CONFIDENTIALITY ORDERS APPLY TO REDACTIONS AT [11], [29], [35], [37], [41], [42], [44], [70], FN 18 AND [71].

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2021-485-484
[2021] NZHC 3608

IN THE MATTER OF	Part 19 of the High Court Rules 2016
BETWEEN	JOHN RUSSELL STRAHL, JOHN ROBERT DOUGLAS, HEATHER CAROLLE WYSE and GRAY STRATTON THOMPSON as members of the Committee appointed to manage the claim brought on a representative basis by the investors of Ross Asset Management Ltd (in liq), formed and convened in Wellington, for an order that the distribution of settlement proceeds be approved Applicants

Hearing:	6 December 2021
Counsel:	J B M Smith QC and F J Cuncannon for Applicants A S Butler for Objectors
Judgment (confidential version):	22 December 2021
Reissued (public version):	23 December 2021

JUDGMENT OF MALLON J

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Introduction

[1] The applicants seek a determination approving a proposed methodology for the distribution of settlement funds to the claimants represented in litigation that has now settled. The litigation arose out of a Ponzi scheme operated by David Ross, through Ross Asset Management Limited (RAM) and related entities. Inevitably, the Ponzi scheme collapsed leaving over 700 victims, who invested in what they had understood to be a legitimate investment operation, with losses of around $115 million.

[2] In July 2019 a High Court proceeding was brought by three representative plaintiffs on behalf of 552 of the investors (together referred to as "the claimants" or "the Plaintiffs"). The proceeding was against ANZ Bank New Zealand Limited (ANZ), RAM's principal banker. It alleged that ANZ was liable to the claimants in knowing receipt, dishonest assistance, and negligence.

[3] The proceeding was the subject of a litigation funding agreement dated 6 June 2019 (the Funding Agreement). The litigation funding arrangements included a committee agreement (the Committee Agreement) under which a litigation committee (the Committee) was appointed.

[4] On 16 August 2021, the Committee entered into a settlement agreement with ANZ on behalf of all claimants in resolution of the High Court proceeding. The settlement agreement did not address the distribution of the net settlement funds as between the claimants. The Committee has determined a proposed distribution

methodology and seeks the Court's approval of that methodology as fair and reasonable.

[5] Two of the claimants, J and T, who each suffered substantial losses as a result of Mr Ross' fraud, object to the proposed distribution. They were represented by counsel at the hearing before me. A further investor, P, has filed submissions also objecting the proposed distribution but was not represented by counsel. Although no other investors have filed a formal objection in this Court, several others indicated their opposition to the distribution methodology during the process adopted by the Committee.

[6] The distribution methodology is largely based on an investor's losses on the dishonest assistance claim. This is because the negligence claim was an alternative basis for seeking the same losses. The methodology also includes an investor's losses on the knowing receipt claim. This represents a smaller proportion of the proposed distribution to investors because the alleged losses under that claim were much smaller than the alleged losses under the dishonest assistance claim.

[7] The methodology distinguishes between two groups of RAM investors (referred to as the Class A and Class B investors) in the dishonest assistance claim. Class A losses are given a greater weighting than Class B based on an assessment by the Committee that they had a greater likelihood of success if the claims had proceeded to a substantive hearing and been determined by the Court. Which group an investor is within depends on an assessment by the Committee of when ANZ had the requisite knowledge for liability on the dishonest assistance claim.

[8] The objectors say that the proposed methodology is not fair and reasonable because of the distinction between Class A and Class B investors that has been made.

Funding Agreement

[9] The litigation funder was LPF Litigation Funding No. 28 Limited (LPF). It was an "opt-in" arrangement. Investors of RAM were invited to join the claim by delivering to LPF a Participation Notice and a completed and signed Deed. There was no registration fee payable by claimants. It was a "no win no cost" arrangement.

[10] The letter inviting investors to join the claim advised that there were two main categories of investors who could do so. It explained:

> (a) Class A. This class comprises investors who invested new money with RAM after the date from which ANZ should have known that the RAM bank account was not being managed as it should have. If fully successful, investors who paid in fresh money after that date should get back what they paid less the costs and the fee paid to the funder.
>
> (b) Class B. This class comprises all investors who had a positive net contribution in the liquidation of RAM. The claim is for money going through the RAM account after the date that ANZ was aware that RAM was not applying the funds to dedicated client accounts as it should have been and that RAM was misappropriating funds for unauthorised purposes. That is that ANZ effectively assisted RAM to maintain its Ponzi scheme. Here it is not possible to trace the payments to any one investor. So the proceeds of any payment here, after costs and the fee to the funder, are likely to be shared between the claimants pro rata to their relative net contributions to RAM.
>
> At this stage it is not possible to give accurate estimates of the size of the claim but if all eligible investors join, our advice is that the claim could be for more than $50m plus interest.
>
> If you have received this letter it is likely that you qualify and are able to claim against ANZ and share in the proceeds of any successful outcome. If you do not join the claim, you cannot share in the proceeds.
>
> …
>
> If the claim is successful the Committee Agreement provides the basis upon which the claimants are to be paid. This will be determined by seeking a court order to ensure that the distribution is approved by the court as being fair.
>
> …
>
> It is the view of the Committee and the legal team that there exists a serious claim against ANZ which, if successful, will provide a substantial payment for those investors who join. No other party will take the claim and the funded option, while paying a reasonable fee to LPF, is by far the best option for investors to recover some of their losses.
>
> At this stage it is not possible to give accurate estimates of the size of the claim but if all eligible investors join, our advice is that the claim could be for more than $50m plus interest. If you have received this letter it is likely that you qualify and are able to claim against ANZ and share in the proceeds of any successful outcome. If you do not join the claim, you cannot share in the proceeds.

[11] The letter attached a summary of advice provided by Justin Smith QC to an initial committee appointed to manage the claim. The advice, based on a review of advice received by the Financial Markets Authority (FMA) and a selection of ANZ

documents provided by the FMA to Mr Smith, was that the eligible RAM investors "have a serious claim on the merits against ANZ". The advice explained the essence of a dishonest assistance claim. **[**Redacted.**]** The advice also said that "the finer details of the amount or amounts which may be claimed and who amongst the investors may be entitled to participate is another issue" and no view was expressed on this at that early stage.

[12] Those who joined the claim were referred to in the Funding Agreement as Plaintiffs. The Funding Agreement deemed each Plaintiff to be a party to the Committee Agreement and to acknowledge that the Committee has "the full, exclusive and irrevocable authority to represent the Plaintiffs" in "the conduct and settlement of the Claims", and including the authority to "negotiate and effect a settlement of the Claims on such terms as the Committee in its sole discretion decides".[1]

[13] Clause 5.1 entitled LPF, upon a Resolution, to be repaid its Project Costs and a Services Fee. Project Costs and Services Fee are defined in the litigation funding agreement.

Committee Agreement

[14] The Committee Agreement provided for the constitution of the Committee. The members were John Strahl, John Douglas, Heather Wyse and Gray Thompson. They were (or represented) large investors who had signed up to the claim. Pursuant to the Committee Agreement, the claimants could vote to remove or replace any Committee member at any time. The Committee was responsible for managing all aspects of the proceeding on behalf of all the claimants who had chosen to opt-in.

[15] Clause 4.1 of the Committee Agreement defined the "Resolution Sum" as meaning the gross proceeds paid in settlement of, or pursuant to a final judgment determining, the proceeding against ANZ. Clause 4.2 then provided how that was to be allocated. Clause 4.2(a) concerned the situation where the Resolution Sum had been received pursuant to a final judgment of the Court with directions as to the allocation or allocation methodology to each plaintiff. Clause 4.2(b) provided:

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1 Clause 2.2.

(b) If the Resolution Sum has been received pursuant to a settlement agreement or a final judgment of the Court without directions as to the allocation to each Plaintiff, then the balance of Resolution Sum shall be allocated to Plaintiffs as follows:

(i) The Committee shall undertake such allocation in its reasonable discretion, having regard to any factors that the Committee may reasonably consider appropriate, including, without limitation:

(A) the best interests of the Plaintiffs taken as a whole; and

(B) the Claims Percentage (defined in clause 5.2(d)) for each Plaintiff,

in consultation with the Lawyers, and the Committee shall be entitled to engage any legal, financial or other advisers it sees fit for the purpose of performing its obligations under this sub-clause (b) at the Plaintiffs' cost.

(ii) As soon as reasonably practicable after making its determination under sub-clause (b)(i), the Committee may either seek a ratifying approval of such determination by a vote of all Plaintiffs and if such vote is approved by 75% in value of all Plaintiffs based on their Claims Percentage, such determination shall be binding on all Plaintiffs, or it may apply to the Court for the Court's endorsement and/or ratification that the Committee's allocation methodology and allocations under sub-clause (b) were fair and reasonable, with the costs of this process to be deducted from the Plaintiffs' share of the Resolution Sum.

(iii) If the Court finds the Committee's method for allocation and allocations of the Resolution Sum under sub-clause (b)(ii) were:

(A) fair and reasonable, then the Committee shall procure the distribution of the applicable allocation of the Resolution Sum to each Plaintiff as determined by it pursuant to sub-clause (b)(ii); or

(B) not fair and reasonable and provides an alternative method for allocating the Resolution Sum, then the Committee shall distribute the Resolution to each Plaintiff in accordance with such alternative methodology.

The parties agree that any finding of the Court pursuant to this sub-clause (b) shall be final and binding, and not capable of dispute, and each Plaintiff hereby irrevocably and unconditionally waives any right that it, he or she may have to challenge the Court's directions as to the allocation.

[16] Clause 4.3 provided that the Plaintiffs authorised the Committee to deduct from any proposed allocation to any Plaintiff any amounts payable by a Plaintiff to LPF or any other party in connection with the proceedings.

[17] Clause 4.4 provided that the balance of the Resolution Sum was to be distributed within 20 working days after the receipt of the Court's final judgment and directions as to the allocation or allocation methodology to each Plaintiff.

[18] Clause 1.3 provided:

> 1.3 **Granting of authority:** Subject to the terms of this Deed, the Plaintiffs hereby irrevocably and unconditionally appoint the Committee with full and exclusive authority to direct, manage, conduct and settle the Claims on their behalf with the powers and authority set out in clauses 5.1 and 5.2.

[19] Clause 5.1 provided the Committee with full, irrevocable and unconditional authority to represent and act on behalf of the plaintiffs and each of them in all matters relating to "the conduct and settlement of the [proceedings]".

[20] Clause 5.2 provided:

> 5.2 **Authority**: Without limiting clauses 1.3 and 5.1, the Committee shall have the full, irrevocable and unconditional authority to:
>
> (a) direct the conduct of the Claims and any negotiation, mediation or settlement and agree and bind all of the Plaintiffs and each of them to a settlement on such terms as the Committee in its sole discretion decides;
>
> …
>
> (d) determine from time to time the proportionate interest that each Plaintiff has in relation to the Claim ("**Claims Percentage**"), by reference to any factor that the Committee may (acting reasonably) consider appropriate, including, without limitation:
>
> (i) the amount of losses claimed by the Plaintiffs with respect to the Claims, and
>
> (ii) the amount contributed by way of new money to RAM after the date that ANZ Bank Limited is held liable or alleged to be liable, and in respect of any sum that can not be traced to an individual Plaintiff then the proportionate sum of each Plaintiff's net

> contribution against the total of net contributions by all Plaintiffs.
>
> …

Court's power of supervision

[21] Rule 4.24 of the High Court Rules 2016 makes provision for representative proceedings with the consent of the other persons with the same interest or as directed by the court on an application by a party or intending party. It does not provide any detail as to the directions the court might give.

[22] The Court's supervisory jurisdiction under this rule was considered by the Supreme Court in *Southern Response Earthquake Services Ltd v Ross*.[2] This case concerned proposed representative proceedings on behalf of policy holders, on an opt-out basis, against Southern Response. Southern Response opposed the proceedings being on an opt-out basis.

[23] The Supreme Court upheld the lower courts' decision that the representative claim be allowed to proceed on an opt-out basis. In doing so they addressed the concerns raised by Southern Response about a representative claim on an opt-out basis. One of those concerns related to settlement of the proceeding. The Court reviewed the position in Australia and Canada, as well as New Zealand. The Court concluded that there was power to approve settlements in cases of this kind and that this would address the issues raised by Southern Response in relation to settlements.

[24] One of the Australian authorities referred to by the Supreme Court was *Camilleri v The Trust Company (Nominees) Ltd*.[3] It considered that *Camilleri* provided a "useful summary of the test for settlement approval that has developed" in Australia and that the main task for the Court was whether it "is a fair and reasonable compromise of the claims".[4] The summary of the test from *Camilleri* that the Supreme Court referred to is as follows (citations omitted):[5]

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2 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126.
3 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468.
4 *Southern Response*, above n 2, at [71] and fn 117, referring to: *Camilleri*, above, at [5] and *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 at [13].
5 *Camilleri*, above, at [5].

(a) the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole: …

(b) there will rarely be one single or obvious way in which the settlement should be framed, either between the claimants and the defendants (*inter partes* aspects) or in relation to sharing the compensation among claimants (the *inter se* aspects) – reasonableness is a range and the question is whether the proposed settlement falls within the range: …

(c) it is not the task of the Court to 'second guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are "knowable" to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances: …

(d) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement … is a useful guide but is neither mandatory nor necessarily exhaustive …

(e) in relation to the *inter se* fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members … the arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible: …

…

[25] The Supreme Court in *Southern Response* summarised the position in Australia:[6]

> [71] … [t]he court will also consider whether the settlement is undertaken in the interests of the members as a whole. The court can have regard to a broad range of factors, including the settlement sums, prospects of success and likely outcome of litigation vis-à-vis the proposed settlement, legal and other expert advice, the likely duration and costs of the proceeding if continued to judgment, and the attitude of the group members to the settlement. …
>
> …
>
> [82] … We add that it may be that to meet some of the concerns expressed by the court's role in approving settlements, the court will draw on the assistance of independent experts. An example of this approach is found in the Federal Court of Australia's practice note governing class actions.

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6 *Southern Response*, above n 2, referring to *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, (2000) 180 ALR 459 at [19].

[26] As to the Canadian position, the Supreme Court referred to the Ontario Class Proceedings Act 1992, under which the courts consider "whether a proposed distribution is reasonable, fair, economical, and practical on the facts of each particular case".[7] In applying this approach, the courts have considered whether the process used to develop the distribution protocol was thorough and whether counsel "took great care to apprise themselves of the merits of all claims, and to design a distribution which was fair and reasonable in light of that information".[8]

[27] The Law Commission is currently considering class actions. It is consulting on a supplementary issues paper which, amongst other things, proposes a legislative provision concerning court approval of settlement for consultation.[9] Of interest for present purposes is the Law Commission's proposal that it might be appropriate for a court to have expert independent assistance when it is evaluating a proposed settlement. However, the Law Commission's work is ongoing and the final shape of any recommendations and the outcome from such recommendations is unknown at this stage.

The Committee's process

[28] On 30 August 2021 the Committee provided to the claimants an outline of the issues it was considering and invited them to provide their views. It advised that an application with the Court had been lodged and that it was seeking legal advice, and already had some preliminary advice, on the best approach to distribution. The advice was from the lawyers acting for the claimants in the litigation against ANZ. The Committee said that, in accordance with the Committee Agreement, it would make a determination having regard to any factors that the Committee might reasonably consider appropriate, the best interests of the claimants taken as a whole, and the Claims Percentage for each client. It would then make a determination that was fair and reasonable for all claimants to be reviewed by the court.

[29] The Committee explained (my emphasis):

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7 *Pro-Sys Consultants Ltd v Infineon Technologies* 2014 BCSC 1936 at [34].
8 At [36].
9 Law Commission *Class Actions and Litigation Funding* (NZLC IP 48, 2021).

Broadly, our claim was that at some point in time, and earlier than when RAM ultimately failed, the bank should have known that RAM was not operating its bank accounts legitimately, and that they should have taken some action then which would have had RAM shut down. So from that point on, no new money would have been paid in, and liquidation at that earlier time would have resulted in a bigger payout to investors. We have called this the knowledge date.

The knowledge date would have been determined by the court based on the evidence presented. The possible dates range from the likely earliest of 5 February 2007 to 12 April 2012. Based on the advice we have been provided the date of 31 May 2010 looks most likely to be adopted for our distribution methodology and is consistent with the FMA's view and the limitation period.

Using that date, and with the help of [Pricewaterhouse Coopers] PWC, we have completed a model which enables us to calculate the total probable damages amount (should the matter have gone to trial) on an individual Claimant basis. In order to do so, the model makes the following main assumptions:

1. The actual details of each investors deposits and withdrawals made with RAM over the relevant period have been imputed;

2. Internal transfers between the same investors account are ignored;

3. Internal transfers between different legal entities of related investors are treated as withdrawals and new deposits;

4. The gross sum for calculating Class B losses, being those for investors who had money lodged as at the knowledge date, was calculated by using the same methodology to assess the likely distribution in the hypothetical liquidation as at the knowledge date as was used in the actual liquidation;

5. For all investors, both class A and class B, any withdrawals after the knowledge date are subtracted; and

6. For all investors, liquidation distributions were also deducted and if that investor had both a class A and a class B claim, the deduction was allocated between each on a pro rata basis.

Once this calculation has been established (for each Claimant), we then apply the distribution methodology.

Proposed distribution methodology.

As investors are aware, our claim has two classes of loss. First, for those investors who lodged new funds with RAM after the knowledge date (Class A claims). We say none of that would have happened if RAM had been wound up on the knowledge date so all should be returned less withdrawals and liquidation payments. Second, for those investors who had funds in RAM on the knowledge date. We call these Class B claims and say that these investors would have got more back if the liquidation had occurred at the earlier point in time. The model calculates the total probable damages sum separately for

> the Class A claim and for the Class B claim. Some investors have claims in each.
>
> *It has been clear at all times that the two different claims did not have equal legal merit.* The Class A claim is based on an established and orthodox legal basis and while the bank has always denied liability, they did not really challenge the possible basis of this claim had they been held liable. By contrast, the Class B claim was novel and was based on general equitable principles rather than any established current cases. **[**Redacted.**]**
>
> *In considering a fair allocation of the settlement sum between the different classes, in our view it is necessary to weight the split between the two classes based on the relative legal strengths of the two claims, and also to reflect the total sum of each. Based on our preliminary advice, the respective likelihood of success for the Class A claim is considered to be about three times greater than the Class B claim.* This results in the sum for allocation to investors in Class A being greater by that proportion than for Class B.
>
> The allocation between investors with a Class A claim will be proportionate to their assessed claim against the amount of the settlement sum allocated to Class A. As between Class B investors, the allocation between them would follow the same approach as in the liquidation (i.e., being based on the net contribution balance).
>
> Applying that methodology, we will then be able to calculate the Claims Percentage of each of the 555 Claimants, for a fair distribution of the net settlement sum.
>
> There is one qualification. Because many investors withdrew funds from RAM after our assumed knowledge date of 31 May 2010, these payments (in addition to all liquidation payments) are deducted from that investor's potential payout, as they would not have been able to recover these amounts from the bank. Thus, while being able to join the claim, many claimants would recover only a tiny amount, or nothing.
>
> However the Committee recognise that the participation of all claimants has increased the pressure on the bank to resolve the case and that as a consequence, the Committee is of the current view that the distribution basis will provide for every claimant to receive a minimum payment from the settlement sum.

[30] The Committee received 18 substantive responses to this communication. One of the responses that was supportive of the proposal (and which acknowledged they were a Class A claimant and therefore biased) noted that the Committee had not stated how the knowledge date had been determined and the "methodology is dependent on being able to make a strong case for the knowledge date".

[31] Eleven of the 18 substantive responses were opposed to the methodology proposed. These investors were concerned about the differentiation between the Class A and Class B claimants and considered that a pro rata distribution across all

claimants was the fair approach. They were concerned about the subjectivity involved in the knowledge date chosen and the three times more likelihood of success of the Class A claim vis-à-vis the Class B claim.

[32] An example of concerns about the chosen knowledge date is provided by this investor's comments:

> As a RAM investor, we fall short of the knowledge date by approximately 2 and a half months, as our investment of $500,000.00 was made on or about 15 February 2010. Trying to understand the distribution model as outlined, I believe we could be impacted considerably? Probably as others will. …
>
> My thought are, morally, that all investors are in the boat together and the final distribution model should be applied regardless of date of investment, that is should not discriminate case A and case B claimants.
>
> …

[33] Another said:

> The settlement with LPF was made 'out of court' and as such, no date has been ruled by any court as to when ANZ could be made liable for any inappropriate action. So, from a fair and just perspective, the principles on which the proposed distribution methodology has been based has no substance or credence, let alone the need to split plaintiffs into A and B categories.

[34] One investor made that point that "the model proposed by the committee will greatly advantage a limited number of investors and disadvantage the greater number" and others expressed similar sentiments. Another investor with similar views noted that the "three times (more likely to be successful) is very subjective and by no means proven, and yet has a major impact on the distribution actual, verifiable losses". This view was also shared by others.

[35] On 21 October 2021, the Committee issued an Interim Distribution Decision and provided five working days for any further feedback from claimants. This advised claimants of the decision to:

> (a) Divide the settlement sum into two portions – one for the knowing receipt claim and one for the dishonest assistance claim – by reference to the relative value of those claims.
>
> (b) In respect of the division of the knowing receipt portion of the settlement sum:

(i) make a minimum payment to each claimant of $**[**redacted**]** to recognise their contribution to the successful resolution of this matter; and

(ii) pro rata the remaining funds by reference to the deposits each claimant is yet to recover in the liquidation.

(c) In respect of division of the dishonest assistance portion of the settlement sum:

(i) adopt a "knowledge date" of 31 May 2010;

(ii) adopt the methodology for calculating each individual claimant's loss used for settlement discussions with the Bank; and

(iii) weight the Class A losses with a 75% likelihood of success and the Class B losses with a 25% likelihood of success.

[36] The Interim Distribution Decision acknowledged the 11 responses that had opposed the proposal set out on 30 August 2021 and had carefully considered them. It went on to set out in some detail both how it had selected the knowledge date and how it had decided on the weighting between Class A and Class B investors. I discuss this later.

[37] The Interim Distribution Decision also discussed why it was appropriate to make a minimum payment to all claimants. It considered that the participation of all claimants had increased the pressure on ANZ to resolve the matter. The knowing receipt claim was a way of providing that minimum payment. It was brought on the basis that claimants would receive their pro rata share of unrecovered deposits. The knowing receipt claim made up 11.19 per cent of the total claim. The Committee determined that all 555 claimants would be paid $**[**redacted**]** (therefore distributing $**[**redacted**]** of the net settlement sum) and the remaining settlement funds for this claim (11.19 per cent of the net settlement sum less $**[**redacted**]** would be shared pro rata by reference to their deposits yet to be covered.

[38] The Committee explained another reason why Class B investors were receiving much less than their deposits and might feel aggrieved:

> We also note that the while the pleaded claim for Class B is assessed at $13.9m, it related to deposits of some $60m. While the theory of loss has been explained in communications to claimants (including the 27 June 2019 letter sent by PwC to all possible claimants inviting them to join the claim), there is

> obviously a significant difference between the amount that those claimants actually lost and what we said the Bank was liable for. This may therefore be disappointing to some Class B investors who had not previously understood the impact of the theory on their personal circumstances and may well think of their losses in terms of the deposits made.

[39] The Committee received eight responses in favour of the proposal in the Interim Distribution Decision and 26 responses that were opposed to it.[10] The general theme of those opposing the proposal was that the claimants had all signed up to the claim on the same basis, it was unfair that Class B investors would recover so little relative to the Class A investors, and that ANZ's views in the settlement negotiations should not be relevant to how the settlement proceeds were allocated. They wanted a pro rata distribution across all claimants and approval of this via a vote. One response also objected to the short time frame the Committee had allowed for a response.

[40] The Committee issued a Final Distribution Decision on 8 November 2021. This referred to the responses that did not agree with what was proposed and said they had been carefully considered. The Committee explained that it did not agree that the distribution methodology should be subject to a vote. It referred to the logistics involved with a vote, the requirement for a 75 per cent approval level, and the fact that the number of votes a claimant has depends on their Claims Percentage and so each claimant does not have an equal say.

[41] The Committee advised that after considering the responses and further reflection it had decided to adopt the Interim Distribution Decision but with one important change. That change was to increase the portion of the settlement funds allocated to the knowing receipt claim up to $**[**redacted**]** from $**[**redacted**]** million as allocated in the interim decision.[11] This weighted the claim at 80 per cent, consistent with the Committee's legal advice that this was the strongest of all the claims because of the lower knowledge requirement for liability. The change in the allocation therefore better reflected the merits of that claim and meant that the methodology was fairer overall.

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[10] In its Final Distribution Decision the Committee referred to there being 28 responses that disagreed with the proposed distribution. That appears to count two that were essentially from the same investor.

[11] By this time the knowing receipt portion of the claim had increased from 11.19 per cent to 11.38 per cent as a result of a PwC audit but this accounts only for a small part of the increase in the settlement sum allocated to this claim decided upon.

[42] This meant that on the knowing receipt claim each claimant would receive a minimum of $[redacted] and then the remaining portion of the $[redacted] allocation for this claim would be allocated to each complainant pro rata. The dishonest assistance portion of the net settlement sum (approximately $[redacted]) would be allocated by adopting the methodology for calculating each claimant's loss used for settlement discussions with ANZ and weighting Class A losses with a 75 per cent likelihood of success and the Class B losses with a 25 per cent likelihood of success.

[43] The Committee disagreed with the view that the net settlement sum should simply be shared pro rata across all claimants (as though it were a distribution in the liquidation). This did not reflect the merits of the claims advanced and the signed Committee Agreement required the settlement sum to reflect individual claimants' Claim Percentage. It also said that the litigation funder would never have funded only Class B claims. The litigation funder needed sufficient Class A investors in order to fund it. Class B claims were a logical extension of the claim and could be prosecuted efficiently at the same time.

[44] The Final Distribution Decision showed how the change to the knowing receipt allocation changed the overall percentage of the settlement sum distributed to the Class A and Class B claimants as follows:

	Total Claim at 31/5/10	Interim Distribution Decision	Final Distribution Decision
Knowing receipt	[$4,408,136.96]	$[redacted] (11.19%)	$[redacted] (24.73%)
Class A	$24,871,111.43 (64.2%)	$[redacted] (75.14%)	$[redacted] (63.47%)
Class B	$13,869,751.37 (35.8%)	$[redacted] (13.68%)	$[redacted] (11.80%)
Total	$38,740,862.80 (100%)	$[redacted] (100%)	$[redacted] (100%)

[45] The Committee advised that claimants wishing to present their views at the upcoming Court hearing could do so.

[46] As at 13 November 2021 the Committee had received 22 responses opposing the proposal. Generally, they were concerned that the Committee was made up of Class A investors and they called for a meeting to elect a new committee that fairly represented investors. These responses were points that T, an original member and driving force of an investor advocacy group, suggested claimants make if they were

opposed to the Committee's proposal. The Committee was concerned at the inaccuracies of the comments made by T in support of his call to investors to make these points. It set out those concerns in an email dated 14 November 2021 to T that I have reviewed.

[47] The Committee subsequently received a further 34 responses. Thirty of these expressed their support of the Committee and appreciation for its work. Two responses sought clarifications. One response was by T, seeking disclosure of all Committee expenses in preparation for the hearing. Another response expressed concerns about the fairness of the Class A and B split, and also suggested potential bias of the Committee and sought clarification on the distribution methodology, referring to an email by T that expressed these concerns.

Fairness and reasonableness assessment

The issues

[48] T, H and P are all Class B investors. P, for example, as a trustee, invested funds in February 2005 and made no deposits or withdrawals after 31 May 2010. He will therefore receive a pro rata share of the net settlement funds allocated to the knowing receipt settlement funds. He will also receive a pro rata share of the net settlement funds allocated to the Class B dishonest assistance share of the settlement funds.

[49] The objectors disagree with a methodology that involves a weighting based on chances of success. They say that this was not the basis on which they opted into the claim. They also say it ignores the fact that a settlement is not a judgment and is influenced by many factors of which chances of success is but one. Even if a weighting methodology is appropriate, they say that the assessed 75/25 weighting has not been sufficiently justified and cannot be correct. There is also a concern that the Committee members benefit from the 75/25 weighting because none of them are solely Class B claimants (three are Class A and B claimants and the other is only Class A).

Comparison with Camilleri

[50] The applicants submit that *Camilleri* is instructive as to how the proposed distribution methodology in the present case should be approached by the Court. In *Camilleri* the Court was asked to approve a settlement of a representative proceeding in which there were two categories of claimants for reasons broadly similar to the present case.[12]

[51] *Camilleri* concerned notes issued by ACR and held by TCL, a trustee, on behalf of the noteholders. The noteholders contended that by late 2005 TCL should have taken steps to protect them from losses arising from the likely prospect that ACR would be in administration in 2007. The failure to take those steps was alleged to have had two consequences and therefore two classes of losses (with some noteholders in both categories):

(a) First, it would have meant that notes issued after late 2005 would not have been issued so that there would have been "no transaction" for new investors who invested after that date. Noteholders in this class suffered "no transaction losses" for investments first made after late 2005.

(b) Secondly, the likely outcome would have been that ACR would have entered administration in late 2005 rather than in 2007, as eventually occurred. Noteholders who invested prior to late 2005 and whose investments were "rolled over" after this date rather than paid out suffered "roll over losses". They would have suffered some loss from a 2005 administration, but at a lower rate than they actually suffered in the 2007 administration.

[52] The Court had before it a document entitled "settlement distribution scheme". It set out how the settlement sum was to be distributed among group members. The distribution scheme involved a process for calculating the estimated loss of each group member, but with a different methodology applicable in the case of "no transaction

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12 *Camilleri*, above n 3.

notes" and "rollover notes". The details of the methodology were set out in a confidential schedule to the distribution scheme. Once the loss applicable to the notes was calculated, the settlement proceeds were to be applied on a pro-rata basis as between group members.

[53] The Court was asked to approve the settlement as fair and reasonable as between the applicants and group members, on the one hand, and TCL, on the other hand, that is, fairness and reasonableness *inter partes*. This is not relevant for present purposes as I am not asked to consider the fairness of the settlement entered into with ANZ.

[54] The Court was also asked to consider whether the settlement was fair and reasonable on an *inter se* basis, that is, as between the members of the group. It is this that is relevant to the present case. As to that, the Court said (my emphasis):

> 39 The next question is whether the proposed arrangements for distributing the fixed pool of settlement funds between the claimants are fair and reasonable.
>
> 40 In this case, as in many representative proceedings, the manner in which the settlement sum is to be distributed requires assumptions to be adopted and judgment calls to be made. *There are different classes of claimants within the body of group members here, and it is necessary to arrive at some model that fairly and reasonably divides the settlement sum between those classes, recognising the differences in their respective claims*. There is no single approach which alone can qualify as reasonable for sharing the fixed pool of funds among the claimants. Inevitably, adjustments in a given approach will be favourable for certain group members at the expense of others.
>
> 41 The question, therefore, can only be whether the model is within the bounds of fairness and reasonableness in its attempts to balance what are, unavoidably, conflicts between the interests of the different claimants.
>
> 42 As mentioned above, the applicants' solicitors have constructed the [the scheme] for managing the distribution of the settlement funds among the claimants. The [the distribution scheme], including the Loss Assessment Formula, reflects various 'judgment calls'. There is no doubt that other permutations of the distribution scheme could have been adopted. The question on this application is whether the [the distribution scheme], as presented now, is within the bounds of reasonableness in achieving a broadly fair, 'rule of thumb' distribution between the claimants.
>
> 43 The cases indicate a number of factors relevant to the assessment whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole. Some of these factors are as follows:

> (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
>
> (b) whether the assessment methodology, to the extent that it reflects 'judgment calls' of the kind described above, is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;
>
> (c) whether the assessment methodology is likely to deliver a broadly fair assessment (where the settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);
>
> 44 There are also procedural factors which relate to the fairness of a proposed distribution process, such as:
>
> (a) whether appropriate individuals have been nominated to administer the scheme;
>
> (b) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner;
>
> (c) whether the scheme incorporates appropriate 'checks and balances', such as procedures for ensuring consistency between assessments and meaningful opportunities for review (and objection) by group members.

[55] The Court determined that "the proposed arrangements for distributing the fixed pool of settlement funds between the claimants are fair and reasonable". It noted that the "rationale of the [distribution scheme], including the different treatment of "No Transaction Notes" and "Rollover Notes"" was discussed "in detail" in a confidential affidavit from the solicitor and a confidential affidavit of counsel. The Judge was satisfied on the basis of them that "the difference in treatment is appropriate and justified".[13]

[56] The Court went on to refer to further matters that supported the fairness and reasonableness of the proposed arrangements:

> 46 First, the [the distribution scheme] does not distinguish between the applicants on the one hand and group members on the other in terms of the procedures to be followed. They are all subject to the same assessment methodology.
>
> 47 Second, the loss assessment formulae under the [the distribution scheme] have been constructed to 'proxy' the kinds of damages-assessment principles which the applicants' representatives expect would in substance be adopted at trial. For example, the formulae take into account differing

[13] At [45].

> amounts in fact recovered to date by group members in respect of the notes the subject of the proceeding.
>
> 48 Third, apart from differences reflecting differences in quantum that likely could have been claimed by claimants respectively, the [the distribution scheme] otherwise does not discriminate between the applicants and the other claimants, or between different subcategories of claimants.
>
> 49 Fourth, under the [the distribution scheme], claimants will be notified of the assessment made for them and will have an opportunity to seek a review, initially by the scheme administrator and then, if required, by independent counsel.
>
> 50 Fifth, the proposed administrator and the solicitors supporting him are experienced with the administration of such schemes. Their specialised skills and background familiarity with the matter should assist in the smooth and efficient administration of the scheme.
>
> 51 Sixth, the scheme is designed to be implemented on a transparent, fair and timely basis.

[57] The applicants say that this supports the approach that the Committee has taken in this case. The objectors say that, while it supports a settlement based on an assessment of different loss calculations before and after a knowledge date, it does not support a weighting approach based on an assessment of prospects of success. They also point out that I do not have the benefit of a detailed opinion to justify the 75/25 weighting as between the two classes.

Pro rata

[58] I agree with the objectors that the distribution scheme in *Camilleri* does not appear to have involved a weighting as between the No Transaction and Rollover investors for their relative prospects of success. Rather, the difference between the two groups was as to how their losses were assessed. In other words, in the litigation their claimed losses were different in kind and the distribution scheme reflected this.

[59] This is similar to the first step in the distribution methodology here (set out earlier but repeated here for clarity):[14]

> As investors are aware, our claim has two classes of loss. First, for those investors who lodged new funds with RAM after the knowledge date (Class A claims). We say none of that would have happened if RAM had been wound up on the knowledge date so all should be returned less withdrawals and

[14] At [29] above.

> liquidation payments. Second, for those investors who had funds in RAM on the knowledge date. We call these Class B claims and say that these investors would have got more back if the liquidation had occurred at the earlier point in time. The model calculates the total probable damages sum separately for the Class A claim and for the Class B claim. Some investors have claims in each

[60] It does not appear that the *Camilleri* methodology included the second step in the distribution methodology here (again set out earlier but repeated here for clarity):[15]

> In considering a fair allocation of the settlement sum between the different classes, in our view it is necessary to weight the split between the two classes based on the relative legal strengths of the two claims, and also to reflect the total sum of each. Based on our preliminary advice, the respective likelihood of success for the Class A claim is considered to be about three times greater than the Class B claim. This results in the sum for allocation to investors in Class A being greater by that proportion than for Class B.

[61] However, the apparent absence of a weighting step in the methodology approved in *Camilleri* does not mean a weighting in the methodology here is unfair and unreasonable. The Committee Agreement authorised the Committee to "undertake such allocation in its reasonable discretion, having regard to any factors that the Committee may reasonably consider appropriate, including … the Claims Percentage … for each Plaintiff". The Claims Percentage was defined as including a claimant's proportionate interest in the claim with reference to any factor the Committee acting reasonably considered appropriate. One of the factors was the amount contributed by way of new money to RAM after the date that ANZ was alleged to be liable.

[62] This definition was broad enough to permit the Committee, if it was reasonable to do so, to distinguish between claimants both on loss calculation and on merits. I discuss later whether there was reasonable basis to distinguish the claimants on the merits and, if so, whether the weighting applied between the two groups was reasonable.

[63] However, I am unpersuaded by the objectors' submission that the fact of a settlement makes anything other than a pro rata distribution unreasonable. It is

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[15] At [29] above. This quotation refers to "preliminary advice" but, as is set out above, this position was confirmed in the Interim and Final Distribution Schemes.

certainly the case that a settlement sum reflects many considerations but a key consideration is the parties' respective views of the likely outcome of the litigation. If one set of claimants had less prospect of success than another set of claimants, that will typically be reflected in the settlement sum agreed upon. The evidence before me is that this was a relevant factor in the settlement negotiations here. A weighting for merits in distributing the settlement sum reflects that reality.

[64] For completeness, I note that *Pro-Sys Consultants Ltd v Infineon Technologies AG* provides an example where the merits of all claimants were taken into account in designing a fair and reasonable distribution of a settlement fund.[16]

Affidavit from counsel

[65] I do not accept the submission that the 75/25 per cent weighting cannot be supported in the absence of a confidential affidavit from counsel setting out its opinion of the respective strengths of the Class A and Class B claimants.

[66] It is apparent from the Committee documentation that the decisions that have been made reflect legal advice received. The Committee said so at the outset. I have reviewed the legal analysis set out in the 30 August 2021 communication and the Interim and Final Distribution Decisions. The legal rationale for a weighting has been reiterated by counsel at the hearing before me. I have had the benefit of counsel's submissions about this. I have also been case managing the proceeding and delivered the judgment on ANZ's unsuccessful strike out application.[17] I therefore have some familiarity with the legal issues albeit without the benefit of the evidence that would have been adduced at a trial.

[67] Further, in devising a settlement distribution methodology and seeking the court's approval of it, there is a balance to be struck between obtaining a near perfect methodology and cost. An opinion from an independent expert as to the likely success of the two classes of claimants would have added to the cost. The Court has the benefit of submissions from experienced and able counsel representing the objectors. It is

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16 *Pro-Sys Consultants Ltd v Infineon Technologies AG*, above n 7, at [36].
17 *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906, [2020] 3 NZLR 145.

unnecessary in these circumstances to require the applicants to instruct an independent expert to provide an opinion to the Court. That is not to say that it will be unnecessary in other cases.

The knowledge date

[68] In the Interim Distribution Decision, the Committee described the knowledge date as "fundamental" to determining the loss that ANZ would have been liable for. This was because there is a material difference between being liable for all money invested compared to being liable for the change in position between the actual liquidation and a notional earlier liquidation. This point relates to why the model adopted by PwC for calculating losses is different as between Class A and Class B. There is no challenge to this aspect of the model.

[69] The Committee also explained that the knowledge date could also have an impact on whether a claimant had recoverable losses. It gave the example of a claimant with only Class B losses who may have withdrawn more money after the knowledge date than they would have been entitled to recover from ANZ at the knowledge date. Such an investor still lost money because of Mr Ross' conduct, but that loss would not have been recoverable against ANZ if the claim had ultimately been successful at trial. Again, there is no issue with the Committee's explanation of this point.

[70] The Committee explained their reasoning for the choice of a 31 May 2010 knowledge date. It explained that **[**redacted**]**.[18]

[71] Against that background, the Committee explained it had decided to adopt a knowledge date of 31 May 2010 date because:

> (a) We consider that **[**redacted**]**.
>
> (b) We agree **[**redacted**]** that the enactment of the Financial Advisers Amendment Act 2010 was an important development. **[**Redacted.**]** But we think a Court would have considered its enactment on 30 June 2010 to be significant given from 1 July 2010 it codified the requirement for fund managers to hold client funds on trust. Accordingly, we consider that there is a strong case for 1 July 2010 to be the relevant knowledge date given the

[18] **[**Redacted.**]**

> Bank's existing knowledge of RAM's operations and the codification of the trust obligations.
>
> (c) Of course, understanding forthcoming legislation will precede it coming into force and we understand that the Bank was in fact well aware of the upcoming changes because it made submissions on the bill in March 2010. Accordingly, we have decided to use 31 May 2010 as the knowledge date as it is proximate to these important legislative changes and aligns the Class A claims with the limitation date risk (ie all deposits from 1 June 2010 are Class A deposits).
>
> (d) Any earlier date, though logical on our view of the Bank's conduct, was likely to face evidential difficulties given the passage of time and was also riskier because of the limitation defence.
>
> (e) Using 31 May 2010 as the knowledge date also has the practical benefit that the PwC analysis for the settlement discussions has been run at this date and the significant cost expended to undertake this analysis need not be incurred a second time for a different date.

[72] I consider these reasons are rational and sound. The knowledge date would have been a hotly contested and important issue had the proceeding gone to trial. It is not possible to say with any certainty how this might have been determined. The competing positions ranged from 5 February 2007 to 12 April 2012. The date determined by the Committee was closer to the later end of the range than the earlier but that does not make it unfair. It was chosen because of the strongly held view (I infer based on legal advice) that a Court would regard legislative developments on 30 June 2010 as significant. That view is a logical one and I can see no obvious reason to disagree with it on the information before me. This choice of date also took into account evidential difficulties, limitation defence risks (which I agree existed) and practicalities. These are all reasonable factors for the Committee to have taken into account.

The 75/25 weighting

[73] In the Interim Distribution Decision the Committee explained why a simple pro rata distribution of the net settlement funds across the claimants by reference to their outstanding claims in the liquidation was not appropriate. Specifically: it would disregard "the Claims Percentage" direction in the Committee Agreement which reflected the theory of loss arising from a knowledge date; the requirement to have regard to the best interests of the claimants taken as a whole was not a direction to

simply pro rata any settlement sum; and it would not reflect the individual strengths and weaknesses of an individual claimant's claims.

[74] The Committee went on to explain its respective assessment of the individual merits of the claim:

> The Class A and Class B claims were not of equal legal merit. The Class A theory was an orthodox claim for losses arising from transactions that were facilitated by the Bank after it had the requisite knowledge to establish liability. The Class B theory was novel, premised on what our legal team considered was a logical application of the principles underpinning the Court's jurisdiction to award equitable compensation.
>
> A further important factor when considering the merits of the claims is the limitation defence the Bank raised. As the strike out process showed, the Bank's view was that it could not be liable for any losses arising before 1 June 2010. While we were able to avoid having claims in respect of deposits prior to this date struck out, claims in respect of deposits after this date were stronger given the risk that the High Court (or an appellate court) would ultimately decide to follow the same approach as the UK Supreme Court in *Williams* as the Bank was arguing for.

[75] The Committee explained its weighting of the Class A and Class B claims as follows (my emphasis):

> As set out above, the Class A and Class B claims did not have the same likelihood of success. Accordingly, the Committee's view is that it is necessary to weight the split of the remaining settlement funds by reference to the relative strengths of the Class A and Class B claims. To do this, we consider that three steps need to be undertaken:
>
> (a) first, calculate the gross Class A and Class B losses as at the knowledge date;
>
> (b) second, weight the total Class A losses and weight the total Class B losses; and
>
> (c) third, assess each claimant's share of the weighted amounts by reference to their pro rata share of the Class A and Class B losses.
>
> Having regard to all of the factual and legal issues each class raised, we consider it is reasonable to adopt an assumption that the Class A claims were three times more likely to succeed than Class B claims. On this basis an appropriate weighting to reflect the relative likelihoods of success is 75% for Class A and 25% for Class B. *We note that views on this could differ, for example splits of two thirds/one third and 80%/20% may also be arguable but our view is that 75%/25% is certainly within the appropriate range*.

[76] There were therefore two factors that were regarded as affecting the likely prospects of success for the Class B claimants: the kind of loss they suffered and the limitation point. The objectors take issue with both of those.

[77] Taking the limitation point first, the applicants support their decision with reference to my decision on the strike-out application. As discussed in that decision, ANZ's view was that any claims as to the misapplication of funds before 1 June 2010 were out of time. It was argued on the narrow basis of whether the majority view that prevailed in a decision of Supreme Court of the United Kingdom had been followed in this country.[19] I held that the point had not been decided in this country but suggested that the claimants might have "somewhat of a hurdle to persuade a court to follow" the dissenting views given what had been decided here.[20] That was not to say that the hurdle was insurmountable but it was reasonable for the Committee to take into account the risk that ANZ's view about limitation would prevail.

[78] The objectors contest this on the basis that ANZ's theory on limitation relates to when Mr Ross misapplied funds rather than when ANZ became a dishonest assistor. While there must be evidence of a breach of trust, there is no duty on the assistor until they have the requisite "dishonest" knowledge. The objectors submit that the Committee's decision to adopt a knowledge date of 31 May 2010 resolved this point for the purposes of the settlement distribution methodology. For both classes of investors the relevant date for calculation of losses is 1 June 2010 and limitation periods are equally unproblematic for both.

[79] The objectors' position on this point may have merit. It has not been the subject of full argument so I reach no concluded view on it. It is, however, dependent on whether the Court would have found the knowledge date as being 31 May 2010. A later date would have turned more Class A claimants into Class B claimants. An earlier date would have turned more Class B claimants into Class A claimants but potentially moved back the limitation period, depending on whether the majority view that prevailed in the United Kingdom would be applied here. The Committee submits it was appropriate to make its decision on the basis of a reasonable prospect that this

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19 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.
20 At [180].

view would have been applied by a Court (potentially on appeal) here. Certainly, I consider the Committee was entitled to factor in some litigation risk about the limitation issue based on the strike out decision and their legal advice about that.

[80] In submissions in reply, counsel for the applicants said that the principal issue supporting the weighting adopted by the Committee was the "loss causation model" for Class B claimants. The submissions for the Committee explained the basis for the claimed losses for Class B claimants was as follows:

> In contrast, the Class B claim was relatively novel, premised on a logical application of the principles underpinning the Court's jurisdiction to award equitable compensation and which bore resemblance to the cases, such as they are, on quantum assessed on a deepening insolvency methodology. The loss sought to be claimed by Class B investors was the difference between what a Class B investor received in the actual liquidation and what they would have received in a hypothetical liquidation proximate to the knowledge date. Based on PwC's analysis this was 22.6295 cents in the dollar (being the difference between the estimated liquidation distribution of 42.2 cents and the actual liquidation distribution of 19.5705 cents). The Committee was aware that this was a generous estimate that had never been tested in anyway …They also knew that, given the nature of a Ponzi scheme, the closer the knowledge date to the date of liquidation the higher the likelihood the Class B claim would in fact be zero.

[81] The loss causation model relates to how damages are assessed. This is not assessed on a simple "but for" analysis. There are other potential factors at play. *Alexander v Cambridge Credit Corporation Ltd* and *Sew Hoy & Sons Ltd (in receivership and in liquidation) v Coopers & Lybrand* are illustrations of this, albeit in different contexts.[21] Counsel for the applicants say that the loss calculation issues were of particular complexity for a range of reasons, for example because of the innumerable transactions at issue.

[82] The objectors say that the Class B claim was not that novel. They agree with the Committee that it was a logical application of the principles underpinning the Court's jurisdiction to award equitable compensation and did bear resemblance to other cases.[22] They accept that the calculation of individual losses for Class B claimants is more complicated, but they say that the complication arises not from

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21 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 and *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand* [1996] 1 NZLR 392.

22 For example, reckless trading: *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 and *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] NZCA 99.

doubt about whether there is a cause of action but from the mingling of funds and the difficulties of tracing. They say that PwC has made its calculations and the complications are better resolved by those calculations and the use of simple pro rata sharing between the members of that class.

[83] I agree with the objectors that the novelty of the Class B claim does not equate to very low prospects of success. The fact that there is no reported case precisely on point more likely reflects the complications involved in proving losses and that civil claims are frequently settled. However, I also agree with the Committee that the complexities in proving the claimed losses for Class B claimants were relevant.

[84] My assessment is that there was a reasonable basis for the Committee to determine that Class A claimants had higher prospects of success for their claimed losses than did Class B claimants. The different categories of claimants was referred to in the letter that went to potential claimants. The accompanying summary advice noted there were still issues to be considered. The higher prospects of success for Class A claimants was based on legal advice, and it took into account that this was a factor relevant in the settlement negotiations. The authorities accept that the prospects of success in the Court can be taken into account in a settlement distribution methodology.

[85] The question is whether it was reasonable to conclude that the respective likelihood of success for the Class A claim was about three times greater than the Class B claim. The Committee accepted that views on this could differ, for example splits of 67/33 per cent and 80/20 per cent may also be arguable. Its view was that 75/25 per cent was within the appropriate range. The objectors submit that a 60/40 per cent weighting would have been more fair.

[86] It is not possible to be precise about this. I accept that reasonable minds could differ about respective prospects of the claims. Just because there is no magic number, however, does not mean I should endorse the Committee's weighting as reasonable. I accept they have been entrusted with a discretion. However, I consider the objectors have raised reasonable concerns about the assessed limitation risk in light of the chosen knowledge date and the novelty of the claim per se (as opposed to difficulties

in proving the causal losses). I also take into account that the chosen knowledge date is at the later end of the possible range of knowledge dates and that this has had an effect on who is a Class B claimant and who is a Class A claimant. The large number of Class B claimants are affected by the weighting assessment. I consider that the 75/25 per cent weighting is a little outside of the reasonable range when all of these factors are taken into account. I conclude that the weighting should be adjusted a little to a 67/33 per cent weighting.

Overall unravelling

[87] The applicants submit that it would not be appropriate for the Court to alter one aspect of the distribution methodology because the various components are an intertwined whole. Changing one aspect could affect the decisions reached on other aspects. However, no issues have been raised about the fairness and reasonableness of those other aspects and none are apparent to me. I have carefully reviewed all the information put before me. The relative weighting of the Class A and Class B claimants is an important individual component of the methodology. I am not persuaded that slightly adjusting the weighting to 67/33 from 75/25 alters the overall fairness of the distribution scheme.

Conclusion

[88] Overall I am satisfied that the proposed distribution is fair and reasonable to the claimants as a whole and to them individually subject to the one adjustment I have made. The process the Committee has followed has been thorough and fair. The concerns that some Class B claimants have had because Committee members are not entirely Class B claimants is understandable. However, I have carefully reviewed the process followed and the decisions reached. I have done so conscious of the grief and hardship that investors suffered at the hands of Mr Ross.[23]

[89] I have read the responses to the various iterations of the Committee's proposed distribution methodology. Some investors have understandably found the

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[23] I was Duty Judge in 2012 when the FMA sought the appointment of receivers when serious concerns about RAM were revealed. Concerned investors were present that day. I was a member of the Court that heard Mr Ross' appeal against sentence.

methodology all a bit too complex to understand. It may be helpful for the investors to know that I consider them to have been well-served by the thorough work of the Committee and their high calibre advisers.

Costs

[90] The objectors seek their legal costs under the High Court Rules 2016, r 14.6(4)(c), which provides a court may order indemnity costs if costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding. The objectors say they acted reasonably and performed a useful function by testing the proposed methodology, adding to the robustness of my assessment. Their approach is that the Committee are in effect trustees in respect of the settlement proceeds and this proceeding is essentially one where trustees are asking the Court for guidance in order to ascertain the interests of the beneficiaries or on a question arising out of trust administration.[24] They refer to *Martin v Morgan*, in which the Court indicated the approach in this rule can apply in contexts beyond trustees or beneficiaries bringing such applications.[25] In the alternative they also rely on r 14.6(4)(f), which provides that a court may award indemnity costs if some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[91] The applicants oppose this and are content to let costs lie where they fall. They say this is a contractual matter and no claimant has an entitlement to make submissions before the Court under the terms of the Committee Agreement and each claimant is bound by the determination of the Committee and has waived any right to challenge the Committee's determination of their claims percentage. I take this as a challenge to the "necessary" element (and possibly "reasonable" element) of r 14.6(4)(c).

[92] I consider that the objectors provided an important voice for the Class B claimants concerned at what was proposed and some comfort that the objections have

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24 One of the categories of proceedings identified in *Re Buckton* [1907] 2 Ch 406 at 414-415. In *Waitara Leaseholders Association Inc v New Plymouth DC* HC New Plymouth CIV-2004-443-162, 20 December 2005, Harrison J observed that r 14.6(4)(c) was apparently drafted to recognise this category (and the category where a beneficiary brings such an application).

25 *Martin v Morgan* HC Hamilton, CIV 2010-419-1628, 10 June 2011, at [32].

been heard and considered. Without their contribution, there would have been no contradictor in the proceedings. The Law Commission in the issues paper on class actions and funding referred to above has discussed the potential need for courts to have independent expert assistance when approving settlements as a way of addressing the "adversarial void" at the settlement approval stage.[26] While the objectors are not independent experts, they did assist in providing an alternative position against which the fairness and reasonableness of the proposed methodology could be tested.

[93] I consider this constitutes a reason under r 14.6(4)(f) to award reasonably incurred indemnity costs for their counsel's submissions and appearance in Court. Those submissions were concise and confined to relevant points. I grant the objectors' costs accordingly.

Result

[94] The distribution methodology proposed by the Committee is approved subject to one variation. The variation is that the weighting of 75/25 per cent applied as between Class A and Class B claimants is adjusted to 67/33 per cent.

[95] Confidentiality orders are made to the information redacted at [11], [29], [35], [37], [41], [42], [44], [70], fn 18 and [71].

Mallon J

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[26] Law Commission *Class Actions and Litigation Funding*, above n 9, at [6.36]-[6.42].