

MEMORANDUM

Date: 17 August 2021
To: Bruno Bickerdale, Philip Dunbar, Glen Marvin and Anthony Simons
From: Stephen Lowe / Ellie Harrison

DEED FOR PROVISION OF SERVICES – PROPOSED CCCFA CLAIM AGAINST ASB

1. Introduction

- 1.1 LPF Litigation Funding No. 33 Limited (**LPF**) has provided us with a draft Deed for Provision of Services (**Deed**) proposing to fund litigation (**Proceedings**) by you as the Representative Plaintiffs (**Representatives**) and other claimants who have completed a participation notice (**Plaintiffs**) against ASB.
- 1.2 In order for you to make an informed decision about whether to agree to the arrangement proposed in the Deed, in this memorandum we have summarised:
- (a) The terms of the Deed; and
 - (b) The Plaintiffs' contractual rights and obligations.
- 1.3 At a basic level, the Deed sets out that:
- (a) The Plaintiffs would like to pursue claims against ASB arising from breaches by ASB of the Credit contracts and Consumer Finance Act 2003 (CCCFA) occasioned by the bank's failure to make required disclosures under that Act.
 - (b) The Plaintiffs are unable to pursue their legal claims against ASB without assistance from LPF.
 - (c) The Plaintiffs have sought assistance from LPF with support from CASL Funder Pty Ltd (**CASL**) to fund the Plaintiffs' legal and expert team and manage the claims;
 - (d) LPF agrees to assist by managing and funding the plaintiffs' claims against ASB (in accordance with the terms set out in the Deed).
 - (e) You are appointed the Representative Plaintiffs and will act on behalf of all Plaintiffs in respect of the conduct and settlement of the Proceedings.¹ Your decisions will bind all Plaintiffs.
 - (f) An application for an opt-out order² and shared costs order³ will be made, with the intention that the Project Costs and Service Fee will be shared by all plaintiffs to the Proceedings.
 - (g) The Proceedings will be advanced together with a similar representative claim against ANZ.
 - (h) The purpose of advancing the ASB and ANZ claims together is to achieve greater efficiency and reduced Project Costs overall.
- 1.4 We set out below key questions we anticipate you may have:

¹ Although there is no detailed guidance in New Zealand on requirements of representative plaintiffs, case law suggests representative plaintiffs must act fairly, vigorously and capably.

² An "opt-out" order means that everyone with the same type of claim as the plaintiffs will automatically be a class member Plaintiff unless they expressly opt-out of the class. See further paragraph 1.4(h).

³ A "shared costs" or "common fund" order would provide for all Plaintiffs who have not opted out of the class to bear a proportionate share of liability to LPF regardless of whether they have signed the Deed, and allow deductions from the amounts payable on settlement to unfunded Plaintiffs equating to applicable Service Fee payable as if they had entered into the Deed.

- (a) *What does this Deed provide?* The Deed provides funding and assistance for the Plaintiffs to pursue claims against ASB to achieve final resolution and protection from any adverse costs orders⁴ if the Plaintiffs are unsuccessful. If the Plaintiffs are successful, LPF is entitled to receive between 16% to 23.5% of the Resolution Sum plus an additional 2.5% on appeal⁵, with the Plaintiffs retaining the remainder of the Resolution Sum (payment obtained through settlement or a court award).
- (b) *What are the Plaintiffs' primary obligations to LPF pursuant to the Deed?* Agreeing to pay the Services Fee, providing information under clause 3.1(c).
- (c) *In what circumstances can LPF withdraw funding?* The payment mechanism in this Deed requires LPF to continue to advance funds to pursue the Plaintiffs' claims against ASB for breaches of the CCCFA unless:
- (i) Based on legal advice (for example the has been a change in the merits due to new evidence that comes to light) LPF makes an assessment that the costs and risks involved are no longer acceptable to it (clause 12.1)⁶;
 - (ii) The Court does not make an opt out or common fund orders (clause 12.2);
 - (iii) The Court determines that the Services Fee chargeable by LPF would exceed the aggregate fee payable to any other litigation funder who is funding a claim against ASB for a breach of the CCCFA (clause 12.2);
 - (iv) The plaintiffs breach the Deed or a related document (clause 12.2);
 - (v) The plaintiffs wish to pursue an appeal but LPF does not (clause 8); or
 - (vi) LPF considers (and the expert appointed to resolve disputes agrees) that the plaintiffs are failing to accept a reasonable settlement offer (clause 15).
- (d) *What happens if LPF terminates the Deed?* If LPF terminates because the Plaintiffs have breached the Deed, it is not liable for any obligations accrued (including any adverse costs order) to the point of termination and is entitled to repayment of the Project Costs. If LPF terminates for any of the other reasons mentioned above in paragraph 1.4(c), LPF remains liable for all Project Costs and adverse costs up to that time. The plaintiffs must arrange for alternative funding (including for security for costs) if they wish to continue the claims.
- (e) *If the Plaintiffs are ultimately unsuccessful, are they required to pay costs?* No; LPF is liable for all project costs, except for any individual Plaintiffs (not the Plaintiffs collectively) who have materially breached the terms of the Deed: see clause 5.3 of the Deed and 12.2(b)(ii) (Termination for Cause).
- (f) *What is the extent of the Plaintiffs' liability to LPF?* The plaintiffs' liability is limited to the amount of the Resolution Sum (even if the Resolution Sum is exceeded by the Project Costs): see clause 5.10.
- (g) *What are "opt in" and opt out" orders?*
- (i) Opt-in orders require potential class members to affirmatively opt into the litigation by signing up by a certain date in order to be bound by any judgment on the common questions in the proceeding, or by a settlement.
 - (ii) The availability of opt-out orders in New Zealand has only recently been confirmed in *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126. Under an opt-out approach, all people who fall within the description of the class are bound by the judgment on common issues or settlement unless they expressly opt

⁴ Subject to clause 12.2(b) as discussed further at paragraph 16.4 of this memorandum.

⁵ See Schedule 1 and as discussed further at paragraphs 9.1 and 9.2 of this memorandum.

⁶ LPF Group Ltd has advised that, to date, neither it nor companies in which it has an interest has terminated a funding deed pursuant to a clause equivalent to 12.1 of this Deed.

out by a certain date to exclude themselves from the proceeding. An opt out order will specify the notice requirements to class holders and how to opt out, and will require court-approval of any settlement.

- (iii) When commencing a representative proceeding, the Representatives must apply to the High Court for leave to proceed on an opt-out basis. The starting point is that the court should adopt the procedure sought by the applicant (opt-in or opt-out), unless there is good reason to do otherwise. However, the court must consider "the relevant factors in light of what will best meet the permissible objectives of the representative action in the particular case." For example, an "opt in" order is more likely where there is a real prospect that some class members may end up worse off or the class size is small. Conversely, a large class size and a high degree of commonality in the claims favour an opt in order.
- (h) *What is a common fund order?* A common fund order requires the class action or group members to all contribute to the litigation funder as a first priority a proportion of any money ultimately recovered in the proceedings, whether or not the plaintiffs are the ones who have signed the funding deed with the litigation funder or whether they have been joined as plaintiffs through an Opt-Out order and are not parties to the funding deed. Similarly, a funding equalisation order allows deductions from the amounts payable on settlement to unfunded class members equating to the funding commission payable if they had entered into the litigation funding agreement. The New Zealand courts have not yet considered the availability of common fund order or funding equalisation orders. However, there is a pending High Court application for a common fund order in the *Ross* case. When it is issued, the decision on that application should provide guidance in this area.
- (i) *Could the Funding Deed be invalidated by the Court?* Although the requirements for a funding agreement are not subject to a defined set of rules, based on present judicial guidance on funding agreements in similar terms, we do not anticipate that there are grounds to invalidate this Deed. (Common reasons for objecting to litigation funding agreements include: the funder has improper motivations, the plaintiffs' claims lack merit, there is no indemnity for costs, or the funder has too much control over pursuit and settlement of the claims).
- (j) *If the Funding Deed is invalidated by the court, what happens as a result?* If the Plaintiffs wished to continue the litigation, they would need to endeavour to remedy the defect with the Deed or find an alternative means of funding the litigation. Any payment obligations to LPF under the Deed (to the extent permitted by law) would need to be met.
- (k) *What are possible monetary risks to Plaintiffs?*
 - (i) Although it is chiefly LPF's money at risk, it remains possible that costs for plaintiffs could arise in the following circumstances:
 - (1) If any plaintiff breached the Deed in a manner that entitles LPF to terminate under clause 12.2(b), LPF can terminate the whole Deed and can recover Project Costs from the plaintiff who breached (but not from the plaintiffs collectively): see clause 5.3.
 - (2) If a plaintiff claimed for costs relating to the litigation which LPF does not accept as "Project Costs" as defined in clause 1.1.
 - (3) If LPF became insolvent at the point where there are some outstanding legal fees⁷ or a judgment debt⁸.
- (l) *How are the possible monetary risks to plaintiffs ameliorated?*

⁷ See clause 5.8.

⁸ See clause 3.2(a). Given that the Deed provides for monthly payments schedules, accumulated legal fees and other Project Costs would be unlikely to exceed two months' fees.

- (i) LPF has incorporated a shell company specifically to fund the proposed CCCFA litigation, so its liability will essentially be limited to Project Costs and any adverse judgments.
- (ii) It is open to LPF or the Plaintiffs to ask the firm of solicitors (Russell Legal Ltd) to agree that, in the event of LPF's insolvency, it will not pursue the Plaintiffs for its own or barristers' outstanding fees. If the solicitors will not agree to this, the Plaintiffs' liability for outstanding legal fees⁹ is likely to be joint and several.
- (iii) "Security for costs"¹⁰ is routinely granted where litigation is funded through a third party (litigation funder). Under the present Deed, security for costs will be paid by LPF as part of the Project Costs.¹¹ Where a litigation funder is involved, the amount "should tend towards relatively full security", in other words the total anticipated costs award if the claim is unsuccessful, not just a portion of it.¹²
- (iv) Plaintiffs (as defined in the Deed as opposed to the pleadings) who are not named in the proceeding are not technically parties and are not generally exposed to an adverse costs order.¹³ To the extent that security for costs does not cover the entire amount of any adverse costs order and LPF is insolvent, liability among named plaintiffs is likely to be joint and several.^{14 15}

2. Plaintiffs' Participation and the Representative Plaintiffs

- 2.1 A Plaintiff becomes a plaintiff in the Proceedings by delivering an executed Participation Notice and Deed to LPF. If an Opt-Out Order is made, all ASB customers affected by the same CCCFA non-disclosure issue as described in the Statement of Claim will be deemed to be Plaintiffs, unless they formally elect not to be (opt-out). The people who become group or class members of the claim through the opt-out order will not be parties to the Deed, but the Opt-Out order may require them to remunerate LPF as if they were.

[Clause 2.1]

- 2.2 Each plaintiff acknowledges that the Representatives have full, exclusive and irrevocable authority to represent all plaintiffs in relation to the conduct and settlement of claims.

[Clause 2.2]

3. Services

- 3.1 LPF will provide investigative and management support, including advice on strategy, selection of legal providers and quantification of loss (**Project Investigation**).

[Clause 3.1(a)]

- 3.2 The plaintiffs acknowledge that LPF has an interest in the outcome of the proceedings. In order to protect its investment in the outcome, LPF may investigate matters relevant to the claims or proceedings including the evidential basis for the claims and the financial capacity of the defendants and any third parties.

⁹ Legal fees would be unlikely to date back more than two months from the date of insolvency.

¹⁰ Security for costs is a payment of money to ensure that if a party to litigation is unsuccessful, it will be able to pay costs. The security for costs is kept in a trust account until the final outcome of the proceeding.

¹¹ See clause 3.2(a).

¹² *Houghton v Saunders* [2013] NZHC 1824 at [125] and *Walker v Forbes* [2017] NZHC 1212 at [33] and [92].

¹³ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [164] and *Ross v Southern Response* [2019] NZCA 431 at [108]; High Court Rules, r 14.14.

¹⁴ Although we are not advising on this issue, named plaintiffs sometimes seek a costs indemnity from Plaintiffs who are not named in the proceedings.

¹⁵ It is possible for a court to make a non-party costs award against a member of the class who is represented by the representative plaintiffs but not named as a plaintiff (whether a "Plaintiff" as defined in this Deed, being a person who has completed a participation notice, or a person joined to the claim through an opt-out order).

[Clause 3.1(b)]

- 3.3 The plaintiffs agree to provide you as the Plaintiff Representatives and LPF with all legal advice, evidence of losses on account of the ASB's CCCFA breaches and other information reasonably required for the Project Investigation.

[Clause 3.1(c)]

- 3.4 The Plaintiffs and you the Representatives agree that LPF can:

- (a) Seek information relevant to the claims from lawyers or any other person / entity in order for LPF to assist the plaintiffs with their claims; and
- (b) Provide a copy of the Deed to third parties who request proof of LPF's authority to seek the information.

[Clause 3.1(d)]

- 3.5 LPF can use the information provided to:

- (a) Assist the Plaintiffs to the ANZ and ASB Proceedings;
- (b) Monitor its obligations under this Deed the ASB Deed (including obtaining legal or financial advice);
- (c) Review the provision of funding to the ANZ or ASB Proceedings;
- (d) Enter into co-funding arrangements with ICP; and
- (e) Obtain and maintain ATE Insurance¹⁶.

[Clause 3.1(e)]

4. **Funding: Payment of Project Costs**

- 4.1 LPF agrees to pay the Project Costs agreed in advance in writing. Project Costs include: court costs, lawyers' fees, expert witness fees, the Committee's costs for a claims administrator and for people engaged by the Representatives (you) in connection with the proceedings and security for costs. LPF is also responsible for any adverse costs order¹⁷.

[Clause 3.2(a) and "Project Costs" as defined under clause 1.1]

- 4.2 Each approved payment of Project Costs will be paid to the lawyers, committee or Plaintiffs within 20 working days of receipt of written notification requesting payment, supported by invoices, the dates on which work was carried out, the hours worked and the hourly rate.

[Clause 3.2(b)]

- 4.3 The Representatives will obtain estimates for Project Costs in advance of the Project Costs being incurred.

[Clause 3.2(c)]

- 4.4 If there is a dispute regarding payment under clause 3.2(b), the parties must meet within 5 working days of receipt of the request for payment and endeavour to resolve the dispute. If that fails, refer to clause 14.

[Clause 3.2(d)]

¹⁶ ATE Insurance (After The Event Insurance) indemnifies the risk of legal expenses arising from an adverse costs order.

¹⁷ Adverse costs are costs which the court may order an unsuccessful party to pay to a successful party in a proceeding or interlocutory application to reimburse that party for its legal costs.

- 4.5 LPF will provide the Representatives with regular and timely updates of Project Costs paid by LPF.

[Clause 3.2(e)]

5. **Funding: Sharing of Project Costs**

- 5.1 The ANZ and ASB¹⁸ Plaintiffs mutually agree to share the Combined Project Costs for both the ASB and ANZ Proceedings on the following terms:

- (a) The Combined Project Costs will be equally divided, except for matters which relate to either the ANZ or ASB Proceedings only.
- (b) Within 10 working days of the “final conclusion”¹⁹ of either the ANZ or ASB Proceedings, LPF or the Representatives may request for the allocation of the Combined Project Costs to be reviewed by giving notice to LPF and the ASB Representative Plaintiffs.
- (c) If LPF and the ANZ and ASB Representative Plaintiffs cannot agree on the allocation of Combined Project Costs, the matter can be referred to the Expert (Bruce Gray QC) for a binding determination. The procedure for resolution of disagreements by the Expert is set out at clauses 14(1)(d), (f), (g) and (h) briefly addressed at 18 below.
- (d) The ASB Plaintiffs’ agreement to share the Combined Project Costs is conditional on the ASB Plaintiffs agreeing to a mirror provision in the ASB funding Deed.
- (e) Even though the ASB Plaintiffs are not a party to this Deed, they can enforce clause 3.3 of this Deed. Likewise, the ASB Plaintiffs can enforce a mirror clause 3.3 in the ANZ funding Deed, even though the ASB Plaintiffs are not a party to the ANZ funding Deed²⁰.

[Clause 3.3]

6. **Control**

- 6.1 The plaintiffs (not LPF) make all final decisions in respect of the continuance and management of the proceedings and claims, with a significant qualification in relation to settlement or proposed discontinuance, in which case clause 15 applies²¹.

[Clause 3.4]

7. **Lawyers**

- 7.1 The appointed lawyers are set out in schedule 1, namely instructing solicitors Russell Legal and barristers Davey Salmon QC and Ali van Ammers of Mills Lane Chambers.
- 7.2 LPF may require by written notice that the Plaintiffs terminate the appointment of the lawyers if it has concerns regarding the lawyers’ preparation or advancement of the proceedings, conduct or fees charged.
- 7.3 LPF may require by written notice that the Plaintiffs appoint a replacement lawyer nominated by LPF but conditional on the Representatives’ approval. That approval cannot be unreasonably withheld or delayed. If agreement cannot be reached, refer to clause 14.

¹⁸ This Deed does not bind the ANZ Plaintiffs because they are not a party to the Deed. However, the ANZ Plaintiffs have been provided with a funding deed mirroring the terms of this Deed. Provided they execute the funding deed, they will be bound by the terms of that funding deed requiring them to share Project Costs with ASB.

¹⁹ “Final conclusion” is not a defined term in the Deed. In our opinion, “final conclusion” means the date of disposition of both the ANZ and ASB Proceedings, either through (i) the parties discontinuing the proceedings; (ii) final judgment when there are no further rights of appeal in relation to liability or costs; or (iii) the expiration of the appeal period after a judgment has been issued and no appeal is filed.

²⁰ See further section 12 of the Contracts and Commercial Law Act 2017.

²¹ Clause 15 is discussed under heading 19 below.

[Clause 3.5(a) and Schedule 1]

7.4 LPF may seek from the lawyers an irrevocable undertaking to:

- (a) Comply with the terms of the Funding Deed,
- (b) Act only act for the Plaintiffs in respect of the ASB Proceedings and (if they are appointed) the ANZ Proceedings and not in any dispute regarding this Deed or the ANZ funding Deed;
- (c) Not seek to recover from the Plaintiffs any of their fees payable by LPF as Project Costs;
- (d) Provide LPF with all the relevant information required pursuant to the Funding Deed including correspondence with and information received from Plaintiffs.

[Clause 3.5(b)]

7.5 If LPF nominates additional or substitute lawyers or requires lawyers to cease acting under clause 3.5(a), the Representatives will act immediately on those instructions.

[Clause 3.5(c)]

7.6 The proceeds of any judgment or settlement will be held in the trust account of a solicitor nominated by LPF with an undertaking from the solicitor to comply with clause 5.4(b) and 5.4(f) (regarding payment of the Resolution Sum). Funds will only be paid out in accordance with written instructions from LPF and the Representatives.

[Clause 3.6]

8. **Condition and Consents**

8.1 LPF's obligation to provide funding under the Deed is conditional upon approval of the board of LPF Group Ltd within 20 working days after the Deed is executed. If LPF Group Ltd does not respond within that timeframe, it will be deemed to have approved the arrangements set out in the Deed.

[Clauses 4.1 and 4.2]

8.2 LPF may, at its discretion, waive conditions.

[Clause 4.3]

8.3 LPF can set aside the Deed by giving written notice that the condition is not satisfied.

[Clause 4.4]

8.4 If the Claims are resolved before LPF has approved the Deed, LPF is entitled to receive amounts payable under clause 5 (concerning distribution of the Resolution Sum)²².

[Clause 4.5]

8.5 The Plaintiffs consent to all money payable to LPF being paid as a priority over all other payments.

[Clause 4.6]

8.6 On or before signing the Deed, the Plaintiffs must provide to LPF the following documents:

- (a) The lawyers' covenant referred to in clause 3.5(b)²³;

²² See heading 9 below.

²³ Presumably LPF will prepare the covenant document and supply it to the Plaintiffs (which the Plaintiffs can then send to the lawyers for execution) to ensure that the covenant meets LPF's requirements.

- (b) All information relevant to the Claims / Proceedings currently held by Plaintiffs;
- (c) The Securities;
- (d) A certificate from the Representative Plaintiffs confirming receipt of independent legal advice on this Deed; Participation Notice and Deed and the Securities;
- (e) Other information reasonably requested by LPF.

[Clause 4.7]

9. Application of the Resolution Sum

9.1 If the Plaintiffs are successful, (subject to any Court order) LPF will be paid the combined total of the “Project Costs” as defined in clause 1.1²⁴, any other amounts owing pursuant to the Deed and the variable “Services Fee” calculated in accordance with Schedule 1 as follows:

(a)	If Project Costs are less than \$1million and the Resolution Sum is less than \$10million	21% of the Resolution Sum
(b)	If Project Costs are less than \$1million and the Resolution Sum is equal to or greater than \$10million	16% of the Resolution Sum
(c)	If Project Costs are equal to or greater than \$1million and the Resolution Sum is less than \$10million	23.5% of the Resolution Sum
(d)	If Project Costs are equal to or greater than \$1million and the Resolution Sum is equal to or greater than \$10million	21% of the Resolution Sum

9.2 The following qualifications apply to the Services Fee ratios above:

- (a) If LPF provides Services in respect of any appeal in the Proceedings, the Services Fee will increase by 2.5% of the Resolution Sum;
- (b) The Service Fee payable will not exceed 50% of the Resolution Sum less the Projects Costs;
- (c) The Services Fee will not exceed the aggregate fee payable to a different litigation funder which funds similar proceedings against the Defendant ASB over the same time period, if that funder had provided the Services which LPF has provided under this Deed.

[Clause 5.1 and Schedule 1]

9.3 The plaintiffs acknowledge that the Services Fee represents a commercial rate of return on the Project Costs paid by LPF based on LPF’s and the plaintiffs’ respective assessments of the amount of the claim, the expected timeframe for resolution and the risks and uncertainties in achieving success.²⁵

[Clause 5.2]

9.4 If the Plaintiffs are not successful in relation to their Claims / the Proceedings, (subject to clause 5.9 regarding partial settlement) there is no liability on the Plaintiffs to pay the Project Costs

²⁴ Note in the definition of Project Costs in clause 1.1 the provision for adjustment following any redistribution of Combined Project Costs in accordance with clause 3.3(a). As discussed under heading 5 above, the intention of sharing Project Costs is to achieve an overall reduction in Project Costs.

²⁵ We have not considered and our memorandum does not include advice on whether or not the Services Fee represents commercial rates.

Sum²⁶, unless they have materially misled LPF. If plaintiffs materially mislead LPF directly or through the Representatives, only those plaintiffs who have misled will be liable for payment.²⁷

[Clause 5.3]

- 9.5 The Plaintiffs and the Representatives provide an unconditional and irrevocable direction to the lawyers to distribute the Resolution Sum in accordance with the terms of the Funding Deed, in particular clause 3.6, clause 5.7 and this clause (5.4).

[Clause 5.4]

- 9.6 Despite the provision of clause 5.4, if the Representatives or Plaintiffs receive part of the Resolution Sum, they will pay the amount received to the solicitors.

[Clause 5.6]

- 9.7 Unless LPF agrees, neither the Committee nor the plaintiffs is entitled to accept the Resolution Sum or any part of it in non-monetary form.

[Clause 5.5]

- 9.8 Default interest applies to any sum owing to LPF at the Reuters Bill Rate (as defined in clause 1.1) plus 5% per annum, calculated daily but not cumulatively.

[Clause 5.8]

- 9.9 In the event of a partial settlement:

- (a) The settlement money must first be applied to pay LPF the equivalent of Project Costs owed pursuant to clause 5.1.
- (b) At LPF's election, it may require payment of its Services Fee on the partial Resolution Sum calculated on the basis that it were the final Resolution Sum. When final Resolution does occur, the Service Fee will be calculated as if no partial Resolution had occurred but deducting the Services Fee paid for the partial Resolution Sum.
- (c) After any deductions for the Services Fee, the balance of the partial Resolution Sum will be held on trust pending final resolution of the Claims / Proceedings.

[Clause 5.9]

- 9.10 Except where clause 5.8 applies (concerning default interest), the plaintiffs' liability to LPF is limited to the Resolution Sum.

[Clause 5.10]

10. **GST**

- 10.1 All amounts payable under the Deed are GST inclusive.

[Clause 6.1]

- 10.2 Clauses 6.2 and 6.3 concerns the application of GST. Our memorandum does not encompass advice on GST. Any such queries should be referred to a qualified advisor.

²⁶ The Project Costs Sum is set out under paragraph 9.1 of this memorandum and clause 5.1 of the Deed.

²⁷ Although we have not reviewed the pleadings, given the nature of the claim, the evidence on which the plaintiffs will rely is likely to be largely documentary, and reliant on documentation provided by ANZ and ASB. Accordingly, there is limited scope for plaintiffs to materially mislead LPF.

11. Security

11.1 The plaintiffs grant to LPF first-ranking general and specific securities to secure payment of the amounts due to LPF under the Deed as set out in Schedule 2.

[Clause 7]

11.2 This memorandum does not provide advice on the terms of the security set out in Schedule 2.

12. Appeals

12.1 Appeal by Plaintiffs:

- (a) If a final judgment is issued which is unfavourable to the Plaintiffs, the Plaintiffs through the Representatives must advise LPF as soon as possible whether the plaintiffs wish to appeal.
- (b) If the Plaintiffs do wish to appeal, LPF must advise the Representatives as soon as practicable whether it will provide the Services (assistance and funding) in respect of the Appeal.
- (c) If the Plaintiffs do not wish to appeal but LPF does, the matter will be resolved in accordance with clause 14.1 (concerning general disputes).

[Clause 8.1]

12.2 Appeal by defendant:

- (a) If there is a final judgment in favour of the Plaintiffs and any defendant or third-party appeals, the Representative Plaintiffs should advise LPF as soon as practicable whether the Plaintiffs wish to defend the appeal.
- (b) If the Plaintiffs do wish to defend, LPF must advise as soon as practicable whether it will provide the Services (assistance and funding) in respect of the Appeal.
- (c) If the plaintiffs do not wish to defend but LPF does, the matter will be resolved in accordance with clause 14.1 (concerning general disputes).

[Clause 8.2]

12.3 If LPF declines to provide Services for an appeal, the Plaintiffs can terminate the Deed with written notice. In that case, the Plaintiffs are not liable to pay the Services Fee relevant to the appeals, but they will remain liable to pay LPF the Service Fee from any settlement matters not subject to the appeal and the Project Costs Sum²⁸.

[Clause 8.3]

13. Warranties

13.1 Clause 9.1 contains general warranties by the Plaintiffs in respect of performance of the obligations of the Deed, including:

- (a) The terms of the Deed do not breach any obligation, agreement, law or regulation;
- (b) Plaintiff companies or trusts will not violate the constitution or limit or exceed its powers; and

²⁸ The Project Costs Sum is set out under paragraph 9.1 of this memorandum and clause 5.1 of the Deed.

(c) Plaintiffs have the required authorities / consents required to enter into the Deed.

13.2 Clause 9.2 contains further generic warranties by the Plaintiffs, including that the plaintiffs are legal plaintiffs, they have not provided security which would affect LPF's interest and they are not withholding relevant information. The parties also acknowledge that the plaintiffs are not providing a warranty as to the merits of the claim.

13.3 LPF relies on the truth and accuracy of the warranties provided under clause 9 and the completeness and correctness of the information provided to LPF when entering into the Funding Deed.

[Clause 9.3]

13.4 The plaintiffs indemnify LPF against all claims, costs, damages and expenses connected with a breach of the Deed or security agreement.

[Clause 9.5]

14. **Conduct of the Proceedings**

14.1 The Plaintiffs and Representative Plaintiffs agree to conduct the proceedings to the best of their ability, to keep LPF abreast of developments, consult LPF and instruct lawyers to keep LPF advised.

[Clause 10.1]

14.2 There is an ongoing obligation to disclose material information in writing to LPF as soon as the Plaintiffs become aware of the information.

[Clause 10.2]

14.3 The Plaintiffs must provide to the lawyers all relevant information at their own cost including evidential statements, agree to attend court, and provide reasonable assistance to the lawyers in relation to the Claims, Proceedings, Appeal or application for a common fund order.

[Clause 10.3]

14.4 The plaintiffs will not communicate with the defendants otherwise than through the plaintiffs' lawyers.

[Clause 10.4]

14.5 The Plaintiffs do not waive legal privilege in respect of documents provided to LPF in accordance with disclosure obligations.

[Clause 10.5]

14.6 Legal opinions provided to the Plaintiffs and Representative Plaintiffs will also be addressed to LPF. The Plaintiffs and Representative Plaintiffs authorise LPF to meet with the appointed lawyers should they wish to do so.

[Clause 10.6 and 10.7]

14.7 The Plaintiffs and Representative Plaintiffs agree to use their reasonable endeavours to minimise the amount of Project Costs and maximise the Resolution Sum in a timely manner.

[Clause 10.10]

15. **Term**

- 15.1 The Deed continues until all obligations by the parties have been satisfied and the amounts payable to LPF have been paid in full.

[Clause 11.1]

16. **Termination**

- 16.1 Termination without cause: If it has made a negative risk assessment based on legal advice of the costs and risks involved in funding the claims, LPF is entitled to terminate the Deed with 5 working days' notice in writing. If LPF terminates the Deed under clause 12.1:

- (a) LPF remains liable for accrued Project Costs and adverse costs orders.
- (b) If there is any later resolution achieved, LPF will be paid the equivalent of the Resolution Sum.
- (c) The Plaintiffs must immediately replace any security for costs paid by LPF.
- (d) The Plaintiffs do not need to pay the Services Fee under clause 5.1(b).
- (e) The Representatives must advise LPF as soon as there is any resolution or Resolution Sum received.

[Clause 12.1]

- 16.2 Termination with cause: LPF is entitled to terminate the Funding Deed with 20 days' written notice if:

- (a) The Court does not make an opt-out order in terms satisfactory to LPF;
- (b) The Court does not make a common fund order in terms satisfactory to LPF;
- (c) The Court determines that the Services Fee would exceed the aggregate fee payable to any other litigation funder who actually funds proceedings against ASB similar to the Claims for the same period;
- (d) Any of the Plaintiffs or Representatives breach the Deed²⁹, or a related document (including the security agreement); or
- (e) There are recurrent breaches of the Deed, even though the breaches are individually remedied; or
- (f) An event occurs which has a material adverse effect on the claims (material meaning more than 20% of the monetary value of the claims).

[Clause 12.2(a)]

- 16.3 If LPF terminates the Deed for any of the reasons set out at paragraph 16.2(a) to (c) above, it is liable for any obligations accrued (including any adverse costs order) to the point of termination.

- 16.4 If LPF terminates the Deed for any of the reasons set out at paragraph 16.2(d) to (f) above:

- (a) It is not liable for any obligations accrued (including any adverse costs order) to the point of termination;
- (b) It is entitled to repayment of the Project Costs;
- (c) It is entitled to 100% of the Services Fee;

²⁹ For example, breaches of clauses 3.1(c); 3.1(c) or 9.2.

(d) The Plaintiffs need to arrange immediate replacement for security for costs; and

(e) The Representatives and lawyers must notify LPF immediately of any resolution

[Clause 12.2(b)]

16.5 (If one Plaintiff is in breach as set out in paragraph 16.2, LPF can terminate the whole Deed, and may be entitled to recover from all Plaintiffs. Although we are not providing advice on this issue, we note that where there is a group claim, it is not unusual for plaintiffs / class members to make an indemnity agreement amongst themselves to ameliorate risks such as this).

16.6 Termination by Plaintiffs:

(a) If LPF commits a material breach of the Deed and does not remedy the breach within 20 working days of receiving written notice from the plaintiffs requiring it to remedy, the plaintiffs may terminate. However, if the breach is disputed, it must be determined by an expert.

(b) LPF remains entitled to payment of the PC Sum as per clause 5.1(a).

(c) LPF remains liable for the accrued obligations for Project Costs up to the date of termination and the plaintiffs are not required to pay the Services Fee.

16.7 An individual Plaintiff can terminate his or her involvement in the claim by giving 60 working days' notice. The Plaintiff is not required to pay the Services Fee unless he or she receives any part of the Resolution Sum.

[Clause 12.3]

17. **Limitation**

17.1 If a Court determines that any part of the Deed is unenforceable, the remaining parts of the Deed remain in force and the Plaintiffs will take steps if asked by LPF to ensure that LPF receives remuneration to which this Deed refers.

[Clause 13.1]

17.2 The Plaintiffs will not challenge the legality of the Deed.

[Clause 13.2]

17.3 LPF's liability is limited to the accrued Project Costs.

[Clause 13.3]

18. **Disputes**

18.1 Clause 14 sets out the procedure governing disputes. The decision of an expert is final and binding. The expert appointed is Bruce Gray QC.

19. **Settlement**

19.1 The Plaintiffs and the Representatives are obliged to maximise the settlement sum. Although LPF can request that the Representatives make or accept an offer of a settlement sum, the Representatives are not obliged to do so.

[Clause 15.1]

19.2 The Representatives must obtain LPF's consent prior to accepting a settlement offer.

[Clause 15.2]

- 19.3 The Representatives must give LPF notice of any planned settlement negotiations.
[Clause 15.3]
- 19.4 Any dispute regarding settlement is governed by clause 14.
[15.4]
- 19.5 Clause 15.5 sets out the procedure regarding disputes about settlement.
- 19.6 Clause 15.6 sets out the expert's considerations in making his or her determinations from the standpoint of an economically rational self-funded plaintiff.
20. **Notices and General**
- 20.1 Clauses 16 and 17 set out the procedure for giving notice and general obligations which are common to agreements of this type.

Yours faithfully
Wynn Williams



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