

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE
COMMERCIAL PANEL**

CIV 2021-404-1190

UNDER the Credit Contracts and Consumer Finance Act
2003 and High Court Rule 4.24

BETWEEN **A P SIMONS**
First plaintiff

AND **A J BEAVEN** and another
Second plaintiffs

AND **P C DUNBAR** and another
Third plaintiffs

AND **B R BICKERDIKE** and another
Fourth plaintiffs

AND **G J MARVIN** and another
Fifth plaintiffs

(continued over)

**NOTICE OF OPPOSITION OF SECOND DEFENDANT TO APPLICATION FOR
LEAVE TO BRING PROCEEDINGS AS REPRESENTATIVE ACTIONS AND FOR
ANCILLARY ORDERS AND SUMMARY JUDGMENT
1 APRIL 2022**

Next event date: 26-27 May 2022 (hearing for class issues)
Judicial officer: Venning J

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AND

ANZ BANK NEW ZEALAND LIMITED

First defendant

AND

ASB BANK LIMITED

Second defendant

To: The Registrar of the High Court at Auckland

And to: The plaintiffs

This document notifies you that:

1. The second defendant (**ASB**) intends to oppose the first and third to fifth plaintiffs' amended interlocutory application dated 28 January 2022 (**Application**) for orders:
 - (a) granting leave under r 4.24(b) of the High Court Rules to bring the action against ASB as a representative action on behalf of the class of persons defined and on the terms set out in Schedule 2 of the Application, or on such terms as the Court thinks fit (**Representative Orders**);
 - (b) on the terms set out in Schedule 4 of the Application, that the plaintiffs' costs in bringing the proceeding, including the Project Costs and CFO Services Fee due to LPF, will be met from (and calculated with reference to) the total sums paid or credited by ASB under any settlement or judgment (**Common Fund Orders**);
 - (c) providing for notice of the Representative Orders, Common Fund Orders and certain other information to be provided to potential class members on the terms set out in Schedule 6 of the Application (**Notification Orders**);
 - (d) entering judgment in favour of the first and third to fifth plaintiffs against ASB on the second cause of action in the amended statement of claim; and
 - (e) costs.
2. The second defendant seeks costs.

Representative Orders

3. The grounds on which the second defendant opposes the granting of the representative orders sought at paragraph 1(a)(ii) of the Application are that:
 - (a) The class which is sought to be represented is not adequately defined and is not capable of identification without:
 - (i) proper particulars of the home and personal loan products and the types of "Agreed Changes" to which the claim relates;
 - (ii) investigation into and consideration of the circumstances of each individual customer who had a loan with ASB during the relevant period, including whether each loan was a "consumer credit contract" as defined by s 11 of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**), whether each customer made one or more "Agreed Changes" to each loan during the relevant period, whether

they received variation disclosure and the content of disclosure received; and

- (iii) determination of factual and legal issues which are in dispute.
- (b) Any investigation process to seek to identify the class would be lengthy and complex and there would remain a significant degree of uncertainty as to whether all those customers who have been identified as a result of such a process are in fact part of the relevant class.
 - (c) The proposed class definition is also circular as it depends on matters which are in issue, including whether ASB provided variation disclosure under s 22 of the CCCFA.
 - (d) The proposed "common issues" are not genuinely common issues and are not suitable for determination on a representative basis:
 - (i) The proposed common issues are premised on incorrect assumptions that particular factual and legal matters are capable of determination on a class-wide basis. In fact, those matters are specific to individual customers and are not within the knowledge of the second defendant, and/or can only be discovered by investigation of the individual customer's records, and/or are disputed, for example:
 - (aa) whether each proposed class member had an ASB loan during the relevant period that was a "consumer credit contract" as defined by s 11 of the CCCFA;
 - (bb) if so, whether each proposed class member made one or more agreed changes to the loan(s) that triggered the obligation for ASB to give variation disclosure under s 22 of the CCCFA;
 - (cc) if so, whether ASB provided the proposed class member with variation disclosure;
 - (dd) if so, whether the variation disclosure that ASB provided in each case was consistent with the requirements of s 22 of the CCCFA, having regard to the circumstances and nature of the agreed change; and
 - (ee) if not, whether the proposed class member suffered any loss or damage and if so, whether the Court should exercise its discretion under s 93 and s 94 of the CCCFA to award a remedy.
 - (ii) The proposed common issues are described in the Application at a high level of generality but encompass within them an extremely broad range of circumstances,

including multiple types of customers, multiple types of loans and loan terms (some of which will vary by individual customer), multiple types of agreed changes, multiple types of disclosure, and different statutory requirements over time.

- (iii) As a consequence, some members of the proposed class will have different rights and interests to other members of the proposed class.
 - (iv) ASB will also have different defences available to it against different members of the proposed class, including as to factual matters, the application of the CCCFA, limitation, equitable defences and discretionary grounds for relief.
- (e) As a consequence of the broad range of circumstances described above, and having regard to their own particular circumstances, the plaintiffs are not representative of the entirety of the proposed class and do not have the same interests as all members of the proposed class.
- (f) The litigation funding arrangements are disproportionately in favour of the interests of the funders and do not adequately safeguard the interests of potential class members, including as to the funder's termination rights under the Funding Deed, the restraints on the plaintiffs' decision making in relation to the proceeding and the potential for double recovery by the funder of any amounts paid by way of security for costs.
- (g) The orders sought are not consistent with the just, speedy, and inexpensive determination of the proceeding and, as a matter of discretion, should not be granted:
- (i) The plaintiffs' original application was based on the misconception that, following ASB's settlement with the Commerce Commission, there was an identified group of customers who had consumer credit contracts and who did not receive variation disclosure as required under s 22 of the CCCFA. This was not the case, but, in any event, the potential class is now entirely indeterminate, following amendment of the plaintiffs' claim.
 - (ii) The orders sought would place a disproportionate burden on ASB to investigate and identify potential class members, with the final size and identity of the class remaining uncertain until the proceedings have been finally determined. This uncertainty would place an additional and unreasonable burden on ASB, including with regard to its relationships with its customers.
 - (iii) To the extent the orders sought require ASB to disclose the identities of and other personal information about customers who have not consented to such disclosure to

the plaintiffs and their representatives, that raises issues as to privacy and confidentiality of customer information.

- (iv) It is not necessary for representative orders to be made to enable the matters in issue to be determined:
 - (aa) the plaintiffs are seeking summary judgment, the costs of which will not be disproportionate to their claims; and
 - (bb) to the extent there are common issues of law (e.g. as to statutory interpretation), other members of the proposed class who have been impacted by those issues will be able to benefit from the Court's judgment whether or not they are formally bound by it as members of a class.
- (v) In the circumstances, representative orders are not in the interests of justice.
- (h) In the alternative, if the Court decides to make representative orders, these should be on an opt in basis:
 - (i) It is appropriate that customers opt in in circumstances where they may be presumed to know:
 - (aa) whether they had home loans or personal loans with ASB during the relevant period;
 - (bb) the purpose of the loan or loans (which goes to whether it is a consumer credit contract);
 - (cc) whether they requested changes to the loan or loans; and
 - (dd) whether they received variation disclosure.
 - (ii) It is appropriate that customers are able to make a choice about whether they wish to join the claim or not, having regard to their own position and preferences, including their assessment of the litigation funding arrangements.
 - (iii) This approach would avoid placing an undue burden on ASB as discussed above and would mean that ASB is not placed in the invidious position of having to determine itself which of its customers have potential claims against it or face ongoing uncertainty about the size of the claim.
 - (iv) This approach would also avoid any need for ASB to disclose the personal details and private banking information of customers who have not opted in or otherwise consented to their information being shared with the plaintiffs.

- (v) A significant number of potential class members have already opted-in or have expressed interest in joining the claim, such that there is already a viable opt in claim available.
 - (vi) Class members will be required to opt in in any event to address individual issues prior to any orders or settlement being made in their favour.
 - (vii) The proposed class includes customers who are foreign residents and jurisdiction over them should not be assumed unless those customers opt in.
- (i) In any event, if the Court decides to make representative orders, these should be on the basis that the orders are to take effect:
 - (i) in respect of "SOP Variations", from the date the proceeding was commenced; and
 - (ii) in respect of "Other Variations", from the date the Amended Statement of Claim was filed.

Common Fund Orders

4. The grounds on which the second defendant opposes the granting of a common fund order as sought at paragraph 1(b)(ii) of the Application are that:
 - (a) The Court does not have jurisdiction to make such an order.
 - (b) A common fund order is not necessary in circumstances where no representative order is made or if the proceedings are conducted as an opt in class action.
 - (c) The funding arrangements are disproportionately in favour of the interests of the funders and do not adequately safeguard the interests of potential class members. A common fund order would increase this imbalance and would infringe on the rights and interests of proposed class members who have not consented to the funding arrangements.
 - (d) Even if the Court were to determine that opt-out representative orders should be made and that common fund orders are in principle available, the appropriate time to consider making any common fund order would be at the conclusion of the proceeding. It is at this point that the Court can best assess whether any such order is appropriate or whether some other form of order, such as a fund equalisation order, might be more appropriate in the circumstances, and is best placed to determine the terms of any such order in light of the outcome of the proceeding and the costs and expenses incurred.

Notification Orders

5. The grounds on which the second defendant opposes the granting of notification orders as sought at paragraph 1(c) of the Application are that:

- (a) Representative orders ought not to be granted in the circumstances of this case, for the reasons provided above.
- (b) If the Court decides to make representative orders, these should be on an opt in basis and notification orders should not be required.
- (c) If the Court is minded to make notification orders, the need for and terms of any notification orders can only properly be determined after the plaintiffs' application for representative orders has been determined. Accordingly, this aspect of the Application should be adjourned for further consideration following the outcome of that part of the Application.
- (d) In the event that the Court decides to make notification orders now, the terms of the orders should be amended to ensure that:
 - (i) the terms of the notification are clear and not misleading, particularly having regard to the degree of uncertainty discussed above as to which customers are potential class members;
 - (ii) the terms of the funding arrangements are fully and accurately disclosed;
 - (iii) there are suitable arrangements in place for customers who receive notification to seek further information (this burden cannot be on ASB);
 - (iv) personal and confidential banking information of customers is not disclosed to the plaintiffs without the consent of each of those customers;
 - (v) notifications are not required to be made to customers via multiple channels. This is contrary to ASB's existing approach, which is aimed at avoiding concern and confusion amongst its customers; and
 - (vi) the costs of notification are borne by the plaintiffs, not ASB.

Summary Judgment

- 6. The grounds on which the second defendant opposes the granting of summary judgment as sought at paragraph 1(d)(ii) of the Application are that:
 - (a) ASB has defences to the plaintiffs' claims as set out in its statement of defence.
 - (b) The proceeding is unsuitable for summary determination having regard to the numerous contested factual and legal issues which cannot be determined on the basis of affidavit evidence and the complexity of the claim.
- 7. ASB relies on:
 - (a) Parts 2 and 4, section 141A, and Schedule 1AA of the CCCFA.

- (b) Rules 1.2 and 4.24 of the High Court Rules 2016.
- (c) *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582; *R J Flowers v Burns* [1987] 1 NZLR 260 (HC); *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245; *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126; *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452; *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454; *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 3116; *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; *Johnson Tiles Pty Ltd and Ors v Esso Australia Pty Ltd and Esso Australia Resources Pty Ltd* [2001] VSC 284; *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162.
- (d) The affidavits of William Paul Daly, Morgan Feather Lee and Nicholas James Cropp Wilson filed with this notice of opposition.
- (e) The affidavits to be filed in support of the opposition to the granting of summary judgment.

DATED 1 April 2022



K M Massey
Solicitor for the second defendant