Case Review: Recent Cases Updates

Common fund orders

1 A common fund order (CFO) is a mechanism which provides a way of sharing the costs of bringing a funded class action between all class members, regardless of whether they have signed the funding agreement.

2 In *Ross v Southern Response Earthquake Services Ltd* the Ross plaintiffs filed/served an application for a common fund order in 2019 but decided to postpone Court consideration of it until the end of the proceeding. There was never a court judgment on the issue as the claim settled.

3 In *Simons & ors v ANZ & anor* [2024] NZCA 330 the Court of Appeal made a CFO in favour of the funders of the litigation; LPF Group Ltd and CASL Management Pty Ltd (CASL) at the same time as it made representative orders. This was a first for NZ and also ahead of Australia.

4 The Supreme Court in *ANZ v Simons & ors* [2024] NZSC 186 dismissed the application for leave to appeal.

5 In the original High Court judgment in Simons & ors v ANZ & anor [2022] NZHC 1836, Venning J:

(1) Granted the first, third, fourth and fifth appellants (together, the ASB appellants) leave to bring a proceeding against ASB Bank Ltd (ASB), the second respondent, on behalf of themselves and approximately 73,000 ASB customers;

(2) Granted the second appellants leave to bring a proceeding against ANZ Bank NZ Ltd (ANZ), the first respondent, on behalf of approximately 17,000 ANZ customers who entered into loans between 6 June 2015 and 28 May 2016. Approximately 61,900 ANZ customers who entered into loans with ANZ before that date were excluded from the representative action;

(3) Ruled that the representative proceedings be brought on an opt-out rather than an opt-in basis;

(4) Concluded that the High Court has jurisdiction to make a CFO, but declined the appellants' application to make such an order at this stage. Leave was reserved to renew the application after the completion of the next stage of the proceedings.

6 The underlying proceeding is about ANZ & ASB defective disclosure of information required under *Credit Contracts and Consumers Finance Act 2003* ("CCCFA").

7 The Court of Appeal confirmed the appropriateness of the representative orders and them being on an opt out basis.

From the CA judgment

> *[94] A CFO is made on the application of a representative party who is in a contractual relationship with a litigation funder. The terms of the contract between the representative party and litigation funder require the litigation funder to bear the costs of the representative action. A CFO imposes the payment terms agreed between the litigation funder and representative plaintiffs on all class members, obliging the representative party and all members of the class to bear a specified proportionate share of the money that will be paid to the litigation funder from the proceeds recovered in the proceedings. The litigation funders entitlement is a first priority on any monies received. Where CFOs are made, the court retains a supervisory role to ensure the interests of justice are upheld between the litigation funder and those who benefit from the litigation.*
>
> *[95] CFOs were developed to address the "free rider" issue. Prior to CFOs, members of a class who had not signed up to the funding agreement with the litigation funder were able to enjoy the fruits of a successful outcome even though they had not contributed to the costs of the litigation.*
>
> *[96] CFOs can be distinguished from Funding Equalisation Orders (FEOs), under which an amount paid to non-funded members of a class is deducted from any sums recovered in the representative proceeding and distributed pro rata amongst all class members. The litigation funder does not, however, receive any payment on account of non-funded members of the class. Thus, while FEOs achieve equity between members of the class, a litigation funder is unable to collect any commission in relation to monies paid to unfunded class members.*
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> *[99] The CFO sought by the second appellants was as follows:*
>
> > *1. If the second plaintiffs' (**the ANZ representative plaintiffs**) representative action against ANZ Bank New Zealand Limited (**ANZ**) CIV 2021-404-1190 is settled with or judgment is entered against ANZ:*

*(a) the Project Costs and other costs which LPF Litigation Funding No. 33 Limited (**LPF**) is entitled to pursuant to clause 5.1(a) of the Deed for Provision of Services in Respect of Litigation (ANZ Litigation) between LPF, CASL Management Pty Ltd, the ANZ representative plaintiffs and ANZ Class Members who have opted in to the representative action (**ANZ Deed**), will be paid from the total, gross amount payable or credited (by whatever means whatsoever) by ANZ to the ANZ Class Members (**Resolution Sum**) before any payments or credits are made to the ANZ representative plaintiffs or the other ANZ Class Members; and*

(b) LPF's CFO Services Fee (or such lower fee as the Court considers reasonable at that time) will be calculated with reference to and paid to LPF from the Resolution Sum before any payments are made to the ANZ representative plaintiffs or the other ANZ Class Members.

2. The mechanics of the payments referred to above and those made to the ANZ representative plaintiffs or other ANZ Class Members from the Resolution Sum will be as directed by the Court, or if Court approval is not required, as agreed in writing by ANZ, the ANZ representative plaintiffs and LPF.

[100] The CFO sought by the ASB appellants is as follows:

*1. If the first and third to fifth plaintiffs' (the **ASB representative plaintiffs**) representative action against ASB Bank Limited (**ASB**) CIV 2021-404-1190 is settled with or judgment is entered against ASB:*

*(a) the Project Costs and other costs which LPF Litigation Funding No. 33 Limited (**LPF**) is entitled to pursuant to clause 5.1(a) of the Deed for Provision of Services in Respect of Litigation (ASB Litigation) between LPF, CASL Management Pty Ltd, the ASB representative plaintiffs and ANZ Class Members who have opted in to the representative action (**ASB Deed**), will be paid from the total, gross amount payable or credited (by whatever means whatsoever) by ASB to the ASB Class Members (**Resolution Sum**) before any payments or credits are made to the ASB representative plaintiffs or the other ASB Class Members; and*

(b) LPF's CFO Services Fee (or such lower fee as the Court considers reasonable at that time) will be calculated with reference to and paid to

LPF from the Resolution Sum before any payments are made to the ASB representative plaintiffs or the other ASB Class Members.

2. The mechanics of the payments referred to above and those made to the ANZ representative plaintiffs or other ANZ Class Members from the Resolution Sum will be as directed by the Court, or if Court approval is not required, as agreed in writing by ASB, the ASB representative plaintiffs and LPF.

[131] Section 146(4) of the Senior Courts Act confers upon the High Court jurisdiction to give "any directions that it thinks fit" when applying any particular rule or rules. In the context of representative proceedings, this requires "flexibility in how [r 4.24] is applied". As the Supreme Court has explained, such flexibility "accords with the modern approach to representative proceedings".

[132] When considering the jurisdiction to make a CFO, sight should not be lost of the fact that a CFO seeks to settle funding issues as between the litigation funder, the representative plaintiff and class members. This relationship leaves little room for placing significant weight upon the concerns of a defendant, provided of course, no injustice is caused to a defendant through a CFO.

[133] As the Supreme Court and this Court have explained on several occasions, a key objective of r 4.24 is to enhance access to justice by representative and class members in a representative proceeding. Unlike the majority of the High Court of Australia in Brewster, we consider that the commercial viability of a litigation-funding arrangement enhances access to justice by providing certainty in the way a representative proceeding is funded.

[135] We are satisfied that r 4.24, interpreted in light of s 146(4) of the Senior Courts Act, and rr 1.2 and 1.6 of the High Court Rules, is broad enough to enable the court to issue an order that ensures the benefits of a successful representative proceeding is shared fairly between the representative plaintiff and all class members. Access to justice is best enhanced through the allocation of the fruits of a successful representative proceeding being agreed upon at an early juncture as between the representative plaintiff and class members, and through the litigation funder having a degree of assurance in knowing that those arrangements include agreement as to its return upon its investment. Critical to this conclusion is that the court will closely scrutinise the CFO and approve any settlement.

[136] The approach which we favour ensures:

a. funding arrangements for a representative proceeding are entered into on a

comparatively secure footing;

b class members are better informed about their possible returns when deciding whether or not to opt out of the proceeding; and

c less uncertainty about how the court might exercise its discretion to allocate the costs of funding the proceeding at the conclusion of the litigation.

[138] We accordingly conclude the High Court Rules confer jurisdiction on the Court to make a CFO and that, as a matter of general principle, such orders should be made at an early stage in proceedings. We dismiss ANZ and ASB's cross-appeals insofar as they challenge the High Court's jurisdiction to grant CFOs.

[141] Venning J declined to make a CFO in the High Court, but reserved leave for the plaintiffs to reapply at the conclusion of the stage-one hearing. In principle, we would have thought that the overall interests of justice and, in particular, access to justice are best achieved through a CFO being made as early as possible in a proceeding such as this. There is no clear benefit in deferring making a CFO at an early stage of this proceeding. Failing to make a CFO at this juncture in this case merely prolongs uncertainty about the funding of the proceeding, thereby placing access to justice at risk.

[142] We therefore allow the aspect of the appellants' appeal relating to the High Court's decision to decline to grant a CFO at that stage.

Supreme Court judgment

8 ANZ and ASB applied for leave to appeal against a judgment of the Court of Appeal. The issues in the proposed appeal were:

(1) Whether the High Court: has the power to make a common fund order (CFO) in a representative action; and

(2) if so, whether the High Court should have made a CFO in this case, rather than waiting until later in the proceeding.

[12] Nothing raised by the applicants suggests that their proposed challenge to the concurrent findings on jurisdiction by the Courts below has sufficient prospect of success to justify the expense and delay of a further appeal. The jurisdiction to make a CFO appears to arise naturally from the making of an opt-out order. In Southern Response Earthquake Services

Ltd v Ross, this Court held that opt-out orders can enhance access to justice. It also held that the courts have the necessary powers to regulate representative proceedings. In that case, this Court did not deal with CFOs, as there was an application for one before the High Court that had not been decided. But the Court did say that, in practical terms, the issue of "free riders" will be more problematic in an opt-out proceeding, and that the Court may have to play a greater role in representative proceedings than is currently the case.

[13] Given this Court's emphasis on access to justice, it is also hard to resist the reasoning of the Court of Appeal in terms of the timing of the making of a CFO in this case. Again, nothing raised by the applicants suggests that there is a sufficient prospect of success on this point to justify the leave application being granted.

[14] The proposed appeal is also from an interlocutory order. This means that the Court must be satisfied that it is in the interests of justice to hear an appeal before the proceeding is concluded.28 In this case that threshold is not met, which is another reason for declining the application for leave to appeal.

Post Simons in NZ

9 I am not aware on any CFO's being made since *Simons*. They are now certainly part of any application for representative orders on an opt out basis in a funded proceeding.

10 Post *Simons* Australian funders were more active in seeking claims to fund in NZ, but that has not gone anywhere yet.

Solicitors Group Costs orders

<u>Victoria</u>

11 The CFO in *Simons* is one where there is a third party litigation funder. Not all class actions are funded by a litigation funder in NZ. Some are on a conditional fee basis. In Australia it is common for law firms to fund class actions.

12 In 2020, legislation was introduced in Victoria which expressly granted the Supreme Court of Victoria the power to order that lawyers representing the plaintiff in a class action could 'self-fund' the class action and in doing so, be allowed to recover a contingency fee (also known as a **Group Costs Order**).

13 Since GCOs were introduced in Victoria in 2020, solicitors have been able, in limited circumstances, to fund the litigation as well as act for a representative plaintiff in a class action, and to receive a fee contingent upon, and proportional to, the final damages award or settlement.

14 Section 33ZDA of the Supreme Court Act 1986 relevantly provides as follows:

Group costs orders

(1) On application by the plaintiff in any group proceeding, the Court, if

satisfied that it is appropriate or necessary to ensure that justice is done

in the proceeding, may make an order —

(a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

15 The lawyers seek to replicate the remuneration models used for commercial litigation funders; namely, receiving a percentage of the gross settlement sum on top of the recoupment of legal costs and disbursements.

16 In *Thomas v The A2 Milk Company Ltd* [2023[VSC 768 the terms of the GCO sought were that the legal costs payable to the solicitors for the plaintiffs and group members (Slater and Gordon and Shine Lawyers) be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, with such payment to be shared equally between the two firms of solicitors. Subject to further order, it is sought that the percentage fixed for the GCO be 24% inclusive of GST. Additional terms of the GCO include that the two firms are liable to pay any costs payable to the defendants, with each firm severally liable for 50% of such costs. The court made the order.

17 In *Allen v G8 Education Ltd* [2024] VSC 487 the Court approved a proposed settlement. It was asked to revisit a previously made GCO in favour of Slater and Gordon. The approved rate was 27.5%. The amount Slater and Gordon receives under the GCO is 1.4 times the amount it would have received for costs on an hourly rate basis together with disbursements.

18 In *Warner v Ansell Ltd* [2024] VSC 491 a group costs order was made pursuant to s 33ZDA of the Supreme Court Act 1986 to the effect that the legal costs payable to Slater and Gordon Limited be determined at 40% rate for a resolution amount up to $50 million and a 25% rate for any part of a resolution amount above $50 million and that liability for payment of the legal costs be shared among all group members.

19 In *Bogan & anor v The Estate of Peter John Smedley* [2025] HCA 7 the High Court of Australia confirmed on 12 March 2025 the availability of a GCO in the Victorian Supreme Court but that the GCO was not transferable on the transfer of the proceeding to NSW. So the proceeding should not be transferred as there was considerable risk that the proceeding would not be able to continue as it could not otherwise be viably funded and that the claims made in the proceeding would have to be abandoned.

<u>Federal</u>

20 *In R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited* [2024] *the* Federal Court held[1] that the Federal Court also has the power to grant a "solicitors' common fund order".

21 It provides for the distribution of funds to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding. providing for such a distribution to a solicitor who has financed the class action (including by provision of security, and indemnity against adverse costs orders).

22 It relied on Section 33V of the Federal Court of Australia Act 1976 that provides:

Settlement and discontinuance—representative proceeding

(1) A representative proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.?

23 In addition, s 33ZF(1) provides that in any class action proceeding:

... the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

24 33Z relevantly provides:

Judgment—powers of the Court

> *(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:*
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> ...
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> *(g) make such other order as the Court thinks just.*

33ZF General power of Court to make orders

1. *(1)In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.*

25 The Blue Sky Decision follows the Full Federal Court's decision in *Elliott-Carde v McDonald's Australia Limited* [2023] FCAFC 162 that the Federal Court has power to make CFOs at the settlement stage pursuant to section 33V(2) of the *Federal Court of Australia Act 1976* (Cth)

26 This issue as to power arose because the applicants and two firms of solicitors (Banton Group and Shine Lawyers) negotiated arrangements for the conduct and funding of this class action in anticipation of two separate class actions being consolidated.

5 LAWYERS' REMUNERATION

5.1 The Applicants will request the Court:

a) at an appropriate stage of the proceeding – to make orders that or to the effect that:

*i legal costs and disbursements be shared among the Applicants and Group Members **(Claimants)** on a costs-equalisation basis (for instance, but without limitation, under section 33ZJ of the Act): (sic)*

*ii Banton and Shine be further remunerated for their risks in funding the legal costs and disbursements by payment of such percentage of the Resolution Sum as may be approved by the Court **(Solicitors' Common Fund Order** or **Solicitors' CFO**); and*

b) as early as practicable in the proceeding – orders that notice be given to the Claimants of the matters in (a) hereof.

5.2 In default of orders pursuant to clause 5.1b) – the Applicants will:

*a) seek orders for a transfer of the proceeding to the Supreme Court of Victoria, and upon such transfer a Group Costs Order pursuant to section 33ZDA of the Supreme Court Act 1986 (Vic) **(GCO);** alternatively*

b) seek commercial litigation funding.

27 The Court concluded that any payment made by a Solicitors' CFO would not be pursuant to any bargain struck which forms part of a retainer. As is evident from the terms of s 33V(2), the payment would be made pursuant to a Court order from an identifiable settlement fund controlled by the Court. To the extent any benefit is conferred, it will be conferred by the Court because it is "just" to do so in all the circumstances. It Is not part of a retainer deal with the client and so outside any restrictions on contingency fees based on a %.

28 In *Blue Sky* the Court referred to work of Vince Morrabito that conclude that GCOS including SCFO's were less than the deductions by litigation funders for fees plus costs.

29 *Blue Sky* is subject to appeal to the High Court.

NZ

30 In *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 the Supreme Court noted the application for a common fund order at para [62] and references the provisions in 33V & 33ZF used in Blue Sky.

31 There is no legislative equivalent in New Zealand to 33V and 33ZF, but in *Credit Suisse & anor v Houghton & ors* [2014] NZSC the Court envisaged New Zealand courts utilising similar powers to manage representative proceedings under the High Court Rules and the inherent jurisdiction. Decisions refer to HCR1.2 & 1.6 as being relevant.

32 NZ courts have identified they have similar powers to the Federal Court in Australia. Maybe someone will apply in NZ for a solicitors' CFO similar to Blue Sky.

Court approval of settlement

33 In *Re Tetro & anor* [2025] NZHC 189 the applicants sought the Court's approval of a proposed methodology for the distribution of settlement proceeds to the claimants in a class action concerning Intueri Education Group Ltd.

34 The claimants commenced proceedings alleging that the IPO documents were misleading and that Intueri had breached its continuous disclosure obligations (the Representative Proceeding). The proceedings settled in September 2024.

35 The issue for the Court was whether the Committee's proposed methodology for the distribution of settlement funds is fair and reasonable. The Settlement Agreement did not specify the methodology by which settlement funds (the Resolution Sum) was to be distributed and this was a matter left for the Committee.

36 In *Southern Response Earthquake Services Ltd v Ross [2021] 1 NZLR 117 at [81]–[82].* , the Supreme Court noted that it is common for the courts to make orders approving settlements and distribution proposals, in exercising its adjudicative power in its protective and supervisory jurisdiction.

37 The Court approved the test for settlement approval as set out by the Federal Court of Australia in *Camilleri v Trust Company (Nominees Ltd)*:4 the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole: …

(1) there will rarely be one single or obvious way in which the settlement should be framed, either between the claimants and the defendants (*inter partes* aspects) or in relation to sharing the compensation among claimants (the *inter se* aspects) — reasonableness is a range and the question is whether the proposed settlement falls within the range:

(2) it is not the task of the Court to 'second guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are "knowable" to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances: …

(3) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement … is a useful guide but is neither mandatory nor necessarily exhaustive …

(4) in relation to the *inter se* fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members … the arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible: …

38 Gardiner J was satisfied that the Committee has undertaken a thoughtful and thorough process to determine a fair distribution methodology. A pro rata distribution between claimants based on each claimant's assessed loss is fair and reasonable, being within the range of reasonable approaches. This approach is consistent with the losses claimed in the proceeding and the claimants' theory of the case that the IPO would never have gone ahead had the market known the true position about Quantum's business model.

39 The judgment references previous settlement approval/distribution cases *Livingstone v CBL Corp Ltd (in liq)* [2023] NZHC 2712 and Re Strahl [2021] NZHC 3608

Natural Disasters

40 Natural disasters in NZ are fertile ground for class actions. This is only going to increase.

41 Below is the table from the ICNZ website about insured losses. Self evidently this does not include uninsured losses.

Date	Event	Categories	Cost ($m)	Inflation adjusted cost ($m)	More Info
2024 25-27 June	North Island East Coast	Storm	29.7	29.7	
2024 Jan 1	Annual total	Extreme weather	3875.5	3964.9	
2023 9-10 May	North Island Weather	Storms	41.4	41.7	
2023 Feb 21 - 28	North Island weather	Storms	20.8	21.1	
2023 Feb 11 -17	Cyclone Gabrielle to 1 Mar 2024	Storm	1835.2	1867.1	
2023 Jan 27 - Feb 02	Auckland Anniversary Weekend to 1 Mar 2024	Flood	1978.1	2016.6	
2023 Jan 1	Annual total	Extreme weather	351.3	359.4	
2022 Nov 18 - 25	Aotearoa storms	Storms	21.6	22.2	
2022 Aug 18 - 21	Remainder of New Zealand (incl. Marlborough)	Flood	36.7	38.5	
2022 Aug 18 - 21	Nelson-Tasman Flooding	Flood	31.1	32.6	
2022 Jul 24 - 27	New Zealand weather	Storm	17.2	18.1	

2022 Jul 17 - 21	South Island weather	Storm	20.6	21.7	
2022 Jul 11 - 13	New Zealand weather	Storm	18.2	19.3	
2022 Jun 9 - 14	North and South Island Storm	Storm	20.3	21.6	
2022 May 20 - 20	Levin Tornado	Tornado	11.1	11.8	
2022 Mar 21 - 29	North Island Floods	Flood, Rain, Storm	119.6	129.2	
2022 Feb 9 - 14	Cyclone Dovi	Cyclone	54.8	59.7	
2022 Jan 15 - 15	Tonga Volcanic eruption and tsunami	Earthquake	5.9	6.5	
2022 Jan 1	Annual total	Extreme weather	324.9	356.	

Wairoa flood 2024

The first event in the table is the East Coast floods of late June 2024 that damaged properties in Wairoa & Hastings. It is already the subject of High Court proceedings *civ 2024-441-00053 Kopu Road Orchards Ltd & anor v Hawkes Bay Regional Council*. It is primarily about Council management of the Wairoa River bar. Hopefully this becomes a representative action for all affected properties. Apparently, insurers are also looking at a class action against Council.

There are likely to be more clams against Councils from Cyclone Gabrielle in Hawkes Bay where insured losses are close to $2B. There are also hundreds of millions of uninsured losses particularly to horticulture and viticulture.

Edgecumbe flood 2017

There are two proceedings commenced in 2023 against the BOP Regional Council out of the 2017 Edgecumbe floods that are yet to be certified as representative proceeding(s). The insured loss was about $113M. One by/for home and business owners (*Civ 2023-463-0006 MConnachie & ors v BOPRC*). The other by/for IAG (*civ 2023-463-0024 Rangiaho & ors v BOPRC & anor*).

IAG commenced its proceeding the day before the expiry of the 6 year limitation period. Since then it has persuaded the BOPRC to waive its limitation defence and consent to Tower, QBE, AA and Vero being in the Iag proceeding. All insurers would have been in the class of the earlier commenced McConnachie proceeding.

The application(s) for representative orders are yet to be heard. It will primarily be a contest about who should be in each class and involve issues about the rights of insureds and insurers to control what occurs and who gets first go at any recovery.

The High Court will have to consider the Australian judgment in *Johnston v Endeavour Energy [2015] NSWSC* 1117 about the rights of an insurer to successfully opt an insured out of a proceeding.

Johnston

Sean Johnston sued Endeavour in a representative capacity for loss damage caused in Blue Mountain bushfires in 2013.

Considerable property was lost. Houses were destroyed. The contents of houses, motor vehicles and other personal property were destroyed. Many of the residents suffered personal injury, particularly by way of post-traumatic stress disorder. Some, but not all of the houses which were destroyed were covered by insurance. Those that were covered by insurance were not always insured for the full value of the replacement cost. Some, but not all, of the personal property, being the contents of the houses that were destroyed, or motor vehicles or other personal property, were insured. Often, not all of the value of the contents or personal property was insured.

On 10 October 2014, the legal representatives for IAG and other related insurers filed notices purporting to opt out 565 identified individuals and entities that they insured from the Johnston proceeding.

The insurers then sent letters to the insureds noting the opt out and asserting that the insurers were entitled to, and better placed to, conduct the recovery action; and commenced a second representative proceeding against Endeavour Energy, with their insureds as group members, seeking recovery for both insured and uninsured losses arising from the bushfires (the Insurer proceeding).

The central issue before the Court was the validity of the opt out notices. The insurers asserted contractual rights under the policies which enabled them to authorise the execution and filing of the opt out notices and commence the Insurer proceedings for both insured and uninsured losses.

The Court determined that unless there is an express contractual right to do so, an insurer which has paid part of an insured's loss does not have authority to conduct and control the insured's right to recover their entire loss, both insured and uninsured. In this case, this meant that insurers were not authorised to file the opt out notices for over 550 of their insureds to remove them from the existing the Johnston proceeding class action and commence the insurers' own Insurer proceeding class action including the claims by those insureds.

This will be an issue NZ Courts will have to consider.

NHC

There are currently two extant class actions against NHC being *Mathias v EQC* (civ 2021-009-2441) and *McEvedy & anor v EQC* (civ .

Mathias is a claim against EQC for what are known as “on sold” properties where subsequent purchasers of earthquake damaged houses say EQC breached its obligations to properly assess, scope, cost and repair damaged houses. It is an opt in class action with north of 200 class members. It is ready to be allocated a trial date.

McEvedy is a claim about land damage by the Canterbury earthquakes. It is currently certified as an opt out class action, but the High Court judgments are subject to appeal and cross appeal with a hearing in mid June 2025 in the Court of Appeal.