

**IN THE COURT OF APPEAL OF NEW ZEALAND
I TE KŌTI PĪRA O AOTEAROA**

CA 481/2022

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

BETWEEN **ASB BANK LIMITED**
Appellant

AND **A P SIMONS**
First respondent

AND **A J BEAVAN** and another
Second respondent

AND **P C DUNBAR** and another
Third respondent

AND **B R BICKERDIKE** and another
Fourth respondent *(continued over)*

**NOTICE OF APPEAL
13 OCTOBER 2022**

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AND

G J MARVIN and another

Fifth respondent

AND

ANZ BANK NEW ZEALAND LIMITED

First defendant

TO: The Registrar of the Court of Appeal

AND TO: The first to fifth respondents and the first defendant

THIS DOCUMENT NOTIFIES YOU THAT:

1. The appellant in the proceeding identified above, ASB Bank Limited, gives notice that the appellant is appealing to the Court against the decision of his Honour Justice Venning delivered 29 July 2022 in this proceeding ([2022] NZHC 1836) ("**Judgment**"). The Judgment included the granting of the first and third to fifth respondents' interlocutory application for a representative order on an opt out basis, a conclusion that the High Court has jurisdiction to make common fund orders ("**CFOs**"), and consequential costs orders. The appellant appeals only these aspects of the Judgment.

2. The specific grounds of the appeal are:

Class issues

(a) The High Court erred in fact and law in finding that the "same interest" requirement in rule 4.24 of the High Court Rules 2016 was met:

(i) The Court erred as a matter of fact and law in finding that an interest in the high-level set of statutory interpretation questions advanced by the first and third to fifth respondents gives rise to a sufficient commonality of interest for all members of the class, as described in the representative order. Specifically, the Court erred as a matter of law in:

(aa) finding that determination of the proposed stage one issues would materially advance the first and third to fifth respondents' claims on a class-wide basis, despite the fact that issues of

breach and liability are not proposed and are not able to be determined on a class-wide basis; and

(bb) failing to acknowledge that the resolution of the proposed stage one issues may have differing effects for different members of the class.

(b) The Court erred in finding that the first and third to fifth respondents' pleadings give rise to a particular class of customers that can be identified, and in not applying the principle that a class must be identifiable otherwise than by the result of the litigation itself, explained in the line of authorities including *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345.

(c) In any event, the Court erred in exercising its discretion to make the orders sought as, given the lack of the requisite same interest and the indeterminacy of the class, those orders are not consistent with the just, speedy and inexpensive determination of the proceeding.

Opt out basis

(d) The Court erred in fact and law in granting the first and third to fifth respondents leave to bring the proceeding against ASB as a representative proceeding on an "opt out" basis. Specifically:

(i) an opt in order at this stage of the proceeding is the only mechanism by which the same interest requirements of rule 4.24 could be met, by enabling the circumstances and interests of class members to be identified;

(ii) the Court erred in finding that only the question of compensation will require customers to opt in at stage two, in circumstances where issues of breach and liability will not have been determined on a class wide basis at stage one and will require customers to opt in before those issues can be determined; and

- (iii) the Court erred in failing to consider or give weight to the factors which make an opt in order more appropriate in this proceeding, if a representative order were to be granted, which include:
 - (aa) the effective and efficient management of this proceeding from both a procedural and substantive perspective would best be achieved through an opt in process;
 - (bb) the need for customers to opt in to confirm that their borrowing was for personal, domestic, or household purposes;
 - (cc) the adverse effects of an opt out approach on the privacy interests of ASB customers;
 - (dd) the adverse effects of an opt out approach on ASB customers' rights to access to justice and control of their banking relationship; and
 - (ee) the matters set out in paragraphs [(a)] and [(b)] above.

Jurisdiction to grant a common fund order

- (e) The Court erred in reserving leave for the first and third to fifth respondents to renew the application for a CFO at a later stage of the proceeding. Specifically, the Judgment erred in:
 - (i) finding that the High Court's inherent jurisdiction and/or rr 1.2 and 1.6 of the High Court Rules 2016 provide sufficient jurisdiction for the Court to make a CFO in the course of a representative proceeding;
 - (ii) proceeding on the basis that the specific constraints noted by the High Court of Australia

in *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574 and the underlying principle recognised there, that the courts' control of their own processes does not extend to enhancing the position of class action funders, are of no relevance in New Zealand; and

(iii) proceeding on the basis that the Court of Appeal in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 provided authority that the jurisdiction to make a CFO exists.

3. The appellant seeks the following judgment from the Court of Appeal:

- (a) an order allowing the appellant's appeal;
- (b) an order dismissing the first and third to fifth respondents' interlocutory application for a representative order;
- (c) an order setting aside the order of the High Court reserving leave for the first and third to fifth respondents to renew the application for a CFO at a later stage of the proceeding; and
- (d) costs and disbursements in its favour, in this Court and in the High Court.

4. The appellant is bringing this appeal pursuant to leave to appeal given by the High Court on 14 September 2022.

5. The appellant is not legally aided.

Dated 13 October 2022



J E Hodder KC | J S Cooper KC | K M Massey
Counsel for the appellant

This document is filed by **KIRSTEN MARGARET MASSEY**, solicitor for the appellant, of Russell McVeagh. The address for service of the appellant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010. Documents for service may be left at that address or may be:

- (a) posted to the solicitor at P O Box 8, Auckland 1140; or
- (b) left for the solicitor at a document exchange for direction to DX CX10085; or
- (c) emailed to the solicitor kirsten.massey@russellmcveagh.com / jeremy.upson@russellmcveagh.com.