IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2021-009-2441
[2022] NZHC 2097

BETWEEN	CAROL ANN MATHIAS Plaintiff
AND	THE EARTHQUAKE COMMISSION Defendant

Hearing: 1 August 2022

Appearances: G D R Shand for Plaintiff (via VMR)
N L Walker and C J Curran for Defendant (via VMR)

Judgment: 23 August 2022

JUDGMENT OF ASSOCIATE JUDGE LESTER

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[1] The plaintiff, Ms Mathias, applies for an order that she sue as a representative plaintiff.

[2] While the application is not opposed by The Earthquake Commission (**EQC**), it is clear that the final form of the application represents significant input from EQC resulting in Ms Mathias amending her application to address EQC's concerns.

The nature of Ms Mathias' claim

[3] Ms Mathias' property at Fir Tree Lane, Aranui, Christchurch (**the property**) was damaged in the Canterbury Earthquakes in 2010 and 2011. Ms Mathias did not own the property at that time.

[4] Ms Mathias agreed to purchase the property in September 2015 and took possession in October 2015. The vendor's rights, interest and title in respect of EQC claims were assigned to her.

[5] EQC assessed the damage caused by the Canterbury Earthquakes and produced a Scope of Works to rectify the damage. EQC determined the cost of repairing the damage fell below the statutory cap under the Earthquake Commission Act 1993 (**the Act**) and elected to undertake repairs of the property which were completed by about August 2014.

[6] Ms Mathias says that after she purchased the property she discovered the EQC repairs did not remediate the property to the standard required by the Act. The parties agree the value of the additional repairs required to bring the work up to standard under the Act, exceeds the statutory cap.

[7] In November 2021, EQC paid Ms Mathias EQC's assessment of what was due to her under the statutory cap.

The representative action

[8] Mr Shand, counsel for Ms Mathias, submits that many on-sold home owners are in a similar position to Ms Mathias in that after purchasing their property they have found further repairs are required, the costs of which exceeds the EQC statutory cap.

[9] Ms Mathias is faced with an uninsured gap, that is, the difference between her statutory entitlements under the Act and the actual cost to remediate the property to the required standard under the Act. Mr Shand submits that for many on-sold properties EQC, by itself or by its agents, did not:

(i) correctly determine the relevant natural disaster damage; and/or

(ii) complete the work to remedy the natural disaster damage to meet the standard required under the Act.

[10] In this proceeding, Ms Mathias pleads EQC was negligent in relation to the assessment of the property.

[11] The pleading is that EQC had obligations to exercise reasonable skill and care to:

(1) Identify all earthquake damage;

(2) Produce a scope of work that:
  (a) Accurately stated damage;
  (b) Once performed, restored the house to the standard required by the EQC Act;

(3) Ensure that remedial work:
  (a) Was carried out to a workmanlike standard;
  (b) Met its obligations under the EQC Act.

[12] Mr Shand submits there are likely to be thousands of people in a similar position to Ms Mathias given that EQC repaired, replaced and/or made payment for over 50,000 properties that were under the statutory cap after the Canterbury Earthquakes of 2010 and 2011 that were subsequently on-sold to new owners.

[13] Mr Shand noted the existence of the on-sold programme introduced in August 2019 which provides an ex gratia payment where certain conditions are met

by the on-sold home owner. He submits the on-sold programme does not suit all on-sold home owners. The existence of that programme is one of the reasons why the parties have suggested that the class be opt-in.

Common issue and class definition

[14] A pre-requisite to the granting of representative orders is the existence of a common issue of fact or law of significance to class members that advances their claim in some way.[1]

[15] Here, the common issue is whether EQC owes subsequent homeowners a duty of care in negligence as pleaded by Ms Mathias. The existence of a duty of care is often an appropriate common issue in a negligence proceeding which can be determined at the stage one trial.[2]

[16] If a duty of care is found to exist at stage one, individual class members will have to prove that, amongst other things, EQC breached that duty to them causing that individual class member to suffer loss. These are matters that will be deferred to the stage two examination if a duty of care is found to exist.

[17] The common issue that has been agreed by the parties is as follows:

> Whether, when settling a claim for natural disaster damage to a residential building pursuant to ss 18 and 29 of the Act, EQC owed a duty of care to a future purchaser of that residential building to:
>
> (a) exercise due skill and care in its recording, scoping and costing of the natural disaster damage; and/or
>
> (b) if a managed repair occurred, to provide/produce a repair that met the standard required by the EQC Act.

[18] Accordingly, the common issue is approved.

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1 *Cridge v Studorp* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11]; and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [53].

2 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 at [10]; *Cridge v Studorp*, above n 1, at [5]; and *Minister of Education v James Hardy New Zealand* [2020] NZHC 47 at [4].

Class definition

[19] The class as worked through by the parties is set out in the ***Schedule*** to this Judgment.

[20] The parties have agreed the proceeding should be brought on an opt-in basis. In respect of these grounds, I adopt verbatim the four main reasons advanced by Mr Curran, counsel for EQC, which are as follows:

(i) First, for a range of potential class members, participating in these proceedings would jeopardise remedies they have already sought. Relevantly, there is an overlap between the defined class and applicants to the Government on-sold policy. Since August 2019, that scheme has made ex-gratia payments to applicants to fully repair over-cap on-sold properties that are still damaged, and for which private insurance is unavailable.

(ii) A key limitation of the policy, however, is that such ex-gratia payments may be declined or discounted where applicants pursue litigation against EQC after 15 August 2019. The potential loss of Government on-sold policy payments represents a real disadvantage to class members who have already chosen to pursue those remedies. The same jeopardy exists for homeowners wishing to settle over-cap claims against EQC outside the Government on-sold policy. Where there is a real prospect of disadvantage to class members, the Supreme Court in *Southern Response Earthquake Services Ltd v Ross* (***Ross***) recognised opt-in orders are more appropriate.[3] An opt-in approach protects class members by exposing them to the potential disadvantages of a representative proceeding only where they actively choose to participate in it.

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[3] *Southern Response Earthquake Services Ltd v* Ross [2020] NZSC 126, [2021] NZLR 117, at [97], [103]–[104], and [108]; Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020) at [12.18] and [12.56(c)]; Law Commission *Class Actions and Litigation Funding: Supplementary Issues Paper* (NZLC IP48, 2021) at [1.57(c)]; and Law Commission *Class Actions and Litigation Funding* (NZLC R147, 2022) at [6.124].

(iii) Secondly, the current uncertainty in the proceeding's funding position represents another source of potential disadvantage for class members. Despite EQC's inquiries, the plaintiff has yet to confirm that a litigation funder supports this litigation. The absence of funding raises the prospect of the litigation failing for those reasons, exhausting class members' claims.[4] Potential class members are also left uncertain as to their responsibility to meet legal fees/disbursements and security for costs, as well as their potential liability for adverse costs.[5] Given class members have other options (for example, the Government on-sold policy or direct settlement with EQC), an opt-in approach ensures they participate in this proceeding only where, after full explanation in a Court-approved class notice, they choose to do so.

(iv) Thirdly, an opt-in approach will identify participating class members now. (By contrast, an opt-out approach only identifies class members if and when they come forward to prove their individual claims at stage two, which could take years.) Early identification is helpful because class members may still have statutory entitlements under the Act. Importantly, when paying statutory entitlements to cap, EQC "disregards" costs it has already paid but which it considers did not contribute to achieving the required standard of repair. As a result, a homeowner's perceived over-cap claim may, in fact, be under-cap. In such cases, further statutory entitlements could resolve all outstanding damage without the need for lengthy litigation.

(v) Once EQC promptly learns of the class member’s identity through an opt-in process, EQC can assess and provide any remaining statutory

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[4] This is not a hypothetical risk, as the recent striking out of the long-running Feltex representative proceeding for funding and security for costs failures demonstrates: *Houghton v Saunders* [2020] NZHC 1088; affirmed *Houghton v Saunders* [2020] NZCA 638; and leave to appeal declined *Houghton v Saunders* [2021] NZSC 38.

[5] Australian and Canadian class action regimes provide for class members to be exposed to adverse costs in respect of (individual) issues that need to be determined for their individual claims. This is also the position recommended by the New Zealand Law Commission: see Law Commission *Class Actions and Litigation Funding* (NZLC R147, 2022) at [12.48]–[12.50]; and Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020) at [13.10].

entitlements to class members. That achieves better and swifter access to justice for class members, and by limiting use of the proceeding to homeowners who need it, also facilitates more efficient use of judicial resources – both permissible objectives of representative proceedings.[6] The Supreme Court recognised in *Ross* that selection of an opt-in or opt-out mechanism will be informed by which best meets those permissible objectives in a particular case.[7]

(vi) Fourthly, an opt-in approach also improves access to justice by enabling class members to be told promptly about the forensic needs of the litigation. Even if the plaintiff establishes a favourable *res judicata* for class members on the common issue (duty) at stage one of this proceeding, class members will be required to prove the remaining issues on their individual claims at stage two (including on breach, causation, loss quantification and contributory negligence). Stage two will thus be fact and document intensive. On opting-in, class members can be informed by plaintiff's counsel at the earliest possible stage of the need to preserve relevant documents and gather evidence. That will improve access to justice for both parties by ensuring the Court adjudicates upon the best possible evidence at stage two, should that be required.

(vii) EQC submits that the reasons for opt-in above, already persuasive in themselves, assume greater significance given what is at stake for class members here. The Law Commission has recognised that an opt-in approach is appropriate where the proceeding relates to class members' significant assets, such as their homes (as here) or retirement savings.[8] Class members' interests in significant assets should be respected by requiring a positive choice to participate in such proceedings, rather

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6 *Southern Response Earthquake Services Ltd v* Ross, above n 3, at [37] and [40].

7 *Southern Response Earthquake Services Ltd v* Ross, above n 3, at [95].

8 Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020) at [12.17]. See, to similar effect, Law Commission *Class Actions and Litigation Funding* (NZLC R147, 2022) at [6.114] and [6.123].

than binding them to the result of litigation of which they could be unaware.

[21] I agree with the above points and that opt-in is appropriate in this case.

[22] It follows I am satisfied that the application should be granted.

Orders

[23] The plaintiff is granted leave pursuant to rule 4.24 of the High Court Rules 2016 to conduct this proceeding on behalf of all persons who meet the class definition set out in the attached ***Schedule*** and who opt-in to the proceeding on a form to be approved by the Court.

[24] The common issues to be determined in stage one of the proceedings are as set out in the attached Schedule.

[25] The plaintiff and any individual class member(s) remain free to settle and/or discontinue his or her individual claim without the leave of the Court, so long as it does not involve a class-wide settlement.

[26] Leave is reserved to the parties to apply to rescind and/or vary the r 4.24 order.

[27] The costs of this application are reserved.

Class communications

[28] Counsel wish to work through the next phase of the proceeding which involves resolving the nature and content of communications with potential class members.

[29] There will be a one day hearing at ***10:00am on Monday 14 November 2022*** with me to address the nature and content of communications with potential class

members along with a telephone conference with me at ***4:00pm on Tuesday 8 November 2022***. Otherwise, the timetable directions in relation to that application will be as set out at para 13 of counsels' joint memorandum of 12 July 2022.

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Associate Judge Lester

Solicitors:
Grant Shand, Auckland (for Plaintiff)
Russell McVeagh, Wellington (for Defendant)

SCHEDULE

Orders

1. The plaintiff is granted leave pursuant to rule 4.24 of the High Court Rules 2016 to proceed in this proceeding on behalf of all persons who meet the class definition set out below and who opt-in to the proceeding on a form to be approved by the Court.

2. The common issue to be determined in stage one of the proceedings is as set out below.

3. The plaintiff and any individual class member remain free to settle and/or discontinue his or her individual claim without the leave of the Court, so long as it does not involve class-wide settlement.

4. Leave is reserved to the parties to apply to rescind and/or vary the r 4.24 order.

5. The costs of this application are reserved.

Class definition

1. The owner of a residential building insured by s 18 of the Earthquake Commission Act 1993 ("**Act**") during the Canterbury Earthquake Sequence that commenced on 4 September 2010 and ended on 23 December 2011 ("**CES**").

2. The residential building suffered natural disaster damage in an earthquake in the CES.

3. Claims(s) made to the EQC for the natural disaster damage.

4. EQC accepted the claim(s) for natural disaster damage to the residential building.

5. In relation to the claim(s) for natural disaster damage to the residential building, EQC by itself, or its agents, produced a:

    (a) Record of the natural disaster damage to the residential building;

(b) Scope of repairs required to reinstate the natural disaster damage to the residential building;

(c) Costing to repair the natural disaster damage to the residential building.

6. EQC then determined the amount of natural disaster damage to the residential building under s 29 of the Act to be under the statutory cap of s 18 of the Act.

7. EQC then chose to settle the under-cap claim(s) for natural disaster damage to the residential building under ss 18 and 29 of the Act by way of payment, replacement or reinstatement.

8. The owner purchased the residential building subsequent to the purported EQC under-cap claim(s) settlement for natural disaster damage in paragraph 7 above.

9. At the time of the purchase in paragraph 8 above the owner was aware of the previous purported under-cap settlement of the claim(s) for natural disaster damage to the residential building by EQC.

10. EQC's purported settlement of the claim(s) for natural disaster damage in paragraph 7 above did not meet the standard required by the Act.

11. The cost to reinstate the residential building to the required standard now exceeds the statutory cap for the property under s 18 of the Act.

12. There is no policy of insurance to pay the reinstatement costs above the statutory cap for the property under s 18 of the Act.

13. The relevant act or omission on which the claim is based occurred:

(a) within six years of 3 June 2021 where EQC or its agents carried out the remedial work to the building; or

(b) within six years of 2 September 2021 for other class members; or

(c) within such longer period as is permitted by the extension provisions of the Limitation Act 2010 for any claimant to whom those extension provisions apply.

The applicable limitation period in (a)–(c) above is qualified by the Building Act 2004 where any claim relates to "building work".

14. There is no binding settlement agreement between the EQC and any owner of the residential building in respect of claim(s) made for natural disaster damage to the residential building in the CES.

Common issue

1. Whether, when settling a claim for natural disaster damage to a residential building pursuant to ss 18 and 29 of the Act, EQC owed a duty of care to a future purchaser of that residential building to:
   (a) exercise due skill and care in its recording, scoping and costing of the natural disaster damage; and/or
   (b) if a managed repair occurred, to provide/produce a repair that met the standard required by the EQC Act.