

## Court of Appeal confirms Southern Response is liable for misleading and deceptive conduct in big win for homeowners

### The Court of Appeal has upheld a decision of the High Court which found Southern Response liable for misrepresentation pursuant to s35 of the Contract and Commercial Law Act 2017, and misleading and deceptive conduct pursuant to s9 of the Fair Trading Act 1986.

Mr. and Mrs. Dodds' home was damaged in the Canterbury Earthquakes and deemed uneconomic to repair. Mr. and Mrs. Dodds elected to proceed with the "Buy Another House" option under their policy. Under this option, Southern Response agreed to pay the purchase price of another house, including all necessary legal and associated fees, up to the cost of rebuilding the Dodds' current house on its present site.

Southern Response provided Mr. and Mrs. Dodds with a Detailed Repair/Rebuild Analysis (**DRA**) which stated it would cost \$894,937 to rebuild their home, when in fact Southern Response had received an alternative DRA which cited the actual cost as being \$1,189,920.75. The alternative DRA included an "Office Use" section which outlined a number of additional costs for internal administration, demolition costs, professional and design fees, project management costs, and project contingency sums. The alternative DRA was not provided to Mr. and Mrs. Dodds, and accordingly they entered into a settlement agreement with Southern Response on the understanding that the estimated rebuild cost of their home was \$894,937. Subsequently Mr. and Mrs. Dodds became aware of the existence of the alternative DRA, and the higher rebuild cost, and commenced proceedings against Southern Response claiming that:

- Southern Response was liable for a misrepresentation that induced them to enter into the settlement agreement, entitling them to

damages under s35 of the Contract and Commercial Law Act;

- Southern Response was liable for misleading and deceptive conduct in breach of s9 of the Fair Trading Act; and
- Southern Response was liable for breach of its implied duty of good faith under the policy.

The High Court found in Mr. and Mrs. Dodds' favour, finding that Southern Response had engaged in misleading and deceptive conduct and had "created a false impression" by providing the abridged DRA and indicating that it was complete, and the only DRA Southern Response had received from Arrow. Having found in the Dodds' favour in respect of these causes of action, the Court declined to make a finding on the claim in respect of a breach of good faith. The Court held Southern Response was liable to the Dodds for damages in the sum of \$178,894.30 being the difference between the actual cost to rebuild their home as set out in the alternative DRA and the lesser sum set out in the abridged DRA, plus interest.

On appeal the Court of Appeal has upheld the decision of the High Court confirming that by concealing the alternative DRA Southern Response is liable for misrepresentation and for misleading and deceptive conduct. This decision is significant as it is estimated there may be as many as 1600 other Southern Response policyholders who may have been misled in the same manner as the Dodds. These homeowners may have equivalent claims against Southern Response, which could expose the Government to significant liability.

The Crown has confirmed Southern Response will not appeal the Court of Appeal decision. In a recent statement, the Hon Grant Robertson confirmed the Government wants to find a "fair and enduring resolution for the outstanding Canterbury earthquake claims" and went on to state that the appeal "was never about Mr. and Mrs. Dodds' individual case, but about needing greater

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clarity from the courts on how to fairly apply the findings to other policyholders in a similar situation."

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