IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV 2018-409-361

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

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PLAINTIFFS' SUBMISSIONS
(APPLICATION FOR LEAVE TO DISCONTINUE)

Dated: 16 November 2021

Judicial Officer:	Justice Osborne
Next Event:	Interlocutory Hearing
Next Event Date:	Monday 29 November 2021

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May it please the Court:

A. Introduction

1. The plaintiffs have applied for leave to discontinue this proceeding. The proposal to discontinue arises out of an agreement reached with Southern Response on 8 October 2021 (**Agreement**), the details of which are discussed in Section B below.

2. In summary, the plaintiffs submit that leave to discontinue this proceeding should be granted because:

   (a) The Agreement provides for a settlement process that is fair and reasonable and in the interests of the class as a whole; and

   (b) The Agreement resolves the "free rider" problem such that no class member (whether funded or unfunded) will have to contribute to the costs of the litigation, thus ensuring equal treatment for all class members.

B. The Agreement

3. The Agreement between the plaintiffs and defendant was negotiated between the parties over an approximately two-week period from late September to early October 2021, with senior counsel for each party leading the negotiations.

4. The Agreement is recorded in a "Deed to Discontinue Proceedings" dated 8 October 2021, between the plaintiffs, Southern Response and the litigation funder Claims Funding Australia Pty Ltd (**CFA**).[1]

5. The key terms of the Agreement are as follows:

   (a) The plaintiffs agree to discontinue the proceeding, subject to leave being granted by the Court;[2]

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[1] Affidavit of Grant Ashley Cameron (13 October 2021), Exhibit A.
[2] Clauses 1 and 9 of the Deed.

(b) Southern Response commits to offering its "Package" settlement scheme to all eligible class members for a period of at least 18 months from the Agreement date.[3] Southern Response agrees this commitment is enforceable by class members.[4]

(c) Southern Response will make a lump sum payment to CFA towards the plaintiffs' legal costs and litigation funding costs (a sum materially less than CFA would have received contractually from members who signed the funding agreement).[5]

(d) CFA will not seek to recover any sums from class members (whether funded or unfunded).[6]

6. The sum to be paid to CFA is a contribution towards both funding commission and the legal fees and disbursements paid by CFA since early 2019. The latter costs include all legal costs associated with conducting the claim, dealing with multiple interlocutory applications, providing funding support for the *Dodds* trial and appeal, and successfully bringing the "opt out" appeal to the Court of Appeal and defending Southern Response's subsequent Supreme Court appeal.

C. What the Agreement means for class members

7. The Agreement has two major implications. First, the representative proceeding will come to an end without a global settlement. Settlement of class members' claims will instead occur on an individual basis through Southern Response's "Package" settlement scheme.

8. Second, Southern Response will pay a contribution towards the plaintiffs' legal and funding costs, and neither CFA nor the plaintiffs' legal team will seek to recover any sums from class members. The

[3] Clause 2.
[4] Clause 3.
[5] Clause 6; Affidavit of Grant Ashley Cameron (13 October 2021) at [15].
[6] Clause 7.

contribution from Southern Response, coupled with the waiver by CFA and the plaintiffs' lawyers, addresses the "free rider problem" that was one of the plaintiffs' initial concerns with the Package scheme: the potential inequity that would arise if funded class members had to contribute towards the costs of the proceeding while unfunded class members did not. Under the Agreement, no class members (funded or unfunded) will be required to contribute anything towards those costs.

9. The key benefits of the Agreement for class members are:

   (a) Southern Response's Package settlement offer will be available for at least 18 months, giving class members a fair period of time in which to become aware of the offer, apply for compensation and receive payment.

   (b) Class members will keep 100 per cent of any compensation they receive from Southern Response.[7] For funded class members, this outcome is very likely better than their best-case scenario in court.[8]

   (c) The Agreement avoids the delays in class members receiving compensation that would potentially result from an appeal of the Court's 20 September 2021 judgments.

   (d) The Agreement also avoids the litigation risk and further legal and funding costs of trial(s) in relation to the stage 1 and stage 2 issues in the proceeding.

10. Counsel consider that the plaintiffs have a duty to advise the Court of any potential adverse consequences for class members that may foreseeably arise out of the Agreement.[9] Counsel have identified the following potential disadvantages:

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[7] Save for any legal fees they may become liable to pay to lawyers they individually instruct.
[8] This is because class members will not need to pay anything to CFA or the plaintiffs' lawyers.
[9] *Babscay v Pitcher Partners* (2020) 148 ACSR 551 (FCA) at [32].

(a) The compensation offered under the Package does not equate to the full amount that has been claimed on class members' behalf in the representative proceeding. This topic is discussed at paragraphs 56 to 66 below. It should be noted that class members are not bound by the terms of the Package if they do not agree to it or (subject to the comments at (c) below) should they wish to pursue their own claims against Southern Response.

(b) Unlike some class actions settlements overseas that included an individual claims assessment process, the Package does not involve ongoing court supervision to ensure that the process is administered fairly and the expected benefits are delivered to class members.

(c) If the proceeding is discontinued, any class members will in theory still be able to pursue individual proceedings against Southern Response, assuming the class member does not receive (or does not wish to accept) a Package settlement offer. But in practice that may prove difficult because:

    (i) For many class members, bringing an individual proceeding is unlikely to be economically viable; and

    (ii) As discussed in Section D below, class members face potential limitation issues in respect of any individual proceedings they may file in future.

(d) As such, the Package scheme may be the only practical avenue for obtaining compensation from Southern Response, leaving class members with very little negotiating leverage if they consider Southern Response's offer is unfair or unreasonable.

D. The limitation issue (in respect of individual claims)

11. If the representative proceeding is discontinued, could class members who choose not to accept an offer from Southern Response to settle their claims file individual proceedings against Southern Response if they have not done so already, or would such claims now be limitation-barred? In counsel's view, there is significant uncertainty on this point.

12. The limitation period for claims under the Fair Trading Act 1986 (**FTA**) is 3 years from when the loss or damage (or likelihood thereof) was discovered or ought reasonably to have been discovered.[10] The limitation period for other "money claims" (including claims for misrepresentation) is 6 years from the date of the act or omission on which the claim is based,[11] with a potential extension (in the event of late knowledge) of up to 3 years from the date when various relevant matters were discovered or ought reasonably to have been discovered.[12]

13. All class members in this proceeding settled their insurance claims with AMI / Southern Response before 1 October 2014,[13] more than 7 years ago. The Court of Appeal and Supreme Court judgments in *Avonside Holdings*, on which the claims in this proceeding are in part based, were delivered on 1 October 2014 and 22 July 2015 respectively.[14] *The Press* published an article on Southern Response's "two DRA" system on 28 May 2015; as such, it is arguable that the 3-year limitation period for FTA claims would have expired on 28 May 2018.[15] The plaintiffs filed this proceeding on 25 May 2018.

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[10] Fair Trading Act 1986, s 43A.
[11] Limitation Act 2010, s 11(1).
[12] Limitation Act 2010, ss 11(2), 14.
[13] See the class member definition in *Ross v Southern Response Earthquake Services* (2019) 25 PRNZ 33 (CA) (***Ross* CA**) at [138], Order 1.
[14] *Avonside Holdings v Southern Response Earthquake Services* [2014] NZCA 483; *Southern Response Earthquake Services v Avonside Holdings* [2017] 1 NZLR 141 (SC).
[15] Affidavit of Grant Ashley Cameron (12 March 2021) at [20].

14. In Australia and Canada, filing a representative proceeding suspends (by statute) the operation of limitation periods upon class members' underlying claims.[16] Time only starts to "run again" for limitation purposes if a class member opts out, or if the proceeding is discontinued or (in Canada) is not certified as a class action. In the United States, similar results occur under a common law rule known as the "*American Pipe* doctrine" pronounced by the US Supreme Court.[17]

15. In all those jurisdictions, if a class member had (say) 90 days left in the limitation period at the time the class action was filed, they would still have 90 days left to file an individual proceeding after the class action was discontinued, regardless of how much time had passed in the interim. Time is "suspended" for limitation purposes during the period when the class action is on foot.[18]

16. In New Zealand there is no statutory provision for suspension of limitation periods, and New Zealand courts have not followed the *American Pipe* approach. The key decisions dealing with limitation in a representative action context are summarised below:

    (a) In *Credit Suisse v Houghton*, the Supreme Court held that filing a representative proceeding tolls the limitation period for class members who participate in the proceeding.[19] However, class members who opt out would be "*subject to limitation periods in the normal way in respect of any other action they might file*".[20] The Court did not discuss what "the normal way" means, but the natural inference is that time continues to run in respect of any separate actions, rather than having been suspended.

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[16] See for example Federal Court of Australia Act 1976 (Cth), s 33ZE; Class Proceedings Act 1992 (Ontario), s 28(1).
[17] *American Pipe & Construction v Utah* 414 US 538 (1974); see also *Crown, Cork & Seal v Parker* 462 US 345 (1983).
[18] See for example *Crown, Cork & Seal v Parker* at 353 - 354; *Smith v Crown Life Insurance* (2002) 40 CPC (6th) 371 (ONSC) at [23] – [25]; *Laine v Thiess* [2016] VSC 689 at [31] – [32].
[19] By opting in (in an opt-in action) or not opting out (in an opt-out action).
[20] *Credit Suisse v Houghton* [2014] 1 NZLR 541 (SC) at [165], [171].

(b) In *Cridge v Studorp*, the Court of Appeal discussed the situation where the court does not permit a proceeding to go forward as a representative action. In that situation, the Court said that class members would be able to join the proceeding as named plaintiffs without any limitation concerns.[21]

17. There is no New Zealand authority on how limitation applies if a representative proceeding is discontinued and class members wish to bring separate actions. The Court of Appeal's discussion of policy factors in *Cridge* suggests (by implication) that tolling or suspension of limitation periods would be appropriate in that scenario.[22] However, the Supreme Court's discussion of opting out in *Credit Suisse* suggests that (by analogy) time would instead continue to run in respect of any separate action class members might file.

18. This uncertainty means there is a real possibility that if this proceeding is discontinued, some or all class members may now be out of time to file separate claims (whether under the FTA or otherwise) given the time that has elapsed since the dates identified at paragraph 13 above.

19. Southern Response previously committed not to raise any limitation defences to proceedings filed prior to 4 September 2018.[23] However, it has not given any commitment (in the Agreement or otherwise) not to raise limitation defences to any proceedings filed beyond that date.

E. Approach to approval of settlement / discontinuance

What the appellate courts have said in this case

20. The Court of Appeal ordered that this proceeding may be discontinued only with the leave of the Court.[24] The Court of Appeal's judgment

[21] *Cridge v Studorp* (2017) 23 PRNZ 582 (CA) at [86].
[22] See *Cridge v Studorp* (2017) 23 PRNZ 582 (CA) at [85].
[23] Affidavit of Grant Cameron (25 May 2018), Annexure C.
[24] *Ross* CA at [136].

explains the reasons for that order:[25]

> 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. …
>
> 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. … whichever approach is adopted the court will need to ensure that any settlement does not involve unfairness to some subset of class members. … 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 … [which] 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.

21. In its appeal to the Supreme Court, Southern Response submitted that the High Court was given no guidance or framework for supervising or approving a settlement or discontinuance.[26] The Supreme Court indicated that guidance can be taken from the approach in Australia and Canada.[27] In both countries, statutes provide that a representative proceeding may not be settled or discontinued without Court approval. However, those statutes are (or were until recently, in the case of Ontario) silent as to the process or criteria for such approval.[28] In both jurisdictions, the tests to be applied were developed by the courts.[29]

22. The Supreme Court concluded:[30]

> … we consider the court has power to approve settlements in cases such as the present and to address the various issues Southern Response raises under this head. It is also clear that the representative plaintiff can settle on behalf of the class. … In

[25] *Ross* CA at [102] – [104].
[26] *Southern Response Earthquake Services v Ross* [2020] NZSC 126 (***Ross* SC**) at [65].
[27] *Ross* SC at [66].
[28] *Ross* SC at [68], [70], [72].
[29] *Ross* SC at [71], [73].
[30] *Ross* SC at [82].

> deciding whether to approve a settlement, courts can consider the extent to which the settlement prejudices individual class members.

Approach to settlement approval in Australia and Canada

23. As the Supreme Court indicated it was helpful to consider the approach in Australia and Canada, we discuss below the tests applied in those jurisdictions.

24. In both countries, the overarching standard for settlement approval is that the settlement is fair and reasonable and in the interests of the class as a whole. That involves consideration of (1) whether the settlement is reasonable "globally" as between the plaintiff class on the one hand and the defendant on the other, and (2) whether the settlement is fair and reasonable as between the class members *inter se*.[31]

25. Within that overarching standard, the courts have articulated several factors that may be relevant in particular cases, while recognising that those factors are not exhaustive or definitive,[32] and a mechanical, formulaic or "check-list" approach should be avoided.[33] The key factors identified in the Australian and Canadian case law (which are similar in some respects) are set out in the table below.[34]

Australia[35]	**Canada**[36]
The amount offered to each group member	Settlement terms and conditions
The prospects of success in the proceeding	Likelihood of recovery, or likelihood of success

[31] See Warren K Winkler, Paul M Perell et al *The Law of Class Actions in Canada* (Thomson Reuters, 2014) at 304; *Blairgowrie Trading v Allco (No 3)* (2017) 343 ALR 476 (FCA) at [81]; *Evans v Davantage Group (No 3*) [2021] FCA 70 at [15].

[32] *Jeffery v Nortel Networks* (2007) 68 BCLR (4th) 317 (BSCC) at [21]; *Newstart 123 v Billabong* (2016) 343 ALR 662 (FCA) at [13]; *Blairgowrie Trading v Allco (No 3)* at [84].

[33] *Parsons v Canadian Red Cross Society* (1999) CarswellOnt 2932 (ONSC) at [73]; *Stanford v DePuy International (No 6)* [2016] FCA 1452 at [114].

[34] In the table, we have arranged the factors in a slightly different order than they appear in the case law, so as to highlight the similarities between jurisdictions.

[35] *Williams v FAI Home Security (No 4)* (2000) 180 ALR 459 (FCA) at [19]; *Newstart 123 v Billabong* (2016) 343 ALR 662 (FCA) at [13]; *Blairgowrie Trading v Allco (No 3)* at [84].

[36] See Winkler, Perell et al *The Law of Class Actions in Canada* at 305 – 306; *Parsons v Canadian Red Cross Society* at [71] – [72]; *Jeffery v Nortel Networks* at [18] - [20].

Australia[35]	**Canada**[36]
The likelihood of class members obtaining judgment for a greater amount, and the ability of the defendant to withstand a greater judgment	Amount and nature of discovery evidence
The complexity and duration of the litigation	Future expense and likely duration of litigation
The terms of any advice received from counsel and from any independent expert	Recommendation and experience of counsel
The reasonableness of the settlement sum in light of the best possible recovery, and in light of all the risks of litigation	Recommendations of neutral parties, if any
The reaction of class members to the settlement	Number of objectors and nature of objections
Whether class members were given timely notice of the essential elements	Degree and nature of communications by counsel and the representative plaintiff with class members during the litigation
	The presence of arms-length bargaining and the absence of collusion
	Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation
	Whether counsel fees were negotiated in the settlement, and if so, how big a factor are they

26. In both countries, the courts have emphasised that reasonableness is "a range", rather than a single point.[37] The court's task is not to determine whether the settlement is the best possible outcome that could have been achieved, but rather whether it falls within the range of reasonable outcomes.[38] In making that assessment, the court must weigh the benefits offered by the settlement against both the potential for greater compensation if the litigation was continued, and the costs and risks that would attach to such continuation.[39]

[37] *Jeffery v Nortel Networks* at [17]; Winkler, Perell et al *The Law of Class Actions in Canada* at 305; *Blairgowrie Trading v Allco (No 3)* at [82].
[38] *Stanford v DePuy International (No 6)* at [117].
[39] *Jeffery v Nortel Networks* at [34].

Should a different test apply to a discontinuance?

27. The Agreement reached in this proceeding is not a global settlement of all class members' claims. Rather, Southern Response will make settlement offers to all class members on an individual basis, and it is proposed that the representative proceeding will be discontinued.

28. In both Australia and Canada, a class action cannot be discontinued without the court's approval. However, in both countries the courts have applied slightly modified tests for approval when a discontinuance is proposed rather than a settlement.

29. In Canada, the test applied is whether class members will be prejudiced by the proposed discontinuance. Unlike a settlement, a discontinuance need not be beneficial to, or in the best interests of, class members.[40] However, where a defendant offered to settle with the representative plaintiff on the condition that the class action would be discontinued in respect of other class members, the Ontario court declined to approve the discontinuance without notice being given to class members.[41] Notice is important because class members may have been relying on the class proceeding rather than commencing actions of their own.[42]

30. In Australia, there are two competing lines of authority on the correct test for approval of discontinuances. In *Mercedes Holdings*, Perram J applied the same test as for approval of a settlement: is it fair and reasonable, in the interests of the class members as a whole?[43] By contrast, in *Laine v Thiess* Dixon J suggested the test was whether the discontinuance would be unfair, unreasonable or adverse to the interests of class members.[44]

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[40] Winkler, Perell et al *The Law of Class Actions in Canada* at 222.
[41] *Smith v Crown Life Insurance* (2002) 40 CPC (6th) 371 (ONSC). Similarly, in Australia the court held it inappropriate to approve a settlement that would provide compensation only to clients of the plaintiffs' solicitors (while effectively discontinuing the proceeding on behalf of other class members) without notice being given: *Williams v FAI Home Security (No 4)* at [20] – [25].
[42] Winkler, Perell et al *The Law of Class Actions in Canada* at 224.
[43] *Mercedes Holdings v Waters (No 1)* (2010) 77 ACSR 265 (FCA) at [9] – [10].
[44] *Laine v Thiess* [2016] VSC 689 at [34].

31. Subsequent cases have either noted the two lines of authority without expressing a concluded preference,[45] or endorsed one or the other approach.[46] In *Babscay v Pitcher Partners*, Anastassiou J preferred the approach of Dixon J in *Laine*:[47]

> In my view, his Honour's statement of the principle to be applied in the case of a unilateral discontinuance, which does no more than return group members to the position they were in before the commencement of the proceeding, aptly describes the focus of the Court's consideration in the present context.

32. However, His Honour said it was important not to conflate a "unilateral discontinuance" with a settlement agreement which includes a term requiring that the representative proceeding be discontinued.[48]

33. More recently, in *Turner v Bayer Australia*, Dixon J elaborated on the approach his Honour had taken in *Laine,* observing that whereas a settlement "*involves a bargain reached between the parties, … permitting a balancing exercise to be undertaken between the advantages and disadvantages to group members*",[49] a discontinuance:[50]

> is the unilateral decision by a plaintiff to bring an end to some or all claims in the litigation. There is no agreement between the parties that can be assessed through the prism of a fair and reasonable test. … The court's task in approving a discontinuance, in exercising its protective jurisdiction, is best served by considering whether any detriment would be occasioned by group members that would be unfair, unreasonable or adverse.

The approach that should be applied in this case

34. The Agreement in this case is not a global settlement of all class members' claims against Southern Response. But nor is it a "unilateral discontinuance" in the sense described in the excerpts from *Babscay* and *Turner* above. Here, an agreement has been reached between the

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[45] See for example *Simonetta v Spotless Group Holdings* [2017] FCA 1017 at [12].
[46] See for example *Tate v Westpac Banking Corp (No 2*) [2020] FCA 1374 at [35], [38], where Middleton J stated that "the preferred approach" was that of Perram J in *Mercedes Holdings.*
[47] *Babscay v Pitcher Partners* (2020) 148 ACSR 551 (FCA) at [28].
[48] *Babscay v Pitcher Partners* (2020) 148 ACSR 551 (FCA) at [24].
[49] *Turner v Bayer Australia* [2021] VSC 241 at [48].
[50] *Turner v Bayer Australia* [2021] VSC 241 at [49].

parties, one term of which is that the proceeding is to be discontinued.

35. The limitation concerns discussed in Section D above mean it cannot safely be concluded that a discontinuance would simply "return class members to the position they were in" before the proceeding was filed. As such, it must be recognised that discontinuing the proceeding could prejudice class members, because they may be out of time to file individual proceedings, leaving the Package programme as the "only game in town" to recover compensation from Southern Response.

36. In those circumstances, the plaintiffs submit that the proper approach is the test for settlement approval: whether the Agreement is fair and reasonable in the interests of the class as a whole. The Court should assess whether the potential disadvantages of a discontinuance are outweighed by the benefits offered under the Agreement.

37. That the Agreement would not settle class members' individual claims is a factor to be weighed in that cost/benefit analysis, but is not in itself a reason to apply a lower standard of scrutiny. If a discontinuance would mean class members have no practical ability to vindicate their claims except through the Package scheme, then in functional terms there is little difference between this Agreement and a class action settlement where a government defendant establishes a claims resolution process and class members' litigation rights are released.[51]

F. Why the plaintiffs support the discontinuance

38. Representative plaintiffs must conduct the litigation in the interests of the class members, including when deciding whether to discontinue. Given the uncertainty around limitation, the plaintiffs need to be confident that the defendant's Package scheme offers compensation that is reasonable in amount and reasonably available to class members.

[51] See for example *Baxter v Canada (Attorney General)* (2006) 83 OR (3d) 481 (ONSC).

How the Agreement addresses the plaintiffs' concerns with the Package

39. As previously submitted to the Court,[52] while welcoming the announcement in December 2020 that Southern Response wished to make an offer of settlement to all class members, the plaintiffs had three broad concerns with Southern Response's Package settlement scheme:[53]

    (a) It would circumvent the Court's supervisory role over settlements;

    (b) It risked prejudicing individual class members' interests; and

    (c) It would create unfairness between class members *inter se* (the "free rider problem").

40. For those reasons, the plaintiffs submitted that Southern Response should not be permitted to negotiate individual settlements with class members;[54] alternatively, if Southern Response was permitted to do so, the Court should make a "set-aside order" to preserve its ability to deal with the free rider problem at a later date.[55]

41. In its judgments delivered on 20 September 2021, the Court largely rejected the plaintiffs' submissions. The plaintiffs were faced with the choice of appealing the court's judgments or attempting to negotiate a settlement that would address, so far as possible, their concerns about the Package settlement scheme. Counsel accordingly filed an application for leave to appeal, while simultaneously entering into settlement discussions with counsel for Southern Response.

42. The resulting Agreement that has been reached goes a long way towards addressing the plaintiffs' three broad concerns identified

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[52] See Plaintiffs' Submissions on Defendant's Application for Directions (11 February 2021).
[53] See *Ross v Southern Response Earthquake Services* [2021] NZHC 2451 (Defendant's Communications – Reasons) at [122].
[54] See Plaintiffs' Submissions – Defendant's Amended Application for Directions (1 April 2021).
[55] See Plaintiffs' Submissions – Application for Set-Aside Order (25 March 2021).

above. Taking those concerns in reverse order:

(a) The Agreement solves the "free rider problem", by ensuring that all class members (funded or unfunded) who receive compensation from Southern Response under the Package scheme will do so without any deductions for the costs of the representative proceeding. This is an extremely positive outcome for class members and entirely addresses the plaintiffs' concerns about potential unfairness between class members *inter se*.

(b) The Agreement (and other developments related to the Package scheme) also goes some way towards alleviating the plaintiffs' concern about unfairness or prejudice to class members individually. Southern Response has committed to hold the Package scheme open for at least 18 months, giving class members a reasonable opportunity to become aware of the Package and apply for it. The Notice of Application to Discontinue, which doubles as a notification about the settlement Package and how to apply for compensation, has now been sent to class members.[56]

(c) Furthermore, there are some limited redress options included in the Package scheme for class members who may consider that they have been treated unfairly or unreasonably by Southern Response in the administration of the settlement scheme. First, systemic failures in the implementation of the Package scheme could be raised with the Independent Oversight Committee. Second, counsel understands that Southern Response intends to establish a two-stage review process for applicants who wish to seek a review of individual settlement offers they receive from Southern Response. Stage one is for the offer to be checked by a

[56] See Minute of Nation J (20 October 2021), Annexure "A".

senior Southern Response manager with authority to amend the offer if any omission or miscalculation is detected. Stage two entitles the applicant to request a further review of the offer by a two-person panel, one of whom will be independent of Southern Response, chair the panel and have the casting vote.

(d) The Agreement does not address the lack of Court supervision over the Package scheme, but the plaintiffs are not in a position to remedy that. There is a potential conflict between Southern Response's role as administrator of the Package scheme and its role as a party to any resulting settlements.[57] The plaintiffs previously submitted that such settlements should not occur without court supervision,[58] but the Court has directed that Southern Response is "*at liberty to negotiate and/or settle claims with individual class members*".[59] Accordingly, having tested the matter the current position is that Southern Response is permitted to negotiate and settle claims without supervision.

43. There is an important caveat. The plaintiffs' conclusions as to the reasonableness of the Agreement are premised on the assumption that Southern Response genuinely intends to make offers, and will in fact make offers, that fairly and reasonably apply the "Package principles" to all class members who apply for compensation under the Package scheme. Broadly speaking, that means offers consistent with the entitlements established in the *Dodds* case (as discussed at [58] below).

44. Soon after the Agreement was reached, the plaintiffs' solicitors applied for compensation on behalf of more than 260 class members who had instructed them to do so. Since then, the plaintiffs' solicitors have applied on behalf of another 123 class members (at the time of writing).

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[57] See *Baxter v Canada (Attorney General)* (2006) 83 OR (3d) 481 (ONSC) at [38].
[58] See Plaintiffs' Submissions on Application for Directions (11 February 2021) at [71] – [81].
[59] *Ross v Southern Response Earthquake Services* [2021] NZHC 2453 (Defendant's communications application) at [92(i)].

45. The plaintiffs' solicitors had expected (based on representations made by Southern Response's legal team) that by now Southern Response would have made offers to at least a significant sample of those applicants, so that the plaintiffs' solicitors would be able to review those offers and ensure that Southern Response was fairly and correctly applying the Package methodology.

46. However, to date the plaintiffs' solicitors have barely received any offers from Southern Response.[60] The plaintiffs are therefore not in a position to confirm that Southern Response is indeed applying the Package in good faith and in a manner consistent with the representations made that it would follow (or be consistent with) *Dodds*. They hope to be in such a position by the time of the hearing on 29 November 2021.

47. If a significant sample of offers have not been received by GCA Lawyers in sufficient time to review and check them in advance of the 29 November 2021 hearing, then it is likely the plaintiffs will seek an adjournment of the hearing. The right for class members to apply for compensation under the Package is obviously a key component of the Agreement, and it goes without saying that it is intended by both parties to be a right that is substantive and valuable. There was no reasonable opportunity to test the good faith implementation of the Package in advance of concluding the Agreement, which is an important reason why a date more than seven weeks after the Agreement was nominated by the parties as a suitable hearing date for the discontinuance application. At present the absence of any offers, despite the multiple applications made several weeks ago, is assumed (hoped) to be a Southern Response resource/administration issue rather

[60] On 1 October 2021, GCA Lawyers received indicative offers for three sets of clients (including the representative plaintiffs Mr and Mrs Ross). Those offers resulted from a written request from GCA Lawyers to Buddle Findlay on 20 August 2021, well before settlement discussions began. Since 1 October 2021, GCA Lawyers has only received two further offers for clients, despite making nearly 400 applications.

than a sign that anything is substantively awry with the implementation of the Agreement.

Prospects of success in the proceeding, likelihood of obtaining judgment for a higher amount, and complexity and duration of litigation

48. As previously canvassed in this proceeding,[61] the *Dodds* test case has effectively established Southern Response's liability. The Court of Appeal decision in *Dodds* would be binding on the High Court in respect of many issues that would arise at a "Stage 1" trial. Having assisted the Dodds, particularly in writing their closing submissions for trial,[62] the plaintiffs' legal team have had a successful "dry run" of a Stage 1 trial and have prepared some of the necessary work product. Counsel consider that if the proceeding were to continue, the prospects of success for class members at Stage 1 would be high.

49. However, that would (in the absence of settlement) leave class members' individual entitlements to be assessed at Stage 2 hearings, at which Southern Response could potentially raise individual defences. Southern Response has previously submitted that such hearings would need to address individual reliance and loss, could require individual pleadings, would likely require class members to give evidence, and could necessitate discovery from (and/or interrogatories to) individual class members.[63] Multiple Stage 2 hearings of that type would necessarily involve significant additional time and expense.

50. So far as the plaintiffs are aware, there is no relevant limit on Southern Response's ability to withstand any judgment(s). The plaintiffs understand that the Crown has committed funding for Southern Response to meet its obligations in that respect.

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[61] See *Ross v Southern Response Earthquake Services* [2021] NZHC 2452 (Notification Application) at [16], [191].
[62] Affidavit of Grant Cameron (12 March 2021) at [45].
[63] Synopsis of Submissions of Defendant (5 November 2018) at [4.28] - [4.33].

Terms of the Agreement / amounts offered to class members

51. The key terms of the Agreement are canvassed at paragraph 5 above.

52. The amounts to be offered to class members will be calculated as per the Southern Response Package methodology. Those amounts will necessarily differ from class member to class member. The following section addresses the reasonableness of the amounts to be offered to class members under the Package, when compared with the amounts claimed in the representative proceeding.

53. Where the primary benefit of a settlement is a claims resolution process by which class members' individual entitlements will be assessed, the practice overseas is that the Court should receive evidence about that process so it can assess how the scheme will be administered and how benefits will be delivered to class members.[64] The Court has previously received evidence from Southern Response about the Package scheme.[65] The plaintiffs will leave Southern Response to proffer any additional evidence as to how the scheme will be administered, and the procedure for class members to apply for and obtain compensation.

Reasonableness of settlement amounts in the light of the best possible recovery and the risks of litigation

54. In Australia, this aspect of the submissions would usually be addressed confidentially with the court and not provided to the defendant, to avoid prejudicing plaintiffs' (and class members') substantive position if the settlement is not approved and the case proceeds to trial.[66] In the present case counsel do not consider that including the comments below in open submissions will prejudice class members' position.

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[64] *Baxter v Canada (Attorney General)* (2006) 83 OR (3d) 481 (ONSC) at [29] – [30].
[65] Affidavit of Casey Hurren (14 December 2020); Affidavit of Casey Hurren (9 March 2021).
[66] Federal Court of Australia "Class Actions Practice Note" at [15.1(a)(i)]; Australian Law Reform Commission "Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (ALRC Report 134, December 2018) at 149, [5.63].

55. Given the matters discussed at 48 to 50 above, the plaintiffs consider:

(a) It would be inappropriate to discontinue unless the compensation being offered to class members under the Package was sufficiently generous to reflect the strength of class members' claims; but

(b) Some "discount" on the full value of class members' claims is acceptable, given the likely cost and duration of litigation that would still be required to secure individual recovery.

56. Based on the information received from Southern Response to date about how the Package is intended to be applied (but subject to the caveat discussed at paragraphs 43 - 47 above), the plaintiffs consider that the compensation offered to class members under the Package scheme satisfies those criteria. Although what is being offered under the Package is a compromise on the full value of class members' claims, the plaintiffs consider it a fair and reasonable compromise given the risks and costs of continued litigation.

57. The claim as pleaded centres on the "two DRA system" operated by Southern Response prior to October 2014.[67] Southern Response sent policyholders a version of the DRA containing a bottom line figure.[68] The DRA was accompanied by a covering letter[69] which represented that the figure in the DRA was Southern Response's calculation of "*the amount it would have cost us to rebuild your house on its present site*".[70] In fact, Southern Response's internal version of the DRA (not provided to policyholders) recorded further costs that Southern Response would necessarily have incurred in rebuilding the house on its present site.[71]

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[67] Summarised in *Ross* CA at [13] – [17].
[68] Statement of Claim at [27] – [29].
[69] Statement of Claim at [34] – [35].
[70] Statement of Claim at [35(b)].
[71] Statement of Claim at [30] – [31].

58. The damages sought on class members' behalf cover each of the further items of cost in the internal DRA, plus general damages and interest. The table below sets out these items, whether they were awarded in the *Dodds* case, and whether they are included in the Package offer.

Item of damages	**Awarded in *Dodds* case?**	**Included in "Package" compensation?**
Items in DRA "Office Use" section		
Arrow costs		
Arrow PMO	Not awarded[72]	No
Arrow DRA	Not awarded[73]	No
Arrow Contract	Awarded[74]	Yes
Arrow Construction	Awarded[75]	Yes
Demolition	Not awarded (not claimed by the Dodds)[76]	No
Design fees	Awarded	Yes
Contingency	Awarded[77]	Yes
Other items of damages		
General damages	Not awarded (not established on the evidence)[78]	No
Interest	Awarded	Yes

59. It is not correct, as Southern Response has previously suggested,[79] that the Package would pay out the full amount of class members' claims without any "discount". When compared with the pleaded claims, the Package offer is a compromise. Three components are missing: the Arrow PMO and DRA costs; demolition costs; and general damages.

60. The Arrow PMO and DRA costs are unlikely to be recoverable at trial for the reasons discussed by the High Court in *Dodds*.[80] As such, it is not unreasonable for the Package offers to omit those costs.

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[72] *Dodds* HC at [67].
[73] *Dodds* HC at [68].
[74] *Dodds* HC at [69]; *Dodds* CA at [187].
[75] *Dodds* HC at [70]; *Dodds* CA at [187].
[76] *Dodds* HC at [65].
[77] *Dodds* HC at [64].
[78] *Dodds* HC at [219] – [224]; *Dodds* CA at [189] – [191].
[79] See Memorandum with Transcript of Parts of Hearing (19 March 2021).
[80] *Dodds* HC at [67] – [68].

61. As to demolition costs:

(a) There is likely no duty to pay demolition costs to policyholders such as the Dodds (or the Rosses) for whom Southern Response demolished their earthquake-damaged home at its cost. In those cases, Southern Response has fulfilled its obligations under the insurance policy by covering the cost of demolition.

(b) However, the plaintiffs understand that some policyholders may have received a cash settlement (with no allowance for demolition costs) without Southern Response demolishing their home, leaving the policyholder to bear the cost of demolition. In those circumstances, Southern Response did not fulfil its policy obligations and misled the policyholder into settling their insurance claim for less than they were entitled to.

(c) The *Avonside Holdings* and *Dodds* cases did not address whether demolition costs are recoverable from Southern Response.[81] Nevertheless, applying the findings in those cases by analogy, the plaintiffs consider there is a strong argument that such costs are recoverable in the circumstances described at (b) above. However, the plaintiffs believe that those circumstances probably only apply to a small subset of class members.

62. The main "discount" from the claims in the representative proceeding is the absence of any compensation for stress and inconvenience. In the Statement of Claim, the plaintiffs have claimed $25,000 in general damages on behalf of each class member. Southern Response is not offering any such compensation as part of the Package.

63. In the *Dodds* proceeding, Mr and Mrs Dodds sought $15,000 each as general damages flowing from Southern Response's misrepresentation, breach of the FTA and breach of the insurer's duty of good faith.[82]

[81] In both cases, Southern Response had demolished the plaintiffs' house (at its own cost) and so the question did not arise.
[82] *Dodds* HC at [214], [219].

Justice Gendall held that this claim failed on the evidence:[83]

> Whilst I clearly have some sympathy for the position which the Dodds have found themselves in relating to this matter, it is my view that the reasonably high threshold which exists for general damages claims in cases such as the present has not been reached here. The Dodds were effectively cash-settled ultimately to enable them to buy a replacement home of their choice. Their policy claim did not involve what is often seen as a long drawn out repair versus rebuild case. There was some evidence before me of reasonable physical inconvenience but I need to say that there was no major evidence that the Court could consider of significant mental distress here.

64. The Court of Appeal agreed:[84]

> We need not determine, in this case, the circumstances in which general damages for stress and inconvenience can be awarded in contract. We agree with the High Court Judge that the evidence does not establish a causal link between the breach complained of … and any inconvenience or stress suffered by the Dodds. … the evidence simply did not establish any material incremental stress as a result of the insurance claim being settled for less than it would have been if the misrepresentations were not made.

65. Neither court ruled out general damages for stress and inconvenience in claims of the kind at issue in this proceeding.[85] However, the *Dodds* judgments demonstrate that recovering general damages for class members would be a fact-specific exercise requiring individual hearings, and a "*reasonably high*" evidential threshold would likely apply. When one also considers that awards for general damages are typically modest,[86] the plaintiffs consider the absence of compensation for stress and inconvenience under the Package a reasonable compromise in exchange for the certainty of obtaining compensation without the delay, expense and risk of individual hearings.[87]

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[83] *Dodds* HC at [223].
[84] *Dodds* CA at [191].
[85] See also *Bruce v IAG New Zealand* [2019] NZCA 590 at [58] – [60], where the Court of Appeal declined to decide whether general damages for stress and inconvenience are available for breach of an insurance contract (in the context of Christchurch earthquake claims).
[86] See *Bruce v IAG New Zealand* [2018] NZHC 3444 at [172].
[87] If class members (or some of them) proceeded to trial, any amounts recoverable for general damages would likely be offset, wholly or in part, by either the funding costs payable to CFA (for funded class members) or by irrecoverable legal costs for unfunded class members who proceeded to trial with a legal representative and without litigation funding.

66. For these reasons, the plaintiffs consider the amount of compensation to be offered under the Package scheme falls within the reasonable range, in the light of the strength of class members' claims and the risks and costs of continued litigation.

67. That leaves the question of whether the compensation is reasonably available to class members. That the compensation is reasonable in amount would be irrelevant if class members were left unaware of its availability, or unable to access it.

68. That issue is addressed by the following:

(a) Clauses 2 and 3 of the Agreement, under which Southern has committed to keep the Package offer open for at least 18 months from the date of the Agreement, with that commitment being enforceable by class members;

(b) Notice of the Agreement (and of the process to apply for compensation under the Package) being sent to class members, as discussed at 71 to 72 below; and

(c) The commitment Southern Response has given (through counsel) to the Court that it will do "*all it can to ensure that it communicates as best it can with all potential claimants, notifies them of their rights and assists them in receiving the benefits they will be entitled to in accordance with the settlement*".[88]

Recommendations of counsel and independent parties (if any)

69. The recommendations of counsel for the plaintiffs are contained in these submissions. Counsel recommends that the Court approve the agreement to discontinue for the reasons discussed herein.

70. The plaintiffs have not obtained any recommendations from independent parties. However, counsel are aware that several other

[88] Minute of Nation J (20 October 2021) at [17].

Christchurch law firms are advertising to assist policyholders to apply for the Package and review any offer received. To that extent the Package scheme itself seems to be broadly well-received.

Whether class members were given timely notice of the essential elements

71. The essential elements of the Agreement were set out in the Notice of Application to Discontinue Representative Proceeding,[89] which Nation J ordered Southern Response to send to class members on or before 29 October 2021.[90] Justice Nation accepted the plaintiffs' submission that Southern Response should send the Notice to all class members it holds contact details for.[91] Southern Response holds email addresses for around 55% of class members, and postal addresses for most class members (although some may be out of date).[92]

72. In addition, Southern Response has caused to be published in the *NZ Herald*, the *Dominion*, the *Press*, and the *Otago Daily Times* a public notice with details of the application for leave to discontinue and a link to the class action website. Furthermore, GCA Lawyers sent email communications on 14 October 2021, announcing that an agreement had been reached and setting out the essential elements of the Agreement, to all class members for whom it holds email addresses, being those class members who are signed clients of GCA Lawyers, as well as other class members who have registered their details at the class action website. In total, GCA Lawyers sent emails to 688 recipients, or roughly 23% of the estimated class.

73. GCA Lawyers has also uploaded to the class action website (www.southernresponseclassaction.co.nz) the application for leave to discontinue, Mr Cameron's affidavit dated 13 October 2021 (which

[89] Minute of Nation J (20 October 2021), Annexure A at [6].
[90] Minute of Nation J (20 October 2021) at [25(b)].
[91] Minute of Nation J (20 October 2021) at [16], [18].
[92] *Ross v Southern Response* [2021] NZHC 2452 (Notification Application) at [175].

attaches a copy of the Agreement) and other key documents including the statement of claim and defence, the Court's 20 September 2021 Judgments and the Minutes issued by the Court in relation to the application to discontinue. These documents are publicly available under the "Important Court Documents" tab on the website.

Reaction of class members to settlement / number and nature of objections

74. The orders made by Nation J on 20 October 2021 provide for class members who wish to support or oppose the application to file a document setting out their position by 25 November 2021.[93] The Notice that His Honour directed be sent to class members explained what class members need to do in order to make submissions or be heard on why the Court should or should not approve the agreement to discontinue.[94]

75. As at the time of writing, the plaintiffs have not received copies of any documents filed with the Court by class members. The plaintiffs will address any class members' submissions that are filed at the hearing on 29 November 2021.

The negotiation process, and whether fees were negotiated in the settlement

76. Negotiations commenced between senior counsel shortly after delivery of the Court's 20 September 2021 judgments. The focus of the negotiations was on achieving an outcome for class members that would result in all class members, whether funded or unfunded, being able to retain 100% of the settlement sum calculated in accordance with the Southern Response Settlement Package announced in December 2020. This involved negotiating a payment by Southern Response to CFA in exchange for CFA releasing its contractual rights under individual funding agreements to recover from the funded class members the costs of the litigation and funding commission costs.

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[93] Minute of Nation J (20 October 2021) at [25(d)].
[94] Minute of Nation J (20 October 2021), Annexure A at [9].

77. The sum to be paid to CFA covers both funding commission and legal fees. As such, legal fees were in a sense negotiated in the settlement. There is nothing improper in that approach, particularly where (as in this case) the payment will be made directly by the defendant and will not diminish class members' recovery.[95]

78. As part of the negotiation, the plaintiffs' legal team agreed to waive their contractual entitlements to recover a success fee from clients who had entered into conditional fee agreements. That discussion was not linked in any way to the amounts payable to class members under the Package scheme. There was no suggestion at any point in the negotiation that class members would receive less compensation in exchange for the lawyers (or CFA) receiving more, or vice versa. It is also worth noting that the Package scheme was developed by Southern Response and announced in December 2020, long before the negotiations took place.

79. Because the Agreement has the effect that no part of the plaintiffs' legal fees will be paid by class members, and those fees will not diminish the funds that Southern Response will use to pay class members' claims, it is unnecessary for the Court to address the reasonableness of the fee amount.[96] As Pitfield J put it in *Killough v Canadian Red Cross Society*:[97]

> If a fee agreement between counsel and a defendant is permitted by the Act, and if there has been no collusion between the parties for the purpose of augmenting fees and reducing class benefits, the court need not be concerned with the question of whether, as between a defendant and Class Counsel, the fee agreement is fair and reasonable. Simply stated, it is not appropriate for the court to be concerned with the manner in which the Government of Canada chooses to spend taxpayers' money …

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[95] *Dabbs v Sun Life Assurance* (1997) 35 OR (3d) 708 (ONSC).
[96] *Northwest v Canada (Attorney General)* [2006] ABQB 902 at [49] - [56]; *Adrian v Canada (Minister of Health)* [2007] ABQB 377 at [29] – [31].
[97] *Killough v Canadian Red Cross Society* (2007) 74 BCLR (4th) 295 (BCSC) at [9].

G. Redaction of sum to be paid to CFA

80. The Court has asked counsel to provide submissions on whether the sum proposed to be paid to CFA under the Agreement should be redacted on the Court copy of Mr Cameron's affidavit of 13 October 2021, or on any copy published or made available to class members.[98]

81. At cl 10 of the Agreement, the parties agreed that the sum to be paid to CFA was confidential and not to be disclosed (or permitted to be disclosed) except in limited circumstances, one of which was where the parties were required to do so by law (the **Confidentiality Clause**).

82. The Confidentiality Clause was not included in the Agreement at the plaintiffs' request, nor at the request of CFA or the plaintiffs' lawyers. Nonetheless, the plaintiffs have agreed to the Confidentiality Clause. They will abide the Court's decision on whether the sum to be paid to CFA should be redacted.

83. However, in view of the request that submissions be provided on this matter, counsel draw to the Court's attention the following:

    (a) The Australian authorities suggest that the Court is invariably informed of the amounts to be paid to a litigation funder.

    (b) If litigation funding costs or legal fees are to be deducted from class members' recovery, the class members should be advised of the amounts.[99] Where legal fees will instead be paid by the defendant, the Australian practice note is silent, and some Canadian courts have expressed doubt as to whether class members have any interest in the amounts paid.[100]

    (c) There does not appear to be any reason why the amounts to be paid to a funder, where they are not coming out of the money to

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[98] Minute of Osborne J (26 October 2021) at [3].
[99] See Federal Court of Australia "Class Actions Practice Note" at [16.1].
[100] See the authorities cited at fn 96 and fn 97 above.

be paid to class members, need to be disclosed to the general public. In Australia, confidentiality is sometimes maintained over this aspect of the settlement, although full disclosure is the more usual course.[101]

(d) In the present case, the payment to CFA represents a negotiated compromise of CFA's entitlements to be reimbursed for legal costs and other project costs that it has paid, and to be paid a funding commission. The negotiations were conducted in confidence and the payment is intended to fully address both legal costs and commission.

H. Conclusion

84. Subject to the plaintiffs' solicitors receiving confirmation - in the form of offers made to at least a substantial subset of the class members for whom it acts - that Southern Response will genuinely and fairly apply the "Package" principles in good faith, the plaintiffs submit that the Agreement represents an excellent outcome for class members and falls within the "reasonable range" of outcomes that could have been achieved in this proceeding. The Agreement is fair and reasonable and in the best interests of the class members as a whole. Accordingly, the Court should grant leave to discontinue.

Dated: 16 November 2021

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Philip Skelton QC / Kelly Quinn / Carter Pearce
Counsel for the Plaintiffs

[101] See the discussion in Australian Law Reform Commission "Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (ALRC Report 134, December 2018) at 146 – 150, [5.53] – [5.69].