

**IN THE COURT OF APPEAL
NEW ZEALAND**

TE KŌTI PĪRA O AOTEAROA

CA 481/2022

BETWEEN Anthony Paul Simons
FIRST APPELLANT
And others

AND ANZ Bank New Zealand Limited
FIRST RESPONDENT
And another

AMENDED NOTICE OF APPEAL

4 NOVEMBER 2022

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Full list of parties

BETWEEN **Anthony Paul Simons**
FIRST APPELLANT

AND **Andrew John Beavan and Mei Lim**
SECOND APPELLANTS

AND **Philip Charles Dunbar and Sheryn Valeri Dunbar**
THIRD APPELLANTS

AND **Bruno Robert Bickerdike and Emma Renae Punter**
FOURTH APPELLANTS

AND **Glenn Jonathan Marvin and Anna Mary Cuthbert**
FIFTH APPELLANTS

AND **ANZ Bank New Zealand Limited**
FIRST RESPONDENT

AND **ASB Bank Limited**
SECOND RESPONDENT

AMENDED NOTICE OF APPEAL

1. The appellants in the proceeding identified above, Anthony Paul Simons, Andrew John Beavan and Mei Lim, Philip Charles Dunbar and Sheryn Valeri Dunbar, Bruno Robert Bickerdike and Emma Renae Punter, and Glenn Jonathan Marvin and Anna Mary Cuthbert, give notice that the appellants are appealing to the Court against the parts of the decision of the High Court in *Simons & Ors v ANZ Bank New Zealand Limited & Anor* [2022] NZHC 1836, delivered on 29 July 2022 in the proceeding CIV 2021-404-1190 (**Judgment**):
 - (a) refusing the second appellants leave to represent ANZ customers within the proposed class who entered into their loans with ANZ before 6 June 2015 (**Existing Loans**); and
 - (b) dismissing the appellants' applications for common fund orders (**CFOs**).
2. The specific grounds of appeal are:
 - (a) The High Court erred (at [109] and [138]) in holding that the second appellants cannot represent ANZ customers with Existing Loans. In particular:
 - (i) The second appellants, and ANZ customers within the proposed class with Existing Loans, have a common interest in the common issues identified in the Judgment (at [59(a)] and [60]).
 - (ii) Contrary to the Judgment (at [109] and [138]), allowing the second appellants to represent ANZ customers with Existing Loans will not deprive ANZ of limitation (or any other) defences that apply only to those customers' claims, including because:
 - (A) Limitation is not an issue that is common to the second appellants and Existing Loan customers, and a finding that ANZ does not have limitation defences to the second appellants' claim will not

preclude ANZ from advancing limitation defences to Existing Loan customers' claims.

(B) On the staged approach proposed by the appellants, assuming Existing Loan customers' claims are progressed after determination of the application for summary judgment, ANZ will at that stage have the opportunity to raise its limitation defences to those claims.

(C) ANZ will not be held liable to Existing Loan customers until all of its defences to their claims have been determined.

(iii) It will be more efficient and cost effective for the second appellants to represent Existing Loan customers in relation to the common issues in respect of which they have the same interest than for:

(A) Existing Loan customers (of which there are approximately 61,900) to bring separate claims; or

(B) the second appellants to apply to join additional plaintiffs with Existing Loans to represent Existing Loan customers before their application for summary judgment has been determined.

(b) The High Court erred (at [179]) in declining to make the CFOs sought by the appellants in circumstances where:

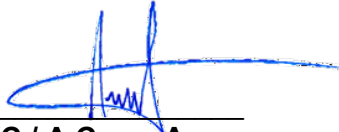
(i) As the High Court held (at [168]), there is jurisdiction to make CFOs in a representative proceeding.

(ii) The making of the CFOs at the commencement of this proceeding will facilitate access to justice and advance the objectives of High Court Rule 4.24 by providing certainty about the funding arrangements to the appellants, funders and class members, including certainty that the proceeding will continue to be funded, and as to who will

bear the costs of the proceeding and what the funding commission rate (**FCR**) is likely to be.

- (iii) The High Court had the necessary information to make the CFOs and to set the FCR, subject to review and potentially revision by the Court at a later stage if circumstances materially changed.
 - (iv) Setting the FCR early in the proceeding, but subject to review and revision if necessary, will allow the Court to equitably determine the FCR with regards to the risks associated with the claim, as understood at the time funding and indemnities are being committed for the benefit of all class members.
 - (v) The making of the CFOs at this stage of the proceeding will ensure that the costs incurred by the appellants and funded class members will be borne by all class members equally, reducing the scope for conflicts of interest between funded and unfunded class members.
 - (vi) The proposed FCR is fair and reasonable.
3. The appellants seek the following judgment from the Court:
- (a) an order allowing the appeal;
 - (b) orders granting the second appellants leave to represent Existing Loan customers with consequential amendments to the representative orders made by the High Court;
 - (c) CFOs in the terms sought by the appellants in their amended interlocutory application to the High Court dated 28 January 2022, as set out in **Schedule 1** (ANZ) and **Schedule 2** (ASB);
 - (d) costs and disbursements on this appeal.
4. The appellants are bringing this appeal pursuant to leave to appeal given by the High Court on 14 September 2022 and 2 November 2022.
5. The appellants are not legally aided.

Dated: 4 November 2022

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

D M Salmon KC / A C van Ammers
Counsel for the appellants

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

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

SCHEDULE 1 – ANZ COMMON FUND ORDER

1. If the second plaintiffs' (the **ANZ representative plaintiffs**) representative action against ANZ Bank New Zealand Limited (**ANZ**) CIV 2021-404-1190 is settled with or judgment is entered against ANZ:
 - (a) the Project Costs and other costs which LPF Litigation Funding No. 33 Limited (**LPF**) is entitled to pursuant to clause 5.1(a) of the Deed for Provision of Services in Respect of Litigation (**ANZ Litigation**) between LPF, CASL Management Pty Ltd, the ANZ representative plaintiffs and ANZ Class Members who have opted in to the representative action (**ANZ Deed**), will be paid from the total, gross amount payable or credited (by whatever means whatsoever) by ANZ to the ANZ Class Members (**Resolution Sum**) before any payments or credits are made to the ANZ representative plaintiffs or the other ANZ Class Members; and
 - (b) LPF's CFO Services Fee (or such lower fee as the Court considers reasonable at that time) will be calculated with reference to and paid to LPF from the Resolution Sum before any payments are made to the ANZ representative plaintiffs or the other ANZ Class Members.
2. The mechanics of the payments referred to above and those made to the ANZ representative plaintiffs or other ANZ Class Members from the Resolution Sum will be as directed by the Court, or if Court approval is not required, as agreed in writing by ANZ, the ANZ representative plaintiffs and LPF.
3. In this Order:
 - (a) **Project Costs** and **Services** have the meanings defined in the ANZ Deed.
 - (b) **ANZ Class Members** means all ANZ class members as defined in the Representative Orders who have not opted out and are entitled to receive a payment from ANZ pursuant to the settlement or judgment.
 - (c) The **CFO Services Fee** shall be a sum equivalent to:

If Project Costs are less than \$1m and the Resolution Sum is less than \$10m	21% of the Resolution Sum
If Project Costs are less than \$1m and the Resolution Sum is equal to or greater than \$10m but less than \$100m	16% of the Resolution Sum
If Project Costs are less than \$1m and the Resolution Sum is equal to or greater than \$100m	The aggregate of: <ul style="list-style-type: none"> • 16% of the Resolution Sum on the initial \$100m of the Resolution Sum; and • on any amount of the Resolution Sum greater than \$100m, 16% less 0.5% for each additional \$10m increment of Resolution Sum above \$100m, provided that such reduction shall not exceed 6% in aggregate.
If Project Costs are equal to or greater than \$1m and the Resolution Sum is less than \$10m	23.5% of the Resolution Sum
If Project Costs are equal to or greater than \$1m and the Resolution Sum is equal to or greater than \$10m	20% of the Resolution Sum
If Project Costs are equal to or greater than \$1m and the Resolution Sum is equal to or greater than \$100m	The aggregate of: <ul style="list-style-type: none"> • 20% of the Resolution Sum on the initial \$100m of the Resolution Sum; and • on any amount of the Resolution Sum greater than \$100m, 16% less 0.5% for each additional \$10m increment of Resolution Sum above \$100m, provided that such reduction shall not exceed 6% in aggregate.

Provided, however, that:

- (a) the CFO Services Fee shall increase by an amount equivalent to 2.5% of the Resolution Sum in the event that LPF provides the Services in respect of any appeal;

- (b) in no event shall the CFO Service Fee payable to LPF exceed 50% of the amount equal to the Resolution Sum less the Project Costs; and
- (c) in no event shall the CFO Services Fee payable to LPF exceed the aggregate fee that would be payable to any other litigation funder that actually funds proceedings relating to a claim against the Defendants similar to the Claims in the same period, had the litigation funder provided services to the Plaintiffs that are equivalent to the Services and otherwise on the same terms as set out in the ANZ Deed.

SCHEDULE 2 – ASB COMMON FUND ORDER

1. If the first and third to fifth plaintiffs' (the **ASB representative plaintiffs**) representative action against ASB Bank Limited (**ASB**) CIV 2021-404-1190 is settled with or judgment is entered against ASB:
 - (a) the Project Costs and other costs which LPF Litigation Funding No. 33 Limited (**LPF**) is entitled to pursuant to clause 5.1(a) of the Deed for Provision of Services in Respect of Litigation (ASB Litigation) between LPF, CASL Management Pty Ltd, the ASB representative plaintiffs and ANZ Class Members who have opted in to the representative action (**ASB Deed**), will be paid from the total, gross amount payable or credited (by whatever means whatsoever) by ASB to the ASB Class Members (**Resolution Sum**) before any payments or credits are made to the ASB representative plaintiffs or the other ASB Class Members; and
 - (b) LPF's CFO Services Fee (or such lower fee as the Court considers reasonable at that time) will be calculated with reference to and paid to LPF from the Resolution Sum before any payments are made to the ASB representative plaintiffs or the other ASB Class Members.
2. The mechanics of the payments referred to above and those made to the ANZ representative plaintiffs or other ANZ Class Members from the Resolution Sum will be as directed by the Court, or if Court approval is not required, as agreed in writing by ASB, the ASB representative plaintiffs and LPF.
3. In this Order:
 - (a) **Project Costs** and **Services** have the meanings defined in the ANZ Deed.
 - (b) **ASB Class Members** means all ANZ class members as defined in the Representative Orders who have not opted out and are entitled to receive a payment from ASB pursuant to the settlement or judgment.
 - (c) The **CFO Services Fee** shall be a sum equivalent to:

If Project Costs are less than \$1m and the Resolution Sum is less than \$10m	21% of the Resolution Sum
If Project Costs are less than \$1m and the Resolution Sum is equal to or greater than \$10m but less than \$100m	16% of the Resolution Sum
If Project Costs are less than \$1m and the Resolution Sum is equal to or greater than \$100m	The aggregate of: <ul style="list-style-type: none"> • 16% of the Resolution Sum on the initial \$100m of the Resolution Sum; and • on any amount of the Resolution Sum greater than \$100m, 16% less 0.5% for each additional \$10m increment of Resolution Sum above \$100m, provided that such reduction shall not exceed 6% in aggregate.
If Project Costs are equal to or greater than \$1m and the Resolution Sum is less than \$10m	23.5% of the Resolution Sum
If Project Costs are equal to or greater than \$1m and the Resolution Sum is equal to or greater than \$10m	20% of the Resolution Sum
If Project Costs are equal to or greater than \$1m and the Resolution Sum is equal to or greater than \$100m	The aggregate of: <ul style="list-style-type: none"> • 20% of the Resolution Sum on the initial \$100m of the Resolution Sum; and • on any amount of the Resolution Sum greater than \$100m, 16% less 0.5% for each additional \$10m increment of Resolution Sum above \$100m, provided that such reduction shall not exceed 6% in aggregate.

Provided, however, that:

- (d) the CFO Services Fee shall increase by an amount equivalent to 2.5% of the Resolution Sum in the event that LPF provides the Services in respect of any appeal;

- (e) in no event shall the CFO Service Fee payable to LPF exceed 50% of the amount equal to the Resolution Sum less the Project Costs; and
- (f) in no event shall the CFO Services Fee payable to LPF exceed the aggregate fee that would be payable to any other litigation funder that actually funds proceedings relating to a claim against the Defendants similar to the Claims in the same period, had the litigation funder provided services to the Plaintiffs that are equivalent to the Services and otherwise on the same terms as set out in the ASB Deed.