

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2025-404-354  
[2026] NZHC 758**

IN THE MATTER of a representative proceeding  
UNDER the Fair Trading Act 1986 and the Consumer  
Guarantees Act 1993  
BETWEEN THERESA GIELEN  
First Plaintiff  
AND PATRICK WYATT  
Second Plaintiff  
AND JOHNSON & JOHNSON (NEW  
ZEALAND) LIMITED  
First Defendant

(continued over)

Hearing: 17 and 18 November 2025  
Appearances: JK Goodall KC, LJ Lindsay, RL Jancaukas and JC Suyker for the  
Plaintiffs  
SM Hunter KC, SVA East and JQ Wilson for the Defendants  
Judgment: 26 March 2026

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**JUDGMENT OF FITZGERALD J**

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This judgment was delivered by me on 26 March 2026 at 4.00pm, pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar .....

Solicitors: JGA Sadler, Auckland  
Bell Gully, Auckland  
To: S Hunter KC, Auckland  
J Goodall KC, Auckland  
L Lindsay, Auckland  
J Suyker, Auckland

AND

JNTL CONSUMER HEALTH (NEW  
ZEALAND) LIMITED  
Second Defendant

AND

JOHNSON & JOHNSON PACIFIC PTY  
LIMITED  
Third Defendant

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## Introduction

[1] The plaintiffs say that a range of cold and flu products manufactured, imported, supplied, marketed and/or distributed by the defendants did not work to relieve symptoms of nasal congestion, despite being marketed as doing so.

[2] They want to progress this proceeding as representative plaintiffs, representing all persons who purchased the products in New Zealand over a period of about 20 years.<sup>1</sup> They want to run the proceeding on an “opt-out” basis. A litigation funder is funding the proceeding, and the plaintiffs seek “common fund” orders. This would have the effect of binding all members of the proposed class to the funding agreement signed between the plaintiffs and the funder. The plaintiffs will also seek orders that damages are assessed and ordered on an “aggregate” basis (on the basis of economic loss/loss in value), rather than by reference to any individual plaintiff’s or class member’s loss.<sup>2</sup> If the claim is permitted to be advanced on an opt-out basis, I am told that it will be one of, if not the, largest representative proceeding that has been brought before the New Zealand courts.

[3] The plaintiffs accordingly seek orders:

- (a) that they are permitted to progress the proceeding on a representative basis;
- (b) that the proceeding advances on an opt-out basis;
- (c) binding the proposed class to the funding agreement signed by the plaintiffs and the litigation funder; and
- (d) a range of other ancillary and related orders.<sup>3</sup>

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<sup>1</sup> From 31 March 2005 to 13 February 2025.

<sup>2</sup> Aggregate damages in representative proceedings is provided for by some statutory class/collective action regimes in other jurisdictions.

<sup>3</sup> Such as the process for any class member to proactively register their interest in the proceeding, how class members may opt out of the proceeding, orders relating to how class members are to be updated on developments in the proceeding, how the proceeding may be settled, and that the representative orders take effect from the date on which the proceeding was commenced.

[4] The defendants oppose the making of the orders sought. They will say that their products worked as intended and marketed. They further say that the proposed class is problematic given it does not distinguish between consumers who purchased the products to relieve nasal congestion, and those who purchased them to relieve other symptoms such as coughs and headaches. They emphasise that the plaintiffs do not challenge the efficacy of the products for those other purposes. If the matter is permitted to proceed on a representative basis, the defendants say that it should do so on an opt-in basis, enabling a proper distinction between these two groups of consumers.

[5] The defendants will also argue that assessing damages on an aggregate basis, even if possible under New Zealand law (which they deny), is problematic for a range of reasons, including a lack of any plan or specificity by the plaintiffs as to how such damages would be quantified in practice. They also say that making common fund orders at this stage of the proceeding is premature, there being no means for the parties or the Court to assess in any meaningful way the potential returns to the funder (and costs to class members) in the absence of information about the size or scope of the class.

[6] I will first summarise the plaintiffs' claims, before setting out the principles applicable to an application for representative orders. I will then address and determine the competing arguments on the application for representative orders and then finally address the application for common fund orders.

### **The plaintiffs' claim**

[7] Core to a proceeding being brought on a representative basis is that the proposed representative plaintiffs and persons comprising the represented class have "the same interest in the subject matter of the proceeding".<sup>4</sup> I therefore start with the plaintiffs' underlying claims, as they give rise to the issues for determination and which the plaintiffs say are common between themselves and the proposed class members. The claims also frame the defendants' objection that there is insufficient commonality of issues as between the plaintiffs and the proposed class.

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<sup>4</sup> High Court Rules 2016, r 4.24(b).

[8] The plaintiffs' amended statement of claim alleges that the products purport to treat nasal congestion, a commonly understood symptom of cold and flu and/or allergies.<sup>5</sup> The plaintiffs' core allegations in relation to the effectiveness of the products as a nasal decongestant are as follows:

- (a) The oral consumption of up to 10 mg of phenylephrine hydrochloride (PE),<sup>6</sup> or up to 60 mg in a 24-hour period taken in accordance with the instructions provided with the products, has never been effective in relieving nasal congestion.
- (b) The oral consumption of up to 10 mg of PE, or up to 60 mg in a 24-hour period taken in combination with other active ingredients present in the products, has never been effective in relieving nasal congestion.
- (c) None of the other active ingredients in the products have ever been effective in relieving nasal congestion.

[9] The plaintiffs' "yardstick" for testing effectiveness will be the United States Federal Drug Administration (FDA) definition of effectiveness, namely:

[Effectiveness] means a reasonable expectation that, in a significant proportion of the target population, the pharmacological effect of the drug, when used under adequate directions for use and warnings against unsafe use, will provide clinically significant relief of the type claimed.

[10] In this way, the plaintiffs will seek to prove effectiveness (or otherwise) at a population level, rather than by reference to any individual user of the products.

[11] It is pleaded that Ms Gielen, the first plaintiff, purchased a range of the products over a 19-year period to "treat her symptoms of sinus congestion".<sup>7</sup> It is said that over the same period that Mr Wyatt, the second plaintiff, also purchased a range of the products in question to "treat symptoms of nasal congestion".

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<sup>5</sup> For example, one of the products, Codral Cold & Flu, describes its uses as being "for the temporary relief of headaches and fever, body aches and pain, *blocked or runny noses* and sore throat." (Emphasis added.)

<sup>6</sup> The active ingredient in the products said to relieve nasal congestion.

<sup>7</sup> It is also particularised that the first plaintiff purchased certain products when her children developed symptoms of nasal congestion caused by colds or flu.

[12] It is pleaded that given the products were never effective in relieving nasal congestion, the plaintiffs (and each proposed class member) have suffered loss and damage, that being be the wasted purchase price for the products. The claim is accordingly one for economic loss, rather than recompense for physical harm.

[13] The plaintiffs' first three causes of action are brought under the Fair Trading Act 1986 (FTA), with two further causes of action under the Consumer Guarantees Act 1993 (CGA). Mr Goodall KC, for the plaintiffs, confirmed that the plaintiffs' primary claims are those brought pursuant to the CGA.<sup>8</sup> He notes that while they will be advanced as the primary claims, a limitation is that there is essentially only one form of statutory damages available which is based on a "reduction in value" approach. He notes that the benefits of the FTA claims include the flexibility in the Court fashioning an appropriate remedy.

[14] Because the CGA claims are now to be advanced as the plaintiffs' primary claims, I address them first. For the purposes of this overview, it is necessary to summarise only one of them.

[15] The fourth cause of action is for an alleged breach of s 6 of the CGA. The plaintiffs say that the defendants breached s 6 by manufacturing (and in the case of one of the defendants, holding itself out as manufacturing) products that were not of an acceptable quality. It is alleged that goods of the type in question were commonly supplied as nasal decongestants and "the products were not fit for this purpose" due to their ineffectiveness. It is alleged that a "reasonable consumer" fully acquainted with this state of the products would not have regarded the products as being acceptable. The plaintiffs will seek "reduction in value" damages pursuant to s 27(1)(a) of the CGA. This would comprise a full purchase price refund for those products solely targeted at relieving nasal congestion, and damages based on a reduction in value in respect of the remaining "combination" products. As flagged at the outset, the claim is for an award of damages calculated at a class or aggregate level, rather than with reference to any individual's loss.

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<sup>8</sup> I apprehend this is because of a number of issues raised by the defendants in opposition to the application for representative orders, primarily in relation to reliance, and the related issue of what the defendants say is an overly broad class. See further below at [36] to [41].

[16] Turning to the FTA claims, it is sufficient for present purposes to outline only the first, namely an alleged breach of s 9.

[17] The plaintiffs allege that between 31 March 2005 and 13 February 2025, the defendants made representations that:

- (a) the products are effective in the relief of nasal congestion; and
- (b) the consumption of PE, in the dosages contained in the product, is effective in the relief of nasal congestion.

(I refer to these as the “Nasal Representations”.)

[18] It is alleged that the Nasal Representations were made to the public at large and were “relied on directly and/or indirectly” by the plaintiffs and also by class members. It is alleged that the Nasal Representations were false, misleading and/or deceptive, and/or likely to mislead or deceive in breach of s 9 of the FTA, given:

- (a) the products were not effective in providing relief from nasal congestion; and/or
- (b) the oral consumption of PE, in the quantities available in the products, was not effective in providing relief from nasal congestion.

[19] Relief is sought in terms of an order directing the defendants to refund the purchase price of the products under s 43(3)(e) of the FTA, and/or an order directing the defendants to pay damages reflecting the loss in an amount to be quantified prior to trial under s 43(3)(f). The plaintiffs will again seek damages at an aggregate level to apply to the class as a whole.

[20] The defendants broadly deny the plaintiffs' claims, and will say that the products are effective in providing temporary relief of nasal congestion. The defendants also plead two affirmative defences:

- (a) First, that certain aspects of the claims are time-barred under the Limitation Act 1950 and/or the Limitation Act 2010.
- (b) Second, and in the event the Court finds that the defendants have breached the FTA and/or CGA, the plaintiffs failed to mitigate their losses. This defence is brought on the basis that the plaintiffs continued to use products that they claim were ineffective for a period of 19 years, and failed to follow the advisory statements set out in the products' labels.

### **The approach to an application for representative orders**

[21] Before going further it is helpful to set out the principles governing applications for representative orders, which are relatively well settled.

[22] In an oft-cited passage, the Court of Appeal in *Cridge v Studorp Ltd* provided a helpful summary of the applicable principles:<sup>9</sup>

- (a) The rule [r 4.24] should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
- (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
- (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
- (d) The words 'same interest' extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.

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<sup>9</sup> *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11] (footnotes omitted). More recently, these principles were endorsed by the Court of Appeal in *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] 3 NZLR 485, at [36].

- (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 members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

[23] As the Court of Appeal subsequently noted in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, an additional consideration is the merits of the proposed claim,<sup>10</sup> though the “provisional assessment [of the merits] requires no more than consideration of the claims as pleaded to ensure that on their face they disclose an arguable case on the facts as pleaded”.<sup>11</sup>

[24] The Supreme Court also examined the broad objectives of r 4.24 in *Southern Response Earthquake Services Ltd v Ross*, in the particular context of whether representative proceedings could be brought on an “opt out” basis.<sup>12</sup> Given some of the issues arising on the present application, it is helpful to set out what the Supreme Court said:<sup>13</sup>

[37] As we have said, the Court of Appeal in the present case saw a representative action as having the objectives of improving access to justice, facilitating efficient use of judicial resources and strengthening incentives for compliance with the law. ...

[38] The majority in *Credit Suisse* saw the need to be guided by the objective of the High Court Rules; namely, securing the just, speedy and inexpensive determination of proceedings as r 1.2 provides. Ensuring access to justice, as well as facilitating the efficient use of resources, fall readily

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<sup>10</sup> *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16].

<sup>11</sup> At [17].

<sup>12</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.

<sup>13</sup> Footnotes omitted.

within that objective. Further, in delivering the reasons of the majority, Glazebrook J said that it is “legitimate for the scope of representative action rules to continue to adapt to ensure that the overall objective of the High Court Rules as outlined in r 1.2 is achieved”. Similar observations were made in the reasons of the minority. In delivering the minority reasons, Elias CJ noted that in *RJ Flowers* the High Court “emphasised that ‘the rule should be applied and developed to meet modern requirements’, subject only to keeping in mind ‘[t]he traditional concern to ensure that representative actions are not to be allowed to work injustice’”.

[39] The third of the objectives identified by the Court of Appeal may less obviously fall within the objective of the High Court Rules, but as the Supreme Court of Canada said in *Western Canadian Shopping Centres Inc v Dutton* in relation to class actions, such proceedings “serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public”.

[40] Against this background, we are content to adopt the Court of Appeal’s description of the three general objectives of r 4.24 as set out in [37] above. We too consider that an opt out procedure is generally consistent with those objectives. In particular, an opt out approach has advantages in improving access to justice. Indeed, the desire to enhance access to justice featured as an important consideration in the adoption of opt out approaches in the class action regimes in Australia. As the Court of Appeal in this case said:

Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with an assessment of whether or not it is in their interests to participate in the proceedings. Some class members will not receive the relevant notice. Others will not understand the notice, or will have difficulty understanding what action they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated. If there is some potential advantage for class members in participating in the proceedings, and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate. The courts should be slow to put unnecessary hurdles in the path of class members, depriving those who fail to take active steps to participate in the proceedings of the opportunity to have their claims determined by the courts, and of the possibility of obtaining some form of relief if their rights have been infringed.

[25] The Court provided further guidance as follows:<sup>14</sup>

[95] First, generally, the court should adopt the procedure sought by the applicant unless there is good reason to do otherwise. We see no basis in policy or practical terms for not adopting that course so long as the court turns its mind to all of the relevant factors. ...

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<sup>14</sup> Footnotes omitted.

..

[97] Second, in terms of departures from this starting point, where there is a real prospect some class members may end up worse off or adversely affected by the proceeding, that favours an opt in approach. Cases where there is a counterclaim or the potential for one to emerge would fall into this category.

[98] Given the objectives of a representative proceeding, class size will have some relevance. In particular, a opt in approach may be the preferable option where the class is small. By that we mean where the number of members in the class is small relative to other claims and there is a natural community of interest, or, as the Court of Appeal put it, a “pre-existing connection”. ... That said, class size will not necessarily be determinative.

[99] We agree with the Bar Association, contrary to the submission for Mr and Mrs Ross, that participation at stage two may be a relevant consideration warranting a departure from an opt out approach if persisting with an opt out approach at that point lessens the benefits of the representative proceeding, or increases any unfairness or prejudice.

[100] Third, as Mr and Mrs Ross submit, a universal approach may be appropriate where the only relief sought is declaratory or injunctive and where the outcome will affect all class members identically. That is because in those cases it may be impractical, and indeed sometimes almost impossible, to provide the necessary notice for either an opt in or opt out approach. ...

[101] Finally, applications under r 4.24 should include proposed conditions as to the court’s supervision of settlement and discontinuance. ...

[26] Finally and most recently, in *Simons v ANZ Bank New Zealand Ltd*, the Court of Appeal again considered the underlying objectives of r 4.24. The Court emphasised that the “same interest” requirement of r 4.24 is a “relatively low hurdle”.<sup>15</sup> It noted that the rule “does not require identity of claim or even the same cause of action”; rather it is enough if there is the same interest in the “subject matter” of the proceeding.<sup>16</sup>

### **The suggested class and common issues**

[27] The plaintiffs propose to represent all persons who purchased the products (as listed in schedule 1 to their amended statement of claim) between 31 March 2005 and 13 February 2025 (the Class Members). There is presently no clarity on the potential

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<sup>15</sup> Above n 9, at [41] with reference to *Cridge v Studorp Ltd*, above n 9, at [11](c), [11](d) and [11](h) and *Saunders v Houghton*, [2009] NZCA 610, [2010] 3 NZLR 331 at [12] and [38].

<sup>16</sup> At [41], with reference to *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [55] per Elias CJ and Anderson J.

size of the class, but evidence filed by the plaintiffs, making admittedly *very* broad brush assessments based on estimated product sales in New Zealand, states that the class could run to 200,000 to 500,000 consumers.

[28] The plaintiffs have also identified a list of what they say are common issues for determination arising from the pleadings, replicated in Schedule 1 of this judgment. The defendants admit that some, but not all, of the suggested common issues are common as between the plaintiffs and the Class Members.

### **Are the plaintiffs suitably representative of the proposed Class Members?**

#### *Introduction*

[29] As the argument developed a key issue emerged: given the plaintiffs say in their affidavits that they bought the products for the specific purpose of relieving nasal congestion, and in doing so actively relied on the Nasal Representations, are they suitably representative of the proposed Class Members, and in particular, those consumers who bought the products for other purposes (such as to provide relief from a headache and/or a cough)? For ease of reference, I will refer to consumers such as the plaintiffs, who bought the products for the purpose of obtaining relief from nasal congestion, as the “Nasal Congestion Purchasers”, and those who bought the products for other purposes as the “Cough/Headache Purchasers”.

[30] The issue centres on the requirement under the FTA claims of reliance.<sup>17</sup> As just noted, the plaintiffs say they purchased the products having actually relied on the Nasal Representations. The defendants say that given the reason for their purchase of the products, the Cough/Headache Purchasers did not rely on the Nasal Representations, directly or indirectly (or “inherently”, as framed in common issue 9 in the attached schedule).

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<sup>17</sup> To recap: the amended statement of claim pleads that the allegedly misleading Nasal Representations (which solely concern effectiveness in relieving nasal congestion) were relied on “directly and/or indirectly” by the plaintiffs, and were relied on “directly and/or indirectly” by Class Members.

[31] This suggested distinction between the plaintiffs and some Class Members gives rise to a number of issues. Does it mean that it is inappropriate for this proceeding to proceed on a representative basis – at least with the current plaintiffs as the proposed representatives of *all* Class Members? Or if it is appropriate for it to proceed on a representative basis, should it do so on the basis of a more narrowly defined class, such as Nasal Congestion Purchasers only? Further, does this issue affect whether the proceeding, if permitted to continue as on a representative basis, is pursued on an opt-in rather than an opt-out basis?

*The plaintiffs' submissions*

[32] Mr Goodall says that the fact the plaintiffs purchased the products to relieve nasal congestion does not mean they do not properly represent all Class Members. As a preliminary point, he notes that two of the 17 products were marketed solely on the basis of relieving nasal congestion,<sup>18</sup> and thus no issue arises in respect of the plaintiffs representing *all* persons who purchased those particular products. He further submits that the reason why a person purchased the combined products<sup>19</sup> is irrelevant for the purposes of the CGA claims, given reliance is not an element of those claims. Rather, he emphasises that the warranty under s 6 of the CGA that goods are of an “acceptable quality” requires that they are acceptable for “all the purposes” for which goods of that type are commonly supplied.<sup>20</sup> On this basis, he argues that the plaintiffs are properly representative of *all* Class Members, irrespective of the reason why any particular Class Member bought the combined products. In addition and in relation to loss, Mr Goodall says the remedy of reduction in value will be applicable across all Class Members, irrespective of their motivation for purchasing a combined product. This is because the Cough/Headache Purchasers will have paid too much for a “combined” product in which one active ingredient does not work.<sup>21</sup>

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<sup>18</sup> PE being the only active ingredient in those two products.

<sup>19</sup> Being those products with active ingredients in addition to PE.

<sup>20</sup> Consumer Guarantees Act 1993, ss 6 and 7(1)(a).

<sup>21</sup> For products solely targeting nasal congestion, and thus purchased by Nasal Congestion Purchasers, the plaintiffs will say the remedy should be a full refund of the purchase price.

[33] As to the FTA claims, Mr Goodall says that the initial and particular motivation for why a person might visit a chemist and purchase one of the combined products is also irrelevant. He says that while a particular symptom such as a headache or cough might have triggered a person to go to a chemist to seek relief, the fact the person bought a combined product (rather than, say, a usually cheaper product specifically targeted at a headache or a cough) demonstrates that they are buying it *because* of its multiple uses and benefits. Mr Goodall referred to this as the “broad spectrum” effect, which he said would be the subject of expert marketing and consumer behaviour evidence. He also referred to a Rolex watch by way of analogy. He said that such a watch might be marketed as being able to be taken to a depth of 10,000 feet, and that while very few people would ever buy a Rolex for that specific reason, its marketing as being suitable for that purpose was part of its overall “spin/value/allure”. In a similar way, he submits that consumers buy the combined products for their “broad spectrum” protection, which includes the claimed relief from nasal congestion. In this context, Mr Goodall took me to aspects of the defendants’ evidence, submitting that it does not go as far as suggesting that the Nasal Representations are irrelevant to the Cough/Headache Purchasers.

[34] Mr Goodall also drew my attention to the Court of Appeal of the Federal Court of Australia’s decision in *Toyota Motor Corporation Australia Ltd v Williams*, which concerned a representative claim in relation to Toyota vehicles having defective diesel filters.<sup>22</sup> He submits that many of the issues drivers experienced as a result of the defective filters were quite idiosyncratic, but did not prevent the Court finding a breach of the Australian equivalent to s 6 of the CGA. He emphasises the following passage from the Court’s decision:

[42] There can be no doubt that the assessment of whether goods are of acceptable quality within the meaning of s 54(2) is to be conducted objectively, not subjectively. That arises inescapably from the statutory inquiry being whether “a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods)” would regard the quality of the goods as acceptable. Thus, the inquiry is made with reference to a hypothetical reasonable consumer and not with reference to the particular individual consumer to whom the goods are supplied in any particular case.

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<sup>22</sup> *Toyota Motor Corporation Australia Ltd v Williams* [2023] FCAFC 50.

[35] The point Mr Goodall makes is that the Court should not be troubled in this case by the fact that some Class Members will have slightly different factual scenarios or motivations for purchasing the products than the plaintiffs, so long as there is sufficient common interest in the subject matter of the proceeding to justify a representative order being made.

*The defendants' submissions*

[36] Mr Hunter KC, for the defendants, expressed some surprise that the CGA claims are now to be advanced as the plaintiffs' primary claims, and reminded me that representative orders are being sought in relation to the FTA claims as well. He submits that on the basis of the plaintiffs' affidavits, it is plain that their cases are based on *actual* reliance on the Nasal Representations. He accordingly says that some form of indirect or inherent reliance as a result of the suggested "broad spectrum" effect of the combined products does not arise on the plaintiffs' own claims. This makes the plaintiffs unsuitable as representatives of persons who might have purchased because of that suggested effect. He took me to aspects of the defendants' evidence to the effect that not all persons who get a cold or flu will ever get a runny nose, and the evidence that it is the particular symptom suffered by a person which tends to trigger and drive their purchase of a product.

[37] Building on this, Mr Hunter argues that the plaintiffs' claims, based on actual reliance on the Nasal Representations, are not reflective of the claims arising in respect of many other Class Members. He suggests that this is analogous to an issue which arose in *Simons*. In that case, the plaintiffs purported to represent a class which included persons who entered into loans with the bank defendants prior to 6 June 2015, and who were thereby subject to an earlier limitation regime than that which governed the plaintiffs' own claims. Both the High Court and Court of Appeal declined to extend the proposed class to customers whose loans commenced before 6 June 2015. The courts considered that to do so would be contrary to one of the basic tenets of representative orders, namely that such an order cannot deprive a defendant of a valid defence.<sup>23</sup> Both courts in *Simons* noted that if the plaintiffs were permitted to represent

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<sup>23</sup> See *Simons*, above n 9, at [76] and *Simons v ANZ Bank New Zealand Ltd* [2022] NZHC 1836 at [109].

persons against whom ANZ would have a limitation defence, but in circumstances where that limitation defence could not be tested by way of a strike out application on the plaintiffs' own claims, ANZ would be prevented from advancing a strike out application. The Court of Appeal observed that "allowing the second appellants to shield other ANZ customers whose loans commenced before 6 June 2015 from a strike out application ... would constitute a grave misuse of r 4.24(b)."<sup>24</sup>

[38] Mr Hunter says that depriving a defendant of a defence is not limited to affirmative defences such as limitation, but extends to grounds upon which a defendant will challenge an element of the claim the plaintiff is seeking to make out.<sup>25</sup> On this basis, he says that the defendants' challenge to the availability of actual, indirect or inherent reliance – both as a matter of law in respect of indirect or inherent reliance, and as a matter of fact in relation to any particular Cough/Headache Purchaser – because the suggested "broad spectrum" effect of the combined products, cannot be tested on the plaintiffs' claims, resting as they do on actual reliance on the Nasal Representations.

[39] Mr Hunter says that this issue is not ameliorated by the fact that the pleading alleges direct or indirect reliance by Class Members on the Nasal Representations. He notes that the pleading in *Simons* also purported to cover loans entered into prior to June 2015, but the High Court and Court of Appeal held that the limitation issue arising on those claims simply did not arise on the plaintiffs' claims.

[40] Turning to the CGA, Mr Hunter submits that a consumer's rationale for purchasing the combined products is also relevant to these claims, even though reliance is not an element of them. He says that the reason for purchase will be relevant to the assessment of the appropriate remedy under s 27(1)(a) of the CGA for two reasons:

- (a) First, the remedy is a discretionary one rather than a mechanical process, and the Court may find it appropriate or necessary to order

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<sup>24</sup> At [78].

<sup>25</sup> He accepts that the defendants' affirmative defences of limitation and failure to mitigate losses are capable of being advanced on the plaintiffs' claims.

different remedies as between Nasal Congestion Purchasers and Cough/Headache Purchasers.

- (b) Second, s 27(1)(a) refers to “value”, which he argues must mean value to the consumer concerned, and as such the value will be different between the two groups of purchasers (and potentially as between individual purchasers). Mr Hunter refers in this regard to the decision of the Superior Court of Ontario in *Singer v Schering-Plough Canada Inc*, in which the Court emphasised that the “value” of a product may well be quite different to different consumers.<sup>26</sup>

[41] Mr Hunter accordingly submits that the issues arising on both the CGA and FTA claims, coupled with other issues arising from the manner in which the plaintiffs propose to progress these proceedings, mean that it is not appropriate to grant the application. In the alternative, he submits that if representative orders are to be made, they should be made on an opt-in basis, so a proper distinction can be made between the two different cohorts of purchasers.

#### *Discussion*

[42] I am not persuaded that the issues raised by Mr Hunter give rise to a reason to decline the application for representative orders, *at least in relation to the CGA claims*.

[43] Reliance – direct or indirect/inherent – is not an element of the CGA claims. The statutory provisions are clear that the s 6 guarantee is that the products are fit for “all purposes” for which products of the type in issue are commonly sold. For this reason, the individual reason why any particular person purchased the products is irrelevant to the question of whether the defendants have breached the acceptable quality guarantee. To put the point another way, liability under the CGA is framed by whether the products were fit for *all* the purposes for which they were marketed. One of those purposes in this case was to relieve nasal congestion. The allegation is that PE was never effective for that purpose. The plaintiffs and the Nasal Congestion Purchasers accordingly have the same interest in that core liability issue. So too do

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<sup>26</sup> *Singer v Schering-Plough Canada Inc*, 2010 ONSC 42, at [177].

the Cough/Headache Purchasers. Assuming the plaintiffs' claims as to the ineffectiveness of PE are made out, the defendants will have failed to meet the s 6 CGA guarantee in respect of *all* Class Members, not only those who purchased the products in order to relieve nasal congestion.

[44] In addition, it may be that loss can be assessed at a class-wide level, or with only two "sub-classes", being a full refund in respect of products solely marketed as a nasal decongestant, and a reduction in value in the combined products on the basis one of the active ingredients did not work. I note Mr Hunter's reliance on the Canadian case of *Singer*, where a reduction in value was described as the reduction in value to the particular consumer concerned.<sup>27</sup> However, the legislative provision in that case specifically refers to a consumer being entitled recover the amount by which the consumer's payment exceeded "the value that the goods or services have *to the consumer*", rather than simply the "reduction in the value of the goods" below the price paid, being the statutory test in this jurisdiction. I pause to note that whether reduction in value for the purposes of s 27(1)(a) is assessed at an objective level (for example, a value ascribed to PE as an active ingredient for the purpose of any reduction in value in the goods), or subjectively (by reference to the value of the defective goods to any particular purchaser or group of purchasers) may warrant early consideration.

[45] I am of the view, however, that the issues raised by the defendants in respect of reliance under the FTA claims weigh against granting representative orders that extend to the FTA claims in respect of the *combined* products. My two primary concerns are the breadth of the proposed Class Members, and that the plaintiffs' claims are unlikely to "match" the claims of many Class Members. As will be evident from the following discussion, the two points are interrelated.

[46] In order to establish entitlement to a remedy under the FTA, a plaintiff is required to establish that they suffered damage "by" the impugned conduct.<sup>28</sup> This requires proof of reliance by the consumer.<sup>29</sup>

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<sup>27</sup> At [177].

<sup>28</sup> Section 43(1).

<sup>29</sup> *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29]; *Plumbco Commercial and Civil Ltd (in liq) v Plumbco New Zealand Ltd* [2024] NZCA 353 at [123]–[124].

[47] It is certainly arguable that the differing rationales for purchasing the combined products could be taken into account at the stage of assessing loss under the FTA. But this does not deal with the important question of reliance, at least in relation to the Cough/Headache Purchasers.

[48] Mr Goodall says that it is this cohort's FTA claims that *the plaintiffs* would seek to make out by inferred or indirect reliance which would be the subject of expert evidence. He said that none of this can prejudice the defendants, unlike how this issue arose in the *Simons* case. But the way in which this argument is framed highlights the difficulty with it. The claims of this cohort of Class Members will contain contested elements of reliance (be that actual, indirect or inherent reliance on the Nasal Representations as part of the suggested broad spectrum effect of the combined products) that could not, and would not need to be, tested on the plaintiffs' own claims. In this way, I accept that the issue is similar to, though admittedly less stark than, that which arose in *Simons*. A similar issue also arose in *Body Corporate Number DPS 91535 v 3A Composites*, in which the Court of Appeal observed that a range of issues arising in respect of the proposed class would need to be determined by the Court at a Stage 1 hearing, but where those issues did not arise on the plaintiffs' own claims.<sup>30</sup>

[49] Mr Goodall sought to persuade me that Mr Wyatt's evidence suggests that he did buy the combined products given their broad spectrum effect and thus he could appropriately represent this cohort of Class Members. I do not agree. Mr Wyatt clearly states that he "purchased the products because they said on the packaging that they would relieve blocked and runny noses". There is no hint that he was a "broad spectrum" purchaser.

[50] Further, the argument is premised on potentially voluminous and contested expert evidence about the so-called broad spectrum effect of the combined products, and evidence of consumer purchasing decisions as a result, being admissible on the plaintiffs' own claims. That is not clear, given the plaintiffs' claims are plainly based on actual and specific reliance on the Nasal Representations. Expert evidence as to some other form of inherent reliance by an average consumer may not be substantially

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<sup>30</sup> *Body Corporate Number DPS 91535 v 3A Composites* [2023] NZCA 648, at [73].

helpful to resolution of the plaintiffs' claims for the purposes of s 25 of the Evidence Act 2006. For the same reason, proposed common issue no. 9 ("*is it inherent in the purchase of any one of the Products that a consumer relies on representations made about the efficacy of that product?*") does not arise for determination on the plaintiffs' claims, given their stated actual reliance. Issue no. 9 is therefore not a common issue as between the plaintiffs and the proposed Class Members.

[51] Further, I disagree that allowing the plaintiffs to represent this cohort of Class Members for the purposes of the FTA claims would not prejudice the defendants. It is correct that the CGA claims would still be advanced by the plaintiffs as representatives of all Class Members, which does not distinguish between the two cohorts of purchasers. But that is not a principled basis to simply let the FTA claims "tag along" with the broader class as presently framed. In those circumstances, the defendants would be prejudiced by being subject to additional legal claims advanced on a representative basis when key factual and legal elements of those claims do not arise for determination on the plaintiffs' claims.

[52] Mr Hunter referred me to two North American cases in which similar issues arose. In *Re Vioxx Class Cases*, claims were advanced in relation to the non-steroid anti-inflammatory drug Vioxx, alleging that the product was marketed as safe, when in fact it increased certain cardiovascular risks.<sup>31</sup> The plaintiffs, who had purchased the product, sought class certification on the basis that they paid for a product that was not as safe as other, less expensive, pain relievers. They sought to bring their claims seeking relief on behalf of all purchasers of the product in California, on the basis of the difference in price between what they paid for Vioxx and what they would have paid for a safer, equally effective, pain reliever.

[53] Class action certification in California requires "the existence of an ascertainable class and a well-defined community of interest among the class members."<sup>32</sup> The Superior Court declined to grant the application for class certification, including on the basis that the individual issues, in particular reliance and

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<sup>31</sup> *Re Vioxx Class Cases* (2009) 180 Cal App 4th 116.

<sup>32</sup> *Akkerman v Mecta Corp Inc* (2007) 152 Cal App 4th 1094 at 1100.

damages, overwhelmed the primary common issue of whether the Vioxx marketing representations were false.

[54] The purchasers appealed and the appeal was dismissed. The Court of Appeal of the Second District, California agreed that the issue of reliance or materiality of the impugned Vioxx representations could not be determined on a class wide basis.<sup>33</sup> The Court noted that the materiality of the suggested cardiovascular risks of Vioxx would not be the same for all persons, and indeed would likely be quite different. In a similar way in this case, purchasers of combined products would likely have different interests in different aspects of the products' claimed benefits.

[55] To a similar effect is the decision of the Court of Appeal for British Columbia in *Harrison v Afexa Life Sciences Inc.*<sup>34</sup> That case concerned an application for class certification of claims in relation to the cold and flu product "Cold-Fx". The plaintiff alleged that the product was promoted as being capable of providing immediate relief from colds and flu when taken in larger doses at the first sign of illness, yet it had no proven beneficial effect when used in that way. The claim did not challenge the efficacy of the product when used in other circumstances and for other purposes. The claim was brought as one of economic loss, the plaintiff seeking restitution of the purchase price paid. The plaintiff sought to represent all purchasers of the Cold-Fx product in British Columbia over a specified period of time.

[56] At first instance, the Supreme Court Judge declined to certify the proceeding as a class action, finding it did not meet three of that jurisdiction's statutory requirements for such actions, being: no identifiable class of two or more persons who have claims; the claims did not raise common issues suitable for determination under the class action regime; and the claim was not brought by a suitably representative plaintiff. On appeal, the Court of Appeal upheld the Judge's determination that certification should be rejected given the proposed claims did not meet the requirement of a suitably identifiable class. The Court explained that this requirement embodies both an objectively identifiable class that that does not depend on the outcome of the

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<sup>33</sup> At 134.

<sup>34</sup> *Harrison v Afexa Life Sciences Inc* (2018) BCCA 165.

case, *and* that there is a “rational relationship between class membership and the common issues asserted to arise in the case”.<sup>35</sup>

[57] With reference to the first instance judgment, the Court of Appeal said the following:<sup>36</sup>

*Equally, there was no attempt by the plaintiff to tailor the class to those who had relied on misrepresentations in purchasing the product, despite that being the central thrust of the claim:*

[33] It should be stated here that the gist of the plaintiff’s claim is not that Cold-Fx is worthless for its stated purpose as a preventative measure to prevent or fight off cold or flu. The claim is that purchasers of Cold-Fx bought the product for short term relief *because of certain representations contained on the labels or in the marketing of the product, and that those representations were false.*

The judge considered that the class, as defined ..., was insufficiently related to the claims advanced. It included people who were not exposed to the alleged misrepresentations, *and people who purchased the product for purposes other than immediate relief of cold and flu symptoms.* She considered that the class description was “overbroad” and therefore failed to meet the requirements of s 4(1)(b):

[52] The requirement not to be overbroad does not mean that everyone in the class must share the same interest in resolution of the common issues ... However, a class definition will be overbroad if there is no connection between some of the proposed class and the alleged misrepresentations, or if the connection cannot be established objectively.

...

[55] The proposed class here includes “all persons resident in British Columbia who purchased Cold-Fx ...between March 9 2002 to present.” The essential complaint is that the defendants misrepresented that Cold-Fx provides short term relief of cold and flu symptoms. However, neither Harrison nor anybody else who has been identified has said why they purchased the product, whether they had read or were aware of the representations, or whether they thought the product worked for the stated purpose or not. In this circumstances, there is no evidential link between any member of the proposed class and a complaint based on the alleged misrepresentations.

...

[57] *The class definition is overly broad.* It includes persons with no claims because some of the Cold-Fx products sold during the relevant time did not contain any of the misrepresentations, *not all of the*

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<sup>35</sup> At [25]. See also *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at 554.

<sup>36</sup> At [38]-[39].

*purchasers would have purchased the product for short term relief, not all of the persons would have purchased the product because of the representations, and not all of the purchasers were dissatisfied with the product.*

...

(emphasis added)

[58] The Court of Appeal agreed with the first instance Judge's reasoning.<sup>37</sup>

[59] I am conscious of the guidance from the appellate courts in this jurisdiction that claims as between the plaintiffs and the class they purport to represent do not need to match, and indeed in some cases can be quite different. Individual issues are often left to a Stage 2 hearing. But the core of the plaintiffs' FTA claims is that they bought the products given their marketing as a nasal decongestant and in doing so specifically relied on the Nasal Representations. Liability and actual reliance on the Nasal Representations are accordingly the crux of the FTA claims. Class Members who did not purchase the combined products because of their stated relief from nasal congestion do not have the same interest in those core issues. Conversely, issues of indirect or inherent reliance, or purchasing because of a combined product's broad spectrum effect, do not arise on the plaintiffs' claims.

[60] I am also mindful of Mr Goodall's confirmation that the CGA claims are now the plaintiffs' primary claims. If that is so, then there is little prejudice to the plaintiffs, or the proposed Class Members as a whole, if the representative orders are not extended to the FTA claims in respect of combined products. Mr Goodall also confirmed that the representative proceedings in Australia (in respect of 22 cold and flu products, 15 of which are the same as in issue in these proceedings) are now progressing only in relation to the CGA claims.

[61] To this point, therefore, and despite the flexible and accommodating approach to be taken to representative orders, I am not minded to grant the application in respect of the FTA claims insofar as they relate to the combined products. The plaintiffs have not suggested any narrowing of the proposed class to seek to address the matters the FTA claims raise.

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<sup>37</sup> At [42].

[62] I turn now to other factors relevant to the Court's consideration of the application.

### **Merits, deterrence and access to justice**

[63] As noted at [23] above, a preliminary review of the merits is a factor to be addressed when considering an application for representative orders.

[64] The present claim has been triggered by steps taken by the FDA. On 7 November 2024, the FDA announced a proposed order to remove PE as an active ingredient that can be used in certain drug products for the temporary relief of nasal congestion. The defendants emphasise that the FDA proposal has been the subject of public consultation and no final order has been issued.

[65] The plaintiffs say that the claims disclose a reasonably arguable cause of action. In support of the application, they advance the expert opinion of Professor Ian Gordon who opines that modern studies of oral PE are of good quality and show that, in that context, it is no more effective than a placebo.

[66] While the defendants note that other health authorities around the world continue to accept oral PE as a safe and effective pharmaceutical ingredient, and two of their experts disagree with the FDA's position, they do not make any express submission that the claim is so lacking in merit that this is relevant to determination of the application.

[67] I am therefore satisfied that a preliminary review of the merits, in the limited sense discussed earlier, discloses a reasonably arguable cause of action.

[68] Turning to deterrence, the plaintiffs note that the deterrent effect of a representative proceeding can be relevant to whether to permit claims to be advanced on that basis, ultimately contributing to access to justice.

[69] Deterrence might not naturally be thought of in connection with access to justice. Nevertheless, in *Southern Response Earthquake Services Ltd v Ross* the Supreme Court endorsed the observation of the Supreme Court of Canada in *Western*

*Canadian Shopping Centres Inc v Dutton* that class action proceedings “serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public”.<sup>38</sup>

[70] Mr Goodall candidly submits that there is either a representative proceeding in this case, or there will be no proceeding at all. He says that there is very little prospect of consumers taking action to enforce their rights or, relevant to this factor, to hold the defendants to account. He also refers to what he says is Consumer NZ Inc’s “endorsement” of this proceeding as furthering the interests of consumers, referring to an online article by that organisation.<sup>39</sup>

[71] Mr Hunter accepts that representative proceedings having a deterrent effect is uncontroversial as a matter of general principle. However, he submits that the relevance of this factor to the determination of an application for representative orders depends on the claim as pleaded. He notes that there is no wrongdoing alleged against the defendants. He also drew my attention to observations in *Singer*, to the effect that the deterrent effect of representative proceedings is less potent when, as here, there is an appropriate statutory and regulatory regime in place through which concerns as to representations on the efficacy of products can be pursued and corrections ordered where required.<sup>40</sup>

[72] I do not consider deterrence a particularly relevant factor here, though any relevance weighs in favour of granting the application. Absent a representative proceeding, it is highly unlikely that individual consumers would take steps to enforce their rights. Granting the application is accordingly consistent with access to justice.

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<sup>38</sup> Above n 12, at [39].

<sup>39</sup> See Belinda Castles “Class action to be taken against Johnson & Johnson for alleged selling ineffective cold and flu medicines” (13 February 2025) Consumer <[www.consumer.org.nz](http://www.consumer.org.nz)>. Consumer NZ Inc has not provided affidavit evidence on this application.

<sup>40</sup> Above n 26, at [207].

## **Aggregated damages**

### *Introduction*

[73] As noted earlier, should all other elements of the plaintiffs' claims be made out, the plaintiffs will seek damages on an aggregate basis. The pleading does not specify any detail of how damages would be aggregated, though the plaintiffs rely on the evidence of Mr Mark Thompson, a chartered accountant, who opines on how damages in this case *could* be assessed on a class-wide aggregate basis. I pause to note that there is a legal issue as to whether a court in New Zealand can award damages under either or both of the FTA and CGA on an aggregate basis, and then if the answer to that question is "yes", the question of whether and, if so, how that ought to be done.

[74] The express power to assess damages on an aggregate basis exists in some other jurisdictions such as the United Kingdom and Australia, though that power has been conferred by statute. While the parties in this case made submissions on whether aggregate damages can be awarded in this jurisdiction, all accept that I do not need to determine that question on the present application. I accept, however, that *whether* damages under either or both of the CGA and FTA can be awarded on an aggregate basis is a common issue between the plaintiffs and the Class Members.

[75] Despite not needing to determine this question on the present application, Mr Hunter nevertheless submits that identifiable issues with the concept of aggregate or class-wide damages in this case weigh against the application for representative orders being granted. I accordingly summarise the key issues raised by the parties, and whether they influence the outcome of the plaintiffs' application.

### *The plaintiffs' position*

[76] Mr Thompson explains how the calculation of aggregate damages might be made in this case. He says that as a first step, he would need to calculate total sales of the relevant products in New Zealand over the time period in question. Total sales would be dependent on two key inputs; the total number of units of the relevant product sold and the average price which those units were sold. Mr Thompson says this would enable him to calculate the total amount consumers spent purchasing the

relevant products. He notes this would be different to what the defendants might have received from the total sales, as consumers will have paid a margin applied by the retailer. Mr Thompson notes that evidence filed to date by the defendants indicates that there should be data available to the defendants of the sales in New Zealand. In the event the sales data is limited in some way, Mr Thompson explains that he would need to apply statistical modelling to address any limitations.

[77] In terms of average sales price, this would be determined by taking into account changes in price for the relevant products over time. Mr Thompson sets out three possible approaches which could be utilised to arrive at a reasonable estimate of average retail prices over time. Mr Thompson says that depending on the Court's factual findings, he may then need to make some deductions to reach a final award amount. This might include deducting purchases made by consumers who are not members of the class and to reflect "perhaps, the utility or benefit obtained from any combination products". In terms of the latter deduction, he says that one approach he could use would be to use a comparative product to calculate the value of the inefficient active ingredient (PE). He describes this as resulting in a "costs thrown away" figure. He notes that there are other possible methodologies to account for this potential deduction, stating that consumer behaviour and retail experts may be able to conduct research or analysis into the value consumers place on the different functions of different ingredients in combination products. He states "if that was the case then I would be able to calculate reduction in value damages based on their findings". Mr Thompson says a third and final possible approach would be to consider the manufacturing cost of the products. He states:

If I am able to ascertain (based on information held by the defendants) the relative manufacturing cost of PE only products as opposed to combination products, that might tend to indicate whether consumers are getting any real economic value from the combination products. If not, it may suggest that a reduction in value is unnecessary or the reduction should be only minimal (if such a reduction is in fact required at all).

[78] Mr Thompson concludes by noting that "there are many methodologies that might be available to consider reduction in value damages, if the need arises". He states that nothing in the methodologies set out in his affidavit turn on the loss suffered by any one individual class member.

[79] The plaintiffs will say that there is a strong case that aggregate damages are available and appropriate in this case, submitting that they have been recognised in New Zealand and overseas. They refer to the District Court’s decision in *Commerce Commission v Martini* as an example of aggregate damages being awarded under s 43 of the FTA.<sup>41</sup> They will submit that the approach was unaltered on the appeal.<sup>42</sup> The plaintiffs submit that the decisions in *Martini* make it clear that as a matter of law there is no impediment to ordering aggregate relief under the FTA and, they submit, under the CGA.

[80] The plaintiffs note that there are specific statutory provisions empowering courts in other jurisdictions to award aggregate damages. The plaintiffs also say that courts in the United Kingdom have endorsed a similar approach even in the absence of a statutory regime for class actions. Mr Goodall refers to the Supreme Court’s decision in *Lloyd v Google LLC*, in which the Court held that representative proceedings for damages are permissible where damage can be calculated on a basis common to all class members.<sup>43</sup> He places particular emphasis on an example given by the Court, namely where consumers acquired the same product with the same defect, which reduced its value by the same amount, observing that the Court would be able to assess damages in such circumstances on a “top-down” basis. He also refers to the position in Alberta, Canada, which has a comprehensive statutory regime dealing with class actions, though submitting that aggregate damages were still available at common law prior to the introduction of that regime. Mr Goodall will submit that the Supreme Court of Canada held that the courts were required to fill a procedural void in order to allow class actions to proceed, and argues that an award of aggregate damages is an appropriate means for doing that.<sup>44</sup>

[81] Finally, Mr Goodall refers to the Law Commission’s report on class actions, in which it suggests that aggregate damages should be available in any New Zealand class action regime.<sup>45</sup>

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<sup>41</sup> *Commerce Commission v Martini*, DC North Shore, 8 November 2005.

<sup>42</sup> *O’Neill v Commerce Commission* HC Auckland CRI-2005-404-411, 24 November 2006 and *Commerce Commission v O’Neill* [2007] NZCA 446.

<sup>43</sup> *Lloyd v Google LLC* [2021] UKSC 50, at [82].

<sup>44</sup> *Western Canadian Shopping Centres Inc v Dutton*, above n 35, at [34].

<sup>45</sup> Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding* (NZLC R147, 2022) at R71.

*The defendants' position*

[82] The defendants, as noted, dispute that aggregated damages are available in this jurisdiction as a matter of law, and that even if they are, they would not be appropriate in this case.

[83] As to the first proposition, Mr Hunter refers to the English and Welsh Supreme Court's comments in *Mastercard Inc v Merricks* in which the concept of aggregate damages was described as a "radical alter[ation]" of basic common law compensatory principles requiring an individual assessment of loss.<sup>46</sup> On this basis, he submits that aggregate damages are not available in New Zealand absent express statutory authority. The defendants will further say that both the CGA and FTA contemplate awards that are referable to the position of individual persons, however many such persons there may be. Mr Hunter refers to observations by Asher J in *Commerce Commission v Carter Holt Harvey* that claims under the FTA "must be for specific persons who have suffered specific losses".<sup>47</sup>

[84] Mr Hunter also disputes that the *Martini* line of cases demonstrates a common law ability to award aggregate damages. The defendants will say that *Martini* concerned a court-supervised distribution exercise for refunds, not the award of aggregate monetary relief in the sense now being sought by the plaintiffs. Mr Hunter also referred me to the decision in *Lloyd v Google LLC* in which the plaintiffs sought to bring a representative action on behalf of approximately 4 million people, seeking aggregate damages under s 13 of the Data Protection Act 1998. The Court held that the calculation of damage under that statute required an individual assessment. Lord Leggatt JSC, delivering judgment for a unanimous Court, said:<sup>48</sup>

... it is not a bar to a representative claim that each represented person has in law a separate cause of action nor that the relief claimed consist of or includes damages or some other monetary relief. The potential for claiming damages in a representative action is, however, limited by the nature of the remedy of damages at common law. What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the object of putting the claimant — as an individual — in the same position, as best money can do it, as if the wrong had not occurred. In the ordinary course, this necessitates an individualised

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<sup>46</sup> *Mastercard Inc v Merricks* [2020] UKSC 51 at [76].

<sup>47</sup> *Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387 (HC) at [43].

<sup>48</sup> Above n 43, at [80].

assessment which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. A representative action is not a suitable vehicle for such an exercise.

[85] Mr Hunter acknowledges the example of a “top down” damages calculation given in *Lloyd v Google* and upon Mr Goodall relies, but he says that example is not analogous to this case, given it involves products with multiple active ingredients which consumers purchased for a range of reasons, with the result that any loss they have suffered will differ. Finally, while acknowledging that the availability of aggregate damages, in law, is a matter for trial, Mr Hunter submits that as part of the Court’s consideration of the desirability of granting representative orders, it is entitled to clarity as to how proposed damages should be assessed, including if aggregate damages are not available, and how any damages award should be distributed.

### *Discussion*

[86] I do not consider that any of the potential issues arising in relation to the availability of aggregate damages prevents me from granting representative orders at this stage, at least on the slightly more limited basis set out at [61] above. If aggregate damages are available under the FTA and/or CGA, then at least based on the observations of the Supreme Court in *Lloyd v Google*, it *may* be possible to conceive of a method where aggregate damages could be calculated in this case at a class level. I am also conscious of the English and Welsh Supreme Court’s observations in *Mastercard Inc v Merricks* that a court considering certification should not view difficulties or uncertainty in the future calculation of aggregate damages as a hurdle to certification, rather than merely a factor to be weighed in the balance.<sup>49</sup>

[87] It is not necessary or appropriate for me to go further in respect of any of these matters, given they do not arise for final determination on the present application. The matters raised do give rise to one cautionary note, however. If the Court were to hold that aggregate or class wide damages are not available in this jurisdiction (or case), issues as to how and when individual assessments of loss would be made, which involves a potentially very large class, might arise. The practical issues arising might

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<sup>49</sup> Above n 46, at [64](b). A statutory power to award aggregated damages is available in certain collective proceedings in the United Kingdom and was available in that case.

be relevant to the future conduct of the proceeding. On the basis the application for representative orders is to be granted, I propose to make it subject to any further order of the Court amending the orders. These matters also reinforce my preliminary and non-binding view that it may be appropriate for the question of the availability of aggregate damages as a matter of law to be determined at an earlier stage of this proceeding.

[88] To be clear, that is not to convey any suggestion that if it were to be determined that aggregate damages are not available in this jurisdiction, the representative orders would be revoked. As noted, many representative proceedings involve individual issues which include loss, often to be determined at a second (or even third) Stage hearing. But having regard to the potential size of the class in this case, if aggregate damages are not available, or it becomes apparent that damages could not otherwise be calculated on a basis that is common to all Class Members, the plaintiffs may need to provide further information to the Court as to how they propose the issue of loss to be dealt with in a class of this magnitude.<sup>50</sup>

### **Opt-in or opt-out?**

#### *Introduction*

[89] To this point therefore, I am satisfied that it is appropriate to make representative orders, though on the narrower basis than that sought by the plaintiffs.

[90] I must now consider whether the orders should be made on an opt-out basis.

[91] Given the representative orders are not to extend to the FTA claims insofar as they apply to combined products, part of the defendants' opposition to an opt-out approach falls away. Nevertheless, this does not fully address the defendants' opposition to an opt-out approach, and so it remains necessary to consider the competing arguments.

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<sup>50</sup> Mr Goodall accepted that an "ordinary" approach to calculating individual damages in a case such as this would be burdensome for the Court and disproportionate for the parties.

[92] There is of course no doubt that the Court has the power to direct that a representative proceeding progresses on an opt-out basis. The appellate courts have also provided clear guidance on the relevant considerations when assessing whether to grant opt-in or opt-out orders. It is sufficient to set out what the Court of Appeal has most recently said on this topic, in *Simons*, largely with reference to the guidance given by the Supreme Court in *Ross v Southern Response Earthquake Services Ltd*.<sup>51</sup>

[43] In *Ross v Southern Response Earthquake Services Ltd*, this Court held the High Court has jurisdiction to make representative orders under r 4.24 on an opt-out or opt-in basis. In allowing representative proceedings to be brought on an opt-out basis, the Court said:

[81] We are satisfied that there is no jurisdictional barrier to the making of an opt out order under r 4.24. The rule clearly authorises a representative plaintiff to bring proceedings on behalf of other persons with the same interest in the subject matter of a proceeding without first obtaining their consent. That is precisely what paragraph (b) of the rule contemplates. ... Although a person normally needs to consent to become a plaintiff in proceedings before a New Zealand court, r 4.24 and its precursors are a longstanding exception to that principle.

...

[83] ... [Rule] 4.24(b) provides that a claim may be brought “as directed by the court”. That is, the provision expressly contemplates that the court may give directions in relation to the manner in which the representative claim is pursued. We consider that the making of both opt out and opt in orders comes within that power.

[44] Access to justice was recognised as a guiding principle when authorising representative proceedings on an opt-out basis. The Court said:

[98] ... an opt out approach is likely to significantly enhance access to justice. The default position matters. Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with an assessment of whether or not it is in their interests to participate in the proceedings. Some class members will not receive the relevant notice. Others will not understand the notice, or will have difficulty understanding what action they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated. If there is some potential advantage for class members in participating in the proceedings, and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate. The courts should be slow to put unnecessary hurdles in the path of class members,

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<sup>51</sup> Above n 9. Footnotes omitted.

depriving those who fail to take active steps to participate in the proceedings of the opportunity to have their claims determined by the courts, and of the possibility of obtaining some form of relief if their rights have been infringed.

[45] The Supreme Court also emphasised access to justice when dismissing an appeal by Southern Response Earthquake Services Ltd, noting that “an opt out approach has advantages in improving access to justice”.

### *The plaintiffs’ submissions*

[93] Mr Goodall submits that there is no principled basis upon which the Court should depart from the plaintiffs’ proposal of an opt-out approach. He notes the class size is likely to be very large. Given individual claims are likely to be very small, it is inevitable that there will be inertia on the part of many consumers to take active steps to opt-in to the proceeding. Mr Goodall emphasises in particular that there is no suggested prejudice or disadvantage to Class Members were representative orders made on an opt-out basis. Standing back, he says that an opt-out approach will best facilitate access to justice in a case such as this, by aggregating what are likely to be modest individual claims into a viable action.

### *The defendants’ submissions*

[94] Mr Hunter, on the other hand, argues that if representative orders are made, they should be on an opt-in basis. He submits that this case is distinguishable from other cases in which opt-out representative orders have been made. In those cases, the scope of the class was known. For example, class members were policy holders, shareholders on a share register, or bank customers who had already been remediated by the defendants.<sup>52</sup> Here, he notes the class is potentially very large indeed, with neither the plaintiffs, the defendants or the Court having any clear picture at this stage of the potential size. Finally, he notes that some form of “opt-in” or registration process will need to take place at some point in any event, in terms of distributing any compensation to affected Class Members. He submits that it would be preferable for this “registration” process to take place now, prior to any final judgment in the event of a successful claim. Given there is no statutory scheme which governs the post-trial

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<sup>52</sup> See for example *Southern Response Earthquake Services Ltd v Ross*, above n 12; *Simons v ANZ Bank New Zealand Ltd*, above n 9; and *Fullarton v Arowana International Ltd* [2021] NZHC 931, [2021] NZCCLR 28.

distribution processes, Mr Hunter submits that the present lack of clarity benefits no-one.

### *Discussion*

[95] I am satisfied that the representative orders ought to be made on an opt-out basis. I agree that the class size is likely to be very large indeed, and the authorities suggest that an opt-out approach will often be more suitable in such circumstances. Further, a key factor is what would inevitably be, in my view, a very high degree of inertia on the part of consumers to opt in to a proceeding of this kind. The reality is that if the matter is only permitted to proceed on an opt-in basis, it is unlikely to proceed at all.<sup>53</sup>

[96] Further, I can see no real risk of any downside or prejudice to Class Members from an opt-out approach. This is not the type of case where counterclaims might arise.

[97] I agree with Mr Hunter that there is not presently a settled view on just how large the class might be. But if anyone is best placed, at least at this juncture, to estimate the potential class size (based on New Zealand sales data), then it is the defendants themselves. Evidence from the defendants suggests that while the data might not be perfect, there is or will be access to such data. I also note that the Court of Appeal in *Simons* did not see early identification or clarification of actual class membership as a reason to decline opt-out representative orders.<sup>54</sup> Further, there is no reason why in principle New Zealand should be immune to large-scale consumer focused actions such as the present, which are a feature in many comparable jurisdictions (albeit now often conducted pursuant to a statutory framework governing such claims). For example, opt-out representative orders have been made in comparable jurisdictions in respect of exceptionally large classes, such as the estimated 46.2 million class in the United Kingdom Mastercard litigation.<sup>55</sup>

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<sup>53</sup> Based on the affidavit of the litigation funder in this case, which states that “Omni Bridgeway would be unlikely to fund an “opt in” class action given the estimated class size.”

<sup>54</sup> *Simons v ANZ Bank New Zealand*, above n 9, at [88].

<sup>55</sup> See above n 46.

## **Representative orders – conclusions**

[98] I am accordingly satisfied that it is appropriate to make representative orders on an opt-out basis. This approach will improve access to justice and, subject to the following comments, there is no principled basis to depart from the proposed representative orders put forward by the plaintiffs.

[99] As explained earlier, however, I am not persuaded that the representative orders should extend to the FTA claims in respect of the combined products. I accept that as presently defined, the class is framed too broadly in relation to those claims and in particular, that inherent and/or indirect reliance does not arise for determination on the plaintiffs' own claims. The representative orders will therefore apply only to the CGA causes of action, and the FTA causes of action insofar as they apply to products in which PE was the sole active ingredient (being products numbered 1 and 7 in Schedule 1 to the Amended Statement of Claim).

[100] Given the potential size of the class in this case, the granting of the representative orders is subject to any later modification ordered by the Court. In particular, the approach to damages in a claim of this size will be important, and how the plaintiffs propose damages will be assessed in the event it is determined that aggregate damages are not available. I have set out above a preliminary view that it might be beneficial for this issue (and perhaps others) to be determined at an early stage. As the matter progresses, the Court may also wish to see further information from the plaintiffs on proposed methods for distribution, particularly following any determination of how damages might be assessed. These are the sorts of case management issues which the Court will wish to hear from the parties on following delivery of this judgment.

## **Should a common fund order (CFO) be made?**

### *Introduction*

[101] A CFO is an order by which the Court approves the sharing of the costs in bringing the claim between all class members, without all class members needing to sign the agreement between a litigation funder and the plaintiffs representing the class.

In this way, a CFO binds all class members to the payment terms agreed as between the representative plaintiffs and the litigation funder.

[102] The CFO sought in this case is in the following terms:

1. If the representative plaintiff's claim against the defendants is settled, or judgment entered against all, some, or one of the defendants, the following payments will be paid from the Resolution Sum (defined below) before any payments or credits are made to the representative plaintiffs or other Class Members:
  - a. All amounts to which Omni Bridgeway (Fund 5) NZ Invt. Limited (**Omni Bridgeway**) is entitled pursuant to the Phenylephrine NZ Litigation Funding Agreement between Omni Bridgeway and the representative plaintiffs dated 11 February 2025 (**Funding Agreement**) namely:
    - i. Those Project Costs due under Clause 5.1.1 of the Funding Agreement;
    - ii. Those amounts due as a percentage of the Resolution Sum (the **Fees**), as contained in the table at Clause 5.1.3 of the Funding Agreement and set out in this Common Fund Order (or such other fee as the Court considers reasonable at that time);
    - iii. Any additional amounts due on account of GST further to Clause 5.1.2 of the Funding Agreement; and
    - iv. Any applicable increase on amounts due under Clause 5.1 of the Funding Agreement, as provided for by Clause 5.2, 6 and 7.
2. The mechanics of the payments referred to above and those made to the representative plaintiffs or other Class Members from the Resolution Sum will be as directed by the Court, or if Court approval is not required, as agreed in writing by the defendants, the representative plaintiffs and Omni Bridgeway.

[103] The "Fees" are defined as follows:

- (a) for each resolution which occurs before 12 months from the Commencement Date, 20 percent;
- (b) for each resolution which occurs on or after 12 months and before from the Commencement Date, 25 percent;

- (c) for each resolution which occurs on or after 24 months and before 36 months from the Commencement Date, 30 percent; and
- (d) for each resolution which occurs on or after 36 months from the Commencement Date, 35 percent.

[104] CFOs are a relatively recent addition to the New Zealand representative proceeding landscape. However, a CFO was made by the Court of Appeal in the *Simons* case, and that Court helpfully summarised the approach to be taken when determining an application for a CFO, and also the timing of one being made. Notably, the Court of Appeal took a different approach to that adopted by the majority of the High Court of Australia in *BMW Australia Ltd v Brewster* which held that a CFO could not be made at the early stages of a representative proceeding.<sup>56</sup> The Court endorsed that in the ordinary course it will be preferable to make a CFO at an early stage. The Court set out its reasoning as follows:<sup>57</sup>

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

[134] We find ourselves in agreement with Gageler J when he said the approach taken by the majority in *BMW Australia Ltd v Brewster*:

... introduces an unrealistic dichotomy to postulate that an order that serves to shore up the commercial viability of the proceeding from the perspective of the litigation funder can have nothing to do with enhancing the interests of justice in the conduct of the representative proceeding.

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

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<sup>56</sup> *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574.

<sup>57</sup> Above n 9. Footnotes omitted.

investment. Critical to this conclusion is that the court will closely scrutinise the CFO and approve any settlement.

[136] The approach which we favour ensures:

- (a) funding arrangements for a representative proceeding are entered into on a comparatively secure footing;
- (b) class members are better informed about their possible returns when deciding whether or not to opt out of the proceeding; and
- (c) less uncertainty about how the court might exercise its discretion to allocate the costs of funding the proceeding at the conclusion of the litigation.

[137] It will be apparent from our reasoning that we do not share Mr Hunter's concern that a CFO is solely concerned with substantive legal rights and goes beyond procedural considerations. While a CFO does regulate the rights of a litigation funder and all members of a class who benefit from the funding agreement, it is also a procedural mechanism designed to ensure access to justice and the fair application of r 4.24. The considerations that govern the making of a CFO involved mixed issues of procedure and substantive law. We are satisfied that making a CFO is consistent with the broad jurisdiction conferred by s 146(4) of the Senior Courts Act and r 4.24.

[105] As to the timing of making a CFO, and taking a different approach to that adopted by the High Court, the Court of Appeal said:<sup>58</sup>

In principle, we would have thought that the overall interests of justice and, in particular, access to justice are best achieved through a CFO being made as early as possible in a proceeding such as this. There is no clear benefit in deferring making a CFO at an early stage of this proceeding. Failing to make a CFO at this juncture in this case merely prolongs uncertainty about the funding of the proceeding, thereby placing access to justice at risk.

[106] Having made that observation, the Court of Appeal made CFOs on the terms sought by the appellants.<sup>59</sup> Thus the CFOs in *Simons* were effectively made at the same time as approval for the proceeding to continue on a representative basis.

#### *The plaintiffs' submissions*

[107] Ms Lindsay, who presented this part of the plaintiffs' argument, emphasises that in this case, an opt-out proceeding will not be economically viable without a CFO. She notes that the representative plaintiffs support a CFO being granted in order to ensure that everyone who might benefit from the proceedings contribute to its costs

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<sup>58</sup> At [141].

<sup>59</sup> At [142].

equally. She emphasises that if Class Members have any concerns about the impact of the CFO on their potential recovery, they are free to opt-out of the proceeding. She highlights, however, that in reality Class Members are unlikely to be able to bring their individual cases before the Court and therefore the alternative to remaining in the proceeding with a CFO is that there would be no recovery at all, despite those consumers may well having a legitimate claim for loss. She notes that notification orders will provide class members with appropriate information about the CFO.

[108] Ms Lindsay also emphasises the Court of Appeal’s decision in *Simons* as to the timing of a CFO, and the Court’s observation that there is “little room for placing significant weight upon the concerns of a defendant, provided of course, no injustice is caused to a defendant through a CFO”.<sup>60</sup> She says that this is because a CFO primarily relates to the relationship between the litigation funder, the representative plaintiffs and the class members, rather than directly engaging the defendants’ interests.

[109] Ms Lindsay notes that the defendants will say that there is relevant prejudice to them from the CFO proposed in this case, given the structure of the funding agreement incentivises the litigation funder to prolong the proceedings in order to receive an increased return in litigation. This is because under the funding agreement, the percentage of any sum recovered which the litigation funder is entitled to claim increases the longer the proceeding continues. However, Ms Lindsay submits the defendants’ concern is misplaced for the following reasons:

- (a) The funding agreement confirms that the litigation fund does not have control over the conduct of the proceeding. This remains with the plaintiffs. She also notes that the funding agreement sets its purpose as “facilitat[ing] the just resolution of the claims and proceedings according to law and as quickly, inexpensively and efficiently as possible.”
- (b) Referring me to the affidavit evidence provided by the litigation funder, the rationale for the increasing percentage over time is not to incentivise

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<sup>60</sup> At [132].

the proceedings being unnecessarily drawn out but is tied to maintaining an adequate Internal Rate of Return (IRR) over time. Ms Lindsay notes that without this a defendant could be encouraged to adopt delay tactics in order to pressure litigation funders in such proceedings, knowing that funders would be eager to ensure a return on their investment in a timely way.

- (c) She further notes that the rates of return in the funding agreement are consistent with the rates addressed by the Federal Court of Australia in *Earglow Pty Ltd v Newcrest Mining Ltd*.<sup>61</sup>
- (d) The litigation funder has confirmed that it will comply with the criteria for litigation funding identified by the Court of Appeal in *Saunders v Houghton*.<sup>62</sup>

[110] Finally and importantly, Ms Lindsey emphasises that the CFO sought in this case is subject to the express power of the Court to review the amounts that would be paid to the litigation funder.

#### *The defendants' submissions*

[111] Ms East, presenting the defendants' submissions on this topic, submits that it is too early in this proceeding to grant a CFO. In the alternative, she says that even if the Court is minded in principle to grant a CFO now, the structure of the CFO actually sought wrongly incentivises the litigation funder to prolong the proceedings. She says this is because it is based on percentage recovery amounts which are meaningless in the absence of further information.

[112] Ms East submits that the Court of Appeal's observations in *Simons* do not prevent a conclusion that it would be appropriate to defer the making of a CFO in some cases until further information is available. She refers to a (post-*Simons*) decision of the High Court of Australia, *Kain v R&B Investments Pty Ltd*, in which the

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<sup>61</sup> *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, referring to funding rates of between 15 and 50 percent at [168]-[169].

<sup>62</sup> Above n 15, at [32]-[33].

majority affirmed its earlier judgment in *Brewster*; namely that it is a “speculative exercise” to fix the litigation funder’s rate of remuneration at the commencement of the proceeding absent criteria to evaluate its appropriateness or necessity.”<sup>63</sup>

[113] Ms East acknowledges that the New Zealand Court of Appeal in *Simons* took a different approach to that of the majority in *Brewster*, but submits that *Simons* was a different kind of case to the present. She highlights that the present case concerns a currently identifiable class of an unknown number, but self-evidently of a very much larger magnitude than in *Simons*. She notes that the Court in *Simons* was in a position to assess the likely percentage return of the proposed CFO at least in the context of the class size,<sup>64</sup> and the plaintiffs’/funder’s ability to liaise with and manage class of a known size. She submits that the Court in the present case is not able to make such an assessment. Ms East argues that factors such as this weigh against the Court exercising its discretion to grant a CFO at this early point in time. Instead, this assessment should be deferred until Class Members are known and the Court can make an assessment as to how the funder has handled the considerable logistics at play. She also referred me to a recent study of Australian class actions, and submits this suggests that prevailing recovery rates for litigation funders are now lower than appeared to be the case from the *Earglow* litigation.<sup>65</sup>

[114] Finally, Ms East suggests that the evidence that the litigation funder would reconsider whether it would be able to fund this proceeding without a CFO is effectively a threat that the Court should be wary of responding to.

### *Discussion*

[115] I am satisfied it is appropriate to make a CFO at this stage of the proceeding.

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<sup>63</sup> *Kain v R&B Investments Pty Ltd* [2025] HCA 28, (2025) 423 ALR 413 at [67] referring to *Brewster*, above n 56, at [66]–[67].

<sup>64</sup> Having before it information indicating class size, and accounting evidence as to what the suggested loss was (being the cost of borrowing).

<sup>65</sup> Vince Morabito *Group Costs Orders, Funding Commissions, Volumes of Class Action Litigation, Reimbursement Payments and Biggest Settlements* (4 February 2025).

[116] First, the Court of Appeal has given recent and clear guidance that in an opt-out representative proceeding, and where it is otherwise appropriate to make a CFO, it will ordinarily best serve the objectives of r 4.24 to do so at an early stage. In reaching this view, the Court deliberately took a different approach to that adopted by the majority of the High Court of Australia in *Brewster*. I do not consider the more recent decision in *Kain* alters the analysis. The majority in *Kain* expressly declined to re-open *Brewster*, which it considered would have permitted “re-agitation of arguments that did not prevail in favour of a ‘commencement CFO’”.<sup>66</sup> For this reason, the position on “commencement CFOs” in Australia remains as per the majority judgment in *Brewster*, which the Court of Appeal in this jurisdiction has not adopted. As to the suggested “threat” that absent a CFO, the litigation funder may not continue to fund the action, similar evidence from the litigation funder in *Simons* did not trouble the Court of Appeal.<sup>67</sup>

[117] I also accept Ms Lindsay’s point that if uncertainty as to the class size was a material factor pointing against making an early CFO, then that may mean early CFOs became unavailable in such circumstances. I do not read the Court of Appeal’s judgment in *Simons* as endorsing such an outcome. Further, I do not share the defendants’ concerns as to the increasing percentage rates for the litigation funder’s return, at least in the sense of providing a basis to decline the application for a CFO. As the Court of Appeal in *Simons* emphasised, given a CFO settles funding issues as between the litigation funder, the representative plaintiff(s) and class members, this “leaves little room for placing significant weight upon the concerns of a defendant, provided of course, no injustice is caused to a defendant through a CFO.”<sup>68</sup>

[118] There is evidence before the Court for the reason for the increase in the percentage recovery over time which is not tethered to an incentive on the part of the litigation funder to delay the progress of the proceeding. Conversely, there is no evidence to counter the explanation provided in relation to the need to maintain a balanced IRR over time. Linked to this, the survey of commission rates set out in *Earglow* indicates that other funders adopt increasing percentage recovery rates over

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<sup>66</sup> Above n 63, at [68].

<sup>67</sup> Above n 9, at [98].

<sup>68</sup> At [132].

time.<sup>69</sup> Further, the funding agreement expressly provides that control of the proceeding sits with the plaintiffs. There is also a cap on the proportion of any damages award or resolution sum that is payable to the litigation funder.<sup>70</sup>

[119] In addition, the plaintiffs received independent legal advice before entering into the funding agreement. Having taken that legal advice, they were obviously satisfied with the terms as between themselves and the litigation funder. I accept that in reality, most Class Members are unlikely to scrutinise the funding agreement carefully and form an independent view on whether to opt-out of the proceeding because of it. But the point remains that it will be open to them to do so. I also cannot see any particular prejudice to Class Members from a CFO being made at this stage. The CFO only operates in the context of a settlement or entry of judgment against any one or more of the defendants and addresses the litigation funder's priority in respect of any Resolution Sum (as defined in the CFO). The inevitable counterfactual to participating a successful claim is that an opting-out Class Member will receive no recompense for purchasing an allegedly worthless or over-priced product.

[120] Importantly in my view, the making of the CFO is expressly subject to review by the Court at the time of any settlement or upon the entry of judgment against the defendants.<sup>71</sup> It would be open to the Court to appoint a contradictor at that time, to address the Court on any emerging issues in relation to the funding agreement, the litigation funder's support to the proceeding, or the CFO should that be required. In addition, and as is the case in other representative proceedings, the representative orders will be made expressly on the basis that any settlement is subject to approval of the Court. Finally and for completeness, an issue was also raised with the fact that the Resolution Sum is referenced to the total "gross" amount payable by the defendants

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<sup>69</sup> Above n 61, at [169].

<sup>70</sup> Although not in relation to an interest charge should the proceedings resolve more than 48 months following commencement

<sup>71</sup> The common fund order sets out that the amount to be paid to the litigation funder by way of "Fees" is as set out in the CFO, being the sliding scale of percentage of the gross Resolution Sum, "or such other fee as the Court considers reasonable at that time". This is slightly different to the CFO in *Simons*, which was framed as "...or such *lower* fee as the Court considers reasonable at that time" (emphasis added). It seems unlikely that a Court scrutinizing the potential payments to a litigation funder at settlement or successful judgment would adopt a *higher* percentage recovery than as set out in the funding agreement. Ms Lindsay described the CFO in this case as providing certainty as to a "ceiling".

to the Class Members. However, this is the same formulation as adopted in the *Simons* CFO and which the Court of Appeal ordered on those terms.

[121] Standing back, there is nothing raised by the defendants which causes me to conclude that there is any particular prejudice to them, or Class Members, from making a CFO, and doing so at this stage of the proceeding. Most importantly, the fees payable to the litigation funder are expressly subject to the Court's later review, and the ongoing case management of this proceeding by an assigned Judge will ensure no party takes steps to unnecessarily delay its progress.

[122] For these reasons, the application for a CFO is granted.

### **Residual matters**

[123] The representative orders as sought include that the orders are to take effect from the date on which the proceeding was commenced. That is now a settled approach, and the defendants did not make submissions in opposition to such an order being made.

[124] Finally, notification orders are also sought, but Mr Goodall confirmed that their determination should be deferred, given determination of the balance of the application might affect the content of notification to Class Members. That is a sensible approach.

### **Result**

[125] The application for representative orders is granted, other than that the orders do not extend to the FTA claims in respect of combined products. The orders are also subject to later modification by the Court.

[126] The application for common fund orders is granted.

[127] The application for notification orders is deferred.

[128] The plaintiffs should now take steps to prepare the text of revised representative orders for approval by me, and then for sealing, which reflect the

judgment of the Court. I encourage the parties to agree an appropriate form of notification orders, taking into account the contents of this judgment.

[129] Finally, as the plaintiffs have been largely successful on their applications, my provisional view is that costs ought to follow the event in the ordinary way. I would certify for second counsel.

[130] If agreement on costs cannot be reached:

- (a) The plaintiffs are to file a costs memorandum within 15 working days of this judgment.
- (b) The defendants are to file a memorandum in response within a further 10 working days.
- (c) The plaintiff may file a memorandum strictly in reply within a further five working days.
- (d) Memoranda referred to at (a) and (b) above are to be no longer than five pages in length (excluding any schedules of costs claimed). The memorandum referred to at (c) above is to be no longer than two pages in length (excluding any schedules of costs claimed).

[131] I will thereafter determine costs on the papers.

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Fitzgerald J

## SCHEDULE 1

### PLAINTIFFS' LIST OF COMMON ISSUES

1. Was the oral consumption of phenylephrine hydrochloride (PE) (in accordance with the directions on the packaging of the Products) effective for the temporary relief of nasal congestion?
2. Was the oral consumption of phenylephrine hydrochloride (PE) (in accordance with the directions on the packaging of the Products) effective for the temporary relief of nasal congestion when combined with any amount of paracetamol, chlorpheniramine maleate, dextromethorphan hydrobromide monohydrate, guaifenesin, or ibuprofen?
3. Did:
  - a. JNTL Consumer Health New Zealand Limited (JNTL) make the Representations (as defined in the Claim), including through:
    - i. making the statements particularised in Schedule 1 to the Claim; and/or
    - ii. any historic statements made by JNTL (to be particularised following discovery)?
  - b. Johnson & Johnson (New Zealand) Limited (J&J NZ) make the Representations, including through:
    - i. making the statements particularised in Schedule 1 to the Claim; and/or
    - ii. any historic statements made by JNTL (to be particularised following discovery)?
  - c. Johnson & Johnson Pacific Pty Limited (J&J Pacific) make the Representations, including through:
    - i. making the statements particularised in Schedule 1 to the Claim; and/or

- ii. any historic statement made by JNTL (to be particularised following discovery)?
4. If so, and during the period 31 March 2005 to 13 February 2025:
  - a. Did any of the Defendants continue to make the Representations?
  - b. Did JNTL, J&J NZ, and/or J&J Pacific continue to engage in the marketing of the Products?
5. Were the Defendants in trade at all relevant times?
6. Are the Representations misleading and/or deceptive and/or likely to mislead or deceive under section 9?
7. Were the Representations liable to mislead the public as to the nature, characteristics and/or suitability for a purpose of the Products?
8. Were these Representations false and misleading representations that the Products:
  - a. were of a particular kind, standard, quality composition and/or grade in terms of section 13(a) of the FTA? And/or
  - b. had particular performance characteristics, uses or benefits in terms of section 13(e) of the FTA?
9. Is it inherent in the purchase of any one of the Products that a consumer relies on the Representations?
10. Did the Representations cause the Loss?
11. Were any of the Defendants, individually or collectively, a “manufacturer” of the Products within the meaning of the CGA?
12. Were the Products of acceptable quality in terms of section 7 of the CGA?

13. Did any of the Defendants breach section 6 of the GCA (guarantee as to acceptable quality)?
14. Did the Defendants import or distribute the Products with the description that they would be effective in relieving nasal congestion for the purposes of section 9 of the CGA?
15. Did any of the Defendants breach section 9 of the CGA?
16. Should the Plaintiffs and the class members be awarded aggregate damages under sections 43(3)(e) of the Fair Trading Act?
17. Should the Plaintiffs and the class members be awarded aggregate reduction in value damages from the Defendants under section 27 of the CGA?
18. If so, how should any damages be assessed?
19. What was the date on which the loss or damage, or likelihood of loss or damage, ought reasonably to have been discovered?
20. Does the longstop period in the Limitation Act 1950 apply to claims under the FTA to time-bar purchases of the Products made between 31 March 2005 and 13 February 2010?
21. Is the continued use of the Products and/or failure to follow advisory statements on the Product labels capable of giving rise to a mitigation defence?