

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

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

COMMERCIAL PANEL

CIV 2021-404-1190

**UNDER THE CREDIT CONTRACTS AND CONSUMER FINANCE
ACT 2003 AND HIGH COURT RULE 4.24**

BETWEEN Anthony Paul Simons, marketer of 53C Howe Street,
Howick, Auckland 2014, suing as a representative under
High Court Rule 4.24

FIRST PLAINTIFF

AND Andrew John Beavan and Mei Lim, IT specialist and
project manager of 121B Hobsonville Road, West Harbour,
Auckland 0618, suing as representatives under High Court
Rule 4.24

SECOND PLAINTIFFS

AMENDED STATEMENT OF CLAIM

Dated: 28 January 2022

Solicitors:
Scott Russell
Russell Legal
Level 1, 40 Eden Crescent, Auckland 1010
Tel: +64 204 0969751
Email: scott.russell@russelllegal.co.nz

Counsel:
Davey Salmon QC / Ali van Ammers
MILLS LANE CHAMBERS
Level 27, 25 Queen Street, Auckland 1010
PO Box 537, Auckland 1140
Tel: +64 21 974 873 / +64 27 5626 351
Email: davey.salmon@millslane.co.nz /
ali.vanammers@millslane.co.nz

Philip Charles Dunbar and **Sheryn Valeri Dunbar**, market researcher and nurse of 19 Kea Place, Mangere Bridge, Auckland 2022, suing as representatives under High Court Rule 4.24

THIRD PLAINTIFFS

Bruno Robert Bickerdike and **Emma Renae Punter**, marketer and manager of 15 Tyler Davies Drive, Red Beach, Auckland 0932, suing as representatives under High Court Rule 4.24

FOURTH PLAINTIFFS

Glenn Jonathan Marvin and **Anna Mary Cuthbert**, marketer and interior designer of 97 Lucerne Road, Remuera, Auckland 1050, suing as representatives under High Court Rule 4.24

FIFTH PLAINTIFFS

AND **ANZ Bank New Zealand Limited**, an incorporated company having its registered address at Ground Floor, ANZ Centre, 23-29 Albert Street, Auckland, 1010

FIRST DEFENDANT

AND **ASB Bank Limited**, an incorporated company having its registered address at Level 2, ASB North Wharf, 12 Jellicoe Street, Auckland 1010

SECOND DEFENDANT

AMENDED STATEMENT OF CLAIM

The plaintiffs say:

1. PARTIES

Plaintiffs

- 1.1. The first plaintiff is Anthony Paul Simmons.
- 1.2. The second plaintiffs are Andrew John Beavan and Mei Lim.
- 1.3. The third plaintiffs are Philip Charles Dunbar and Sheryn Valerie Dunbar.
- 1.4. The fourth plaintiffs are Bruno Robert Bickerdike and Emma Renae Punter.
- 1.5. The fifth plaintiffs are Glenn Jonathan Marvin and Anna Mary Cuthbert.
- 1.6. At all material times the second plaintiffs (**ANZ representative plaintiffs**) were customers of the first defendant.
- 1.7. The ANZ representative plaintiffs sue the first defendant as representatives of a class of persons with the same interests in issues in this proceeding as set out in paragraph 2.46 below.
- 1.8. At all material times the first and third to fifth plaintiffs (**ASB representative plaintiffs**) were customers of the second defendant.
- 1.9. The ASB representative plaintiffs sue the second defendant as representatives of a class of persons with the same interests in issues in this proceeding as set out in paragraph 3.64 below.

Defendants

- 1.10. The first defendant is ANZ Bank New Zealand Limited (**ANZ**). ANZ:
 - (a) is an incorporated company having its registered address at Ground Floor, ANZ Centre, 23-29 Albert Street, Auckland, 1010;
 - (b) was incorporated on 23 October 1979;
 - (c) is a registered bank under the Reserve of New Zealand Bank Act 1989.

- 1.11. The second defendant is ASB Bank Limited (**ASB**). ASB:
- (a) is an incorporated company having its registered address at Level 2, ASB North Wharf, 12 Jellicoe Street, Auckland 1010;
 - (b) was incorporated on 16 August 1988;
 - (c) is a registered bank under the Reserve of New Zealand Bank Act 1989.

2. **BACKGROUND IN RELATION TO THE CLAIM AGAINST ANZ**

ANZ's conduct

- 2.1. ANZ's conduct at issue in this claim occurred between 30 May 2015 and 28 May 2016 (**ANZ Relevant Period**).
- 2.2. During the ANZ Relevant Period, ANZ provided, in trade, home loans and personal loans to individual debtors in New Zealand (**ANZ Borrowers**).
- 2.3. Some of the loans provided to ANZ Borrowers were consumer credit contracts to which the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) applies (**ANZ Loans**), because:
- (a) the ANZ Borrowers were natural persons;
 - (b) the credit was used, or intended to be used, wholly or predominantly for personal, domestic or household purposes;
 - (c) either:
 - (i) interest charges were or could be payable under the contracts;
 - (ii) credit fees were or could be payable under the contracts; and/or
 - (iii) a security interest was or could be taken under the contract entered into;
 - (d) ANZ was a creditor under the contract entered into; and
 - (e) ANZ carried on a business providing credit.

- 2.4. The terms of the ANZ Loans were recorded in consumer credit contracts and included:
- (a) the applicable interest rates;
 - (b) the terms of the contract; and
 - (c) the amount, number and frequency of repayments.
- 2.5. Some of the ANZ Loan were entered into before 6 June 2015 (**ANZ Existing Loans**) and some were entered into after 6 June 2015 (**ANZ Post Amendment Loans**).
- 2.6. On various dates during the ANZ Relevant Period, ANZ made agreed changes to various ANZ Borrowers' ANZ Loans.
- 2.7. For some ANZ Borrowers, ANZ made agreed changes to more than one of their ANZ Loans.
- 2.8. For some ANZ Borrowers, ANZ made agreed changes to one or more of their ANZ Loans on more than one occasion.
- 2.9. Pursuant to s 22 of the CCCFA, whenever ANZ made an agreed change to the terms of an ANZ Borrower's ANZ Loan, it was required to ensure that it provided that ANZ Borrower with disclosure of the full particulars of the change within the prescribed timeframe (**Variation Disclosure**).
- 2.10. During the ANZ Relevant Period, ANZ purported to provide ANZ Borrowers with Variation Disclosure by sending them Loan Variation Letters.
- 2.11. Some ANZ Borrowers received more than one Loan Variation Letter during the ANZ Relevant Period.
- 2.12. The Loan Variation Letters were generated by one of ANZ's computer systems called Frontline Tools.
- 2.13. Frontline Tools contained a calculator which automatically calculated the figures to be included in the Loan Variation Letters (**Calculator**).

- 2.14. Due to a coding error, in calculating the figures to be included in each Loan Variation Letter, the Calculator did not take into account any interest that had accrued on the relevant ANZ Loan, but had not yet been charged (the **Coding Error**).
- 2.15. As a result of the Coding Error, the Loan Variation Letters that ANZ sent to certain ANZ Borrowers during the ANZ Relevant Period 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 the new regular payment;
 - (d) the total number of payments to be made;
 - (e) the date of final payment.

(Incorrect Information)

- 2.16. ANZ provided Loan Variation Letters containing Incorrect Information to all ANZ Borrowers whose ANZ Loans were subject to agreed changes during the ANZ Relevant Period, except for those ANZ Borrowers whose agreed changes took effect on the same day that the accrued interest was charged to their ANZ Loan balance.
- 2.17. ANZ Borrowers who received Loan Variation Letters containing Incorrect Information during the ANZ Relevant Period are referred to hereafter as **Affected ANZ Borrowers**.

The Coding Error is identified

- 2.18. In May 2016, as a result of customer complaints, ANZ identified the Coding Error.
- 2.19. ANZ has previously asserted that after identifying the Coding Error it promptly steps to fix it.

Particulars

- (i) The settlement agreement between ANZ and the Commerce Commission dated 2 March 2020 (the **ANZ Settlement Agreement**) records that after identifying the Coding Error, ANZ promptly took steps to fix it.
- (ii) On its website <https://www.anz.co.nz/comms/loan-calculator-issue/> ANZ states: “We fixed the loan calculator in May 2016”.
- (iii) Whether ANZ in fact took steps to fix the Coding Error, what steps it took and the effect of those steps on Affected ANZ Borrowers’ ANZ Loan balances are within the knowledge of ANZ.
- (iv) Further particulars will be provided following discovery.

2.20. ANZ was aware that:

- (a) The effect of s 99(1A) of the CCCFA is that a borrower is not liable for costs of borrowing relating to any period during which a lender failed to comply with ss 17 or 22.
- (b) A failure to comply with s 99(1A) creates a duty to refund or credit the costs of borrowing to the borrower under s 48.
- (c) Section 99(1A) applies in all situations, even if the lender has corrected their breach of ss 17 or 22 and there has been no material harm to the borrower.

Particulars

- (i) ANZ is a member of the New Zealand Banking Association (**NZBA**).
- (ii) On 17 May 2016, the NZBA wrote a letter to the Ministry of Business, Innovation and Employment (**MBIE**) expressing its and its members concerns regarding s 99(1A) in which it made the statements in paragraph 2.20(a) to (c) above.

- (iii) ANZ's understanding of and views as to the effects of s 99(1A) are within the knowledge of ANZ and will be further particularised following discovery.

Commerce Commission investigation and settlement

- 2.21. The Commerce Commission (**Commission**) is a body corporate established under s 8 of the Commerce Act 1986. Its functions include enforcement of the CCCFA.
- 2.22. On 19 June 2017, ANZ reported to the Commission that it had provided Affected ANZ Borrowers with Loan Variation Letters containing Incorrect Information during the ANZ Relevant Period.
- 2.23. In 2018 and 2019, ANZ sent letters to certain Affected ANZ Borrowers:
 - (a) informing them that ANZ had a problem with the loan calculator that set the repayments and term of their ANZ Loan which resulted in ANZ not including some interest that it was due to charge;
 - (b) informing them that payments had been made to their accounts in the amounts underpaid by them while their Loans were affected by the calculator problem;
 - (c) as applicable, attaching current loan details as at the date of the letters reflecting application of the payments referred to above;
 - (d) in some instances, attaching "historical information" being the information ANZ provided to the Affected ANZ Borrowers in the Loan Variation Letters, but including the interest that was left out as a result of the Coding Error (**Historical Information**).

(Calculator Problem Letters)

Particulars

- (i) The ANZ Settlement Agreement records that by no later than April 2019, ANZ had advised certain Affected ANZ Borrowers of the Incorrect Information.

- (ii) The affidavit of James Richard McIvor referred to in paragraph 2.30(b) states that ANZ advised the “Affected Borrowers” of the issues with the Loan Variation Letters between 28 June 2018 and April 2019.
- (iii) The identities, number and proportion of Affected ANZ Borrowers who received Calculator Problem Letters, how those Borrowers were selected to receive the Calculator Problem Letters, when they received them, and the content of the individual Calculator Problem Letters is within the knowledge of ANZ and will be further particularised following discovery.

2.24. Also in 2018 and 2019, ANZ made payments to certain Affected ANZ Borrowers’ ANZ Loans totalling \$5,591,000 (**First Remediation Payment**).

Particulars

- (i) The ANZ Settlement Agreement records that ANZ provided some remediation to “Affected Borrowers” in the amount of \$5,591,000.
- (ii) On its website <https://www.anz.co.nz/comms/loan-calculator-issue/> ANZ says that, over 2018 to 2019 it “paid \$5.6m to customers who had consumer credit contracts”.
- (iii) The number and proportion of Affected ANZ Borrowers who received payments, when they received payments, the amounts of the payments they received, and how those amounts were calculated is within the knowledge of ANZ and will be further particularised following discovery.

2.25. Following review and analysis of ANZ’s information, the Commission decided to bring civil proceedings in the High Court against ANZ alleging that it had breached s 9C(2)(a)(iii) of the CCCFA by failing to exercise the care, diligence and skill of a responsible lender in its subsequent dealings with Affected ANZ Borrowers in relation to the variation of their ANZ Loans by failing to take sufficient steps to ensure the Loan Variation Letters were accurate.

- 2.26. On 2 March 2020, ANZ and the Commission agreed to resolve the Commission's anticipated High Court civil proceedings against ANZ and entered into the ANZ Settlement Agreement, pursuant to which:
- (a) ANZ admitted the breach of s 9C(2)(a)(iii) alleged by the Commission;
 - (b) the Commission accepted that the breach was inadvertent;
 - (c) the parties agreed a court procedure by which to obtain a declaratory order confirming ANZ's breach of s 9C(2)(a)(iii) by consent;
 - (d) ANZ agreed to make a payment towards the Commission's costs in relation to the investigation and litigation; and
 - (e) ANZ agreed to pay "Affected Borrowers" a total of \$35,032,000, including the First Remediation Payment, in the manner provided for in the ANZ Settlement Agreement.
- 2.27. The rights of Affected ANZ Borrowers against ANZ in relation to the Loan Variation Letters containing Incorrect Information were not compromised by the ANZ Settlement Agreement.
- 2.28. Also on 2 March 2020, the Commission filed a statement of claim (**SOC**) in the High Court containing factual allegations materially identical to those set out in paragraphs 2.1 to 2.18 above and alleging that ANZ breached s 9C(2)(a)(iii).
- 2.29. On 6 March 2020, ANZ filed a statement of defence to the Commission's SOC in which it admitted the factual allegations materially identical to those set out in paragraphs 2.1 to 2.18 above and that it had breached s 9C(2)(a)(iii).
- 2.30. On 31 March 2020, the Commission filed:
- (a) an interlocutory application for a declaratory order on admission of facts pursuant to rule 15.15 of the High Court Rules (**Application**);
 - (b) an affidavit of James Richard McIvor in support of the Application;
 - (c) a joint memorandum of counsel for the Commission and ANZ confirming that the Application was not opposed by ANZ.

- 2.31. On 2 April 2020, the High Court granted the Application and made a declaration that ANZ breached its obligations under s 9C(2)(a)(iii) of the CCCFA when Affected ANZ Borrowers varied their loans between 5 June 2015 and 28 May 2016.
- 2.32. Beginning in May 2020, ANZ sent certain Affected ANZ Borrowers letters informing them that after recent discussions with the Commission, ANZ had agreed to make further payments in relation to the loan calculator problem and that their accounts had been credited (**2020 Calculator Problem Letters**).

Particulars

- (i) The identities, number and proportion of Affected ANZ Borrowers who received 2020 Calculator Problem Letters, how those Borrowers were selected to receive the 2020 Calculator Problem Letters, when they received them, and the content of the individual 2020 Calculator Problem Letters are within the knowledge of ANZ and will be further particularised following discovery.
- 2.33. Also beginning in May 2020, ANZ made payments to certain Affected ANZ Borrowers in accordance with the ANZ Settlement Agreement.

Particulars

- (i) The identities, number and proportion of Affected ANZ Borrowers who received payments in 2020, when they received payments, the amounts of the payments they received, and how those amounts were calculated are within the knowledge of ANZ and will be further particularised following discovery.
- 2.34. To date, ANZ has not provided Variation Disclosure to any of the Affected ANZ Borrowers in relation to agreed changes made to their ANZ Loans during the ANZ Relevant Period.

Particulars

- (i) The Loan Variation Letters sent to Affected ANZ Borrowers did not comply with s 22 of the CCCFA.
- (ii) The Historical Information provided to certain Affected ANZ Borrowers with their Loan Problem Letters did not comply with s 22 and therefore did not constitute Variation Disclosure.
- (iii) Whether ANZ has subsequently provided or purported to provide the ANZ Affected Borrowers with Variation Disclosure in relation to agreed changes made to their ANZ Loans during the ANZ Relevant Period is within ANZ's knowledge and will be particularised following discovery.

The ANZ representative plaintiffs are Affected ANZ Borrowers

2.35. During the ANZ Relevant Period, the second plaintiffs had an ANZ Loan.

Particulars

- (i) On or around 7 August 2015, the second plaintiffs obtained an ANZ Post Amendment Loan (account number is 0323-0088267241-1002) to fund their purchase of 121B Hobsonville Road, West Harbour, Auckland 0618.
- (ii) The second plaintiffs fully repaid their ANZ Loan on 2 September 2019.

2.36. During the ANZ Relevant Period, ANZ made an agreed change to the second plaintiffs' ANZ Loan.

Particulars

- (i) On or around 23 November 2015, ANZ made an agreed change to the second plaintiffs' ANZ Loan, fixing the interest rate at 4.49% p.a. for a period of three years (**2015 Agreed Change**).

2.37. Each time that ANZ made an agreed change to the second plaintiffs' ANZ Loan, ANZ was required pursuant to s 22 of the CCCFA to provide the second plaintiffs with Variation Disclosure.

2.38. In relation to the 2015 Agreed Change, ANZ purported to provide the second plaintiffs with Variation Disclosure by sending them a Loan Variation Letter dated 23 November 2015 (the **2015 Loan Variation Letter**).

2.39. The 2015 Loan Variation Letter did not comply with s 22.

Particulars

- (i) The 2015 Loan Variation Letter contained Incorrect Information, including as to:
 - (A) the total interest left to pay;
 - (B) the total amount left to pay;
 - (C) the amount of the new repayments; and
 - (D) the amount of the last repayment.

2.40. On 30 January 2019, the second plaintiffs received a payment of \$917.32 from ANZ to their ANZ Loan.

2.41. On 1 February 2019, the second plaintiffs received a Calculator Problem Letter from ANZ.

Particulars

- (i) On 1 February 2019 the second plaintiffs received a Calculator Problem Letter from ANZ headed "Your ANZ Home Loan has been affected by a calculator problem – here's how we're putting it right".
- (ii) The Loan Calculator Problem Letter:
 - (A) Stated that, when changing the second plaintiffs' ANZ Loan back in 2015, ANZ had a problem with a loan calculator that set repayments and loan terms. As a result, ANZ did not include some interest it was due to charge on the ANZ Loan.

- (B) Stated that ANZ had credited the second plaintiffs' ANZ Loan with \$917.32 and there was nothing the second plaintiffs needed to do.
- (C) Attached a current loan statement showing the application of the \$917.32 to the ANZ Loan.
- (D) Attached Historical Information.

2.42. On 12 May 2020, the second plaintiffs received a payment of \$10.26 as part of the Total Remediation Payment.

2.43. On 13 May 2020, the second plaintiffs received a 2020 Calculator Problem Letter from ANZ.

Particulars

(i) On 13 May 2020, the second plaintiffs received a 2020 Calculator Problem Letter from ANZ with the heading "We've paid you more for a loan calculator problem that affected your closed ANZ Home Loan".

(ii) The Letter informed the second plaintiffs that:

(A) after recent discussions with the Commission, ANZ had agreed to make a further payment of \$10.26 to the second plaintiffs in relation to the loan calculator problem;

(B) the payment had been credited to their account and would appear on their statement as "ANZ LOAN CALCULATOR CREDIT"; and

(C) there was nothing they needed to do.

2.44. To date, ANZ has not provided the second plaintiffs with Variation Disclosure in relation to the 2015 Agreed Change.

Particulars

- (i) The 2015 Loan Variation Letter did not comply with s 22 of the CCCFA, because it contained Incorrect Information. It therefore did not constitute Variation Disclosure.
- (ii) The Historical Information attached to the Calculator Problem Letter received by the second plaintiffs in February 2019 did not comply with s 22 of the CCCFA.
- (iii) ANZ has not provided or purported to provide the second plaintiffs with Variation Disclosure in relation to the 2015 Agreed Change on any other occasion.

2.45. The second plaintiffs paid all interest and fees (**costs of borrowing**) relating to their ANZ Loan charged by ANZ.

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

2.46. The Affected ANZ Borrowers form a class of persons having the same interest in this proceeding because they each received one or more Loan Variation Letters containing Incorrect Information after ANZ made agreed changes to the terms of their ANZ Loan(s) during the ANZ Relevant Period.

2.47. There are between approximately 86,000 and 101,000 Affected ANZ Borrowers.

Particulars

- (i) The ANZ Settlement Agreement records that a total of approximately 101,535 ANZ Borrowers received a Loan Variation Letter from ANZ during the ANZ Relevant Period that contained Incorrect Information.
- (ii) In public statements made in March 2020 ANZ said that around 86,000 customers would receive further payments as a result of the ANZ Settlement Agreement.
- (iii) On its website <https://www.anz.co.nz/comms/loan-calculator-issue/> ANZ says that payments pursuant to the ANZ Settlement

Agreement would be made to customers with consumer credit contracts.

- (iv) The identities and number of Affected ANZ Borrowers is within the knowledge of ANZ and will be further particularised following discovery.

3. BACKGROUND IN RELATION TO CLAIM AGAINST ASB

ASB's conduct

- 3.1. ASB's conduct at issue in this claim occurred between 6 June 2015 and 18 June 2019 (**ASB Relevant Period**).
- 3.2. During the ASB Relevant Period, ASB provided, in trade, home loans and personal loans to individual debtors in New Zealand (**ASB Borrowers**).
- 3.3. Some of the loans provided to ASB Borrowers were consumer credit contracts to which the CCCFA applies (**ASB Loans**), because:
 - (a) the ASB Borrowers were natural persons;
 - (b) the credit was used, or intended to be used, wholly or predominantly for personal, domestic or household purposes;
 - (c) either:
 - (i) interest charges were or could be payable under the contracts;
 - (ii) credit fees were or could be payable under the contracts; and/or
 - (iii) a security interest was or could be taken under the contract entered into;
 - (d) ASB was a creditor under the contract entered into; and
 - (e) ASB carried on a business providing credit.
- 3.4. The terms of the ASB Loans were recorded in consumer credit contracts and included:

- (a) the applicable interest rates;
 - (b) the terms of the contract; and
 - (c) the amount, number and frequency of repayments.
- 3.5. Some of the ASB Loans were entered into before 6 June 2015 (**ASB Existing Loans**) and some were entered into after June 2016 (**ASB Post Amendment Loans**).
- 3.6. On 6 June 2015, ASB implemented a new standard operating procedure (**SOP**) which allowed staff in ASB branches and in the ASB call centre to make changes to the following terms of ASB Loans when requested to do so by ASB Borrowers in person or by phone:
- (a) repayment dates;
 - (b) repayment amounts; and
 - (c) repayment frequency.
- (SOP Variations)**
- 3.7. On various dates during the ASB Relevant Period, ASB made SOP Variations to various ASB Borrowers' ASB Loans.
- 3.8. For some ASB Borrowers, ASB made SOP Variations to more than one of their ASB Loans.
- 3.9. For some ASB Borrowers, ASB made SOP Variations to one or more of their ASB Loans on more than one occasion.
- 3.10. Pursuant to s 22 of the CCCFA, whenever ASB made a SOP Variation to an ASB Borrower's ASB Loan, it was required to provide that ASB Borrower with Variation Disclosure.
- 3.11. To ensure compliance with s 22, the SOP provided for ASB staff actioning requests from ASB Borrowers for SOP Variations to immediately prepare and issue Variation Disclosure.

3.12. On review, ASB identified that it could not confirm that the SOP was consistently followed and that a number of ASB Borrowers were not provided with Variation Disclosure when ASB made SOP Variations to their ASB Loans during the ASB Relevant Period.

Particulars

- (i) The settlement agreement between ASB and the Commerce Commission dated 23 February 2021 (**ASB Settlement Agreement**) records that upon review, ASB identified that it could not confirm that the SOP was followed consistently and that some customers were not given the required disclosure.
- (ii) The nature, timing and findings of the review referred to in the ASB Settlement Agreement is within the knowledge of ASB and will be further particularised following discovery.

3.13. ASB has previously asserted that by 18 June 2019 it had updated its policies, processes and procedures to ensure that all ASB Borrowers who request SOP Variations receive Variation Disclosure.

Particulars

- (i) The ASB Settlement Agreement records that ASB advised the Commission that it had updated its policies, processes and procedures to ensure that all customers who request a change to their repayment date, amount or frequency receive the required disclosure.
- (ii) The ASB Relevant Period, defined as the “Relevant Period” in the ASB Settlement Agreement, ends on 18 June 2019.
- (iii) Whether and if so when and how ASB in fact updated its policies and procedures as asserted and the efficacy of ASB’s current policies and procedures in this regard are within the knowledge of ASB and will be further particularised following discovery.

3.14. ASB was aware that:

- (a) The effect of s 99(1A) of the CCCFA is that a borrower is not liable for costs of borrowing for any period during which a lender failed to comply with ss 17 or 22.
- (b) A failure to comply with s 99(1A) creates a duty to refund or credit the costs of borrowing to the borrower under s 48.
- (c) Section 99(1A) applies in all situations, even if the lender has corrected their breach of ss 17 or 22 and there has been no material harm to the borrower.

Particulars

- (i) ASB is a member of the NZBA.
- (ii) On 17 May 2016, the NZBA wrote a letter to MBIE expressing its and its members concerns regarding s 99(1A) in which it made the statements in paragraph 3.14(a) to (c) above.
- (iii) ASB's understanding of and views as to the effects of s 99(1A) are within the knowledge of ASB and will be further particularised following discovery.

Commission investigation and settlement

- 3.15. In September 2019, ASB reported its failure to provide all ASB Borrowers who made SOP Variations to their ASB Loans within the ASB Relevant Period with Variation Disclosure to the Commission.
- 3.16. On 23 February 2021, the Commission and ASB agreed to resolve the matter by entering into the ASB Settlement Agreement, pursuant to which:
 - (a) ASB admitted that it breached s 9C(2)(a)(iii) of the CCCFA by failing to ensure that its systems, processes and procedures were sufficient to ensure that Variation Disclosure was consistently provided as required during the ASB Relevant Period. It also admitted that during some of the ASB Relevant Period it failed to have appropriate controls in place to promptly identify this failure and rectify it within a reasonable period.

- (b) ASB agreed to pay \$8,123,394 to “Affected Customers” with:
 - (i) \$68 each to be paid to 26,088 ASB Borrowers (including joint borrowers where applicable) identified by ASB and notified to the Commission as having entered into only ASB Existing Loans and requested and obtained at least one SOP Variation after 6 June 2015 (**Cohort A**);
 - (ii) \$135 each to be paid to 47,032 ASB Borrowers identified by ASB and notified to the Commission as having entered into at least one ASB Post Amendment Loan and requested and obtained at least one SOP Variation (**Cohort B**).

3.17. The rights of Affected Customers against ASB in relation ASB’s failure to provide them with Variation Disclosure in relation to SOP Variations made to their ASB Loans during the ASB Relevant Period were not compromised by the Settlement Agreement.

3.18. Beginning in or around May 2021, ASB sent emails and/or letters to certain Affected Customers:

- (a) recording that they previously requested changes to one or more of their ASB Loans;
- (b) informing them that when ASB actioned their requests, it may not have given them written confirmation of the changes to their ASB Loans as required under the CCCFA;
- (c) stating that ASB has updated its systems and processes to ensure each time an ASB Borrower asks to make a change to their ASB Loan they will receive written confirmation of the details of the change;
- (d) informing them that, in recognition that written confirmation may not have been provided when required, ASB has made a payment to their account.

(ASB Emails)

Particulars

- (i) The identities and number of Affected Customers who received ASB Emails, how those Customers were selected to receive the ASB Emails, when they received them, and the content of the individual ASB Emails are within the knowledge of ASB and will be further particularised following discovery.

3.19. Also beginning in or around May 2021, ASB made payments to certain Affected Customers in accordance with the ASB Settlement Agreement.

Particulars

- (i) The identities, number and proportion of Affected Customers who received payments, how those Customers were selected to receive the payments, when the payments were received, the amount of the payments received by each Customer, and the basis on which the amounts paid to Cohort A and B respectively were calculated are within the knowledge of ASB and will be further particularised following discovery.

3.20. To date, ASB has not provided or purported to provide corrective Variation Disclosure to ASB Borrowers who did not receive Variation Disclosure in relation to SOP Variations made to their ASB Loans during the ASB Relevant Period (**SOP Affected ASB Borrowers**).

3.21. On various dates during the ASB Relevant Period, ASB also made agreed changes other than SOP Variations (**Other Variations**) to various ASB Borrowers' ASB Loans.

3.22. For some ASB Borrowers, ASB made Other Variations to more than one of their ASB Loans.

3.23. For some ASB Borrowers, ASB made Other Variations to one or more of their ASB Loans on more than one occasion.

3.24. Pursuant to s 22 of the CCCFA, whenever ASB made an Other Variation to an ASB Borrower's ASB Loan, it was required to provide that ASB Borrower with Variation Disclosure.

- 3.25. During the ASB Relevant Period, ASB failed to provide some ASB Borrowers with Variation Disclosure when it made Other Variations to their ASB Loans (**OV Affected ASB Borrowers**).
- 3.26. SOP Variations and Other Variations are together **Relevant Variations**.
- 3.27. SOP Affected ASB Borrowers and OV Affected ASB Borrowers are together **Affected ASB Borrowers**.

The ASB representative plaintiffs are Affected ASB Borrowers

First plaintiff

- 3.28. The first plaintiff has been a customer of ASB since approximately 1993.
- 3.29. During the ASB Relevant Period, the first plaintiff had multiple ASB Loans.

Particulars

- (i) On 17 November 2014, the first plaintiff entered into a facility agreement with ASB (**AS Facility Agreement 1**) pursuant to which he obtained the following ASB Existing Loans to finance the purchase of 2/29 Waterloo Street, Auckland:
- (A) 12-3028-0548557-51 – Revolving Credit Facility with a limit of \$60,000 (**AS 51 Revolving Facility**);
 - (B) 12-3028-0548557-96-005 – Term Loan in the amount of \$484,000 (**AS 05 Term Loan**);
 - (C) 12-3028-0548557-96-006 – Term Loan in the amount of \$85,377 (**AS 06 Term Loan**);
 - (D) 12-3028-0548557-96-007 – Term Loan in the amount of \$150,000 (**AS 07 Term Loan**); and
 - (E) 12-3028-0548557-96-008 – Term Loan in the amount of \$116,000 (**AS 08 Term Loan**).

- (ii) On 20 January 2015, the first plaintiff entered into a facility agreement with ASB pursuant to which the limit on the AS 51 Revolving Facility was increased (**AS Facility Agreement 2**).
- (iii) On 18 June 2015, the first plaintiff entered into a facility agreement with ASB (**AS Facility Agreement 3**) pursuant to which he obtained an ASB Post Amendment Loan, namely a term loan in the amount of \$10,000, account number 12-3028-0548557-96-011 (**AS 011 Term Loan**).
- (iv) On 1 March 2016, the first plaintiff entered into a facility agreement with ASB (**ASB Facility Agreement 4**) pursuant to which he obtain an ASB Post Amendment Loan, namely a term loan in the amount of \$112,000, account number 12-3028-0548557-96-013 (**AS 013 Term Loan**).
- (v) The first plaintiff fully repaid his ASB Loans on or around 8 June 2018 when he sold 2/29 Waterloo Street.

3.30. During the ASB Relevant Period, the first plaintiff requested and ASB made Relevant Variations to the first plaintiff's ASB Loans.

Particulars

- (i) On 21 October 2015, in response to a request by email, ASB made Relevant Variations to AS Facility Agreements 1 and 3, namely the application of interest only periods on the AS 06, 07, 08 and 011 Term Loans (**21 October 2015 Variations**).
- (ii) On 27 January 2016, in response to a request by email, ASB made Relevant Variations to AS Facility Agreements 1, 2 and 3, namely (**27 January 2016 Variations**):
 - (A) to fix interest on the AS 08 Term Loan at 4.39% p.a. for two years;
 - (B) to fix interest on the AS 51 Revolving Facility at 4.39% p.a. for two years; and

- (C) an interest only period on all of the first plaintiff's ASB Loans.
- (iii) On 28 December 2016, ASB made Relevant Variations to AS Facility Agreements 1 and 3, namely the application of interest only periods on the AS 06, 07 and 011 Term Loans (**28 December 2016 Variations**).
- (iv) On 11 January 2017, ASB made Relevant Variations to AS Facility Agreements 1, 3 and 4, namely suspending all repayments on the AS 06, 07, 08, 011, and 013 Term Loans (**11 January 2017 Variations**).
- (v) On 19 April 2017, ASB made Relevant Variations to AS Facility Agreements 1 and 3, namely the application of interest only periods to the AS 06, 07 and 011 Term Loans (**19 April 2017 Variations**).
- (vi) On 16 May 2017, ASB made a Relevant Variation to AS Facility Agreement 3, namely the fixing of interest on AS Term Loan 011 at 4.45% p.a. for one year (**16 May 2017 Variation**).
- (vii) On 31 May 2017, ASB made Relevant Variations to AS Facility Agreements 1 and 3, namely the application of interest only periods on the AS 06, 07 and 011 Term Loans (**31 May 2017 Variations**).
- (viii) On 23 August 2017, in response to a request by email, ASB made Relevant Variations to AS Facility Agreements 1 and 3, namely the application of interest only periods on the AS 06, 07 and 011 Term Loans (**23 August 2017 Variations**).

On 7 February 2018, ASB made Relevant Variations to AS Facility Agreements 1, 3 and 4, namely the application of interest only periods on the AS 06, 07, 08, 011, and 013 Term Loans (**7 February 2018 Variations**).

(Together, **AS Variations**)

- 3.31. Each time that ASB made a Relevant Variation to one of the first plaintiff's ASB Loans, ASB was required pursuant to s 22 of the CCCFA to provide the first plaintiff with Variation Disclosure.
- 3.32. ASB did not provide the first plaintiff with Variation Disclosure in accordance with s 22 when it made the AS Variations:
- (a) in relation to the 21 October 2015 Variations, on 19 October 2015, ASB sent an email to the first plaintiff which did not comply with s 22;
 - (b) in relation to the 27 January 2016 Variations, on 27 January 2016 ASB sent an email to the first plaintiff which did not comply with s 22;
 - (c) in relation to the 28 December 2016 Variations, ASB provided the first plaintiff with a loan statement in accordance with its continuing disclosure obligations which did not comply with s 22;
 - (d) in relation to the 11 January 2017 Variations, on 9 January 2017 ASB had the first plaintiff sign a borrower's agreement which did not comply with s 22;
 - (e) in relation to the 19 April 2017 Variations, on 10 April 2017 ASB sent the first plaintiff an email and letter which did not comply with s 22;
 - (f) in relation to the 16 May 2017 Variations, on 16 May 2017 ASB sent the first plaintiff a message via its online application and a letter which did not comply with s 22;
 - (g) in relation to the 31 May 2017 Variations, on 30 May 2017 ASB sent the first plaintiff an email and a letter which did not comply with s 22;
 - (h) in relation to the 23 August Variations, on 23 August 2017 ASB sent the first plaintiff an email and a letter which did not comply with s 22;
and
 - (i) in relation to the 7 February 2018 Variation, on 31 January 2018 ASB sent the first plaintiff a letter which did not comply with s 22.

3.33. On 27 April 2021, the first plaintiff received a credit of \$135.00 to one of his ASB accounts marked "ASB Credit".

3.34. On 28 April 2021, the first plaintiff received an ASB Email from ASB.

Particulars

(i) On 28 April 2021, the first plaintiff received an email from ASB with the subject line and heading "An important message about your account" to his email address anthony@brandstorm.nz.

(ii) The ASB Email stated that:

(A) The first plaintiff previously varied one or more of his loans linked to his ASB Loan.

(B) ASB actioned his requests for changes, but at the time may not have given him written confirmation of the changes as required under the CCCFA.

(C) ASB has updated its systems and processes to ensure that each time he makes a change to his loan he will receive written confirmation of the details of the change.

(D) ASB made a payment to his account of \$135.00 on 27 April 2021 which would appear on his statement as ASB Credit.

(E) There was nothing the first plaintiff needed to do.

3.35. To date, ASB has not provided the first plaintiff with Variation Disclosure in relation to the AS Variations.

Particulars

(i) ASB did not provide the first plaintiff with Variation Disclosure within the timeframes prescribed by s 22.

(ii) The ASB Email received by the first plaintiff on 28 April 2021 did not contain Variation Disclosure.

- (iii) ASB has not subsequently provided or purported to provide the first plaintiff with Variation Disclosure in relation to the AS Variations.

3.36. The first plaintiff has paid all interest and fees in relation to his ASB Loan charged by ASB.

Third plaintiffs

3.37. The third plaintiffs have been customers of ASB since approximately 2001.

3.38. During the ASB Relevant Period, the third plaintiffs had multiple ASB Loans.

Particulars

- (i) On 23 May 2008, the third plaintiffs entered into a facility agreement with ASB (**PD Facility Agreement 1**) pursuant to which they obtain an ASB Existing Loan, namely a term loan in the amount of \$78,000, account number 12-3261-0011051-91-015 (**PD 015 Term Loan**).
- (ii) On 8 August 2013, the third plaintiffs entered into a facility agreement with ASB (**PD Facility Agreement 2**) pursuant to which they obtain an ASB Existing Loan, namely a term loan in the amount of \$96,300, account number 12-3261-0011051-91-017 (**PD 017 Term Loan**).
- (iii) On 30 September 2014, the third plaintiffs entered into a facility agreement with ASB (**PD Facility Agreement 3**) pursuant to which they obtained an ASB Existing Loan, namely a revolving credit facility in the amount of \$100,000, account number 12-3261-0011051-00 (**PD 00 Revolving Facility**).
- (iv) On 11 November 2015, the third plaintiffs entered into a facility agreement with ASB (**PD Facility Agreement 4**) pursuant to which they obtained an ASB Post Amendment Loan, namely a term loan in the amount of \$127,000, account number 12-3261-0011051-91-018 (**PD 018 Term Loan**).

- (v) On 17 May 2017, the third plaintiffs entered into a facility agreement with ASB (**PD Facility Agreement 5**) in relation to the PD 00 Revolving Facility pursuant to which the limit was increased from \$50,000 to \$65,000.

3.39. During the ASB Relevant Period, the third plaintiffs requested and ASB made Relevant Variations to the third plaintiffs' ASB Loans.

Particulars

- (i) On 26 January 2016, ASB made a Relevant Variation to PD Facility Agreement 1, namely to fix interest on the PD 015 Term Loan at 4.49% p.a. for three years (**26 January 2016 Variation**).
- (ii) On 12 November 2017, ASB made a Relevant Variation to PD Facility Agreement 4, namely to fix interest on the PD 018 Term Loan at 4.79% p.a. for one year (**12 November 2017 Variation**).
- (iii) On 29 January 2019, ASB made a Relevant Variation to PD Facility Agreement 1, namely to fix interest on the PD 015 Term Loan at 4.15% for two years (**29 January 2019 Variation**).

(Together, **PD Variations**)

3.40. Each time that ASB made a Relevant Variation to one of the third plaintiffs' ASB Loans, ASB was required pursuant to s 22 of the CCCFA to provide the third plaintiffs with Variation Disclosure.

3.41. ASB did not provide Variation Disclosure in accordance with s 22 when it made the PD Variations:

- (a) In relation to the 26 January 2016 Variation, ASB provided a loan statement in accordance with its continuing disclosure obligations which did not comply with s 22;
- (b) In relation to the 12 November 2017 Variation, on 18 October 2017 ASB sent the third plaintiffs an electronic message and a letter which did not comply with s 22;

(c) In relation to the 29 January 2019 Variation, on 8 January 2019 ASB sent the third plaintiffs an electronic message and a letter which did not comply with s 22.

3.42. On 6 May 2021, the third plaintiffs received a credit of \$68.00 to one of their ASB accounts marked "ASB Credit".

3.43. On 6 May 2021, the third plaintiffs each received an ASB Email from ASB.

Particulars

(i) On 6 May 2021, the third plaintiffs each received an email from ASB with the subject line and heading "An important message about your account" to their email addresses phil@marketingknowledge.co.nz and psdunbar@xtra.nz.

(ii) The ASB Emails stated that:

(A) The third plaintiffs previously varied one or more of their loans linked to their ASB Loan.

(B) ASB actioned their requests for changes, but at the time may not have given them written confirmation of the changes as required under the CCCFA.

(C) ASB has updated its systems and processes to ensure that each time they make a change to their loan they will receive written confirmation of the details of the change.

(D) ASB made a payment to their account of \$68.00 on 27 April 2021 which would appear on their statement as ASB Credit.

(E) There was nothing the third plaintiffs needed to do.

3.44. To date, ASB has not provided the third plaintiffs with Variation Disclosure in relation to the PD Variations.

Particulars

- (i) ASB did not provide the third plaintiffs with Variation Disclosure within the timeframes prescribed by s 22.
- (ii) The ASB Emails received by the third plaintiffs on 6 May 2021 did not contain Variation Disclosure.
- (iii) ASB has not subsequently provided or purported to provide the third plaintiffs with Variation Disclosure in relation to the PD Variations

3.45. The third plaintiffs have paid all interest and fees on their ASB Loans charged by ASB.

Fourth plaintiffs

3.46. The fourth plaintiffs have been customers of ASB since a least 2012.

3.47. During the ASB Relevant Period, the fourth plaintiffs had multiple ASB Loans.

Particulars

- (i) In February 2012, the fourth plaintiffs entered into a facility agreement with ASB (**BB Facility Agreement 1**) pursuant to which they obtained an ASB Existing Loan, namely a term loan in the amount of \$530,448, account number 12-34457-0042183-91-001 (**BB 01 Term Loan**) to fund the purchase of 63 Fourth Avenue, Kingsland, Auckland 1021. Under Facility Agreement 1, Ms Punter was the borrower and Mr Bickerdike was a guarantor.
- (ii) On 12 October 2013, pursuant to an addendum to BB Facility Agreement 1, Mr Bickerdike became ceased to be a guarantor and became a borrower in relation to the BB 01 Term Loan.
- (iii) Also on 12 October 2013, the fourth plaintiffs entered into a facility agreement (**BB Facility Agreement 2**) with ASB pursuant to which they obtained an ASB Existing Loan, namely a revolving credit facility with a limit of \$96,480, account number 12-3048-0505116-00 (**BB 00 Revolving Facility**).

- (iv) On or around 16 October 2013, the suffix for the BB 00 Revolving Facility was changed to 02 (**BB 02 Revolving Facility**) and the account number for the BB 01 Term Loan changed with the suffix adjusted to 02 (**BB 02 Term Loan**).
- (v) On 4 September 2015, the fourth plaintiffs entered into a facility agreement with ASB (**BB Facility Agreement 3**) pursuant to which they obtained an ASB Post Amendment Loan, namely a term loan in the amount of \$580,000, account number 12-3048-0505116-91-03 (**BB 03 Term Loan**) and the credit limit on the BB 02 Revolving Facility was reduced to \$19,582.
- (vi) On 24 August 2017, the fourth plaintiffs entered into a facility agreement with ASB (**BB Facility Agreement 4**), pursuant to which the limit on the 02 Revolving Facility was increased to \$70,000.
- (vii) On 6 November 2018, the fourth plaintiffs entered into a facility agreement with ASB (**BB Facility Agreement 5**) pursuant to which they obtained a new revolving credit facility with a limit of \$70,000, account number 12-3048-0505116-00 (**BB 00 Revolving Facility No 2**) and a new term loan in the amount of \$607,290m account number 12-3048-0505116-91-004 (**BB 04 Term Loan**).
- (viii) On or around 7 November 2018, the suffix for the BB 00 Revolving Facility No 2 was changed to 02 (**BB 02 Revolving Facility No 2**).
- (ix) On 26 February 2019, the fourth plaintiffs entered into a facility agreement with ASB (**BB Facility Agreement 6**) in relation to a new revolving credit facility with a limit of \$89,765, account number 12-3048-0505116-00 (**BB 00 Revolving Facility No 3**).

3.48. During the ASB Relevant Period, the fourth plaintiffs requested and ASB made Relevant Variations to the fourth plaintiffs' ASB Loans.

Particulars

- (i) On 10 August 2015, in response to a request by email, ASB made a Relevant Variation to BB Facility Agreement 2, namely to fix the interest rate on the BB 02 Term Loan at 4.89% p.a. for three years (**10 August 2015 Variation**).
- (ii) On 21 August 2015, ASB made a Relevant Variation to Facility Agreement 2, namely the termination of the interest rate arrangement referred to in (i) above (**21 August 2015 Variation**).
- (iii) On 9 November 2018, in response to a request by email ASB made a Relevant Variation to BB Facility Agreement 5, namely to change the frequency of payments on the 04 Term Loan from fortnightly to monthly (**9 November 2018 Variation**).

(Together, **BB Variations**)

- 3.49. Each time that ASB made a Relevant Variation to one of the fourth plaintiffs' ASB Loans, ASB was required pursuant to s 22 of the CCCFA to provide the fourth plaintiffs with Variation Disclosure.
- 3.50. ASB did not provide the fourth plaintiffs with Variation Disclosure in accordance with s 22 when it made the BB Variations:
 - (a) In relation to the 10 August 2015 Variations, on 10 August 2015 ASV sent an email to one of the fourth plaintiffs which did not comply with s 22;
 - (b) In relation to the 21 August 2015 Variation, ASB provided the fourth plaintiffs with a loan statement in accordance with its continuing disclosure obligations which did not comply with s 22; and
 - (c) In relation to the 9 November 2018 Variation, on 7 and 12 November 2018, ASB sent one of the fourth plaintiffs emails which did not comply with s 22.
- 3.51. On 27 April 2021, the fourth plaintiffs received a credit of \$135.00 to one of the ASB accounts marked "ASB Credit".

3.52. On 28 April 2021, one of the fourth plaintiffs, Mr Bickerdike, received an ASB Email from ASB.

Particulars

- (i) On 28 April 2021, Mr Bickerdike received an email from ASB with the subject line and heading “An important message about your account” to his email address brunobickerdike@gmail.com.
- (ii) The ASB Email stated that:
 - (A) The fourth plaintiffs previously varied one or more of their loans linked to their ASB Loan.
 - (B) ASB actioned their requests for changes, but at the time may not have given them written confirmation of the changes as required under the CCCFA.
 - (C) ASB has updated its systems and processes to ensure that each time they make change to their loan they will receive written confirmation of the details of the change.
 - (D) ASB made a payment to their account of \$135.00 on 27 April 2021 which would appear on their statement as ASB Credit.
 - (E) There was nothing the fourth plaintiffs needed to do.

3.53. To date, ASB has not provided the fourth plaintiffs with Variation Disclosure in relation to the BB Variations.

Particulars

- (i) ASB did not provide the fourth plaintiffs with Variation Disclosure within the timeframes prescribed by s 22.
- (ii) The ASB Email received by Mr Bickerdike on 28 April 2021 did not contain Variation Disclosure.

- (iii) ASB has not subsequently provided or purported to provide the fourth plaintiffs with Variation Disclosure in relation to the BB Variations.

3.54. The fourth plaintiffs paid all interest and fees on their ASB Loans charged by ASB.

Fifth plaintiffs

3.55. The fifth plaintiffs have been customers of ASB since at least 2017.

3.56. During the ASB Relevant Period, the fifth plaintiffs had multiple ASB Loans.

Particulars

- (i) On 17 September 2016, the fifth plaintiffs entered into a facility agreement with ASB (**GM Facility Agreement 1**) pursuant to which they obtained the following ASB Post Amendment Loans:
 - (A) 12-3488-0054769-00 – Revolving Credit Facility with a limit of \$15,000 (**GM 00 Revolving Facility**);
 - (B) 12-3488-0054769-91-001 – Term Loan in the amount of \$200,000 (**GM 01 Term Loan**);
 - (C) 12-3488-0054769-91-002 – Term Loan in the amount of \$25,000 (**GM 02 Term Loan**); and
 - (D) 12-3488-0054769-91-003 – Term Loan in the amount of \$23,000 (**GM 03 Term Loan**).
- (ii) On 9 April 2017, the fifth plaintiffs entered into a facility agreement with ASB (**GM Facility Agreement 2**) pursuant to which they obtained an ASB Post Amendment Loan, namely a term loan in the amount of \$45,000, account number 12-3388-0054769-91-006 (**GM 06 Term Loan**).
- (iii) On 6 August 2017, the fifth plaintiffs entered into a facility agreement with ASB (**GM Facility Agreement 3**) pursuant to

which they obtained an ASB Post Amendment Loan, pursuant to which they renewed the GM 00 Revolving Facility and increased its limit to \$60,000.

3.57. During the ASB Relevant Period, the fifth plaintiffs requested and ASB made Relevant Variations to the fifth plaintiffs' ASB Loans.

Particulars

- (i) On 24 October 2016, in response to a request by email, ASB made Relevant Variations to GM Facility Agreement 1, namely (the **24 October 2016 Variations**)
 - (A) A change in the deduction account for the GM 03 Term Loan;
 - (B) An increase of repayment amounts on the GM 01 Term Loan; and
 - (C) A change to repayments on the GM 02 Term Loan from interest only to interest and principal.
- (ii) On 17 April 2018, in response to a request by email, ASB made a Relevant Variation to GM Facility Agreement 3, reducing the credit limit on the GM 00 Revolving Facility to \$15,000 (**17 April 2018 Variation**).
- (iii) On 23 April 2018, in response to a request by email, ASB made a Relevant Variation to GM Facility Agreement 1, namely to increase the amount of repayments on the GM 01 Term Loan (**23 April 2018 Variation**);
- (iv) On 20 September 2018, ASB made a Relevant Variation to GM Facility Agreement 1, namely to fix interest on the GM 01 Term Loan at 4.09% p.a. for one year (**20 September 2018 Variation**).
- (v) On 24 September 2018, ASB made Relevant Variations to GM Facility Agreements 1 and 3, namely to increase the amount of

repayments on the GM 01 and 03 Term Loans (**24 September 2018 Variations**).

- (vi) On 8 October 2018, in response to a request by email, ASB made Relevant Variations to GM Facility Agreement 1, namely to reduce the amount of repayments on the GM 01 Term Loan (**8 October 2018 Variation**).
- (vii) On 14 January 2019, ASB made a Relevant Variation to GM Facility Agreement 1, namely to increase the amount of repayments on the GM 01 Term Loan (**14 January 2019 Variation**).
- (viii) On 11 March 2019, ASB made a Relevant Variation to GM Facility Agreement 1, namely to increase the amount of repayments on the GM 01 Term Loan (**11 March 2019 Variation**).

(Together, **GM Variations**)

3.58. Each time that ASB made a Relevant Variations one of the fifth plaintiffs' ASB Loans, ASB was required pursuant to s 22 of the CCCFA to provide the fifth plaintiffs with Variation Disclosure.

3.59. ASB did not provide the fifth plaintiffs with Variation Disclosure in accordance with s 22 when it made the GM Variations:

- (a) in relation to the 24 October 2016 Variations, on 18 October 2016 ASB sent one of the fifth plaintiffs an email which did not comply with s 22;
- (b) in relation to the 17 April 2018 Variation, on 17 April 2018 ASB sent one of the fifth plaintiffs an email which did not comply with s 22;
- (c) in relation to the 23 April 2018 Variation, on 12 April 2018, ASB sent one of the fifth plaintiff an email which did not comply with s 22;
- (d) in relation to the 20 September 2018 Variation, on 8 September 2018 ASB sent the fifth plaintiff a letter and electronic message which did not comply with s 22;

- (e) in relation to the 24 September 2018 Variations, on 23 September 2018 ASB sent the fifth plaintiffs two letters and two electronic messages which did not comply with s 22;
 - (f) in relation to the 8 October 2018 Variation, on 1 October ASB sent one of the fifth plaintiffs an email which did not comply with s 22;
 - (g) in relation to the 14 January 2019 Variation, on 12 January 2019 ASB sent the fifth plaintiffs an electronic message and letter which did not comply with s 22; and
 - (h) in relation to the 11 March 2019 Variation, on 10 March 2019 ASB sent the fifth plaintiffs an electronic message and letter which did not comply with s 22.
- 3.60. On 6 May 2021, the fifth plaintiffs received a credit of \$135.00 to one of their ASB accounts marked "ASB Credit".
- 3.61. Also on 6 May 2021, one of the fifth plaintiffs, Mr Marvin, received an ASB Email from ASB.

Particulars

- (i) On 6 May 2021, Mr Marvin received an email from ASB with the subject line and heading "An important message about your account" to his email address glenn.marvin@konnector.co.nz.
- (ii) The ASB Email stated that:
 - (A) The fifth plaintiffs previously varied one or more of their loans linked to their ASB Loan.
 - (B) ASB actioned their requests for changes, but at the time may not have given them written confirmation of the changes as required under the CCCFA.
 - (C) ASB has updated its systems and processes to ensure that each time they make changes to their loan they will receive written confirmation of the details of the change.

(D) ASB made a payment to their account of \$135.00 on 6 May 2021 which would appear on their statement as ASB Credit.

(E) There was nothing the fifth plaintiffs needed to do.

3.62. To date, ASB has not provided the fifth plaintiffs with Variation Disclosure in relation to GM Variations.

Particulars

(i) ASB did not provide the fifth plaintiffs with Variation Disclosure within the timeframes prescribed by s 22.

(ii) The ASB Email received by Mr Marvin on 6 May 2021 did not contain Variation Disclosure.

(iii) ASB has not subsequently provided or purported to provide the fifth plaintiffs with Variation Disclosure in relation to the GM Variations.

3.63. The fifth plaintiffs have paid all interest and fees on their ASB Loans charged by ASB.

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

3.64. The Affected ASB Borrowers form a class of persons having the same interest in this proceeding because they each have not received Variation Disclosure in relation to Relevant Variations made to their ASB Loans during the ASB Relevant Period.

3.65. The ASB representative plaintiffs currently do not know how many Affected ASB Borrowers there are.

Particulars

- (i) The ASB Settlement Agreement records that there are approximately 73,129 Affected Customers, 26,088 in Cohort A and 47,032 in Cohort B.
- (ii) Not all Affected Customers will be SOP Affected ASB Borrowers, as Affected Customers include all ASB Borrowers who had SOP Variations made to their ASB Loans during the ASB Relevant Period without reference to whether or not they received Variation Disclosure.
- (iii) The plaintiffs do not know how many OV Affected ASB Borrowers there are, but some of them will also be Affected Customers.
- (iv) The identities and number of Affected ASB Borrowers is within the knowledge of ASB and will be further particularised following discovery.

4. FIRST CAUSE OF ACTION – BY ANZ PLAINTIFFS AGAINST ANZ – BREACH OF SECTION 22 OF THE CCCFA

The ANZ representative plaintiffs repeat sections 1 and 2 above and say:

- 4.1. Whenever ANZ made agreed changes to the ANZ representative plaintiffs' and other Affected ANZ Borrowers' ANZ Loans, ANZ was required to provide the ANZ representative plaintiffs and the other Affected ANZ Borrowers with Variation Disclosure in accordance with s 22 of the CCCFA.
- 4.2. During the ANZ Relevant Period, ANZ purported to provide the ANZ representative plaintiffs and the other Affected ANZ Borrowers with Variation Disclosure by providing them with Loan Variation Letters.
- 4.3. The Loan Variation Letters received by ANZ representative plaintiffs and by the other Affected ANZ Borrowers contained Incorrect Information.
- 4.4. Because of the Incorrect Information, the Loan Variation Letters received by the ANZ representative plaintiffs and the other Affected ANZ Borrowers did not comply with s 22 and therefore did not constitute Variation Disclosure.

- 4.5. In failing to provide the ANZ representative plaintiffs and other Affected ANZ Borrowers with Variation Disclosure in relation to agreed changes made to their ANZ Loans during the ANZ Relevant Period, ANZ breached s 22 of the CCCFA
- 4.6. To date, ANZ has not provided the ANZ representative plaintiffs or the other Affected ANZ Borrowers with Variation Disclosure in relation to the agreed changes made to their ANZ Loans made during the ANZ Relevant Period.
- 4.7. Pursuant to s 99(1A) 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 a ANZ Post Amendment Loan.
- 4.8. 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.
- 4.9. To the extent that the ANZ representative plaintiffs and the other Affected ANZ Borrowers have paid costs of borrowing on their ANZ Loans in relation to periods during which ANZ was in breach of s 22 (**ANZ Breach Period Payments**), ANZ was not and is not entitled to receive or retain those amounts.
- 4.10. Pursuant to s 48 of the CCCFA, ANZ was and is required to refund the ANZ Breach Period Payments to the ANZ representative plaintiffs and the other Affected ANZ Borrowers, or to credit the Payments against amounts otherwise owing by them, as soon as practicable.
- 4.11. In breach of s 48, ANZ has not fully refunded or credited the ANZ Breach Period Payments to the ANZ representative plaintiffs or the other Affected ANZ Borrowers and in some cases continues to receive them.
- 4.12. The ANZ representative plaintiffs and the other Affected ANZ Borrowers have suffered loss or damage by ANZ's conduct in failing to fully refund or credit the ANZ Breach Period Payments in breach of s 48.

Claim for relief

The ANZ representative plaintiffs seek the following relief against ANZ:

- (a) A declaration that the Loan Variation Letters received by them and by the other Affected ANZ Borrowers during the ANZ Relevant Period did not comply with s 22 of the CCCFA;
- (b) a declaration that ANZ breached s 48 by failing to fully refund or credit the ANZ Breach Period Payments to the ANZ representative plaintiffs and to the other Affected ANZ Borrowers;
- (c) a declaration that where a breach of s 22 is established, triggering ss 99(1A) and/or 99(1) and 48, and a defendant has not complied in full with s 48, a plaintiff is entitled to orders under s 94(1)(a) requiring the defendant to refund or credit all extant costs of borrowing received by it during the period it was in breach of s 22 (except to the extent that such costs of borrowing have already been refunded or credited) without any adjustment or discretion being applied;
- (d) orders pursuant to ss 93(a) and 94(1)(a) directing ANZ to fully refund or credit the ANZ Breach Period Payments to the ANZ representative plaintiffs and to other Affected ANZ Borrowers;
- (e) to the extent that the court declines to make the orders in (d) above, orders under s 90 of the CCCFA directing ANZ to pay the ANZ representative plaintiffs and the other Affected ANZ Borrowers statutory damages under ss 88(1)(b) and 89(1)(d);
- (f) interest under s 10 of the Interest on Money Claims Act 2016;
- (g) costs;
- (h) such other relief the Court sees fit.

5. SECOND CAUSE OF ACTION - BY THE ASB REPRESENTATIVE PLAINTIFFS AGAINST ASB – BREACH OF SECTION 22 OF THE CCCFA

The ASB representative plaintiffs repeat sections 1 and 3 above and say:

- 5.1. Whenever ASB made Relevant Variations to the ASB representative plaintiffs' and the other Affected ASB Borrowers' ASB Loans, ASB was required to provide the ASB representative plaintiffs and the other Affected ASB Borrowers with Variation Disclosure in accordance with s 22 of the CCCFA.
- 5.2. 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 their ASB Loans during the ASB Relevant Period.
- 5.3. To date, ASB has not provided the ASB representative plaintiffs or the other Affected ASB Borrowers with Variation Disclosure in relation to the Relevant Variations made to their ASB Loans during the ASB Relevant Period.
- 5.4. Pursuant to s 99(1A) of the CCCFA, the ASB representative plaintiffs and the other Affected ASB Borrowers were and are not liable for costs of borrowing relating to any periods during which ASB was or is in breach of s 22 in relation to a Relevant Variation to an ASB Post Amendment Loan
- 5.5. 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 any periods during which ASB was or is in breach of s 22 in relation to a Relevant Variation to an ASB Existing Loan.
- 5.6. To the extent that the ASB representative plaintiffs and the other Affected ASB Borrowers paid costs of borrowing in relation to periods during which ASB was in breach of s 22 (**ASB Breach Period Payments**), ASB was and is not entitled to receive or retain those amounts.
- 5.7. Pursuant to s 48 of the CCCFA, ASB was and is required to refund the ASB Breach Period Payments to the ASB representative plaintiffs and the other Affected ASB Borrowers, or to credit them against amounts otherwise owing by them.
- 5.8. In breach of s 48, ASB has not fully refunded or credited the ASB Breach Period Payments to the ASB representative plaintiffs or the other Affected ASB Borrowers.

5.9. The ASB representative plaintiffs and the other Affected ASB Borrowers have suffered loss or damage by ASB's conduct in failing to fully refund or credit the ASB Breach Period Payments in breach of s 48.

Claim for relief

5.10. The ASB representative plaintiffs seeks against ASB:

- (a) a declaration that ASB breached s 22 of the CCCFA by failing to provide the ASB representative plaintiffs and the other Affected ASB Borrowers with Variation Disclosure in relation to Relevant Variations made to their ASB Loans during the ASB Relevant Period;
- (b) a declaration that ASB breached s 48 by failing to fully refund or credit the ASB Breach Period Payments to the ASB representative plaintiffs and the other Affected ASB Borrowers;
- (c) a declaration that where a breach of s 22 is established, triggering ss 99(1A) and/or 99(1) and 48, and a defendant has not complied in full with s 48, a plaintiff is entitled to orders under s 94(1)(a) requiring the defendant to refund or credit all extant costs of borrowing received by it during the period it was in breach of s 22 (except to the extent that such costs of borrowing have already been refunded or credited) without any adjustment or discretion being applied;
- (d) orders pursuant to ss 93(a) and 94(1)(a) directing ASB to fully refund or credit the ASB Breach Period Payments to the ASB representative plaintiffs and other Affected ASB Borrowers;
- (e) to the extent that the court declines to make the orders in (d) above, orders under s 90 of the CCCFA directing ASB to pay the ASB representative plaintiffs and the other Affected ASB Borrowers statutory damages under ss 88(1)(b) and 89(1)(d);
- (f) interest under s 10 of the Interest on Money Claims Act 2016;
- (g) costs;
- (h) such other relief the Court sees fit.

This statement of claim is filed by **SCOTT EDWARD RUSSELL**, solicitor for the plaintiffs, of the firm Russell Legal. The address for service of the plaintiffs is at the offices of Russell Legal, Level 1, 40 Eden Crescent, Auckland 1010.

Documents for service on the plaintiffs may be emailed to the solicitor for the plaintiffs at scott.russell@russelllegal.co.nz.