In the High Court of New Zealand **CIV-2021-404-1190**
Auckland Registry
I Te Kōti Matua o Aotearoa
Tāmaki Makaurau Rohe
Commercial Panel

Under the Credit Contracts and Consumer Finance Act 2003 and High Court Rule 4.24

Between

Anthony Paul Simons

First Plaintiff

And others

and

ANZ Bank New Zealand Limited

First Defendant

And another

(Abbreviated list of parties)

Statement of Defence for the First Defendant

1 April 2022

BELL GULLY
BARRISTERS AND SOLICITORS

S V A EAST / J H STEVENS
SOLICITOR FOR THE FIRST DEFENDANT
LEVEL 22, VERO CENTRE, 48 SHORTLAND STREET
PO BOX 4199, AUCKLAND 1140, DX CP20509, NEW ZEALAND
TEL 64 9 916 8800 EMAIL SOPHIE.EAST@BELLGULLY.COM / JENNY.STEVENS@BELLGULLY.COM

STEPHEN HUNTER QC, SHORTLAND CHAMBERS
COUNSEL FOR THE FIRST DEFENDANT
LEVEL 13, 70 SHORTLAND STREET, AUCKLAND
EMAIL SMHUNTER@SHORTLANDCHAMBERS.CO.NZ

Full list of parties

Between

Anthony Paul Simons

First Plaintiff

and

Andrew John Beavan and Mei Lim

Second Plaintiffs

and

Philip Charles Dunbar and Sheryn Valeri Dunbar

Third Plaintiffs

and

Bruno Robert Bickerdike and Emma Renae Punter

Fourth Plaintiffs

and

Glenn Jonathan Marvin and Anna Mary Cuthbert

Fifth Plaintiffs

and

ANZ Bank New Zealand Limited

First Defendant

and

ASB Bank Limited

Second Defendant

In response to the plaintiffs' amended statement of claim dated 28 January 2022, the first defendant (**ANZ**) by its solicitor says:

1. Parties

Plaintiffs

1.1 It denies paragraph 1.1 and says further that the first plaintiff is Anthony Paul Simons.

1.2 It admits paragraph 1.2.

1.3 It admits paragraph 1.3.

1.4 It admits paragraph 1.4.

1.5 It admits paragraph 1.5.

1.6 In response to paragraph 1.6, it:

(a) admits that the second plaintiffs drew-down a loan of $250,000 on 14 August 2015;

(b) says that that loan was fully repaid and closed on 3 September 2019;

(c) says further that the second plaintiffs had other accounts and borrowing with ANZ; but

(d) otherwise denies paragraph 1.6.

1.7 In response to paragraph 1.7, it:

(a) admits that the second plaintiffs purport to sue ANZ as representatives of a class of persons with the same interests in issues in this proceeding;

(b) denies that the persons whom the second plaintiffs purport to represent have the same interests in issues in this proceeding; and

(c) otherwise denies paragraph 1.7.

1.8 It apprehends that it is not required to plead to paragraph 1.8.

1.9 It apprehends that it is not required to plead to paragraph 1.9.

Defendants

1.10 It admits paragraph 1.10, assuming that the reference to the "Reserve of New Zealand Bank Act 1989" is intended to be a reference to the Reserve Bank of New Zealand Act 1989.

1.11 It apprehends that it is not required to plead to paragraph 1.11.

2. Background in relation to the claim against ANZ

ANZ's (alleged) conduct

2.1 It admits paragraph 2.1.

2.2 It admits paragraph 2.2.

2.3 It admits paragraph 2.3 but says further that determining whether any particular loan is a consumer credit contract requires a factual inquiry into the matters set out in sections 11, 12 and 15 of the Credit Contracts and Consumer Finance Act 2003 (the **CCCFA**), including (in particular) an inquiry in each case as to whether:

(a) in the case of contracts entered into before 6 June 2015, the debtor entered into the contract primarily for personal, domestic, or household purposes;

(b) in the case of contracts entered into on or after 6 June 2015, the credit was used, or was intended to be used, wholly or predominantly for personal, domestic or household purposes; and

(c) in all cases, whether the debtor is a trustee acting in his or her capacity as a trustee of a family trust (in which case the contract

is not a consumer credit contract by virtue of section 15(1)(c) of the CCCFA).

2.4 It admits paragraph 2.4.

2.5 It admits paragraph 2.5.

2.6 It admits paragraph 2.6 and says further that in some cases the agreed changes increased borrowers' obligations and in other cases decreased those obligations.

2.7 It admits paragraph 2.7.

2.8 It admits paragraph 2.8.

2.9 It admits paragraph 2.9 but says further that, prior to 6 June 2015, section 22 set out certain circumstances in which disclosure was not required to be provided, being where a change:

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

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

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

(d) changed the place where payments were to be made.

2.10 In response to paragraph 2.10, it:

(a) admits that it purported to provide, and says further that it in fact did provide, certain borrowers who changed the terms of their loans with the variation disclosure required under the CCCFA by sending or giving them Loan Variation Letters;

(b) says further that in some cases borrowers may have received the variation disclosure required under the CCCFA in other forms, such as through statements; and

(c) otherwise denies paragraph 2.10.

2.11 It admits paragraph 2.11 and refers further to paragraph 2.12 below.

2.12 In response to paragraph 2.12, it:

(a) admits that some loan variation letters provided to borrowers between 30 May 2015 and 28 May 2016 (the **ANZ Relevant Period**) were generated by an ANZ computer system called Frontline Tools;

(b) says that not all loan variation letters or other forms of variation disclosure provided to borrowers during the ANZ Relevant Period were generated using Frontline Tools; rather, some borrowers received variation disclosure containing information generated by Systematics, ANZ's core lending system, or other ANZ systems;

(c) says further that there was no issue with loan variation letters or other forms of variation disclosure containing information generated by Systematics or other ANZ systems; and

(d) otherwise denies paragraph 2.12.

2.13 In response to paragraph 2.13, it:

(a) admits that Frontline Tools contained a calculator which (from 30 May 2015) automatically calculated some of the information to be included in the loan variation letters that it produced;

(b) repeats paragraphs 2.12(b) and (c) above; and

(c) otherwise denies paragraph 2.13.

2.14 In response to paragraph 2.14, it:

(a) admits that during the period from 30 May 2015 to 28 May 2016, due to a coding error, Frontline Tools did not, in calculating information to be included in the loan variation letters that it generated, take into account any interest that had accrued on the relevant ANZ Loan but had not yet been charged;

(b) repeats paragraphs 2.12(b) and (c) above; and

(c) otherwise denies paragraph 2.14.

2.15 It admits paragraph 2.15 but says further that:

(a) the relevant agreed change was correctly disclosed in the loan variation letters;

(b) in some instances, it was the amount of the new final payment (rather than the new regular payment) which was incorrect;

(c) customers were, in fact, charged the new regular payment set out in the letter;

(d) it was not required to provide information referred to in paragraph 2.15 of the statement of claim in order to disclose the "full particulars of the change" under section 22 of the CCCFA;

(e) it repeats paragraph 2.12 above; and

(f) following the settlement with the Commerce Commission, affected borrowers have, in effect, not paid the accrued interest that was omitted from the calculations in their loan variation letters and have paid less than they owed under their loan agreements.

2.16 It admits that borrowers whose agreed changes took effect on the same day that the accrued interest was charged to their loans were not affected by the Frontline Tools coding error but otherwise denies paragraph 2.16 and says further that:

(a) it repeats paragraph 2.12 above; and

(b) borrowers whose disclosure was produced other than by Frontline Tools were not affected by the coding error and did not receive incorrect information as a result.

2.17 It apprehends that it is not required to plead to paragraph 2.17.

The Coding Error is identified

2.18 In response to paragraph 2.18, it:

(a) says that it discovered that there was an issue in Frontline Tools in March 2016 following a small number of customer enquiries and began work on an urgent fix on 1 April 2016;

(b) resolved the issue on 28 May 2016 when it addressed the coding error; and

(c) otherwise denies paragraph 2.18.

2.19 It admits paragraph 2.19, repeats paragraphs 2.18(a) and (b) above, and says that it did promptly take steps to fix the coding error.

2.20 In response to paragraph 2.20, it:

(a) admits that the New Zealand Bankers' Association wrote a letter dated 17 May 2016 to the Ministry of Business, Innovation and Employment expressing its and its members' concerns regarding a possible interpretation of section 99(1A) but refers to the letter for its terms;

(b) denies that the intention and effect of section 99(1A) is as pleaded in paragraph 2.20 of the statement of claim; and

(c) otherwise denies paragraph 2.20.

Commerce Commission investigation and settlement

2.21 It admits paragraph 2.21.

2.22 It admits paragraph 2.22.

2.23 It admits paragraph 2.23.

2.24 In response to paragraph 2.24, it:

(a) admits that it made payments to borrowers totalling $5,591,000; but

(b) clarifies that not all payments were made to affected borrowers' loans by way of an adjustment to the loan balance – in particular, for Affected ANZ Borrowers with closed loans, payments were made to borrowers' bank accounts; and

(c) otherwise denies paragraph 2.24.

2.25 It admits paragraph 2.25.

2.26 It admits paragraph 2.26 but relies on the complete terms of the Settlement Agreement as if pleaded here in full.

2.27 It admits paragraph 2.27 but relies on the complete terms of clause 4.4 of the Settlement Agreement as if pleaded here in full.

2.28 In response to paragraph 2.28, it:

(a) admits that the Commerce Commission filed a statement of claim in the High Court on 2 March 2020 (commencing proceeding CIV 2020-404-378) alleging that ANZ breached section 9C(2)(a)(iii) of the CCCFA;

(b) denies that the Commerce Commission's statement of claim contained "factual allegations materially identical to those set out in paragraphs 2.1 to 2.18" of the plaintiffs' statement of claim in this proceeding; and

(c) otherwise denies paragraph 2.28.

2.29 In response to paragraph 2.29, it:

(a) admits that on 6 March 2020 it filed a statement of defence to the Commerce Commission's statement of claim and admitted that it had breached section 9C(2)(a)(iii) of the CCCFA;

(b) denies that the factual allegations to which it admitted were "materially identical" to those set out in paragraphs 2.1 to 2.18 of the plaintiffs' statement of claim in this proceeding;

(c) relies on the complete terms of its statement of defence to the Commerce Commission's statement of claim as if pleaded here in full; and

(d) otherwise denies paragraph 2.29.

2.30 It admits paragraph 2.30.

2.31 It admits paragraph 2.31 save that it apprehends that the reference to "5 June 2015" is intended to be a reference to "6 June 2015" in accordance with the terms of the order made by Woolford J.

2.32 It admits paragraph 2.32 but says further that:

(a) not all customers would have received a credit to their account (as there were cases in which this was not possible);

(b) some customers were contacted to say that they were due a credit, and were asked to provide ANZ with details of an account to which the credit should be paid; and

(c) other customers (estates) were contacted to say that they were due a credit, and were asked for information as to who should receive the payment and for details of the account to which the credit should be paid.

2.33 It admits that it made payments to certain borrowers in accordance with the ANZ Settlement Agreement but otherwise denies paragraph 2.33

and says further that the first tranche of payments was made and letters sent on 29 April 2020.

2.34 It denies paragraph 2.34 and says further that:

(a) The loan variation letters sent to Affected ANZ Borrowers did comply with section 22 of the CCCFA (notwithstanding the inclusion of any incorrect information), as:

(i) section 22 requires disclosure of "full particulars of the change" as well as "any other information prescribed by regulations to be information that must be disclosed under [that] section";

(ii) at the relevant time, there were no regulations specifying information that was required to be disclosed under section 22 beyond the "full particulars of the change";

(iii) in each case, the borrower was provided with full particulars of the change that they had requested, and those particulars were correct;

(iv) ANZ was not required by section 22 to include the additional information that was (in at least some instances) incorrect; and

(v) in any event, the errors were of a minor nature such that they could not mean that ANZ has failed to provide disclosure under section 22.

(b) In some instances (set out in paragraph 2.9 above), no disclosure was required to be provided under section 22 in relation to a particular change.

(c) Provision of the historical information was not required for ANZ to comply with section 22 of the CCCFA. However, even if historical information was required to be provided, it was so provided in the "Loan Problem Letters" (referred to elsewhere in the plaintiffs' statement of claim as the "Calculator Problem Letters") either on

their own terms, or in combination with the original loan variation letters, noting that under section 32(2)(a) of the CCCFA disclosure may be given in "a series of related documents".

(d) Irrespective of the Calculator Problem Letters, many Affected ANZ Borrowers will have had other changes to their loans for which they received a subsequent loan variation letter containing correct information about the loan from that point onward (generated either by a different system, or by Frontline Tools after resolution of the issue with the loan calculator) fulfilling all requirements of the CCCFA.

The second plaintiffs are Affected ANZ Borrowers

2.35 It admits paragraph 2.35 but clarifies that the second plaintiffs' loan number 0323-0088267241-1002 was:

(a) pursuant to a loan agreement signed on 7 August 2015; and

(b) drawn down on 14 August 2015.

2.36 It admits paragraph 2.36 and says further that the previously applying interest rate was 5.34% p.a.

2.37 It admits paragraph 2.37.

2.38 It admits paragraph 2.38 and says that it did provide the second plaintiffs with variation disclosure (that is, "full particulars of the change" in accordance with the requirements of section 22) by way of the loan variation letter dated 23 November 2015.

2.39 It denies paragraph 2.39 and says further that:

(a) while the loan variation letter contained incorrect information in some respects, the full particulars of the change given in the letter were correct (namely, the new interest rate that would apply to the loan until 23 November 2018) and it did, therefore, comply with section 22 of the CCCFA;

(b) the second plaintiffs were in fact charged the new regular repayment amount set out in the loan variation letter; and

(c) the total interest and total amount left to pay were both clearly noted in the loan variation letter to be "indicative" only.

2.40 It admits paragraph 2.40.

2.41 It admits paragraph 2.41 but relies on the complete terms of the letter sent to the second plaintiffs as if pleaded here in full.

2.42 It admits paragraph 2.42.

2.43 It admits paragraph 2.43 but relies on the complete terms of the letter sent to the second plaintiffs as if pleaded here in full.

2.44 It denies paragraph 2.44 and says further that:

(a) The loan variation letter dated 23 November 2015 did comply with section 22 of the CCCFA (notwithstanding the inclusion of any incorrect information), as:

(i) section 22 requires disclosure of "full particulars of the change" as well as "any other information prescribed by regulations to be information that must be disclosed under [that] section";

(ii) at the relevant time, there were no regulations specifying information that was required to be disclosed under section 22 beyond the "full particulars of the change";

(iii) the second plaintiffs were provided with full particulars of the change that they had requested (a fixed interest rate of 4.49% p.a. for three years), and those particulars were correct;

(iv) ANZ was not required by section 22 to include the additional information that was incorrect; and

(v) in any event, the errors were of a minor nature such that they could not mean that ANZ has failed to provide disclosure under section 22.

(b) On 22 November 2018, the second plaintiffs received a further loan variation letter containing correct information about the loan from that point onward, fulfilling all requirements of the CCCFA.

(c) Provision of the historical information was not required for ANZ to comply with section 22 of the CCCFA. However, even if historical information was required to be provided, it was so provided in the Calculator Problem Letter received by the second plaintiffs in February 2019 either on its own terms, or in combination with the original loan variation letter, noting that under section 32(2)(a) of the CCCFA disclosure may be given in "a series of related documents".

2.45 It admits paragraph 2.45.

ANZ denies that the Affected ANZ Borrowers form a class of persons having the same interest in this proceeding

2.46 It denies paragraph 2.46 and refers to its notice of opposition to the plaintiffs' application for leave to bring proceedings as representative actions and for ancillary orders and summary judgment.

2.47 In response to paragraph 2.47, it:

(a) admits that the Settlement Agreement with the Commerce Commission defines "Affected Customers" for that purpose as "the approximately 101,535 customers who had or have a consumer credit contract with ANZ, and between the relevant dates received from ANZ a Loan Variation Letter containing Incorrect Information";

(b) admits that in public statements made in March 2020, it said that around 86,000 customers would receive further payments as a result of the ANZ Settlement Agreement, noting that Schedules Three and Four of the Settlement Agreement set out

circumstances in which it was not required to make payments to or to write to certain customers;

(c) says further that in considering whether customers were eligible for payment in accordance with the terms of the Settlement Agreement, it did not seek to verify whether individual loans came within the definition of "consumer credit contract" in section 11 of the CCCFA, but rather relied on the loan type and certain information provided when the loan was entered into, without verifying that information on an individual basis; and

(d) otherwise denies paragraph 2.47.

3. Background in relation to claim against ASB

ASB's (alleged) conduct

3.1 It apprehends that it is not required to plead to paragraph 3.1.

3.2 It apprehends that it is not required to plead to paragraph 3.2.

3.3 It apprehends that it is not required to plead to paragraph 3.3.

3.4 It apprehends that it is not required to plead to paragraph 3.4.

3.5 It apprehends that it is not required to plead to paragraph 3.5.

3.6 It apprehends that it is not required to plead to paragraph 3.6.

3.7 It apprehends that it is not required to plead to paragraph 3.7.

3.8 It apprehends that it is not required to plead to paragraph 3.8.

3.9 It apprehends that it is not required to plead to paragraph 3.9.

3.10 It apprehends that it is not required to plead to paragraph 3.10.

3.11 It apprehends that it is not required to plead to paragraph 3.11.

3.12 It apprehends that it is not required to plead to paragraph 3.12.

3.13 It apprehends that it is not required to plead to paragraph 3.13.

3.14 It apprehends that it is not required to plead to paragraph 3.14.

Commission investigation and settlement

3.15 It apprehends that it is not required to plead to paragraph 3.15.

3.16 It apprehends that it is not required to plead to paragraph 3.16.

3.17 It apprehends that it is not required to plead to paragraph 3.17.

3.18 It apprehends that it is not required to plead to paragraph 3.18.

3.19 It apprehends that it is not required to plead to paragraph 3.19.

3.20 It apprehends that it is not required to plead to paragraph 3.20.

3.21 It apprehends that it is not required to plead to paragraph 3.21.

3.22 It apprehends that it is not required to plead to paragraph 3.22.

3.23 It apprehends that it is not required to plead to paragraph 3.23.

3.24 It apprehends that it is not required to plead to paragraph 3.24.

3.25 It apprehends that it is not required to plead to paragraph 3.25.

3.26 It apprehends that it is not required to plead to paragraph 3.26.

3.27 It apprehends that it is not required to plead to paragraph 3.27.

The ASB plaintiffs are Affected ASB Borrowers

First plaintiff

3.28 It apprehends that it is not required to plead to paragraph 3.28.

3.29 It apprehends that it is not required to plead to paragraph 3.29.

3.30 It apprehends that it is not required to plead to paragraph 3.30.

3.31 It apprehends that it is not required to plead to paragraph 3.31.

3.32 It apprehends that it is not required to plead to paragraph 3.32.

3.33 It apprehends that it is not required to plead to paragraph 3.33.

3.34 It apprehends that it is not required to plead to paragraph 3.34.

3.35 It apprehends that it is not required to plead to paragraph 3.35.

3.36 It apprehends that it is not required to plead to paragraph 3.36.

Third plaintiffs

3.37 It apprehends that it is not required to plead to paragraph 3.37.

3.38 It apprehends that it is not required to plead to paragraph 3.38.

3.39 It apprehends that it is not required to plead to paragraph 3.39.

3.40 It apprehends that it is not required to plead to paragraph 3.40.

3.41 It apprehends that it is not required to plead to paragraph 3.41.

3.42 It apprehends that it is not required to plead to paragraph 3.42.

3.43 It apprehends that it is not required to plead to paragraph 3.43.

3.44 It apprehends that it is not required to plead to paragraph 3.44.

3.45 It apprehends that it is not required to plead to paragraph 3.45.

Fourth plaintiffs

3.46 It apprehends that it is not required to plead to paragraph 3.46.

3.47 It apprehends that it is not required to plead to paragraph 3.47.

3.48 It apprehends that it is not required to plead to paragraph 3.48.

3.49 It apprehends that it is not required to plead to paragraph 3.49.

3.50 It apprehends that it is not required to plead to paragraph 3.50.

3.51 It apprehends that it is not required to plead to paragraph 3.51.

3.52 It apprehends that it is not required to plead to paragraph 3.52.

3.53 It apprehends that it is not required to plead to paragraph 3.53.

3.54 It apprehends that it is not required to plead to paragraph 3.54.

Fifth plaintiffs

3.55 It apprehends that it is not required to plead to paragraph 3.55.

3.56 It apprehends that it is not required to plead to paragraph 3.56.

3.57 It apprehends that it is not required to plead to paragraph 3.57.

3.58 It apprehends that it is not required to plead to paragraph 3.58.

3.59 It apprehends that it is not required to plead to paragraph 3.59.

3.60 It apprehends that it is not required to plead to paragraph 3.60.

3.61 It apprehends that it is not required to plead to paragraph 3.61.

3.62 It apprehends that it is not required to plead to paragraph 3.62.

3.63 It apprehends that it is not required to plead to paragraph 3.63.

The plaintiffs allege that the Affected ASB Borrowers form a class of persons having the same interest in this proceeding

3.64 It apprehends that it is not required to plead to paragraph 3.64.

3.65 It apprehends that it is not required to plead to paragraph 3.65.

4. First cause of action – by ANZ plaintiffs against ANZ – alleged breach of section 22 of the CCCFA

4.1 In response to paragraph 4.1, it:

(a) admits that it was required to provide variation disclosure in relation to agreed changes in accordance with the requirements of section 22 of the CCCFA;

(b) refers to paragraph 2.9 above; and

(c) otherwise denies paragraph 4.1.

4.2 It admits paragraph 4.2, says further that it did provide the second plaintiffs and the other Affected ANZ Borrowers with variation disclosure by providing them with loan variation letters, and refers further to paragraphs 4.3 and 4.4 below.

4.3 In response to paragraph 4.3, it:

(a) admits that some loan variation letters generated by Frontline Tools contained incorrect information;

(b) says that loan variation letters generated by Frontline Tools contained correct information as to the particular change that the borrower requested;

(c) says further that the information that was incorrect was information that it was not required to provide in order to give "full particulars of the change" as required by section 22; and

(d) otherwise denies paragraph 4.3.

4.4 It denies paragraph 4.4, repeats paragraph 4.3 above, and says further that the loan variation letters sent to Affected ANZ Borrowers did comply with section 22 of the CCCFA (notwithstanding the inclusion of any incorrect information), as:

(a) section 22 requires disclosure of "full particulars of the change" as well as "any other information prescribed by regulations to be information that must be disclosed under [that] section";

(b) at the relevant time, there were no regulations specifying information that was required to be disclosed under section 22 beyond the "full particulars of the change";

(c) in each case, the borrower was provided with full particulars of the change that they had requested, and those particulars were correct;

(d) ANZ was not required by section 22 to include the additional information that was (in at least some instances) incorrect;

(e) in the case of borrowers with interest only or straight line loans with a term longer than 7 years, the only incorrect information in the loan variation letters generated by Frontline Tools related to the indicative total interest and the indicative total amount payable. Even if section 22 does require redisclosure of the information in Schedule 1 of the CCCFA that has changed (which is denied), information as to the total interest and total amount payable would not be required by virtue of clauses (l) and (o)(iii) of Schedule 1; and

(f) in any event, the errors were of a minor nature, and in some cases were in respect of information expressed to be "indicative" only, such that they did not mean that ANZ has failed to provide disclosure under section 22.

4.5 It apprehends that paragraph 4.5 contains matters of law and/or submission to which it is not required to plead. If it is required to plead, it denies paragraph 4.5, says further that it did not fail to provide the second plaintiffs or other borrowers with variation disclosure, and repeats paragraphs 2.34, 2.44, and 4.2 to 4.4 above.

4.6 It denies paragraph 4.6 and repeats paragraphs 2.34, 2.44, and 4.2 to 4.4 above.

4.7 It apprehends that paragraph 4.7 contains matters of law and/or submission to which it is not required to plead. If it is required to plead, it denies paragraph 4.7 and says further that:

(a) it has not failed to comply with section 22 and repeats paragraphs 2.34, 2.44, 4.2 to 4.4 and 4.6 above;

(b) even if there was non-compliance with section 22 (which is denied), section 99(1A) of the CCCFA:

(i) only removes the ability to enforce payment of borrowing costs (rather than disentitling the creditor from receiving payment and requiring a refund); and

(ii) relates only to costs of borrowing referable to the particular change for which there was non-compliance with section 22; and

(c) if the provision of incorrect information means that it did breach section 22 as at the date of the loan variation letter (which is denied), the period during which it failed to comply with section 22 ends on the earlier of:

(i) the date it next re-amortised the loan and gave an updated loan variation letter or other disclosure in accordance with the CCCFA;

(ii) the date the borrower repaid the loan in full, whether at the loan term's end or earlier; or

(iii) the date on which a borrower received a remediation letter from ANZ containing updated information.

4.8 It apprehends that paragraph 4.8 contains matters of law and/or submission to which it is not required to plead. If it is required to plead, it denies paragraph 4.8 and says further that:

(a) it has not failed to comply with section 22 and repeats paragraphs 2.34, 2.44, 4.2 to 4.4, and 4.7 above; and

(b) even if there was non-compliance with section 22 (which is denied):

(i) section 99(1) in its terms only prevents enforcement "before [the] disclosure is made", and does not trigger any refund obligation; and

(ii) it has made disclosure on the earlier of the dates set out in paragraph 4.7(c) above and, if that disclosure is found not to be compliant with the requirements of section 22 for any reason, it remains open to ANZ to make further corrective disclosure and proceed to enforcement.

4.9 It apprehends that paragraph 4.9 contains matters of law and/or submission to which it is not required to plead. If it is required to plead, it denies paragraph 4.9, repeats paragraphs 4.7 to 4.8 above, and refers to paragraph 4.10 below.

4.10 It apprehends that paragraph 4.10 contains matters of law and/or submission to which it is not required to plead. If it is required to plead, it denies paragraph 4.10, repeats paragraphs 4.7 to 4.9 above, and says further that:

(a) section 48 is only concerned with payments the creditor is "not entitled" to by virtue of the CCCFA;

(b) neither section 99(1) nor section 99(1A) extinguish the debtor's underlying obligation to pay or the creditor's underlying entitlement to receive payment of the costs of borrowing; and

(c) in any event, some borrowers will not have paid any costs of borrowing so there is nothing to be refunded or credited. Such borrowers include those whose loans were closed before the change took effect, and those who made a subsequent loan change before the change took effect, or before interest was charged or any payment made.

4.11 In response to paragraph 4.11, it:

(a) admits that it has not fully refunded or credited all costs of borrowing received during what the plaintiffs have termed the "ANZ Breach Period";

(b) admits that it continues to receive costs of borrowing from some customers;

(c) denies that it has breached section 48 or that it is required to provide further/additional refunds; and

(d) otherwise denies paragraph 4.11 and repeats paragraphs 4.7 to 4.10 above.

4.12 It denies paragraph 4.12, repeats paragraphs 4.7 to 4.10 above, and says further that:

(a) Affected ANZ Borrowers did not suffer any loss by virtue of the incorrect information in the loan variation letters generated by Frontline Tools;

(b) some Affected ANZ Borrowers with principal and interest loans were:

(i) paying a slightly lower amount as a result of the loan calculator error, but ANZ provided these borrowers with remediation payments which had the effect of clearing the amount underpaid while their loans were affected by the calculator problem; or, alternatively

(ii) paying the right amount but would not have paid off their loan in full by the specified loan term, but ANZ provided these borrowers with remediation payments which had the effect of ensuring that the loan would be repaid by (or prior to) the specified loan term and clearing any additional interest charged;

(c) Affected ANZ Borrowers with straight line or interest only loans were paying exactly the right amount on their loans; and

(d) in any event, as agreed with the Commerce Commission, ANZ has provided Affected ANZ Borrowers with remediation payments in relation to the issue which mean that those borrowers have paid less than the amounts owing under their loan agreements, such that there has been no loss or damage.

5. Second cause of action – by the ASB plaintiffs against ASB – alleged breach of section 22 of the CCCFA

5.1 It apprehends that it is not required to plead to paragraph 5.1.

5.2 It apprehends that it is not required to plead to paragraph 5.2.

5.3 It apprehends that it is not required to plead to paragraph 5.3.

5.4 It apprehends that it is not required to plead to paragraph 5.4.

5.5 It apprehends that it is not required to plead to paragraph 5.5.

5.6 It apprehends that it is not required to plead to paragraph 5.6.

5.7 It apprehends that it is not required to plead to paragraph 5.7.

5.8 It apprehends that it is not required to plead to paragraph 5.8.

5.9 It apprehends that it is not required to plead to paragraph 5.9.

5.10 It apprehends that it is not required to plead to paragraph 5.10.

6. Affirmative defences

ANZ repeats paragraphs 1.1 – 5.10 of this statement of defence and says further:

Limitation – loans entered into prior to 6 June 2015 – section 99(1)

6.1 Prior to 6 June 2015, section 95(2) of the CCCFA provided that "[a]n 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".

6.2 By virtue of the transitional provisions in Schedule 1AA of the CCCFA, for loans entered into prior to 6 June 2015, a claim under section 93 must be made within 3 years from the time when the matter giving rise to the application occurred.

6.3 The claims of Affected ANZ Borrowers whose loans were entered into prior to 6 June 2015 (i.e. those with "ANZ Existing Loans") are statute barred on the basis that this claim was filed more than 3 years from the time when the matter giving rise to the application occurred (at the latest, 28 May 2016).

Limitation – loans entered into prior to 6 June 2015 – statutory damages

6.4 Prior to 6 June 2015, section 90(3) of the CCCFA provided that an application for the enforcement of statutory damages "may be made at any time within 3 years from the time when the matter giving rise to the application occurred".

6.5 By virtue of the transitional provisions in Schedule 1AA of the CCCFA, for loans entered into prior to 6 June 2015, a claim under section 90 must be made within 3 years from the time when the matter giving rise to the application occurred.

6.6 The claims of Affected ANZ Borrowers whose loans were entered into prior to 6 June 2015 (i.e. those with "ANZ Existing Loans") for statutory damages are statute barred on the basis that this claim was filed more

than 3 years from the time when the matter giving rise to the application occurred (at the latest, 28 May 2016).

Limitation – loans entered into on or after 6 June 2015 – section 99(1A)

6.7 From 6 June 2015, section 95(2) of the CCCFA has provided that "[a]n 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".

6.8 If Affected ANZ Borrowers did suffer loss or damage (which is denied), certain borrowers discovered or ought reasonably to have discovered that loss or damage more than three years prior to the filing of this claim (i.e. before 25 June 2018).

6.9 The claims of Affected ANZ Borrowers whose loans were entered into after 6 June 2015 (i.e. those with ("ANZ Post Amendment Loans"), and who discovered or ought reasonably to have discovered loss or damage prior to 25 June 2018, are statute barred on the basis that this claim was filed more than 3 years after that date.

Limitation – loans entered into on or after 6 June 2015 – statutory damages

6.10 From 6 June 2015, section 90(3) of the CCCFA has provided that an application for the enforcement of statutory damages "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".

6.11 The claims for statutory damages of Affected ANZ Borrowers whose loans were entered into after 6 June 2015 (i.e. those with ("ANZ Post Amendment Loans"), and who discovered or ought reasonably to have discovered the matter giving rise to the breach (i.e. the loan calculator issue or the presence of incorrect information in a loan variation letter that they received) prior to 25 June 2018, are statute barred on the basis that this claim was filed more than 3 years after that date.

Relief should be refused as a matter of the Court's discretion under section 93 of the CCCFA

6.12 Section 93 of the CCCFA provides that a 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 relevant conduct.

6.13 In the event that Affected ANZ Borrowers can demonstrate qualifying loss or damage (which is denied), relief should be refused in the Court's discretion on the basis that:

(a) errors in the information provided to Affected ANZ Borrowers were de minimis, or otherwise very minor;

(b) any breach of the CCCFA is at most of a technical nature;

(c) the issue arose from a coding error in an automated computer system (developed by an external supplier);

(d) it has already provided Affected ANZ Borrowers with remediation payments in relation to the issue as agreed with the Commerce Commission (and following a proactive approach to the Commerce Commission about the issue), with the result that Affected ANZ Borrowers have paid less than the amounts otherwise owing under their loan agreements; and

(e) in all the circumstances, it is inequitable to grant relief to Affected ANZ Borrowers.

Section 95A

6.14 From 20 December 2019, section 95A of the CCCFA has permitted the Court to order that the effect under section 48 or 99(1A) of a failure to make disclosure be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that such an order be made.

6.15 By virtue of clause 8(6) of Schedule 1AA of the CCCFA, section 95A applies to the costs of borrowing in relation to any period after commencement (that is, 20 December 2019).

6.16 To the extent that ANZ would otherwise be liable to refund costs of borrowing in relation to the period from 20 December 2019 (which is denied), it is just and equitable that its liability be extinguished given (inter alia) that:

(a) any breach of the CCCFA is at most of a technical nature;

(b) ANZ had an appropriate compliance programme;

(c) the error was minor, and arose due to a coding error;

(d) no person has been prejudiced by the error;

(e) the error arose due to a reasonable mistake;

(f) the error was remedied after the breach was discovered;

(g) ANZ has made remediation payments to Affected ANZ Borrowers as agreed with the Commerce Commission (and following a proactive approach to the Commerce Commission about the issue) with the result that Affected ANZ Borrowers have paid less than the amounts otherwise owing under their loan agreements; and

(h) in all the circumstances, it is inequitable to grant relief to Affected ANZ Borrowers.

Statutory damages – reasonable mistake defence

6.17 Section 106(1) of the CCCFA provides that every person has a defence to a claim for statutory damages under section 88 if the person proves that:

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

(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.

6.18 ANZ has a defence under section 106(1) of the CCCFA to the plaintiffs' claim for statutory damages as:

(a) the coding error was due to a reasonable mistake and/or to events outside of ANZ's control (having been an issue caused by a third-party software developer);

(b) the issue was remedied as soon as practicable after it was discovered by ANZ; and

(c) ANZ has made remediation payments to Affected ANZ Borrowers as agreed with the Commerce Commission (and following a proactive approach to the Commerce Commission about the issue) with the result that Affected ANZ Borrowers have paid less than the amounts otherwise owing under their loan agreements.

Extinguishment/reduction of statutory damages

6.19 Section 91 of the CCCFA provides that the court may, on the application of a creditor, order that the statutory damages payable in connection with a breach or breaches that affect that class be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that such an order be made.

6.20 Section 92 of the CCCFA provides that in deciding whether to make an order under section 91 and the terms and conditions applying to an order under that section, the court must have regard to the following matters:

(a) the role that statutory damages have in providing incentives for compliance with the CCCFA;

(b) whether the creditor or lessor had an appropriate compliance programme;

(c) the extent of, and the reasons for, the breach or breaches;

(d) the extent to which any person has been prejudiced by the breach or breaches;

(e) the extent to which the creditor, lessor, transferee, or buy-back promoter has compensated, or agreed to compensate, the persons who are affected by the breach or breaches; and

(f) any other matters that the court thinks fit.

6.21 In the event that ANZ is found to have prima facie liability to pay statutory damages, ANZ seeks an order that those statutory damages are extinguished (or reduced to the remediation amount that it has already paid to customers) on the basis that it is just and equitable to do so as:

(a) any breach of the CCCFA is at most of a technical nature;

(b) ANZ had an appropriate compliance programme;

(c) the error was minor, and arose due to a coding error caused by a third-party provider;

(d) no person has been prejudiced by the error;

(e) the error was remedied after the issue was discovered;

(f) ANZ has made remediation payments to Affected ANZ Borrowers as agreed with the Commerce Commission (and following a proactive approach to the Commerce Commission about the issue) with the result that Affected ANZ Borrowers have paid less than the amounts otherwise owing under their loan agreements; and

(g) in all the circumstances, it is inequitable to grant relief to Affected ANZ Borrowers.

Set-off

6.22 Under the terms and conditions applying to the ANZ Loans, ANZ has a right of set-off.

6.23 If an order is made in favour of an Affected ANZ Borrower, that liability should be set off against any indebtedness due and payable by the customer to ANZ in accordance with the applicable loan terms and conditions and section 134 of the CCCFA.

This document is filed by Sophie Virginia Addison East, of Bell Gully, solicitor for the first defendant. The address for service of the first defendant is Level 22, Vero Centre, 48 Shortland Street, Auckland.

Documents for service on the first defendant may be left at that address or may be:

(a) posted to the solicitor at PO Box 4199, Auckland; or

(b) emailed to the solicitor under HCR 6.6(2)(b)(ii) provided that the email is less than 25MB and sent to both sophie.east@bellgully.com and jenny.stevens@bellgully.com.

Documents served on the first defendant should be marked for the attention of S V A East.