know who all the other policyholders in that class are, and the sheer number would make that impractical in any event. So they required leave to bring the claim on behalf of the members of the class under paragraph (b) of r 4.24.

[29] As noted above, the High Court made a representation order on an opt in basis. The class was confined to rebuild customers, and excluded repair customers.[7]

The claim will be heard in two stages

[30] It was common ground before us that the representative proceedings would need to be heard in two stages. Stage 1 would deal with the common issues, i.e. the issues that arise in the claim by Mr and Mrs Ross, and in the claims of other class members. Mr Skelton QC, counsel for Mr and Mrs Ross, indicated that Mr and Mrs Ross would also seek to have the other issues raised by their own claim heard at that hearing. So the stage 1 hearing would deal with the common issues, and the question of the relief (if any) to which Mr and Mrs Ross are entitled. If the claims are unsuccessful, that will bring the proceedings to an end for all claimants. If the claims are wholly or partly successful, on the other hand, then there would need to be a stage 2 at which questions of relief are addressed in relation to the other claimants.

[31] Mr Skelton's submissions identified the following issues which he says are likely to be dealt with as common issues at stage 1 of the proceedings:

(a) Was Southern Response (**SR**) obliged by the policies to pay the additional costs in the "AMI Office section"?

(b) Did SR owe a duty of good faith to its policyholders, and if so did that duty oblige it to disclose the "office copy" DRA to policyholders?

(c) Where SR provided a DRA to a policyholder without disclosing the existence or contents of the "office copy", did that amount to:

  (i) A breach of SR's duty of good faith (if such a duty existed);

  (ii) Misleading or deceptive conduct; and/or

  (iii) Making any of the representations pleaded at paragraph 53 of the Statement of Claim; if so, were those representations false and/or misleading or deceptive;

(d) Where SR told a policyholder that the estimated total cost to repair or rebuild their home was $x (where $x was SR's interpretation of the amount it was

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[7] The orders made by the High Court, which were set out at [81] of the High Court decision, above n 1, are set out with our modifications at [138] below.

obliged to pay under the "Buy another house" option, excluding the additional costs in the "AMI Office section"), did that amount to:

(i) A breach of SR's duty of good faith (if such a duty existed);

(ii) Misleading or deceptive conduct; and/or

(iii) Making any of the representations pleaded at paragraph 53 of the Statement of Claim; if so, were those representations false and/or misleading or deceptive;

(e) When SR offered to settle with a policyholder in the circumstances referred to at (c) and/or (d) above, at the sum recorded in the disclosed DRA, and the policyholder accepted the offer:

(i) Did that amount to a breach of SR's duty of good faith (if such a duty existed)?

(ii) Did it amount to misleading or deceptive conduct?

(iii) Does the policyholder's acceptance give rise to a presumption (rebuttable or otherwise) that they relied upon or were misled or induced to settle by SR's conduct and/or representations?

(iv) Did the policyholder suffer loss as a result of SR's conduct?

(f) Does clause 11 of the settlement agreements SR entered into with Class Members provide a defence to any of the causes of action pleaded?

[32] The precise scope of the common issues to be determined in stage 1 will need to be determined by the High Court in the course of managing these proceedings.

[33] Mr Skelton also provided us with a list of the case management steps which he anticipates will be required in these proceedings. A notice will need to be sent to class members asking them to opt in to the proceedings, if it continues on an opt in basis; or advising them of the ability to opt out, if it proceeds on an opt out basis. There are a number of preliminary issues which will need to be addressed before any notice can be sent to class members. The stage 1 trial will then determine the common issues settled by the Court for all represented claimants.

[34] Mr Weston QC, counsel for Southern Response, emphasised the many customer-specific issues which he envisages would arise at stage 2, including questions of reliance and causation and quantification of any loss.

Claimants will need to opt in to stage 2

[35] It was common ground before us that if this proceeding reaches stage 2 then it will be necessary for represented claimants to take active steps if they want to establish their individual claims. In other words, if a represented claimant wants to obtain compensation they would need to opt in at stage 2 of the proceedings, and provide all information relevant to their compensation claim. So the real issue before this Court is whether stage 1 can proceed on an opt out basis, with claimants taking positive steps to participate only at stage 2 (if and when that stage is reached), or whether they are required to opt in now in order to have their rights determined in stage 1 of the proceedings.

Litigation funding arrangements

[36] The High Court decision recorded the intention of Mr and Mrs Ross and their solicitor that a litigation funder be engaged.[8] We were advised that arrangements have now been entered into between Mr and Mrs Ross, their lawyers, and a litigation funder. The litigation funder has agreed to meet the costs of the proceeding, and any adverse costs order if the proceeding is unsuccessful. So the claimants will not incur the cost of pursuing the proceedings, and will not be exposed to the risk of a costs order being made against them if the proceedings are unsuccessful. We were advised by Mr Skelton that the involvement of the litigation funder is not dependent on whether the proceeding continues on an opt in or opt out basis. Mr Skelton emphasised that in some cases, an opt out order will be necessary for a claim to be financially viable. But he accepted that that was not the case here.

Claimants who have registered an interest in the proceedings

[37] The solicitors acting for Mr and Mrs Ross, GCA Lawyers (GCA), have established a website in relation to these proceedings in order to bring the proceedings to the attention of potential claimants. The website enables potential claimants to register their interest in the proceedings, so they will receive updates by email. Potential claimants can also indicate a desire to become a client of GCA. We were advised by Mr Skelton that as at the date of the hearing before us there had been 268

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8 High Court decision, above n 1, at [54].

registrations of interest, and of these 128 had indicated a desire to become a client of GCA.

Representative proceedings: an overview

[38] The appeal raises a number of issues about the scope and purpose of r 4.24, which makes provision for representative proceedings in the High Court. For ease of reference we set the rule out again:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[39] In many other jurisdictions there are detailed rules governing representative proceedings, and in particular claims brought on behalf of a large class of potential claimants (often referred to as "class actions"). Rules of this kind have been proposed in New Zealand on a number of occasions. But none of those proposals has yet borne fruit. In 2008 the Rules Committee, which is responsible for the procedural rules in the High Court, prepared a draft Class Action Bill and accompanying amendments to the High Court Rules. But that Bill did not proceed. Since 2017 the Rules Committee has been working on a new proposal to amend the High Court Rules to provide more guidance in relation to representative proceedings. The Law Commission's work programme also includes a reference about class actions.[9] That reference may eventually result in the introduction of legislation providing detailed rules for class actions in New Zealand. However until such time as new legislation or new High Court Rules are adopted, r 4.24 provides the basis for representative claims in the High Court in New Zealand. As this case illustrates, it falls to the courts to determine the many practical issues that arise in the context of representative claims under r 4.24.

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[9] See Douglas White "The Future of Class Actions Symposium, Thursday, 15 March 2018, The University of Auckland Business School: Setting the Scene: The Law Reform Project and the Current Review of Class Actions and Litigation Funding" (2018) 24 NZBLQ 95.

[40] This short rule has a long history. Its origins can be traced back to English procedural rules adopted in the late 19th century. Those rules can in turn be traced back to the practice of the English chancery courts (also referred to as the equity courts) in the late 17th and early 18th centuries.

[41] By the 19th century the chancery courts had a well-established practice of permitting representative actions. The origins of that practice were summarised by Lord Macnaghten in *Duke of Bedford v Ellis*:[10]

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

[42] Prior to 1873 the common law courts did not have the ability to entertain claims by a representative plaintiff. Every plaintiff had to be a party, so had to expressly consent to be involved in the proceedings. The Supreme Court of Judicature Act 1873 (UK 1873 Act) merged the jurisdiction of the former common law and equity courts in the new High Court of Justice. The equity practice of permitting representative claims was extended to the common law courts. Rule 10 of the Rules of Procedure scheduled to the UK 1873 Act provided:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

[43] The effect of this reform was explained by Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd*:[11]

> The purpose of rule 10 was to make the jurisdiction and practice of the old courts of Chancery permitting, in appropriate cases, proceedings to be commenced by representative plaintiffs or against representative defendants, applicable to all proceedings in any division of the High Court. As some

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

11 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 at 245.

> proceedings in the High Court would inevitably be proceedings which before the Act could only have been commenced in the common law courts the principles under which representative actions were permitted were necessarily extended into a new field where the principles would have to be applied by analogy to the cases in which actions by or against representative plaintiffs or defendants were permitted in the courts of Chancery.

[44] The English rules of civil procedure have continued to provide for representative actions in broadly similar terms since 1873.[12]

[45] In 1882 New Zealand adopted a representative action rule based on the English provision. Section 79 of the Supreme Court Act 1882 was closely modelled on r 10 of the UK 1873 Act. Section 79 was re-enacted unchanged as r 79 of the former Code of Civil Procedure in the Supreme Court (set out in the Second Schedule to the Judicature Act 1908). Rule 79 read:

> 79. When there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court to defend in such action on behalf of or for the benefit of all persons so interested.

[46] That rule continued largely unchanged until 1985, when it was redrafted and renumbered as r 78 of the High Court Rules, which read:[13]

> **78. Persons having the same interest**—Where two or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.

[47] A new version of the High Court Rules introduced in 2009 replaced the former r 78 with the current r 4.24. The provision was redrafted but there was no change of substance.

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12 See Civil Procedure Rules 1998 (UK), r 19.6. The English Civil Procedure Rules also provide for "Group Litigation Orders" to govern the management of multiple claims giving rise to common or related issues of fact or law: see r 19.11.

13 Judicature Act 1908, sch 2.

[48] The history of the English and New Zealand rules was described in some detail by McGechan J in *R J Flowers Ltd v Burns*.[14] The English courts have for the most part adopted a liberal and pragmatic approach to the operation of the rule.[15] In *Taff Vale Railway Co v Amalgamated Society of Railway Servants*, Lord Lindley observed:[16]

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.

[49] In *John v Rees* the representative procedure was described as "being not a rigid matter of principle but a flexible tool of convenience in the administration of justice".[17] And in *Prudential Assurance Co Ltd v Newman Industries Ltd*, Vinelott J observed that "[c]onsideration of the history of the rule … militates against any narrow construction of it."[18]

[50] Writing in 1986, McGechan J observed that there was surprisingly little New Zealand authority about the correct approach to interpretation of the rule, and that "over the last 20 years the representative proceeding has not been much used in New Zealand, and recent judicial attitudes to it are hard to gauge".[19]

[51] However in the 30 or so years since McGechan J delivered his decision in *R J Flowers Ltd v Burns*, the use of representative proceedings in New Zealand has increased substantially.[20] That development has undoubtedly been stimulated by the

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14 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 264–267. See also *Carnie v Esanda Finance Corp Ltd* [1995] HCA 9, (1995) 182 CLR 398 at 415–419 and 427–430; and *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [19]–[25].

15 See for example *Duke of Bedford v Ellis*, above n 10; and *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL). The more restrictive approach adopted in cases such as *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) was rejected in subsequent cases, which reasserted the more liberal and pragmatic approach of the early authorities: see *John v Rees* [1970] Ch 345; and *Prudential Assurance Co Ltd v Newman Industries Ltd*, above n 11.

16 *Taff Vale Railway Co v Amalgamated Society of Railway* Servants, above n 15, at 443.

17 *John v Rees*, above n 15, at 370.

18 *Prudential Assurance Co Ltd v Newman Industries Ltd*, above n 11, at 245.

19 *R J Flowers Ltd v Burns*, above n 14, at 266–267.

20 For a helpful survey of the use of representative proceedings in New Zealand, see Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132. See also Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] 1 NZ L Rev 73.

rapid spread of the class action procedure in other common law jurisdictions, including Australia. Rule 4.24 has been considered in a number of cases in this Court and in the Supreme Court.[21] As a recent decision of this Court records, the principles governing the application of r 4.24 are now well established:[22]

> (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
>
> (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
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> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
>
> (d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
>
> (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
>
> (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
>
> (g) The court should take a liberal and flexible approach in determining whether there is a common interest.
>
> (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.
>
> (i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.
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> (Footnotes omitted.)

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21 In the Supreme Court see *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541. Recent decisions of this Court include *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331; *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652; and *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582.

22 *Cridge v Studorp Ltd*, above n 21, at [11].

[52] The authorities in New Zealand and other common law jurisdictions identify three important advantages that representative claims can offer:

(a) improving access to justice;

(b) facilitating efficient use of judicial resources; and

(c) strengthening incentives for compliance with the law.

[53] The Supreme Court of Canada elaborated on these advantages in *Western Canadian Shopping Centres Inc v Dutton*:[23]

> Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): …
>
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: …
>
> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: …

[54] Of these objectives, we consider that access to justice is far and away the most important: that is why we put it first in our list at paragraph [52] above.

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23 *Western Canadian Shopping Centres Inc v Dutton*, above n 14, at [27]–[29].

Issue 1: opt out or opt in approach?

[55] In most comparable jurisdictions, class actions are almost invariably brought on an opt out basis. The class is defined, and all members of that class are included in the claim unless they positively choose to opt out. However New Zealand has taken a different path. It appears that to date there have been no opt out representative claims under r 4.24. There have however been a number of claims brought on an opt in basis. The origin of this trend can be traced to the decision of the High Court in *Houghton v Saunders*.[24]

[56] In *Houghton v Saunders* two plaintiffs filed proceedings in relation to their investments in an initial public offering (IPO) of shares in Feltex Carpets Ltd (Feltex), claiming that the share prospectus for the Feltex IPO contained untrue and misleading statements. They sought to bring representative proceedings on behalf of a large number of investors in Feltex. At the same time the statement of claim was filed, the plaintiffs applied for a representation order under r 78 of the High Court Rules (the precursor to the current r 4.24, set out at [46] above).

[57] The orders, which were sought on a without notice basis, provided for an opt out approach. An Associate Judge granted the application. The defendants applied to the High Court to review and rescind the leave granted by the Associate Judge to bring representative proceedings. French J delivered a judgment determining that application, together with a number of other applications by defendants seeking to strike out or limit the scope of the proceedings.

[58] Her Honour held that a representative order was not justified on the basis of the original statement of claim, because of difficulties in relation to the way the claims were pleaded, which meant there was not a sufficient commonality of interest to satisfy the requirements of r 78.[25] However these problems could be overcome by amendment to the statement of claim.[26] On the assumption that the necessary "same interest" could be achieved by amending the statement of claim, her Honour moved on to consider the appropriateness of the opt out approach approved by

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24 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).
25 At [154].
26 At [155].

the Associate Judge.[27] Her Honour held that the opt out order should not have been made, and should be replaced by an opt in order.[28] Her Honour's analysis was at the heart of the argument we heard, as it set the course for the use of the opt in procedure in subsequent New Zealand proceedings, and was expressly followed by the Associate Judge in the present case in declining to make an opt in order.[29] We therefore set out in full the relevant passage of Her Honour's judgment:

> **Appropriateness of opt out procedure**
>
> [157] The notion someone can become a party to a Court proceeding without their consent is somewhat alien to our way of thinking.
>
> [158] However, it appears use of the opt out procedure in representative/class actions is a relatively common phenomenon in other jurisdictions including Australia, but (contrary to what the Associate Judge was advised) not England.
>
> [159] Significantly, the Rules Committee in New Zealand has been considering the possibility of introducing legislation that would provide for opting-out procedures at the discretion of the Judge.
>
> [160] However, as the High Court Rules now currently stand, there is no express opt out provision. If it exists, the power to make such an order must therefore of necessity be derived from the Court's inherent jurisdiction and/or r 9 ("cases not provided for").
>
> [161] The respective merits of opt in and opt out have been much debated in academic literature, especially in England [Mulheron R, "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70 MLR 550 at 556]:
>
> > … the essential rubric of the debate is that an opt out regime sweeps the unwilling or the vulnerable into the class, which advances two of the basic tenets of modern civil procedure — access to justice and efficient allocation of scarce judicial resources. In response to the allegation that opt out regimes tend to sweep in those who do not wish to litigate, or even the indifferent, there are various mechanisms which have been employed in opt out regimes to guard against that possibility. These include: detailed notice requirements explaining opt out rights, stringent individual and widely disseminated notice, and repetitive opt out rights at different stages of the litigation. The other principal advantage of an opt-out regime is that it more effectively ensures that defendants are assessed for the *full* extent of the loss and damages that they have caused. In contrast, an opt-in regime tends to under-compensate, because a number of class members may not take the relevant step to opt-in …

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27 At [156].
28 At [168].
29 High Court decision, above n 1, at [57]–[60].

> … opt-in regimes 'frontload' legal resources and costs; many factors, which have nothing to do with a disinterest in the litigation, can dissuade claimants from opting in; satellite litigation (eg, by those wishing to join the group register after the cut-off date) is a considerable difficulty with opt in regimes; and the relationship of opt in regimes with limitation periods, test actions, and pre-action protocols are problematical.

In short, participation rates are said to be much higher in opt out regimes because of the various social, psychological or economic barriers to commencing litigation.

[162] I do not however consider it is necessary for me to enter into the debate. For, as the extract quoted above indicates, where opt out procedures have been introduced in other jurisdictions they have been accompanied by detailed legislative rules regulating the process that is to be followed. They include safeguards to protect the interests of defendants, as well as the members of the represented class. The fact our own Rules Committee see legislative change as necessary before being able to introduce an opt out procedure is obviously highly significant.

[163] Effectively the plaintiffs are asking this Court to operate in a vacuum, the practical dangers of doing so being vividly illustrated by the problems experienced with the public notice. Not only was the content misleading, but the extent of publication (one occasion in six newspapers) was inadequate.

[164] I accept that those who have become party to the proceeding without actively consenting will not be exposed to any order for costs, and in a very real sense have everything to gain and nothing to lose.

[165] However, in my view, an opt out procedure represents too radical a departure from the existing Rules. In the absence of legislative change, the Court must work within the existing Rules which only contemplate "opt in".

[166] Apart from jurisdictional issues, I also consider opt out was not in any event justified in a situation where it is possible for the representative plaintiffs to identify every qualifying shareholder from the share registry and to communicate directly with those people. The plaintiffs' ex parte application stated it was impractical to obtain consent from all the investors. I do not accept that is the case.

[167] The main reason for seeking opt out was because it would generate the funding needed to be able to bring the claim. However, once the shareholders know of the existence of the funding agreement, their enthusiasm for legal action is likely to be much greater than it was when previous attempts were made to solicit their support. Mr Wakefield acknowledged as much himself.

[168] In conclusion, in my view the opt out order should not have been made and should be replaced by an "opt in" order.

[59] It was estimated that the total number of shareholders who purchased shares in Feltex in the relevant period, and whom the plaintiffs sought to represent, was in

excess of 8,000.[30] At the time the proceedings were filed, approximately 800 shareholders had signed a written authority authorising the plaintiffs' solicitors to act on their behalf, and consenting to proceedings being commenced.[31] If the proceeding continued as an opt out proceeding, the represented claimants would have been all of the approximately 8,000 shareholders, less any who elected not to participate in the proceedings. If on the other hand it proceeded as an opt in claim, the represented claimants would be the approximately 800 shareholders who had already consented to the proceedings being commenced, and any additional shareholders who elected to opt in following receipt of a notice providing them with that opportunity.

[60] It was common ground before the High Court in *Houghton v Saunders* that that was the first occasion on which an opt out order had been made in New Zealand.[32] As at the date of the hearing before French J, 110 shareholders had opted out, 25 per cent of those being shareholders associated with the defendants.[33] The group represented by the named plaintiffs comprised over 8,000 people, on the opt out approach approved by the Associate Judge.[34] The High Court decision providing for an opt in regime meant that claimants had to complete, and return to the Court, an opt in form.[35] The date for opting in was extended on a number of occasions.[36] By the final pre-trial cut off date of 21 June 2013, some 3,689 represented claimants had opted in to the proceedings.[37]

[61] The defendants appealed to this Court from aspects of the High Court judgment in *Houghton v Saunders*. There was no cross-appeal by the plaintiffs in relation to the direction that the proceedings should continue on an opt in basis. As this Court noted in its judgment, the validity of an opt out order in the absence of legislation was not argued on appeal. This Court made no comment on that issue.[38]

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30 *Houghton v Saunders*, above n 24, at [9].
31 At [20(i)].
32 At [28].
33 At [29].
34 At [29].
35 At [224].
36 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74 at [15].
37 At [15].
38 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [12].

[62] A further round of interlocutory litigation in the Feltex litigation raised questions about the implications of the representation orders that had been made for limitation purposes (among other issues). The High Court held that time stopped running for all qualifying shareholders at the time the proceedings, which included an application for a representative order, were filed.[39] The Court of Appeal upheld that decision.[40] There was a further appeal by the defendants to the Supreme Court in relation to two issues, including the limitation implications of the representation orders. The appeal was dismissed, by a majority in the case of the limitation issue.[41] The majority in the Supreme Court held that the form of order made, and the timing of the order, were not relevant for limitation purposes:[42]

> [163] We do not accept the submissions of the appellants or the related argument of the second respondents. It is not the opting in or out that defines the class. The class represented is defined by reference to the class of persons having the same interest in the same subject matter. That is what r 4.24 provides.
>
> [164] The representative order, as originally made, appointed Mr Houghton to act as the representative of all those who had bought Feltex shares in the initial public offering. This means that the action was filed on behalf of all those shareholders and therefore (in terms of our analysis on the first argument of the appellants) brought (or made) by those shareholders.
>
> [165] The function of the opting out procedure was to reduce the original class to those who did not take the positive step of opting out. Those who did opt out of the proceeding would be subject to limitation periods in the normal way in respect of any other action they might file.
>
> [166] French J amended but did not rescind the original order. The opt-in procedures set by French J were a different mechanism but they served the same function of reducing the original class of persons represented. In this case, those that failed to opt in by the relevant date are subject to limitation periods in the normal manner with regard to any other actions they may seek to file.
>
> [167] The fact that a different mechanism for reducing the represented class was substituted by French J had no effect on the scope of the original order. It did not change the fact that the representative order meant that the proceeding was brought on behalf of (and therefore by) all those who had bought shares in the initial public offering.
>
> [168] It would be inappropriate to allow the opt-in or opt-out elements of a representative action to influence when limitation periods start to run. To do

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39 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 9 March 2011; full reasons delivered in *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [128].

40 *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652.

41 *Credit Suisse Private Equity LLC v Houghton*, above n 21.

42 McGrath, Glazebrook and Arnold JJ; Elias CJ and Anderson J dissenting on this issue.

> so would not only run contrary to the language of the relevant rules but would also be a recipe for uncertainty and ongoing dispute. The date of the filing of the statement of claim is certain and easily ascertainable and provides a bright line test.
>
> [169] As well, those who had bought shares in the initial public offering could legitimately have relied on Associate Judge Christiansen's order as meaning they did not have to file separate proceedings. It would be unfair if the change of the terms of the representative order made by French J had the potential to deprive them of substantive rights and that this could occur without them having been given any opportunity to be heard before the changes were made.
>
> (Footnotes omitted.)

[63] The majority concluded that time ceased to run for the members of the represented class on the day the proceeding was filed by the plaintiffs, and the initial without notice representative proceeding order was made.[43] The change from the original opt out procedure to an opt in procedure did not affect that conclusion:[44]

> The function of both procedures is to reduce the class represented. If, by the relevant date, a person has opted out (in the case of an opt-out procedure) or failed to opt in (in the case of an opt-in procedure), that person will, however, be subject to limitation periods in relation to any separate action.

[64] The majority also expressed the view that nothing turned on the date when the representation order was made, as such orders could be backdated if necessary:

> [128] In this case, the date of filing and the date the application to sue in a representative capacity was granted were the same. The fact that, under the High Court Rules, an action is commenced when the statement of claim is filed, may necessitate the backdating of a representative order if it is not made at the time of filing. This is necessary and desirable to ensure that the court's process does not disqualify those on behalf of whom a representative proceeding is brought, should the limitation period end in the period between filing and when the representative order is made.

[65] Although the appropriateness of opt out orders was not before the Supreme Court, the majority judgment appears to proceed on the basis that both opt in and opt out orders are permissible methods of reducing the class represented.

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43 At [170].
44 At [171].

[66] The circumstances in which representation orders should be made, and the limitation implications of applications for representation orders, came before this Court again in *Cridge v Studorp Ltd*.[45] One of the issues before the Court was the appropriate length of the opt in period for a representative claim, and whether extending the opt in period had the effect of extending the limitation period for claims. The Court held that limitation periods were irrelevant when it came to fixing an appropriate opt in period.[46] The length of the opt in period should be determined by considering what period of time is reasonable in all the circumstances "to allow potential class members to be made aware of the proceeding and consider their options after making any necessary investigations and taking advice".[47] Allowing qualifying owners to opt in after the expiry of the limitation period did not bypass the Limitation Act 2010 or undermine its policy.[48]

[67] The Court also held that the filing of the proceedings was effective to stop time running for limitation purposes for all class members, whether or not a representation order was ultimately made by the Court.[49] When the representative proceedings were filed, they were expressly brought on behalf of all members of the class defined in the statement of claim. It followed that when time stopped running under the Limitation Act for the representative owners, on the date the proceedings were filed, it stopped for everyone else on whose behalf they purported to sue. That remained the case regardless of whether or not a representation order was ultimately made:[50]

> Had Ellis J declined to make a representative order, those homeowners who had already consented, or who were within the definition of the class, would therefore have been able to join the proceedings as named plaintiffs after 31 December 2015 [the date assumed for the purposes of that hearing to be the cut-off date for limitation purposes].

[68] The logic underpinning this decision is that all proceedings that are filed as representative proceedings are in effect universal when they are first filed: they operate as claims brought by every member of the class sought to be represented. The effect of a subsequent opt in order is that the class is reduced to those who have opted in by

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45 *Cridge v Studorp Ltd*, above n 21.
46 At [54].
47 At [54].
48 At [55].
49 At [86].
50 At [86].

the date fixed by the Court. The effect of a subsequent decision refusing leave to bring a representative proceeding is that the claimants in the class sought to be represented have filed proceedings through the plaintiffs, but cannot continue the proceedings in that way: there is a procedural irregularity which can be cured by naming those claimants as plaintiffs in the proceedings. Claimants who are named as plaintiffs in their own right will be treated as having commenced proceedings when the original proceedings were filed, for limitation purposes.[51]

High Court decision on opt out/opt in in the present case

[69] The Associate Judge was conscious of the practical significance of the choice between opt in and opt out procedures.[52] He referred to research suggesting that around 8 per cent of class members might be expected to opt out, but only around 39 per cent might opt in.[53] As he noted, in the present case that could make the difference between some 2,700 members in the class on an opt out approach, but perhaps only 1,200 if the Court directed an opt in approach.[54]

[70] The Associate Judge said that it was necessary to determine whether the High Court has jurisdiction to make an opt out order, noting that r 4.24 does not make any express reference to this issue.[55] He recorded that the only decision of a senior court in New Zealand on the issue of whether an opt out or an opt in order should be made was the High Court judgment in *Houghton v Saunders*.[56] He observed that the Supreme Court in *Credit Suisse* did not express an opinion one way or the other on approval of opt in and opt out mechanisms.[57] That Court appeared to

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51 At [77]–[81], referring with approval to the decision of the Queensland Supreme Court in *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133.

52 High Court decision, above n 1, at [47].

53 At [47], referring to the Ontario Law Reform Commission *Report on Class Actions* (Ministry of the Attorney General, 1982). See also Vince Morabito "Class Actions: The Right to Opt Out under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) MULR 615 at 629, referring to a study commissioned by the Committee on Commerce of the United States Senate which found that in three cases requiring an affirmative opt in procedure, class sizes were reduced by 39, 61 and 73 per cent, while in two-thirds of the cases applying the standard opt out procedure, reductions in class size were less than 10 per cent.

54 At [47].

55 At [52].

56 At [57], citing *Houghton v Saunders*, above n 24.

57 At [64].

accept that both were possible. It remained the case that since *Houghton v Saunders*, no New Zealand court had made an opt out order:[58]

> For all that, it remains that no New Zealand Court has reached a different conclusion to that of French J in *Houghton v Saunders*, nor cast any doubt on the correctness of her Honour's decision.

[71] After noting that the Rules Committee is reviewing the way in which the High Court Rules deal with representative proceedings, and that it seemed that the Rules Committee was of the view that a rule change would be necessary if a proceeding is to be brought on an opt out basis,[59] the Associate Judge went on to say:

> [67] Whilst this Court is not bound by its previous decisions, those decisions are highly persuasive. The law on opt-out/opt-in is presently as expressed by French J in *Houghton v Saunders*. Whilst New Zealand may be out of step, in a sense, with other comparable jurisdictions in not preferring opt-out orders, opt-in orders have been made in all cases in this country. A notable example is found in the James Hardie litigation, which is comparable to the present case as the represented parties are a group with no prior social or business connection, and a common interest only as defined in the case. Indeed, they are likely to be spread over the whole country rather than focussed on the Christchurch region as in this case.

[72] The Associate Judge proceeded to review, and dismiss, a number of reasons put forward by Mr Skelton for adopting a different approach in this proceeding.[60] He considered that the strongest of these arguments was that an opt out order was a "fail safe" mechanism, in which all potential claimants are included, with their rights protected whether they respond to or even understand the information made available to them and whether or not it comes to their attention, unless and until they opt out or their claims fail.[61] But he was not persuaded that this was a compelling reason to adopt an opt out mechanism:

> [72] However, those in the class in this case are, or at least were at the time of their claims, house owners. They will have at least some familiarity with legal and financial matters. It seems likely that many if not most will have been represented by solicitors from whom they can take advice. I do not find persuasive the suggestion that a significant number of the class will be ill-equipped to make a decision. In any event, all members of the class are faced with the decision on whether to be involved or not, one way or the other,

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58 At [64].
59 At [66].
60 At [68]–[75].
61 At [71].

> as even with an opt-out direction there is a further significant decision to be made at a later date.

[73] The Associate Judge set out his conclusion as follows:

> [75] Even taking together all Mr Skelton's reasons for directing an opt-out procedure, in my opinion he has not demonstrated a sufficiently cogent reason why this Court should depart from its earlier decision. That decision is not inconsistent with current practice in this Court, and has not been shown to be wrong. I therefore follow the decision of French J in *Houghton v Saunders* and direct that in this case there will be an opt-in procedure.

Submissions of Mr and Mrs Ross supporting opt out approach

[74] On appeal, Mr and Mrs Ross submit that the High Court has jurisdiction to order that an opt out mechanism be adopted. Insofar as the High Court in *Houghton v Saunders* had decided that an opt out procedure was not available, it was wrongly decided. The availability of the opt out approach is supported by the history of the rule, by its text, and by the authorities in other jurisdictions, in particular Australia and Canada, interpreting similar rules. They also submit that there are strong policy reasons favouring the adoption of an opt out approach.

[75] Second, Mr and Mrs Ross submit, if an opt out procedure is available it should have been adopted in this case. There were good reasons for adopting an opt out procedure, and no good reasons for adopting an opt in procedure. An opt out approach would be more effective to protect the rights of class members. It would enhance access to justice. It would be more efficient. And it would enhance the deterrent effect of court proceedings. A member of the class who did not want to participate in the proceedings would remain free to do so by "opting out": so opt out would be equally consistent with respect for individual autonomy, and freedom of choice. Legislative change is not required before New Zealand courts authorise opt out representative proceedings: r 4.24 is sufficient to authorise an opt out approach, and the courts are capable of addressing the procedural issues raised by an opt out approach.

[76] In particular, Mr Skelton submitted, the court can ensure that the proceedings are not settled on a basis that is unfair to represented claimants by requiring the representative plaintiffs to obtain the leave of the Court before discontinuing

the proceedings. Rule 15.20(3) of the High Court Rules provides that a plaintiff in a proceeding in which there is more than one plaintiff can only discontinue the proceeding with the consent of all the other plaintiffs, or with the leave of the court. Any uncertainty about whether this rule would require the representative plaintiffs in this case to seek leave before discontinuing the proceedings can be addressed by making an order that they can only discontinue with the leave of the court.

Submissions of Southern Response opposing opt out approach

[77] Southern Response's written submissions did not contest the jurisdiction of the High Court to make an opt out order. At our request, the question of jurisdiction was addressed in oral submissions. But the emphasis in Southern Response's submissions remained that if there was jurisdiction to make an opt out order, it was inappropriate for such an order to be made in the absence of detailed statutory provision for the conduct of such proceedings. Mr Weston pressed on us the many difficult and complex issues that he said would arise in the context of an opt out proceeding. The uncertainty, complexity and cost of resolving these on an ad hoc basis strongly pointed away from the courts seeking to develop, without a detailed legislative regime, a novel opt out approach. Rather, the position had now been reached in New Zealand that legislative reform would be necessary for a representative order to be made on an opt out basis, at least for a complex proceeding of this nature involving a litigation funder. The Court's inherent jurisdiction is inadequate to provide an appropriate level of protection for participants in such proceedings.

[78] Mr Weston also argued, though somewhat faintly, that if an opt out approach is available then the decision of the Associate Judge was the exercise of a discretion which should not lightly be interfered with by this Court. However in the course of argument Mr Weston accepted that the Associate Judge had approached the question of whether an opt out procedure should be adopted at a level of principle, treating the issue as determined by the approach previously adopted by the High Court in *Houghton v Saunders*. He accepted that it was necessary for this Court to determine whether that approach was right as a matter of principle. We can therefore put this issue to one side.

[79] Mr Weston identified four main problems with the court adopting an opt out mechanism. First, he said, an opt out process developed on an ad hoc basis by the courts cannot provide the protective mechanisms evident in other opt out jurisdictions where there is comprehensive regulation. Second, the inherent jurisdiction of the court is a less than satisfactory tool for resolving the absence of a procedural framework. Third, the introduction of a commercial litigation funder introduces substantive issues about the viability of an opt out regime without a legislative framework. Fourth, the acceptance of an opt out process would uproot the relative certainty already achieved with the opt in process, so would not advance the objectives of r 1.2 of the High Court Rules: the just, speedy and inexpensive determination of proceedings.

[80] Mr Weston also identified a number of factors specific to this case which, he said, made an opt out order inappropriate here: the variation in the circumstances of class members, and the large number of issues that would need to be determined at stage 2; the relative significance of those issues compared with the stage 1 issues; the size of the claims; and the Associate Judge's observation that class members are (or were) house owners who are likely to have at least some familiarity with legal and financial matters.

Analysis

[81] We are satisfied that there is no jurisdictional barrier to the making of an opt out order under r 4.24. The rule clearly authorises a representative plaintiff to bring proceedings on behalf of other persons with the same interest in the subject matter of a proceeding without first obtaining their consent. That is precisely what paragraph (b) of the rule contemplates. The jurisdiction to permit one plaintiff to sue on behalf of others without their consent was, as noted above, developed by the chancery courts many hundreds of years ago. Although the common law courts did not originally have jurisdiction to entertain a claim by one plaintiff on behalf of others, that jurisdiction was conferred by statute in the United Kingdom in 1873.[62] That jurisdiction was also conferred on the New Zealand courts by statute in 1882, as noted at [45] above.[63]

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62 The Supreme Court of Judicature Act 1873 (UK).
63 The Supreme Court Act 1882.

Although a person normally needs to consent to become a plaintiff in proceedings before a New Zealand court, r 4.24 and its precursors are a longstanding exception to that principle.

[82] The history of proceedings authorised under the various iterations of the rule confirms that representation orders are available in circumstances where class members have not given their consent to being represented by the plaintiffs in the proceedings. In *Duke of Bedford v Ellis*, for example, the plaintiffs sued on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs within the meaning of the Covent Garden Act 1828.[64] There was no suggestion in the judgment that prior consent needed be obtained from this large, indefinite and ever-changing group of growers. No opt in or opt out order was sought or made. There are many other examples of representative claims being brought on a universal basis i.e. on behalf of a defined class of claimants without their prior consent, and without any opt in or opt out order being made.[65]

[83] As the Supreme Court explained in *Credit Suisse*, an opt in or opt out order does not define the class of people with the same interest in the subject-matter of the proceedings, on behalf of whom the claim is commenced.[66] Rather, these are mechanisms that may be adopted to reduce the class size where there is good reason to do so.[67] The court need not make either type of order: under r 4.24, as under its precursors, a claim may be brought on behalf of a group of claimants on a universal basis, as in *Duke of Bedford v Ellis*. In other cases, where the court considers it is appropriate to do so, the court has the ability to provide an opportunity for members of the class to opt out, or to provide that the claim will be brought only on behalf of members of the class who opt in. Neither approach is expressly provided for in the rule. But r 4.24(b) provides that a representative claim may be brought "as directed by the court". That is, the provision expressly contemplates that the court may give

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64 *Duke of Bedford v Ellis*, above n 10.

65 All of the English representative proceeding cases referred to by McGechan J in *R J Flowers Ltd v Burns*, above n 14, were brought on a universal basis, as were all the early New Zealand decisions: no opt in or opt out orders had been made in New Zealand prior to *Houghton v Saunders*, above n 24. For examples of recent New Zealand representative proceedings brought on a universal basis see Anthony Wicks, above n 20, at 81.

66 *Credit Suisse Private Equity LLC v Houghton*, above n 21, at [164].

67 At [165].

directions in relation to the manner in which a representative claim is pursued. We consider that the making of both opt out and opt in orders comes within that power.

[84] The decision of this Court in *Cridge v Studorp Ltd* confirms that when representative proceedings are first filed, they are issued on behalf of all members of the class as pleaded.[68] The High Court has jurisdiction to entertain the claim on behalf of all of the identified claimants: their claims are validly commenced from the date of filing regardless of whether a representation order is subsequently made, and regardless of the terms of that order.[69] The making of representation orders is a procedural matter — a question of case management — not a matter that goes to jurisdiction.

[85] As noted above, Mr Weston pressed strongly on us the argument that assuming jurisdiction to make an opt out order, such orders should not be made in New Zealand unless and until an appropriate legislative framework was in force.

[86] Similar arguments have been made, and rejected, in both Australia and Canada. In *Carnie v Esanda Finance Corp Ltd* the High Court of Australia allowed an appeal from a New South Wales Court of Appeal decision finding that the named plaintiffs could not bring a representative claim on behalf of similarly situated borrowers from the defendant lender.[70] The appellants based their claim for a representative order on r 13(1) of the Supreme Court Rules 1970 (NSW), which read:

> Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

[87] The New South Wales Court of Appeal held (by majority) that the rule was inadequate as a foundation for a modern class action regime. Gleeson CJ concluded his judgment with the following observation:[71]

> If class actions of the kind now available in the Federal Court are to be permitted in New South Wales, (and there are large policy issues involved in

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68 *Cridge v Studorp Ltd*, above n 21, at [86].
69 At [86].
70 *Carnie v Esanda Finance Corp Ltd*, above n 14.
71 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 (NSWCA) at [390].

> that decision), then this should only be done with the backing of appropriate legislation or rules of court, adequate to the complexity of the problem, and appropriate to the requirements of justice.

Meagher JA agreed with Gleeson CJ. Kirby P dissented, concluding that, subject to certain amendments to the statement of claim, the representative action should be allowed to proceed.

[88] The High Court of Australia was unanimous in allowing the appeal. Three of the seven judges hearing the appeal would have granted the opt out representative order sought by the appellants. The majority considered that the question should be referred back to the courts below to determine whether an order should be made that the action not continue as a representative action. In response to the argument that r 13(1) was an inadequate foundation for a representative claim, Mason CJ and Deane and Dawson JJ said:[72]

> Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r. 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice.
>
> Once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the court's power to order otherwise. And that leaves for consideration the question whether the case is one in which the court should, in the exercise of that power, make an order that the action should not continue as a representative action. Relevant to that question are some of the comments of Gleeson C.J. in the course of explaining his concern about the absence of a detailed legislative prescription. In that context, Gleeson C.J. mentioned the need to deal with such important matters as: (1) whether or not consent is required from group members; (2) the right of such members to opt out of the proceedings; (3) the position of persons under a disability; (4) alterations to the description of the group; (5) settlement and discontinuance of the proceedings; and (6) the giving of various notices to group members.

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72 *Carnie v Esanda Finance Corp Ltd*, above n 14, at 404–405 (footnotes omitted).

[89] Toohey and Gaudron JJ addressed the issue as follows:[73]

> *Adequacy of* r. 13
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> As noted earlier, Gleeson C.J. regarded the present case as an attempt to make r. 13(1) the foundation of a class action. Questions of nomenclature aside, it is true that r. 13 lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires". The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

[90] Brennan J agreed with the reasons given by Toohey and Gaudron JJ for rejecting the proposition that the scope and purpose of r 13(1) was limited in the manner contended for by the respondent.[74] Brennan J emphasised the flexibility of the rule, and the need for judicial control of the conduct of a representative action:[75]

> However, it is precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf. The self-proclaimed carrier of a litigious banner may prove to be an indolent or incompetent champion of the common cause in the courtroom. As Vinelott J. said in the course of his judgment in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, the court must be satisfied that "the issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim". I would add that if, for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented persons from the action. That power can be exercised at any time before the judgment is perfected.

[91] In *Western Canadian Shopping Centres Inc v Dutton* the Supreme Court of Canada considered the circumstances in which a class action may be brought under a rule with a pedigree similar to New Zealand's r 4.24.[76] The proceedings had been filed in Alberta at a time when class action legislation had been adopted in other

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73 At 422 (footnotes omitted). See also the judgment of McHugh J at 431.
74 At 408.
75 At 408 (footnotes omitted).
76 *Western Canadian Shopping Centres Inc v Dutton*, above n 14.

Canadian jurisdictions, and was under consideration in Alberta.[77] But that legislation had not yet been adopted, and the case fell to be considered under r 42 of the Alberta Rules of Court, which read:

> 42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

[92] As the Supreme Court noted:[78]

> Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*: …

[93] The Court dealt with the absence of a detailed legislative framework as follows:[79]

> The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.
>
> Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit 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" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.
>
> Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.
>
> Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: … However desirable comprehensive legislation on

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77 At [30].
78 At [31].
79 At [31]–[34].

> class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

[94] The Supreme Court considered that where the conditions for a class action are met, the court should exercise its discretion:[80]

> … in a liberal and flexible manner, like the courts of equity of old. 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. In the end, the Court must strike a balance between efficiency and fairness.

[95] The Court was conscious that a wide range of procedural issues could arise, and that these would need to be dealt with by the courts on a case-by-case basis:[81]

> 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, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

[96] The Supreme Court upheld the decision of the Alberta Court of Appeal allowing the claimants to proceed as a class.[82] The appropriateness of adopting an opt out approach was not in issue before the Court, but the judgment proceeds on the assumption that an opt out approach would be adopted.[83]

[97] We consider that the New Zealand courts should adopt the same liberal and flexible approach to r 4.24 that was adopted in the context of similar rules in Australia and Canada. The absence of detailed legislation in relation to representative claims is not a sufficient reason to decline to entertain such claims, or to decline to make whatever procedural orders will best serve the three purposes of r 4.24 identified at [52] above. We consider that it is clear that those purposes will in most cases be better served by adopting an opt out approach.

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80 At [44].
81 At [51].
82 At [57].
83 At [49].

[98] In particular, an opt out approach is likely to significantly enhance access to justice. The default position matters. Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with an assessment of whether or not it is in their interests to participate in the proceedings.[84] Some class members will not receive the relevant notice. Others will not understand the notice, or will have difficulty understanding what action they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated. If there is some potential advantage for class members in participating in the proceedings, and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate.[85] The courts should be slow to put unnecessary hurdles in the path of class members, depriving those who fail to take active steps to participate in the proceedings of the opportunity to have their claims determined by the courts, and of the possibility of obtaining some form of relief if their rights have been infringed.

[99] Allowing representative proceedings to proceed on an opt out basis will also strengthen the incentives for insurers and other large entities dealing with the public to comply with the law, as it increases the prospect that they will be held to account for any breaches of their obligations to large numbers of individuals in circumstances where individual claims may not otherwise be pursued. Those incentives will be weaker if the potential breacher is only exposed to an opt in claim brought on behalf of a modest proportion of affected persons who have actively sought to participate in the claim. In the present case the Associate Judge noted that deterrence was not a relevant goal with respect to Southern Response, as it has no continuing insurance business, and the relevant class closed on 1 October 2014.[86] However it is general deterrence that is relevant in this context: the incentives that adoption of an opt out

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84 See Cass Sunstein "Deciding by Default" (2013) 162 U Pa L Rev 1.

85 See Cass Sunstein *Simpler: The Future of Government* (Simon & Schuster, New York, 2013) especially chapter 5. Professor Sunstein suggests, as an aspiration for governments, *make it automatic*: "For governments, the goal should be to ensure that if people do nothing at all, things will go well for them."

86 High Court decision, above n 1, at [74].

approach in this case and other cases will create for insurers and other entities to comply with their legal obligations, including obligations under the Fair Trading Act.

[100] Mr Weston submitted that adopting an opt out approach would be less efficient for a number of reasons. We see efficiency factors as finely balanced. Representative proceedings will reduce the number of parallel claims whether an opt in or opt out approach is adopted. An opt out approach does not preclude the possibility of parallel claims: claimants can opt out and bring their own claim, or participate in another opt in claim (plainly there cannot be two opt out proceedings on behalf of the same class: that would make no sense). The fact that there is a proceeding on foot in which all claimants are represented unless they opt out will reduce the attraction of commencing similar proceedings raising the same issues. But providing an opportunity to opt in to these proceedings seems likely to have a similar effect: it would be simpler and easier to opt in to these proceedings than to commence separate proceedings, other things being equal.

[101] There may be some efficiency advantages for the claimant class on an opt out approach, as it seems likely that fewer claimants will need to complete the relevant form and submit it to the court. That would also reduce somewhat the administrative burden for the court in connection with the filing of such notices. In a case with around 3,000 potential claimants, for example, the empirical research referred to above suggests that there may be a few hundred opt out notices as compared with more than a thousand opt in notices.

[102] Mr Weston submitted that adopting an opt out approach will require additional supervision of the proceeding by the Court, to ensure that there is no unfair prejudice to the "absent" claimants who have not actively chosen to participate in the proceedings. The absent claimants may not be aware of the proceedings, or of particular developments in the proceedings. It may not be possible to communicate with them to seek their views on matters such as a proposed settlement. Communication with represented claimants is easier if they have opted in, and provided contact details.

[103] However many of the procedural issues that arise in the context of representative actions will arise whether or not an opt out approach is adopted. On either an opt in or opt out approach, it is necessary for the court to review the notices to members of the class setting out information relevant to the decision they are required to make. If anything, more scrutiny of the content of the notice and the way in which it is distributed will be needed in the opt in context, as claimants are less likely to opt in and obtain the benefit of a proceeding even though it is in their interests to do so if the notice does not reach them, or if the notice is difficult to understand, or if what a claimant needs to do is unclear or unnecessarily burdensome.

[104] If a litigation funder is involved in the proceedings the court will need to ensure that the arrangements with the litigation funder do not amount to an abuse of process, whether those proceedings are brought on an opt in or opt out basis, or for that matter on a universal basis.[87] Similarly, whichever approach is adopted the court will need to ensure that any settlement does not involve unfairness to some subset of class members. The mere fact that class members have opted in does not mean that they are well placed to protect their own interests in relation to significant matters such as settlement of the proceedings, and can be expected to take active steps to do so. We agree with Mr Skelton that any doubt about whether representative plaintiffs need leave to discontinue the proceedings can be removed by making an express order to that effect. The New Zealand courts have been willing to supervise the exercise of the power to discontinue representative proceedings, and to set aside a discontinuance filed against the wishes of class members, in the absence of such an order.[88] But making the order suggested by Mr Skelton will make it clear to all concerned that leave must be sought before taking steps to discontinue, and ensure that the court has an opportunity to review any proposed settlement.

[105] We consider that the courts are able to exercise an appropriate supervisory jurisdiction in relation to representative proceedings brought on an opt out basis under r 4.24 and their inherent powers to control matters of practice and procedure, as they can in relation to proceedings brought on an opt in basis or on a universal basis.

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87 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91; and *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312.

88 See *Tamaki v Baker* (1902) 22 NZLR 97 (SC).

It would be preferable to have a legislative framework for representative claims which provides greater certainty and predictability for both claimants and defendants. Such a framework would reduce the procedural conflict that bedevils representative proceedings. But as the Supreme Court of Canada said in *Western Canadian Shopping Centres Inc v Dutton*, if such legislation has not been enacted the courts must determine the availability of the class action and the mechanics of class action practice.[89]

[106] The courts will need to grapple with a range of procedural issues that arise in relation to opt out claims, addressing these on a case by case basis. These issues should be approached in a liberal and flexible manner, seeking to achieve a balance between efficiency and fairness.[90] We do not consider that any additional scrutiny that may be required in the opt out context is beyond the capacity of the court, or so significant that it weighs against the adoption of an opt out approach.

[107] It remains open to the High Court to direct that a claim be brought on a universal basis on behalf of all identified members of the class, without providing for class members to opt in or opt out. But in most cases, respect for the freedom of class members to choose to bring their own claims, or to decline to participate in the proceedings, will justify providing an opportunity to opt out. (This opportunity should not be permitted to lead to an inefficient multiplicity of proceedings: separate proceedings filed by claimants who opt out may well be consolidated, or heard together: that will be a matter of case management to be determined by the courts on a case by case basis.)

[108] It also remains open to the High Court to direct that a claim be brought on behalf of class members who opt in to the proceedings. This may be appropriate where the number of claimants is small, and they have a pre-existing connection which makes it reasonable to seek their positive consent to participation in the proceedings. It will also be appropriate if for example there is a real prospect that participation in the proceedings could lead to an adverse outcome for a represented claimant.

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89 *Western Canadian Shopping Centres Inc v Dutton*, above n 14, at [34].

90 See also *Credit Suisse Private Equity LLC v Houghton*, above n 21, at [49] and [131]; and *Carnie v Estanda Finance Corp Ltd*, above n 14, at 404 and 422.

Represented claimants who are not named plaintiffs are not exposed to the risk of an adverse costs award.[91] But in some cases — likely to be rare — the result of the plaintiffs succeeding with their claim might be that some represented claimants risk being worse off.[92]

[109] Mr Weston drew our attention to criticism of the 2008 Rules Committee proposals, which provided for both opt in and opt out approaches. It was suggested by commentators that this would encourage litigation about which approach should be adopted, exposing parties to additional uncertainty, cost and delay.[93] Mr Weston argued that this was another reason for this Court not to allow opt out proceedings in the absence of detailed legislation. We do not see this as a material factor: we anticipate that opt out orders will be the norm, in the absence of cogent reasons to prefer either a universal approach or an opt in approach by reference to the twin goals of fairness and efficiency. No dispute should arise about the appropriate approach in most cases. Nor is the possibility of such disputes a good reason to decline to permit opt out proceedings, forgoing the advantages such proceedings can provide in terms of access to justice, efficiency, and incentives to comply with legal obligations.

[110] Mr Weston also drew our attention to the difficult issue of "free-riders" — claimants who have not agreed to contribute to the costs of the proceedings, but who stand to benefit from a settlement or court-ordered relief. Again, this issue is not confined to opt out proceedings. It arises in proceedings brought on a universal basis. And it can arise in opt in proceedings brought on an "open class" basis, where claimants who opt in are not required to become clients of the plaintiff's solicitors, or to enter into a funding agreement with the plaintiff's litigation funder. The Australian courts have developed a range of techniques for addressing the perceived unfairness of a subset of claimants bearing all of the costs of the proceedings while others receive the same benefits from those proceedings, including making orders closing the class before relief is provided, making funding equalisation orders, and making common

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91 *Houghton v Saunders*, above n 24, at [164]; and *Markt & Co Ltd v Knight Steamship Co Ltd*, above n 15.

92 This was identified as a risk by the New South Wales Supreme Court in *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465, when the proceedings were referred back to that court following the decision of the High Court of Australia. That decision is discussed in more detail below.

93 Vince Morabito "Opt in or Opt out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421 at 435.

fund orders.[94] We make no comment on the availability of such orders under r 4.24: that would not be appropriate in circumstances where an application by Mr and Mrs Ross for a common fund order remains to be determined in the High Court. But we are confident that the Court has the necessary tools to address any real unfairness in this context, whether under the High Court Rules or in the exercise of its inherent powers.

Conclusion — opt out orders are available

[111] We were fortunate to have the assistance of excellent submissions from counsel for both parties. In the light of those submissions, the recent New Zealand case law on representative proceedings, and developments in the use of representative claims over the last 10 years, we have reached a view that differs in some respects from that reached by French J in *Houghton v Saunders* in 2008, and by the Associate Judge in this case. We are satisfied that there is no jurisdictional barrier to the making of opt out orders in representative proceedings. Nor is there any policy reason why they should be exceptional. It all depends on the case. In most cases there will be compelling access to justice reasons for making an opt out order. We do not consider that it is necessary — or appropriate — to wait for detailed legislation about class actions to be enacted before the court is willing to make such orders. The courts have the necessary powers to manage the procedural issues that will arise in the context of opt out representative proceedings.

An opt out approach is appropriate in this case

[112] The reasons we have identified for preferring opt out orders to opt in orders in most cases are applicable in this case. The class is large: some 3,000 members. Many more of them will have their claims heard and determined by the court, and their rights will be effectively preserved until determined by the court, if an opt out order is made. If a class member prefers not to participate in the proceedings, they can elect to opt out. There are compelling access to justice factors which point towards an opt out approach in this case.

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

[113] We have not identified any factors peculiar to this case which would justify making an opt in order, with the inevitable significant reduction in represented claimants that this approach would produce. This is not a claim by a small group where early identification of all claimants is feasible and offers significant efficiency benefits. There is no disadvantage to a class member from being included as a represented claimant during stage 1. The range of issues that may arise at stage 2, and the need for active participation by claimants at that stage, are not reasons for stage 1 to proceed on an opt in basis. Nor are we persuaded that class members can be expected to take positive steps to protect their position because they are (or were) home owners. Class members will mostly be individual home owners, not large and sophisticated commercial entities. The social, economic and psychological factors that cause individuals to fail to take active steps to protect their own interests are likely to be relevant in the context of this claim.

[114] Mr Weston suggested to us that there could be a disadvantage to claimants if an opt out approach were adopted, because Southern Response might pursue a counterclaim against some represented claimants. As a result of participating in the proceedings, those claimants might incur a liability which they would otherwise avoid. We agree that claimants should not be exposed to potential liability without being advised of that risk. We also agree that in cases where there is a real prospect of such a result, an opt in approach may well be appropriate. That was the conclusion reached by the New South Wales Supreme Court in *Carnie v Esanda Finance Corp Ltd*, when the proceeding was referred back to that Court following the decision of the High Court of Australia.[95] Young J considered that the opt out approach was a "fail safe system" but that it was less appropriate where there is a potential liability on a member of the group.[96] The Judge said:[97]

> The question then is, who should send out the notification and should the notification be of the opt-in and or opt-out variety?
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> The Supreme Court of the United States of America considered the respective merits of opt-in and opt-out in *Phillips Petroleum Co v Shutts* 472 US 797 (1985) at 812-813. The drawback of the opt-in procedure is that it requires action to be taken on behalf of the person to whom the notification is addressed and if that person does not understand fully what the dispute is all about and

95 *Carnie v Esanda Finance Corporation Ltd*, above n 92.
96 At 473.
97 At 473.

> does not have very much at stake, apathy may mean that nothing happens. On the other hand, the opt-out procedure means that the person represented will be represented unless he or she makes a deliberate decision not to be involved, or alternatively to be more involved as a named party. It accordingly has more of the aspects of a fail safe procedure.
>
> The general approach in common law jurisdictions which have embraced representative actions appears to be the opt-out procedure. However, in the instant case, Mr McDougall QC who appeared with Mr Lindsay SC for Esanda, put that wherever there is a potential liability on the member of the group, then there should be an opt-in procedure adopted because the person should not be affected by the action to his or her detriment without conscious choice.
>
> This, in my view, is correct. The advantages of a fail safe system which is normally one of the things to recommend the opt-out procedure does not apply where one has the situation that there is a potential liability on the member of the group.

[115] We see the prospect of a counterclaim in the present case as somewhat speculative. None is pleaded against Mr and Mrs Ross. The claim as pleaded does not seek to set aside the settlement agreements entered into by claimants: it simply seeks compensation on their behalf for losses and harm said to have been incurred as a result of entering into those agreements on the basis of the abridged DRAs. Counsel for Southern Response did not identify any other representative action brought on an opt out basis where class members had ultimately incurred a substantive liability to the defendant.[98] But in any event, the prospect of a counterclaim does not arise at stage 1 of these proceedings. If Southern Response does ultimately decide to plead and pursue a counterclaim against some class members, that would need to happen at stage 2 when the specific circumstances of each claimant fall to be considered. At that stage, as noted above, any claimant who wishes to make a claim for compensation will need to actively participate: in effect, to opt in. If there is a real prospect of a counterclaim at that stage, then that will be an important factor for class members when they make a decision to participate in stage 2. But that is not a reason to depart from the opt out approach in the context of stage 1.

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[98] See also *Carnie v Esanda Finance Corp Ltd*, above n 92, at 473, where Young J observed that as far as he could see, "there has never been a case where it is possible that the people represented in a representative action may in fact be liable to pay money as a result of the action", with the possible exception of *Brown v Vermuden* (1676) 1 Chan Cas 272, 22 ER 796 (Ch). However *Brown v Vermuden* was a case involving representative defendants, not plaintiffs.

[116] Southern Response did not identify any other disadvantage for class members in being included in the represented class at stage 1 of these proceedings. Represented claimants are not required to meet the costs of bringing the claim. Nor are they exposed to an adverse costs order, if the claim fails at stage 1. The litigation funder has agreed to meet those costs. And in any event, as noted above, a represented claimant who is not a named plaintiff is not exposed to a costs order.[99]

[117] Mr Weston emphasised the significance of stage 2 in these proceedings, if that point is reached. He said that it will be necessary to consider the individual circumstances of many different claimants. Even if Mr and Mrs Ross are successful at stage 1 there will be significant variation in the circumstances applicable to different claimants at stage 2 and, as a result, in any entitlements that claimants may have to receive compensation. If Mr Weston's prediction about the range of issues to be decided at stage 2 is correct — and we express no view on that point — we do not see that prospect as a barrier to adopting an opt out approach for the purposes of stage 1.

[118] 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 wish to obtain compensation. The need for an election to participate in the proceeding can be deferred until after stage 1. It will be needed if and only if the claim has succeeded. 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.[100] The class members will be better placed to make that choice. Meanwhile, their interests will have been protected by inclusion as represented claimants in stage 1 of the proceedings.

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99 *Houghton v Saunders*, above n 24, at [164]; and *Markt & Co Ltd v Knight Steamship Co Ltd*, above n 15.

100 It seems to us that there is much to be said for leaving the question of whether a common fund order should be made until after stage 1 has been determined. If the proceedings fail at stage 1, then the time and cost involved in litigating about such an order before proceeding to the stage 1 trial will have been wasted. If the proceedings succeed at stage 1, then the issue of contributing to costs as a precondition to obtaining relief squarely arises, and can be dealt with on a more informed basis. Information about any order made requiring claimants to contribute to the cost of the proceedings out of any compensation they might obtain could be provided to class members to inform their decision on whether to participate in stage 2. But ultimately that is a matter for Mr and Mrs Ross and their advisers.

[119] We therefore allow the appeal on this issue, and amend the orders made in the High Court to provide for an opt out approach. We will also vary the orders to require leave to be obtained before discontinuing the proceedings, as suggested by Mr Skelton, to ensure that the High Court has an opportunity to review any settlement that might be reached between the plaintiffs and Southern Response.

Issue 2: Should repair customers be included in the class?

High Court decision

[120] In the High Court Southern Response sought to narrow the definition of the class pleaded by Mr and Mrs Ross in a number of respects. The Associate Judge did not accept most of the suggested limits on the class definition.[101] However, the Associate Judge held that the class should be limited to claimants whose home was damaged beyond economic repair.[102] He said:

> [44] The options which are in focus in this case are all predicated on a claimant's house being damaged beyond economic repair. That is the fact which triggers a claimant's right to choose a settlement option, and as can be seen from paragraph 1(c) of the policy above. I therefore agree with Southern Response that the class should be limited to those whose houses were thus affected. I prefer, however, the use of the word "damaged" to the use of the word "deemed" because that reflects the wording in the policy. I am satisfied that the proposed restriction in paragraph (c)(i) of the above table should be included in terms "their residential dwelling the subject of the claim was damaged beyond economic repair".

Submissions of Mr and Mrs Ross

[121] Mr Quinn, who argued this aspect of the appeal for Mr and Mrs Ross, emphasised that the correct test was whether repair customers had the "same interest" as rebuild customers. That test is satisfied if there is a significant common interest in the resolution of any question of law or fact arising in the proceeding.[103]

[122] Mr Quinn took us to the list of common issues that we set out at paragraph [31] above. He said that all of these issues are common to both rebuild and repair customers.

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101 High Court decision, above n 1, at [43].
102 At [44] and [81].
103 *Cridge v Studorp Ltd*, above n 21, at [11(c) and (d)]. See [51] above.

[123] Mr Quinn emphasised that the focus should be on what the class members have in common, rather than on the differences that may arise at stage 2 of the proceedings. He referred to *Duke of Bedford v Ellis*, where a representative claim was permitted to proceed even though the grower claimants fell into three different groups with different statutory entitlements in respect of stands at the Covent Garden market.[104] He also referred us to *Cooper v ANZ Bank New Zealand Ltd*, where the High Court approved a class that encompassed several sub-groups relating to different types of bank account or credit card.[105]

[124] Mr Quinn submitted that the Associate Judge erred in focussing on the options available to a policyholder whose house is damaged beyond economic repair. Those options, he said, are not the focus of the case. Rather, the focus is on the claim that Southern Response misled both rebuild and repair customers into settling claims by providing the abridged DRA, and failing to provide the full DRA.

Submissions of Southern Response

[125] Ms Paterson, who argued this aspect of the appeal on behalf of Southern Response, sought to support the decision of the Associate Judge. She emphasised that the policy response differed as between rebuild and repair claims. Different limbs of the policy applied. Issues were likely to arise about whether the same allowances for contingencies, and certain additional costs, were relevant under each of those different limbs. The approach to settlement with the different groups adopted by Southern Response also differed at some points in time: for example, some repair customers were paid a sum representing a contingency allowance.

[126] Ms Paterson also emphasised that the abridged DRAs provided to repair customers, at least prior to June 2013, were set out differently as compared with the DRAs sent to rebuild customers. She drew our attention to the differences in the information included in decision packs distributed to repair customers, as compared with rebuild customers.

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104 *Duke of Bedford v Ellis*, above n 10, at 12.
105 *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 at [46].

Analysis

[127] Repair customers can properly be included in the same claimant class as rebuild customers like Mr and Mrs Ross if, and only if, the requirement in r 4.24 that they have the same interest in the subject matter of the proceeding is satisfied. As this Court said in *Cridge v Studorp Ltd*, the words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.[106]

[128] We explored with Ms Paterson whether the issues identified by counsel for Mr and Mrs Ross as common issues, which are set out at [31] above, were equally applicable in relation to repair customers. She confirmed that they were, but said that the answers to those issues might differ for repair customers, or for some sub-groups of repair customers.

[129] We consider that there are significant questions of both law and fact which are common to rebuild and repair customers. Any relevant differences in policy entitlements arising from differences in the terms of the policy in relation to repair and rebuild scenarios can readily be addressed at stage 1 of the proceedings. That is more efficient than having a separate proceeding in relation to repair customers, which would need to traverse much of the same territory. And as already noted, it is common ground that the circumstances of individual class members will need to be addressed at stage 2.

[130] It follows that repair customers have the same interest in the proceedings for the purposes of r 4.24. It would be more consistent with the goals of efficiency and fairness for them to be included in the claimant class in this proceeding.

[131] We explored with counsel whether it would be preferable for the pleading to be amended to include a repair customer as a second plaintiff, to ensure that any differences between rebuild and repair customers are properly pleaded and addressed in the course of stage 1. Mr Quinn did not think that this was necessary, or that it would add anything. However Ms Paterson considered that this would be appropriate,

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106 *Cridge v Studorp Ltd*, above n 21, at [11].

in the event that the Court did not accept her primary submission that repair customers should be excluded from the proceedings.

[132] We see some attraction in having a second plaintiff who is a repair customer, whose claim could be fully determined at stage 1 in the same manner that is contemplated in respect of the claim of Mr and Mrs Ross. That is likely to assist with the ultimate resolution of the proceedings. But whether this is necessary is better left to be addressed in the High Court in the course of case management of these proceedings.

[133] We allow the appeal on this issue. It follows that order 1(c) made in the High Court should be deleted.

Result

[134] We allow the appeal on both the opt out issue, and the repair customer issue.

[135] We amend the orders made by the High Court by deleting order 2 and replacing it with the following order: [107]

> 2. A class member may elect to opt out of the proceeding by completing an opt out election form approved by the High Court for that purpose, and sending it to the Registrar of the High Court in Christchurch on or before a date to be fixed by the High Court.

[136] We also amend the orders made by the High Court by inserting a new order 2A as follows:

> 2A. The plaintiffs may discontinue this proceeding only with the leave of the Court.

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[107] High Court decision, above n 1, at [81].

[137] The success of the appeal on the repair customer issue means that order 1(c) made by the High Court is deleted. This has the effect of removing the limit to rebuild customers only.

[138] For ease of reference we set out the representation orders made by the High Court incorporating our changes (new text is italicised):

> 1. The plaintiffs are granted leave pursuant to High Court Rule 4.24(b) to bring this proceeding against the defendant on behalf of all persons who have the same interest in the subject matter of the proceeding, namely:
>
> (a) They own or owned a residential dwelling in Canterbury that was insured with the defendant under a "Premier House Cover" or "Premier Rental Property Cover" policy (**Policy**);
>
> (b) They lodged a claim or claims with the defendant under the Policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (**Claim**);
>
> (c) [deleted]
>
> (d) They received a DRA from the defendant that did not include the Office Use section;
>
> (e) They did not receive a DRA from the defendant that included the Office Use section;
>
> (f) They entered into a settlement agreement with the defendant prior to 1 October 2014 in settlement and discharge of their Claim; and
>
> (g) They are not persons for whom the defendant managed the repair of their home, or rebuilt their home.
>
> 2. A class member may elect to *opt out of* the proceeding by completing an *opt out* election form approved by the High Court for that purpose, and sending it to the Registrar of the High Court in Christchurch on or before a date to be fixed *by the High Court*.
>
> *2A. The plaintiffs may discontinue this proceeding only with the leave of the Court.*
>
> 3. This order is to take effect from 25 May 2018.

[139] Costs should follow the event in the normal way. The respondent must pay costs to the appellants for a standard appeal on a band B basis together with usual disbursements. We certify for second counsel.

Solicitors:
GCA Lawyers, Christchurch for Appellants
Buddle Findlay, Christchurch for Respondent