

**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)

**SECOND DEFENDANT'S STATEMENT OF DEFENCE
TO AMENDED STATEMENT OF CLAIM
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

In response to the plaintiffs' amended statement of claim dated 28 January 2022, the second defendant by its solicitor says:

1. PARTIES

Plaintiffs

- 1.1 It denies paragraph 1.1 and says further that the first plaintiff is Anthony Paul Simons.
- 1.2 It admits paragraph 1.2.
- 1.3 It admits paragraph 1.3.
- 1.4 It admits paragraph 1.4.
- 1.5 It admits paragraph 1.5.
- 1.6 It is not required to plead to paragraph 1.6.
- 1.7 It is not required to plead to paragraph 1.7.
- 1.8 It admits that the first and third to fifth plaintiffs are or have been customers of the second defendant. Except as admitted it denies paragraph 1.8.
- 1.9 In response to paragraph 1.9, it:
 - (a) admits that the first and third to fifth plaintiffs are seeking leave to bring the proceedings on a representative basis; but
 - (b) denies that the persons whom the second plaintiffs purport to represent have the same interests in issues in this proceeding; and
 - (c) except as admitted denies paragraph 1.9.

Defendants

- 1.10 It is not required to plead to paragraph 1.10.
- 1.11 It admits paragraph 1.11, on the basis that the reference to the "Reserve of New Zealand Bank Act 1989" is an error and is a reference to the Reserve Bank of New Zealand Act 1989.

2. BACKGROUND IN RELATION TO THE CLAIM AGAINST ANZ

- 2.1 It is not required to plead to paragraphs 2.1 to 2.47.

3. BACKGROUND IN RELATION TO THE CLAIM AGAINST ASB

- 3.1 It admits that the plaintiffs make claims in relation to the period between 6 June 2015 and 18 June 2019 inclusive ("**ASB Relevant Period**"). To the extent that paragraph 3.1 alleges that ASB engaged in actionable conduct as alleged in the statement of claim in the ASB Relevant Period, that is denied.

- 3.2 It admits paragraph 3.2.
- 3.3 It admits paragraph 3.3 and says further that:
- (a) other reasons why some home loans and personal loans provided by ASB to individual debtors were not consumer credit contracts to which the CCCFA applies include that some ASB Borrowers entered into loans provided by ASB as trustees acting in their capacity as trustee of a family trust;
 - (b) the meaning of "consumer credit contract" is set out in s 11 of the CCCFA;
 - (c) prior to 6 June 2015, s 11(1)(b) read "the debtor enters into the contract primarily for personal, domestic, or household purposes";
 - (d) the amendments to s 11 do not apply to agreements entered into before 6 June 2015; and
 - (e) determining whether any particular loan is a consumer credit contract requires a factual inquiry into the matters set out in ss 11, 12 and 15 of the CCCFA, including (in particular) an inquiry in each case as to whether:
 - (i) in the case of contracts entered into before 6 June 2015, the debtor entered into the contract primarily for personal, domestic, or household purposes; or
 - (ii) in the case of contracts entered into on or after 6 June 2015, the credit was used, or was intended by the debtor to be used, wholly or predominantly for personal, domestic, or household purposes.
- 3.4 It admits that the terms of the ASB Loans were recorded in the terms of each contract and relies on the terms of those contracts as if pleaded in full. Save as admitted, paragraph 3.4 is denied.
- 3.5 It admits paragraph 3.5.
- 3.6 It admits that on or around 6 June 2015 it implemented a new standard operating procedure ("**SOP**") which allowed staff in ASB branches and in the ASB call centre to make changes to the following aspects of ASB Loans when requested to do so by ASB Borrowers in person or by phone:
- (a) repayment amounts; and
 - (b) repayment frequency.
- Except as expressly admitted it otherwise denies paragraph 3.6.
- 3.7 It admits paragraph 3.7.
- 3.8 It admits paragraph 3.8.
- 3.9 It admits paragraph 3.9.

- 3.10 It denies paragraph 3.10 and says further that:
- (a) s 22 of the CCCFA does not apply to all SOP Variations; and
 - (b) if ASB exercises a power under the contract to change the repayment date, amounts, or frequency of an ASB Borrower's ASB Loan, that is not subject to s 22 of the CCCFA.
- 3.11 In relation to paragraph 3.11, it:
- (a) admits that the SOP provided for ASB staff to provide variation disclosure where required; but
 - (b) except as expressly admitted, otherwise denies paragraph 3.11.
- 3.12 In relation to paragraph 3.12, it:
- (a) admits that it informed the Commerce Commission that it had identified that it could not confirm in 2019 that the process set out in the SOP was followed consistently; and
 - (b) denies that it failed to provide variation disclosure as required under the CCCFA; and
 - (c) says further that, in addition to the process set out in the SOP, variation disclosure was also provided by methods including letters, emails, account statements, electronic messages, via its FastNet Classic website ("**FNC**") and via its mobile application (the "**App**"); and
 - (d) says further that each of the first and third to fifth plaintiffs received variation disclosure as required under the CCCFA during the relevant period; and
 - (e) except as expressly admitted, otherwise denies paragraph 3.12.
- 3.13 In relation to paragraph 3.13:
- (a) it admits that the ASB Settlement Agreement records that ASB advised the Commerce Commission that it had updated its policies, process and procedures to ensure that all customers who request a change in their repayment date, amount or frequency receive the required variation disclosure;
 - (b) it admits that the ASB Settlement Agreement defines the "Relevant Period" as ending on 18 June 2019; and
 - (c) it says further that ASB had policies, processes and procedures that in fact ensured that all ASB Borrowers who requested SOP Variations received variation disclosure in the ASB Relevant Period where required. In addition to the process set out in the SOP, variation disclosure was also provided by methods including letters, emails, account statements, electronic messages, via its FNC website, and via the App.

Except as admitted, it denies paragraph 3.13.

- 3.14 It denies paragraph 3.14.
- 3.15 It denies paragraph 3.15 and repeats paragraph 3.12 above.
- 3.16 In relation to paragraph 3.16:
- (a) it admits that it entered into the ASB Settlement Agreement with the Commission on 23 February 2021;
 - (b) it admits that in the ASB Settlement Agreement, it admitted that:
 - (i) in breach of s 9C(2)(a)(iii) of the CCCFA, it failed to ensure that its systems and processes were sufficient to ensure that required variation disclosure was given in all instances where it was required to be given during the "Relevant Period" as defined in that Agreement; and
 - (ii) during some of the Relevant Period it failed to have appropriate controls in place to promptly identify this failure and rectify it within a reasonable period;
 - (c) it admits that in the ASB Settlement Agreement, it agreed to make the payments set out at paragraph 3.16(b);
 - (d) it otherwise denies paragraph 3.16; and
 - (e) says further the admissions contained in the ASB Settlement Agreement were limited to the admissions expressly made and nothing in the ASB Settlement Agreement constituted any wider admission of liability by ASB or any admission that any person has suffered loss, harm or prejudice; and
 - (f) says further that Customer Cohort A and Cohort B in the ASB Settlement Agreement included customers who did not have consumer credit contracts, and customers to whom variation disclosure was provided.
- 3.17 In relation to paragraph 3.17, it admits that the ASB Settlement Agreement states that it:
- (a) is entered into without prejudice to the rights of the Affected Customers in respect of the "breach", being the admitted breach set out at paragraph 3.16(b)(i) above, which rights the Commission was not compromising on the Affected Customers' behalf; and
 - (b) will not limit or affect the ability of any person, who has not consented to be bound by the terms of the ASB Settlement Agreement, from pursuing any rights that person considers would be available to them arising from the matters contained in the ASB Settlement Agreement,
- but otherwise denies paragraph 3.17.
- 3.18 It admits paragraph 3.18.

- 3.19 It denies paragraph 3.19 and says further that it began making payments on or about 20 April 2019.
- 3.20 It denies paragraph 3.20 and says further that:
- (a) variation disclosure was made to ASB Borrowers in relation to changes to their loans with ASB through one or more methods including letters, emails, account statements, and electronic messages and information otherwise given through FNC and the App; and / or
 - (b) many ASB Borrowers will have had other changes to their loans for which they received subsequent disclosure statements fulfilling all requirements of the CCCFA.
- 3.21 As to paragraph 3.21, it admits that in the ASB Relevant Period, various ASB Borrowers requested, and ASB agreed, changes other than SOP Variations to their ASB Loans.
- 3.22 As to paragraph 3.22, it admits that in the ASB Relevant Period, some ASB Borrowers requested, and ASB agreed, changes other than SOP Variations to more than one of their ASB Loans.
- 3.23 As to paragraph 3.23, it admits that in the ASB Relevant Period, some ASB Borrowers requested, and ASB agreed, changes other than SOP Variations to one or more of their ASB Loans on more than one occasion.
- 3.24 In relation to paragraph 3.24:
- (a) it admits that s 22 of the CCCFA required ASB to make disclosure of the full particulars of the change to the ASB Borrower, if the parties to the contract agreed to change the contract for the ASB Loan;
 - (b) it says further that:
 - (i) s 22 of the CCCFA does not apply to all Other Variations; and
 - (ii) if ASB exercises a power under the contract to change the repayment date, amounts, or frequency of an ASB Borrower's ASB Loan, that is not subject to s 22 of the CCCFA; and
 - (c) except as admitted, paragraph 3.24 is denied.
- 3.25 It denies paragraph 3.25 and says further that:
- (a) variation disclosure was provided by methods including letters, emails, account statements, and electronic messages and information otherwise given through FNC and the App; and
 - (b) each of the first and third to fifth plaintiffs received variation disclosure as required under the CCCFA during the ASB Relevant Period.

- 3.26 It apprehends that it is not required to plead to paragraph 3.26.
- 3.27 It denies paragraph 3.27 and says further that no ASB Borrowers can be said to be affected or suffered any loss.

First plaintiff

- 3.28 It denies paragraph 3.28 and says further that the first plaintiff has been a customer of ASB since at least 1987.
- 3.29 It admits that the first plaintiff had loans with ASB but in the absence of knowledge of the purpose of the loans relied upon denies that the loans are consumer credit contracts and denies paragraph 3.29. It says further that:
- (a) the AS 05 Term Loan was repaid on or about 28 November 2014, before the ASB Relevant Period;
 - (b) the effect of AS Facility Agreement 2 was to replace the AS 51 Revolving Facility with a new facility with the same account number ("**AS 51 Revolving Facility No 2**"), not to increase the facility limit of the AS 51 Revolving Facility which was made available under AS Facility Agreement 1;
 - (c) AS 51 Revolving Facility No 2 was repaid from the advance of the AS 013 Term Loan pursuant to AS Facility Agreement 4; and
 - (d) it denies that either of the AS 011 Term Loan and the AS 013 Term Loan are "ASB Post Amendment Loans" as that term is used in the amended statement of claim.
- 3.30 It admits paragraph 3.30, but says further that it:
- (a) repeats paragraphs 3.10 and 3.24 above;
 - (b) denies that a variation was made to AS 51 Revolving Facility No 2 on 27 January 2016 in the form of a fixed interest rate arrangement and says further that:
 - (i) no such change could be made to a revolving credit facility; and
 - (ii) on 1 March 2016 it entered into AS Facility Agreement 4, pursuant to which:
 - (aa) AS 51 Revolving Facility No 2 was fully repaid; and
 - (bb) it made available to the first plaintiff the AS 013 Term Loan in the amount of \$112,000 with account number 12-3028-0548557-96-013; and
 - (c) denies that a variation was made to either AS Facility Agreement 2 or AS Facility Agreement 3 in the form of an "interest only" period on 27 January 2016 and says further that:

- (i) the AS 05 Term Loan was fully repaid on or about 28 November 2014;
- (ii) the AS 06 Term Loan, AS 07 Term Loan and AS 011 Term Loan were each already subject to six-month interest only periods on 27 January 2016 and those interest only periods were not extended as a result of the first plaintiff's request; and
- (iii) no interest only period was applied to AS 51 Revolving Facility No 2 on 27 January 2016, nor could such a change be made to a revolving credit facility.

3.31 It denies paragraph 3.31.

3.32 In relation to paragraph 3.32, it:

- (a) repeats paragraph 3.30 above;
- (b) denies paragraph 3.32; and
- (c) says further that it provided full particulars:
 - (i) of the 21 October 2015 Variations, including by letter to the first plaintiff, email via the first plaintiff's broker, Peter Reilly, on 19 October 2015 and the statement for AS 51 Revolving Facility No 2 for the month to 17 November 2015;
 - (ii) of the 27 January 2016 Variations, including by letter to the first plaintiff on 27 January 2016, email via Mr Reilly on 27 January 2016 and the statement for AS 51 Revolving Facility No 2 for the month to 17 February 2016;
 - (iii) of the 28 December 2016 Variations, including by letter to the first plaintiff and the statement for the first plaintiff's Omni account with account number 12-3028-0548557-51 ("**AS Omni Account**") for the month to 12 January 2017;
 - (iv) of the 11 January 2017 Variations, including by letter countersigned by the first plaintiff on 9 January 2017 and the statement for the AS Omni Account for the month to 12 January 2017;
 - (v) of the 19 April 2017 Variations, including by letter to the first plaintiff on 10 April 2017, email to the first plaintiff on 11 April 2017 and the statements for the AS Omni Account for the months to 12 April 2017 and 12 May 2017;
 - (vi) of the 16 May 2017 Variations, including by letter to the first plaintiff on 16 May 2017, electronic message to the first plaintiff on 16 May 2017 and the statement for the AS Omni Account for the month to 12 June 2017;
 - (vii) of the 31 May 2017 Variations, including by letter to the first plaintiff on 30 May 2017, email to the first plaintiff on 30

May 2017 and the statement for the AS Omni Account for the month to 12 June 2017;

- (viii) of the 23 August Variations, including by letter to the first plaintiff on 23 August 2017, email to the plaintiff on 23 August 2017 and the statement for the AS Omni Account for the month to 12 September 2017;
- (ix) of the 7 February 2018 Variation, including by letter to the first plaintiff on 31 January 2018 and the statement for the AS Omni Account for the month to 12 February 2018; and
- (x) in every case, via:
 - (aa) FNC and the App, and by statements; and / or
 - (bb) disclosure statements in respect of subsequent changes fulfilling all requirements of the CCCFA,

with capitalised terms not otherwise defined above having the meanings given to them in paragraph 3.30 of the plaintiffs' amended statement of claim, to the extent that those definitions are consistent with paragraphs 3.29 and 3.30 above.

3.33 It admits paragraph 3.33.

3.34 In relation to paragraph 3.34, it admits that an email was sent to the first plaintiff with the subject line and heading "An important message about your account" on 28 April 2021 and relies on the contents of that email as if pleaded in full, but otherwise denies paragraph 3.34.

3.35 It denies paragraph 3.35 and repeats paragraphs 3.30 and 3.32 above.

3.36 It admits paragraph 3.36.

Third plaintiffs

3.37 It denies paragraph 3.37 and says further that:

- (a) Ms Dunbar has been a customer of ASB since at least 2006; and
- (b) Mr Dunbar has been a customer of ASB since at least 1983.

3.38 It admits that the third plaintiffs had home loans with ASB, but in the absence of knowledge of the purpose of the loans relied upon denies that the loans are consumer credit contracts and denies paragraph 3.38. It says further that:

- (a) the PD 015 Term Loan was repaid on 24 December 2021;
- (b) the PD 017 Term Loan was repaid from the advance of the PD 018 Term Loan pursuant to PD Facility Agreement 4;
- (c) the effect of PD Facility Agreement 5 was to replace the PD 00 Revolving Facility with a new facility ("**PD 00 Revolving Facility No 2**") with the same account number,

not to increase the facility limit of the PD 00 Revolving Facility which was made available under PD Facility Agreement 3; and

- (d) it denies that the PD 018 Term Loan is an "ASB Post Amendment Loan" as that term is used in the amended statement of claim.

3.39 It admits paragraph 3.39, but says further that it:

- (a) repeats paragraphs 3.10 and 3.24 above;
- (b) denies that a variation was made to PD Facility Agreement 1 on 26 January 2016, and says further that it entered into a fixed interest rate arrangement with the third plaintiff in respect of the PD 015 Term Loan that took effect on 29 January 2016, pursuant to which interest would be fixed at 4.49% for 3 years ("**29 January Variation**"); and
- (c) denies that a variation was made to PD Facility Agreement 4 on 12 November 2017 pursuant to which a fixed interest rate arrangement was entered into in respect of the PD 018 Term Loan for a 1-year period and says further that the term of the relevant arrangement was 3 years.

3.40 It denies paragraph 3.40.

3.41 In relation to paragraph 3.41, it:

- (a) repeats paragraph 3.39 above; and
- (b) denies paragraph 3.41; and
- (c) says further that it provided full particulars:
- (i) of the 29 January 2016 Variation, including by letter to the third plaintiffs on 28 January 2016 and the statement for the PD 00 Revolving Facility for the month to 23 February 2016;
- (ii) of the 12 November 2017 Variation, including by letter to the third plaintiffs on 18 October 2017, electronic message to the third plaintiffs on 18 October 2017 and the statement for PD 00 Revolving Facility No 2 for the month to 23 November 2017;
- (iii) of the 29 January 2019 Variation, including by letter to the third plaintiffs on 8 January 2019, electronic message to the third plaintiffs on 8 January 2019 and the statement for PD 00 Revolving Facility No 2 for the month to 23 February 2019; and
- (iv) in every case, via:
- (aa) FNC and the App, and by statements; and / or
- (bb) disclosure statements in respect of subsequent changes fulfilling all requirements of the CCCFA,

with capitalised terms not otherwise defined above having the meanings given to them in paragraph 3.41 of the plaintiffs' amended statement of claim, to the extent that those definitions are consistent with paragraphs 3.38 and 3.39 above.

- 3.42 It admits paragraph 3.42.
- 3.43 In relation to paragraph 3.43, it admits that an email was sent to the third plaintiffs with the subject line and heading "An important message about your account" on 6 May 2021 and relies on the contents of that email as if pleaded in full, but otherwise denies paragraph 3.43.
- 3.44 It denies paragraph 3.44 and repeats paragraphs 3.39 and 3.41 above.
- 3.45 It denies paragraph 3.45 and says further that the third plaintiffs have open loans with ASB with unpaid balances.

Fourth plaintiffs

- 3.46 It admits paragraph 3.46 insofar as it relates to the fourth plaintiffs' joint accounts with ASB and says further that:
- (a) Ms Punter has been a customer of ASB since at least 2001; and
 - (b) Mr Bickerdike has been a customer of ASB since at least 2007.
- 3.47 It admits that the fourth plaintiffs had home loans with ASB but in the absence of knowledge of the purpose of the loans relied upon denies that the loans are consumer credit contracts and denies paragraph 3.47. It says further that:
- (a) BB Facility Agreement 1 was executed on 9 February 2012;
 - (b) the BB 02 Term Loan was repaid from the advance of the BB 03 Term Loan pursuant to BB Facility Agreement 3;
 - (c) the effect of BB Facility Agreement 4 was to replace the BB 02 Revolving Facility with a new facility ("**BB 02 Revolving Facility B**") with the same account number, not to increase the facility limit of the BB 02 Revolving Facility which was made available under BB Facility Agreement 2;
 - (d) the BB 03 Term Loan and BB 02 Revolving Facility B were repaid from the advance of the BB 04 Term Loan and BB 00 Revolving Facility No 2 pursuant to BB Facility Agreement 5;
 - (e) all of the fourth plaintiffs' remaining loans, being the BB 04 Term Loan and BB 02 Revolving Facility No 2, were repaid on 10 May 2019 when the fourth plaintiffs refinanced their home loans with Resimac Home Loans; and
 - (f) it denies that the BB 03 Term Loan was an "ASB Post Amendment Loan" as that term is used in the amended statement of claim.
- 3.48 It admits paragraph 3.48, but says further that it:

- (a) repeats paragraphs 3.10 and 3.24 above; and
 - (b) denies that a variation was made to BB Facility Agreement 2 on 10 August 2015 or 21 August 2015 and says further that the BB 02 Term Loan was made available pursuant to BB Facility Agreement 1.
- 3.49 It denies paragraph 3.49.
- 3.50 In relation to paragraph 3.50, it:
- (a) repeats paragraph 3.48 above;
 - (b) denies paragraph 3.50; and
 - (c) says further that it provided full particulars:
 - (i) of the 10 August 2015 Variations, including by letter to the fourth plaintiffs on 10 August 2015 and email via the fourth plaintiffs' broker, Jeffrey Royle, on 10 August 2015;
 - (ii) of the 21 August 2015 Variation, including by letter to the fourth plaintiffs on 21 August 2015; and
 - (iii) of the 9 November 2018 Variation, including by email via Mr Royle on 7 November 2018 and to the fourth plaintiffs on 12 November 2018 and the statements for the fourth plaintiffs' Streamline account with account number 12-3048-0505116-00 ("**BB Streamline Account**") for the months to 9 November 2018 and 9 December 2018; and
 - (iv) in every case, via:
 - (aa) FNC and the App, and by statements; and / or
 - (bb) disclosure statements in respect of subsequent changes fulfilling all requirements of the CCCFA,

with capitalised terms not otherwise defined above having the meanings given to them in paragraph 3.50 of the plaintiffs' amended statement of claim, to the extent that those definitions are consistent with paragraphs 3.47 and 3.48 above.
- 3.51 It admits paragraph 3.51.
- 3.52 In relation to paragraph 3.52, it admits that an email was sent to Mr Bickerdike with the subject line and heading "An important message about your account" on 28 April 2021 and relies on the contents of that email as if pleaded in full, but otherwise denies paragraph 3.52.
- 3.53 It denies paragraph 3.53, and repeats paragraphs 3.48 and 3.50.
- 3.54 It admits paragraph 3.54.

Fifth plaintiffs

- 3.55 It admits paragraph 3.55 insofar as it relates to the fifth plaintiffs' joint accounts with ASB and says further that:
- (a) Ms Cuthbert has been a customer of ASB since at least 1981; and
 - (b) Mr Marvin has been a customer of ASB since at least 1997.
- 3.56 It admits that the fifth plaintiffs had home loans with ASB but denies that those loans are consumer credit contracts, and further says:
- (a) the GM 03 Term Loan was entered into for business purposes, specifically the refinancing of a loan for a business vehicle;
 - (b) the effect of GM Facility Agreement 3 was to restructure the GM 06 Term Loan and replace the GM 00 Revolving Facility with a new facility ("**GM 00 Revolving Facility No 2**") with the same account number, not to renew and increase the facility limit of the GM 00 Revolving Facility which was made available under GM Facility Agreement 1;
 - (c) the GM 02 Term Loan was repaid on 10 April 2018;
 - (d) the GM 03 Term Loan was repaid on 25 October 2018; and
 - (e) Ms Cuthbert entered into the fifth plaintiffs' ASB Loans in both her individual capacity and as trustee for the Mapiu Trust.
- 3.57 It admits paragraph 3.57 but says further that it repeats paragraphs 3.10, 3.24, 3.56(a) and (e) above.
- 3.58 It denies paragraph 3.58.
- 3.59 In relation to paragraph 3.59, it:
- (a) repeats paragraph 3.57 above;
 - (b) denies paragraph 3.59; and
 - (c) says further that it provided full particulars:
 - (i) of the 24 October 2016 Variations, including by emails to the fifth plaintiffs on 17 and 18 October 2016 and the statements for:
 - (aa) the GM 00 Revolving Facility for the period 29 August to 20 October 2016; and
 - (bb) Ms Cuthbert's Business Focus account with account number 12-3488-0055593-00 ("**Cuthbert Interiors Business Account**") for the month to 21 November 2016;

- (ii) of the 17 April 2018 Variation, including by email to the fifth plaintiffs on 17 April 2018 and the statement for GM 00 Revolving Facility No 2 for the month to 20 April 2018;
- (iii) of the 23 April 2018 Variation, including by email to the fifth plaintiffs on 12 April 2018 and the statement for GM 00 Revolving Facility No 2 for the month to 20 April 2018;
- (iv) of the 20 September 2018 Variation, including by letter to the fifth plaintiffs on 8 September 2018, electronic message to the fifth plaintiffs on 8 September 2018 and the statement for GM 00 Revolving Facility No 2 for the month to 20 October 2018;
- (v) of the 24 September 2018 Variations, including by letters to the fifth plaintiffs on 23 September 2018, electronic messages to the fifth plaintiffs on 23 September 2018 and the statements for:
 - (aa) GM 00 Revolving Facility No 2 for the month to 20 October 2018; and
 - (bb) the Cuthbert Interiors Business Account for the month to 21 October 2018;
- (vi) of the 8 October 2018 Variation, including by email to the fifth plaintiffs on 1 October 2018 and the statement for GM 00 Revolving Facility No 2 for the month to 20 October 2018;
- (vii) of the 14 January 2019 Variation, including by letter to the fifth plaintiffs on 12 January 2019, electronic message to the fifth plaintiffs on 12 January 2019 and the statement for GM 00 Revolving Facility No 2 for the month to 20 January 2019;
- (viii) of the 11 March 2019 Variation, including by letter to the fifth plaintiffs on 10 March 2019, electronic message to the fifth plaintiffs on 10 March 2019 and the statement for GM 00 Revolving Facility No 2 for the month to 20 March 2019; and
- (ix) of in every case, via:
 - (aa) FNC and the App, and by statements; and / or
 - (bb) disclosure statements in respect of subsequent changes fulfilling all requirements of the CCCFA,

with capitalised terms not otherwise defined above having the meanings given to them in paragraph 3.59 of the plaintiffs' amended statement of claim, to the extent that those definitions are consistent with paragraphs 3.56 and 3.57 above.

3.60 It admits paragraph 3.60.

- 3.61 In relation to paragraph 3.61, it admits that an email was sent to the fifth plaintiffs with the subject line and heading "An important message about your account" on 6 May 2021 and relies on the contents of that email as if pleaded in full, but otherwise denies paragraph 3.61.
- 3.62 It denies paragraph 3.62, and repeats paragraphs 3.57 and 3.59 above.
- 3.63 It denies paragraph 3.63 and says that the fifth plaintiffs have open loan with ASB with unpaid balances.
- 3.64 It denies paragraph 3.64 and says further that ASB met its obligations to provide variation disclosure.
- 3.65 It admits paragraph 3.65 and says further that ASB met its obligations to provide variation disclosure.

4. FIRST CAUSE OF ACTION – BY ANZ PLAINTIFFS AGAINST ANZ: BREACH OF SECTION 22 OF THE CCCFA

- 4.1 It is not required to plead to paragraphs 4.1 to 4.12.
- 4.2 It is not required to plead to ANZ representative plaintiffs' claim for relief against ANZ.

5. SECOND CAUSE OF ACTION – BY THE ASB REPRESENTATIVE PLAINTIFFS AGAINST ASB: BREACH OF SECTION 22 OF THE CCCFA

It repeats sections 1 and 3 above and says:

- 5.1 ASB is obliged to give variation disclosure in the circumstances provided in the CCCFA as it applied at the relevant time. Except as admitted, it denies paragraph 5.1.
- 5.2 It denies paragraph 5.2.
- 5.3 It denies paragraph 5.3.
- 5.4 It denies paragraph 5.4.
- 5.5 It denies paragraph 5.5.
- 5.6 It denies paragraph 5.6.
- 5.7 It denies paragraph 5.7.
- 5.8 It denies paragraph 5.8.
- 5.9 It denies paragraph 5.9.
- 5.10 It denies that the plaintiffs are entitled to any of the relief sought.

6. FIRST AFFIRMATIVE DEFENCE: LIMITATION – LOANS ENTERED INTO PRIOR TO 6 JUNE 2015

- 6.1 Any claims of Affected ASB Borrowers in respect of ASB Loans entered into prior to 6 June 2015 (ie "ASB Existing Loans") in respect of variations that occurred prior to 25 June 2018 are statute barred.

7. SECOND AFFIRMATIVE DEFENCE: LIMITATION – LOANS ENTERED INTO ON OR AFTER 6 JUNE 2015

- 7.1 Any claims of Affected ASB Borrowers whose loans were entered into on or after 6 June 2015 (ie those with "ASB Post Amendment Loans"), who discovered or ought reasonably to have discovered loss or damage (if any, which is denied):

- (a) prior to 28 January 2019 in respect of Other Variations, or
- (b) prior to 25 June 2018, in respect of SOP Variations,

are statute barred.

8. THIRD AFFIRMATIVE DEFENCE: RELIEF SHOULD BE REFUSED

- 8.1 In the event that Affected ASB Borrowers can demonstrate qualifying loss or damage (which is denied), relief should be refused in the Court's discretion in all of the circumstances, including that:

- (a) each of the relevant variations were requested by customers who have had the benefit of the ASB Loans, including the variations;
- (b) ASB provided fulsome disclosure to customers through a range of channels at the time of changes and information about the status and key features of loans remained available at all times on the ASB FNC system;
- (c) any breach of the CCCFA is at most of a technical nature;
- (d) ASB had an appropriate compliance programme;
- (e) any errors were minor, and inadvertent;
- (f) no person has been prejudiced by any errors;
- (g) any errors were due to a reasonable mistake or due to events outside the control of ASB;
- (h) ASB self-reported the SOP issue to the Commerce Commission, and provided remediation payments as agreed with the Commerce Commission;
- (i) ASB received interest and other payments from the Affected ASB Borrowers on their ASB Loans in good faith and has relied on the validity of the payments; and

- (j) in all the circumstances, it is inequitable to grant relief to the Affected ASB Borrowers.

Section 95A

- 8.2 Should ASB otherwise be liable to refund costs of borrowing in relation to the period from 20 December 2019 (which is denied), ASB seeks an order that the effect under s 48 or 99(1A) of any failure to make disclosure be extinguished by the Court.
- 8.3 It is just and equitable that its liability be extinguished given (amongst other things) that:
- (a) each of the relevant variations were requested by customers who have had the benefit of the ASB Loans, including the variations;
 - (b) ASB provided fulsome disclosure to customers through a range of channels at the time of changes and information about the status and key features of loans remained available at all times on the ASB FNC system;
 - (c) any breach of the CCCFA is at most of a technical nature;
 - (d) ASB had an appropriate compliance programme;
 - (e) any errors were minor, and inadvertent;
 - (f) no person has been prejudiced by any errors;
 - (g) any errors were due to a reasonable mistake or due to events outside the control of ASB;
 - (h) ASB self-reported the SOP issue to the Commerce Commission, and provided remediation payments as agreed with the Commerce Commission; ASB received interest and other payments from the Affected ASB Borrowers on their ASB Loans in good faith and has relied on the validity of the payments; and
 - (i) in all the circumstances, it is inequitable to grant relief to the Affected ASB Borrowers.

Statutory damages – reasonable mistake defence

- 8.4 ASB has a defence under s 106(1) of the CCCFA to the plaintiffs' claim for statutory damages as:
- (a) any errors were due to a reasonable mistake and / or to events outside of ASB's control;
 - (b) any issue was remedied as soon as practicable after it was discovered by ASB; and
 - (c) ASB self reported the SOP issue to the Commerce Commission, and provided remediation payments as agreed with the Commerce Commission.

Extinguishment / reduction of statutory damages

- 8.5 In the event that ASB is found to have prima facie liability to pay statutory damages, ASB seeks an order that those statutory damages are extinguished (or reduced to the remediation amount that it has already paid to customers) on the basis that it is just and equitable to do so as:
- (a) each of the relevant variations were requested by customers who have had the benefit of the ASB Loans, including the variations;
 - (b) ASB provided fulsome disclosure to customers through a range of channels at the time of changes and information about the status and key features of loans remained available at all times on the ASB FNC system;
 - (c) any breach of the CCCFA is at most of a technical nature;
 - (d) ASB had an appropriate compliance programme;
 - (e) any errors were minor, and inadvertent;
 - (f) no person has been prejudiced by any errors;
 - (g) any errors were due to a reasonable mistake or due to events outside the control of ASB;
 - (h) ASB self-reported the SOP issue to the Commerce Commission, and provided remediation payments as agreed with the Commerce Commission;
 - (i) ASB received interest and other payments from the Affected ASB Borrowers on their ASB Loans in good faith and has relied on the validity of the payments; and
 - (j) in all the circumstances, it is inequitable to grant relief to the Affected ASB Borrowers.

9. FOURTH AFFIRMATIVE DEFENCE: SET OFF

- 9.1 Terms and conditions applying to each of the ASB Loans enable ASB to set off any amount ASB may owe in or towards satisfaction of any indebtedness due and payable by the customer to ASB but unpaid.
- 9.2 A creditor may set-off any entitlement of a debtor to statutory damages or to an amount that must be paid to a debtor under an order made under section 93 or section 94A against any amount otherwise owing by the debtor.
- 9.3 To the extent that an order is made in favour of any Affected ASB Borrower, that liability should be set off against any indebtedness due and payable by the customer to ASB but unpaid.

10. FIFTH AFFIRMATIVE DEFENCE: ESTOPPEL

- 10.1 At all relevant times ASB and each of the Affected ASB Borrowers proceeded on the basis of a common assumption that the relevant Affected ASB Borrower was liable to pay and ASB was entitled to receive the contractually agreed costs of borrowing of the relevant ASB Loan (the "**Assumption**").
- 10.2 Each party has, to the knowledge of the other, expressly or by implication accepted the Assumption as being true for the purposes of each of the ASB Loans.

Particulars

ASB made each ASB Loan available on an ongoing basis and issued disclosure documents, loan statements and other communications based on the Assumption.

Each of the Affected ASB Borrowers utilised their ASB Loan and (in general) paid the costs of borrowing in accordance with the agreed terms.

- 10.3 Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
- 10.4 ASB was entitled to act and has acted, as the Affected ASB Borrowers knew or intended, in reliance upon the Assumption being regarded as true and binding by continuing to make the ASB Loans available to the Affected ASB Borrowers.
- 10.5 ASB would suffer detriment if the Affected ASB Borrowers were allowed to resile or depart from the Assumption.

Particulars

ASB would suffer loss in the event that ASB were required to refund the costs of borrowing on the ASB Loans. The amount of such loss is not presently able to be quantified.

- 10.6 In all the circumstances it would be unconscionable to allow the Affected ASB Borrowers to resile or depart from the Assumption.

11. SIXTH AFFIRMATIVE DEFENCE: CHANGE OF POSITION - JUDICATURE ACT 1908, SECTION 94B / PROPERTY LAW ACT 2007, SECTION 74B

- 11.1 In the event it is determined that ASB was not entitled to receive all or any of the costs of borrowing paid to ASB by Affected ASB Borrowers (which is denied) then:
- (a) The payments in relation to costs of borrowing were made by the Affected ASB Borrowers under a mistake as to whether they were under an obligation to make such payments.
 - (b) ASB received the payments in relation to the cost of borrowing from the Affected ASB Borrowers in good faith.

- (c) ASB has altered its position in reliance on the validity of the payments.
- (d) To the extent there was any failure or defect in relation to variation disclosure to any of the Affected ASB Borrowers (which is denied) it did not cause the Affected ASB Borrowers any loss or prejudice.
- (e) The Affected ASB Borrowers have had the benefit of the ASB Loans including the variations which they sought and which were agreed by ASB.
- (f) There are no implications in respect of other persons that weigh against relief being granted.

11.2 In all the circumstances, having regard to all possible implications in respect of other persons, it is inequitable to grant relief or to grant relief in full to the Affected ASB Borrowers and the Court must deny wholly or in part the relief sought by the plaintiffs under the CCCFA.

This document is filed by **KIRSTEN MARGARET MASSEY**, solicitor for the second defendant, of Russell McVeagh. The address for service of the second defendant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1140.

Documents for service may be left at that address or may be:

- (a) emailed to the solicitor at kirsten.massey@russellmcveagh.com / jeremy.upson@russellmcveagh.com; or
- (b) posted to the solicitor at PO Box 8, Auckland 1140; or
- (c) left for the solicitor at a document exchange for direction to CX10085.