IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CIV-2022-454-9
[2022] NZHC 2439

UNDER	Parts 12 and 15 of the High Court Rules
BETWEEN	LYNETTE JOY MILLS First Plaintiff
	CARL JAMES PETERSON Second Plaintiff
AND	KELLY DALZELL First Defendant
	TRACY LEVENBACH Second Defendant
	ASB BANK LIMITED Third Defendant
	GRAHAM HOWARD MILLS Fourth Defendant
	JOHN LEVENBACH Fifth Defendant
	CAROL KRAMMER Sixth Defendant

Hearing:	11 August 2022
Appearances:	Plaintiffs in person B J Upton and S L Hawksworth for First and Third Defendant No appearance for Second Defendant J R Sparrow and S T Hartley for Fourth Defendant B R Webster and W L Abrie for Fifth and Sixth Defendants
Judgment:	23 September 2022

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

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Introduction

[1] Before the Court for determination are three interlocutory applications by the first and third defendants, Kelly Dalzell and ASB Bank Ltd; the fourth defendant, Graham Mills; and the fifth and sixth defendants, John Levenbach and Carol Krammer. The categorisation of those groups is based primarily on the fact that they are represented by different solicitors and counsel. The second defendant, Tracy Levenbach, does not feature in the above groups as she has died and no appearance has been entered by her personal representative or representatives.

[2] The three applications are the same, although the grounds upon which they are made differ. They seek either an order pursuant to r 15.1 of the High Court Rules 2016 striking out the plaintiffs' claims against the applicant or applicants, or an order pursuant to r 12.2 for summary judgment. The two plaintiffs, Lynette Mills and Carl Peterson, who are self-represented, oppose all three applications.

[3] In my assessment, the defendants' applications are more naturally analysed under r 15.1, as applications for orders striking out the plaintiffs' claims, than as applications for summary judgment.

[4] If, as they contend, the defendants are able to establish that they are entitled to orders striking out the claims against them on the basis that the plaintiffs have no arguable claim against them, then they would also be entitled to summary judgment.

[5] If, on the other hand, the defendants are not entitled to orders striking out the claims, it will be necessary to consider their applications for summary judgment.

[6] It will also be necessary to come back to the position of the second defendant.

Principles governing applications pursuant to r 15.1

[7] Rule 15.1 of the High Court Rules provides that:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[8] All three applicant groups invite the Court to strike out the claims against them on the basis that they disclose no reasonably arguable cause of action. ASB and Ms Dalzell also contend that the plaintiffs are prevented from prosecuting their claims against them (and the late Ms Levenbach) by reason of a settlement agreement, as does Mr Mills who was a party to the same agreement. All three groups also raise limitation defences.

[9] The general rule is that in assessing whether a claim or cause of action is reasonably arguable under r 15.1(1)(a), the Court will assume that the plaintiff will be able to establish the facts as pleaded.[1]

[10] However, that is not an absolute rule. The Court will not assume that pleadings that are entirely speculative or without foundation can be established. Furthermore, where a plaintiff pleads fraud, as the plaintiffs do here, it is for the plaintiff to establish that there is at least prima facie evidence of fraud.[2]

The factual background

[11] The background to this litigation is not without its complications. There is a considerable amount of affidavit evidence before the Court. However, in the end, the material facts are clear enough.

[12] Mr Mills and Ms Mills were both domestic and business partners. They farmed two properties. They banked with ASB in Nelson. They operated what I take to have been a joint current account (referred to in the evidence as a "revolving credit account", and apparently styled an "Orbit" account), and term loan accounts. ASB held all obligations first ranking mortgage securities over their properties.

[13] Although Mr Mills and Ms Mills were not married, they used the same surname. Mr Mills adopted Ms Mills' surname. For reasons that will become obvious it may be useful to make some general observations about this. At law an individual is entitled to call himself or herself by any name (subject to qualifications that are irrelevant for present purposes). An issue only arises if a person adopts a name for unlawful purposes such as with an intention to defraud or deceive others, and even then it is not the adoption of the name that is unlawful but the purpose for its adoption.

[14] In 2010, Mr Mills and Ms Mills separated, though of course this did not have any immediate impact on their contractual rights and obligations in relation to ASB.

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1 *Attorney-General v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258; affirmed in *Couch v Attorney-General* [2008] NZSC 45 at [33].

2 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [33]; citing *Shannon v Shannon* [2002] 3 NZLR 567 (HC) at [51] per Potter J; *Birch v Birch* [1902] P 130 (CA) at 130; and *Boswell v Coaks (No 2)* (1894) 86 LT 365 (HL).

[15] In 2014, Mr Peterson and Ms Mills commenced a relationship, which also had, and continues to have, both domestic and business dimensions.

[16] In May 2015, Mr Peterson, Ms Mills and Mr Mills agreed that Mr Peterson would acquire Mr Mills' relationship property and assume Mr Mills' indebtedness and related obligations to ASB. No doubt this appeared to the parties to be a tidy way of addressing aspects of the division of relationship property as between Mr Mills and Ms Mills. Regrettably, however, the parties did not involve ASB until after they had made these arrangements. When, eventually, they sought ASB's consent, it was not forthcoming.

[17] At around the same time there were dealings in connection with the joint current account, which appear to have been something of a flashpoint in terms of the relationships between Mr Peterson and Ms Mills, Mr Mills and ASB.

[18] In mid-June 2015, Mr Peterson made a payment of $40,000 into the current account. Following this payment, Mr Mills, who of course was an account holder, asked ASB to reduce the overdraft limit for the account from $50,000 to $12,000. ASB did so. When Mr Peterson and Ms Mills became aware of the reduction in the overdraft limit, Ms Mills, who was the other account holder, requested the Bank to reinstate the $50,000 limit. Again, ASB did so. Following the reinstatement of the $50,000 overdraft facility, Mr Mills withdrew $40,000.

[19] These events, and most particularly Mr Mills' withdrawal of funds from the joint current account, appear to have led to Mr Peterson and Ms Mills commencing proceedings against both Mr Mills and ASB. It is unnecessary to describe these claims in detail. The proceeding against Mr Mills was commenced by Mr Peterson and Ms Mills in late 2015 and the claim against ASB in early 2016. The theme running through these claims was that Mr Mills had defrauded Mr Peterson and Ms Mills, that ASB, through its officers, Ms Dalzell and the late Ms Levenbach, and Mr Levenbach, a solicitor practising in Nelson, and his legal executive, Ms Krammer, were all complicit in the fraud or frauds.

[20] Mr Peterson and Ms Mills' proceeding against Mr Mills was concluded by May 2021. Orders made by Palmer J in that proceeding facilitated the transfer to Mr Peterson of Mr Mills' half share in the properties and the repayment of the residual indebtedness to ASB by means of the sale of one of the properties.[3] Mr Peterson and Ms Mills sought leave to appeal. This was declined by the Court of Appeal, the Court concluding that the application by Ms Mills and Mr Peterson was without merit.[4]

[21] In the claim against ASB, the Bank applied for summary judgment and was successful in the District Court.[5] Mr Peterson and Ms Mills appealed to this Court unsuccessfully.[6] They then sought leave to appeal to the Court of Appeal, and this application was declined.[7] However, special leave to appeal was granted by the Court of Appeal on the question of whether the District Court was correct to grant ASB summary judgment on one of several pleaded causes of action.[8] Plainly the District Court was not entitled to do so, and, sensibly, the parties agreed to the appeal being upheld on that ground, and the matter being referred back to the District Court.[9]

[22] At this point, the parties entered into a settlement agreement. I am informed that this was originally proposed by ASB. The settlement agreement itself was dated 21 December 2021.

Application of first and third defendants

[23] It appears to me that the most efficient approach to determining all three applications is to deal first with the application made by the first and third defendants. Having done so, I anticipate that it will be possible to deal more briefly with the two remaining applications and the position of the second defendant.

[24] The first and third defendants apply for an order striking out the claim against them on the grounds that:

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3 *Peterson v Mills* [2020] NZHC 2400.
4 *Peterson v Mills* [2021] NZCA 179.
5 *Peterson v ASB Bank Ltd* [2018] NZDC 14505.
6 *Mills v ASB Bank Ltd* [2019] NZHC 1505.
7 *Mills v ASB Bank Ltd* [2019] NZHC 2383.
8 *Mills v ASB Bank Ltd* [2020] NZCA 228.
9 *Mills v ASB Bank Ltd* [2021] NZCA 259.

(a) by reason of the terms of the settlement agreement, the plaintiffs are precluded from pursuing their claim;

(b) even putting aside the settlement agreement, the plaintiffs are unable to establish a reasonably arguable cause of action against them; and

(c) even if there was one or more reasonably arguable cause of action, it would be time barred.

[25] In his synopsis of submissions, Mr Upton described the plaintiffs' extant statement of claim as "a discursive combination of pleadings, evidence and submission (which also contain unsubstantiated, scandalous and pejorative allegations against the various defendants)." Certainly I have found it very difficult to decipher the pleading.

[26] Mr Upton helpfully attempted to identify the essential allegations made by the plaintiffs against ASB and its officers, which he summarised in these terms:

(a) The orbit facility agreement was fraudulently entered into by Mr Mills (with the assistance of Ms Dalzell and ASB) in that:

(i) Ms Mills did not sign the Orbit Facility Agreement and/or that Ms Dalzell completed the witness section of the Orbit Facility Agreement when she had not actually witnessed Ms Mills signing the Orbit Facility Agreement;

(ii) Mr Mills entered into the Orbit Facility Agreement using the "Mills" name as an alias. The plaintiffs simultaneously allege that the use of the Mills name was to hide Mr Mills' previous bankruptcy from ANZ and, later, from ASB (effectively defrauding ASB) and that ASB was aware of the named fraud and is, therefore, liable to the plaintiffs for that fraud and its alleged consequences;

(b) Ms Dalzell owed and breached fiduciary duties to Ms Mills when she (allegedly) advised Mr Mills to withdraw the $40,000 in July 2015; and

(c) Ms Dalzell and ASB did not comply with a s 9C of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) allegedly failing to make enquiries of Ms Mills when increasing the limit of the Orbit Facility in August 2011.

[27] That appears to me to be an accurate summary.

[28] The first issue then is whether Mr Peterson and Ms Mills are precluded from pursuing their claim against ASB and its staff by the settlement agreement.

[29] In cl 4.1 of the agreement the parties released and discharged each other from:

> … all past, present and future claims, liabilities, and obligations … arising between the parties out of, or in any way connected with the Debt, the Mortgages, the ASB Proceedings, the Mills' Proceedings and/or the Fraud Claim, whether known or unknown, in the contemplation of the parties or otherwise, with the exception of claims to enforce this deed.

[30] The defined terms in that clause relate to the banking arrangements originally between Mr and Ms Mills and ASB, the contractual arrangements between Mr Peterson and Ms Mills on the one hand and Mr Mills on the other, the two proceedings referred to earlier and the allegations of fraud made by Mr Peterson and Ms Mills in the context of those proceedings.

[31] On any analysis, Mr Peterson and Ms Mills' claim against ASB and their staff in this proceeding relates exclusively to those matters and I did not understand Mr Peterson and Ms Mills to contend otherwise.

[32] The parties to the settlement agreement were limited to the litigants involved in the proceedings and did not include the ASB's officers, Ms Dalzell and the late Ms Levenbach. However, cl 8.1 of the settlement agreement referred expressly to the Bank's "advisors, employees, servants and assigns". In my view this is a clear case in which s 12 of the Contract and Commercial Law Act 2017 applies, enabling those individuals (or, in the case of Ms Levenbach, her personal representative or representatives) to enforce a contract that was expressly entered into by the parties inter alia for their benefit. Mr Peterson or Mr Mills did not develop any argument to the contrary.

[33] On what basis or bases, then, do Mr Peterson and Ms Mills contend that they can pursue these claims notwithstanding the terms of the settlement agreement?

[34] As I understood their argument they relied on two grounds.

[35] First, Mr Peterson and Ms Mills invited the Court to review the correspondence between the parties leading up to the execution of the settlement agreement. They contended that that correspondence put a different complexion on the settlement agreement, indicating that the parties did not intend that it should prevent them from pursuing any subsequent fraud claim.

[36] The argument was that in the correspondence between the parties that led to the execution of the settlement agreement Mr Peterson and Ms Mills made it clear that they intended to commence new proceedings along the lines of this claim. They contend that cl 4.1 of the settlement agreement should be interpreted in the light of such a common understanding between the parties.

[37] Having reviewed the correspondence contained in the affidavit evidence before the Court — and there was no suggestion from Mr Peterson and Mr Mills that this was incomplete — I can see nothing that would support that contention. There was certainly an indication — threat — that Mr Peterson and Mr Mills would commence further proceedings if matters were not settled on terms that suited them. However, that falls well short of establishing a 'common understanding' that the settlement agreement was subject to Mr Peterson and Ms Mills preserving an entitlement to commence a further claim of any sort. On the contrary, in an email dated 13 December 2021, Mr Peterson himself suggested that "all parties be indemnified against all historic claims 'known or unknown' by other party or parties to the proposed deed of settlement".

[38] In my assessment, the correspondence between the parties reinforces that their common intention was to settle all matters between them arising from or otherwise related to the factual background that I have described, for once and for all, which common intention is faithfully reflected in the settlement agreement.

[39] The second contention advanced by Mr Peterson and Ms Mills is that the settlement agreement, and in particular cl 4.1, is unenforceable against them because the parties have not performed their obligations under the same.

[40] It seems clear that insofar as possible, Mr Mills and ASB performed their obligations under the agreement. Certainly Mr Peterson and Ms Mills did not point to any obligation that those parties could have but had not performed. So for example, Mr Mills has apparently discharged his obligations under cl 2 to transfer his half share in the properties formerly owned by Mr and Ms Mills to Mr Peterson, and ASB has discharged its obligations under cl 1 to reduce the amount of the debt owed to it by Mr and Ms Mills to a figure of $265,000.

[41] As Mr Peterson and Ms Mills' argument unfolded, it became clear that they were contending that because they had not performed their obligations to make the payments they had committed to make under cl 2.5 of the agreement, cl 4.1 of the agreement could not be enforced against them. As Mr Upton submitted, it is elementary that a party to an agreement cannot take advantage of its own default in order to avoid obligations under the same.[10]

[42] In my judgment, the contention that cl 4.1 of the 21 December 2021 settlement agreement operates as a complete bar to Mr Peterson and Ms Mills' claim against ASB and Ms Dalzell is unanswerable. Although there is no application before the Court on behalf of her deceased estate, the same conclusion would apply to the late Ms Levenbach.

The merits of the claim

[43] It will be recalled that Mr Peterson and Ms Mills make three distinct claims against the first, second and third defendants.

[44] The first is founded on allegations of fraud.

[45] The allegation appears to start from the premise that Mr Mills adopted Ms Mills' name for fraudulent purposes. It is true that Mr Mills was adjudicated bankrupt prior to the events involved in this case, and it is of course conceivable that he adopted Ms Mills' surname in order to avoid the stigma of that bankruptcy. However, that scarcely constitutes fraud. Even if it did Mr Peterson and Ms Mills'

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[10] See *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60; and *Frucor Beverages Ltd v Blumberg* [2019] NZCA 547, [2020] 2 NZLR 51 at [149].

pleading is framed on the basis that any fraud involved the deception of ASB and its officers, rather than them.

[46] To the extent that there is any direct allegation of fraud on the part of ASB and its officers, this relates to the execution of a document relating to the current account.

[47] To cut a relatively long story short, in mid 2011 it was necessary for Mr Mills and Ms Mills to execute documentation relating to a change of the terms of their joint current account. There is no issue relating to Mr Mills' execution of the document (other than the accusation already dealt with concerning his use of the name Mills). It is Ms Mills' apparent execution of the document that is in issue. At the time, she happened to be based in Tauranga. If Ms Mills signed it, that is where she did so. Assuming that she signed it her execution of it was unwitnessed. When the document found its way back to the Nelson branch of ASB, Ms Dalzell took it upon herself to witness Ms Mills' apparent signature. The very point of having a document witnessed is that the witness observes the party who is to be bound by the document executing it. The clue is in the meaning of the word "witness". Plainly Ms Dalzell should not have witnessed an event she did not observe. However, this was not a document that required witnessing. So long as Ms Mills signed the document, her execution of it was perfectly lawful and enforceable, irrespective of any irregularity in the way that her execution was witnessed — or not witnessed.

[48] Before me Ms Mills maintained that she did not execute the document. It follows that she is saying that someone must have forged her signature on the document. I do not accept that contention. It is not one that was advanced until very recently, and even then it was advanced only tentatively. Hitherto, Ms Mills' position had been that she couldn't remember the execution of the document.

[49] Even on the basis of affidavit evidence, I am satisfied that Ms Mills signed the document in Tauranga, and Ms Dalzell's irregular authentication of her execution is a red herring.

[50] As indicated earlier, in an application for an order striking out a proceeding on the basis that it does not disclose an arguable cause of action, where the plaintiff

alleges fraud, the Court will not assume the existence of the relevant allegations. The plaintiff must establish at least a prima facie case of fraud.

[51] In this case, not only is the pleading opaque in the extreme, but there is no evidence at all to support the allegations of fraud made by Mr Peterson and Ms Mills against ASB and its officers (a Mr Mills). They are mere allegations.

[52] The plaintiffs' second claim against ASB and its officers is that they breached fiduciary obligations they owed to them.

[53] There are two situations in which the law recognises the existence of a fiduciary relationship.

[54] Certain relationships are recognised as being fiduciary by their nature. Examples of these are parent and child, trustee and beneficiary and lawyer and client.[11] The relationship of banker and customer is not recognised as fiduciary in its nature. The cases are clear that it is a contractual, debtor and creditor, relationship.

[55] The second situation is where the particular circumstances of a relationship give rise to fiduciary obligations on the part of one party – the categories of fiduciary relationship are not closed.[12] This is generally where one party is in a demonstrably stronger position than the other and is potentially able to take advantage of that. Such situations may, and not infrequently do, arise as between banker and customer, and banker and third party engaged in business dealings with a customer. However, as Mr Upton submitted, there would need to be a properly pleaded and particularised allegation of the existence of a fiduciary relationship between ASB and Mr Peterson and Ms Mills, and at least some evidence of breach.

[56] In this case, not only is there no properly pleaded and particularised allegation, there is no evidence that ASB through any officer assumed a fiduciary role or breached the same. As the case is pleaded, and as I read the affidavit evidence, there is no

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11 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.1].

12 At [17.2.7].

arguable foundation for any allegation that ASB owed or breached fiduciary obligations to Mr Peterson or Ms Mills.

[57] The final cause of action which appears to be relied on by Mr Peterson and Ms Mills is a claim pursuant to s 9C of the Credit Contracts and Consumer Finance Act 2003.

[58] This can be dealt with very briefly.

[59] The provision that Mr Peterson and Ms Mills rely on was not in force at the time the original lending documentation was executed, or when the amount of the overdraft limit was varied. Section 9C, which was introduced by the CCCF Amendment Act 2014, did not come into force until 6 June 2015. It can have no application to the present case.

[60] In my assessment, even assuming that they were able to establish the factual assertions they make, to the extent that the Court is able to discern what these are from the pleadings, Mr Peterson and Ms Mills are not able to make out arguable claims on any of the bases referred to above.

Statutory limitation period

[61] Even if the settlement agreement did not act as a bar to the claim made by Mr Peterson and Ms Mills, and even if they could establish an arguable claim on one or more of the bases that I have attempted to discern from their pleadings, I accept the submission made by Mr Upton that any claim would be time barred under the Limitation Act 2010.

[62] It is a defence to a money claim if the defendant shows that the claim was commenced more than six years after the act or omission on which the claim is based.[13] If a claimant has 'late knowledge' within the terms of s 14, then it is a defence to a money claim if the defendant shows that the claim was filed at least three years after the date on which the claimant acquired 'late knowledge'.[14]

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13 Limitation Act 2011, s 11(1).
14 Sections 11(2), 11(3)(a), and 14.

[63] Plainly, all of the events that feature in Mr Peterson and Ms Mills' claim occurred more than six years prior to the commencement of this proceeding.

[64] To the extent that 'late knowledge' is in issue, on the evidence, it could not be clearer that Mr Peterson and Ms Mills were aware of all material facts more than three years prior to the commencement of this proceeding.

[65] Here is how Mr Upton advances this aspect of the argument for the first and third defendants:

> To the extent that the plaintiffs say they were not immediately aware of [their] claim, [the first and third defendants] submit that they were aware or ought to have been aware of the alleged frauds since at least 2015 … :
>
> (a) In May 2015 Mr Peterson and Ms Mills entered into the Agreement with Mr Mills under which they agreed to take responsibility for the Orbit Facility. In July 2015 Ms Mills complained about the reduction in the $50,000 limit of the Orbit Facility. Accordingly they ought to have been aware of the Orbit Facilities' existence, limit and, thus, the claim by July 2015;
>
> (b) In any event, Ms Mills and Mr Peterson were (by their own admission) aware of the claim by 4 December 2018, as they set out the claim as a "new cause of action" in their submissions to the High Court in the ASB proceedings.
>
> (c) Accordingly, the latest date on which they could bring the claim was 4 December 2021 (being three years after 4 December 2018).

[66] I agree.

Conclusion in relation to the application by the first and third defendants

[67] In my judgment, the first and third defendants, are entitled to an order striking out the claims against them by Mr Peterson and Ms Mills.

The remaining applicants

[68] As earlier anticipated, having dealt with the first and third defendants, it is unnecessary to cover the same ground in relation to the fourth, or the fifth and sixth, defendants.

[69] Insofar as the position of the fourth defendant, Mr Mills, is concerned, he was a party to the settlement agreement and is entitled to the benefit of that in the same way as the first and third defendants.

[70] In analysing the amended statement of claim Mr Sparrow for Mr Mills identified three possible causes of action pleaded by Mr Peterson and Ms Mills against him:

(a) the name fraud allegation as a basis for tortious deceit;

(b) the name fraud allegation as a basis for establishing that 'Mr Mills' was not a legal person and that therefore all of his dealings under that name were nullities; and

(c) that for the same reason the deed of settlement was void.

[71] All of those asserted bases are dependant on the allegation that Mr Mills acted fraudulently by adopting Ms Mills surname.

[72] In dealing with the claim against the first and third defendants, I concluded that there was no proper pleading and no evidential foundation for any allegation that Mr Mills acted fraudulently in adopting the Mills surname. That is sufficient to deal with the causes of action alleged against him.

[73] Finally, and once again drawing on the above analysis relating to the first and third defendants, Mr Mills, like them, is in a position to maintain that the claims against him are stale.

[74] The position of the fifth and sixth defendants, Mr Levenbach and Ms Krammer, is somewhat different from that of the ASB and its officers, or that of Mr Mills.

[75] As already said, at all material times Mr Levenbach was practising as a solicitor in Nelson, and Ms Krammer was employed by him as a legal executive. Neither was involved in the earlier litigation, and neither was a party to the settlement agreement.

[76] Ms Webster opened her submissions on their behalves by saying that the claim against them was:

> … nothing more than an attempt by the plaintiffs to avoid having to make payments to [ASB and Mr Mills] due under a settlement agreement dated 21 December 2021…Unsubstantiated allegations of fraud and collusion have been made against [Mr Levenbach and Ms Krammer]. They appear to have only been included in [an] attempt to create fresh grievances that have not already been settled in the hope that the plaintiffs can already avoid the Settlement Agreement.

[77] In my view, that overall assessment of the claims against Mr Levenbach and Ms Krammer is not far wide of the mark.

[78] The allegations the plaintiffs make in their statement of claim against Mr Levenbach and Ms Krammer are advanced, as Ms Webster says, in extravagant and scandalous terms. As an example, they refer to Mr Levenbach and Ms Krammer being part of a crime family.

[79] In the end, the only allegation that can really be discerned against Mr Levenbach and Ms Krammer is that in their professional capacities they had some involvement with Mr Mills assumption of Ms Mills' surname.

[80] I have already concluded that there is no proper pleading or any foundation for concluding that Mr Mills' actions were fraudulent.

[81] It follows that there is no basis for any allegation against Mr Levenbach and Mr Krammer of involvement in a (non-existent) fraud.

[82] In any event, like the first, third, and fourth defendants, Mr Levenbach and Ms Krammer are entitled to the benefit of a limitation defence.

The second defendant

[83] Mrs Levenbach (who, incidentally, but entirely irrelevantly, was Mr Levenbach's wife) was an employee of ASB at the relevant time.

[84] Whilst her personal representative or representives have not entered any appearance, her position is effectively the same as that of Ms Dalzell. She would have been entitled to advance the same contentions as are advanced by the first and third defendants. In those circumstances, the Court's order should cover her position.

Result

[85] There will be an order striking out the plaintiffs' claims in their entirety pursuant to r 15.1 of the High Court Rules 2016 on the grounds that they disclose no arguable cause of action against any defendant, and that the proceeding is otherwise an abuse of process having regard to the terms of the settlement agreement between the plaintiffs and the third and fourth defendants that applies also to the first and second defendants, and that all claims are in any event time barred.

[86] I reserve costs having not heard from the plaintiffs or counsel in relation to these. My preliminary view is that the first, third, fourth, fifth and sixth defendants as the successful parties are entitled to a costs award. If the parties are unable to resolve costs they may file and serve memoranda in the usual way and I will deal with them on the papers.

Associate Judge Johnston

Solicitors:
Simpson Grierson, Auckland for First and Third Defendants
Holland Beckett, Tauranga for Fourth Defendant
Morgan Coakle, Auckland for Fifth and Sixth Defendants