

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

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

**CIV-2019-404-001730  
[2025] NZHC 940**

BETWEEN

MICHAEL JOHN SMITH  
Plaintiff

AND

FONTERRA CO-OPERATIVE GROUP  
LIMITED  
First Defendant

GENESIS ENERGY LIMITED  
Second Defendant

DAIRY HOLDINGS LIMITED  
Third Defendant

NEW ZEALAND STEEL LIMITED  
Fourth Defendant

Z ENERGY LIMITED  
Fifth Defendant

BT MINING LIMITED  
Sixth Defendant

Hearing: 18 February 2025

Appearances: D M Salmon KC, M Heard, D A C Bullock and R E King for  
Plaintiff  
D Kalderimis KC and N K Swan for First Defendant  
S J P Ladd and B A Keown for Second Defendant  
B G Williams for Third Defendant  
J E Hodder KC and C S Morrison for Fourth Defendant  
T D Smith and E N L Peart for Fifth Defendant  
No appearance for Sixth Defendant

Judgment: 16 April 2025

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**JUDGMENT OF ANDREW J**

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This judgment was delivered by Justice Andrew on 16 April 2025 at 3.00 pm pursuant to r 11.5 of the High Court Rules 2016 -  
Registrar / Deputy Registrar – Date: .....

## Introduction

[1] The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders.

[2] Each of the six defendants in the second amended statement of claim<sup>1</sup> is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned. Mr Smith alleges that the defendants have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional, and spiritual significance to him and his whānau.

[3] Mr Smith advances two causes of action in tort: public nuisance and a new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change. He seeks a declaration that the defendants have (individually and/or collectively) unlawfully breached a duty owed to him, or caused or contributed to a public nuisance through their activities. Injunctions are also sought requiring the defendants to produce or cause a peaking of their emissions by 2025, a particularised reduction in their emissions by the ends of 2030, 2040, and 2050 (by linear reductions in net emissions each year until those times), and zero net emissions by 2075. Alternatively, a (potentially suspended) injunction is sought, requiring the defendants to immediately cease emitting or contributing to net emissions.

[4] In its decision of 7 February 2024, the Supreme Court reinstated Mr Smith's pleadings after they had been struck out in full by the Court of Appeal.<sup>2</sup>

[5] In the present interlocutory applications, the first to third defendants (the applicants) seek the following orders:

- (a) That the Court determine whether, as a matter of principle, it is properly arguable that the applicants are entitled to join to the proceeding, as

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<sup>1</sup> Dated 16 December 2024 and filed subsequent to the Supreme Court judgment.

<sup>2</sup> *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134.

third parties, overseas entities falling within any of the following three categories: overseas commercial emitters, overseas government emitters, and overseas non-profit emitters; and

- (b) If so, leave accordingly be granted under the High Court Rules 2016, r 4.8 for an extension of time to 25 working days from the date of the Court’s decision for the applicants to issue third-party notices pursuant to r 4.4.

[6] The first to fifth defendants (the defendants) seek orders that the proceedings be declared a universal representative proceeding pursuant to r 4.24 of the High Court Rules. In particular, they seek the following orders:

- (a) That all of the defendants are sued on behalf of all persons with the same interest in the subject matter of the proceeding, namely all New Zealand entities which, “as part of commercial profit-making enterprises”, produce GHG emissions, or supply or produce products that, when used, produce GHG emissions, and whose emissions “are significantly greater than the emissions of an ordinary New Zealand citizen”.
- (b) That leave be reserved for the plaintiff and the current defendants to seek to vary these orders as the proceedings develop.

[7] In opposing the applications, Mr Smith says that the applicants are seeking collaterally to attack the Supreme Court’s strike-out decision which, he says, held that not “all defendants causing or contributing to a nuisance must be before the Court (or capable of being so).”<sup>3</sup>

### **The parties and the pleadings**

[8] The second amended statement of claim alleges as follows:

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<sup>3</sup> *Smith v Fonterra Co-operative Group Ltd*, above n 2, at [164].

- (a) The first defendant (Fonterra) is in the business of producing and exporting the majority of New Zealand’s dairy products. It owns and operates eight dairy factories in New Zealand that burn or can burn coal to generate energy for the production of dairy products, including milk powder. It will continue to burn coal in its dairy factories for the foreseeable future. It has publicly stated that it intended to reduce the number of sites that use coal by 40 per cent by the end of 2024 and intends to eliminate coal use by 2037. It has publicly stated that it intends to reduce its Scope 1 and 2 emissions by 50 per cent by 2030 (as defined by the Greenhouse Gas Protocol (utilised by the Science Based Targets initiative)). The combustion of coal in the dairy factories releases GHGs into the atmosphere including carbon dioxide (CO<sub>2</sub>), methane, and nitrous oxide.<sup>4</sup>
- (b) The second defendant (Genesis) is in the business of generating and selling electricity in New Zealand. It operates the Huntly Power Station, which is the largest thermal power station in New Zealand. That power station is fuelled by the combustion of coal and natural gas. The combustion of coal and natural gas at the Huntly Power Station releases GHGs into the atmosphere.<sup>5</sup>
- (c) The third defendant (Dairy Holdings) is in the business of operating dairy farms in the South Island. These dairy farms release GHGs into the atmosphere, including by releasing methane as a result of enteric fermentation in nitrogen dioxide from nitrogen-based fertiliser use. It does not need to surrender emissions units under the Emissions Trading Scheme in respect of its agricultural methane emissions.<sup>6</sup>
- (d) The fourth defendant (New Zealand Steel) is in the business of producing steel in New Zealand. It operates the Glenbrook Steel Mill which is

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<sup>4</sup> Second amended statement of claim, above n 1, at [13]–[15].

<sup>5</sup> At [4], [17]–[18], and [25].

<sup>6</sup> At [5] and [27]–[28].

primarily fuelled by the combustion of coal. That combustion releases GHGs into the atmosphere.<sup>7</sup>

- (e) The fifth defendant (Z Energy) is in the business of distributing fuel in New Zealand and its commercial customers include the aviation and maritime industries, which it supplies with petrol, diesel, jet fuel, and petroleum-related fuel products. It has publicly stated that it intends to reduce its operational GHG emissions by 42 per cent by 2030. The fuel products supplied by Z Energy are burned, resulting in the release of GHGs into the atmosphere.<sup>8</sup>
- (f) The sixth defendant (BT Mining) owns and operates the Stockton Mine (north of Westport), the Takitimu Mine (north of Invercargill), and the Maramarua and Ratowaro Mines (in the Waikato region). The Stockton Mine is the largest open cast mine in New Zealand and produces bituminous, coking, and thermal coal. The majority of the coal from the Stockton Mine is exported to China where it is primarily burned in the production of steel. The GHG emissions arising from the burning of that coal are not materially or effectively regulated.<sup>9</sup>
- (g) In 2022–2023, the defendants were together responsible for approximately one third of New Zealand’s total reported GHG emissions. In that same period:<sup>10</sup>
  - (i) just 15 companies were responsible for more than 66 per cent of New Zealand’s total reported GHG emissions; and
  - (ii) approximately 50 companies were responsible for more than 90 per cent of New Zealand’s total reported GHG emissions.

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<sup>7</sup> At [6], [29]–[30], and [36].

<sup>8</sup> At [7] and [37]–[39].

<sup>9</sup> At [8], [41], and [43]–[46].

<sup>10</sup> At [49]–[50] and [52].

- (h) The release of GHGs into the atmosphere from human activities (including the defendants' activities) will result in dangerous and anthropogenic interference with the climate system.<sup>11</sup>
- (i) It is possible for the defendants to reduce the emissions from their activities and products to reflect the minimum global reductions<sup>12</sup> (as to timing and amount) directly and from the activities of those to whom they supply fossil fuels.<sup>13</sup>
- (j) Requiring the defendants to cease, or to reduce, their GHG emissions (or contribution to emissions from producing and selling fossil fuels) will materially reduce the adverse effects of climate change.<sup>14</sup>
- (k) The defendants have variously:<sup>15</sup>
  - (i) failed to credibly commit to voluntary measures that would see them proportionately contribute to, or better, the minimum global reductions as to timing or volume; and
  - (ii) actively lobbied against regulatory measures that would require them to reduce their emissions to proportionately contribute to, or better, the minimum global reductions as to timing or volume.
- (l) The GHG emissions of several of the defendants are actually, or effectively, unconstrained by the current regulatory regime.<sup>16</sup>
- (m) By their continued GHG emissions, the defendants knowingly externalise both the harms of the GHG emissions and the cost of otherwise achieving a reduction in GHG emissions sufficient to achieve

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<sup>11</sup> At [56] and [59].

<sup>12</sup> The plaintiff defines, at [61], "minimum global reductions" as the reductions necessary to avoid dangerous climate change, as set out by the Intergovernmental Panel on Climate Change (IPCC).

<sup>13</sup> At [62].

<sup>14</sup> At [63].

<sup>15</sup> At [77].

<sup>16</sup> At [78].

the minimum global reductions onto others, including Mr Smith, his whānau, and his descendants.<sup>17</sup>

- (n) There are multiple options available to the defendants to achieve, and better, the minimum global reductions and to achieve the reductions sought by Mr Smith in this proceeding. The orders sought in the proceeding will cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions in a manner that will materially mitigate the harm faced by Mr Smith, his whānau, and his descendants.<sup>18</sup>

[9] As noted, there are two causes of action: public nuisance and breach of duty (in addition, or in the alternative).

[10] In relation to public nuisance,<sup>19</sup> Mr Smith alleges that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system and the adverse effects of climate change caused or contributed to by the defendants jointly and separately. The particulars alleged include increasing sea levels, causing increased coastal erosion, inundation, flooding and storm surges.

[11] Mr Smith alleges that the defendants' interference with public rights is substantial, material, and unreasonable as to the nature and level of their contribution and the consequences of their contribution.<sup>20</sup> The particulars allege that the defendants emit as part of commercial profit-making enterprises and that their emissions are significantly greater than the emissions of an ordinary New Zealand citizen.

[12] Mr Smith alleges the defendants knew, or ought reasonably to have known, since at least 1960, that fossil fuel use increases the concentration of CO<sub>2</sub> in the atmosphere.<sup>21</sup>

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<sup>17</sup> At [79].

<sup>18</sup> At [81].

<sup>19</sup> At [85].

<sup>20</sup> At [87].

<sup>21</sup> At [95].

[13] By way of relief for the public nuisance cause of action, Mr Smith seeks a declaration that the defendants have (individually and/or collectively) unlawfully caused or contributed to a public nuisance through their emitting activities (or their production of coal in the case of BT Mining, and their production or supply of fuel products in the case of Z Energy).

[14] In addition, Mr Smith seeks an injunction requiring the defendants to produce (or cause in relation to the products or services they sell) a peaking and reduction of emissions in various amounts specified.

[15] In relation to the breach of duty cause of action, Mr Smith alleges that the defendants owe a duty, cognisable at law, to cease materially contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through the emission of GHGs into the atmosphere (or the production or exportation of coal in the case of BT Mining, and their production and supply of fuel products in the case of Z Energy).

[16] Mr Smith further alleges that the defendants have breached, and will continue to breach, the duty by emitting GHGs into the atmosphere (or by causing the emission of GHGs through the sale of fossil fuel products) for their own profit and knowing that those emissions will contribute to damage to the climate system, dangerous anthropogenic interference with the climate system, the adverse effects of climate change, and injury to the plaintiff and people like him.

[17] By way of relief for the second cause of action, Mr Smith seeks a declaration that the defendants have (individually and/or collectively) unlawfully breached a duty through their emitting activities (or the production or exportation of coal in the case of BT Mining, and the production and supply of fuel products in the case of Z Energy). He also seeks an injunction requiring each of the defendants to produce (or cause in relation to the products they sell, in the case of BT Mining and Z Energy) a peaking and reduction of emissions in specified amounts sought. Alternatively, he seeks an injunction requiring the defendants to immediately cease emitting net GHG emissions or contributing to the net emission of GHGs through the sale of their products.

## **Application for leave to issue third-party notices**

[18] Rule 4.4(1) of the High Court Rules provides:

### **4.4 Third parties**

- (1) A defendant may issue a third party notice if the defendant claims any or all of the following:
  - (a) that the defendant is entitled to a contribution or an indemnity from a person who is not a party to the proceeding (a **third party**):
  - (b) that the defendant is entitled to relief or a remedy relating to, or connected with, the subject matter of the proceeding from a third party and the relief or remedy is substantially the same as that claimed by the plaintiff against the defendant:
  - (c) that a question or issue in the proceeding ought to be determined not only between the plaintiff and the defendant but also between—
    - (i) the plaintiff, the defendant, and the third party; or
    - (ii) the defendant and the third party; or
    - (iii) the plaintiff and the third party:
  - (d) that there is a question or an issue between the defendant and the third party relating to, or connected with, the subject matter of the proceeding that is substantially the same as a question or an issue arising between the plaintiff and the defendant.

[19] Rule 4.8 of the High Court Rules provides:

### **4.8 Court's power and discretion**

- (1) On an application seeking leave to issue a third, fourth, or subsequent party notice, the court must have regard to all relevant circumstances, including delay to the plaintiff.
- (2) On the making of an application of that kind, the court may grant or refuse leave or grant leave on just terms.

[20] As I will discuss further, in making their application, the applicants seek to rely on s 2 of the Declaratory Judgments Act 1908, s 17 of the Law Reform Act 1936, and the principles of equitable contribution to explain the need for third-party notices.

[21] Section 2 of the Declaratory Judgments Act provides:

No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[22] Section 17 of the Law Reform Act relevantly provides:

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—

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(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[23] In opposing the application, Mr Smith says that there is no jurisdiction to permit third-party notices to be issued because there is no available route to seek third-party contribution or relief in a tort claim where damages are not sought against the alleged tortfeasors. Here, the only relief sought is a declaration and/or injunctive relief. Mr Smith says s 17 of the Law Reform Act is constrained to monetary claims for damages. Mr Smith further says this application should be declined because it is merely advisory or is otherwise abusive.

[24] In responding to those contentions, the applicants say that their application is a responsible way of addressing an informal procedural matter bearing on the true character of Mr Smith's claims. They say that Mr Smith's proceeding in its DNA, and however finessed, is a claim against all the world. As such, its implications must, they say, be reckoned with. They describe this as a point of principle.

[25] The applicants say that this is a novel proceeding and that it is therefore unsurprising that novel procedural mechanisms are appropriate for dealing with this. They submit that Mr Smith's claim alleges the defendants are liable to him on the basis that they emit as part of commercial profit-making enterprises, and their emissions are significantly greater than those of ordinary New Zealand citizens. They submit that if the law can contemplate liability of the defendants to Mr Smith based on their emissions profile, it must also contemplate if or how such defendants can legitimately

seek to defray, offset or share any such liability with other third-party emitters. It is said that do so would be appropriate and can be accommodated within the scheduled trial fixture of April 2027.

[26] The applicants further contend that the position of New Zealand emitters is addressed through the separate representative action application. They note, however, that offshore emitters are also in the frame. Their emissions, which are orders of magnitude greater than those of the applicants', are "putatively contributing to the alleged damage which Mr Smith seeks to stop".

[27] I begin my analysis with the issue of jurisdiction.

### *Jurisdiction*

[28] To issue a third-party notice "it is a pre-requisite that there should be a right of action between the defendants and the third party".<sup>22</sup> Rule 4.4(1)(a) of the High Court Rules expressly refers to contribution and indemnity, while sub-rr 4.4(1)(b)–(d) relate to relief generally.

[29] The applicants recognise that this is a novel application of the principles of third-party liability for contribution in tort in response to a novel claim against them. They submit that it is seriously arguable that they have a case for relief under r 4.4(1)(b) because:

- (a) s 2 of the Declaratory Judgments Act provides a "stand-alone" jurisdiction for declarations of legal rights;
- (b) s 17 of the Law Reform Act is not constrained to monetary claims for damages, despite this being the usual focus; and
- (c) the principles of equitable contribution should respond to the situation, such that, if the defendants are liable to Mr Smith, responsibility arises also for the overseas entities.<sup>23</sup>

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<sup>22</sup> *Karori Properties Ltd v Jelcich* [1969] NZLR 698 (SC) at 703.

<sup>23</sup> See above at [5](a).

[30] I find that in a novel proceeding such as this, the Court should proceed cautiously and avoid the pre-emptive determination of important issues of remedy and relief without a full testing of the facts at trial. As the applicants correctly submit, the test is one of a seriously arguable claim.

[31] I acknowledge that there is substantial support in the legislative history of s 17 of the Law Reform Act (including its UK origins)<sup>24</sup> that s 17(1)(c) has, from its origins, been intended to apply to the recovery of monetary contribution only. However, the applicants are correct that “damage” under s 17 does not mean “damages”; it means the harm suffered by another person.<sup>25</sup> As the Supreme Court has acknowledged:<sup>26</sup>

The policy of the law is that it is unfair that someone liable in common with another to a plaintiff for the same damage should have to carry the entire burden. Where the plaintiff chooses to proceed against one defendant alone rather than another liable in respect of the same damage, contribution is equally available between the potential defendants. Any other result would, ... be unjust.

(footnotes omitted)

[32] I do not find it necessary to address in detail the comprehensive arguments advanced by the parties on this issue. As I have said, the test is one of whether it is seriously arguable and, in any event, for reasons given below, the jurisdiction issue is not decisive of the application.

[33] My conclusion is that it is seriously arguable that the applicants have a case for relief under r 4.4(1) of the High Court Rules. I find, based on the recent decision of *Timaru District Court v Minister of Local Government*,<sup>27</sup> that s 2 of the Declaratory Judgments Act provides a stand-alone jurisdiction for declarations of legal rights that would allow the Court here to make a declaration not covered by the separate s 3

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<sup>24</sup> See *Hotchin v New Zealand Guardian Trust Company Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 at [161]–[167].

<sup>25</sup> *Westwood Group Holdings Ltd v Rilean Construction (South Island) Ltd* [2013] NZHC 1739 at [18], citing *Walter Peak Corporate Trustee Ltd v Anderson Lloyd HC Dunedin CIV-2009-412-389*, 9 December 2011 at [11]. See also *Birse Construction Ltd v Haiste* [1996] 2 All ER 1 (CA) at 8.

<sup>26</sup> *Hotchin v New Zealand Guardian Trust Company Ltd*, above n 24, at [140] per Elias CJ.

<sup>27</sup> *Timaru District Court v Minister of Local Government* [2023] NZHC 244, [2023] 3 NZLR 572 at [87]–[89], citing *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [97].

jurisdiction for declarations on the construction or validity of legislation.<sup>28</sup> I further find that it is seriously arguable that an equitable contribution claim is available to the applicants. As the Supreme Court has observed in the *Hotchin* case,<sup>29</sup> the test for equitable contribution is the same as the Law Reform Act (albeit not subject to the specific statutory wording):

In summary, the test for contribution under s 17(1)(c) of the [Law Reform] Act and that for equitable contribution is the same. Both require that there be the same damage, with no additional requirement. Proportionate contribution is also available for both.

(footnotes omitted)

[34] I note also that the equitable contribution doctrine is to be interpreted broadly and the “circumstances in which a Court will order contribution are not closed”.<sup>30</sup>

[35] I conclude that it is seriously arguable that I do have jurisdiction to grant leave under r 4.8. I now turn to address the related question of whether I can and should determine, as a matter of principle, whether it is properly arguable that the applicants are entitled to join the proposed third parties.

#### *Advisory opinion*

[36] I accept that the applicants have acted responsibly in bringing the third-party leave application as a means of addressing what they say is an important matter of principle. I reject the claim by Mr Smith that the proper course of action would have been for the applicants to have issued third-party notices without seeking the Court’s position, with the consequences being that any party opposing such notices would then be able to apply to set them aside. I accept that the applicants appropriately formed the view that issuing third-party notices without any prior engagement with the Court risked unnecessary delay and confusion. In particular, had that been done, a number

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<sup>28</sup> I note the related observation of the Supreme Court in these proceedings at [171] that the “utility of the declaration of inconsistency jurisdiction in public law suggests the court should not dismiss the power of purely declaratory relief in private law. That itself was a motivating factor in the enlargement of remedies created by the Defamation Act 1992.”

<sup>29</sup> *Hotchin v New Zealand Guardian Trust Company Ltd*, above n 24, at [97] per Glazebrook J and [179] per Elias CJ.

<sup>30</sup> *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [49] per McHugh J, cited in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [58] per Elias CJ.

of additional entities would automatically have become party to the proceeding prior to the issue of principle being clarified.

[37] It is nevertheless correct, as Mr Smith submits, that this Court does not have a merely advisory jurisdiction. In the circumstances, I find that the best way to proceed is to address some of the arguments raised by the said point of principle, as part of my decision whether to grant leave under r 4.8 for an extension of time to issue third-party notices. There is no dispute that leave is now required, and the very broad discretion conferred on the Court under r 4.8 allows me to address some of the arguments advanced.

#### *Merits of the application*

[38] At the core of the third-party application is the submission that Mr Smith's claim is, in reality, a legal assertion that any entity worldwide who emits as part of a commercial profit-making enterprise, and whose emissions are significantly greater than the emissions of an ordinary New Zealand citizen, is potentially liable to Mr Smith.

[39] The applicants summarise their position as follows:

The plaintiff's opposition to this application, and to the parallel application seeking universal representative orders, seeks to prevent this proceeding from being viewed through the lens that the plaintiff's own pleaded formulation entails. A narrow focus, isolated to specific defendants, may suit the plaintiff tactically but is not an appropriate lens for litigation of a global phenomenon on which the defendants have only an infinitesimal impact, particularly given the plaintiff is seeking onerous injunctive relief that would have profound negative and distortionary effects.

[40] They pose the question: why, in this kind of case only, must the applicants stand alone to be held solely responsible for alleged damage to which their own contributions are infinitesimal.

[41] The concerns of the applicants, and indeed the defendants generally, and the point of principle they advance, are readily understandable. The science, which I understand is essentially not disputed, is that the contribution that the defendants make

to the global phenomenon of GHG emissions generated by entities in a commercial profit-making enterprise is a very small one.

[42] The applicants' point of principle argument raises the issue of the true characterisation of Mr Smith's pleading. As noted, the applicants say it is in substance a claim against the whole world. In response, Mr Smith says "no, it's not". He says he is not suing for an indivisible loss caused by many other emitters in New Zealand and abroad. He says that his pleading focuses on the specific context in which the six defendants operate (not every emitter), and the focus of the pleading is on their regulatory context and their particular business models. These factually specific matters are pleaded as the footing for the causes of action.

[43] Mr Smith accepts that, in relation to his public nuisance claim, he will have to prove that the defendants' alleged interference with public rights is unreasonable. That is an element of that cause of action. He says that the question of what is unreasonable is inevitably going to be defendant specific. He says that he has pleaded in relation to each individual defendant the particular background facts that he says lead to available findings that the element of unreasonableness is made out.

[44] In rejecting the applicants' contention that his claim is against the world, Mr Smith argues by analogy with river pollution cases where liability has been found for public nuisance. This issue is discussed in the Supreme Court judgment on the strike-out application. The Court noted that there are numerous cases where defendants have been found to have caused public nuisances by discharging into rivers, despite individual householders being the actual contributors to the discharge or the waterways having been polluted by numerous other non-party sources (including other industrial users).<sup>31</sup> The Supreme Court noted that, in these cases, not all of the contributing polluters were before the Court, and nor was it realistic to identify any meaningful, finite number of known contributors.<sup>32</sup>

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<sup>31</sup> *Smith v Fonterra Co-operative Group Ltd*, above n 2, at [159].

<sup>32</sup> *Attorney-General for the Dominion of Canada v Ewen* (1895) 3 BCR 468 (BCSC); *Crossley and Sons Ltd v Lightowler* (1867) LR 2 Ch App 478; *Blair v Deakin* (1887) 57 LT 522 (Ch); and *Woodyear v Schaefer* 57 Md 1 (Court of Appeals of Maryland 1881).

[45] Much of the applicants' arguments about the characterisation of the pleading are matters that, to a large extent, have already been addressed by the Supreme Court. I accept that the findings of that Court do not, as a matter of binding superior court authority, preclude this Court from granting leave to join third parties (they did not squarely confront the issue or expressly rule it out). However, in my view, it is clear from the judgment of that Court that it clearly anticipated that the proceedings would continue against the specified defendants only. The Court expressly stated, "it is not, therefore, the case that all defendants causing or contributing to a nuisance must be before the Court (or capable of being so)".<sup>33</sup> They also stated:<sup>34</sup>

Further, the waterway cases suggest it is certainly arguable that in the case of public nuisance, a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others.

[46] In my view, the arguments raised by the applicants do, to a large extent, constitute a challenge to the conclusions of the Supreme Court. That challenge may not, in a strict legal sense, be a collateral attack because it does not challenge binding ratio decidendi findings of the Court, but rather obiter dicta conclusions/observations. In this case, however, that is not material. In my view, there is no legitimate basis to revisit the Supreme Court's conclusions.

[47] I also find that it is not necessary, nor appropriate, for me to make any definitive findings at this stage on this issue of the characterisation of the pleadings. That is a live issue for trial, as the Supreme Court effectively recognised.<sup>35</sup> Regardless of my decision on the third-party application, the applicants will remain free to argue at trial that Mr Smith's claims are non-justiciable because they raise amorphous policy and economic considerations that the Court is not capable of determining and should not entertain as a matter of judicial policy/jurisdiction. Equally, they will be able to continue to maintain the position that, in circumstances where their contribution to the

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<sup>33</sup> *Smith v Fonterra Cooperative Group Ltd*, above n 2, at [164].

<sup>34</sup> *Smith v Fonterra Cooperative Group Ltd*, above n 2, at [164] (footnote omitted).

<sup>35</sup> *Smith v Fonterra Cooperative Group Ltd*, n 2 above, at [169] where the Supreme Court noted that: "Whether the [defendants'] actions amount to a substantial and unreasonable interference with public rights remains a fundamental issue of fact for trial."

global phenomenon of climate change is “infinitesimal” and “de minimus”, the element of unreasonableness simply cannot be met.

[48] In addressing the issue of the characterisation of the pleadings, the defendant applicants contend and emphasise that Mr Smith has pleaded joint and several solidary liability. They refer to paragraphs [85], [101(a)], and [103(a)] of the second amended statement of claim, which allege individual and collective liability. The applicants submit, “as a key point of justice”, that it is inherently wrong and unfair to deny the joinder of overseas third parties to reflect the reality that the most culpable parties (absent joinder) will escape liability. They say it is fundamentally wrong for the small, insignificant players with de minimis culpability to have to shoulder all of the blame. It is again, however, in my view not necessary for me to grant the third-party applications to enable the defendant applicants to advance a defence based on fundamental justice and fairness. The declaratory relief sought by Mr Smith is discretionary. It is, and will remain, open for the defendant applicants to argue that relief should be refused on the grounds that the truly culpable parties are not before the Court and that, in circumstances where the defendants that are present have made such a small contribution, there is simply no utility in making any declaration. Equally, the same arguments can be made in contending that the necessary element of unreasonableness (i.e. an element of the tort of public nuisance) has not been made out. The presence of other parties, the subject of any third-party notice, is not necessary for those particular matters to be addressed. The principle of liability in solidum does not require that approach.

[49] A fundamental problem with the present, third-party application is that it is inconsistent with the objective of the High Court Rules, namely the just, speedy and inexpensive determination of any proceeding.<sup>36</sup> It is also contrary to the fundamental principle of access to justice. The inevitable consequences of joinder of third parties would be complexity, expense and delay, and a very high likelihood, in my view, that the trial scheduled for April 2027 would not proceed on that date. These factors are apparent from the three very broad categories that the defendant applicants refer to and rely on in their application (i.e. overseas commercial emitters, overseas

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<sup>36</sup> High Court Rules 2016, r 1.2.

government emitters, and overseas non-profit emitters) and the nature of the issues raised by the pleadings. I note, too, the uncertainty that the application gives rise to, given that there are no draft statements of claim or any indication as to any particular entities within the three categories that might become parties.

[50] Joining the second category identified by the defendant applicants, namely overseas government emitters, would significantly increase the risk of delay and uncertainty. Logically, it would include China and the United States – two of the world’s largest GHG emitters.<sup>37</sup> Issues of sovereign immunity, comity, protest to jurisdiction and the like would likely arise. I also acknowledge that Mr Smith has chosen not to sue foreign governments even if, as a matter of principle, that might have been open to him, at least on the basis of the present pleading.

[51] As Mr Salmon KC, for Mr Smith, submitted, it is now nearly six years since the proceedings were commenced and the trial is only two years away. The present application could have been brought at any point before now. It is clear that further delay and complexity would have a hugely significant impact on Mr Smith and his right of access to justice. The Supreme Court has given a very clear and binding ruling that the proceedings are to continue and there is real force in Mr Smith’s submission that the complexity and uncertainty that my granting the application would likely give rise to would simply overwhelm him and effectively mean that there would never be a trial.<sup>38</sup> He would be denied access to justice. Furthermore, while the facts are yet to be fully tested, in substance, Mr Smith is claiming that he wishes to hold the defendants to account for their emissions before it is too late and irreparable damage ensues.

[52] A further problem that arises, were I to grant the application, is its cascading effect. As Mr Heard submitted, and particularly given the present uncertainty as to which particular third parties might be joined, the scope for multiple and endless joinder/additional party applications (i.e. fourth, fifth, sixth, etcetera parties) must also

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<sup>37</sup> IPCC *Climate Change 2022: Mitigation of Climate Change – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, April 2022) at ch 2.

<sup>38</sup> I record Mr Salmon’s submission that Mr Smith is impecunious and that he is trying to get a trial “during his lifetime”. This is to ensure that he meets his duties as kaitiaki.

be great. To grant the application would, again, in such circumstances, be in breach of the fundamental objective of the High Court Rules, as set out in r 1.2.

[53] For all these reasons, I conclude that the application for leave under r 4.8 of the High Court Rules for an extension of time to issue third-party notices is declined.

### **Application for representative orders**

[54] The first to fifth defendants seek a representative order that all the defendants are sued on behalf of all persons with the same interest and subject matter of the proceeding. They say such an order is necessary to “reflect the true nature” of the plaintiff’s claim and to ensure judicial economy and the expeditious resolution of further proceedings.

[55] Rule 4.24 of the High Court Rules reads:

#### **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.

[56] The Court of Appeal in *Cridge v Studorp Ltd*<sup>39</sup> summarised the principles governing r 4.24 applications:

- (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
- (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter

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<sup>39</sup> *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11] (footnotes omitted), citing *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] NZLR 541; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.

potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.

- (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
- (d) The words “same interest” extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
- (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
- (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
- (g) The court should take a liberal and flexible approach in determining whether there is a common interest.
- (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.

[57] So long as the representative proceeding is not allowed to work injustice, it is now well-established that r 4.24 should be applied liberally and developed to meet modern requirements.<sup>40</sup>

[58] The courts may also give directions as to “the manner in which a representative claim is pursued”.<sup>41</sup> That is, whether the proposed represented parties need to “opt in”, “opt out”, or – really – whether they are represented by operation of a court order regardless of their awareness of the proceeding or willingness to be involved (“a universal ‘order’”).<sup>42</sup> The specified nature of the order is significant and it will have a fundamental impact on the necessary procedural steps.

[59] I accept the defendants’ submission that this application needs to be considered separately from the third-party applications considered above. However, there is significant cross-over between them. In particular, the defendants repeat their

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<sup>40</sup> Jessica Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR4.24.01], citing *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271.

<sup>41</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [25], approving the Court of Appeal’s statement in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [83].

<sup>42</sup> See Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding* (NZLC R147, 2022) at [6.103].

essential contention that the representative order would “reflect the true nature of the proceedings”.

[60] I accept and agree with the submission of the defendants that, because the matter was not before it on the strike-out application, the Supreme Court did not determine the capacity in which the selected defendants are being sued and how this should be recognised under the law of civil procedure in accordance with the overriding objectives. That procedural matter is, I agree, necessarily a matter for the trial court. However, in my view, the Supreme Court clearly anticipated and proceeded on the assumption that Mr Smith was proceeding against particular defendants. Accordingly, I consider that the clear effect of the Supreme Court’s judgment is that the plaintiff, Mr Smith, is able to bring a claim against only the named defendants.

[61] In my view, therefore, the defendants’ application for a representative order effectively seeks to relitigate that same issue. The defendants continue to allege that Mr Smith’s claim is somehow in “substance” a claim against the class which the defendants have proposed.

[62] Mr Smith has brought his claim against the six named defendants only. He says that the relief sought against each is specific and limited to the six. He seeks relief in civil proceedings before this Court, with the overriding objective being the just, speedy and inexpensive determination of proceedings. His right of access to justice to vindicate his rights and seek accountability against the defendants of his choice (where he has conscientiously sought to make a principled distinction between the particular defendants he has named and others) is an important factor in the exercise of my discretion. Again, and for similar reasons given above in relation to the third-party application, my decision to decline to make a representative order will not preclude the defendants from advancing their defence that this remains a non-justiciable claim against the world based on broad non-justiciable policy considerations that cannot realistically and fairly result in declaratory and/or injunctive relief.

[63] I reject Mr Hodder KC’s submission that the representative orders will ensure the trial’s continuing focus “on more than an unprincipled selection of a subset of

emitters”. With or without a representative order, the defendants can continue to advance the principal defence of non-justiciability and fully address the real or central “controversy” as to whether GHG emissions (beyond de minimus) should be categorised as tortious and thus subject to the Court’s control (and management). The defendants are well placed to call evidence and make submissions bearing on the wider policy considerations and it is far from clear, in any event, how a representative order encompassing New Zealand-based emitters, would materially assist in ensuring that all of the relevant policy considerations were before the Court.

[64] In support of their contention that Mr Smith’s claim is already, in substance, a representative claim (both as to plaintiffs and defendants), the defendants contend that Mr Smith’s public nuisance claim – the only cause of action to be given attention in the Supreme Court, and now the only surviving cause of action (save the novel tort claim, which remains inchoate) – is in substance a strict liability claim that does not depend on the specific actions or characteristics of the particular defendants that Mr Smith has selected.

[65] However, that is not how Mr Smith’s claim has been pleaded. The second amended statement of claim expressly refers, in part, to the knowledge of individual defendants and I understand that is directly relevant to the unreasonableness element of the tort. In any event, these are, in my view, all issues for trial. It would be wrong, at this stage, for me to make any definitive ruling on the essential elements of the two torts in question, particularly given the novel circumstances in which they arise. It is, for example, entirely conceivable that, in relation to the inchoate tort at least, the Court might ultimately hold (should it recognise the claim as an actionable wrong) that knowledge is an essential element of the tort.

[66] The defendants submit that if Mr Smith were successful in this proceeding, he (and others) would be able to seek orders against any other New Zealand person who emits as part of commercial profit-making enterprises and whose emissions are significantly greater than the emissions of an ordinary New Zealand citizen. They say that that person would necessarily be liable, meaning that this proceeding has consequences extending far beyond the six individual defendants.

[67] There may be some merit in that submission. However, at this interlocutory stage, it is very difficult to predict the ultimate outcome of the proceeding and/or the consequences if Mr Smith is successful. There is a high degree of uncertainty and I do not see a representative order being made at this stage as being of any real utility or assistance. The issues raised by the defendants are all for the future, once the facts have been tested – and all of these arguments can, as I have emphasised, be made by the defendants in defending the claim generally. They do not need a representative order to do so or to ensure that some material perspective, which would otherwise be absent, is put before the Court.

[68] I accept the defendants' submission that the commonality of interest threshold, which is not high, is made out. As noted above, the courts take a liberal and flexible approach to this issue. However, that factor is a pre-requisite rather than a sufficient ground in or of itself for making a representative order.<sup>43</sup> I must still exercise my discretion to determine whether a representative order is appropriate in the circumstances.<sup>44</sup>

[69] There is, again, a high degree of uncertainty associated with this application. As Mr Smith submits, representative orders are overwhelmingly sought by, and granted in favour of, plaintiffs seeking to bring proceedings representing similarly harmed parties. In the few cases where representative defendant orders have been sought or granted, they tend to have been sought by plaintiffs as a way to manage a large number of defendants they have already sued or intend to sue, often as an answer to difficult joinder questions.<sup>45</sup> It seems that, in most of those cases, relief was sought against each of the represented defendants. They were people the plaintiff was actually suing. As noted, Mr Smith says that is not the case here.

[70] In my view, that fundamental distinction is demonstrated by the following three cases relied upon by the defendants:

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<sup>43</sup> *McGechan on Procedure*, above n 40, at [HR4.24.01]–[HR4.24.06].

<sup>44</sup> *Southern Response Earthquake Services Ltd v Ross*, above n 41.

<sup>45</sup> The Law Commission has also noted “we think it would be unnecessary to bring a case seeking a declaration or injunction that will have general effect as a class action. We see class actions as a form of aggregate litigation that enables many individual claims to be brought together”; Law Commission, above n 42, at [6.130].

- (a) *Talley's Fisheries Ltd v Minister of Immigration*.<sup>46</sup> In that case, the plaintiff challenged the legality of around 4,500 work permits issued by the Minister of Employment to foreign fishing crews. The Court identified that the claim would effectively involve invalidating the permits and, given the direct impact the relief would have on foreign crew (invalidation of their work permits), it was necessary the permit holders were part of the proceeding. The Court held that joinder of 4,500 crew was impractical, so made a representative defendant order.<sup>47</sup> The trigger for orders was the fact that the Court would be ruling on the validity of permits that had been issued to a defined and knowable number of seafarers, under which those seafarers had vested legal rights. The Court held that the presence of a proposed class of permit holders was necessary. Representative orders were a mechanism for bringing those persons before the Court.

[71] In this proceeding, the Supreme Court has already held that the presence of the proposed open class of defendants may not be necessary to adjudicate on the plaintiff's claims.<sup>48</sup> The necessary threshold is not made out here.

- (b) *Tahi Enterprises Ltd v Taua*.<sup>49</sup> The High Court declined the plaintiff's application for orders that the trustees of the Te Kawerau ā Maki Iwi Settlement Trust represent the members of the iwi. The plaintiff sought to bring the claim specifically against the members of the iwi.<sup>50</sup> After its application for a representative order was declined, Tahi sought to join all members of the iwi, either as principals in an agency relationship, or as beneficiaries of a trust. Discovery orders were obtained to identify those necessary additional defendants. The decision to grant those orders was appealed to the Supreme Court. The Supreme Court noted there were a number of difficult questions about

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<sup>46</sup> *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington, CP201/93, 12 October 1993.

<sup>47</sup> *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC) at 470.

<sup>48</sup> *Smith v Fonterra Cooperative Group Ltd*, above n 2, at [164].

<sup>49</sup> *Tahi Enterprises Ltd v Taua* [2018] NZHC 516.

<sup>50</sup> *Taua as trustees of Te Kawerau Iwi Tribal Authority v Tahi Enterprises Ltd* [2021] NZSC 182 at [2].

who was able to represent who.<sup>51</sup> Ultimately the Court considered that, “representation orders may provide the best means of resolving the issues on the appeal”.<sup>52</sup>

[72] I agree with the submission of Mr Smith that *Tahi* is an example of one of the orthodox applications of representative defendant orders – enforcing an obligation owed by an unincorporated body. In *Tahi*, all members of the iwi, who were the represented parties, were actually being sued with the plaintiff. That is not the case here.

(c) *Whakatane District Council v Keepa*.<sup>53</sup> This case concerned the rateability of particular blocks of land of which there were between 500 and 600 owners. Some owners alleged the blocks were exempt from rating. The Council applied to have Mr Keepa nominated as the appropriate representative defendant because serving more than 500 owners directly affected would be “impracticable and inexpedient”.<sup>54</sup> The Council sought directions which, in effect, established that it had the right to levy rates in the Ruatoki lands. That is, it sought relief in respect of each of the represented defendants.

[73] Again, this case is arguably different. Mr Smith, the plaintiff, is suing particular named defendants and disavows the claim that he is also targeting or seeking relief against a wider class.

[74] A key objective of r 4.24, as held by the Court of Appeal in *Simons v ANZ Bank New Zealand Ltd*,<sup>55</sup> is to enhance access to justice by representative and class members in a representative proceeding. The above three cases demonstrate the making of orders to achieve that objective. However, this case is different. In my view, the principle of access to justice would not be enhanced by making a representative order. On the contrary, it would likely add to delay and complexity and thwart Mr Smith in

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<sup>51</sup> At [14].

<sup>52</sup> At [15].

<sup>53</sup> *Whakatane District Council v Keepa* HC Rotorua, M7/00, 27 June 2000.

<sup>54</sup> At [6].

<sup>55</sup> *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] 3 NZLR 485 at [133], citing *Southern Response Earthquake Services Ltd v Ross*, above n 41.

prosecuting the proceeding, without any material advantage to the defendants or the Court in its management of the proceeding.

[75] In my view, most of the authorities demonstrate that representative defendant orders have recognised utility in particular circumstances, such as where the defendant is an association of people without recognised independent legal status, or where named (or intending) defendants would otherwise be unrepresented. There can be a particular utility in answering difficult joinder questions raised by a plaintiff. However, it is a different proposition to make an order that a significant number of parties be represented defendants when they are not defendants, the plaintiff does not intend them to be so, and it is not necessary for them to be before the Court. This must be especially the case where the order is opposed by the plaintiff. The defendants cannot, by a representative order, force Mr Smith to sue people he does not sue or wish to sue.

[76] I acknowledge that in *Credit Suisse v Houghton*<sup>56</sup> the Supreme Court emphasised that, where injustice can be avoided, the rules on representative actions should be applied to promote the expedition and economy of proceedings.<sup>57</sup> I also acknowledge, as the defendants submit, that r 4.24 is agnostic as between plaintiff and defendant. However, expedition and economy do not here favour the granting of the orders sought. On the contrary, to grant the order here would likely give rise to uncertainty, complexity and delay.

[77] The defendants say that it is not necessary for them to have identified who would represent their proposed defendant class. They say that no single defendant needs to do so and that it is common in plaintiff representative class actions to have a number of test cases. In principle, that may be correct, but in the circumstances here, I can see that the resolution of that issue, namely who is to represent the defendant class, would likely lead to significant complexity and delay. As Mr Salmon submitted, what is proposed is a putative group of unknown size, with no data to suggest whether they will cooperate with the defendants or seek to thwart them. There is also the

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<sup>56</sup> *Credit Suisse Private Equity LLC v Houghton*, above n 39.

<sup>57</sup> At [151].

problem that some in the proposed class might seek leave to splinter off and to run their own defences.

[78] For all these reasons, I conclude that the application for a representative order under r 4.24 should be declined.

## **Result**

[79] I make the following orders and directions:

- (a) I decline to make an order determining whether, as a matter of principle, it is properly arguable that the defendants (Fonterra Co-operative Group Ltd, Genesis Energy Ltd, and Dairy Holdings Ltd) are entitled to join to the proceeding, as third parties, overseas entities falling within any of the categories set out in Schedule A of their written submissions.
- (b) I decline the application by those applicants for leave under r 4.8 of the High Court Rules for an extension of time for the applicants to issue third-party notices pursuant to r 4.4 of the High Court Rules.
- (c) I decline the application by the defendants, Fonterra Co-operative Group Ltd, Genesis Energy Ltd, Dairy Holdings Ltd, New Zealand Steel Ltd, and Z Energy Ltd, for a universal representative proceeding order pursuant to r 4.24 of the High Court Rules.

[80] Having successfully defended the applications, I am of the preliminary view that the plaintiff, Mr Smith, is entitled to costs (on both applications) on a 2B basis plus disbursements. If costs cannot be agreed, then memoranda are to be filed by **16 May 2025**.

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**Andrew J**