

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

---

**NOTICE OF AMENDED INTERLOCUTORY APPLICATION FOR A  
COMMON FUND ORDER**

**Dated: 7 November 2019**

---

Next Event: Directions Conference at 4pm on Friday 8 November 2019

Judicial officer: Justice Gendall

---

**Solicitors:**

GCA Lawyers  
PO Box 3241  
Christchurch

**Solicitor Acting:** Grant Cameron

Phone: (03) 365 1347  
Fax: (03) 365 4856  
Email: grant@gcalawyers.com

**Counsel:**

Philip Skelton QC / Kelly Quinn  
Bankside Chambers  
Level 22, 88 Shortland Street  
Auckland 1010

Tel: (09) 307 9966  
(09) 307 8773  
Email: philip@philipskelton.co.nz  
kelly.quinn@bankside.co.nz



- (c) Claims Funding Australia Pty Ltd (CFA) has agreed to bear (in the first instance) the Plaintiffs' costs and expenses of bringing the proceeding;
- (d) It would be unjust if the Plaintiffs or CFA were required to bear those expenses without contribution from the other Class Members who benefit from the common fund;
- (e) It is just and equitable that the expenses are borne *pro rata* by all Class Members who benefit from the common fund;
- (f) The most convenient way to achieve a *pro rata* contribution is to order that the expenses be repaid to CFA directly from the common fund in priority to other distributions;

#### Funding commission

- (g) CFA has also undertaken significant financial risks (including the risk of any adverse costs order against the Plaintiffs) in agreeing to fund the proceeding;
- (h) In the event that a common fund is recovered, it is just and equitable that CFA be paid a reasonable risk premium (over and above repayment of the expenses it has incurred) from the fund in consideration for undertaking those risks;

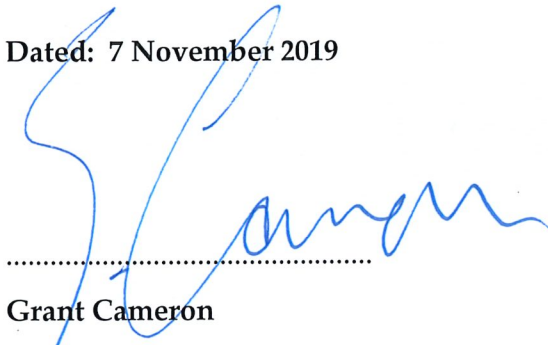
#### Summary

- (i) The Common Fund Order will ensure the following benefits:
  - (i) Equal financial treatment between the Class Members, so that no Class Member is unjustly enriched at the expense of any other Class Member;

- (ii) That if a common fund is recovered, CFA will be repaid the expenses of the proceeding and paid a reasonable risk premium in consideration for funding the proceeding; and
    - (iii) That the costs to be paid to CFA will be brought under Court supervision, so that the Court can ensure the amount of those costs is fair and reasonable to the Class Members.
  - (j) The application for a Common Fund Order should be determined before any Opt-Out Notice is sent to Class Members, so that Class Members can be informed of their rights and obligations if they remain in the proceeding, and can make an informed decision whether to remain in the proceeding or opt out.
3. The Common Fund Order is also sought on the grounds contained in the affidavit of Grant Ashley Cameron sworn on 7 November 2019 and filed in support.
4. This application is made in reliance on:
- (a) Section 12 of the Senior Courts Act 2016; Section 5 of the Supreme Court Act 1860; Rules 1.2, 1.6, 4.24, 14.1 and 14.6 of the High Court Rules 2016; and
  - (b) The Court's inherent jurisdiction; and
  - (c) *Stanton v Hatfield* (1836) 1 Keen 357, 48 ER 344 (Ch); *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 (HL); *Trustees v Greenough* 105 US 527 (1882); *Batten v Wedgwood Coal Co* (1884) 28 Ch D 317; *Central Railroad & Banking Co v Pettus* 113 US 116 (1885); *Re New Zealand Midland Railway Co* [1901] 2 Ch 357 (CA); *Re Universal Distributing Co (in liq)* (1933) 48 CLR 171; *Sprague v Ticonic National Bank* 307 US 161 (1939); *Boeing v*

*Van Gemert* 444 US 472 (1980); *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94 (CA); *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC); *Woodward v Smith* [2014] 3 NZLR 525 (HC); *Money Max v QBE Insurance* (2016) 245 FCR 191 (FCAFC); and *Ross v Southern Response Earthquake Services* [2019] NZCA 431.

**Dated: 7 November 2019**



.....  
**Grant Cameron**

Solicitor for the Applicants

**Annexure A – Common Fund Order**

1. All sums paid by the Defendant in resolution (or part resolution) of this proceeding, whether under a judgment or any settlement agreement, and including sums paid by way of costs, shall be paid to and held by GCA Lawyers and treated as a single fund (the **Common Fund**).
2. Subject to any further order of the court, GCA Lawyers shall make the following payments out of the Common Fund:
  - (a) First, all costs (on a solicitor-client basis) and disbursements reasonably and actually incurred by the Plaintiffs in the proceeding shall be paid to Claims Funding Australia;
  - (b) Second, as consideration for funding the proceeding Claims Funding Australia shall be paid a further sum (the **Funding Commission**); and
  - (c) Third, the balance of the Common Fund shall be distributed to the class members represented by the Plaintiffs on a *pro rata* basis, in accordance with any distribution scheme approved by the Court.
3. The Funding Commission shall be a sum to be approved by the Court, expressed as a percentage of the Common Fund, and being either:
  - (a) The percentage provided for under clauses 11.1(b) and 11.1(c) of the Funding Agreement signed between the Plaintiffs and Claims Funding Australia on 14 March 2019; or
  - (b) Such lower percentage as the Court considers appropriate.