IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-001190
[2022] NZHC 1836

UNDER	the Credit Contracts and Consumer Finance Act 2003 and High Court Rule 4.24
BETWEEN	ANTHONY PAUL SIMONS First Plaintiff
	ANDREW JOHN BEAVAN and MEI LIM Second Plaintiffs

…/2 cont'd

Hearing:	26-27 May 2022
Appearances:	D M Salmon QC and A C van Ammers for Plaintiffs S M Hunter QC, S V A East, J H Stevens and S R Hiebendaal for First Defendant J S Cooper QC, K M Massey, and J W Upson for Second Defendant
Judgment:	29 July 2022

JUDGMENT OF VENNING J

This judgment was delivered by me on 29 July 2022 at 9.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

Solicitors:	Russell Legal, Auckland Bell Gully, Auckland Russell McVeagh, Auckland
Counsel:	D Salmon QC/A van Ammers, Auckland S Hunter QC, Auckland J Cooper QC, Auckland

PHILIP CHARLES DUNBAR and SHERYN VALERI DUNBAR
Third Plaintiffs

BRUNO ROBERT BICKERDIKE and EMMA RENAE PUNTER
Fourth Plaintiffs

GLENN JONATHAN MARVIN and ANNA MARY CUTHBERT
Fifth Plaintiffs

AND

ANZ BANK NEW ZEALAND LIMITED
First Defendant

ASB BANK LIMITED
Second Defendant

TABLE OF CONTENTS

Introduction

[1] The plaintiffs are or were customers of ANZ Bank New Zealand Limited (ANZ) or ASB Bank Limited (ASB). They allege the Banks failed to provide them with variation disclosure required under s 22 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). The plaintiffs seek a number of declarations including that the Banks breached s 22 of the CCCFA and, ultimately, if necessary, orders under the CCCFA directing the Banks to fully refund or credit the payments made by them under their credit contracts with the Banks.

[2] The plaintiffs seek leave to represent other customers of the Banks who they say were also not provided with variation disclosure as required during certain defined periods.

[3] In their amended application dated 28 January 2022 the plaintiffs seek:

(a) leave to bring the proceedings as a representative action under r 4.24 High Court Rules 2016;

(b) common fund orders (CFOs);

(c) notification orders; and

(d) summary judgment.

[4] The parties agreed that the hearing and judgment were to be restricted to the applications for representative orders and CFOs. The application for notification orders and summary judgment are to be dealt with at subsequent hearing(s).

Background

[5] The proceedings follow settlements reached by both Banks with the Commerce Commission (Commission) arising from errors in process acknowledged by the Banks which they had disclosed to the Commission.

ANZ

[6] Between 30 May 2015 and 28 May 2016 (ANZ relevant period) ANZ sent letters to its consumer loan customers regarding changes made to their loans. Some of those letters contained incorrect information.

[7] The incorrect information was generated by a calculator that was part of an automatic computer system called Frontline Tools. The calculator did not take into account interest that had accrued but had not yet been charged. Following customer complaints ANZ identified the error in May 2016 and promptly amended its calculator.

[8] On 19 June 2017 ANZ reported to the Commission that it had made errors in the production of loan variation letters sent to some consumers who varied their loans between 30 May 2015 and 28 May 2016.

[9] Following a review by the Commission, ANZ admitted that, in failing to take sufficient steps to ensure the loan variation letters were correct, it breached s 9C(2)(a)(iii) of the CCCFA. It accepted that it had failed to exercise the care, diligence and skill of a responsible lender in its subsequent dealings with its borrowers. The Commission accepted the breaches were inadvertent and not reckless. ANZ agreed to pay an agreed remediation amount to its affected customers.

[10] The second plaintiffs, Andrew Beavan and Mei Lim were customers of the ANZ during the relevant period. They received a total of $927.58 by way of remediation.

ASB

[11] Between 6 June 2015 and 18 June 2019 inclusive (ASB relevant period) ASB's standard operating procedure for providing variation disclosure was not consistently followed where customers requested certain changes to home and personal loans in branch or by telephone.

[12] In September 2019 ASB reported an issue relating to the agreed variation disclosure to the Commission. ASB advised the Commission it had identified that it

could not confirm the process of preparing and issuing a customer with the relevant variation disclosure required by the CCCFA had been followed consistently. As a result some customers were not provided with the required disclosure.

[13] The customers fell into two cohorts, A and B. Cohort A (26,088 customers) entered home loan contracts before 6 June 2015 but had at least one relevant variation after 6 June 2015. Cohort B (47,032 customers) entered home loan contracts on or after 6 June 2015 and had at least one variation.

[14] ASB admitted it was in breach of s 9C(2)(a)(iii) of the CCCFA in failing to ensure that its systems and processes were sufficient to ensure that the required variation disclosure was provided during the ASB relevant period. ASB also admitted that, during the period, it failed to have appropriate controls in place to promptly identify the failure and rectify it within a reasonable period.

[15] Paul Simons, the first plaintiff; Philip and Sheryn Dunbar, the third plaintiffs; Bruno Bickerdike and Emma Punter, the fourth plaintiffs; and Glenn Marvin and Anna Cuthbert, the fifth plaintiffs were all loan customers of the ASB during the ASB relevant period.

[16] The first, fourth and fifth plaintiffs fell into cohort B and received a payment or credit of $135. The third plaintiffs fell into cohort A and received a payment of $68.

[17] Although both settlements with the Commission expressly recorded that nothing in the settlement agreements constituted any wider admission of liability and did not directly address or refer to s 22 of the CCCFA, the plaintiffs say the Banks' failings breached that section. Mr Salmon QC also referred to internal Consumer Division reports prepared by the Commission's officers which referred to s 22. However, the settlement agreements did not refer to or address s 22. The Banks' admissions in the settlement with the Commission were expressly limited to the admissions as to the breach of s 9C(2)(a)(iii) of the CCCFA.

The plaintiffs' claims

[18] The plaintiffs each raise one cause of action based on breach of s 22 of the CCCFA. In the case of ANZ, the second plaintiffs allege that, during the ANZ relevant period, ANZ provided loan variation letters to them and other affected ANZ borrowers which contained incorrect information and so did not constitute variation disclosure under s 22 of the CCCFA. They plead that, pursuant to s 99(1A) of the CCCFA the ANZ representative plaintiffs and the other affected ANZ borrowers are not liable for costs of borrowing in relation to an agreed change to an ANZ post-amendment loan.[1]

[19] Further, they allege that, pursuant to s 99(1) of the CCCFA the ANZ representative plaintiffs and the other affected ANZ borrowers were and are not liable for costs of borrowing relating to any periods during which ANZ was or is in breach of s 22 in relation to an agreed change to an ANZ existing loan.

[20] They then plead that, to the extent they or other affected ANZ borrowers paid costs of borrowing while ANZ was in breach of s 22, ANZ was not, and is not, entitled to receive or retain the amounts paid by them. Pursuant to s 48 of the CCCFA, ANZ was, and is, required to refund the costs of borrowing paid by them during the relevant period.

[21] Declarations and orders are sought that:

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

(b) ANZ breached s 48 of the CCCFA by failing to fully refund or credit the ANZ breach period payments; and

(c) where a breach of s 22 is established triggering s 99(1A) and/or s 99(1) and s 48 and ANZ has not complied in full with s 48 a plaintiff is entitled to orders under s 94(1)(a), requiring ANZ to refund or credit all

---

[1] Post amendment loans are loans made on or after 6 June 2015, the date material amendments were made to the CCCFA. In this judgment, loans made prior to 6 June 2015 are referred to as existing loans.

costs of borrowing received by it during the period it was in breach of s 22; and

(d) pursuant to ss 93(a) and 94(1)(a) of the CCCFA ANZ is to fully refund or credit the ANZ breach period payments; and

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

(f) interest.

[22] The ASB plaintiffs similarly plead that, in breach of s 22 ASB did not provide the ASB representative plaintiffs or other affected ASB borrowers with variation disclosure in relation to relevant variations made to the ASB loans during the ASB relevant period (and has still not provided that disclosure).

[23] They then plead that, pursuant to s 99(1A) the ASB representative plaintiffs and other affected ASB borrowers were, and are, not liable for the costs of borrowing relating to any periods during which ASB was or is in breach of s 22 after 6 June 2015.

[24] Next, it is alleged that pursuant to s 99(1) of the CCCFA the ASB representative plaintiffs and the other affected ASB borrowers were, and are, not liable for costs of borrowing in relation to an ASB existing loan.

[25] To the extent that the ASB representative plaintiffs and other affected borrowers paid costs of borrowing in relation to periods ANZ was in breach of s 22 ASB was not, and is not, entitled to retain the amounts.

[26] Again, it is then pleaded that, pursuant to s 48 of the CCCFA, ASB was and is required to refund the ASB breach payments during that period. Similar relief to that detailed in the ANZ cause of action is sought.

The Banks' defences

[27] Apart from denying any breach of s 22 of the CCCFA, ANZ raises affirmative defences of limitation and discretionary relief under ss 93 and 95A of the CCCFA. It also pleads a reasonable mistake defence under s 106(1) of the CCCFA to the claim for statutory damages. Next, it relies on the Court's discretion under s 91 of the CCCFA to extinguish or reduce damages. Finally, it pleads set-off.

[28] In addition to denying breach of s 22 of the CCCFA, ASB also raises affirmative defences of limitation, discretionary relief under s 95A and reasonable mistake under s 106(1). It also pleads set-off. Finally, it relies on change of position.[2]

The statutory setting

[29] The plaintiffs' claims are based on a breach of s 22 of the CCCFA. Section 22 requires variation disclosure in the following circumstances:

> **22 Disclosure of agreed changes**
>
> (1) Every creditor under a consumer credit contract must ensure that disclosure of the following information is made to every debtor under the contract if the parties to the contract agree to change the contract:
>
> (a) full particulars of the change:
>
> (b) any other information prescribed by regulations to be information that must be disclosed under this section.
>
> (2) Disclosure under this section must be made before the change takes effect.
>
> (3) Despite subsection (2), disclosure may, instead of being made in accordance with that subsection, be made in accordance with subsection (4), but only if the change is one that—
>
> (a) reduces the obligations that the debtor would otherwise have, unless the obligations are reduced following an application under section 55; or
>
> (b) extends the time for payment of any payment to be made under the contract, unless the time for payment is extended following an application under section 55; or
>
> (c) releases the whole or any part of a security interest relating to the contract; or

[2] Under s 94B, Judicature Act 1908, and s 74B, Property Law Act 2007.

(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.

[30] Section 99 of the CCCFA provides:

99 Enforcement of consumer credit contract prohibited

(1) If disclosure is required under section 17 or section 22, no person (other than a debtor under the consumer credit contract) may, before that disclosure is made,—

(a) enforce the contract; or

(b) enforce any right to recover property to which the contract relates; or

(ba) enforce any right in relation to the costs of borrowing; or

(bb) require the debtor or any other person to make a full prepayment or a part prepayment on the basis of a failure by the debtor or other person to pay the costs of borrowing; or

(c) enforce any security interest taken in connection with the contract.

(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.

(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.

(1C) However, subsection (1A) does not apply in relation to fees or charges payable as referred to in section 45 unless the other person, body, or agency referred to in that section is an associated person of the creditor.

(2) This section does not limit any rights that a person has in connection with a bill of exchange.

[31] The CCCFA was amended from 6 June 2015.[3] The amendments affected s 22(3), (4) and (5). Sections 99(1)(ba), (bb) and s 99(1A) were also inserted by the amendment and apply to post amendment loans.

[32] The plaintiffs say they and the represented parties are entitled to enforce repayment of their costs of borrowing under s 48 of the CCCFA if necessary. Section 48 provides:

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.

[33] Section 48 is engaged by ss 93(a) and 94(1)(a) which provide:

93 Court's general power to make orders

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

…

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

94 Court orders

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

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

---

3 Credit Contracts and Consumer Finance Amendment Act 2014.

[34] As noted, the plaintiffs alternatively seek orders under s 90 directing the Bank to pay statutory damages under ss 88(1)(b) and 89(1)(d). Section 90 provides:

> **90 Enforcement of statutory damages**
>
> (1) The court may, on the application of the Commission or any party to a consumer credit contract or other credit contract, guarantee, consumer lease, or buy-back transaction, make an order directing a creditor, a creditor's agent, a lessor, a transferee, or a buy-back promoter to pay any statutory damages that are payable under section 88.
>
> (2) An order under subsection (1) may be made whether or not any person has suffered, or is likely to suffer, any loss or damage as a result of the breach referred to in section 88.
>
> (3) An application under this section may be made at any time within 3 years after the matter giving rise to the breach was discovered or ought reasonably to have been discovered.
>
> (4) An application by the Commission under this section may be made by the Commission on behalf of a person or a class of persons.

[35] The Banks deny breach of s 22 and also rely on the limitation provision in s 95(2) of the CCCFA. Before the 6 June 2015 amendment s 95(2) provided:

> **95 Miscellaneous provisions concerning court's general power to make orders**
>
> …
>
> (2) An application for an order under section 93 may be made at any time within 3 years from the time when the matter giving rise to the application occurred.

[36] Further, the Banks note that, prior to the 6 June 2015 amendment, s 90(3) of the CCCFA also provided for an application for enforcement to be "made at any time within 3 years from the time when the matter giving rise to the application occurred".

[37] In relation to the post amendment loans, the Banks also rely on s 95(2) as amended.

> **95 Miscellaneous provisions concerning court's general power to make orders**
>
> …

(2) An application for an order under section 93 or 94A may be made at any time within 3 years after the date on which the loss or damage was discovered or ought reasonably to have been discovered.

[38] The Banks also refer to the discretion under s 95A and the reasonable mistake defence under s 106:

95A Court may reduce effect of failure to make disclosure

(1) The court may, on the application of a creditor under a class of consumer credit contracts, order that the effect under section 48 or 99(1A) of a failure to make initial disclosure under section 17, or variation disclosure under section 22, be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made.

…

(4) The order may be made on the terms and conditions that the court thinks fit.

106 Reasonable mistake defence

(1) Every person has a defence to a claim for statutory damages under section 88, … 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.

The current applications

[39] Mr Beavan and Ms Lim, the second plaintiffs, seek leave to bring the proceeding against ANZ as a representative action on behalf of all persons who have the same interest in the subject matter of the proceeding on an opt out basis. They seek to represent customers of ANZ:

(a) who had one or more home or personal loans with ANZ between 30 May 2015 and 28 May 2016 (ANZ relevant period) which were or are consumer credit contracts under the CCCFA (ANZ loan);

(b) who requested and ANZ made one or more agreed changes to the terms of one or more of their ANZ loans during the ANZ relevant period *in relation to which ANZ was required to provide them with variation disclosure under s 22* (agreed changes);[4] and

(c) that ANZ sent at least one loan variation letter intended to disclose the full particulars of the agreed changes, which as a result of loan calculator error, contained incorrect information in respect of one or more of the following:

(i) the total amount payable under the loan;

(ii) the total amount of interest payable under the loan;

(iii) the amount of new regular payment;

(iv) the total number of payments to be made;

(v) the date of final payment (the ANZ class members).

[40] Mr Simons, the first plaintiff, the Dunbars, Mr Bickerdike and Ms Punter, and Mr Marvin and Ms Cuthbert, the first and third to fifth plaintiffs, seek leave to bring the proceeding against ASB as a representative action on behalf of all persons who have the same interest in the subject matter of the proceeding on an opt out basis. They seek to represent customers:

(a) who had one or more home or personal loans with ASB between 6 June 2015 and 18 June 2019 (ASB relevant period), which were or are consumer credit contracts to which the CCCFA applied or applies (ASB loan); and

[4] This additional wording was added in the plaintiffs' submissions.

(b) who requested and ASB made one or more agreed changes to one or more of their ASB loans during the ASB relevant period (agreed changes); and

(c) that ASB did not provide disclosure under s 22 of the CCCFA in relation to the agreed changes within the prescribed timeframes (and related orders).

[41] In addition, the plaintiffs seek CFOs if the proceeding is settled with or judgment entered against the Banks. The plaintiffs (and others) have entered litigation funding arrangements with LPF Litigation Funding No 33 Ltd (LPF) and CASL Management Pty Ltd (CASL) to enable them to pursue these proceedings.

[42] The terms of the CFOs sought include:

> (a) the Project Costs and other costs which LPF Litigation Funding No. 33 Limited (LPF) is entitled to pursuant to … the Deed for Provision of Services in Respect of Litigation … between LPF, CASL Management Pty Ltd, the … representative plaintiffs and … Class Members who have opted in to the representative action …, will be paid from the total, gross amount payable or credited (by whatever means whatsoever) by [the Bank] Class Members (Resolution Sum) before any payments or credits are made to the … representative plaintiffs or the other … Class Members; and
>
> (b) LPF's CFO Services Fee (or such lower fee as the Court considers reasonable at that time) will be calculated with reference to and paid to LPF from the Resolution Sum before any payments are made to the … representative plaintiffs or the other … Class Members.

Details of the calculation of the CFO services fee are set out in the schedule to the application.

[43] As noted, the defendant Banks oppose the proceedings being brought by way of representative action. As an alternative, they submit that if the Court was minded to grant leave to bring the proceedings as a representative action it should be on the basis of an opt in rather than an opt out procedure.

[44] The Banks also oppose the plaintiffs' request that the Court make the CFOs sought.

The evidence

[45] The plaintiffs have filed affidavits detailing their personal loan accounts with the Banks. They have also filed evidence from Ms Karen Chow, a solicitor in the employ of the plaintiffs' solicitors. Ms Chow annexes relevant documentation, including the settlement agreements with the Commission. Philip Newland, a director of LPF and Jonathan Woodhams, the Executive Director of LPF, have also filed affidavits, as has Stuart Robertson, the Chief Executive of CASL, the joint funder with LPF for the proposed proceedings. Mr Newland confirms LPF's experience with litigation funding, its commitment to compliance with the directions of the Court and the relevant Code of Conduct for Litigation Funders. He also addresses the need for the CFOs at this stage. Mr Woodhams' reply affidavit is also directed at the need for the CFOs. Mr Price confirms the commitment by CASL to the funding arrangements with LPF.

[46] In addition, the plaintiffs filed an affidavit from Tina Payne, a forensic accountant setting out the losses claimed by the plaintiffs. It is apparent the quantum of losses claimed would not support these proceedings without a litigation funder. The plaintiffs also filed an affidavit of Lachlan Armstrong QC in response to the affidavits of Wendy Harris QC regarding the use of CFOs in Australia. Finally, the plaintiffs filed an affidavit of Fraser Colegrave, an economist. Mr Colegrave addressed hindsight bias and also gave his opinion as to whether the funding commission rate (FCR) in the current proposed LPF was high or not. The defendants objected to Mr Colegrave's evidence regarding hindsight bias, a matter to which I return later.

[47] For their part, the ANZ filed affidavits from Matthew Pickering, the General Manager of Marketing and Brett Lumsden. Mr Pickering's affidavit is primarily directed at the issues regarding notification if representation orders were made. Mr Lumsden, the Head of Business Products gives evidence of the difficulty the Bank would face in notifying customers if a representation order was made. ANZ also filed an affidavit of Wendy Harris QC, as to the current position of the use of CFOs in Australia.

[48] For the ASB, evidence was given by Morgan Lee and William Daly. Ms Lee is the head of Direct Marketing. Again her evidence is directed primarily at the effect of the requirements of notification orders. Mr Daly is the General Manager of Retail Products. He notes the issues a representative order would cause the Bank, in particular the significant complexities involved in identifying the customers who might be affected. Finally, ASB filed an affidavit of Nicholas Wilson, a solicitor employed by ASB's lawyers to attach relevant documents.

Jurisdiction

[49] The application for representative orders on an opt out basis is made under r 4.24 of the High Court Rules which provides:

> **Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[50] Under r 4.24 proceedings can be brought on a universal basis, an opt out or opt in basis.[5] Previously there was some doubt whether r 4.24 permitted proceedings on an opt out basis, but it is now settled that the rule provides jurisdiction for the Court to grant leave to plaintiffs to commence representative proceedings on an opt out basis in the first instance. The recent decisions of the Court of Appeal in *Ross v Southern Response Earthquake Services Ltd* and the Supreme Court in *Southern Response Earthquake Services Ltd v Ross* have confirmed that the Court has jurisdiction to grant leave for parties to bring a representative action on an opt out basis in an appropriate case.[6]

[51] In *Ross v Southern Response Earthquake Services Ltd* the Court of Appeal confirmed:[7]

---

5 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [83]; and *Duke of Bedford v Ellis* [1901] AC 1 (HL).

6 *Ross v Southern Response Earthquake Services Ltd*, above n 5; and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.

7 *Ross v Southern Response Earthquake Services Ltd*, above n 5, at [81] (footnotes omitted).

> [81] We are satisfied that there is no jurisdictional barrier to the making of an opt out order under r 4.24. The rule clearly authorises a representative plaintiff to bring proceedings on behalf of other persons with the same interest in the subject matter of a proceeding without first obtaining their consent. That is precisely what paragraph (b) of the rule contemplates. …

[52] In *Southern Response* the Supreme Court dismissed the appeal and confirmed the jurisdiction to make opt out representative orders.

[53] Mr Salmon submitted that opt out orders were appropriate in this case. It is a large scale consumer action and, as such, is a paradigm example of a case best brought on an opt out basis. There is no prospect of class members being disadvantaged by the proceeding, especially at stage 1. Opt out orders will not require the defendants to disclose customers' personal information and private banking information until after they have had the opportunity to opt out. Such information is not required at stage 1, which will focus on the representative plaintiffs' claims.

[54] While both defendants accept the Court has jurisdiction to make representative orders on an opt out basis, Mr Hunter QC submitted that applying the settled principles governing applications under r 4.24 the plaintiffs' claim was not suitable to be brought as a representative action, let alone on an opt out basis. But if, despite that principal submission, the Court considered that representative orders were appropriate, such orders should be on an opt in basis.

[55] Ms Cooper QC submitted that the common issues being advanced by the plaintiffs were a high level set of statutory interpretation questions, the answers to which would not advance the claims of the proposed class members at all. The proceeding was unsuitable for a representative action. But again if, despite that submission, the Court was minded to make representative orders, they should be made on an opt in basis.

Requirements for a representative action

[56] The principles to consider on an application under r 4.24 are now relatively well established. They were summarised by French J in delivering the decision of the Court of Appeal in *Cridge v Studcorp Ltd*:[8]

> (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
>
> (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
>
> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
>
> (d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
>
> (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
>
> (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
>
> (g) The court should take a liberal and flexible approach in determining whether there is a common interest.
>
> (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.
>
> (i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

---

[8] *Cridge v Studcorp Ltd* [2017] NZCA 376 (2017) 23 PRNZ 582 at [11]. See also *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

[57] The following observations about the approach to be taken on an application such as this can be drawn from the Supreme Court's decision in *Southern Response*:[9]

> First, generally, the court should adopt the procedure sought by the applicant unless there is good reason to do otherwise. Second, where there is a real prospect that some class members may end up worse off or adversely affected by the proceeding, (for example where there is a counterclaim), that favours an opt in approach. Class size has some relevance: an opt in approach may be preferable where the class is small or there is a pre-existing connection between the members. Stage one would deal with issues common to all members of the class, and if all those claims are unsuccessful, that would bring the proceedings to an end for all claimants. If those claims succeed in whole or part, then there would need to be a stage two, at which questions of relief are addressed in relation to other claimants. Participation at stage two may be a relevant consideration warranting a departure from an opt out approach if persisting with an opt out approach at that point lessens the benefits of the representative proceeding or increases any unfairness or prejudice. Third, a universal approach may be appropriate where the only relief sought is declaratory or injunctive and the outcome will affect all class members identically. Fourth, the need for court approval of a settlement or discontinuance should be a condition of giving leave under r 4.24(b) to bring proceedings on an opt out basis.

Are the requirements for the "same interest" and the need for "common issues" met?

[58] Rule 4.24 requires the plaintiffs and the parties they propose to represent to have the same interest in the proceeding which may extend to a significant common interest in the resolution of any question of law or fact.

[59] Mr Salmon submitted the plaintiffs and the classes of customers they seek to represent had the same interest which derived from:

(a) in the case of the ANZ plaintiffs and class members the fact that during the ANZ relevant period they all received loan variation letters generated by Frontline Tools that contained incorrect information; and

(b) in the case of the ASB plaintiffs and class members the fact that during the ASB relevant period they all made agreed changes to their ASB loans when it appears ASB did not have adequate processes and

---

9 *Southern Response Earthquake Services Ltd v Ross*, above n 6, at [9], [83], [94]–[95], [97]–[101].

procedures in place to ensure it provided them with compliant variation disclosure.

[60] At stage 1 the plaintiffs say the common issues would include:

(a) Pursuant to s 22(1) of the CCCFA what information was ANZ/ASB required to provide to the plaintiffs and class members when they made agreed changes to the ANZ/ASB loans during the relevant periods?

(b) Is there a de minimus exception to s 22(1)?

(c) During the ASB relevant period was ASB able to provide the plaintiffs and class members with variation disclosure in s 18 continuing disclosure statements via FastNet and/or via an App?

(d) Did the plaintiffs and class members who had not received refunds or credits of breach period payments that ANZ/ASB is required to pay to them under s 48 suffer a loss for the purposes of s 93?

(e) Where the plaintiffs and class members can establish a breach of s 48 does the Court have a discretion to refuse to make the orders sought under s 94(a)?

(f) If an order is made in favour of a plaintiff or class member, must the resulting liability be set off against any indebtedness of that class member to ANZ/ASB under s 134?

[61] Mr Salmon accepted that, because of the amendments that applied from 6 June 2015 to the CCCFA, it would be necessary to divide each of the classes into two subgroups, pre and post that amendment, although some customers will be in both. He submitted that members of the Pre Amendment Subgroup would have the same interest in the following common issues:

(a) Pursuant to s 99(1), are the Pre Amendment Subgroup members liable for costs of borrowing relating to breach periods?

(b) Under s 99(1), are Pre Amendment Subgroup members not liable for all costs of borrowing in relation to their breach periods, or does s 99(1) only extinguish liability for costs of borrowing referable to the particular change for which there was non-compliance with s 22?

(c) Was the Bank able to provide the Pre Amendment Subgroup members with corrective disclosure and end their breach periods for the purposes of s 99(1) by providing variation disclosure in relation to different, subsequently agreed changes or other disclosure required under the CCCFA?

(d) Does s 99(1) disentitle the Bank from receiving breach period payments from the Pre Amendment Subgroup members, such that s 48 is triggered?

(e) For the purposes of s 90(3) (pre amendment) was the Bank continuously in breach of s 22 during the breach periods, such that for each plaintiff and class member, the matter giving rise to the breach occurred up until the end of their breach periods? And

(f) For the purposes of s 95(2) (pre amendment) is the Bank still in breach of s 48, such that for each plaintiff and class member, the matter giving rise to the breach is still occurring?

[62] The plaintiffs submit the Post Amendment Subgroup members have the same interest in essentially the same common issues, but in relation to s 99(1A) instead of s 99(1) and the post amendment versions of ss 90(3) and 95(2).

[63] Mr Salmon acknowledged that the stage 1 common issues in which members of the Pre Amendment Subgroup are interested would not be determined on the ANZ plaintiffs' claims as the second plaintiffs did not have a loan prior to 6 June 2015. He suggested the findings on the ASB plaintiffs' claims would be binding on ANZ and the proposed ANZ class or alternatively, if the Court considered that was not the case,

the plaintiffs could add further ANZ plaintiffs who had an existing loan prior to 6 June 2015 for the purposes of the stage 1 proceeding.

[64] Mr Salmon also acknowledged that the proceeding would involve at least two stages, likely more. Stage 1 would determine the common issues and the issue of what relief, if any, the named plaintiffs were entitled to. He accepted that if the named plaintiffs' claims were unsuccessful that would bring the proceedings to an end for all claimants, including the representative plaintiffs. If, however, the claims were wholly or partly successful there would need to be further stage(s) to the proceedings at which the claims of perhaps further separate sub-classes of the claimants would need to be addressed.

[65] Mr Hunter criticised the second plaintiffs' position on the common issues as a moving feast. He submitted that none of the issues identified by the second plaintiffs were common issues.

[66] Mr Hunter made the point that the second plaintiffs do not have a common interest with customers under loan contracts entered into before 6 June 2015 as they entered their loan contract after that date. That was relevant to consideration of the earlier version of s 22(3) and also to the limitation issues more generally.

[67] Mr Hunter also submitted the proposed common issues would require the majority of the proposed representative class members to conduct a legal analysis of a repealed version of s 22 to determine whether they were in the class in order to make a decision whether to opt out. If the previous version of s 22(3)(a) which provided: "Disclosure is not required under this section in relation to a change that – (a) reduces the obligations that the debtor would otherwise have," had applied to the second plaintiffs, ANZ would not have had to make any variation disclosure to them because, in their circumstances, the agreed change reduced their obligations.

[68] Further, in addition to the change to the wording of s 22(3) the amendment of 6 June 2015 also included the insertion of ss 99(1)(ba) and (bb) and s 99(1A) and (1B), all of which could be relevant to limitation arguments.

[69] Mr Hunter argued that if the opt out representative orders were granted as sought the Court would be asked to determine significant issues that did not arise on the second plaintiffs' own claim. There are approximately 61,900 ANZ customers within the proposed class who entered the contracts prior to 6 June 2015 compared to approximately 17,000 ANZ customers who entered the contracts from that date on.[10] So two-thirds of the class the second plaintiffs seek to represent entered loan agreements prior to the amendments to the CCCFA. Section 99(1) would apply to those parties but a potentially different situation applied under s 99(1A) for customers with contracts from 6 June 2015. The second plaintiffs could only ever represent the latter group.

[70] Mr Hunter submitted it was no answer to that point for the second plaintiffs to suggest, as Mr Salmon had, that the amended sections have the same effect but if necessary a new plaintiff would be added or that the ANZ would be bound by findings in relation to pre 6 June 2015 contracts from the ASB proceedings. The first and third to fifth plaintiffs cannot represent ANZ customers. If the plaintiffs seek to add further plaintiffs, ANZ should be free to deal with such applications on their merits.

[71] Mr Hunter noted the plaintiffs' concession that different subgroups may be necessary to represent customers with pre and post 6 June 2015 loans and submitted that undermined the plaintiffs' suggestion the amended sections have the same effect and do not alter the substantive issue.

[72] Mr Hunter submitted that the different proposed class members would also have different kinds of loans and would have agreed different changes to the loans. The particulars of the changes would be different. The second plaintiffs agreed to change the type and amount of their interest rate but that would bear no relation to the disclosure required for a customer who agreed to change the term of their loan.

[73] Mr Hunter argued that ANZ and the Court could only deal with the pleaded claims that have been made. The "same interest" test is not met where an assessment

---

[10] Mr Lumsden's evidence is that of the 101,000 ANZ customers, approximately 61,900 entered contracts prior to 6 June 2015.

of the individual circumstances of each class member's claims would be required to establish its success.[11]

[74] Next, he made the point that whether de minimis would apply to any failure to disclose under s 22 could not be a common issue.

[75] Next, Mr Hunter submitted that the application of s 48 was not a common issue, it was a submission. It argues or assumes that there were customers who were entitled to receive refunds or credits. Some would not be. According to Mr Lumsden's evidence, for example, between 5,000 and 8,000 loan variation letters were sent to customers who, for a number of reasons, did not pay any costs of borrowing over the relevant period. He also noted that a number of the proposed class will include foreign residents. In some jurisdictions that has been considered to be a relevant consideration that supports opt in rather than opt out orders.

[76] Next, Mr Hunter submitted that ss 93 and 94 only apply if there is a breach. It is a pre-condition to the making of orders under s 94 that a person has suffered loss or damage. Mr Hunter submitted that none of the plaintiffs or the parties they sought to represent had suffered any loss or damage. Further, orders under s 94 were discretionary. That must include a discretion to make no order at all. For the Court to exercise its discretion would require an analysis of the facts of the particular customer seeking the order which would not be possible on a class basis.

[77] Further, since December 2019, the Court has had a discretion under s 95A to reduce or extinguish any monetary remedy for a breach of s 22. That would also require a fact specific analysis in each case.

[78] Finally, similar reasoning, namely that statutory damages under ss 88 to 90 are discretionary and would require a fact specific analysis of each customer's case, applied in relation to the claims for statutory damages.

---

[11] *Cooper v ANZ Bank of NZ Ltd* [2013] NZHC 2827; and *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC).

[79] For all those reasons Mr Hunter submitted the proposed opt out procedure was not appropriate in this case.

[80] Ms Cooper referred to the Supreme Court's observation in *Southern Response Earthquake Services Ltd v Ross*:[12]

> the concern not to work injustice on a defendant [through a representative order] is met at least in part by the requirement that applicants under r 4.24 have to satisfy the court as to the requisite common interest.

She submitted that the plaintiffs were unable to identify a significant issue, the success or failure of which was likely to determine or resolve the outstanding issues between the parties in this case. In her submission, the plaintiffs sought to raise a set of high level statutory interpretation issues. None of the issues sought findings of breach on the part of ASB of the legislative provision to the circumstances of the wider proposed representative class. It would not be possible to make class wide findings of breach given the variety of loans, terms and conditions, and the individual circumstances relevant to such a finding.

[81] As the Court could only answer the stage 1 issues in a highly generalised way, that would only defer the problems with the plaintiffs' case. Any answers provided by the Court would be at such a level of generality they would not meaningfully advance the claims of the proposed class members. It is inevitable that, given the differences between the parties the findings on the proposed stage 1 common issues would favour some class members but not others. The four ASB plaintiffs do not have the same interests as each other, let alone the same interests as all members of the proposed class. Ms Cooper submitted that the prospect acknowledged by the plaintiffs that some class members may fail on what is said to be a common issue, (such as failure to establish a breach of s 22 or those who did not pay any costs of borrowing) while others may succeed, plainly illustrated that not all proposed class members have the same interest.

---

12 *Southern Response Earthquake Services Ltd v Ross*, above n 6, at [41].

[82] Ms Cooper referred to the following passage from *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*:[13]

> [32] We do not accept that a representative plaintiff can advance claims other than those which its own claim "represents". The representative plaintiff may, as Mr Cooke argues, have the same interest as the other claimants, in the sense that he has the same insurance policy for earthquake damage and alleges that Southern Response has breached that insurance policy, but that common interest does not give rise to a common issue the resolution of which will advance the disposal of the claim. …

[83] Ms Cooper noted that the plaintiffs themselves conceded that if they "succeed at stage 1 it will then be necessary to apply the Court's judgment and the parties' increased knowledge of the matters in issue to identify stage 2 common issues".

[84] She submitted that before any representative order was made the plaintiffs had to demonstrate they had an issue in common with remaining members of the class, the success or failure of which was likely in practice to determine the result of the case. The plaintiffs' proposed procedure was effectively "kicking the can down the road".

[85] In Ms Cooper's submission, the only issue that could conceivably give rise to a common interest would be a finding that ASB had breached s 22 on a class wide basis. But the plaintiffs apparently no longer proposed that as a common issue, acknowledging the need for subgroups.

[86] Ms Cooper suggested the following additional issues arose and were not addressed by the proposed common issues:

(a) whether the customer had a loan to which the CCCFA applied?

(b) whether the customer made an agreed change to which s 22 applied?

(c) what specific information ASB was required to provide by way of variation disclosure to that customer in light of the nature of the agreed change.

---

[13] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312.

[87] As to the first point she noted that s 22 only applies to consumer credit contracts.

[88] As to the second point, the plaintiffs have to date purported to rely on a non-exhaustive list of a number of agreed changes. There was an inadequate definition of agreed changes. Some changes cannot be made to certain types of loan contracts such as revolving credit facilities.

[89] Ms Cooper noted that ASB offered a number of different home and personal loan products over the relevant period. There was no identification of the loan products in the pleadings. It was impossible to identify the loans to which it was said the CCCFA applies. That would require consideration of the debtor's purpose for the loan and the capacity in which they were borrowing the money from ASB. As Mr Daly confirmed, there are 10 sets of different retail terms and conditions that applied during the ASB relevant period.

[90] Ms Cooper made the point that, self-evidently, not all the information ASB was required to provide was the same in all cases. The specific information ASB was required to provide customers by way of variation disclosure must depend on the nature of the agreed change and its impact on a particular customer's contract. It cannot be answered at a class level. Section 17 of the CCCFA refers to the need for a lender to "ensure disclosure of as much of the key information … as is applicable to the contract".

[91] It would be necessary in each case to determine whether the particular information provided to the particular customer complied with the standard required in the particular case. Any commonality would be conditional at best.

[92] Finally Ms Cooper submitted the requirement to determine what disclosure was provided and when, meant it would be inherently complex to locate the relevant disclosure as Mr Daly had noted. Mr Daly says the work required to identify the proposed class would require identifying the relevant home and personal loan products, the agreed changes, the loans to which the CCCFA does not apply and the disclosure provided. He considers it could take up to 12 months.

Analysis – same interest

[93] The parties' arguments properly focused on the requirement for the represented parties to have the same interest as the named plaintiffs. The challenges to the representative orders proposed by the plaintiffs are those typically raised in opposition to representative orders generally and to opt out orders in particular.

[94] The Court of Appeal has confirmed in this context the same interest extends to a significant common interest in the resolution of any question of law or fact arising in the proceeding. The common interest need not lead to a complete resolution of the case.[14]

[95] There will be a substantial number of customers of the Banks during the relevant periods who, in the case of the ANZ, received information regarding their loans following an agreed change which was incorrect and, in the case of the ASB, may not have received the variation disclosure required under s 22. At a general level those customers will all have the same or common interest in clarifying the obligations of the Banks in giving variation disclosure under s 22 of the CCCFA and relevantly, in the event of a breach of the obligations under s 22, whether as a result the Banks are prima facie (and dependent on the customers' individual circumstances) required to repay the costs of borrowing paid during that period. To that extent there is a class of customers who will have the same interests.

[96] The fact that in the case of the ANZ, for example, the information may have been incorrect in a number of different ways, for example, as to the total amount of interest payable, the amount of the new regular payment or the total number of payments or the date of final payment does not of itself count against a representative order. The Court's detailed consideration of the form and extent of disclosure required to comply with s 22 in the case of the second plaintiffs, for example, will necessarily involve consideration of those issues.

[97] The Banks' obligations under s 22 and/or potential liability to repay the plaintiffs will be resolved at the stage 1 hearing. I do not consider it fatal to the

---

14 *Cridge v Studcorp Ltd*, above n 8.

plaintiffs' application for representative orders that second or even further stage hearings may be necessary at which consideration of the individual circumstances of the different claimants will have to be considered to respond to, for example, the points regarding discretionary relief made by the defendants. In *Ross v Southern Response Earthquake Services Ltd* the Court of Appeal confirmed the opt out procedure was appropriate, despite the need for claimants to opt in at stage 2 if they wished to obtain compensation, noting that the need to opt in would only be necessary if the claim had succeeded to that stage.[15] The Court did not consider such a staged process to be a bar to confirming and approving the opt out procedure as appropriate at the initial stage.[16] It may well be that at that second stage the remaining plaintiffs may have to opt in to confirm their further participation (class closure) if they are to seek compensation.

[98] Nor do I consider it particularly an issue that the current representative plaintiffs had home loans whereas they also seek to represent customers with personal loans as well. Again in *Ross*, the Court of Appeal accepted representative orders could be made that applied to repair customers, even though the Ross' claim under the policy was a rebuild claim. The Court considered that any relevant differences could be readily addressed at the stage 1 hearing. Similarly, in the present case, the general issues raised in relation to the home loans and personal loans will be the same provided both were consumer credit contracts. The principal common issue, namely the extent of the Banks' obligations under s 22 will be the same. In fact there is more similarity in the case of home and personal loans (in relation to the Bank's obligations under s 22 of the CCCFA) than there was between the rebuild and repair home owners under the insurance policies in *Ross.*

[99] As to the point raised by Ms Cooper for ASB that s 22 only applied to consumer credit contracts, that is dealt with by definition of the class. The plaintiffs only seek to represent customers who had consumer credit contracts. To the extent the Banks are concerned that claims may be made by customers who do not satisfy that requirement, it could be dealt with at stage 2 (if the proceedings reach that point) when customers who seek compensation could be required to opt in. As part of that process

---

15 *Ross v Southern Response Earthquake Services Ltd*, above n 5.
16 *Ross v Southern Response Earthquake Services Ltd*, above n 5, at [35].

they would be required to confirm their eligibility as customers with consumer credit contracts.

[100] Both counsel for the Banks referred to the English Court of Appeal case of *Emerald Supplies Ltd v British Airways plc* in the context of the need to properly identify the class and the same interest.[17] The defendants submit the plaintiffs' definition of proposed classes, particularly in relation to the ASB is indeterminate and circular.

[101] In *Emerald Supplies Ltd* the Court of Appeal of England and Wales dismissed an appeal from the High Court's judgment striking out the representative action issued by Emerald Supplies. The class was framed on the basis that it was a representative action on behalf of all direct or indirect purchasers of air freight services, the prices for which had been inflated by one or more of the alleged agreements or concerted practices that British Airways had engaged in with other air freight providers to fix prices at which air freight services were supplied, with the object or effect of preventing or distorting competition. The Court of Appeal confirmed it was a requirement of bringing or continuing the representative claim that at all stages of the proceedings, not just at the date of judgment, it was possible to say whether or not any particular person qualified for membership of the represented class of persons by virtue of having the same interest in the proceedings as the claimant. In the case pursued by Emerald Supplies it would not be possible to say whether or not a person was a member of the class until a judgment on liability had been obtained.

[102] The *Emerald Supplies* case was referred to by Associate Judge Lester in the case of *Ideal Investments Ltd v The Earthquake Commission*,[18] which was also relied on by the defendants. Associate Judge Lester declined Ideal's application to bring a representative action on behalf of owners or former owners of residential properties damaged in the Canterbury earthquakes where EQC had assessed the claims "inaccurately or inadequately". He considered that the common issue raised factual issues personal to each home-owner.

---

17 *Emerald Supplies Ltd and v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345. See also *Beggs v Attorney-General*, above n 11.

18 *Ideal Investments Ltd v The Earthquake Commission* [2022] NZHC 400.

[103] The difference in the present case is that, unlike the position of British Airways in *Emerald Supplies*, the Banks have accepted that they sent incorrect information regarding agreed changes to their customers (in the case of ANZ) or that they could not be sure they had provided variation disclosure to their customers where it was required following an agreed change (in the case of the ASB). While it may be onerous to identify such customers, they do form a particular class and can be identified.

[104] In the course of delivering the Court of Appeal judgment in *Emerald Supplies* Mummery LJ referred to an article by Professor Zuckerman, in which the author noted there were two different sorts of interest in a multi-party proceedings context.[19] The first was a true collective interest where all those concerned shared a single common interest (e.g. pollution, anti-discrimination); the second was where individual substantive rights happened to be shared by several persons relating to a single event or similar transactions (e.g. personal injury claims following mass disasters, product liability claims). The case Emerald Supplies pursued was a true common interest case. It fell into the first category. It was not synonymous with a case arising from a single event, product or transaction. By contrast, in the present case the plaintiffs seek to represent customers who share certain features, namely who were entitled to variation disclosure following an agreed change to their loans and who were provided incorrect information or who may not have received disclosure.

[105] If the parties agree to change the terms of a consumer credit contract, s 22 of the CCCFA (both pre and post amendment) required the Banks to ensure that disclosure of full particulars of the change and any other information prescribed by regulations to the information that must be disclosed is made to every debtor (variation disclosure).[20]

[106] While Ms Cooper referred to [32] from the case of *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, the Court of

---

19 Adrian Zuckerman *Zuckerman on Civil Procedure – Principles of Practice*, (2nd ed, Sweet & Maxwell, London, 2006) at [12.22].

20 Subject to the original form of s 22(3)(a).

Appeal went on to accept that, even though consideration of individual circumstances would still be required, that was no bar to the grant of the representative order sought:[21]

> [35] Having reviewed the pleading and the schedule of claims we can see that there are common threads running through claims, involving both the contractual term at issue and the type of conduct alleged to constitute a breach. …
>
> [36] In our assessment it will be possible to address the issues of contractual interpretation and whether agreed or proved conduct on the part of Southern Response is a breach of those obligations, through the representative process. That will still leave issues of whether the conduct in question was applied to the individual claimant, and assessment of individual damages to be addressed later in the proceeding. Just how these issues will be addressed, is we accept, a sequencing issue, properly the province of case management. But the fact that significant issues will need to be worked through after the common issue is addressed by the Court, and on an individual basis, is no bar to the grant of leave.

[107] Similarly, in the present case, issues of the proper interpretation of s 22, its requirements and the potential obligation of the Bank to refund costs of borrowing will be able to be considered by the Court in the context of the stage 1 hearing process. While that may still leave issues open, including the exercise of discretion for later consideration, is of itself, no bar to the representative order. The case of *Ideal* can be distinguished on that basis.[22]

[108] As the Court of Appeal has said on previous occasions, it is not necessary that the common interest completely resolve the case. Also, the Court should take a liberal and flexible approach in determining whether there is a common interest. The requisite commonality of interest is not a high threshold. The Court should be wary of looking for impediments to the representative action rather than being facilitative of it.[23]

[109] However, as the Court of Appeal has also confirmed, a representative action should not permitted if to do so would be to deny a defendant a defence, or where the same common issues plainly do not arise. In this case that proviso applies to the second plaintiffs' attempt to represent the pre 6 June 2015 existing customers of ANZ.

---

21 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 13 (footnotes omitted).

22 *Ideal Investments Ltd v The Earthquake Commission*, above n 18.

23 *Cridge v Studcorp Ltd*, above n 8; and *Credit Suisse Private Equity LLC v Houghton*, above n 8.

The second plaintiffs cannot represent those parties as their own loans post-dated 6 June 2015. The amendments to the CCCFA which came into effect on 6 June 2015 changed a number of limitation provisions. ANZ has potential limitation defences available to it in relation to existing, pre 6 June 2015 loans that would not apply to the second plaintiffs' loans or other loans made after 6 June 2015. The second plaintiffs cannot represent ANZ customers with existing pre 6 June 2015 loans. If the plaintiffs wish to join other plaintiffs to represent that class of customer they will have to make the appropriate application under rr 4.2 and 4.56.

[110] The other relevant considerations that inform whether the representative order (and if so what type) should be made, can be dealt with relatively briefly.

Funding issues

[111] The defendants criticised the funding arrangements set out in the deeds for the provision of funding services, particularly cls 10.7 and 12.1 of both deeds.

[112] The defendants say the deeds are unduly weighted in favour of the litigation funders. The plaintiffs have limited practical ability to dispute the decisions of the funders. For example, they note the plaintiffs are not permitted to pursue legal action against the funders or to challenge the funders' decision to terminate the arrangement.

[113] The deeds for the provision of funding services are before the Court. Clause 10.7 provides:

> 10.7 **No adverse orders:** The Plaintiffs and the Representative must obtain the prior written consent of LPF (which may be given or withheld at LPF's sole discretion) prior to applying for any Court order during the course of the Proceedings and term of this Deed that may detrimentally affect LPF's rights under this Deed or its ability to enforce this Deed.

[114] I agree with Mr Salmon's response to the criticism that, in context, the clause is not sinister. Clause 10.7 ensures that one or more of the proposed representative plaintiffs do not incur unnecessary costs for other plaintiffs by taking a different approach to the collective interest. There is a dispute provision in the funding deeds

(cl 14) which the plaintiffs can have resort to. Further, the Court will be supervising the process throughout.

[115] Mr Woodhams deposed that the funding agreements used by LPF in other group funded actions contained clauses that are materially the same as the clauses the defendants take issue with. In none of those cases was the funding agreement found to be unfair, oppressive or misleading.[24]

[116] I also note that by 21 January 2022, 4,189 ANZ and 5,236 ASB customers had registered interest in the proceedings and 1,384 ANZ and 2,048 ASB customers had signed up to the funding deed. Independent legal advice about the deed was available to them.

[117] The defendants also submit there is an imbalance in the termination rights. Clause 12.1 provides for termination without cause:

> 12.1 **Termination by LPF without cause:**
>
> (a) LPF is entitled, at its sole discretion, if it has made an assessment (based on the advice of its legal advisors) that the costs and risks involved in funding the Claims and the Proceedings are no longer acceptable to LPF, to terminate its obligations under this Deed, other than accrued obligations under sub-clause (b), by giving 5 Working Days' written notice to the Representative (on behalf of the Plaintiffs) that the Deed and LPF's obligations are terminated.

[118] Again I accept Mr Salmon's submission that a responsible and rationale plaintiff would want to have the right to terminate the proceedings and should not be prevented from doing so by an unreasonable stance taken by any one or more of the represented plaintiffs. In any event, a condition of any opt out order will be that the Court must approve any discontinuance.

Merits

[119] The parties take diametrically different positions regarding the merits of, and motivation for, these proceedings. Mr Salmon says the proceedings are necessary to

---

[24] *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596; and *Fullerton v Arowana International Ltd* [2021] NZHC 931.

hold the Banks to account for breaches of their obligations under the CCCFA to large numbers of individuals in circumstances where individual claims may not otherwise be pursued. He noted the immense power banks have over their customers who rely on them to comply with their legal obligations, including under consumer protection laws like the CCCFA. Banks have significant and financial legal resources to ensure compliance. Absent opt out representative actions banks would rarely be held to account by retail customers, no matter how serious or widespread their breach was. There are a number of reasons why, apart from the economic reality, individual customers would not take action against their banks.

[120] On behalf of ANZ Mr Hunter says that, while ANZ does not dispute the right of its customers to pursue claims against it, ANZ opposes the current proceedings as being without merit. He noted that the plaintiffs say the error in the loan variation letters entitles them to repayment of all interest paid on their loans from the date of the letter to the present day. That is not what the CCCFA provides for. There can be no suggestion the second plaintiffs or the other customers they seek to represent have suffered any loss or paid interest other than at rates agreed with ANZ.

[121] Mr Hunter submitted that the ANZ was not in breach of s 22, had no obligation to repay under s 99 and the plaintiffs have not incurred any loss or damage.

[122] He noted that at the relevant time there were no applicable regulations under s 22(1)(b) so the second plaintiffs' claim relies entirely on s 22(1)(a).[25] The second plaintiffs held a principal and interest loan and agreed a change in November 2015. Mr Lumsden's evidence is that ANZ disclosed the rate correctly but its letter contained a relatively minor error as to the amount of the monthly and final repayments. ANZ had complied with the requirements on it.

[123] Next, he submitted ss 99(1) and 99(1A) did not impose a positive obligation to repay costs of borrowing. Further, *King v Norfolk Nominees Ltd* confirmed that the effect of s 99(1) ended when the creditor made corrective disclosure.[26] In his

---

25 Regulation 4F only applied from 1 December 2021.
26 *Norfolk Nominees Ltd v King* [2013] NZHC 398.

submission, s 99(1A) was introduced to expressly remove a creditor's ability to take enforcement steps while not complying with the Act.

[124] Next, he submitted the potential claimants have not suffered any loss so that ss 93 and 94 were not engaged.

[125] Finally, he noted the limitation defences available to the Bank.

[126] For ASB, Ms Cooper noted the proceedings had not been prompted by customer concerns or complaints. Rather, she submitted they were an attempt by the plaintiffs (or their litigation funders) to leverage ASB's responsible decision to self-report a systems issue to the Commission for their own purposes and to seek to intervene in tens of thousands of customers' banking relationships.

[127] Ms Cooper submitted this was not a case that should engage the CCCFA. Consumers were not misled. Products or services were not mis-sold. There is no allegation of loss. Like Mr Hunter, she also noted that on the plaintiffs' case the consequences of the alleged non-compliance would be that the plaintiffs and the entire class they seek to represent would be entitled to a full refund of all their costs of borrowing under any affected loans, irrespective of the amounts to be refunded or the materiality (or lack of materiality) of the alleged errors or omissions in disclosure. Such a result would have wildly disproportionate and far reaching consequences and cannot have been the intended effect of the CCCFA.

[128] Ms Cooper also submitted the merits of the proposed claim against ASB were weak. She argued that on a proper interpretation s 22 did not expressly require disclosure of consequential changes to the key information listed in schedule 1 required under s 17.

[129] She also took issue with the suggestion that reg 4F, which was inserted in December 2021, was merely clarificatory.

[130] Ms Cooper also made the point that a significant portion of the proposed claim would relate to existing loans (pre 6 June 2015). They would be subject to limitation

defences. Further, in response to the plaintiffs' suggestion that the breach was continuing, Ms Cooper referred to the Court of Appeal decision under the Fair Trading Act 1986 in *Gosper v Re Licensing (NZ) Ltd* where the Court rejected the argument for continuing liability under a similarly worded section.[27]

[131] In response, Mr Salmon submitted that no more than a provisional appraisal of the merits was required or appropriate at this stage. He submitted the amended statement of claim disclosed an arguable case based on the facts as pleaded, which, to a significant degree relied on admissions made by the defendants when settling with the Commission. He suggested that the regulations inserted on 1 December 2021 did support the plaintiffs' case.

[132] Further, s 99(1A) was inserted to clarify, post *Norfolk Nominees Ltd v King* that under s 99(1) a debtor is not liable for costs of borrowing in relation to a period during which the contract is unenforceable.[28]

[133] I agree that the time for consideration of the merits arguments raised by the defendants is at stage 1 of the proceedings, rather than at this preliminary stage. To resolve the arguments raised by the defendants will require a more detailed consideration and analysis of the arguments than is appropriate at this stage of the proceeding. As the Court of Appeal said in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*:[29]

> … the Court cannot grant leave to the bringing of plainly meritless claims, and so allow those propounding the claim to invite others to join the group represented. But it is highly undesirable that this criterion be seen as creating the need or opportunity for a mini trial at the leave stage, at which the Court receives and reviews evidence on contested fact. Such an approach would be inconsistent with the objectives of the High Court Rules, and would substantially undermine the effectiveness of the r 4.24 procedure.

---

27 *Gosper v Re Licensing (NZ) Ltd* [1998] 3 NZLR 580 (CA).

28 *Norfolk Nominees Ltd v King*, above n 26; and *King v Norfolk Nominees Ltd* [2012] NZCA 190.

29 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 13, at [16].

It cannot be said at this stage that the claims are so plainly without merit (as they were in the case of *Sneesby v Southern Response Earthquake Services Ltd*)[30] that the representative orders sought should not be granted.

Access to justice

[134] Access to justice factors point towards an opt out approach in this case. Such an approach will potentially enable many more class members to have their claims heard and determined. I agree with the plaintiffs' submission that the risk of class members failing to opt in without good reason is high in claims of this nature, particularly at this stage. The sums involved would not, on their own, justify the detailed and complicated litigation against the Banks. Further, some of the Banks' customers may be vulnerable and not feel able to individually pursue a claim on their own.

[135] Mr Salmon made the additional point that an opt out order would promote the objective of strengthening incentives for compliance with the law. Given the Banks' self-reporting to the Commission, I do not place particular weight on that submission.

No adverse effect

[136] This is not a case where there is any prospect, let alone a "real prospect" of a class member being adversely affected by an opt out order.

Prejudice

[137] Finally, in response to the Banks, particularly ASB's point, that opt out orders would place a disproportionate burden on them to investigate and identify potential class members, the Banks will have the relevant information. While it may be difficult for them to extract it and to identify the affected customers, it will not be impossible. Further, the fact that the proceedings will be staged and that the represented plaintiffs could be required to opt in during the process to be eligible for compensation should mitigate the ultimate impact on the Banks.

---

30 *Sneesby v Southern Response Earthquake Services Ltd* [2022] NZHC 262.

Conclusion – representative orders

[138] Subject to the limitation point involving the ANZ customers who cannot be represented by the second plaintiffs, I accept that the remaining potentially affected classes of customers are adequately defined and can be represented by the plaintiffs. Opt out orders are clearly appropriate in a large consumer class action of this nature.

[139] Having the common issues dealt with on a representative basis will materially advance the class members' claims. If the Court determines at stage 1 the provisions of the CCCFA apply as the plaintiffs allege, the claims can progress to the next stage with key legal issues clarified. If, on the other hand, the Court rejects the plaintiffs' interpretation of the Banks' obligations under s 22(1), and/or the effect of any breach of s 22, that will likely be dispositive of the case. Even if the claim proceeds to the next stage, clarification of the limitation defences will enable more focus on the class sizes and groups that may remain.

[140] It will be far more efficient and cost effective for the parties and the Court to have the common issues determined on a representative basis than to have the Court consider (and defendants defend) a number of different and individual claims. In relation to that, I note the apparent willingness of a number of customers to be involved in the proceeding. No doubt complexities will arise but the Court of Appeal and Supreme Court have both confirmed they expect this Court to be able to deal with them through case management.

[141] Finally, while defending the action may be burdensome for the Banks, that cannot justify refusal of representative orders where they would otherwise be appropriate.

Common fund orders (CFOs)

[142] The plaintiffs also seek CFOs at this time. CFOs provide for the quantum of the litigation funder's remuneration to be fixed as a proportion of any monies so recovered in the proceedings, for all class members to bear a proportionate share of

that liability, and for the liability to be discharged as a first priority from any monies recovered.[31]

[143] CFOs were primarily developed as a response to the "free rider" issue – the ability of class members who had not signed up to the funding agreement to benefit from a successful outcome, notwithstanding they had not contributed to the legal and funding costs of the litigation. Prior to the decision of the High Court of Australia in *BMW Australia Ltd v Brewster* they were regularly applied for and made in representative proceedings in Australia.

[144] CFOs can be contrasted with funding equalisation orders (FEOs). FEOs deduct an amount from the settlement or award paid to non-funded members that is equivalent to the amount they would have had to pay to the funder, had they entered the funding agreement. The amount deducted is then pooled and distributed pro rata amongst all class members, but not the funder. FEOs achieve equity amongst class members, but do not augment the sums paid to the funder.

[145] In Mr Salmon's submission FEOs are inferior to CFOs. FEOs do not incentivise funders to invest in opt out proceedings, because they do not allow funders to collect a commission on unfunded class members' recoveries or provide certainty as to potential returns at the beginning of the proceedings. Under FEOs the Court has less flexibility to amend the funding commission rates (FCRs). CFOs are simpler and easier to understand. The other advantage of a CFO is that it obviates the need for book building and ensures that class members are able to make better informed choices as to whether to opt out.

[146] The plaintiffs submit the Court has power to make CFOs in opt out representative actions and one should be made in this case. Mr Salmon noted the first and only other application for a CFO in New Zealand was in the *Ross v Southern Response* litigation. The application was adjourned pending determination of the appeals to the Court of Appeal and Supreme Court on the availability of opt out orders.

---

[31] *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574 at [1], [135] and [178].

[147] The Banks submit there is no jurisdiction for the Court to make a CFO in New Zealand. Rule 4.24 cannot extend to provide jurisdiction and nor can rr 1.2 and 1.6 which are concerned with practice and procedure. Further, the Court's inherent jurisdiction does not permit the making of such orders.

[148] Mr Hunter referred to the decision of the High Court of Australia in *Brewster*.[32] The High Court held that the relevant provisions of the Federal Court of Australia Act 1976 (CTH) (FCA) and Civil Procedure Act 2005 (NSW) (CPA) did not authorise the making of CFOs at the outset of a representative proceeding.[33]

[149] The defendant Banks also refer to the evidence of Wendy Harris QC as to the current Australian law in relation to CFOs. In Ms Harris' opinion the position regarding use of CFOs is uncertain in Australia following the *Brewster* decision.[34] If the power to make a CFO exists at all, such an order will now only be made at settlement or judgment. Ms Harris also opined that there were a number of reasons why there has been a move against the use of CFOs in Australia.

[150] The plaintiffs filed an affidavit from Lachlan Armstrong QC in response to Ms Harris. Mr Armstrong agreed with Ms Harris that, following the decision in *Brewster*, CFOs are not available prior to settlement or judgment. But in his opinion the premise that policy reasons have driven a move against CFOs is not correct. In his opinion *Brewster* reflected that Court's interpretation of Australia's detailed statutory class action regime, rather than any policy move against them as a matter of principle.

[151] I note that in *Southern Response Earthquake Services Ltd v Ross* the Supreme Court observed that the Australian Law Reform Commission's report (which included consideration of CFOs) did not suggest a move away from opt out procedures.[35] Following that report, the Australian Government introduced the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021. The Bill acknowledged the possibility of CFOs and provided the prescribed process

---

32 *BMW Australia Ltd v Brewster*, above n 31.
33 *BMW Australia Ltd v Brewster*, above n 31. See *Southern Response Earthquake Services Ltd v Ross*, above n 6, at [60] onwards..
34 *BMW Australia Ltd v Brewster*, above n 31.
35 *Southern Response Earthquake Services Ltd v Ross*, above n 6.

for enforcing a litigation funding agreement would not apply where a CFO had been made. It would have addressed the issues raised by *Brewster*. However, as Ms Harris has confirmed, the Bill has lapsed.

[152] In *Southern Response Earthquake Services Ltd v Ross* the Supreme Court left the issue regarding CFOs and FEOs open:[36]

> [62] Mr and Mrs Ross have made an application for a common fund order. That application has not yet been dealt with by the High Court so we make no comment on the availability of that order. Nor do we comment on the availability of the other technique commonly used to ensure costs of litigation funding are distributed across all claims, namely, funding equalisation orders. The latter order allows deductions from the amounts payable on settlement to unfunded class members equating to the funding commission payable if they had entered into the litigation funding agreement.

[153] As the Supreme Court left the position open, the first issue for the Court is whether there is jurisdiction to make a CFO.

[154] Prior to the decision of *Brewster*, the Full Court of the Federal Court of Australia had confirmed the availability of CFOs and they were commonly made in representative proceedings in Australia.[37]

[155] However, in *Brewster* the High Court confirmed that the Court had no jurisdiction to make CFOs at the outset of a proceeding. The plurality of the High Court concluded that the relevant provisions, 33ZF(1) of the FCA and s 183 of the CPA, did not empower a court to make a CFO. Section 33ZF(1) provided:[38]

> In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

[156] The plurality considered that, while the power conferred by the section was wide, it empowered the Court to make orders as to how an action should proceed to do justice. It was not concerned with the different question as to whether an action

---

36 *Southern Response Earthquake Services Ltd v Ross*, above n 6, (footnote omitted).
37 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, 245 FCR 191.
38 *BMW Australia Ltd v Brewster*, above n 31, at [9]. Section 183 of the CPA being in all but identical terms.

should proceed at all. The making of a CFO at the outset of a representative proceeding in order to assure a potential funder of a sufficient level of return upon its investment to secure its support for the proceeding, was beyond the purpose of the legislation.

[157] In coming to that conclusion the High Court noted that there were other provisions in Pt IVA of the FCA and Pt 10 of the CPA which expressly provided for the making of orders to facilitate the distribution of proceeds of a representative proceeding. The High Court concluded that the time for making such orders was at the conclusion of the proceeding.

[158] The High Court considered that it was reasonably to be expected that, if the legislation intended to enlist the Court in attempting to assess the value of the support and appropriate cost sharing orders to be made at the outset, it would have made a specific provision in that regard. That it had not done so was a contextual indication the power to make such an order was not to be discerned in "gap filling" provisions such as s 33ZF or s 183.[39]

[159] Following *Brewster*, the Australian Courts have expressed diverging views as to whether the decision precluded CFOs altogether, or whether they were still available at a later, (settlement or judgment) stage. But in 2020, the New South Wales Court of Appeal and the Federal Court of Australia each in separate decisions held that the effect of the *Brewster* decision was confined to early stage CFOs.[40]

[160] In New Zealand there are no such detailed provisions directed at representative proceedings. Rule 4.24 is general in its terms. The specific constraints noted by the High Court of Australia based in the express legislative provisions do not apply in New Zealand. Equally however, the wording of r 4.24 does not, on its face, extend to the making of a CFO. The jurisdiction for making a CFO must be found elsewhere.

[161] In support of his submission there was no jurisdiction to make a CFO, Mr Hunter also referred to the cautionary comments of the Supreme Court in *Waterhouse*

---

39 At [68]–[69].

40 *Brewster v BMW Australia Ltd* [2020] NSWCA 272; and *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183, (2020) 281 FCR 501.

v Contractors Bonding Ltd[41] and the following passage from the Court of Appeal's decision in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*:[42]

> It is not the role of the Court to "approve" litigation funding arrangements. The grant of leave to bring representative proceedings is not, and should not be seen to be, an endorsement of the funding arrangements.
>
> …
>
> This conclusion reflects the discussion in *Waterhouse* that it is not the general role of the courts to regulate litigation funders, and that there are institutional difficulties in the courts taking up such a role.

[162] He also submitted that other overseas authorities suggested that legislative authority was required to support such orders.

[163] Ms Cooper also submitted the Court did not have jurisdiction to make a CFO. In the absence of any precedent, a CFO was neither necessary for, nor directed to, the purposes of controlling the Court's processes.

[164] While the Supreme Court in *Southern Response Earthquake Services Ltd v Ross*[43] made no comment on whether a CFO order was available in New Zealand it appears from the earlier decision of the Court of Appeal in the same case that the Court of Appeal considered a CFO was available. The general tenor of the Court of Appeal's decision was that it was for this Court to case manage and make whatever orders might be necessary to enable the proceedings to be advanced, which could include the making of a CFO or other funding order. At [105] and [106] Goddard J noted:[44]

> [105] We consider that the courts are able to exercise an appropriate supervisory jurisdiction in relation to representative proceedings brought on an opt out basis under r 4.24 and their inherent powers to control matters of practice and procedure, as they can in relation to proceedings brought on an opt in basis or on a universal basis. … But as the Supreme Court of Canada said in *Western Canadian Shopping Centres Inc v Dutton*, if such legislation has not been enacted the courts must determine the availability of the class action and the mechanics of class action practice.

---

41 *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91.

42 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 13, at [76]–[77]. *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

43 *Southern Response Earthquake Services Ltd v Ross*, above n 6.

44 *Ross v Southern Response Earthquake Services*, above n 5, (footnotes omitted).

> [106] The courts will need to grapple with a range of procedural issues that arise in relation to opt out claims, addressing these on a case by case basis. These issues should be approached in a liberal and flexible manner, seeking to achieve a balance between efficiency and fairness. We do not consider that any additional scrutiny that may be required in the opt out context is beyond the capacity of the court, or so significant that it weighs against the adoption of an opt out approach.

The Court also went on to consider, albeit in a footnote, at what stage it might be appropriate for a CFO to be made.[45]

[165] Despite the defendants' submissions to the contrary, I consider the Court has jurisdiction to make CFOs in the context of representative proceedings such as these. Section 12 of the Senior Courts Act 2016 confirms the Court retains its inherent jurisdiction which incudes the ability to control its own processes. It also includes such powers as may be necessary to enable it to act effectively and administer justice.[46] An example of the exercise of such power is *Busby v Thorn EMI Video Programmes Ltd* in which case the Court of Appeal relied in part on the Court's inherent jurisdiction to make Anton Pillar orders although there was no express provision for such orders in the rules at the time.[47]

[166] Further, at some stage in every representative proceedings, it will be necessary for the Court to address the issue of how any fund recovered in the class action is to be distributed. That will inevitably require the Court to consider the position of, and appropriate return to, the litigation funder. As the Supreme Court noted in *Southern Response Earthquake Services Ltd v Ross* it is common for this Court to make orders approving settlements and distribution proposals. The Court has an adjudicative power in its protective or supervisory jurisdiction, and there is a need for the Court to exercise that jurisdiction in that context.[48] Ellen France J went on to say:[49]

> Accordingly, we consider the court has power to approve settlements in cases such as the present and to address the various issues Southern Response raises under this head. It is also clear that the representative plaintiff can settle on behalf of the class.

---

45 I note the Court of Appeal decision in *Ross v Southern Response* was issued before the HCA judgment in *BMW v Brewster*.

46 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

47 *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

48 *Southern Response Earthquake Services Ltd v Ross*, above n 6, at [79]–[81].

49 (footnote omitted).

[167] And later, when considering how to deal with issues that may arise in the context of the proceeding:[50]

> Finally, r 1.6 addresses the situation where the High Court Rules do not make provision for a case. In those situations, r 1.6(2) provides that the court is to proceed in a manner that the court considers is "best calculated to promote the objective" of the Rules; namely, to secure the just, speedy and inexpensive determination of any proceeding. The court in exercising its supervisory powers can also draw r 1.6(2) in aid.

[168] For the above reasons I consider there is jurisdiction for this Court to make a CFO in a representative proceeding. In the absence of detailed statutory provisions or rules, the constraints identified by the High Court of Australia do not apply. The Court's inherent jurisdiction and rr 1.2 and 1.6 provide sufficient jurisdiction for this Court to make a CFO in the course of a representative proceeding. The issue is whether the Court should make a CFO at this time.

[169] In the *Brewster* case, Gageler J wrote a strong dissenting judgment in support of making a CFO at the outset of the proceeding.[51] He considered that, provided the interests of group members were adequately represented at the time of its making, there was no reason in principle why the Court should not think that making a CFO early in the proceeding would advance the interests of justice by placing the funding available to the representative party on a secure footing, by reducing uncertainty on the part of all concerned about how the Court might exercise statutory discretions to distribute the cost of funding the proceeding at the conclusion of the proceeding, and by allowing group members to make more informed decisions about their potential returns at the time of choosing whether or not to opt out of the proceeding.

[170] Mr Salmon submitted that CFOs made at an early stage of the proceeding advanced the objectives of r 4.24, particularly access to justice by encouraging funded opt out proceedings. CFOs allow the Court to protect the interests of absent class members by reviewing and setting the FCR for the funder. Absent a workable solution to the free rider problem, funders will be disincentivised to invest in opt out cases and will either book build or decline to fund at all. He referred to Mr Woodhams' evidence that if the CFOs are not made at the outset:

---

50 At [88].
51 *BMW Australia Ltd v Brewster*, above n 31.

> The funder is left largely in the dark as to what return it might be able to make if the claim proceeds. The full extent of the funder's entitlements will effectively be left to be determined in hindsight, once the parties know where the cards have fallen. That is clearly undesirable given funders are required to decide whether to commit to potentially long term funding arrangements based only on assessments made at the outset when the outcome is unknown. Such uncertainty can be expected to reduce the number of cases best brought on an opt out basis that attract funding and increase the costs of funding in such cases.

[171] Mr Newland went further. He said:

> Opt out orders without associated Common Fund Orders would not be commercially acceptable to LPF.

[172] In response to the suggestion it may be difficult for the Court to assess a fair FCR at the outset of the proceeding when the costs and value of the claim are uncertain, Mr Salmon argued that Australian Courts had, prior to *Brewster*, accepted that was possible. Further, there could be a provision for review. Mr Salmon supported his submission by reference to the evidence of Mr Colegrave about the risks of hindsight bias. Hindsight bias can cause people to perceive events as being more predictable once they have occurred. A retrospective assessment risks understating the returns required to compensate the funder for those risks.

[173] Mr Salmon submitted the CFO services fee in this case was fair and reasonable by reference to comparative Australian authority. He noted, by reference to Mr Newland's evidence, that without the CFOs there was no guarantee the litigation funder would continue with the proceedings. For those reasons Mr Salmon submitted the CFOs should be made in this case and at this time.

[174] The defendants objected to Mr Colegrave's evidence about hindsight bias. I consider the objection well founded. Mr Colegrave is not a psychologist. He is an economist. More relevantly the opinion evidence proffered by him regarding hindsight bias is not admissible as it is not "substantially" helpful to the Court in understanding other evidence.[52] The Court is well aware of the concept of hindsight bias. The Court is often called on to consider risk and the reasonableness of actions after the event. In *Brewster* both Gageler and Edelman JJ acknowledged and referred

---

[52] Evidence Act 2006, s 25.

to the concept of hindsight bias.[53] It was unnecessary for them to refer to evidence about the concept.

[175] The Court notes Mr Newlands' evidence regarding LPF's position if a CFO is not made at this stage. On one reading of it that could be taken as an attempt to influence the Court in its decision by suggesting that if the orders were not made, LPF would not support the proceeding. It would be inappropriate to seek to influence the Court in that way and the Court would not respond to it. However, in context I do not read it that way. Mr Newland does go on to note LPFs concern is that, without a CFO, class members who had not accepted the terms of the funding arrangements could not be obliged to contribute to LPF's costs and remuneration. But that exercise, including the requirement to contribute to the funder's costs and remuneration, can be conducted at a later stage in the proceeding.

[176] Further, as Mr Hunter submitted, on the evidence LPF and its subsidiaries have previously funded over 25 litigation projects, all without CFOs. Presumably LPF considered it commercially viable to support those claims.

[177] Next, the Court is, as noted, aware of the dangers of hindsight bias in carrying out the exercise later. Nevertheless, as the majority in the High Court noted, the Court will be better informed at the conclusion of the proceedings, and will then be able to make appropriate orders (taking account of the dangers of hindsight bias). By the conclusion of the proceeding the value of the litigation and the extent of the burden undertaken by the funder will be certain. Also, the Court will be aware of the number of parties, the costs, the length of time the proceeding has been on foot, and the ultimate return.

[178] In his dissenting judgment Edelman J noted that one advantage of making a CFO at the outset is that the Court is apprised of all relevant facts other than the success of the proceeding.[54] I am not satisfied that the Court is in that position at the present stage of these proceedings.

---

53 *BMW Australia Ltd v Brewster*, above n 31.
54 *BMW Australia Ltd v Brewster*, above n 31, at [221].

[179] I agree with the arguments for the defendants that, at this stage of the proceeding, the uncertainty as to a number of relevant factors mean it is premature to make the CFOs at this stage.

[180] Further, in any event, as Mr Salmon conceded during the course of submission, any CFO fixing the return for the litigation funder at this stage could be made subject to review. If that is so then the certainty which the funder seeks would not exist in any event.

[181] I note that in the footnote to its decision in *Ross v Southern Response Earthquake Services Ltd* the Court of Appeal observed that there is much to be said for leaving the question of whether a CFO should be made until after stage 1 has been determined.[55] That suggests the issue of the CFO could be addressed at that stage, rather than waiting until the conclusion of the proceedings. I accept that the Court will be better informed after the conclusion of the stage 1 process. If the proceedings fail at stage 1 then it will be unnecessary to consider the possibility of a CFO. If the proceeding succeeds at stage 1 then the issue of contributing to costs as a pre-condition to obtaining relief will squarely arise and could be considered on a more informed basis. Further, it is likely that at that stage of the proceeding some form of opt in or class closure will be required. I leave open the issue of whether a CFO might be made at some point after stage 1, but before the conclusion of the proceedings.

[182] While I note the concerns noted by Mr Woodhams in his evidence if CFOs are not made now, I do not consider them to be conclusive or determinative. CFOs at the outset are not a necessary concomitant of opt out representative proceedings. Prior to the *Money Max*[56] decision in 2016, which sanctioned the use of CFOs, a substantial number of class actions were brought and maintained in Australia, including on an opt out basis, without CFOs being made at the commencement.

Result

[183] In the case of the second plaintiffs' applications:

---

55 *Ross v Southern Response Earthquake Services Ltd*, above n 5.
56 *Money Max Int Pty Ltd v QBE Insurance Group Ltd*, above n 37.

1. Leave is granted to the second plaintiffs (the ANZ representative plaintiffs) to bring the proceeding against ANZ as a representative action on behalf of all persons who have the same interest in the subject matter of the proceeding on the basis that:

    (i) they had one or more home or personal loans with ANZ between 6 June 2015 and 28 May 2016 (the refined ANZ relevant period) which were or are consumer credit contracts under the CCCFA (ANZ Loan);

    (ii) they requested and ANZ made one or more agreed changes to the terms of one or more of their ANZ loans during the refined ANZ relevant period in relation to which ANZ was required to provide them with variation disclosure under s 22 (agreed changes); and

    (iii) ANZ sent them at least one loan variation letter intended to disclose the full particulars of the agreed changes which, as a result of loan calculator error contained incorrect information in respect of one or more of the following:

        a. the total amount payable under the loan;

        b. the total amount of interest payable under the loan;

        c. the amount of new regular payment;

        d. the total number of payments to be made;

        e. the date of final payment

        (the ANZ class members).

2. Any ANZ class member may opt out of the ANZ representative plaintiffs' action by completing an opt out election form approved by the High Court for that purpose, [details].

3. Any ANZ class member may proactively opt in to the ANZ representative plaintiffs' representative action by completing the online registration process at www.bankingclassaction.com [details].

4. Any ANZ class member who neither opts out of or in to the ANZ representative plaintiffs' representative action shall remain an ANZ class member represented by the ANZ representative plaintiffs in the representative action.

5. The ANZ representative plaintiffs will notify ANZ and the Court periodically of details of opt ins.

6. The ANZ representative plaintiffs may only settle or discontinue this proceeding with leave of the Court.

7. This order is to take effect from the date on which the proceeding was commenced.

8. Leave is reserved to all parties to apply for further directions that may be necessary or appropriate in relation to the representative orders.

9. The application for a CFO at this stage of the proceeding is dismissed but with leave reserved to renew the application for a CFO after the completion of the stage 1 hearing.

[184] In the case of the first and third to fifth plaintiffs' application:

1. The first and third to fifth plaintiffs (the ASB representative plaintiffs) are granted leave to bring this proceeding against ASB as a representative action on behalf of all persons who have the same interest in the subject matter of the proceeding on the basis that:

(i) they had one or more home or personal loans with ASB between 6 June 2015 and 18 June 2019 (ASB relevant period) which were or are consumer credit contracts to which the CCCFA applied or applies (ASB Loan);

(ii) they requested and ASB made one or more agreed changes to one or more of their ASB Loans during the ASB relevant period (agreed changes); and

(iii) ASB did not provide them with disclosure under s 22 of the CCCFA in relation to the agreed changes within the prescribed timeframes (the ASB class members).

2. Any ASB class member may opt out of the ASB representative plaintiffs' representative action by completing an opt out election form approved by the High Court for that purpose [details].

3. Any ASB class member may proactively opt in to the ASB representative plaintiffs' representative action by completing the online registration process at www.bankingclassaction.com [details].

4. Any ASB class member who neither opts out of or in to the ASB representative plaintiffs' representative action shall remain an ASB class member represented by the ASB representative plaintiffs in the representative action.

5. The ASB representative plaintiffs will notify ASB and the Court periodically of details of opt ins.

6. The ASB representative plaintiffs may only settle or discontinue this proceeding with leave of the Court.

7. This order is to take effect from the date on which the proceeding was commenced.

8. Leave is reserved to all parties to apply for further directions that may be necessary or appropriate in relation to the representative orders.

9. The application for a CFO at this stage of the proceeding is dismissed but with leave reserved to renew the application for a CFO after the completion of the stage 1 hearing.

[185] In both sets of representative orders, further details are required to complete orders 2 and 3. I expect counsel to be able to agree those details. The parties are to confer and by **26 August 2022** are to file a joint memorandum providing for the necessary details to complete orders 2 and 3. If the parties cannot agree they are each to file and serve separate memoranda setting out their proposals to complete orders 2 and 3 by that date.

Review

[186] The Court will convene a teleconference with counsel at **9.00 am, 1 September 2022** to review the position and make directions to advance the proceeding.

Costs

[187] The plaintiffs have succeeded in obtaining representative opt out orders largely in the terms sought. I also agree with their submission the Court has jurisdiction to make CFOs. However, the plaintiffs have not succeeded in having CFOs made at this stage. Overall I assess the plaintiffs' success to be approximately 70 per cent. Costs should follow the event on that basis. Costs should be calculated on a category 3 basis. Time band B would seem appropriate for the steps taken to date. I certify for second counsel.

[188] I expect counsel to be able to agree costs given the above indication, but in the event they are unable to do so memoranda may be exchanged.

_____

Venning J