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

Under the Credit Contracts and Consumer Finance Act 2003, and rule 4.24 of the High Court Rules

Between

Anthony Paul Simons

First Plaintiff

And others

and

ANZ Bank New Zealand Limited

First Defendant

And others

(Abbreviated list of parties)

Notice of opposition to application for leave to bring proceedings as representative actions and for ancillary orders and summary judgment

1 April 2022

Judicial Officer: Venning J

BELL GULLY

BARRISTERS AND SOLICITORS

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Full list of parties

Between

Anthony Paul Simons

First Plaintiff

and

Andrew John Beavan and Mei Lim

Second Plaintiffs

and

Philip Charles Dunbar and Sheryn Valeri Dunbar

Third Plaintiffs

and

Bruno Robert Bickerdike and Emma Renae Punter

Fourth Plaintiffs

and

Glenn Jonathan Marvin and Anna Mary Cuthbert

Fifth Plaintiffs

and

ANZ Bank New Zealand Limited

First Defendant

and

ASB Bank Limited

Second Defendant

To: The Registrar of the High Court at Auckland

And to: The plaintiffs

This document notifies you that:

1. The first defendant (**ANZ**) intends to oppose the amended interlocutory application by the second plaintiffs dated 28 January 2022 (**Application**) for orders:

    (a) granting leave to bring the proceeding against ANZ as an "opt out" representative action on behalf of the class of persons defined and on the terms set out in Schedule 1 of the Application or on such terms as the Court thinks fit (**Opt Out Representative Orders**);

    (b) that the second plaintiffs' costs in bringing the proceeding, including the costs and fees payable to one of the litigation funders, will be met from sums paid by ANZ under any settlement or judgment (**Common Fund Orders**);

    (c) that the second plaintiffs and ANZ send particular communications to potential class members on the terms set out in Schedule 5 of the Application (**Notification Orders**);

    (d) entering summary judgment in favour of the second plaintiffs against ANZ on the first cause of action in the amended statement of claim dated 28 January 2022; and

    (e) as to costs.

2. The grounds on which ANZ opposes the making of the orders are set out below.

Opt Out Representative Orders

No common interest

3. The proposed class members do not all have the "same interest" for the purposes of rule 4.24.

4. None of the seven issues that are said by the plaintiffs to be common issues are in fact common issues:[1]

   (a) Issue 1: Whether ANZ breached section 22 of the CCCFA by providing the class members with Loan Variation Letters containing Incorrect Information.[2]

   First, the plaintiffs' framing of this issue assumes that it can be dealt with on a class-wide basis by asking a single question: did providing "Incorrect Information" to the proposed class result in a breach of section 22? However, determining whether ANZ breached section 22 (which is denied) gives rise to at least two individualised issues:

   (i) what information did ANZ have to provide to the particular customer under section 22 given the particular change that the customer agreed with ANZ (i.e., what are the "full particulars of the change" for each customer)?

   (ii) did the information that ANZ in fact provided to the particular customer comply with the requisite standard under section 22 for that customer?

1 As outlined in the Application at Schedule 7, paragraph 12.

2 Application at Schedule 7, paragraph 12(a). "Incorrect Information" is defined in a different Schedule of the Application, and in the amended statement of claim dated 28 January 2022, to mean "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".

These issues are not common and cannot be determined on a class-wide basis. Different proposed class members had different kinds of loans, and agreed different changes to those different loans, and were therefore required by section 22 to receive different disclosure.

Moreover, it is not possible to determine whether ANZ breached section 22 on a class-wide basis even on a broad interpretation of section 22. Even if the Court was to decide that section 22 required ANZ to provide each customer with the same categories of information following an agreed change (regardless of the details of the change), the coding error did not affect all of ANZ's loan variation letters in the same way. So, for example, the amount of the new regular payment following the change, which is one of the categories of "incorrect information" alleged by the second plaintiffs, was only incorrect for some customers (and only in a minor way). The category of information that was affected by the coding error differed according to the type and characteristics of the loan, the nature of the change, and a range of other factors.

Second, ANZ provided disclosure of agreed changes to consumer credit contracts entered into prior to 6 June 2015 even where it was not required to do so under section 22 (for example because the agreed change reduced the borrower's obligations). So, the test for whether section 22 is engaged differs depending on when the borrower entered into the loan agreement. The question whether ANZ breached section 22 is therefore not a common issue for all borrowers.

Third, even if ANZ breached section 22 (which is denied), ANZ subsequently made other disclosures that had the effect of correcting or superseding any incorrect previous disclosure. These subsequent disclosures were different because they were addressing different earlier disclosures or because they addressed different agreed changes.

(b) Issue 2: Whether, in light of section 99(1A) of the CCCFA, ANZ was entitled to receive "ANZ Breach Period Payments"[3] in relation to ANZ Loans entered into after 5 June 2015 from the ANZ class members.[4]

First, section 99(1A) only applies if there has been a failure to comply with section 22 (which is denied). Its application is therefore dependent on issue 1 which, as noted above, is not a common issue. It follows that the application of section 99(1A) cannot be a common issue either.

Second, this issue expressly applies to only part of the proposed class: those who entered into loans after 5 June 2015. The proposed class seeks to include all persons who "had a home or personal loan with ANZ between 30 May 2015 and 28 May 2016",[5] which would encompass contracts entered into before 6 June 2015, and from 6 June 2015 onwards.

This issue itself recognises that there are differing interests within the proposed class, arising from the date on which the proposed class members entered into their loans. The difference arises because section 99(1A) of the CCCFA does not apply to consumer credit contracts entered into prior to 6 June 2015. Issue 2 is accordingly not a common issue for these two different groups of borrowers, with one group (post-6 June 2015 contracts) arguably entitled to rely on section 99(1A), while the other group (pre-6 June 2015 contracts) are not.

Third, even if section 99(1A) applied, it only applies for a period in which there has been a failure to comply with section 22. As already noted, ANZ issued subsequent disclosures that had the effect of correcting or superseding any prior breach of section 22.

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3 This is defined by the plaintiffs to mean credit fees, default fees or interest charges in relation to the period during which it is alleged that "ANZ failed and is failing to provide them with Variation Disclosure".

4 Application at Schedule 7, paragraph 12(b).

5 Application at Schedule 1, paragraph 1(a).

Those subsequent disclosures to purported class members were made on different terms at different times.

(c) Issue 3: Whether, in light of section 99(1) of the CCCFA, ANZ was entitled to receive ANZ Breach Period Payments in relation to ANZ Loans entered into before 6 June 2015 from the ANZ class members.[6]

This issue is the corollary to issue 2.

First, like issue 2, it only applies if there has been a failure to comply with section 22 (which is denied). Its application is therefore dependent on issue 1 which, as noted above, is not a common issue. The application of section 99(1) is not a common issue either.

Second, again like issue 2, this issue is expressly limited to a subset of the proposed class: borrowers who entered into consumer credit contracts with ANZ prior to 6 June 2015. The second plaintiffs have implicitly accepted that issues 2 and 3 are not common issues.

Third, different versions of section 99(1) apply depending on whether the contract was entered into prior to 6 June 2015, or from that date onwards. Subsections 99(1)(ba) and 99(1)(bb), which refer to costs of borrowing, apply only to contracts entered into from 6 June 2015 onwards. The application of section 99(1) is therefore not a common issue for borrowers under contracts entered into before 6 June 2015, and borrowers under contracts entered into from 6 June 2015 onwards.

6 Application at Schedule 7, paragraph 12(c). The plaintiffs have worded this issue as applying to loans entered into "before 5 June 2015", but the relevant date is 6 June 2015.

(d) Issue 4: Whether ANZ breached section 48 of the CCCFA by failing to fully refund or credit ANZ Breach Period Payments to the ANZ class members.[7]

The second plaintiffs rely on sections 99(1) and 99(1A) as giving rise to a right to a refund under section 48.[8] However, as noted above, the questions whether sections 99(1) and 99(1A) apply are not a common issue. It follows that any entitlement to a refund under section 48 is not a common issue either.

In addition, the proposed class would include some borrowers who had loans during the Relevant Period (which the second plaintiffs define as between 30 May 2015 and 28 May 2016) but did not pay costs of borrowing to ANZ (e.g., because the loan was closed early, or was closed before the change was made). These customers could not be entitled to a refund under section 48; there would be nothing to refund. ANZ could not on any view have breached section 48 in relation to these customers. This is an additional reason why issue 4 is not a common issue.

(e) Issue 5: Whether ANZ is required to fully refund or credit the ANZ Breach Period Payments to the ANZ class members and the Court must make orders pursuant to sections 93(a) and 94(1)(a) of the CCCFA requiring it to do so.[9]

First, this issue again depends on the resolution of the preceding issues. The second plaintiffs seek orders under sections 93 and 94 on the basis of the alleged breaches of sections 22 and 48, and in reliance on sections 99(1) and 99(1A). The issues relating to those sections are not common issues, so issue 5 is not a common issue either.

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7 Application at Schedule 7, paragraph 12(d).

8 Amended Statement of Claim at paragraphs 4.7-4.10.

9 Application at Schedule 7, paragraph 12(e).

Second, orders under sections 93 and 94 could only be made if class members suffered "loss or damage". There was no loss or damage in this case. Some proposed class members did not pay any costs of borrowing. The other proposed class members are in fact in a better position than they otherwise would be had the error not occurred. That is because ANZ has made remediation payments which have resulted in proposed class members paying less interest than they agreed to pay under their contracts with ANZ.

Third, even if the class members had suffered loss or damage, the framing of the issue mischaracterises how sections 93 and 94 are to be applied (if at all). In short, even if a breach of sections 22 and 48 has occurred (which is denied), ANZ would not be "required" to make refunds or credits, and the Court would not be forced to make any orders. Rather, the Court would have a discretion to make orders under sections 93 and 94 (it "*may*" make orders). The question whether orders for payment should be made, and the quantum of any such payment, are necessarily individual issues requiring individual proof. This is an additional reason that issue 5 is not a common issue.

Fourth, section 95A of the CCCFA allows the Court to extinguish or reduce the amount payable due to a failure to make variation disclosure under section 22, if it considers that it is just and equitable to do so. If the section applies, that may require individualised assessment.

Fifth, section 95A applies only to costs of borrowing after 20 December 2019. ANZ does not accept that the second plaintiffs would be entitled to any costs of borrowing after that date because there was no breach of section 22, and/or any breach was corrected or superseded well before 20 December 2019. However, the potential application of section 95A cannot be tested in the proceeding because the second plaintiffs closed their loans on 3 September 2019 and they would not have incurred any costs of borrowing to which section 95A could apply,

but other members of the proposed class allegedly have done, i.e., the Court would have a discretion in relation to some members of the class but not the second plaintiffs, thereby undermining any commonality between them.

(f) Issue 6: To the extent the Court does not make the orders referred to in issue 5 above, whether the Court must make orders requiring ANZ to pay the ANZ class members statutory damages under sections 88, 89, and 90 of the CCCFA and the quantum of those damages if so.[10]

This issue is not a common issue. As with issue 5, the Court has a discretion whether to order statutory damages as being payable under section 90(1) of the CCCFA (it "*may*" make orders).

Assessing the quantum of any statutory damages payable would, among other things, require proof of the borrower's individual loan terms for the purposes of section 89(1)(d) of the CCCFA, and consideration of the individual payments that ANZ has already made to class members.

There are different caps on statutory damages for agreements entered into before 6 June 2015, and agreements entered into from that date, under section 89(1)(d) of the CCCFA. As noted above, the proposed class would include borrowers under agreements in each period.

The Court has a discretion under section 91 to reduce or extinguish any amount otherwise payable in statutory damages "if the Court considers that it is just and equitable" to do so, on terms and conditions that the Court thinks fit. This requires an individualised assessment having regard to the factors set out in section 92, which include "the extent to which any person has been prejudiced by the breach or breaches".

10 Application at Schedule 7, paragraph 12(f).

(g) Issue 7: The application of relevant limitation periods, if any.[11]

This is not a common issue because different limitation periods apply to different groups of borrowers.

In relation to contracts entered into before 6 June 2015, applications for orders under section 93 and 94 or statutory damages under section 90 had to be made "within 3 years from the time when the matter giving rise to the application occurred". The second plaintiffs allege that incorrect loan variation letters were sent during the "Relevant Period", which ended on 28 May 2016.[12] Claims based on those letters were, on any view, time-barred when the second plaintiffs filed their claim on 25 June 2021, and when they amended it on 28 January 2022.

Claims in relation to contracts from 6 June 2015 onwards had to have been brought within 3 years after the date on which the loss or damage, or matter giving rise to the breach, was discovered or ought reasonably to have been discovered.[13] The question when each of the class members ought reasonably to have discovered the alleged "loss or damage", or the matter giving rise to the breach, is a question that can only be addressed on an individual basis. It is not a common issue.

The second plaintiffs do not adequately represent the proposed class

5. The second plaintiffs are not in a position to represent the proposed class fairly and adequately, and the facts of the second plaintiffs' claim do not allow all of the relevant legal issues, including in relation to ANZ's defences, to be tested. In summary, and as outlined above, different provisions of the CCCFA apply differently depending on whether the relevant contract was entered into before 6 June 2015.

11 Application at Schedule 7, clause 12(g).

12 Amended Statement of Claim at paragraphs 2.1 and 2.10-2.17.

13 Sections 95(2) and 90(3) of the CCCFA. Note that for loans entered into prior to 6 June 2015, a claim under section 93 must be made within 3 years from the time when the matter giving rise to the application occurred (by virtue of the transitional provisions in Schedule 1AA of the CCCFA). However, as above, section 99(1A) of the CCCFA does not in any event apply to consumer credit contracts entered into prior to 6 June 2015.

The second plaintiffs entered into a single loan after that date. The facts of their claim do not, therefore, allow the many such issues to be tested under the previous versions of the CCCFA.

Class definition is circular and not capable of clear definition

6. The proposed class is defined by reference to an issue that is in dispute (whether and to what extent class members received "incorrect information relating to the amount, timing and number of payments due on the Loan"). This means that it cannot be determined who is represented in the class unless and until there is a judgment on liability.

7. The proposed class definition fails to exclude people who would have a conflict of interest or who would otherwise be inappropriate to be included within the class due to their relationship with the proceeding and/or ANZ (e.g., lawyers acting for the parties, judges who may determine issues in the proceeding).

Orders would create claims and preclude defences

8. Granting the Opt Out Representative Orders would give class members an alleged claim they would not otherwise have had, and also deprive ANZ of defences it could have raised if separate proceedings were brought by different class members. As noted above:

   (a) Section 99(1A) of the CCCFA does not apply to consumer credit contracts entered into prior to 6 June 2015. Although the second plaintiffs entered into their loan after 6 June 2015, the proposed class also includes borrowers who entered into contracts with ANZ before that date. Any order permitting the second plaintiffs to represent all borrowers would give pre-6 June 2015 borrowers an alleged claim under section 99(1A) that they would not otherwise have had. As a corollary, ANZ would be prevented from raising a defence against pre-6 June 2015 borrowers that section 99(1A) does not apply to their contracts.

   (b) The second plaintiffs' claims in relation to sections 48, 93, and 94 all depend on the application of sections 99(1) and 99(1A). For

the reasons above, granting the Opt Out Representative Orders would confer alleged claims under these sections on, and prevent ANZ from raising defences in relation to, the borrowers under pre-6 June 2015 contracts.

(c) The second plaintiffs paid costs of borrowing during the Relevant Period. ANZ would be prevented from raising lack of payment as a defence against those in the class who did not pay costs of borrowing during the Relevant Period.

(d) The second plaintiffs did not incur any costs of borrowing to which section 95A applies. ANZ would be prevented from raising a defence under that section against class members who did incur costs of borrowing to which section 95A applies.

(e) A different limitation period applies to the second plaintiffs (three years based on reasonable discovery) from that which applies to those who entered into contracts prior to 6 June 2015 (three years from the matter giving rise to the application). ANZ would be prevented from raising the previously applicable limitation defence against pre-6 June 2015 borrowers because the second plaintiffs purport to represent all borrowers as one class.

Merits are weak

9. The claim is weak. ANZ did not breach section 22 of the CCCFA. That section only requires disclosure of the "full particulars of the change". The change agreed by the second plaintiffs was to change from a floating interest rate to a fixed interest rate of 4.49% per annum for a three year period (Amended Statement of Claim at paragraph 2.36). ANZ fully and accurately disclosed that agreed change to the second plaintiffs. Any errors in the disclosure were not errors in information required under section 22 and were *de minimis*.

10. In addition, sections 99(1) and 99(1A) could, at most, only prevent enforcement. They are within a part of the CCCFA entitled "Prohibited enforcement", and the heading of section 99 is "Enforcement of

consumer credit contract prohibited". Sections 99(1)(a) and (ba) state the creditor cannot "enforce the contract" or "enforce any right in relation to the costs of borrowing", and section 99(1A) states that the debtor is not "liable for the costs of borrowing" during a period of non-compliance with section 22. Neither section creates an obligation to repay. Moreover, under section 99(1), the costs of borrowing become enforceable again after disclosure is made, including costs of borrowing accrued prior to the corrective disclosure.

11. Even if there had been a breach of section 22, the pleaded claims are untenable in relation to certain subsets of the proposed class. For example, as noted:

(a) Any claim based on section 99(1A) for contracts entered into pre-6 June 2015 must fail, because the section does not apply to those contracts.

(b) Claims in relation to pre-6 June 2015 contracts are also time-barred.

(c) Any claim to a refund of costs of borrowing under section 48 must fail for borrowers who have not paid costs of borrowing.

(d) Orders under section 94 can only be made if a person has "suffered loss or damage". The class members did not suffer loss or damage. In fact, they are better off than the position they contracted for – borrowers ended up paying less interest than they contracted to pay. The second plaintiffs now seek an additional windfall: to recover significantly more interest and other costs of borrowing that they had contracted to pay.

(e) Relatedly, section 93 provides that a person must have "suffered loss or damage *by conduct of* any creditor". ANZ's conduct (being the alleged breach of section 22) has not caused the second plaintiffs any loss in the sense required by that section.

12. In any event, even if sections 48 and 99(1) or 99(1A) required repayment, they would only require repayment of any additional costs

of borrowing referable to any breach of section 22, not all costs of borrowing. In the case of the second plaintiffs, the agreed change was to reduce their interest rate. Given that the effect of the agreed change was to reduce the second plaintiffs' costs of borrowing, there would not be any costs of borrowing to repay.

Funding arrangements are unfair, oppressive, and/or misleading

13. The funding arrangements are unfair, oppressive, and/or misleading, particularly in circumstances where they will (if the Opt Out Representative Orders are granted) affect the conduct of a claim on behalf of consumers who have not agreed to them:

(a) CASL Management Pty Ltd is said to be a co-funder of the proceeding, but has no obligations to the second plaintiffs under the Deed for Provision of Services in Respect of Litigation (ANZ Litigation) (**Funding Deed**), whether in relation to providing funding or otherwise. It is only the shell company LPF Litigation Funding No.33 Ltd (**LPF**) that has obligations under the Funding Deed.

(b) If the second plaintiffs' claim succeeds, LPF would receive double recovery of any amount of security for costs. That is because the "Project Costs" paid to LPF following settlement or judgment include the face value of any security for costs, despite the fact that any security provided would be separately repaid to LPF.

(c) The termination rights under the Funding Deed are unbalanced and prejudice the second plaintiffs:

(i) LPF can terminate the Funding Deed at any time, if it considers that the costs and risk of funding the claim are "no longer acceptable", in its sole discretion (clause 12.1). LPF can also terminate the Funding Deed if a court does not make an opt out order, common fund order, or fund equalisation order (clause 12.2(a)(i) and (ii)). In the event of cancellation under either option above, LPF is still

entitled to be repaid its Project Costs out of any Resolution Sum, LPF is not liable for any Adverse Costs Order made after termination, and the Plaintiffs must replace the security for costs provided by LPF (clause 12.1(b)). In other words, if LPF stops funding the claim, LPF continues to take the benefit, but not the burden leading up to, any resolution of the claim, or any similar claim, in the second plaintiffs' favour.

(ii) In contrast, the second plaintiffs can only terminate the Funding Deed for a material breach by LPF that remains un-remedied within 20 working days (clause 12.3), or if LPF consents (clause 12.3(c)). In either case, LPF still remains entitled to be repaid the Project Costs – that is, even though it may have committed a material breach of the Funding Deed.

(d) The Funding Deed contains extraordinary restraints on the second plaintiffs' ability to make material decisions in relation to the proceeding:

(i) Legal advice: any "legal and other advice" that the second plaintiffs receive in relation to the claim, Funding Deed, or security documents must be provided to LPF (clause 3.1(c)). The effect is that they cannot take full and frank, independent advice on their rights and obligations.

(ii) Lawyers: LPF may require the second plaintiffs to terminate the appointment of any lawyer if LPF "has concerns" about (among other things) the lawyer's performance or fees, or their conduct generally (clause 3.5(a)(ii)), which is a broadly worded right to dictate the second plaintiffs' legal counsel. LPF may require the representative plaintiff to replace a lawyer with a lawyer nominated by LPF (if the representative plaintiff withholds approval, that is deemed to be a dispute under the agreement) (clause 3.5(a)(iii)).

(iii) No orders adverse to LPF: the second plaintiffs cannot apply for any order "that may detrimentally affect LPF's rights under this Deed or its ability to enforce this Deed" without first obtaining written consent from LPF, which is at LPF's sole discretion (clause 10.7). This would be an extraordinary limit on the second plaintiffs' rights if a dispute arises under the Funding Deed – the second plaintiffs would be prevented from pursuing legal action against LPF without LPF's consent.

(e) LPF has "sole and absolute discretion" in relation to any consent, approval, or agreement LPF is requested to give under the Funding Deed (clause 17.6(a)). In contrast, the second plaintiffs cannot unreasonably withhold or delay any consent to be given to LPF (clause 17.6(b)).

(f) The relationship between LPF and CASL is governed by an agreement to which the second plaintiffs are not a party (**Litigation Co-Funding Agreement**). They therefore have no contractual rights against CASL under that Agreement (or at all). That is despite the fact that, through LPF, CASL has a material degree of control over the proceeding. LPF has to obtain CASL's consent in relation to "material case management decisions", engagement of lawyers, and any settlement or discontinuance (clause 5.2).

(g) In the event of a dispute between LPF and CASL there is a dispute resolution process that culminates in expert determination (clause 5). The expert's determination is binding on LPF and CASL (clause 5.4(d)). The process applies where LPF and CASL have a dispute in relation to whether the proceeding should be settled or not, or discontinued or not. In other words, in the event of a dispute over a matter that goes to the heart of the second plaintiffs' rights in relation to the proceeding, the second plaintiffs have no say – they have no right to participate in the process.

(h) CASL or LPF's rights and obligations under the Litigation Co-Funding Agreement can be assigned with consent of the other, which must not be unreasonably withheld (clause 14). Again, the second plaintiffs have no right to control who is ultimately providing (some or all of the) funding for this proceeding.

(i) The memorandum of advice provided to the second plaintiffs on the Funding Deed did not mention, or provide any independent advice in relation to, the Litigation Co-Funding Agreement.

Alternatively, opt in orders would be more appropriate

14. Even if representative orders were to be granted, there are good reasons for those orders not to be made on an opt out basis:

(a) The alleged quantum of the claim for each class member (i.e., the costs of borrowing for a period of years) is sufficiently large to make it economic for claims to be brought individually, or at least for class members to be sufficiently incentivised to opt in.

(b) This proceeding is brought against two defendants (ANZ and ASB), and involves two entirely separate proposed classes with alleged claims against the different defendants, with no factual overlap between those claims. An opt in procedure would likely result in a class size that is more manageable for the Court and the parties.

(c) Class members will in any event need to opt in to address the individual issues identified above and/or to register to facilitate any settlement discussions in the future.

(d) The proposed class includes foreign residents. The Court should not assume jurisdiction over foreign residents unless they actively opt into the proceeding.

Common Fund Orders

15. The application for Common Fund Orders is only relevant if the Court grants the second plaintiffs' application for Opt Out Representative Orders. For the reasons already set out above, that application should be declined.

16. The Court does not have jurisdiction to grant a Common Fund Order. Although the Court has a supervisory jurisdiction to ensure that these proceedings are managed efficiently, that ought not to extend to issuing a Common Fund Order to improve the economics of the claim for LPF.

17. There is no legal basis on which the Common Fund Orders could be made:

    (a) LPF has no contractual or equitable right, or claim, to receive any proceeds of the proceeding other than under the Funding Deed, and a Common Fund Order would be contrary to the fundamental common law doctrine of privity of contract.

    (b) A Common Fund Order would effectively take money owing (on the plaintiffs' case) away from parties who are not before the Court. Those parties would have no rights against LPF (and no class member has any rights against CASL).

18. The funding arrangements in this case are unfair, oppressive, and/or misleading, for the reasons given above. They should not be imposed upon members of the proposed class unless, at least, those members have actively agreed to them, having been properly and independently advised.

19. Even if the Court did have jurisdiction to make a Common Fund Order, or any similar order such as a Fund Equalisation Order, the Court would have a discretion whether or not to grant the Order. It would be premature to exercise that discretion now because:

    (a) The information necessary to exercise the Court's discretion would only be known at the conclusion of the proceeding (final

quantum hearing or settlement agreed in principle), when the Court has information as to (for example) the conduct of the litigation, any amount payable by ANZ, the costs expended by LPF, the extent of the burden the funding arrangements will place on class members, and whether some other mechanism, such as a Fund Equalisation Order, might be available, less onerous on class members, and more appropriate in the circumstances.

(b) Making an order now would not, as the second plaintiffs suggest,[14] put members of the proposed class in any better position to decide whether or not to opt out. A Common Fund Order would not provide class members with any greater certainty about how much LPF might take out of any recovery, because the formula for LPF's fee is complex and its application is based on unknown variables including what "Project Costs" will be incurred and what will ultimately be recovered.

(c) LPF and the second plaintiffs implicitly acknowledge that it is not appropriate to make a Common Fund Order at this stage. The order they seek reserves to the Court a discretion to change the amount that LPF takes from class members to an amount that "the Court considers reasonable at the conclusion of the proceedings".[15] Making such an open-ended order now would not create any greater certainty than determining whether to make an order at the end of the proceeding.

Notification Orders

20. The terms of any Notification Orders can only properly be determined after a decision has been made on the other Orders (e.g., whether representative orders are granted at all, whether any representative orders are opt in or opt out, the definition of any class, and whether the materials need to explain the Common Fund Orders or not).

14 Application at paragraph 4(i)(i).
15 Application at paragraph 4(f) and at Schedule 3, paragraph 1(b).

21. Even if the Court is prepared to make some form of notification order now:

(a) It would be inappropriate for ANZ to notify customers through social media channels, which are, for a number of reasons (including practical constraints and security concerns) not used for that nature of communication.

(b) The Notification Orders would require ANZ to send communications to its customers containing links to the plaintiffs' website. ANZ has an established practice of not sending links to its customers, for reasons of internet security. Departing from that practice would be likely to cause confusion and risk to ANZ customers.

(c) ANZ's records of contact details for its customers are more accurate as regards postal addresses, such that mailed letters would be more appropriate, effective and safer to notify customers.

(d) It is not a simple, quick, or cheap task for ANZ to contact every proposed class member. ANZ does not have contact details for the whole proposed class because some of the proposed class members are no longer customers. ANZ had to carry out significant work at its own cost in order to track down details for customers for the remediation it has already provided, and that was approximately three years ago.

(e) The notification materials provided by the second plaintiffs are unclear and could not be sent in their current form.

(f) The notification materials fail properly to explain the litigation funding arrangements, including LPF's broad and unconstrained rights to terminate the Funding Deed.

(g) The Notification Orders would require ANZ to send notification to "all ANZ class members". It is likely that not all individuals within that class (as defined) will have consumer credit contracts for the

purposes of the CCCFA, and sending such communications to individuals who do not have eligible contracts may be misleading.

(h) There are several placeholders and procedural matters in the Notification Orders that would need to be the subject of consultation between the parties and then determination by the Court if they cannot be agreed – particularly given the practical difficulties ANZ would have in complying with the Notification Orders as drafted.

22. In the event that the Notification Orders are made, ANZ ought not to bear the costs of effectively book-building a claim against itself. The plaintiffs should pay the third party disbursements and direct expenses and ANZ should be reimbursed for any reasonable costs incurred.

Summary judgment

23. For the reasons given above, the proceeding is not suitable for summary judgment. There will be numerous, contested factual and legal issues that differ across the proposed class, and which cannot be determined on affidavit evidence.

24. The second plaintiffs' application must fail in any event because ANZ has a number of valid defences to the cause of action. In particular:

(a) ANZ has not breached section 22;

(b) Even if there was a breach of section 22 (which is denied), sections 99(1) and 99(1A) prevent enforcement; they do not create a repayment obligation in respect of costs of borrowing received;

(c) In any event, if sections 99(1) and 99(1A) did create a repayment obligation (which is denied), they could only require repayment of any additional costs of borrowing referable to any breach of section 22, and there were no such additional costs of borrowing in the case of the second plaintiffs;

(d) In the event that ANZ has any liability to repay costs of borrowing to the second plaintiffs pursuant to sections 99(1), 99(1A), and 48 (which is denied), the period for which ANZ is liable ended on 22 November 2018 when ANZ sent the second plaintiffs a new loan variation letter or, in the alternative, 1 February 2019, when ANZ sent the second plaintiffs a further letter containing information about their loan;

(e) In the event that ANZ has any liability to repay costs of borrowing to the second plaintiffs pursuant to sections 99(1), 99(1A), and 48 (which is denied), the second plaintiffs have not suffered loss or damage for the purposes of sections 93 and 94 of the CCCFA, so that sections 93 and 94 are not engaged;

(f) In the event that there was a breach of section 22 (which is denied), ANZ has a defence of reasonable mistake under section 106 of the CCCFA to the second plaintiffs' claim for statutory damages;

(g) Any statutory damages should be reduced or extinguished under section 91 of the CCCFA, including because the second plaintiffs have not suffered any prejudice; and

(h) The Court should exercise its discretion under sections 93 and 94 not to grant the second plaintiffs any relief.

25. ANZ relies on:

(a) Parts 2 and 4, section 141A, and Schedule 1AA of the CCCFA.

(b) Rules 1.2 and 4.24 of the High Court Rules 2016.

(c) *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) PRNZ 582; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126; *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312, *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC); *R J Flowers v Burns* [1987] 1 NZLR 260 (HC); *Ross v*

Southern Response Earthquake Services Ltd [2021] NZHC 2452; *Sneesby v Southern Response Earthquake Services Ltd* [2022] NZHC 262; *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345; *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 3116; *Claims Resolution Service Ltd v Smith* [2020] NZCA 664; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284; *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627; *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454; *Krukziener v Hanover Finance Ltd* (2008) 19 PRNZ 162; and *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 299 (CA).

(d) The affidavits of Brett James Lumsden, Matthew Alexander Pickering, and Wendy Anne Harris QC filed with this notice of opposition.

Dated 1 April 2022

S M Hunter QC / J H Stevens / S V A East
Counsel for the first defendant