IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 90/2024
[2024] NZSC 186

BETWEEN	ANZ BANK NEW ZEALAND LIMITED Applicant
AND	ANTHONY PAUL SIMONS First Respondent
	ANDREW JOHN BEAVEN AND MEI LIM Second Respondents
	PHILIP CHARLES DUNBAR AND SHERYN VALERI DUNBAR Third Respondents
	BRUNO ROBERT BICKERDIKE AND EMMA RENAE PUNTER Fourth Respondents
	GLENN JONATHAN MARVIN AND ANNA MARY CUTHBERT Fifth Respondents

SC 93/2024

BETWEEN	ASB BANK LIMITED Applicant
AND	ANTHONY PAUL SIMONS First Respondent
	ANDREW JOHN BEAVEN AND MEI LIM Second Respondents
	PHILIP CHARLES DUNBAR AND SHERYN VALERI DUNBAR Third Respondents
	BRUNO ROBERT BICKERDIKE AND EMMA RENAE PUNTER Fourth Respondents

GLENN JONATHAN MARVIN AND
ANNA MARY CUTHBERT
Fifth Respondents

Court: Glazebrook, Ellen France and Miller JJ

Counsel: S M Hunter KC, S V A East and S R Hiebendaal for Applicant ANZ Bank New Zealand Limited
J E Hodder KC, K M Massey and J W Upson for Applicant ASB Bank Limited
D M Salmon KC, A C van Ammers and S E Russell for Respondents

Judgment: 20 December 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondents costs of $2,500.

REASONS

Introduction

[1] ANZ Bank New Zealand Limited (ANZ) and ASB Bank Limited (ASB) apply for leave to appeal against a judgment of the Court of Appeal.[1]

[2] The issues in the proposed appeal are whether the High Court:

(a) has the power to make a common fund order (CFO) in a representative action; and

(b) if so, whether the High Court should have made a CFO in this case, rather than waiting until later in the proceeding.

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1 *Simons v ANZ Bank Ltd* [2024] NZCA 330, [2024] NZCCLR 219 (Cooper P, French and Collins JJ) [CA judgment].

[3] The Court of Appeal explained CFOs in the following terms:[2]

> [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. 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.
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> [95] CFOs were developed to address the "free rider" issue. 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.
>
> [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.

High Court decision

[4] In the High Court, Venning J granted the application to bring a representative proceeding[3] against ASB covering approximately 73,000 customers and another against ANZ covering some 17,000 customers.[4] The proceedings are to be opt out rather than opt in.[5]

[5] The application for a representative order on an opt-out basis and for a CFO was made under r 4.24 of the High Court Rules 2016. The Judge said that r 4.24 is general in its terms but "does not, on its face, extend to the making of a CFO", meaning

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2 Footnotes omitted.

3 A representative proceeding is where particular plaintiffs bring an action on behalf of members of a general class.

4 *Simons v ANZ Bank Ltd* [2022] NZHC 1836, [2022] NZCCLR 30 (Venning J) [HC judgment].

5 In an "opt-out" action, a claim is brought on behalf of every member of the class except for those who explicitly choose not to participate. In an "opt-in" action, members of the class must actively choose to join the proceeding in order to be included. See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [2].

that the jurisdiction to do so must be found elsewhere.[6] He noted that s 12 of the Senior Courts Act 2016 confirms that the High Court retains its inherent jurisdiction, including the ability to control its own processes. Inherent jurisdiction also "includes such powers as may be necessary to enable it to act effectively and administer justice".[7] The Judge went on to say:[8]

> [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.[9] Ellen France J went on to say:[10]
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> > 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.
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> [167] And later, when considering how to deal with issues that may arise in the context of the proceeding:[11]
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> > 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.

[6] The Judge held that, for the above reasons, there is jurisdiction for the High Court to make a CFO in a representative proceeding.[12] He said that, in the absence of detailed statutory provisions or rules, the constraints identified by the High Court of Australia in *BMW Australia Ltd v Brewster*[13] do not apply. The Judge was of the view that the Court's inherent jurisdiction and rr 1.2 and 1.6 of the

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6 HC judgment, above n 4, at [160].

7 At [165]. The Judge gave as an example the reliance in part on the inherent jurisdiction of the High Court in order to make Anton Pillar orders: *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

8 Footnotes omitted.

9 Citing *Southern Response Earthquake Services Ltd v Ross*, above n 5, at [79]–[81].

10 At [82].

11 At [88].

12 HC judgment, above n 4, at [168].

13 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574.

High Court Rules provide sufficient jurisdiction for this Court to make a CFO in the course of a representative proceeding.[14]

[7] As to the timing of such an order, the Judge noted that, in *Brewster*, Gageler J wrote a "strong dissenting judgment" in support of making a CFO at the outset of the proceeding.[15] The Judge, however, considered that it was premature to make a CFO at the current stage of these proceedings as there was uncertainty as to a number of relevant factors.[16]

Court of Appeal decision

[8] The Court of Appeal also concluded that the High Court Rules confer jurisdiction on the Court to make a CFO.[17] The Court said that a key objective of r 4.24 of the High Court Rules is to enhance access to justice. The Court stated that the commercial viability of a litigation-funding arrangement enhances access to justice, rejecting the approach of the majority of the High Court of Australia in *Brewster*.[18] The Court went on to say:

> [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. …
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> …
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> [137] It will be apparent from our reasoning that we do not share [counsel'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 [2016] and r 4.24.

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14 HC judgment, above n 4, at [168]; and see *BMW Australia Ltd v Brewster* at 615–623 per Gaegler J dissenting.
15 At [169].
16 At [179].
17 CA judgment, above n 1, at [136].
18 At [133].

[9] The Court also considered that there is a good argument that a CFO could be made under inherent jurisdiction.[19]

[10] Differing from the High Court, the Court of Appeal held that access to justice is best achieved through a CFO being made as early as possible in a proceeding such as this. This gives the litigation funder a degree of assurance in relation to its return on its investment. The Court said that, critical to the conclusion that a CFO enhances access to justice, is that "the court will closely scrutinise the CFO and approve any settlement".[20] The Court of Appeal said: [21]

> 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.

[11] The Court said that the approach it favoured ensures:[22]

> (a) funding arrangements for a representative proceeding are entered into on a comparatively secure footing;
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> (b) class members are better informed about their possible returns when deciding whether or not to opt out of the proceeding; and
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> (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.

Our assessment

[12] Nothing raised by the applicants suggests that their proposed challenge to the concurrent findings on jurisdiction by the Courts below has sufficient prospect of success to justify the expense and delay of a further appeal.[23] The jurisdiction to make a CFO appears to arise naturally from the making of an opt-out order. In *Southern Response Earthquake Services Ltd v Ross*, this Court held that opt-out orders can enhance access to justice.[24] It also held that the courts have the necessary powers to

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19 At [139]–[140].
20 At [135].
21 At [141].
22 At [136].
23 See for example *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; *Hookway v R* [2008] NZSC 21 at [4]; and *B (SC 18/2020) v R* [2020] NZSC 52 at [12].
24 *Southern Response Earthquake Services Ltd v Ross*, above n 5, at [40].

regulate representative proceedings.[25] In that case, this Court did not deal with CFOs, as there was an application for one before the High Court that had not been decided.[26] But the Court did say that, in practical terms, the issue of "free riders" will be more problematic in an opt-out proceeding, and that the Court may have to play a greater role in representative proceedings than is currently the case.[27]

[13] Given this Court's emphasis on access to justice, it is also hard to resist the reasoning of the Court of Appeal in terms of the timing of the making of a CFO in this case. Again, nothing raised by the applicants suggests that there is a sufficient prospect of success on this point to justify the leave application being granted.

[14] The proposed appeal is also from an interlocutory order. This means that the Court must be satisfied that it is in the interests of justice to hear an appeal before the proceeding is concluded.[28] In this case that threshold is not met, which is another reason for declining the application for leave to appeal.[29]

Result

[15] The application for leave to appeal is dismissed.

[16] The applicants must pay the respondents costs of $2,500.

Solicitors:
Bell Gully, Auckland for Applicant in SC 90/2024
Russell McVeagh, Auckland for Applicant in SC 93/2024
Russell Legal, Auckland for Respondents

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25 At [41], [82] and [88]–[89].
26 At [62].
27 At [86].
28 Senior Courts Act 2016, s 74(4).
29 We note that, should any issues arise with the CFOs made in this case, these can be raised in the High Court.