

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA314/2024
[2026] NZCA 396**

BETWEEN TOKA TŪ AKE – NATURAL HAZARDS
COMMISSION
Appellant

AND ANDREW ROBERT FREER AND
LUCINDA RAE MCEVEDY
Respondents

CA315/2024

BETWEEN ANDREW ROBERT FREER AND
LUCINDA RAE MCEVEDY
Appellants

AND TOKA TŪ AKE – NATURAL HAZARDS
COMMISSION
Respondent

Hearing: 11 and 12 June 2025

Court: Courtney, Ellis and Campbell JJ

Counsel: C J Curran, M L Campbell and M C Grant for Appellant in
CA314/2025 and Respondent in CA315/2024
A R B Barker KC and G D R Shand for Respondents in
CA314/2024 and Appellants in CA315/2024

Judgment: 26 August 2026 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal in CA314/2024 is allowed in part.

B The representative order made in [2023] NZHC 3662 at [134] is set aside.

C The appeal in CA315/2024 is dismissed.

D The respondents in CA314/2024 are to pay the appellant in CA314/2024 costs for a standard appeal on a band A basis, together with usual disbursements.

E We make no order for costs in CA315/2024.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] Mr Freer and Ms McEvedy (the plaintiffs) own a residential property in Christchurch that was damaged in the 2010 and 2011 earthquakes. The damage included damage to the land in the form of increased liquefaction vulnerability (ILV). This kind of damage to residential land is covered under the Earthquake Commission Act 1993 (the EQC Act) and its successor, the Natural Hazards Insurance Act 2023.¹ However, the plaintiffs and Toka Tū Ake – Natural Hazards Commission (the Commission) do not agree as to the basis on which cover is provided.² The plaintiffs maintain that they are entitled to the cost of reinstating the land up to the statutory cap on the amount insured. The Commission says that the land is covered for indemnity value only and the plaintiffs’ right to indemnity was met by payment for the diminution of value (DOV) of the land.

[2] The Commission relies on a decision of a Full Court of the High Court, *Earthquake Commission v Insurance Council of New Zealand Inc*, which held that under the EQC Act the basis for cover for natural disaster damage to residential land in the form of ILV — and another type of earthquake-related damage known as

¹ *Earthquake Commission v Insurance Council of New Zealand Inc* [2014] NZHC 3138, [2015] 2 NZLR 381 [Full Court decision] at [93]. The Earthquake Commission Act 1993 was repealed and replaced on 1 July 2024 by the Natural Hazards Insurance Act 2023.

² Until 1 July 2024, Toka Tū Ake – Natural Hazards Commission was named the Earthquake Commission: see Natural Hazards Insurance Act, s 125. We refer to it as “the Commission”.

increased flooding vulnerability (IFV) — was indemnity value (the Full Court decision).³ The Full Court also held that a policy developed by the Commission for settlement of such claims on a DOV basis where repair was not appropriate was consistent with the requirements of the EQC Act.⁴

[3] The plaintiffs consider that the Full Court decision was wrongly decided. They brought a proceeding against the Commission and applied for a representative order to allow them to bring a class action on behalf of property owners who had suffered IFV or ILV damage to their land and whose claims had been settled on a DOV basis. The proposed common issues included whether cover under the EQC Act for natural disaster damage to residential land was on an indemnity basis (the interpretation issue). In *Freer v Earthquake Commission (Freer (No 1))* Associate Judge Paulsen held that this issue was not reasonably arguable, having regard to the Full Court decision.⁵ However, he allowed the plaintiffs to amend their application for a representative order in order to adequately identify a common issue.⁶

[4] Under the amended application, the plaintiffs again advanced their challenge to the Full Court decision and also proposed a new common issue regarding whether the Commission's policy accorded with the Full Court decision (the application issue).⁷ The plaintiffs alleged that the policy effectively predetermined that all claims would be settled on the basis of DOV, and the Commission had adopted a deliberate strategy of settling IFV and ILV claims on a DOV basis to minimise the cost of settlements.⁸ In *Freer v Earthquake Commission (Freer (No 2))* the Judge granted the application for a representative order, though not on the exact terms sought by the plaintiffs.⁹

[5] The plaintiffs appeal both *Freer (No 1)* and *Freer (No 2)*. The Commission appeals *Freer (No 2)*.

³ Full Court decision, above n 1, at [105]–[113].

⁴ At [114], [123]–[125] and [160].

⁵ *Freer v Earthquake Commission* [2023] NZHC 1301 [*Freer (No 1)*] at [81].

⁶ At [103].

⁷ *Freer v Earthquake Commission* [2023] NZHC 3662 [*Freer (No 2)*] at [16].

⁸ At [15].

⁹ At [134].

Issues on appeal

[6] The issues for determination are:

- (a) In *Freer* (No 1), did the Judge err in finding that the proposed challenge to the Full Court decision was not reasonably arguable? (the plaintiffs' appeal)
- (b) In *Freer* (No 2), did the Judge err in:
 - (i) Failing to consider whether the common issues would materially advance the claims of individual class members? (the Commission's appeal)
 - (ii) Finding that the plaintiffs were adequate representatives of the class, despite there being no evidence that they could, or intended to, undertake land repairs? (the Commission's appeal)
 - (iii) Finding that the new allegations contained in the second amended statement of claim, which forms the basis for the common issues, were not time-barred? (the Commission's appeal)
 - (iv) Finding that the plaintiffs were not suitable representatives for property owners who have sustained IFV damage to their land? (the plaintiffs' appeal)?
 - (v) Finding that a proposed alternative representative for property owners who have sustained IFV damage (Mr Wootton) was not a suitable representative for those owners? (the plaintiffs' appeal)
 - (vi) Finding that the class should not include former owners who did not undertake repairs but retained their rights to claim against the Commission? (the plaintiffs' appeal)

- (vii) Finding that the class should not include subsequent owners who took assignment of the right to claim? (the plaintiffs' appeal)

[7] These questions are to be determined by reference to the settled principles relating to representative orders made under r 4.24 of the High Court Rules 2016. Rule 4.24 permits the court to make an order allowing a party to bring a representative action on behalf of a specified class of claimant:

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.

[8] Representative orders derive from an equitable procedure designed to facilitate the disposition of cases where the parties were so numerous that proceedings would otherwise be unmanageable.¹⁰ The objectives of representative orders are to improve access to justice, facilitate the efficient use of judicial resources and strengthen incentives for compliance with the law.¹¹ These objectives are properly viewed alongside the general objectives of the High Court Rules to ensure the just, speedy and inexpensive determination of proceedings.¹²

[9] The principles relevant to the making of such orders were summarised by this Court in *Cridge v Studorp Ltd* as follows:¹³

- (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

¹⁰ *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 264–265, quoting *Duke of Bedford v Ellis* [1901] AC 1 (HL) at 8 per Lord Macnaghten.

¹¹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [37] and [40], approving *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [52].

¹² *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [130] per McGrath, Glazebrook and Arnold JJ. See High Court Rules 2016, r 1.2(1).

¹³ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11] (footnotes omitted).

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.
- (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 member 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.

The relevant statutory provisions

[10] Sections 18 and 19 of the EQC Act deal, respectively, with natural disaster damage to residential buildings and residential land.¹⁴

[11] Section 18 provides:

18 Residential buildings

- (1) Subject to any regulations made under this Act and to Schedule 3, where a person enters into a contract of fire insurance with an insurance company in respect of any residential building situated in

¹⁴ Schedule 1 cl 3(1) of the Natural Hazards Insurance Act provides that the Earthquake Commission Act continues to apply in relation to natural disaster damage that occurred before the commencement date of the Natural Hazards Insurance Act.

New Zealand, the residential building shall, while that contract is in force, be deemed to be insured under this Act against natural disaster damage for its replacement value to the amount (exclusive of goods and services tax) which is the least of—

- (a) if the contract of fire insurance specifies a replacement sum insured for which the building is insured against fire under that contract, the amount of that sum insured;
 - (b) if the contract of fire insurance does not specify such a replacement sum insured but does specify an amount to which the building is to be insured under this Act, that amount;
 - (c) the amount arrived at by multiplying the number of dwellings in the building (being the number determined in accordance with subsection (3)) by \$150,000 or such higher amount as may be fixed from time to time for the purposes of this paragraph by regulations made under this Act.
- (2) An amount specified for the purposes of subsection (1)(b) shall not be less than the amount calculated by multiplying \$2,500, or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building. Where a contract specifies a lesser amount, the amount specified is deemed to be the amount calculated by multiplying \$2,500, or such higher sum as is fixed from time to time for the purposes of this subsection by regulations made under this Act, by the area in square metres of the residential building.
- (3) For the purposes of subsection (1)(c), a residential building is deemed to comprise 1 dwelling unless the existence of a higher number of dwellings in the building is disclosed to the insurance company at the time that the contract of fire insurance is entered into.

[12] Section 19 provides that where a residential building is deemed to be insured under the EQC Act against natural disaster damage, the residential land on which that building is situated is deemed to be insured:

... to the amount ... which is the sum of, in the case of any particular damage,—

- (a) the value, at the site of the damage, of—
 - (i) if there is a district plan operative in respect of the residential land, an area of land equal to the minimum area allowable under the district plan for land used for the same purpose that the residential land was being used at the time of the damage; or
 - (ii) an area of land of 4 000 square metres; or
 - (iii) the area of land that is actually lost or damaged—

whichever is the smallest; and

- (b) the indemnity value of any property referred to in paragraphs (d) and (e) of the definition of the term residential land in section 2(1) that is lost or damaged.

[13] The basis on which claims for natural disaster damage to residential buildings and land must be settled is specified in s 29. Relevantly, subs (2) provides that “the Commission shall settle any claim (by payment, replacement, or reinstatement, at the option of the Commission) to the extent to which it is liable under this Act”.

The history of the plaintiffs’ claim with the Commission

The claim is accepted and paid on a DOV basis

[14] The Commission accepted the plaintiffs’ claim for ILV damage to their property in late 2015. By then, the Commission had finalised its policy for settlement of ILV claims. Its letter to the plaintiffs advised that settlement for ILV damage would be made by cash payment on the basis of either the cost of repairing the land under and around the edge of the house, together with the DOV for the rest of the land, or DOV alone.

[15] The plaintiffs wanted to repair their land but could not advance plans for that until they had settled their claim for the damage to their house with their insurer, IAG New Zealand Ltd (IAG). Nevertheless, IAG obtained a geotechnical engineering report from Cook Costello and, in September 2016, the plaintiffs provided the Commission with a quote from South East Earthworks Ltd for the cost of remediating their land of \$98,006.45. Although not explicit in the quote, the nature of the proposed work would require the house to be removed and the foundations rebuilt. The quote was said to be “[a]s per Cook Costello Consulting Engineers Report”. The Commission requested a copy of the report and the proposed timeframe for undertaking the work. According to the Commission, the plaintiffs did not respond to this request.

[16] In November 2016, the Commission wrote to the plaintiffs informing them that it wished to settle ILV claims by the end of that year and advising that it required documents showing that repair works were to be undertaken (including a signed

contract for the works, which could be conditional on Commission approval). If those documents were not provided within 14 days, the Commission instructed it would settle the claim on a DOV basis. The letter advised that if the plaintiffs decided to proceed with repair works later, they could approach the Commission again.

[17] The Commission's evidence in the High Court included assertions that it would readily revisit a DOV settlement if a customer later wished to undertake repairs, but we note that the (undated) November letter cautioned that:

... [the Commission] is not in a position to commit to the availability of a repair cost settlement at a future date. The availability will depend on the length of time between the ILV DOV settlement you received and you contacting us for a revised settlement on a repair cost basis, as well as any of your circumstances that caused that delay.

[18] The plaintiffs advised the Commission that they intended to remediate the land but could not provide them with the requested documents because settlement with their private insurer, IAG, was delayed by the Commission not confirming that their claim for damage to their house exceeded the statutory cap.

[19] In April 2017 the Commission wrote to the plaintiffs advising that, because their house was still in place, the established ILV repair techniques could not be used, and it was settling the claim on the basis of DOV, which it calculated at \$22,214.84.

[20] The following year IAG settled the plaintiffs' claim in respect of their house on a cost of repair rather than rebuild basis. They have been unable to remediate the land or demolish their detached garage.

The Freer (No 1) decision

[21] The plaintiffs commenced proceedings against the Commission in 2021. In their first amended statement of claim, they alleged they were entitled to the cost of repairing the ILV damage to their land up to the value of the cap in s 19(a) of the EQC Act, which was \$160,000, and the Commission's settlement of their claim for \$22,214.84 on a DOV basis was in breach of its statutory obligations. They claimed

\$132,785.16, being the cost of repairs up to the statutory cap, less the excess and the DOV amount already paid.¹⁵

[22] In 2022, the Commission responded to interrogatories about the process leading to the settlement of their ILV claim. The plaintiffs say that they became aware from the Commission's answers that it had failed to undertake an individual assessment of their property, including consideration of the proposed repair strategy, the cost of repairs, the plaintiffs' stated intention to repair the property and their individual circumstances. Underpinning these complaints was the assertion that the Commission had used a "check box" method to determine the basis on which the plaintiffs' claim would be settled, which did not consider repair costs or available methods of repair and did not properly apply the Full Court decision.

[23] The plaintiffs' application under r 4.24 initially proceeded on the basis of the first amended statement of claim. The proposed common issue, as it was reformulated during the hearing of the application, was:¹⁶

Whether, when settling a claim for natural disaster damage for residential land under s 19 of the [EQC Act], [the Commission's] use of [DOV] is in accordance with the [EQC Act]. In particular:

- a. Are claims for natural disaster damage to residential land to be settled on an indemnity basis?

If so

- b. Was the use of a [DOV] approach to determine the indemnity value of claims for natural disaster damage to residential land by IFV and/or ILV applied to such claims in a mechanical way and without proper consideration of their individual circumstances[?]
- c. Was the use of the DOV approach in that way consistent with [the Commission's] indemnity obligation[?]

[24] The Commission opposed the application. It accepted that the interpretation issue (paragraph (a), regarding the use of an indemnity approach) was a common issue capable of creating a *res judicata*, but only if the plaintiffs established that the Commission could never settle claims for damage to residential land by payment on

¹⁵ The plaintiffs also claimed general damages of \$25,000 for distress, inconvenience and mental anguish but that aspect of the claim is not relevant to the issues on the appeal.

¹⁶ *Freer* (No 1), above n 5, at [26].

the basis of DOV. Otherwise, no res judicata would be established.¹⁷ On that basis the proposed common issue was not reasonably arguable and would be contrary to the terms of the Full Court decision.¹⁸ It submitted the application issue (paragraphs (b) and (c), regarding the alleged misuse of the indemnity approach) had only been raised at the hearing and was not a common issue because it depended on the individual circumstances of claims.¹⁹

[25] The Judge could see nothing in the plaintiffs' arguments to suggest that the Full Court decision had been wrongly decided or that they had any realistic prospect of convincing a court that it was wrongly decided.²⁰ He therefore declined the application in respect of the interpretation issue. He went on to identify several difficulties with the plaintiffs' application issue.²¹ However, rather than declining the application outright, the Judge allowed the plaintiffs a further opportunity to propose a suitable common issue.²²

The second amended statement of claim and amended application for representative orders

[26] In July 2023, the plaintiffs filed their second amended statement of claim together with an amended application for representative orders.

[27] The second amended statement of claim still contained a single cause of action asserting that the plaintiffs' remaining entitlement under s 19 was \$132,785.16 and seeking damages in that amount. However, the cause of action was restructured to include a new, extensive range of allegations directed towards the Commission's policy for settling ILV and IFV claims. The various allegations now appeared under the headings "Interpretation Issue", "Application Issue" and "Implementation of the Policy". We discuss these later in relation to the limitation issue.

[28] The amended application sought orders that: (a) the plaintiffs be permitted to sue as representatives for owners or former owners who retained the right to the EQC

¹⁷ At [29].

¹⁸ At [30].

¹⁹ At [31].

²⁰ At [81].

²¹ At [84]–[93].

²² At [95]–[100] and [103].

claim whose land suffered natural disaster damage in the Canterbury earthquake sequence and who had been paid by the Commission on a DOV basis when the cost of reinstatement exceeded that amount and the owners had not reached a binding settlement with the Commission; and (b) another property owner, Nigel Wootton, be permitted to represent a sub-class of owners whose land had suffered IFV damage.

[29] The amended application proposed the following common issues as supporting a representative order:

Whether, when settling a claim for natural disaster damage for residential land under s 19 of the [EQC Act], [the Commission's] use of DOV is in accordance with the [EQC Act]. In particular:

- (a) Are claims for natural disaster damage to residential land to be settled on an indemnity basis?

If so

- (b) Did [the Commission] misuse the DOV approach to determine the indemnity value of claims for natural disaster damage to residential land, by:
 - (i) Incorrectly applying the [Full Court decision];
 - (ii) Formulating and applying a policy not in accordance with the [Full Court decision] and/or the [EQC Act];
 - (iii) Not making individual assessments to determine if the ILV and/or IFV was capable of repair and assessing the costs of repair;
 - (iv) Having a strategy to wrongly minimise its payment by using DOV;

[30] The proposed class was defined as:

1. An owner, or former owner (who has the rights to ... claim(s)), in relation to residential land insured under s 19 of the [EQC Act].
2. The residential land suffered natural disaster damage in the Canterbury Earthquake Sequence that commenced on 4 September 2010 and ended on 23 December 2011.
3. [The Commission] determined the amount of natural disaster damage to the residential land and/or made a payment for natural disaster damage to the residential land to the owner/former owner under s 29 of the [EQC Act] after 13 September 2015.

4. [The Commission] quantified the payment (in full or in part) based on alleged diminution in/of value of the land by the natural disaster damage.
5. The cost to reinstate the natural disaster damage to the land exceeded the payment in 3 and 4 above.
6. There is no binding settlement agreement between the [Commission] and the owner/former owner in respect of any residential land claim.

The Freer (No 2) decision

[31] The Judge considered that the first proposed common issue had already been ruled out in *Freer* (No 1) and declined to reconsider it as a possibility.²³ On the second proposed common issue, he ruled out sub-issue (i) because it was insufficiently specific.²⁴ He ruled out sub-issue (iii), primarily because individual assessments could not have been required in every case and therefore a finding on the issue would not give rise to a *res judicata*.²⁵ The Judge accepted that sub-issues (ii) and (iv) raised common issues suitable for inclusion in a representative order.²⁶

[32] However, the Judge rejected both the plaintiffs and Mr Wootton as suitable representatives for owners whose land had suffered IFV damage.²⁷ He also did not accept that the represented class should include former owners who had retained their rights to the land claim but not repaired their property.²⁸ Nor did he consider the represented class should include subsequent owners who had taken an assignment of the vendor's claim against the Commission where the cost of repairs had not been incurred.²⁹

[33] The Judge rejected the Commission's submissions that the plaintiffs were not adequate representatives because their claim could not succeed as they never had the ability to undertake repairs to their land and because the new allegations in the second amended statement of claim were time-barred.³⁰ Nor did he accept that the represented

²³ *Freer* (No 2), above n 7, at [23].

²⁴ At [26].

²⁵ At [31]–[35]. The Judge also noted it was inconsistent with the plaintiffs' pleadings whether an assessment of the damage to their property and whether it was repairable was in fact undertaken by the Commission: at [32].

²⁶ At [27]–[29] and [36]–[41].

²⁷ At [81] and [85]–[92].

²⁸ At [98].

²⁹ At [102]–[104].

³⁰ At [46], [60] and [74].

class should exclude owners who did not wish to undertake repairs or for whom repairs were not feasible: whether a particular owner could feasibly carry out repairs and/or intended to do so were trial issues to be determined at stage two of the proceedings when individual liability was considered.³¹

[34] Despite the Commission's opposition, the Judge considered that the order should be made on an opt-out basis.³²

[35] The representative order was made on the following basis:³³

Class definition

[1] An owner who made a claim to [the Commission] in relation to residential land insured under s 19 of the [EQC Act].

[2] The residential land suffered [ILV] damage in the Canterbury Earthquake Sequence that commenced on 4 September 2010 and ended on 23 December 2011.

[3] [The Commission] determined the amount of ILV damage to the residential land and/or made a payment for ILV damage to the residential land to the owner under s 29 of the [EQC Act] after 18 July 2016.

[4] [The Commission] quantified the payment (in full or in part) based on alleged diminution in/of value of the land by the ILV damage.

[5] The cost to reinstate the land to remediate the ILV damage exceeded the payment in 3 and 4 above.

[6] There is no binding settlement agreement between [the Commission] and the owner in respect of any ILV damage claim.

Common issue

Whether, when settling a claim for natural disaster damage for residential land under s 19 of the [EQC Act], [the Commission] misused the DOV approach to determine the indemnity value of claims for ILV damage to residential land, by:

- (a) formulating and applying a policy not in accordance with the [Full Court decision] and/or the [EQC Act] in the respects pleaded in the second amended statement of claim; and
- (b) having a strategy to wrongly minimise its payments by using DOV.

³¹ At [106].

³² At [133].

³³ At schedule.

[36] The first common issue (at (a)) has subsequently been referred to as the “application issue” and the second (at (b)) as the “strategy issue”.

Issue (a): is the proposed challenge to the Full Court decision arguable? (the plaintiffs’ appeal)

The issue

[37] By 2014, the Commission had recognised both IFV and ILV damage to residential land as natural disaster damage under the EQC Act. It had developed a policy for settling IFV claims and applied to the High Court for declarations as to: whether IFV was a form of natural disaster damage for the purposes of the EQC Act; the basis on which natural disaster damage to residential land was covered under the EQC Act; whether the policy the Commission had developed for settling IFV claims complied with its statutory obligations; and whether settlements already reached on the basis of the policy were lawful.

[38] The Insurance Council of New Zealand Inc (the Insurance Council) counterclaimed for declarations to similar effect in relation to ILV damage.

[39] This ground of appeal is concerned with the Full Court’s conclusion that s 19 of the EQC Act did not, and was not intended to, provide replacement cover for residential land — that is, residential land was covered on an indemnity basis.³⁴ The plaintiffs say that this conclusion is wrong. They wish to challenge it in their current proceedings against the Commission and to do so pursuant to a representative order. However, the Judge held — they say erroneously — that their interpretation is not arguable and could not raise a substantial issue of significance common to them and the proposed represented class.³⁵

[40] Before we consider the interpretation adopted by the Full Court, we first record the details of the Commission’s policy that was the subject of the Full Court decision.

³⁴ Full Court decision, above n 1, at [105]–[108] and [114].

³⁵ *Freer* (No 1), above n 5, at [81]; and *Freer* (No 2), above n 7, at [23].

The Full Court decision — approval of the Commission's policy

[41] The policy in respect of which the Commission sought declarations envisaged settlement of claims for IFV damage by payment of a fixed sum, rather than reinstatement. The basis of the payment would be determined by reference either to the cost of repair of the land or the DOV caused by the IFV. The Commission identified four factors that would be relevant in determining whether payment would be based on repair costs or DOV. These factors were:³⁶

- (a) If the residential building had to be removed in order to repair the land, settlement would be on the basis of DOV.
- (b) If resource consent was required under the Resource Management Act 1991 in order for repairs to be undertaken, settlement would be on the basis of DOV, unless the claimant could demonstrate that they could obtain resource consent and would effect the repairs.
- (c) If the residential land had been sold by the claimant after the earthquake that caused the IFV damage, settlement would be on the basis of DOV.
- (d) In all other cases the Commission would pay the repair cost unless that cost was disproportionate to the DOV, having regard to the circumstances of the claimant, including their stated intentions in relation to repairing the land.

[42] The policy contained a separate provision for assessing diminution in value. This assessment was to be undertaken by independent valuers on the basis that the diminution would:³⁷

- (a) be the discount from the price that would have been paid for a property (land and buildings combined) on the day prior to the earthquake as agreed between a willing buyer and a willing seller because of the specified physical change to the land, with full knowledge about that

³⁶ Full Court decision, above n 1, at [49].

³⁷ At [50].

change and its impact on the vulnerability of the land to flooding, the cost of repair options and advice from competent and reasonable advisors; and

- (b) not take into account any change in value to the property resulting from external changes or effects, whether from the earthquakes or otherwise (including regulatory changes), general stigma arising from the earthquakes and any changes in value to non-insured residential land and buildings.

[43] The policy contained a claims review process which allowed the claimants to challenge the Commission’s decision to refuse cover.³⁸

[44] Having confirmed that cover under the EQC Act for natural disaster damage to residential land was on an indemnity basis, the Full Court turned to consider whether the Commission’s policy complied with its obligations under the EQC Act. It held that the policy was consistent with the Commission’s obligations:³⁹ the EQC Act contemplated settlement of claims for natural disaster damage to residential land by meeting repair or reinstatement costs in appropriate cases, but repair or reinstatement would not always be available or appropriate, particularly in relation to IFV claims.⁴⁰ For that reason, the Commission had flexibility under the EQC Act to “tailor” the indemnity response to meet the particular circumstances of any given case — for example, where a claimant did not intend to repair or reinstate because doing so was neither technically feasible nor lawful.⁴¹

[45] The Full Court observed that in such a situation, the claimant would be overcompensated if they received the estimated cost of repairs to the extent that these exceeded the diminution in value of the property.⁴² Likewise, a claimant who had sold a property without repairing the damage would receive a windfall if the indemnity was calculated on the basis of repair costs to the extent that these exceeded the DOV of the

³⁸ At [51]–[52].

³⁹ At [114] and [123].

⁴⁰ At [110]–[112].

⁴¹ At [112].

⁴² At [112].

property. The Full Court concluded that it could not have been Parliament's intention — and it would have been contrary to the purposes of the Act — for claimants to receive payments that exceeded their actual loss and conferred a windfall.⁴³

[46] The condition in the policy providing that repair costs would not be paid where they were disproportionate to the DOV of the land was the subject of criticism by the Insurance Council.⁴⁴ The criticism was rejected by the Full Court, which held:

[120] The Commission cannot be liable to meet the costs of repairing or reinstating residential land that has suffered natural disaster damage irrespective of how disproportionately high these costs may be in relation to the damage. A policy that takes no account of this factor would be defective and could lead to the Commission making unjustified payments from the Natural Disaster Fund.

...

[122] The appropriate indemnity response will be a question of fact to be determined in the particular circumstances of each case. The claimant's intention to carry out repairs and the feasibility of these repairs will be relevant. There may be cases where repair costs are disproportionate and unreasonable in all of the circumstances. That question can only be judged on a case by case basis. We can go no further than to state that proportionality, and the consequent reasonableness of repair costs, will be a relevant consideration that the Commission should take into account.

[47] The Full Court made the following declarations in respect IFV claims:⁴⁵

The settlement of claims compliant with the [EQC Act] for natural disaster damage to residential land involving [IFV] may be approached on the basis of the Commission:

- (a) indemnifying the claimant against his or her financial loss by an appropriate payment, including by payment of:
 - (i) the costs of relevant and appropriate repair or reinstatement activities; or
 - (ii) in appropriate circumstances, by payment of the loss of market value of the insured land together with any associated residential buildings; or
- (b) at the option of the Commission, by undertaking relevant and appropriate repair or reinstatement activities.

⁴³ At [113].

⁴⁴ At [119].

⁴⁵ At [125].

[48] The same conclusions followed for ILV damage and declarations were made in identical terms in relation to ILV claims.⁴⁶

[49] The Full Court was, however, cautious about actually declaring that the policy was legally valid. Acknowledging the concern that the policy could be applied mechanically rather than on a case-by-case basis, the Full Court said:

[155] The Commission must, in the first instance, make an internal decision as to whether, on the balance of probabilities, the claimant's property has suffered damage (so that the Commission is liable to repair, reinstate or pay in cash). If it opts for the latter course, it must decide, again in the first instance on the balance of probabilities, the quantum of loss suffered by the claimant. We agree ... that there is no scope here for the Commission to adopt a "conservative approach", so it will pay claims only if they meet its Policy, or if otherwise it is quite clear that the Commission is liable. The former would convert the Policy into a substitute for the statute. The latter would be to misstate the standard of proof.

[156] We agree with the submission from the Insurance Council that the Policy must not produce "wrong answers". It must not lead to rejection of claims which are on the balance of probabilities well-founded. It must not, in the event of acceptance of a claim, result in payment of less than the amount which on the balance of probabilities is the amount payable. It must incorporate sufficient flexibility to ensure marginal cases that meet entitlement to payment are indeed met. These are not matters of discretion. The outcomes of the Commission's claims management process must correctly meet its statutory insurance obligations, as a matter of law.

...

[158] What is required is a good faith determination, based on all relevant considerations, that will fairly address an individual claim in a timely fashion, subject to rights of challenge to particular decisions made by the Commission by individual claimants. ...

[50] The result was the following declaration:⁴⁷

The Commission is entitled to develop and publish guidelines identifying factors it will take into account in assessing the validity of a claim for "natural disaster damage" based on [IFV] and/or [ILV] provided the guidelines:

- (a) require the Commission to act in good faith; and
- (b) are not applied mechanically; and
- (c) do not exclude consideration of factors that are relevant to any particular case; and

⁴⁶ At [125].

⁴⁷ At [160].

- (d) do not prevent claimants challenging the decision in a court of competent jurisdiction by way of an ordinary proceeding, judicial review or both.

Some preliminary points

[51] Before we consider whether the reasoning of the Full Court on the interpretation issue is arguably wrong, we address some of the general complaints advanced by the plaintiffs about the circumstances of the hearing before the Full Court.

[52] The proceedings were brought by the Commission, with the Insurance Council, Christchurch City Council⁴⁸ and Southern Response Earthquake Services Ltd (Southern Response) as defendants.⁴⁹ Some homeowners were given leave to intervene — the Flockton Cluster Group and a homeowner living in the Red Zone.⁵⁰ Two counsel to assist were appointed: one to represent homeowners affected by the earthquakes and one as contradictor in relation to the scope of the High Court's declaratory jurisdiction.⁵¹

[53] Mr Shand, who acts for the plaintiffs, appeared at the hearing for the intervening Red Zone homeowner. In written submissions in the present appeal he identified aspects of the hearing which, he says, meant that homeowners' interests, in particular the argument that residential land was insured for reinstatement value, were not adequately considered. Specifically: the hearing proceeded on the basis of agreed facts and issues formulated by the Commission and private insurers; homeowners did not have the opportunity to provide evidence or to cross-examine; counsel assisting appointed to represent the homeowners' interests submitted (contrary to the interveners' argument) that cover was on an indemnity basis;⁵² the technical evidence came from the Commission's engineers, whom Mr Shand says could not be regarded as impartial having regard to their commercial relationship with the Commission; and, although there was no evidence about ILV and the Commission did not seek

⁴⁸ At [8]. Initially, the Christchurch City Council counterclaimed for independent declarations, but it later discontinued those claims and was represented at the hearing on a watching brief basis.

⁴⁹ At [5].

⁵⁰ At [6].

⁵¹ At [7].

⁵² At [103] and [108].

declarations regarding ILV, the private insurers (through the Insurance Council) sought — and were granted — such declarations. Mr Shand submitted this was not in the interests of the homeowners. Finally, because the interveners had no right of appeal, the findings, which they say are incorrect, were not able to be challenged on appeal.

[54] These complaints were made in the High Court and rejected.⁵³ While not dismissing the concerns, we do not see these complaints as capable of affecting the substantive issues of whether the finding in the Full Court decision that s 19 of the EQC Act provides cover for residential land on an indemnity basis is arguably wrong and whether the Judge was wrong to dismiss that question as a legitimate common issue.

The Full Court decision — interpretation of s 19

[55] We turn to the reasoning of the Full Court in relation to the interpretation of s 19. The Court began by noting that “replacement value” is defined in s 2 of the EQC Act only in relation to residential buildings and personal property.⁵⁴ There is no comparable provision for residential land (which includes retaining walls, bridges and culverts). The Full Court considered this difference showed that Parliament had distinguished between the types of cover provided for residential land and for residential buildings and personal property.⁵⁵ The Full Court considered that the legislative history of s 19 tended to confirm this conclusion.⁵⁶

[56] Mr Barker KC, for the plaintiffs, argued that on the plain and ordinary meaning of s 19, residential land is covered for the cost of repairs up to the stated limit and, if repair is not possible, the owner is entitled to payment for the value of the land (up to the statutory cap). As to the analysis of text, Mr Barker made the following points. First, s 19 does not expressly say that land is covered for indemnity value, whereas the cover under s 19(b) for bridges, culverts and retaining walls is explicitly for indemnity. Had all residential land been intended to be covered for indemnity value, it would have

⁵³ *Freer* (No 1), above n 5, at [41]–[42].

⁵⁴ Full Court decision, above n 1, at [106]. We note that the provisions in the Earthquake Commission Act relating to personal property were repealed on 1 July 2019 by the Earthquake Commission Amendment Act 2019.

⁵⁵ At [106].

⁵⁶ At [107]–[108].

been unnecessary to expressly provide that for bridges, culverts and retaining walls. Secondly, s 19(a), which identifies various amounts for which land is insured, is inconsistent with cover being based on indemnity value. Thirdly, one would expect consistency between the coverage provided for residential buildings and residential land.

[57] We do not accept these arguments. In our view, it is not arguable that the words “deemed to be insured ... to the amount” in s 19 convey anything other than that the land is insured up to the maximum amount provided for. But that does not mean that the maximum amount is always payable. To the contrary, it does not go beyond the general principle that an insurance policy is a contract of indemnity under which an insured may recover their actual loss, subject to any provision as to the maximum amount recoverable, but not more than their actual loss.⁵⁷ This principle was explained by Brett LJ in *Castellain v Preston*:⁵⁸

The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

[58] In *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, the Supreme Court cited this passage and added:⁵⁹

This is a succinct definition of the indemnity principle, a principle which is generally applicable to the assessment of losses under an indemnity policy and underlies the unwillingness of courts to construe such policies so as to confer entitlements which exceed the loss of the insured.

[59] Mr Barker’s argument would require words to be read into s 19 to justify a departure from that principle. But the words used in s 19 are analogous to the typical

⁵⁷ *Leppard v Excess Insurance Co Ltd* [1979] 1 WLR 512 (CA) at 518–519 per Megaw LJ.

⁵⁸ *Castellain v Preston* (1883) 11 QBD 380 (CA) at 386.

⁵⁹ *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352 at [35] (footnotes omitted). See also *Xu v IAG New Zealand Ltd* [2019] NZSC 68, [2019] 1 NZLR 600 at [14]–[15].

operative clause in an insurance policy, in which the insurer agrees to “insure” or to “indemnify”, which, absent some express provision, will do no more than confer the right to be indemnified in the sense described in *Castellain v Preston*.

[60] The fact that indemnity value is specified in relation to culverts, bridges and retaining walls could not, in ordinary language, have the effect that the plaintiffs contend. Nor is there any basis on which to approach the question of interpretation by assuming that Parliament intended to provide the same kind of cover for residential land and residential buildings. The concept of replacement cover, as opposed to indemnity cover, is only meaningful in relation to structures because, unlike indemnity cover, it provides the insured with “new for old”. That concept is inapt in relation to land because no issue of depreciation (or betterment) arises. The only relevant questions can be whether it is possible to repair the damage, whether the insured is going to repair the damage and, if not, what is the loss sustained by the insured.

[61] Nor do we consider it arguable that the Full Court erred in viewing the legislative history of s 19 as supporting its interpretation. The Full Court was concerned with the passage of the Earthquake Commission Bill 1992, which would replace the Earthquake and War Damage Act 1944.⁶⁰ Before we discuss the provisions in the Bill, we briefly canvas the earlier history of cover for natural disaster damage to residential land.

[62] When the first statutory scheme for natural disaster damage was introduced through the Earthquake and War Damage Act in 1944, insurance cover in New Zealand was generally offered on an indemnity basis. Amendments were enacted in 1951 to recognise policies providing replacement cover.⁶¹ Automatic cover under the Earthquake and War Damage Act was explicitly for indemnity value only and limited

⁶⁰ Earthquake Commission Bill 1992 (210-1).

⁶¹ Earthquake and War Damage Amendment Act 1951. See *Michalik v Earthquake Commission* [2014] NZHC 2238 at [59]; *Farms Mutual Insurance Co Ltd v Bay Milk Products Ltd* [1989] 3 NZLR 647 (CA) at 652–653; *AMP Fire and General Insurance Company (NZ) Ltd v Earthquake and War Damage Commission* (1983) 2 ANZ Insurance Cases 60-529 (CA); Earthquake and War Damage Amendment Bill 1951 (23-1) (explanatory note); and (28 November 1951) 296 NZPD 1146.

to buildings.⁶² Cover for certain land was added later by the Earthquake and War Damage (Land Cover) Regulations 1984.⁶³

[63] Regulation 5(1) provided that:

... the following property owned by the owner of [a building insured under the Earthquake and War Damage Act] shall also be deemed to be insured ...

(a) The land on which the insured building is situated ...

...

Regulation 6 provided that if any property covered under reg 5 was damaged by earthquake:

... the Commission shall be liable to make good (by payment or reinstatement or repair or by a combination thereof, at the option of the Commission) all such loss or damage to an amount not exceeding ...

There followed a formula that is very similar to that used in s 19(a) of the EQC Act.

[64] In 1993, the Finance and Expenditure Committee considered the Earthquake Commission Bill. As originally drafted, cl 18(1) relevantly provided that:

... where ... any person enters into a contract of fire insurance with an insurance company in respect of any residential property ... the residential property shall at all times during that period be deemed to be insured ... against natural disaster damage to the amount which is the lesser of the replacement value of the property or the maximum amount, plus the value of any land covered under this section suffering natural disaster damage.

[65] The Full Court noted that, in its submission to the Select Committee, the Commission had pointed out that the effect of this provision would be to provide replacement cover for land as well as buildings, which was not intended and was not previously provided for.⁶⁴ The Full Court concluded:⁶⁵

[108] For that reason, the Commission submitted to the Select Committee that “residential building” and “residential land” should be defined separately and that there should be separate insuring provisions for each. This

⁶² Land was excluded by reg 5(b) of the Earthquake and War Damage Regulations 1944. Section 14(2A) of the Earthquake and War Damage Act (inserted by the Earthquake and War Damage Amendment Act in 1951) made it explicit that only indemnity cover was provided.

⁶³ Earthquake and War Damage (Land Cover) Regulations 1984, regs 5 and 6.

⁶⁴ Full Court decision, above n 1, at [107].

⁶⁵ Footnote omitted.

submission appears to have been accepted. The [EQC Act] separately defines residential buildings and residential land and these are insured under separate provisions. Further, the replacement cover expressly provided in the case of residential buildings and personal property is not referred to in the insuring provision for residential land. Nor does the definition of “replacement value” extend to residential land. ...

[66] Mr Barker submitted that the Full Court had misunderstood the effect of the change from the Bill as originally drafted to the section as enacted. He argued that contrary to the way the Full Court had understood the draft provision, the reference to “replacement value” was a reference to buildings, not land, and the cover for land was for “the value of [the] land”, so the separation of the cover into what became ss 18 and 19 simply created a separate limit to the value of the land. This, he submitted, was simply a drafting decision and did not represent a substantive change in the level of cover provided. Therefore, the legislative history did not, in fact, support the interpretation the Full Court had reached.

[67] We do not see any error in the Full Court’s reading of the Bill. It is clear from the Commission’s submission that the perceived problem arose from the extended definition of “Residential property” which, as originally drafted, included: the land on which the building was situated; all land within eight metres, in a horizontal line, of the building; and that part of the land holding within 60 metres (in a horizontal line) of the building and which constituted the main access way or part of the main access way to the building from the boundary.⁶⁶ While it is correct that the original cl 18 did appear to provide separate cover for “the value of any land”, there was obviously potential for confusion by virtue of the fact that cl 18 also provided cover for “the replacement value of the property”, given the definition of residential property included the residential land described above. Prima facie, then, cl 18 provided replacement cover for residential land. Given this, in the clause as drafted it was unclear what the separate cover for the “value of any land” referred to. This was undoubtedly the reason the Commission had recommended splitting the definition of residential land.

[68] Mr Barker’s second criticism of the Full Court decision was of the Full Court’s concern that a windfall could result from a payment on the basis of the cost of repairs

⁶⁶ Earthquake Commission Bill, cl 2(1) definition of “Residential property”.

to owners who had sold their property without having undertaken the repairs, where the cost of repairs would exceed the diminution in value.⁶⁷ Mr Barker submitted that this concern was misplaced. This was because s 19 clearly intended that where land could not be repaired, the owner would be entitled to be paid the value of the land. There is an element of circularity in this argument. We have already concluded that it is not arguable that the Full Court erred in holding that cover for land under s 19 is for indemnity only. If an owner sells, they will never incur the cost of repairs and therefore that cost is not one for which they could expect to be indemnified. Their loss, which will have crystallised on the sale, is the DOV, and, on the general principle of indemnity, they cannot recover a sum greater than their loss.

[69] However, as the Full Court properly recognised, indemnity cover does not necessarily mean that a DOV payment is the appropriate measure of loss. The Full Court pointed out that the loss to the insured must be assessed as a question of fact in each case and would not necessarily be satisfied by a payment that represented the loss in market value of the property, quoting the following explanation from *Reynolds v Phoenix Insurance Co Ltd*:⁶⁸

... you are not to enrich or impoverish: the difficulty lies in deciding whether the award of a particular sum amounts to enrichment or impoverishment. This question cannot depend in my view on an automatic or inevitable assumption that market value is the appropriate measure of the loss. Indeed in many, perhaps most cases, market value seems singularly inept, as its choice subsumes the proposition that the assured can be forced to go into the market (if there is one) and buy a replacement. But buildings are not like tons of coffee or bales of cloth or other commodities unless perhaps the owner is one who deals in real property. To force an owner who is not a property dealer to accept market value if he has no desire to go to market seems to me a conclusion to which one should not easily arrive. There must be many circumstances in which an assured should be entitled to say that he does not wish to go elsewhere and hence that his indemnity is not complete unless he is paid the reasonable cost of rebuilding the premises in situ.

[70] The Full Court considered that the EQC Act contemplated that the Commission could settle claims for natural disaster damage to residential land “by meeting repair or reinstatement costs in appropriate cases”.⁶⁹ However, that would not always be an available or appropriate response, especially in relation to IFV — for example, where

⁶⁷ Full Court decision, above n 1, at [113].

⁶⁸ At [109], quoting *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd’s Rep 440 (QB) at 451.

⁶⁹ Full Court decision, above n 1, at [110].

a claimant does not intend to reinstate or has sold the property without doing the repair work or where carrying out the repair work is neither technically feasible nor lawful. Paying for repair or reinstatement costs in those situations would produce a windfall, overcompensating the claimant rather than meeting their actual loss.⁷⁰

[71] This ground of appeal fails.

Issue (b)(i): will the common issues materially advance the case? (the Commission's appeal)

The issue

[72] The Judge accepted that the following two common issues identified by the plaintiffs were suitable for a representative action:⁷¹

Whether, when settling a claim for natural disaster damage for residential land under s 19 of the [EQC Act], [the Commission] misused the DOV approach to determine the indemnity value of claims for ILV damage to residential land, by:

- (a) formulating and applying a policy not in accordance with the [Full Court decision] and/or the [EQC Act] in the respects pleaded in the second amended statement of claim; and
- (b) having a strategy to wrongly minimise its payments by using DOV.

[73] The Judge accepted that these questions raised common issues because a finding that the Commission's policy was not lawful could establish a res judicata for the benefit of the represented group.⁷² He added:⁷³

[29] ... Individual class members will still need to establish, at a second stage of the proceeding, an entitlement to payment assessed on some basis other than DOV and quantify that entitlement. As has been recognised in other cases, that is no bar to the grant of leave under r 4.24. ...

[74] In making the latter observation, the Judge cited the decision in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, in which this Court accepted that allegations of a strategy to misrepresent claimants'

⁷⁰ At [112]–[113].

⁷¹ *Freer* (No 2), above n 7, at schedule. The Judge rejected the other issues advanced as too vague or as untenable as a matter of law: at [23], [26] and [31] and [35].

⁷² At [29] and [41].

⁷³ Footnote omitted. See also at [37] and [41].

contractual rights under a common policy wording and to delay processing claims was a suitable common issue, even though aspects of the claims would still need to be determined individually.⁷⁴ The Judge then added:⁷⁵

[37] If, to minimise its financial liability, [the Commission] had a deliberate strategy that regardless of the individual circumstances it would settle all claims on a DOV basis, that would be a breach of [the Commission's] obligations under the [EQC Act] potentially affecting all group members. ...

[75] The Commission challenges this aspect of the Judge's decision on the basis that, even if the threshold requirement of a common issue of significance to the represented class was met, a further overriding question remained which the Judge had failed to address — whether a representative order would advance the principal objective of the High Court Rules of securing the just, speedy and inexpensive determination of the proceedings.⁷⁶

[76] In *Body Corporate No DPS 91535 v 3A Composites GmbH*, this Court observed that even if there is a class with the same interest in the subject matter of the proceeding such that the threshold requirement of r 4.24 is met:⁷⁷

[65] ... 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 ...

[77] The Commission submitted that this requirement is implicit in the statements in *Credit Suisse Private Equity LLC v Houghton* and *Cridge* that there must be a common issue of fact or law of significance to each member of the represented class and that it “must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity”.⁷⁸

⁷⁴ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 [*Southern Response Unresolved Claims Group*] at [29], [36], [44]–[45] and [54].

⁷⁵ *Freer* (No 2), above n 7.

⁷⁶ High Court Rules, r 1.2(1).

⁷⁷ *Body Corporate No DPS 91535 v 3A Composites GmbH* [2023] NZCA 648, [2023] NZCCLR 27.

⁷⁸ *Credit Suisse Private Equity LLC v Houghton*, above n 12, at [53(b) and (c)] per Elias CJ and Anderson J; and *Cridge v Studorp Ltd*, above n 13, at [11(d) and (f)].

[78] While Mr Curran, on behalf of the Commission, accepted that leaving some individual issues to stage two of the proceeding would not be a bar to the plaintiffs' application, he submitted that the Judge had erred in not considering whether resolution of the identified common issues would materially advance the class members' claims. The Commission contends that resolution of the common issues at stage one would not do so because of the extent of proof required at stage two to establish individual entitlements.

Would the common issues materially advance the claims of the class members?

[79] The plaintiffs' application issue, pleaded for the first time in their second amended statement of claim, alleges that the Commission's policy for settling ILV and IFV claims was inconsistent with the Full Court decision and the EQC Act because it:

- (a) did not provide for the Commission to determine the costs to reinstate or repair the land before determining the appropriate basis for settlement and instead put the obligation on the claimant to provide the information necessary to establish that DOV was not the appropriate basis for settlement (specifically, by requiring the claimant to establish the cost of repairs, that the relevant consents would either be obtained or were not necessary and that the repairs could be undertaken within a reasonable period);
- (b) did not allow for consideration of whether the aforementioned requirements were appropriate in individual claims;
- (c) applied various standards to land repairs as a basis for settling claims on a DOV basis without considering the circumstances of individual claims;
- (d) allowed for settlement on a DOV basis if the reinstatement cost was disproportionate to the DOV;
- (e) did not allow for a flexible and good faith assessment of each individual claim; and

- (f) was not consistent with the way the Commission addressed claims for land damage other than ILV and IFV.

[80] The plaintiffs also allege that the Commission's strategy was to settle all IFV and ILV claims on a DOV basis, regardless of individual circumstances (the strategy issue). They say that, in their case, a good faith assessment would have led to a settlement on the basis of the cost of repairs up to the s 19(a) cap.

[81] The Commission, however, says that even if these allegations were substantiated, each class member would still have to prove they were entitled to a cost of repair settlement under s 19 and the amount of that settlement. The Commission adduced evidence about the challenges of establishing the feasibility of repairing IFV and ILV damage, both technically and in terms of the consents needed. Each claimant would need to prove that they intended to repair the land, had a feasible repair methodology and that the cost of the proposed repair was not disproportionate to the DOV. Put another way, while the allegations that the Commission had followed a strategy or applied a policy that was contrary to its obligations under the EQC Act could impugn the decision to settle for DOV, they could not establish the actual entitlement of any individual claimant. In any given case, that would require evidence relating to the individual properties and the claimant's individual circumstances.

[82] Mr Curran submitted that this case was, therefore, distinguishable from *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, where allegations of breach of contract and the duty of good faith made by claimants holding identically-worded insurance policies were held to give rise to a common issue for claimants seeking to revisit the basis upon which their claims had been settled. The *Southern Response Unresolved Claims Group* had sought a representative order on the basis of the allegation that Southern Response had adopted a strategy that resulted in breaches by the insurer of its contractual obligations and of its duty of good faith which affected all the individual members of the Group.⁷⁹ Southern Response resisted the application on the ground that the aggregation of individual allegations of breach and description of them as deliberate or a strategy

⁷⁹ *Southern Response Unresolved Claims Group*, above n 74, at [11]–[12].

could not give rise to a common issue. Moreover, even if a common issue could be identified from the allegations, the issue would be overwhelmed by the individual questions raised in each claim.⁸⁰

[83] The Court agreed that the fact claimants had the same interest in the sense of holding identical insurance policies and alleging the same breach did not give rise to a common issue the resolution of which would dispose of the claims. Individual claimants still needed to prove both that the alleged breaches applied to them and the loss that flowed from the breaches.⁸¹ However, further inquiry led to the Court being satisfied the claimants could be grouped into subcategories with separate representatives reflecting specific contractual terms and conduct.⁸² It concluded that, even though the relevance of specific breaches to individual claimants and the assessment of individual losses would still need to be addressed at a later stage, proceeding on the basis of the identified common issues would remove the need for multiple claimants to prove, in numerous proceedings, the correct interpretation of the same contractual wording and whether essentially the same conduct amounted to a breach of contract.⁸³ It considered that resolution of the common issues was likely to enable prompt resolution of the claims and narrow the issues for any subsequent proceedings or negotiations.⁸⁴

[84] We do not see the circumstances of *Southern Response Unresolved Claims Group* as very different from the present case. The former concerned contractual obligations under an insurance policy and the latter obligations under a statutory insurance scheme.⁸⁵ There are undoubted likenesses between private insurers and the Commission in relation to the management and settlement of claims, which both private insurers and the Commission must undertake in good faith.⁸⁶ The complaints made against Southern Response in *Southern Response Unresolved Claims Group* are not dissimilar to those being made by the claimants in the present case — that the Commission did not act in good faith in formulating and implementing its policy for

⁸⁰ At [21]–[22].

⁸¹ At [32].

⁸² At [33].

⁸³ At [36]–[37].

⁸⁴ At [37].

⁸⁵ Earthquake Commission Act, s 5; and Full Court decision, above n 1, at [145].

⁸⁶ Full Court decision, above n 1, at [158] and [160].

the settlement of claims and, as a result of its policy, failed to properly consider the individual claims made on it.

[85] It is true that, ultimately, the class members must prove their individual entitlement. However, we think that the Commission overstates the difficulty in this respect. As in *Southern Response Unresolved Claims Group* we think that this aspect can be sufficiently addressed by careful identification of the class and, if necessary, the establishment of subcategories. Moreover, our conclusion that the challenge to the interpretation of s 19 in the Full Court decision is not reasonably arguable will necessarily mean that the class must (as we come to later) exclude those homeowners who have sold their houses and so will never incur the costs of repair. This ground of appeal therefore fails.

Issue (b)(ii): is the plaintiffs' claim without merit? (the Commission's appeal)

[86] A claim advanced by a representative plaintiff on behalf of the represented class must be arguable.⁸⁷ If it clearly lacks merit and so cannot succeed, the court will not permit other claims by members of the class to go forward in reliance on it. However, all that is required is a provisional assessment to ensure that the claim discloses an arguable case on the facts as pleaded.⁸⁸ This approach is a broad-brush impressionistic one rather than a detailed analysis of every allegation.⁸⁹ It does not require the applicant to prove the facts on which the claim is based but will allow a defendant to refute through the production of evidence a clearly wrong and critical factual allegation.⁹⁰

[87] The Full Court held that a claimant who does not intend or is not able to undertake land damage repairs should not be entitled to the cost of repairs.⁹¹

⁸⁷ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 [*Saunders v Houghton* (No 1)] at [38(d)]; *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652 [*Saunders v Houghton* (No 2)] at [103]–[104]; *Southern Response Unresolved Claims Group*, above n 74, at [16]; and *Sneesby v Southern Response Earthquake Services Ltd* [2022] NZHC 262 at [23] and [45].

⁸⁸ *Southern Response Unresolved Claims Group*, above n 74, at [16]–[17]; and *Saunders v Houghton* (No 1), above n 87, at [38(d)].

⁸⁹ *Southern Response Unresolved Claims Group*, above n 74, at [17]; and *Saunders v Houghton* (No 2), above n 87, at [104]–[105], affirming *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [44]–[45].

⁹⁰ *Southern Response Unresolved Claims Group*, above n 74, at [17].

⁹¹ Full Court decision, above n 1, at [112]–[113], [122] and [124].

The Commission says that the plaintiffs are therefore not adequate representatives of the proposed class because they were always unable to undertake repairs to their land.

[88] The Judge did not accept this argument. He approached the issue on the basis that the plaintiffs could not repair the ILV damage to their land until they had settled with their private insurer, which they ultimately did on a repair basis. They did not carry out repairs to the land, did not then seek a cost of repair settlement from the Commission and there was no evidence that they could undertake land repairs by that stage “except potentially in respect to land upon which a garage is situated”.⁹² Nevertheless, the Judge did not regard them as unsuitable representatives:

[46] ... Their case is that [the Commission’s] policies prevent anything other than settlement based on DOV. Whether the plaintiffs are now feasibly able and intend to undertake land repairs, and whether [the Commission] has an obligation to pay for the cost of such repairs if the plaintiffs were to incur them, are trial issues they will need to confront but does not make them unsuitable to advance the common issues on behalf of the represented class.

[89] Mr Curran argued that this conclusion was wrong and the lack of any evidence that the plaintiffs could, or intended to, repair the land was fatal to their entitlement to claim repair costs now. That made them unsuitable as representative plaintiffs. He pointed out that Ms McEvedy’s evidence was to the effect that she and Mr Freer did not have the means to repair the land. Even if repair costs had been paid out to the statutory cap, they would have faced a shortfall of at least \$60,000 on their own pleadings. This assertion was based on the pleaded ILV repair costs of around \$209,000. The applicable land cap was \$160,000 which meant that after deduction of the \$5,000 excess and the \$6,000 already paid for visible land damage there would have only been \$149,000 available for land repairs. Mr Curran added that, in reality, the shortfall would likely have been greater, including because the South East Earthworks Ltd quote excluded engineering, design and consenting costs.

[90] Nor was there evidence to support a potential exception in respect of the land on which the garage was situated. Mr Curran submitted that the proposed method of repair in relation to the land on which the garage was situated was different from the

⁹² *Freer* (No 2), above n 7, at [45].

ILV land repair previously contemplated, and the plaintiffs' evidence was that they also lacked the money to pursue it.

[91] Mr Curran submitted that these matters ought not be deferred to trial since it cannot benefit the class to be represented by a plaintiff with a hopeless claim.

[92] The plaintiffs' response is that they clearly did intend to repair the land and this is evident from their email communications with the Commission at the time and the fact that they obtained a quote for the work. However, the Commission has effectively frustrated the land repair option by settling on a DOV basis. To treat that as determining the question of their intention to repair would be to allow the Commission to rely on its own wrongdoing. It is speculative to say that they would not or could not have repaired even if the land cap had been paid.

[93] Undoubtedly, the plaintiffs did want to repair their land at the time. But equally, that option — even on their own evidence — depended on a satisfactory settlement with their private insurer. The fact that the proposed means of repairs involved a removal and rebuild of the house means that there is no realistic prospect of land repair being undertaken. This is unrelated to the Commission's own conduct and instead is simply a function of the options that were available to the plaintiffs at the time and the fact that those options have not altered.

[94] We therefore agree with the Commission that the Judge erred in treating the plaintiffs' inability to undertake land repairs as a trial issue. The merits assessment of a potential representative plaintiff is provisional but must be allowed to have some effect as a screening test, so that it can guard against misuse of representative orders. The Commission's appeal is therefore allowed on this issue and the High Court's order granting the plaintiffs leave to sue as representative plaintiffs is set aside.

[95] We note that, given this finding, it is not strictly necessary for us to address the remainder of the plaintiffs' appeal. The remaining issues raised by the plaintiffs relate to the scope of the representative order made in *Freer* (No 2). However, for the sake of completeness, we will discuss the plaintiffs' remaining grounds of appeal briefly,

after we deal with the Commission's final ground of appeal, being whether the application issue in the plaintiffs' second amended statement of claim is time-barred.

Issue (b)(iii): is the claim as now pleaded time-barred? (the Commission's appeal)

The issue

[96] The time for bringing a money claim runs for six years from the date of the act or omission on which the claim is based (the primary period).⁹³ However, the primary period is extended if the claimant has "late knowledge" of specified facts.⁹⁴ Such a claimant may bring their claim within three years of acquiring actual or constructive knowledge of those facts (the late knowledge period).⁹⁵

[97] It will be recalled that the second amended statement of claim, which was filed on 7 July 2023, expanded the original cause of action to include allegations relating to the Commission's policy for settling IFV and ILV claims. It was alleged that the Commission's policy did not accord with the Full Court decision or the provisions of the EQC Act and had not been applied in a way that complied with the Full Court decision (the application issue).⁹⁶ Specifically, the Commission had failed to assess the reinstatement cost for the plaintiffs' land, determined to settle on the basis that the reinstatement cost was disproportionate to the DOV without a proper understanding of the reinstatement cost or proper regard to the plaintiffs' stated intention to reinstate and required the plaintiffs to provide information regarding reinstatement within an unreasonable time frame. The culmination of these allegations was that:

On a proper and good faith assessment of the plaintiffs' case, the appropriate indemnity response would have been settlement on the basis of the Reinstatement Costs subject to the cap ...

⁹³ Limitation Act 2010, s 11(1).

⁹⁴ Sections 11(2)–(3) and 14.

⁹⁵ Sections 11(3)(a) and 14(1).

⁹⁶ The new pleading included an allegation that the Commission had deliberately used a strategy of settling on a DOV basis as a means of reducing its liability (the strategy issue). The Judge's conclusion that this allegation was a fresh cause of action but that the plaintiffs had an arguable case as to late knowledge (with the result that the issue should be allowed to proceed to trial) is not challenged in this appeal: see *Freer* (No 2), above n 7, at [66] and [74].

[98] The Judge rejected the Commission’s argument that these allegations are time-barred. The Commission says that the Judge’s conclusion was wrong and the application issue constitutes a fresh cause of action and is time-barred because the second amended statement of claim was filed more than six years after the act on which it is based, whether that act was the publication of the policy for settlement of IFV and ILV claims in September 2016 or the Commission’s determination of the plaintiffs’ entitlements under s 19 on 18 April 2017. The claim is therefore outside its primary period.

[99] The Commission also says that the plaintiffs cannot establish late knowledge so as to entitle them to bring the claim outside the primary period.

Did the application issue amount to a fresh cause of action?

[100] Rule 7.77(2)(a) of the High Court Rules permits the addition of a fresh cause of action in an amended pleading if it is not statute-barred. Whether a cause of action is fresh is determined by reference to the principles summarised in *Transpower New Zealand Ltd v Todd Energy Ltd*:⁹⁷

- (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another ...
- (b) Only material facts are taken into account and the selection of those facts “is made at the highest level of abstraction” ...
- (c) The test of whether an amended pleading is “fresh” is whether it is something “essentially different” ... Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
- (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case “varying so substantially” from the previous pleadings that it would involve investigation of factual or legal matters, or both, “different from what have already been raised and of which no fair warning has been given” ...

[101] In *ISP Consulting Engineers Ltd v Body Corporate 89408*, this Court said that the question to ask is whether the amended pleading has “an essentially different

⁹⁷ *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61] (citations omitted).

character” and considered that the assessment is an objective one to be considered by reference to the substance of what is pleaded rather than the form.⁹⁸

The Judge’s reasoning on the limitation issue

[102] The Judge’s decision on this issue needs to be viewed against his decision in *Freer* (No 1). It will be recalled that in the first amended statement of claim the plaintiffs alleged they were entitled to the cost of repairing the ILV damage to their land up to the value of the cap in s 19(a), and that the Commission’s settlement of their claim on a DOV basis was in breach of its statutory obligations. In its statement of defence to the first amended statement of claim, the Commission admitted settling the plaintiffs’ claim for an amount that reflected the DOV and said further that “DOV is an appropriate basis for settling ILV damage claims and was confirmed as lawful by the full bench of the High Court in [the Full Court decision]”. It admitted the amounts it had paid the plaintiffs in respect of the ILV damage and visible land damage, and said further:

... that details of the land settlement amount were provided to the plaintiffs by letter dated 18 April 2017, which stated that, in accordance with the terms of [the Commission’s] ILV policy, it was settling the plaintiffs’ ILV damage claim for the amount of the DOV as assessed by [the Commission’s] valuers
...

[103] In seeking a representative order on the basis of the first amended statement of claim, the plaintiffs — after a number of attempts — proposed the following common issues.⁹⁹

- a. Are claims for natural disaster damage to residential land to be settled on an indemnity basis? [(referred to as the “interpretation argument”)]

If so

- b. Was the use of a [DOV] approach to determine the indemnity value of claims for natural disaster damage to residential land by IFV and/or ILV applied to such claims in a mechanical way and without proper consideration of their individual circumstances[?]
- c. Was the use of the DOV approach in that way consistent with [the Commission’s] indemnity obligation[?]

⁹⁸ *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 at [22]. See *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273; and *Smith v Wilkins and Davies Construction Company Ltd* [1958] NZLR 958 (SC) at 961.

⁹⁹ *Freer* (No 1), above n 5, at [26].

[(together referred to as the “application argument”)]

[104] Self-evidently, these questions reflected the declaration made by the Full Court, which, it will be recalled, relevantly included:¹⁰⁰

The Commission is entitled to develop and publish guidelines identifying factors it will take into account in assessing the validity of a claim for “natural disaster damage” based on [IFV] and/or [ILV] provided the guidelines:

...

(b) are not applied mechanically; and

(c) do not exclude consideration of factors that are relevant to any particular case; ...

...

[105] The Judge recorded counsel’s argument in relation to the application argument being the basis for a common issue as follows:¹⁰¹

[82] ... [Mr Barker] argues global decisions were made that IFV and ILV land damage was too expensive and difficult to repair and that “[the Commission] was not going to pay on that basis.” This is denied by [the Commission] both in respect to the plaintiffs’ claim and to ILV and IFV claims generally.

[83] Mr Barker argues that [the Commission’s] position that there were individual assessments undertaken ignores the reality that over 99.9 per cent of ILV and IFV claims were settled on a DOV basis. He says this can only be reconciled with an approach to the settlement of claims that was applied “mechanically” and “without individual consideration”.

[106] The Judge rejected this argument, saying:

[84] ... I do not accept that the plaintiffs’ pleading is sufficiently broad to encompass the application argument as it has now been expressed. The amended statement of claim refers on several occasions to [the Commission] having made assessments of the plaintiffs’ claim. As I read the pleading, what is alleged is that [the Commission] assessed the plaintiffs’ claim incorrectly, not that [the Commission] undertook no assessment of it. In this respect the pleading contradicts the assertion that there was no individual assessment of claims. My view of the pleading is consistent with the manner in which the plaintiffs initially framed the common issue which, to my mind, simply advanced the interpretation issue.

¹⁰⁰ Full Court decision, above n 1, at [160].

¹⁰¹ *Freer* (No 1), above n 5.

[107] *Freer* (No 2) was decided on the basis of the second amended statement of claim, which included new allegations directed at the application issue claiming that the Commission misused DOV as a basis for settlement by adopting a policy that did not accord with the Full Court decision or the provisions of the EQC Act. The Judge rejected the Commission's argument that this pleading constituted a new cause of action for limitation purposes.¹⁰²

[60] ... I have arrived at the view that the application issue is not a fresh cause of action. I accept it is arguable that the plaintiffs' pleading in the first amended statement of claim was broad enough in its terms to encompass the application issue.

[61] [The Commission's] view is that the first amended statement of claim only raised the interpretation issue. That was also the view I took and expressed in my first judgment. No doubt that view was influenced by the fact the plaintiffs initially raised the interpretation issue as the single common issue to be advanced.

[62] However, the first amended statement of claim does not plead that [the Commission] must *always* settle ILV (or IFV) claims on a cost of repair basis. The pleading is that [the Commission] failed to properly assess the plaintiffs' claim on that basis. In response to that, [the Commission] has raised both the [Full Court decision] and its policy as justifying the DOV settlement.

[63] To my mind, on the face of those pleadings, in the event the plaintiffs failed to convince the trial judge that the [Full Court decision] was wrongly decided that would not be an end of the matter. The judge would still be required to go on and consider whether [the Commission's] assessment that DOV was the appropriate basis upon which to settle the plaintiffs' claim was correct. That would inevitably involve consideration of [the Commission's] policies, whether they were consistent with [the Commission's] obligations under the [EQC Act], and the manner in which they were applied to the plaintiffs' claim.

[108] The Judge acknowledged that this view appeared inconsistent with the way he had expressed himself in *Freer* (No 1) but explained further:

[65] ... I agree with Mr Barker's submission that it is important not to confuse the basis of the plaintiffs' claim and the matters advanced as common issues for the purposes of the proposed representative action. The comments in my earlier judgment were in the context of the plaintiffs' failure to properly articulate a viable common issue. It follows therefore that I am not able to accept [the Commission's] submission that the application issue is fresh and therefore statute barred.

¹⁰² *Freer* (No 2), above n 7 (footnotes omitted).

Did the Judge err in finding that the application issue as now pleaded is not a fresh cause of action?

[109] In arguing that the application issue is properly viewed as constituting a fresh cause of action the Commission submitted, first, that the first amended statement of claim only alleged that it wrongly settled on a DOV basis rather than for cost of repair, as required by s 19. This pleading was concerned with the interpretation of s 19, which would engage the correctness of the Full Court's interpretation of s 19 in the Full Court decision. The Commission pointed out that the first amended statement of claim necessarily proceeded on the basis that the Full Court's interpretation was wrong, whereas the second amended statement of claim, which alleged that the Commission had failed to comply with the Full Court decision, assumed the correctness of that decision.

[110] The plaintiffs commenced their proceedings some seven years after the Full Court delivered its decision. The Commission's policy was well known, though its implementation may not have been so commonly understood. While the first amended statement of claim was undoubtedly minimalist, it was necessarily predicated on an assertion that the Full Court's interpretation of s 19 was incorrect, that cover under s 19 was on a replacement basis and, consequently, that the Commission should have assessed the plaintiffs' claim on a cost of repair basis.

[111] At [7] of the first amended statement of claim, the plaintiffs pleaded, relevantly, that under ss 18 and 19 of the EQC Act the amount of cover for natural disaster damage to residential land:

- (2) ... is/was the smallest of the value, at the site of the damage, of:
 - (a) The minimum lot size under the applicable District Plan at the time of the damage;
 - (b) An area of land of 4000m²;
 - (c) The area of land that is actually lost or damaged.

[112] Then, at [26], the plaintiffs pleaded that the Commission should have assessed and paid them the costs to repair the land up to the value of the cap in s 19(a).

[113] These assertions were, self-evidently, a challenge to the reasoning in the Full Court decision. Consequently — because the Commission's policy which formed the basis for settlement of the plaintiffs' claims on a DOV basis depended on the Full Court's reasoning — it must have been apparent that the status of the policy would come under challenge as well. The fact that the Commission referred in its statement of defence to the first amended statement of claim to its advice to the plaintiffs that their settlement was based on its policy is consistent with that, as is the fact that the Commission pleaded that the use of DOV to quantify the plaintiffs' loss was appropriate and in accordance with the Full Court decision.

[114] For that reason, we agree with the Judge that the effect of the first amended statement of claim was to complain that the Commission failed to properly assess the plaintiffs' claim on a cost of repair basis. In our view, it was implicit that both the Full Court decision and the Commission's policy would be under challenge. We also accept that if the challenge to the Full Court's interpretation of s 19 was not successful, a judge determining the plaintiffs' claim would still need be satisfied that the policy complied with the Full Court decision and that an assessment had been properly made under it. We therefore do not see any inconsistency in the pleadings. We find that the application issue was sufficiently raised in the first amended statement of claim such that the allegations in the second amended statement of claim do not constitute a fresh cause of action.

[115] However, the Commission argued, alternatively, that even if the application issue was found to have been raised in the first amended statement of claim, it was nevertheless a fresh cause of action as pleaded in the second amended statement of claim because it involved a range of novel factual and legal enquiries that did not arise in the first amended statement of claim. These novel enquiries included the interpretation of the policy; whether the policy was consistent with the Full Court decision and the EQC Act; and whether the Commission's approach to and assessment of a range of cases, not just the plaintiffs' case, was adequate in terms of the EQC Act.

[116] We do not accept that the expanded allegations relating to the application issue are so significantly different from the general complaint in the first amended statement of claim as to be viewed as a fresh cause of action. The plaintiffs' complaint in the

first amended statement of claim was that their claim had not been properly settled on a cost of repair basis. The new allegations in the second amended statement of claim do no more than provide particulars of the Commission's alleged failings (that is, the way in which the Commission failed to properly settle the claim in accordance with its obligations under the EQC Act, as interpreted in the Full Court decision). Moreover, the broader focus of the second amended statement of claim (including the allegations relating to how the Commission settled the claims of other owners) is clearly in response to the plaintiffs' application for representative orders, which post-dated the first amended statement of claim. The broader focus does not substantially alter the character of the application issue.

[117] We therefore find that the application issue, as pleaded in the second amended statement of claim, is not a fresh cause of action and so is not time-barred. This ground of appeal fails.

Late knowledge

[118] Our conclusion on the primary period means that the issue of late knowledge falls away. We therefore address it very briefly.

[119] Under s 14 of the Limitation Act 2010, the "late knowledge date" is the date on which the claimant either gained knowledge of or ought reasonably to have gained knowledge of, among other things:

- (a) the fact that the act or omission on which the claim is based had occurred:
- (b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:
- (c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:

...

[120] The plaintiffs do not disagree with the Commission's view that the act or omission on which the claim is based was either the publication of the policy or the Commission's determination of their entitlement under s 19: respectively, in

September 2016 and April 2017. They say, however, that it was not until later that they discovered that the Commission had never costed a repair for their property and had never individually assessed their claim.

[121] Had the issue still been live, we would have held that the plaintiffs knew of these alleged failings before September 2016. The plaintiffs had been told in a letter dated 27 June 2016 that the Commission would need to work with their professional adviser to develop a detailed ground improvement design in order to progress a repair costs settlement. The Commission was still seeking ground repair design information in a 12 September 2016 email. Further, the plaintiffs ought reasonably to have been aware of a Commission fact sheet (published in June 2016) which made it clear that repair-based settlements under s 19 first required either the Commission to review a claimant's professional design or for the claimant and their professional adviser to review a professional design prepared by the Commission (in the event the professional adviser was not able to produce a ground improvement design themselves). We therefore accept the Commission's submission that the plaintiffs must have known by June 2016 that it had not independently costed a repair for the land.

Issue (b)(iv): are the plaintiffs suitable representatives for the IFV claimants? (the plaintiffs' appeal)

[122] Although the plaintiffs sustained (only) ILV damage to their property, they also sought to represent property owners who had sustained IFV damage.

[123] The Judge held that they could not do so because the two types of damage were materially different. He accepted the argument advanced by the Commission that, even though the EQC Act did not refer to, or distinguish between, ILV damage and IFV damage, and even though both resulted from a change in the levels of land in a natural disaster, there was still an obvious basis for distinguishing between them (and such a distinction was made in the Full Court decision).¹⁰³ Specifically, the vulnerability to which the land is exposed is different in each case and the methods by which each can be repaired, as well as the practical impediments in effecting repairs, are different.¹⁰⁴ The Commission's policies for assessing and settling ILV claims and

¹⁰³ *Freer* (No 2), above n 7, at [80], referring to Full Court decision, above n 1, at [89]–[92].

¹⁰⁴ *Freer* (No 2), above n 7, at [80].

IFV claims were materially different, and the plaintiffs’ claim was assessed under the policy provisions specific to ILV damage. As a result, any finding made in respect of the plaintiffs’ claim for ILV damage could not create a res judicata that bound members of the group who made claims in respect of IFV damage.¹⁰⁵

[124] A plaintiff can only sue in a representative capacity for the benefit of the other members of the class (the adequate representation requirement), and the representative will not be permitted to advance claims other than those which its own claim represents.¹⁰⁶ However, the “same interest” requirement in r 4.24 is a relatively low hurdle. In *Simons v ANZ Bank New Zealand Ltd* this Court said that:¹⁰⁷

The rule “does not require identity of claim or even the same cause of action”. As the language of r 4.24 indicates, it is enough that there is “the same interest in the *subject matter* of the proceeding”.

[125] In our view, there is sufficient commonality between claims for IFV damage and ILV damage to treat the respective claimants as having the same interest in the subject matter of the proceedings. We see it as relevant that s 19 does not differentiate between types of natural disaster damage covered. We also see it as significant that the Full Court treated both as natural disaster damage covered by s 19.¹⁰⁸ Moreover, the Commission treated the two types of damage as functionally equivalent in terms of how the policy for settling claims would be formulated and applied, and the declarations confirming the suitability of the Commission’s policy and the way it should be applied were in identical terms.¹⁰⁹

[126] The position has some similarity with *Ross v Southern Response Earthquake Services Ltd*, in which this Court determined that insureds whose houses required “repairs” rather than a “rebuild” could be included in the same insured class:¹¹⁰

[129] We consider that there are significant questions of both law and fact which are common to rebuild and repair customers. Any relevant differences

¹⁰⁵ At [81].

¹⁰⁶ *Ressels v Southern Response Earthquake Services Ltd* [2023] NZHC 3344 at [13(c)], citing *Southern Response Unresolved Claims Group*, above n 74, at [32].

¹⁰⁷ *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] 3 NZLR 485 at [41], quoting *Credit Suisse Private Equity LLC v Houghton*, above n 12, at [55] per Elias CJ and Anderson J (footnote omitted).

¹⁰⁸ Full Court decision, above n 1, at [91].

¹⁰⁹ At [125] and [160]–[161].

¹¹⁰ *Ross v Southern Response Earthquake Services Ltd*, above n 11.

in policy entitlements arising from differences in the terms of the policy in relation to repair and rebuild scenarios can readily be addressed at stage 1 of the proceedings. That is more efficient than having a separate proceeding in relation to repair customers, which would need to traverse much of the same territory. And as already noted, it is common ground that the circumstances of individual class members will need to be addressed at stage 2.

[130] It follows that repair customers have the same interest in the proceedings for the purposes of r 4.24. It would be more consistent with the goals of efficiency and fairness for them to be included in the claimant class in this proceeding.

[127] We consider that the Judge erred on this issue and that the plaintiffs do have the “same interest” in proceedings brought in relation to both ILV and IFV claims. However, given our previous finding that the plaintiffs are not suitable representative plaintiffs, this finding has no bearing on our overall conclusion.

Issue (b)(v): was Mr Wootton suitable to represent the IFV owners? (the plaintiffs’ appeal)

[128] As an alternative to representing IFV owners themselves, the plaintiffs proposed a third party, Mr Wootton, as a representative plaintiff for those owners. Our conclusion on the previous issue means that this issue falls away. We nonetheless address it very briefly, for completeness.

[129] Mr Wootton provided an affidavit confirming that he owned a property that had suffered earthquake damage in the Canterbury earthquake sequence and that he had been advised by the Commission in 2016 that the property had sustained IFV damage and his claim would be settled on a DOV basis. He says that documents he received from the Commission in 2023 show that it had never considered methods of repairing or remediating the damage or priced the cost of repairing the damage. He agreed to represent the interests of homeowners who were assessed and paid for IFV damage on a DOV basis.

[130] The Commission resisted Mr Wootton being named as a representative sub-class plaintiff because there was no application to join him to the proceeding as a plaintiff and his adequacy as a representative of the IFV class could not be assessed. It particularly noted concerns about Mr Wootton’s ability (on the available evidence) to substantiate a repair cost entitlement and limitation issues.

[131] The Judge did not consider that Mr Wootton was a suitable representative for a sub-class of IFV claimants for the following reasons:¹¹¹

- (a) To sue on behalf of or for the benefit of others Mr Wootton needed to either commence an action in his own name or be joined under r 4.56 of the High Court Rules to an existing proceeding, which would require amendments to the statement of claim.¹¹²
- (b) The requirement to be joined as a plaintiff was not a mere formality: the making of an order for joinder was dependent upon the requirements of r 4.56, which governs the striking out and adding of parties, being satisfied.
- (c) The plaintiffs had not applied to join Mr Wootton as a plaintiff and did not appear to have given any consideration to the requirements of r 4.56.

[132] Moreover, the Judge agreed with the Commission that there were obvious deficiencies in Mr Wootton's evidence and no pleading upon which his viability as a representative plaintiff could be assessed.¹¹³

[133] The plaintiffs submitted that Mr Wootton could represent a sub-class without first being joined as a plaintiff, and there was sufficient information upon which his suitability could be assessed. Regardless, there was enough information for him to be joined under r 4.56 if required.

[134] We consider that the Judge was correct on this issue. In *Ressels v Southern Response Earthquake Services Ltd*, this Court considered that a party who was not, and could not become, a party to the proceeding in which the application for a representative order had been made faced "insuperable" obstacles to becoming a representative plaintiff.¹¹⁴

¹¹¹ *Freer* (No 2), above n 7, at [85]–[92].

¹¹² At [86]–[87], citing *Southern Response Unresolved Claims Group*, above n 74, at [37] and *Simons v ANZ Bank New Zealand Ltd* [2022] NZHC 1836, [2022] NZCCLR 30 at [109].

¹¹³ *Freer* (No 2), above n 7, at [93].

¹¹⁴ *Ressels v Southern Response Earthquake Services Ltd* [2023] NZCA 614 at [30].

[135] Rule 4.56 of the High Court Rules relevantly provides:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - ...
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.
- ...

[136] There is no basis for treating Mr Wootton either as a person who ought to have been joined to the existing proceeding or as a person whose presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding. Leaving aside the fact that no formal application for joinder has been made, there is no draft pleaded claim, Mr Wootton's evidence does not show any intention or ability to repair his property and any claim advanced by him would likely be time-barred.

Issue (b)(vi): should the class include former owners who did not undertake repairs but retained their right to claim against the Commission? (the plaintiffs' appeal)

[137] The Judge held that the represented class should not include former owners who had not undertaken repairs but who retained their rights to claim against the Commission. This was because, on the fundamental principle of indemnity, they could not be entitled to a payment on the basis of the cost of repairing land they no longer owned.¹¹⁵

[138] The plaintiffs say that those who sold following an erroneous assessment, determination or payment by the Commission should nevertheless be entitled to the amount required to reinstate, as otherwise the Commission would be permitted to take

¹¹⁵ *Freer* (No 2), above n 7, at [95]–[98].

advantage of its own wrongdoing. They rely on *Edwards v AA Mutual Insurance Co*, in which the insureds recovered the cost of reinstatement even after they had sold the property and, as a result, would never incur the cost of reinstatement.¹¹⁶

[139] In *Edwards* the insurer wrongly declined to indemnify the plaintiffs following the destruction of their house by fire, asserting misstatement and nondisclosure. The evidence was that the plaintiffs intended to rebuild and had been prevented from doing so by the insurer's wrongful declinature, which left them without sufficient funds. In those circumstances, the insurer was taken to have accepted that the requirement for the insureds to rebuild in order to be entitled to reinstatement cover was no longer effective. The Court applied the general rule that a defendant cannot rely on non-fulfilment of a condition precedent where the defendant has prevented its performance.¹¹⁷

[140] In this case the alleged wrongdoing by the Commission, as it appears from the second amended statement of claim, is its failure to undertake a good faith assessment of the plaintiffs' claim and requiring the plaintiffs to provide plans for reinstatement when they were unable to do so. The plaintiffs say that if the Commission had acted correctly in these respects, the appropriate indemnity response would have been the cost of reinstatement up to the statutory cap. But, as we have noted previously, the plaintiffs' position regarding reinstatement, which is evident from Ms McEvedy's affidavit, is that they were apparently never in a position to reinstate the land because their private insurer settled the claim in respect of their house on a repair, rather than a rebuild, basis.¹¹⁸ The facts are therefore quite different from those in *Edwards*; this is not a situation where the repairs to the land would have been undertaken had the Commission not acted in (supposed) breach of its obligations.

[141] Moreover, in advancing this argument, the plaintiffs face the barriers of both the Full Court decision¹¹⁹ and this Court's decision in *Medical Assurance Society of*

¹¹⁶ *Edwards v AA Mutual Insurance Co* (1985) 3 ANZ Insurance Cases 60-668 (HC).

¹¹⁷ At 79,172.

¹¹⁸ See above at [88] and [93].

¹¹⁹ Full Court decision, above n 1, at [112]–[113].

New Zealand Ltd v East.¹²⁰ In the latter case, which was also decided in the context of a claim for earthquake damage to a residential property, this Court explained:

[21] The difference in wording between this and other policies is immaterial. What is plain is that MAS' reinstatement clause reflects an insurer's orthodox obligation to indemnify against a liability where the insured party elects to rebuild, not to pay out money where the insured has not incurred and may never incur a liability to meet the cost of restoration. It agrees to cover the cost, not an estimate of it, and the cost is not and will not be known until, at the least, liability to pay for the work is incurred.

Issue (b)(vii): should the class include subsequent owners who took an assignment of the right to claim against the Commission? (the plaintiffs' appeal)

[142] One of the proposed sub-classes comprised subsequent owners who had taken an assignment of the vendor's claim against the Commission. The Judge held that owners in this position could not form part of the class.¹²¹ The assignment taken by owners in this position was an assignment only of the vendor's right to payment of the debt owing to them by the insurer. The amount of the debt was the insured's accrued right to payment, which reflected their actual loss.¹²² If repairs had not been undertaken at the time of sale, that loss was restricted to the DOV.

[143] This was the effect of the Supreme Court's decision in *Xu v IAG New Zealand Ltd*,¹²³ and the Judge did not see any basis on which to distinguish the present case.¹²⁴ *Xu* concerned the assignment of rights to claim under a home insurance policy which provided cover for the cost of restoration. The vendors had not incurred the costs of restoration and the insurer did not accept that the assignment of the vendors' rights under the policy entitled the subsequent owners to claim the amount of those costs if they chose to repair the house themselves. The majority of the Supreme Court held that the entitlement to replacement cover was conditional on the insureds reinstating the property and if they had not done so they could not assign the right to claim those costs.¹²⁵ The majority recognised that fire insurance policies are personal to the

¹²⁰ *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250, (2015) 18 ANZ Insurance Cases 62-074.

¹²¹ *Freer* (No 2), above n 7, at [99]–[104].

¹²² At [104].

¹²³ *Xu v IAG New Zealand Ltd*, above n 59.

¹²⁴ *Freer* (No 2), above n 7, at [102].

¹²⁵ *Xu v IAG New Zealand Ltd*, above n 59, at [45]–[46] per William Young, O'Regan and Ellen France JJ.

insured and reflect, among other things, the insurer's assessment of the moral hazard presented by the insured, which is one of the reasons that replacement cover is usually conditional on the insured actually reinstating the property.¹²⁶

[144] Mr Barker sought to distinguish *Xu* on the basis that cover under the EQC Act is quite different to a typical fire policy in that cover under the EQC Act is not a personal right because it relates to the property, not the person; no moral hazard issue arises; cover is not conditional upon the insured reinstating the property; and the EQC Act does not bar assignments, and the Commission's own publications confirm that an assignee will have the same entitlements under the EQC Act as the original owner.

[145] We do not accept these arguments. The statutory insurance cover provided by the EQC Act is subject to the ordinary principles of insurance law unless clearly indicated otherwise.¹²⁷ Most homeowners acquired cover under the EQC Act for both residential buildings and land by taking out a fire insurance policy with a private insurer.¹²⁸ As a result, statutory cover for natural disaster damage only becomes available after a private insurer has made the usual assessments involved in offering fire insurance cover, including assessment of the moral hazard. Nor do we accept that no moral hazard issue arises in relation to natural disaster damage. For example, the conditions in cl 3(f) of sch 3 to the EQC Act permitting the Commission to decline any claim that is fraudulent in any respect, and in cl 3(g) permitting the Commission to decline a claim where the natural disaster damage was caused or contributed to by the owner's negligence, reflects the fact that no type of insurance cover is free from this concern.

[146] As to the fact that there is no specific requirement under the EQC Act for an insured to undertake reinstatement work if that is the basis on which the claim is settled, we note the following. Cover for residential land under s 19 depends on there

¹²⁶ See at [16]–[21] per William Young, O'Regan and Ellen France JJ. See also at [93] per Glazebrook and Arnold JJ.

¹²⁷ Full Court decision, above n 1, at [171], citing *Earthquake and War Damage Commission v Waitaki International Ltd* [1992] 1 NZLR 513 (PC) at 514 and *AMP Fire and General Insurance Company (NZ) Ltd v Earthquake and War Damage Commission*, above n 61.

¹²⁸ See ss 18(1) and 19 of the Earthquake Commission Act. It is possible to insure directly with the Commission under s 22 of the Earthquake Commission Act, but that is not the case here.

being cover for natural disaster damage to residential buildings under s 18. Cover for natural disaster damage to residential buildings under s 18 depends, in turn, on there being a “contract of fire insurance” in respect of the residential building. The extent of cover under the EQC Act for natural disaster damage to residential buildings is generally fixed by reference to the cover provided in the fire insurance policy, which typically includes a condition requiring the insured to undertake reinstatement work if that is the basis on which the claim is settled.¹²⁹ It would be artificial to treat the statutory cover for natural disaster damage to residential buildings and land as entirely unconnected to private fire insurance. So, while there is no express requirement in the EQC Act for the insured to undertake reinstatement work to residential buildings, we consider that the scheme clearly contemplates that the basis for settlement will be consistent with the terms of the fire insurance on which the statutory cover ultimately depends.

[147] For the reasons discussed earlier, the loss sustained by homeowners who have sold without undertaking repair work (save in situations such as that which existed in *Edwards*) will be diminution in value of the property. If the homeowners are not entitled to the repair costs, their assignee cannot be in any better position. We see no reason to distinguish *Xu*. The principles in that case regarding the assignment of claims are equally applicable to private contracts of insurance and statutory insurance cover.

Summary of conclusions

[148] Issue (a): the plaintiffs’ first ground of appeal — that the Judge was wrong to find that the challenge to the Full Court decision was not reasonably arguable — fails. We are satisfied that the Full Court’s reasoning cannot be impugned. The plain and ordinary meaning of s 19 of the EQC Act is that residential land is insured on an indemnity basis. The legislative history of the EQC Act supports that conclusion.

[149] Issue (b)(i): the Commission’s first ground of appeal fails. We consider that the resolution of the common issues approved by the Judge would materially advance

¹²⁹ Earthquake Commission Act, ss 18(1)(a) and (b) and 30.

the claims of individual class members, even though each class member would still be required to prove their entitlement at the second stage of the proceeding.

[150] Issue (b)(ii): the Commission's second ground of appeal succeeds. We are satisfied that the representative order made in *Freer* (No 2) should be set aside on the basis that the plaintiffs' claim is meritless: there is no evidence before the Court that they would have been able to repair the ILV damage to their property (a prerequisite to a cost of repairs settlement under s 19 of the EQC Act). The plaintiffs' ability to repair the ILV damage appears contingent on settling the claim with their private insurer in respect of their house on a rebuild basis. Ultimately, that claim was settled on a repair basis. This makes it very unlikely that the plaintiffs would have been able to repair the ILV damage, as the additional cost of the necessary enabling works (involving removal of the house while the works were effected) put the cost of repairs significantly higher than the cap. There is no evidence before the Court that the plaintiffs would nonetheless have been able to repair the land, nor that they would be able to repair the land now if the basis for settlement were revisited. Therefore, the plaintiffs would not have been entitled to settlement on a cost of repairs basis in any event. It is not in the interests of the class members to be represented by plaintiffs with a hopeless claim.

[151] Issue (b)(ii): on the question of limitation, we are satisfied that the new allegations contained in the plaintiffs' second amended statement of claim as to the Commission's policy simply particularise the overarching allegation in the first amended statement of claim. Accordingly, we are satisfied that the new allegations do not raise a fresh cause of action and so are not time-barred. The Commission's appeal fails on this ground.

[152] Issue (b)(iv)–(vii): it is not strictly necessary to determine the plaintiffs' remaining grounds of appeal, given our conclusion that the representative order should be set aside. Briefly, however: had the representative order not been set aside, the plaintiffs were suitable representatives for class members whose land had suffered both IFV damage and ILV damage; Mr Wootton was not a suitable representative for a sub-class of class members suffering IFV damage because he was not a party to the proceeding and there are no grounds to add him as a party; and, on ordinary principles

of insurance law, the class should not have included former owners who retained their right to claim against the Commission and subsequent owners who were assigned the right to claim by vendors.

[153] Overall, the Commission has succeeded on both appeals and, as a result, the representative order will be set aside. However, the plaintiffs had a measure of success on some issues. In the circumstances, we consider that costs on the plaintiffs' appeal should lie where they fall.

Result

[154] The appeal in CA314/2024 is allowed in part.

[155] The representative order made in [2023] NZHC 3662 at [134] is set aside.

[156] The appeal in CA315/2024 is dismissed.

[157] The respondents in CA314/2024 are to pay the appellant in CA314/2024 costs for a standard appeal on a band A basis, together with usual disbursements.

[158] We make no order for costs in CA315/2024.

Solicitors:

Russell McVeagh, Wellington for Appellant in CA314/2024 and Respondent in CA315/2024

Grant Shand, Auckland for Respondents in CA314/2024 and Appellants in CA315/2024