IN THE COURT OF APPEAL OF NEW ZEALAND

CA37/2017
[2017] NZCA 489

BETWEEN	SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED Appellant
AND	THE SOUTHERN RESPONSE UNRESOLVED CLAIMS GROUP Respondent

Hearing:	5 July 2017
Court:	Harrison, Winkelmann and Clifford JJ
Counsel:	M D O'Brien QC, D J Friar and NFD Moffatt for Appellant FMR Cooke QC and M S Smith for Respondent
Judgment:	30 October 2017 at 2.30 pm

JUDGMENT OF THE COURT

A The applications for leave to admit fresh evidence on appeal are granted.

B The appeal is dismissed.

C The cross-appeal is allowed in part.

D High Court order directing counsel for the appellant to provide a draft explanatory letter to the Court for approval and which provides for a 21-day cooling-off period is set aside.

E Leave under r 4.24 is conditional on counsel for the appellant satisfying the High Court that represented claimants with no DRA as at April 2015 will be no worse off after joining the representative proceeding.

F The cross-appeal is otherwise dismissed.

G The appellant must pay the respondent 75 per cent of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Winkelmann J)

Table of contents **Para No.**

[1] The respondent, Southern Response Unresolved Claims Group (the Group), is an unincorporated body. Its members are homeowners whose insurance claims against the appellant, Southern Response Earthquake Services Ltd (Southern Response), arising out of the Canterbury earthquakes are unresolved.[1] Southern Response formerly carried on business as an insurer under the name AMI Insurance Ltd. Following the Canterbury earthquakes, its reserves and reinsurance arrangements were found to be insufficient to cover all the claims against it, and as a consequence the Crown intervened. Southern Response is now a Crown-owned company and exists only as a run-off insurer in relation to claims against it.

[2] The main issue on this appeal is whether leave under r 4.24 of the High Court Rules should be granted for the proceeding to be brought as a representative action against Southern Response on behalf of the Group and others who wish to join the claim.[2] Rule 4.24 empowers the High Court to allow a plaintiff to bring representative proceedings on behalf of others having the same interest in the subject matter of the proceeding and provides in material part:

> **4.24 Persons having same interest**
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> 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—
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> …

[3] The grant of leave would enable a single, representative plaintiff, Mr Yeadon, to bring the claim, alleging breach of the contract of insurance and breach of the duty of good faith.[3] The Group say the common interest to be represented by the proposed plaintiff is the interest of those who have lodged claims against Southern Response under the same one or two contracts of insurance, contracts which are, for all relevant purposes, identical. The Group alleges that these

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1 When the proceeding commenced in 2015, the Group consisted of 47 claimants. That number has reduced to 27 as at the date of the hearing of this appeal, the reduction in number primarily due to settlements with Southern Response.

2 The Group proposes a three-month opt-in period after the grant of leave for other claimants with the same interest.

3 The identity of the proposed representative plaintiff or plaintiffs has changed over time as Southern Response has settled with those claimants.

claimants are affected by a scheme that Southern Response operates of delaying and misleading conduct, and which breaches Southern Response's contractual obligations. It is alleged that the purpose of the scheme is to minimise the extent of payments made to the claimants to settle their claims. The Group's case is that this strategy has been applied widely, with Southern Response free to do this because, with its business as an insurer at an end, it no longer has commercial goodwill to preserve.

[4] The primary reason put forward by the Group for proceeding by way of representative action is that the individual policy-holder claimants would never have the resources to bring claims against Southern Response, an experienced and well-resourced litigant. However, collectively the Group has been able to secure funding for the proceedings from a litigation funding service, Litigation Lending Services (New Zealand) Ltd.

[5] In the High Court, Gendall J granted the application for leave, but on terms requiring the Group to provide further information to its members as to the nature of the representative action and the funding arrangements for it, and also providing them with an opportunity to withdraw.[4] Southern Response appeals against the grant of leave to proceed by way of representative action. It says that leave should have been refused because properly analysed there is no common issue within the claim, that even if a common issue can be identified it does not found a tenable course of action, and in any case any common issue that can be identified by the Group does not materially advance their claim. The first issue on this appeal is therefore whether Gendall J was right to grant leave under r 4.24.

[6] For its part, the Group cross-appeals against the conditions imposed upon that grant of leave. It says that the conditions, particularly the requirement to provide a further "cooling off" period to enable members to reflect upon and properly understand the implications of the litigation funding arrangements and to withdraw from those arrangements, significantly restrict the Group's ability to pursue this claim — it effectively dooms the claim to failure. The Judge imposed the conditions

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4 *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105 [Gendall J Decision].

because he was concerned that members of the Group may have been misled by materials promoting the representative action to potential claimants. The second issue which arises then is whether these materials were misleading, and if so whether the Judge was right to impose the conditions on the grant of leave.

[7] The Group also cross-appeals against Gendall J's decision not to make a discovery order requiring Southern Response to identify the names and contact details of other claimants whose claims remain unresolved so that the communication about the action approved by the Court can be directed to them. The Group argues that he was wrong to reason that such an order would involve a breach of confidentiality between Southern Response and the insured. That is the third issue we must address.

[8] Southern Response sought leave to file an updating affidavit from Mr Hurren, its General Manager, Legal and Strategy. This affidavit updates progress with settling the outstanding insurance claims of individuals since the High Court hearing. The Group filed an affidavit in reply from Ms Simmonds, a senior solicitor at GCA Lawyers (the Group's solicitors), which provides more detail in connection with the settlements and their circumstances. We accept that the updating information is helpful background, and accordingly grant leave to Southern Response to file that evidence, and to the Group to file the affidavit in reply.

First issue: should leave have been granted to the Group to bring the claim as a representative action?

The nature of the claims

[9] The Group alleges that Southern Response adopted a strategy designed to systematically reduce the cost of meeting the claims arising out of the Canterbury earthquake below its true liability. Each member of the Group's claims have been addressed by Southern Response in accordance with the strategy, and Southern Response has thereby failed to provide them with their contractual entitlements. The key components of that strategy are said to be as follows:

(a) misrepresenting to claimants the nature of Southern Response's obligations and the claimants' rights;

(b) understating the extent of the work required, and the cost of undertaking that work;

(c) asserting that the claimants' rights to receive a cash settlement of their claims were for amounts significantly below the assessed cost of undertaking the work in question;

(d) assuming control of the rebuilding and repair work so that Southern Response could minimise the cost to it of the required work;

(e) unreasonably delaying in responding to and meeting the claims of a claimant;

(f) inducing settlements of the claims made against it for significantly reduced amounts and through undertaking substandard repair work through the implementation of the strategy; and

(g) adopting other strategies designed to reduce its liability.

[10] We gratefully adopt Gendall J's summary of the key aspects of the operation of the strategy, noting however that these do not capture all of the allegations as to its operation:[5]

> (a) Southern Response has asserted that it is in control of the undertaking of all required rebuilding and repair work under the parties' insurance policy rather than the homeowner claimants. It does so by having its partner Arrow International (Arrow) managing all such work. The plaintiffs say Southern Response was not entitled to take this stance.
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> (b) Southern Response has said that there were necessary delays involved in having such reinstatement or repair work undertaken and that plaintiff policyholders would simply need to wait their turn for the work managed by Arrow to be done. As a consequence, a number of years have gone by with all policyholders simply waiting.

5 At [24].

(c) The cost of undertaking that work has been disclosed to the plaintiff claimants in the form of Detailed Repair/Rebuild Analyses (DRAs) prepared by Arrow which grossly understate the true cost of undertaking the required work to the standard set by the policy.

(d) Southern Response has stated it would only cash settle with individual policy claimants at amounts significantly discounted from the DRA figures within the policy, but it has indicated it was prepared to negotiate "without prejudice" and "out of policy" responses on a cash basis, thereby inducing lower financial settlements.

[11] The first cause of action pleaded against Southern Response seeks declarations that Southern Response has acted and is acting in breach of the policy, and damages for each claimant for breach of contract. It is alleged that as a consequence of the application of the strategy, Southern Response has acted in breach of contract, failing to meet its substantive promises in the policy to indemnify the claimants. It is also in breach of the contractual term requiring Southern Response to provide a fair settlement of its payment obligation "as quickly as circumstances allow". Particulars of the claims made by each claimant in this regard are detailed in a schedule attached to the statement of claim. The schedule provides the claimant's personal details, an overview of the damage to the property, a description of Southern Response's dealings with the claimant, and an outline of the heads of claim applicable to the claimant's circumstances.

[12] The second cause of action alleges breaches of Southern Response's duties of good faith, including contractual duties to deal with the claims in good faith, with reasonable promptness, to ensure that the claims were handled professionally and fairly, and to pay claims in a timely manner. In addition to claims for damages for losses, the Group seeks a declaration that Southern Response has acted and is acting in breach of its duties of good faith, and in breach of contract. The Group also seeks general damages of $25,000 for each claimant as a consequence of the strategy, and $15,000 for each claimant for each year that satisfaction of the claims has been delayed as a consequence of the strategy.

[13] For ease of reference we call the first cause of action the breach of contract claim, and the second the breach of good faith claim, although acknowledging that they are each contractual in nature.

Relevant principles

[14] A critical issue, usually the critical issue, in applications under r 4.24 is what constitutes "the same interest in the subject matter of a proceeding". In *Credit Suisse Private Equity LLC v Houghton*,[6] Elias CJ and Anderson J said that this question is to be assessed purposively to allow the representative proceeding to be a "flexible tool of convenience in the administration of justice".[7] In particular it is to be construed in accordance with the purposes of the High Court Rules, towards the just, speedy, and inexpensive determination of proceedings so that a multiplicity of proceedings can be avoided in circumstances where use of the representative process will not be unfair to the proposed defendant.[8]

[15] In a recent decision, *Cridge v Studorp Ltd*, this Court summarised the principles to be deduced from the relevant authorities as follows:[9]

> (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
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> (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
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> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
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> (d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
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> (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
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> (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.

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

7 At [2] citing *John v Rees* [1970] Ch 345 (Ch) at 370.

8 *Credit Suisse Private Equity LLC v Houghton*, above n 6, at [55]–[56] and [61] per Elias CJ and Anderson J.

9 *Cridge v Studorp Ltd* [2017] NZCA 376 at [11].

(g) The court should take a liberal and flexible approach in determining whether there is a common interest.

(h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.

(i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

(Footnotes omitted.)

[16] Southern Response identifies an additional consideration: the merits of the proposed claim. In *Saunders v Houghton (No. 1)* this Court said that a provisional appraisal of the merits of the proposed claim is also necessary before the grant of leave.[10] That must be so, as the Court cannot grant leave to the bringing of plainly meritless claims, and so allow those propounding the claim to invite others to join the group represented. But it is highly undesirable that this criterion be seen as creating the need or opportunity for a mini trial at the leave stage, at which the Court receives and reviews evidence on contested fact. Such an approach would be inconsistent with the objectives of the High Court Rules, and would substantially undermine the effectiveness of the r 4.24 procedure. We consider the facts of this case demonstrate very clearly the unfortunate consequences of approaching the leave application as an opportunity for a wide-ranging attack on the merits. As we come to, both sides have adduced excessive evidence of a contested and contestable nature.

[17] A provisional assessment requires no more than consideration of the claims as pleaded, to ensure that on their face they disclose an arguable case on the facts as pleaded. In *Saunders v Houghton (No. 2)* this Court approved the approach of French J who adopted a "broad brush impressionistic approach" to that issue, rather than a detailed analysis of every allegation.[11] Such an assessment does not require an applicant to prove the facts upon which its claim is based, but it would allow a defendant to refute through the production of evidence a clearly wrong and critical

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10 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [38(d)] [*Saunders v Houghton (No. 1)*].

11 *Saunders v Houghton* [2012] NZCA 545, [2013] 1 NZLR 652 at [104]–[105] [*Saunders v Houghton (No. 2)*], approving *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [44], [45] and [52] [*Houghton* (HC, 2011)].

factual allegation; the receipt of evidence in support of a strike-out application provides a useful analogy.[12] The approach we describe is consistent with the approach taken in jurisdictions with detailed class action rules.[13]

High Court Judgment.

[18] The decision the subject of the appeal was not the first occasion upon which the Group's application for leave had been before the Court. On 24 February 2016 Mander J declined its first application. He found that the Group had failed to meet the threshold requirements for a representative proceeding, because the pleadings failed to identify any substantial issues of significance common to the representative plaintiff and the then members of the Group.[14] Rather, the pleading put at issue Southern Response's treatment of individual insurance claims. However the Judge granted leave to the Group to bring a modified application to obtain representative action status if the Group recast their claim to meet the concerns expressed in his judgment.[15]

[19] The Group then filed the first amended statement of claim, renewing their application for leave. As reflected in the judgment, a focus of the hearing before Gendall J was whether the amended pleading was sufficiently different to the pleading before Mander J to justify a different outcome.[16] Those issues were also traversed, even if to only a limited extent, in argument before us. We do not however propose to compare the pleadings before Mander J to those before Gendall J, or the reasoning in the two judgments. There is nothing to be gained from that exercise.

[20] Gendall J recorded that the common issue the Group now focused upon was not the individual insurance claims, but rather the claim that Southern Response has engaged in the alleged strategy.[17] He expressed himself satisfied, by a reasonably fine margin, that the Group's pleadings had been satisfactorily reframed to identify a

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12 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.
13 See for example *Hollick v City of Toronto* [2001] 3 SCR 158 at [16].
14 *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 at [74]–[76].
15 At [93].
16 Gendall J Decision, above n 4, at [42]–[61].
17 At [43]–[46].

sufficient common interest.[18] He was satisfied that a common "spine" of both claims against Southern Response was the deliberate "strategy", allegedly designed to deceive policy holders and delay claims with a view to reducing the financial liability that Southern Response might have to its policy holders, and that it was a proper common issue for a r 4.24 representative action.[19]

Arguments on appeal

[21] Southern Response argues Gendall J was wrong to grant leave for the bringing of this claim as a representative action because there is no true common issue. It says the Group has aggregated a number of individual issues, and recast them as a common issue by labelling them a strategy. It has taken 27 individual allegations of breach of policy and, by claiming the breaches were deliberate, tried to convert them into a common issue. Describing the breaches as deliberate or as part of a strategy does not create a common issue.

[22] The nature of the case, Southern Response says, is such that the position of each member of the Group raises individual questions which overwhelm the only (arguably) common issue that has been identified — the strategy. Determination of the "strategy" allegation relates only to the claim for a declaration and general damages connected with the breach of good faith claim. A general damages claim has no independent existence and depends on each member of the Group proving breach of its contract of insurance. Disposing of the issue as to whether there was a deliberate strategy will not therefore advance resolution of the individual claimants' claims.

[23] Moreover, any utility there is in the identification of that common issue is undone by the fact that the breach of good faith cause of action has no realistic prospect of success.

[24] The Judge, says Southern Response, also did not properly consider other critical factors, in particular the practicalities as to how the complaints might be advanced by way of representative action and whether this would be efficient or

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18 At [62].
19 At [58]–[62].

effective. He was therefore wrong to conclude that the Group's amended claim met the requirements of the rules.

[25] Counsel for the Group, Mr Cooke QC, says the Judge was right to grant leave, and urged upon us the view that the only issue for the Judge, and now for this Court, is whether there is a common issue. All else, he says, is case management.

[26] As we come to, the way in which the argument developed before us means that there is little benefit in assessing the correctness of the decision under appeal. We have therefore addressed ourselves to the relevant criteria afresh.

Is there a common issue of significance to the resolution of the claim, and would the representative procedure be an efficient and effective way of addressing the claims?

The conduct of the proceeding if leave is granted

[27] We received little assistance from Mr Cooke as to how the proceedings would be managed if pursued through a representative plaintiff. We infer from our review of the two High Court judgments that both Mander and Gendall JJ were in the same position. As noted, Mr Cooke's submission is that this detail is case management, and we need not concern ourselves with it. But in reality, some understanding of how a proceeding will be conducted is fundamental to the assessments required as to the significance of a common issue to the represented, the impact on the defendant, and considerations of expedition and appropriate use of judicial resources.

[28] When asked as to how he saw the conduct of this proceeding, Mr Cooke accepted Southern Response's proposition that the first cause of action, breach of contract, would have to be heard first, as that would establish whether elements of the alleged strategy were indeed lawful. But Gendall J proceeded on the basis that the second cause of action (the breach of good faith claim) would be tried first, and we assume that he did so because of the way the arguments were run at the hearing.[20]

[20] At [48] and [58].

[29] We agree that the first cause of action should be addressed first, as that provides the critical foundation for the breach of good faith claim. Proving the existence and application of the strategy which lies at the heart of that claim is only useful to the claimants if it can be shown that Southern Response misrepresented and breached its contractual obligations. The first step in proving the breach of good faith cause of action is proving the breaches alleged in the first cause of action.[21]

[30] The issue can be looked at another way. Addressing whether such a strategy exists or existed will not advance resolution of the first cause of action. That cause of action requires each claimant to prove the nature of Southern Response's contractual obligations, that Southern Response has acted in breach of those obligations (including by delaying the settlement of claims, and failing to settle them in accordance with the policy) and finally, that damages flowed from any breach.

First cause of action: breach of contract of insurance

[31] We raised with Mr Cooke whether it was proposed to conduct this first stage of the proceeding utilising the r 4.24 procedure. Mr Cooke confirmed that it was. Although he conceded that not all of the alleged breaches affect all claimants (and indeed some, due to settlement of individual claims, may not be affected at all) he argued that the single nominated representative plaintiff could still represent all claimants at the first phase. Mr O'Brien QC for Southern Response contends that it is not feasible to conduct the first cause of action as different members of the Group allege different breaches of action; no one claim under r 4.24 affects all claimants, and so one plaintiff cannot represent them all — a claim for breach of contract is quintessentially a personal claim.

[32] We do not accept that a representative plaintiff can advance claims other than those which its own claim "represents". The representative plaintiff may, as Mr Cooke argues, have the same interest as the other claimants, in the sense that he has the same insurance policy for earthquake damage and alleges that Southern Response has breached that insurance policy, but that common interest

[21] We say largely, as the second cause of action contains the additional allegations in relation to Southern Response's obligations as to how it processes claims.

does not give rise to a common issue the resolution of which will advance the disposal of the claim. Individual claimants will still need to prove the alleged breaches of the contractual obligations apply to them personally and that damages have flowed from those alleged breaches.

[33] In further discussions at the hearing Mr Cooke agreed that it would be possible to group claimants into sub-categories for the purposes of the first cause of action, for which representative plaintiffs could be utilised. That would require more than the one representative currently identified, to ensure that all of the alleged breaches are represented. Mr Cooke also said that it should be possible to reduce the extent of the live allegations of breach because the number of claimants has reduced since the amended claim was filed. If the pleading is tidied up, he said that it should be possible to proceed for that first stage on the basis of an agreed statement of facts, thereby considerably reducing the amount of evidence to be called. We therefore proceed to consider the issue of leave on this basis.

[34] In some cases an application for representative orders is made by a single plaintiff in respect of a prospective, and therefore largely hypothetical, class. In this case we have the advantage of being able to assess the commonality of interest within the current 27 members of the Group, although this number may yet grow or reduce.

[35] Having reviewed the pleading and the schedule of claims we can see that there are common threads running through claims, involving both the contractual term at issue and the type of conduct alleged to constitute a breach. Some of those threads are summarised at [11] above, but there are others, for example:

- Whether Southern Response is entitled to rely upon builder's quotes to settle the extent of its obligations when its own quantity surveyor puts the figure higher?

- Whether the use of "jacking and packing" as a repair technique meets Southern Response's obligations under the contract? (Southern Response accepts this affects six existing Group members.)

- Whether Southern Response is entitled to conduct rebuilding work itself, with an associated right to make a cash settlement at its election?

[36] In our assessment it will be possible to address the issues of contractual interpretation and whether agreed or proved conduct on the part of Southern Response is a breach of those obligations, through the representative process. That will still leave issues of whether the conduct in question was applied to the individual claimant, and assessment of individual damages to be addressed later in the proceeding. Just how these issues will be addressed, is we accept, a sequencing issue, properly the province of case management. But the fact that significant issues will need to be worked through after the common issue is addressed by the Court, and on an individual basis, is no bar to the grant of leave.[22]

[37] If the claims are organised in this way, behind truly representative plaintiffs, then we agree that would promote efficiency and economy in the conduct of the litigation for the first cause of action. It will remove the need for multiple claimants to prove in numerous proceedings, the correct interpretation of the same contractual clauses and whether the same essential conduct is in breach of contract. We are not persuaded by Southern Response that the individual issues swamp the issues of contractual interpretation and breach, some of which we have referred to at [35] above. Resolution of the common issues is likely to enable prompt resolution of the claims. It will narrow the issues for any subsequent proceedings or settlement negotiations.

[38] It could be argued that all claimants should be joined as plaintiffs. But requiring each plaintiff to prove an allegation of breach of contract which is common among many would seem to bring no advantage to any party. In other words, there would seem to be no good reason to prefer the procedural complexity of multiple claims over what should be the relative simplicity of a representative claim.

[39] At this stage it is not possible or appropriate to comment upon the possible merits of the claim embodied in the first cause of action. A very large volume of affidavit material was been filed by both sides in the High Court, contesting whether

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22 *Cridge v Studorp Ltd*, above n 9, at [11(e)].

or not Southern Response was in breach of contract. The parties seem to have attempted or at least envisaged a preliminary hearing on the merits of the claim as part of the leave hearing. As we have discussed, a detailed review of the merits of the claim is not appropriate. The approach taken has, we have no doubt, cost each side a great deal and added delay to the procedural woes of this proceeding without advancing its disposition.

[40] At this point we confine ourselves to a consideration of whether there are obvious defects in the causes of action as pleaded. We see nothing which causes us to conclude that those claims have no prospect of success. As to the affidavit material, all it establishes is that there are legal and factual issues between the parties which are properly issues for trial.

[41] We do make this observation however. Currently the pleading does not identify the Group members affected by the particular allegations. As acknowledged by Mr Cooke, it will be necessary to amend the pleading both to create the necessary sub-groupings, and to link the allegations to the relevant sub-groups and representatives of those sub-groups.

Second cause of action: breach of good faith

[42] The case for leave was more clearly articulated for the Group in respect of the second cause of action. The claim relies upon a clause in the contract of insurance, cl 2, which it is alleged obliged Southern Response to deal with the claims in good faith and in particular to:

(a) deal with claims in a fair manner; and

(b) promptly process and settle claims.

[43] We also understand the claimants to invoke an implied duty of good faith affecting all stages of claims handling.[23]

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[23] *State Insurance Ltd v Cedenco Foods Ltd* CA216/97, 6 August 1998.

[44] Southern Response mischaracterises these allegations when it says that by alleging a "strategy" the Group attempts to dress up what is in reality a collection of 27 separate claims and 27 separate issues. It is a better characterisation of the second cause of action to say that the Group relies upon the experiences of multiple claimants to prove the existence of the strategy. Proving the application of a strategy will require evidence from, at least, several of the claimants as to how their claims were handled by Southern Response. If the Group can prove, through a pattern that emerges from that evidence, that Southern Response formulated and applied a strategy to misrepresent the nature of the claimants' contractual rights, and to delay the processing of those claims, that may be evidence of a breach of the contractual duty of good faith, whether express or implied.

[45] It may be that individual claimants will then need to show that aspects of this strategy were applied to their claim. But that is a far less onerous task than each being required to prove the strategy. They will also, as Southern Response contends, have to lay out the basis for their general damages claim. At least the portion of general damages based upon delay will need to be assessed on a claimant-by-claimant basis. Again, the need for aspects of the claim to be determined individually is not a bar to the use of the r 4.24 procedure. We accept however that it is relevant to the assessment of issues of efficiency and efficacy.

[46] Southern Response also argued that the second cause of action is swamped by the first, in terms of the quantum of claim. Members' insurance claims are of significantly greater value than any claim for general damages. Southern Response says both that general damages awards are typically small, and their availability for breach of an insurance contract is not settled.[24]

[47] Since the Group's proposal is to proceed under r 4.24 with both causes of action, this point assumes less significance than it had when the sole common issue identified was the existence and application of the strategy. In any case, while we agree that the quantum involved will be considerably less than for the first cause of action, the issues at stake for the claimants are nevertheless significant — holding

[24] The possibility of general damages for breach of an insurance claim was recently discussed in *Young v Tower Insurance Ltd* [2016] NZHC 2956 at [151]–[156]. We do not discuss the merits of the Group's claims and express no view about this issue.

Southern Response to account for conduct the Group alleges was in breach of its duties of good faith.

[48] We also observe that it is when the individual claims are small that the r 4.24 procedure provides the clearest benefits. It enables the individual to seek vindication of his or her rights, even though it would be uneconomic to do so if it were forced to bring its own claim. We accept Mr Cooke's submission that the claimants would not be able to prove or challenge the strategy other than by acting collectively.

[49] Southern Response contends that the breach of good faith claim is without merit, and this is another reason to refuse leave; allowing a representative plaintiff to advance a claim that will ultimately fail will not assist in the resolution of the claimants' contractual entitlements or grievances. It points to evidence including evidence from the former Chief Executive Officer of Southern Response, Peter George Rose, to the effect that he never authorised such a strategy as Chief Executive and that no such strategy has ever existed at Southern Response.

[50] Again, an in-depth review of the merits of the proposed claim is not appropriate.[25] Southern Response says the claim is hopeless, relying on evidence it says refutes it. But the claimants point to what they say is a pattern of claim handling, detailed in the schedule the claim. It is not possible or appropriate to reach a view on this factual contest at this early stage of the proceeding.

[51] The claimants will need to prove that:

(a) Southern Response did have contractual obligations to them to deal with their claims in a fair and timely way, and in good faith.

(b) A strategy existed as alleged, and was deployed by Southern Response in breach of its contractual obligations.

(c) General damages are recoverable in respect of that breach.

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[25] See above at [16]–[17].

While we acknowledge that this claim is not likely to be an easy one to establish, and that there are issues of some legal complexity with it, on the pleadings and uncontested evidence before us, we cannot say it is without merit or, from a legal perspective fatally flawed.

[52] We see obvious efficiencies in proceeding under r 4.24. A single plaintiff can prove the existence of a strategy, calling upon such of the evidence of the 26 other claimants as it needs for that purpose. For this reason, the second cause of action is suited to the representative procedure. While discovery processes will need to be carefully managed, there can be no doubt that discovery will be a considerable undertaking and better conducted only once. All of the claimants will have the benefit of any favourable finding and will be bound by any finding against them, rather than 27 (perhaps more) separate plaintiffs each being put to proof on the same point.

[53] For completeness, we are satisfied that allowing the issues to be brought before the Court in a representative proceeding will not deprive Southern Response of any defence to the individual claims, nor give the individual claimants a claim they would otherwise not have had.

Conclusion on the issue of leave

[54] We have concluded that the r 4.24 procedure is appropriate for these proceedings. The claimants allege breaches of the same clauses of the contract arising out of certain easily defined conduct. Those issues can be conveniently resolved using the r 4.24 procedure. That will enable a limited number of representative plaintiffs to bring claims to determine the nature of Southern Response's obligations under the contracts of insurance, whether its conduct was in compliance with those obligations, and whether it had and applied a strategy in handling the claims which was in breach of its obligations of good faith. Those claims will resolve critical issues of fact and law for each of the claimants, in an effective and efficient manner.

[55] We also weigh that the r 4.24 procedure will enable claimants to pursue the good faith claims which while otherwise uneconomic, are of importance to them.

[56] It may be necessary for individual claimants to prove that conduct which breached Southern Response's contractual obligations, or that was encompassed by the strategy was applied to them, and also to prove individual loss. But those issues do not swamp, as Southern Response would have it, the common issues able to be pursued through the representative procedure.

[57] Nor do we consider that there is any unfair prejudice to Southern Response if leave is granted. There was no suggestion before us that allowing the claim to proceed in this way would deprive Southern Response of a defence that it would otherwise have. We record however that the pleading will have to be amended to link the various allegations of breach of contract to particular representative plaintiffs and particular sub-groups.

Outcome on appeal

[58] The appeal against the grant of leave under r 4.24 to bring a representative proceeding is dismissed. The next issue to be addressed arises under the cross-appeal and is whether the leave should be conditional and, if so, what any conditions should be.

Second issue: were the materials used to promote the representative action misleading, and if so what conditions should be imposed on leave under r 4.24?

Arguments on appeal

[59] In the High Court Southern Response argued that the Court should not grant leave for the representative action in light of the funding arrangement. It advanced a number of arguments, only one of which was upheld and which forms the basis of this second issue. It argued that in the promotional material the litigation funder had made misleading statements to proposed class members. The Judge expressed himself "satisfied, although only by a small margin, that technically, Group members may have been, to a limited extent, misled by some of the statements made on the

Southern Response Class Action website and elsewhere in the material provided".[26] He continued:[27]

> As I have noted, these comments may have contributed to minor misunderstanding on the part of members who have joined the plaintiff group. In my judgment this is able to be remedied by way of a further explanatory letter/memorandum (the terms of which are to be first approved by the Court) provided to existing and any future members of the plaintiffs' group, giving a further 21 day "cooling off" period to extract themselves from the LFA if required. In my view this will remedy any possible complaint as to those parties being misled by material provided to them to date. A direction relating to this aspect is to follow.

[60] On appeal the Group submits:

(a) The jurisdiction to require remedial steps of the kind directed by the Court only arises in situations where there has been an abuse of process arising from the misrepresentation which has materially misled members of the complainant group. The Judge was therefore wrong to exercise this jurisdiction in circumstances where he found only by a fine margin that some members of the Group may have been technically misled.

(b) If there was a risk that the claimants had been misled, the appropriate remedy would have been to direct publication of correcting material. But the remedy imposed by the Judge was inappropriate because of its adverse impact on other members of the Group, who would have a greater share of the costs of the action redistributed to them if the claimants exercised the new right. The disadvantage would also be arbitrary and uneven for remaining members of the Group.

(c) The Judge failed to identify how the misstatements were misleading. He provided no reasons for that finding. That was required if he was going to make remedial orders.

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26 Gendall J Decision, above n 4, at [82].
27 At [82].

(d) The material provided to the Group members is not, in any event, misleading.

[61] The second issue can be broken down into the following sub-issues:

(a) What is the Court's role in approving the funder and the funding arrangements?

(b) Were members of the Group misled as to the nature of the claim and the funding arrangements?

(c) Did the Court err in directing the cooling-off period?

[62] The Group says that Gendall J failed to give reasons for his conclusion that members of the Group may have been "technically" misled.[28] We accept that is so. The Judge's reasoning is no more extensive than the passage we have set out above at [59]. We have therefore addressed these issues afresh.

What is the Court's role in approving the funder and the funding arrangements?

Submissions

[63] Southern Response's submission is that the Court has a supervisory role in respect of the funding arrangements and, if the funding agreement between the litigation funder and the claimant has been procured through misleading material, the Court has a discretion to decline to approve the funding arrangements. It follows that if the Court has concerns regarding the arrangements, it can direct the kind of remedy that was provided to claimants in this case as a condition of such an approval.

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[28] At [82].

[64] Mr Cooke says that the High Court wrongly treated the matter as if it needed to make an order approving the litigation funding arrangements. He says that there is no separate rule that must be applied to "approve" the litigation funding arrangements. Rather, the issue is simple. In performing its function under r 4.24 to grant leave it is appropriate that the Court ensure that there is no abuse of its processes involved in the representative proceeding.

The approaches taken in the authorities

[65] Gendall J proceeded on the basis that approval of the funding arrangements was necessary, relying on the decision of this Court in *Saunders v Houghton (No. 1)*, which is the starting point for our analysis.[29] In that case this Court discussed the approach to issues of leave where a litigation funder is involved as follows:

> [38] The judge must bring a critical and creative mind to bear on all aspects and implications of the initial representation decision. While the threshold for representation orders is low, when accompanied by an order admitting a funder it may prove desirable to view the total package of orders as a stool supported by four legs, each essential to its stability:
>
> (a) the order for representation (considered along with its funding element);
>
> (b) the court's approval of the funder and the funding arrangement;
>
> (c) the application for security (which may include consideration of the final leg); and
>
> (d) the provisional appraisal of the merits. An erroneous decision on any element may either wrongly exclude worthy plaintiffs from access to the court, or wrongly impose on defendants who have committed no fault such burden of costs and distraction from their other affairs so as to pressure them to yield to a baseless demand and settle.

[66] The Court also set out a list of criteria (suggested by counsel for one of the defendants in the proceeding) as appropriate for the Court to apply when considering whether to grant a representation order involving a particular funder. The list required approval of the litigation funding agreement "at the time when the litigation

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[29] *Saunders v Houghton (No. 1)*, above n 10.

is commenced".[30] It also required that any communication inviting people to join the representative group should be submitted to the Court for approval before distribution. The Court said that in the absence of specific rules to regulate the conduct of representative proceedings "the courts must make interim provision for the types of safeguard they may be expected to provide".[31]

[67] The Court did not formally pronounce upon this list of criteria, which was not the subject of argument, and which it said should first be considered by the High Court as part of its overall evaluation. Nevertheless, the Court said the list identified "questions which warrant recording for future consideration".[32]

[68] In the subsequent High Court decision in *Houghton v Saunders* in which leave to bring a representative claim was granted, French J commented that she found the list very helpful in her deliberations, noting that it had not been challenged by any party.[33] The Judge proceeded to review proposed funding arrangements in detail.

[69] Also of interest is the *Code of Conduct for the United Kingdom* of the Third Party Litigation Funders Association 2009. Again this is set out in this Court's decision in *Saunders v Houghton (No. 1)*.[34] That Code requires commitments from funders that:

> (a) an individual claimant must have a solicitor, whose obligations are spelt out and who must not cede control of the conduct of the case to the funder;
>
> (b) promotional literature must be clear and not misleading;
>
> (c) funders will not accept claims for funding that they consider frivolous, vexatious or lacking merit;
>
> (d) funders will not engage in anti-competitive conduct; and
>
> (e) funders will comply with specified funding requirements.

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30 At [32].
31 At [63].
32 At [32].
33 *Houghton* (HC, 2011), above n 11, at [75].
34 *Saunders v Houghton (No.1)*, above n 10, at [33].

[70] Finally, we refer to the decision of Supreme Court in *Waterhouse v Contractors Bonding Ltd*.[35] That case did not involve representative proceedings. The issue for the Court was whether a party which was litigation funded should be ordered to disclose the litigation funding agreement to the other side and, if so, on what terms. In the High Court, disclosure to the Court was ordered so that the Court could ensure the funder was not legally able to usurp the parties' control over the proceedings.[36]

[71] In this Court in *Waterhouse*, the issues were framed this way: whether the Court should exercise any form of oversight over proceedings between individual litigants where a litigation funder is involved and, if so, the nature and extent of that oversight.[37] The Court held that both the trial Court and the non-funded party should be given formal notice that the litigation funder is involved when a proceeding is commenced and that certain information should be disclosed so that it could determine whether the agreement raised any issues that could lead to an abuse of process.[38]

[72] The Supreme Court held that it was not the role of the Court to act as general regulators of litigation funding agreements, or to give prior approval of such arrangements, at least in cases not involving representative actions.[39] Nor was it the role of the Court to assess the fairness of a funding arrangement as between the funder and the claimant party. However if the funding arrangement amounted to an abuse of process, the Court could intervene to grant a stay of proceeding.[40]

[73] As to that however, the Supreme Court said the inherent powers of the Court to stay a proceeding for abuse of process are not limited to the narrow tort of abuse of process but included the inherent power which any court possesses to prevent misuse of its procedures. Quoting from the judgment of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* it said steps or actions would be an abuse of process which, "although not inconsistent with the literal application of the

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35 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 [*Waterhouse* (SC)].
36 *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 13 December 2010.
37 *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, [2012] 3 NZLR 826 at [17].
38 At [67].
39 *Waterhouse* (SC), above n 35, at [28].
40 At [29].

procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right-thinking people".[41] A funding arrangement which amounted to an effective assignment of a bare cause of action to a third party would be an abuse of process. So too would proceedings that use the processes of the Court in an unfair or dishonest way, or which are manifestly groundless.[42]

[74] In light of this discussion the Supreme Court identified situations in which funding agreements should be disclosed to the opposing party, and in which the Court would order disclosure of the funding agreement under the High Court Rules.[43]

[75] The Supreme Court expressly stated it was not to be taken as commenting on the supervisory role of the Courts under r 4.24.[44] Nevertheless, we consider that the Supreme Court's comments as to the role of the Court in regulating the relationship between funder and plaintiff (and which we have summarised at [72] above) do have some application in the context of representative proceedings.

The role of the Court when checking litigation funding arrangements under r 4.24

[76] In short, we have concluded:

a) It is not the role of the Court to "approve" litigation funding arrangements. The grant of leave to bring representative proceedings is not, and should not be seen to be, an endorsements of the funding arrangements.

b) But the Court will ensure that, in granting leave under r 4.24, it is not facilitating an abuse of its processes. If a representative proceeding is based on clearly misleading funding arrangements, or is champertous (for example) then the Court will not grant leave knowing that its processes are being used to facilitate unlawful conduct.

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41 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536.
42 *Waterhouse* (SC), above n 35, at [30]–[32] and [57].
43 At [66]–[72].
44 At [28].

[77] This conclusion reflects the discussion in *Waterhouse* that it is not the general role of the courts to regulate litigation funders, and that there are institutional difficulties in the courts taking up such a role.[45] However, the invocation of the Court's processes under r 4.24 requires the Court to exercise an increased degree of vigilance when detecting possible abuses of its processes.

[78] Our starting point then is that there is good reason why the courts should exercise a greater supervisory role in respect of the setting up of representative proceedings than in proceedings where a party pursues its own claim, even if litigation funded. By the "setting up" of a proceeding we mean the funding arrangements and communications with prospective class members. This is because the applicant under r 4.24 is seeking to use a process of the court to enable one plaintiff to represent, and to bind, many. The Court will not grant leave to bring such a claim in circumstances where to do so would be to enable or further an abuse of process. So for example, if the funding arrangement entailed a bare assignment of the represented group's claims, that would amount to an abuse of process which a court could not sanction. Similarly, where the claim has been marketed to prospective litigants with misleading statements, the Court will be concerned not to allow its processes to be used to facilitate that misleading conduct.

[79] Even so, we do not consider it appropriate to speak of the Court "approving" funding arrangements and marketing materials. First, we see no basis for the court to assume such a power. There is nothing in r 4.24 which enables a court to approve funding arrangements or communications, and in the absence of rules creating a regime for approval, the status of any such approval would be uncertain. Would approval preclude the represented or others from later complaining that the material was misleading? Of more concern perhaps is that court approval, in this context at least, could reassure prospective claimants that all is well with the claim, so that they do not undertake their own assessment. There also must be questions about the institutional capacity of the courts to approve such arrangements in what is at best, in this country, a developing market for litigation funders, and given the absence of any detailed rules of procedure or legislation as exist in other jurisdictions. Rule 4.24 cannot bear the weight of a complex funding approval scheme.

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[45] At [28].

[80] We agree with Mr Cooke that in reviewing the materials for this purpose, the primary concern of the Court will be to ensure that its processes are not used in a way which amounts to an abuse, and in particular that it does not sanction such an abuse by the grant of leave. As this Court noted in *Saunders v Houghton (No. 1)*, the requirement in the High Court Rules that proceedings be determined in a "just and speedy" manner reflects "the fundamental principle … that there must be no abuse of process" in the way the proceeding is run.[46] We acknowledge that in that case this Court used the language of approval.[47] But when the passage in question is read in context, we think it apparent that the Court was not laying down a requirement that there be an approval process for funding arrangements and marketing of representative claims. The proper approach is as we have set out above.

[81] We therefore agree with Mr Cooke that the Court is not required to give prior approval for a funding arrangement. The Court will be concerned to see detail of the funding arrangement and the information provided to prospective class members, to reassure itself that there is no obviously unfair, oppressive or misleading aspect to the arrangement. The grant of leave does not amount to an approval of the arrangements, because approving the arrangements carries the risk that a prospective class member will be falsely reassured by the Court's approval and so not undertake the due diligence that they should do, to protect their own interests.

[82] It follows that if the Court considered the material used to market the claim was materially misleading, then it could refuse to grant leave in order to avoid facilitating an abuse of process. Alternatively it could make the grant of leave conditional upon the correction of the harm done by the distribution of that material. We do not think it right to stipulate what the appropriate response will be in any given situation.

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46 *Saunders v Houghton (No. 1)*, above n 10, at [26], referring to High Court Rules, r 1.2.

47 *Saunders v Houghton (No. 1)*, above n 10, at [38(b)].

Were members of the Group misled as to the nature of the claim and the funding arrangements?

Background

[83] Southern Response says that group members were misled by marketing material as to the risk they undertook in joining the proceeding. They were told in effect that it would be at no cost to them, and that the "class action holds very high prospects of success". The background to the claim was also such that there is a risk, says Southern Response, that at least some claimants misunderstood the nature of the claim they had signed up to. To address these claims it is necessary to set out a little of the background to the formation of the Group and the bringing of the claim.

[84] There were a series of public meetings in 2014 at which a possible class action against Southern Response for delay in processing and settling claims was discussed. This was called the "Honour Your Promises" action. Initial proposals were that the action be funded by contributions from group members so it needed a minimum number of policy holders to join before it was feasible. While many did pay an initial fee, in the end not enough people came forward. The lawyers involved then sought alternative sources of funding. Litigation Lending Services (LLS), an established Australian litigation funder with operations in New Zealand, was approached and agreed to fund the action.

[85] A website was set up providing initial information for those who might like to register for the class action. 450 people registered their interest through the website. Those who wished to receive more information could register their interest and if they did they were sent an information pack including a letter explaining how their representative action was expected to work, and introducing formal legal documents which were included in the pack: the litigation funding agreement between the individual claimant and LLS and an agreement for legal services between the individual claimant and the law firm involved.

[86] The letter explained the action against Southern Response would be for breach of provisions of the insurance policy, and in particular that it would allege that Southern Response had broken promises to cover the claimant for damage

suffered in the earthquake, repair it to an "as new" condition, deal with the claim in a professional and efficient manner, and give a fair settlement of the claim.

[87] The letter explained that there would be three main claims seeking:

(a) settlement of the insurance claim in accordance with the insurance contract;

(b) compensation for costs which policy holders have incurred as a result of the delay; and

(c) a damages payment recognising that Southern Response's delays were not acceptable and compensating for the stress, anxiety, frustration and time taken to deal with their claims.

[88] The letter described the two agreements. In relation to the agreement for legal services, the letter explained that each claimant would be responsible for payment of legal fees, but on the basis that those fees would not exceed five per cent of the money recovered by the claimant, with no amount payable if no amount was recovered.

[89] The litigation funding agreement was explained as follows. To cover the risk LLS was taking in funding the case, those who joined the claim would be required to agree they would pay from the monies recovered their share of the global cost of the project to LLS, together with a percentage of the amount which they recovered. This percentage would be between nine per cent and 15 per cent of the total amount recovered, depending on how long the case took to settle and the total settlement values of all the claims in the class action. Unless all claims settled within 12 months, claimants should assume that the percentage payable to LLS would be 15 per cent, although each claimant would receive a refund of the actual percentage payable if the end of the action was less than that.

[90] The legal funding agreement included a "cooling down" period, which was alternatively labelled in subsequent materials as a "cooling off" period. Anyone who signed the litigation funding agreement had 14 days within which to reconsider.

[91] In an affidavit filed in support of the application for leave, Mr Stewart Price, the Managing Director of LLS, explained that the rationale for restricting the right to reconsider to 14 days after signing the agreement was to ensure that people did not take advantage of the benefit of the class action, but then withdraw just before the point of settlement, thus avoiding the cost of the proceeding but retaining the benefit. That, he said, would be unfair to the funder, the law firm who is doing the work, and to other members of the class who would then have to bear the costs of people who took the benefit of the action, but then chose not to pay their fair share.

[92] The letter stated that it was important that those who signed up to the agreements understood them, and recommended they take advice if they were unsure about their meaning.

[93] Although 450 had registered their interest only 47 people signed the required documentation and became part of the Group. Members entered the relevant agreements between May and August 2015. 27 of those 47 now remain in the Group, the rest having settled.

[94] On appeal Southern Response argues there were three particular aspects of the promotional material for the action that were misleading. First, it argues that the material misled potential claimants as to what the nature of the claim was. Secondly, it argues that the material misled claimants by suggesting the claim had "very high prospects of success". And thirdly, it argues that material stating that there would be "no win, no fee" misled potential claimants as to how much joining the action would cost them. We address each of these arguments in turn.

Did material distributed by LLS create confusion as to the nature of the action?

[95] Southern Response relies on the evidence of Mr Kingham and Ms Taylor, two former members of the Group who have sworn affidavits in support of

Southern Response's arguments. They say they understood the representative action was only for damages flowing from Southern Response's delay, and did not include a claim for entitlements under the contracts of insurance. This was because the earlier proposed "Honour Your Promises" action would have been for damages for delay only.

[96] We see nothing in this point. The letter Mr Kingham and Ms Taylor received when they registered their interest stated in simple terms what the claim would cover. It said it would include settlement of the insurance claim in accordance with the insurance contract. This information featured toward the beginning of the letter. It was stated in plain terms. Mr Kingham admits that he did not read the material carefully. We infer that Ms Taylor also did not. It was Ms Taylor and Mr Kingham's responsibility to read what they were signing. There is no deficiency or misleading statement on this point in the marketing and explanatory material provided to prospective claimants.

Was it misleading for the material to suggest the action had "very high prospects of success"?

[97] The second aspect of the material that Southern Response complains of is the statement in advertising material that the class action holds "very high prospects of success". Southern Response observes that the allegation is inherently implausible; it is an allegation that a Crown-owned entity formulated and embarked on a deliberate strategy of misleading claimants and delaying resolution of the claim, with a view to minimise amounts paid in settlement. Gendall J described the common issue as perhaps having "a reasonably tenuous basis".[48] The funder, Southern Response says, should have taken a balanced and accurate approach and made it clear that there is a significant risk that the Group will not succeed on the allegation of a scheme.

[98] We are not in a position to assess the merits of the claim that there was a scheme operating of the nature that the Group alleges. While on the face of it, it may seem improbable, as Mr O'Brien submits, that a Crown entity would operate such a scheme, that is no reason to doubt its merit. The issue is not probabilities but proof.

[48] Gendall J Decision, above n 4, at [48].

Sometimes the improbable happens. We have no basis for forming a view as to the likely prospects for this claim and accordingly whether this is a misleading claim. We venture no comment.

Was it misleading for the material to suggest that there was "no win, no fee" for claimants?

[99] A key feature of the material on the website was the suggestion that there would be "no win, no fee". Statements on the website included that "there is nothing to lose by joining", that "there is no downside to joining", that claimants will be "no worse off" and that they would "pay nothing if the case is not successful". That raised an issue as to what exactly was a "win" for these purposes, as it was clear that the claimants would receive a payment out from Southern Response in any circumstance and, unless the proceedings had the effect of increasing the amount that the claimant was to receive, it was arguable that there was no "win" for them. Mr Kingham and Ms Taylor say they were told similar things by the lawyers acting for the Group.

[100] LLS acknowledged the ambiguity created by these statements and addressed the issue in a letter dated 2 July 2015 to members of the Group, clarifying how a "win" was to be understood for the purposes of the deduction of fees:

> **Confirmation of "can't lose" terms and waiver by LLS(NZ)**
>
> To provide additional certainty and comfort to members of the class action, where a claimant has been served with a DRA [a detailed repair/rebuild analysis] funds from Southern Response that was dated before 29 April 2015, all fees payable to LLS(NZ) under clause 11.11 of the litigation funding agreement and all professional fees charged by GCA under the agreement for legal services will not exceed a sum which would result in the claimant receiving a total distribution of settlement monies or judgment monies less than the figure contained in the DRA.
>
> Where more than one DRA has been issued to the claimant, this undertaking applies to the most recent DRA issued by Southern Response as at 29 April 2015.

[101] In addition, LLS has agreed to a ceiling to the repayment obligation under the litigation funding agreement. This takes the form of a 20-per-cent cost-cap guarantee taking into account all costs of the action. To the extent that the total fee, which includes all work done by the lawyers, the barristers, experts, LLS's success

fee, all disbursements and GST exceeds 20 per cent of the recovery, LLS has said it will absorb that cost. This means that the claimant will receive 80 per cent of what they are offered to settle the insurance claim and the damages claim.

[102] Mr Price has given evidence that LLS usually charges a percentage of between 25 to 30 per cent of whatever sum is recovered from the defendant, including any costs order. But to recognise that there was value in the claim which would be realised with or without the action, and that the work of the action was to recover the difference between that value and the true value of the entitlement under the insurance policy, LLS agreed with the class action solicitors that the percentage to be applied would be lower than usual. Accordingly, LLS agreed to fund the claim for a recovery percentage of 10 per cent to 15 per cent only, rather than its usual 20 to 25 per cent. Those arrangements are of course now subject to the cost floor and ceiling to which LLS has agreed.

[103] Southern Response says that the statements in question are misleading. Since the funding agreement requires members of the Group to pay the funder and lawyers up to 20 per cent of the entire amount of their insurance settlement, plus costs, they may well be worse off than if they had continued to negotiate with Southern Response. Although Southern Response acknowledges the cost "floor" and "ceiling" have been provided, they were only provided after the initial funding agreement. Members of the Group should have been given this information before they signed up, not after. And if the funder is proclaiming in headlines that Group members have "nothing to lose" then the qualifying material must be in a sufficiently prominent position in the same document to prevent the headlines from being misleading. A separate letter is not sufficient.

[104] In addition, even with the addition of the fee ceiling and floor, the claim that no member of the Group will be worse off and that each of them has nothing to lose is either wrong or misleading. Southern Response gives as an example claimants who did not have a DRA as at the strike date of 29 April 2015, the date which the undertaking in the letter from LLS set out above relates to. For those claimants, up to 20 per cent of the entire amount of the settlement is payable to the funder and

lawyers, with no "floor" at all, and therefore no recognition of the value that they had in their insurance claim irrespective of any representative proceedings.

[105] Even for customers who had a DRA, because the strike date of 29 April was three and a half months before proceedings were issued, any change in Southern Response's assessment thereafter is for the benefit of the funder and not the Group member, and therefore, in Southern Response's assessment, a loss to the Group member. The Kinghams were in this category. Although the Kinghams had a DRA at a certain level as at April 2015, they knew there were additional costs which would be included in the final settlement but which were not set out in the DRA. They later settled for a cash payment that included those costs, but because the DRA as at April 2015 did not include those additional costs, the floor was set at the lower amount, enabling the funder to charge its full fee. Southern Response says that these issues should have been brought expressly to the attention of possible participants.

[106] We analyse the two sets of claimants set out at [104] and [105] separately. As we come to, we disagree with Southern Response that claimants who had a DRA in April 2015 have been misled, but we are concerned that claimants who did not have a DRA at the strike date may well be worse off, and that for those claimants the statements were misleading.

[107] We agree with Southern Response that the use of this "no win, no fee" promotional material in the website and elsewhere was ill advised, especially when the details of how fees would be charged against settlements and in the case of a successful award of damages had apparently not been thought through. LLS's letter of 2 July 2015 clarifying what was treated as a success for the purposes of ensuring a claimant was "no worse off" was, as LLS accepts, needed.

[108] We approach this issue on the basis that this clarification and the later fee cap are part of the material against which we assess whether the material provided to prospective claimants was misleading. We see nothing in the timing point that Southern Response makes. Although these additional points of clarification as to the basis upon which Southern Response would charge fees and expenses were provided

after the Group members had signed up, they are for the benefit of the Group members and limit LLS's entitlement to charge fees.

[109] We would be concerned if the 2 July letter and fee cap had not been offered. Although the fees and expenses to be charged were clearly spelt out in the documents signed by claimants, the use of language of the sort employed in the website material, "no worse off", "you can't lose" had the potential to mislead claimants as to what they were giving away by signing up. This potential existed because the claimants were always going to receive some payment under their insurance contracts. Because the claim includes claims for base contractual entitlements under the contracts of insurance, some of which at least claimants would expect to be paid with or without the proceeding, there needed to be clarity about what constituted a "win" for these purposes. The right to indemnity is not at issue in this proceeding; just its measure. Without the 2 July letter there was room for confusion and dispute.

[110] The effect of the 2 July letter was to ensure that claimants would receive at least the uncontested portion of the claim represented by the latest DRA. That would accord with the natural meaning of "no worse off"; that the claimants receive at least what they would have without the litigation. The fee cap provides both fairness between claimants, and also makes allowance for the value that existed in the claim irrespective of the proceeding.

[111] As to the situation of the individual claimants, Mr Kingham says he relied on the statements in the marketing material and from counsel, that claimants would be no worse off through joining the action. In reality, he says, he will be worse off notwithstanding the 2 July and fee cap arrangements. He says that as at April 2015 he had received a DRA which together with additional costs Southern Response expected to incur on site, was about the amount he ultimately settled the claim for after the litigation had commenced. Since he was always going to receive that amount, with or without the litigation, he is now worse off once a fee is deducted.

[112] The claim that Mr Kingham is worse off rests upon the assumption that Southern Response was always going to pay the higher amount he received in settlement. We see no evidence of that. The settlement Mr Kingham ultimately reached was several hundred thousand more than Southern Response had offered as at the date that Mr Kingham signed up to the funding agreement. Mr Kingham received advice from the solicitors for the Group leading up to his settlement as to the appropriate level and form of settlement. He makes no apparent allowance for any benefit he received from that advice. In making his claim he will be worse off, Mr Kingham also assumes the claim for general damages will not succeed. Taking these matters together, we do not consider that Mr Kingham can claim to be worse off by reason of joining the claim.

[113] Ms Taylor's complaint is that her claim was in the early stages, and any DRA she had received was always going to get better. We cannot say whether that is so. We would expect any DRA provided by Southern Response to be carefully and responsibly prepared. Nevertheless the evidence provided by the Group does suggest that the DRAs tend to increase over time — sometimes dramatically so. The purpose of obtaining representation through the Group is to ensure that any settlement ultimately reached fairly reflects contractual entitlements. We accept Mr Cooke's submission that Ms Taylor's complaint is fairly characterised as a case of second thoughts about the wisdom of joining the Group. Those who had second thoughts had the opportunity to avail themselves of the 14 day "opt out" period. Ms Taylor did not do so. In any case, Ms Taylor has not shown that she will be worse off by reason of having joined the Group.

[114] Southern Response makes the more substantial point that the 2 July clarification did not adequately address the situation of claimants who had no DRA as at the strike date in April 2015, the group of claimants noted at [104] above. This meant there was no floor and the full value of their insurance claim was exposed to fees and expenses. There was therefore little or no recognition of the value in their insurance claim which existed irrespective of the representative proceeding. Southern Response refers to two of the Group who fall into this category. They have already settled. From the schedule to the statement of claim there appear to be

others who are in a similar situation (although we acknowledge that these members of the Group may also have settled).

[115] We are concerned that representations to individuals with no DRA as at the strike date that they will be no worse off after joining the proceeding at best create uncertainty as to the basis on which fees will be charged and, at worst, are misleading for these individuals. While the fee cap and reduced fee charging may mean that the fees charged are, overall, fair as between claimants and the funder (and we have no basis to assess that), just what a win is for the purposes of people who had no DRA as at April 2015 remains open to debate.

[116] LLS says that it has given a "no worse" off guarantee and stands by it. If that guarantee is given the weight it deserves, the "no worse off" and "no win/no fee" statements cannot be characterised as misleading communications in any situation. If for any reason the existing limits on the fees are insufficient as a matter of fairness to deal with a particular claimant's situation, then LLS would respond reasonably.

[117] In our view this is not an adequate answer to our concerns about regarding the pre-existing DRA as at April 2015. Although LLS says the Court should trust them to stand by their "no worse off" guarantee, the issue is what that guarantee means. There should be clear agreement as to risks, benefits and costs so that disputes do not arise, and expectations that have been created through misleading language (even where there was intent to mislead) are not disappointed. And as Mr O'Brien noted in his written submissions, if the individual plaintiffs lack the means to bring a claim against Southern Response, presumably they also lack the means to bring a claim against LLS based on any such dispute or expectation.[49]

Did the Court err in directing the cooling off period?

[118] Because Gendall J found that the some of the Group members may have been technically misled by some of the statements on the website, approval of the funding arrangements (and it followed logically, the grant of leave) was conditional upon:[50]

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[49] See the discussion in Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (2nd ed, ThomsonReuters, Pyrmont, 2012) at [17.280].

[50] Gendall J Decision, above n 4, at [82] and [102].

(a) The provision of a further explanatory letter to existing and prospective members of the Group, the terms of which were to be approved by the Court, to correct any misapprehension.

(b) That existing members then have a further 21-day "cooling off" period during which they may extract themselves from the Group if they want.

[119] Southern Response says that this was the appropriate response to the Judge's finding, and notes that Australian authorities allow for an extension of time for class members to leave a class after being given a corrective notice.[51] Mr Cooke points out that these authorities address situations where class members have to opt out of the class, or they will automatically be treated as being represented.

[120] We do not doubt the jurisdiction of this Court to require the distribution of corrective material to existing class members as a condition of the grant of leave, if there is concern that the members have been misled as to a matter material to their decision to opt into or opt out of a class. That must follow from the proposition, which Mr Cooke accepts, that the Court is concerned in the grant of leave not to approve proceedings if to do so would, in substance, sanction an abuse of process.[52]

[121] As to what steps may be taken, as a matter of common sense the publication of corrective material to existing members of a class is only effective if they can elect to withdraw when told of the true position. We do not exclude the possibility that there may be cases in which it is appropriate for a court to stipulate for the extension of a cooling off period if that is necessary to address concerns that the grant of leave would bind members to a proceeding and its outcome, and who may not understand the implications of being so bound.

[122] In this case however we see difficulty in what the Judge has directed. First, it is not clear, given his finding, just who is affected by any misleading statement and what misapprehension is required to be corrected by the further material. On the

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51 See for example *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575 at [18]–[19]; and *Johnstone v HIH Pty Ltd* [2004] FCA 190 at [99]–[107].

52 See at [78] above.

view we have taken of the facts, the risk that members have been misled as to what "no worse off" means, relates only to those who did not have a DRA prior to April 2015. However the condition the Judge has imposed extends to all claimants.

[123] There is another difficulty. The Judge did not hear argument on the implications of extending the cooling-off period. We are told that issue was not traversed during the hearing. In argument before us Mr Cooke submitted the extension of a cooling-off period so long after commencement of proceedings raises important issues of fairness within the Group, and between the Group and LLS, and these are issues not addressed by Gendall J in his judgment. Members of the Group have received benefits to date from the work that the Group's legal representatives have performed. Experts have been instructed in respect of individual claims and considerable legal costs incurred. There are also issues to be addressed in relation to the shifting of the costs incurred in connection with those who elect to use the period to leave, onto other members of the Group who decide to stay. Southern Response says that the fee ceiling meets that concern, but that is only the case if fees and costs would otherwise exceed that ceiling. We do not understand there to be evidence that the fees do at present.

[124] We accept Mr Cooke's submission that when viewed in the round, the extension of the "cooling off" period for those who had long since joined the Group created a further obstacle to the bringing of the claim, and was an unnecessary intrusion into contractual relations between LLS and Group members.

[125] Mr Cooke proposed as an antidote to any misleading communication that the Court direct an explanatory memorandum. It is difficult to see how this meets the concern that parties have joined the representative proceeding because they misunderstood the effect of the funding arrangements and in particular the fee structure. We had given some thought to the possibility that LLS can offer a further qualification on fees for those who had no DRA prior to the signing up which meets the concerns we have identified. We do not however want to fall into difficulty by proposing a solution without hearing from counsel as to its ramifications. The best approach is therefore is to attach a fresh condition to the grant of leave: that it is conditional upon provision of information to the High Court that addresses, to its

satisfaction, the concern that those members of the Group who did not have a DRA as at April 2015 may have been misled by the statements that they will only pay a fee if they win, that they have nothing to lose, and that they will be no worse off.

[126] Accordingly the cross-appeal is allowed on this ground. The order directing that a draft explanatory letter correcting the misleading statements be provided to the Court, and that there be a further "cooling off" period as a condition of leave, is set aside. However, the grant of leave to bring the representative proceeding is conditional upon the Group satisfying the High Court that the position of plaintiffs with no DRA as at April 2015 will be no worse off if the claim is successful, for the reasons given above at [114]–[115].

Third issue: discovery of unresolved claim holders' details

[127] The Group applied for discovery of the names and addresses of policy holders who have unresolved claims with Southern Response. They say they require that information to communicate with the claim holders, to enable them to decide if they wish to join the representative action. It argued that direct communication was preferable to public advertising.

[128] Gendall J declined the application, finding that it might well involve the release of confidential information and that confidentiality could only be waived by the policy holders.[53]

[129] On appeal Mr Cooke argues for the Group that any confidentiality interest, whether it arises under contract or the Privacy Act 1993, does not preclude the making of an order for discovery of the material. While the Court would properly take into account questions of privacy and confidentiality in deciding whether to make such an order, there is no breach of privacy or confidentiality in complying with a court order. In this case he says, direct communication is far preferable to advertising, and the intrusion on the claimants' privacy is minimal, merely receiving a communication under a court order.

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53 Gendall J Decision, above n 4, at [99].

[130] It is not disputed that the Court has jurisdiction to order discovery of such material, but the issue is, as Mr Cooke acknowledges, whether it should do in light of the privacy interests of the third-party claimants. People with unresolved claims against Southern Response are entitled to expect that Southern Response will not disclose their name and the status of their claim to outsiders to the contractual relationship — in other words, they have a privacy interest in that information. It is the disclosure of that information to the Group (or at least to their legal advisors) which is the intrusion on that interest.

[131] On the other hand, these proceedings are brought for the purpose of facilitating access to justice for those who are in dispute with Southern Response. We have no doubt that an advertising campaign is a less effective means of bringing these proceedings to the attention of potential claimants than direct communication. However, the intrusion on the privacy interest held by people with unresolved claims (and whose interests are unrepresented on this application) cannot be justified on the basis that advertising is a less effective means of communicating with potential claimants, especially when, as we come to, alternative means of communication exist. We therefore think Gendall J was right to decline to make the order sought.

[132] It may be that the path around this difficulty is for the Court to require Southern Response to provide information about the proceedings to the potential claimants.[54] Such a procedure would not involve a breach of privacy as it would not require disclosure of clients' details to a third party. Other jurisdictions have legislation and rules which address this issue, and which envisage processes such as this. In the absence of a detailed class action regime we consider the High Court would have jurisdiction to order such communication as an incident of its power under r 4.24 to approve the bringing of representative claims. However this is an issue that is best addressed in the High Court. We suggest it is for the parties to work together to resolve the form of that communication. We envisage it would be a short form, advising contact details for how to obtain detailed information about the claim.

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[54] In the *Houghton v Saunders* litigation, French J envisaged cooperation between the parties to facilitate a similar process, or an order compelling notification in the alternative. She did not rule on the issue due to natural justice concerns, but "indicated that the Court expected the fourth and fifth defendants would use all reasonable endeavours to notify the shareholders in question". *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010 at [68]–[70].

[133] Accordingly, this ground of the cross-appeal is dismissed.

Conclusion

[134] We summarise our conclusions on the issues as follows. First, Gendall J was right to grant leave under r 4.24. We reject Southern Response's argument that leave under r 4.24 requires a provisional appraisal of the merits of the proposed representative action for the reasons given at [16]–[17]. And for the reasons summarised at [54]–[57] above, we consider that the r 4.24 procedure provides a just and efficient means of resolving the Group's claims against Southern Response.

[135] Secondly, Gendall J was right in part to impose conditions on the granting of leave. We accept that the courts should scrutinise litigation funding arrangements to ensure that there is no abuse of process being facilitated by the court, but it is not the Court's role to approve such arrangements. In this case, the "no win, no fee" material promoting the representative action was misleading as regards claimants with no DRA as at April 2015, and corrective action is required in respect of those claimants.

[136] Thirdly, Gendall J did not err in refusing to make an order requiring Southern Response to disclose the names and contact details of other claimants whose claims remain unresolved. The Group may however wish to bring a fresh application in the High Court along the lines set out at [132] above if the parties cannot agree on a method for the Group to communicate with potential claimants.

[137] As mentioned above, we are concerned with the lack of progress with these proceedings. The High Court Rules require that parties to litigation cooperate to achieve the just, speedy and inexpensive determination of the proceeding.[55] The proceedings are in need of careful case management, to assist the parties with progressing to trial in a prompt and cost effective manner.

[138] At the hearing both counsel said they were willing to cooperate to ensure that the proceeding get back on track. Cooperation between the parties will assist in

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[55] See High Court Rules, rr 1.2, 7.1AA, 7.3 and sch 5.

resolving the procedural issues this judgment leaves outstanding in relation to leave and communication with potential claimants, and should help define the issues between the parties and ensure that only relevant material is put before the Court.

[139] Mr Cooke suggested that the first cause of action could be heard on the basis of largely agreed facts, an approach which seems sensible and which should be explored. It may also be helpful for the parties to liaise as to how each sub-class should be defined and which claimant should represent each sub-class. The more that issues are defined and agreed the simpler and less costly the proceeding will be.

Result

[140] The applications for leave to adduce fresh evidence on appeal are granted.

[141] The appeal is dismissed.

[142] The cross-appeal is allowed in part. We set aside the order directing counsel for the appellant to provide a draft explanatory letter to the Court for approval and which provides for a 21 day cooling off period. We order that leave under r 4.24 is conditional on counsel for the appellant satisfying the High Court that represented claimants with no DRA as at April 2015 will be no worse off after joining the representative proceeding**.**

[143] The cross-appeal is otherwise dismissed.

[144] The Group has succeeded on appeal in defending the grant of leave, but it has had mixed success on its cross-appeal. In the circumstances a discounted award of costs should be paid by Southern Response. The appellant must pay the respondent 75% of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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