

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

COMMERCIAL PANEL

CIV 2021-404-1190

**UNDER THE CREDIT CONTRACTS AND CONSUMER FINANCE
ACT 2003 AND HIGH COURT RULE 4.24**

**BETWEEN Anthony Paul Simons, suing as a representative under
High Court Rule 4.24**

FIRST PLAINTIFF

**AND Andrew John Beavan and Mei Lim, suing as
representatives under High Court Rule 4.24**

SECOND PLAINTIFFS

**PLAINTIFFS' REPLY TO SECOND DEFENDANT'S STATEMENT OF
DEFENCE**

Dated: 20 April 2022

Solicitors:
Scott Russell
Russell Legal
1 Beaumont Street, Auckland 1010
Tel: +64 204 0969751
Email: scott.russell@russelllegal.co.nz

Counsel:
Davey Salmon QC / Ali van Ammers
Mills Lane Chambers
Level 27, 25 Queen Street, Auckland 1010
PO Box 537, Auckland 1140
Tel: +64 21 974 873 / +64 27 5626 351
Email: davey.salmon@millslane.co.nz /
ali.vanammers@millslane.co.nz

Philip Charles Dunbar and **Sheryn Valeri Dunbar**, suing
as representatives under High Court Rule 4.24

THIRD PLAINTIFFS

Bruno Robert Bickerdike and **Emma Renae Punter**, suing
as representatives under High Court Rule 4.24

FOURTH PLAINTIFFS

Glenn Jonathan Marvin and **Anna Mary Cuthbert**, suing
as representatives under High Court Rule 4.24

FIFTH PLAINTIFFS

AND

ANZ Bank New Zealand Limited

FIRST DEFENDANT

AND

ASB Bank Limited

SECOND DEFENDANT

PLAINTIFFS' REPLY TO SECOND DEFENDANT'S STATEMENT OF DEFENCE

In response to the second defendant's statement of defence dated 1 April 2022 the first and third to fifth plaintiffs say:

1. PARTIES

Plaintiffs

- 1.1 They admit the positive allegation in paragraph 1.1 and say further that there is a typographical error in paragraph 1.1 of the amended statement of claim.

Defendants

- 1.11 They say that there is a typographical error in paragraph 1.11 of the amended statement of claim, which is intended to refer to the Reserve Bank of New Zealand Act 1989.

3. BACKGROUND IN RELATION TO CLAIM AGAINST ASB

ASB's conduct

- 3.3 In relation to paragraph 3.3:
- (a) They have insufficient knowledge of, and therefore deny, the positive allegation in paragraph 3.3(a).
 - (b) They apprehend they are not required to plead to the positive allegations in paragraphs 3.3(b) to (e), which are allegations of law.
- 3.5 They are not required to plead to paragraph 3.5. They note, however, that that there is a typographical error in paragraph 3.5 of the amended statement of claim, and that the ASB Post Amendment Loans include any ASB Loans that were entered into on or after 6 June 2015.
- 3.10 They deny the positive allegations in paragraph 3.10(a) and repeat paragraphs 3.6 and 3.10 of the amended statement of claim.
- 3.12 They deny the positive allegations in paragraph 3.12.

- 3.13 In relation to the positive allegation in paragraph 3.13(c):
- (a) They have insufficient knowledge of whether ASB had the alleged (and unparticularised) policies, processes and procedures referred to in paragraph 3.13(c), and therefore deny that it did.
 - (b) They deny that all ASB Borrowers who requested SOP Variations received Variation Disclosure in the ASB Relevant Period.
 - (c) They deny that Variation Disclosure was provided by the other alleged (and unparticularised) methods referred to in paragraph 3.13(c).

Commission investigation and settlement

- 3.16 In relation to paragraph 3.16:
- (a) They admit that clause 4.3 of the ASB Settlement Agreement purported to limit the admissions contained in the ASB Settlement Agreement. Save as expressly admitted, they deny the positive allegation in paragraph 3.16(e) and rely on the ASB Settlement Agreement as if pleaded in full.
 - (b) It has insufficient knowledge of, and therefore denies, the positive allegation in paragraph 3.16(f).
- 3.19 They have insufficient knowledge of, and therefore deny, the positive allegation in paragraph 3.19.
- 3.20 They deny the positive allegations in paragraph 3.20.
- 3.24 They deny the positive allegations in paragraph 3.24(b) and repeat paragraphs 3.21 and 3.24 of the amended statement of claim.
- 3.25 They deny the positive allegations in paragraph 3.25.
- 3.27 They deny the positive allegation in paragraph 3.27.

The ASB representative plaintiffs are Affected ASB Borrowers

First plaintiff

- 3.28 They admit the positive allegation in paragraph 3.28.
- 3.29 They admit the positive allegations in paragraphs 3.29 and repeat paragraph 3.5 above.
- 3.30 In relation to paragraph 3.30:
- (a) They have insufficient knowledge of, and therefore deny, the positive allegation in paragraph 3.30(b)(i).
 - (b) They admit the positive allegations in paragraph 3.30(b)(ii).
 - (c) They admit the positive allegations in paragraphs 3.30(c)(i) and (ii).
 - (d) They admit that no interest only period was applied to the AS 51 Revolving Facility on 27 January 2016. Save as expressly admitted, they have insufficient knowledge of, and therefore deny, paragraph 3.30(c)(iii).
- 3.32 They admit that ASB sent letters, emails and statements to the first plaintiff and Mr Reilly (as the case may be) on the dates referred to in paragraphs 3.32(c)(i) to (ix). Save as expressly admitted, they deny the positive allegations in paragraph 3.32(c) and repeat paragraph 3.32 of the amended statement of claim.

Third plaintiffs

- 3.37 They admit the positive allegations in paragraph 3.28.
- 3.38 They admit the positive allegations in paragraphs 3.38(a) to (c) and repeat paragraph 3.5 above.
- 3.39 They admit the positive allegations in paragraphs 3.39(b) and (c) and repeat paragraph 3.39 of the amended statement of claim.

3.41 They admit that ASB sent letters and statements to the third plaintiffs on the dates referred to in paragraphs 3.41(c)(i) to (iii). Save as expressly admitted, they deny the positive allegations in paragraph 3.41(c) and repeat paragraph 3.41 of the amended statement of claim.

3.45 They admit the positive allegation in paragraph 3.45 and repeat paragraph 3.45 of the amended statement of claim.

Fourth plaintiffs

3.46 They admit the positive allegations in paragraph 3.28.

3.47 They admit the positive allegations in paragraphs 3.47(a) to (e) and repeat paragraph 3.5 above.

3.48 They admit the positive allegation in paragraph 3.48(b) and say further that the variations on 10 August 2015 and 21 August 2015 were made to BB Facility Agreement 1.

3.50 In relation to paragraph 3.50:

(a) They deny that ASB sent an email to the fourth plaintiffs on 12 November 2018 and say further that the email was sent to Ms Punter only.

(b) They otherwise admit that ASB sent letters, emails and statements to the fourth plaintiffs and Mr Royle (as the case may be) on the dates referred to in paragraphs 3.50(c)(i) to (iii).

(c) Save as expressly admitted, they deny the positive allegations in paragraph 3.50(c) and repeat paragraph 3.50 of the amended statement of claim.

Fifth plaintiffs

3.55 They admit the positive allegations in paragraph 3.28.

3.56 They admit the positive allegations in paragraphs 3.56(a) to (e).

3.59 In relation to paragraph 3.59:

- (a) They deny that ASB sent email to the fifth plaintiffs on 17 and 18 October 2016, 17 April 2018, 12 April 2018 and 1 October 2018, and say further that those emails were sent to Ms Cuthbert only.
- (b) They otherwise admit that ASB sent letters, emails, and statements to the fifth plaintiffs on the dates referred to in paragraphs 3.59(c)(i) to (viii).
- (c) Save as expressly admitted, they deny the positive allegations in paragraph 3.59(c) and repeat paragraph 3.59 of the amended statement of claim.

3.63 They admit the positive allegation in paragraph 3.63 and repeat paragraph 3.63 of the amended statement of claim.

The Affected ASB Borrowers form a class of persons having the same interest in this proceeding

3.64 They deny the positive allegation in paragraph 3.64.

3.65 They deny the positive allegation in paragraph 3.65.

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

6.1 They deny paragraph 6.1 and say further that:

- (a) As pleaded in paragraph 5.3 of the amended statement of claim, ASB has not provided the ASB representative plaintiffs or the other Affected ASB Borrowers with Variation Disclosure in relation to the Relevant Variations made to their ASB Loans during the ASB Relevant Period, and is therefore in continuing breach of s 22 of the CCCFA.
- (b) As pleaded in paragraph 5.8 of the amended statement of claim, ASB has not fully refunded or credited the ASB Breach Period Payments to the ASB representative plaintiffs or the other Affected ASB Borrowers, and is therefore in continuing breach of s 48 of the CCCFA.
- (c) None of the claims are statute barred.

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

7.1 They deny paragraph 7.1 and say further that none of the claims are statute barred.

8. THIRD AFFIRMATIVE DEFENCE: DISCRETION TO DECLINE RELIEF

8.1 They deny paragraph 8.1 and say further that the Court does not have a discretion to decline relief in circumstances where a creditor is in breach of s 48 of the CCCFA.

Section 95A

8.2 They apprehend they are not required to plead to paragraph 8.2, which seeks an order and does not make allegations of fact, but they deny that there are grounds for the order sought to be made.

8.3 They deny paragraph 8.3.

Statutory damages – reasonable mistake defence

8.4 They deny paragraph 8.4.

Extinguishment/reduction of statutory damages

8.5 They deny paragraph 8.5.

9. FOURTH AFFIRMATIVE DEFENCE: SET OFF

9.1 They have insufficient knowledge of, and therefore deny, paragraph 9.1.

9.2 They apprehend they are not required to plead to paragraph 9.2, which is an allegation of law.

9.3 They deny paragraph 9.3 and repeat paragraph 9.1 above.

10. FIFTH AFFIRMATIVE DEFENCE: ESTOPPEL

10.1 They deny paragraph 10.1.

10.2 They deny paragraph 10.2.

10.3 They deny paragraph 10.3.

10.4 They deny paragraph 10.4.

10.5 They deny paragraph 10.5.

10.6 They deny paragraph 10.6.

11. SIXTH AFFIRMATIVE DEFENCE: CHANGE OF POSITION

11.1 They deny paragraph 11.1.

11.2 They deny paragraph 11.2.