IN THE SUPREME COURT OF NEW ZEALAND

SC 100/2012
[2014] NZSC 37

	BETWEEN	CREDIT SUISSE PRIVATE EQUITY LLC First Appellant
		CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Second Appellant
	AND	ERIC MESERVE HOUGHTON First Respondent
		T E C SAUNDERS & ORS Second Respondents
		FIRST NEW ZEALAND CAPITAL Third Respondent
		FORSYTH BARR LIMITED Fourth Respondent

Hearing:	15 October 2013
Court:	Elias CJ, McGrath, Glazebrook, Arnold and Anderson JJ
Counsel:	A S Olney and C J Curran for Appellants A J Forbes QC, P A B Mills and T J P Gavigan for First Respondent D J Cooper for Second Respondent D H McLellan QC for Third Respondent No appearance for the Fourth Respondent
Judgment:	9 April 2014

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs of $25,000 are awarded to the first respondent plus usual disbursements (to be set by the Registrar if necessary). The appellants and the second and fourth

respondents are liable jointly and severally for the costs and disbursements. We certify for second counsel.

REASONS

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ELIAS CJ AND ANDERSON J

(Given by Elias CJ)

[1] By r 4.24 of the High Court Rules, a person may bring a claim on behalf of others with "the same interest in the subject matter of a proceeding" only with the consent of those with the same interest or "as directed by the court on an application made by a party or intending party to the proceeding". If consent has been given, the plaintiff may file a representative claim as of right. Without consent, a representative claim requires the direction of the court. The two issues raised by the appeal are:

(a) is a representative proceeding confined to issues common to the plaintiff and the parties represented (on which declaratory findings will set up res judicata on the common issues as a platform for further claims), so that matters of difference between those represented (going, for example, to questions of reliance and loss) must be pursued in separately constituted proceedings, themselves brought within the statutory limitation periods applicable?

(b) are those who opt in to a representative proceeding in accordance with a direction of the court under r 4.24 represented from the time of their consent or from the time the proceeding itself was filed for statutory limitation purposes?

Summary of appeal and conclusions

[2] What constitutes "the same interest in the subject matter of a proceeding" under r 4.24 is assessed purposively to allow the representative proceeding to be "a flexible tool of convenience in the administration of justice".[1] It is sufficient if the party and those represented "have a community of interest in the determination of some substantial issue of law or fact".[2]

[3] It was determined by the Court of Appeal in a judgment of 18 December 2009, not appealed, that the plaintiff, Mr Houghton, had sufficient commonality of interest with others who acquired shares in Feltex Carpets Ltd in a public offering of shares in 2004 to justify a representative proceeding.[3] The proceeding at issue in this case, in which the plaintiff Mr Houghton sued for himself and on behalf of others who acquired shares in Feltex in the initial public offering of shares in 2004, was filed in February 2008.[4] It claimed damages in respect of losses said to have been suffered as a result of particular statements in and omissions from the prospectus issued for the public offering of shares, which were made or omitted negligently or in breach of statutory duties under the Securities Act 1978 and the Fair Trading Act 1986.[5]

[4] The December 2009 conclusion of the Court of Appeal was however provisional on approval of an amended statement of claim by the High Court[6] and the imposition by the High Court of conditions relating to the conduct of the

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1 *John v Rees* [1970] Ch 345 (Ch) at 370.

2 *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J. See also the judgment of Mason CJ, Deane and Dawson JJ at 404 and the judgment of McHugh J at 427.

3 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 [*Saunders v Houghton (No 1)*] at [93].

4 A second plaintiff, Mr Jones, who had purchased shares in the secondary market before a profit downgrade announcement, also claimed in a representative capacity on behalf of others who had purchased shares in the same way. His claim was however held by French J on 7 October 2008 to be unsuitable for representative claim: *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) [*Houghton v Saunders* (HC 2008)] at [224].

5 Although the point was not the subject of argument and need not be considered further, it is not clear to me that recourse to r 4.24 was necessary given the terms of s 43(1) of the Fair Trading Act 1986, which expressly permits application under that Act to be made by "any person" for recovery of loss suffered by a person "whether or not [that person] made the application or is a party to the proceedings". Subsection (1) has since been amended and wording to this effect is now found in subs (2)(b).

6 *Saunders v Houghton (No 1)*, above n 3, at [110].

representative proceeding.[7] The Court of Appeal noted that it had become "common ground" that the representative procedure was likely to be appropriate for the determination of whether the prospectus in issue complied with the law.[8] The Court considered that how to manage matters of difference, in particular any questions of reliance, could not sensibly be considered until the facts had been pleaded and proved.[9] The continuation of the representative proceeding was remitted to the High Court for further consideration.[10] In the meantime, an interim stay imposed on the proceeding in the High Court was to be maintained.[11]

[5] The present appeal is concerned with the next stage, in which the High Court in a decision of 9 March 2011[12] (for which reasons were provided on 8 June 2011[13]) held that the representative order was to be maintained[14] and lifted the interim stay subject to conditions which included the provision of security for costs and the continuing supervision by the court of the conduct of the litigation funder.[15] The High Court considered that any differences between those represented on matters concerning reliance, causation, loss and limitation could not be resolved at the stage the proceeding had reached and that the Court of Appeal had not intended that they be revisited "at this stage".[16] The decision of the High Court was upheld by a judgment of the Court of Appeal of 23 November 2012.[17] The Court of Appeal held that addressing differences between those represented was something to be undertaken as part of the case management of the proceeding and did not affect the suitability of the representative form of the action.[18]

[6] The judgment of the Court of Appeal is now appealed to this Court by Credit Suisse Private Equity LLC and Credit Suisse First Boston Asian Merchant Partners

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7 At [93]–[94].
8 At [14].
9 At [89].
10 At [110].
11 At [93].
12 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 9 March 2011 (French J) [*Houghton v Saunders* (HC 2011)].
13 *Houghton v Saunders [Lifting Stay]* (2011) 20 PRNZ 509 (HC).
14 At [232].
15 At [231] and [234].
16 At [93].
17 *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652 (O'Regan P, Randerson and Harrison JJ) [*Saunders v Houghton (No 2)*].
18 At [85].

LP. They are supported in their submissions on the appeal by the former directors of Feltex and, in written submissions, by Forsyth Barr Ltd. Counsel for First New Zealand Capital appeared but did not seek to be heard on the appeal. Mr Houghton supported the judgment of the Court of Appeal.

[7] First, it is contended by the appellants that the representative order meant that the proceeding was "brought"[19] on behalf of the represented shareholders only to the extent of the common interest in establishing breach of common law and statutory duties in the preparation of the prospectus for the public share offering. Judgment on the threshold issue of breach would establish res judicata binding on all claimants. It is argued by the appellants that the representative action cannot extend beyond the matters common to all shareholders and that, since the represented shareholders are not parties to the current proceeding but simply bound by its determination of the common issue, the present proceeding cannot be a vehicle for the individual claims for damages, which must be the subject of a separate proceeding. These are now said to be barred by statutory limitation periods.

[8] As appears in the reasons given below, we consider that this argument is inconsistent with settled authority that representative claims are appropriately made under r 4.24 where some substantial question is common to a number of litigants or the claims of a number of potential litigants arise out of the same transaction or series of transactions. In such cases, requiring an additional separate proceeding for consequential issues which are individual or in respect of which any common interest is with a subgroup of those represented would be inconsistent with the "just, speedy, and inexpensive determination" of proceedings, which is the objective of the High Court Rules.[20] A view that damages claims are not suitable for representative actions is no longer held in New Zealand. Nor is identity of the cause of action necessary. Divergence, such as in assessing loss, can be managed by subsequent directions for joinder as parties of those represented, or by staging the hearing, or by

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[19] Section 4(1) of the Limitation Act 1950 bars certain actions being "brought" after the expiration of a limitation period while s 43(5) of the Fair Trading Act 1986 bars applications under s 43(1) being "made" after the expiration of a limitation period. In these reasons, references to the time at which an action was "brought" should be understood to encompass the time at which an application was "made" for the purposes of the Fair Trading Act. (Section 43(5) of the Fair Trading Act has since been amended and the statutory bar is now found in s 43A.)

[20] High Court Rules, r 1.2.

severance of the initial proceeding. Additional distinct proceedings are not necessary. Once a person is represented in a claim to the court, an action on behalf of that person has been brought for the purposes of the statutory limitations under the Limitation Act 1950 or the Fair Trading Act. In this conclusion we agree with the result reached by other members of this Court.

[9] The second question raised by the appeal concerns when an action has been "brought" on behalf of a person permitted by court direction to opt in to an existing proceeding. As already indicated, the answer depends on whether the action is treated as having been "brought" on his behalf on the date on which the plaintiff filed a claim in representative form or on the date on which the person represented joins it in conformity with the court direction. We regard this as a question of some difficulty, on which in the end we differ from the conclusion reached by other members of the Court.

[10] As appears in the reasons given below, we consider that an action not brought with the consent of those purportedly represented, but which they are able to join under court direction, is not brought on behalf of a represented person until he gives consent by "opting in" in accordance with the directions of the court. There is no relation back to the date on which the plaintiff filed the claim. (Similarly, if the court makes a representative order in respect of a class of persons, with or without the opportunity to opt out, the action would not in our view be brought on behalf of those represented until the date of that court order, not the date on which the plaintiff filed the claim.)

[11] The Australian authorities which cause other members of the Court to come to a different conclusion are based on rules which allow representative claims to be brought without consent of those represented or direction of the court, but subject to later court control over their *continuation* as representative actions. This seems to me to be a point of material distinction from r 4.24. Under such rules, a direction that a representative claim be continued separately for the future does not entail defeat of statutory defences where time limits have expired, because the representative claim was constituted when filed.

[12] Under r 4.24, the representative claim is not constituted on behalf of those represented unless it is brought with their consent or in accordance with the direction of the court. Where the direction of the court is that those represented must opt in to the claim, we consider that the claim is "brought" on behalf of those represented when each exercises the option to join and not before. This interpretation is, we think, consistent not only with the terms of r 4.24 but with wider policies of procedural law, and with the view of the Court of Appeal expressed in the judgment of 18 December 2009. We would allow the appeal on this basis, leaving the application of the limitation defences to be determined at trial once the facts are established.

[13] French J considered it arguable that time did not start to run for the purposes of the Fair Trading Act claim until July 2007 and so concluded that she could not be satisfied as to the degree of certainty required that the Fair Trading Act claim was statute-barred.[21] The Judge stressed that this analysis did not represent a final conclusion and could change as more became known.[22] In respect of the Limitation Act defences, French J took the view that the relevant dates from which the periods of limitation run are either 21 May 2004 or 2 June 2004[23] (depending on whether the shares were purchased through the public offering which closed on 21 May 2004 or from a broker who had received an allocation, the closing date of the offer for applications pursuant to firm allocations being 2 June 2004), but we do not think this Court is in a position finally to resolve the limitation defences. And, indeed, we consider there is force in the submission made by the director respondents that on application for strike out on the basis that the claims were statute-barred it was not appropriate to resolve the substantive limitation defence on determination that the strike out failed.

History of the appeal

[14] On 26 February 2008 Mr Houghton filed a proceeding in the High Court as plaintiff and in a representative capacity pursuant to r 4.24 of the High Court Rules[24]

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21 *Houghton v Saunders [Lifting Stay]*, above n 13, at [114].
22 At [114].
23 At [121].
24 Rule 4.24 is the current form of the rule. When the claim was filed, its predecessor, r 78, was in

for shareholders in Feltex who purchased shares under the public offer and the prospectus and who claim to have suffered loss on their investment.[25] The claim was brought against the directors of Feltex (the second respondents), the promoter of the offering (Credit Suisse Private Equity LLC, the first appellant), the vendor and issuer of part of the shares in the public offering (Credit Suisse First Boston Asian Merchant Partners LP, the second appellant), and the organisers and joint lead managers of the public offer (First New Zealand Capital, the third respondent, and Forsyth Barr Ltd, the fourth respondent). Throughout, it was made clear that the claims were to be financed by a commercial litigation funder, coordinated by Joint Action Funding Ltd, in which the principal is Mr Gavigan. The fact that the claim is financed by a litigation funder and the difficulties over finalising the funding arrangements led to more complexity in the litigation than might otherwise have been the case.

[15] On the date the claim was filed, Associate Judge Christiansen made an order on an ex parte basis that the plaintiff was to represent all shareholders who bought shares in Feltex from the date of the public offering on 2 June 2004 (the initial public offer allotment date).[26] The representation was authorised in respect of all shareholders who had suffered loss through their acquisition of shares and who did not opt out of the litigation by 4 pm on 11 April 2008. Shareholders who did not choose to opt out were given the opportunity to remain within the representative proceeding but opt out of the litigation funding arrangement with Joint Action Funding Ltd if they entered into a "standard retainer" with the solicitors for Mr Houghton.

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force. Rule 78 does not differ in any material way from r 4.24, and in these reasons it is convenient to refer to r 4.24.

25 The class purported to be represented was stated more broadly in the original statement of claim: see *Houghton v Saunders* (HC 2008), above n 4, at [19]. At the time of filing the proceedings, some 800 shareholders had provided consent to be represented, although some of these may well have been shareholders who acquired shares subsequently to the public float and who were therefore excluded from the representative order substituted by French J in October 2008 as described above at n 4. Whether the representative proceedings were appropriately constituted without court direction in relation to the consenting qualifying shareholders has not been the subject of argument. It may be that the terms on which the litigation funding arrangements were permitted to continue would have to be observed in any event, effectively requiring informed consent through the opt-in procedure directed.

26 *Houghton v Saunders* HC Auckland CIV-2008-409-348, 26 February 2008 (Order for Directions) at [1]. Associate Judge Christiansen said in error that the date of the initial public offer allotment was 4 June 2004. French J amended the representative order to correct the error in 2011: *Houghton v Saunders [Lifting Stay]*, above n 13, at [12] and [232].

[16] The defendants applied to review the representative orders made by Associate Judge Christiansen and sought a stay of the proceeding because they claimed that the litigation funding arrangements were an abuse of process. French J, in a judgment of 7 October 2008, declined to stay the proceeding as an abuse of process because of the litigation funding.[27] She confined the representative order to those who had acquired shares through the initial public offering, excluding from the order those who had purchased their shares on the secondary market.[28] The terms of the representative order were also recast. French J considered that a representative order on an opt-out basis was not available under r 4.24 and should not have been made.[29] She replaced the opt-out order with a direction that qualifying shareholders had until 19 December 2008 to advise the Court that they consented to be part of the proceeding through completion of a consent form, which was to be submitted to the Court for approval, that explained the various funding options.[30] Leave was reserved to the plaintiff to apply for variation of the date by which consent from the qualifying shareholders was to be provided if the date of 19 December proved "impractical or gives insufficient time".[31]

[17] The defendants appealed to the Court of Appeal against the refusal of the stay on the basis that the litigation funding arrangements were an abuse. The plaintiff did not cross-appeal against French J's conclusion that the opt-out procedure was inappropriate or her substitution of an opt-in procedure. It was therefore unnecessary for the Court of Appeal to consider those questions.

[18] The appeal was not heard by the Court of Appeal until November 2009. In the meantime, French J noted in a further judgment of 24 July 2009 that the plaintiffs were in "some disarray".[32] Opt-in forms had been sent to the shareholders in November 2008, without having first been submitted to the Court for approval.[33] The solicitors for the plaintiffs had withdrawn in March 2009 and new solicitors

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27 *Houghton v Saunders* (HC 2008), above n 4, at [201].
28 At [224].
29 At [165]–[168].
30 At [224].
31 At [225].
32 *Houghton v Saunders [Privilege]* (2009) 19 PRNZ 476 (HC) at [9].
33 At [10].

were not instructed until June.[34] No amended statement of claim had been filed, as directed[35] (and the amended statement of claim was still in draft when the Court of Appeal hearing was held in November).[36] The delay and the conduct of the proceeding by Mr Gavigan were criticised by French J in her judgment of 24 July 2009.[37] In a judgment of May 2010, she pointed out that it was arguable that some of the claims would become statute-barred in early June 2010.[38] In the judgment of 24 July 2009, French J imposed an interim stay on the proceeding pending determination of the appeal to the Court of Appeal, on the application of the defendants.[39] The interim stay was made in order "to avoid confusion and ensure the orderly conduct of the proceedings"[40] because opt-in consent forms had been sent to shareholders without having been approved by the Court and while the representative order was the subject of the appeal.[41]

[19] The Court of Appeal judgment was delivered on 18 December 2009. Much of it was concerned with whether the litigation funding arrangements were an abuse of process. The Court dismissed the defendants' appeal from the High Court refusal of a stay on the grounds of those arrangements. It took the view that, although there was a risk that commercial funding could lead to oppressive litigation, such risk could be managed by High Court approval of the arrangements and supervision of the case (with the continuing ability to permanently stay the proceeding should abuse be shown).[42] It held, however, that in principle there was no impediment in law to financing litigation for profit.[43] The Court of Appeal also allowed an appeal against the refusal of the High Court to strike out a cause of action for breach of fiduciary duty. It struck out the cause of action as overbroad.[44] The principal matter of interest for the present appeal is the determination relating to the representative order the Court of Appeal made in its 2009 judgment. The arguments in the current appeal

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34 At [11]–[12].
35 At [13].
36 *Saunders v Houghton (No 1)*, above n 3, at [47].
37 *Houghton v Saunders [Privilege]*, above n 32, at [81] and [16] respectively.
38 *Houghton v Saunders* HC Christchurch CIV-2008-409-000348, 19 May 2010 [*Houghton v Saunders* (HC 2010)] at [5].
39 *Houghton v Saunders [Privilege]*, above n 32, at [84].
40 At [79]–[80].
41 At [81].
42 *Saunders v Houghton* (*No 1)*, above n 3, at [93].
43 At [79].
44 At [101].

come close to reprising those considered and rejected, albeit on a tentative basis, in the Court of Appeal judgment.

[20] In its judgment of 18 December 2009, the Court of Appeal pointed out that New Zealand does not have a system of class actions comparable to those available under legislation in a number of other jurisdictions, including Australia.[45] In New Zealand, complex representation must be dealt with, in the absence of such legislation, under r 4.24 and the inherent powers of the High Court. The Court acknowledged that the issues as to representative orders and litigation funding, although distinct, were intertwined.[46] The combination of a representative order and control of litigation by a commercial funder required "at least careful control of the funder by suitable conditions and, if that is insufficient protection for the defendant, possibly even consideration of whether a representative order can be sustained".[47] The High Court would need to approve the proposal for litigation funding and be satisfied both that there was no abuse of process and that there was an arguable case for vindication of rights on the pleadings as amended.[48]

[21] On the suitability of the representative claim, the Court of Appeal rejected a narrow view of r 4.24, preferring the more "generous approach"[49] adopted in the New Zealand cases of *R J Flowers Ltd v Burns*[50] and *Taspac Oysters Ltd v James Hardie & Co Pty Ltd*,[51] in application of the principles approved by the House of Lords in *Taff Vale Railway Co v Amalgamated Society of Railway Servants*[52] and reaffirmed by Vinelott J in his influential decision in *Prudential Assurance Co Ltd v Newman Industries Ltd*.[53] It agreed with the approach adopted by Brennan J in the High Court of Australia in *Carnie v Esanda Finance Corp Ltd* that "the same interest" in a proceeding does not require identity of cause of action or an

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45 At [15]. Class actions have been available in the Federal Court of Australia since 1992 with the passage of the Federal Court of Australia Amendment Act 1991 (Cth), and in the State Supreme Courts of Victoria (under Part 4A of the Supreme Court Act 1986 (Vic)) and New South Wales (under Part 10 of the Civil Procedure Act 2005 (NSW)) since 2000 and 2011 respectively.

46 At [21].

47 At [21].

48 At [79] and [82].

49 At [10].

50 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC).

51 *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC).

52 *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL).

53 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 (Ch).

entitlement to share in the same relief.[54] The "more the parties have in common", the greater the claim to representative procedure: "[g]reater precision is unattainable".[55]

[22] The Court of Appeal held that the principles "now established are":[56]

> that a representative action can be brought where each member of the class is alleged to have a separate cause of action, provided:
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> (a) the order may not confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in such separate proceeding;
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> (b) there must be an interest shared in common by all members of the group; and
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> (c) it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.

[23] Of particular relevance to the present appeal is the acceptance by the Court of Appeal in the 18 December 2009 judgment of the principle that representative orders do not expand the rights of action of members of the class represented or bar defences available in separate proceedings. Important too are the statements the Court made relating to the effect of "opt-in" and "opt-out" methods of adherence. It took the view that where an "opt-in" method is adopted, "members of the represented group" are thereby protected "against a limitation bar *arising after the date of their election to opt in to the proceeding*".[57] While these expressions of opinion do not control the determination we have to make, we consider that they are correct and are persuasive authority for the position we prefer on the second question for determination on the appeal.

[24] The judgment of 18 December 2009 did not resolve the question of representation in the case or the suitability of the litigation funding arrangements. The representative nature of the proceeding was held not to be objectionable in principle, but the representative order, although not overturned, was to be subject to

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54 *Carnie*, above n 2, at 408.
55 *Saunders v Houghton (No 1)*, above n 3, at [19].
56 At [13], drawing in particular on those described by Vinelott J in *Prudential Assurance*, above n 53, at 254–255.
57 At [12] (emphasis added).

the High Court's imposing "suitable conditions".[58] By reference back to an earlier paragraph in its judgment, the Court of Appeal made it clear that the "suitable conditions" it envisaged were the obligations to keep all those represented fully informed and to prevent the encouragement of new participants through provision of misleading information.[59] The Court pointed out that, because of the stay, the original statement of claim had not yet been replaced.[60] It would have to be further considered by the High Court, which would need to be satisfied that the pleadings disclosed a sufficiently "arguable case for rights that warrant vindicating".[61] Only then could the High Court determine whether the stay should be lifted, and to what extent.

[25] The Court of Appeal suggested that consideration should be given to lifting the stay for the limited purposes of permitting the amended statement of claim to be filed to avoid any future limitation bars for new causes of action and to permit others to opt in.[62] The Court noted a submission by counsel for the defendants that the new causes of action proposed would be statute-barred, but offered no comment upon any such defence or the effect of the opt-out order originally made by the Associate Judge (points which had not been argued).[63] It indicated its view that it was not inappropriate for declarations of liability to be first made in the proceeding, to be followed by subsequent inquiries into damages,[64] provided conditions were imposed as safeguards to ensure that all those represented were informed of all steps and consulted about them "and that no misleading information is given to encourage new participants".[65] It took the view that questions of reliance in particular would turn on what facts were pleaded and proved.[66]

[26] Despite the known limitation risks, the plaintiff did not file an amended statement of claim, as was required to enable the representative orders to be finalised, until early May 2010. It seems that the litigation funding arrangements

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58 At [93].
59 At [63].
60 At [43].
61 At [79], [80] and [82].
62 At [43].
63 At [46].
64 At [14].
65 At [63].
66 At [89].

were not secure and that another litigation funder was being sought. Because of concern about the expiry of relevant limitation periods, French J lifted the interim stay on 19 May 2010 to allow the draft amended statement of claim to be filed and to permit shareholders who qualified to consent to being brought within the representative proceeding.[67] The Judge approved a draft form of consent which required return by 31 May 2010 and carried the warning that consents received after that date might be faced with limitation defences.

[27] Lists of shareholders who had consented to be included in the representative action were filed in the High Court on 1 June 2010 (a total of 1,539 shareholders), 2 June 2010 (270 shareholders), 3 June 2010 (77 shareholders), 4 June 2010 (27 shareholders), 12 April 2011 (69 shareholders), 23 February 2012 (when a consolidated list amounting to 2,852 shareholders included 1,053 new claimants).

[28] On 29 July 2010 (after the initial lists and the new statement of claim had been filed), the plaintiff applied to the High Court to lift the interim stay first imposed in the judgment of 24 July 2009 (and partially lifted in May 2010 to allow shareholders to opt in to the representative action). The application was opposed by the Credit Suisse parties on a number of bases:

(a) that the plaintiff had not established "a sufficiently arguable case for rights that warrant vindicating" (as the Court of Appeal had required);

(b) that the opt-in lists filed with the Court were "subject to statutory time limitations which expired prior to the date on which those persons opted-in";

(c) that the amended statement of claim raised "individual issues such that it does not satisfy the requirements of High Court Rule 4.24" and the case was not suitable for representative form for that reason and also because the limitation issues would have to be individually determined at trial;

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67 *Houghton v Saunders* (HC 2010), above n 38.

(d) alternatively, that if the proceeding were allowed to continue on a representative basis, there should be conditions imposed limiting the order to allegations in respect of which a sufficiently arguable case was "established by admissible evidence" and requiring the replacement of Joint Action Funding Ltd with a "reputable and financially capable funder" which would submit to the costs jurisdiction of the Court.

[29] The notice of opposition also cross-referenced a strike out application made by the Credit Suisse parties on a number of grounds, including a claim that the proceeding was barred by statutory limitations periods, and an application for an order for security for costs, both dated 30 July 2010. Both of these applications were heard with the defended application to lift the stay by French J at a hearing in November and December 2010 and were covered by the same judgment.

[30] Because of the February earthquake in Christchurch, delivery of judgment was delayed. French J delivered an interim judgment of the key decisions she had taken on 9 March 2011[68] and full reasons on 8 June 2011.[69] These are the judgments the subject of the Court of Appeal determination which is now appealed to this Court. Before dealing with the judgments in the High Court and Court of Appeal, the narrative of events can be completed by indicating that in December 2011 an application by Mr Houghton to divide the hearing of the claim into separate hearings of liability and loss was resolved when a consensus emerged at the hearing that Mr Houghton's own personal claim should be heard first. That would resolve issues common to all claims while leaving the consideration of individual elements of the claims of other shareholders to be considered subsequently.

The High Court judgments of 9 March and 8 June 2011

[31] The "key decisions" contained in the interim judgment of 9 March were:[70]

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68 *Houghton v Saunders* (HC 2011), above n 12.
69 *Houghton v Saunders [Lifting Stay]*, above n 13.
70 *Houghton v Saunders* (HC 2011), above n 12, at [4].

(a) to lift the interim stay (on provision of security for costs by the plaintiff or the litigation funder in the sum of $200,000 to cover the interlocutory stage of the proceeding up to discovery);

(b) to confirm that the statement of claim could proceed with one cause of action only being struck out (a claim under the Fair Trading Act for wrongfully disguising the availability of a remedy under s 37A of the Securities Act); and

(c) to approve the representative order and give directions on the way in which the Court was to be kept informed about the litigation funding negotiations then underway:

> The actual funder will be required to satisfy the Court that it has the means to pay the full costs of the litigation and that the existing rights of qualifying shareholders under the funding agreement with [Joint Action Funding Ltd] are not in any way prejudiced as a result of any arrangements the actual funder may enter into with [Joint Action Funding Ltd].

[32] In her full reasons delivered in June, French J explained her decision to lift the stay. Some of the reasons are directed to matters which are no longer live issues on the appeal and may be omitted or shortly stated. Of importance for present purposes are the reasons the Judge gave for rejecting the argument by the Credit Suisse parties that the representative order should not continue because there was insufficient commonality of interest and the reasons she gave for rejecting the contention that the representative claims were barred by limitation provisions.

[33] Although French J considered that the criticisms of the conduct of the litigation by the litigation funder to date were "well founded"[71] and accepted that there was uncertainty as to whether an actual funder "[would] ever be found",[72] she concluded that any prejudice to the defendants in permitting the claim to continue "in the meantime" could be mitigated by an order for security for costs and the future control the Court could have over the arrangements and the conduct of the litigation

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71 *Houghton v Saunders [Lifting Stay]*, above n 13, at [83].
72 At [84].

funder.[73] She considered that the claims were arguable and ought to proceed.[74] This assessment was necessarily based on "a broad brush impressionistic approach rather than a detailed analysis of each and every pleaded allegation":[75] genuinely disputed facts could not be resolved; no statements of defence had been filed and discovery was yet to occur; much of the critical information was within the knowledge and control of the defendants; and there were "serious questions" to be tried.[76] The litigation funding agreement was a standard form used by a major Australian litigation funder (and the agreement had not been criticised when it came before the High Court of Australia)[77] and the conditions imposed followed a guideline suggested by counsel for the directors, which had not been challenged by any party.[78]

[34] In relation to the opposition to continuation of the representative order, French J took the view that questions of reliance, causation and reasonable discoverability (urged as differences between those represented which meant that the representative proceeding was unsuitable) could not be resolved and that the Court of Appeal had not intended that the High Court would revisit these issues "at this stage".[79] The amendments to the statement of claim had not changed the position earlier considered by the Court of Appeal. French J concluded that the representative order was appropriate in its existing form.[80]

[35] In relation to the claims that the actions were barred by expiry of statutory limitation periods, French J took the view that to justify strike out the defendants had to show that there was no reasonable possibility that the claims were within time.[81]

[36] In relation to the Fair Trading Act claims which depend on when the loss, or likelihood of loss, "was discovered or ought reasonably to have been discovered",[82] French J considered that the limitation period ran from "when Mr Houghton had knowledge (actual or constructive) of the fact statements in the prospectus were

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73 At [87].
74 At [86]–[87].
75 At [44].
76 At [43]–[44].
77 At [76].
78 At [74]–[75].
79 At [93].
80 At [94].
81 At [99].
82 Fair Trading Act, s 43(5).

probably incorrect and misleading".[83] Applying that test (and even after acknowledging the force of the contention of the defendants, based on uncontested evidence, that the claims under the Fair Trading Act were reasonably discoverable by December 2006), French J held that she could not "be satisfied to the degree of certainty required than any May 2010 claim is definitely statute-barred under the Fair Trading Act":[84]

> At this very early stage I consider it is still arguable that time did not start to run until July 2007, which is when shareholders were informed that expert reports had been obtained advising that certain statements in the prospectus were false and misleading. …

[37] In relation to the negligence claim, the limitation period was that under the Limitation Act 1950.[85] The period of limitation accordingly ran from when the loss occurred.[86] That turned on how Mr Houghton had acquired the shares. If through a firm allocation, the crucial date would be 2 June 2004. If not, time started to run on 21 May 2004 (being the closing date for subscriptions under the public offer), since Mr Houghton was committed to the purchase on that date.[87] As the Judge accepted, it was possible that some qualifying shareholders might be in a different position for limitation purposes than Mr Houghton "depending on the method by which they came to acquire their shares".[88] French J noted that counsel for the plaintiff accepted "as a general principle that time must start to run for all qualifying shareholders at the same time as it started for Mr Houghton".[89]

[38] For Mr Houghton, time stopped running for limitation purposes when the proceeding was filed in February 2008, apart from the new causes of action filed in May 2010.[90] French J considered that the position "is not quite so clear-cut as regards qualifying shareholders".[91] Counsel had identified four possibilities:

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83 At [110].
84 At [113]–[114].
85 At [116].
86 At [118].
87 At [121].
88 At [122].
89 At [122].
90 At [123].
91 At [124].

(a) The date the proceeding together with the application for the representative order was filed.

(b) The date the representative order was made by the Associate Judge.

(c) The date the shareholders first signalled their willingness to be part of the group (requiring different assessments for those who had signed an authorisation form authorising a firm of Christchurch solicitors to commence the proceeding in 2007, and those who had become involved in 2010, after proceedings were filed and following receipt of the court-approved opt-in form).

(d) The date an opt-in list bearing the name of each shareholder was filed in court.

[39] French J remarked that the matter had never before arisen for determination in New Zealand and was not addressed in either the Limitation Act or the High Court Rules.[92] She held that time stopped for all qualifying shareholders "at the time the proceedings which included an application for a representative order were filed".[93] This conclusion was reached "having regard to the Australian authorities, the nature of representative proceedings and the underlying policy and purposes of limitation periods".[94]

[40] The Judge set out her reasons as follows:[95]

> (i) The rule which creates the right to bring [a] representative proceeding states that a person may sue "on behalf of all persons" with the same interest in the subject matter of a proceeding.
>
> (ii) It follows that if a proceeding is "on behalf" of the qualifying shareholders, then when the proceeding is filed the shareholders can properly be said at that time to have "brought" an action in terms of the Limitation Act or to have "made" an application under the Fair Trading Act. This was

92 At [126].
93 At [128].
94 At [129].
95 At [129].

> the approach taken by McPherson SPJ in *Cameron*, and is an analysis I find persuasive.
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> (iii) While the order made by the Associate Judge may have been amended, it was not a nullity and was never rescinded. Accordingly, if the appropriate test is whether the representative rule has been properly engaged (as [is] also suggested in the Australian cases), then that test is satisfied. Further, there has been no prejudice to the defendants. The subsequent amendments to the representative order have served to reduce the class, not enlarge it.
>
> (iv) The underlying purpose of limitation periods is to protect defendants against the injustice of stale claims being fought many years after the events when records have been lost and memories dimmed. In this case, the filing of the application for a representative order clearly put the defendants on notice as to the potential scope of the claim.

[41] As a result, French J concluded that "for limitation purposes the claims of the qualifying shareholders stand and fall with Mr Houghton".[96]

> When the limitation clock stopped for him, it stopped for everyone else on whose behalf he sues. That accords with common sense and the practicalities. It is, in our view, also just.

The judgment of the Court of Appeal

[42] The directors appealed to the Court of Appeal against the continuation of the representative order. Its dismissal of their appeal is not the subject of appeal to this Court.

[43] The Credit Suisse parties appealed against the refusal of a stay on the basis that most, perhaps all, of the shareholder claims were time-barred. The Court of Appeal decision upholding French J's judgment is the subject of the present appeal. As French J noted, it raises an issue that is not the subject of previous authority in New Zealand – when a representative claim is brought.

[44] It was argued that the representative order identified those who would be the subject of res judicata on judgment on the common issues but did not mean that the shareholders represented were parties to the litigation. On this basis, it was

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[96] At [130].

contended that the filing of the proceeding in representative form of itself did not establish the date on which shareholder claims had been brought for limitation purposes beyond the determination of the common issues which were the subject of the representative proceeding. Distinct proceedings for the individual claims beyond the common issues were required and would have to be brought before expiry of the limitation periods applicable. It was said that permitting the narrow representative claim to be the vehicle for the individual claims would be to allow judicial suspension of statutory defences.

[45] The Court of Appeal took the view that the representative order first made by the Associate Judge was "effective from the date on which it was made – that is, 26 February 2008": [97]

> It did not impose any limitation on the scope of representation; it was not restricted to the threshold element of breach of duty. It was extended expressly to representation of shareholders who suffered loss on their investments. Consistently with the terms of r 4.24, Mr Houghton was nominated as the plaintiff in his capacity as representative; no other parties were joined as plaintiffs.

[46] The Court considered that the argument for Credit Suisse "would largely negate the purpose of r 4.24".[98] It would mean that if "the threshold issue of breach had not been determined before expiry of the limitation period, multiple proceedings ["[p]otentially … 6,000 separate proceedings"] would be necessary".[99] The Court went on to state that "[i]n the event that the individual plaintiffs failed at the threshold stage and were unable to prove breach of duty, the exercise would be a major waste of time, resources and money" and "[a]rguably, also, it would be unmanageable".[100] The Court held that the High Court Rules "determine when a proceeding is filed or brought and by whom", including for the purposes of s 4 of the Limitation Act. The proceeding was "brought" by Mr Houghton on behalf of the class, members of which were bound by the result.[101] Finally, the Court of Appeal considered that the argument "reduces to a dispute about case management".[102]

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97 *Saunders v Houghton (No 2)*, above n 17, at [59].
98 At [63].
99 At [63].
100 At [63].
101 At [65].
102 At [66].

[47] The Court considered that the policy of limitations was not undermined by the approach it took because the potential claims by all Feltex shareholders were known to the defendants from the date of service of the proceeding in early 2008. The potential aggregate liability equalled the full purchase price of the shares (some $250 million).[103] There was "no practical difference" from the defendants' point of view between plaintiffs identified in separate proceedings and those "identified at a later or contingent stage for the purpose of bringing specific claims on reliance and loss". The defendants' method would simply be "less efficient" in reaching "the same end result".[104]

[48] The Court treated the opt-in date provided by French J in the representative order as "a condition of participation", not "an essential term of the representative order".[105] The setting of a new date for opting in (as was necessary) was simply "a function of case management":[106]

> [74] In summary, the policy objectives of the Limitation Act are satisfied. [Credit Suisse] has always been able to identify its maximum risk and potential exposure and provide accordingly. Its ability to carry out that exercise is not affected by whether the proceeding is brought in a representative capacity or separately by all members of the represented class. The evidence remains fresh. The representees cannot sit on their rights: they must choose to opt-in by the new date set by the Court or continue to be subject to the usual limitation requirements.
>
> [75] In our judgment the text, policy and practicalities of the relevant legislative instruments confirm that the statutory limitation period stops running for all represented persons when a representative order is made. A judge granting a representative order should impose a final opt-in or opt-out date as part of normal case management procedures. By this means the purposes of the Limitation Act will continue to be met in the representative context. A represented person who opts-out or fails to opt-in by the stipulated date will then be subject to the limitation provisions in the normal way.

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103 At [67].
104 At [68].
105 At [72].
106 At [72].

Separate proceedings are not necessary to address differences among those properly represented

[49] A rule for representative proceedings, based as r 4.24 is on a nineteenth century model,[107] is not well-adapted to modern commercial litigation funding and is being "required to bear a weight for which it was not designed".[108] French J was justified in the remark that "[t]he absence of class action rules is creating difficulties for the parties in this case".[109] Nevertheless, rules for representative proceedings must be used where they will further the administration of justice, as was emphasised in the joint judgment of Mason CJ, Deane and Dawson JJ in the High Court of Australia in *Carnie*:[110]

> Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice.

[50] The form of r 4.24 follows the nineteenth century model in requiring "the same interest" between a party and those represented,[111] although it is arguably wider than the rules in issue in some of the Australian authorities[112] because the "same interest" refers not to "the proceeding" but to "the subject matter of a proceeding":

> **4.24 Persons having same interest**
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> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—

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107 *Carnie*, above n 2, at 415–417 per Toohey and Gaudron JJ (which concerned a rule equivalent to r 4.24). See also *R J Flowers*, above n 50 at 266. This case concerned r 78 of the High Court Rules, which has since been replaced by the substantially identical r 4.24.

108 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [3] per Gleeson CJ.

109 *Houghton v Saunders* [2012] NZHC 1828 (on plaintiff's application for split trial/determination of preliminary questions) at [45].

110 *Carnie*, above n 2, at 404.

111 At 415–416 per Toohey and Gaudron JJ. See also *R J Flowers*, above n 50, at 265–266.

112 Rules such as r 13(1) of the Supreme Court Rules 1970 (NSW) (in issue in the High Court cases of *Carnie*, above n 2, and *Fostif*, above n 108), and Order 3, r 10 of the Rules of the Supreme Court (Qld) (in issue in *Cameron v National Mutual Life Association of Australia Ltd (No 2)* [1992] 1 Qd R 133 (QSC)).

(a) with the consent of the other persons who have the same interest; or

(b) as directed by the court on an application made by a party or intending party to the proceeding.

[51] Any difference between "the same interest" in a proceeding and "the same interest" in "the subject matter of a proceeding" is likely to be immaterial in practice because in Australia, as in the United Kingdom[113] and New Zealand,[114] it has been held that there is sufficient community of interest for a representative claim if there is common interest in "the determination of some substantial issue of law or fact".[115] In *Carnie*, Toohey and Gaudron JJ, after referring to the history of representative actions, explained how the earlier "broad and liberal approach"[116] had been reasserted in England[117] after the "setback" when in *Markt & Co Ltd v Knight Steamship Co Ltd*[118] the English Court of Appeal had excluded from its scope actions where the relief claimed was damages or where there were separate and individual contracts. Representative actions may be brought even if members of a class have different causes of action[119] or different remedies.[120] Indeed, it was suggested by Mason J in *Payne v Young* that the rule may well permit representation in respect of different defendants if the causes of action arise out of the same transaction or series of transactions.[121]

[52] In some cases, the divergence between those sought to be included in a representative claim may lead the judge, as a matter of assessment, to decline to permit a representative claim or, where the question is continuation of a claim in representative form (as in *Cameron v National Mutual Life Association of Australia Ltd (No 2)*[122]), to decline to permit it to continue in that form. Here, however, the

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113 *Prudential Assurance*, above n 53, at 520; *John v Rees*, above n 1, at 374.

114 *R J Flowers*, above 50, at 271 (holding that the fact that the claims arose under separate contracts was not a bar to a representative action; cited with approval by the High Court of Australia in *Carnie*, above n 2, at 418), and *Taspac*, above n 51, at 447.

115 *Carnie*, above n 2, at 408 per Brennan J and at 430 per McHugh J.

116 At 416.

117 At 417, citing *Prudential Assurance*, above n 53.

118 *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

119 *Prudential Assurance*, above n 53 (different causes of action in tort), *Carnie*, above n 2, at 420–421 (different unique contracts).

120 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, cited in *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [182].

121 *Payne v Young* (1980) 145 CLR 609 at 618.

122 *Cameron*, above n 112.

commonality was assessed as more important than the differences, which were left to be managed by directions at the next stage of the proceeding. That assessment was upheld by the Court of Appeal in its 18 December 2009 decision (subject only to limited further consideration by the High Court Judge). There is no basis to revisit it now.

[53] Because it is recognised that representative actions may be oppressive and may work injustice, use of representative form is subject to the three conditions ultimately derived from the judgment of Vinelott J in *Prudential Assurance*,[123] although Vinelott J's requirement of a "common element" in each cause of action[124] is more restrictive than modern approach taken in such cases as *Carnie*[125] and *R J Flowers*.[126] The approach now taken in New Zealand is that:

(a) the order cannot confer a right of action on a member of the represented class who would not otherwise have been able to assert a claim in separate proceedings and cannot bar a defence otherwise available in a separate action;

(b) there must be a common issue of fact or law of significance for each member of the class represented; and

(c) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.

[54] The appellants do not directly challenge this understanding of the effect of the rule and the authorities. Instead, they argue that a representative claim covers determination only of the issues common to all those represented, on which it establishes res judicata. That resolution may be used by those represented as a "staging post" or "legal platform" on which to bring further proceedings for determination of the issues individual to them (including damages). Such distinct proceedings must be brought by the individuals within the applicable limitation

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123 *Prudential Assurance*, above n 53, at 254–255.
124 At 256.
125 *Carnie*, above n 2.
126 *R J Flowers*, above n 50.

period either by stand-alone actions or by their joinder as parties to the representative proceeding. On this argument, the representative action in which Mr Houghton is plaintiff has been "brought" only in relation to common issues. Individual issues, necessary to establish remedy, are now statute-barred.

[55] The representative procedure was introduced to simplify previous recourse to joinder of claims and thereby achieve savings in effort.[127] In its modern form it does not require identity of claim or even the same cause of action. As the language of r 4.24 indicates, it is enough that there is "the same interest in the *subject matter* of the proceeding".[128] When the common issues are resolved, it may be necessary to organise the hearing of the remaining issues according to subcategories or even on a devolved individual basis. Representative form does not prevent later severance should that be necessary to deal with particular issues relating to the individual circumstances of those within the representative action[129] nor does it prevent sequencing of hearing in the manner adopted by French J through directions.[130]

[56] Those represented in a properly constituted action may not have identical interests throughout. If issues individual to each shareholder (or common to a subcategory of shareholders) require distinct determination, it would be highly inconvenient if aspects beyond what is strictly common had to be constituted in separate additional proceedings, whether or not coordinated by joining those with similar interests as co-plaintiffs (as the appellant suggests). Such pointless formalism is contrary to the authorities relied on in the 18 December 2009 decision of the Court of Appeal.

[57] The appellants' argument that representative claims for damages are "exceptional" and are appropriate only where loss can be established readily "as a global sum" and apportionment among the class is automatic or uncontested is not

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127 See *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 at [13].

128 Emphasis added. See *Prudential Assurance*, above n 53, at 255; *R J Flowers*, above n 50, at 271; *Carnie*, above n 2, at 408 per Brennan J and 427–431 per McHugh J; and *Saunders v Houghton (No 1)*, above n 3, at [13].

129 See, for example, *Fostif*, above n 108, at [12] per Gleeson CJ.

130 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 9 December 2011 (minute).

supported by the authorities. It would effectively reinstate the straitjacket of *Markt & Co Ltd v Knight Steamship Co Ltd*,[131] only slightly relaxed.

[58] Although the appellants argued that two-step litigation was mandated by the Court of Appeal in its 18 December 2009 decision, we are unable to read the remarks of the Court of Appeal as other than a reference to the staging of the representative proceeding. The passage relied upon by the appellants follows on from the Court's explanation that the "relatively low threshold" now applied to a representative order was "consistent with r 1.2 of the High Court Rules" and that "such an order allows proceedings to be conducted in an efficient manner and avoiding their multiplication by the need (in this case) for at least 800 separate filings" and (in opt-in form) "protects members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding".[132] Both these benefits, which the Court treated as allowing the Court to respond to the justice of the case, would be lost if the passage relied on by the appellants is read in any sense other than as approving staging of the proceeding properly constituted as a representative action:

> [14] We endorse the statement by Barker J in *Taspac* at 446 that representative proceedings for damages are not foreclosed. Provided the foregoing conditions are met [those proposed by Vinelott J in *Prudential Assurance*] it is proper to claim a declaration of liability, thus establishing res judicata on the common issue, and permitting individual claims to establish individual damage to follow.

[59] The decision in our view envisages that in the proceedings for damages properly instituted on a representative basis, questions of relief or other individual matters may require staged hearing and modification of the terms of representation for those whose claims are within the existing proceeding. The court has ample authority under the Rules and in its inherent jurisdiction to ensure that such staging or decoupling through severance or joinder of parties serves the interests of justice.[133]

[60] As has we think been convincingly shown by McPherson SPJ in *Cameron*, an action may be "brought" for the purposes of s 4(1) of the Limitation Act even though

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131 *Markt & Co Ltd v Knight Steamship Co Ltd*, above n 118.

132 *Saunders v Houghton (No 1)*, above n 3, at [12].

133 For example, Gleeson CJ allowed severance to be an available outcome in *Fostif*, above n 108, at [12]–[13].

a person represented in the proceeding is not a party under the Rules.[134] If it were not so, a representative action would be highly defective and its purpose in preventing a multiplicity of actions would be undermined. That no evasion of limitation defences is entailed by later joinder of a represented party or group of represented parties for the purpose of determining individual issues once common issues are cleared away is illustrated by two cases cited by McPherson SPJ, *Coombs v Bristol & Exeter Railway Co*[135] and *Moon v Atherton*.[136] In both, the effect of the Court's decision was that a person on whose behalf the action was brought was substituted for the original plaintiff, despite lapse of the limitation period. The argument of the appellants that the representative claim is properly confined to what is common and excludes all individual aspects of a claim is simply reassertion of the rejected view that a representative claim is not available if damages are claimed or different causes of action are involved. To the extent that the decision of Vinelott J in *Prudential Assurance* suggested that separate successive actions, each brought within the period of limitation, were necessary for determination of the common issues and the individual issues, his view followed from the position there maintained that an action for damages could not be brought in a representative proceeding. That is no longer consistent with the approach followed in New Zealand and Australia, as has been explained.

[61] No adequate reason for the procedural complexity suggested by the appellants is made out. It is contrary to the purpose of the High Court Rules, prescribed in r 1.2. In *R J Flowers*, McGechan J 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".[137] No injustice arises in the present case if the individual aspects of claims brought on a representative basis are addressed distinctly in the course of the same proceeding. As the conditions of inclusion referred to in paragraph [53] make clear, the representative nature of the proceeding does not permit claims that could not have been properly constituted as stand-alone

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134 "Party" is defined in r 1.3 of the High Court Rules as "any person who is a plaintiff or a defendant or a person added to a proceeding".

135 *Coombs v Bristol & Exeter Railway Co* (1858) 1 F & F 206, 175 ER 693 (Exch).

136 *Moon v Atherton* [1972] 2 QB 435 (CA).

137 *R J Flowers*, above n 50, at 271.

proceedings to be included, nor does it prevent any available defence, including any limitation defence. All else, as the Court of Appeal rightly said, is case management.

When a claim is "brought" in a representative proceeding

[62] As the text of r 4.24 indicates, those who have the same interest in the subject matter of a proceeding may be represented in it if they consent or if the court directs representation on application made by a party or an intending party. No other basis for representation is provided in the Rules.

[63] Those who consented at the time to be represented by Mr Houghton in his claim were represented from its filing in February 2008. No other authority for a representative claim than that it is brought with the consent of those represented is necessary.[138] Since the proceeding was filed in February 2008, it was brought within the limitation period under the Limitation Act for all those represented in it with their consent.[139]

[64] The question raised for determination on the second question on the appeal requires consideration of when proceedings were "brought" for those shareholders who had not given consent before the claim was filed and who subsequently provided consent to their representation under the procedure set up by the High Court.[140] As has been foreshadowed, we do not consider that the appeal permits conclusion about the Limitation Act defences. They require determination on further pleading and on evidence once it is decided, as we would decide, that the actions were not brought until the shareholders eligible opted into the proceeding.

[65] An expansive view of "the same interest" under rules equivalent to r 4.24 is taken in the New Zealand and Australian authorities already cited on the basis that it

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138 As has been indicated at n 25, it is not clear how many of the 800 shareholders who apparently gave consent had purchased shares not through the public float but subsequently (and were therefore excluded from the representative proceeding by the judgment of French J of 7 October 2008: *Houghton v Saunders* (HC 2008), above n 4).

139 Whether there is a Fair Trading Act limitation defence in respect of those shareholders remains to be ascertained on the facts: see [13] above.

140 The Fair Trading Act limitation defences, in which time starts to run on reasonable discoverability and in respect of which, in any event, the terms of s 43 of the Fair Trading Act may make recourse to representative action under r 4.24 unnecessary (see n 5 above), require separate consideration, as envisaged by French J, and were not the subject of consideration on the appeal to this Court.

is not permitted to work injustice. Such injustice would arise if the individuals represented could not have made the claims in separate proceedings or if their inclusion in the representative proceedings would defeat limitation or other defences. This accords with the views expressed by the Court of Appeal in its 18 December 2009 judgment that a representative order made under r 4.24 does not "confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in such separate proceeding".[141] As has been described, the Court of Appeal was of the view that those who came within representative proceedings on an opt-in basis were protected "against a limitation bar arising *after the date of their election to opt in* to the proceeding".[142]

[66] We agree with that view. It accords with the meaning of r 4.25 and with principles generally observed that there is no relation back to the date the proceedings were brought by Mr Houghton, as French J and the Court of Appeal in the judgment the subject of the present appeal were prepared to hold. The Australian authorities relied upon in the lower courts were based upon rules which are materially different in that they allow a plaintiff to make a claim in representative form without consent or court approval, subject to later determination by the court whether the proceedings so instituted may continue as representative proceedings. We explain these conclusions and why we do not think the opt-out order set aside by French J prompts a different outcome in what follows.

(a) The terms of r 4.24

[67] The question whether there is relation back for limitation purposes to the date on which a proceeding in representative form was instituted had not arisen in New Zealand before French J's decision. The starting point in addressing it must be the terms of the rule. There is no one model for representative proceedings. As was pointed out by Gummow, Hayne and Crennan JJ in *Fostif*:[143]

> [T]he rules governing representative or group proceedings vary greatly from court to court. Two things of present significance follow from this. The first

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141 *Saunders v Houghton (No 1)*, above n 3, at [13].
142 At [12] (emphasis added).
143 *Fostif*, above n 108, at [40].

> is that close attention must be given to particular Rules of the Supreme Court upon which this litigation turns. The second is that the outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating that there would have been the same outcome in proceedings under the rules of other courts.

[68] The text of r 4.24 is set out in paragraph [50]. Only with the consent of those represented or as directed by the court may another "sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding". A claim by the party in a pleading that he represents those with the same interest is not enough to constitute representative proceedings under r 4.24. Under the rule, the proceeding is not instituted as representative until consent is provided or until representation is established in accordance with the directions of the court. In cases where the direction of the court requires provision of consent (as in the opt-in arrangements approved here by French J), we consider that the proceeding is not brought on behalf of those purportedly represented until the opt-in arrangements have been completed. That is the date on which the representative claims are "brought" for the purposes of statutory limitations.

[69] Relation back to the earlier point when the plaintiff's claim was filed does not accord with the language of the rule and would work injustice if it deprives the defendant of a limitation defence. Nor does it accord with the legal policy applied in the closely related cases of amendment to pleadings to add parties or causes of action. Amendment of pleadings to add a party or a cause of action is not permitted if it would defeat a limitation defence. The policy is now contained as a rule in the High Court Rules,[144] but has long been applied by the courts.

[70] So, in *Liff v Peasley,*[145] in a statement later approved by the House of Lords in *Ketteman v Hansel Properties Ltd,*[146] Brandon LJ pointed out that although amendments are often treated as relating back to the date of the original pleading and unobjectionable, that is only if the amendment "does not involve the addition of a new party, either as plaintiff or defendant, or the raising of a new cause of action, but involves only the modification, by addition, deletion or substitution, of pleas or averments made between existing parties in respect of a cause or causes of action

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144 High Court Rules, r 7.77.

145 *Liff v Peasley* [1980] 1 WLR 781 (CA).

146 *Ketteman v Hansel Properties Ltd* [1987] AC 189 (HL) at 201 per Lord Keith of Kinkel.

already raised".[147] Where an additional party or new cause of action is involved however, such "relation back" is not permitted, especially where "there is an arguable question whether the claim against the person added or sought to be added as defendant is statute-barred or not":[148]

> Such a question may arise where there is doubt about the date on which the relevant cause of action arose, or an issue as to whether the plaintiff can rely on suspension or interruption of the relevant period of limitation on one ground or another. … If the "relation back" theory applies and no special order is made, the addition of the new defendant will of itself take away his right to rely on the time bar, and so make the question whether he would, before such addition, have been entitled to rely on it or not a purely academic question. In order to get over this difficulty the order giving leave to add the new defendant will have to be made on special terms, namely, that the addition shall not relate back but shall take effect from the date of amendment of the writ only.

[71] As has been discussed at paragraphs [49] to [61], relaxation of strict identity of interest in proceedings brought in representative form was justified on the basis that the courts will not permit it to work injustice, including in the defeat of limitation defences. Neither the language of r 4.24 nor the basis on which an expansive view of "same interest" has developed (avoidance of prejudice and facilitation of the objectives of the rules) make relation back before the conditions of representation are fulfilled appropriate. We are unable to agree with the view of the Court of Appeal that the opt-in procedure directed by French J as "a condition of participation" was not also "an essential term of the representation order".[149] Opting in was essential if the proceedings were to be representative of those within the potential class.

(b) Differences between r 4.24 and the Australian rules

[72] Part 8, r 13(1) of the rules of the Supreme Court of New South Wales, in issue in both *Carnie* and *Fostif*, provided:

> Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

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147 *Liff v Peasley*. above n 145, at 803.
148 At 803–804.
149 *Saunders v Houghton (No 2)*, above n 17, at [72].

[73] Order 3, r 10 of the Rules of the Supreme Court of Queensland, in issue in *Cameron*, provided:

> **10.** When there are numerous persons having the same interest in the subject matter of a cause or matter, 1 or more of such persons may sue, and the Court or a Judge may authorise 1 or more of such persons to be sued, or may direct that 1 or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested.

[74] Both the New South Wales and Queensland rules differ from r 4.24 in making it clear that a person may institute representative proceedings without having obtained consent or the authority or direction of the Court. The continuation of such proceeding is then a matter for the Court to consider, but, as Gleeson CJ explained in the High Court of Australia in *Fostif*, in relation to the New South Wales rule:[150]

> The rule said nothing about obtaining their consent, or about procedures for opting in or opting out. This Court [in *Carnie*] has left those difficulties to be worked out at the discretionary level of leave to proceed.

Although the Queensland rule provided the option of a court representative order, it too provided for representative proceedings to be undertaken by a party claiming in representative form.

[75] In *Carnie* and *Cameron*, the proceedings were properly constituted by the plaintiff on behalf of those within the class represented, leaving adjustment and the conditions of continuation of the representative claim to be dealt with at the stage when the court was already seized of a representative claim. By contrast, under r 4.24 no claim is properly instituted as representative without consent or under court direction. Under rules where the representative claim can be brought without consent or approval, the relevant date for limitation purposes may well be the date of filing of the claim, subject to its being disallowed and to any adjustment made later by the court. That is not an available position under r 4.24.

[76] In *Fostif*, although the claim could have been instituted under the New South Wales rule by the plaintiff without consent or court approval for all with the same interest, the plaintiff claimed to represent only those who chose to opt in to the proceeding after its filing. The High Court, by a majority, overturned the Court of

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150 *Fostif*, above n 108, at [9].

Appeal judgment relied on in support of their argument by the appellants. The High Court (Gummow, Hayne and Crennan JJ, with Gleeson CJ and Kirby J dissenting) held that the proceeding had not been properly instituted as a representative claim:[151]

> At the time the summons was issued to commence the Fostif proceedings, there were no persons, other than Fostif, who had an interest in the proceedings which were instituted, as distinct from an interest in knowing which way the issues raised in those proceedings were decided. No other person had an interest in those proceedings because no order made or judgment given in the proceedings would bind that other person. No grant of declaratory relief was sought to resolve or determine any question common to the "numerous persons" alleged to have "the same interest in the proceedings". The summons is thus to be distinguished from the statement of claim in *Carnie*, where the plaintiffs claimed declarations for the common benefit of "the represented debtors". No doubt it was hoped that the procedures for "opting-in", which the summonses contemplated would be followed *after* the proceedings had been instituted, would lead to there being numerous persons with the same interest, but that was a hope or expectation about future events.
>
> It may readily be accepted that, when the proceedings in *Carnie* were issued, it may have been difficult to list all of the persons whom the plaintiffs represented. And some who met the relevant criteria may later have sought exclusion from representation. In that sense, one could not say at the time the proceedings in *Carnie* were issued who the plaintiffs represented. … By contrast, in the *Fostif* proceedings, where it was sought to represent only those from within the class of represented retailers who actively chose to be bound, it could not be said that there was *any* person, let alone numerous persons, whom the plaintiff would represent.

For these reasons, the majority in the High Court concluded that when the proceeding were instituted "the only persons who then had an interest in the proceedings were the named plaintiffs".[152] They held that the Court of Appeal of New South Wales erred then in ordering that the proceedings should continue as representative ones.

[77] For the purposes of this case, what is striking is that the majority treated the representative claim as not brought because no one was represented until they had opted in. As the majority in this Court puts it in describing the argument of the appellants, they treated the class as empty until "populated once shareholders opted in".[153] Whether or not the contingent nature of the representative claim in *Fostif* justified that conclusion on the basis that the rule there in issue is not a matter with

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151 At [58]–[59].
152 At [60].
153 Judgment of Glazebrook J at [162].

which we are concerned. But the terms of r 4.24 and the opt-in requirement imposed by French J seem to me to compel the conclusion here that those represented were only those who opted in and that the claims on their behalf were brought only from the time each opted in.

[78] French J decided that the proceeding had been "brought" at the time the claim was filed because it was "on behalf" of those within the class identified in the claim. She was heavily influenced in that view by the reasoning of McPherson J in *Cameron.* Her reasons have been upheld by the Court of Appeal and are supported by other members of this Court. As indicated above in answer to the first question, we too find the reasoning of McPherson J compelling in the point that a claim is "brought" for statutory limitation purposes when it is brought on behalf of those represented. But on the question when the representative claim was brought, critical to the second point on the appeal, the conclusions reached under the Queensland rule in *Cameron* and the New South Wales rule considered in *Carnie* and in *Fostif* (in which representative proceedings can be brought without consent or court approval) do not persuade me that representation in proceedings takes effect under the New Zealand rule except by consent or adherence in accordance with an order of the court and at the time of that consent or adherence.

(c) The effect of the "opt out" order made in February 2008

[79] We are unable to agree with the other members of the Court that the proceedings were "brought" for the purposes of statutory limitations when the Associate Judge approved the "opt-out" arrangements. French J was of the view that the orders made by the Associate Judge should "not have been made".[154] Those orders were set aside and overtaken by the orders made by French J which replaced the "opt-out" arrangements with "opt-in" arrangements.[155] The effect of French J's decision was that no one was represented by the proceeding who had not either consented to the proceeding in which Mr Houghton was plaintiff being brought on their behalf or opted in in accordance with the arrangements put in place in the judgments of 9 March and 8 June 2011. If the argument that the making of

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154 *Houghton v Saunders* (HC 2008), above n 4, at [168].

155 At the time that French J recast the orders made by Associate Judge Christiansen, limitation defences were not in issue.

representative orders later set aside could stop the clock for the purposes of statutory limitation periods is right, the clock would be stopped also for actions initially approved as appropriate for representative proceedings but later held to be unsuitable because of insufficient common interest (as the claims in respect of the secondary market share purchases were held to be). As the appellants have pointed out, this creates a perverse incentive to make an expansive and unfounded representative claim with the effect that it will stop time running for as many potential represented persons as possible. In Canada, the courts have distinguished between those actions that are allowed to continue as representative actions and those that are disallowed. Only in the case of actions permitted to continue are class members protected for limitation period purposes.[156] The Supreme Court of Canada has held that the suspension of limitation periods for claims not properly prosecuted in a representative proceeding would "undoubtedly [require] legislative intervention in this country".[157]

[80] It is not necessary that the orders made by the Associate Judge were "nullities" to act on the fact that they were set aside and overtaken. Whether and when representation of qualifying shareholders in the proceeding occurred depended on the steps each took in accordance with the orders made by French J. The Judge had no power to suspend the statutory limitation periods and, indeed, her actions in May 2010 in lifting the stay for the purposes of allowing opt-in against the risk of limitation periods expiring indicates that she appreciated that fact. The extensions of the periods of opt-in could not operate to defeat defences available to the defendants.

[81] We are also unable to agree with the view that the second question on the appeal turns on the definition of "the class".[158] Sufficient common interest to justify representative proceeding is of course necessary under r 4.24. But where there is no consent to the proceedings under the rule, no order for representation by the court except by consent and no adherence through the consent mechanism prescribed by

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156 Vince Morabito "Statutory Limitations Periods and the Traditional Representative Action Procedure" (2005) 5 OUCLJ 113 at 136, citing *Shiels v TELUS Communications Inc* [2004] ABQB 76 at [13].

157 *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72 at 105.

158 See judgment of Glazebrook J at [163].

the court, the representative action is not "brought" on behalf of someone who qualifies for inclusion within the class covered by the representative proceeding.

"Policy" considerations

[82] The Court of Appeal was heavily influenced in its conclusion that the claim had been brought on behalf of all within the class when filed by what it considered to be the policy objectives of limitation statutes: "to protect a party against stale claims or the risk of endless litigation".[159] It considered that the defendants knew their potential aggregate liability from the date of service of the proceedings and that there was "no practical difference" from their point of view between identifying individual plaintiffs in separate proceedings or as identified at a "later or contingent stage".[160] The Court was principally concerned with responding to the appellants' arguments that only common matters could be resolved in the proceeding, leaving individual components of the claim to be determined in separate proceedings. As has been indicated, we agree that representative proceedings were able to be brought despite the likelihood that severance or segmentation of the hearing would be required at a later stage. We consider that the policy of the Rules supports such flexibility in procedure. But we cannot agree that this premise means that the opting in required by the Court was not essential to constitute the actions on behalf of those opting in. Otherwise, a claim could be "brought" on behalf of someone which is not binding on him if he does not opt in. We do not accept that opting in can continue to be "case managed" as open for opting in for three years or more after the undoubted expiry of the limitation period, as is the effect here. That the defendants knew the nature of the potential claimants' claim is not really relevant. That will often be the case but still does not negate the statutory defence. Limitation times are imposed to bar stale claims, for policy reasons, and are not to be subverted by procedural court orders. In our view the relevant "policy" of the statutory limitations is that the limits set must be observed by bringing claims within the period prescribed.

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159 *Saunders v Houghton (No 2)*, above n 17, at [66].
160 At [68].

Conclusion

[83] For these reasons, we would allow the appeal on the second point. We would hold that, for those who did not consent to the bringing of the proceedings, the claims were brought on the date that each qualifying shareholder opted in to the representative proceedings. The statutory limitation periods apply on that basis.

McGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Glazebrook J)

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Introduction

[84] Mr Houghton has brought a claim against the appellants and the second, third and fourth respondents. The claim relates to losses suffered after the collapse of Feltex Carpets Ltd in 2006. Mr Houghton sues on his own behalf and as representative of a number of other Feltex shareholders who bought shares in the initial public offering in 2004.

[85] At issue is whether (and the extent to which) the making of a representative order under r 4.24 of the High Court Rules means that those represented under the order have brought an action for the purposes of the limitation periods under the Limitation Act 1950 and the Fair Trading Act 1986.[161]

[86] In a judgment of 8 June 2011, French J held that time had ceased to run for the represented shareholders when the proceedings (which included an application for a representative order) were filed by Mr Houghton on 26 February 2008.[162] That conclusion was upheld by the Court of Appeal in a judgment of 23 November 2012.[163] Leave to appeal to this Court was granted on 8 April 2013.[164]

[87] The appellants' first submission is that a representative action is brought, for limitation purposes, only for the named plaintiff and not for the represented shareholders. In their submission, the only effect of a representative order is that there is res judicata on the common issues decided in the representative proceedings. This means that the represented shareholders all had to file separate proceedings[165] before the expiry of the relevant limitation periods (2 June 2010 for Limitation Act purposes)[166] to deal with issues individual to them, such as reliance and loss.

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161 The principles to be applied when deciding whether to make a representative order and whether or not such an order should have been made in this case are not the subject of this appeal.

162 *Houghton v Saunders [Lifting Stay]* (2011) 20 PRNZ 509 (HC) at [128]–[130].

163 *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652 (O'Regan P, Randerson and Harrison JJ) [*Saunders v Houghton (No 2)*].

164 *Credit Suisse Private Equity LLC v Houghton* [2013] NZSC 25.

165 Or apply for joinder as parties to Mr Houghton's proceedings.

166 French J, in *Houghton v Saunders [Lifting Stay]*, above n 162, at [112]–[115], did not make a conclusive determination on when, for the purposes of the Fair Trading Act, the limitation period began. French J accepted that it was arguable that the limitation period did not start to run until July 2007. If that is so, then the limitation period would have ended in July 2010. Similarly, in *Houghton v Saunders* [2013] NZHC 1824, Dobson J did not make a conclusive determination on this point but noted that two potential dates were October 2006 and July 2007: at [26].

[88] If that submission is rejected, the appellants submit that the proceedings were brought when each represented shareholder opted into the group under the opt-in procedure set by French J in a judgment of 7 October 2008.[167] This would mean that all those who opted into the representative proceedings after 2 June 2010 are out of time for Limitation Act purposes.[168]

[89] Mr Houghton supports the judgment of the Court of Appeal. The second respondents filed a memorandum supporting the submissions of the appellants and also made oral submissions. The third respondent filed no written submissions and, although its counsel appeared at the hearing, he did not seek to be heard. The fourth respondent filed a memorandum supporting the submissions of the appellants but indicated that it would not appear at the oral hearing.

[90] Before we deal with the appellants' two arguments, we set out the relevant legislative provisions, outline the procedural background in more detail, summarise the decisions of the courts below and deal with a preliminary point made by the second respondents in their oral submissions at the hearing.

The legislative background

[91] Representative actions are provided for in r 4.24 of the High Court Rules,[169] which provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[92] Also relevant are rr 1.2, 5.25(1) and 5.35 of the High Court Rules, which provide that:

> **1.2 Objective**

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167 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [168].
168 With regards to the Fair Trading Act limitation period dates, see above n 166.
169 Formerly r 78.

The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

5.25 Proceeding commenced by filing statement of claim

(1) A proceeding must be commenced by filing a statement of claim in the proper registry of the court.

…

5.35 Representative capacity of party

A party to a proceeding who sues or is sued in a representative capacity must show in what capacity the party sues or is sued in the statement of claim.

[93] The relevant limitation period is set out in s 4(1) of the Limitation Act, which provides:

4 Limitation of actions of contract and tort, and certain other actions

(1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—

(a) actions founded on simple contract or on tort:

(b) actions to enforce a recognisance:

(c) actions to enforce an award, where the submission is not by a deed:

(d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

[94] The relevant subsections of s 43 of the Fair Trading Act provide:[170]

43 Other orders

(1) Where, in any proceedings under this Part, or on the application of any person, the court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—

(a) a contravention of any of the provisions of Parts 1 to 4; or

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[170] This version of s 43 of the Fair Trading Act 1986, applicable to the present appeal, has now been replaced with effect from 18 December 2013.

(b) aiding, abetting, counselling, or procuring the contravention of such a provision; or

(c) inducing by threats, promises, or otherwise the contravention of such a provision; or

(d) being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or

(e) conspiring with any other person in the contravention of such a provision—

the court may (whether or not it grants an injunction or makes any other order under this Part) make all or any of the orders referred to in subsection (2).

…

(5) An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

…

Procedural background

[95] On 26 February 2008, Mr Houghton commenced an action against Feltex's former directors (the second respondents), the promoter (the second appellant), the vendor of the shares (the first appellant) and the organising participant and joint lead managers of the share issue (the third and fourth respondents).

[96] There are claims under the Securities Act 1978, the Fair Trading Act, in negligence for losses allegedly suffered as a result of particular statements in or omissions from the prospectus issued for the public offering of shares in Feltex in May and June 2004, and for breaches of fiduciary duties. By December 2006, Feltex was in liquidation and the shareholders' funds had been lost.

[97] On the same day as the action was filed, Associate Judge Christiansen made the following (ex parte) representative order:[171]

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[171] *Houghton v Saunders* HC Auckland CIV-2008-409-348, 26 February 2008 (Order for Directions) at 1. The date quoted by Associate Judge Christiansen was incorrect and was clarified in *Houghton v Saunders [Lifting Stay]*, above n 162, as either 21 May 2004 or 2 June 2004. For simplicity, but without making a finding of fact, this judgment will assume the

> The plaintiffs, Eric Meserve Houghton of Upper Moutere and Darryl Alexander Jones of Dunedin, both Investors sue in this proceeding as representatives of all shareholders and former shareholders in Feltex Carpets Limited (now renamed EXFTX Limited) ("Feltex") who acquired and/or beneficially owned shares in Feltex:
>
> - Between 4 June 2004 (being the Initial Public Offer allotment date); and
> - 31 March 2005 or thereabouts (being the profit downgrade announcement date); and
> - Suffered a loss on that investment
>
> (Hereinafter called "the group") on the following bases:
>
> 1.1 Opt-out of Proceedings
>
> 1.1.1 That the named plaintiffs represent all Feltex Shareholders within the class referred to in paragraph 2 herein unless they elect to opt-out of the proceedings by 4 pm on 11 April 2008;

[98] Mr Houghton was the representative plaintiff for those who had bought shares in the initial public offering and Mr Jones was the representative plaintiff of those who had bought shares subsequently.

[99] The order went on to identify how shareholders could opt out, referred to a litigation funding offer, provided for the advertising of the proceedings and the opt-out procedures, and deferred the case management conference. At the time the proceedings were filed, about 800 shareholders had signed a written consent to the proceeding being issued on their behalf.[172]

[100] In a judgment of 7 October 2008, French J held that the opt-out procedure adopted in the representative order was inappropriate and should be replaced by an opt-in procedure.[173] She also held that only those who had bought shares in the initial public offering could be part of the representative action. The order she made was as follows:[174]

> Subject to the statement of claim being amended in accordance with para 171 of this judgment, orders numbered 1, 2 and 3 of the order for directions made by the Associate Judge on 26 February 2008 are amended:

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limitation period began on 2 June 2004. For more detail on this point, see [37] of the Chief Justice's reasons.

172 *Saunders v Houghton (No 2)*, above n 163, at [7].

173 *Houghton v Saunders*, above n 167, at [168].

174 At [224]. See n 171 above for an explanation as to why the date should be 2 June 2004.

(a) by providing that only the first plaintiff, Eric Meserve Houghton of Upper Moutere, investor, sues in a representative capacity for shareholders who purchased shares in the IPO on 4 June 2004 and who suffered a loss on their investment;

(b) by rescinding those parts of the order providing for an opt out procedure and replacing them with an opt in procedure, whereby qualifying shareholders will be given until 19 December 2008 to advise the Court they consent to being part of the proceeding;

(c) the form of the consent is to be prepared by the plaintiffs and submitted to the Court for approval;

(d) the consent form should include an explanation of the various funding options.

[101] French J dealt with a number of other applications in her judgment, including an application for a stay because of the existence of a litigation funder. This was refused.[175] Later, in June 2009, French J made an order for an interim stay of proceedings pending the outcome of an appeal to the Court of Appeal.[176]

[102] In *Saunders v Houghton*,[177] the Court of Appeal dismissed the appeal against French J's judgment of October 2008. It also dismissed the challenge to the participation of a litigation funder, Joint Action Funding Ltd, subject to the satisfaction of certain conditions. The Court left the interim stay in place until further order of the High Court to allow the pleading and funding issues to be dealt with.

[103] Subsequently, in an interim judgment of March 2011, French J lifted the interim stay, subject to the provision of security for costs. The order also imposed conditions relating to the litigation funding.[178] The reasons for the lifting of the interim stay were given in the judgment of 8 June 2011 where the limitation issues relevant to this appeal were decided. That judgment also dealt with applications for security for costs and addressed applications to strike out aspects of the amended statement of claim, mainly on limitation grounds.[179]

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175 At [201].

176 *Houghton v Saunders [Privilege]* (2009) 19 PRNZ 476 (HC).

177 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 *[Saunders v Houghton (No 1)]*.

178 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 9 March 2011.

179 *Houghton v Saunders [Lifting Stay]*, above n 162. This judgment gave the Judge's reasons for the rulings given in the earlier interim judgment, above n 178.

[104] French J later approved Mr Houghton's actual litigation funding, which had been arranged in accordance with his earlier proposal and in satisfaction of one of the conditions for the lifting of the interim stay set by French J.[180]

[105] In November 2011, Mr Houghton filed an application seeking an order, under r 10.15 of the High Court Rules, that all issues of liability be determined separately and before issues of loss.

[106] At the hearing of that application in December 2011 "a consensus developed" that, rather than a split between liability and loss, Mr Houghton's personal claim (both liability and loss) would be heard in its entirety. That would involve resolution of all issues that are common to Mr Houghton and all the other claimants, as well as dealing with issues unique to Mr Houghton. In the second stage, "the individual aspects of the claims of all the other qualifying shareholders would be considered."[181]

[107] It was agreed that a list of common issues would be compiled in advance for that first stage of the hearing. This was done. Mr Houghton's application to add further issues to the first stage (including the extent of reliance necessary) was declined but leave was reserved to apply to vary the scope of the first stage of the hearing.[182]

High Court decision on limitation issues

[108] On the basis that time started running for Limitation Act purposes on 2 June 2004, French J held, in her 8 June 2011 judgment, that Mr Houghton had filed his proceeding within time.[183] The representative order made by Associate Judge Christiansen in this case was not a nullity and was never rescinded. In terms of r 4.24, Mr Houghton had brought the proceedings "on behalf of" those

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180 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 30 November 2011.

181 *Houghton v Saunders* [2012] NZHC 1828 at [8]. This judgment covered hearings in December, March and May.

182 At [41]–[43].

183 *Houghton v Saunders [Lifting Stay]*, above n 162, at [123]. For the Fair Trading Act position see above n 164.

with the same interest in the subject matter.[184] This meant that time had also ceased to run for those shareholders when the proceedings (which included an application for a representative order) were filed.

[109] In the Judge's view, that conclusion followed from the Australian authorities, the nature of representative proceedings and the underlying policy and purposes of limitation periods.[185] The application for the order had put the defendants on notice as to the potential scope of the claim.[186]

The Court of Appeal decision on limitation issues

[110] The Court of Appeal upheld French J's decision.[187] The Court approached the appeal by an analysis of the facts and the conjunctive effect of s 4 of the Limitation Act and r 4.24 of the High Court Rules. It then tested its conclusion against the Commonwealth authorities.[188]

[111] The Court rejected Mr Olney's submission (which is repeated in this Court) that the only effect of a representative order is to create a res judicata for those represented on common issues. It did not consider that this interpretation conformed with the plain meaning of r 4.24. The High Court Rules determine when a proceeding is brought and by whom. In this case, under r 4.24, Mr Houghton brought the proceedings for himself and all those he represented.[189]

[112] The Court had earlier noted that the representative order was effective from 26 February 2008 and that the order provided no limitation on the scope of representation. In particular, the order was not restricted to the threshold element of breach of duty.[190]

[113] The Court also considered that Mr Olney's interpretation would largely negate the purpose of r 4.24, given that it would potentially require the filing of

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184 At [124] and [128]–[129].
185 At [129]; in particular approving the reasoning of McPherson SPJ in *Cameron v National Mutual Life Association of Australasia (No 2)* [1992] 1 Qd R 133 (QSC) at 137.
186 At [129].
187 *Saunders v Houghton (No 2)*, above n 163.
188 At [53].
189 At [65].
190 At [59].

separate proceedings by all those represented.[191] Finally, the Court was of the view that the policy objectives of the Limitation Act were satisfied in that the maximum risk and potential exposure had been identified at the time the proceedings were filed.[192]

[114] The Court did note that an opt-in and opt-out mechanism without a final date for either can create uncertainty and that, for case management purposes, such a date should be imposed.[193] It considered, however, that an opt-in date is a condition of participation and not an essential term of the representative order.[194] Nevertheless, a represented person who failed to opt in by the stipulated date would be subject to the limitation provisions.[195]

[115] In its discussion of the Commonwealth authorities, the Court of Appeal analysed the Australian decisions of *Cameron v National Mutual Life Association of Australasia Ltd (No 2)*[196] and *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*,[197] which were based on analogous provisions. The Court concluded that these decisions supported its conclusion and preferred the reasoning in these judgments over the main decision relied on by Mr Olney, *Prudential Assurance Co Ltd v Newman Industries Ltd*.[198]

Preliminary point made by the second respondents

[116] Before we turn to the appellants' two arguments, we deal with a preliminary point made on behalf of the second respondents at the hearing. It was submitted that the pleaded limitation defences of the second respondents had effectively been dealt with in an interlocutory context and that the final determination on those defences

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191 At [63].
192 At [74].
193 At [71]–[72]. French J's judgment setting the 19 December date had been stayed and a new date had not been set at the time of the Court of Appeal judgment. A date of 30 May 2013 was set as a final opt-in date by Dobson J by minute of 10 April 2013.
194 At [72].
195 At [75].
196 *Cameron*, above n 185.
197 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, (2005) 63 NSWLR 203.
198 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 (Ch).

should have waited until trial.[199] This point was not raised by the second respondents in the courts below, although they were represented at both hearings.[200]

[117] We do not accept the second respondents' submission. It is not unusual for limitation issues to be dealt with in the context of strike out applications. Some decisions on limitation issues are able to be made definitively at that stage – for example, when it is clear which dates apply. Some limitation issues may need to await full trial. In this case, the date the proceedings were filed is clear. The appeal concerns the effect of the representative nature of those proceedings, which is merely a question of the interpretation of the High Court Rules and the relevant statutory provisions. We have not been pointed to any factual issues that may need to be determined at trial with regard to the Limitation Act and there is no reason why a decision cannot be made on the interpretation issues at this stage of the proceeding. A decision on whether the proceedings were filed in time for Fair Trading Act purposes will of course need to await trial.[201]

The appellants' first argument

[118] We propose to deal with the appellants' submissions on their first argument under the following headings:

(a) nature of a representative claim;

(b) the caselaw;

(c) comparison with class action regimes; and

(d) policy issues.

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199 The appellants in this Court accept that a decision on the limitation issues in this appeal can be made at this stage of the proceedings.

200 The second respondents were appellants in the Court of Appeal but not on this issue.

201 With regards to the Fair Trading Act dates, see above n 166.

Nature of a representative claim

Appellants' submissions

[119] The appellants' first argument relates to what they say are the nature and limits of a representative claim. It is submitted that Mr Houghton's claim is a bifurcated one and includes:

(a) issues common to Mr Houghton and all represented shareholders ("common issues"), in respect of which judgment on his personal claim will establish a res judicata binding on all; and

(b) issues particular to Mr Houghton and each represented shareholder ("individual issues"), in respect of which judgment on his claim will not establish a res judicata beyond Mr Houghton and the defendants.

[120] In the appellants' submission, the only effect of a representative order under r 4.24 is to extend the res judicata established by a judgment on the plaintiff's claim (or aspects of it) beyond the parties to include the represented persons. The representative procedure does not operate by "bringing" the claims of represented persons. It is submitted that the representing plaintiff's claim is the only claim that is brought.

[121] In the appellants' submission, the res judicata only applies to issues which are common to the plaintiff and the represented persons. Claims relating to any individual issues must be validly brought before the expiry of limitation periods through the mechanism of individual proceedings, joinder or filing a separate joint proceeding.

[122] It is recognised by the appellants that damages can now be recovered in a representative proceeding, although that has not been the position in the past. However, in their submission, whether damages can be recovered by a plaintiff in his or her representative capacity depends on whether it is necessary to determine individual issues as they apply to members of the represented group.

[123] In the appellants' submission, representative proceedings for damages are recognised to be exceptional. They have two typical characteristics:

(a) the total liability at issue can be readily established in the representative proceeding as a global sum; and

(b) the amount due to individual represented persons is uncontested: usually because members waive individual recovery or because apportionment between them follows automatically as a matter of law or fact.

[124] The appellants submit that neither of these exceptions applies in this case. Further, it is submitted that each shareholder needs to establish individual issues such as reliance and loss. None of the individual represented shareholders in this case have brought individual claims. Accordingly, the damages claims of all represented shareholders (including those who provided written consents to the proceeding being issued on their behalf) are now statute-barred.

Our analysis

[125] Section 4(1) of the Limitation Act limits certain actions being brought after the expiration of six years from the date on which the cause of action accrued. Similarly, s 43(5) of the Fair Trading Act limits applications under s 43(1) being brought after the expiration of three years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered. The Limitation Act and the Fair Trading Act, however, do not deal with the question of when actions are brought for Limitation Act purposes or when applications are made for the purposes of the Fair Trading Act. That is the function of the rules of court.[202] In this case therefore it is the High Court Rules that determine this question.

[126] Rule 5.25 of the High Court Rules provides that an action is commenced by the filing of a statement of claim. In terms of r 5.35, a party who sues in a

[202] *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 (NSWCA) at 720 per Gleeson CJ (with whom Clarke JA agreed, Kirby J not deciding); and *Fostif*, above n 197, at [44] per Mason P.

representative capacity must show in the statement of claim the capacity in which the party sues.[203] Under r 4.24, a representative may sue "on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding". A representative action can be commenced with the consent of those to be represented or as directed by the court.

[127] The combination of those rules means that a representative action is brought when the statement of claim is filed. It is brought not only by the representing plaintiff but also on behalf of those represented. We agree with the High Court and the Court of Appeal that the fact a representative sues "on behalf of" those represented has the result that the action was brought (and an application made for Fair Trading Act purposes) by the class of represented shareholders through their representative, Mr Houghton, on 26 February 2008.

[128] In this case, the date of filing and the date the application to sue in a representative capacity was granted were the same. The fact that, under the High Court Rules, an action is commenced when the statement of claim is filed, may necessitate the backdating of a representative order if it is not made at the time of filing. This is necessary and desirable to ensure that the court's process does not disqualify those on behalf of whom a representative proceeding is brought, should the limitation period end in the period between filing and when the representative order is made.

[129] There is nothing in r 4.24 that restricts the representative to dealing with common issues or that mandates the bifurcated approach contended for by the appellants. There is also nothing in the rule that restricts damages claims that may be dealt with, in the context of representative proceedings, to the narrow instances outlined by the appellants. We accept Mr Houghton's submission that flexibility in how the rule is applied accords with the modern approach to representative proceedings.[204]

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[203] The rule also applies when persons are sued in a representative capacity.

[204] See the discussion of the history of representative proceedings in *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 415–419 per Toohey and Gaudron JJ, with whom Mason CJ, Deane and Dawson JJ largely agreed (at 403). Brennan J (at 408) and McHugh J (at 427–429) also substantially agreed with the comments on the scope and purpose of the rule relating to representative proceedings. See also the discussion by Mason P in *Fostif*, above n 197, at

[130] In our view, 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. As McGechan J said in *R J Flowers Ltd v Burns*:[205]

> The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept constantly in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements. It is, as has been said, in *John v Rees* [1970] Ch 345, 370 "not a rigid matter of principle but a flexible tool of convenience in the administration of justice".

[131] How individual issues, including damages, are to be dealt with in the context of a representative proceeding is a matter for the High Court. Any procedures put in place must of course ensure that a defendant is not deprived of the ability to put any relevant defences. As was said by Toohey and Gaudron JJ in *Carnie*:[206]

> … it is true that r 13 [the New South Wales equivalent of r 4.24] lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires". The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

[132] We accept that it may be possible for the courts to restrict the extent of representative proceedings and the role of a representative. In this case, however, there is nothing in the representative order (either as originally made or as amended by French J) that limits the representation to common issues.

[133] Mr Houghton submits that proof of reliance is not required in this case. If he is correct in that contention, the exercise of assessing loss will be relatively straightforward. If he is wrong, then, depending on the nature of the reliance required, sub-classing may be the most efficient means of dealing with the next stage of the case. But whether that is the case or whether there should, at the second stage

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[156]-[164] and [177]–[204]; and that in *Irish Shipping Ltd v Commercial Union Assurance Co PLC* [1991] 2 QB 206 (CA) at 223–227 (per Staughton LJ) and at 234–239 and 241–244 (per Purchas LJ). See also the discussion of McGechan J in *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 267–271.

205 *R J Flowers*, above n 204, at 271.

206 *Carnie*, above n 204, at 422.

of the proceedings, be joinder of some or all of the represented persons is a matter for the High Court.

The caselaw

[134] The Court of Appeal favoured the approach taken in Australia in *Cameron*[207] and *Fostif*.[208] The appellants submit the better position is that of Vinelott J in *Prudential Assurance*.[209] We first summarise those decisions, before setting out the appellants' submissions on the cases in more detail. We then give our views on the caselaw.

Cameron

[135] *Cameron* was a decision of the Supreme Court of Queensland.[210] The claim related to the alleged defective condition of a building in which the plaintiffs owned units. It was made in a representative capacity on behalf of themselves and other unit owners. The Supreme Court of Queensland did not allow the claim to proceed as a representative action but all individual unit holders who were not named as plaintiffs were given leave to elect to be joined as plaintiffs. The defendants appealed on the ground that the joinder of the unnamed defendants was time-barred when the order was made.

[136] In dismissing the appeal, McPherson SPJ held the issue to be whether the unnamed parties had brought an action in time, not whether they were parties to the action in time.[211] Order 3, r 10 of the Rules of the Supreme Court (Qld) (similar to the wording of r 4.24) provided that persons having the same interest in the subject matter were authorised to sue "on behalf of and for the benefit of all persons so interested". Because this rule makes no distinction between named and unnamed plaintiffs, McPherson SPJ was satisfied the rule permitted actions to be brought on behalf of plaintiffs even if they were not named in the writ. Accordingly, the limitation period was held to have stopped running for both named and unnamed

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207 *Cameron*, above n 185.
208 *Fostif*, above n 197.
209 *Prudential Assurance*, above n 198.
210 *Cameron*, above n 185.
211 At 136.

plaintiffs when the action was brought by the named plaintiffs on behalf of the others.[212] Moynihan J agreed with McPherson SPJ,[213] while Ryan J dismissed the appeal on an alternative basis.[214]

Fostif

[137] This was a decision of the Court of Appeal of New South Wales.[215] In this case groups of licensed tobacco retailers brought representative proceedings on behalf of themselves and unnamed persons, seeking to recover licensing fees paid before a licensing scheme was declared invalid. Unnamed plaintiffs were required to sign an opt-in notice in order to participate in the proceedings. The defendants sought to strike out the claim of the unnamed parties as time-barred under the Limitation Act 1969 (NSW).

[138] Mason P endorsed the approach of McPherson SPJ in *Cameron* of focussing on when the action was brought. He was satisfied that the limitation period stopped for the whole group once the named plaintiffs issued a proceeding.[216]

Prudential Assurance

[139] In *Prudential Assurance*,[217] Vinelott J took a different approach. Here the defendant company acquired the assets of another company after a majority of shareholders passed a resolution approving the transaction. Prudential Assurance, a minority shareholder, had opposed the transaction and later issued proceedings against the company and two of its directors, expressed to be on behalf of itself and all other shareholders of the company, aside from the named directors. The claim separately alleged conspiracy and deceit and sought rescission of the agreement or damages in lieu. After an interlocutory ruling, Prudential applied to amend its claim in order to seek a declaration of entitlement to damages and an award of damages

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212 At 137.
213 At 144.
214 At 143.
215 *Fostif*, above n 197.
216 At [44] per Mason P delivering the lead judgment for the Court. The High Court of Australia allowed the appeal but on different grounds: see *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.
217 *Prudential Assurance*, above n 198.

against the two directors personally for conspiracy in a representative capacity on behalf of the other company shareholders. Prudential's counsel conceded the amendment was necessary to enable the claim for damages in a representative capacity. The directors opposed the amendment.

[140] Vinelott J allowed the amendment, finding no limitation issue arose from it because the only effect of an order in favour of a plaintiff in its representative capacity would be that the issues covered by that order will be res judicata.[218] He held that persons within the represented class would have to establish damage in separate actions. Accordingly, they would have to bring those actions in compliance with the ordinary limitation provisions in the Limitation Act 1939 (UK).[219]

Appellants' submissions

[141] In the appellants' submission, neither *Cameron* nor the intermediate appellate decision in *Fostif* support the view that the clock stopped for all potential represented shareholders when Mr Houghton filed his claim.

[142] The appellants point out that *Cameron* was not a representative case. The proceeding had been filed as a representative one but that aspect of the proceeding had been struck out at first instance. That decision was confirmed on appeal.[220] This meant that the common and individual aspects of the claims had never been identified and thus McPherson SPJ's conclusion about the limitation effects of the proceeding was reached without that critical context.

[143] While recognising that *Fostif* is more authoritative, the appellants point out that Mason P described the restitutionary claims of each tobacco retailer as essentially "identical" with only some "mathematics" required to produce individual money judgments.[221] *Fostif* thus fell within the exceptional category of representative damages cases.

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218 At 521.
219 At 520.
220 For the procedural history of that case, see *Cameron*, above n 185, at 134–135.
221 *Fostif*, above n 197, at [198].

[144] More fundamentally, it is submitted that the decisions in *Cameron* and *Fostif* focus on who it is that a representative represents. In the appellants' submission, the key issue for limitation purposes is what the representative can (and cannot) do on behalf of those represented in the action he or she has brought and what remains for those represented to do for themselves: in this case, bring the damages claims.

Our analysis of the caselaw

[145] The Court of Appeal has undertaken a full analysis of the Australian decisions of *Cameron* and *Fostif* and of the *Prudential Assurance* decision. We agree with the Court's analysis. Like the Court of Appeal, we prefer the fully reasoned and targeted discussion of the nature of representative proceedings in *Cameron* and *Fostif.*

[146] *Cameron* and *Fostif* both concerned statutory provisions similar to s 4 of the Limitation Act and r 4.24, and in both cases the limitation issue was squarely before the Court. By contrast, the limitation aspect in *Prudential Assurance* was not so contentious, as both parties agreed the relevant limitation period would continue to operate in the same manner as if no order had been made in the representative action.[222] Limitation was therefore not an issue Vinelott J needed to consider (or did consider) in any depth. Moreover, Vinelott J proceeded on the strict premise that damages are not available in a representative action. This is not the position in New Zealand.[223]

[147] We also consider that, by requiring the filing of a multiplicity of related claims, the *Prudential Assurance* approach to resolving representative actions is needlessly complex and inconsistent with the objectives of the High Court Rules: that being to secure the just, speedy and inexpensive determination of any

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222 *Prudential Assurance*, above n 198, at 255.

223 See *Saunders v Houghton (No 1),* above n 177, at [14], finding representative proceedings for damages are not foreclosed. It is also doubtful whether this continues to be the position in England; see *EMI Records Ltd v Riley* [1981] 1 WLR 923 (Ch) at 926 where Dillon J found damages were recoverable by the plaintiffs in a representative capacity and implicitly distinguished *Prudential Assurance*, above n 198, finding it would be a "wholly unnecessary complication of our procedure" for all members of representative actions to issue separate claims for damages.

proceeding. As we note below,[224] clogging the courts with a multiplicity of actions covering the same subject matter would undermine the efficiency and economy of litigation, which representative actions seek to promote.[225]

[148] The appellants submit that *Cameron* was not a representative action case and therefore is not to be regarded as supportive of Mr Houghton's position. That is true in that it was held that the representative action was not properly brought. It was, however, essential to the reasoning of two of the Judges (McPherson SPJ and Moynihan J) that the proceeding had initially been filed as a representative action.

[149] The appellants submit that *Fostif* must be understood as coming within the very narrow class of cases where damages claims can be pursued in a representative action. They also submit that both *Cameron* and *Fostif* fail to recognise that a representative can only act on common issues. We have, however, rejected the appellants' submissions relating to damages and the bifurcated approach. It follows that we do not accept that *Fostif* is distinguishable.

[150] Nor do we accept the appellants' more general criticism of the approach in *Cameron* and *Fostif*. Whether the focus is on who the representative plaintiff represents or on what the representative plaintiff can do, the result is the same. Mason P *(Fostif)* and McPherson SPJ (*Cameron*) made it clear that it was the actions of the plaintiff bringing the proceedings that are crucial to determining when the action has been brought and when time has expired. We agree.

[151] We also consider the case of *R J Flowers* to be instructive. That case involved two applications by plaintiffs in two separate proceedings for orders directing they may take representative proceedings for damages, heard together by consent. McGechan J found a liberal interpretation of the rules on representative proceedings to be supported by the objectives of the High Court Rules; those being to secure the just, speedy and inexpensive determination of proceedings.[226] Accordingly, where injustice can be avoided, the rules should be applied to promote the expedition and economy of proceedings. McGechan J was therefore satisfied

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224 At [155].
225 See *R J Flowers*, above n 204, at 271.
226 *R J Flowers*, above n 204, at 271.

that a representative action for damages was possible. The Judge set out the requirements: that the members of the class to be represented must have a common interest in the proceedings; that they all must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class; that the action must be beneficial to all of the class; that the action covers the whole or virtually the whole of the class of potential plaintiffs and that the consent of all represented members to payment of global damages to the representative plaintiff is given.[227]

[152] The approach taken by McGechan J in *R J Flowers* accords with the objectives of the High Court Rules and the goal of representative proceedings: the promotion of expedition and efficiency of litigation. Nonetheless, it is not the last word on the issue. As long as defendants are not compromised and the aims underlying representative actions are advanced, there is scope for continual development in this area.[228]

Comparison with class action regimes

[153] The appellants submit that their argument is supported by the statutory class action regimes in other jurisdictions, which have introduced limitation suspension provisions. In their submission, limitation rules would only need modification if limitation periods would otherwise continue to run.

[154] We do not derive any assistance from the fact that class action rules in other jurisdictions provide for the formal suspension of limitation periods. Class action rules, unlike rules relating to representative actions, are usually very detailed. In that context, it is not surprising that they deal with limitation periods explicitly. That they do so is not an indication that limitation periods continue to run for those represented under representative action rules in New Zealand.

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227 At 270–271.

228 See the discussion above at [129]–[131] in relation to the ability of the rules to continue to adapt, including the setting of procedures to deal with individual defences and damages in a fair manner in the context of a representative action.

Policy issues

The appellants' submissions

[155] The appellants submit that the approach taken in both the High Court and Court of Appeal impedes realisation of the three policy objectives of limitation statutes. These are generally stated as being to protect defendants from having to face ancient obligations, to prevent litigation from being determined on stale evidence and to ensure plaintiffs do not sleep on their rights.[229] In particular, it is submitted that the approach taken has distorted these policy aims by subjecting the appellants to uncertain and ongoing liability, undermining Parliament's determination of limitation periods and distorting the operation of representative proceedings.

Our analysis

[156] The primary rationale for limitation provisions is fairness to intended defendants.[230] They protect against endless litigation and the inevitable prejudice in preparing a defence to long-dormant claims where evidence is stale or no longer available and they also recognise the public interest in claims being pursued within a reasonable period.[231] This is reflected in s 3 of the Limitation Act 2010, which provides that the purpose of the Act is to "encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims". Limitation statutes achieve these ends by ensuring defendants are notified of claims against them in a timely fashion. Statutes of limitation are generally regarded as beneficial and construed liberally.[232] Unless the defendant would be unfairly prejudiced by the delay, depriving a plaintiff of the right to bring an action is not a legislative purpose.[233]

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229 *GD Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 131.
230 *W v Attorney-General* [1999] 2 NZLR 709 (CA) at [77].
231 *Cave v Robinson, Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384 at [6] per Lord Millett.
232 At [5].
233 *GD Searle & Co v Gunn*, above n 229, at 131.

[157] We agree with the Court of Appeal that the policy objectives of the Limitation Act are satisfied on the approach taken by us and the Courts below.[234] The conclusion we have drawn as to the effect on limitation periods of representative actions accords with the policy behind limitation periods in that the appellants (and the second, third and fourth respondents) in this case were fully informed of the nature and potential extent of the claims at the time the proceedings were filed and the representative order made.

[158] Allowing the representative order to toll the limitation period in this manner does not distort the operation of representative proceedings. Indeed, by preventing the needless multiplicity of actions that would otherwise be necessary, the tolling of limitation provisions furthers the principal purpose of representative actions: the promotion of efficiency and economy of litigation.[235] We agree with the Courts below and with Mr Houghton's submission that requiring the filing of separate proceedings or joinder to the existing representative proceedings at the outset would largely negate the advantages of a representative proceeding. Further, to hold otherwise would not meet the objectives of the High Court Rules as set out at r 1.2 for the just, speedy and inexpensive determination of proceedings. The whole point of having a representative proceeding is to avoid clogging the courts with individual actions covering the same subject matter.

[159] We are accordingly satisfied that the policy of limitation provisions and of representative actions is promoted, rather than distorted, on our approach.

The appellants' second argument

[160] The appellants' alternative argument focuses on when Mr Houghton became the representative of the shareholders. In the appellants' submission, in terms of r 4.24, Mr Houghton did not and could not act "on behalf of" shareholders in any capacity unless and until they had opted in.[236] By 2 June 2010, the limitation expiry

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234 *Saunders v Houghton (No 2)*, above n 163, at [74].

235 See *R J Flowers*, above n 204, at 271; See also the decision of the Supreme Court of the United States in *Crown, Cork & Seal Co Inc v Parker* 462 US 345 (1983) at 349, citing *American Pipe & Construction Co v Utah* 414 US 538 (1974) at 553. Although that case concerned a class action suit, the same principles are applicable here.

236 Those who had provided written consent at the time the proceedings were issued would presumably be treated in the same way as the "opt-in" group.

date, some 1,730 shareholders were listed as having complied with the opt-in procedure. By 23 February 2012, that list had grown to 2,852 shareholders, of which about 1,053 had opted in after 2 June 2010.

[161] It is submitted that the conclusion of the Courts below distorts the operation of the representative proceeding. The judicial setting of a final opt-in date some three years following the expiry of statutory limitation periods allows shareholders to join a representative proceeding at a time when their claims could not be validly asserted in separate proceedings. That is a breach of the justice principle, which regulates the fundamental fairness of the representative procedure.

[162] In a related argument for the second respondents, it was submitted that, when French J "rescinded" the opt-out order, this meant that Mr Houghton at that point represented no one. In other words, the class of those represented was empty. It only became populated once shareholders opted in.

Our analysis of the second argument

[163] We do not accept the submissions of the appellants or the related argument of the second respondents. It is not the opting in or out that defines the class. The class represented is defined by reference to the class of persons having the same interest in the same subject matter. That is what r 4.24 provides.

[164] The representative order, as originally made, appointed Mr Houghton to act as the representative of all those who had bought Feltex shares in the initial public offering. This means that the action was filed on behalf of all those shareholders and therefore (in terms of our analysis on the first argument of the appellants) brought (or made) by those shareholders.

[165] The function of the opting out procedure was to reduce the original class to those who did not take the positive step of opting out. Those who did opt out of the proceeding would be subject to limitation periods in the normal way in respect of any other action they might file.

[166] French J amended but did not rescind the original order. The opt-in procedures set by French J were a different mechanism but they served the same function of reducing the original class of persons represented. In this case, those that failed to opt in by the relevant date are subject to limitation periods in the normal manner with regard to any other actions they may seek to file.

[167] The fact that a different mechanism for reducing the represented class was substituted by French J had no effect on the scope of the original order. It did not change the fact that the representative order meant that the proceeding was brought on behalf of (and therefore by) all those who had bought shares in the initial public offering.

[168] It would be inappropriate to allow the opt-in or opt-out elements of a representative action to influence when limitation periods start to run. To do so would not only run contrary to the language of the relevant rules but would also be a recipe for uncertainty and ongoing dispute. The date of the filing of the statement of claim is certain and easily ascertainable and provides a bright line test.[237]

[169] As well, those who had bought shares in the initial public offering could legitimately have relied on Associate Judge Christiansen's order as meaning they did not have to file separate proceedings. It would be unfair if the change of the terms of the representative order made by French J had the potential to deprive them of substantive rights and that this could occur without them having been given any opportunity to be heard before the changes were made.

Conclusion

[170] We conclude that time ceased to run for the identified represented class (all shareholders who bought shares in the Feltex initial public offering) on 26 February 2008 when the proceedings were filed by Mr Houghton and the representative order made. That applies both to common issues and to individual issues, including those of reliance (if that is needed) and damages. How those individual issues will be managed is a matter for the High Court.

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[237] This accords with the approach of Mason P in *Fostif*, above n 197, at [44]. This case also involved an opt-in mechanism.

[171] The change from the original opt-out procedure to an opt-in procedure had no effect on the above conclusion. The function of both procedures is to reduce the class represented. If, by the relevant date, a person has opted out (in the case of an opt-out procedure) or failed to opt in (in the case of an opt-in procedure), that person will, however, be subject to limitation periods in relation to any separate action.

Result

[172] The appeal is accordingly dismissed.

[173] Costs of $25,000 are awarded to the first respondent plus usual disbursements (to be set by the Registrar if necessary). The appellants and the second and fourth respondents are liable jointly and severally for the costs and disbursements. We certify for second counsel.

Solicitors:
Russell McVeagh, Wellington for Appellants
Wilson McKay, Auckland for First Respondent
Bell Gully, Auckland for the Second Respondent
Jones Fee, Auckland for the Third Respondent
McElroys, Auckland for the Fourth Respondent