IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV 2018-409-361

UNDER	Section 56(3) of the Senior Courts Act 2016
BETWEEN	**BRENDAN MILES ROSS** and **COLLEEN ANNE ROSS** Plaintiffs
AND	**SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED** Defendant

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

Dated: 8 October 2021

Judicial Officer:	Justice Osborne
Next Event:	N/A
Next Event Date:	N/A

Solicitors:
GCA Lawyers
PO Box 3241
Christchurch

Solicitor Acting: Grant Cameron
Phone: (03) 365 1347
Fax: (03) 365 4856
Email: grant@gcalawyers.com

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

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

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

To the Registrar of the High Court at Christchurch

And to the Defendant

This document notifies you that:

1. The Plaintiffs seek leave from the High Court under s 56(3) of the Senior Courts Act 2016 to appeal each of the following judgments of the Court:

   (a) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2453 (**Communications Judgment**);

   (b) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2452 (**Notification Judgment**); and

   (c) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2454 (**Set Aside Judgment**).

2. The proposed grounds of appeal against the judgments are that:

   <u>Communications Judgment</u>

   (a) The Court erred in determining that the defendant should be permitted to communicate and/or negotiate directly with class members, rather than through the Court-appointed class representatives and their legal team (at [20]);

   (b) The Court erred in permitting the defendant to communicate its Settlement Package, and to proceed to conclude settlements with individual class members, without the Court having first considered and approved the Settlement package (at [20]);

(c) The Court erred in determining that the defendant should be permitted to communicate and discuss its Settlement Package directly with class members during the opt-out period (at [22]-[24] and [84]);

(d) In the Reasons judgment explaining the Court's dismissal of the defendant's original application for directions permitting it to communicate its Settlement Package ([2021] NZHC 2451), delivered on the same day as the Communications Judgment, it is evident the Court proceeded on the basis that the Settlement Package would be an implementation of the reasoning and principles in the *Dodds* litigation.[1] This same assumption is evident again in the Communications Judgment at [12], [38], [64]-[68] and Appendix 6. However:

(a) The Settlement Package methodology does not implement the principles established in the *Dodds* litigation; and

(b) The Settlement Package would, or may, materially under-calculate the loss suffered by any policyholder for whom multiple DRAs were prepared, including the representative plaintiffs.

Notification Judgment

(e) The Court erred in directing that the notice be headed "Notice of Opt Out rights" rather than "Class Action Notice" or "Class Member Notice" (at [62] and Annexure A);

[1] [2021] NZHC 2451 at [11] – [14] and [20] – [29].

(f) The Court erred by requiring the Plaintiffs to publicise the funding commission agreed between Funded Class Members and the litigation funder (at [107]-[108]);

(g) In determining what (if anything) should be said about the detail of funding arrangements, the Court erred (at [104]) in deciding to follow the approach taken in *Bartlett v Commonwealth of Australia (No 2)* [2019] FCA 800, a case not analogous or applicable to the present proceedings;

(h) Having decided that the notice should include detail regarding the level of funding commission to be sought as part of a common fund order (at [107]-[108]), the Court failed to provide any opportunity (within the draft Class Member Notice, either at Section 6 or 7) for the Plaintiffs to state the maximum level of funding commission that will be sought in the application for a Common Fund Order, with the result that the only reference to a specific funding rate in the Class Member Notice is to the funding commission agreed between Funded Class Members and the litigation funder;

(i) The Court erred in directing that reference should be made in the class member notice to the defendant's proposed individual Settlement Package (at [121]-[133]); and

(j) As approved, the Class Member Notice does not warn class members that the Settlement Package offered by the defendant will or may be an offer for a sum materially less than the class member's entitlements calculated in accordance with the principles established in the *Dodds* litigation (refer item 2(d) above).

Set Aside Judgment

(k) The Court erred in characterising an application for a common fund order as being "*an asserted ultimate entitlement to recover costs (from non-parties)*" (at [60]);

(l) The Court erred in failing to give due weight or consideration to the "free-rider" problem, incorrectly characterising the set aside application as "*a measure for the convenience of the plaintiffs and their funder*" (at [75]);

(m) Related to the "free-rider" problem, the Judge erred in failing to take into account the possibility (likelihood, the appellants say) that the defendant will, if permitted, continue to settle with individual class members after the opt out period has passed, with the effect that (if the appellant's substantive claim is successful) the eventual judgment/settlement sum to which a common fund order or other cost-spreading order might attach will be further diminished, but not as a result of class members opting out of the proceeding;

(n) The Court erred in holding, on no or inadequate evidence, that a set aside order would adversely affect the ability of the defendant to settle claims of policyholders as soon as possible, and that it would similarly "discourage" policyholders from settling with the defendant (at [85]);

(o) The Court erred in holding, on no or inadequate evidence, that setting aside 15% (or any similar sum) from settlement payments would discourage individual policyholders from reaching full and final settlement with the defendant (at [86]);

(p) The Court erred in holding that current low rates of deposit account interest are a factor in the balance of convenience (at 86]);

(q) The Court failed to give sufficient weight to the significant practical difficulties the Plaintiffs will face in giving effect to a common fund order (assuming one is made in due course) if class members subject to such an order have already received 100% of their settlement funds from the defendant (at [87]);

(r) The Court erred in holding that the balance of convenience favoured allowing the defendant to make settlement payments without any deduction (at [78]-[87]);

(s) The Court erred in holding that the freedom of choice and individual autonomy of class members would be threatened or impaired by the imposition of a set aside order (at [89]);

(t) The Court erred in concluding that the unsettled nature of relevant aspects of the law in New Zealand, and the possibility that certain orders might not ultimately be obtained, was a factor counting against granting the interim relief sought (at [90]); and

(u) The Court erred in holding that the overall justice of the case was against making the set aside order (at [88]-[91]).

3. The full proposed grounds of appeal, and the orders which the Plaintiffs will seek from the Court of Appeal, are set out in a draft Notice of Appeal attached to this application.

4. Leave to appeal should be granted because:

(a) The judgments contain arguable errors of law.

(b) Evidence has emerged since the hearing in April, as set out in the affidavit of Grant Cameron filed in support of this Leave Application and the accompanying Stay Application, calling into question one of the fundamental premises upon which the applications were argued – namely that the Settlement Package would constitute an interpretation and application of *Dodds*.

(c) The proposed appeals, considered individually and together, raise issues of significant importance to the parties and to class members:

(i) The Notification Judgment and Communications Judgment deal with the manner, timing and content of critical communications to the class and it can reasonably be assumed they will directly affect the number of class members remaining in the proceeding, or opting out of it.

(ii) The key concern for the Plaintiffs remains the so-called "free-rider" problem. The Plaintiffs are determined that the proceeding should benefit the greatest number of people possible, and that the costs of the action should be spread equitably across the greatest number of people possible (thus minimising the burden on any individual).

(iii) In the particular set of facts which have arisen, the Set Aside Judgment currently results in a situation in which slightly less than 300 Funded Class Members are potentially liable to fund the entire costs of the action.

(d) These issues are also of general and public importance, and considerable novelty, in an area of the law (class actions) currently growing in prominence. There is no direct appellate authority in New Zealand addressing:

- the ability of a defendant to communicate and/or negotiate directly with class members in an Opt-Out representative action (including during the Opt-Out period);

- the proper content of a class member notice in an Opt-Out representative action;

- the availability of a set-aside order.

These issues ought to be fully considered by the Court of Appeal to provide guidance to the community and the legal profession.

(e) It is in the interests of justice that leave to appeal be granted.

5. Further, it is desirable that leave to appeal should be granted against all three judgments together because the judgments are linked and cross-reference each other. Having all three judgments before it will assist the Court of Appeal to fully understand the issues.[2]

6. This application is made in reliance on s 56(3) of the Senior Courts Act 2016; *Greendrake v District Court of New Zealand* [2020] NZCA 122; *Finewood Upholstery v Vaughan* [2017] NZHC 1679; and *Li v Chief Executive, MBIE* [2018] NZHC 1171.

Dated: 8 October 2021

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

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[2] The plaintiffs intend that the proposed appeal would also necessarily address aspects of the Reasons Judgment ([2021] NZHC 2451) given in respect of the defendant's original communications application dismissed (by the Result Judgment) on 23 February 2021, given that the Reasons Judgment is referred to and relied upon in the Communications Judgment [2021] NZHC 2453.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA /2021

BETWEEN	**BRENDAN MILES ROSS** and **COLLEEN ANNE ROSS** Appellants
AND	**SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED** Respondent

[DRAFT] NOTICE OF APPEAL

Dated: XX October 2021

Solicitors:
GCA Lawyers
PO Box 3241
Christchurch

Solicitor Acting: Grant Cameron
Phone: (03) 365 1347
Fax: (03) 365 4856
Email: grant@gcalawyers.com

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

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

NOTICE OF APPEAL

Brendan Miles Ross and Colleen Anne Ross, the appellants in this proceeding, give notice that they are appealing to the Court against three decisions of His Honour Justice Osborne, all dated 20 September 2021, given in the Christchurch High Court in CIV-2018-409-361 as follows:

(a) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2453 (**Communications Judgment**);

(b) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2452 (**Notification Judgment**);

(c) The judgment delivered on 20 September 2021 with neutral citation [2021] NZHC 2454 (**Set Aside Judgment**);

together, **the Judgments**.

1. The parts of the Judgments appealed against, and the grounds of appeal in each case are set out below.

Communications Judgment

2. At [92] of the Communications Judgment, His Honour made orders approving/authorising the terms, content and timing of communications that the respondent is permitted to make for the purposes of marketing, pursuing and implementing its proposed Settlement Package. That included at [92](i) and (j) orders permitting the respondent to negotiate and settle claims direct with individual class members (without having to deal with the Appellants as Court-appointed class representatives), and orders at [92](k)-(m) permitting such communications and negotiations to occur during the opt out period.

3. The Appellants appeals against all the orders made at [92](a)-(n) inclusive.

4. The grounds of appeal are that:

(a) The Judge erred in determining that the respondent should be permitted to communicate and/or negotiate directly with class members, rather than through the Court-appointed class representatives and their legal team (at [20]);

(b) The Judge erred in permitting the respondent to communicate its Settlement Package, and to proceed to conclude settlements with individual class members, without the Court having first considered and approved the Settlement Package (at [20]);

(c) The Judge erred in holding that the respondent should be permitted to communicate and discuss its Settlement Package directly with class members during the opt-out period (at [22]-[24] and [84]); and

(d) As a result of evidence offered and submissions made by the respondent, the Judge erred by proceeding on the basis that the Settlement Package was, or would, entail an application of the principles set out in the *Dodds* litigation, and/or that class members settling with the respondent on the basis of the Settlement Package would receive a sum representing their entitlements calculated in accordance with the principles established in the *Dodds* litigation ([12], [38], [64]-[68] and Appendix 6).

Notification Judgment

5. At [196] of the Notification Judgment, His Honour made orders setting the opt out date, and specifying the content and timing of communications to the class members, including in respect of their rights to opt out of the proceeding.

6. The Appellants appeal against the orders made at [196](a) and (b), which is to say they appeal against certain content of the class member notice (at [196](b) and Annexure A of the Notification Judgment) and seek a new date

to be set for the opt out period (but do not challenge the duration of three months set by the Judge).

7. The grounds of appeal are that:

   (a) The Jude erred in directing that the notice be headed "Notice of Opt Out Rights" rather than "Class Action Notice" or "Class Member Notice" (at [62] and Annexure A).

   (b) The Judge erred by requiring the Appellants to publicise the funding commission agreed between Funded Class Members and the litigation funder (at [107]-[108]);

   (c) In determining what (if anything) should be said about the detail of funding arrangements, the Judge erred (at [104]) in deciding to follow the approach taken in *Bartlett v Commonwealth of Australia (No 2)* [2019] FCA 800, a case not analogous or applicable to the present proceedings;

   (d) Having decided that the notice should include detail regarding the level of funding commission to be sought as part of a common fund order (at [107]-[108]), the Judge failed to provide any opportunity (within the draft Class Member Notice, either at Section 6 or 7) for the Appellants to state the maximum level of funding commission that will be sought in the application for a Common Fund Order, with the result that the only reference to a specific funding rate in the Class Member Notice is to the funding commission agreed between Funded Class Members and the litigation funder;

   (e) The Court erred in directing that reference should be made in the class member notice to the respondent's proposed Settlement Package (at [121]-[133]); and

(f) In requiring reference to be made to the Settlement Package, the Court wrongly proceeded on the basis that the Settlement Package would yield, for any given class member, an offer resulting in the class member receiving their full policy entitlement calculated in accordance with the principles established in the *Dodds* litigation.

Set Aside Judgment

8. The Appellants appeal against the order made at [93](a) of the Set Aside Judgment, dismissing the application for a set aside order.

9. The grounds of appeal are that:

(a) The Judge erred in characterising an application for a common fund order as being "*an asserted ultimate entitlement to recover costs (from non-parties)*" (at [60]);

(b) The Judge erred in failing to give due weight or consideration to the "free-rider" problem, incorrectly characterising the set aside application as "*a measure for the convenience of the plaintiffs and their funder*" (at [75]);

(c) Related to the "free-rider" problem, the Judge erred in failing to take into account the possibility (likelihood, the Appellants say) that the respondent will, if permitted, continue to settle with individual class members after the opt out period has passed, with the effect that (if the Appellant's substantive claim is successful) the eventual judgment/settlement sum to which a common fund order or other cost-spreading order might attach will be further diminished, but not as a result of class members opting out of the proceeding.

(d) The Judge erred in holding, on no or inadequate evidence, that a set aside order would adversely affect the ability of the respondent to

settle claims of policyholders as soon as possible, and that it would similarly "discourage" policyholders from settling with the respondent (at [85]);

(e) The Judge erred in holding, on no or inadequate evidence, that setting aside 15% (or any similar sum) from settlement payments would discourage individual policyholders from reaching full and final settlement with the respondent (at [86]);

(f) The Judge erred in holding that current low rates of deposit account interest are a factor in the balance of convenience (at 86]);

(g) The Judge failed to give sufficient weight to the significant practical difficulties the Appellants will face in giving effect to a common fund order (assuming one is made in due course) if class members subject to such an order have already received 100% of their settlement funds from the respondent (at [87]);

(h) The Judge erred in holding that the balance of convenience favoured allowing the respondent to make settlement payments without any deduction (at [78]-[87]);

(i) The Judge erred in holding that the freedom of choice and individual autonomy of class members would be threatened or impaired by the imposition of a set aside order (at [89]);

(j) The Judge erred in concluding that the unsettled nature of relevant aspects of the law in New Zealand, and the possibility that certain orders might not ultimately be obtained, was a factor counting against granting the interim relief sought (at [90]); and

(k) The Judge erred in holding that the overall justice of the case was against making the set aside order (at [88]-[91]).

Leave to appeal

10. The Appellants were granted leave to appeal each of the Judgments by His Honour Justice Osborne in a judgment dated [xx October 2021], a copy of which is **attached**.

Orders sought

11. The Appellants seek the following judgment from the Court of Appeal:

    (a) Orders allowing each of the appeals;

    (b) An order fixing a new Opt Out date, reflecting the three month period adopted by the Judge but making due allowance for any delay occasioned by these appeals;

    (c) In respect of the Notification Judgment:

        (i) Orders that the class member notice (Annexure A to the Notification Judgment) be amended in accordance with the draft attached to this Notice of Appeal; and

        (ii) An order for costs.

    (d) In respect of the Communications Judgment:

        (i) An order that the respondent's communications application dated is dismissed; and

        (ii) An order for costs.

    (e) In respect of the Set Aside Judgment:

        (i) Orders granting the Set Aside order in terms of the Appellants' application to the High Court dated ; and

        (ii) An order for costs.

12. The Appellants are not legally aided.

Dated: XX October 2021

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Philip Skelton QC / Kelly Quinn / Carter Pearce

Counsel for the Appellants