**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA481/2022**
**[2024] NZCA 330**

| | |
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| BETWEEN | ANTHONY PAUL SIMONS<br>First Appellant |
| | ANDREW JOHN BEAVAN AND MEI LIM<br>Second Appellants |
| | PHILIP CHARLES DUNBAR AND SHERYN VALERI DUNBAR<br>Third Appellants |
| | BRUNO ROBERT BICKERDIKE AND EMMA RENAE PUNTER<br>Fourth Appellants |
| | GLENN JONATHAN MARVIN AND ANNA MARY CUTHBERT<br>Fifth Appellants |
| AND | ANZ BANK NEW ZEALAND LIMITED<br>First Respondent |
| | ASB BANK LIMITED<br>Second Respondent |

| | |
|---|---|
| Hearing: | 23 and 24 April 2024 |
| Court: | Cooper P, French and Collins JJ |
| Counsel: | D M Salmon KC, A C van Ammers and S E Russell for Appellants<br>S M Hunter KC, S V A East and S R Hiebendaal for First Respondent<br>J E Hodder KC, K M Massey and Y Li for Second Respondent<br>M G Colson KC for LPF Group Ltd as Intervener |
| Judgment: | 19 July 2024 at 12 pm |

## JUDGMENT OF THE COURT

**A** **The appellants' appeal is allowed in part, insofar as it relates to the High Court's decision to decline to grant a CFO. The remaining grounds of appeal are dismissed.**

**B** **The cross-appeals of the first and second respondents are dismissed.**

**C** **We make the CFOs on the terms sought by the appellants, set out below at [99]–[100], and direct that they are to commence immediately.**

**D** **The respondents together must pay the appellants one set of costs, in respect of the appeal and two cross-appeals, for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.**

## REASONS OF THE COURT

(Given by Collins J)

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## Introduction

[1] The appeal and cross-appeals raise issues about the scope of representative actions and the High Court's jurisdiction to make a common fund order (CFO) in representative proceedings.

[2] In the High Court, Venning J:[1]

(a) Granted the first, third, fourth and fifth appellants (together, the ASB appellants) leave to bring a proceeding against ASB Bank Ltd (ASB), the second respondent, on behalf of themselves and approximately 73,000 ASB customers.[2]

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1 *Simons v ANZ Bank NZ Ltd* [2022] NZHC 1836, [2022] NZCCLR 30 [decision under appeal].
2 At [184].

(b) Granted the second appellants leave to bring a proceeding against ANZ Bank NZ Ltd (ANZ), the first respondent, on behalf of approximately 17,000 ANZ customers who entered into loans between 6 June 2015 and 28 May 2016. Approximately 61,900 ANZ customers who entered into loans with ANZ before that date were excluded from the representative action.[3]

(c) Ruled that the representative proceedings be brought on an opt-out rather than an opt-in basis.[4]

(d) Concluded that the High Court has jurisdiction to make a CFO, but declined the appellants' application to make such an order at this stage. Leave was reserved to renew the application after the completion of the next stage of the proceedings.[5]

[3] The second appellants appeal the decision excluding from the representative proceeding those ANZ customers whose loans commenced before 6 June 2015. All of the appellants appeal the decision declining to make a CFO at this stage of the proceedings.

[4] In its cross-appeal, ASB appeals the decisions we have summarised above at [2(a)] and [2(c)] and the conclusion the High Court has jurisdiction to make a CFO. ANZ also cross-appeals the conclusion that the High Court has jurisdiction to make a CFO.

[5] LPF Group Ltd (LPF), as an intervenor, submitted in support of early-stage CFOs and contended they are necessary to provide the required certainty for litigation funders to fund opt-out proceedings. It did not address the jurisdictional issue.

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3 At [183].
4 At [187].
5 At [183]–[184].

**Structure of this judgment**

[6] The balance of this judgment is structured as follows:

(a) First, we outline the background to these proceedings.

(b) Second, we summarise the appellants' claims.

(c) Third, we canvass the legal context underlying the claims, namely pertinent legislative amendments, and procedural attributes of representative proceedings.

(d) Fourth, we assess the grounds of appeal directed to the representative orders made in the High Court, being:

(i) ASB's challenge to the representative order made in respect of the ASB appellants;

(ii) the second appellants' contention that the High Court Judge erred in declining to extend the ANZ representative class to those affected customers whose loans commenced before 6 June 2015; and

(iii) ASB's contention that, in the event the representative order was not made in error, any representative order should have been made on an opt-in rather than opt-out basis.

(e) Finally, we assess the High Court's jurisdiction to make a CFO and its decision to decline to make a CFO at this stage, namely:

(i) whether the High Court erred in finding that the High Court has jurisdiction to make CFOs in representative proceedings; and

(ii) if the High Court does have jurisdiction to make CFOs, whether it erred in declining to make the CFOs sought by the plaintiffs at this stage of the proceeding.

**Background**

*ANZ*

[7] Between 30 May 2015 and 28 May 2016, ANZ sent loan-variation letters to customers who had a home or personal loan with ANZ and made an agreed change to their loan in this period. The information sent to customers was generated by a software program, which had failed to take into account accrued interest that had not been charged in calculating new repayments or loan terms. As a result, some customers were affected by several errors. ANZ identified the issue in May 2016 and promptly fixed the software program.

[8] On 19 June 2017, ANZ reported to the Commerce Commission that it had misinformed some customers about the terms of their varied loans. It was subsequently recorded in a settlement agreement between ANZ and the Commerce Commission that ANZ accepted that its variation notices breached s 9C(2)(a)(iii) of the Credit Contracts and Consumers Finance Act 2003 (CCCFA). Paragraph (a)(iii) provides that every lender must, at all times:

> (a) exercise the care, diligence, and skill of a responsible lender—
>
> …
>
> (iii) in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee; and

[9] The second appellants took out a home loan with ANZ on 7 August 2015. They borrowed approximately $250,000 over a period of just under 30 years. Initially, they had a floating interest rate of 5.59 per cent. On 23 November 2015, ANZ issued a variation letter lowering the second appellants' interest rate to 4.49 per cent for three years. The ANZ software error resulted in the second appellants being misinformed about the monthly repayments they were required to make, and the final repayment amount that would be required to clear the loan. The miscalculation by ANZ was very

minor ($1.34 per month in relation to Mr Beavan and $1.13 per month in relation to Ms Lim). The second appellants received a total of $927.58 by way of remediation from the ANZ.

[10] We explain, at [24]–[28], the significance of the fact that the second appellants' loan was taken out after 6 June 2015.

*ASB*

[11] In September 2019, ASB notified the Commerce Commission that between 6 June 2015 and 18 June 2019 it had not consistently provided clients with disclosure information required by the CCCFA.

[12] The affected ASB customers fell into two categories. Cohort A comprised 26,088 customers who had taken out loans with ASB before 6 June 2015, but had received at least one variation notice after that date. Cohort B comprised 47,032 customers who had taken out home loans on or after 6 June 2015. They had also received at least one variation notice.

[13] ASB accepted it had breached s 9C(2)(a)(iii) of the CCCFA.

[14] The first, fourth and fifth appellants were members of Cohort B and received $135 by way of remediation. The third appellants came within Cohort A and received $68 from the ASB.

## The claims

[15] The appellants allege the respondents' conduct breached s 22 of the CCCFA. That section states:

> **22 Disclosure of agreed changes**
>
> (1) Every creditor under a consumer credit contract must ensure that disclosure of the following information is made to every debtor under the contract if the parties to the contract agree to change the contract:
>
> (a) full particulars of the change:

(b) any other information prescribed by regulations to be information that must be disclosed under this section.

(2) Disclosure under this section must be made before the change takes effect.

(3) Despite subsection (2), disclosure may, instead of being made in accordance with that subsection, be made in accordance with subsection (4), but only if the change is one that—

(a) reduces the obligations that the debtor would otherwise have, unless the obligations are reduced following an application under section 55; or

(b) extends the time for payment of any payment to be made under the contract, unless the time for payment is extended following an application under section 55; or

(c) releases the whole or any part of a security interest relating to the contract; or

(d) increases or decreases any credit limit under the consumer credit contract.

(4) The disclosure referred to in subsection (3) may be made, at the creditor's discretion, either—

(a) within 5 working days of the day on which the change takes effect; or

(b) if the creditor is required to make continuing disclosure under section 18, at the same time as the creditor provides the debtor with the next continuing disclosure statement (as required under that section) after the change takes effect.

(5) Subsection (4) does not apply to a high-cost consumer credit contract.

*ANZ*

[16] The second appellants contend that they and other affected ANZ customers are not liable for the costs of borrowing in relation to loans that were the subject of noncompliant variation notices issued after 6 June 2015. This part of the second appellants' claim is based on s 99(1A) of the CCCFA, which provides:

(1A) Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22.

[17] The second appellants also plead that other affected ANZ customers are not liable for costs of borrowing for any period that ANZ was in breach of s 22 in relation

to loans taken out before 6 June 2015. This part of the second appellants' claim relies on s 99(1) of the CCCFA, which provides:

> (1) If disclosure is required under section 17 or section 22, no person (other than a debtor under the consumer credit contract) may, before that disclosure is made,—
>
> (a) enforce the contract; or
>
> (b) enforce any right to recover property to which the contract relates; or
>
> (ba) enforce any right in relation to the costs of borrowing; or
>
> (bb) require the debtor or any other person to make a full prepayment or a part prepayment on the basis of a failure by the debtor or other person to pay the costs of borrowing; or
>
> (c) enforce any security interest taken in connection with the contract.

[18] In addition, the second appellants maintain that ANZ is required to refund them and other affected ANZ customers the costs of borrowing paid by them during the period that ANZ issued defective variation notices. This part of the second appellants' claim relies on s 48 of the CCCFA, which states:

> **48 Recovery of payments**
>
> (1) If a debtor makes any payment to a creditor that, by virtue of this Act, the creditor is not entitled to receive, the creditor must, as soon as practicable,—
>
> (a) refund the payment to the debtor; or
>
> (b) credit the payment against any amount otherwise owing by the debtor to the creditor.
>
> (2) Subsection (1) applies despite any agreement to the contrary.

[19] Sections 93 and 94 of the CCCFA are also relevant to s 48. The key parts of those sections provide:

> **93 Court's general power to make orders**
>
> The court may make all or any of the orders referred to in section 94 if the court finds that a person (whether or not that person is a party to any proceedings) has suffered loss or damage by conduct of any creditor, creditor's agent, lessor, transferee, buy-back promoter, paid adviser, or broker that constitutes, or would constitute,—

…

(a) a breach of any of the provisions of Part 2, 3, 3A, or 5A:

…

**94 Court orders**

(1) The types of orders that the court may make against the person who engaged in the conduct referred to in section 93 are as follows:

(a) an order directing the person to refund or credit a payment in accordance with section 48:

…

[20] The second appellants also seek an award of statutory damages under s 90 of the CCCFA. Such an award may be made via ss 88 and 89 for breaches of s 22 of the CCCFA.

[21] The relief sought by the second appellants is:

(a) a declaration the loan-variation letters did not comply with s 22 of the CCCFA;

(b) a declaration that ANZ breached s 48 of the CCCFA by failing to fully refund or credit the affected ANZ customers the costs of borrowing paid by them during the period that ANZ issued defective variation notices;

(c) a declaration that where a breach of s 22 is established, including ss 99(1A) and/or 99(1) and s 48, and ANZ has not complied in full with s 48, a claimant is entitled to orders under s 94(1)(a), requiring ANZ to refund or credit all costs of borrowing received by ANZ during the period it was in breach of s 22;

(d) an order pursuant to ss 93(a) and 94(1)(a) of the CCCFA, that ANZ is to fully refund or credit the payments made by affected ANZ customers;

(e) to the extent this Court declines to make the above order, further orders under s 90 of CCCFA directing ANZ to pay the affected ANZ customers statutory damages under ss 88(1)(b) and (89)(1)(d) of the CCCFA; and

(f) interest.

*ASB*

[22] The claims by the ASB appellants are similar to those brought by the second appellants against ANZ. In summary, the ASB appellants plead:

(a) ASB breached s 22 of the CCCFA by not providing them and other affected ASB customers with accurate variation disclosure notices.

(b) Pursuant to s 99(1A), they and other affected ASB customers are not liable for the costs of borrowing for any period that ASB was in breach of s 22 after 6 June 2015.

(c) Pursuant to s 99(1), they and other affected ASB customers are not liable for the costs of borrowing in relation to any periods ASB was in breach of s 22 in respect of loans taken out before 6 June 2015.

(d) Pursuant to s 48, ASB is required to refund the payments made during the period that ASB breached s 22 of the CCCFA.

[23] The ASB appellants seek the same relief as the second appellants' claim in relation to the ANZ.

**Context underlying the claims**

*6 June 2015 amendments to the CCCFA*

[24] As we have noted at [16]–[19], the second appellants allege that when ANZ breached s 22 of CCCFA, the effect of ss 48, 99(1) and 99(1A) of the CCCFA is to absolve affected ANZ customers of any obligation to pay interest or other costs of borrowing during the period in which ANZ was in breach.

[25] Section 99(1A) took effect from 6 June 2015 and only applies to variations to loans taken out on or after that date.[6] Prior to the new iteration of s 90(3) coming into force on 6 June 2015, s 90(3) of the CCCFA provided that claims for statutory damages based upon a breach of s 22 are subject to a three-year limitation period starting on the date "when the matter giving rise to the application occurred".[7] Post-amendment, however, the three-year limitation period starts when "the matter giving rise to the breach was discovered or ought reasonably to have been discovered".

[26] As we have noted at [9], the second appellants took out their home loan with ANZ on 7 August 2015. The proceeding was commenced on 25 June 2021.

[27] At this juncture, ANZ does not contest that the second appellants' claim under s 99(1A) has been brought within time. ANZ challenges, however, the standing of the second appellants to represent approximately 61,900 ANZ customers who entered their ANZ loan contracts prior to 6 June 2015.

[28] As we have noted at [2], Venning J agreed with ANZ that the second appellants could not represent ANZ customers who took out their loan prior to 6 June 2015 because to do so would deny ANZ the ability to rely on the three-year limitation period set out in s 90(3) of the CCCFA.[8]

*Staged hearings*

[29] It is often the case in representative proceedings that some issues can only be resolved on an individual basis. In such cases, issues may be the subject of staged hearings with common issues being resolved before the court determines issues on an individual basis.[9]

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6 Credit Contracts and Consumer Finance Amendment Act 2014, s 64(2).

7 Both before its amendment and presently, s 90(1) of the Credit Contracts and Consumers Finance Act 2003 [CCCFA] provides that a court may make an order for any specified party to pay statutory damages payable under s 88. Damages payable under s 88(1)(b) include breaches of s 22.

8 Decision under appeal, above n 1, at [138] and [183].

9 See for example *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [55] per Elias CJ and Anderson J and [129]–[131] per McGrath, Glazebrook and Arnold JJ; *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [13]–[14]; *Cridge v Studorp Ltd* [2017] NZCA 376 , (2017) PRNZ 582 at [11(e)]; and *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [36].

[30] In *Saunders v Houghton*, this Court said that a claim for damages could involve a representative plaintiff seeking a declaration as to liability at a common issues hearing followed by individual hearings to determine damages.[10]

[31] The appellants currently propose a set of common issues be determined at a first-stage hearing. The plaintiffs' proposed common issues are annexed.

*Litigation funders*

[32] Two litigation funders are involved in funding the appellants' proceeding:

(a) LPF, and

(b) CASL Management Pty Ltd (CASL).

[33] As noted at [5], LPF was granted leave to intervene in the appeal in relation to issues concerning the making of a CFO. We will return to those issues when discussing the appeals and cross-appeals arising from the order we have summarised at [2].

**Representative proceedings**

[34] We turn to address the grounds of appeal directed to the representative orders made in the High Court. We set out the law pertaining to representative orders, before assessing the issues on appeal and cross-appeal.

[35] Rule 4.24 of the High Court Rules 2016 confers jurisdiction on the High Court to make representative orders. That rule states:

> **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

[10] *Saunders v Houghton*, above n 9, at [14], citing *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC) at 446.

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

[36] The principles governing an application under r 4.24 were summarised by French J on behalf of this Court in *Cridge v Studorp Ltd.*[11] Those principles are:[12]

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

(c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.

(d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.

(e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.

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

(g) The court should take a liberal and flexible approach in determining whether there is a common interest.

(h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.

(i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

[37] We now examine in more depth several of the key principles underlying representative proceedings.

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11 *Cridge v Studorp Ltd*, above n 9.

12 At [11] (footnotes omitted).

*Expedition and judicial economy*

[38] In *Credit Suisse Private Equity LLC v Houghton*, the Supreme Court examined the interrelationship between representative orders under r 4.24, and the limitation periods under the Limitation Act 1950 and the Fair Trading Act 1986.[13] The following points were made by Glazebrook J when writing for the majority:

(a) The principal purpose of a representative proceeding is the promotion of efficiency and economy of litigation. The whole point of having a representative proceeding is to avoid clogging the courts with a multiplicity of individual proceedings covering the same subject matter which would undermine the efficiency and economy of litigation.[14]

(b) Flexibility in the application of r 4.24 accords with the modern approach to representative proceedings, and the rule should be applied to ensure that the overall objective of the High Court Rules outlined in r 1.2 is achieved.[15]

(c) Where injustice can be avoided, the rules should be applied to promote the expedition and economy of proceedings.[16]

*Each represented participant must have a right of action*

[39] In *Saunders v Houghton*, this Court said that to bring a representative action, it was a fundamental requirement that the representative order not confer a right of action on a member of the class represented who could not have asserted their claim in a separate action.[17] The rationale is self-evident. A representative proceeding cannot confer a right of action to which a represented person is not entitled.

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13 *Credit Suisse Private Equity LLC v Houghton*, above n 9, at [125]–[129] per McGrath, Glazebrook and Arnold JJ.

14 At [147] and [158] per McGrath, Glazebrook and Arnold JJ.

15 At [129]–[130] per McGrath, Glazebrook and Arnold JJ.

16 At [151] per McGrath, Glazebrook and Arnold JJ, citing *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 270–271.

17 *Saunders v Houghton*, above n 9, at [13].

*A defendant should not be denied a legitimate defence*

[40] The converse also applies. A representative order cannot be made if the effect of such an order is to deprive a defendant of a defence.[18] The principle that a representative action should not be permitted if allowing such an action would cause injustice to a defendant was referred to by the Supreme Court in *Credit Suisse Equity LLC v Houghton*. When considering the risk of injustice to a defendant the majority endorsed the following observations:[19]

> 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 rules should be applied and developed to meet modern requirements. …

*The same interest*

[41] The "same interest" requirement of r 4.24 is a relatively low hurdle.[20] The rule "does not require identity of claim or even the same cause of action". As the language of r 4.24 indicates, it is enough that there is "the same interest in the *subject matter* of the proceeding".[21]

[42] We discuss the leading authorities concerning the same interest test when analysing ASB's appeal against the High Court orders allowing the representative action against that bank at [47]–[66].

*Opt-out representative orders*

[43] In *Ross v Southern Response Earthquake Services Ltd*, this Court held the High Court has jurisdiction to make representative orders under r 4.24 on an opt-out

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18 *Credit Suisse Private Equity LLC v Houghton*, above n 9, at [131] per McGrath, Glazebrook and Arnold JJ, citing *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 422 per Toohey and Gaudron JJ

19 *Credit Suisse Private Equity LLC v Houghton*, above n 9, at [130] per McGrath, Glazebrook and Arnold JJ, citing *R J Flowers Ltd v Burns*, above n 16, at 271.

20 *Cridge v Studorp Ltd*, above n 9, at [11(c)], [11(d)] and [11(h)], citing *Saunders v Houghton*, above n 9, at [12] and [38].

21 *Credit Suisse Private Equity LLC v Houghton*, above n 9, at [55] per Elias CJ and Anderson J (emphasis in original).

or an opt-in basis.[22] In allowing representative proceedings to be brought on an opt-out basis, the Court said:

> [81] We are satisfied that there is no jurisdictional barrier to the making of an opt out order under r 4.24. The rule clearly authorises a representative plaintiff to bring proceedings on behalf of other persons with the same interest in the subject matter of a proceeding without first obtaining their consent. That is precisely what paragraph (b) of the rule contemplates. … Although a person normally needs to consent to become a plaintiff in proceedings before a New Zealand court, r 4.24 and its precursors are a longstanding exception to that principle.
>
> …
>
> [83] … [Rule] 4.24(b) provides that a claim may be brought "as directed by the court". That is, the provision expressly contemplates that the court may give directions in relation to the manner in which the representative claim is pursued. We consider that the making of both opt out and opt in orders comes within that power.

[44] Access to justice was recognised as a guiding principle when authorising representative proceedings on an opt-out basis. The Court said:[23]

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

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22 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [81]–[83].

23 Footnotes omitted.

> courts, and of the possibility of obtaining some form of relief if their rights have been infringed.

[45] The Supreme Court also emphasised access to justice when dismissing an appeal by Southern Response Earthquake Services Ltd, noting that "an opt out approach has advantages in improving access to justice".[24]

[46] The following general observations were made by the Supreme Court about the exercise of the jurisdiction to authorise opt-out proceedings:[25]

> [95] First, generally, the court should adopt the procedure sought by the applicant unless there is good reason to do otherwise. We see no basis in policy or practical terms for not adopting that course so long as the court turns its mind to all of the relevant factors. …
>
> …
>
> [97] Second, in terms of departures from this starting point, where there is a real prospect some class members may end up worse off or adversely affected by the proceeding, that favours an opt in approach. Cases where there is a counterclaim or the potential for one to emerge would fall into this category.
>
> [98] Given the objectives of a representative proceeding, class size will have some relevance. In particular, an opt in approach may be the preferable option where the class is small. By that we mean where the number of members in the class is small relative to other claims and there is a natural community of interest, or, as the Court of Appeal put it, a "pre-existing connection". … That said, class size will not necessarily be determinative.
>
> …
>
> [100] Third, … a universal approach may be appropriate where the only relief sought is declaratory or injunctive and where the outcome will affect all class members identically. That is because in those cases it may be impractical, and indeed sometimes almost impossible, to provide the necessary notice for either an opt in or opt out approach. …
>
> [101] Finally, applications under r 4.24 should include proposed conditions as to the court's supervision of settlement and discontinuance. … As we have noted, the Court of Appeal in this case added a requirement that the plaintiffs seek the court's leave to settle the claim or to discontinue it. … [We] endorse that approach.

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[24] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [40] per Ellen France J.

[25] Footnotes omitted.

## The ASB representative order

*High Court decision*

[47] As we have noted at [2], Venning J decided that the ASB appellants and the members of the ASB representative class had sufficient common interest in the subject matter of the proceeding to justify making a representative order.[26] The same conclusion was reached in respect of the second appellants and other affected ANZ customers whose loans commenced after 6 June 2015.[27]

[48] The principal reasons for the High Court deciding that representative claims could be brought against both banks were recorded in the following way:

> [95] There will be a substantial number of customers of the Banks during the relevant periods who, in the case of the ANZ, received information regarding their loans following an agreed change which was incorrect and, in the case of the ASB, may not have received the variation disclosure required under s 22. At a general level those customers will all have the same or common interest in clarifying the obligations of the Banks in giving variation disclosure under s 22 of the CCCFA and relevantly, in the event of a breach of the obligations under s 22, whether as a result the Banks are prima facie (and dependent on the customers' individual circumstances) required to repay the costs of borrowing paid during that period. To that extent there is a class of customers who will have the same interests.
>
> [96] The fact that in the case of the ANZ, for example, the information may have been incorrect in a number of different ways, for example, as to the total amount of interest payable, the amount of the new regular payment or the total number of payments or the date of final payment does not of itself count against a representative order. The Court's detailed consideration of the form and extent of disclosure required to comply with s 22 in the case of the second plaintiffs, for example, will necessarily involve consideration of those issues.
>
> [97] The Banks' obligations under s 22 and/or potential liability to repay the plaintiffs will be resolved at the stage 1 hearing. I do not consider it fatal to the plaintiffs' application for representative orders that second or even further stage hearings may be necessary at which consideration of the individual circumstances of the different claimants will have to be considered to respond to, for example, the points regarding discretionary relief made by the defendants. …
>
> [98] Nor do I consider it particularly an issue that the current representative plaintiffs had home loans whereas they also seek to represent customers with personal loans as well. … [T]here is more similarity in the case of home and personal loans (in relation to the Bank's obligations under s 22 of the CCCFA)

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26 Decision under appeal, above n 1, at [184].
27 At [183].

> than there was between the rebuild and repair home owners under the insurance policies in *Ross*.

[49] Venning J considered that ASB's concern that claims may be made by customers who did not have a consumer credit contract could be conveniently resolved at the stage-two hearing.[28]

*ASB's appeal*

[50] Mr Hodder KC accepted on behalf of ASB that r 4.24(b) requires the flexible and liberal approach endorsed by the Supreme Court in *Southern Response Earthquake Services Ltd v Ross*.[29]

[51] However, Mr Hodder submitted that the representative order should not have been made in this case because the fundamental requirements for a representative proceeding were not satisfied. In particular, the requirements are that class members have the same interest, the class be clearly defined and the claims be properly particularised at the outset. He emphasised that the "efficiencies of aggregation" sought from a representative proceeding will not be achieved.

[52] Mr Hodder contended that the core issue is whether or not ASB breached s 22 of the CCCFA. He argued this is:

> … not an issue that can be determined on a class wide basis … There is no requisite same interest across the proposed opt out class, and the proposed class itself is inherently indeterminant, as it is only identifiable by the result of the proceeding, which result cannot be determined on a class wide basis. …

[53] Mr Hodder maintained that absent a proper application of the fundamental requirements for a representative proceeding, ASB will be left facing an indeterminate claim on behalf of an unidentifiable number of customers.

[54] He also submitted that ASB customers would be unable to determine whether they are part of the proposed claim. That uncertainty would continue even after the stage-one common issues were determined. As those common issues would not result

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28 At [99].

29 *Southern Response Earthquake Services Ltd v Ross*, above n 24.

in any class-wide findings of breach, they would not determine which customers were within the proposed class definition.

[55] Mr Hodder submitted that the parameters and membership of a class cannot depend upon the outcome of the proceedings, relying on the judgments of the Court of Appeal of England and Wales in *Emerald Supplies Ltd v British Airways plc*,[30] the United Kingdom Supreme Court in *Lloyd v Google LLC*,[31] and the Supreme Court of Canada in *Western Canadian Shopping Centres Inc v Dutton*.[32] Mr Hodder submitted this is the effect of allowing the ASB representative proceedings to continue pending the High Court making declarations as to the meaning of s 22 of the CCCFA.

*ASB appellants' response*

[56] The response from the ASB appellants is that the class is adequately defined by reference to the following facts:

(a) All of the ASB claimants had one or more ASB loans during the relevant period.

(b) ASB made one or more agreed variations to the ASB claimants' loans during the relevant period.

(c) ASB failed to provide the claimants with disclosure under s 22 of the CCCFA in relation to one or more of the agreed variations to their loans (the third criterion).

[57] The ASB appellants reject the contention that an alleged breach of s 22 is, in itself, insufficient to meet the requirements of r 4.24. Rather, Mr Salmon KC, on behalf of the ASB appellants, contended that there should not be an absolute rule that a representative action can never proceed where the class definition cannot be applied from the outset. In the context of this particular case, it would be possible to apply the third criterion relatively early in the proceedings. This is because the High Court will

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30 *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, [2011] 2 WLR 203.
31 *Lloyd v Google LLC* [2021] UKSC 50, [2022] AC 1217.
32 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534.

be asked to rule on the meaning of s 22 of the CCCFA at an early stage. Mr Salmon contended that at that point it will be possible to compare what ASB was required to provide in relation to each loan variation notice against the information it did provide. This exercise was described by Mr Salmon as being "essentially a matter of data analysis".

*Analysis*

[58] Although we have some sympathy for Mr Hodder's argument that ASB should not, at the commencement of the proceeding, be unaware of the perimeter and size of the representative class, we do not think that concern justifies reversing the ASB representative order. Our reasons for reaching this conclusion can be summarised in the following way.

[59] First, we are satisfied that the ASB representative class satisfies the "same interest" test and that the making of an order under r 4.24 was justified. All members of the class:

(a) held loans with ASB that were required to be the subject of variation notices during the relevant period; and

(b) share a common interest in resolving the meaning of s 22 of the CCCFA so as to determine whether or not their claims can continue.

In this respect, all members of the ASB representative class have "a significant common interest in the resolution of [a] question of law … arising in the proceeding".[33]

[33] *Cridge v Studorp Ltd*, above n 9, at [11(d)].

[60] Second, allowing ASB's appeal at this juncture risks offending a key principle that underpins r 4.24, namely access to justice.[34] As this Court said in *Cridge v Studorp Ltd*:[35]

> Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.

[61] Third, although ASB will face considerable logistical challenges in determining which of its customers qualify for the class action, it will not suffer injustice or be denied a viable defence of their claim. In this respect, ASB is in a different position to ANZ because the ASB appellants include people whose loans were taken prior to 6 June 2015. We will return to this point when examining the ANZ representative order.

[62] Fourth, *Emerald Supplies v British Airways* is readily distinguishable from the current proceedings. Unlike in the present case, there was no intermediate hearing proposed in *Emerald Supplies*. Instead, in that case, members of a class would only be determined at the final stages of the proceeding after issues of liability had been settled. It is also significant that, unlike in *Emerald Supplies*, ASB has accepted it was in breach of s 9C(2)(a)(iii) of the CCCFA. It acknowledges that it failed to ensure that the required variation disclosure was given in all instances where it was necessary during the relevant period.

[63] The United Kingdom Supreme Court in *Lloyd v Google LLC* endorsed the general principle articulated in *Emerald Supplies* that "membership of the class should not depend on the outcome of the litigation".[36] However, the Court also said that:[37]

> … while it is plainly desirable that the class of persons represented should be clearly defined, the adequacy of the definition is a matter that goes to the court's discretion in deciding whether it is just and convenient to allow the claim to be continued on a representative basis rather than a precondition for the application of the [equivalent rule to r 4.24(b)].

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34 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [100(i)]; affirmed *Saunders v Houghton*, above n 9; and *Credit Suisse Private Equity LLC v Houghton*, above n 9. 35 *Cridge v Studorp Ltd*, above n 9, at [11(b)].

35 *Cridge v Studorp Ltd*, above n 9, at [11(b)].

36 *Lloyd v Google LLC*, above n 31, at [78].

37 At [78].

[64] We do not think that the general principle endorsed in *Lloyd* is at risk of being breached by allowing the representative claim to proceed to the next stage of hearing in its current form. The High Court's interpretation of s 22 of the CCCFA will substantially define the scope and membership of the representative class and in many cases may prove to be dispositive of claims. We think this approach is consistent with that described in *Lloyd* — the nature of this proceeding is such that it is just and convenient to allow the claim to continue on a representative basis.[38]

[65] Similarly, we do not accept that the judgment of the Supreme Court of Canada in *Western Canadian Shopping Centres Inc v Dutton* supports ASB's position. In that case, the Court was satisfied that the basic conditions for a class action were satisfied.[39] While there were differences between the claims of members of the class, they nevertheless "raise[d] essentially the same claim requiring resolution of the same facts". The Court observed that if material differences emerged between the claims of those in the representative class, the trial court could deal with those issues at the appropriate time.[40] That approach closely resembles that taken by Venning J in the present case.

[66] Aside from the logistical challenges facing ASB, there is no reason in principle why the reversal of the ASB representation order is justified. We dismiss this aspect of ASB's cross-appeal.

**Second appellants' appeal concerning ANZ customers whose loans commenced prior to 6 June 2015**

[67] We have explained at [2] and [28] that Venning J denied the second appellants' application to represent affected ANZ customers whose loans commenced before 6 June 2015 because to do so would deny ANZ the ability to strike out those claims on the basis they breached the three-year limitation period set out in s 90(3) of the CCCFA.

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38 At [78].
39 *Western Canadian Shopping Centres Inc v Dutton*, above n 32, at [57].
40 At [54].

*Second appellants' case*

[68] The second appellants contended that Venning J erred when he declined to extend the ANZ representative class to those affected customers whose loans commenced before 6 June 2015.

[69] In summary, Mr Salmon submitted:

(a) The second appellants, and those ANZ customers whose loans commenced before 6 June 2015, have the same interest in a set of common issues that the High Court will be asked to determine at the stage-one hearing.

(b) After that stage, the ANZ customers will be divided into two categories: those whose loans commenced before 6 June 2015; and those whose loans commenced after that date.

(c) Determination of the class common issues at stage one will materially advance and could be dispositive of claims by those customers whose loans commenced before 6 June 2015.

(d) ANZ will not be deprived of the ability to strike out claims on limitation grounds. At worst, ANZ may not be able to pursue its limitation defences in respect of customers whose loans commenced before 6 June 2015 until after stage one.

*ANZ's case*

[70] Mr Hunter KC submitted that those ANZ customers whose loans were commenced before 6 June 2015 are clearly timed barred because the loan-variation letters were sent, at the latest, on 28 May 2016, while the proceedings were not commenced until 25 June 2021, almost five years after the loan variation notices were issued.

[71] Mr Hunter emphasised that if any ANZ customers whose loans commenced before 6 June 2015 had brought a separate claim, ANZ would already have applied to strike it out.

[72] ANZ says it cannot raise the s 90(3) CCCFA limitation defence against the second appellants because their loan was taken out on 7 August 2015, and it firmly rejects the notion that its limitation defence can be pursued at a later stage of the proceeding.

*Analysis*

[73] When this issue was considered in the High Court, Mr Salmon said the appellants "could add further ANZ plaintiffs who had an existing loan prior to 6 June 2015 for the purposes of the stage 1 proceeding".[41]

[74] It is instructive that despite suggesting the possibility of adding more ANZ plaintiffs, no ANZ customers whose loans commenced before 6 June 2015 have been added as plaintiffs to the proceeding. We infer that the reason for this is that if a pre-6-June-2015 ANZ plaintiff was added to the proceeding, ANZ would promptly move to strike out that claim under s 90(3) of the CCCFA.

[75] Rather than risk that course of action, the second appellants continue to seek to represent ANZ customers whose loans were taken out before 6 June 2015.

[76] Allowing the second appellants to represent ANZ customers whose loans commenced before 6 June 2015 offends one of the basic tenets of representative orders. As we explained at [40], a representative order cannot be made if its effect would be to deprive a defendant of a valid defence.

[77] In this case, allowing the second appellants to represent ANZ customers whose loans commenced before 6 June 2015 puts ANZ in an impossible position. If the second appellants' appeal succeeds, ANZ cannot seek to strike out the second appellants' proceeding on the basis that the proceeding breaches the limitation period

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41 Decision under appeal, above n 1, at [63].

in s 90(3) of the CCCFA because that section does not apply to the second appellants' proceeding.

[78] On its face, s 90(3) of the CCCFA constitutes a genuine impediment to ANZ customers whose loans commenced before 6 June 2015. Allowing the second appellants to shield other ANZ customers whose loans commenced before 6 June 2015 from a strike-out application under s 90(3) would constitute a grave misuse of r 4.24(b).

[79] We are therefore satisfied that the High Court was correct when it limited the second appellants' representative order to ANZ customers whose loans commenced after 6 June 2015. We dismiss this aspect of the second appellants' appeal.

**Should the representative order have been made on an opt-in rather than opt-out basis?**

*ASB's case*

[80] ASB contends that any representative order should have been made on an opt-in rather than opt-out basis.

[81] Mr Hodder submitted that an opt-in representative order would enable:

(a) a clearer understanding of the class, or at least who the members of it are;

(b) class members to confirm that their loans were consumer credit contracts within s 11 of the CCCFA (which depends on those customers' intentions when borrowing);

(c) class members to provide their informed authorisation of disclosure of their personal banking information to the Representative Plaintiffs and their funders;

(d) class members to agree to the terms of the funding arrangements;

(e) the Court and parties to consider and determine the issues that would need to be addressed to enable the substantive advancement and resolution of those claims as a representative proceeding; and

(f) the proper procedural management of the proceeding in light of the parties and issues before the Court, including the determination of relevant sub-groups and issues without the need for a multi-stage, iterative process.

[82] Mr Hodder said these considerations point to an opt-in process being significantly more appropriate to the circumstances of this case.

*Appellants' case*

[83] Mr Salmon submitted there are compelling access to justice factors that point towards an opt-out approach in this instance: "many more class members will have their claims heard and determined if opt out orders are made".

[84] In response to the specific concerns raised by Mr Hodder which we have set out at [81], Mr Salmon maintained:

> (a) An opt in approach will not clarify who is in the class unless members are properly identified. … [T]hat is not likely to be practical and should not be necessary at this stage.
>
> (b) … [C]lass members can confirm their loans were consumer credit contracts at stage 2. They can authorise the provision of their information to the plaintiffs … at the same time.
>
> (c) There is no reason why the Court and parties cannot consider and determine the issues that need to be addressed to substantively advance the proceeding or identify subgroups in an opt out proceeding.

*Analysis*

[85] As the Supreme Court noted in *Southern Response Earthquake Services Ltd v Ross*:[42]

> (a) the court should generally adopt the procedure sought by the applicant unless there is good reason to do otherwise; and
>
> (b) opt-out orders are likely to be more appropriate than opt-in orders where the class is large.

[86] The reasoning of this Court in *Ross v Southern Response Earthquake Services Ltd* when authorising an opt-out representative order is apposite to this case.[43]

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42 *Southern Response Earthquake Services Ltd v Ross*, above n 24, at [95], [102]–[103] and [108] per Ellen France J.

43 See *Ross v Southern Response Earthquake Services Ltd*, above n 22, at [97]–[110] and [112]-[119].

An opt-out approach will significantly enhance access to justice as many class members are unlikely to take the positive steps required to participate in opt-in proceedings. Their inaction may be due to administrative challenges in serving them with an opt-in notice, or in them understanding what action they are required to take. Further:[44]

> Even where a class member considers that it is in their interest to participate in the proceedings, the significance of inertia in human affairs should not be underestimated. If there is some potential advantage for class members in participating in the proceedings, and no real prospect of any disadvantage, then it should be made as easy as possible for them to participate.

[87] Significantly, in these proceedings there are no genuine disadvantages to class members in the court directing representation on an opt-out basis.

[88] We do not accept that at this stage that an opt-in approach will more accurately identify who should be in the class. The practical reality is that an opt-in order will reduce the size of the class, but only because many of those entitled to join the class will not take the necessary steps to opt in. The opt-in approach has the effect of frustrating access to justice by placing unnecessary hurdles in front of those who are entitled to be members of the representative class.

[89] We also agree with Venning J when he said that class members can confirm their loans were credit contracts at stage two of the proceedings.[45]

[90] Nor do we see merit in Mr Hodder's submission that the opt-out approach will hinder the court and parties in determining the issues which must be addressed to advance this litigation. There is, as Mr Salmon submitted, no reason why the court and parties cannot, in an opt-out proceeding, identify the issues that need to be addressed to progress the litigation.

[91] We are therefore satisfied Venning J was correct when he ordered the representative proceedings be conducted on an opt-out basis. We dismiss this aspect of ASB's cross-appeal.

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44 At [98] (footnote omitted).
45 Decision under appeal, above n 1, at [99].

**Common fund orders**

[92] We now turn to the grounds of appeal directed to the High Court's jurisdiction to make a CFO and its decision to decline to make a CFO at this stage. In essence, the appellants submit that the courts have jurisdiction to make CFOs, and that this Court should exercise that jurisdiction and make CFOs now. ANZ submits that the courts cannot, or alternatively should not, make a CFO. ASB adopts ANZ's submissions.

[93] It is common ground that the High Court judgment is the first New Zealand decision to confirm the High Court's jurisdiction to make a CFO. CFOs are a mechanism which provide a way of sharing the costs of bringing a class action between all class members, regardless of whether they have signed the funding agreement.[46]

[94] A CFO is made on the application of a representative party who is in a contractual relationship with a litigation funder. The terms of the contract between the representative party and litigation funder require the litigation funder to bear the costs of the representative action. A CFO imposes the payment terms agreed between the litigation funder and representative plaintiffs on all class members, obliging the representative party and all members of the class to bear a specified proportionate share of the money that will be paid to the litigation funder from the proceeds recovered in the proceedings.[47] The litigation funders entitlement is a first priority on any monies received. Where CFOs are made, the court retains a supervisory role to ensure the interests of justice are upheld between the litigation funder and those who benefit from the litigation.

[95] CFOs were developed to address the "free rider" issue.[48] Prior to CFOs, members of a class who had not signed up to the funding agreement with the litigation funder were able to enjoy the fruits of a successful outcome even though they had not contributed to the costs of the litigation.

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46 Te Aka Matua o te Ture | Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa — Class Actions and Litigation Funding* (NZLC R147, 2022) at [9.3].

47 At [9.4], citing Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (Senate Printing Unit, Parliament House, Canberra, 2020) at [9.6]; and *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574 at [1], [135] and [178].

48 See *BMW Australia Ltd v Brewster*, above n 47, at [132] per Gordon J, referring to *Perera v GetSwift Ltd* (2018) 263 FCR 1, 357 ALR 586 at [25].

[96] CFOs can be distinguished from Funding Equalisation Orders (FEOs), under which an amount paid to non-funded members of a class is deducted from any sums recovered in the representative proceeding and distributed pro rata amongst all class members. The litigation funder does not, however, receive any payment on account of non-funded members of the class. Thus, while FEOs achieve equity between members of the class, a litigation funder is unable to collect any commission in relation to monies paid to unfunded class members.[49]

[97] Mr Newland, the founder and director of LPF, said in his affidavit that:

> 49. The reasons [for seeking opt-out orders in combination with CFOs] are that:
>
> …
>
> (d) Opt out orders without associated Common Fund Orders would not be commercially acceptable to LPF. Without Common Fund Orders, class members who had not accepted the terms of LPF's funding agreements could not be obliged to contribute to LPF's costs and remuneration notwithstanding that no recovery from the defendants would otherwise have been possible. Such an outcome would be unjust for those class members who had agreed to contribute, incentivise class members to withhold consent to LPF's funding agreement, and introduce a level of risk and uncertainty which would require LPF to reassess the basis upon which it was prepared to fund the litigation, or even whether it was prepared to at all.
>
> …
>
> 51. The considerations that affect the level of the remuneration that LPF (or any litigation funder in the market) would charge include the:
>
> (a) Risks inherent in the nature of the litigation that LPF is taking on.
>
> (b) Risks inherent in recovering a judgment entered against the defendants.
>
> (c) Level of investment which LPF might have to make to meet the costs of the litigation.
>
> (d) Time it might take for a return on that investment, including possible appeals.

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[49] See *BMW Australia Ltd v Brewster*, above n 47, at [134] per Gordon J, citing *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 338 ALR 188 at [5].

(e) The costs to be incurred by LPF in investigating the matter and managing the case.

52. Uncertainty associated with LPF's ability to recover against the proceeds of successful litigation after it has accepted the risks and costs described above would be of significant concern to LPF's board. This is not a risk that LPF would be prepared to accept in the usual course.

[98] While Mr Hunter submitted LPF overstated the risk of it not funding the representative proceeding in the absence of a CFO, there was no evidence challenging Mr Newland's concerns.

**The CFOs sought by the appellants**

[99] The CFO sought by the second appellants is as follows:

1. If the second plaintiffs' (the ANZ representative plaintiffs) representative action against ANZ Bank New Zealand Limited (ANZ) ([insert CIV)] is settled with or judgment is entered against ANZ:

   (a) the Project Costs incurred by the ANZ representative plaintiffs in bringing the action on behalf of all those they represent (ANZ Class Members), advanced by LPF Litigation Funding No. 33 Limited (LPF) pursuant to the Deed for Provision of Services in Respect of Litigation (ANZ Litigation) between LPF, ICP Funder Pty Ltd, the ANZ representative plaintiffs and ANZ Class Members who have opted in to the representative action (ANZ Deed), will be paid from the total sum recovered from ANZ under the settlement or judgment before any payments are made to the ANZ representative plaintiffs or the other ANZ Class Members; and

   (b) LPF's Service Fee due to it pursuant to the ANZ Deed will be calculated with reference to and paid from the total sum recovered from ANZ under the settlement or judgment before any payments are made to the ANZ representative plaintiffs or the other ANZ class members.

2. In this Order, Project Costs and Service Fee have the meanings defined in the ANZ Deed.

[100] The CFO sought by the ASB appellants is as follows:

3. If the first and third to fifth plaintiffs' (the ASB representative plaintiffs) representative action against ASB Bank Limited (ASB) ([insert CIV)] is settled with or judgment is entered against ASB:

   (a) the Project Costs incurred by the ASB representative plaintiffs in bringing the action on behalf of all those they represent

(ASB Class Members), advanced by LPF Litigation Funding No. 33 Limited (LPF) pursuant to the Deed for Provision of Services in Respect of Litigation (ASB Litigation) between LPF, ICP Funder Pty Ltd, the ASB representative plaintiffs and ASB Class Members who have opted in to the representative action (ASB Deed), will be paid from the total sum recovered from ASB under the settlement or judgment before any payments are made to the ASB representative plaintiffs or the other ASB Class Members; and

(b) LPF's Service Fee due to it pursuant to the ASB Deed will be calculated with reference to and paid from the total sum recovered from ASB under the settlement or judgment before any payments are made to the ASB representative plaintiffs or the other ASB class members.

4. In this Order, Project Costs and Service Fee have the meanings defined in the ASB Deed.

## Jurisdiction to make a CFO

*High Court decision*

[101] Venning J's reasons for concluding the High Court has jurisdiction to make a CFO were expressed in the following way:[50]

> [165] … I consider the Court has jurisdiction to make CFOs in the context of representative proceedings such as these. Section 12 of the Senior Courts Act 2016 confirms the Court retains its inherent jurisdiction which [includes] the ability to control its own processes. It also includes such powers as may be necessary to enable it to act effectively and administer justice. …
>
> [166] Further, at some stage in every representative proceedings, it will be necessary for the Court to address the issue of how any fund recovered in the class action is to be distributed. That will inevitably require the Court to consider the position of, and appropriate return to, the litigation funder. As the Supreme Court noted in *Southern Response Earthquake Services Ltd v Ross* it is common for this Court to make orders approving settlements and distribution proposals. The Court has an adjudicative power in its protective or supervisory jurisdiction, and there is a need for the Court to exercise that jurisdiction in that context. Ellen France J went on to say [at [79]–[81]]:
>
> > Accordingly, we consider the court has power to approve settlements in cases such as the present and to address the various issues Southern Response raises under this head. It is also clear that the representative plaintiff can settle on behalf of the class.
>
> [167] And later [at [88]], when considering how to deal with issues that may arise in the context of the proceeding:

[50] Decision under appeal, above n 1 (footnotes omitted).

> Finally, r 1.6 addresses the situation where the High Court Rules do not make provision for a case. In those situations, r 1.6(2) provides that the court is to proceed in a manner that the court considers is "best calculated to promote the objective" of the Rules; namely, to secure the just, speedy and inexpensive determination of any proceeding. The court in exercising its supervisory powers can also draw r 1.6(2) in aid.
>
> [168] For the above reasons I consider there is jurisdiction for this Court to make a CFO in a representative proceeding. In the absence of detailed statutory provisions or rules, the constraints identified by the High Court of Australia do not apply. The Court's inherent jurisdiction and rr 1.2 and 1.6 provide sufficient jurisdiction for this Court to make a CFO in the course of a representative proceeding. The issue is whether the Court should make a CFO at this time.

[102] The Judge went on to explain that it was premature to make a CFO and reserved leave to the appellants to renew their application for a CFO after the completion of the stage-one hearing.

*ANZ and ASB's case*

[103] As noted, ASB adopted the submissions made by ANZ in relation to this part of the appeal. Mr Hunter submitted it was wrong for the High Court to have concluded it has jurisdiction to make a CFO and to reserve leave for the appellants to renew their application. In summary, Mr Hunter emphasised:

(a) The High Court Rules focus upon "practice and procedure" and that a CFO does not satisfy the objectives of the Rules.[51]

(b) The High Court's inherent jurisdiction does not extend to the making of a CFO.

(c) The High Court has "the judicial jurisdiction that may be necessary to administer the laws of New Zealand".[52] A CFO is not, however, an order that is necessary to administer the laws of New Zealand; "[r]ather, it creates a new legal relationship that serves to increase the level of return to a litigation funder on its investment in a proceeding".

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51 Citing Senior Courts Act 2016, ss 146 and 148.

52 Citing Senior Courts Act, s 12(b); and Judicature Act 1908, s 16.

[104] As further support for the points (a) and (b) above, Mr Hunter cited the judgment of Chilwell J in *Kenton v Rabaul Stevedores Ltd*, which said there is a "vital and a central distinction between substantive law, and procedure law", with a function of substantive law being "to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties". This, said Mr Hunter, "is in contrast to practice and procedure, the function of which is to 'provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a court of law'".[53]

[105] Mr Salmon submitted that the ANZ was wrong when it argued the High Court has no jurisdiction to make a CFO:

> The Court has an inherent, equitable jurisdiction to require all claimants to contribute to the legal and funding costs of a representative proceeding. The [High Court Rules] do not exclude that jurisdiction. Rather rr 1.2 and 1.6, together with the Court's inherent powers to supervise its own processes, and its supervisory jurisdiction in the context of representative proceedings, give it the procedural ability (and flexibility) to make a CFO at the outset of the proceeding, confirming that the substantive equitable obligation will be enforced once a common fund has come into existence and the Court has approved the settlement or distribution of the fund.

*Intervener's case*

[106] Mr Colson KC referred to Mr Newland's evidence and submitted that litigation funding is an inherently risky business. A CFO, however, provides a reasonable degree of certainty to a litigation funder. The absence of certainty as to who will be required to pay the litigation funder's commission and at what level introduces a degree of risk that may make funding opt-out proceedings unacceptable to funders. That in turn adversely affects access to justice.

[107] For these reasons Mr Colson submitted an early CFO in an opt-out proceeding is important to the future of litigation funding in New Zealand and its associated positive impact on allowing those who are being wronged an opportunity to have that put right.

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[53] Citing *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156 (HC) at 15, citing *Halsbury's Laws of England* (4th ed, 1979) vol 37 at [10].

**CFOs in cognate jurisdictions**

[108] We will examine the position of CFOs in Australia and United Kingdom before analysing whether or not the High Court has jurisdiction to make such an order in New Zealand. We shall also briefly refer to the making of CFOs in Canada, which are now governed by legislative provisions.

*Australia*

[109] Australian courts have had considerable experience with CFOs. The CFOs that have been made in Australia relied on s 33ZF of the Federal Court of Australia Act 1976 (Cth) (the FCA Act) which confers jurisdiction to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding" where the proceeding is commenced under pt IVA of that Act. Federal representative proceedings are conducted under pt IVA of the FCA Act.

[110] The cases from Australia were traversed in affidavits from Ms Harris KC and Mr Armstrong KC, leading practitioners in class actions in Australia.

[111] The first CFO issued at an early stage of proceedings in the Federal Court of Australia occurred in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*.[54] In that case, a Full Court of the Federal Court of Australia concluded s 33ZF empowered the Court to make a CFO, and that in the circumstances of that case it was appropriate to make such an order early in the proceeding.[55]

[112] In *BMW Australia Ltd v Brewster*,[56] the High Court considered whether there is jurisdiction for the court to make a CFO under the FCA Act and s 183 of the Civil Procedure Act 2005 (NSW) (CPA), which is the New South Wales equivalent to s 33ZF of the FCA Act.

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54 *Money Max Int Pty Ltd v QBE Insurance Group Ltd*, above n 49.
55 At [168].
56 *BMW Australia Ltd v Brewster*, above n 47.

[113] In their judgment, Kiefel CJ, Bell and Keane JJ said:[57]

> [3] Properly construed, neither s 33ZF of the [FCA Act] nor s 183 of the CPA empowers a court to make a CFO. Section 33ZF of the [FCA Act] and s 183 of the CPA each provide relevantly that in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred by these sections is wide, it does not extend to the making of a CFO. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.

[114] In their judgments, Nettle J and Gordon J took a similar approach and concluded that s 33ZF of the FCA Act and s 183 of the CPA could not be employed to address "uncertainties on the part of litigation funders as to the financial viability of funding such proceedings".[58]

[115] In their dissenting judgments, Gageler J and Edelman J considered CFOs are "appropriate or necessary to ensure that justice is done in the proceeding, and so can be made in exercise of the power conferred by s 33ZF(1) of the [FCA Act] or s 183 of the [CPA]".[59]

[116] While the majority judgment in *Brewster* plainly precludes the making of a CFO in Australia at an early stage of proceedings, there remain lingering uncertainties as to whether or not a CFO may be made in Australia at the conclusion of a proceeding.

[117] Some cases decided since the High Court's judgment in *Brewster* suggest that the decision of the High Court majority was not authority for the proposition that there is no power under the FCA Act or CPA to make a CFO at the point of settlement approval.[60] However, both the Full Court of the Federal Court and the New South

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57 Emphasis in original.

58 *BMW Australia Ltd v Brewster*, above n 47, at [126]–[127] per Nettle J; and at [143], [148], [152], [158], [164] and [166] per Gordon J.

59 At [106] per Gageler J dissenting; and at [232] per Edelman J dissenting.

60 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183, (2020) 384 ALR 650 at [32]; and *Brewster v BMW Australia Ltd* [2020] NSWCA 272 at [28], [30] and [41]–[43].

Wales Court of Appeal declined to rule positively on whether they have the power to make a CFO at the resolution of a class action, because there was no application before either Court.[61]

[118] The uncertainty as to the jurisdiction to make a CFO at the final stages of a representative proceeding in Australia stems from the wording of s 33V of the FCA Act. That section states:

> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

[119] There is, however, recent authority for the proposition that CFOs cannot be made in Australia at any stage of a proceeding. In *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)*,[62] O'Callaghan J addressed the scope of s 33V(2) of the FCA Act and concluded:[63]

> Although the decision of the High Court in *BMW Australia Ltd v Brewster* … was concerned with the power to make a common fund order at a preliminary stage of proceedings under s 33ZF, the reasoning of the majority points clearly enough to the conclusion that there is similarly no power to make a common fund order upon settlement under s 33V(2).

*England and Wales*

[120] The issue as to whether or not there is jurisdiction in England and Wales to make a CFO was touched upon, but not determined, by the United Kingdom Supreme Court in *Lloyd v Google LLC*.[64] The Court held the claimant could not bring a representative claim on behalf of more than four million potential claimants against Google LLC for allegedly having breached s 13 of the Data Protection Act 1998 (UK). This was because the claimant would not be able to demonstrate that individual members of the potential class had suffered "damage" for the purpose of s 13 of the

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61 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd*, above n 60, at [43] and [68]–[72] per Lee J; and *Brewster v BMW Australia Ltd*, above n 60, at [43]–[47] per Bell P.

62 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2023] FCA 84 at [183].

63 At [183].

64 *Lloyd v Google LLC*, above n 31.

Data Protection Act.[65] This conclusion meant it was not necessary for the Court to determine whether or not r 19.6(4)(b) of the Civil Procedure Rules,[66] the equivalent of New Zealand's r 4.24(b), permitted the making of the CFO.

[121] However, the Court said:

> [79] … as persons represented by a representative claimant or defendant will not normally themselves have been joined as parties to the claim, they will not ordinarily be liable to pay any costs incurred by the representative in pursuing (or defending) the claim. That does not prevent the court, if it is in the interests of justice to do so, from making an order requiring a represented person to pay or contribute to costs and giving permission for the order to be enforced against that person pursuant to CPR r 19.6(4)(b). Alternatively, such an order could be made pursuant to the general jurisdiction of the court to make costs orders against non-parties. It is difficult, however, to envisage circumstances in which it could be just to order a represented person to contribute to costs incurred by a claimant in bringing a representative claim which the represented person did not authorise. On the other hand, a commercial litigation funder who finances unsuccessful proceedings is likely to be ordered to pay the successful party's costs at least to the extent of the funding: …
>
> …
>
> [83] The recovery of money in a representative action … may give rise to problems of distribution to the members of the class, … [Q]uestions of considerable difficulty would arise if in the present case the claimant was awarded damages in a representative capacity with regard to how such damages should be distributed, including whether there would be any legal basis for paying part of the damages to the litigation funders without the consent of each individual entitled to them: …

[122] In *Commission Recovery Ltd v Marks & Clerk LLP*,[67] Knowles J recognised that an order to deduct sums from the net recovery of a successful representative action was not an issue that he was required to resolve, and that if it did arise "it is likely to be a later stage, perhaps as late as when and if the Court is dealing with remedy".[68]

[123] Thus, the current position in England and Wales is that there is much uncertainty as to whether the Civil Procedure Rules permit the making of a CFO, let alone one at the commencement of a representative proceeding.

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65 At [143]–[144] and [159].

66 Peter Coulson (ed) *Civil Procedure – the White Book Service* (Sweet & Maxwell, 2023) vol 1 at [19.6].

67 *Commission Recover Ltd v Marks & Clerks LLP & Another* [2023] EWHC 398 (Comm), [2023] 2 All ER (Comm) 949.

68 At [74].

*Canada*

[124] Opt-out proceedings can be brought in the Canadian Federal jurisdiction under pt 5.1 of the Federal Court Rules 1998.[69] The Federal Court approves litigation-funding agreements as part of the exercise of supervisory jurisdiction in class action proceedings.[70]

[125] Ontario has a statutory regime for class actions. Originally, litigation-funding agreements were able to be approved in Ontario under the general power in the Class Proceedings Act 1992 (Ont) which allowed a court to "impose such terms on the parties as it considers appropriate".[71] Since 2020, litigation funding agreements are able to be approved under ss 6 and 33(1) of the Class Proceedings Act.

*Analysis*

[126] We shall approach our task by first considering whether or not the High Court Rules permit the making of a CFO and then briefly comment on the High Court's inherent jurisdiction to make such an order.

[127] The High Court Rules are secondary legislation passed pursuant to ss 146 and 148 of the Senior Courts Act 2016. Relevantly, s 146(1) and 146(4) state:[72]

> **146 High Court Rules**
>
> (1) The practice and procedure of the High Court in all civil proceedings is regulated by the High Court Rules.
>
> …
>
> (4) If in any civil proceedings any question arises as to the application of any provision of the High Court Rules or of any rules made under section 148, the court may, either on the application of any party or on its own initiative, determine the question and *give any directions that it thinks fit.*

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69 Federal Court Rules SOR/98-106 C 1998.
70 See *Difederico v Amazon.com Inc* 2021 FC 311, [2021] 3 FCR 3.
71 Class Proceedings Act 1992 (Ont), s 12.
72 Emphasis added.

[128] The objective of the High Court Rules is explained in r 1.2, namely, "to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application".

[129] Rule 1.6 enables the Court to deal with a case in circumstances where there is no prescribed procedure. That rule provides:

> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.
>
> (2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (*see* rule 1.2).

[130] When interpreting the scope and jurisdiction conferred by r 4.24(b) in light of rr 1.2 and 1.6, we bear in mind the following contextual considerations:

(a) The advent of litigation funders and their role in funding representative proceedings is a comparatively recent development in New Zealand. Mr Newland founded LPF in 2009. Since then, it has been involved in funding over 25 proceedings, including some high-profile representative proceedings such as *Strathboss Kiwifruit Ltd v Attorney-General*,[73] and *Southern Response Earthquake Services Ltd v Ross*.[74]

(b) The interpretation of r 4.24 continues to evolve in response to new and innovative ways in which representative proceedings are commenced and funded. The courts continue to test, evaluate and modify the way they supervise representative proceedings in response to emerging innovations in this area of the law.

[131] Section 146(4) of the Senior Courts Act confers upon the High Court jurisdiction to give "any directions that it thinks fit" when applying any particular rule or rules. In the context of representative proceedings, this requires "flexibility in how

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73 *Strathboss Kiwifruit Ltd v Attorney-General* [2019] NZHC 62.
74 *Southern Response Earthquake Services Ltd v Ross*, above n 24.

[r 4.24] is applied". As the Supreme Court has explained, such flexibility "accords with the modern approach to representative proceedings".[75]

[132] When considering the jurisdiction to make a CFO, sight should not be lost of the fact that a CFO seeks to settle funding issues as between the litigation funder, the representative plaintiff and class members. This relationship leaves little room for placing significant weight upon the concerns of a defendant, provided of course, no injustice is caused to a defendant through a CFO.

[133] As the Supreme Court and this Court have explained on several occasions, a key objective of r 4.24 is to enhance access to justice by representative and class members in a representative proceeding.[76] Unlike the majority of the High Court of Australia in *Brewster*, we consider that the commercial viability of a litigation-funding arrangement enhances access to justice by providing certainty in the way a representative proceeding is funded.

[134] We find ourselves in agreement with Gageler J when he said the approach taken by the majority in *Brewster*:[77]

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

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

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75 *Credit Suisse Private Equity LLC v Houghton*, above n 9, at [129] per McGrath, Glazebrook and Arnold JJ.

76 See for example *Southern Response Earthquake Services Ltd v Ross*, above n 24, at [40] per Ellen France J; and *Cridge v Studorp Ltd*, above n 9, at [11(b)].

77 *BMW Australia Ltd v Brewster*, above n 47, at [110] per Gageler J.

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

[136] The approach which we favour ensures:

(a) funding arrangements for a representative proceeding are entered into on a comparatively secure footing;

(b) class members are better informed about their possible returns when deciding whether or not to opt out of the proceeding; and

(c) less uncertainty about how the court might exercise its discretion to allocate the costs of funding the proceeding at the conclusion of the litigation.

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

[138] We accordingly conclude the High Court Rules confer jurisdiction on the Court to make a CFO and that, as a matter of general principle, such orders should be made at an early stage in proceedings. We dismiss ANZ and ASB's cross-appeals insofar as they challenge the High Court's jurisdiction to grant CFOs.

*Inherent jurisdiction*

[139] Having concluded that the High Court Rules permit the making of a CFO, we need not analyse in any depth the submissions concerning the High Court's inherent jurisdiction to make a CFO. It suffices to say that there is merit in the proposition that, as a court of equity, the High Court has jurisdiction to do justice as between the

plaintiff and those who benefit through the success of the plaintiff's proceedings. That equitable jurisdiction may also exist to regulate the financial relationship between the representative plaintiff, members of the class, and in this case, the litigation funder without whose investment there is little prospect of the representative proceeding progressing.

[140] The High Court's inherent power to supervise its own processes, and in particular, its ability to control representative proceedings ensures it has the jurisdiction to make a CFO at the outset of a class action.

**Timing of a CFO**

[141] Venning J declined to make a CFO in the High Court, but reserved leave for the plaintiffs to reapply at the conclusion of the stage-one hearing.[78] In principle, we would have thought that the overall interests of justice and, in particular, access to justice are best achieved through a CFO being made as early as possible in a proceeding such as this. There is no clear benefit in deferring making a CFO at an early stage of this proceeding. Failing to make a CFO at this juncture in this case merely prolongs uncertainty about the funding of the proceeding, thereby placing access to justice at risk.

[142] We therefore allow the aspect of the appellants' appeal relating to the High Court's decision to decline to grant a CFO at that stage.

**Result**

[143] The appellants' appeal is allowed in part, insofar as it relates to the High Court's decision to decline to grant a CFO at that stage. The remaining grounds of appeal are dismissed.

[144] The cross-appeals of the first and second respondents are dismissed.

[145] We make the CFOs on the terms sought by the appellants, set out above at [99]–[100], and direct that they are to commence immediately.

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78 Decision under appeal, above n 1, at [183]–[184].

## Costs

[146] The respondents together must pay the appellants one set of costs, in respect of the appeal and two cross-appeals, for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Russell Legal, Auckland for Appellants
Bell Gully, Auckland for First Respondent
Russell McVeagh, Auckland for Second Respondent
Tompkins Wake, Hamilton for Intervener

**ANNEXURE A**[79]

## COMMON ISSUES BEFORE THE HIGH COURT[80]

## STAGE 1 COMMON ISSUES – ANZ CLASS

| Topic / section(s) | Common issues(s) | Class members with the same interest |
|---|---|---|
| Variation disclosure<br><br>Sections 22 and 32 | Pursuant to s 22(1), what information was ANZ required to provide to the plaintiffs and class members when they made agreed changes to their ANZ Loans during the ANZ Relevant Period? | All class members |
| Variation disclosure<br><br>Sections 22 and 32 | Is there a de minimis exception to s 22(1)? | All class members |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Pursuant to s 99(1A) are the Post Amendment Subgroup members liable for costs of borrowing relating to Breach Periods? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Under s 99(1A), are Post Amendment Subgroup members not liable for all costs of borrowing in relation to their Breach Periods, or does s 99(1) only extinguish liability for costs of borrowing referable to the particular change for which there was non-compliance with s 22? | Post Amendment Subgroup |

79 Formatting altered slightly for the purposes of readability, but aside from that, the table is unaltered.

80 Schedules 3 and 4 to the [plaintiffs'] synopsis of submissions dated 12 May 2022, amending Schedules 7 and 8 to the plaintiffs' amended interlocutory application dated 28 January 2022 (original footnote).

| | | |
|---|---|---|
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Was ANZ able to provide the Post Amendment Subgroup members with corrective disclosure and end their Breach Periods for the purposes if s 99(1) by providing variation disclosure in relation to different, subsequent agreed changes or other disclosure required under the CCCFA? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Does s 99(1A) disentitle ANZ from receiving Breach Period Payments from the Post Amendment Subgroup, such that s 48 is triggered? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Pursuant to s 99(1) (pre amendment), are the Pre Amendment Subgroup members liable for costs of borrowing relating to Breach Periods? | Pre Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Under s 99(1), are Pre Amendment Subgroup members not liable for all costs of borrowing in relation to their Breach Periods, or does s 99(1) only extinguish liability for costs of borrowing referable to the particular change for which there was non-compliance with s 22? | Pre Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Was ANZ able to provide the Pre Amendment Subgroup members with corrective disclosure and end their Breach Periods for the purposes if s 99(1) by providing variation disclosure in relation to different, subsequent agreed changes or other disclosure required under the CCCFA? | Pre Amendment Subgroup |

| | | |
|---|---|---|
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Does s 99(1) disentitle ANZ from receiving Breach Period Payments from the Pre Amendment Subgroup members, such that s 48 is triggered? | Amendment Subgroup |
| Section 93 | Did the plaintiffs and class members who have not received full refunds or credits of Breach Period Payments ANZ is required to pay to them under s 48 suffered a loss for the purposes of s 93? | All class members |
| Section 94 | Where the plaintiffs and class members have established a breach of s 48, does the Court have a discretion to refuse to make the orders sought under s 94(a)? | All class members |
| Limitation – statutory damages<br><br>Sections 90(3) | For the purposes of s 90(3) (pre amendment) was ANZ ASB continuously in breach of s 22 during the plaintiffs' and class members' Breach Periods, such that for each plaintiff and class member, the "matter giving rise to the breach occurred" up until the end of their Breach Period(s)? | Pre Amendment Subgroup |
| Limitation – statutory damages<br><br>Sections 90(3) | How should section 90(3) (post amendment) be interpreted in relation to an alleged breach of s 22? | Post Amendment Subgroup |
| Limitation – refunds / credits<br><br>Section 95(2) | For the purposes of s 95(2) (pre amendment) is ANZ / ASB still in breach of s 48, such that for each plaintiff and class member, the *"matter giving rise to the breach*" is still occurring? | Pre Amendment Subgroup |

| | | |
|---|---|---|
| Limitation – refunds / credits<br><br>Section 95(2) | How should section 95(2) (pre amendment) be interpreted and applied in relation to an alleged breach of s 48? | Post Amendment Subgroup |
| Set off<br><br>Section 134 | If an order is made in favour of the plaintiffs or a class member, should the resulting liability be set off against any indebtedness of those persons to ANZ? | All class members |

## STAGE 1 COMMON – ASB CLASS

| Topic / section(s) | Common issues(s) | Class members with the same interest |
|---|---|---|
| Variation disclosure<br><br>Sections 22 and 32 | Pursuant to s 22(1), what information was ASB required to provide to the plaintiffs and class members when they made agreed changes to their ASB Loans during the ASB Relevant Period? | All class members |
| Variation disclosure<br><br>Sections 22 and 32 | Is there a de minimis exception to s 22(1)? | All class members |
| Variation disclosure<br><br>Sections 22 and 32 | During the ASB Relevant Period, was ASB [able] to provide the plaintiffs and class members with variation disclosure in s 18 continuing disclosure statements, via FastNet and/or the App? | All class members |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Pursuant to s 99(1A) are the Post Amendment Subgroup members liable for costs of borrowing relating to Breach Periods? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Pursuant to s 99(1A) are the Post Amendment Subgroup members liable for costs of borrowing relating to Breach Periods? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Was ASB able to provide the Post Amendment Subgroup members with corrective disclosure and end their Breach Periods for the purposes if s 99(1) by providing variation disclosure in relation to different, subsequent agreed changes or other disclosure required under the CCCFA? | Post Amendment Subgroup |

| | | |
|---|---|---|
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1A) and 48 | Does s 99(1A) disentitle ASB from receiving Breach Period Payments from the Post Amendment Subgroup, such that s 48 is triggered? | Post Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Pursuant to s 99(1) (pre amendment), are the Pre Amendment Subgroup members liable for costs of borrowing relating to Breach Periods? | Pre Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Under s 99(1), are Pre Amendment Subgroup members not liable for all costs of borrowing in relation to their Breach Periods, or does s 99(1) only extinguish liability for costs of borrowing referable to the particular change for which there was non-compliance with s 22? | Pre Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Was ASB able to provide the Pre Amendment Subgroup members with corrective disclosure and end their Breach Periods for the purposes oif s 99(1) by providing variation disclosure in relation to different, subsequent agreed changes or other disclosure required under the CCCFA? | Pre Amendment Subgroup |
| Debtor liability for costs of borrowing and creditor liability to pay refunds / credits<br><br>Sections 99(1) and 48 | Does s 99(1) disentitle ASB from receiving Breach Period Payments from the Pre Amendment Subgroup members, such that s 48 is triggered | Pre Amendment Subgroup |

| | | |
|---|---|---|
| Section 93 | Did the plaintiffs and class members who have not received full refunds or credits of Breach Period Payments ASB is required to pay to them under s 48 suffered a loss for the purposes of s 93? | All class members |
| Section 94 | Where the plaintiffs and class members have established a breach of s 48, does the Court have a discretion to refuse to make the orders sought under s 94(a)? | All class members |
| Limitation – statutory damages<br><br>Sections 90(3) | For the purposes of s 90(3) (pre amendment) was ASB continuously in breach of s 22 during the plaintiffs' and class members' Breach Periods, such that for each plaintiff and class member, the "matter giving rise to the breach occurred" up until the end of their Breach Period(s)? | Pre Amendment Subgroup |
| Limitation – statutory damages<br><br>Sections 90(3) | How should section 90(3) (post amendment) be interpreted in relation to an alleged breach of s 22? | Post Amendment Subgroup |
| Limitation – refunds / credits<br><br>Section 95(2) | For the purposes of s 95(2) (pre amendment) is ASB / ASB still in breach of s 48, such that for each plaintiff and class member, the "*matter giving rise to the breach*" is still occurring? | Pre Amendment Subgroup |
| Limitation – refunds / credits<br><br>Section 95(2) | How should section 95(2) (pre amendment) be interpreted and applied in relation to an alleged breach of s 48? | Post Amendment Subgroup |

| | | |
|---|---|---|
| Set off<br><br>Section 134 | If an order is made in favour of the plaintiffs or a class member, should the resulting liability be set off against any indebtedness of those persons to ASB? | All class members |