

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

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

**CIV-2021-404-001190  
[2026] NZHC 11**

UNDER The Credit Contracts and Consumer Finance Act  
2003

BETWEEN ANTHONY PAUL SIMONS  
First Plaintiff

ANDREW JOHN BEAVAN and MEI LIM  
Second Plaintiffs

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

Hearing: (On the papers)

Judgment: 14 January 2026

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**JUDGMENT OF VENNING J  
[APPROVING SETTLEMENT]**

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**This judgment was delivered by me on 14 January 2026 at 11.45 am, pursuant to Rule 11.5 of the  
High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

## **Introduction**

[1] The first and third to fifth plaintiffs (ASB Representative Plaintiffs) seek the Court's approval to settle their claims against ASB Bank Limited (ASB) and to distribute the settlement funds on the terms set out in the application dated 5 November 2025. They also seek ancillary orders, including confidentiality. In the event the Court approves the settlement, they seek leave to discontinue the proceedings against ASB.

[2] The application is supported by the affidavits of Mr Simons, on behalf of the ASB Representative Plaintiffs; Mr Beavan, on behalf of the second plaintiffs who have brought proceedings against ANZ Bank Limited (ANZ) in the same proceedings; Mr Russell, the plaintiffs' solicitor; Mr Woodhams, the Executive Director of LPF Group Limited, (LPF) the litigation funder; Stephen Eldridge, the General Manager – Risk for the Personal Banking Division at ASB and Reuben Hurliman, a solicitor in Russell McVeagh, ASB's solicitors.

## **Background**

[3] In February 2021, ASB entered a settlement agreement with the Commerce Commission. The agreement records that between 6 June 2015 and 18 June 2019 ASB's operating procedure for providing variation disclosure in accordance with s 22 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) was not consistently followed when customers requested changes to their home or personal loans. ASB admitted breaching s 9C(2)(a)(iii) of the CCCFA and agreed to pay \$8,123,304 to approximately 73,000 "Affected Customers". The Affected Customers were divided into two groups. The first group had entered loans before 6 June 2015. The second group had entered loans on or after 6 June 2015. The significance of 6 June 2015 is that, on that date, certain amendments to the CCCFA, including the insertion of s 9C, came into force. The second group of customers received double the first group's entitlement. The settlement was without prejudice to the rights of Affected Customers.

[4] The ASB Representative Plaintiffs determined to pursue a civil claim against ASB and entered a Funding Agreement with LPF and CASL Management Pty Limited (CASL) (Funders). These proceedings were then commenced in June 2021.

[5] In July 2022, the Court made representative orders granting leave to the ASB Representative Plaintiffs to bring the ASB proceeding as a representative action on an opt out basis on behalf of the groups identified in the judgment. The Court declined to make a Common Fund Order (CFO) at that stage of the proceeding. In July 2024, the Court of Appeal made CFOs in both the ASB proceeding and the ANZ proceeding.

[6] The CFO approved by the Court provided for a Services Fee which superseded the Services Fee in the prior ASB Funding Agreement. Under the ASB CFO the mechanics of the Project Costs and CFO Services Fee payments are to be as directed by the Court. The ASB CFO provides that if the representative action against ASB is settled or judgment is entered against ASB:

- (a) The Project Costs and other costs which LPF is entitled to pursuant to clause 5.1(a) of the ... ASB Funding Agreement ... will be paid from the total, gross amount payable or credited ... by ASB to the ASB Class Members (Resolution Sum) before any payments or credits are made to the ASB representative plaintiffs or the other ASB 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 ASB representative plaintiffs or the other ASB Class Members.

[7] On 20 May 2025, the Court made orders by consent enabling the parties to formally notify potential ASB class members of the ASB Proceeding, and of their right to opt out. Ninety people opted out by the due date.

[8] The ASB Representative Plaintiffs have applied for summary judgment. On 13 June 2025, ASB applied to strike out some of the claims against it. Both applications are scheduled for hearing in March 2026, at the same time the ANZ Representative Plaintiffs' application for summary judgment is to be heard.

[9] On 12 September 2025, the ASB Representative Plaintiffs, the funders, and ASB reached an in-principle settlement of the ASB Proceeding. A settlement deed was executed on 5 October 2025.

[10] The settlement deed which the parties seek the Court's approval of provided:

- (a) ASB is to pay \$135,625,000 (Resolution Sum);
- (b) four sets of payments are to be made from the Resolution Sum:
  - (i) to LPF for Project Costs and the CFO Services Fee (Funder Payments);
  - (ii) to the ASB Representative Plaintiffs to compensate them for their work conducting the ASB Proceeding (Representative Plaintiff Payments);
  - (iii) payment of legal and other costs incurred by the ASB Representative Plaintiffs in relation to the ASB Proceeding after settlement approval (Retention Payment); and
  - (iv) payment of the balance to “Eligible Class Members”.
- (c) ASB is to administer the process of distributing funds to the Eligible Class Members;
- (d) the settlement is a full and final settlement of the ASB Proceeding with no admission as to liability; and
- (e) the settlement is conditional upon the Court granting leave to the ASB Representative Plaintiffs to settle and discontinue the ASB Proceeding.

[11] The Court’s approval is required as under the representative orders the ASB Representative Plaintiffs may only settle or discontinue the ASB proceeding with leave of the Court. Further, the mechanics of the payments under the ASB CFO must be as directed by the Court. Once the settlement is approved by the Court, all ASB Class Members who did not opt out of the ASB Proceeding by the due date will be bound by the terms of the settlement as if they were parties to it.

## Principles

[12] In *Southern Response Earthquake Services Ltd v Ross*, and after reviewing the approaches taken to Court approval of such settlements in both Australia and Ontario, the Supreme Court confirmed the Court has an adjudicative power in its protective or supervisory jurisdiction to oversee and approve a settlement and also the method of distribution in a representative action.<sup>1</sup> The Court must be satisfied that the decision to settle and discontinue is “fair and reasonable”, having regard to a range of relevant factors which may include:

- (a) the likelihood of recovery or success;
- (b) the amount and nature of discovery, evidence or investigation;
- (c) the settlement terms and conditions;
- (d) the recommendation and experience of counsel;
- (e) the future expense and likely duration of litigation risk;
- (f) recommendations from neutral parties, if any;
- (g) the number of objectors and nature of objections;
- (h) the presence of good-faith, arms-length bargaining and the absence of collusion;
- (i) the degree and nature of communications by counsel and the representative plaintiffs with class members during the course of the litigation;
- (j) information conveying to the Court the dynamics of and positions taken by the parties during negotiation;

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<sup>1</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.

- (k) if counsel's fees were negotiated; and
- (l) whether class members were given timely notice of the essential elements of the settlement.

[13] It is, however, not for the Court to seek to second-guess or go behind the tactical or other decisions made by the plaintiffs' legal representatives, (and in this case ASB) but rather to satisfy itself that the decision to settle is within a reasonable range of decisions, having regard to:<sup>2</sup>

- (a) the circumstances "knowable" to the plaintiffs and their representatives; and
- (b) a reasonable assessment of risks, based on those circumstances.

[14] In determining whether the decision is within a reasonable range of decisions, the Court will have regard to the interests of the classes the plaintiffs represent and particularly:

- (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing their share of the Resolution Sum;
- (b) the assessment methodology;
- (c) whether the assessment methodology is likely to deliver a broadly fair assessment; and
- (d) whether the costs of a more perfect assessment procedure would erode the notional benefit; and
- (e) to the extent there are reimbursement payments as proposed in this case, whether the special treatment is justifiable.

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<sup>2</sup> *Livingstone v CBL Corporation Ltd (in liq)* [2023] NZHC 2712 at [39(c)]; and *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468.

## **Evidence and submissions in support of approval**

[15] Mr Russell submits (and Mr Simons confirms in his affidavit) that the ASB Representative Plaintiffs considered the likelihood of success and recovery in deciding whether to settle, including taking advice from senior counsel. Consideration was given to the position of certain members who had agreed to changes before 25 June 2018 or before 28 January 2019, being a sub-class of claims ASB had applied to strike out on the basis they were time-barred. A decision was taken to exclude that sub-class from the definition of Eligible Class Members. The decision was made on the basis that it was fair and reasonable that individuals with stronger claims should not have their entitlements diluted by those whose claims were less likely to succeed.

[16] Although no orders for discovery have been made the ASB Representative Plaintiffs have been able to test the strength of the case through the hearing and determination of several interlocutory applications before the Court. They have also requested and received further particulars and documents from ASB and taken advice from senior counsel. Under the settlement both the ASB Representative Plaintiffs and ASB will avoid considerable time and costs associated with pursuing discovery, preparation of evidence and general preparation for a substantive fixture.

[17] The decision to settle is consistent with the advice of senior counsel.

[18] From the perspective of the ASB Representative Plaintiffs, the length, cost, and merits of the interlocutory and substantive hearing processes, together with the likelihood of appeals and further delays, (noting that the proceeding has been on foot for four and a half years already), also support the resolution, as does the risk that the claims against ASB would not necessarily succeed.

[19] I note that Mr Simons has confirmed that the settlement was negotiated over 12 weeks and involved extensive negotiations.

[20] In this case there was the additional complication of the proposed amendment to the CCCFA which, in the form it was in when introduced in March 2025, would have retrospectively changed the relevant law which the ASB Representative Plaintiffs

relied on. The ASB Representative Plaintiffs and the Funders lobbied against the proposed retrospectivity. The Select Committee was due to report on 20 October 2025. The settlement was concluded against that background which added an additional uncertainty to the legal process.

[21] Mr Russell has confirmed that the ASB Representative Plaintiffs have complied with their obligations under the process orders. The proposed settlement has been advertised in accordance with the Court's directions.

[22] Sixty-eight persons filed notices of support for the settlement. ASB has confirmed that of the 68, 21 could not be identified in ASB's notification class member data. There has only been one notice of objection to the proposed settlement. The objector suggested that non individuals should have been included in the settlement. However, non-natural members are not eligible. The claims are based on the plaintiffs being party to a consumer credit contract, which requires them to be a natural person.<sup>3</sup>

[23] The legal fees were not negotiated in the settlement. They are dealt with in accordance with the ASB Deed as Project Costs. The Project Costs and CFO Services Fee are payable in accordance with the ASB CFO.

[24] The ASB Representative Plaintiffs seek orders that 65 per cent of the combined Project Costs incurred up to and including 30 September 2025 be allocated to the ASB Proceeding with the remaining 35 per cent to be allocated to the ANZ Proceeding. From 1 October 2025, all Project Costs become Excluded Combined Costs, with the result they can be allocated to either the ASB or ANZ Proceeding. It is necessary to determine the allocation before distributions can be made to the Eligible Class Members.

[25] The ANZ Representative Plaintiffs consent to the proposed Combined Project Costs allocation. Mr Russell has confirmed the advice given to the ANZ Plaintiffs and Mr Beavan has confirmed approval.

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<sup>3</sup> CCCFA, s 11(1)(a).

### **ANZ's position**

[26] ANZ provided a memorandum in response to the proposed settlement and the related orders sought from the Court. ANZ's position is that the settlement is ultimately a matter for the ASB Representative Plaintiffs, ASB and the Court. ANZ submits that it does not have sufficient information to comment on the matter in any detail. For that reason, ANZ neither supports nor opposes the settlement.

[27] However, ANZ's position is that it cannot be bound in any respect by the decision on the settlement on matters that indirectly relate to the claim against ANZ such as the proposed allocation of combined project costs incurred by the funders. ANZ queries the figure of Combined Project Costs up to 30 September 2025, which was said to be \$4,533,000. In fact, Mr Woodhams confirms in his affidavit that, after taking account of further invoices relating to the period up to 1 October the figure is \$4,744,186.66. Sixty-five per cent of that is \$3,537,506.56.

[28] ANZ does not consider the breakdown is fair or reasonable to ANZ Class Members as it considers costs will have been incurred solely in the ASB proceeding and any costs that cannot be specifically allocated to the ASB or ANZ claims should be attributed at more than 65 per cent to the claim against ASB given the significantly larger class sizes (approximately 276,000 ASB customers versus approximately 17,000 ANZ customers), the larger number of Representative Plaintiffs and wider range of issues.

[29] ANZ has also raised the issue of potential inconsistencies between the orders sought and the description of the orders in the settlement notice, but as noted, it accepts it is ultimately for the ASB Representative Plaintiffs, ASB and the Court.

### **Response to ANZ's position**

[30] While noting the points made on behalf of ANZ, particularly in relation to the Combined Projects Costs, I am satisfied from both Mr Russell's and Mr Beavan's affidavits that the ANZ Representative Plaintiffs' consent to the proposed settlement was properly informed. That is significant on the issue.

[31] I note the ANZ accepts that the attribution of a larger share to the ASB Representative Plaintiffs' claim is appropriate, but it argues it should be greater than 65 per cent. I accept that it is appropriate to depart from the equal sharing provided for as the default position in the Funding Agreements. The agreements do make provision for a departure where there are significantly readily identifiable costs related to material tasks that are clearly connected to one or other proceeding.

[32] As Mr Russell also notes, there are differences in scale and size of the claims which support a larger share of the Combined Project Costs being attributed to the claim by the ASB Representative Plaintiffs. I note that the claim against ASB includes loans entered before and after the CCCFA was amended on 6 June 2015 while the claim against ANZ now relates only to post amendment loans. The volume of documents involving the ASB claims is considerably greater. Different issues have arisen in the different claims.

[33] However, even given the disparity in terms of the difference in number of affected customers and the above factors, there were a number of heads of cost which related to both proceedings. The claims for both sets of Representative Plaintiffs relied on the same provisions of the CCCFA. Similar interlocutory applications were required and were heard at the same time, as were the appeals and applications for leave. Both were potentially affected by the proposed amendment to the CCCFA.

[34] Any adjustment to the equal sharing of Combined Project Costs involves an assessment and an exercise of judgement. Having regard to Mr Russell's affidavit evidence I accept the proposed 65 per cent allocation is within range. I note that senior counsel has approved the figure.

### **ASB's position**

[35] ASB confirms that it supports the proposed settlement. Mr Hurliman has confirmed ASB has complied with the process orders issued by the Court relating to notice of the proposed settlement. Mr Eldridge's affidavit explains how ASB proposes to identify Eligible Class Members. An overinclusive approach has been taken to ensure all who are eligible will receive payments and that they will be paid

earlier. ASB will appoint an independent “Scheme Assurer” to verify compliance, and it will also report to the Court quarterly during the implementation of the Distribution Scheme.

### **Decision**

[36] The settlement makes a distinction between Eligible Class Members depending on whether they entered loans before or after the CCCFA was amended on 6 June 2015. The distinction is made on the basis of legal advice. It is consistent with the basis upon which ASB settled with the Commerce Commission in 2021. I accept that the time and expense involved would not justify seeking further refinements within the respective classes.

[37] The CFO Services Fee is calculated in accordance with the ASB CFO. In the schedule to his affidavit Mr Woodhams confirms how the fee has been calculated in accordance with the ASB CFO as 21.78 per cent of the Resolution Sum (\$28,856,250).

[38] The parties also seek an order for payment of \$30,000 in total to the Representative Plaintiffs with \$9,000 to Mr Simons and \$3,500 to each of the six remaining Representative Plaintiffs (\$7,000 per couple).

[39] I accept that the proposed sum of \$30,000 payable to the individual Representative Plaintiffs is reasonable and that the slightly larger amount paid to Mr Simons recognises the additional work undertaken by him as the lead representative plaintiff.

[40] The Retention Payment is sought to cover the further legal and other costs that will be incurred in relation to the proceeding after the settlement approval orders are made, including for instance, the costs associated with the distribution scheme. The costs are pre-estimated so that they may be paid from the Resolution Sum on the settlement approval allowing distribution to eligible class members and quantification. That is a practical and reasonable approach.

[41] The confidentiality orders sought are primarily related to settlement negotiations, legal professional privilege and private information about the Representative Plaintiffs and Class Members. They are appropriate.

**Result – Orders**

[42] For the above reasons the Court is satisfied it is appropriate to make the orders sought, including the confidentiality orders. Orders are made in terms of the application and in accordance with the draft attached, including the distribution scheme.

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Venning J

Solicitors: Russell van Hout, Auckland (S E R Russell)  
Russell McVeagh, Auckland (K M Massey, J W Upson and Y Li)  
Counsel: D M Salmon KC/A C van Ammers, Auckland  
J Cooper KC, Auckland

## **Draft orders**

(A) *Settlement approval and leave to discontinue* (**Settlement Approval Orders**)

- (a) that settlement is approved on the terms of the deed of settlement between the First and the Third to Fifth Plaintiffs (**ASB Representative Plaintiffs**), ASB Bank Limited (**ASB**), LPF Litigation Funding No. 33 Limited (**LPF**), and CASL Management Pty Limited (**CASL**) dated 5 October 2025 (**Settlement Deed**), including the distribution scheme attached to the Settlement Deed (**Distribution Scheme**) attached as a Schedule to these orders;
- (b) that the ASB Representative Plaintiffs are authorised, with effect from the date of the Settlement Deed (i.e. 5 October 2025), to enter into and give effect to the Settlement Deed for and on behalf of ASB class members who did not opt out of the claims brought by the ASB Representative Plaintiffs against ASB in CIV-2021-404-1190 (**ASB Proceeding**) by 26 September 2025 as a deed duly executed by the parties according to its terms;
- (c) it is declared that ASB class members who did not opt out of the ASB Proceeding by 26 September 2025 are bound by the terms of the Settlement Deed, in particular to relevant rights and obligations of the ASB Representative Plaintiffs under the Settlement Deed, as if they are parties to it;
- (d) that, in relation to the “Combined Project Costs” (as defined in clause 3.3(a) of the Deed for Provision of Services in Respect of Litigation (ASB Litigation) (**Funding Agreement**)) paid or payable by LPF and CASL (the **Funders**):
- (i) Combined Project Costs paid or payable by the Funders up to and including 30 September 2025 are allocated 65 per cent to the ASB Proceeding, and 35 per cent to the claims brought against ANZ Bank New Zealand Limited (**ANZ**) by the Second Plaintiffs (**ANZ Proceeding**), with the resulting sum in respect of the ASB Proceeding to be paid by ASB to the Funders within three working

days of Settlement Approval Orders being made pursuant to cl 5.1(a) of the Distribution Scheme; and

- (ii) from 1 October 2025, all Project Costs are to be treated as significant readily identifiable Project Costs (as defined in clause 1.1 of the Funding Agreement) that relate to material tasks clearly connected to the ASB Proceeding or the ANZ Proceeding and are to be allocated separately to either the ASB or ANZ Proceeding;
- (e) that, within three working days of receiving written instructions from Russell van Hout following the Settlement Approval Orders being made, ASB shall pay \$30,000 (comprising of payments of \$3,500 to each of the Third to Fifth ASB Representative Plaintiffs and \$9,000 to the First ASB Representative Plaintiff) from the settlement sum to compensate the ASB Representative Plaintiffs for the time and costs reasonably incurred by them in relation to the ASB Proceeding, into the trust account of Tompkins Wake, in accordance with clause 5.2 of the Distribution Scheme;
- (f) that, within three working days of the Settlement Approval Orders being made, ASB shall pay \$130,000 from the settlement sum for the payment of any legal or other costs incurred by the ASB Representative Plaintiffs in relation to the ASB Proceeding after Settlement Approval Orders are made, including in relation to the Distribution Scheme, into the trust account of Tompkins Wake, in accordance with clause 5.3 of the Distribution Scheme;
- (g) that the ASB Representative Plaintiffs are granted leave to discontinue the ASB Proceeding with no issue as to costs once ASB has reported to the Court and to the Representative Plaintiffs the steps it has taken to comply with clause 6.1 of the Distribution Scheme;

(C) *Confidentiality and other orders (Ancillary Orders)*

- (aa) that the affidavit of the First Plaintiff, Anthony Simons dated 4 November 2025, the affidavit of Steven Eldridge dated 14 November 2025, and the confidential information highlighted in the affidavit of Scott Russell dated 18 December 2025 are confidential and not to be published;
- (bb) that the Court's judgment be circulated to counsel 24 hours before it is made publicly available, to enable counsel to confirm that either

no confidential information is included in the judgment, or all confidential information is redacted before it is published;

- (cc) that external counsel for ASB may provide the opt out notices that they have received (on a counsel-only basis) from Russell van Hout to ASB and the Scheme Assurer (as defined in clause 7.1 of the Distribution Scheme), to enable ASB to determine whether any person is not an Eligible Class Member;
- (dd) that the parties bear their own costs in relation to the application dated 5 November 2025, including in respect of the Distribution Scheme; and
- (ee) that leave be granted to the ASB Representative Plaintiffs to seek further directions.

## DISTRIBUTION SCHEME SCHEDULE

### 1. BACKGROUND

1.1 The purpose of the Distribution Scheme is to fairly and reasonably distribute the Settlement Sum to:

- (a) ASB Class Members who did not opt out of the Proceeding by 26 September 2025;  
and
- (b) the Funders.

### 2. ADMINISTRATOR

2.1 ASB will be the administrator of the Distribution Scheme.

### 3. ELIGIBLE CLASS MEMBERS

3.1 A person is an eligible class member if they:

- (a) are a natural person;
  - (b) had one or more home or personal loans with ASB during the Relevant Period, whether or not as a joint borrower, being a loan product listed in Annexure A;
  - (c) made one or more Agreed Changes, being a type of agreed change listed in Annexure B, to one or more of their ASB loans referred to in paragraph (b) during the Relevant Period;
  - (d) either:
    - (i) entered into one or more of the ASB loans referred to in paragraph (b) on or after 6 June 2015 ("**Group 1 Member**"); or
    - (ii) only entered into one or more of the ASB loans referred to in paragraph (b) prior to 6 June 2015 and made one or more of the Agreed Changes referred to in paragraph (c) after 25 June 2018 in the case of SOP Variations or after 28 January 2019 in the case of Other Variations (such that they do not only have Time-barred Claims) ("**Group 2 Member**");  
and
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(e) did not opt out of the Proceeding before 26 September 2025.

("Eligible Class Member").

#### 4. PAYMENT TO ELIGIBLE CLASS MEMBERS

4.1 ASB will pay the amounts from the Settlement Sum to Eligible Class Members calculated according to the following formulae:

(a) For each Group 1 Member:

$$2 \times (\$135,625,000 - \text{Funder Payment} - \text{Retention Payment} - \text{Representative Plaintiff Payments}) / ([\text{number of Group 1 Members}] \times 2 + [\text{number of Group 2 Members}])$$

(b) For each Group 2 Member:

$$(\$135,625,000 - \text{Funder Payment} - \text{Retention Payment} - \text{Representative Plaintiff Payments}) / ([\text{number of Group 1 Members}] \times 2 + [\text{number of Group 2 Members}])$$

(each "**Class Member Payments**").

4.2 ASB will make the Class Member Payments as follows:

(a) For any Eligible Class Member who has an ASB Relevant Account:

(i) Within 4 months of Settlement Approval, excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year, ASB will make the Class Member Payment by direct crediting the ASB Relevant Account.

(ii) Within 4 months of Settlement Approval, excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year, ASB will write to the Eligible Class Member, advising them of:

(aa) the payment to be made to them;

(bb) which ASB Relevant Account the payment will be made to;

(cc) the reasons for making the payment; and

(dd) the complaints process in clause 8.

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- (b) For any Eligible Class Member who does not have an ASB Relevant Account:
- (i) Within 8 months of Settlement Approval, excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year, ASB will take reasonable steps using the contact information that it holds to advise them of the matters in paragraph 4.2(a)(ii) and obtain instructions from the Eligible Class Member (for example, by contacting the Eligible Class Member by email, post or telephone) as to a Nominated Relevant Account into which the Class Member Payment can be paid.
  - (ii) Subject to subparagraphs 4.2(b)(iii) and 4.2(b)(iv), if ASB obtains instructions from an Eligible Class Member who does not have an ASB Relevant Account as to a Nominated Relevant Account into which the Class Member Payment can be paid, within 10 Business Days of receiving those instructions, ASB shall make the Class Member Payment by direct crediting the Nominated Relevant Account.
  - (iii) If ASB does not obtain instructions from any Eligible Class Member who does not have an ASB Relevant Account within 8 months of Settlement Approval, excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year, ASB will use reasonable endeavours to locate those Eligible Class Members through engaging the assistance of a credit reporter to help trace customers.
  - (iv) If, after 2 months of ASB taking the steps required under subparagraphs (i) and (iii), excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year, there is any Eligible Class Member who ASB cannot locate, the Class Member Payment that would have otherwise been paid to that Eligible Class Member will be dealt with according to clause 6.
- (c) Notwithstanding paragraphs (a) and (b), if ASB is aware that any Eligible Class members are bankrupt, the Class Member Payment that would have otherwise been paid to that Eligible Class Member will be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.
- (d) Notwithstanding paragraphs (a) and (b), if ASB is aware that any Eligible Class Members are deceased:
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- (i) If possible, ASB will make the Class Member Payment according to paragraph (a).
- (ii) Otherwise, ASB will, within 8 months of Settlement Approval excluding the period commencing with the 22nd day of December in any year and ending with the 12th day of January in the following year:
  - (aa) use reasonable endeavours to contact the representative(s) of the deceased Eligible Class Member and inform them of the entitlement to the Class Member Payment; and
  - (bb) pay the Class Member Payment to a bank account nominated by the representative(s) of the deceased Eligible Class Member; or
  - (cc) if the representative(s) of the deceased Eligible Class Member has not contacted ASB within 2 months of ASB's last attempt to contact them, the Class Member Payment that would have otherwise been paid to that Eligible Class Member will be dealt with according to clause 6.

4.3 ASB shall not be required to make a payment to any ASB Class Member who is not an Eligible Class Member.

**5. DISTRIBUTION TO FUNDERS, RETENTION PAYMENT AND POTENTIAL REPRESENTATIVE PLAINTIFF PAYMENTS**

5.1 Within three Business Days of receiving written instructions from Russell van Hout following Settlement Approval, ASB will distribute the following amounts from the Settlement Sum to Tompkins Wake's solicitor's trust account for the benefit of the Funders in accordance with the ASB CFO:

- (a) An amount for costs incurred by the Representative Plaintiffs up until the date of Settlement Approval which the Funders are entitled to recover pursuant to clause 5.1(a) of the Funding Deed and the ASB CFO and in accordance with clause 3.3(a) of the Litigation Co-funding Agreement; and
- (b) \$28,856,250 for LPF's services fee, calculated pursuant to paragraph 3(c) of the ASB CFO and in accordance with clause 3.3(b) of the Litigation Co-funding Agreement

(together, "**Funder Payments**").

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- 5.2 Also within three Business Days of Settlement Approval, ASB shall pay any amount approved by the court to compensate the Representative Plaintiffs for the time and costs reasonably incurred by them in relation to the Proceeding from the Settlement Sum into a solicitor's trust account as directed by the court for the benefit of the Representative Plaintiffs ("**Representative Plaintiff Payments**").
- 5.3 Also within three Business Days of Settlement Approval, ASB shall pay an amount approved by the court from the Settlement Sum into a solicitor's trust account as directed by the court for the benefit of the Representative Plaintiffs and for the payment of any legal or other costs incurred by the Representative Plaintiffs in relation to the Proceeding after Settlement Approval, including in relation to the Distribution Scheme ("**Retention Payment**").
- 5.4 If 3 months after discontinuance of the Proceeding and the payment of all costs incurred by the Representative Plaintiffs up until that date there is any amount of the Retention Payment remaining, Russell van Hout Limited will, within 10 Business Days, pay the remaining amount to a charity or charities (in equal shares) nominated by the Representative Plaintiffs and will notify the Court that it has completed this step.

## **6. REMAINING AMOUNT OF SETTLEMENT SUM**

- 6.1 If, after ASB completes the steps in clause 9.2 and the Court is of the opinion that ASB has complied with its obligations under clauses 4 and 5, there is an amount of the Settlement Sum remaining, the amount remaining will be treated as unclaimed money under the Unclaimed Money Act 1971, and ASB will pay the amount remaining to the Commissioner of Inland Revenue within four months of the Court confirming its opinion.
- 6.2 If the Commissioner of Inland Revenue returns any money to ASB that ASB paid to them under clause 6.1, ASB will pay that money to ASB's nominated charity or charities (in equal shares) within 10 Business Days of the Commissioner returning the money to ASB.

## **7. SCHEME ASSURER**

- 7.1 ASB will, in consultation with the Representative Plaintiffs and with the Representative Plaintiffs' consent (not unreasonably to be withheld), engage a suitably qualified and experienced third party to provide assurance over the Distribution Scheme ("**Scheme Assurer**").
- 7.2 ASB will provide the Representative Plaintiffs with a copy of the terms of engagement between ASB and the Scheme Assurer.
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- 7.3 The Scheme Assurer's function is limited to providing assurance over ASB's payment of the Settlement Sum in accordance with the Distribution Scheme, and to receiving and investigating complaints from ASB Class Members in relation to compliance with the Distribution Scheme.
- 7.4 ASB will engage the Scheme Assurer at its own cost and will instruct the Scheme Assurer to perform all of the Scheme Assurer's functions under the Distribution Scheme.
- 7.5 Within a reasonable period after ASB believes it has completed the steps in clauses 4 and 5, ASB will provide the Scheme Assurer with:
- (a) a written report of the steps it has taken to perform its obligations under clauses 4 and 5; and
  - (b) any other information that the Scheme Assurer reasonably requires to perform its functions under the Distribution Scheme.
- 7.6 Within 20 Business Days of ASB providing the Scheme Assurer with the information in clause 7.5, the Scheme Assurer will:
- (a) provide ASB with a written report on its assessment of whether ASB has taken reasonable steps to perform its obligations under clauses 4 and 5 ("**Scheme Assurer Report**"); or
  - (b) request further information from ASB about ASB's performance of its obligations under clauses 4 and 5, in which case:
    - (i) ASB may provide further information to the Scheme Assurer within 10 Business Days; and
    - (ii) the Scheme Assurer will provide ASB with the Scheme Assurer Report within 10 Business Days of ASB providing further information to the Scheme Assurer.
- 7.7 After the Scheme Assurer provides ASB with the Scheme Assurer Report under clause 7.6, ASB may:
- (a) take further steps to perform its obligations under clauses 4 and 5; and
  - (b) within 20 Business Days of being provided with the Scheme Assurer Report, provide information to the Scheme Assurer on the further steps taken under paragraph (a).

7.8 Within 10 Business Days of ASB providing information to the Scheme Assurer under clause 7.7(b), the Scheme Assurer will provide ASB with an updated version of the Scheme Assurer Report based on the further steps that ASB has taken.

## **8. COMPLAINTS PROCESS**

8.1 A person claiming an entitlement to a Class Member Payment may, at any time up until the date upon which ASB notifies the Court and Representative Plaintiffs in accordance with clause 9.2(a) below, make a complaint to the Scheme Assurer if the person considers that the Distribution Scheme has not been complied with in relation to the claimed entitlement.

8.2 A complaint may be made to the Scheme Assurer in writing to an email address made available by the Scheme Assurer for that purpose.

8.3 On receipt of a complaint:

- (a) The Scheme Assurer will investigate the complaint and for that purpose may ask ASB for information relating to the complainant's entitlement or otherwise.
- (b) If the Scheme Assurer concludes that the Distribution Scheme has not been complied with in relation to the person's claimed entitlement, the Scheme Assurer will inform ASB of the non-compliance and, if the non-compliance means the person has received less than their entitlement under the Distribution Scheme, ASB will make such further payment as is required to ensure compliance with the Distribution Scheme in relation to that person's entitlement.
- (c) If the Scheme Assurer concludes either that the Distribution Scheme has been complied with, or that it has not been complied with but the non-compliance has not resulted in an under-payment, the Scheme Assurer will inform the complainant of that conclusion and that no further steps will be taken.

## **9. REPORTING ON ADMINISTRATION**

9.1 ASB will provide a report to the High Court and the Representative Plaintiffs' solicitors, detailing the progress of distributions every three months after the High Court makes the Settlement Approval order, such periods to exclude the period commencing with the 22<sup>nd</sup> day of December in any year and ending with the 12<sup>th</sup> day of January in the following year, and ending once ASB believes it has complied with its obligations under clauses 4 and 5.

- 9.2 Within 20 Business Days after ASB believes it has complied with its obligations under clauses 4 and 5 and after ASB has been provided with the Scheme Assurer Report as provided under clause 7.6 or 7.8, whichever is the later, ASB will:
- (a) notify the High Court and the Representative Plaintiffs' solicitors of the following:
    - (i) that ASB has completed the steps in clauses 4 and 5; and
    - (ii) whether any time periods in the Distribution Scheme were not complied with;
  - (b) provide the High Court and the Representative Plaintiffs with the Scheme Assurer Report; and
  - (c) seek confirmation from the High Court that it is satisfied that ASB has complied with its obligations under clauses 4 and 5.
- 9.3 The Representative Plaintiffs will be given the opportunity to make submissions on and/or be heard as to whether the confirmation referred to in clause 9.2(c) above should be given.
- 9.4 Within 10 Business Days after ASB believes it has complied with its obligations under clause 6.1, ASB will notify the High Court and the Representative Plaintiffs of the steps it has taken under clause 6.1.
- 10. COURT SUPERVISION**
- 10.1 ASB or the Representative Plaintiffs may refer any issues arising in relation to the Scheme to the Court for determination.
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