

# **SETTLEMENT AGREEMENT**

between

**THE FINANCIAL MARKETS AUTHORITY**

and

**MARK STEPHEN HOTCHIN**

and

**GREGORY JOHN MUIR**

and

**TIPENE GERARD O'REGAN**

and

**BRUCE PATRICK GORDON**

and

**ERIC JOHN WATSON**

and

**DENNIS JOSEPH BROIT**

AGREEMENT dated 28 April 2015

## PARTIES

(1) THE FINANCIAL MARKETS AUTHORITY (FMA)

(2) MARK STEPHEN HOTCHIN

(3) GREGORY JOHN MUIR

(4) TIPENE GERARD O'REGAN

(5) BRUCE PATRICK GORDON

(6) ERIC JOHN WATSON

(7) DENNIS JOSEPH BROIT

(together called "the Defendants").

## RECITALS

- A. Messrs Hotchin, Muir, O'Regan and Gordon (together the **Issuer Directors**) are or were directors of Hanover Finance Ltd (**HFL**), United Finance Ltd (**UFL**) and Hanover Capital Ltd (**HCL**) (together the **Hanover Finance Companies**). Messrs Broit and Watson (together the **HGL Directors**) are or were directors in Hanover Group Limited (**HGL**).
- B. At various times between 1984 and 2010 HFL, UFL and HCL traded as finance companies. The principal business of HFL and UFL involved lending activities to property developments. HCL was a funding vehicle used to raise funds for HFL and UFL. At various times the Hanover Finance Companies raised funds they required for their financing activities from members of the public who invested in debenture stock and bond products offered by them from time to time. The FMA alleges that, between 7 December 2007 and 23 July 2008 (the **Relevant Period**) HGL was a promoter of the offers made by HFL, UFL and HCL.
- C. On 7 December 2007 the Hanover Finance Companies issued prospectuses to the public and these remained available to the public and potential investors until 23 July 2008. In that period extension certificates were issued and advertisements were circulated to investors. Over that period 5,500 members of the public invested in the Hanover Finance Companies.
- D. On 23 July 2008, the Hanover Finance Companies suspended their offers of securities (the **moratorium**) and suspended repayments to investors.
- E. In December 2008, investors in the Hanover Finance Companies elected to enter a debt restructure plan which would enable repayment of principal to investors in an orderly manner but this was overtaken by the transaction referred to in F below.
- F. In December 2009, the Hanover Finance Companies' investors elected to enter a transaction whereby their debt securities in the Hanover Finance Companies would be exchanged for shares in Allied Farmers Limited. This debt for equity transaction included investors accepting a reduction in principal of their investments totalling

approximately NZ\$24million (for investors who invested in the period 7 December 2007 to 23 July 2008). Following that transaction, investors held shares in Allied Farmers Limited and no longer held any securities in the Hanover Finance Companies.

- G. The Hanover Finance Companies did not go into liquidation or receivership and have since been removed from the Companies Office Register.
- H. In March 2010, the Securities Commission commenced an investigation into whether the directors and promoters of the Hanover Finance Companies had complied with their disclosure obligations under the Securities Act 1978 (the **Act**) with respect to the prospectuses and advertisements issued in the period 7 December 2007 to 23 July 2008 (the **Offer Documents**).
- I. FMA has issued separate proceedings against the First Defendant and certain trusts under CIV-2010-404-8082 in relation to preservation of assets.
- J. In May 2011, on its establishment the FMA assumed responsibility for the investigation of the Hanover Finance Companies.
- K. In March 2012, the FMA issued a proceeding against the Defendants in the Auckland High Court under CIV-2012-404-1771(the **Proceeding**) in which it claimed that the Defendants breached their disclosure obligations in the Act with respect to the Offer Documents and sought declarations as to civil liability events, declarations of liability by the Defendants, pecuniary penalties and orders pursuant to section 55G of the **Act** that the Defendants pay compensation to all persons (the **Eligible Investors**) who subscribed for the securities in Hanover Finance Companies in the **Relevant Period** who were not repaid prior to the moratorium.
- L. In the Proceeding the FMA alleges that the offer documents were misleading as to the financial position of the Hanover Finance companies, particularly in respect of liquidity; disclosure about forecasting; disclosure about funding, funding arrangements and the funding relationships between the Hanover Finance Companies; and disclosure about related party transactions. The FMA considers it is likely that the Defendants breached their disclosure obligations under the Act in the Relevant Period and that the claims brought by the FMA are justified.
- M. In the Proceeding the Defendants say that the offer documents were accurate with respect to the financial position of the companies, particularly in respect of liquidity; disclosure about forecasting; disclosure about funding, funding arrangements and the funding relationships between the Hanover Finance Companies; and disclosure about related party transactions. The Defendants further say that they had a reasonable basis for believing in the accuracy of the offer documents and acted reasonably in approving those documents. Each of the Defendants considers it likely that a Court would accept that he did not breach the Act.
- N. The Issuer Directors and the HGL Directors are in different positions in the Proceeding. The Issuer Directors were the directors of the Hanover Finance Companies while the HGL Directors were only directors of HGL, which the FMA alleges was a promoter of the offers made to the public by the Hanover Finance Companies during the relevant period.
- O. The Defendants, Watson and Broit, each consider that HGL does not fall within the statutory definition of promoter in the Act and that he did not occupy a position that attracts liability under the Act.

- O. The FMA and the Defendants have agreed the terms of a full and final settlement in relation to the Proceeding and any other claims or potential claims which either party may have against the other arising out of the Hanover Finance Companies, save for enforcing the terms of this agreement and wish to record those terms herein.

**IT IS AGREED:**

1. This agreement shall be effective upon due execution by all parties and the receipt of all counterparts by each party, or their representative, pursuant to clause 26 and once the conditions in clause 27 have been met. The date on which this occurs is referred to as the **Effective Date**.
2. The Defendants Hotchin, Muir, Gordon, O'Regan and Broit with contribution from their insurers, will pay the FMA a total sum of NZ\$18million (GST inclusive if any) (the **Settlement Sum**) no later than 20 working days after the Effective Date.
3. The Settlement Sum shall be paid without set-off or deduction by depositing cleared funds, into an account to be nominated by the FMA. Payment will be effective upon confirmation by the receiving bank of the deposit of cleared funds into the relevant account.
4. The parties agree that the Settlement Sum will be distributed to the Eligible Investors (excluding any Defendants) and such distribution will be managed by the FMA (or a third party appointed by the FMA) in the manner which the FMA deems fit and consistent with process described in the **Schedule** to this agreement.
5. The Defendants shall co-operate in good faith and provide such assistance as is reasonably required, by the FMA or its agents or representatives, to identify Eligible Investors and to enable distribution to occur.
6. The Defendants acknowledge and do not object to the distribution process which will be substantially similar to those set out in the **Schedule** to this agreement.
7. This agreement is not intended to create an action against the FMA enforceable at the suit of an Eligible Investor, or any other third party, in respect of distribution or any other promise made by the FMA.
8. Subject to the rights which FMA may have to enforce the terms of this agreement whether under the Financial Markets Authority Act 2011 or otherwise, payment of the Settlement Sum will be accepted by the FMA in full and final settlement of all claims against all Defendants in proceeding CIV-2012-404-1771 and any claims or potential claims or proceedings of any nature (whether presently known or not) against any of the Defendants arising directly or indirectly out of the Hanover Finance Companies during the Relevant Period or the Offer Documents, whether pleaded in proceeding CIV-2012-404-1771 or otherwise.
9. In consideration of payment of the Settlement Sum, and the other terms hereof, the FMA agrees not to make or pursue any claims, or issue any further proceedings of any type, or to invoke any powers to seek or impose orders or bans or other sanctioning measures in relation to the Defendants involvement in the Hanover Finance Companies in the Relevant Period, under section 34 of the Financial Markets Authority Act 2011, the Financial Markets Conduct Act 2013, the Act or any other enactment or whether using any other rights in law, against:

- (a) the Defendants or any other former director or officer or employee of any of the Hanover Finance Companies; or
  - (b) any of the auditors, trustees, solicitors, advisers, consultants or other service providers to the Hanover Finance Companies; or
  - (c) Any insurer of any Hanover entity or director or officer.
10. Clauses 8 and 9 above are subject to the FMA's right to enforce the terms of this agreement including the undertakings and representations provided by the Defendants.
11. The Defendants' rights to obtain contribution to the Settlement Sum from any of the Hanover Finance Companies' auditors, trustees, solicitors, advisers, consultants or other service providers are unaffected by this agreement.
12. Costs are to lie where they fall in proceeding CIV-2012-404-1771 and the FMA will file a notice of discontinuance of that proceeding with the consent of all Defendants forthwith after confirmation of receipt of the Settlement Sum in accordance with clause 3 and to the extent possible, prior to the announcement of the settlement.
13. While the FMA remains of the view that the Defendants have likely breached the disclosure obligations under the Act, as alleged in the Proceeding, none of the Defendants admits any liability as claimed by the FMA in the Proceeding, or otherwise, and each of the Defendants disputes that a civil liability event within the meaning of section 55B of the Act has at any time occurred in respect of any of the Hanover Finance Companies. Further, the HGL Directors dispute that they are potentially liable persons under the Act as they allege that HGL does not fall within the statutory definition of promoter.
14. Each Issuer Director voluntarily offers, and the FMA accepts, an undertaking that he will not act as a director of a deposit-taker of funds from the public in New Zealand (including a Bank or Non-Bank - Deposit Taker as defined in section 5 Non-bank Deposit Takers Act 2013) for a period ending on 30 April 2018 without the prior written approval of the FMA.
15. Each HGL Director represents to the FMA that he does not intend now or in the future to act as a director of a bank or a Non-Bank - Deposit Taker (as defined in section 5 of the Non-Bank Deposit Takers Act 2013) in New Zealand. The FMA relies on this representation in entering into this settlement agreement with the HGL Directors. If the above representation proves to be incorrect the FMA may cancel this agreement with that HGL Director only and recommence a civil claim consistent with the Proceeding against him at any time before 30 October 2018. The provisions of this paragraph 15 do not affect the settlement with the other parties and the right of the FMA to retain the payment referred to in paragraph 2.
16. If the FMA recommences the Proceeding against an HGL Director pursuant to clause 15 above:
  - (a) The relevant HGL Director will not raise or be entitled to rely on any limitation defence on a compensation or pecuniary penalty application not available as at the date of the second amended statement of claim filed in CIV-2012-404-1771 and waives any contractual or equitable remedies which may arise from

this settlement or discontinuance that he may have to oppose the recommencement of this claim, if any exists.

- (b) Any new proceeding may use the pleading referred to in clause 16(a) and the discovery which has been completed as at the date of this agreement.
  - (c) The FMA may, in the new proceeding, claim the full amount sought in the Proceeding against the relevant HGL Director, minus the Settlement Sum.
  - (d) If a HGL Director breaches clause 15 above, he shall pay all of the FMA's costs, on an indemnity basis, in bringing the new proceeding to the position where pleading and discovery is complete.
  - (e) The HGL Directors agree that Wilson Harle is authorised to accept service on behalf of the HGL Directors in relation to the recommenced proceeding.
17. Each Defendant acknowledges that he will fully comply with any valid and lawful disclosure obligation applying to him in relation to the offering of any financial products in New Zealand including disclosing matters relating to Hanover and the proceeding.
18. Each Defendant who has provided the FMA with a declaration of his financial position warrants that there has been no material improvement to the Defendant's net asset position at the time of signing this agreement or, if that is not the case, will provide a new declaration as to his financial position. The FMA acknowledges that this information is confidential to each Defendant respectively.
19. At the same time as discontinuing CIV-2010-404-1771 the FMA will permanently discontinue the preservation order proceeding under CIV-2010-404-8082 against all Defendants to that proceeding on the basis that there are no issues as to costs and, will consent to the prompt making of any orders by the Court necessary to revoke all existing orders, including, but not limited to, all orders relating to KA No 2 Trust and the monies formerly held in Tompkins Wake's trust account.
20. The Defendant in CIV-2010-404-8082, Mr Mark Hotchin, shall not claim costs in that proceeding upon discontinuance, and the FMA shall claim no costs against him in that proceeding.
21. The fact of and terms of this agreement are not confidential and, subject to clause 22 below, may be disclosed by the parties.
22. The parties agree that following the filing of the notice of discontinuance in CIV-2012-404-1771 the FMA may make a public announcement that the settlement has been reached and may post a copy of this settlement agreement on its website. The FMA will provide the Defendants with a confidential copy of any initial press release which it intends to issue, 24 hours before the press release is to be issued. The Defendants agree not to make any public statement or to issue a press release regarding the settlement prior to the FMA issuing its press release and agree that if they decide to make an initial press release, to provide the FMA with a confidential copy of their press release 24 hours before the press release is issued.
23. Subject to the terms of this agreement, all materials exchanged between the parties during all without prejudice negotiations, shall retain their privileged and confidential character.

- 24. All materials produced and obtained by the Securities Commission, the FMA and any of its advisors, during the investigation into the Hanover Finance Companies, as well as during the Proceeding, shall retain any confidential or privileged character that they may have.
- 25. This agreement is governed by and is to be construed in accordance with New Zealand law. The parties submit to the exclusive jurisdiction of the courts of New Zealand in relation to all disputes arising out of or in connection with this agreement.
- 26. This agreement may be executed in any number of counterparts. Once the parties have executed the counterparts, and each party, or its representative, has received a copy of each signed counterpart which that party did not execute, each counterpart will be deemed to be as valid and binding on the party executing it as if it had been executed by all the parties.
- 27. This agreement is conditional upon the Defendants obtaining within 7 days of Effective date both:
  - (a) agreement from their D&O insurer as to the sum it will contribute to the settlement; and
  - (b) agreement from Hanover's broker as to the sum it will contribute to the settlement.
- 28. The Defendants will notify the FMA by the end of the 7<sup>th</sup> day after the Effective date whether both of the conditions above have been fulfilled.

**SIGNED** by **THE FINANCIAL** )  
**MARKETS AUTHORITY** by its Chief ) .....  
 Executive Officer **ROB EVERETT** in the  
 presence of:

**Witness**

Signature: .....

Name (full): .....

Occupation: .....

Address: .....

SIGNED by THE FINANCIAL )  
MARKETS AUTHORITY by its Chief )  
Executive Officer ROB EVERETT in the )  
presence of:



**Witness**

Signature: 

Name (full): C R CARRUTHERS

Occupation: BARRISTER

Address: WELLINGTON

SIGNED by )  
MARK STEPHEN HOTCHIN )  
in the presence of: )

.....

Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

SIGNED by )  
GREGORY JOHN MUIR )  
in the presence of: )

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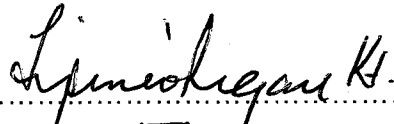
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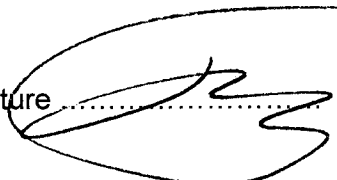
Witness name: .....

Occupation: .....

Address: .....

SIGNED by )  
TIPENE GERARD O'REGAN )  
in the presence of: )



Witness signature 



Witness name: JWA Johnson  
Occupation: Solicitor  
Address: Christchurch

**SIGNED by** )  
**BRUCE PARICK GORDON** )  
in the presence of: )

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Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

**SIGNED by** )  
**ERIC JOHN WATSON** )  
in the presence of: )

.....

Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

**SIGNED by** )  
**DENNIS JOSEPH BROIT** )  
in the presence of: )

.....

Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

**SIGNED by**  
**MARK STEPHEN HOTCHIN**  
in the presence of:

)  
) M. Hotchin  
)

Witness signature [Signature]  
Witness name: J. McQuillan  
Occupation: SOLICITOR  
Address: HAMILTON

**SIGNED by**  
**GREGORY JOHN MUIR**  
in the presence of:

)  
) [Signature]  
)

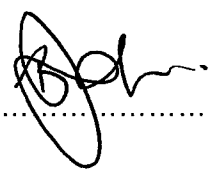
Witness signature [Signature]  
Witness name: Michael Heard  
Occupation: Solicitor  
Address: Auckland

**SIGNED by**  
**TIPENE GERARD O'REGAN**  
in the presence of:

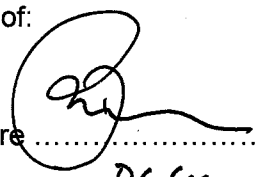
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Witness signature .....  
Witness name: .....  
Occupation: .....  
Address: .....

SIGNED by )  
BRUCE PARICK GORDON )  
in the presence of: )

  
.....

Witness signature .....



Witness name: .....

DCSMORRIS

Occupation: .....

Solicitor

Address: .....

AUCKLAND 28/4/15

SIGNED by )  
ERIC JOHN WATSON )  
in the presence of: )

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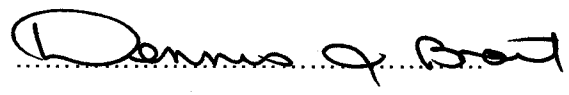
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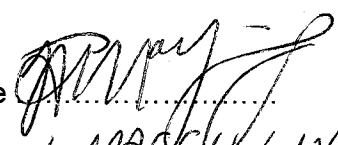
Occupation: .....

Address: .....

SIGNED by )  
DENNIS JOSEPH BROIT )  
in the presence of: )

  
.....

Witness signature .....



Witness name: .....

J. MACGILLIVRAY

Occupation: .....

SOLICITOR

Address: .....

HAMILTON

Witness name: .....

Occupation: .....

Address: .....

**SIGNED by** )  
**BRUCE PARICK GORDON** )  
in the presence of: )

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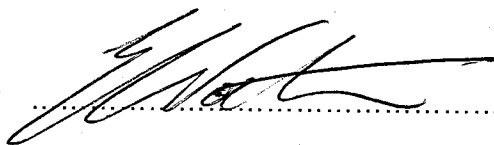
Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

**SIGNED by** )  
**ERIC JOHN WATSON** )  
in the presence of: )



Witness signature 

Witness name: C.P. Browne

Occupation: Solicitor

Address: Auckland

**SIGNED by** )  
**DENNIS JOSEPH BROIT** )  
in the presence of: )

.....

Witness signature .....

Witness name: .....

Occupation: .....

Address: .....

## Distribution Schedule

1. The Settlement Sum of NZ\$18 million represents a compromise payment to be distributed to Eligible Investors (excluding any Defendants who may have subscribed), who invested or reinvested in the Relevant Period, in each of HFL, UFL and HCL, but excluding those investments and reinvestments made in the Relevant Period which were repaid prior to Moratorium. It is a compromise payment to compensate for some of the losses suffered by the Eligible Investors.
2. Of the 16,500 investors in all three companies, only those investors who invested or reinvested in the period 7 December 2007 to 23 July 2008 will be eligible for a share in the Settlement Sum. Their distribution will only relate to the value of the investment (or reinvestment) made in that period and not to any prior investment. An Eligible Investor does not include an investor who invested prior to 7 December 2007 and who did not reinvest that investment in the period 7 December 2007 to 23 July 2008.
3. A third party, Deloitte, will be engaged to independently design, implement and manage the distribution process.
4. Deloitte has recommended that a fair and reasonable mechanism to calculate the pro rata distribution for each Eligible Investor is by reference to the net exchange values adopted for each of the Hanover Finance Company investor groups in the Allied Farmers Limited debt for equity swap (see below). The FMA agrees with this recommendation and propose to adopt this approach. The Defendants do not object. This mechanism is proposed to be used in the absence of a court determined compensation methodology.

	Face Value	Interim Distribution	Release	Net Exchange
HFL Secured Depositors	100 cents	Less 6 cents	Less 22 cents	<b>= 72 cents</b>
UFL Secured Stockholders	100 cents	Less 6 cents	Less 10 cents	<b>= 84 cents</b>
HFL Subordinated Noteholders	100 cents	Nil	Less 70 cents	<b>= 30 cents</b>
HCL Bondholders	100 cents	Nil	Less 70 cents	<b>= 30 cents</b>

5. The Defendants will assist Deloitte to compile an accurate database of Eligible Investors. Deloitte will correspond with Eligible Investors with respect to their potential distribution entitlement. Once the details and distribution entitlements have been determined, and identity has been verified, payments will be made to investors. Any unclaimed amounts will be paid to the Inland Revenue in accordance with the Unclaimed Moneys Act 1971.