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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SUBMISSIONS OF THE DEFENDANT FOR APPLICATION FOR LEAVE TO DISCOTINUE

Dated: 23 November 2021

Judicial Officers: Osborne J
Next event date: Hearing on 29 November 2021

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MAY IT PLEASE THE COURT:

1. The plaintiffs have applied to discontinue this representative proceeding. Notice of the proposal to discontinue the proceeding has been given to class members in the proceeding and class members have had an opportunity to file submissions in support of or in opposition to this application.

2. The defendant does not oppose the application to discontinue and, indeed, supports it. At the time of filing these submissions, the deadline for class members to submit on the application has not yet passed. It may be necessary to supplement these written submissions if further issues are raised by class members after these submissions are filed.

3. An affidavit of Casey Michael Hurren is filed with these submissions to give the Court further information about issues that may be relevant to the plaintiffs' application.

Background[1]

4. The Court is, by now, familiar with the background to this application, both substantive and procedural. A brief summary is provided below for the benefit of class members who may read these submissions.

5. The substantive claim in this proceeding arises out of the settlement of the plaintiffs', (being Mr and Mrs Ross), earthquake insurance claim with the defendant, Southern Response (formerly known as AMI Insurance). Mr and Mrs Ross' house was deemed to be beyond economic repair. They elected the "buy another house" option under their policy to settle their insurance claim, the result of which was that Southern Response paid them $242,495 (in addition to the sum of $119,860 paid by EQC).[2]

6. The Rosses now claim in this proceeding[3] that misrepresentations made by Southern Response as contained in a Detailed Repair/Rebuild Analysis (**DRA**) document[4] misled them to accept a settlement that was $141,061 less what they say they were entitled to.[5] Mr and Mrs Ross also seek general damages of $25,000 each plus interest and costs. They were

[1] For general background see *Ross v Southern Response* [2018] NZHC 3288 (***Ross* HC**) at [7] to [20].
[2] Recorded in a Settlement and Discharge Agreement signed on 22 and 23 May 2013. See *Ross* HC at [16] and *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 (***Ross* CA**) at [18].
[3] *Ross* CA at [21] describes the four causes of action. See Statement of Claim.
[4] The DRA summarised the key aspects of the house, the damage suffered and the repair or rebuild work required to remediate that damage.
[5] This figure is calculated as the difference between the amount shown in a DRA held by Southern Response and the payment made to them.

granted leave by the High Court to bring this proceeding as a representative proceeding pursuant to r 4.24 of the High Court Rules on behalf of other policyholders who settled their claims in similar circumstances.[6] The class is around 3,000 in size.[7] This proceeding, although filed in 2018, was delayed by an interlocutory dispute as to whether it could proceed on an opt-out basis, as sought by the plaintiffs. In late 2020, the Supreme Court determined that opt-out is permissible in New Zealand and appropriate for this proceeding.[8]

7. The High Court, in the decision of *Dodds v Southern Response*,[9] determined issues similar (but not identical) to those raised in the current proceeding. The case was determined against Southern Response and its appeal was largely unsuccessful. Southern Response was held to be liable to pay Mr and Mrs Dodds some of the sums on another version of the DRA (often referred to as the Internal DRA) that was not disclosed to them. Southern Response defended the *Dodds* claim effectively as a test case on the wider issue of its liability to policyholders who cash settled their claims prior to 1 October 2014.[10]

8. Following the *Dodds* Court of Appeal decision, on 14 December 2020 the Government announced a settlement package for those policyholders in a similar position to Mr and Mrs Dodds (**Package**). The Government and Southern Response had made earlier public statements that they would address the issues arising out of the *Dodds* proceeding once the Court of Appeal had clarified various issues.

9. Southern Response brought an application for directions to clarify whether it is permitted to communicate directly with class members in respect of the Package. Although that application was initially dismissed,[11] the Court reserved leave for Southern Response to file an amended application seeking approval of particular draft communications and details in relation to their form and timing. Southern Response filed an amended application,

[6] *Ross* HC, above n 2. The class definition is set out at [138] in *Ross* CA, above n 3.
[7] Affidavit of Darrell Hansen dated 17 August 2018 at [112].
[8] *Ross* HC, above n 1, *Ross* CA, above n 2, *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126 (***Ross* SC**) at [108].
[9] *Dodds v Southern Response Earthquake Services Limited* [2019] NZHC 2016, [2019] 3 NZLR 826 (***Dodds* HC**). Substantively upheld on appeal to the Court of Appeal in *Southern Response Earthquake Services Limited v Dodds* [2020] NZCA 395 (**Dodds CA**).
[10] Affidavit of Casey Hurren dated 14 December 2020 at [10].
[11] *Ross v Southern Response* [2021] NZHC 253 [Result Judgment]; *Ross v Southern Response* [2021] NZHC 2451 [Reasons Judgment].

producing specific draft proposed communications in relation to its Package.

10. Southern Response's amended application for directions was heard together with the plaintiffs' applications for notification orders (relating to notification to class members of the proceeding) and for orders requiring Southern Response to set aside 15% of any settlement it reaches with a class member.

11. Judgments on the above applications were released on 20 September 2021.[12] Southern Response's proposed communications were approved, with minor modifications. The plaintiffs' notice to class members was approved, with amendments, including a requirement for the plaintiffs to disclose to class members the rate of commission that would be payable to the litigation funder from any recovery made by class members. An opt-out date of 20 December 2021 was set. The plaintiffs' application for a set-aside order was dismissed.

12. The plaintiffs sought leave to appeal all three judgments, but the application for leave to appeal has been stayed pending determination of this application which, if granted, would resolve this proceeding.

13. This application has come about because Southern Response, the plaintiffs and the litigation funder, Claims Funding Australia Pty Limited (**CFA**), have reached an agreement to end this representative proceeding. The agreement was reached following delivery of the 20 September 2021 judgments and is subject to the Court granting leave to discontinue the proceeding. By consent, orders were made by Dunningham J[13] staying the Notification Judgment in its entirety and partially staying the Communications Judgment. The opt-out date is now at large. Southern Response has continued to process Package applications both through legal representatives and now directly with policyholders.

The settlement

14. The Deed of Agreement is annexed to the affidavit of Mr Cameron dated 13 October 2021 (Exhibit A) (**Agreement**). The settlement sum is redacted. This redaction is discussed below.

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[12] *Ross v Southern Response* (Notification) [2021] NZHC 2452 (**Notification Judgment**); *Ross v Southern Response* (Communications No 2) [2021] NZHC 2453 (**Communications Judgment**); *Ross v Southern Response* (**Setting aside Judgment**) [2021] NZHC 2454.
[13] Minute dated 11 October 2021.

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

    (a) Southern Response agrees to offer to all eligible class members the right to participate fully in, and receive the benefit of, its settlement Package for a period of at least 18 months from the date of the Agreement.

    (b) If the Court approves the discontinuance, Southern Response will make an agreed payment to CFA, the litigation funder of this proceeding. The sum to be paid by Southern Response to CFA is confidential to the parties except in limited circumstances.

    (c) On receipt of the payment, CFA gives up any right it has under any litigation funding agreement and at law to any share of a class member's payment under the Package.

    (d) If the discontinuance is not approved by the Court, the proceeding will continue. The proceeding is currently stayed by consent, but the stay will come to an end and a new timetable will be sought.

16. There is no provision in the Agreement (and Southern Response does not seek such a term) that requires class members to give up any rights they may have against Southern Response or that extinguishes such rights. We discuss this further below.

17. As noted in the plaintiffs' submissions,[14] the Agreement has significant implications for class members. Individual class members will be free to pursue a payment through Southern Response's Package without any obligation to account to CFA or the representative action lawyers for any sum. As such, all eligible policyholders will receive their payments under the Package without deduction.

18. Counsel for the plaintiffs place considerable weight on the amelioration of the so called "free rider" problem.[15] While Southern Response agrees there are material benefits for class members as a consequence of the agreement reached with CFA and the plaintiffs, in earlier hearings Southern Response has downplayed the "free rider" issue in this proceeding, and continues to do so. As submitted in earlier hearings, the numerous hearings conducted in this proceeding so far have occurred principally in

[14] Plaintiffs' submissions (Application for leave to discontinue) dated 16 November 2021 (**Plaintiffs' submissions**) at [7], [8].
[15] Plaintiffs' submissions at [8].

relation to a dispute about the opt-in/opt-out issue. Until the Notification Judgment, there was little substantive progress in the proceeding. Evidence presented for earlier hearings[16] supports the proposition that the Package was not a response to this proceeding, but to the issues raised more widely, particularly in the *Dodds* proceeding. Further, class members had not yet had an opportunity to opt out, so it is not accurate to describe all within the class definition as "free riders". Southern Response never ruled out the prospect of a cost sharing mechanism being awarded in this proceeding (albeit it advocated strongly against a common fund order). Realistically though, such a mechanism could only ever have applied to class members that did not opt out.

19. We do not downplay the significance of this settlement for class members, but Southern Response does not share the views of the plaintiffs' legal team on the so-called "free rider" problem. The greatest benefit arising from the discontinuance, at this point in time, is for those that had signed up to a funding agreement with CFA and terms of engagement with GCA Lawyers (and are to be released from these obligations).

Notice of this application

20. Following a directions conference on 18 October 2021, the Court made directions on 20 October 2021 requiring notice to be given to class members of the proposed discontinuance in the following ways:

    (a) Southern Response was to publish the newspaper notice in an approved form in each of The Press, the New Zealand Herald, the Dominion Post and the Otago Daily Times on 23 October 2021.

    (b) Southern Response was to send a Court approved notice by post and email to all known or potential class members on or before Friday 29 October 2021 as follows:

        (i) by sending a printed copy of the Court Approved Notice by tracked delivery to the last known postal or physical address (if any) that Southern Response has on file for each class member; and

        (ii) by sending an electronic copy of the Court Approved Notice by email to the last known email address (if any) that Southern

[16] Affidavits of Casey Hurren dated 19 March 2021 at [7] to [16] and 30 March 2021 at [5].

Response has on file for each class member, together with an electronic read receipt request.

21. Southern Response duly complied with these requirements. Mr Hurren's accompanying affidavit confirms compliance with the Court directions as to notice (with one minor exception relating to a small batch of courier notices that were sent for delivery one working day after the 29 October 2021 deadline). Mr Hurren's affidavit also confirms:

    (a) 2,802 courier packages were sent out. Of these, 2,667 are reported as delivered while 224 have been returned as undeliverable.

    (b) 2,634 emails were sent out. Of the emails sent, 2,099 were successfully delivered and 1,670 have been opened. 535 were returned as undeliverable.

22. Mr Hurren's affidavit also confirms that Southern Response has received a large volume of calls and emails in response to the notices. Staff have reported some confusion from people making contact as to what the notice was about and what it meant for recipients. The level of contact has had the consequence that there has been a material increase in applications for the Package.

What are the key considerations for the Court on this application?

23. The Court of Appeal[17] made it a condition of granting leave to proceed on an opt-out basis that the plaintiffs must obtain leave to discontinue the proceeding. That decision was upheld by the Supreme Court which held[18] that, as a general rule, the need for court approval of a settlement or discontinuance should be a condition of giving leave under r 4.24(b) to bring the proceedings on an opt-out basis.

24. The position is arguably analogous to r 15.20(3). That rule prohibits a plaintiff from discontinuing a proceeding where there is more than one plaintiff unless all plaintiffs consent or the Court grants leave. Rule 15.20 also provides a number of other restrictions on discontinuance without leave. In *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* the High Court said:[19]

[17] *Ross* CA at [136].
[18] *Ross* SC at [83].
[19] *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 223 at [6].

> A consideration relevant to the decision of whether or not to grant leave is that a plaintiff ought not to be forced to continue against a defendant whom it does not wish to bring to trial. To require such an outcome would seem contrary to the objective of the High Court Rules, which is to secure the just, speedy and inexpensive determination of any proceeding. The starting point is that a party has a right to discontinue. The party will only be constrained in exercising that right where it is necessary to address some injustice that would otherwise occur due to the way in which the discontinuing party has conducted the proceedings to that point — for example, by obtaining an order for an interim injunction. In such circumstances, the discontinuance may not be permitted at all, or only be permitted on certain conditions.

25. The fact that this proceeding has been conducted as a representative proceeding means that it is necessary to ensure no injustice arises from the discontinuance.

26. The Supreme Court in *Ross* determined that the High Court has jurisdiction to supervise representative proceedings conducted on an opt-out basis. In reviewing the Package Communications in the exercise of its supervisory jurisdiction, the Court should be concerned with the interests of the unrepresented class members, not those running the class action.[20] What then is this Court's role in considering the application for discontinuance? What considerations should the Court have regard to in determining whether to grant the application on behalf of the unrepresented class members? The Supreme Court noted that the extent to which a settlement prejudices class members should be an important consideration.[21] It did not comment on what the approach might be where the application is for leave to discontinue. It might be assumed similar considerations will be applied.

27. Like many aspects of this proceeding, this application for leave to discontinue is largely without precedent in New Zealand. Notably, the recent settlement of the *White v James Hardie* class action, which resulted in the discontinuance of the proceeding in return for a payment of $1.25m to the defendant for costs, appears to have proceeded without any input from the Court despite the fact that class members' rights appear (based on media reports)[22] to have been extinguished without any recovery. Of course, it was not an opt-out action.

28. The decision considered by the Supreme Court in this proceeding, *Tamaki v Baker*,[23] appears to provide the only example of the issue of a discontinuance of a class action being considered by the Court. In that

[20] *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 at [21].
[21] *Ross* SC at [82].
[22] https://www.rnz.co.nz/news/business/448371/leaky-home-class-action-trial-ends-in-settlement
[23] *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC).

proceeding, the representative plaintiff discontinued the proceeding, but another member of the affected iwi applied to set aside the discontinuance. The Supreme Court upheld the application and substituted the applicant as the representative plaintiff. Referring to the predecessor to r4.24, Edwards J said that the rule could not be read as allowing the representative plaintiff "*to prejudice or alter the rights of those whom he represents*".[24]

29. Like many other aspects of the proceeding to date, the Court may take guidance from overseas jurisdictions that are more advanced with their class action regimes. In this instance, and as recognised by the Supreme Court in this proceeding,[25] the Court can take useful guidance from both Australia and the Canadian province of Ontario, both of which have legislative regulation of discontinuance. Neither provision gives any explicit guidance to the Court on the factors that the Court could or should take into account when considering discontinuance of a class action. However, the Courts in those jurisdictions have articulated various principles to be applied.

Australia

30. Section 33V of the Federal Court of Australia Act 1976 provides:

> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

31. There is no guidance as to discontinuance of a class action in the Class Action Practice Note. However, there are relevant cases that provide guidance. Two slightly different approaches have emerged:

    (a) In *Mercedes Holdings Pty Ltd v Waters (No 1)*,[26] the Court approached the issue by asking whether the proposed discontinuance would be fair and reasonable not only in the interests of the immediate parties, but for the class members as a whole.[27]

[24] Ibid at 103.
[25] *Ross* SC at [66].
[26] *Mercedes Holdings Pty Ltd v Waters* (No 1) [2010] FCA 124; (2010) 77 ACSR 265.
[27] At [10] and [24].

(b) The test was formulated somewhat differently in *Laine v Thiess; Beetson v Sun Water Limited.*[28] Dixon J approached the issue by considering whether the discontinuance would be unfair, unreasonable, or adverse to the interests of the class members.[29] In other words there is no positive onus to prove that the discontinuance is fair and reasonable to all class members.

32. Anastassiou J in *Babscay Ptd Ltd v Pitcher Partners* respectfully agreed with the slightly less strict articulation of the principle in *Laine* and confirmed that the application of this approach does no more than return group members to the position they were in before the commencement of the proceeding.[30]

33. In *Francis (Trustee) v Oculus Accounting Pty Ltd (No 2)* Derrington J addressed the two approaches and considered there is *much force* in the view which prefers the less stringent test from *Laine*:[31]

> The benign effect of discontinuing a representative proceeding on group members' rights may make it difficult to conclude that a proposed discontinuance is "in the interests of all class members" even where it is plainly appropriate. By contrast, if there is sufficient evidence of the circumstances, it will normally be possible to reach a conclusion as to whether the discontinuance would be unfair, unreasonable, or adverse to the interests of group members.[32]

34. In *Francis* the Court did not determine which was the correct test for all purposes because it reached the view, on the facts, that it *was inappropriate* to approve the discontinuance whichever standard was applied. Much may depend on the circumstances of the case.

Canada (Ontario)

35. Section 29(1) of the Class Proceedings Act 1992 provides:[33]

> (1) A proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> Notice
>
> (2) In approving a discontinuance or abandonment, or in dismissing a proceeding for delay, other than under section 29.1, the court shall consider whether

[28] *Laine v Thiess; Beetson v Sun Water Limited* [2016] VSC 689.
[29] At [34].
[30] *Babscay Ptd Ltd v Pitcher Partners* [2020] FCA 1610; (2020) 148 ACSR 551 at [28].
[31] *Francis (Trustee) v Oculus Accounting Pty Ltd (No 2)* [2021] FCA 1275 at [33].
[32] At [33].
[33] Note the section was recently amended by removing reference to approval of settlement. This is now dealt with separately.

notice should be given under section 19, and whether such notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding;

(c) any other prescribed information; and

(d) any other information the court considers appropriate.

36. To approve a discontinuance under s29, the court must be satisfied that the interests of the class will not be prejudiced.

37. In *Logan v Canada (Minister of Health)*,[34] the Ontario Superior Court of Justice was considering a motion for an order substituting the representative plaintiff, but the Court's comments have been applied in a wider discontinuance context. The Court said:[35]

> The court must be cautious in permitting representative plaintiffs to withdraw once they have commenced a class proceeding. The decision to begin a class action should not be taken lightly. There must be a cogent reason for seeking to withdraw and this can only be done with court approval. A court must scrutinize a motion for withdrawal carefully. Considerations such as whether the class proceeding has been commenced for an improper purpose, whether there is a viable replacement so that putative class members will not be prejudiced, the question of prejudice to the defendant…and other pertinent facts will all bear on the ultimate decision as to whether to grant the motion for withdrawal.

38. The Ontario Superior Court of Justice considered discontinuance under s29 in *Durling v Sunrise Propane Energy Group Inc* where it confirmed that the absence of prejudice to the class is a prerequisite to the Court's approval of any discontinuance.[36]

39. The Court accepted that while the existence of reasonable grounds for discontinuing and the requirement of good faith can be relevant, they should be viewed as part of the inquiry into prejudicial effect on the interests of class members. If the applicant cannot establish the decision to discontinue was made on reasonable grounds and in good faith, there is likely to be prejudice to the interests of the class members.[37]

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[34] *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418; 36 CPC (5th) 176 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451; 71 OR (3d) 451 (C.A.).
[35] At [7].
[36] *Durling v Sunrise Propane Energy Group Inc* 2009 CarswellOnt 9181, [2009] O.J. No. 5969, 98 C.P.C. (6th) 48 at [16].
[37] At [18].

40. *Gradja v. Barrick Gold Corp*[38] is a relatively recent example of the application of the principles where the Court was considering an application to discontinue a class proceeding. The defendant consented to the application on the basis that the parties had agreed to an agreement whereby the plaintiff would release the defendant from his claims and the defendant would not seek costs.

41. The Court, in a brief judgment, recorded that the relief sought was equivalent to an abandonment or discontinuance of the proposed class action.[39] Before giving approval of discontinuance or an abandonment, the court must be satisfied that the interests of the putative class members will not be prejudiced. The Court quoted the extract above from *Logan* and went on:[40]

> The policy rationales for requiring court approval for the discontinuance of a proposed class action include: (1) deterring plaintiffs and class counsel from abusing the class action procedure by bringing a meritless class proceeding (a so-called strike suit) to extract a payment as the price of discontinuing the class proceeding; and (2) providing an opportunity to ameliorate any adverse effect of the discontinuance on class members who might be prejudiced by the discontinuance.

42. The Court granted the discontinuance.

Law Commission

43. The Law Commission recently issued its Supplementary Issues Paper on Class Actions and Litigation Funding.[41] The Supplementary Issues Paper draws on feedback to Issues Paper 45 and expands the issues on which feedback is sought. It includes draft provisions for some key topics, including settlement.

44. The Supplementary Issues Paper briefly touches on discontinuance of a class action.[42] It states:[43]

> We consider that court approval should be required to discontinue both opt-in and opt-out class actions as this will bring the proceeding to an end for class members. As our draft settlement provisions include detailed procedures for court approval of settlements that will not be applicable to discontinuance, we think it would be preferable to have a separate provision requiring court approval to discontinue a class action.

[38] *Gradja v. Barrick Gold Corp*., 2019 ONSC 4869.
[39] Ibid at [13].
[40] At [15].
[41] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa; Class Actions and Litigation Funding: Supplementary Issues Paper - He Puka Kaupapa 48* (NZLC IP48, 2021).
[42] At [6.9], [6.10].
[43] At [6.10].

45. The Supplementary Issues Paper does not include a draft provision, but refers to provisions in Canada and Australia, discussed above.[44] The Commission notes that it has not included a draft provision because it envisages "this would be uncontroversial".[45] As such, we can expect that the Commission is anticipating a provision equivalent to the Australian and Canadian provisions which both provide, in effect, that leave of the Court is required to discontinue the proceeding. There does not appear to be an intention on the part of the Commission to stipulate any mandatory considerations for discontinuance.

Comment

46. The position in Canada seems relatively settled. The guiding principle for the Court is to consider whether there is any prejudice to class members as a result of the proposed discontinuance. This test is consistent with the less stringent test in Australia and with the decision in *Tamaki.*

47. It is submitted that this is the test this Court should apply. The plaintiffs prefer the more stringent test of whether the Agreement is "fair and reasonable in the interests of the class as a whole".[46] In this respect, they point to the fact that there are limitation concerns for class members, and it cannot be said that a discontinuance would simply return class members to the position they were in before the proceeding was filed. However, Southern Response has agreed to a limitation waiver which gives class members some protection in this regard (see below). In any event, we expect it will be unnecessary for the Court to reach a firm view on which test should be applied. As will be submitted further below, it is submitted that present circumstances would satisfy even the more stringent test and that it is in the interests of class members that this proceeding be discontinued.

The Package

48. As noted above, this is an application to discontinue the proceeding. It is not an application seeking approval of a settlement of the proceeding. The Package was announced in December 2020 and Southern Response has been processing applications under the Package since May 2021 (initially

[44] For example at [6.14] to [6.19].
[45] At [6.10], footnote 14.
[46] Plaintiffs' submissions at [36].

through legal representatives only). Southern Response does not seek the Court's approval of the Package.

49. For the Court better to understand the basis for the submission that there is no prejudice to class members as a consequence of the discontinuance, Southern Response recognises that the Court may want to have some high-level understanding of what the Package offers and how this compares to the claims made in the proceeding. As noted, and to be clear, Southern Response does not seek approval of the Package and the evidence supporting these submissions, and the submissions themselves, are made with a view to assisting the Court in considering whether there is any prejudice to class members (or that the discontinuance is in the interests of class members).

50. The statement of claim filed in this proceeding seeks for each class member:

    (a) Damages in an amount being the difference between the settlement sum received by each Class Member and the Full Estimate prepared for that class member's claim. The term "Full Estimate" is defined in the claim to mean the full estimate of the cost to rebuild or repair the class member's dwelling was the "Grand Total House (including GST)" cost recorded in the Full DRA or Final DRA (in cases where a Final DRA was also prepared). In essence, this is the Internal DRA.

    (b) General Damages in the sum of $25,000 per Class Member;

    (c) Interest pursuant to s 24 of the Interest on Money Claims Act 2016, from date of payment under the settlement agreement to the date of judgment, at the rate prescribed by s 12 of the Act; and

    (d) Costs.

51. Mr Hurren's affidavit gives further information relevant to the Package.[47] Annexed to Mr Hurren's affidavit is an Appendix that goes out with every Package offer for a dwelling claim of the type required to be a member of the plaintiff class in this proceeding. The Appendix provides a plain language step-by-step explanation of how Package offers are calculated. This Appendix is the best reference guide if the Court wishes to understand how Package offers are calculated.

[47] Affidavit of Casey Hurren to be filed with these submissions.

52. The primary purpose of the Package is to ensure that customers who cash settled with Southern Response prior to 1 October 2014, without receiving professional fees or contingency amounts specified on an Internal DRA, now receive payments for those items plus interest.

53. While the plaintiffs suggest[48] there is some compromise in relation to certain items, Southern Response submits when properly considered, the only aspects of the plaintiffs' claim that are compromised have little-to-no prospect of success.

54. The plaintiffs' claim in this proceeding is materially the same as the claims made by the Dodds in their separate proceeding. The plaintiffs effectively seek the difference in value between the Internal DRA and the settlement sum that they received under the original cash settlement.

55. In the *Dodds* proceeding damages were claimed for the difference between the settlement sum received by the Dodds and the undisclosed rebuild cost estimate on the Internal DRA. The Court in *Dodds* said damages were payable representing difference between the true value of the Dodds' claim under their policy and the settlement payment they actually received.[49]

56. The High Court calculated the amount payable to the Dodds by examining the elements of the Internal DRA that were not in the Customer DRA. In *Dodds* payment for demolition was not sought[50], and the Court further removed Arrow PMO and Arrow DRA costs from the Internal DRA.[51] The Court of Appeal accepted further arithmetical adjustments were required because the contingency sum recorded in the Internal DRA included contingency on the demolition, Arrow PMO and Arrow DRA costs that were excluded from the damages awarded by the High Court.[52]

57. As noted by the plaintiffs in their submissions (at [61]), there may be a small number of properties that were damaged beyond economic repair where Southern Response cash settled with the policyholder and did not either carry out the demolition, pay the policyholder to complete the demolition, or (at the policyholder's request) allow the policyholder to retain their damaged property instead of having it demolished. However:

[48] Plaintiffs' submissions at [59].
[49] *Dodds* HC at [206].
[50] *Dodds* HC at [65] and [205].
[51] *Dodds* HC at [205].
[52] *Dodds* CA at [188].

(a) In most cases Southern Response carried out the demolition works for properties damaged beyond economic repair (rebuilds).

(b) Southern Response has not yet come across any cash settlement prior to 2014 in which at least one of the demolition scenarios referred to in paragraph 57 above has not occurred. Despite this, Southern Response accepts that it is possible that there may be a very small number of cases where none of those circumstances apply. However, the number of such cases is expected to be so small that it would not, of itself, justify keeping this proceeding on foot.

General damages

58. The plaintiffs' pleaded claim seeks general damages of $25,000 per class member for stress and inconvenience. The Package does not include any payment for general damages. However, it is submitted that the absence of any payment for general damages should not be a material consideration for this Court on this application for at least two reasons:

(a) First, the likelihood of general damages being awarded is extremely low (for the reasons outlined below).

(b) Second, (as recognised by the plaintiffs (at [65]), the absence of compensation for stress and inconvenience is a reasonable compromise for receiving compensation under the Package without the stress, inconvenience and continued delay of court proceedings.

59. In *Dodds*, Mr and Mrs Dodds claimed $15,000 each in general damages for "loss and damage including inconvenience, stress and anxiety". In the High Court, Gendall J noted that the threshold for such claims is high.[53] He held that the reasonably high threshold which exists for general damages claims in cases such as the present had not been reached.[54] He contrasted the position with a claim where there had been a long drawn out process to determine whether a property is a rebuild or repair. He noted that there was some evidence of physical inconvenience but no major evidence of significant mental distress. The claim for general damages failed.

60. On appeal, the Court of Appeal agreed that the evidence did not establish a causal link between the breach complained of (misrepresentations about

[53] *Dodds* HC at [215].
[54] *Dodds* HC at [223].

rebuild cost) and any inconvenience or stress.[55] Southern Response had argued that although general damages may be available for breach of an insurance contract in New Zealand, the threshold is high. Generally in a contractual setting the courts are more ready to award general damages where the claim relates to physical inconvenience. General damages are generally not available for mental distress except where the object of the contract is to provide pleasure, enjoyment or freedom from distress.[56] Southern Response argued that cases in which the courts have awarded general damages for mental distress are typically those in which the insurer has refused indemnity, often based on a wrongful allegation of, for example, arson or fraud.[57] In view of the Court of Appeal's decision, though, it was not necessary for that Court to address the underlying legal issue of whether general damages were available in a case of this type.

61. Further, while, conceivably, a class member might be able to produce evidence of significant mental distress, it must be the case that the likelihood of such distress being linked to Southern Response's misrepresentation conduct is very low. Class members are AMI customers who settled their claims in the relatively early period of claims settlement – before 1 October 2014. Most can be expected to have moved on with their lives and would have been unaware that Southern Response misrepresented aspects leading to their insurance settlement until many years later. As noted by Gendall J, the case is quite different to a scenario where a homeowner has had a protracted and difficult negotiation with an insurer.

62. If this proceeding were to continue, any class member who wanted to claim general damages would have had to come forward in Stage 2 of the proceeding and prove affirmatively the physical damage (mental distress, inconvenience) and a causal connection to Southern Response's conduct. Successfully obtaining an award for such damages must be a very remote possibility. A portion of any general damages recovery, and any recovery more generally, may also be payable to the litigation funder, CFA.

[55] *Dodds* CA at [119].
[56] *Bruce v IAG New Zealand Ltd* [2018] NZHC 3444 at [163] – [167], quoting Neil Campbell, "Claims for Damages Against Insurers in New Zealand" (paper presented to New Zealand Law Association Conference, Christchurch, 2001).
[57] For example, *Joseph v McMillan* HC Wellington, A347/82, 18 May 1984 at 9, *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd (No 2)* (1988) 5 ANZ Insurance Cases 60-844, 75-274 at 75,282.

Interest

63. Interest is paid on Package settlements from the date of the original SDA to the date Southern Response releases its Package payment to the policyholders nominated bank account. This aspect of the plaintiffs' claim is addressed in full under the Package.

Costs

64. The settlement reached by Southern Response with the plaintiffs and CFA provides for Southern Response to pay an agreed sum to CFA in return for CFA agreeing not to pursue class members for a share of their settlement. As such, none of the costs of this proceeding will be payable by the class members.

65. In contrast, if this proceeding continues, class members wanting to come forward and claim compensation will likely incur costs associated with further steps in the proceeding (e.g. at stage 2). Such costs are not likely to be recoverable in full.

66. It is also to be noted that the Package includes a payment of up to $2,000 (including GST) for policyholders with dwelling claims to take legal advice on the Package offer presented to them and their legal options.

Limitation

67. We now address the question of limitation (a topic covered at paragraphs [11] to [19] of the plaintiffs' submissions). The general summary of law at paragraph [12] of the plaintiffs' submissions is accepted as correct, so far as it is material.

68. The question posed by the plaintiffs is whether class members (who do not accept payments offered by Southern Response under the Package) could file individual proceedings against Southern Response, or whether such claims would now be limitation-barred? The plaintiffs say there is "significant uncertainty on this point".[58] Southern Response says that this submission is overstated. Rather, the likely and obvious position is that, if discontinuance is granted, time will start to run from the point at which the clock was stopped; being 25 May 2018 when this proceeding was filed.[59] In other words class members who bring individual claims would get the

[58] Plaintiffs' submissions at [11].
[59] Plaintiffs' submissions at [13].

benefit of the additional time that has elapsed since this proceeding was filed and, from a limitation perspective, will not be prejudiced in any way by the current proceeding being discontinued.[60]

69. As has previously been advised, eligible policyholders will be able to apply under the Package for a period of 18 months from the date of the Agreement. Southern Response will not apply any limitation restrictions to Package registrations made within this timeframe.

70. For those policyholders who do not accept payment from Southern Response under the Package but wish to pursue their own individual claims, Southern Response has agreed to a waiver (see below) on terms which ensure these policyholders are not prejudiced from a limitation perspective relative to those who wish to settle under the Package. Such waiver is extended on purely pragmatic grounds and without any concession as to the correct legal position.

71. It is submitted that the terms of the waiver agreed to by Southern Response are such that any concerns about limitation periods are no longer materially relevant in the context of this discontinuance application. However, for completeness, some further comments on the limitation issues addressed by the plaintiffs are set out in **Schedule A** hereto.

Limitation waiver

72. Regardless of the legal position, Southern Response has confirmed to some lawyers representing policyholders, and it now confirms for the benefit of the class as a whole, that it is willing to agree to a limitation waiver on the terms set out below.

73. If the *Ross* representative proceeding is discontinued, Southern Response will agree not to raise or rely on any defence under the Limitation Act 1950 or the Limitation Act 2010 (or any analogous limitation defence) in respect of any claim by any (former) class member, in relation to their original cash settlement, for:

    (a) professional fees (including Arrow Contract and Arrow Construction costs allowed in *Dodds*);

    (b) contingency; and

[60] Of course this only applies to the extent that individual causes of action relate to causes of action pursued in the representative action.

(c) interest.

74. This waiver lasts for 18 months from the date of the Court's order granting leave to discontinue the *Ross* representative proceeding and, after that date, Southern Response reserves the right to raise any limitation defence.

No prejudice to class members

75. As noted, it is submitted that the question for this Court is whether there would be any prejudice to class members if the proceeding were discontinued. (Alternatively, the Court may consider whether the Agreement is in the interests of class members.) The following factors are relevant to the assessment of both prejudice and class members' interests:

(a) All class members are likely to be eligible to register for the Package. The basis for calculating offers under the Package is outlined in the Appendix annexed to Casey Hurren's affidavit.

(b) The plaintiffs accept (at [58]) that the Package addresses claims for professional fees, contingency and interest.

(c) While it is arguable that *Dodds* has established Stage 1 liability, as the plaintiffs recognise, there would be a need for individual proof at Stage 2 of individual reliance and loss if this proceeding were to continue.[61] There is no reason to believe that class members will do better if they proceed to trial.

(d) The Package will be available for a period of at least 18 months so there is no immediate time pressure, and plenty of time for class members to take advice on Package offers (noting that Southern Response will offer up to $2,000 (including GST) towards the cost of obtaining independent legal advice on Package offers). A number of law firms are offering to advise on Package offers for a sum consistent with this allowance (or not materially in excess of it).

(e) Relief from costs and commission obligations in relation to this proceeding. Southern Response has agreed to pay a sum to CFA in return for which CFA will not pursue class members for any share of their settlement with Southern Response. In the absence of this agreement, class members could expect to contribute a portion of any recovery they make from Southern Response to CFA (including for

[61] See plaintiffs' submissions at [48] to [50].

lawyers' success fees). This is a given for those class members that have signed up to a funding agreement, but the plaintiffs have also sought a common fund order (or funding equalisation order) which, if granted would extend to all class members. As discussed above, Southern Response does not hold the same view as the plaintiffs as to the so-called "free rider" problem, but there is undoubtedly a tangible financial benefit to class members as a consequence of the Agreement. Southern Response agrees with the submissions of the plaintiffs at [76] to [79]: the process of negotiation was principled and with a view to agreeing a sum acceptable to all parties which would enable class members to receive their Package payments from Southern Response without any deduction being made for legal or funding costs associated with this proceeding. The redaction of the settlement sum is discussed further below, but Southern Response agrees with the submission for the plaintiffs at [79] that, in circumstances such as this, it is not necessary for the Court to address the reasonableness of the agreed settlement sum.

(f) The limitation waiver. As noted above, Southern Response has agreed to a limitation waiver on the terms outlined above (paragraph 73) if the *Ross* proceeding is discontinued. Class members are no worse off than before the claim was filed and, indeed, are likely to be better off as a consequence of the waiver.

(g) No extinguishment of rights. Class members who choose not to take a Package payment from Southern Response retain their legal rights and are no worse off for having been part of the class action or as a result of the class action having been discontinued. Southern Response does not seek to extinguish rights through the discontinuance. If the proceeding is discontinued, (former) class members may pursue a separate claim against Southern Response if they so choose.

76. At the time of filing these submissions, the deadline for class members to file submissions supporting or opposing the discontinuance has not yet passed. It is possible further responses will be received. The plaintiffs' submissions identify possible disadvantages to class members at [10]. In terms of these identified disadvantages, and the grounds for opposition in the responses received to date, they are summarised below, with submissions in response.

Compensation offered under the Package does not equate to the full amount claimed on class members' behalf[62]

77. It is correct that the Package provides payment for professional fees, contingency and interest. The issues raised in relation to general damages and other aspects of the plaintiffs' pleaded claim are discussed more fully at paragraphs 58 and 62 above.

The Package does not involve ongoing court supervision[63]

78. This is correct as a proposition of fact, but not of material consequence. The Crown has appointed an Independent Oversight Committee (**IOC**) to oversee implementation of the Package. Details about the IOC have been given in earlier affidavits in this proceeding and its Terms of Reference are now produced by Mr Hurren.

79. As deposed to by Mr Hurren,[64] the role of the IOC is to provide independent oversight of Southern Response's decision-making in relation to implementation and delivery of the Package, make recommendations to the board of directors of Southern Response, and report to the Crown.

80. The TOR for the IOC require it to "*independently review and exercise oversight of Southern Response's processes and decision-making in relation to the implementation and delivery of the Package. This review and oversight function is to ensure that Southern Response is implementing and delivering the Package in accordance with the principles and processes agreed between Southern Response and the Crown, and giving due consideration to the interests of affected policyholders*."[65]

81. The IOC first met on 5 February 2021 and has been examining Southern Response's decision making and processes for Package delivery since then. The members of the IOC are David Ayers (former mayor of Waimakariri District Council), Nina Khouri (lawyer and mediator), Sandra Manderson (former New Zealand Police District Commander and International Liaison Officer) and Fiona Mules (audit and risk director).

82. A new and separate operational unit within Southern Response has been established that is separate from Southern Response's business as usual operations and exclusively tasked with implementation and delivery of the

[62] Plaintiffs' submissions at [10(a)].
[63] Plaintiffs' submissions at [10(b)].
[64] Affidavit of Casey Hurren dated 14 December 2020 at [16].
[65] Page 5 IOC TOR.

Package. This is another one of the operational and governance arrangements for Package delivery that have been agreed by the Crown and the Company that is outlined in the IOC's TOR.

83. Finally, it should also be noted in this regard that Southern Response will review Package offers if policyholders are concerned any error may have been made and has agreed to a limitation waiver, as outlined above. Policyholders will also have the option of going to Court if they do not wish to participate in the Package process.

Ability to pursue individual claims is limited[66]

84. In their submissions, the plaintiffs suggest that, while individual class members could pursue individual proceedings, this may prove difficult in practice because of cost concerns and limitation issues.

85. The limitation issue is addressed above.

86. In relation to costs, class members are no worse off than before the proceeding was commenced. This is an issue facing litigants every day and the fact that the Package is available significantly ameliorates any real concerns around the cost of pursuing individual recovery of loss. If a policyholder is not eligible for the Package it is unlikely that they would have fallen within the class definition for this proceeding.

Class members have little negotiating leverage[67]

87. Offers under the Package are calculated pursuant to Package principles that have been approved by Cabinet. Southern Response calculates Package offers according to a prescribed formula (set out in the Appendix annexed to Mr Hurren's affidavit).

88. If a policyholder considers that Southern Response has not correctly applied the Package principles to the facts of their case, has overlooked some relevant piece of information, or has not calculated the Package offer correctly, Southern Response is willing to review the offer.

89. Policyholders do not need leverage to bring this about. Southern Response is very motivated to deliver the Package in a manner that helps achieve the

[66] Plaintiffs' submissions at [10(c)].
[67] Plaintiffs' submissions at [10(d)].

Crown's overriding public policy objectives of fair and enduring settlement of earthquake related claims.

Timing of settlements

90. It will not be possible to issue all individual Package offers before the discontinuance hearing. But that is not a reason to refuse the discontinuance. Class members will certainly not receive compensation under the proceeding any earlier if this proceeding continues. Policyholders also receive interest calculated to the date their Package payment is released by Southern Response and will therefore be compensated for any delay in payment.

91. The plaintiffs have raised concerns at paragraphs [44] to [47] of their submissions about the timing of offers to clients of GCA Lawyers. It was made clear to the plaintiffs during negotiations that GCA's clients would need to apply for the Package, that they would not be given preferential treatment and that applications would be processed in the order in which they were received.

92. Southern Response has had a significant spike in applications under the Package since notice of the application to discontinue has been published and sent to class members. Approximately 1,180 applications already have been received (well over one third of the expected total for dwelling claims). Southern Response is working hard to process applications and is making good progress.

93. The process has been working well to date. Over 163 offers have been sent out and 66 accepted, documented and paid by Southern Response. Southern Response has confidence in its processes and a high level of care is taken to prepare each offer.

94. Further offers have now been submitted to GCA and it has a sample of Package offers to review. Presumably, counsel can update the Court at the hearing of any issues in this regard.

95. Notably, if this application is dismissed, the proceeding will revert back to its status quo. That will mean the plaintiffs' application for stay and for leave to appeal will need to be dealt with. The procedural arguments taken by the plaintiffs have already delayed the substantive roll out of the Package for the best part of a year and appeals are only likely to add to the delays and

costs for all involved. Equally, there is no certainty that CFA will continue to fund the claim.[68]

Class members will lose rights because of limitation periods

96. Time stopped running for all class members when the proceeding was filed. Class members are therefore no worse off in that regard if the proceeding is discontinued. The position will revert to how it was the day prior to the proceeding being filed. Further, if the discontinuance is approved, Southern Response has agreed to a limitation waiver in relation to the cost elements provided in the Package – professional fees, contingency and interest. The waiver will last for 18 months from the date on which leave is given to discontinue the proceeding.

Southern Response should not be the delivery agent / General unspecified concerns about Southern Response[69]

97. Southern Response was selected as the agent to deliver the Package by the Crown. It has been doing so successfully since May 2021 and has settled a number of claims to date.

98. It is not an issue for this Court to determine whether Southern Response should be the delivery agent for the Package. That decision has already been made by the Crown. The Court must determine whether there is any prejudice to class members if the proceeding is discontinued. In the absence of any tangible evidence, or even examples, of any misconduct on the part of Southern Response in delivering the Package, there is no basis for the Court to decline leave to discontinue on such a basis.

99. The Crown has also appointed the IOC to oversee delivery of the Package and there will be a review process for Package offers. Additionally, no legal rights will be extinguished by the discontinuance. In these circumstances, it is respectfully submitted that there will be no prejudice to class members as a consequence of the discontinuance.

Overall comment

100. In short, none of the specific reasons identified gives rise to a meaningful basis to suggest that the discontinuance will cause any prejudice to the class members.

[68] See clause 19.1(b) of the Funding Agreement.
[69] Emails from Karl Dodds dated 15 November 2021and Monique Bond (Cupples) dated 9 November 2021

Confidentiality

101. As noted above, the parties have agreed that the settlement sum to be paid by Southern Response to CFA is confidential to them, with limited exceptions. The exceptions (clause 10 of the Agreement) include where disclosure is required by law, or to enforce the terms of the Agreement.

102. In a joint memorandum dated 13 October 2021, the parties indicated that they would seek a direction confirming the redaction and non-publication of the amount of payment. In their memorandum dated 15 October 2021, the plaintiffs' counsel sought an order that the sum be redacted on the Court copy and on any copy of the affidavit published or made available to class members (paragraph 38(i)). Southern Response recorded its agreement in a memorandum of counsel dated 18 October 2021 (paragraph 16).

103. In his Minute dated 20 October 2021, Nation J made the order sought by the parties, but only on an interim basis, and to be subject to review at the hearing on 29 November 2021. In a Minute dated 26 October 2021, Osborne J requested that counsel include in submissions a distinct set of submissions in relation to the proposal for redaction of material.

104. Southern Response acknowledges it is appropriate to share the unredacted Agreement with the Court so that it can be fully appraised of the facts. Southern Response continues to oppose any wider dissemination of that version and seeks an ongoing confidentiality order.

Evidence Act 2006 and Official Information Act 1982

105. Section 69 of the Evidence Act 2006 (**EA**) provides for the Court to have an overriding discretion as to the disclosure of confidential information in a proceeding. The overriding consideration is whether the public interest overrides any potential harm that might come from disclosure. The section provides a number of considerations that the Court must have regard to, including:

> (a) the likely extent of harm that may result from the disclosure of the communication or information; and
>
> (b) the nature of the communication or information and its likely importance in the proceeding; and
>
> (c) the nature of the proceeding; and
>
> (d) the availability or possible availability of other means of obtaining evidence of the communication or information
>
> …

106. For the purposes of the EA, information will be confidential if the party claiming confidentiality could have a reasonable expectation of confidentiality.[70]

107. The High Court in *Small v Body Corporate 324525*[71] considered s 69 in the context of confidential settlements. The Court commented at [5] that:

> There is a public value in upholding confidentiality terms in agreements settling proceedings. Some defendants are prepared to settle proceedings only on terms that the amount of any compromise is kept confidential. That can be a legitimate interest. Likewise many plaintiffs will agree to confidentiality as part of the price of settlement. The assurance of confidentiality encourages settlement in contrast to an open hearing in court and a public judgment deciding the matters in issue. There is a benefit in parties resolving their disputes by negotiated settlements instead of continuing the disputes to defended hearings. That benefit includes reducing demand on public resources of the courts and saving expenses, effort and stress for the parties. Upholding settlements and their terms, including as to non-disclosure, gives confidence that parties can safely resolve their disputes by negotiation. That is a value to be protected under s 69 of the Evidence Act, especially s 69(2)(b)(ii).

108. It is submitted that the factors considered in *Small* weigh in favour of protecting confidentiality in this case. There is public value in protecting a state-owned enterprise's ability to settle litigation and remove expensive and resource-intensive class actions from the court.

109. In addition to the considerations under the EA, as a state-owned enterprise, the defendant is subject to the Official Information Act 1982 (**OIA**). Section 9(2)(ba) of the OIA provides:

> (9)(2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
>
> (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
>
> (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
>
> (ii) would be likely otherwise to damage the public interest;

110. For the purposes of the OIA, information is confidential if it is subject to an obligation of confidence arising from an express or implied understanding between the parties that the information will be kept confidential.[72]

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[70] *Greenbaum v Southern Cross Hospitals Ltd* [2019] NZCA 438, [2019] NZAR 1794 at [28].
[71] *Small v Body Corporate 324525* [2018] NZHC 19.
[72] *Office of* the Ombudsman, *Confidentiality: A guide to section 9(2)(ba) of the OIA and section 7(2)(c) of the LGOIMA* (November 2020) pages 5-9.

111. The Office of the Ombudsman has considered the conflict between the public interest and the protection of confidential settlements. The following Ombudsman case notes provide useful guidance:

(a) The terms of a settlement agreement were upheld where information was sought about the amount of compensation paid to an individual whose personal information had been disclosed in error. The terms of the settlement between the individual and Work and Income New Zealand were subject to a confidentiality clause. It was considered that confidentiality promoted proper discussion of all issues involved and ultimately assisted the parties in reaching an agreement. The Ombudsman considered it was in the public interest to protect the confidentiality of the agreement.[73]

(b) Confidentiality of the terms of settlement between a Crown Health Enterprise and an employee was upheld following a request under the OIA. Confidentiality was a key factor in the parties achieving settlement. It was noted by the Ombudsman that it was in the public interest for agencies to be able to reach appropriate settlements, and that sometimes confidentiality was necessary to do so. If disclosure would prejudice the ability to settle, it would damage the public interest.[74]

112. The recurrent theme in the above case notes is the overarching concern that a failure to protect information that had been understood or expressly agreed between the parties as confidential would be detrimental to the public interest. This is largely due to a concern that confidentiality (or lack thereof) could become a barrier to agencies negotiating settlements.

113. It is a practical reality that many settlements are only possible because of the confidentiality that allows parties to engage in more pragmatic negotiations. If parties do not believe their agreed outcome will remain confidential, it is likely to alter attitudes towards settlement due to external considerations, such as public opinion.

114. Despite the plaintiffs' submission that a confidentiality provision was not included at their request, the fact remains that such a clause was agreed.[75]

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[73] *Anand Satyanand, Request for details of compensation for breach of privacy* Ombudsman case note W42207 and W42212 (July 1999).
[74] *Sir Brian Elwood, Request for details of out-of-court settlement of a personal grievance* Ombudsman case note W35268 (January 1996).
[75] Plaintiffs' submissions at [82].

There is a clear mutual understanding of confidentiality between the parties in respect of the settlement amount. The understanding is both express, as it is contained in the terms of the settlement agreement, and implied through the mutual expectation of confidentiality that usually attaches to settlement negotiations.

115. It is submitted that Southern Response could legitimately withhold the settlement amount if it were to receive a request under the OIA, and the Court should take this into consideration.

Other jurisdictions' approaches to confidentiality

116. New Zealand has been influenced by procedure in Australia, in particular, the Federal Court of Australia's Class Actions Practice Note.[76]

117. The Practice Note provides that confidentiality orders may only be made in accordance with Part VAA of the Federal Court of Australia Act 1976. The Act provides that the starting point for consideration of any confidentiality order is the primary objective to safeguard the public interest in open justice.

118. A confidentiality order must be necessary to prevent prejudice to the proper administration of justice.[77] What is required to meet the threshold of *"necessary"* was discussed in *Hogan v Australian Crime Commission*.[78] The Court commented that *"necessary"* was a strong word which meant more than trivial.[79] It would be insufficient for a confidentiality order to be *"convenient, reasonable or sensible"*.[80] It is submitted that the bias towards disclosure of information, unless there are strong reasons to withhold, is analogous to the threshold under the EA and OIA discussed previously.

119. The plaintiffs comment at [83(a)] of their submissions that the Court in Australia is invariably informed of the amounts to be paid to a litigation funder. However, this must be principally in the situation where the Court is considering approval of a settlement and where the amount to be paid to the funder will directly impact on the class members' share of any settlement. The settlement approval process includes consideration of the

[76] J L B Allsop, Chief Justice *Class Actions Practice Note (GPN-CA)* (20 December 2019) at [17].
[77] Federal Court of Australia Act 1976, section 37AG(1)(a).
[78] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651.
[79] At [30].
[80] At [31].

reasonableness of the settlement amount and any legal costs or litigation funding charges.[81]

120. Canada also requires judicial approval of settlements,[82] however Canadian courts have relevantly commented that, where legal fees are paid as between the litigation funder and the defendant, but do not affect the recovery of the class members, the Court's enquiry should be limited to whether or not counsel actually achieved the best settlement and were not persuaded to settle due to a large payment offered to either counsel or the funder.[83] Similarly, the class members also have no direct financial interest in those fees where the payment does not affect the amount received by the claimants.[84] In *Manuge v Canada* the Federal Court, in a settlement approval context, noted:[85]

> If there is a public interest that pertains to matters such as this, it is more properly situated around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation. In my view it is relevant in assessing the reasonableness and fairness of class action legal fees to consider the impact of those fees on the individual recoveries of class members.

121. Southern Response submits the above comments are of particular relevance to the present case where, as a result of Southern Response's Package, the class members have no direct financial interest in the amount agreed between Southern Response and CFA. Further, given Southern Response has for some time now wanted to roll out its Package to affected policyholders, there can be no question that settlement was reached for proper reasons.

Further considerations

122. A settlement in this case will allow the claimants to the class action to receive payment under the Package sooner than would be possible if payment was not made until the end of the class action process (and any subsequent appeals have been dealt with).

123. Further, it is submitted that publication of the settlement amount could establish a precedent for other litigation funders to benchmark against.

124. On occasion, it can be suitable to satisfy the public interest in transparency by allowing limited disclosure of information. Given the number of

[81] J L B Allsop, Chief Justice *Class Actions Practice Note (GPN-CA)* (20 December 2019) at [15] and [16] respectively.
[82] Class Proceedings Act, SA 2003, C-16.5, section 35.
[83] *Adrian v Canada (Minister of Health)* 2007 ABQB 377; (2007) 42 C.P.C (6th) 201 at [29].
[84] *Northwest v Canada (Attorney General)* 2006 ABQB 902; (2006) 45 C.P.C (6th) 171 at [49].
[85] *Manuge v Canada* [2014] 4 FCR 67 at [41].

claimants and the high-profile nature of these proceedings, Southern Response submits that confidentiality of the settlement amount could not be sufficiently protected by disclosure to a confined group (such as the claimants). The possibility that at least one of the claimants might breach any confidentiality order (whether intentionally or unintentionally) is sufficiently high that the risk of prejudice outweighs any benefit that could be gained from an attempt at limited disclosure.

125. The Court must ultimately balance the public interest against the parties' express understanding of confidentiality. In Southern Response's submission, the balance favours the continuing confidentiality of the settlement amount. Given the concerns identified by the Ombudsman, the unique features of this litigation, and the risk of a 'benchmark' settlement amount, it is submitted that the public interest in disclosure is outweighed in this case.

Conclusion

126. It is submitted that, in all the circumstances:

(a) There is no prejudice to class members consequent on the discontinuance of this proceeding; and, indeed

(b) The discontinuance is in the interests of class members.

Dated: 23 November 2021

TC Weston QC / K M Paterson
Counsel for the defendant

Schedule A – Limitation

See paragraph 71 above

1. There is no direct authority in New Zealand in relation to limitation periods where a representative action is discontinued, or any directly applicable provisions or rules. The leading authority in relation to limitation periods in a class action context arises in *Credit Suisse v Houghton.*[86] While the plaintiffs have highlighted two isolated (obiter) comments in that case as being the cause of doubt,[87] in Southern Response's submission the weight and ratiocination of *Credit Suisse* clearly supports Southern Response's view that limitation periods have been suspended whilst this proceeding has been on foot.

2. In *Credit Suisse* the majority of the Supreme Court upheld the lower court decisions by the High Court and Court of Appeal which both held that the limitation period stopped running from the point at which the representative claim was filed ([127]). As the Supreme Court said at [41] "*when the limitation clock stopped for him [Mr Houghton], it stopped for everyone else on whose behalf he sues*". Therefore, as at 25 May 2018, the clock stopped running for all policyholders within the class definition. If discontinuance is approved, then time would start to run again "in the normal way" but only from the point reached when the clock stopped, not any earlier point. This, it is submitted, is the natural and ordinary interpretation.

3. There are other reasons too which strongly suggest that the filing of the claim has the effect of stopping the limitation period for represented policy holders for all purposes (until it is restarted again). First the Supreme Court majority in *Credit Suisse* rejected an argument that the filing of a representative action stopped the clock only in relation to the common issues (not in relation to individual damages claims). It took a broader, policy-based view of limitation. See [124], [129] [131], [133]. The Court's reference at [133] to the possibility of joinder of parties at stage 2 clearly contemplates that such parties would have the benefit of the clock being stopped in the meantime. There seems no principled reason for a different approach, say, where a claim is discontinued prior to stage 2 and then individual proceedings are filed.

[86] *Credit Suisse v Houghton* [2014] 1 NZLR 541 (SC).
[87] Plaintiffs' submissions at [16(a)].

4. Second, the Supreme Court was influenced in its assessment by the fact that shareholders in *Feltex* could have legitimately relied on AJ Christiansen's original order (granting leave to the representative plaintiff to proceed under r4.24) as meaning they did not have to file separate proceedings ([169]). Surely similar considerations must arise here. Here, as in *Feltex*, class members have been entitled to rely on the class action as preserving their position on limitation periods. But the plaintiffs' alternative position would mean that, not only have class members not had their rights preserved, but, in fact, the class action may have been prejudicial to their position. This would seem to undermine the entire basis on which opt-out proceedings were endorsed by the Supreme Court in *Ross*.

5. At [154] the majority of the Supreme Court in *Credit Suisse* dealt with the absence of statute-based rules in New Zealand which provide for a formal suspension of limitation periods: *"[t[hat they do so is not an indication that limitation periods continue to run for those represented under representative action rules in New Zealand*."

6. As to the obiter comments at [165] of *Credit Suisse* that "*those who did opt out of the proceeding would be subject to limitation periods in the normal way*" this does not mean that time would be assessed as if the representative action had never been filed. As noted above, the "clock stopped" when the claim was filed. It would then restart for those who opt-out, but it is submitted it would restart at the point at which it stopped, not at any other point. In any event, this is not a situation where class members have opted out of the class action.

7. The comments by the Law Commission in its Supplementary Issues Paper 48 also support Southern Response's position over alternatives.[88] For example at [1.122] it proposes criteria for circumstances which would "start limitation running again" and these include when a class member opts-out or the proceeding ends without an adjudication on the merits e.g. discontinuance. While this is in contemplation of a legislative design (potentially involving certification), the Commission's comments (on these matters) clearly appear to assume consistency with the present position. Indeed in its earlier Issues Paper 45 the Commission noted that class

[88] NZLC IP48, above n 41.

members are given the advantage of extra time to bring individual claims if the class action is discontinued.[89]

Comparison with overseas jurisdictions

8. This position harmonises the New Zealand approach with the overseas position, notably Australia and Canada, as referred to at paragraph [14] of the plaintiffs' submissions. It would be odd if, despite our Senior Courts having drawn so heavily on these jurisdictions to establish a class action framework under r4.24, our courts would suddenly take a different path on the important issue of limitation. Indeed, such would be directly at odds with the Supreme Court majority's clear statement of intent, in *Credit Suisse* at [49] and [154], that the absence of rules did not support a different approach in New Zealand.

9. The Supreme Court's (majority) endorsement, in *Credit Suisse*, of *Cameron v National Mutual Life Association of Australasia (No 2)*[90] and *Fostif Ptd Ltd v Campbells Cash & Carry Pty Ltd*[91] further confirms that the position in Australia (as reflected in its legislative provisions) is highly likely to apply. In *Cameron* joinder of plaintiffs was permitted when the representative action was discontinued. In exercising the right of joinder the calculation of the limitation period excluded the period of time during which the representative action was on foot.[92] This is the best analogy with the current position before the Court. As noted above, this finding has been endorsed by our Supreme Court.

Benefit and prejudice in practical terms

10. Finally the court can take a practical and context-based approach to the benefits of the class action from a limitation perspective. Of itself the fact that a class action preserves limitation rights cannot be a reason to refuse an application to discontinue. If it were otherwise, class actions might never be allowed to discontinue.

11. It is not necessary for this Court to determine whether the 3-year limitation period under the FTA would have expired on 28 May 2018 – see paragraph [13] of the plaintiffs' submissions. But even were that so, is that a reason to

[89] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa; Class Actions and Litigation Funding: Issues Paper - He Puka Kaupapa 45* (NZLC IP45, 2020) at 8.23(c), see also NZLC IP48, above n 41 at [1.122] (see also [1.118 – 1.120]).
[90] *Cameron v National Mutual Life Association of Australasia (No 2)* [1992] 1 Qd.R. 133 (QSC).
[91] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, (2005) 63 NSWLR 203.
[92] *Cameron v National Mutual Life Association of Australasia (No 2)* above n 90 at 135-138, 143.

decline discontinuance? If that position was accepted the natural and ordinary inference would be that parties who have had an opportunity to pursue an FTA claim have not done so. Arguably that is a factor which supports discontinuance rather than refusing it.