IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000361

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

Hearing: 18 October 2021 via telephone conference

Appearances: P G Skelton QC, K M Quinn and R Lynn for the Plaintiffs
T C Weston QC, K M Paterson and O Peers for the Defendant

Date of Minute: 20 October 2021

MINUTE OF NATION J

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[1] A telephone conference was convened on 18 October 2021 for the first call of the plaintiff's application for leave to discontinue the proceeding. Comprehensive and helpful memoranda were filed for both parties and addressed by counsel during this conference.

[2] These are representative proceedings, brought by the plaintiffs on behalf of a class of persons who might have similar claims against Southern Response Earthquake Services Ltd (Southern Response). Approximately 3,000 people could be within that open class.

[3] Of that class, 278 are clients of the plaintiffs' solicitors, GCA Lawyers.

[4] In September 2019, the Court of Appeal ordered that the representative proceedings could continue on an "opt out" basis.[1] This means that the claims are currently brought on behalf of every class member except for those who choose to exclude themselves from the class by filing with the High Court a court approved opt out notice.

[5] On 20 September 2021, Osborne J issued four judgments in the proceedings. Included in his judgment were directions as to the form and content of a notice to be sent to all class members advising them of the proceedings and what they had to do if they wished to opt out of the proceedings.

[6] In the earlier judgments, the courts have recognised that, with the way these proceedings have been pursued, counsel acting for the plaintiffs and the 278 clients of their solicitors have a duty to protect the interests of all those who might potentially have a claim against Southern Response through coming within the open class of potential claimants. The courts have also recognised that, in overseeing the proceedings, the courts had to protect the rights and interests of all potential claimants and not just the plaintiffs and the clients of GCA Lawyers.

[7] The proceedings have been pursued and claims advanced by the plaintiffs and other clients of GCA Lawyers through arrangements that have been made between the plaintiffs and other clients of GCA Lawyers for the payment of costs that were being incurred in pursuing the proceedings. To date, the proceeding has been funded by a company in the business of funding litigation, Claims Funding Australia Pty Ltd. It was presumably a condition of that funding arrangement that Claims Funding Australia would be entitled to a portion of any amount the plaintiffs or other entitled members of the class would recover from Southern Response.

[8] In a judgment of 20 September 2021, Osborne J had ordered that the approved notices advising all class members of the proceedings were to be sent to all class members forthwith, with Southern Response to report to the Court as to the progress that had been made in that regard by 25 October 2021.

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1 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33.

[9] Shortly after the release of Osborne J's 20 September 2021 judgment, the parties entered into negotiations to resolve the litigation. Through the memoranda from counsel and an affidavit of 13 October 2021, the Court has been advised that an agreement to resolve the proceedings has been reached between the named plaintiffs, Claims Funding Australia and Southern Response. It is apparent that Southern Response, funded by the New Zealand Government, has agreed to pay to all members of the class the amount they are entitled to in respect of certain agreed matters but with no entitlement as to certain other limited aspects of their claims which they may have wished to pursue (it is not necessary for me to provide further details as to these matters in this minute).

[10] An important feature of the settlement is however that a payment will be made to Claims Funding Australia.

[11] With notice of the settlement that had been reached and by consent of the parties, on 11 October 2021 Dunningham J made orders staying the judgment requiring notification of the proceedings to all members of the class. It was a condition of her directions that the plaintiffs would file an application for leave to discontinue the proceedings by 13 October 2021.

[12] That application to discontinue the proceedings was filed with the High Court on 13 October 2021. If granted, the discontinuance will bring the Court proceedings between the plaintiffs, on behalf of existing clients of GCA Lawyers and all potential members of the class, to an end. Discontinuance will thus affect all members of the class.

[13] When the Court of Appeal approved the pursuit of these proceedings, on behalf of an open class and on an opt out basis, they stipulated that any discontinuance of the proceedings must be approved by the Court. The plaintiffs and Southern Response both recognise this. In their memoranda, they both asked for an urgent hearing for the parties to be able to explain why, with the settlement that has been reached and having regard to all potential class claimants, it is appropriate to discontinue the proceedings and implement the settlement that has been negotiated. They agreed that, because of

Osborne J's familiarity with the proceedings, it would be best for him to preside at the necessary hearing.

[14] Prior to the telephone conference with counsel, the Court was able to confirm that Osborne J would be available to preside over the required hearing on 29 November 2021 at 10.00 am. Counsel confirmed that date is suitable for them. The application for discontinuance is accordingly to be heard on 29 November 2021.

[15] Through memoranda, counsel had agreed on the form of a notice which the Court should also direct informing potential claimants of key features of the settlement and the hearing (now scheduled for 29 November 2021) that is to take place.

[16] The only aspect of the notice which was contentious was the plaintiffs' requirement that it be sent to all parties who are identifiably part of the open class of claimants. Mr Skelton QC for the plaintiffs submitted that this was important because, with the settlement that has been reached and the stay of the orders made as to the way in which class members were to be notified of the proceedings, it is only the 278 Clients of GCA Lawyers who have been aware of the proceedings and how their potential claims have been pursued through the proceedings. Mr Skelton says the information in the proposed notice about the proceedings and how members of the class might have claims reflects careful consideration by the parties and the Court, and is thus the appropriate way to inform potential claimants of the way they are involved and have certain rights and claims connected with the proceedings as they are at present.

[17] Mr Weston QC for Southern Response said that Southern Response is committed to implementing the settlement that has been reached and will be doing all it can to ensure that it communicates as best it can with all potential claimants, notifies them of their rights and assists them in receiving the benefits they will be entitled to in accordance with the settlement that has been reached. He submitted that it could be confusing for such people to receive the notice proposed by the plaintiffs and then further information from Southern Response. He stressed it was not Southern Response's wish in any way to limit the information which all members of the class

and claimants might receive. Southern Response agrees it will, at its cost, give notice as directed by the Court.

[18] Having heard from counsel, I consider that the proposed notice should be sent to all members of the class as proposed in the manner and as proposed for the plaintiffs. This will not limit Southern Response's ability to also communicate with all such claimants in such other ways as they consider are appropriate.

[19] I note however that Southern Response have said that, while they will do all they can to communicate with potential claimants, they cannot guarantee they will be able to do so for everyone because there are some for whom they have no current contact details. The number of such claimants is however limited. They will no doubt be able to advise the Court of the number of such people when the application for discontinuance is heard.

[20] The parties had also agreed that the Court should also be directing that, with the proposed documents, there would be no reference to the amount being paid by Southern Response to Claims Funding Australia, in accordance with the agreement reached between the parties that the sum would remain confidential.

[21] The Court raised a concern that members of the class would have to consider whether they had particular claims through the proceedings, the extent to which they might be giving up a particular claim and, if so, the value of such claim. They would be doing that knowing that, in return, Claims Funding Australia were giving up the potential financial benefit they might have obtained through the proceedings. Class members would be deciding what to do without knowing the extent to which Claims Funding Australia had benefited from the settlement.

[22] In their memorandum and in submissions, both counsel emphasised however that the settlement would not require the potential members of the class to give up all potential claims. It was suggested the potential claimants would be free to pursue their own proceedings if they wished to recover more than they might be entitled to under the settlement. It was also clear that, with the settlement that has been reached, the

amounts that each member of the class will be entitled to from Southern Response will not be limited by reason of the amount that is to be paid to Claims Funding Australia.

[23] Mr Weston also said that the Court will be told of the amount that is to be paid to Claims Funding Australia when the application for approval of the discontinuance is heard.

[24] Against that background, I make the direction sought as to the redaction of the amount to be paid to Claims Funding Australia but that direction is made on an interim basis and is to be reviewed in the hearing on 29 November 2021.

[25] Against that background, I direct:

(a) the defendant is to publish the newspaper notice annexed marked "B" in each of The Press, the New Zealand Herald, the Dominion Post and the Otago Daily Times on 23 October 2021;

(b) the defendant is to send the Court approved notice annexed marked "A" 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 the defendant 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 the defendant has on file for each class member, together with an electronic read receipt request.

(c) costs and disbursement of the newspaper advertisements and the posting and emailing of the Court Approved Notice are to be borne by the defendant;

(d) class members who wish to support or oppose the application for leave to discontinue must file a document with the High Court on or before Thursday 25 November 2021 setting out their particular position;

(e) class members who file such a document are given leave to appear and be heard at the fixture for the hearing of the application;

(f) the plaintiffs are to file submissions in support of the application by Thursday 18 November 2021;

(g) the defendant is to file submissions in reply on or before Thursday 25 November 2021;

(h) a half-day fixture for hearing the application is set down before Osborne J on 29 November 2021; and

(i) the sum payable to Claims Funding Australia recorded in paragraph 6 of the Agreement (Exhibit "A" to Mr Cameron's affidavit sworn 13 October 2021) may be redacted on the Court copy and on any copy of the affidavit published or made available to class members but that direction is made on an interim basis and is to be subject to review on 29 November 2021.

Solicitors:
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GCA Lawyers, Christchurch
Buddle Finlay, Christchurch.