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Client Update

Shaping the future of insurance law

Supreme Court confirms opt-out representative class actions are available with *Southern Response* decision

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AT A GLANCE

- New Zealand has no statutory or regulatory framework that specifically deals with representative actions so claimants have relied on High Court rules as the mechanism to bring an action.
- The Supreme Court, as expected, found that opt-out orders should be made available where appropriate.
- The Court states that a plaintiff's proposal should be adopted, including whether to make it opt-out or opt-in, unless there are good reasons to do otherwise. The Court provides some general guidelines on that assessment.
- It must now be a term of any opt-out representative action orders that the court approve settlement of the representative action.
- The decision otherwise confirms that, in the absence of comprehensive legislation about how to exercise power, particularly on representative actions, the courts should exercise their powers to fill that void.
- There will be continued ad-hoc determination of issues in representative action proceedings until comprehensive legislation is passed.

BACKGROUND

In May 2018, Mr and Mrs Ross issued proceedings against Southern Response Earthquake Services Ltd, a government-owned company responsible for settling Canterbury earthquake claims by AMI policyholders. The Ross couple claimed that Southern Response provided incomplete information to them for the settlement of their residential earthquake claim. They also brought an application for leave to bring a representative action on behalf of approximately 3,000 other policyholders.

The proceedings were split in two stages: the first involved the common issues and the Ross claim; and the second addressed the question of relief for the group. Mr and Mrs Ross sought orders that their representative action be opt-out for the first stage, so that all people who fell within the

identified class were a member for the purposes of the proceeding unless they expressly opted-out. People could then, if successful in the first stage, opt-in to the second stage.

The High Court dismissed the application to make the action opt-out, and only made orders on an opt-in basis. This followed earlier cases and the pending Law Commission review on class actions. Mr and Mrs Ross appealed to the Court of Appeal, who granted the appeal and made opt-out orders. The Court of Appeal also suggested that opt-out actions should now be the default (see our earlier article).

Southern Response appealed to the Supreme Court. The Court granted leave to appeal, and then handed down its decision on 17 November 2020.

THE SUPREME COURT DECISION

The Supreme Court was asked to consider whether opt-out orders were permissible for representative actions in the absence of legislative change expressly contemplating opt-out orders.

The sole provision under which representative actions can be brought in New Zealand permits a plaintiff from claiming on behalf of others who consent to that process, or where the Court directs. The provision states:

> ***4.24 Persons having same interest***
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding —
>
> *a) with the consent of the other persons who have the same interest; or*
>
> *b) as directed by the court on an application made by a party or intending party to the proceeding.*

The Supreme Court, as expected, considered that opt-out orders are available and should be used where appropriate. The Court found that opt-out orders are consistent with the three relevant objectives for representative actions: improving access to justice, facilitating efficient use of judicial resources, and strengthening incentives for compliance with the law. It upheld the Court of Appeal's finding that there was no good reason not to agree to the orders sought by Mr and Mrs Ross.

THE DECISION'S IMPACT ON OTHER REPRESENTATIVE ACTIONS

The *Southern Response* decision will have an impact on current and future representative actions.

Southern Response includes an implicit finding that the courts should exercise their power in the absence of comprehensive legislation regarding representative actions, despite there being a forthcoming legislative review.

The decision also highlights that a plaintiff's proposal should be adopted, including whether to make it opt-out or opt-in, unless there are good reasons to do otherwise. The Court provided four helpful touchstones for this issue, including the need to consider:

- whether there are any adverse effects on prospective class members – for example, where counterclaims might be made against a few members, there could be adverse effects on the entire class
- what relief is sought – for example if the relief is universal across all members (declaratory judgment, injunctive relief etc) then opt-out orders may be appropriate but for claims for compensation based on individual circumstances, opt-in orders may suit best
- whether any staging of issues in the proceeding will require a departure from those orders – for example there must be a subsequent hearing on class members' individual circumstances to establish causation and loss, and
- what orders are proposed for the court's for the court's supervision of settlement and discontinuance.

The *Southern Response* decision also confirms that a court has the power, and ought to be asked, to approve any settlement and discontinuance of a representative action. The Supreme Court expressly states that where opt-out orders are sought a court must approve the settlement. That may also need to be a term when opt-in orders are sought. The Court further clarified that the approval should be an adjudicative process.

In reaching its position, the Supreme Court drew comparisons with the processes in Australia and Canada, where substantive reviews of settlement take place. It said that prejudice to individual class members is of specific concern, including the prospects of a new representative

plaintiff continuing should there be prejudice to some members. Whether this approval for settlements must be sought for current representative actions remains to be seen, but it is possible most representative actions will seek approval out of caution.[1]

The Supreme Court confirms there should be a substantive degree of supervision and management generally by courts on representative actions to ensure they meet the objectives for representative actions. An example specifically noted by the Court is the competing representative actions in CBL, for which the Court noted there are various powers to resolve that competition. This may lead to some closer supervision of representative actions, as was the case in the recent *Feltex* decision (see our earlier article). In that case orders were made to strike out the proceeding unless security was paid – despite liability been found.

Southern Response may also lead to common fund orders, or fund equalisation orders, becoming available in New Zealand. Common fund orders are orders that first deduct a litigation funder's fee and reimbursement of costs from all settlement sums or judgment sum payable to class members, regardless of whether the members agreed to do so with the litigation funder. Fund equalisation orders allow deductions from settlement sums payable to unfunded class members equating to the funding commission payable if they had entered the agreement. Recently, the High Court of Australia ruled that common fund orders are not available under the Australian regime.

Mr and Mrs Ross have applied for common fund orders, which was subject to a hearing pending the appeal. The Supreme Court expressly said that it makes no comment on the availability of common fund orders but was silent on fund equalisation orders, despite noting their prospect. However, given the Supreme Court's comments on supervision, it is likely a lower court would be prepared to accept that they are available depending on the specifics of a case.

WHAT THE DECISION MEANS FOR INSURERS

The Supreme Court's *Southern Response* decision provides certainty that opt-out orders are available.

However, given the absence of comprehensive legislation, New Zealand is left with the current ad-hoc nature of representative action supervision. With *Southern Response*, the Supreme Court confirms there should be court supervision, and suggests that courts should exercise all powers available to them to effectively manage and supervise them. However, in doing so, it has only offered general guidance.

The ad-hoc nature of managing representative actions makes it inevitable that there will be more procedural and substantive issues that can only be resolved by court supervision – the Supreme Court specifically notes CBL and issues with its competing actions. As the courts can only determine how to best manage these actions on this ad-hoc basis, and given the stakes in each action, it seems inevitable that these issues will also be subject to appeals. This all leads to further costs for insurers and insureds until the Law Commission completes its review and comprehensive legislation is passed.

> **The Supreme Court's *Southern Response* decision provides certainty that opt-out orders are available.**

[1] As has happened with the provision of litigation funding agreements in support of representative action orders, despite there being no requirement to do so.

NEED TO KNOW MORE?

For more information please contact us.

Antony Holden
Partner, Wellington
T: +64 4 260 4286
E: Antony.Holden@wottonkearney.com

Michael Cavanaugh
Senior Associate, Auckland
T: +64 9 393 9514
E: Michael.Cavanaugh@wottonkearney.com