IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA248/2018
[2018] NZCA 590

	BETWEEN	FINANCIAL MARKETS AUTHORITY Appellant
	AND	ANZ BANK NEW ZEALAND LIMITED Respondent

Hearing: 23 October 2018

Court: Miller, Cooper and Asher JJ

Counsel: H B Rennie QC, T C Stephens and J Orpin-Dowell for Appellant
A R Galbraith QC, S M Hunter and V L Heine for Respondent

Judgment: 17 December 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court orders quashing the appellant's decision to make the proposed disclosure, and prohibiting the appellant from making the proposed disclosure, are quashed.

C The High Court costs award in favour of the respondent is quashed. Costs in the High Court are to be reconsidered by that Court in the light of this judgment.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

E Order prohibiting distribution or publication of this unredacted copy of the judgment beyond the parties and their legal counsel.

F The respondent is to file submissions on suppression or redaction by 16 January 2019. The appellant is to file submissions in response by 25 January 2019.

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] This is a judicial review proceeding. The respondent, ANZ Bank New Zealand Ltd (ANZ), has challenged the Financial Markets Authority's (FMA) decision to disclose to third parties documents the FMA has obtained from ANZ through the exercise of its statutory powers. The FMA had obtained information from ANZ as part of its investigation into the Ponzi scheme run by Ross Asset Management Ltd (RAM) and the subsequent failure of that scheme causing loss to investors. The FMA decided to disclose the documents obtained through this process to RAM's liquidation committee and the liquidators (and their legal counsel) for three purposes:

(a) to obtain responses and any additional information from the RAM investors to the information received from ANZ; and

(b) to determine the next steps that should occur to enable the RAM investors to evaluate the merits of a claim against ANZ and consider their position with respect to any such claim; and

(c) to enable the FMA to consider and determine whether to exercise its powers under s 34 of the [Financial Markets Authority Act 2011].

[2] ANZ argued successfully before Fitzgerald J in the High Court that the proposed disclosure was outside the powers of the FMA as conferred by the Financial Markets Authority Act 2011 (the Act) and was for an unauthorised purpose.[1] The FMA appeals that decision.

Background

[3] RAM held itself out as an investment service. Investors paid money into RAM believing that their funds would be invested in a portfolio of shares and other securities on their behalf. Investors made payments on the understanding that both their money and securities would be held on trust on an individual investor basis. The money was not held on trust. Instead, investors' money became part of a pool of cash and shares. RAM provided fictitious quarterly reports to investors claiming that investor funds were making strong returns. Meanwhile, the pool of investor funds was used to meet RAM's operating expenditure or to pay out withdrawals sought by other investors in order to perpetuate the scheme.

[4] In October 2012 the FMA began receiving complaints from investors in RAM who had repeatedly requested to withdraw their funds without success. The FMA immediately commenced an inquiry. On 26 October 2012 the FMA issued notices under s 25 of the Act to all five major New Zealand banks in order to identify RAM's bankers. Section 25 of the Act empowers the FMA to require a person or entity to supply information or documents if the FMA considers this "necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act or any provision of the financial markets legislation". ANZ responded that day confirming that it held accounts for RAM and associated persons and entities.

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1 *ANZ Bank New Zealand Ltd v Financial Markets Authority* [2018] NZHC 691, [2018] 3 NZLR 377.

On 30 October 2012 the FMA sent a further notice to ANZ asking it to confirm whether ANZ held accounts for further entities associated with RAM. ANZ responded on 31 October 2012 confirming it held bank accounts for two of the entities named in the notice.

[5] In the early stages of its investigation the FMA's priority was to ascertain the status and location of investor funds in order to maximise recovery for investors. In November 2012 it issued ANZ with two further notices under s 25 of the Act seeking bank account statements, file notes and correspondence between ANZ and RAM entities. Internal memoranda within the FMA at this time demonstrate that the purpose of these notices was to assess what action could be taken to protect investors funds. Shortly afterwards, on 17 December 2012, RAM and its associated entities were put into liquidation.

[6] The FMA's focus throughout 2013 was on the prosecution and conviction of the operator of RAM, Mr David Ross, in connection with the Serious Fraud Office. However, the FMA also continued to work alongside the liquidators as they carried out their recovery strategy for investors. To that end, in response to requests by the liquidators, the FMA supplied the liquidators with banking records, file notes and log notes relating to ANZ's dealings with Mr Ross and RAM. This included information the FMA had obtained from ANZ pursuant to one of the notices under s 25 of the Act.

[7] On 11 December 2014, representatives of the FMA met with the liquidators of RAM. Having conducted their own inquiry, the liquidators had obtained legal advice on the prospects of a claim against ANZ for participation in RAM's breaches of trust to investors. However, they had concluded that, while there may be a potential claim in knowing receipt or dishonest assistance, it was not the role of the liquidators to bring it. Rather, the claim was properly brought by the investors, or by the FMA under s 34 of the Act.

[8] The FMA subsequently began a focussed inquiry into ANZ's operation of RAM's bank accounts. Between April and June 2015 it issued two more notices to ANZ under s 25 of the Act requesting further information, including RAM client trust

account balances and information about ANZ staff members the FMA considered it may wish to interview in the course of its inquiry. After reviewing the material provided, the FMA obtained an external legal opinion about the prospects of a claim against ANZ. In January 2016 the FMA's inquiry into ANZ's management and conduct of RAM's accounts became an investigation.

[9] On 17 February 2016 the FMA wrote to ANZ stating that it had formed the view that ANZ "may still be liable to a beneficiary for a breach of trust in equitable causes of action for knowing receipt and dishonest assistance". The central issue was described as the extent to which ANZ could be said to have "known" of RAM's misapplication of investor funds, according to the requisite knowledge standard. The letter also expressed concern that there were omissions in ANZ's records that were difficult to understand, and that this had obstructed the FMA's ability to efficiently investigate the matter. The letter indicated that the FMA considered it "appropriate to share its findings with RAM investors as any decision about whether a claim is brought will necessarily need to have their input".

[10] On 15 March 2016 ANZ replied via its general counsel, setting out its view that there was no basis for civil proceedings against it. It also asserted there was no basis for the FMA to disclose its findings to RAM investors and that "the FMA has no legitimate reason to disclose this information and the investors and the liquidators have no legitimate interest in receiving the information".

[11] The Enforcement Division of the FMA met on 25 May, 16 June and 8 July 2016 to consider the matter of disclosure. We will refer to the minutes of those meetings later in this judgment. The Enforcement Division ultimately determined that it was appropriate to make disclosure under ss 59(3)(c) and 59(3)(f) of the Act for the three purposes outlined above at [1]. The information to be disclosed would comprise the external legal advice in relation to the potential claims against ANZ and the documents referred to in that advice, including documents obtained from ANZ pursuant to the notices issued by the FMA under s 25 of the Act. Those documents comprise RAM account operating authorities, credit memoranda, bank diary notes in relation to RAM accounts, internal ANZ email correspondence and correspondence between ANZ and RAM.

[12] Rather than disclosing that information to all RAM investors, the FMA resolved to engage with the RAM liquidation committee as a proxy for the wider investor group.[2] Part of the reason for that decision was to make it easier to obtain and enforce confidentiality agreements in respect of the disclosed information. Disclosure would also be made to the liquidators of RAM and their legal counsel.

[13] The initial process for disclosure was outlined in an Enforcement Division Paper dated 4 July 2016.[3] In general terms, the proposed process was:

(a) The FMA would seek a meeting with the RAM liquidation committee, the liquidators, and their legal counsel.

(b) In advance of the meeting, the FMA would obtain confidentiality agreements from every liquidation committee member, liquidator, and legal counsel.

(c) The meeting would involve:

(i) verbally sharing the FMA's findings to date;

(ii) summarising the external legal advice;

(iii) confirming the FMA's view that there may be claims against ANZ, subject to further evidence that may need to be obtained (the nature of that further evidence would also be explained); and

(iv) stating that the FMA is prepared to disclose certain documents on a common interest privilege basis provided that the FMA can be satisfied that the confidentiality of the information can be maintained.

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2 A liquidation committee was established shortly after the appointment of the liquidators under s 315 of the Companies Act 1993.

3 There was a minor amendment to that process recorded in the minutes of the Enforcement Division meeting on 8 July 2016.

(d) No documents would be disclosed at the meeting. Once satisfied that appropriate confidentiality protections were in place, the FMA would disclose the external legal advice and the documents referred to in it on a counsel only basis to the RAM liquidation committee's legal counsel, and to the liquidators and their legal counsel.

(e) Discussion would follow about a wider disclosure of documents to the RAM liquidation committee, and the potential scope of any further disclosure that may be required.

[14] On 13 July 2016 the FMA advised ANZ of its decision to disclose, reiterating the three purposes set out above at [1]. ANZ sought judicial review of that decision.

The High Court decision

[15] The Judge held that the FMA's proposed disclosure would be in breach of provisions of the Act.[4] Importantly, the Judge held that the FMA's three stated purposes in making the disclosure were insufficient. The first claimed purpose was said to be a "secondary or non-operative" purpose.[5] Disclosure was not authorised because the investors did not have a "proper interest" in receiving the information for the purposes of s 59(3)(f) of the Act.[6] She also held that, under s 59(3)(c), disclosure must be "reasonably necessary" for the performance or exercise of any FMA function, power, or duty, or there must be a "close connection or nexus" between the proposed disclosure and the FMA's performance or exercise of the relevant function.[7] That standard was not met in this case.[8] The FMA's decision to make the proposed disclosure was quashed and the FMA was prohibited from making the proposed disclosure.[9]

[16] We will return to the Judge's decision in more detail later in this judgment.

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4 *ANZ Bank New Zealand Ltd v Financial Markets Authority*, above n 1, at [160].
5 At [45(a)].
6 At [142].
7 At [99].
8 At [101].
9 At [161].

The statutory scheme

The critical section — s 59(3)

[17] Section 59 of the Act governs the disclosure of information and documents obtained by the FMA under the Act. Section 59(3) and (4) provide:

> **59 Confidentiality of information and documents**
>
> …
>
> (3) The FMA must not publish or disclose, or direct an authorised person to publish or disclose, any information or document to which this section applies *unless*—
>
> (a) the information or document is available to the public under any enactment or is otherwise publicly available; or
>
> (b) the information is in a statistical or summary form; or
>
> (c) *the publication or disclosure of the information or document is for the purposes of, or in connection with, the performance or exercise of any function, power, or duty conferred or imposed on the FMA by this Act or any other enactment*; or
>
> (d) the publication or disclosure of the information or document is to a law enforcement or regulatory agency under subpart 2; or
>
> (e) the publication or disclosure of the information or document is to an overseas regulator under subpart 2 or otherwise for the purpose of assisting the FMA to co-operate with an overseas regulator; or
>
> (f) *the publication or disclosure of the information or document is to a person who the FMA is satisfied has a proper interest in receiving the information or document*; or
>
> (g) the publication or disclosure of the information or document is with the consent of the person to whom the information or document relates or of the person to whom the information or document is confidential.
>
> (4) The FMA must not publish or disclose, or direct an authorised person to publish or disclose, any information or document under subsection (3)(f) unless the FMA is satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document (in particular, information that is personal information within the meaning of the Privacy Act 1993).
>
> (Emphasis added.)

[18] The FMA considers that its proposed disclosure is permitted under s 59(3)(c) and 59(3)(f).

[19] Section 60 of the Act empowers the FMA to impose any conditions in relation to the publication, disclosure or use of the information or document by the person to whom the disclosure is made under s 59(3)(c) or (f). Section 60(3)(a) states that the conditions may include conditions to maintain the confidentiality of anything provided.

[20] As the High Court recognised, at the core of this case is an issue of statutory interpretation, in particular the interpretation of s 59(3)(c) and (f).[10] In assessing those provisions we bear in mind s 5 of the Interpretation Act 1999, which makes the text and purpose of an enactment the key drivers of statutory interpretation. We apply the often-quoted words of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[11]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[21] To put s 59 in context, we begin with a brief history of the Act.

Brief history of the legislation

[22] The predecessor of the FMA was the Securities Commission. This was established by the Securities Act 1978.[12] From 2007 there were a number of serious failures in the financial sector involving significant losses to investors. There was a perception that the existing Securities Act regime did not go sufficiently far in protecting investors. In 2008 the Capital Market Development Taskforce was established to examine New Zealand's capital markets systems and make

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10 At [73].

11 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

12 Securities Act 1978, s 9.

recommendations as to how they could be improved. In 2009 the Capital Market Development Taskforce observed that earlier financial markets legislation had not served retail investors well.[13] The Taskforce proposed the consolidation of existing regulatory functions in a single regulator to address overlap and concentrate expertise, and the vesting of new powers in that regulator to reduce regulatory gaps.[14]

[23] In early 2010 the Minister of Commerce announced the government's intention to introduce a successor to the Securities Act, and create a single regulator for New Zealand's financial markets. The legislation was described as being "at the centre of the Government's drive to restore the confidence of mum and dad investors in our financial markets".[15] The FMA was to take over the functions of the Securities Commission, the Government Actuary, and other consolidated regulatory functions which had been fragmented across the Ministry of Economic Development and the Minister of Commerce.[16]

[24] It was also intended that the FMA would have a more active surveillance and enforcement role in respect of the financial markets. The FMA was given additional functions and powers enabling it to take on a more hands-on regulatory function.[17] To that end, under s 34 of the Act, the FMA was empowered to exercise a person's civil right of action against a financial markets participant. We will return to s 34 later in this judgment.

Objectives and functions of the FMA

[25] Section 59 must be read in light of the FMA's objective and functions. The FMA's main objective is set out at s 8 of the Act:

> **8 FMA's main objective**
>
> The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets.

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13 Capital Market Development Taskforce *Capital Markets Matter: Report of the Capital Market Development Taskforce* (December 2009) at 83–84.

14 At 87–88.

15 Beehive.govt.nz "Government announces 'super-regulator' for financial markets" (press release, 29 April 2010).

16 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-1) (explanatory note) at 1.

17 Ministry of Economic Development *Regulatory Impact Statement: A power for the FMA to exercise an investor's right of action* (14 September 2010).

[26] It is to be noted that the objective of promoting and facilitating the development of "fair, efficient, and transparent" financial markets is broad. In the light of the legislative history we have outlined above, the reference to "transparency" indicates that Parliament was concerned that investors were not receiving sufficient information, and that transparency is a means of achieving protection for investors. This is reinforced by the description of the FMA's functions under s 9 of the Act

[27] The FMA's functions, insofar as they are relevant to the appeal, are:

> **9 FMA's functions**
>
> (1) The FMA's functions are as follows:
>
> (a) *to promote the confident and informed participation of businesses, investors, and consumers in the financial markets, including (without limitation) by—*
>
> (i) *collecting and disseminating information or research about any matter relating to those markets*:
>
> …
>
> (iv) providing, or facilitating the provision of, public information and education about any matter relating to those markets:
>
> (v) stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct (for example, to give a person some level of certainty that the FMA will take no further action in relation to a matter):
>
> (b) to perform and exercise the functions, powers, and duties conferred or imposed on it by or under the financial markets legislation and any other enactments:
>
> (c) to monitor compliance with, investigate conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforce—
>
> (i) the Acts referred to in Part 1 of Schedule 1 (and the enactments made under those Acts); and
>
> (ii) the Acts referred to in Part 2 of Schedule 1 (and the enactments made under those Acts) to the extent that those Acts or other enactments apply, or otherwise relate, to financial markets participants:

(d) *to monitor, and conduct inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets*:

…

(Emphasis added.)

[28] As s 9(1)(d) indicates, one of the ways in which the FMA achieves its main objective is by monitoring and conducting inquiries and investigations into the conduct of financial markets participants. We have already noted s 25, which empowers the FMA to require a person to supply information, produce documents, or give evidence if the FMA considers this is "necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act". In addition, the FMA has the power to enter and search a place, vehicle or other thing in order to ascertain whether a person has engaged in or is engaging in conduct that may constitute a contravention of any financial markets legislation.[18]

[29] Overall, the FMA's main objective is served by two broad functions. First it is met by the Act improving the checks and balances on financial markets participants so that they fairly and fully inform investors of what is offered. This enhances the fair and transparent promotion of financial products. Second it is met by the creation in the Act of more specific mechanisms to help the FMA enforce relevant legislation and duties to investors. Section 34 of the Act is an example of this. It provides:

34 FMA may exercise person's right of action

(1) If, as a result of an inquiry or investigation carried out by the FMA, the FMA considers that it is in the public interest for it to do so, the FMA may, in accordance with this subpart,—

(a) *exercise the right of action that a person (**person A**) has against a person who is or has been a financial markets participant by commencing and controlling specified proceedings against the person who is or has been a financial markets participant*; or

(b) *take over specified proceedings that have been commenced by a person (**person A**)* against a person who is or has been a financial markets participant for the purpose of continuing the proceedings.

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18 Financial Markets Authority Act 2011, 29.

(2) In this subpart, **specified proceedings** means any of the following kinds of proceedings:

(a) proceedings under, or in respect of, any financial markets legislation (other than criminal proceedings):

(b) *proceedings seeking damages or other relief for a contravention, an involvement in a contravention, fraud, negligence, breach of duty, or other misconduct, committed in connection with a matter to which the inquiry or investigation referred to in subsection (1) related*.

(3) In exercising a power under this section, the FMA must act in the public interest, but (subject to that duty) *may take into account the interests of—*

(a) *person A*; and

(b) the shareholders, members, and creditors of person A; and

(c) if person A is an issuer, any product holders of financial products issued by person A.

(4) *[Repealed]*

(5) The FMA *must*, when considering whether exercising a power under this section is in the public interest, *have regard to—*

(a) *its main objective under section 8*; and

(b) the likely effect of the proceedings on the future conduct of financial markets participants in connection with the financial markets; and

(c) *whether exercising the powers is an efficient and effective use of the FMA's resources*; and

(d) *the extent to which the proceedings involve matters of general commercial significance or importance to the financial markets;* and

(e) *the likelihood of person A commencing the proceedings (if those proceedings have not yet been commenced) and diligently continuing the proceedings*; and

(f) any other matters it considers relevant.

(Emphasis added.)

[30] In its Regulatory Impact Statement on s 34, the Ministry of Economic Development noted that, under the previous legislation, financial markets participants and other persons may have acted in a manner that gave rise to a civil right of action,

but the Securities Commission was unable to act.[19] This could include cases of negligence and breach of trust. It was stated:[20]

> It is rarely in the interests of individual investors to act in these cases because of the costs and risks involved or, in the case of debenture holders, because they have limited legal standing. Further, in the case of closely held companies, the company and its shareholders may not have the right incentives to bring action against directors. This is likely to have been the case with a number of finance companies, for example.
>
> *A majority of the FMA Establishment Board's members consider that there is a material risk of a mismatch between expectations and powers if the FMA does not have a more general power to take cases on behalf of investors. This has the potential to undermine the credibility of the FMA, especially if important cases arise during the critical establishment period and the FMA is unable to act.*

[31] The Regulatory Impact Statement identified three intermediate objectives:[21]

> 1. Increasing the likelihood that duties owed to investors by financial markets participants are enforced, particularly where large numbers of retail investors are affected.
>
> 2. Improving investor confidence in the regulator and financial markets more broadly.
>
> 3. Ensuring that experienced and competent directors and other financial markets participants are not discouraged from participating in financial markets.

[32] It was recognised that there were trade-offs between the first two intermediate objectives and the third. It was considered that the best option would balance those intermediate objectives in a way that maximised achievement of the overall objective of facilitating a fair, efficient and transparent financial market.[22] It was noted that in Australia the Australian Securities and Investments Commission has a power to exercise another person's civil right of action.[23] Based on that power, it was proposed that the FMA be given an equivalent power to exercise a person's right to bring a civil action against a financial markets participant where it considered this to be in the public interest. In choosing to give the FMA the new power it was observed that this would benefit investor confidence in the regulator and financial markets, given the

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19 Ministry of Economic Development *Regulatory Impact Statement*, above n 17, at 2.
20 At 2 (emphasis added).
21 At 2.
22 At 3.
23 Australian Securities and Investments Commission Act 2001 (Cth), s 50.

knowledge that the FMA would be able to take action on a much wider range of matters than previous regulators.[24] There could be greater compliance by financial markets participants involved in public offerings of financial products, because civil cases would become possible where they were not practical previously "such as where there were numerous investors with relatively small investments".[25]

[33] In the explanatory note to the Financial Markets (Regulators and KiwiSaver) Bill 2010 (which later became the Act), it was commented:[26]

> The power does not change the duties or liability of any person: its sole effect is to give the FMA standing to take up existing rights of action against certain persons in certain circumstances. Its primary objective is to promote the public interest rather than to obtain redress for investors, although redress (for example, damages) would often follow if the FMA's action were successful. The power is similar in scope to that available under section 50 of the Australian Securities and Investments Commission Act 2001 (Aust).
>
> In assessing whether it is in the public interest to take action, the FMA will have to consider certain matters, including the FMA's objective of promoting fair, efficient and transparent markets, the likely effect of proceedings on future conduct, the effective and efficient use of its resources, the significance of the matter *and whether the action would be taken if the FMA did not act*. As a result, it is expected that the FMA will exercise the power infrequently.

[34] The section is important to the issues in this appeal, as one of the stated reasons for the proposed disclosure arises from the FMA's belief that investors may have a right of action against ANZ. The FMA's third stated purpose of disclosure is "to enable to FMA to consider and determine whether to exercise its powers under s 34 of the Act". The FMA contends that the proposed disclosure is therefore "for the purposes of, or in connection with, the performance or exercise of any function, power or duty conferred or imposed on the FMA" by the Act under s 59(3)(c). We will return to this issue later in the judgment.

Confidentiality — general approach

[35] In the High Court, the Judge began her analysis with an examination of "the broader context to the statutory scheme regarding confidentiality".[27] The Judge noted

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24 Ministry of Economic Development *Regulatory Impact Statement*, above n 17, at 3.
25 At 3.
26 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-1) (explanatory note) at 4.
27 *ANZ Bank New Zealand Ltd v Financial Markets Authority*, above n 1, at [72(a)].

that s 59, as its title confirms, concerns confidentiality of documents and information obtained by the FMA through the exercise of its statutory powers.[28] The Judge emphasised the statement of Lord Toulson JSC in *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners*:[29]

> The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the *Marcel* principle, after *Marcel v Comr of Police of the Metropolis* [1992] Ch 225.

[36] The Judge relied on this and other cases for the principle that "absent clear wording to the contrary, the purpose for which documents may be compulsorily obtained by a public body will ordinarily limit the purpose for which they can be used and disclosed".[30] She concluded as a matter of statutory interpretation, applying that principle, that s 59(1)(c) only permitted disclosure:[31]

> (a) when disclosure is reasonably necessary for the purposes of the performance or exercise of any function, power or duty conferred or imposed on the FMA by the Act or any other enactment; or
>
> (b) where there is a close connection or nexus between the disclosure and the performance or exercise of the FMA's relevant function, power or duty.

[37] We note that the statutory regimes in the cases relied upon by the Judge were all different from the present. Those cases emphasised the importance of the terms of the relevant statutory powers. In *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* confidential taxpayer information obtained using the Revenue and Customs Commissioners compulsory powers was disclosed to journalists in an informal briefing.[32] There was no statutory provision authorising such disclosure, and the Supreme Court observed that the total confidentiality of the assessments was a vital element in the working of the system.[33]

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28 At [75].

29 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [17].

30 *ANZ Bank New Zealand Ltd v Financial Markets Authority*, above n 1, at [80].

31 At [99].

32 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners*, above n 29.

33 At [17].

[38] In *Marcel v Commissioner of Police of the Metropolis*, the issue was whether the police, on being served with a subpoena in civil proceedings, were required to produce documents that had been seized under compulsion in a criminal proceeding.[34] It was held by the Court of Appeal of England and Wales that they were obliged to do so, although the question of whether they could have been voluntarily produced was raised.[35] It was noted that the legislation did not "spell out expressly the purpose for which documents seized … can be used".[36] In the absence of an express provision permitting disclosure, there could be no voluntary disclosure "otherwise than for the specific purposes specified in the Act".[37] It was also observed that voluntary disclosure could be "only for those purposes for which the relevant legislation contemplated they might be used".[38]

[39] We note also the following statement of Lord Browne-Wilkinson in *Re Arrows Ltd (No 4)*:[39]

> In my view, where information has been obtained under statutory powers the duty of confidence owed on the *Marcel* principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure.

[40] We consider that the Judge's starting point should have been the plain language of s 59. Section 59 expressly recognises the confidentiality of documents obtained by the FMA using its powers under the Act to obtain information, and sets out a regime permitting disclosure in certain circumstances. Section 59 must be read and understood in the context of the whole Act, which is designed to assist investors both before they invest, and after they invest if they have suffered losses through actionable conduct by financial markets participants. In our view s 59 must be construed in the usual way outlined in *Fonterra*,[40] without the overlay of an additional common law presumption against the disclosure of confidential documents. With that approach in

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34 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA).
35 At 256–257.
36 At 233.
37 At 258.
38 At 262.
39 *Re Arrows Ltd (No 4*) [1995] 2 AC 75 (HL) at 102.
40 See above at [20].

mind, we turn to consider whether the three purposes of disclosure advanced by the FMA meet the requirements for disclosure under the Act.

Analysis

[41] As we have set out, the FMA resolved to make disclosure for three purposes:

> (a) to obtain responses and any additional information from the RAM investors to the information received from ANZ; and
>
> (b) to determine the next steps that should occur to enable the RAM investors to evaluate the merits of a claim against ANZ and consider their position with respect to any such claim; and
>
> (c) to enable the FMA to consider and determine whether to exercise its powers under s 34 of [the Act].

The first purpose

[42] In the High Court it was determined that the first purpose of disclosure was a "secondary or non-operative purpose only".[41] Two key reasons were given for that finding. First, this purpose was not discussed in any detail or substance in the papers and meeting minutes "including what information or comments the RAM investors (via the Liquidation Committee) might be able to provide on the documents to be disclosed".[42] Second, the scope of the information to be disclosed was "determined by (and limited to) the recipients' ability to make an informed decision regarding a potential claim against ANZ".[43]

[43] We do not agree with this assessment. In our view, there was a good deal of evidence indicating that the first purpose was a genuine purpose. Although it was related to the other purposes, this was not a basis for disregarding it. Once the first purpose to get the information from investors was achieved, then the second and third purposes would come into play, namely using that information to enable RAM investors (the second purpose) and the FMA (the third purpose) to consider and determine the way forward for any claim.

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41 *ANZ Bank New Zealand Ltd v Financial Markets Authority*, above n 1, at [45(a)].
42 At [45(a)].
43 At [45(b)].

[44] The minutes of the first meeting of the FMA's Enforcement Division regarding disclosure on 25 May 2016 state that the first purpose of disclosure was "to assist the FMA's on-going investigation". The need for further information was highlighted in the minutes, which record:

> The division noted that further inquiry was necessary before the FMA could conclude whether s 34 could be utilised, and indeed before it could determine the egregiousness of the alleged misconduct.

[45] Further:

> [M]embers agreed that there was insufficient information at present to make a decision about the FMA taking action pursuant to s 34. It was a possibility and would remain so until all information had been received and the investigation concluded. The decision as to whether the FMA would exercise its powers under s 34 would be influenced by whether investors decided to take action and no decision could be made by the FMA until investors decide whether to take action.

[46] The need to consult with investors as part of the next stage of the investigation was recorded again in the papers prepared in relation to the Enforcement Division's second and third meetings. We consider that the documentary record establishes that the first purpose was an operative one in the sense that it did motivate the FMA. We accept the submission for the FMA that investors may have knowledge and understanding about the transactions shown in ANZ's records based on their interactions with RAM and its staff. In any event, this is judicial review. There is no need to calibrate and overly analyse the usefulness or importance of this potential information to the FMA. It is plain that the FMA regarded investor input as an important part of its investigation.

[47] Thus we do not consider that there was a proper basis for the Judge to relegate the first stated purpose and to not give it weight. There is no basis for not taking the FMA's assertion of its purpose on face value. It genuinely wanted information from the RAM investors. It wanted this to help it decide whether it should issue its own proceedings, and to help investors decide whether to issue their own claim. That its first purpose was related to the second and third was not a basis for disregarding it.

The second and third purposes

[48] The second and third purposes relate to evaluating a possible claim against ANZ. The second purpose is about a claim by investors. The third is about the FMA potentially exercising the investors' right of action under s 34. The FMA contends that disclosure for both of these purposes, and indeed the first purpose, is permitted by s 59(3)(c) of the Act.

Section 59(3)(c)

[49] Section 59(3)(c) provides for disclosure "for the purposes of, or in connection with, the performance or exercise of any function, power, or duty" of the FMA. The FMA contends that the proposed disclosure is for the purposes of, or connected with, the following functions and powers:

(a) The FMA's function of conducting investigations into any matter relating to financial markets or the activities of financial markets participants (s 9(1)(d)).

(b) The FMA's power to exercise a person's right of action under s 34.

[50] As we have set out, the Judge concluded that s 59(1)(c) only permits disclosure when disclosure is "reasonably necessary" for the purpose of the FMA's performance or exercise of one of its functions, or when there is a "close connection or nexus" between disclosure and the performance or exercise of the relevant function.[44] In the Judge's view, the proposed disclosure in this case did not meet either of those requirements.[45] She found that, although the FMA may in practice wish to engage with investors before deciding whether to commence proceedings in order to assess the likelihood of that person commencing and diligently continuing proceedings, such

[44] At [99].
[45] At [101].

disclosure was "not required or envisaged" by the statutory provisions.[46] She also held:

> [105] Further, by giving disclosure such as that proposed in this case, the likelihood of Person A commencing proceedings will no doubt be increased from what would have otherwise been the case. In effect, the disclosure itself will drive, enhance or, at the very least, affect the likelihood of Person A commencing the proceedings. In my view, s 34(5)(e) is aimed at the FMA making an assessment of the likelihood of Person A commencing the proceedings, independent of the FMA's own investigation and the particular information it may have learned as a result. As I raised with [counsel for the FMA] at the hearing, prospective plaintiffs are required every day to form a view on whether to commence proceedings, based on information they then have at their disposal. Disclosure such as that proposed in this case would place Person A in a quite different and indeed privileged position to other litigants making the same sorts of decisions.
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> [106] I do not consider that result was intended through the requirement that, when considering whether to exercise its powers under s 34, the FMA have regard to the "likelihood" of Person A commencing the proceedings. In addition, the record demonstrates that an operative purpose of the Proposed Disclosure in this case is to enable the [Company X] investors *to form their own view*, with the benefit of the information and documents obtained through the FMA's inquiry, on whether they *will* bring proceedings against ANZ, rather than *the FMA* making its own assessment of the *likelihood* of the [Company X] investors doing so. Section 34 explicitly requires the FMA to make the second of those assessments, but it is silent as to the first.
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> (Original emphasis.)

[51] We disagree with this analysis. The words "reasonably necessary" or "close connection or nexus" do not appear in s 59. Rather, what s 59(3)(c) requires, by its plain words, is that the disclosure be "for the purposes of, or in connection with" the performance by the FMA of one of its functions. We consider that disclosure in this case was clearly for the purposes of, or in connection with, the FMA's exercise of its powers under s 34 of the Act.

[52] In exercising the power under s 34, the FMA must act "in the public interest".[47] In assessing whether the exercise of the power is in the public interest, the FMA must have regard to the matters listed in subs (5):

> (a) its main objective under section 8; and

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46 At [104].

47 Financial Markets Authority Act, s 34(3).

(b) the likely effect of the proceedings on the future conduct of financial markets participants in connection with the financial markets; and

(c) whether exercising the powers is an efficient and effective use of the FMA's resources; and

(d) the extent to which the proceedings involve matters of general commercial significance or importance to the financial markets; and

(e) the likelihood of person A commencing the proceedings (if those proceedings have not yet been commenced) and diligently continuing the proceedings; and

(f) any other matters it considers relevant.

[53] We consider that these provisions indicate that Parliament contemplated the FMA working closely with investors or investor representatives in exercising its duties under s 34. In relation to s 34(5)(e), how else could it be discerned whether investors were likely to commence proceedings and pursue them diligently? We agree with the submission for the FMA that it is rational for the FMA, before deciding whether to exercise the s 34 power, to try and assess the RAM investors' capacity and willingness to bring the claim themselves, and diligently pursue it. That can only be done if the RAM investors are adequately informed of the grounds on which the claim might be brought and pursued. If the RAM investors, having been made aware of the basis of the claim, consider that they wish to bring a claim themselves, then the FMA may consider that the exercise of its powers under s 34 would not be an efficient and effective use of its resources under subs (5)(c).

[54] Furthermore, if the FMA is prevented from continuing its investigation because obtaining further evidence would involve disclosure of existing material, how can the FMA fully assess the strength of an investor claim? The strength of the claim would surely be relevant to the FMA's assessment of the matters in subs (5)(a)–(c).

[55] Section 34(3)(a) states that, subject to its duty to act in the public interest, the FMA may take into account the interests of the person with the right of action against a financial markets participant. Again, that contemplates communication with investors. Disclosure may be required in order to ascertain where the interests of the person with a right of action lie. The person with the right of action has the opportunity to object to a claim being brought by the FMA on their behalf, and if the person does

so, the FMA must obtain the leave of the High Court before exercising the power.[48] Leave of the High Court is also required before the FMA may take over existing proceedings.[49] These provisions recognise the rights and interests of private claimants in claims brought on their behalf.

[56] Unlike the Judge, we are not troubled by the prospect that disclosure may increase the likelihood of a person with a right of action commencing proceedings themselves. The creation of the power in s 34 recognises that it is in the public interest to ensure that claims are brought, not just to give private investors redress, but to "facilitate the development of fair, efficient, and transparent financial markets",[50] by "[i]ncreasing the likelihood that duties owed to investors by financial markets participants are enforced, particularly where large numbers of retail investors are affected".[51] That objective is achieved by the FMA bringing proceedings. But it is also met if the FMA's consideration of whether to bring proceedings, and its discussions with investors, leads to investors taking action themselves.

[57] Indeed, if the FMA is prevented from making disclosure, it will provide investors with an incentive to not investigate or take proceedings, and to rely on the FMA to do so. If investors are aware that the FMA, through the exercise of its investigative powers under the Act, may possess information that it is unable to disclose that may enhance the chances of a claim succeeding, investors are likely to simply allow the FMA to complete its investigation and exercise their rights of action on their behalf under s 34. As a result of the inability to make disclosure, the FMA might end up commencing a proceeding which, if investors were sufficiently informed, investors would commence and diligently pursue themselves.

[58] It is not spelt out in ss 34–43 that the FMA can assist investors in deciding whether to sue themselves, as distinct from suing for them or taking over their proceedings. However, this is not fatal. Clearly the FMA could not make a decision as to whether to issue proceedings itself unless it had a full understanding of whether investors would bring their own proceedings. Investors could not make decisions

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48 Section 35.
49 Section 36.
50 Section 8.
51 Ministry of Economic Development *Regulatory Impact Statement*, above n 17, at 2.

unless they knew the facts, and the FMA could not make decisions about exercising its powers under s 34 without getting the investors' feedback on the facts.

[59] We do not think that it matters that the FMA did not know at the point it was seeking to disclose the information whether it would initiate its own proceedings under s 34 or not. Section 9(1)(c) requires the FMA to investigate conduct that constitutes or may constitute a contravention. As it was bound to do to meet its duties under the Act, it was and is in the process of investigating what are the best steps to be taken to assist investors who have lost large sums of money following the collapse of RAM. Without seeing the documents proposed to be disclosed the investors are unlikely to have sufficient information to decide whether to bring their own claims. Further, as we have said, once there has been disclosure and feedback from the investors, the FMA will be in a better position to decide whether to take action itself on behalf of investors.

[60] We do not see it as a matter of concern that some investors may decide to proceed themselves using a litigation funder. Plainly it may be in the interests of investors who cannot afford individually to bring proceedings, to be able to band together under the umbrella of the litigation funder. We see the involvement of litigation funders in appropriate circumstances as being consistent with the object of having fair and transparent markets, and with the requirement to take into account the interests of persons with a right of action under s 34(3). Issues of disclosure to the litigation funder itself might arise and they would have to be dealt with on their merits. We see no difficulty in this process developing, following the initial disclosure that is proposed.

Section 59(3)(f)

[61] Section 59(3)(f) permits disclosure to a person who the FMA is satisfied has a proper interest in receiving the information or document. The FMA submitted that it was open to them to decide that the RAM investors have a proper interest in receiving the information and documents in question, given their interest in the FMA's ongoing investigation and the prospect that the FMA might bring causes of action on their

behalf. It was also open to the FMA to conclude that the RAM investors have a proper interest in understanding their own potential causes of action against ANZ.

[62] The Judge found that there is a "public/private" divide between the public functions, powers and duties of the FMA and the private interests of investors in obtaining civil redress.[52] She found:

> [135] There is no doubt that the FMA is a public body and that its core objectives and functions are public in nature. Ultimately its functions, powers and duties are aimed at driving its main *public* objective, namely promoting and facilitating the development of fair, efficient and transparent financial markets. It is not a primary objective or function of the FMA to drive or promote purely private interests.

[63] The Judge determined:[53]

> [G]iven the purposes of the Act, and the FMA's core objectives and functions, coupled with the strict limits on the circumstances in which the FMA is permitted to disclose confidential information obtained through the exercise of its statutory powers, I do not consider disclosure to a person who has a purely *private* interest in receipt of the materials, divorced from any of the public purposes of the Act, or the public objectives and functions of the FMA, would be disclosure to a person with a "proper interest".

[64] Having already found that disclosure for the purposes of the FMA to evaluate whether to bring or take over a claim under s 34 was not permitted under s 59(3)(c), the Judge:[54]

> … [did] not consider the RAM investors have a "proper interest" in receipt of the information and documents when such disclosure is not reasonably necessary or sufficiently connected with the FMA's own decision-making functions under s 34.

[65] As to the investors' interest in the information to enable them to evaluate whether or not to bring their own claims, the Judge held:[55]

> [I]nvestors' private interests in independently pursuing their own claims are not sufficiently connected or linked to the FMA's public functions and objectives to mean they have a "proper interest" in disclosure for the purposes of s 59(3)(f).

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52 *ANZ Bank New Zealand Ltd v Financial Markets Authority*, above n 1, at [136].
53 At [138].
54 At [143].
55 At [145].

[66] We disagree with the Judge's analysis. We consider that the Act does not draw a sharp public/private distinction between the functions, powers and duties of the FMA and the interests of investors in obtaining civil redress. Rather, the scheme of the Act, and in particular s 34, recognises that civil redress against financial markets participants may help to meet the public interest in promoting and facilitating the development of fair, efficient and transparent financial markets. That the FMA has an ability, under s 34, to bring or take over a civil right of action indicates Parliament's recognition that such claims are in the public interest. We agree with the submission for the FMA that the FMA's assessment under s 34 therefore involves two considerations:

(a) First, whether the proceedings are in the public interest. For example, they may clarify an important point of law, have general commercial significance, or involve a large number of victims or wrongdoing on a significant scale.

(b) Second, whether it is in the public interest for the FMA to bring the proceedings. This question is affected by additional considerations, including the prioritisation of the FMA's resources and the likelihood of investors bringing the proceedings and diligently pursuing them themselves.

[67] On that basis, we consider that one natural category of persons who may have a proper interest in disclosure of material held by the FMA are investors seeking civil redress in matters under investigation by the FMA.

[68] Furthermore, there are other provisions in the Act that give the FMA a role in facilitating compensation or civil redress for investors. For example, under ss 46 and 46A, the FMA may accept undertakings from financial markets participants to pay compensation to any person to remedy the effects of a contravention of any provision of financial markets legislation. Similarly the Financial Markets Conduct Act 2013

equips the FMA with a range of tools to utilise the civil liability provisions of that Act, enabling the FMA to facilitate claims by them when loss has occurred.[56]

[69] Therefore we do not consider that the public/private interest distinction drawn by the Judge is sustainable. As we have discussed above,[57] one of the key objectives of the Act was to increase the likelihood that duties owed to investors by financial markets participants are enforced. It is inherent in the scheme of the Act that the enforcement of private interests performs a regulatory function that ultimately serves the public interest in fair, efficient, and transparent financial markets.

Protecting confidentiality

[70] We acknowledge ANZ's concerns about confidentiality. In general terms, the documents to be disclosed relate to the management of accounts in which investors' funds were supposedly being held on trust. Privacy concerns arise because the documents reveal the personal identities of particular investors and their financial affairs, and the identities of ANZ employees. ANZ does not claim that the information is market sensitive or connected to commercially sensitive aspects of ANZ's own banking business. Nonetheless, s 59 recognises the confidentiality of information and documents disclosed to or obtained by the FMA under the Act. Disclosure should therefore be limited to what is necessary for the purposes in s 59(3)(c) and (f). Section 59(4) states that the FMA must not make disclosure "unless the FMA is satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document".

[71] The FMA has proposed a number of measures to ensure that confidentiality is maintained by the persons to whom disclosure is made, that is the RAM liquidation committee, the liquidators, and their legal advisers. Those measures involve obtaining confidentiality agreements on an individual basis before any information or documents are disclosed.

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56 See for example Financial Markets Conduct Act 2013, ss 486–488 concerning declarations of contravention; ss 494–495 regarding compensatory orders; ss 497–498 regarding other civil liability orders; and ss 522–524 regarding asset preservation orders to protect the interests of investors.

57 See above at [30]–[31].

[72] ANZ argued that the requirement that the FMA be "satisfied that appropriate protections are or will be in place" for confidentiality was difficult to meet in the circumstances of this case, given the large number of people to whom disclosure is proposed to be made. ANZ questioned the effectiveness of confidentiality agreements in ensuring the disclosed information and documents are not shared.

[73] We consider that the steps proposed by the FMA to protect confidentiality were sufficient for it to be "satisfied" that confidentiality would be protected under s 59(4). Under, s 60, the FMA may impose conditions relating to the publication, disclosure or use of information or documents disclosed under ss 59(3)(c) or (f). Conditions can be imposed relating to confidentiality and the storing, copying, returning and disposing of copies of documents.[58] Section 60(4) provides that a person who refuses or fails without reasonable excuse to comply with any conditions commits an offence and is liable on conviction to a fine not exceeding $200,000. Breaches of confidentiality conditions are, therefore, a serious offence.

[74] There is no reason, therefore, to doubt the effectiveness of obtaining undertakings to preserve confidentiality. As with civil discovery, it is appropriate to assume that the undertakings will work and that confidentiality will be preserved. All the more so when there is a significant statutory sanction. Only those specified persons who are known and have signed undertakings will see the documents. There is of course the possibility that the issue of further disclosure to a wider range of persons may arise following the initial disclosure. If that happens the issue of further disclosure would have to be considered on its merits by the FMA. It can be presumed that the FMA will not disclose to persons whose undertakings would not be reliable, despite s 60, and that disclosure will be as limited as reasonably possible. The confidentiality of the documents can be maintained, save for those who have a legitimate interest in seeing the material, and in respect of whom confidentiality can be assured if they provide the requisite enforceable undertakings.

[75] As the issue was raised, we comment that the fact that the documents might be obtained by the notional RAM investor if he or she issued proceedings by way of

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[58] Financial Markets Authority Act, s 60(3).

discovery does not work against disclosure at this stage. It is essential that an informed decision on whether proceedings should be brought is made now, before proceedings are issued. We do not see pre-trial discovery as the answer.

Conclusion

[76] We consider that s 59(3) permits the FMA to disclose documents to investors to allow both the FMA and investors who have suffered loss, and may have claims against ANZ, to assess and pursue claims on a fully informed basis. The FMA can disclose the information and documents to selected investor representatives providing it obtains enforceable confidentiality undertakings. In pursuit of fair and transparent markets it is appropriate for the FMA to provide information to investors so the FMA can get their feedback to aid the FMA's investigation, and to consult with investors in the exercise of its decision-making powers under s 34, provided proper steps are taken to ensure confidentiality.

[77] We do not agree with the proposition that the Act contemplates a strict divide between public and private interests. To the contrary ss 34 and 59 contemplate the FMA working on a properly informed basis with investors in relation to possible claims. It is in the public interest as contemplated by the Act that financial markets participants know that they will be held accountable to investors who suffer loss through their action, whether the claim is brought by investors or the FMA.

[78] We have formed the view that it is within the FMA's powers to disclose these documents in the manner proposed. We disagree with the Judge's assessment that the disclosure would not be for a permitted purpose. To the contrary, we see disclosure for the purposes of assisting the FMA and investors to decide whether to bring a claim against a financial market participant as exactly within the purposes of the Act. Confidentiality is an important matter and this is expressly recognised by the Act at ss 59 and 60, where a regime is created to protect confidentiality within specified limits. The limited and controlled disclosure proposed by the FMA applies and utilises that regime.

Result

[79] The appeal is allowed.

[80] The High Court orders quashing the appellant's decision to make the proposed disclosure, and prohibiting the appellant from making the proposed disclosure, are quashed.

[81] The High Court costs award in favour of the respondent is quashed. Costs in the High Court are to be reconsidered by that Court in the light of this judgment.

[82] Costs follow the event. The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

[83] We make an order prohibiting distribution or publication of this unredacted copy of the judgment beyond the parties and their legal counsel.

[84] We have difficulty with the proposition that this judgment should be restricted in terms of its publication, and indeed whether parts of it should be redacted for confidentiality reasons. Therefore we require ANZ to file submissions on suppression or redaction by 16 January 2019. The FMA is to file submissions in response by 25 January 2019. We will then determine whether there should be any suppression orders or redaction in the judgment that is released to the public.

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