IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000361
[2018] NZHC 3288

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

Hearing: 12 & 13 November 2018

Appearances: P G Skelton QC and C Pearce for Plaintiffs
T C Weston QC, K Paterson and O Gascoigne for Defendant

Judgment: 13 December 2018

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS
Judgment 1: Terms of representation order and Direction on opt-out / opt-in

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Introduction

[1] The plaintiffs, Mr and Mrs Ross, sue the defendant, Southern Response Earthquake Services Limited (Southern Response) on four causes of action arising from the settlement of their insurance claim for damage to their house in the Canterbury earthquakes between 2010 and 2012. They say that by certain actions in the period leading up to that settlement Southern Response breached the Fair Trading Act 1986, made misrepresentations, and breached an implied duty of good faith in their insurance contract. They also say that they were influenced in entering their settlement agreement by certain mistakes on factual matters.

[2] This judgment determines Mr and Mrs Ross's application to bring this proceeding as representatives of a group of other policy holders with Southern

Response who are also said to have settled claims in similar circumstances, and who have the same rights against Southern Response as a result.

[3] Rule 4.24 of the High Court Rules 2016 provides:

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

[4] As consent has not been sought, Mr and Mrs Ross require leave of the Court under r 4.24 to proceed with a representative action.

[5] Evidence before the Court indicates that if leave is granted for a representative action on the basis sought by Mr and Mrs Ross, the likely number of persons whom they would represent is approximately 3,000.

[6] Southern Response does not oppose Mr and Mrs Ross proceeding by way of a representative action for others with a similar interest in the subject matter of this case, but differs from them on key aspects of the orders they seek from the Court.

Overview of the basis of the claim

[7] Mr and Mrs Ross insured the house that was damaged in the earthquakes under a "Premier House Cover" policy with AMI Insurance Ltd (AMI) a number of years before the earthquake sequence. The policy was renewed annually on 30 June each year and was current at the time of the Canterbury earthquakes. They say that the policy provided that if the house was damaged "beyond economic repair" they had the right to elect one of a number of options: rebuilding the house on the same site, rebuilding on another site, buying another house or taking a cash payment at the market value of the house at the time of the loss.

[8] Mr and Mrs Ross also plead that under the policy they had cover for additional costs, architects' and surveyors' fees involved in repair or rebuilding, demolition and

debris removal, removing household contents if necessary for repair or reinstatement, and the cost of any additional work required for compliance with building legislation and rules.

[9] All sums payable under the policy were to be net of any sum payable to Mr and Mrs Ross by the Earthquake Commission.

[10] AMI held cover over approximately one-third of the residences in Christchurch at the time of the first earthquake on 4 September 2010. After the second major earthquake on 22 February 2011 it became apparent to AMI that its financial reserves and reinsurance levels would not be sufficient to cover all claims resulting from the earthquakes. As a consequence it made an arrangement with the New Zealand Government which resulted in sequential capital injections, and a restructure of AMI. The relevant elements of this restructure were first, that the day-to-day business of AMI was sold to another company, and secondly, claims in relation to earthquake damage prior to 5 April 2012 remained with AMI, and AMI was renamed Southern Response. It then became a Crown-owned company with its shares held by the Minister of Finance and the Minister for the Earthquake Commission. Principally, therefore, the business of Southern Response is to manage and settle claims by AMI customers for damage resulting from the Canterbury earthquakes. It is required to do so, however, consistently with normal commercial and financially prudent principles, though not on a profit-making basis.

[11] The causes of action in this case arise from allegations about Southern Response's use of documents which it created during the course of assessing Mr and Mrs Ross's claim. Southern Response engaged Arrow International Ltd (Arrow) to inspect damaged homes of policy holders, to recommend whether each home was able to be repaired or was beyond economic repair, and to prepare detailed estimates of the cost of repair or rebuilding, which were then set out in documents known as "Detailed Repair/Rebuild Analyses"(DRAs).

[12] Mr and Mrs Ross allege that on the instructions of Southern Response, Arrow prepared two DRAs for each house. They plead that two versions of the DRA were created simultaneously with the same number, one labelled "DRA – SR – Ross" and

the other "DRA – Customer – Ross". They say both of these were supplied to Southern Response, but shortly after that Southern Response provided to Mr and Mrs Ross only the latter, which they describe as an abridged version of the former. They say the former, though held by Southern Response, was not at any point prior to settling their claim supplied to them, nor at that time were they made aware of its existence.

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

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

[15] It will be noted that with the additional items in the full DRA the total house rebuilding cost is shown as approximately $113,000 more than in the abridged version.

[16] After some negotiation Mr and Mrs Ross settled their claim with Southern Response for the lower figure of $362,353.98, from which the sum received by them from EQC was deducted, and they received a net sum. This settlement was reached after considering further material provided to them by Southern Response known as a "Decision Pack" and signing a settlement form described as a "Settlement Election Form". Mr and Mrs Ross took the "Buy another house", option available to them under their policy, which led to the cash payment to which I have referred. Prior to settling, however, Mr and Mrs Ross say that they obtained their own estimate of the likely cost of rebuilding, which was considerably higher than that estimated by Southern Response. When this was put to Southern Response it declined to adjust its settlement offer and in the end Mr and Mrs Ross accepted.

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

[18] Based on this, Mr and Mrs Ross plead that:

(a) Southern Response engaged in misleading conduct under the Fair Trading Act;

(b) Southern Response misrepresented factual matters which were material to them when they entered a settlement agreement;

(c) they were mistaken on the estimated cost to rebuild or repair their dwelling and on Southern Response's belief as to that estimated cost, and they were mistaken as to the sum recoverable under their policy; and

(d) Southern Response breached its duty of good faith in the way I have described.

[19] Of relevance to the present application, the statement of claim contains the following paragraphs:

> 58. Between 2011 and October 2014, the Defendant entered into settlements with an unknown number of policyholders (currently thought to be approximately 2,000) in circumstances materially similar to those described above.
>
> 59. The policyholders just referred to form a class of persons having the same interest in this proceeding, in that each of them:
>
> (a) Own or owned a residential dwelling in Canterbury that was insured with the Defendant under either a "Premier House Cover" or "Premier Rental Property Cover" policy (the **Policy**);
>
> (b) Lodged a claim or claims with the Defendant under the Policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (the **Claim**);

(c) Received an Abridged DRA from the Defendant;

(d) Did not receive the corresponding Full DRA from the Defendant;

(e) Entered into a settlement agreement with the Defendant prior to 1 October 2014 in settlement and discharge of the Claim.

(collectively, **Class Members**)

60. The Defendant made express or implied representations to each Class Member that were the same or materially the same (save as to sums involved) to those pleaded at paragraph 53 above (**Representations**).

61. In each instance, the Defendant made the Representations to the Class Member by means of acts and omissions that were the same or materially the same as the acts and omissions (or some of them) pleaded at paragraph 54 above (**Misleading Conduct**).

62. In relation to each Class Member, the Defendant knew at all material times that:

(a) The cost estimate provided in the Abridged DRA was not a full estimate of the cost to rebuild or repair the Class Member's dwelling; and

(b) 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) (**Full Estimate**).

63. As at the date each Class Member entered into a settlement agreement with the Defendant, the actual cost to rebuild or repair the Class Member's dwelling to an "as new" condition on the same site was believed by the Defendant to be no less than the Full Estimate recorded in the Full DRA (or Final DRA, where applicable) prepared for that Class Member's Claim.

[20] Each of the four causes of action which I have summarised is pleaded on behalf of each member of the represented class described in paragraph 59 of the statement of claim. On each cause of action Mr and Mrs Ross seek judgment for the difference between the sums shown in the "abridged" and full versions of the DRA together with general damages, interest and costs, and they also plead on behalf of each represented person damages which will be derived from the personal circumstances of each party, together with interest and costs.

The issues

[21] As noted, Southern Response does not oppose the making of a representative order under r 4.24. However, it takes issue with each of the other orders sought by Mr and Mrs Ross. As a result the issues to be decided are these:

(a) What are the terms of the representative order that should be made?

(b) Should members of the class be determined on an opt-out or an opt-in basis?

[22] In the application before the Court, further consequential orders are sought, but counsel agree these should be reserved for consideration after release of this judgment on the first two issues. I record them for completeness:

(a) What orders should be made for notification to represented parties if an opt-out order is made, or to parties who might be represented if an opt-in order is made?

(b) Should the Court make a common fund order to provide for payment of Mr and Mrs Ross's costs on receipt of funds by way of settlement or on judgment?

As well, the issues for determination at a first trial, common to all class members, will need to be settled.

First issue: What are the terms of the representative order that should be made?

[23] The representative order sought by Mr and Mrs Ross was initially in the following terms:

> The Plaintiffs are granted leave pursuant to High Court Rule 4.24(b) to bring this proceeding against the Defendant on behalf of all persons who have the same interest in the subject matter of the proceeding, being those persons who:
>
> (a) Own or owned a residential dwelling in Canterbury that was insured with the Defendant under a "Premier House Cover" or "Premier Rental Property Cover" policy (**Policy**);

(b) Lodged a claim or claims with the Defendant under the Policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (**Claim**);

(c) Received an Abridged DRA from the Defendant;

(d) Did not receive the correspondent Full DRA from the Defendant; and

(e) Entered into a settlement agreement with the Defendant prior to 1 October 2014 in settlement and discharge of their Claim.

(collectively, "**Class Members**")

[24] Southern Response opposed the making of an order in these terms. During the latter stages of argument a measure of consensus emerged on some of the elements of these orders. The following summary of the orders now sought by the plaintiffs shows in standard text the orders that are agreed, and in italics those which remain in contention. As well, it is clear on the evidence that a more accurate way of referring to the additional section of material contained in the full DRAs is as the "office use" section. This terminology is used from this point.

Proposed orders

1. The Plaintiffs are granted leave pursuant to High Court Rule 4.24(b) to bring this proceeding against the Defendant on behalf of all persons who have the same interest in the subject matter of the proceeding, namely:

(a)	They own or owned a residential dwelling in Canterbury that was insured with Southern Response under a "Premier House Cover" or "Premier Rental Property Cover" policy (**Policy**);	Agreed
(b)	They lodged a claim or claims with the Defendant under the policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (**Claim**);	Agreed
(c)	***Their residential dwelling the subject of the Claim was:***	SR
	(i) Deemed uneconomic to repair; and ***(ii) Located in the Government Red Zone;***	
(d)	***They elected the "buy another house" settlement option under the Policy;***	SR
(e)	They received a DRA from the Defendant that did not include the Office Use section;	Agreed

(f)	They did not receive a DRA from the Defendant that included the Office Use section;	Agreed
(g)	They entered into a settlement agreement with the Defendant prior to 1 October 2014 in settlement and discharge of their Claim;	Agreed
(h)	They are not persons for whom the Defendant managed the repair of their home, or rebuilt their home.	

2. A class member may elect to ***[opt-out / opt-in]*** to the proceeding by completing an ***[opt-out / opt-in]*** election form approved by the Court for that purpose and sending it to the Registrar of the High Court in Christchurch on or before ***[a date to be fixed]***.
3. ***[This order is to take effect from 25 May 2018.]***
4. Leave is reserved to the parties to apply to the Court for an order to rescind or vary this order.

Commonality of interest

[25] The starting point for settling a class of persons to be represented in a proceeding is the wording of r 4.24. This provides that "all persons with the same interest in the subject matter of a proceeding" may be represented. The rule has its origins in the Court of Chancery in England. It was recognised by the House of Lords in the *Duke of Bedford v Ellis*.[1] The Duke of Bedford was the owner of land on which Covent Garden market then stood. A dispute arose between the Duke of Bedford and the holders of stands in the market in relation to claims by those holders to priority rights for allocation of vacant stands. Mr Ellis and five other stand holders commenced this proceeding "on behalf of themselves and all others, the growers of fruit, flowers, vegetables, roots or herbs". The Duke of Bedford challenged their right to do so.

[26] His Lordship observed:[2]

> In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.

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1 *Duke of Bedford v Ellis* [1901] AC 1. For a brief review of the origins of representative actions, see Anthony Wicks "Class Actions in New Zealand: is legislation still necessary?" [2015] NZ L Rev 73.

2 At 7-8.

…

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

[27] His Honour then observed:[3]

> It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed with that difficulty. It seems to me that the description of the persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not.

[28] The House of Lords allowed the representative action to proceed.

[29] Whilst the existing stand holders in Covent Garden constituted a group with a common business activity and a common interest in resolution of an issue material to the operation of their businesses, prior association is not a prerequisite for inclusion in a representative group. The order in that case was in terms which included those who may later become stand holders. In *Credit Suisse Private Equity LLC v Houghton*,[4] the Supreme Court made the following observations. First, the majority of the Court said:

> [130] In our view, it is legitimate for the scope of representative action rules to continue to adapt to ensure that the overall objective of the High Court Rules as outlined in r 1.2 is achieved. As McGechan J said in *R J Flowers Ltd v Burns*:[5]
>
> > The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept constantly in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements. It is, as has been said, in *John v Rees* [1970] Ch 345,370 "not a

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3 At 11.

4 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

5 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271.

> rigid matter of principle but a flexible tool of convenience in the administration of justice".
>
> [131] How individual issues, including damages, are to be dealt with in the context of a representative proceeding is a matter for the High Court. Any procedures put in place must of course ensure that a defendant is not deprived of the ability to put any relevant defences. As was said by Toohey and Gaudron JJ in *Carnie*:[6]
>
> > … it is true that r 13 [the New South Wales equivalent of r 4.24] lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires". The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

[30] The minority of the Court observed:[7]

> What constitutes "the same interest in the subject matter of a proceeding" under r 4.24 is assessed purposively to allow the representative proceeding to be "a flexible tool of convenience in the administration of justice". It is sufficient if the party and those represented "have a community of interest in the determination of some substantial issue of law or fact". [citations omitted]

[31] Frequently, plaintiffs and those they represent share a common social context, or have commonality of business interests. An example is the plaintiffs (Houghton and others) in the cases which have come to be known as the Feltex litigation, where the shareholders in Feltex sue its directors, and investors in finance companies in such cases as *LDC Finance*.[8] An example of cases where that is not so is *Cridge v Studorp Ltd*, a suit by representatives of users of products of James Hardie Ltd, for product failure.[9]

[32] Those who may be represented in this proceeding, however the class is defined, do not share a pre-existing commonality. Rather their common interest is derived from their being policy holders with Southern Response who lodged claims for damage to their homes, a situation akin to that in *Cridge*. The fact that Southern Response does not challenge the prospect of a representative order being made on this basis

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6 *Carnie v Esanda Finance Corp Ltd* [1995] HCA9, (1995) 182 CLR 398 at 415-419.
7 *Credit Suisse v Houghton*, above n 4, at [2] per Elias CJ.
8 *LDC Finance Ltd v Miller* [2015] NZHC 3165.
9 *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281 and subsequent judgments of the High Court and Court of Appeal.

recognises the approach to the making of such orders as described, for example, in *Credit Suisse*. Its opposition, however, to the breadth of the orders sought on behalf of Mr and Mrs Ross is founded on a view that the commonality propounded by Mr and Mrs Ross does not extend as far as they say, so they should be restricted in their representation in the ways set out in the table above at [24].

[33] Mr Skelton QC, for Mr and Mrs Ross, accepts the limitation argued for Southern Response by Mr Weston QC which is reflected in paragraph (g) in the above table, in relation to persons who would have been included within the class Mr and Mrs Ross initially applied to represent.

The policies in more detail, and Mr and Mrs Ross's settlement

[34] The practice of Southern Response was to issue to claimants a suite of information described as a "decision pack". According to Mr Hansen, the operations manager for Southern Response at relevant times, this comprised a covering letter, the DRA prepared for the claimants' home, and a collection of standard form documents to assist the customer concerned to understand the available options. Mr Hansen says the purpose of this pack was to inform policy holders of key aspects of their claims, and to help them understand the settlement process so they could make informed decisions. These documents were followed by settlement election forms which provided for claimants to inform Southern Response of how they wished to proceed towards settlement of their claims.

[35] Southern Response maintains that these documents were derived from the terms of the policies in question. In particular, the choices available to claimants were spelled out. The relevant section of the policies is in these terms:

> **What is covered by this policy**
>
> Cover for your house
>
> **Your house is covered for any unforeseen and sudden physical loss or damage that is not excluded by this policy**. …
>
> 1. What we will pay:
>
> (a) We will pay to repair or rebuild your house to an "as new" condition, up to the floor area stated in the Policy Schedule.

(b) We will use building materials and construction methods in common use at the time of repair or rebuilding.

(c) If your house is damaged beyond economic repair you can choose any one of the following options:

(i) **to rebuild on the same site**. We will pay the full replacement cost of rebuilding your house.

(ii) **to rebuild on another site**. We will pay the full replacement cost of rebuilding your house on another site you choose. This cost must not be greater than rebuilding your house on its present site.

(iii) **to buy another house**. We will pay the cost of buying another house, including necessary legal and associated fees. This cost must not be greater than rebuilding your house on its present site.

(iv) **a cash payment**. We will pay the market value of your house at the time of the loss.

(d) If your house is damaged and can be repaired, we can choose to either:

(i) repair your house to an "as new" condition, or

(ii) pay you the cash equivalent of the cost of repairs.

[36] The policies then provide "cover for additional costs" in the categories of professional fees, demolition and debris removal, removal of household contents and compliance with building legislation and regulations.

[37] Each policy has a specific section in relation to earthquake damage. Relevantly, it states that cover is provided on the same basis as "cover for your house" which I have set out. It is clear, however, that this is on a top-up basis after allowing for the maximum amount payable to a claimant by the Earthquake Commission.

[38] Mr and Mrs Ross's house was damaged beyond economic repair. Because it was in the Red Zone, the options sent to them did not include an option to rebuild on the site their home previously occupied. Mr and Mrs Ross elected the "buy another house" option. As noted, the policy provided "this cost must not be greater than rebuilding your house on its present site".

[39] Mr and Mrs Ross were provided with a DRA which was limited in its scope, as recorded in [12] to [14] above. Even though Mr and Mrs Ross were not rebuilding, Southern Response provided this information because the limitation on the amount to be paid under their "buy another house" option was that the cost of another house must not be greater than rebuilding the Ross's house on its present site. Southern Response's estimate of that cost, and what it saw as the elements of that cost for which it was responsible under the policy, comprised the information in the DRA provided.

[40] On 22 July 2015 the Supreme Court released its judgment in *Southern Response Earthquake Services v Avonside Holdings Ltd*.[10] The case concerned assessment of the cost of rebuilding on Avonside's present site, as Avonside, like Mr and Mrs Ross, had elected to buy another house. At issue was whether the cost of rebuilding in this context includes a sum for professional fees and contingencies. The Supreme Court noted that although the limitation on the amount of Southern Response's liability was based on notional rather than actual rebuilding of Avonside's existing house, this did not:[11]

> affect the inclusion of an allowance for risks generally encountered. Such risks are relevant to estimating the cost of an actual rebuild and, as noted above, it is the actual cost of rebuilding that must be estimated.
>
> …
>
> [49] As mentioned earlier, the exercise that is required is to estimate the actual cost of rebuilding on the site. Mr Harrison [Avonside's quantity surveyor] did this, while Mr Farrell's approach [Southern Response's quantity surveyor] was based on his erroneous assumption that a different approach was required for a notional rebuild. Mr Harrison's allowance for professional fees was based on orthodox quantity surveying practice. Contrary to MacKenzie J's view, the estimate was based on the use of an architectural draftsperson and not an architect and took full account of the fact that the notional build was a rebuild on an existing site with existing plans. The percentage Mr Harrison used was also very similar to the percentage (nine per cent) used by Arrow in its estimate of what it would actually cost to rebuild. We thus accept Avonside's submission that the Court of Appeal's approach to this issue was correct.

[41] As a result the Court upheld the decision of the Court of Appeal that Avonside was entitled to an allowance in its settlement for professional fees, as well as a contingency sum.

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10 *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110, [2017] 1 NZLR 141.

11 At [40].

[42] Neither of these categories of expenditure was included in the DRA forwarded to Mr and Mrs Ross, nor therefore in the settlement sum offered to them and eventually accepted. Figures for these items and other costs were, however, included in the office use section of the DRA for their house which was held by Southern Response but not released. This is the foundation for Mr and Mrs Ross's claim.

Should the class be limited to those who elected the "buy another house" option?

[43] As noted above the terms of the policy pegged entitlements under the options of rebuilding on the same site, and rebuilding on another site, to the cost of rebuilding a claimant's house on its present site, as they do in respect of the option of buying another house on another site. It is for this reason that representation is sought for all those who elected to rebuild on the same site and rebuild on another site, as well as those who, like Mr and Mrs Ross, elected to buy another house. Although claimants who elected these options are not strictly within the terms of the *Avonside* judgment, it is arguable, because of the use of the same phraseology within the policy, that their entitlements included sums for contingencies and professional fees. Accordingly I am unable to agree with Southern Response's position that there should be a limitation on the class to those who elected the "buy another house" settlement option under the policy.

Should the class definition refer to dwellings being deemed uneconomic to repair?

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

Should the class be limited to owners of dwellings in the Red Zone?

[45] As noted in the table, Southern Response also seeks a limitation to those claimants whose homes were located in the Red Zone. The significance of this location is the inability to rebuild on sites within it. Thus persons in this category were not offered option (c)(i) of the policy because they could not take it up. To my mind that is not a relevant factor, because all the options refer to the cost of rebuilding the existing house, and that is the issue which was decided by the Supreme Court in *Avonside*. I do not therefore consider that the class should be limited to only those who could not rebuild on their own land. I therefore decline to accept Southern Response's proposed amendment to the class contained in paragraph (c)(ii).

Second issue: Should membership of the class be determined on an opt-out or opt-in basis?

[46] If membership of a class is determined on an opt-out basis, all persons within the terms of the class are members of it, whether their identity or whereabouts is known or not, unless they formally elect not to be. Conversely, if membership of the class is to be determined on an opt-in basis, no person who is within the approved definition of the class is actually a member of it for the purposes of the case, unless that person takes the formal step of opting-in.

[47] The effect of a decision on this issue is significant. The Court was informed that the number of persons who might be within the class settled by the Court may be up to 3,000. Some research shows that around 8 per cent of class members might opt-out, whereas only around 39 per cent might opt-in.[12] In the present case, therefore, there might be some 2,700 members in the class if the Court directs an opt-out mechanism for membership, but perhaps 1,200 if the Court directs an opt-in mechanism.

[48] Trial of proceedings of this nature will be in two stages, the first stage dealing with issues that are common to all members of the class.[13] If the issues in stage 1 are

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[12] Ontario Law Reform Commission *Report on Class Actions* (1982) referring to a study of the consequences of a decision by a Court to divide a class into two subclasses, the members of one of which were required to opt-in and the members of the other being given the choice to opt-out.

[13] The settling of issues will be by Court Order at a later stage.

decided against Southern Response, a second trial will follow which will consider each individual class member's own case. This requires analysis of the files of every class member to establish whether, even if orders are made at stage 1 which could potentially result in liability, there is in fact liability in respect of any given member of the class. For example, it is clear that in some cases there will be issues of causation, as some class members took independent professional advice and in deciding to settle, may not have relied on the information put before them by Southern Response. Whilst Mr Skelton questions the relevance of reliance, Mr Weston says Southern Response will defend individual claims on that basis, where that has occurred. It also seems that in some cases Southern Response made payments to persons who may be members of the class which took into account professional fees and/or contingencies. Those are just two examples; it is easy to envisage that there may be a myriad of circumstances within a class of this size which require analysis to determine whether any given claimant has a valid claim or not.

[49] Prior to the stage two trial, where individual claims are tested for reasons just described, all class members have to elect whether or not to go on, as they must actively participate in order to prove their cases. This is what Southern Response says should occur at the outset, not after the stage one trial.

[50] Before examining the present law, I look briefly at the interests of Mr and Mrs Ross. I cannot discern, on the information before the Court, any reason why Mr and Mrs Ross might be concerned one way or the other by the number of persons they represent. This does not seem to be relevant to their case. Therefore, the Court must assume that the case can proceed irrespective of the number, and there are no hurdles which might be more readily overcome by an opt-out order, such as, for example, financial viability. Their solicitor, Mr Cameron, deposes in his affidavit in support of this application that his firm has acted for many former policy holders with Southern Response and has found in each of the cases investigated so far that rebuilding costs have been underestimated, when the DRAs without the office use section are compared with full versions. On that basis it seems that Mr and Mrs Ross have accepted nomination as plaintiffs so these allegations can be aired on behalf of a wide but largely unknown group of policy holders, not just on their own behalf. The case is not apparently brought due to an established widespread disenchantment, but rather

to see whether there is a group who may want to reassess their settlement decisions and sue.

[51] Exception cannot be taken to a representative action being permitted on that basis. In all likelihood the members of the class will be completely unassociated apart from the fact that they held the same policy with their insurer. And many will likely be unaware of the rights it is now asserted that they have.

[52] It is necessary to determine whether this Court has jurisdiction to make an opt-out order. The starting point is r 4.24. It will be noted that this rule does not make any express reference to this issue. It simply refers to a person suing on behalf of "all persons with the same interests in the subject matter of a proceeding". Nor was there any consideration of this issue in early cases such as *Duke of Bedford v Ellis*.[14] Mr Weston submits that the opt-in or opt-out mechanisms were developed to deal with more complex staged actions which are now more prevalent, for example *Houghton v Saunders*, the Feltex litigation. This is discussed in *Carnie v Esanda Finance Corp*.[15] Young J reviewed the origin and development of class actions and concluded:

> Whatever its origin, the opt-in or opt-out procedure has now been accepted in most of the common law world which has adopted class actions as being a convenient system in order to notify people of proceedings in the court which might affect them.
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> …
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> The drawback of the opt-in procedure is that it requires action to be taken on behalf of the person to whom the notification is addressed and if that person does not understand fully what the dispute is all about and does not have very much at stake, apathy may mean that nothing happens. On the other hand, the opt-out procedure means that the person represented will be represented unless he or she makes a deliberate decision not to be involved, or alternatively to be more involved as a named party. It accordingly has more of the aspects of a fail safe procedure.
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> The general approach in common law jurisdictions which have embraced representative actions appears to be the opt-out procedure.

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14 *Duke of Bedford v Ellis*, above n 1.

15 *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465 at 472-473.

[53] His Honour then discussed cost liability and concluded:[16]

> The advantages of a fail safe system which is normally one of the things to recommend the opt-out procedure does not apply where one has the situation that there is a potential liability on the member of the group.

[54] In the present case the intention of Mr and Mrs Ross and their solicitor Mr Cameron is that a litigation funder will be engaged, and there will be no liability for costs on either Mr and Mrs Ross (who will presumably be indemnified by that funder) or on any member of the class. There does not, therefore, seem to be any disadvantage to class members from an opt-out order, the more fail safe alternative according to *Carnie*.

[55] The Court was presented with a wealth of information about the use of opt-out procedures in overseas jurisdictions. As an example, in *Western Canadian Shopping Centres Inc v Dutton* the Supreme Court of Canada reviewed the application of representative actions under its rules which, as in New Zealand, lacked comprehensive class action legislation.[17] The judgment of the Court was delivered by the Chief Justice who observed that it would be advantageous if a legislative framework existed that addressed issues that arise in relation to representative actions, but nonetheless found that class actions should be allowed to proceed where a class is capable of clear definition, there are issues of fact or law, common to all class members, success for one class member means success for all, and the proposed representative adequately represents the interests of the class. Her Honour then observed:

> [49] Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

[56] Mr Skelton produced a report of the Australian Law Reform Commission which concluded that an opt-out regime would strike a fair balance of rights. He noted

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16 At 473.

17 *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534.

that law reform bodies in South Australia, British Columbia, Victoria, Manitoba, Alberta, Hong Kong and Western Australia have reached the same conclusion. He said that of more than 16 common law jurisdictions that have enacted detailed class action rules, all bar one employs an opt-out approach in damages claims and only Pennsylvania also permits an opt-in approach. On this basis Mr Skelton submits that interpreting r 4.24 as requiring an opt-in approach makes New Zealand an outlier, as he put it, as well as ignoring the text, history and purpose of the rule.

[57] The only decision of a senior court in New Zealand on the issue of whether an opt-out or opt-in order should be made is the judgment in *Houghton v Saunders*, the first judgment in the Feltex litigation.[18] When that proceeding was filed the plaintiffs also filed an ex parte application for a representative order based on an opt-out procedure. This came before an Associate Judge on the day it was filed and the Judge made an order in terms of the application. The defendant directors applied for a review of this decision, asking that the order for directions be rescinded. They argued that the proceedings did not satisfy the prerequisites for making a representation order under r 78 (the forerunner of r 4.24) and they also argued that even if the proceedings were appropriate, an opt-out order was not. There is no distinction between r 78 and r 4.24 material to the present issue.

[58] French J noted that the use of an opt-out procedure in representative actions is a relatively common phenomenon in other jurisdictions including Australia. She noted that the Rules Committee had been considering the possibility of introducing legislation that would provide for opt-out procedures at the discretion of the Judge. She found, however, that the High Court Rules as they then stood did not make express provision for an opt-out order, so the power to make such an order would of necessity be derived from the Court's inherent jurisdiction, and/or r 9 which provided for cases not provided for elsewhere in the rules.

[59] Her Honour's reference to the consideration of the Rules Committee in New Zealand would appear to have been a reference to a consultation paper issued by the

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[18] *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).

Committee in October 2008 in which, amongst other recommendations, the Rules Committee proposed that both opt in and opt out class actions be permitted.

[60] Her Honour then concluded:

> [162] I do not however consider it is necessary for me to enter into the debate. For, as the extract quoted above indicates, where opt out procedures have been introduced in other jurisdictions they have been accompanied by detailed legislative rules regulating the process that is to be followed. They include safeguards to protect the interests of defendants, as well as the members of the represented class. The fact our own Rules Committee see legislative change as necessary before being able to introduce an opt out procedure is obviously highly significant.
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> [163] Effectively the plaintiffs are asking this Court to operate in a vacuum, the practical dangers of doing so being vividly illustrated by the problems experienced with the public notice. Not only was the content misleading, but the extent of publication (one occasion in six newspapers) was inadequate.
>
> [164] I accept that those who have become party to the proceeding without actively consenting will not be exposed to any order for costs, and in a very real sense have everything to gain and nothing to lose.
>
> [165] However, in my view, an opt out procedure represents too radical a departure from the existing Rules. In the absence of legislative change, the Court must work within the existing Rules which only contemplate "opt in".

[61] The defendant directors appealed the judgment of the High Court. The Court of Appeal did not alter the decision of French J:[19]

> Applied to claims by a group of plaintiffs [a representation] order allows proceedings to be conducted in an efficient manner and avoiding their multiplication by the need (in this case) for at least 800 separate filings. If it is an "opt-in" form, as Mr Galbraith QC conceded, it thereby protects members of the represented group against a limitation bar arising after the date of their election to opt-in to the proceeding. In New Zealand the jurisdiction in the opt-in form has been employed whenever the justice of the case requires. The validity of an "opt-out" order in the absence of legislation was not argued and we offer no comment upon that or whether it can stop time running or create res judicata for those who have opted out.

[62] A further appeal was brought by the defendants including Credit Suisse, and the Supreme Court dismissed the appeal by a majority.[20] The order approving opting-in was not under appeal. The majority of the Court referred to both opt-in and opt-out orders in the context of time limitations:

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19 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [12].

20 *Credit Suisse v Houghton*, above n 4.

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

[63] In that case, as I have noted, the representation order was made on the day the proceeding was filed, ex parte. This will rarely be the case. Applications for representation orders are now invariably made on notice and unless with consent are not suitable for consideration on an ex parte basis. It may be assumed, therefore, that they will not be made on the day of filing. The majority of the Supreme Court dealt with this as follows:

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

> proceeding is brought, should the limitation period end in the period between filing and when the representative order is made.

[64] This led to the conclusion of the Court that time ceased to run for the identified represented class on the day the proceeding was filed by Mr Houghton and the representative order was made. I return to this point later in this judgment. For present purposes I observe that the Court did not express an opinion one way or the other on approval of opt-in and opt-out mechanisms. It appeared to accept that both were possible. For all that, it remains that no New Zealand Court has reached a different conclusion to that of French J in *Houghton v Saunders*, nor cast any doubt on the correctness of her Honour's decision.

[65] The position in New Zealand is once more under review by the Rules Committee. On 6 September this year, it released a consultation paper. It proposes rules which are designed to supplement r 4.24. At paragraph 4 of its paper the Committee says:

> 4. New Zealand has no legislative framework regulating the bringing of representative proceedings. Given the Committee's jurisdictional limitation to matters of practice and procedure, the proposed rules do not address matters of policy which are best left for legislative response, such as whether an opt-out procedure should be permissible under the High Court Rules.

[66] It seems therefore that the Rules Committee is of the view that a rule change is necessary if a proceeding is to be brought on an opt-out basis.[21]

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

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[21] At the date of the hearing the period for submissions on the consultation paper had not ended.

[68] Mr Skelton referred to a number of factors in support of his argument that the Court should not follow *Houghton v Saunders*, and instead make an opt-out order. First, he said there is a large potential class of claimants, each of whom has a relatively small claim which it would be uneconomic to bring in this Court. Whilst this is a factor relevant to whether or not a class action should be ordered, I do not see it as specifically focussed on the question of opt-out or opt-in.

[69] Secondly, Mr Skelton argues that the fact that the members of the represented class do not have a natural or pre-existing community of interest favours the making of an opt-out order, because persons without a pre-existing association are unlikely to communicate with others about the existence of the case. To that extent the making of an opt-in order may result in it being less likely to bring an action to the attention of others than may be the case where there is a pre-existing community of interest. The Court does not have any empirical evidence on this specific point, but in any event if it directed opt-in the Court would require significant steps to be taken to bring this case to the attention of persons within the class, which in my view outweighs any disadvantage identified by this factor.

[70] Thirdly, Mr Skelton says that the plaintiffs do not have access to a register of potential claimants as, for example, in the Feltex litigation where the plaintiffs obtained a register of shareholders. That is correct, but on the other hand Southern Response does have information about all persons who might be in the class, and it is likely that this information can be made available to the plaintiffs one way or another. Although Southern Response says it does not now have up-to-date contact records for everyone who may be within the class, it will have fairly recent information, and I think it reasonable to assume that a very significant number of those within the class will be contactable by means held on Southern Response's files. It seems likely to me that many if not most class members will have provided email addresses, and email addresses do not change frequently, certainly not as frequently as physical addresses. The same applies to cellphone numbers.

[71] Fourthly, Mr Skelton stressed that in *Carnie* the making of an opt-out order was described as fail safe.[22] All potential claimants are included, with their rights protected, whether they respond to or even understand the information made available to them, or whether it even comes to their attention. I think this is the strongest argument in favour of an opt-out order. Whilst in a sense opt-out is a paternalistic order, it does have the advantage of including everyone unless and until such time as they opt-out or their claims fail. If the Court finds that only an opt-in procedure may presently be directed, this may well be the best argument for changing the rules as the Rules Committee suggests.

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

[73] Fifthly, Mr Skelton referred to the decision of the Supreme Court in *Credit Suisse*. Once a representative action is brought, it is brought not only on behalf of the representing plaintiff, but also on behalf of those represented, so for limitation purposes, time stops running for all persons within the class on the day of filing. The Supreme Court, recognising that a representative order will not always be made on the date of filing (as it was in that case) noted that as an action is commenced when the statement of claim is filed, this may necessitate the backdating of a representative order to that date if it is not made at the time of filing.[23] Because of this decision there is a prospect that there will later be separate claims brought in the court by other persons who do not opt into this case. The Court is aware that there are several other proceedings raising the issues in this case already. There is, therefore, a prospect of an inefficient use of the Court's resources. On balance, I think that prospect is slight. I think the likelihood is that those who are aware of their rights now, or become aware

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22 See [52]-[54] above.

23 *Credit Suisse v Houghton*, above n 4, at [163]-[168] and [127]-[128].

of them by virtue of service and advertising of this case, will elect to be part of it because that will be an opportunity without monetary cost to them. Taking separate actions would be at personal cost. Given the sums which appear to be at stake that seems to me to be an option less likely to be pursued.

[74] Finally, Mr Skelton argues that ordering an opt-out mechanism service is a deterrent to wrongful conduct. I do not find this to be relevant in the present case. As noted, Southern Response has only a limited role now, and in any event the class closed as at 1 October 2014.

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

Effective date of this order

[76] As I have noted, the Supreme Court in *Credit Suisse v Houghton* found that it would be inappropriate to allow the opt-in or opt-out elements of a representative action to influence when limitation periods start to run. The Court said that to do so would not only run contrary to the language of the relevant rules, but would also be a recipe for uncertainty and ongoing dispute. The date of the filing of the statement of claim is certain and easily ascertainable and provides a bright line test.[24]

[77] The Court concluded that time ceased to run for the identified representative class on the date when the proceeding was filed and the representative order was made, which in that case were the same day. As I have observed, this will rarely be the case. Recognising this the Court said it was necessary and desirable to ensure that the Court's process does not disqualify those on whose behalf a representative proceeding is brought should the limitation period end in the period between filing and when a representative order is made. Therefore, where the representative order is not made at

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[24] *Credit Suisse v Houghton*, above n 4, at [168].

the time of filing it may be necessary to backdate the effective date of the representative order.[25]

[78] Mr Weston noted that the actual decision of the Court, as distinct from its observation just recorded, was that time ceased to run for the identified represented class when both the proceeding was filed and the representative order was made. Mr Weston is correct; this conclusion followed from the unusual circumstance of the representative order having been made on the day the proceeding was filed. I am persuaded, however, that it is clear from the judgment that the Court considers that the effective date of a representative order should be the date of filing in order to give certainty on the date on which time ceases to run.

[79] Accordingly, I direct that the representative order now made will take effect as at 25 May 2018.

Reservation of leave

[80] The draft order presented for Mr and Mrs Ross included a reservation of leave, as recorded at [24] at paragraph 4. This is a final judgment, and I do not think a broad reservation of leave to apply to rescind or vary it is appropriate. With a representative action, the Court retains overall supervision of the process and will reconsider the definition of the class if for a reason not presently foreseen an amendment is in the interests of justice.

Outcome

[81] The Court makes the following orders:

1. The plaintiffs are granted leave pursuant to High Court Rule 4.24(b) to bring this proceeding against the defendant on behalf of all persons who have the same interest in the subject matter of the proceeding, namely:

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[25] *Credit Suisse v Houghton*, above n 4, at [127]-[128].

(a) They own or owned a residential dwelling in Canterbury that was insured with the defendant under a "Premier House Cover" or "Premier Rental Property Cover" policy (**Policy**);

(b) They lodged a claim or claims with the defendant under the Policy for damage suffered to their dwelling as a result of the 2010 – 2012 Canterbury earthquakes (**Claim**);

(c) Their residential dwelling the subject of the Claim was damaged beyond economic repair;

(d) They received a DRA from the defendant that did not include the Office Use section;

(e) They did not receive a DRA from the defendant that included the Office Use section;

(f) They entered into a settlement agreement with the defendant prior to 1 October 2014 in settlement and discharge of their Claim; and

(g) They are not persons for whom the defendant managed the repair of their home, or rebuilt their home.

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

3. This order is to take effect from 25 May 2018.

4. Costs are reserved.

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J G Matthews
Associate Judge

Solicitors:
GCA Lawyers, Christchurch
Buddle Findlay, Christchurch