IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CIV-2023-463-006
[2026] NZHC 836

BETWEEN	DAVID P McCONNACHIE and FIONA DORIS McINTOSH First Plaintiffs
	JOHN McNEILL Second Plaintiff
	MICHAEL GRANT MEAD Third Plaintiff
	KARL DAVID STEVENSON Fourth Plaintiff
	EDGECUMBE SUPERMARKET LIMITED Fifth Plaintiff
AND	BAY OF PLENTY REGIONAL COUNCIL Defendant

CIV-2023-463-024

BETWEEN	GLEN POTANGO RANGIAHO Representative First Plaintiff
	IAG NEW ZEALAND LIMITED Second Plaintiff
	VERO INSURANCE NEW ZEALAND LIMITED Third Plaintiff
	AA INSURANCE LIMITED Fourth Plaintiff
	TOWER LIMITED Fifth Plaintiff

continuing …

QBE INSURANCE (AUSTRALIA) LTD
Sixth Plaintiff

AND

BAY OF PLENTY REGIONAL COUNCIL
First Defendant

WHAKATANE DISTRICT COUNCIL
Second Defendant

Hearing: 22 and 23 October 2025

Appearances: Simon W B Foote KC/Hamish Davies/J A Clark/HR Gwynne
for the plaintiffs in the 006 proceeding
Michael Ring KC/Oliver Collette-Moxon/T Wood/D Morley
for the plaintiffs in the 024 proceeding
Campbell Walker KC/K D Perry/J C Tian
for the Bay of Plenty Regional Council
Prajna Moodley for the Whakatane District Council

Judgment: 2 April 2026

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR
[Application for an order under Rule 4.24 of the High Court Rules 2016]

This judgment was delivered by me on ***2 April 2026*** *at* ***1:00pm***
pursuant to Rule 11.5 of the High Court Rules 2016

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Registrar/Deputy Registrar

Solicitors:
Shine Lawyers NZ Ltd (Hamish Davies/JA Clark/HR Gwynne), Auckland, for the Plaintiffs in the 006 Proceeding
Duncan Cotterill (Tanya Wood/Dion Morley), Auckland, for the Plaintiffs in the 024 Proceeding
Heaney & Partners (Kent Perry/John Tian), Auckland, for the Bay of Plenty Regional Council in both Proceedings
Brookfields Lawyers (Prajna Moodley), Auckland, for the Whakatane District Council

Counsel:
Simon B W Foote KC, Auckland, for the Plaintiffs in the 006 Proceeding
Michael G Ring KC/Oliver Collette-Moxon, Auckland, for the Plaintiffs in the 024 Proceeding
Campbell Walker KC, Auckland, for the Bay of Plenty Regional Council

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Introduction

[1] On 6 April 2017, the town of Edgecumbe suffered an extensive flood. The flood caused significant damage to property.

[2] Two proceedings have arisen from the flood. The first proceeding is CIV- 2023-463-0006 (the **006 Proceeding**). In this proceeding, five individual plaintiffs are bringing claims against the Bay of Plenty Regional Council (**BOPRC**) seeking damages. The plaintiffs plead negligence, nuisance, the tort in *Rylands v Fletcher*,[1] and breach of statutory duty against the BOPRC. The plaintiffs in the 006 Proceeding are represented by Shine Lawyers NZ Ltd (**Shine**).

[3] The second proceeding is CIV-2023-463-0024 (the **024 Proceeding**). In this proceeding, all individual policyholders with the five named insurance companies, and the insurance companies themselves, are bringing claims against the BOPRC and the Whakatāne District Council (**WDC**) seeking damages. The first-named plaintiffs have pleaded negligence, nuisance, and the tort in *Rylands v Fletcher* against the BOPRC, and negligence against WDC. As separate causes of action, the second, third, fourth, fifth and sixth plaintiffs have pleaded equitable subrogation as a cause of action against the BOPRC and WDC respectively.

Procedural history

[4] The 006 Proceeding was commenced on 9 February 2023, and on 13 March 2023, the 006 plaintiffs filed an application under r 4.24 of the High Court Rules 2016 to be certified as representatives for all other people who suffered loss/damage in the flood on an "opt out" basis.

[5] The 024 Proceeding was commenced on 16 May 2023 when the insurer, IAG New Zealand Limited (**IAG**), served a statement of claim dated 4 April 2023 as a

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1 *Rylands v Fletcher* (1868) LR 3 HL 330.

representative application. The insurer proceeding named IAG insured Ms Jill Payne as the first plaintiff and as a proposed representative plaintiff for IAG-insureds who suffered loss in the flood. Ms Payne sought to represent only IAG-insureds. IAG also purported to sue BOPRC as a named second plaintiff on an equitable subrogation basis.

[6] BOPRC filed and served statements of defence and notices of opposition to both representative applications.

[7] On 18 August 2023, the 006 plaintiffs filed and served the first amended statement of claim, and the 024 plaintiffs filed and served a first and second amended statements of claim on 22 August 2023 and 4 October 2023. The 024 plaintiffs then filed and served a third amended statement of claim on 12 April 2024 in which they replaced Ms Payne with Mr Glen Rangiaho, a new first plaintiff and representative plaintiff, and sought to add the insurers Vero Insurance New Zealand Limited (**Vero**), AA Insurance Limited (**AA**), Tower Limited (**Tower**) and QBE Insurance (Australia) Limited (**QBE**) as third to sixth plaintiffs.

[8] On 16 April 2024, the 024 plaintiffs filed and served a fourth amended statement of claim. IAG's lawyers represent Mr Rangiaho and all other IAG-insureds and the insureds of the other plaintiff insurers.

[9] On 12 April 2024, the 024 plaintiffs, BOPRC and WDC, filed a joint memorandum which, inter alia:

(a) advised that there was a dispute as to whether the IAG-insureds could or should be in the class of the 006 Proceeding;

(b) observed any claims by AA, Vero, QBE and Tower and their respective insureds would be time-barred if brought in the 024 Proceeding (the limitation period ending on 5 April 2023 – six years after the flood);

(c) advised that nevertheless BOPRC agreed that it would waive limitation to allow these insurers and any insureds to be included within the intended class of the IAG proceeding.

[10] On 10 May 2024, the 024 plaintiffs filed an amended application for representative orders in which Mr Rangiaho purports to sue on behalf of the insureds of all five plaintiff insurers.

[11] On 19 June 2024, the 024 plaintiffs filed and served notice of opposition to the 006 Proceeding representative plaintiff application which contends that all proposed members of the 024 class should be excluded from the 006 Proceeding on the basis that the rights of the individual insureds were properly exercised by the insurer plaintiffs.

[12] By notice of opposition dated 12 July 2024, the 006 plaintiffs opposed the 024 plaintiffs' representative action.

Abandonment of the r 4.24 application in the 024 Proceeding

[13] On 20 October 2025, immediately before the hearing of this matter, the r 4.24 application in the 024 Proceeding was withdrawn. The 024 Proceeding is now an ordinary subrogated action on behalf of all individuals who were insured with the relevant insurance company plaintiffs in respect of their insured losses. They are listed in the fifth amended statement of claim, which was provided in draft prior to the hearing, and they together are the first plaintiffs. The second to sixth plaintiffs have maintained their claim in equitable subrogation against BOPRC as the fifth cause of action.

Background

[14] On 6 April 2017, during ex-cyclone Debbie, the stopbank and floodwall adjacent to the Rangitāiki River at 54-56 College Road, Edgecumbe (the **College Road Floodwall**), were breached and the town of Edgecumbe was flooded (the **2017 flood**).

[15] Edgecumbe is situated on the Rangitāiki Plains in the Bay of Plenty and has historically been vulnerable to flooding because of its location adjacent to the Rangitāiki River and the low-lying topography of the surrounding plains. Since 1987

there have been at least five flooding events in and around Edgecumbe, excluding the 2017 flood. One of these, in July 2004, was a 1-in-a-100-year flood that resulted in the Rangitāiki River breaching its stopbank at Sullivan's Bend, causing significant flooding (the **2004 Flood**).

[16] Following the 2004 Flood, Edgecumbe was divided into four "quadrants" for the purposes of flood risk management and flood protection: south-east, north-east, south-west and north-west. The principal flooding risks were different as between these areas because of their locations and characteristics, and therefore the flood protection mechanisms appropriate for each quadrant also differed.

[17] Following the 2004 Flood, WDC added a notation to its Land Information Memorandum which, amongst other things, informed recipients that, where applicable, the relevant property had been subject to inundation during the 2004 flood, referring them to the relevant flood damage reports and the remedial works that had been carried out.

Bay of Plenty Regional Council

[18] BOPRC is the statutory authority responsible for the management of rivers and drainage schemes in the Bay of Plenty region. Amongst its functions are flood protection, river control, and hazard management. BOPRC manages the Rangatāiki-Tarawera River Scheme (the **Scheme**) which includes stopbanks along the Rangitāiki River, the Matahina Dam which can be operated to assist in achieving flood management objectives and the Reid's Floodway and Spillway, which are designed to divert excess flows from the main Rangitāiki River channel when the threshold river levels are reached.

[19] The cost of flood protection assets is primarily funded through targeted rates charged by BOPRC to owners of rating units (i.e. owners of land). The targeted rates for each unit are calculated and charged differentially, taking into account the benefit that property derives from the flood protection assets as a result of the property's proximity to the Rangitāiki River. Additional rates are paid by some rating units because they are also part of the Rangitāiki Drainage Scheme and/or the

Rangitāiki Pumping Scheme. Tenants (and other occupiers of properties who are not landowners) do not pay targeted rates for flood protection.

Rule 4.24 applications

[20] The representative application in the 006 Proceeding is made under r 4.24 of the Rules. That rule provides:

> **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.

[21] In *Cridge v Studorp*, the Court of Appeal summarised the principles governing the application of the rule as follows:[2]

> (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.
>
> (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.
>
> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
>
> (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.
>
> (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.
>
> (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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2 *Cridge v Studorp* [2017] NZCA 376 at [11] (footnotes omitted).

(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.

[22] A provisional assessment of the overall merits of the claim is also part of the assessment under r 4.24, but the assessment is quite general and simply requires that the claims, as pleaded, disclose an arguable case on the facts as pleaded.[3]

The 006 Proceeding

[23] There are four sets of submissions which have been filed by the plaintiffs in the 006 Proceeding: the submissions filed on 23 April 2024 (in anticipation of a hearing in May 2024 which did not proceed); submissions filed on 3 October 2025 for this hearing; submissions filed on 17 October 2025 in response to the BOPRC's submissions of 10 October 2025; and then submissions filed at the hearing on 22 and 23 October 2025.

[24] In the 006 Proceeding, the representative plaintiffs are:

(a) all owners or sets of owners of residential house properties in Edgecumbe, three of whom lived in Rata Avenue (one street over from College Road and the river), at numbers 10, 14 and 17, and one who lived at 19 Kowhai Avenue (two streets away from the river); and

(b) Edgecumbe Supermarket Limited which owned and operated the supermarket at 7 Bridge Street, Edgecumbe (between Rata Avenue and College Road).

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3 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [17].

Pleadings

[25] The causes of action in the 006 Proceeding against BOPRC are:

(a) negligence;

(b) nuisance;

(c) the tort of *Rylands v Fletcher*;[4] and

(d) breach of statutory duty.

[26] The BOPRC, in its statement of defence dated 28 July 2023, accepts the College Road Floodwall failed on 6 April 2017 causing flooding to the properties, but denies legal liability, and, as a positive defence to the claims in nuisance, *Rylands v Fletcher,* and breach of statutory duty, pleads a defence under s 148 of the Soil Conservation and Rivers Control Act 1941 (the **SCRC Act**).

[27] The specific allegations made in the 006 Proceeding against the BOPRC are:

(a) failure to monitor, inspect, maintain or conduct safety checks or reviews in respect of the College Road Floodwall and stopbank;

(b) inadequate operation (design, construction, engineering, maintenance and management) of the Scheme assets;

(c) deciding, following the 2004 flood, not to widen the lower reaches of Reid's Floodway to at least 200 metres;

(d) not having completed the modification of Reid's Floodway and spillway;

(e) not having or using monitoring devices and alarms in respect of water levels and pressure in the river, or monitoring the performance of stopbanks and floodwalls;

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4 *Rylands v Fletcher*, above n 1.

(f) deficient design in the construction of the College Road Floodwall;

(g) failing to identify and remedy defects in the College Road Floodwall;

(h) installing or allowing installation of the concrete wall at the College Road Floodwall;

(i) failing to optimise the operation of the Matahina Dam to minimise downstream flows in the 2017 flood; and

(j) failing to excavate manually the College Road Floodwall prior to the height of the 2017 flood.

The 006 Proceeding plaintiffs' application of the r 4.24 principles

[28] The 006 Proceeding plaintiffs seek to apply the principles set out in *Cridge v Studorp Ltd.*[5] The principles have been applied in *Ross v Southern Response Earthquake Services Ltd*,[6] and, more recently, in *Simons v ANZ Bank New Zealand Ltd.*[7]

[29] In addition to the principles set out in *Cridge v Studorp Ltd*[8] (as noted at [21] of this judgment), the 006 plaintiffs also point to the decision in *Ross*[9] as support for the proposition that opt-out enhances access to justice, and should be the norm (as adopted in the *Simons* decision), and the Court should adopt the procedure sought by the applicant unless there is good reason to do otherwise.[10]

Common issues

[30] Mr Foote, for the 006 plaintiffs, submits the following common issues arise in respect of the 006 representative class:

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5 *Cridge v Studorp,* above n 2.
6 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [51].
7 *Simons v ANZ Bank New Zealand Ltd* [2022] NZHC 1836.
8 *Cridge v Studorp,* above n 2.
9 *Ross v Southern Response Earthquake Services* Ltd, above n 6.
10 *Ross v Southern Response Earthquake Services* Ltd, above n 6, at [95].

(a) What were BOPRC's legal obligations relative to the 2017 flood?

(b) Did BOPRC owe the class members a duty of care?

(c) Did BOPRC breach its obligations?

(d) Did the breach cause legally recoverable loss or damage?

Duty of care

[31] The 006 plaintiffs submit that in respect of the duty of care the common issues are:

(a) Did BOPRC, as the authority responsible for the design, construction and ongoing management of the Scheme, owe class members in the 006 Proceeding a duty of care to exercise reasonable skill and care to prevent or minimise damage from the 2017 flood?

(b) Did BOPRC's functions and powers under the SCRC Act give rise to a statutory duty owed to the plaintiffs and class members to minimise and prevent damage from the 2017 flood?

[32] The 006 plaintiffs submit:

(a) BOPRC owes a duty to all members of the class listed in Schedule A of the 006 plaintiffs r 4.24 application which essentially encompasses a duty to all those who suffered loss as a result the flooding caused by the failure of the College Road Floodwall on 6 April 2017;

(b) the authorities on class actions have made it clear that it is not appropriate to enter into merits arguments at anything other than a very high level at the representative order stage.[11] Whether the duty owed by

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[11] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* above n 3, at [16]–[17], [40], and [50]–[51].

BOPRC is as extensive as pleaded remains to be argued at stage one of the representative action;

(c) the proposed class is an ascertainable class to which BOPRC arguably owed a duty of care. It was foreseeable to BOPRC that if it failed in its statutory duty, then flood damage could result to property;

(d) proximity here is an institutional rather than an individual. BOPRC created and administered the Scheme as a statutory and operational system designed to protect a delineated area and population. The relationship was fixed in advance through formal designations, targeted rating boundaries, and asset management plans identifying the communities intended to benefit. The existence and scope of BOPRC's duty can arguably be determined as a common question of law and policy by reference to those objective markers, without resolving each claim in its precise spatial or financial connection to the Scheme. Variations at the margins can be addressed later as necessary through sub-classing or stage two causation enquiries.

[33] The 006 plaintiffs submit:

(a) the area targeted by rates for the Scheme is a physical area for which responsibility for damage is assumed by BOPRC if caused by its negligence, and although BOPRC funds its flood protection works through targeted rates, the legal duty need not be confined to ratepayers; and

(b) incidental occupiers of that area are foreseeably in harm's way if BOPRC negligently fails in its duty to manage the Scheme for the protection of the community and property within its physical boundaries, and all persons and their property in the area at any particular time are arguably in a sufficiently proximate relationship of reliance and foreseeability.

[34] The 006 plaintiffs rely on the decision in *Easton Agriculture Ltd v Manawatu Wanganui Regional Council*,[12] which concerned the defendant Council's responsibility for flood-damaged crops caused by a failure of a stopbank within the lower Manawatu Flood Control Scheme. Mr Foote submits that while this was not a class action (the plaintiffs were two arable farmers), the Court found that the Council owed a duty of care on the basis of the Council's responsibilities under the SCRC Act, and that it drew the class of beneficiaries with that duty broadly "at the very least, those who paid rates for maintenance services [for the Flood Scheme] are proximate".[13]

[35] Mr Foote submits in respect of the *Easton Agriculture* decision*:*

(a) The Court held that "landowners in New Zealand may be held to owe a duty to maintain their land and take positive steps to prevent harm to adjacent landowners resulting from the operational use of their land" and harm to people and property adjacent to the flood infrastructure of the Scheme following failure to meet the duty was "wholly foreseeable". The duty of care to monitor and maintain the stopbanks on the Council was in favour of "the adjoining landowners and occupiers";[14]

(b) the decision illustrates that a council in the position of BOPRC owes a duty of care to monitor and maintain the stopbanks to prevent flood damage, and that the beneficiaries of the duty are broad — ratepayers, landowners and occupiers, and they can be readily identified without examination of individual circumstances; and

(c) it is open to the Court to define a class of people to whom the duty is owed at stage one (for example, adjoining landowners and occupiers), and leave any argument as to whether an individual plaintiff comes within the scope of the beneficiaries of the duty to stage two.ther

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12 *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC).
13 At [135].
14 At [136], [139] and [141].

[36] Mr Foote relies on *Strathboss Kiwifruit Ltd v Attorney-General.*[15] The case involved claims in negligence relating to losses suffered by multiple kiwifruit orchardists as a result the introduction of a pathogenic bacteria into New Zealand. He submits that in that case claims were bifurcated between liability and quantum, and at stage one the Court dealt, inter alia, with whether the Ministry of Agriculture and Fisheries owed a duty of care and to whom. He submits it is appropriate and tenable to assess the scope of the group to whom a duty of care is owed at stage one of a representative action, and if the particular plaintiff comes within that scope of the class it can be further examined at stage two, relying on the Court's finding:[16]

> I have found that MAF owed a duty of care to some members of the Strathboss class to take reasonable skill and care in its actions or omissions prior to the New Zealand Psa incursion to avoid physical damage to property. It also owed a duty to take care to avoid loss consequential on that damage to property. The extent of consequential loss that is properly recoverable remains to be determined. *The members of the Strathboss class who have sufficient property rights to be within the class to whom the duty is owed is yet to be determined but does include those who were both owners and operators of orchards whose vines suffered damage*.
>
> (Emphasis added)

[37] Mr Foote submits:

(a) The Court may find in stage one that a duty is owed to the class as defined in the 006 plaintiffs' application in Schedule A or may limit the class, as BOPRC suggests, to claimants who pay targeted rates, reside or have their business within the area intended to be protected by the Scheme, or some other relevant distinction;

(b) the Court could manage stage one to require evidence from the sample plaintiffs in various categories; and

(c) the Court's determination as to the scope of the duty of care will then determine the relevant class members at stage two, with any dispute about an individual class member's categorisation also dealt with at stage two.

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15 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69.
16 At [15].

[38] Mr Foote relies on *Minister of Education v James Hardie Ltd* as support for the proposition that a staged approach is appropriate and that such a process meets the objectives of securing the just, efficient and speedy determination of the proceeding, under which the first stage should determine whether a duty was owed and whether the defendant breached that duty.[17]

[39] Mr Foote seeks to distinguish the decision in *Fletcher Construction Company Ltd v MPM Waterproofing Services Ltd*[18] (on which BOPRC, in its defence, relies) with a proposition that in relation to negligence causes of action, it is difficult to set out the issues for determination between the stage one and stage two hearing.[19] He submits that the *Fletcher Construction* case was not a representative action nor akin to one, and the case management benefits that exist in a representative action were not available in the circumstances of the *Fletcher Construction* case.

[40] Mr Foote seeks to distinguish the decision in *Body Corporate No. DPS 91535 v 3A Composites GmbH*[20] on the basis that the circumstances of that case are distinguishable from the present case. He submits the circumstances of that case were that the Court of Appeal upheld the High Court's decision not to make a representative order in a claim involving "Alucobond", which was alleged to create an unacceptable fire risk in breach of the Building Code. The Court found that the issue of the Building Code compliance would inevitably vary to such an extent from building to building such that the answers to those questions would not materially contribute to the resolution of individual building owners' claims at stage two.

Breach of duty

[41] Mr Foote submits that breach of duty by BOPRC is a common issue. He submits:

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17 *Ministry of Education v James Hardie Ltd* [2018] NZHC 1481 at [55]–[61].
18 *Fletcher Construction Company Ltd v MPM Waterproofing Services Ltd* [2024] NZHC 1122 (HC).
19 At [39].
20 *Body Corporate No. DPS 91535 v 3A Composites GmbH* [2023] NZCA 648, [2023] NZCCLR 27.

(a) the 006 plaintiffs allege that BOPRC breached its duties through a series of acts and omissions relating to its management of the Scheme assets which include:

(i) the design, construction and maintenance of the College Road Floodwall;

(ii) the failure to complete widening of Reid's Floodway and Spillway;

(iii) operational management of the Matahina Dam during the flood events; and

(iv) general failures in monitoring and inspection of the Scheme's assets.

(b) whether these alleged failures occurred and whether they fell below the required standard of care are questions of fact and expert evidence that are identical for every class member and BOPRC's conduct is the same, regardless of who is asking the question; and

(c) a single hearing and determination of these issues would avoid enormous duplication of effort and risk of inconsistent findings that would arise if, alternatively, hundreds of individual trials canvassed the same evidence.

Causation

[42] In answer to BOPRC's contention that causation is an entirely individual issue, pointing to different potential causes of flooding for different properties (for example, "river breach flooding" versus "drainage flooding") and the individualised nature of its affirmative defences, Mr Foote submits that this position fails to distinguish between the two distinct stages of causation in this case:

(a) stage one — common causation: did BOPRC's alleged breaches individually or cumulatively cause or contribute to the failure of the College Road Floodwall on 6 April 2017? This is a primary common question for the entire class, to which the answer will turn on complex expert evidence regarding hydrology and engineering that is common to all claims and is most efficiently dealt with in a single hearing; and

(b) stage two — individual causation: did the subsequent inundation resulting from that failure cause the specific loss suffered by an individual class member? This question, which may involve considering other factors like drainage flooding of properties further from the breach site, is properly an individual issue to be determined at stage two.

[43] Mr Foote submits that this staged approach is well suited to the structure, and a finding at stage one that BOPRC's breaches caused the College Road Floodwall to fail would substantially advance every class member's claim, leaving only the individual consequences of that failure to be proven in stage two.

Management of individual issues and defences

[44] Mr Foote submits that a representative order will not deprive BOPRC of any defences it could have raised in separate proceedings such as contributory negligence or *volenti non fit injuria*. He submits that the two-stage approach is a standard and accepted methodology for representative proceedings and ensures no prejudice to the defendant, as these defences, with individual causation matters and quantum, can be assessed on an individual basis at stage two, after the common issues are resolved.

[45] Mr Foote submits that resolving core liability issues for all class members in one hearing is manifestly more efficient than conducting separate trials for each plaintiff, all of which would require the same extensive factual and expert evidence on BOPRC's alleged negligence and, in many cases, it would be cost-prohibitive for an individual plaintiff.

Summary of common issues

[46] Mr Foote, in summary, submits:

(a) all class members share a significant common interest in the determination of the existence of the duty of care, the scope of the beneficiaries of the duty, the existence of alleged breaches of duty in the management of the Scheme and whether any breach/breaches caused the failure of the College Road Floodwall. These are substantial common issues of fact and law and their resolution in a stage one hearing will be for the benefit of all the class of members and will provide the most just, speedy and inexpensive determination of the core matters in dispute, consistent with the purpose of r 4.24. The individual issues of loss, causation, quantum and defences can effectively and properly be managed at a subsequent stage two of the proceeding; and

(b) the contention advanced by BOPRC that there must be more common issues than individual ones for an application under r 4.24 is misconceived, and there is no predominance requirement under r 4.24.[21]

Class definition

[47] As to BOPRC's submissions regarding the differences between the claims of the representative plaintiffs and those of some class members (or differences between the claims of different class members) with respect to the type of loss and damage suffered as a reason for the Court not to make an order under r 4.24, Mr Foote submits that these are just individual issues which will require determination at stage two once the common issues are resolved and are not a reason for denying a representative order.

[48] Mr Foote submits that in *Credit Suisse Private Equity LLC v Houghton*, the Supreme Court noted that a representative proceeding may be brought "even if

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[21] *Cridge v Studorp Ltd*, above n 2, at [36].

members of the class have different causes of action or different remedies".[22] He submits:

(a) there is no requirement for the representative plaintiffs' claims to be "typical" of those of class members or even substantially similar. Rather, what matters is that there is one or more common issues which can be usefully determined on a common basis, and that requirement can be satisfied notwithstanding significant differences between the claims of the representative plaintiff and those of the class members; and

(b) in the present case, the differences that exist between the plaintiffs' claims and class members' claims are not significant as they only relate to the particular form of the loss and damage suffered. Common issues remain applicable to each of the 006 plaintiffs.

Opt-out

[49] In response to BOPRC's contention that if a representative order is made, it ought to be on an opt-in basis, Mr Foote points to the judgment of the Court of Appeal and the Supreme Court in *Ross*[23] which he submits establishes a strong presumption in favour of an opt-out representative order and establishes the following principles:

(a) opt-out should be the norm, and no dispute should arise about the appropriate approach in most cases;

(b) in most cases there would be compelling access to justice reasons for making an opt-out order;

(c) the purposes of r 4.24 would in most cases be better served by adopting an opt-out approach;

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22 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [51].

23 *Ross v Southern Response Earthquake Services Ltd*, above n 6; and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.

(d) opt-out significantly enhances access to justice;

(e) the Court should adopt the procedure sought by the applicant unless there is good reason to do otherwise;

(f) the fact of significant individual issues to be resolved at stage two is not a reason to depart from the presumption of an opt-out order;

(g) the Court may depart from the presumption in favour of opt-out where there is a real prospect some class members may end up worse off or be adversely affected by the proceeding; and

(h) while not determinative, class size will have some relevance. An opt-in approach may be a preferable option where the class is small relative to other claims and there is a natural community of interest between the class members.

[50] Mr Foote submits that the principles were followed by the High Court in *Freer v The Earthquake Commission*,[24] and by the High Court and Court of Appeal in *Simons* v *ANZ Bank (New Zealand) Ltd* and,[25] and that the same approach should apply here as there is no good reason to oppose the opt-out order.

Interface with the 024 Proceeding

[51] The 024 plaintiffs, having withdrawn the r 4.24 application, now bring proceedings in the name of their insureds as plaintiffs based on what they maintain are contractual rights to do so contained in the relevant insurance policies. The 024 plaintiffs and BPORC assert that the 006 Proceeding class of plaintiffs cannot overlap with the 024 class of plaintiffs as they submit the insurers have a right to bring controlled proceedings in the name of the insureds, and therefore those insureds cannot be part of the 006 Proceeding seeking to recover the same loss.

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24 *Freer v The Earthquake Commission* [2023] NZHC 3662 at [133].

25 *Simons v ANZ Bank New Zealand Ltd*, above n 7; and *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] 3 NZLR 485.

[52] The 006 plaintiffs say that the 024 plaintiffs are overstating their rights under the relevant insurance policies to bring and control proceedings on behalf of the insureds.

Insurers' rights/subrogation

[53] Mr Foote argues that the 024 plaintiffs are overstating their rights to control the recovery proceedings, and that in fact a significant proportion of the insureds have the right to elect to control the recovery proceedings against BOPRC and WDC.

[54] In support of this argument, Mr Foote submits that the principles in respect of the insurers' rights of subrogation are as follows:

(a) the principles of subrogation at common law are:

(i) The insured retains the right to control litigation for insured and uninsured loss unless and until fully indemnified for all loss;

(ii) the insured must conduct the litigation with reasonable regard to the insurer's rights and must account to the insurer out of the proceeds of a successful claim because an insurer has the right in equity to recover claims paid to an insured if the insured claims successfully against a third party;

(iii) if the insured refuses to act reasonably in recovery, then the insurer can bring a claim in the insured's name;

(iv) the insurer's rights of subrogation do not extend beyond the subject matter of the policy; and

(v) an insurer does not have claims in subrogation in their own name against a third party. An insurer can only bring a claim in its own name against a third party if the claim is assigned to it by the insured. Assignment does not arise in respect of any insurance policies in this case;

(b) the common law position can be amended by contract (or statute). The insurer's common law rights of subrogation are often enhanced/amended by the terms of the insurance policy; and

(c) because the subrogation terms in insurance policies by their nature seek to diminish the common law rights of insureds, the courts interpret them strictly/narrowly. The extent to which control is forfeited, and which claims are subrogated to an insurer, and when, must be set out in clear and express language to be effective. Ambiguity is addressed *contra proferentem* against the insurer.

[55] Mr Foote submits that in the draft fifth amended statement of claim, the insurers claim in the name of the insureds for all their loss, both insured and uninsured. He submits however that the subrogation/recovery clauses in the relevant insurance policies largely:

(a) do not extinguish the insured's right to control the proceedings unless fully indemnified; and/or

(b) do not give the insurers the right to claim the insured's uninsured loss.

He submits, in respect of the policies in paragraph (a) above, this means an insured retains the right to insist they bring and control their own proceeding, with attendant obligations to the insurer. In respect of policies of the type referred to in paragraph (b) above, it means that the insurers have no authority to begin the proceedings in the insured's name for uninsured loss.

[56] Mr Foote submits that, in the present case, the insurers have some contractual rights (e.g. a discretion, but not a duty, to bring proceedings to recover insured loss), but the insureds retain the right to control the proceeding and to bring their own claim for uninsured loss. He submits that given the two proceedings cannot co-exist, the outcome should be:

(a) as the insureds have not assigned their claims, they may seek to control their own claims, or they may agree to the insurer taking their claims for an uninsured loss;

(b) the 006 Proceeding r 4.24 application should be granted as the proceeding includes all insureds claiming all loss. If the insureds with insured losses stay in the 006 Proceeding, they will need to account to the insurer in respect of recovered insured losses, however, the insured will have the opportunity to opt out of the class action by the opt-out date, and the insureds may, at that stage, agree to the insurer taking claims for uninsured loss (if any); and

(c) this outcome resolves the authority issue for the insurers and properly gives the insured a choice of whether to hand over control rights generally and in respect of uninsured claims.

[57] Mr Foote submits that three cases support the 006 plaintiffs' analysis of the insurers' subrogated rights under the policies: *Farrell Estates Ltd v Canadian Indemnity Co*;[26] *Zurich Insurance Co v Ison T. H. Auto Sales*;[27] and *Johnston v Endeavour Energy*.[28] He submits the principles to be drawn from these cases are as follows:

(a) *Farrell Estates* — this case finds that the clause which subrogates all rights of recovery of the insured against any person to an insurer on making payment or assuming liability under an insurance policy, by which an insurer may then bring an action in the name of the insured to enforce those rights, does not abrogate the insured's right to control the litigation, should he choose to do so, until he is fully indemnified. The Court will not lightly take away the right of an insured to initiate and control an action in which he is claiming for losses suffered at the hands of a third party, as the right to control the litigation process is a very

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26 *Farrell Estates Ltd v Canadian Indemnity Co* (1990) 45 BCLR (2d) 223.
27 *Zurich Insurance Co v Ison T. H. Auto Sales Inc* 2011 ONSC 1870, (2011) 333 DLR (4th) 696.
28 *Johnston v Endeavour Energy* [2015] NSWSC 1117.

significant one. Express and precise language should be required to take away rights which the insured enjoyed at common law;

(b) *Zurich Insurance* — a Honda car dealer suffered insured and uninsured losses as a result of a fire in a building in which the cars were stored. The judgment turns on a dispute between the car dealer and his insurers as to the control of claims against a third-party tortfeasor alleged to have caused the fire. The contractual subrogation clause in that case was very similar to the subrogation clause in the present case, and the Court determined that a discretion for the insurer to take proceedings "in the name of the insured" for "all rights of recovery" and "against any person" did not deprive the insured of the right to control proceedings. Nor do contracts which refer broadly to "the rights of the insured" extend subrogation to claims to those outside the subject matter of the policy; and

(c) *Johnston* — this case illustrates the wording of the policy must be prescriptive to encompass uninsured loss, and if it does not, then the subrogation rights of the insurer only extend to insured losses. The insurer does not have the right to opt out insureds from an existing claim for uninsured loss, nor can it commence proceedings for the insured in respect of uninsured loss without specific authority to do so.

[58] Mr Foote submits that a review of the policy subrogation wording in the 024 plaintiffs' insurance policies leads to the following conclusions:

(a) the policies do not expressly refer to uninsured losses;

(b) while giving the insurer the option/discretion to commence proceedings for some loss, it is subject to the usual subrogation rights at common law, which entitle the insured to insist on control of the proceeding, meaning the insured retains the right to control the proceedings; and

(c) the insurers do not (in almost all cases) have the right to include uninsured loss, or at least loss outside the subject matter of the policy, in the 024 Proceedings.

[59] Mr Foote submits that this leaves the insurers presently claiming for uninsured losses without authority to do so, in circumstances where the plaintiff insureds can insist on control of the proceedings. He submits that the proper way to deal with this is to grant the 006 Proceeding r 4.24 application to ensure that all losses are claimed, and that the insureds can opt out altogether and take their own proceeding or opt out and agree that the insurer can take control of their proceeding for uninsured losses if applicable.

[60] Mr Foote submits that, in practice, the insurers would have the opt-out period under the 006 Proceeding to seek the insureds' consent to the proceedings they have filed in their names, and that the insureds would have the opportunity to weigh up the benefits of the 006 Proceeding versus remaining in the 024 Proceeding.

Insurers' claim in equitable subrogation

[61] As to the insurers' contention that they are entitled to bring all insureds' claims in their own names pursuant to "equitable subrogation" as a cause of action, Mr Foote submits that the law does not recognise a cause of action for an insurer against a third party in "equitable subrogation" or otherwise. He submits that equitable subrogation is a restitutionary remedy, not a cause of action, and reviews the authorities in this respect as follows:

(a) *Filby v Mortgage Express (No.2) Limited*:[29]

(i) the judgment explicitly states that subrogation is "a remedy, not a cause of action" and it is a tool used by the Court to reverse an unjust enrichment, not an independent cause of action;

[29] *Filby v Mortgage Express (No.2) Limited* [2004] EWCA Civ 759.

(ii) the case is not about insurance but instead involved a mortgage lender (the claimant) who was the victim of fraud when the husband forged his wife's signature on a mortgage application. The lender was not an insurer, and the homeowner was not an insured party;

(iii) this was about unjust enrichment, quoting the following passage from the judgment:[30]

> Accordingly, so far as relevant to this appeal, the remedy of equitable subrogation is a restitutionary remedy available to reverse what would otherwise be unjust enrichment of the defendant at the expense of the claimant.

(iv) the present case concerns the interpretation and operation of contractual mechanisms as they were intended to work, and there is no unjust enrichment involved;

(b) the *Cultural Foundation v Beazley Furlonge*[31] — the 024 plaintiffs claim the principle has been recognised but in fact:

(i) equitable subrogation is raised hypothetically on two occasions and both times the Judge refuses to rule on it, highlighting that it was not properly argued, and its scope is unclear;[32]

(ii) the case is not about defining types of subrogation but instead is about determining which policy year specific claims should attach to, based on when "circumstances" were notified, and the insurers' right to setoff overpaid defence costs on the occasion of a Third Parties Rights (Rights against Insurers) Act 1930;

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30 At [62].
31 *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm).
32 At [376(iv)] and [447].

(c) *Re HIH Casualty and General Insurance*[33] — a case which involved QBE seeking to recover payments it made for leaky building claims, which it later determined should have been covered by the (now) liquidated insurer HIH/FAI. The judgment does not recognise equitable subrogation as a cause of action, illustrated by the following passage from the judgment:[34]

> As a general rule rights of subrogation have to be exercised in the name of an insured. Mr Ring submits this is not a universal rule. As an example of this he referred to the case of *Banque Financiere*[35] where a lender discharged all a borrower's debt to the benefit of another lender. In that case the lender was able to pursue recovery of its claim in its own name. Mr Ring notes that this was an example of an equitable subrogation where a restitutionary remedy was intended to prevent unjust enrichment of another. That said, Mr Ring acknowledged it is a rare event which provided the circumstances to sue in one's own name the rights subrogated from another. As shall appear later in this judgment, it is not a debate this Court needs to embark upon.

Associate Judge Christiansen did not have to determine the issue — the claim was to reverse the decision of the liquidator, and the complex unjust enrichment claim was not suitable for determination in that context. The Judge observed that "If QBE seeks a remedy of subrogation based on a claim of unjust enrichment, it may have an uphill battle in New Zealand".[36]

(d) *FM Custodians v McKenzie*[37] — this case involved a dispute over funds from a property sale where the finance company claimed entitlement because its misappropriated funds had been used to make interest payments on a mortgage held by FM Custodians. Hugh Williams J expressly found that "subrogation is a process, not a cause of action".[38] The subject was not subrogation in an insurance context but instead was

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33 *Re HIH Casualty and General Insurance (NZ) Limited (in liq)* HC Auckland CIV-2009-404-3637, 23 March 2011.
34 At [26].
35 *Banque Financiere de lat Cite v Parc (Battersea) Limited* [1999] 1AC 221 (HL).
36 At [36].
37 *FM Custodians Ltd v McKenzie* HC Auckland CIV-2009-404-3285, 26 July 2010.
38 At [67].

a commercial dispute concerning misappropriated funds, mortgage payments and competing creditors; and

(e) *Swynson Ltd v Lowick Rose LLP*[39] — this case provides a clear explanation between an insurance (or contractual) subrogation and equitable subrogation. Lord Sumption endorsed the distinction made by Lord Hoffmann in *Banque Financiere* between "contractual subrogation (as in the case of an indemnity insurance or guarantee) and equitable subrogation" where the latter is "an equitable remedy to reverse or prevent unjust enrichment, which is not based upon any agreement or common intention of the party enriched and the party deprived".[40]

[62] Mr Foote submits that the 024 plaintiffs have mischaracterised equitable subrogation as an independent cause of action, when in fact it is a remedy to reverse unjust enrichment in defective transaction cases. He submits that it has not been recognised or applied to the general operation of an insurance contract and the 024 plaintiffs' cause of action in equitable subrogation is meritless.

024 plaintiffs' submissions

Control of recovery proceedings

[63] Mr Ring KC submits that the 006 Proceeding has, as its class, those who suffered property damage as a result of the 2017 flood, whether they were insured or uninsured, and, where they were insured, whether they are claiming only insured losses or both insured and uninsured losses. He submits that this includes approximately 555 prospective plaintiffs, of which the 024 Proceeding is issued on behalf of the 486 plaintiffs. The 024 Proceeding seeks to recover both insured and uninsured losses.

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39 *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 at [24].

40 At [24], citing *Banque Financiere de lat Cite v Parc (Battersea) Limited*, above n 35.

[64] As to the 006 plaintiffs' argument that the insurers do not have the right to control the recovery proceedings in respect of both insured losses and uninsured losses, Mr Ring submits that the 006 plaintiffs' arguments do not address the existence of binding and/or persuasive (and controlling) dicta in the New Zealand authorities to the effect that:

(a) in the comparatively most favourably-worded policy to the 006 plaintiffs' argument, the category one policies held by the 024 plaintiffs, by their express terms, provide that the insurers have exclusive right to control any recovery proceeding for insured and uninsured losses because they have undertaken to fund 100 per cent of the recovery proceeding. This is the case even more so in category two policies where they have an express right to recover the insured losses (and have given a similar undertaking) and in category three policies where they have an express right to recover both insured and uninsured losses; and

(b) if the insurers have the exclusive right to control the recovery proceeding for even just insured losses, it necessarily follows that the insureds cannot recover them in the 006 Proceeding, and it is legally and procedurally impermissible for the recovery of insured and uninsured losses to be split between the 006 Proceeding and the 024 Proceeding.

Insurers' contractual subrogation rights

[65] Mr Ring submits that the general law position is that where an insured is only partially indemnified, it has the right to control recovery proceedings for its uninsured losses. He submits that while this may be a general proposition, almost invariably the subrogation terms in the policies in this case effectively reverse this entitlement.

[66] Mr Ring submits that the binding legal position in New Zealand is established by the Court of Appeal in *Arthur Barnett Ltd v National Insurance Limited.*[41] The relevant clause in the insurance policy in that case stated:[42]

> 15. The insured shall, at the expense of the company, do and concur in doing, and permit to be done, all such acts and things as may be necessary or reasonably required by the company for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the company shall be or would become entitled or subrogated, upon its paying for or making good any loss or damage under this policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the company.

[67] Mr Ring submits that the legal position established by the *Arthur Barnett* case is:

(a) the machinery clause is inserted for the benefit of the insurer to enhance its general law subrogation rights; and

(b) the default position is that the insured has control over the recovery proceeding and it is funded proportionately. However, if the insurer undertakes to fund the whole cost of the recovery action, it has the right to control the proceeding, which, in this case, the insurers have undertaken

[68] Turning to an analysis of the policies, Mr Ring submits:

(a) There are seven insureds with category one policies, in which the subrogation clauses do not give the insurer the express right to recover insured losses and do not mention uninsured losses. However, they do expressly provide that the insured, at the insurer's expense, do what the insurers require for the purposes of enforcing the subrogation rights;

(b) there are 237 insureds with category two policies, in which the subrogation clause expressly provides that the insurer has control of

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41 *Arthur Barnett Ltd v National Insurance Limited* [1965] NZLR 874 (CA).
42 As cited at 876.

any recovery proceeding for insured losses, but there is no reference to recovery for uninsured losses. He submits, in respect of these policies:

(i) the insurers have undertaken to cover 100 per cent of the recovery costs so it would be inherently implausible and illogical if the insurers did not have at least the same rights as in respect of the category one policies;

(ii) in any event, as a matter of proper interpretation, if there are also uninsured losses, the insured's express right to control and recover any insured losses could not be negated by an implied proviso. This would contradict the express term and neither would it be necessary to give business efficacy to the contract. Rather, if there is an implied term in respect of recovery of uninsured losses, to be consistent with the express term, it would have to provide that, if the insured wanted to recover its uninsured losses as well, the insurer would need to include them in the insurer's recovery action — again, particularly if the insurer is funding the whole of the costs; and

(iii) this is also consistent with the judgment in *Johnston v Endeavour Energy*[43] where the New South Wales Supreme Court held, in respect of the group one policies in that case, which also provided expressly for recovery for insured losses and were silent in respect of uninsured losses that the insurer would have been entitled to commence the recovery action in respect of the just insured losses without an insured's express consent;

(c) there are 242 insureds with category three policies, in which the subrogation clause expressly provides that the insurer has control of the recovery proceeding for both insured and uninsured losses. In respect of these policies:

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[43] *Johnston v Endeavour Energy*, above n 28.

(a) it must be unarguable that the insurer has the right to control the recovery proceeding, because that is what the policy plainly says;

(b) it would be bizarre if the insurer did not have at least the same rights in respect of category one (and category two) policies; and

(c) this was also held to be the case in the *Johnston* decision.

[69] Mr Ring presents the following analysis:

(a) the losses, insured and uninsured, for the 486 plaintiffs in the 024 Proceedings, are $72.7 million, of which uninsured losses account for approximately 1.5 per cent; and

(b) at least 369 plaintiffs of the 486 could never be in the 006 Proceeding because:

(i) 242 are category three policy insured, and this group includes some insureds who have also signed preference forms and/or only have insured losses; and

(ii) 127 are category one or two insured who have signed preference forms and/or only have insured losses.

Equitable subrogation claim

[70] Mr Ring submits that equitable subrogation is not the same as ordinary subrogation and it has been recognised:

(a) as an independent cause of action. It is materially different from ordinary subrogation because the insurer is exercising its own rights (not its insureds' rights) and therefore it is exercising these rights in its own name and not in the name of the insured. Under equitable

subrogation, the insurer is held to have acquired new rights, having the identical characteristics and content to those enjoyed by the insured, subject to any modification to ensure that the insurer does not get more than the insured would have been entitled to. Mr Ring refers to the decision in *Filby v Mortgage Express (No 2) Ltd*;[44]

(b) in the United Kingdom and the United States as applying in the insurance context, such as to enable an insurer to sue in its own name;[45] and

(c) generally by the New Zealand High Court as a cause of action whose parameters and applicable circumstances have been expressly left open. Mr Ring refers to *FM Custodians Ltd v McKenzie* and *Re HIH Casualty and General Insurance (NZ) Ltd (In Liquidation*).[46]

[71] Mr Ring submits that given the state of the law as described above, the insurers' claim in equitable subrogation cannot be dismissed as plainly meritless.

BOPRC's submissions

No sufficient common interest in fact or in law

[72] Mr Walker, for BOPRC, submits that there is no sufficient common interest between the 006 Proceeding class members to justify granting the r 4.24 application.

[73] Mr Walker submits:

(a) the resolution of common issues must substantially resolve or advance each individual group member's claim. Hence the

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44 *Filby v Mortgage Express (No.2) Ltd*, above n 29, at [63].

45 Referring to *Cultural Foundation v Beazley Furlonge Ltd*, above n 31, at [376(iv)], citing Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2011) at 166; *Progressive American Insurance Company v Geico General Insurance Company* 180 NC App 457, 637 SE 2d 282 (NC App 2006).

46 See *FM Custodians Ltd v McKenzie*, above n 37, at [13]-[14]; and *Re HIH Casualty and General Insurance (NZ) Limited (in liq)*, above n 33, at [22], [24], [36] and [38] for application in the insurance context.

requirement that the representative stage of the claim determine "some substantial issue of law or fact " for all class members;[47] otherwise, allowing a representative proceeding would not serve the objects of expediency and judicial economy;

(b) if the preponderance of uncommon issues to common issues is such that having a first, representative stage, would not substantially advance matters, there is no sufficient common interest;

(c) in relation to the 006 Proceeding plaintiffs' claim in negligence against BOPRC, fundamental to any negligence claim is establishing that the defendant owes a duty of care to the plaintiff. The issue is whether all members of the class benefit from the same duty. There is a genuine question as to whether any duty owed by BOPRC is only owed to ratepayers, or to those residing in the area (in each case, depending on where they are located), or anyone whose real or personal property may be damaged by the escape of water from the Scheme assets;

(d) in assessing whether any duty is owed by BOPRC to the 006 plaintiffs, ownership of real property, and the paying of rates in respect of that property, is at least a significant consideration and may be determinative of whether a duty is owed to a particular plaintiff;

(e) based on the decision in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*,[48] the payment of targeted rates for maintenance services was a major or determining factor as to whether sufficient proximity existed to found a duty in the context of the SCRC Act. Where a council receives funding from rates specifically to monitor or maintain flood defences such as stopbanks, there may be a sufficiently proximate relationship between the council and those ratepayers of

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47 *Credit Suisse Private Equity LLC v Houghton*, above n 22, at [2] and [51].
48 *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, above n 12.

adjacent land to find a duty of care. The corollary, at law, must be that the council may owe no duty to others in respect of its flood protection activities, recognising that:

(i) a council should not owe a duty to all residents or passer-through indiscriminately, when only ratepayers have paid for the services. Ultimately, it is the ratepayers who will bear any liability of the council to such other parties;

(ii) tenants, licensees and visitors do not pay rates; and

(iii) this avoids exposing the council to indeterminate liability to an indeterminate class in respect of indeterminate loss;

(f) there is also a divergence among those represented plaintiffs who do pay rates:

(i) properties in Edgecumbe fall into different "rating categories" that determine how much rates each property-owner pays. This calculation is directly linked to the level of benefit that properties can derive from flood protection assets for which rates are used. These variances across a reported class of members go to the existence and scope of any duty. It cannot be assumed that ratepayers subject to differential rates are owed the same duty; and

(ii) Edgecumbe is split into four "quadrants" for the purposes of flood protection, each with its own unique flooding risks and recommended protection measures. The properties in the proposed class span across at least three of those quadrants.

(g) Kós J in *Easton*[49] referred to "adjacent" and "adjoining" landowners, indicating that spatial divergence was clearly a factor in determining

[49] At [141].

> the existence of a duty of care. To the extent class members are not owed duties, or are owed duties of a materially different scope, granting the r 4.24 application would confer a right of action on members who have none.

Breach

[74] Mr Walker submits that, while there may be common issues regarding breach assuming the same duty, the potential for some class members to be owed a duty but others not, or that class members to be owed duties of a different scope, entails the risk that particular allegations of breach may only be applicable to certain class members. He submits that breach is only common to the extent that duty is common.

Causation

[75] Mr Walker submits that Edgecumbe is susceptible to both "drainage flooding" and "river flooding" and properties in certain areas are at a higher risk of one type of flooding over the other. He submits the level of flooding and damage in the 2017 flood varied across Edgecumbe based on the relevant property's location and its proximity to the College Road Floodwall.

[76] Mr Walker submits that BOPRC has pleaded a defence of contributory negligence and intends to plead *volenti non fit injuria*, and these are necessarily individualised defences and go to the issue of causation.

Loss

[77] Mr Walker submits that it does not appear to be in dispute that the issues of what loss was caused, whether it is recoverable in law, and what its quantum is, are individualised issues. He submits that BOPRC has pleaded betterment, which is an individualised defence.

Conclusion in relation to negligence

[78] Mr Walker submits, in conclusion, in respect of the negligence claim against BOPRC, that the only common issues relate to breach and to whether the breach caused the failure of the College Road Floodwall, and then only in respect of those members of the class who are owed a relevant duty. He submits that all other issues are individualised and not common.

Nuisance / Rylands v Fletcher

[79] Mr Walker submits that claims in nuisance and under the rule in *Rylands v Fletcher* are barred by s 148 of the SCRC Act based on the authority of the *Easton* decision, and that, similarly, the claim for breach of statutory duty is barred by s 126 of the SCRC Act.

[80] As to nuisance, Mr Walker submits that not all members of the class would have sufficient interest to be plaintiffs in a nuisance claim, and that, in each cause of action, there would be individual issues of causation, recoverability and quantum.

Bifurcation

[81] Mr Walker rejects the 006 Proceeding plaintiffs' submission that the issues relating to causation and quantum, which may be individualised, can be managed through bifurcation by determining issues of liability at the first stage, leaving causation and quantum for individualised second-stage hearings. Relying on the decision in the *Fletcher Construction Company Ltd v MPM WaterproofingServices Ltd*,[50] where the Court declined to order a split trial with liability to be argued at stage one and quantum at stage two, he submits that the issues of duty and breach, breach and causation, and causation and loss, cannot be disentangled "particularly in relation to negligence causes of action".[51]

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50 *Fletcher Construction Company Ltd v MPM Waterproofing Services Ltd*, above n 18.
51 At [39].

[82] Mr Walker submits that r 4.24 should not be misused to apply indirectly for the bifurcation of proceedings between liability and quantum to overcome the presumption that all matters shall be determined in one trial.

Representative action will not lead to just, speedy, efficient and inexpensive determination of claim

[83] Mr Walker submits that even if the common interest test is satisfied, it is not automatic that the Court will grant a representative action order. He refers to the Court of Appeal's statement in *Body Corporate No.DPS 91535 v 3A CompositesGmbH* where the Court said:[52]

> [64] In these circumstances, we accept that the threshold for application of r 4.24 is met: there are persons with the same interest in the subject matter of this proceeding.
>
> *Should a representative proceeding be authorised?*
>
> [65] However that does not mean that a representative proceeding order will automatically be made. Rather, all it means is that the minimum threshold for the making of such an order has been crossed. The real question in this case is whether the objectives of the High Court Rules — the just, efficient and speedy resolution of proceedings — will be advanced by making the opt out representation order sought by the appellants.

[84] Mr Walker submits that allowing the 006 Proceeding to continue as a representative action would not lead to the just, speedy or inexpensive determination of the proceeding, but, on the contrary, it would entail more complexity, the substantial extension of the proceeding in time, greater cost, and the risk of doing an injustice between the parties. He submits that there have already been significant delays in the prosecution of the 006 Proceedings plaintiffs' claim in particular, and granting the r 4.24 application might engender the following delays:

(a) it might take two to three years to get to trial on the common issues;

(b) if the 006 plaintiffs succeeded at the initial trial on duty and breach, BOPRC would be still free to argue at the initial trial that any issue of duty is not common to all class members, so that any findings of duty

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[52] *Body Corporate No. DPS 91535 v 3A Composites GmbH*, above n 20.

and breach of such duty in respect of the representative plaintiffs would not create a *res judicata* as regards the rest of the class. If BOPRC was successful in that argument it would undo the benefit of the proceeding under r 4.24, and any other class members would have to start again after any appeals on the duty point;

(c) whatever the result of the initial trial, there are likely to be appeals given the amounts at stake, which might add one or two additional years, depending on whether or not there are appeals to the Supreme Court;

(d) if the representative class had findings on common issues in its favour, all of the represented plaintiffs would then have to join the proceeding as parties, to litigate the individual or sub-class issues including BOPRC's individualised defences. The plaintiffs will need to give discovery in respect of these issues; and

(e) it is not inconceivable that it might take a further two or three years to get to a second trial, with additional one or two years for appeals, resulting in a timeframe that might be six years to nine years or more for the determination of the representative claims.

Funding and representation arrangements

[85] Mr Walker submits that the Court scrutinizes the third party funded representative actions to avoid abuse of process, referring to the *Southern Response Earthquake Services Ltd v Ross*,[53] *Ross v Southern Response Earthquake Services Ltd*,[54] and *Strathboss Kiwifruit Ltd v Attorney-General*[55] decisions.

[86] On 21 October 2025, the plaintiffs in the 006 Proceeding filed an affidavit from a Shine director, Ms Mobeena Hills, asserting that the agreements with the representative plaintiffs in the 006 Proceeding as attached to the affidavit of Mr Simon

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53 *Southern Response Earthquake Services Ltd v Ross*, above n 23, at [85]–[86].
54 *Ross v Southern Response Earthquake Services Ltd*, above n 6, at [104].
55 *Strathboss Kiwifruit Ltd v Attorney General*, above n 15.

Morrison (dated 30 September 2025), were entered into in error, and do not reflect Shine's current usual terms.

[87] The original terms of engagement by Shine in respect of the 006 Proceeding were criticised by both the 024 plaintiffs and by BOPRC. The criticisms included whether the representative plaintiffs had been advised, and told to take independent advice in respect of:

(a) the fee plus uplift can only be taken from the representative plaintiff's share of any settlement or judgment;

(b) the plaintiffs could not be subjected to a conditional fee arrangement without compliance with rr 9.8 to 9.10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;

(c) the representative plaintiffs paying all disbursements, regardless of the success (cl 4.5), and even though Shine and the representative plaintiffs benefit, includes counsel's fees; and

(d) the representative plaintiffs are responsible for paying all defendants' costs (cl 19.1) and for providing all security for costs, even though both Shine and the representative plaintiffs benefit.

[88] Subsequent to the hearing, Ms Hills filed a second affidavit dated 9 December 2025, and Mr Foote filed a memorandum dated 10 December 2025. Attached to Ms Hills' second affidavit is a letter to the 006 plaintiffs explaining the new agreement for legal services and highlighting clauses in respect of which the plaintiffs are recommended to obtain independent legal advice. The affidavit also attaches the revised legal services agreements signed by each of the representative plaintiffs.

[89] Mr Foote, in his memorandum, and Ms Hills, in her affidavit, make the following points in response to the criticism of the original legal services arrangements made by the 024 plaintiffs and BOPRC:

(a) Shine NZ will be responsible for meeting any orders for security for costs, and any adverse costs, not the 006 representative plaintiffs; and

(b) the 006 representative plaintiffs will only be responsible for paying external disbursements upon a Successful Outcome of the matter ("Successful Outcome" being defined under the agreement for legal services).

[90] The intention of Ms Hills and Mr Foote in filing these documents was to inform the Court of the now operative terms on which the 006 plaintiffs have engaged Shine.

[91] Notwithstanding the clarification of Shine's terms of engagement, Mr Walker submits that there are issues relating to the funding and representative arrangements with the 006 Proceeding:

(a) Shine have sunk considerable cost (time) into the proceeding and its incentive will be to recover that cost;

(b) while attempts might be made to have representative plaintiffs to be seen to run the action, in reality, it will be directed by Shine as funder and solicitor;

(c) Shine will inevitably be conflicted between its duties to its client and of independence to the Court on the one hand, and its financial interests in running the proceeding in a way which ensures recovery of its investment plus the 20 per cent premium on the other;

(d) a classic instance of a conflict will be in respect of settlement. Shine's incentive will be to settle at a time, in circumstances and on terms which best ensure that Shine maximises its fees, based on time spent plus a 20 per cent premium, rather than a return to the represented plaintiffs; and

(e) the represented plaintiffs might be said to have accepted this risk by entering into this fee arrangement, assuming it has been explained adequately to them, and, as appropriate, they have received

independent advice. The represented plaintiffs have no control over Shine's conduct of the proceeding or settlement, and yet it is their interests which will be compromised.

Representative action otherwise inappropriate

[92] Mr Walker points to the delays in the 006 Proceedings, as noted at [85] of this judgment. He submits that BOPRC is entitled to early justice and to certainty regarding any exposure.

[93] Mr Walker submits that a representative action is inappropriate for, in summary, the following reasons:

(a) it appears that there may be up to 69 landowners in the Edgecumbe area not in the 024 Proceeding. Shine has not provided evidence about what attempts it has made to persuade those potential plaintiffs to join the 006 Proceeding, or why they have not joined, nor provided evidence of what plaintiffs there might be who are not landowners;

(b) if all 69 unrepresented landowners were added as parties to the 006 Proceeding, it would not render the proceeding unmanageable, referring to:

(i) the 024 Proceedings;

(ii) *Leisure Investments NZ Limited Partnership v Grace*[56] and *Wakefield v Network Waitaki*;[57]

(iii) *Body Corporate 366567 v Auckland Council* where the second plaintiffs were present or past owners of 400 units and where 621 briefs of evidence were served;[58] and

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56 *Leisure Investments NZ Ltd Partnership v Grace* [2023] NZCA 89, [2023] 2 NZLR 724.
57 *Wakefield v Network Waitaki* [2024] NZHC 614.
58 *Body Corporate 366567 v Auckland Council* [2024] NZHC 32.

(iv) bifurcation of liability and causation of loss/quantum is not encouraged in non-representative proceedings and there is a heavy presumption all issues were resolved at once — referring to *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd*,[59] *KPMG New Zealand Ltd v Gemmell*,[60] *Lepionka Company Investments Ltd v Gibson Sheat*[61] and *Fletcher Construction Company Ltd v M P Waterproofing Co Ltd*;[62]

(c) it is accepted that considerations of representative claims may require striking a different balance, but the Court must still take into account the policy/practical reasons for avoiding bifurcation generally and determining whether a representative claim entailing automatic bifurcation is appropriate. It is still a matter of balancing advantages and costs including in relation to case management;

(d) if stage one creates a *res judicata*, it is critical to ensure that issues are truly common for the whole class and the Court must still assess efficiency, including for case management, of orthodox versus representative given bifurcation of the latter, in the circumstances of the case. In this case there are unusual circumstances where there is a parallel orthodox proceeding for the majority of the plaintiffs and no reason why the remnant plaintiffs cannot join the 006 Proceeding as parties;

(e) bifurcation takes longer, requires more judicial resources and entails more costs. Bifurcation is inappropriate for negligence claims (issues of duty and breach cannot realistically be divorced from issues of causation and loss, particularly in a negligence cause of action), relying on the *Fletcher Construction Company Ltd* decision;

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59 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1998) 12 PRNZ 333.
60 *KPMG New Zealand Ltd v Gemmell* HC Auckland CIV-2008-404-4288, 27 March 2009.
61 *Lepionka Investments & Company Ltd v Gibson Sheat* [2022] NZHC 1488.
62 *Fletcher Construction Co Ltd*, above n 18.

(f) the 024 Proceeding will proceed as an orthodox one-step proceeding. There is disconnection between the two proceedings as:

(i) the two proceedings cannot practically be case managed together. WDC cannot be constrained by the slower 006 Proceeding;

(ii) discovery, interrogatories and other interlocutories and evidence: on all the issues in the 024 Proceeding, but only common issues in the 006 Proceeding;

(iii) the proceedings cannot be tried together without making the 006 plaintiffs wait for a trial of all issues in the 024 Proceeding, with a trial of individual issues following, with all the 024 Proceeding issues bleeding into the 006 Proceeding individual issues; and

(iv) the 024 Proceeding will be completed long before the 006 Proceeding;

(g) given the disconnection, there is a risk of inconsistent findings between the two proceedings, contrary to the objective of r 4.24;

(h) there is no cost or time benefit from bifurcating the trials as required in the 006 Proceeding and in any event, efficiency might otherwise be achieved through avoiding having multiple plaintiffs lost since the multi-plaintiff 024 Proceeding on the same matter is going ahead. The r 4.24 application in the 006 Proceeding creates inefficiency in having two disconnected proceedings on the same matters, requiring more Court resources over a longer period of time;

(i) there is no access to justice issues as potential plaintiffs can join the 006 Proceeding as parties in sharing costs currently borne by the representative plaintiffs and benefit from the "no win/no fee"

arrangement. The 006 represented plaintiffs will have to join as parties anyway on individual issues, unless the representatives lose on a critical issue, including after appeals;

(j) any potential plaintiffs within the 006 class will have in-time claims by virtue of the 006 Proceeding and the representative application. It is appropriate to require them to join the 006 Proceeding now as parties within a time period, rather than allowing the representative action to proceed. The two proceedings can then be case managed in parallel and heard together; and

(k) the submission by the 006 plaintiffs that it is more efficient to resolve the "core liability issues first" than to have "separate trials for each plaintiff" is manifestly wrong in the current circumstances when they can join the 006 Proceeding as parties and have their claim resolved in one step.

Result

[94] I am of the view that the 006 plaintiffs' application for an order pursuant to r 4.24 that the proceeding proceed as a representative action should be declined. The reasons for my view are set out in the following paragraphs of this judgment.

Common interest

[95] BOPRC, in opposition to the r 4.24 application, has argued that there is insufficient common interest among the representative plaintiffs for an order to be made. Mr Walker has argued that there is a preponderance of uncommon issues and therefore having a first representative stage trial would not substantially advance matters. BOPRC's arguments as to there being insufficient common interest were, in summary:

(a) different duties of care may be owed by BOPRC to different plaintiffs depending on whether the duties were only owed to ratepayers or only

those residing in the area (in each case depending on where they are located), or to anyone whose real or personal property may have been damaged by the escape of water from the Scheme assets;

(b) differences between plaintiffs arising from the payment of targeted rates for the maintenance of the services when determining the scope of BOPRC's duty, and the degree of proximity of the relevant plaintiff to the College Road Floodwall. Properties in Edgecumbe fall into different rating categories to determine the quantum of rates each property-owner pays, and this is directly linked to the level of benefit properties can derive from flood protection assets for which the rates are used. Mr Walker submitted that these variances across the purported class of members will cause differences between plaintiffs as to the existence and scope of any duty;

(c) differences between plaintiffs arising due to Edgecumbe's different flood protection zones. Edgecumbe is split into four quadrants for the purposes of flood protection, each with its own unique flooding risks and recommended protection measures and the duty of BOPRC may differ between them in the different quadrants; and

(d) differences between plaintiffs arising from location of their damage properties. BOPRC relied on the judgment in *Easton Agriculture*[63] which referred to "adjacent" and "adjoining" landowners, indicating that spatial divergence was clearly a factor in the existence of a duty of care.

[96] In my view there is sufficient common interest between the represented plaintiffs to justify a r 4.24 order. The main liability issues to be determined against the defendants are:

(a) a duty of care;

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63 *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, above n 12.

(b) breach; and

(c) the common physical consequences of the breach (short of specific damage to individual properties).

These issues do not involve any questions of fact or law specific to any individual insured (as opposed to all of them), and the justiciable issues arising from them are therefore all common.

[97] The pleaded consequences of the defendant's negligent acts and omissions include:

(a) the operations of the Matahina Dam (affecting the volume of the river through the Edgecumbe township);

(b) non-operation of Reid's Floodway, also affecting the volume of the river through Edgecumbe township;

(c) consequently, higher river levels through the Edgecumbe township;

(d) directly increased water pressures and forces acting on the stopbanks and floodwall protecting the Edgecumbe township; and

(e) the mechanisms of the failure of that critical infrastructure.

In my view these pleaded events and causes have no plaintiff-specific aspects and any disputed issues in connection with them, whether of fact or of law, are common.

[98] Adopting the approach in *Easton Agriculture*[64] and *Strathboss Kiwifruit Limited*,[65] in my view it is appropriate and tenable for the Court to assess the scope of the group to whom the duty of care is owed at stage one of the representative action, and whether a particular plaintiff comes within the scope of that class, can be further examined at stage two. There is common interest in ascertaining the scope of the duty

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64 *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council,* above n 12.
65 *Strathboss Kiwifruit Ltd v Attorney General*, above n 15.

of BOPRC and causes of the failure of the College Road Floodwall. This is sufficiently common to all potential plaintiffs that it will advance matters on behalf of the class of plaintiffs, justifying a stage one hearing.

Bifurcation of the trials

[99] BOPRC have submitted that bifurcation of trials, with stage one hearings determining liability, stage two hearings determining breach and causation and causation and loss, all cannot be disentangled, particularly in relation to negligence causes of action. BOPRC rely on the decision in *Fletcher Construction Company Ltd*.[66] BOPRC points to issues relating to causation, such as "drainage flooding" versus "river flooding", individual-related defences of contributory negligence and *volenti non fit injuria*, which are individualised defences going to the issue of causation. In addition, BOPRC submits that the quantum suffered by individual plaintiffs is an individualised issue, and that defences of betterment, which BOPRC has pleaded, is an individualised defence.

[100] In my view, again adopting the approach in *Strathboss Kiwifruit,* it is tenable for the Court to deal with the duty of care at stage one, where the Court may find that the duty is owed to a class as defined in the 006 plaintiffs' application, or may limit the class to claimants who pay targeted rates, reside or have their business within the area intended to be protected by the Scheme, or who fall within some other relevant determinant of the class of plaintiffs owed a duty of care. This is not a reason, however, to remove sufficient common interest among members, and the determination as to the scope of the duty of care will then determine the relevant class members at stage two, with any dispute about any individual class members' categorisation, also dealt with at stage two.

[101] The residual issues which are likely to be individualised include:

(a) the physical damage/harm suffered by each plaintiff;

(b) whether such damage was caused by flooding; and

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66 *Fletcher Construction Company Ltd v MPM Waterproofing Services Ltd*, above n 18.

(c) quantum of the loss.

These are predominantly factual questions which do not prevent the determination of the common issues described at [96] and [97] of this judgment.

[102] I am of the view that the management processes dealing with bifurcated trials are sufficient to deal with the objections raised by BOPRC as set out at [81] and [82] of this judgment.

Should a representative order be made?

[103] Having determined that there are sufficient common issues for a representative order to be made, the next considerations are:

(a) the interface of the 006 Proceeding with the 024 Proceeding, which is relevant to whether a r 4.24 order should be made, given the existence of the 024 Proceeding in its current form, i.e. an ordinary action for which no representative order is sought; and

(b) given there is sufficient common interest to justify a r 4.24 order, is it nevertheless inappropriate that such an order be made?

Interface with 024 Proceeding

Insurers rights of subrogation

[104] The 024 plaintiffs submit that the legal position in New Zealand is established by the Court of Appeal in the *Arthur Barnett* decision[67] and it follows:

(a) the machinery clause is inserted in the policies for the benefit of the insurer to enhance its general law rights of subrogation; and

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[67] *Arthur Barnett Ltd v National Insurance Limited,* above n 41.

(b) the default position is that the insured has control over the recovery proceeding and it is funded proportionately. However, if the insurer undertakes to fund the whole cost of the recovery action, it has the right to control the proceeding, which ,in this case, the insurers have done.

[105] The 024 plaintiffs submit their rights as insurers means that at least 369 of the potential 486 plaintiffs who might have been in the 006 Proceeding will remain in the 024 Proceeding, because, bearing in mind, the two proceedings cannot co-exist for the same loss:

(a) 242 potential plaintiffs are in the category three policies in the 024 Proceeding, which gives the insurers the express right to recover insured and uninsured losses; and

(b) 127 potential plaintiffs are in category one or category two policies who have signed preference forms and/or only have insured losses.

[106] This leads the 024 plaintiffs to submit that even if an order under r 4.24 is made in favour of the 006 Proceeding, the 024 Proceeding will continue and hence the vast majority of potential Edgecumbe plaintiffs will remain in the 024 Proceeding.

[107] The 006 plaintiffs submit that the 024 plaintiffs are overstating their rights to control recovery proceedings, and, in fact, a significant proportion of the insureds have the right to elect control of the recovery proceedings against BOPRC and WDC. The 006 plaintiffs submit that the subrogation/recovery clauses in the relevant insurance policies in the 024 Proceeding, in large part:

(a) do not extinguish the insured's right to control the proceedings unless fully indemnified; and/or

(b) do not give the insurer the right to claim the insured's uninsured loss.

The 006 plaintiffs submit that this means the insured would retain the right to insist on bringing and controlling their own recovery proceeding, with attendant obligations to the insurer, and that in respect of policies that do not give the insurers the right to claim

the insured's uninsured loss, the insurers have no authority to begin the proceedings in the insured's name for uninsured loss.

[108] The 006 plaintiffs submit that insurers have some contractual rights (e.g. a discretion, not a duty, to bring proceedings to recover insured loss), but the insured retains the right to control the proceeding and bring its own claim for uninsured loss. They submit that given the two proceedings cannot co-exist (which is common ground), the outcome should be:

(a) as the insureds have not assigned their claims to the insurer (which is common ground), they may seek to control their own claims or they may agree to the insurer taking their claims for uninsured loss;

(b) the 006 Proceeding r 4.24 application should be granted as the proceeding includes all insureds claiming all loss. If the insureds with insured losses stay in the 006 Proceeding, they will need to account to the insurer in respect of recovered insured losses; however, the insured will have the opportunity to opt out of the class action by the opt-out date, and the insured may at that stage agree to the insurer taking claims for uninsured loss (if any); and

(c) this outcome resolves the authority issue for the insurers and properly gives the insured a choice on whether to hand over control rights generally and in respect of uninsured claims.

[109] The 006 plaintiffs, relying on the decisions in *Farrell Estates Ltd,*[68] *Zurich Insurance Co Ltd*,[69] and *Johnston*,[70] submit that a review of the wording of the 024 plaintiffs' insurance policies leads to the following conclusions:

(a) the policies do not expressly refer to uninsured losses;

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68 *Farrell Estates Ltd v Canadian Indemnity Co*, above n 26.
69 *Zurich Insurance Co Ltd v Ison T. H. Auto Sales*, above n 27.
70 *Johnston v Endeavour Energy v Endeavour Energy*, above n 28.

(b) while giving the insurer an option/discretion to commence proceedings for some loss, they are subject to the usual subrogation rights at common law and to the insured's ability to insist on controlling the proceeding, meaning the insured retains the right to control the proceedings; and

(c) the insurers do not (in almost all cases) have the right to include uninsured loss, or at least loss outside the matter of policy in the 024 Proceedings.

[110] I am of the view that the decision of the Court of Appeal in *Arthur Barnett*[71] is the current law in New Zealand, and that *Johnston v Endeavour Energy, Zurich Insurance Co Ltd* and *Farrell Estates* are of persuasive authority only. While those decisions emphasise the need for express wording for the insurer to have the right to control recovery proceedings, in my view the wording in the three categories of the insurers' policies, either expressly or by necessary implication, gives the insurer the right to bring and control proceedings for insured losses, and, as two proceedings for the same loss cannot co-exist, it means the insured plaintiffs in the 024 Proceeding cannot join the 006 Proceeding.

[111] I accept the 024 plaintiffs' proposition that the right to control recovery proceedings for insured losses by implication, and in accordance with general law principles, includes the right to recover the insured's uninsured losses in the same proceedings, if the insureds want those losses to be recovered. In my view, it must be implied that if the insured requests, the insurer will also recover uninsured losses, especially if the subrogation clauses also provide that the recovery action will be at the insurer's expense. In this instance the insurers have agreed to fund all the recovery action.

[112] The result of this analysis is that the vast bulk of plaintiffs will remain in the 024 Proceeding, and, accordingly, a representative order under r 4.24 in respect of the 006 Proceeding is not appropriate.

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71 *Arthur Barnett Ltd v National Insurance Limited,* above n 41.

Equitable subrogation

[113] The 024 plaintiffs submit that aside from the subrogated action on behalf of the insureds against BOPRC and WDC, the insurers have a claim in their own names against those entities under the principle of equitable subrogation. The 024 plaintiffs submit that:

(a) equitable subrogation is an independent cause of action and is materially different from ordinary contractual subrogation because the insurer is exercising its own rights (not the insured's rights);

(b) that under equitable subrogation the insurer is held to have acquired new rights, having identical characteristics and content to those enjoyed by the insured, subject to modification to ensure the insurer does not get more than the insured would have been entitled to; and

(c) that the equitable subrogation has been recognised as not being the same as ordinary subrogation, relying on the decisions in *Filby,*[72] authorities in the United Kingdom and the United States jurisdictions and the fact that the High Court has left equitable subrogation open as a potential cause of action in the decisions of *FM Custodians*[73] and *Re HIH Casualty and General Insurance*.[74]

[114] The 006 plaintiffs submit that the equitable subrogation claimed by the insurers is meritless and should not be taken into account by the Court in determining whether to grant the r 4.24 order in respect of the 006 Proceeding. They submit that:

(a) the law does not recognise a cause of action for an insurer against a third party in "equitable subrogation" and that equitable subrogation is a restitutionary remedy only;

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72 *Filby v Mortgage Express (No.2) Ltd*, above n 29.
73 *FM Custodians Ltd v McKenzie*, above n 37.
74 *Re HIH Casualty and General Insurance (NZ) Limited (in liq)*, above n 33.

(b) on review of the authorities relied upon by the 024 plaintiffs, there is no support for the concept of a separate right of action in favour of the insurers in equitable subrogation, and it is merely a remedy to reverse unjust enrichment in defective transactions cases and it has not been recognised to apply in general operation to insurance contracts; and

(c) accordingly, the 024 plaintiffs' cause of action in equitable subrogation is plainly meritless.

[115] I am of the view that it is not established that the insurers' claim in equitable subrogation is plainly meritless. Support from existing authorities is weak, but does not reach the threshold of it being able to be dismissed without the Court hearing further argument.

[116] Accordingly, as the equitable subrogation cause of action cannot be dismissed out of hand. The 024 plaintiffs have indicated their intention to pursue it, and, bearing in mind that two sets of proceedings seeking to recover the same loss from BOPRC and WDC cannot co-exist, this further weighs against granting the r 4.24 order in favour of the 006 Proceeding.

Is a r 4.24 order otherwise inappropriate?

[117] This question resolves into two sub-issues:

(a) Would granting the r 4.24 order promote the objectives of the High Court Rules 2016 of leading to the "just, speedy, and inexpensive determination" of the claims against BOPRC and WDC?

(b) On scrutinization of Shine's terms of engagement with the 006 plaintiffs, is it appropriate for an order to be made?

Would granting the r 4.24 order promote the objectives of r 1.2?

[118] As I have already determined earlier in this judgment, a r 4.24 order in favour of the 006 plaintiffs is not appropriate, as the vast majority of potential plaintiffs

arising from the Edgecumbe flood losses will remain in the 024 Proceeding. This is dispositive of the 006 plaintiffs' application. However, given the arguments presented by counsel, I provide my views in respect of the appropriateness of making a r 4.24 order in the light of the objectives of the High Court Rules.

[119] The situation relating to the claims against BOPRC and WDC is unusual in that the 024 Proceeding will continue regardless of whether r 4.24 order is made in respect of the 006 Proceeding. BOPRC have submitted that, as outlined at [84] of this judgment, the 024 Proceeding will be resolved well before the 006 Proceeding, and therefore granting the r 4.24 order is not in the interest of resolving the claims against BOPRC and WDC expeditiously.

[120] BOPRC have submitted that in addition to the 006 Proceeding if a representative proceeding taking much longer to resolve than the orthodox one-step 024 Proceeding, there is disconnection between the two proceedings. BOPRC cites as examples of this disconnection:

(a) the two proceedings cannot practicably be case managed together as the 006 Proceeding will be much slower;

(b) discovery, interrogatories and other interlocutories and evidence will be dealt with on all issues in the 024 Proceeding but only the common issues in the stage one trial of the 006 Proceeding; and

(c) the proceedings cannot be tried together without making the 006 plaintiffs wait for a trial of all issues in the 024 Proceeding, with the trial of individual issues following with all the 024 Proceeding issues bleeding into the 006 Proceeding individual issues.

BOPRC submits that the r 4.24 application in the 006 Proceeding creates an inefficiency by resulting in two disconnected proceedings on the same matters, requiring more Court resources over a longer period of time.

[121] BOPRC also submits that there are no access-to-justice issues as potential plaintiffs can join the 006 Proceeding as parties, and the 006 represented plaintiffs will in any event have to join as parties when individual issues are litigated at the second trial. BOPRC submits that it is appropriate these parties be joined now rather than allowing the 006 proceeding to proceed as a representative proceeding and the two proceedings could then be case managed in parallel and together.

[122] I am of the view that the 024 Proceeding, which will contain the vast majority of Edgecumbe plaintiffs, which will proceed as a one-step orthodox proceeding, will be dealt with more expeditiously than by the 006 Proceeding (if the r 4.24 is made) and that having regard to the disconnection between the proceedings with the 024 Proceeding continuing as an orthodox one-step proceeding and the 006 Proceeding as a bifurcated trial with consequent delays, it is inappropriate to make the r 4.24 order in favour of the 006 Proceeding.

Shine's terms of engagement

[123] While the affidavits of Ms Hills and the memorandum of Mr Foote dated 10 December 2025 have clarified some of the criticisms raised by BOPRC and the 024 plaintiffs in relation to the Shine's terms of engagement with the representative plaintiffs, in my view some issues still remain. These are summarised at [91] of this judgment. There is potential for a conflict of interest between Shine wishing to obtain a settlement that recovers its costs, and a settlement which maximises return to the represented plaintiffs.

[124] Overall, my view is that the potential for conflicts of interest under Shine's terms of engagement with the represented plaintiffs are a factor which weighs against granting the r 4.24 order, although is not a significant factor.

Orders

[125] I make the following orders:

(a) the 006 plaintiffs' application for a r 4.24 order is dismissed;

(b) as to costs, while the application for the r 4.24 order has been dismissed, the various parties have had various degrees of success in respect of the arguments respectively put forward by them during the hearing. Having regard to this, counsel are directed to endeavour to agree as to costs and failing agreement being reached within a period of 20 working days from the date of this judgment, counsel for the 024 plaintiffs and counsel for BOPRC will file memoranda as to costs (each not to exceed five pages) within five working days after expiry of the 20 working day period, and counsel for the 006 plaintiffs will file a memorandum (not to exceed five pages) in response within five working days of receipt of counsel for the 024 plaintiffs and counsel for BOPRC's memoranda. A decision as to costs will then be made on the papers.

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Associate Judge C B Taylor