IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3247
[2013] NZHC 2827

BETWEEN	SANDRA NORMA COOPER First Representative Plaintiff
AND	CRAIG RICHARD JONES Second Representative Plaintiff
AND	IVOR MARQUISE DE MENEFY Third Representative Plaintiff
AND	INK NZ LIMITED Fourth Representative Plaintiff
AND	ANZ BANK NEW ZEALAND LIMITED Defendant

Hearing: 14 October 2013

Appearances: B D Gray QC, S D Williams and D J K Mitchell for Plaintiffs
A R Galbraith QC, R G Simpson and S V A East for Defendant

Judgment: 25 October 2013

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 25 October 2013 at 3.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Douglas Mitchell, Auckland
Bell Gully, Auckland

Counsel: B D Gray QC, Auckland
S D Williams, Auckland
A R Galbraith QC, Auckland

Introduction

[1] This proceeding is brought by the Plaintiffs for themselves and as representatives of 13,500[1] past or present customers of the National Bank and the Defendant ("ANZ"). I refer to these customers as "group members". The Plaintiffs seek to recover sums, referred to in the statement of claim as "Exception Fees", that the National Bank or ANZ charged them for breaching the terms on which they held their account and/or credit card. Recovery is sought in respect of all such sums charged to group members after June 2007.

[2] The brands of ANZ and National Bank were consolidated in October 2012. There is no dispute that ANZ is the proper defendant to the proceeding insofar as it relates to the National Bank.

Applications

[3] This judgment is in respect of an application for directions made by the Plaintiffs dated 25 June 2013 ("Plaintiffs' application") and an application by ANZ for security for costs dated 14 August 2013. Prior to the hearing the parties were able to agree the terms on which many of the orders sought should be made.

Security for costs

[4] The terms on which the Plaintiffs are to provide security for costs are set out in the parties' joint memorandum regarding security for costs dated 14 October 2013. I make orders in terms of that memorandum. Such security is to be provided by way of a bank-backed guarantee.

Particulars

[5] The Plaintiffs are to provide the particulars set out in the joint memorandum of counsel, also dated 14 October 2013, regarding particulars of group members. I make orders in terms of that memorandum.

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[1] Submissions of ANZ dated 30 September 2013 at [1.1].

Approval of Litigation Lending Services (NZ) Limited

[6] The Plaintiffs seek an order approving Litigation Lending Services (NZ) Limited ("LLS(NZ)") as the funder of this proceeding. ANZ does not object to the making of the order. In support of this application, the Plaintiffs have filed an affidavit of David John Ross, sworn on 24 June 2013. Mr Ross is a director of LLS(NZ). On the basis of Mr Ross's affidavit, I am satisfied that it is appropriate to make the order sought.

Litigation Funding Agreement

[7] The Plaintiffs seek an order approving the litigation funding agreement ("funding agreement") that each Plaintiff and group member has entered into with LLS(NZ). ANZ does not object to the making of this order, the parties having agreed as to how ANZ should be notified if LLS(NZ) withdraws. The parties have reached agreement as to the giving of that notice.

[8] As to whether it is otherwise appropriate to make the order sought, Counsel for the Plaintiffs informed me during the hearing that Ms Alison Ferguson, a partner at Wilson Harle, solicitors of Auckland, had advised group members on, amongst other things, the funding agreement and that she was satisfied that it was appropriate in the circumstances. There is, however, no affidavit from Ms Ferguson to that effect.

[9] The criteria to be considered when approving a litigation funding agreement was discussed by French J in *Houghton v Saunders*[2] and the Court of Appeal in *Saunders v Houghton*.[3] I have reviewed the funding agreement proposed in this case and I am satisfied that its terms adequately reflect the criteria to which I have referred. I make the order sought accordingly. I add, however, that on the face of the funding agreement it is possible that it, or some version of it, will be submitted to the Court for approval in some other representative action against a bank or financial institution. Clearly my approval of the funding agreement in this case does not bind the Court on a subsequent occasion.

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[2] *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 8 June 2011 at [74] – [75].
[3] *Saunders v Houghton* [2009] NZCA 610 at [32] – [34] and [63]. See also *Saunders v Houghton* [2012] NZCA 545 at [31] – [32].

Confidentiality

[10] The Plaintiffs no longer seek the order referred to in [1](d) of their application.

[11] In [1](e) of their application, the Plaintiffs seek an order that the un-redacted statement of claim dated 25 June 2013 (including its various schedules) remain confidential for the purpose of non-party access to the Court file under Part 3 of the High Court Rules.

[12] Ellis J made an order to this effect on 9 October 2013. That order continues pending further order of the Court and so it unnecessary to make any further order at present. I do, however, make the direction that the Plaintiffs seek in [1](f) of their application in so far as it concerns Ellis J's order. Please would the Registry take the necessary steps.

Outstanding matters

[13] Two matters remain for determination.

[14] The first is the order ("representation order") sought in [1](a) of the Plaintiffs' application, namely an order:[4]

> ... confirming that the representative plaintiffs and the group members have the same interest in the subject matter of the proceeding.

[15] There is no dispute between the parties that it is appropriate to give some form of direction confirming that the four Plaintiffs sue for themselves and as representatives of group members. The issue is whether the terms of the order sought by the Plaintiffs are accurate, that is, whether each Plaintiff has the requisite "same interest" as each group member. ANZ contends that they do not and that the direction should identify as between which Plaintiff(s) and group members that same interest exists.

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[4] Interlocutory Application for Directions Under Rule 4.24 and Confidentiality Orders dated 25 June 2013 at Plaintiffs application at [1](a).

[16] The second matter requiring determination is whether the Court should make an order fixing the date by which interested parties must "opt in" to this proceeding. Counsel for ANZ submitted that the Court is required to make such an order and proposed a date in December 2013 be fixed. Counsel for the Plaintiffs opposed any such order.

Proceedings

[17] As I have said, the Plaintiffs and group members are or were customers of ANZ and/or National Bank who were or have been charged Exception Fees.

[18] Affidavits filed by the Plaintiffs provide some background as to how the proceeding has come to be commenced and how group members have registered to participate.[5] It appears from these affidavits that group members have registered to participate on a website established for that purpose; have advised that they were charged Exception Fees by National Bank or ANZ or have advised that they were charged Exception Fees and that they held an ANZ account;[6] and have agreed to the terms of the funding agreement and to the terms of an agreement for legal services between each claimant and Mr Hooker, the solicitor on the record for the Plaintiffs.

[19] To date, the Plaintiffs have provided ANZ with limited information concerning each group member. The particulars which it is agreed the Plaintiffs should provide will give ANZ additional information, including the names of each group member and the type of account they held and with which bank. I add that ANZ has undertaken it will not discriminate against any customer named as a group member.[7]

[20] The proceeding is at an early stage. The statement of claim identifies six different groups or sub-groups and pleads four alternative causes of action. The first three causes of action are brought for the benefit of all Plaintiffs and all group members. The fourth is brought for the benefit of the "Consumer Group" alone, which excludes the Fourth Plaintiff.

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[5] Affidavit of A C C Hooker sworn 25 June 2013; and Affidavit of B T Hardwick dated 8 June 2013.
[6] Ibid. See affidavit of A C C Hooker, Exhibit "ACH01".
[7] Joint Memorandum of Counsel Regarding Particulars of Group Members dated 14 October 2013, at [2].

[21] ANZ's statement of defence responds to the four causes of action pleaded by the Plaintiffs and alleges three affirmative defences being limitation, set off, and acquiescence, delay or laches.

[22] At the hearing before me, Counsel advised that they are considering whether the Court ought to be asked to determine one or more preliminary issues. They expect to make a decision on this matter before the end of the year.

Representation order

[23] The Court has power to make the representation order that the Plaintiffs seek under r 4.24 High Court Rules:

> **4.24 Persons having same interest**
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> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[24] Accordingly, to make the representation order sought, the Court must be satisfied that the Plaintiffs and all group members have "the same interest in the subject matter of the proceeding". The dispute between the parties is whether the Plaintiffs and group members have sufficient in common to satisfy the "same interest" requirement.

Approach

[25] Counsel referred me to several authorities as to the circumstances in which a representative plaintiff and group members are considered to have the same interest in the subject matter of a proceeding. These included *RJ Flowers Ltd v Burns*, *Registered Securities Ltd (in liquidation) v Westpac Banking Corporation*, *Saxmere Company Ltd v The Wool Board Disestablishment Company Ltd*, *Beggs v Attorney-General* and judgments of the High Court and Court of Appeal in the *Houghton v*

Saunders or "Feltex" litigation.[8] The judgments in the *Houghton v Saunders* litigation have been of particular assistance, as they are recent, detailed and describe the facilitative approach that the Court is now required to adopt to the application of r 4.24.

[26] In *Houghton v Saunders* French J was required to determine an application for a representation order in respect of litigation commenced on behalf of two groups of shareholders of Feltex. She listed the principles that she had distilled from the authorities as follows:[9]

> (i) The Rule should be applied to serve the interests of expedition and economy, the underlying reasons for its existence being judicial economy, elimination of duplication, sharing of costs, and also access to justice.
>
> (ii) ... the test is whether the parties to be represented "have the same interest in the proceeding as the named parties".
>
> (iii) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
>
> (iv) The Court should take a liberal and flexible approach in determining whether there is a common interest...
>
> (v) The requisite commonality of interest is not a high threshold and the Court should be wary about looking for impediment to the representative action rather than being facilitative of it (*Registered Securities Limited (in liq) & Ors v Westpac Banking Corporation* (2000) 14 PRNZ 348).
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> (vi) A representative action should not, however, be allowed in circumstances which would:
>
> a. deprive a defendant of a defence which it could have relied on in a separate proceeding against one or more members of the class; or
>
> b. enable a person within the representative class to succeed where that person would not have succeeded had they brought an individual claim. Or to put it another way, each member of the class must have the same cause of action and there should be no

[8] *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260; *Registered Securities Ltd (in liquidation) v Westpac Banking Corporation* (2000) 14 PRNZ 348; *Saxmere Company Ltd v The Wool Board Disestablishment Company Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005; *Beggs v Attorney-General* (2006) 18 PRNZ 214; *Houghton v Saunders* (2008) 19 PRNZ 173; and *Saunders v Houghton* [2010] 3 NZLR 331.

[9] *Houghton v Saunders*, above n 8, at [100].

> defences available as against some members but not others.
>
> ...

[27] French J's judgment was appealed to the Court of Appeal. The Court did not refer expressly to the principles above. I accept the Plaintiffs submission, however, that the Court of Appeal's approach is consistent with French J's approach. On the issue of how best to ascertain whether the parties have the same interest in the subject matter of the proceeding, the Court of Appeal said:[10]

> [17] In determining whether to make or sustain a representation order involving a litigation funder the Court must take special care to meet the objective of the High Court Rules, stated in r 1.2 .... We return to that topic. Putting that aside for the present there are two sub-issues: ...
>
> (a) What is the nature of the claim and the claimant group? ...
>
> (b) What are the likely issues?

[28] Rule 1.2 provides:

> **1.2 Objective**
>
> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

[29] The Court of Appeal also stated that a "generous approach to representation applications", adopting a "relatively low threshold" was to be preferred as being consistent with r 1.2.[11]

Pleadings

[30] Counsel for the Plaintiffs submits that it is apparent from the pleadings that the "same interest" requirement is met. Given that submission, it is necessary to consider the pleadings in greater detail.

[31] As Counsel for ANZ submits, the statement of claim defines six different groups or sub-groups:

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[10] *Saunders v Houghton*, above n 8, at [17] – [20].
[11] Ibid, at [10] and [12].

(a) Consumer Group.[12] Members of this group used their account(s) primarily for personal, domestic or household purposes.

(b) National Bank Deposit Group.[13] Members of this group held a "National Bank Deposit Account", being a cheque or deposit account provided by the National Bank primarily for personal, domestic or household purposes;

(c) National Bank Card Group.[14] Members of this group held a "National Bank Card Account", being a credit card account provided by the National Bank primarily for personal, domestic or household purposes;

(d) National Bank Business Group ("Business Group").[15] Members of this group held a "National Bank Business Account" being a cheque or deposit account provided by the National Bank for business purposes;

(e) ANZ Deposit Group.[16] A member of this group held an "ANZ Deposit Account", being a cheque or deposit account provided by ANZ. Such account might be used for personal, domestic or household purposes or for business purposes; and

(f) ANZ Card Group.[17] Members of this group held at least one "ANZ Card Account" being a credit card account provided by ANZ primarily for personal, domestic or household purposes.

[32] For each group, the statement of claim pleads the documents recording the terms of the contract (as amended from time to time) between customer and bank, the circumstances in which the bank might charge Exception Fees and the amount of

[12] Statement of claim dated 25 June 2013, at [10].
[13] Ibid, [16].
[14] Ibid, at [23].
[15] Ibid, at [30](a).
[16] Ibid, at [36].
[17] Ibid, at [48].

each such fee. The term "Exception Fees" encompasses all fees in issue, including "dishonour", "overdraw" and "late payment" fees.

[33] The First Plaintiff is a member of every group, the Second and Third Plaintiffs are members of the groups referred to in [31](a), [31](e) and [31](f), and the Fourth a member of [31](d) and [31](e) but not [31](a).

[34] The Plaintiffs plead four alternative causes of action, summarised as follows:

(a) the Exception Fees were penalties for breach of contract, or in equity (first and second causes of action);

(b) it was an implied term of the contract between customer and bank that the amount by which any Exception Fee would be varied would be fair and reasonable; that term was breached; and loss or damage was caused; and

(c) contracts entered into or varied as between members of the Consumer Group and the bank concerned were "credit contracts"; the Exception Fees were "default fees" that were "unreasonable" in breach of s 41 Credit Contracts and Consumer Finance Act 2003 ("CCFA"). Because this cause of action is concerned only with credit contracts, it is not brought for the benefit of the Fourth Plaintiff or any group member who held their account other than for personal, domestic or household purposes.

[35] As to the first cause of action, ANZ denies that Exception Fees were penalties payable for breach of contract. It alleges that Exception Fees were payable on the occurrence of prescribed events and were charged for services rendered by the particular bank for the customer's benefit.[18] ANZ's response to the second cause of action is the same. It says further that no action for penalty in equity is recognised under New Zealand law.[19]

[18] Statement of Defence dated 27 September 2013, at [63].
[19] Ibid, at [67] – [80].

[36] As to the third cause of action, ANZ denies the existence of the alleged implied term, alternatively denies breach, and alternatively denies loss or damage.

[37] As to the fourth, ANZ puts the Plaintiffs to proof on the issue of whether the members of the Consumer Group did in fact use their facilities primarily for personal, domestic or household purposes. Subject to that, ANZ admits that Card Contracts (being contracts pursuant to which customers held a credit card from either the National Bank or ANZ) were credit contracts. Other than that, ANZ denies the fourth cause of action.

Discussion

[38] Counsel for the Plaintiffs submitted that the Plaintiffs and group members have a significant common interest in the resolution of the likely legal issues, such as whether an Exception Fee may be considered a penalty and if so what is the appropriate remedy; and whether the alleged implied term formed part of the contracts in issue.

[39] Counsel for ANZ submits that there can be no commonality of interest between a group member who held, say, a National Bank credit card and was charged a late payment fee and the holder of an ANZ Deposit Account charged a fee for honouring a payment when there were insufficient funds in their account. Counsel for ANZ proposed that the Court make an order in the following terms:

> 1. The plaintiffs have leave to sue in their own right and on behalf of, and for the benefit of, those persons listed in Appendix A to the Statement of Claim (**SOC**), as follows:
>
> (a) The first and third plaintiffs on behalf of those person who held a National Bank Deposit Account for personal domestic or household purposes ...;
>
> (b) The first, second and third plaintiffs on behalf of those persons who held an ANZ Deposit Account for personal domestic or household purposes ...;
>
> (c) The first plaintiff on behalf of those persons who held a National Bank Credit Card Account ...;
>
> (d) The first, second and third plaintiffs on behalf of those persons who held an ANZ Credit Card Account ...;

(e) The first and fourth plaintiffs on behalf of those persons who held a National Bank Business Account ...;

(f) The first and fourth plaintiffs on behalf of those persons who held an ANZ Deposit Account used for business purposes ...

[40] The difficulty with an order in these terms, however, is that differences between the accounts are not significant as regards the issues which arise on the pleadings at present. Moreover, an order in these terms is more complex than is necessary or desirable having regard to r 1.2.

[41] Counsel for ANZ also submitted that authorities relied on by the Plaintiffs may be distinguished from the present case. In the *Houghton v Saunders* litigation, for instance, the proceedings were concerned with discrete events, namely statements in a prospectus which were said to be misleading.

[42] Counsel for ANZ submitted that this case is closer to *Beggs v Attorney-General*.[20] In that case, Gendall AJ (as he then was) declined to hold that the plaintiffs had the same interest as all those whom they sought to represent. Each member of the group had been arrested following a protest. The Plaintiffs sued for alleged breaches of the New Zealand Bill of Rights Act 1990, assault, false imprisonment, and malicious detention. There were, however, significant factual differences in the treatment of members of the group. Some had been detained for a period, some allegedly subject to violence and others to have been strip-searched.

[43] *Beggs* was a case, however, where the different individual experiences were likely to be material to liability and/or remedy. As I have said, that is not so in the present case, at least in respect of the first three causes of action.

[44] Some distinction may arise on the Plaintiffs' fourth cause of action, given that it is brought for the benefit of members of the Consumer Group. That necessarily excludes the Fourth Plaintiff and any other group member who held their account for business purposes. Given ANZ's pleading, a further distinction may arise in future, between those members of the Consumer Group who held a card, as opposed to a deposit, account.

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[20] *Beggs v Attorney-General*, above n 8.

[45] I have considered whether it is necessary or preferable to make that distinction apparent in the representation order but have decided that it is not, for the following reasons.

[46] First, I accept counsel for the Plaintiffs' submission that the Court may make a representation order, notwithstanding that not all representative Plaintiffs and group members share in the same causes of action or are entitled to share in the same relief.[21]

[47] Secondly, the representation order sought by the Plaintiffs is consistent with the Court of Appeal's comments in *Saunders v Houghton*, namely to prefer a "generous approach" and one that meets the objective of r 1.2. Drawing a distinction in respect of the fourth cause of action is likely to complicate matters unnecessarily. That should be avoided, especially in a case involving so many group members. I add that, without resiling from his submissions in any way, counsel for ANZ confirmed that there is no pressing reason at present to draw any such distinction.

[48] Thirdly, and this point extends beyond issues arising in respect of the fourth cause of action, counsel for both the Plaintiffs and ANZ confirmed to me that they saw no reason why the Court might not vary or rescind a representation order at a later date if some change in circumstances were to make it necessary or desirable. McGechan J expressly left open such a possibility in *RJ Flowers Ltd v Burns.*[22] The Court of Appeal also had that possibility in mind in *Saunders v Houghton*, when it referred to "making or *sustaining*" (emphasis added) a representation order.

[49] Given that, I am satisfied that the grounds for the making of an order under r 4.24 are made out and accordingly I make the order sought by the Plaintiffs in [1](a) of their application.

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[21] See *Saunders v Houghton*, above n 8, at [18] where the Court of Appeal cited *Carnie Esanda Finance Corporation Ltd* (1995) 182 CLR 398 (HCA).
[22] *RJ Flowers Ltd v Burns*, above n 8, at 272 – 273.

Order to close off the opting in period

[50] In his written submissions, counsel for ANZ sought an order:[23]

> ... closing the class of claimant group members, but expressly reserving to all claimants the right to "opt out" of the proceeding.

[51] Counsel for ANZ proposed that all claimants be required to opt-in to the proceedings by 14 November 2013, after which date no further claimants could be added. At the hearing before me, counsel indicated that a date prior to Christmas 2013 would be acceptable.

[52] Counsel referred me to *Saunders v Houghton* in which the Court said:[24]

> [75] In our judgment the text, policy and practicalities of the relevant legislative instruments confirm that the statutory limitation period stops running for all represented persons when a representative order is made. *A Judge granting a representative order should impose a final opt-in or opt-out date as part of normal case management procedures.* By this means the purposes of the Limitation Act will continue to be met in the representative context. A represented person who opts-out or fails to opt-in by the stipulated date will then be subject to the limitation provisions in the normal way.
>
> (Emphasis added)

[53] Counsel for the Plaintiffs opposed the making of any order and submitted that the date to be fixed should be determined at the case management conference referred to below.

[54] It is apparent from the passage in the Court of Appeal's judgment that closing off the opting in period is tied to issues as to limitation. The Supreme Court is presently considering an appeal in *Saunders v Houghton* in which limitation issues in the context of representative actions will be considered. Regardless, I accept ANZ's submission that an order should be made now.

[55] Given that, I make an order that the period for registering to participate, or to "opt in", to the proceeding is to close at midnight on 13 December 2013 (New Zealand time). A claimant's right to "opt out" is unaffected by this order.

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[23] Submissions of ANZ, above n 1, at [5.1].
[24] *Saunders v Houghton* [2012] NZCA 545; [2013] 2 NZLR 652.

[56] I reserve leave to apply if either party wishes to make any submissions as to the precise wording of the order, in which case I shall vary it as appropriate.

Costs

[57] Costs are to lie where they fall on these applications, as each party has had a measure of success.

Case management

[58] There is to be a case management conference at 9 am, 28 November 2013. Any party who wishes to make an interlocutory application in advance of that conference is to file and serve the same, and any affidavits on which they rely, by 4pm 14 November 2013. Any notices of opposition and evidence in support are to be filed and served by 4pm 21 November 2013. Any submissions and/or memoranda are to be filed and served by 4pm 25 November 2013.

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M Peters J