

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

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

**CIV-2021-404-001190
[2026] NZHC 1154**

UNDER The Credit Contracts and Consumer Finance
Act 2003

BETWEEN ANTHONY PAUL SIMONS
First Plaintiff (LEAVE TO DISCONTINUE)

ANDREW JOHN BEAVAN and MEI LIM
Second Plaintiffs

../2 cont'd

AND ANZ BANK NEW ZEALAND LIMITED
First Defendant

ASB BANK LIMITED (LEAVE TO
DISCONTINUE)
Second Defendant

Hearing: 23–24 March 2026

Appearances: D M Salmon KC, A C van Ammers, S Russell and T Kelly for
Second Plaintiffs
S M Hunter KC, S V A East, S R Hiebendaal and J A Ruddell for
First Defendant

Judgment: 4 May 2026

JUDGMENT OF VENNING J

**This judgment was delivered by me on 4 May 2026 at 11.30 am, pursuant to Rule 11.5 of the High
Court Rules.**

Registrar/Deputy Registrar

Date.....

PHILIP CHARLES DUNBAR and
SHERYN VALERI DUNBAR (LEAVE
TO DISCONTINUE)

Third Plaintiffs

BRUNO ROBERT BICKERDIKE and
EMMA RENAE PUNTER (LEAVE TO
DISCONTINUE)

Fourth Plaintiffs

GLENN JONATHAN MARVIN and
ANNA MARY CUTHBERT (LEAVE TO
DISCONTINUE)

Fifth Plaintiffs

Solicitors: Russell van Hout, Auckland (S E R Russell)
Bell Gully, Auckland (S V A East and SR Hiebendaal)

Counsel: D M Salmon KC/A C van Ammers, Auckland
S M Hunter KC, Auckland

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[1] The second plaintiffs, Andrew Beavan and Mei Lim (plaintiffs), seek summary judgment against the first defendant, ANZ Bank New Zealand Limited (ANZ).

[2] The plaintiffs allege ANZ breached the Credit Contracts and Consumer Finance Act 2003 (CCCFA) by failing to provide them (and a number of other borrowers in the class which they represent) variation disclosure as required by s 22 of the CCCFA.

[3] The plaintiffs' case is that, as a result, they are not liable for the costs of borrowing (primarily the interest charged) until the breach was remedied. They seek declarations as to the interpretation and application of ss 22 and 99(1A) of the CCCFA and related declarations. They also seek orders pursuant to ss 93(a) and 94(1)(a) of the CCCFA directing ANZ to fully refund payments made during the period ANZ was in breach of its obligations, or, in the alternative, orders under s 90 of the CCCFA directing ANZ to pay statutory damages. The plaintiffs also seek interest under the Interest on Money Claims Act 2016 (IMC).

General background

[4] Pursuant to s 22 of the CCCFA, whenever a lender makes an agreed change to a consumer credit contract,¹ it must ensure disclosure of full particulars of the change is provided to the borrower under the contract within timeframes prescribed by the section (variation disclosure).

[5] ANZ provided variation disclosure of agreed changes to its customers by sending them Loan Variation Letters (LVLs).

[6] ANZ's LVLs were generated by a lending system, Systematics. In 2015, ANZ engaged a third party developer to design and implement changes to a software package known as Frontline Tools to enable it to generate the LVLs. This involved creating a loan calculator to calculate repayment amounts and loan terms.

¹ As defined in s 11 of the Credit Contracts and Consumer Finance Act 2003 [CCCFA].

[7] On 30 May 2015, ANZ began using Frontline Tools to generate LVLs. Due to a coding error, the loan calculator in Frontline Tools did not include accrued but not yet charged interest when calculating the new repayment amounts or loan terms (the Coding Error). As a result, most of the LVLs generated contained incorrect information.

[8] After receiving customer complaints, ANZ fixed the Coding Error in May 2016. It reported the matter to the Commerce Commission on 19 June 2017.

[9] Between June 2018 and April 2019, ANZ wrote to approximately 101,535 customers who had received LVLs affected by the Coding Error and paid them a total of \$5,591,000.

[10] On 2 March 2020, ANZ entered a settlement agreement with the Commission pursuant to which it admitted breaching s 9C(2)(a)(ii) of the CCCFA and agreed to pay affected customers a total of \$35,032,000 (inclusive of the \$5,591,000 already paid). Section 9C(2)(a)(ii) required ANZ to exercise the care, diligence and skill of a responsible lender before agreeing to provide credit.

[11] Starting in April 2020, ANZ wrote to affected customers informing them of the further payments to be made in relation to the Coding Error and paid out a further \$29,441,000.

Plaintiffs' borrowing

[12] On 6 August 2015 the plaintiffs entered a home loan with ANZ for the amount of \$650,000. The lending was split into two loans: one for \$400,000 fixed for two years at a rate of 4.69 per cent per annum and the second for \$250,000 with a floating interest rate, initially of 5.59 per cent annum.

[13] In November 2015, through their broker, the plaintiffs asked to fix their interest rate on the second loan at the rate then available of 4.49 per cent per annum for three years.

[14] ANZ agreed and varied the plaintiffs' loan accordingly. On 23 November 2015, ANZ sent the plaintiffs a LVL generated by Frontline Tools in the following terms:

23/11/2015

Thank you for banking with ANZ.

This letter outlines some changes we're making to your loan on 23/11/2015. It's called a loan variation letter, and is an important document that you should keep in a safe place. The changes we've outlined below form part of your loan agreement with us. You should take a fresh look at your loan agreement – because of the changes we're making, some different clauses may now apply to your loan.

Your updated loan details

Your loan number	0323-0088267241-1002	
Your loan amount	Amount you owe on your loan today:	\$248,420.37
	Indicative total interest you'll pay:	\$201,328.35
	Indicative total amount you'll pay:	\$449,748.72
Your loan term	29 Year(s), 8 Month(s), 22 Day(s) - from 23/11/2015 until 14/08/2045	
Your new interest rate until 23/11/2018	Interest rate:	ANZ Home Loan Three Year Fixed interest rate available on 23/11/2015 date.
	Current rate:	4.49% p.a.
	Fixed-rate period:	Until 23/11/2018
	The interest rate can change, including before the 23/11/2015. Your interest rate also changes at the end of your fixed-rate period to the ANZ Home Loan Floating interest rate available on 23/11/2018.	
	If you repay your loan early, you will have to pay us an Early Repayment Administration fee, and you may have to pay us an Early Repayment Recovery. An Early Repayment Recovery is an amount you pay us to compensate us for the loss we incur when you repay some <i>OR</i> all of the loan early during a fixed-rate period. Talk to us before you decide to repay early, as any Early Repayment Recovery could be large.	
Your new repayments start 04/12/2015	Repayments of:	\$579.57
	Repayments include:	Loan amount, interest, and any other amounts you may have to pay like fees.
	Repayments start:	04/12/2015
	Frequency:	Fortnightly
	Number of repayments:	776
	Final repayment of:	\$579.57
	Final repayment due:	14/08/2045

<p>Final repayment includes: All of the remaining loan amount, interest, and any other amounts you may have to pay like fees.</p> <p>Your repayments may change at the end of your fixed-rate period.</p>
<p>Customer Number 2329793</p>

[15] Due to the Coding Error the LVL contained the following errors:

	Information	Incorrect figure (NZD)	Correct figure (NZD)	Difference (NZD)
1.	Indicative total interest payable under the loan	201,328.35	203,140.58	1,812.23
2.	Indicative total payable under the loan	449,748.72	451,560.95	1,812.23
3.	Amount of the new regular (fortnightly) payment	579.57	581.91	2.34
4.	Amount of the new final repayment	579.57	580.70	1.13

[16] On 22 November 2018, the plaintiffs and ANZ agreed to a further variation which fixed the interest rate on the second loan at 3.95 per cent per annum for one year. ANZ sent a further LVL (the 2018 LVL). The information contained in the 2018 LVL, including the repayment amounts, was accurate.

[17] Between November 2015 and November 2018, the plaintiffs had made loan repayments based on the incorrect statements in the LVL.

[18] On 30 January 2019, ANZ sent the plaintiffs a “Calculator Problem Letter” and paid them \$917.32.

[19] On 3 September 2019, the plaintiffs repaid their entire loan with ANZ and refinanced with Westpac.

[20] On 13 May 2020, ANZ sent the plaintiffs a “2020 Calculator Problem Letter” and paid them a further \$10.26.

The plaintiffs' case

[21] Section 22 of the CCCFA required ANZ to disclose “full particulars of the change” when it agreed to the plaintiffs’ request to refix the interest rate for the borrowing on the second loan in November 2015.

[22] The plaintiffs argue that, as the information ANZ disclosed in the LVL was incorrect, ANZ failed to comply with its obligations under s 22 to disclose “full particulars of the change”. As a result, pursuant to s 99(1A) the plaintiffs were not liable for the costs of borrowing for the period ANZ was in breach of s 22. The plaintiffs say that the breach continued from 23 November 2015 until their loan was repaid on 3 September 2019.

[23] The plaintiffs allege they have suffered a quantifiable loss of \$40,248.84, being the costs of borrowing paid by them during that period.

[24] The plaintiffs argue that as ANZ was not entitled to receive any payments for the costs of borrowing during the period it remained in breach and s 48 of the CCCFA required it to refund the \$40,248.84 to them as soon as practicable. It has not refunded the payments and so is in breach of s 48.

[25] The plaintiffs submit that ANZ has no defence to their personal claim and seek orders under ss 93 and 94 of the CCCFA directing ANZ to refund them the \$40,248.84, together with interest under the IMC. In the alternative they seek statutory damages in the amount of \$6,000 pursuant to ss 88, 89 and 90 of the CCCFA.

[26] As to the class action aspect of the case, the plaintiffs bring their claim as a representative proceeding on behalf of approximately 17,000 ANZ customers (past or present) who received LVLs relating to borrowing entered on or after 6 June 2015 that contained incorrect information due to the Coding Error.

[27] The plaintiffs seek declarations as to the breach and also relating to the operation of certain key provisions of the CCCFA, which will apply to others in the class of borrowers they represent. The common issues sought to be determined and the responses to them are set out in the schedule attached to this judgment.

ANZ's case in response

[28] ANZ says that it was not in breach of s 22 of the CCCFA. Section 22(1) only required it to accurately disclose the new interest rate and the term for which it was fixed, which it did. Alternatively, if it was required to disclose the affected items of information the errors were *de minimis* such that the LVL was compliant with s 22(1).

[29] Next, even if ANZ did breach s 22 (which is denied) s 99(1A) did not extinguish its contractual entitlement to receive the costs of borrowing. Section 99(1A) is a shield, not a sword, functioning only to remove a lender's entitlement to enforce the debtor's obligation to pay costs of borrowing. Section 48 was not engaged.

[30] In any case, ANZ say that s 99(1A) concerns only the costs of borrowing relating to the matter for which non-compliant disclosure was given, not all costs of borrowing under the contract. The plaintiffs' variation reduced their costs of borrowing, and accordingly there are no sums to which s 99(1A) relates.

[31] ANZ then says the plaintiffs have not suffered loss or damage so are not entitled to relief under ss 93 and 94. Even if they are found to have suffered loss or damage, ANZ says that those sections afford the Court a residual discretion in making a remedial order which should be exercised in ANZ's favour.

[32] Next, ANZ says in any event, it is entitled to restitution for the lending services provided.

[33] As to the period of the breach, if one is found, ANZ says that the period during which any claim applied ceased on 22 November 2018 when the plaintiffs agreed to change their interest rate again.

[34] ANZ then says the claim for statutory damages must also fail as there was no breach of s 22 and in any event, ANZ has a defence of reasonable mistake and/or the Court should exercise its discretion to reduce or extinguish such damages.

[35] Finally, ANZ says the plaintiffs are not entitled to interest under the IMC.

[36] In any event, ANZ says that the claim is not suitable for summary determination due to the complex issues that are raised.

The evidence

[37] The application for summary judgment is supported by the affidavit evidence of Mr Beavan filed on behalf of himself and Ms Lim. Mr Beavan has made three affidavits dated 25 June 2021, 17 September 2025, and 17 December 2025. In his first affidavit Mr Beavan set out the details of his and Ms Lim's home loan, the LVLs they received, the subsequent payment following the calculation problems, his understanding of ANZ's settlement with the Commerce Commission and his wish to make a representative claim. In his second affidavit he confirmed the factual allegations in the second amended statement of claim, dated 16 May 2025,² and in his final affidavit, which is not directly relevant to the present application, he confirmed his agreement to the allocation of combined project costs in the first and third to fifth plaintiffs' (leave has been granted to be discontinued) claim against ASB in these proceedings.

[38] Tina Payne, a forensic accountant and electronic forensic investigator, filed an affidavit dated 28 January 2022 confirming the amount the plaintiffs had paid in costs of borrowing over the entire period of the loan was \$40,249.11.

[39] Brett Lumsden, the Head of Business Products at ANZ, filed two affidavits in response to the plaintiffs' application, dated 1 April 2022 and 16 May 2025 (sworn 12 December 2025).

[40] In his first affidavit Mr Lumsden outlined the relevant factual background, including the relevant lending products offered by ANZ prior to May 2015; the lending tools used by ANZ staff involved in the error which is the subject to the proceedings; the identification of the error; ANZ's approach to resolving the error in a way that it considered fair and transparent for customers; and a timeline of the second plaintiffs' home loan with ANZ. His affidavit also addresses factual

² There is now a third amended statement of claim dated 10 February 2026.

differences within the proposed class of ANZ customers. In his second affidavit Mr Lumsden provided further relevant details of the factual background.

[41] Also in reply to the application for summary judgment, ANZ filed expert evidence from Professor Lauren Willis, an expert in the area of consumer finance, and Mr James Mellso, an economist. Professor Willis is a professor of Consumer Law at Loyola Marymount University Law School in California and specialises in consumer finance and the use of disclosure as a regulatory tool. Professor Willis concludes that a consumer in the plaintiffs' position would place little weight on the LVL and the difference between the incorrect and correct figures was very unlikely to have impacted the plaintiffs' decision-making due to the small size of the discrepancies and the timing of the disclosures. She noted that in this context consumer decision-making tends to take place in two psychological stages: first, the deliberative stage where the consumer considers whether to engage in a particular transaction and second, the implementation stage. Following the making of the decision the consumer takes the action necessary to implement it. In her opinion, it was very unlikely the misstated figures would have had an effect on the plaintiffs in the present case due to the correct and incorrect amounts being roughly similar in dollar figures. In her opinion most consumers would round the numbers to two significant figures, meaning they likely would not perceive a difference between the two; and secondly, the timing of the disclosures after the plaintiffs moved to an implementation mindset meant they were unlikely to reconsider their decision. That was especially so given the similar dollar figures. There was no reason for a consumer to move out of the implementation phase.

[42] Mr Mellso concluded that the numerical errors in the LVL were not economically significant and could be described as trivial. In his opinion, had accurate disclosure been received, the plaintiffs would not have made a different decision. Next, it could not be concluded the plaintiffs suffered any economic loss or harm as a result of the errors, especially in light of the remediation by ANZ. They were more than fully compensated. The interest costs incurred by the plaintiffs reflected reasonable market rates by comparison to the rates offered by other major banks. Finally, a borrower could reasonably expect interest rates to vary over the course of their loan – variations of around 71 basis points could be expected for the floating interest rate and 77 basis points for the three-year fixed rate.

[43] In response the plaintiffs called the evidence of Associate Professor Spooner and Shamubeel Eaqub. Associate Professor Spooner is an Associate Professor of Law at the London School of Economics and Political Science, with a research background in consumer credit and debt. He has a PhD in law on consumer debt and personal insolvency.

[44] In Professor Spooner's opinion the academic literature on the point presented a complex and context-dependent understanding of consumer decision-making that was at odds with Professor Willis' firm conclusions that consumers in general and the plaintiffs in this case specifically would place little weight on the contents of the LVL. He considered it was appropriate to assess the inaccurate disclosure by reference to the broader aims served by the regulation of consumer finance and the multiple aims of information disclosure. In his opinion, it was not possible to draw firm conclusions on the weight that may be placed on the contents of the LVL. He noted the point that the figures were presented in dollars and concerned fortnightly repayment amounts, which indicated to him that consumers may be more likely to consider that information.

[45] In conclusion, Professor Spooner considered that ongoing inaccurate disclosure by major institutions such as banks may mean consumers lose their ability to rely on the information provided concerning their rights and obligations. Consumers' trust and confidence would be affected and their ability to make confident purchasing decisions would be negatively affected. The purpose of consumer finance is more than facilitating consumer choice, it includes promoting fairness and enhancing consumer confidence and trust. The impact on consumers should be assessed with reference to the effect in reducing levels of consumer trust and confidence and expectations of fair treatment across consumer finance markets.

[46] Mr Eaqub, an economist, reviewed Mr Mellsop's evidence. He considers Mr Mellsop took an unduly narrow approach to assessing the economic significance of the errors and as a result reached incorrect conclusions. He considered the issue was whether the disclosure regime could be said to be functioning as intended in the market.

[47] Irrespective, Mr Eaquib considered the errors were economically significant by virtue of ANZ failing to meet its statutory compliance requirements. The errors were large taken overall and were not altered by later remedial payments. A lender's failure in this respect erodes trust in the market. It diminishes the ease of comparing products, which reduces competition between lenders and results in inefficiencies. In his opinion, the plaintiffs suffered economic loss or harm by receiving a lesser quality product. A rational consumer would prefer a credit product with compliant disclosure. The fact the relevant rate was broadly consistent with market benchmarks does not establish that product attributes were competitively validated.

Principles of summary judgment

[48] As an application for summary judgment the onus is on the plaintiffs to satisfy the Court that ANZ has no defence to their claim. Generally summary judgment will not be appropriate where the Court is required to determine genuinely disputed questions of fact.³

[49] Although there is a divergence of opinion between the experts' evidence for the plaintiffs and ANZ, in this case the focus is primarily on the correct interpretation and application of a number of sections of the CCCFA. While interesting, I do not consider the evidence of the respective experts to be of substantial assistance in the interpretation of the relevant provisions of the CCCFA. The underlying factual issues are not in dispute. The errors in the LVL, the amounts paid by the plaintiffs, and the compensation paid by ANZ are all agreed. As such, I consider the interpretation issues raised can be decided at this stage and it is unnecessary for the matter to proceed to a full hearing on those interpretation issues.

Issues

[50] The application raises the following issues:

- (a) Was ANZ in breach of s 22 of the CCCFA?

³ *Pemberton v Chappell* [1987] 1 NZLR 1 (CA); and *International Ore and Fertilizer Corporation v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA).

- (b) Does the *de minimis* principle apply?
- (c) What is the relevant breach period?
- (d) What is the meaning and effect of s 99(1A)?
- (e) Is ANZ in breach of s 48?
- (f) Do ss 93 and 94 apply in this case?
- (g) Does a defence of quantum meruit/set-off or circuity of action apply?
- (h) Are statutory damages available in the alternative?
- (i) If applicable, are the plaintiffs entitled to interest under the IMC?

Principles of statutory interpretation

[51] As noted, this case turns on the interpretation of a number of the provisions of the CCCFA. Section 10(1) of the Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text and in light of its purpose and context.

[52] In *Burrows and Carter on Statute Law in New Zealand* the authors note that the purpose of an Act can refer to the theme of an Act as enacted, often summarised in a purpose section, or the social, economic or other end that Parliament was hoping to achieve by the Act.⁴ As a general proposition, if the purpose of the Act is clear its text should, if possible, be interpreted so as to give effect to that purpose. Legislation should work as Parliament intended it to work.

[53] While the Court can have regard to the legislative history of an enactment “as a check on and to bolster [the] construction” which the Court has determined,⁵ care is

⁴ Ross Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis,, Wellington 2015) at 238.

⁵ *R v Aylwin* (2008) 24 CRNZ 87 (CA) at [58].

required when seeking to draw meaning from legislative history, especially “the further back one goes in the policy development process”.⁶

[54] Relevantly in this case there is also a general rule that amendments subsequent to the period at issue may not be taken into account in interpreting the relevant statutory provision.⁷ Whether there is an exception to that general rule is considered later.

[55] A number of other principles are applicable. Individual sections of an Act should be read in the context of the Act as a whole.⁸

[56] For ANZ, Mr Hunter KC also argued that the following principles required consideration in this case:

- (a) there is a presumption that “the drafter has used words consistently throughout the Act”;⁹
- (b) Parliament does not usually intend disproportionate consequences, and legislation should generally be construed to avoid such consequences;¹⁰
- (c) the principle of legality provides that clear words are needed to abrogate common law rights, including freedom of contract and to property;¹¹ and
- (d) caution is necessary about the interpretation of penal statutes (i.e., statutes which criminalise conduct, like s 22 of the CCCFA).¹² While

⁶ *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [126].

⁷ *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* [2012] NZCA 481, [2013] 1 NZLR 66 at [22].

⁸ Carter, above n 4, at 287.

⁹ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 337.

¹⁰ *Rabobank New Zealand Ltd v McAnulty* [2011] 3 NZLR 192 (CA) at [27], citing *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 (HL) at [116]–[117].

¹¹ Carter, above n 9, at 435.

¹² *Chen v R* [2019] NZCA 299 at [44].

the Court must still undertake a purposive interpretation, “a defendant is entitled to the benefit of doubt in cases of genuine ambiguity”.¹³

[57] Where, as here, the relevant enactment expressly sets out its purpose, the Court must have regard to that section. The purposes of the CCCFA are stated to be:¹⁴

3 Purposes

- (1) The primary purpose of this Act is to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land.
- (2) It is also the purpose of this Act—
 - (a) to promote the confident and informed participation in markets for credit by consumers; and
 - (b) to promote and facilitate fair, efficient, and transparent markets for credit; and
 - (c) to protect the interests of consumers under credit contracts, consumer leases, and buy-back transactions of land, both when those agreements are entered into and for their duration; and
 - (d) to provide remedies for debtors, lessees, and occupiers (including consumers) in relation to—
 - (i) oppressive credit contracts, consumer leases, and buy-back transactions of land; and
 - (ii) oppressive conduct by creditors under credit contracts, lessors under consumer leases, and transferees under buy-back transactions of land.
- (3) To achieve the purposes referred to in subsections (1) and (2), this Act—
 - (a) requires creditors under consumer credit contracts and transferees under buy-back transactions of land to be responsible lenders, both when they provide credit or finance and for the duration of those agreements; and
 - (b) provides for the disclosure of adequate information to consumers under consumer credit contracts and consumer leases (both before entry into, and before variation of, such agreements)—

¹³ *R v QF* [2019] NZHC 3058 at [212(d)].

¹⁴ As from 6 June 2015.

- (i) to enable consumers to distinguish between competing credit or lease arrangements; and
- (ii) to enable consumers to be informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them; and
- (iii) to enable consumers to monitor the performance of consumer credit contracts; and
- ...
- (c) provides rules about interest charges, credit fees, default fees, and payments in relation to consumer credit contracts; and
- ...
- (g) provides, in relation to credit contracts that include or involve a security interest,—
 - (i) rules that apply in relation to the creditor’s rights to repossess consumer goods; and
 - (ii) corresponding rights for consumers and third parties that are affected by the exercise of the creditor’s rights; and
- (h) applies, as appropriate, the requirements, disclosure obligations, rules, and remedies specified in paragraphs (a) to (g) in relation to guarantors; and
- ...

[58] The particularly relevant purposes in the present case are s 3(2)(a) to (c). To achieve those purposes s 3(3)(b) provides for the disclosure of “adequate information” to enable consumers to be informed of the terms of consumer credit contracts both before entry and before variation of the contracts.

The legislative framework generally

[59] The CCCFA replaced the Credit Contracts Act 1981 as from 1 April 2005. It was itself amended in June 2014. Inter alia, amendments were made to ss 3, 22, 48, 93 and 94, and s 99(1A) was inserted. The background to the changes can be seen in the initial briefing to the Commerce Committee of 24 October 2013. The intention was to enhance existing protections, including with regard to disclosure.

[60] The plaintiffs rely particularly on ss 22, 99(1A), 48, 93 and 94 to support their case:

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.¹⁵
 - (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.
- ...

¹⁵ At the relevant time there were no regulations prescribed. When the Bill was introduced to Parliament the Ministry of Consumer Affairs stated the regulations were intended to cover “technical and administrative matters”.

99 Enforcement of consumer credit contract prohibited

...

- (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.

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.

...

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:

...

Was ANZ in breach of s 22 of the CCCFA?

[61] ANZ agreed to the plaintiffs' request to change the floating interest rate that applied to their loan of \$250,000 to 4.49 per cent for three years. Section 22 of the CCCFA required ANZ to ensure that it disclosed "full particulars of the change".

Plaintiffs' submissions

[62] Mr Salmon KC submitted that the focus of s 22(1) was not on the specific change requested (the interest rate) but rather on the changes the plaintiffs had agreed to. The dictionary definitions of “full” and “particular” mean complete, especially in detail or number of specific items or details of information. He submitted that ANZ was required to provide details of the actual change (the interest rate) and any additional applicable key information affected by the change, which in this case included the payment amounts and the indicative total interest and total payments under the loan contract.

[63] Mr Salmon submitted that once the parties agree to change their contract the terms of the contract changed and so did a number of other aspects of key information. Unless the further disclosure was provided of those matters the borrower would no longer have all the information about their contract that they needed. On that basis the full particulars of change in this case included not only the interest rate, but also the effect of the change(s) on the key information in Schedule 1 that was required to be provided in initial disclosure. The variation disclosure was an update to initial disclosure under s 17.

[64] Next, he submitted that treating s 22(1) as requiring an update to the initial disclosure is consistent with the reference in s 99 to both ss 17 and 22. Both sections trigger s 99, which is a strong indicator that the two provisions are related. That can be contrasted with s 23 for example, which, while also requiring the disclosure of changes, following the exercise of a power, is not referred to in s 99.

[65] Mr Salmon noted s 22 was in subpart 2 – required disclosure of Part 2 of the Act. Reading it in context and by reference to s 17, the details of what was required to be disclosed as “full particulars of the change” become clear. They incorporated the particulars required by Schedule 1. Without that, the plaintiffs would not have all the information about their borrowing that they needed.

[66] Mr Salmon submitted that s 22(1)(b) was not a reason to read s 22(1)(a) down. Regulation 4F (which only came into effect on 1 December 2021) was of limited relevance to the interpretation of s 22(1)(a) and could shed no light on Parliament’s

intention when s 22 was initially enacted. In any event the legislative history suggests that the regulations were intended to clarify what was required by “full particulars of the change”.

[67] Next, he submitted that on its face the CCCFA imposes clear disclosure obligations and requires strict compliance, with any deviation being a breach. He submitted that the plaintiffs’ interpretation of s 22(1) was consistent with the history and purposes of the Act under s 3. It ensures borrowers are provided with the adequate information contemplated by s 3(b)(i) to (iii) and they receive an accurate record of their rights.

[68] Mr Salmon also noted that it appears the Commission interprets ss 22, 23 and 26 in the same way.

[69] On the basis of the above, Mr Salmon submitted that because of the errors in the LVL ANZ breached its obligations under s 22(1) of the CCCFA.

ANZ’s submissions

[70] ANZ argues that s 22(1) only required disclosure of details of the agreed variation to the contract, in this case the change in the interest rate. It does not require disclosure of the impact of the agreed change or the matters set out in Schedule 1, for example, the repayment amounts. The errors in the LVL did not affect matters that needed to be disclosed.

[71] ANZ argues its interpretation gives best effect to the natural and ordinary meaning of s 22. The section only applies where the parties agree to change the contract. It does not require particulars “about” or “in respect of” the change or disclosure of the consequences of the change.

[72] Mr Hunter referred to the case of *Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd* as an example of what was required by “full particulars.”¹⁶ That case involved consideration of a section of the Strata Titles Act 1985 (WA) which required disclosure

¹⁶ *Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd* [2009] WASC 230.

of full particulars of any notifiable variation to a strata plan. The purchasers argued that required the vendor to disclose the consequences or effect of the variation. Johnson J rejected the argument. He considered “full particulars” meant nothing more than “full details”.

[73] Next, ANZ submits its interpretation is consistent with the meaning of “full particulars of the change” used elsewhere in the CCCFA, particularly in s 23. Section 23(2) requires disclosure of the “full particulars of the change”. Section 23(4) goes on to provide a creditor may disclose a change in interest rate by publication (e.g. through its website). Mr Hunter submitted that this confirms “full particulars of the change” means the change to the interest rate only. It does not extend to consequential impacts on repayment amounts. Parliament must have intended the wording in s 22 and s 23 to have the same meaning in both sections.

[74] Mr Hunter also referred to *Hardie v Westpac New Zealand Limited*.¹⁷ In that case Downs J rejected an argument the bank was in breach of CCCFA by sending notification of a change in interest rate to a former address. He accepted Westpac had complied with its obligations by publishing the interest rate changes.

[75] Third, Mr Hunter submitted that ANZ’s case would produce results consistent with the purposes of s 22. At most, disclosure under s 22 is directed at facilitating record keeping so that borrowers know what contractual variations have actually been agreed. On ANZ’s interpretation that purpose is achieved. Borrowers will be provided with full particulars of the change. If they desire further detail they can seek request disclosure.

[76] Mr Hunter then made the point that the disclosure regime draws careful distinctions between the requirements and consequences of the various types of disclosure. He noted s 22 does not refer to Schedule 1, whereas ss 17, 24 and 25 do.

[77] Mr Hunter then rejected the argument of any link between s 17 and s 22. The words of the sections are different. There are different consequences for breaches. By contrast with initial disclosure there is no right to cancel the contract if variation

¹⁷ *Hardie v Westpac New Zealand Limited* [2024] NZHC 2302.

disclosure is not provided. For example, the right to cancel following disclosure only applies to initial disclosure, not variation disclosure.

[78] Further, he submitted that the plaintiffs' interpretation of s 22(1)(a) was undermined by the existence of s 22(1)(b) which contemplated the making of further regulations to specify the additional information to be provided. The legislative history of the regulations which were ultimately passed supports ANZ's interpretation.

[79] A 2018 Cabinet paper noted the meaning of "full particulars" was not clear and recommended that the Credit Contracts and Consumer Finance Amendment Bill include provision to extend s 22 to the "effect of the change" (rather than just the change itself).¹⁸ The Government decided not to implement that suggestion but instead published regulations which expressly provided for the disclosure required.¹⁹ The Regulations were only needed if consequential matters were not already covered by s 22(1)(a) and only required disclosure of some of the matters in Schedule 1.

[80] Mr Hunter submitted that the plaintiffs' case was inconsistent with the legislative history having regard to the earlier requirements for modification disclosure under the Credit Contracts Act. Modification disclosure under that Act did not require disclosure of changes to the amount of payments.

[81] Mr Hunter rejected the submission by the plaintiffs that, even if disclosure of the Schedule 1 matters were not required, s 22(1)(a) required disclosure of inevitable consequential changes. He submitted there was no requirement to disclose second-order consequences. There could not, on any view, be an obligation to disclose matters which were not contractual consequences such as the indicative total interest or indicative total amount payable which is simply illustrative and based on the (plainly incorrect) assumption the interest rate would not change for the rest of the 30 year term.

[82] For the above reasons ANZ says it was not in breach of s 22(1)(a). The change agreed was the fixing of the interest rate at 4.49 per cent for three years. The LVL

¹⁸ Cabinet Paper "Review of Consumer Credit Regulation" (2018) at [55].

¹⁹ Credit Contracts and Consumer Finance Regulations 2004, reg 4F.

accurately disclosed that change. The “indicative figures” were not contractual terms and did not require disclosure. The repayment amounts were products of the change agreed but not the change itself.

[83] Alternatively, Mr Hunter submitted that the terms of the contract were varied to the figures set out in the LVL. The LVL was part of the loan agreement. The amount in the LVL was what the plaintiffs were contractually obliged to pay (by reference to the loan agreements). There was no disconnect between the contractual position and the disclosure, so there was no breach.

[84] For the above reasons ANZ says its interpretation is correct, or at least for summary judgment purposes is arguable.

Analysis

[85] The answer to what is required by the reference to “full particulars” in s 22 must be informed by the purposes of the CCCFA and the function of disclosure in meeting those purposes.

[86] The CCCFA provides for various types of disclosure: initial, continuing, variation and request and guarantee disclosure. Each form of disclosure has its own purpose but each is also intended to meet the purposes of the Act by providing adequate information, in the case of variation disclosure in particular, to “enable consumers to monitor the performance of consumer credit contracts” and perhaps to “distinguish between competing credit arrangements”.

[87] As a starting point, I consider that the requirement for “full particulars” suggests that somewhat more than just disclosure of the agreed interest rate and the period for which it is fixed is required. The borrower would obviously already be aware of the change to the particulars of the interest rate and the period of the loan. Some further meaning must be given to “full”. The particulars required on the initial disclosure provided for by s 17 provide context. Section 17 requires the disclosure of the particulars set out in Schedule 1 to the Act. Notably, under the heading of ‘Payments Required’ Schedule 1 provides that the following information is required:

- (o) if more than 1 payment is to be made—
 - (i) the amount of the payments or the method of calculating the amount; ...

[88] While s 22 does not refer to Schedule 1, because the amount of the payments changed with the agreed change to the interest rate, without advice of the particulars of the changed payment amounts, the plaintiffs, in this case, would not have “full particulars” of the change as required by s 22. The change in the payment amounts is a relevant particular affected by the change to the interest rate. I consider ANZ’s argument that relies on the section not specifically requiring particulars “about” or “in respect of” to be too narrow an approach given the purposes of the Act. Further, ANZ chose to set out the new fixed interest rate, period and payment amounts in the LVL as new terms, referring to them as “changes we are making to your loan” and changes that “form part of your loan agreement with us”.

[89] Next, s 99, which prohibits the enforcement of a consumer credit contract where disclosure has not been made, expressly provides that it applies where disclosure is required under s 17 or s 22. Parliament has thus determined that the consequences of failure to make disclosure of the full particulars on a change in circumstances under s 22 should have the same impact as a failure to provide initial disclosure under s 17. That also supports the view that something more than just the change in interest rate was required to be disclosed.

[90] I do not consider the case of *Bankmist Holdings Pty Ltd* to be of assistance.²⁰ The applicant sought to terminate a contract to purchase a strata title on the basis the respondent had not provided “full particulars” of a change to the underlying plan. When considering the meaning of the “full particulars” required in that case, Johnson J confirmed that the interpretation was to be directly linked to the preceding sections of the relevant legislation. The respondent had provided advice of changes to the strata plan including to the size and hence unit entitlements. The applicant argued that the respondent had not provided full particulars of the notifiable variation as required by the Act. The Judge considered that the broad interpretation argued for of “full particulars” would have required the provision of more detail on the variation than

²⁰ *Bankmist Holdings Pty Ltd v Azine Holdings Pty Ltd*, above n 16.

was required under the preceding sections of the relevant legislation which provided for the initial information required. The case is distinguishable but confirms that the meaning of the phrase is to be determined by its context and the purposes of the legislation.

[91] There are few High Court decisions relating to the interpretation of the CCCFA. In *Hardie v Westpac New Zealand Ltd* the Hardies had sought an injunction to prevent a mortgagee sale, alleging Westpac was in breach of its disclosure obligations under the CCCFA.²¹

[92] To support their application for injunction the Hardies first argued that “full particulars of the change” required under s 22(1)(a) included the priority amount as well as the interest charged.²² The Hardies argued they had an arguable case that Westpac had breached s 22, as it had failed to provide disclosure of the priority amount. Downs J rejected the argument primarily on the ground that a change to the priority amount in connection with a security interest was just that, a change to the security interest only. It did not change or affect the consumer credit contract so that s 22 was not engaged by the change to the priority amount alone. As such no breach of s 22 could occur.²³

[93] While Downs J did go on to consider the second cause of action, observing that s 23 required Westpac to advise of a change in interest rate, he concluded that that argument was “similarly porous” as s 23 specifically enabled disclosure by alternative means including online banking. While Mr Salmon accepted that aspect of the reasoning suggested all that was required to be disclosed was advice of the interest rate, I do not consider the case to be authoritative on the point. It was an application for an interim injunction without full argument on the point and it appears both the applicants and Downs J had focused on the first cause of action. There was no detailed consideration of what “full particulars” under s 22 required.

²¹ *Hardie v Westpac New Zealand Ltd*, above n 17.

²² At [13].

²³ At [22].

[94] Relatedly, ANZ points to the requirement in s 23 to disclose “full particulars of the change” noting that s 23(4) confirms the requirement can be satisfied by publication of the interest rate. Section 26(4) has an equivalent provision. ANZ argues that a similar meaning must be given to the wording of “full particulars of the change” in s 22. However, s 23(4) expressly only applies where a creditor exercises a power under the contract to change the interest rate (or of any fee or charge payable). Neither section applies to other changes under s 23(1) such as to the amount of any payment under the contract (or under s 26(1) which deals with increased obligations under the contract). There is no equivalent provision to ss 23(4) or 26(4) in s 22. I do not consider the way s 23 deals with the provision of “full particulars of the change” to be inconsistent with a requirement that the change in the amount is properly regarded as one of the particulars required by variation disclosure under s 22.

[95] Next, while the consequences of a failure to provide initial disclosure are different to the consequences of a failure to provide variation disclosure, there is an understandable reason for that, given the importance of initial disclosure. The argument that if the borrowers require further disclosure they can request it is unconvincing.

[96] As noted, regulations have now been passed as provided for by s 22(1)(b), specifically reg 4F which came into force on 1 December 2021. It prescribes information to be disclosed under s 22(1)(b) including the amounts of future payments. However, I do not consider that reg 4F can have any direct bearing on the meaning of s 22(1) and what was required to satisfy the requirement to provide “full particulars” at the relevant time in this case. As Glazebrook J said in *Agnew v Pardington*, “[i]t is rarely permissible to rely on subsequent legislation even as an interpretative aid”.²⁴ The reasons for this principle are clear:

- (a) The task of interpreting the law is for the Court, not a subsequent Parliament: “the mere fact that an enactment shows that Parliament

²⁴ *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [28].

must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different”.²⁵

- (b) Parliament can of course change the law or declare it to have a particular meaning or effect. However, the presumption against retrospectivity means that, absent clear words, it does so only prospectively. If subsequent amendments are used to interpret the law as it stood before those amendments, that amounts to changing the original law retrospectively.

[97] Further, to the extent it is relevant, the legislative history to the regulation confirms that it was intended to “clarify” that the requirement for “full particulars” included the effects of the change. Put colloquially, it can be regarded as a “belts and braces” approach by Parliament. Considered in that way, it supports the plaintiffs’ interpretation. It does not mean that until the regulation was imposed there was no requirement to disclose that information on a variation.

[98] Next, I do not consider there to be anything in the argument which relies on the fact the modification provisions of the Credit Contracts Act did not require disclosure of changes to the amount of payments. The purpose of the CCCFA was to address in part the inadequacies of the former Act. As noted, the CCCFA was itself reviewed and amended on a number of occasions.

[99] However, I do accept ANZ’s argument that there can have been no requirement to disclose the indicative amounts of the total interest payable or total payments under the loan. Given the length of the loan period, they were not required to be disclosed under Schedule 1. The fact they were provided and were in error, is not material and is itself not a breach of s 22. The breach was in failing to provide full particulars of the change to the amount of the payments.

[100] Finally on this point, ANZ argues that, if it was required to provide particulars of the changed amount of the payments in terms of the loan contract, the LVL became

²⁵ *Birmingham Corp v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 (HC) at 898, cited in *West Coast ENT Inc v Buller Coal Ltd* [2014] 1 NZLR 32 (SC) at [174].

part of the loan contract. The plaintiffs became obliged to pay the amounts set out in the LVL so that there was no error and thus no breach of s 22. The difficulty with that argument is that in that case there would have been a change in the loan agreement that the borrowers had not requested – the effect of the changed amount was to reduce the “correct amount” of the repayments which affected the structure of the loan itself.

[101] Subject to ANZ’s argument that a *de minimis* error would not breach s 22, I accept that ANZ was in breach of s 22. As a matter of logic and statutory interpretation, where one of the changes was to the amount of the regular payments then disclosure of “full particulars of the change” required disclosure of the regular amounts payable under the loan following the agreed change to the interest rate. Advice of the changed interest rate and the period for which it was fixed without more detail does not meet the purposes of promoting the confident and informed participation in markets for credit and facilitate transparent markets. Further, the “full particulars” ANZ was required to disclose were required to be accurate. The obligation to disclose “full particulars” is not satisfied if the particulars provided are incorrect. It is accepted that the changed amount in the present case was not correct.

The *de minimis* argument

[102] ANZ next argues that, in any event, the errors in the LVL were so minor they did not constitute a breach of s 22, relying on the following passage from *Bennion, Bailey and Norbury on Statutory Interpretation*:²⁶

Unless the contrary intention appears, the legislature is presumed to intend an enactment to be read in light of the principles of the maxim *de minimis* ... **The principle is essential to the working of any legal system by helping to discourage unnecessary litigation, to reduce time and cost and to preserve the dignity of the law.** It may be assumed that the legislature intends an enactment to be read in light of the *de minimis* principle, unless the contrary intention appears.

²⁶ Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, Lexis, London, 2022)) at 313 (emphasis added).

[103] Mr Hunter then referred to a number of cases under the Consumer Credit Act 1974 (UK) (broadly the equivalent of notices under s 119 of the Property Law Act 2007) where the principle had been applied.²⁷

[104] He then noted a broader principle that substantial compliance with disclosure or other procedural requirements is generally sufficient, especially if draconian consequences would otherwise result. As a result, Courts have held that substantial (rather than strict) compliance is sufficient for payment claims under the Construction Contracts Act 2002, take-over notices under the Companies Amendment Act 1963, disclosure of relevant information in conditional fee agreements, and notices in relation to land.

[105] Then, in response to the plaintiffs' argument that ANZ is contending for a "variable standard of accuracy" which would introduce "a high degree of complexity and uncertainty", he submitted the standard is set by s 32. The CCCFA is also replete with judicial discretions so that enforcement produces just results.

[106] Mr Hunter noted that there was no apparent Parliamentary intention to depart from the *de minimis* or substantial compliance principles. In fact, he says that the pragmatic purposes of the CCCFA, for example by favouring the provision of "adequate" information, supports the application of those principles. He says that enforcing strict compliance would be inconsistent with the general wording of "full particulars of change", in a context where a breach constitutes a criminal offence.

[107] Mr Hunter argued that there were only minor misstatements in the present case. The relevant figures were understated by \$2.34 and \$1.13, which represent deviations from the correct figures of 0.4 per cent and 0.19 per cent. Professor Willis' evidence is that it is very unlikely that these deviations will have affected the plaintiffs, given consumers' general approach to rounding. There was no direct evidence from the plaintiffs that they ever saw or were influenced by the misstatements. Any such evidence would also need to be the subject of cross-examination.

²⁷ *Woodchester Lease Management Services Ltd v Swain & Co* [1999] 1 WLR 263 (CA); *JP Morgan Chase Bank NA v Northern Rock (Asset Management) plc* [2014] 1 WLR 2197 (Ch); *Rankine v American Express Services Europe Ltd* [2008] CTLR 195 (QB).

[108] Finally, he noted that the alleged failures did not result in any loss for the plaintiffs, particularly in light of the remedial action taken by ANZ. In those circumstances, the errors were *de minimis* and there was substantial compliance with s 22. At a minimum, whether the errors were *de minimis* was a “context specific” value judgement, unsuitable for summary determination and determination on a class-wide basis (noting that, for many class members, the errors will be even more minor).

Analysis

[109] The starting point is that unless the contrary intention appears, legislation imports the principle expressed in the maxim “*de minimis non curat lex*” (meaning the law does not concern itself with the trifling matters) so that if a departure from an obligation is truly *de minimis* the obligation is considered to have been complied with. If an action’s impact is trivial, then it does not amount to the mischief that Parliament intended to prohibit.

[110] Whether the principle applies in a particular case requires consideration of the obligation breached, interpreted in the context of the relevant statute, to determine whether the departure is so trifling that the principle should be applied.²⁸

[111] Under the CCCFA lenders such as ANZ must comply with the general responsibility principles, which include a requirement to assist borrowers in reaching informed decisions in all dealings in relation to a loan agreement and particularly to exercise the care diligence and skill of a responsible lender before entering an agreement to provide credit. Relevantly, in its settlement with the Commission, ANZ accepted that it had failed to act responsibly in that way.

[112] Also relevant in this context are the requirements of s 32 of the CCCFA. That section requires the information to be provided clearly and concisely and not be likely to deceive or mislead a reasonable person. Those obligations are conjunctive.

²⁸ Dennis Pearce *Statutory Interpretation in Australia* (10th ed, LexisNexis, Australia, 2024) at 4.45.

[113] When those various provisions are read with the purposes of the CCCFA, it becomes difficult to apply the *de minimis* principle to this case. Strict accuracy is required. The principle is somewhat in conflict with the clear and direct requirements regarding disclosure under the CCCFA. The Bank was in the best position to ensure accuracy. There is force in the plaintiffs' submission that to imply some undefined variable standard of accuracy would be unworkable in this context.

[114] While I accept that there is a stronger argument for application of the *de minimis* principle to the indicative amounts in the LVL, I do not consider those amounts or statements to be in breach of s 22 in any event. The misleading and inaccurate statements regarding the regular payments are however of a different character. They were required to be accurate as they directly affected the borrowers' obligations under the loan. They related to the essential element of the credit contract, namely the costs of borrowing. The plaintiffs were entirely dependent on ANZ to calculate the amounts correctly. The repayment amount of \$2.34, while small, cannot be regarded as *de minimis* in the circumstances of ongoing regular repayments. They are not rounding errors.

[115] I consider the argument that the plaintiffs would not have made a different decision in relation to fixing their interest rate had the accurate disclosure been provided or that they did not suffer any economic loss or harm as a consequence of the errors because of the remedial action taken by ANZ to be somewhat of a red herring. To meet the purposes of s 3(3)(b) ANZ was required to provide adequate information (which I consider must have been accurate). Inaccurate information does not meet that purpose.

[116] The information in the LVL related to the plaintiffs' home loan which was a significant long-term commitment. The affected items of information were terms of a contract which ANZ would have sought to enforce if necessary. The affected items of information included the changed regular repayment amounts, which was the item of information likely to be of most importance to the plaintiffs and which needed to be accurate to ensure they were able to comply with their obligations under the contract to repay the loan in full at the end of the term. The plaintiffs were not in a position to calculate this themselves. The affected items of information, particularly repayments,

were incorrect by material margins. As a result of the error, a sum of accrued interest (\$801.82) was left out of the calculation. The repayment amount of \$2.34 was not a mere rounding error. Over the term of the loan it amounted to a sum which could not be described as *de minimis*.

[117] The errors in the LVL regarding the regular repayment amounts concerned actual and relevant information rather than something truly minor.

[118] For the above reasons I reject ANZ's argument that the *de minimis* principle applies.

The length of the breach period

[119] Having found that ANZ was in breach of its obligations under s 22 of the CCCFA, the next issue is the length of time ANZ remained in breach. The plaintiffs say that by reference to s 99(1B) the breach period commenced on 23 November 2015, the day of the first LVL, and has not yet ended. By reference to s 99(1B)(b) they argue the breach period would only come to an end when the disclosure required by s 22 in relation to the change in November 2015 was made. As disclosure has never been made directed to the agreed change in November 2015, the breach period has not ended.

[120] Section 99(1B) provides:

- (1B) The period referred to in subsection (1A)—
 - (a) starts on the date of the failure; and
 - (b) ends only at the close of the day on which the disclosure under section 17 or 22 is made.

[121] In the event it is liable to the plaintiffs for breaching s 22, ANZ says the relevant period of breach ceased when it and the plaintiffs agreed a further variation to fix the interest rate at 3.95 per cent for one year on 22 November 2018 and ANZ correctly disclosed those arrangements and provided full particulars of that in the 2018 LVL.

[122] In support of their position the plaintiffs suggest that the ANZ interpretation would create perverse incentives. A lender would be incentivised to simply wait for

the borrower to request another change rather than to promptly correct any error. It would result in borrowers being left without an accurate and complete written record of their position. Also, it would make no sense in relation to breaches of s 17 given that initial disclosure is only ever provided once. If subsequent variation disclosure could end a s 17 breach period, then affected borrowers would effectively never receive initial disclosure.

[123] For those reasons the plaintiffs argue that the 2018 LVL does not constitute corrective disclosure and nor do the calculation problem letters. They did not contain the advice or information which was required to be disclosed in relation to the November 2015 change. The plaintiffs' argument is that the only way the breach period could be brought to an end in this case was for ANZ to provide the plaintiffs with the disclosure that was required, and failed to do so. The 2018 LVL did not constitute corrective disclosure.

[124] Despite the plaintiffs' arguments and despite the wording of s 99(1B), I consider the breach period must have come to an end when the plaintiffs and ANZ made a new change which effectively altered the loan terms entered in November 2015 and the operative arrangement between them relating to the incorrect disclosure.

[125] The purpose of the disclosure required under s 22 was to provide full particulars of the changes that applied to the plaintiffs' borrowing. The plaintiffs' borrowing changed again when they refixed their interest rate for the period of one year on 22 November 2018. At that time the effect of the earlier change was effectively wiped. The costs of borrowing from 22 November 2018 were not in relation to the period in which ANZ failed to comply with s 22. As Mr Hiebendaal submitted, as at 22 November 2018 ANZ complied with its obligations to make disclosure of the then change to the loan contract. The disclosure made on 22 November 2018 was correct. The payments the plaintiffs made after that date were made under the new terms of loan.

[126] I consider ANZ's approach to the interpretation of the breach period to be consistent with the policy objective. I do not accept the plaintiffs' argument it would lead to perverse incentives. It would be in the interest of a bank faced with the

consequences of a breach of s 22 to bring that breach period to an end whether or not a subsequent variation has that effect. Not all borrowers will seek a subsequent variation. Further, to the extent the borrowers are left with an inaccurate record for the period they have not had the corrected disclosure, they are more than compensated by the consequences that follow the breach as discussed below. As for the suggestion that a subsequent variation could end the s 17 breach period, s 27 expressly preserves the right to cancel for a breach of s 17.

[127] For those reasons I am satisfied the breach period ended on 22 November 2018. The payments that ANZ is liable to the plaintiffs for as a consequence is \$32,728.42.

[128] In the circumstances I do not consider it necessary to determine whether the subsequent advice to the customers of the issue is sufficient. However, if necessary, I would have found that the advice in those letters corrected the errors in the LVL.

The application of s 99(1A)

[129] Having found that ANZ was in breach of s 22, the issue now is the consequences of the breach. The plaintiffs argue ANZ is required to refund the costs of borrowing paid by them during the breach period. It is not in dispute that the plaintiffs paid all the costs of borrowing in relation to their loan. ANZ denies it is liable to repay the costs of borrowing.

[130] Resolution of the issue requires consideration of the impact and application of ss 99(1A) and 48 in particular. The plaintiffs submit that the clear meaning of s 99(1A) is that they were not liable for the costs of borrowing during the breach period, and that ANZ was not entitled to receive the monies paid by them as costs of borrowing during that period. As a consequence, s 48 requires ANZ to refund the payments to the plaintiffs.

[131] ANZ argues that s 99(1A) only removes the lender's ability to enforce payment of the costs of borrowing, it does not disentitle a lender from receiving payment under the contract. It is a shield, not a sword.

[132] Mr Hunter referred to the legislative history. Section 99(1A) was introduced in June 2015 in response to the case of *Norfolk Nominees Ltd v King*.²⁹ In that case, Osborne J (an Associate Judge at the time) accepted that once corrective disclosure was made the lender could enforce the contract.

[133] Mr Hunter argued there was nothing in the legislative history to indicate that Parliament intended the result the plaintiffs base their case on. Further, it cuts across the scheme of statutory damages. He argues that the distinction between an obligation and a liability is widely accepted.³⁰ Mr Hunter says that the other provisions of the CCCFA support his interpretation that s 99(1A) does not impose an obligation. He says that in the absence of a clear history or statutory language, Parliament cannot be taken to have intended the unreasonable result sought by the plaintiffs.³¹

[134] Next, he made the point that ANZ had already faced consequences for its breach. It had compensated all affected customers for its admitted breach of s 9C.

[135] Mr Hunter then submitted that none of the costs of borrowing claimed in this case were referable to the variation because the variation lowered, rather than increased, the interest rate.

Analysis

[136] Section 99(1A) was inserted on 6 June 2015 by the 2014 Amendment Act. The normal or natural interpretation of s 99(1A) is that the plaintiffs had no legal obligation to pay costs of borrowing relating to the period that during which ANZ failed to comply with s 22. “Liable” as used in s 99 must mean legally responsible for something. As the plaintiffs had no liability to make the payments, it follows that ANZ has no right to retain them. In the words of s 48, it received payments that it was “not entitled to receive”. Section 48 requires the bank to refund or credit the payments.

[137] I am not able to accept ANZ’s argument that s 99(1A) is a shield not a sword. Section 99(1) is the “shield” provision, as it expressly confirms that until disclosure

²⁹ *Norfolk Nominees Ltd v King* [2013] NZHC 398, (2013) 13 TCLR 650.

³⁰ *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10 at [219].

³¹ *R (Edison First Power Ltd) v Central Valuation Officer*, above n 10, at [116]–[117].

under s 22 is made the lender cannot enforce the contract. Section 99(1A) has a different purpose. It expressly provides that borrowers such as the plaintiffs are not liable for the costs of borrowing during the period that ANZ (in this case) failed to comply with its obligations regarding variation disclosure under s 22.

[138] The outcome, while perhaps extreme, is consistent with the consequences prescribed by s 99B for breach of s 99A. Those sections were inserted at the same time as s 99(1A). While s 99A deals with a different issue (non-registration under the Financial Service Providers (Registration and Dispute Resolution) Act 2008), it also provides that a party in default may not enforce rights in relation to the costs of borrowing, until the creditor is registered and provides notice of that to the borrower. Section 99B(3) provides for enforcement after the issue is remedied but only for the costs of borrowing for the period after notice is given, which is similar to the effect of ss 99(1A) and 99(1B) (when read together). The alternative interpretation would leave s 99(1B) with little remedial effect. There is force in Mr Salmon's submission that s 99(1A) must be read to give effect to the definition of costs of borrowing. The definition is broad. It need not be read down. It includes the interest charges even where the effect of the variation is to reduce the interest rate.

[139] Next, reference should be made to s 95A which was inserted by the Credit Contracts Legislation Amendment Act 2019. It applies from 20 December 2019. It does not apply to the plaintiffs' case. However, as Mr Salmon submitted, the wording of s 95A is consistent with the plaintiffs' interpretation of s 99(1A) as it refers to a link between ss 99(1A) and 48. Section 48 only applies and the link between the two is only relevant if there is a requirement to repay the payments that the borrower (the plaintiffs in this case) have made but which s 99(1A) provides they were not liable to repay. The reference to the Courts jurisdiction to "extinguish" or "reduce" the effect that ss 48 or 99(1A) would otherwise have is consistent with s 48 having the effect of requiring the creditor to repay the amounts which it was not entitled to retain by reason of s 99(1A).

[140] While the 2019 amendments plainly post-date the transactions in this case, I consider the exception noted by the Court of Appeal in *Commissioner of Inland Revenue v Vector Ltd* to be applicable:³²

[36] We consider this is a proper case to take into account legislative developments post-dating the June 2010 agreement. Caution is needed in drawing inferences from policy material and legislative amendments post-dating the relevant period. The general rule was stated by this Court in *Postal Workers Union of Aotearoa v New Zealand Post Ltd*:

“ ... it is well settled that statutory amendments subsequent to the period at issue may not be taken into account in interpreting the relevant statutory provision unless they are retrospective or declared by Parliament to be enacted to resolve an ambiguity.”

However, as we noted in the *Terranova Homes* case, there is an exception to this rule:

“ ... based on legislative harmony and the desirability of keeping the statute book as a whole as rational and consistent as possible. Thus the courts have held that where there are two competing interpretations of an Act, and one interpretation means a later Act was unnecessary, the other interpretation should be preferred. Parliamentary time is sufficiently precious for Parliament not to pass unnecessary Acts.”

[37] This, we consider, is such a case. It is relevant to consider the later amendments in assessing the Commissioner's contention that a broad principle of taxation of amounts derived from the use of land existed at the time the Consideration was paid in 2010.

Quantum meruit

[141] As a fallback, ANZ argues that, even if the Court were to find ANZ had breached s 22 and s 99(1A) invalidated ANZ's entitlement to the costs of borrowing ANZ nevertheless would be entitled to a claim in quantum meruit for the interest on the loan moneys it had provided, or alternatively on the basis of a complete failure of consideration.³³ Mr Hunter referred to the maxim “*frustra petis quod mox es restiturus*” loosely translated as “it is no good trying to get something which immediately afterwards you are going to have to hand back”.³⁴

³² *Commissioner of Inland Revenue v Vector Ltd* [2016] NZCA 396 (footnotes omitted).

³³ *Goss v Central Acceptance Ltd (in liquidation)* [1996] 3 NZLR 385 (PC).

³⁴ *Post Office v Hampshire CC* [1980] QB 124 (CA) at 134.

[142] The requirements for quantum meruit were confirmed by the Court of Appeal in *Edubase Ltd v Ministry of Education*.³⁵ The essential elements are:³⁶

- (a) Party A has provided services to pay B;
- (b) Party A made clear they expected to be paid; and
- (c) Party B fully accepted or at least acquiesced in the provision of the services.

In those circumstances, Party A is entitled to the reasonable value of the services which is usually the objective market value.

[143] Mr Hunter submitted all the elements of a quantum meruit were satisfied in this case. ANZ provided services, the lending (the principal loan) to the plaintiffs. It clearly expected to be paid and the plaintiffs had asked for and freely accepted the services. The reasonable value of the services was at least the rate of interest that ANZ charged because, on Mr Mellsop's evidence, that was the lowest in the market at the time.

[144] Mr Hunter argued that the CCCFA did not contain the clear words necessary to extinguish common law claims. The claim for quantum meruit is a fundamentally different claim and does not rest on contract. While accepting that in principle a claim for quantum meruit would not be allowed if to do so would be to stultify the relevant statutory policy in his submission the plaintiffs could not establish that in this case.

[145] Mr Hunter submitted s 48 did not assist the plaintiffs. Even if it required the Bank to refund the payments it said nothing about what may happen next. Nor did it exclude common law claims for recompense.

³⁵ *Edubase Ltd v Ministry of Education* [2024] NZCA 430.

³⁶ At [70].

[146] The plaintiffs refer to and rely on the cases of *Wilson v First County Trust Ltd* and *Dimond v Lovell*.³⁷ In *Dimond v Lovell* the House of Lords held in the context of the Consumer Credit Act 1974:³⁸

Parliament intended that if a consumer credit agreement was improperly executed, then subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law.

[147] However, Mr Hunter submitted that that case and *Wilson* offered no assistance in considering the scheme of the CCCFA. He referred to the case of *Norfolk Nominees Ltd v King*,³⁹ in which case Osborne J noted that the observations in *Wilson v First County Trust Ltd* turned on the wording and construction of the relevant Act. At [92] of that judgment the Judge confirmed that New Zealand legislation must be interpreted in light of its specific and not only its general purposes.

Analysis

[148] Importantly, in *Norfolk*, the issue was whether the corrective disclosure provided by the lender was sufficient to address its failure to provide initial disclosure. In an earlier decision in the proceeding the Court of Appeal had confirmed that pending corrective disclosure the lender was unable to enforce the right to possession in the loan contract. In the concluding comments of paragraph [92], the Judge went on to note:⁴⁰

At the same time, there remain for the lender serious permanent consequences in terms of the loss of the right to enforce interest payments for the time being (thereby depriving the lender of a return on its money) and the liability of the lender to statutory damages on account of each breach.

[149] Although the Judge referred to “for the time being”, which ultimately led to the amendments to the Act, I do not consider the case to be of assistance in relation to the quantum meruit argument. The principle was not considered, nor was it referred to at all in that judgment. The cases of *Wilson* and *Dimond* are more directly

³⁷ *Wilson v First County Trust Ltd* [2003] 2 All ER (Comm) 491 (HL); *Dimond v Lovell* [2002] 1 AC 384.

³⁸ *Dimond v Lovell*, above n 37, at 398.

³⁹ *Norfolk Nominees Ltd v King*, above n 29.

⁴⁰ At [92].

applicable. In *Wilson* the House of Lords held that an agreement with a pawnbroker was subject to the provisions of the Consumer Credit Act (UK) 1974 and held the effect of the pawn broker's non-compliance with the Act meant the agreement was unenforceable. Referring to *Dimond* amongst other authorities, the House of Lords held:⁴¹

...there is no relevant restitutionary remedy available to the lender in respect of the money lent. Since the lender is intended by Parliament to be left without recourse against the borrower, the lender cannot assert that the borrower has been unjustly enriched. A conclusion to the contrary is inconsistent with the parliamentary intention in rendering the entire agreement unenforceable.

[150] I note that Mr Hunter also submitted that a number of cases under the Credit Contracts Act had confirmed the Court's reluctance to allow borrowers to obtain windfalls from technical breaches, referring to *Mardon & Stephens Group Ltd v Zenn Holdings Ltd*; *Anderson v Burberry Finance Ltd*; *Collier v Equitable Life & General Insurance Co Ltd*; and *Peninsular Helicopters Limited v Mills*.⁴² All those cases turned on their own facts and the relevant statutory provisions. As noted, the CCCFA was passed, at least in part, to address perceived failings in the earlier Act. Mr Hunter also referred to *Goss v Chilcott*. In that case, the Privy Council upheld the lender's claim for restitution of a loan advance and interest on a loan where the lender had altered and executed a mortgage instrument which made it unenforceable.⁴³ However, importantly the Court went on to note that there was no suggestion in that particular case of any illegality or other ground of policy which precluded recovery and restitution.

[151] ANZ also relies on the Australian case of *Australian Securities and Investments Commission v Fast Access Finance Pty Ltd*,⁴⁴ where a non-registered party had provided loans. The Federal Court had the power to make orders preventing a lender from profiting from its breach. The Court rejected a submission by ASIC that the borrowers should have received interest-free loans as a result, noting that the customer

⁴¹ *Wilson*, above n 37, at 492.

⁴² *Mardon & Stephens Group Ltd v Zenn Holdings Ltd* HC Auckland CIV-2006-404-707, 1 August 2006; *Anderson v Burberry Finance Ltd* [1988] 2 NZLR 196 (CA); *Collier v Equitable Life & General Insurance Co Ltd* (1991) 3 NZBLC 102,142 (CA); and *Peninsular Helicopters Limited v Mills* HC Auckland CP558/89, 6 September 1991.

⁴³ *Goss v Central Acceptance Ltd (in liquidation)*, above n 33.

⁴⁴ *Australian Securities and Investments Commission (ASIC) v Fast Access Finance Pty Ltd* [2015] FCA 1055.

has had the benefit of the advance or advances and should pay the price for it, to the extent that the law allowed. Relevantly in that case, the Court exercised the discretion it had and declined to make the orders sought. That is quite different to the present situation where the non-enforceability is provided for by statutory provision rather than left as a discretionary outcome for the Court to determine. Read in the context of its purposes, both general and specific, the CCCFA excludes the application of the principle of quantum meruit in this case.

[152] In another Australian case cited by Mr Hunter, *Pavey & Matthews Pty Ltd v Paul*,⁴⁵ the Court applied the principle of *indebitatus assumpsit* and allowed the plaintiff's claim. The case involved a building contract. The relevant legislation provided that a building contract was not enforceable unless it was made in writing. The parties made an oral contract under which the builder carried out substantial works. The majority allowed the builders claim to quantum meruit, noting it was based on restitution or unjust enrichment. Again, I consider that case to be of little assistance. The present case and ANZ's claim based on quantum meruit is to be determined against the specific provisions and purposes of the CCCFA.

[153] I note that in the case of *Ovidio Carridoo Nominees Pty Ltd v Dog Depot Pty Ltd* the Court accepted a common law right to recover was not excluded by the language in that case.⁴⁶ But again the statutory language did not address the issue of retention or refunds of the relevant consideration paid under the contract. By contrast, s 99(1)(ba) and 99(1A) squarely address the issue and exclude enforcement of rights.

[154] I consider Mr Hunter's submission that, even if ANZ's contractual right to enforce the contract may have been precluded by the CCCFA, that was not inconsistent with its claim for quantum meruit (based on *Attorney-General of Trinidad and Tobago v Trinsalvage Enterprises Ltd*) to be unsustainable.⁴⁷ Indeed, that case confirmed the principle that a claim in quantum meruit would be dismissed if it would stultify relevant statutory policy.

⁴⁵ *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

⁴⁶ *Ovidio Carridoo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6.

⁴⁷ *Attorney-General of Trinidad and Tobago v Trinsalvage Enterprises Ltd* [2023] 1 WLR 4045 (PC).

[155] With respect, I consider ANZ's argument on this point to be an attempt to place a gloss on the wording of the statute which is not available. Section 99(1)(ba) confirms that before disclosure is made, ANZ may not enforce any right in relation to the costs of borrowing and s 99(1A) expressly confirms that the debtor is not liable for the costs of borrowing in relation to the period during which there is a failure to comply with ss 17 or 22. The purposes and express statutory provisions of the CCCFA effectively excludes the claim for quantum meruit for the reasons expressed in *Wilson v First County Trust*.⁴⁸

[156] Mr Hunter also sought to take support from the fact the CCCFA contemplates the creditor may have a right of set-off against a claim, for example, of statutory damages or under s 93. However, in my judgment s 134 of the Act which provides for the right of set-off is properly construed as permitting a set-off against a separate obligation rather than a claim for quantum meruit created in response to the consequences of the Bank's breach of the CCCFA.

[157] There is force in Mr Salmon's submission for the plaintiffs that the proper analysis of ANZ's claim for reasonable compensation or quantum meruit is that ANZ's right to receive costs of borrowing from the plaintiffs was conditional upon its compliance with its disclosure obligations. It would in effect be unjust for ANZ to avoid the consequences of the CCCFA by the application of the doctrine of quantum meruit where in circumstances it has failed to meet that statutory obligation.

The application of s 48 and do ss 93 and 94 provide for a discretion?

[158] The wording of s 48 is clear. Section 99(1A) confirms the plaintiffs were not liable for the costs of borrowing and s 99(1) confirms ANZ could not enforce any right (in relation to the cost of borrowing) during the breach period. ANZ received payments from the plaintiffs that it was not entitled to receive. Section 48(1)(a) requires ANZ to refund the costs of borrowing payments made by the plaintiffs during the breach period.

⁴⁸ *Wilson v First County Trust Ltd*, above n 37.

[159] As ANZ has failed to refund the payments, the plaintiffs seek an order in reliance on ss 93 and 94, directing ANZ to make the refund due under s 48.

[160] First, Mr Hunter says that relief under ss 93 and 94 is only available if loss or damage has been suffered by conduct constituting one of the prescribed breaches. He says that such a loss has not occurred here.

[161] In any event, Mr Hunter submits that a remedial discretion remains. He noted that ss 93 and 94 provided that the “court may make” the range of orders set out. The wording “may” is plainly discretionary. He submitted that the discretion imported by ss 93 and 94 should not be affected by the subsequent introduction of s 95A. On the facts of this case there was a compelling case that the Court should not exercise its discretion in the plaintiffs’ favour. He noted that:

- (a) the errors in the LVL resulted in underpayments being required by the plaintiffs. They kept the money they underpaid and it was not possible to conclude they suffered economic loss or harm;
- (b) the errors in the LVL were minor and very unlikely to have had an impact on the decision-making;
- (c) ANZ had paid considerable sums to the plaintiffs as part of the remediation programme agreed with the Commission; and
- (d) the loan calculation error was the result of a third party developer. ANZ had responded promptly to the breach and had paid out approximately \$35 million as a result. He noted the Courts had consistently declined attempts by borrowers to use technical breaches to avoid consequences of clearly agreed and understood repayment obligations referring to the case of *Mardon & Stephens Group Ltd v Zenn Holdings Ltd*.⁴⁹

⁴⁹ *Mardon & Stephens Group Ltd v Zenn Holdings Ltd*, above n 42.

[162] Mr Hunter argued that the Court should exercise the discretion consistent with the Court's approach in *Goldsbro v Walker*.⁵⁰ That case concerned s 43 of the Fair Trading Act 1986 (FTA), which provided:

43. Other orders—(1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—

- (a) A contravention of any of the provisions of Parts I to IV of this Act; or
- (b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or
- (c) Inducing by threats, promises, or otherwise the contravention of such a provision; or
- (d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or
- (e) Conspiring with any other person in the contravention of such a provision—

the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Court may make the following orders—

...

- (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage.”

[163] In that case, Cooke P noted:⁵¹

The remaining question in the appeal is discretion. A monetary award is but one of an extensive list of alternative or cumulative remedies that the Court ‘may’ grant under the New Zealand Act. In this respect the New Zealand Act differs from s 82(1) Trade Practices Act 1974 of the Commonwealth of Australia, which takes the form that a person suffering loss or damage ‘may recover’ the amount: words which would seem to confer a right of action. Our s 43 is of a different structure and I think that the difference is significant. As to a monetary award, no right of action is conferred. It is one of a range of discretionary remedies. In that context there is no compelling reason to hold

⁵⁰ *Goldsbro v Walker* [1993] 1 NZLR 394 (CA).

⁵¹ At 399.

that if the defendant's misleading conduct has contributed to cause the plaintiff's loss, the only course open to the Court, where no other form of relief is appropriate, is to order payment of a sum representing the full loss. Nor is there any compelling reason to hold that the only discretion of the Court is to award all or nothing.

[164] Cooke P's approach was endorsed by the Supreme Court in *Red Eagle Corp Ltd v Ellis*.⁵² In *GE Custodians v Bartle*, the Supreme Court noted that s 120 of the CCCFA permitted, but did not require, a court to reopen a contract.⁵³ It was a true discretionary provision.

[165] The plaintiffs' response is that there is no discretion. Section 48 creates an obligation on the creditor to refund the payments that it was not entitled to receive. Sections 93 and 94 must be read as treating a breach of s 48 as resulting in loss or damage. The inclusion of the reference in s 94(1)(a) to directing a refund under s 48 makes no sense otherwise.

Analysis

[166] In *Merchant Finance v Xu* Fitzgerald J considered the application of ss 93 and 94 and the relief available under those sections for breach of any of the provisions of Part 2.⁵⁴ The relevant sections alleged to have been breached in that case were ss 17, 18, 38 and 41. Ultimately the Judge concluded that, as Merchant Finance was in breach of its initial disclosure obligations from the inception of the Loan Agreement, and at no time remedied that breach, enforcement of the Loan Agreement was prohibited.⁵⁵ The Judge went on to opine that the effect of s 99(1A) was that as a matter of law the debtor was relieved of any liability in relation to the costs of borrowing occurred during the period of default. She noted:⁵⁶

... "Costs of borrowing" are defined in the CCCFA as any or all of a "credit fee, a default fee (which does not include default interest charges) and interest charges". "Interest charge" is defined to include both ordinary interest and default interest.

⁵² *Red Eagle Corp Ltd v Ellis* [2010] 2 NZLR 492 (SC) at [30].

⁵³ *GE Custodians v Bartle* [2011] 2 NZLR 31 (SC).

⁵⁴ *Merchant Finance v Xu* [2021] NZHC 3589.

⁵⁵ At [244].

⁵⁶ At [249] (footnotes omitted).

[167] Ultimately Fitzgerald J did not consider it appropriate to make any formal orders as the matter had not been directly addressed in submission, but she gave the parties the opportunity to confer on the implication of the provisions on the quantum of Merchant Finance’s claim against the borrower including the possibility that moneys may in fact be due from Merchant Finance to the defendants.⁵⁷

[168] I consider the answer to Mr Hunter’s submission that the plaintiffs have not suffered any loss or damage so that relief under ss 93 and 94 is not available is the short point that as the plaintiffs were entitled to a refund of costs of borrowing under s 48 but the ANZ had not provided one, the plaintiffs had suffered a loss or damage for the purposes of ss 93 and 94.

[169] As to the discretion argument, in *B v Waitemata District Health Board* the Supreme Court observed that “may” is usually permissive or empowering in some situations but read in context it can mean “must”.⁵⁸ In other words, the permitted power must be exercised. Again, the context is important. In the present case and in relation to the orders that may be made under s 94(1)(a) “may” can only mean “must”, given the unequivocal wording of s 48.

[170] Next, I agree with the plaintiffs’ submission that the *Goldsbro* case is of limited assistance as the FTA is a different Act with different purposes. There is no equivalent to s 48 which is limited in terms of relief to either refund or credit. Section 43 of the Fair Trading Act provided a number of other alternative remedies to which the Court’s discretion could apply to. The “may” in s 94 empowers the Court to use any one or the most appropriate one of the various remedies available to the Court, but where s 48 is engaged as it is in this case, there is no discretion not to make such an order under s 48.

[171] If ANZ’s argument for discretion is correct then that would see ss 93 and 94 having two conflicting meanings regarding relief from the effects of s 48 when having regard to ss 95A and 95B. Effectively there would be a general discretion prior to the

⁵⁷ At [252]. See the subsequent quantum decision *Merchant Finance v Xu* [2022] NZHC 1111.

⁵⁸ *B v Waitemata District Health Board* [2017] 1 NZLR 823 at [31].

incorporation of those sections and no discretion in relation to the effects of s 48 when triggered by s 99(1A) for subsequent costs of borrowing.

[172] Next, the statutory damages provisions provide for a discretion in the face of the presumptively absolutely statutory entitlement (s 88). Similar wording could have been applied but Parliament chose not to.

[173] Finally, as Mr Salmon noted, there was no discretion in relation to failure to comply with the obligations under ss 17 or 22 before ss 95A and 95B were enacted. Parliament has chosen not to make ss 95A and 95B apply retrospectively.

[174] Although the plaintiffs seek orders under ss 93 and 94, there is an argument that it would be unnecessary for such orders in the present case. As Fitzgerald J observed in the *Merchant Finance* case, the sections are premised on the basis that the borrowers have suffered loss or damage by the creditor's conduct. While the plaintiffs in the present case have suffered damage because they have paid costs of borrowing to ANZ that it was not entitled to, it could be argued that there is no need for them to rely on those sections, as the combined effect of s 99(1A) and s 48 is that given the plaintiffs were not liable for the costs of borrowing but in fact paid them, ANZ has an obligation under s 48 to refund the payments which the Court would enforce by declaration without the need to rely on ss 93 and 94. I note that s 90(2) expressly contemplates, by reference to s 88 (incorporating s 88(1)(b)), that in some instances a breach of ss 17 to 24 may not lead to a loss or damage. Although for the foregoing reasons I consider the plaintiffs have suffered loss or damage in this case.

Statutory damages

[175] In the alternative to their claim for the costs of borrowing of \$40,248.84 the plaintiffs seek statutory damages for the breach of s 22 of the CCCFA.

[176] Having found that ANZ was in breach of s 22 of the Act it follows the plaintiffs are prima facie entitled to statutory damages. Section 88 confirms their entitlement:

88 Creditors, creditors' agents, lessors, transferees, and buy-back promoters liable for statutory damages

- (1) The debtor under a consumer credit contract is entitled to recover from the creditor under the contract the amount of the statutory damages set out in section 89 if the creditor breaches, in connection with the contract, any of the following provisions:

...

- (b) sections 17 to 24, 32 to 40, and 70:

...

[177] In the present case the parties agree that if statutory damages are to be awarded then the quantum is \$6,000 which is fixed as a result of s 89 of the Act:

89 Amount of statutory damages

- (1) The amount of the statutory damages is,—

...

- (d) in the case of any other breach, the lesser of \$6,000 or 5% of,—

- (i) in the case of a revolving credit contract, the credit limit at the time of the breach; or

- (ii) in the case of a consumer lease, the cash price of the goods; or

...

[178] However, ANZ says that either it has a defence of reasonable mistake under s 106, or that any award of statutory damages should be reduced or extinguished under s 91 of the Act.

[179] Section 106 provides:

105 Reasonable mistake defence

- (1) Every person has a defence to a claim for statutory damages under section 88, a prosecution under section 103(1), or proceedings for pecuniary penalties under subpart 5A, in connection with a breach of this Act, if the person proves that—

- (a) the breach was due to a reasonable mistake or due to events outside of the person's control; and

- (b) the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was

discovered by the person or brought to the person's notice;
and

(c) the person has compensated or offered to compensate any person who has suffered loss or damage by that breach.

(2) For the avoidance of doubt, a mistake does not include a mistake of law or a mistake in the interpretation of any enactment or of any document.

[180] Ms van Ammers noted that to establish a defence of reasonable mistake ANZ had to prove the breach was due to a reasonable mistake or events outside of ANZ's control and that the breach was remedied as soon as practicable after being discovered, and that ANZ had compensated or offered to compensate the plaintiffs. While accepting ANZ had compensated the plaintiffs, she submitted ANZ could not make out the first two elements.

[181] Section 107 confirms that in determining whether a breach is due to a reasonable mistake the Court must take into account whether, in this case, ANZ had in place an "appropriate compliance programme". Section 84 defines when such a programme exists. In Ms van Ammers' submission, ANZ's evidence fell short of establishing a reasonably arguable defence of reasonable mistake. ANZ was itself responsible for upgrading the Frontline Tools and ensuring that the letters that generated the LVLs that generated were compliant. Rather than being a third party developer's actions that caused the breach it was ANZ's failure to run appropriate tests or audits to identify the coding error. The evidence does not establish that the developer was outside ANZ's control. The evidence was silent as to its compliance systems.

[182] Further, ANZ's evidence fell short of establishing it remedied the breach as soon as practicable. There was no evidence of what steps ANZ had taken to address the issue and it took ANZ nearly three years to take any steps to remedy the breach by sending the calculator problem letter and making the first remediation payment to the plaintiffs.

[183] Mr Lumsden's affidavit deals in large part with these issues. That evidence establishes that ANZ undertook tests of the calculator before and after the third party developer had made changes to the programme after ANZ had identified an initial

error. ANZ had required the error to be addressed and, after checking, was satisfied that particular error was resolved. It however failed to pick up the ultimate error which caused the issue in the present case. While it may not be said the error was outside ANZ's control it clearly was a mistake. Were it not for the mistake obviously the breach would not have occurred.

[184] Section 106 contemplates that a party will make mistakes. The issue is whether the mistake is reasonable. On the basis of Mr Lumsden's evidence I accept it is at least reasonably arguable that the breach of s 22 was a reasonable mistake. Next, I accept that it could be said that it is again reasonably arguable the breach was remedied as soon as practicable after it was discovered. As noted, ANZ took steps to correct the loan calculation error and it was fixed by 28 May 2016 and then also to correct the errors in the LVL. There is a difference between addressing the error and remedying and compensating the borrowers and in this case the plaintiffs. I accept there is force in the submission for ANZ that the size and complexity of the issue was a challenge and there was a need to ensure that the corrective action was itself accurate and complete.

[185] As to the compliance systems, s 84 defines compliance programme broadly. ANZ had systems in place as described by Mr Lumsden, which provides an arguable basis that it sought to require its employees and agents to follow procedures or it had implemented automated procedures designed to ensure compliance with the Act. That was the whole purpose of the Frontline Tools system. As for systematically identifying the deficiencies, ANZ tested the software before and after the calculator was amended. For those reasons I accept that ANZ has a reasonably arguable defence to the claim for statutory damages on the basis of reasonable mistake.

[186] For completeness, I also consider that in any event under s 91, ANZ has a strong argument for the damages to be extinguished on the basis it would be just and equitable to do so, primarily because the errors in the LVL resulted in underpayments by the plaintiffs. The plaintiffs kept the money they were underpaid. To the extent their obligations were affected ANZ has compensated them for that. As a result, the plaintiffs are effectively better off than if the error had not occurred.

[187] For those reasons, if it became necessary to do so I would have concluded that it is arguably just and equitable in the present case to extinguish the award of statutory damages.

Interest

[188] The plaintiffs seek interest on the judgment sum relying on the provisions of the IMC. They rely on ss 24 and 9 and 10 of that Act in particular. Section 24 provides:

24 Special provision for interest or lump sum relating to contracts entered into before commencement

- (1) This section applies to the period before the date of a money judgment if the judgment is given for an amount under, or for breach of, a contract entered into before the coming into force of this Act.

...

[189] In my judgment s 24 does not apply to the present situation. The judgment for the principal amount is not under or for breach of a contract. The jurisdictional basis for the judgment is breach of the provisions of the CCCFA. The plaintiffs are not able to rely on s 24.

[190] Sections 9 and 10 provide:

9 Period for mandatory award of interest

- (1) When giving a money judgment, a court must award interest under this Act for the period that—
- (a) begins either—
 - (i) on the day on which the cause of action arose; or
 - (ii) if the amount on which interest is to be awarded was not quantified at the day on which the cause of action arose, on a later day that the court specifies in the judgment as the day at which that amount was quantified; and
 - (b) ends on the day on which the judgment debt (including all interest payable under this Act) is paid in full.
- (2) Subsection (1) applies unless—
- (a) this Act expressly provides that interest cannot be awarded under this Act; or

- (b) the court, in accordance with this Act, specifies in the judgment any 1 or more shorter periods as the period or periods for which interest is to be awarded under this Act.

...

10 Mandatory award of interest

- (1) In every money judgment, a court must award interest under this section as compensation for a delay in the payment of money.
- (2) Subsection (1) does not apply if this Act expressly provides otherwise.

[191] Section 9 provides for the period that interest is awarded for and s 10 confirms that the Court must (unless the IMC expressly provides otherwise) award interest as compensation for the delay in making payment of the money. Prima facie, the plaintiffs would be entitled to interest on the judgment sum as compensation for ANZ's delay in repaying that sum to them.

[192] ANZ makes a number of submissions in response. First it submits that, as the amount sought was not quantified on a day in which the cause of action arose (23 November 2015) and would only effectively be quantified once the Court exercised its discretion to set the appropriate amount under ss 93 and 94 (or alternatively when the expert evidence setting out the quantum of the claim was filed), there is no or little interest payable. The difficulty with that submission is, however, that the amount must have been known to or at least calculable by ANZ. While the Court has only subsequently determined ANZ's liability, at the time the proceedings were issued ANZ must have been aware of the potential sum it owed based on the alleged breach of s 22 of the CCCFA.

[193] ANZ also relies on s 19 of the IMC, which provides:

19 No interest to be awarded on penalty

A court may not award interest under this Act on an amount that is a penalty or in the nature of a penalty.

[194] In *127 Hobson Street Ltd v Honey Bees Preschool Ltd*, the Supreme Court discussed what may amount to a penalty in a commercial context.⁵⁹ In short, a clause

⁵⁹ *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53.

in a commercial contract will be a penalty if the consequences of breach of the contract are out of all proportion (i.e. exorbitant) compared to the legitimate interests of the innocent party.

[195] The Court identified a number of other considerations, namely that the legitimate interests of the innocent party must be weighed in a balancing exercise and whether the clause is a penalty or not may involve broader interests, such as in this case public policy; deterring a breach can have a legitimate interest (although punishment is not); and the focus should be on the legitimate interest being protected.⁶⁰

[196] Applying that approach, in this case the legitimate interest was the public policy and purposes of the CCCFA. Notwithstanding that, the overall consequences of the Court's finding is that the plaintiffs have effectively had use of the Bank's capital advance of \$250,000 for a significant period without any consequential obligation to pay interest. To then award them interest on that sum seems exorbitant compared to the public interest of ensuring that banks make proper disclosure.

[197] Even if it could be said that an award of interest in this case would not strictly amount to a penalty, the section also goes on to refer to "or in the nature" of a penalty. Some meaning must be given to those additional words that Parliament chose to include in the section. "In the nature of a penalty" must apply to circumstances which may not meet the strict requirements of a penalty.

[198] The requirement to repay the entire costs of borrowing for the breach period is in the nature of a penalty. On any view of it, in my judgment to award interest on that sum would also be in the nature of a penalty in this case.

[199] Finally, s 18 is also relevant. That provides the Court with a discretion in special circumstances. If, in the opinion of the Court, special circumstances make it inequitable to award interest in a money judgment the Court may determine not to award interest. Again, largely for the above reasons I consider special circumstances apply in this case. I decline to make any award for interest.

⁶⁰ At [91].

Result

[200] I make orders entering summary judgment for the plaintiffs against ANZ on the first cause of action in the third amended statement of claim and directions following the determination to dispose of the extant issues on the representative proceedings (in accordance with the attached schedule) as follows:

- (a) The “full particulars of the change” required by s 22 of the CCCFA required ANZ to provide accurate disclosure of the amount of the new regular (fortnightly) payments.
- (b) ANZ breached s 22 of the CCCFA in relation to the plaintiffs’ agreed change on 23 November 2015 by failing to provide accurate disclosure of the new regular (fortnightly) payments.
- (c) The breach period began on 23 November 2015 but concluded when ANZ provided the correct disclosure on the subsequent agreed change on 22 November 2018 (breach period).
- (d) The plaintiffs were not liable for the costs of borrowing relating to the breach period.
- (e) ANZ was not entitled to receive any costs of borrowing payments relating to the breach period (breach period payments).
- (f) Under s 48 of the CCCFA, ANZ was required, as soon as possible, to refund the breach period payments to the plaintiffs or to credit any breach period payments against any amount owing by the plaintiffs to the ANZ.
- (g) As the plaintiffs were not fully refunded or credited all breach period payments they have suffered loss or damage for the purposes of s 93 of the CCCFA.

- (h) Pursuant to ss 93 and 94 of the CCCFA ANZ is directed to refund the sum of \$32,728.42 to the plaintiffs.
- (i) Given the above findings and orders it is strictly unnecessary to make the further orders sought in the alternative, but for the reasons given I would have declined to enter summary judgment for statutory damages.

[201] I decline to award interest on the costs of borrowing that will be refunded on the basis that the award is, at the least, in the nature of a penalty under s 19 of the IMC. If I had not made this finding, I would have exercised my discretion under s 18 to decline to award interest on the basis that special circumstances exist that would make it inequitable to award interest on the judgment sum.

[202] Finally, I reserve leave to the parties to seek further orders or directions that may be necessary to implement the above orders.

Consequential findings on the representative proceedings

[203] I attach the schedule with summarised answers based on the preceding reasoning.

Costs

[204] The plaintiffs are entitled to costs calculated on category 3. I expect that time band C would be appropriate for most if not all of the steps taken. I allow for second counsel. I leave it for counsel to settle costs, but if the parties cannot agree, quantum can be settled by the Court following an exchange of memoranda. Plaintiffs are to file within 20 working days. ANZ is to respond within 15 working days. Any reply five working days thereafter.

Venning J

SCHEDULE 1 – STAGE 1 COMMON ISSUES

1. What does s 22(1) of the CCCFA require?

Disclosure of the changed payment amounts.

2. Is there a de minimis exception to s 22(1)?

No.

3. Pursuant to s 99(1A), where a lender has failed to comply with s 22, is the borrower's liability for costs of borrowing relating to the Breach Period permanently extinguished?

Yes, for borrowers whose loans were varied prior to the introduction of s 95A.

4. If the answer to 3 is yes, is the effect of s 99(1A) to extinguish liability for all costs of borrowing relating to the Breach Period or to only extinguish costs of borrowing relating to the Breach Period and referable to the particular agreed change in respect of which the lender failed to comply with s 22?

It extinguishes liability for all costs of borrowing relating to the breach period.

5. If the answer to 3 is yes, where, pursuant to s 99(1A) a borrower is not liable for costs of borrowing relating to a Breach Period, is the lender not entitled to receive Breach Period Payments such that s 48 is triggered and the lender is must, as soon as practicable, refund or credit any Breach Period Payments to the borrower?

Yes.

6. What is a lender required to do to bring a Breach Period to an end?

Provide corrective disclosure or, as in the present case provide correct disclosure when and if a further change is agreed.

7. Can a lender bring a Breach Period to an end by providing compliant variation disclosure in relation to a different, subsequent agreed or unilateral change to the same loan?

Yes.

8. If the answer to 5 is yes, has a borrower who has not been fully refunded or credited all Breach Period Payments suffered loss for the purposes of s 93?

Yes.

9. If the answers to 3 and 5 are yes, where a breach of s 22 is established, triggering ss 99(1A) and 48, and a lender has not complied in full with s 48, is the borrower entitled to orders under s 94(1)(a) requiring the lender to refund or credit all extant Breach Period Payments without any adjustment or discretion being applied?

Yes.

10. How should section 90(3) be interpreted in relation to an alleged breach of s 22?

There was insufficient argument on this point to answer the question.

11. How should section 95(2) be interpreted and applied in relation to an alleged breach of s 48?

Again, there was insufficient argument on this point.

12. 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 pursuant to s 134 of the CCCFA?

Yes, the Bank would be entitled to offset any amount owing to the borrowers against any of their indebtedness otherwise owing to the Bank.