

**From:** [REDACTED]  
**Sent:** Friday, 26 March 2021 5:10 PM  
**To:** AFCA Review  
**Subject:** Submission to Treasury on the Review of AFCA 26th March 2021 - Kelgon Development Corp. P/L  
**Attachments:** Kelgon & Bankwest Loan History - Rev 25.1.2021.docx; AFCA Recommendations & Kelgon Responses 25.1.21.docx

My comments relate to my submission as director of Kelgon Development Corp. P/L to AFCA of a complaint lodged on 26 June 2020 against Bankwest according to the 'Legacy Complaint' provisions. It pertained to an approved \$3.7m real estate construction loan application which was terminated by the bank after an unconscionably treated and financially penalising one-year-long construction loan approval process. For your reference, I have attached 'Kelgon & Bankwest Loan History' which summarises the reasons for my complaint.

But since this submission relates to my relationship with AFCA during their internal review process, I will make the following observations:

- Following the original submission of my complaint to AFCA, Case Manager [REDACTED] requested that Bankwest respond to my claim of their culpability. On 30 July 2020, Senior Case Manager, [REDACTED], opened his reply by addressing AFCA as being a part of his team. In this context, the Oxford Dictionary defines the word 'team' as "two or more persons working together". If this indeed was the case, as it seems to have been, then the AFCA recommendation to deny my complaint was unduly prejudiced.
- I have attached the written response from [REDACTED] in recommending the rejection of my claims along with my responses in 'AFCA Recommendations & Kelgon Response'. A review of this document, along with my referenced exhibits, clearly shows that Mr [REDACTED] did not fully understand the evidence I had presented, or chose not to do so.
- My damage caused by Bankwest's mishandling of my application is far more than the \$1.0m allowed in my case and should be in line with the value of the losses incurred. What is the rationale behind the \$1.0 limit? It is fair to those claiming up to \$1.0m but unfair to those claiming over. This is discriminatory.
- According to the terms of reference for Legacy complaints, if AFCA recommends the denial of a claim and the complainant disagrees, the case would be reviewed and arbitrated by the Ombudsman's offices (FOS) as the final word on the matter. My concern is that I accepted this option of appeal on 25 January 2021, two months ago, but have not yet received a response.

The above addresses my issues with AFCA, but I also wish to express my solidarity with the opinions and recommendations expressed to Treasury by Michael Sanderson and the group represented by Leon Ashby.

Sincerely yours,

George Kelepecz.

# KELGON DEVELOPMENT CORPORATION PTY LTD

## KELGON & BANKWEST LOAN HISTORY

Rev 25 January 2021

1. Several years ago I purchased a 1.104 hectare parcel of industrial property for \$700k in Brooklyn Victoria intending to build a cold storage facility and lease it out for investment purposes. I began the development by spending around \$1.4m of my own funds on foundation and site work but had to temporarily put a hold on construction due to an impending recession.

2. By the time I resumed my efforts, construction funding was becoming scarce, especially to build a speculative cold store. So to make the use more mainstream, I redesigned the superstructure as a 2 unit standard office/warehouse to fit on the existing foundations. Within two weeks of my application to Bankwest for funding, I received an Offer Letter from [REDACTED], Business Development Manager to provide me with \$3.7m to pay off an existing mortgage, fund an interest reserve so I could develop the project, find a tenant or buyer, and then proceed to complete the building using the balance of the construction funding. Unfortunately, the rush to prepare the Bankwest loan documents resulted in errors, some of which remained unresolved and later come back to haunt me.

3. Before I get into the specifics, please refer to my 'List of Exhibits' items 1 – 87 which comprise of documents relating to the loan.

The \$3.7m Bankwest loan offer for a 15 month term settled on 1 Sep 2008 but was abruptly reduced to \$1.25m at settlement due to an adverse last-minute valuation.

The loan which settled comprised of two parts and amounted to:

\* \$1.25m land loan component secured by the subject property and

\* \$2.40m allocated for construction of an office/warehouse shown in (Exh 7).

From the \$1.25 land loan, \$1,007,500 paid out the existing mortgage principal. The remaining amount available to me was \$242,500 and was disbursed as (Exh 28):

(i) Settlement costs & legal: \$ 20,564      (ii) Establishment fee: \$18,500

(iii) Int. reserve for 15 months: \$115,000      (iv) Development funding: \$88,436

The critical \$50,000 shortfall in the funds available for project development (\$88,436 instead of \$138,436) starved me of anticipated funding. A subsequent February panel valuation of \$2,500,000 would have restored the much-needed \$50k but was overlooked.

(b) An obvious error (also to Kelgon's detriment) was the bank's overestimate of \$278k as being the interest to be incurred during an assumed 9 month construction period. On page 6 of this document I have calculated that even if a cold store was financed, the interest during construction at the prevailing rate of 5.5% pa. would be around \$67,000. This correction would have reduced the construction interest figure by \$211k, which could then have been added towards the \$2.4m construction allowance.

(c) In order to trigger the construction funding, Kelgon needed to produce either a suitable tenant(s) willing to pay a total net rental of \$215k pa or a buyer willing to pay \$2.325m for all properties sold (see Facility Terms 5.3 & 5.9). Realistically, neither of these transactions would have covered the servicing or repayment of a \$3.7m loan (a \$2.325m sale price would not

cover the \$3.7m debt). To correct this error, the words "per unit" should have been added to both the rental and sales figures. These errors illustrate that the Facility Terms were sloppily prepared and also that Bankwest was confused about whether it was funding two independent units or just a single building. The Kelgon funding application documents clearly showed that there were two units proposed (Site & Floor Plan – Exhibit 7).

*Note: Since the time I had composed this document I have provided AFCA with additional information relating to the disputed contract requirement for a lease, a sale, either or both, and it can be found as items 2 and 3 of my attached 'Letter to ██████ of 3.11.2020'.*

4. In compliance with clause 5.3 of the Facility Terms, on 27 Nov 08 I introduced Dockside Coldstore as a prospective tenant for Stage 1 of the two units. This was soon followed by the cost to construct such facility prepared by Varcon Constructions. Even though the bank approval was for a "speculative office/warehouse", a cold storage office/warehouse qualified within the classification if the tenant, income stream and builder were acceptable to the bank as outlined in the Bankwest General Terms for Business Lending. In compliance with clauses 14.2(k), 14.3(b), 14.3(c)(iii) and 14.5, I made several requests for a review of these submissions, keeping in mind that a speedy resolution was required to meet the mandated 28 Feb 09 start of construction. No response came until 5 months later on 22/4/09.

5. It was around this time that the acquisition of Bankwest by CBA was finalised. Through continuing discussions with the BDM I noticed a measure of reluctance on the part of the bank to communicate in a manner required to expedite any such project approval process. As an engineer, builder and developer, I have in the past arranged for the funding of numerous commercial and residential projects, but in all cases thus far, funding was expedited in a timely manner. The BDM attributed these procedural delays to internal turmoil resulting from the change in ownership but assured me that any representation made by Bankwest would be honoured by the new owners.

6. So I was displeased to receive a brief email from Bankwest on 30 Dec 08 indicating receipt of the Dockside tenancy documents but requesting mostly irrelevant information before the application could be presented to Credit for review or comment. Disturbingly, the additional information asked for would still have been well short of the input needed for a competent Credit presentation, demonstrating what appeared to be a casual attitude toward my application. A face to face meeting with the bank to summarise its specific requirements would have answered more questions and resolved more issues than weeks of email exchanges. I gained a strong feeling that Bankwest just wanted me to go away.

7. Nevertheless, I held out hope that this was not a stall but an unavoidable consequence of reorganisation within the bank. To demonstrate sincerity and as a gesture of encouragement for me to persevere, on 21 Jan 09 the BDM transferred \$38,000 from my interest reserve account into the development funding account so Kelgon could keep operating pending the release of construction funding. Please note that these were not new funds drawn from the \$50,000 that Kelgon had been short-changed per Item 3(a), but a simple redistribution of the \$1.25 land loan. I continued sending information on the proposed Stage 1 office/warehouse construction phase including a new 24 Feb 2009 panel valuation formally instructed by the BDM himself which included a detailed 27 Feb 09 Heads of Agreement with Dockside Coldstore. In the meantime, the 28 Feb 09 start of construction mandated in the Facility Terms came and went without incident. I was told by the BDM not to worry about the default because that date was flexible. This further added to my feeling of uncertainty – as if the bank had more pressing matters to attend to and could not be bothered with the contractual agreement between us.

8. Then finally, on 22 Apr 09, a long 16 weeks after my last email communication with the BDM and an intolerably long 5 months after I introduced Dockside Coldstore as a tenant, I received an emailed

tenant review (of sorts) written by an unidentified member of the credit department and addressed to the BDM who simply forwarded it on to me without comment. This could not have been classified as official bank document. The Credit person's list of questions included some topics addressed long ago, suggesting an ill-prepared assemblage of data presented to him. The writer's main concern was Dockside's potential inability to meet rental payments and the inadequate Loan to Development cost ratio (LDR), but encouraged Kelgon to follow-up by starting his correspondence with "There are a couple of issues before we can progress" and ending with "Happy to discuss further as required." The fact that such communication could have been initiated last December (four months earlier) to discuss the viability of the tenant and revised funding arrangements is further proof of bank neglect. It was obvious that my application had not been attended to. As will be seen later that this statement from the bank representative was a gross misrepresentation because numerous subsequent submissions I sent in reply by were ignored. The next communication from the bank, other than the verbal loan rejection, was an official document of variation of the contract to eliminate construction funding entirely (see Item 13).

*Note: Since the time I had composed this document, I have been made aware of new and significant internal bank information on issues addressed here and relevant to my complaint. They can be found as item 3 of the attached 'Letter to ██████████ of 3.12.20'.*

It is important to my case that the Site & Floor Plan (Exh 7) is viewed to understand that the BDM must have overlooked that the project was comprised of 2 units (Stage 1 & 2) and that the first prospective tenant, Dockside Coldstore, was to occupy Stage 1 only, leaving Stage 2 as a land asset which would enhance the project value by reserving it for future development as well as a source of further income (see income projection on page 6). Given that the bank's panel valuation for land was \$2.50m, and only half was utilised in Stage 1, the other half worth, say, \$1.25m should have been credited to the project as an asset contribution. The Credit Manager who later rejected my application was incorrectly instructed and therefore could not have taken this land asset into account, not to mention that with the construction of Stage 1 most of the basic site work worth \$1.4m such as drainage, sewerage, roadworks and landscaping for both units would also have been an asset in place.

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9. Following the Credit Manager's email and believing that Bankwest was finally going to properly process my application, during the next several weeks I reissued documents requested by the Credit member and answered his questions on the builder, costings, and permits – 19 exhibits in all. But most importantly, I addressed his concerns on how Kelgon would potentially reduce the loan/development cost ratio by also offering equity from my Toorak residence. Furthermore, to enhance the project loan servicing capability, Kelgon produced a Letter of Intent from Fernhurst Cold Store, a major player in the cold storage and transport industry, to substantially boost Dockside's income by sub-leasing 1000 pallet spaces at \$450,000 pa. In short, this provided the opportunity to confirm unquestionably the economic viability of the project. Based on the Credit statement of "Happy to discuss further as required" I expected a continuation of dialogue with Credit to discuss the tenant and contents of the lease including the annual \$450k funding infusion which was to be provided by the new Fernhurst sub-lease arrangement.

10. Just for good measure, and to guarantee eligibility for the release of Bankwest construction funding, on 14 July 09 I secured a Letter of Intent from Fernhurst Coldstore, to now alternatively lease the entire Stage 2 of the project (instead of subleasing a portion of Dockside's Stage 1) for a ten year initial term at a net rental of \$648,120 pa. Fernhurst's managing director considered Stage 2 as an ideal rental for his frozen meat storage needs. I naturally thought that the Credit Manager who previously reviewed the Dockside application would now be satisfied with the quality of the tenants and the rental income stream, and quickly respond, especially after stating on 22 Apr 09 "Happy to discuss further as

required." It was now 33 weeks since I had introduced Dockside as a prospective tenant and almost a year since approval of the full loan application was granted.

11. But alas, the response I received was not what I had expected. During a phone conversation with the BDM on 3 Aug 09, during which I inquired how the new Fernhurst tenancy was received by Credit, I was informed that the bank no longer wanted to continue with my application and was unilaterally terminating the agreement to lend. Understandably, I was devastated. The facility expiry date of 30 Nov 09 was still four months away and I had not at any time received a negative response to my tenancy submissions. This was an obvious breach or repudiation of the formal contract to lend. Further, it rendered the Credit statement of "Happy to discuss further as required" as a misrepresentation and therefore an unconscionable act.

12. A formal bank review of the Fernhurst financials would have confirmed Kelgon's compliance with the rental requirement in the loan agreement and made it very difficult for Bankwest to find a reason to reject Fernhurst as a tenant. It was much more expedient for Bankwest to terminate the loan than have to provide a written cause for rejection which later could be challenged in court. But as many of the submissions to the Australian Senate Inquiry demonstrated, the financially superior Bankwest, which was now under CBA control, had little regard for proper banking practice or the laws governing binding contracts.

13. The letter of complaint I wrote soon after also went unanswered, as expected. However, a few days later, on 7 Aug 09, I received a cleverly worded Letter of Variation which began with "We are pleased to advise that we have agreed to provide additional facilities to you." At first sight, it appeared that these facilities offered were in addition to the original land and construction loan offer of 14 Aug 08. But a closer look revealed that, whilst the bank had increased the current land loan by \$20,000, it had now completely excluded the vital construction loan which was the very purpose of my original loan application. In other words Bankwest was saying that they will provide me with an additional \$20,000 so that I could afford to pay their interest until maturity and therefore avoid default on the land loan, but only if I relinquished my claim on the \$2,400,000 construction loan. This rejection came despite my having tenants in hand who were ready to occupy within 6 months, potentially paying a handsome net annual rental of \$1,287,000 for a 10 year initial term. The nine months of bank inaction since my original tenant notification on 27 Nov 08 had depleted my company and personal reserves, yet I could not allow the existing loan to fall into default. Faced with the reality that I had no alternative I reluctantly signed the variation under economic duress and returned it to Bankwest on 25 Aug 09. Since the original bank approval, I had developed lease arrangements, the appropriate design drawings and obtained pricing from sub-contractors to cover every aspect of the proposed construction according to the requirements of the two tenants. All this does not even mention the work that went into the securing of planning and building permits, and of course, the volumes of information sent to Bankwest. I had to sign the variation or lose it all without the chance to find alternative funding.

14. By now the effects of the GFC had permeated throughout the lending institutions and none were willing to invest in such real estate deals especially with the stigma associated with the Bankwest rejection. Besides, Bankwest had left me with insufficient funds to finance a new establishment fee, let alone the valuation and other costs required to lodge a new application. Also working against me was that I owed money to architects, engineers and others who had assisted with the project development while the dragged-out Bankwest loan application was pending. But most importantly I lost my prime tenant, Fernhurst Cold Storage, who understandably declined to proceed after I informed them that I could not meet their January 2010 occupancy deadline.

15. Desperately short of funds and still holding out some hope that I may be able to salvage my project since Dockside Coldstore was still available as a tenant, in November of 2009 I was forced to borrow

\$100,000 on a second mortgage basis from a lender of last resort at an interest rate of 25% pa. I was then able to extend the Bankwest land loan to 28 February 2010. When I could no longer service this loan extension, Bankwest applied a usury and illegal default rate of approximately 19% pa. to my monthly interest payments. On 19 July 2010 Bankwest appointed receivers and on 14 Dec 10, the property was sold for \$1,575,000, \$965,000 less than the \$2,540,000 earlier valuation carried out by Bankwest's own panel valuer.

16. It is important to note that, had the bank reviewed and then rejected Dockside as a tenant prospect when first introduced on 27 Nov 08, I could have moved on from there and explored other possibilities without incurring the subsequent development and interest costs. My chances of obtaining construction funding elsewhere, especially with a long-term tenant(s) in hand, was extremely good even in difficult times. Alternatively, for Bankwest to stand by for so long and do nothing to advance the lending process while I was depleting not only my company's development funds but my personal finances as well, represented a true example of unconscionable conduct.

17. To quantify an approximation of 'what could have been' if, say, the project had been fully funded to build Stages 1 based on lease agreements with both Dockside and Fernhurst the calculation below shows that I could have realised an annual income of around \$411,170. My accountant's figures for 2009 show that between 1988 and 2009 (Exh 73) I had invested, perhaps foolishly, \$2,711,546 in this cold store project, but lost it all due to Bankwest's refusal to adequately communicate with me and review my submissions – see List of Exhibits (Exh 00).

**Estimated Kelgon Cold Store Construction Costs and Projected Income**

Tenants: Dockside Coldstore Lessee and Fernhurst Refrigerated Transport Sub-Lessee	
Direct Builder's Costs to Construct Stage 1 (28 Feb 2010 occupancy) .....	\$2,950,000
Contingency of 10%	295,000
Interest During Construction (5.5% for 9 months drawn progressively)	67,000
Repayment of Existing Bankwest Loan (interest prepaid until 1/12/09)	<u>1,250,000</u>
<b>Total Project Cost</b> (for Stage 1 excl. GST)	<b>\$4,140,000</b>
Net Rental Income from Stage 1 .....	\$638,870
Annual Interest (\$4,140,000 x 5.5%)	<u>227,700</u>
<b>Annal Profit Before Tax:</b> (commencing, say, 28 Feb 2010)	<b>\$ 411,170</b>

Note: Stage 1 would have occupied only half of the property. Land, foundations and exterior paving would already be in place to facilitate Stage 2 construction which would have doubled that profit to over \$800,000 pa.

18. As mentioned earlier, I have compiled a 42 page 'Kelgon Brief' which is an expansion of this document and describes events in detail. This Kelgon Brief, together with the 87 exhibits listed as (Exh 1 – 87) in the attachments, includes the volumes of information with which I supplied Bankwest during the so-called approval process. It seemed inconceivable that under normal conditions a major bank, which had entered into a \$3.7m contract to lend, would intentionally allow the lending process to remain stagnant for almost one whole year, during which time its Credit Department issued just one e-mail to Kelgon regarding the contract itself. Most unusually, not one face to face meeting between the parties took place. This conduct of disregard was in violation of the "cooperation requirement" implied in every contract and amounted to unconscionable behavior in allowing this neglect to linger for so long. The resultant effect was my drawn-out financial demise. The Bankwest Credit Manager's invitation for Kelgon to submit enhancements to the Dockside lease before construction funding would be considered, and

then ignoring those documents when issued, amounted to willful misrepresentation on his part. In fact, the disregard and misrepresentations demonstrated throughout the process would constitute a Bankwest repudiation of its contract with Kelgon and consequently render it answerable for its actions in a court of law.

George Kelepecz  
Director.

# KELGON DEVELOPMENT CORPORATION Pty. Ltd.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## RESPONSE to AFCA RECOMMENDATIONS

25 January 2021

[REDACTED]  
[info@afca.org.au](mailto:info@afca.org.au)

Dear Mr [REDACTED]

<b>Complaint</b>	<b>Kelgon Development Corporation Pty Ltd</b>
<b>Financial Firm</b>	<b>Bank of Western Australia Limited (Bankwest)</b>
<b>Case Number</b>	<b>735191</b>

1  
This letter contains a copy of your 10 December 2020 recommendations to which I have added my comments. For clarity, I have left your headings unaltered but changed your comments to grey font with my responses placed underneath in standard black type.

I understand that the Ombudsman's determination will be my last attempt at compensation, so I have made my responses as clear as possible, even to the point of redundancy in some instances.

I did not want to veer too much from replying directly to your comments, but in some cases I had to add information to cover omissions. But to achieve the best results in communicating the events to the Ombudsman, I have revised a previous submission to you and attached it as "Kelgon & Bankwest Loan History – Rev 25 January 2021". If this is read first, our presentations would be much easier to understand.

Regards,

George Kelepecz, Director

### **Kelgon Attachments:**

Kelgon & Bankwest Loan History – Rev 25.1.2021.

Answers to [REDACTED] Questions of 18.8.2020

Letter to Mr [REDACTED] 3.11.2020.

Letter to Mr [REDACTED] 3.12.2020.

List of Exhibits – Listing of the 87 submissions relating to the Bankwest loan.

*Exhibit Attachments 1 to 34 – These are submissions dated up to the first Tenant introduction.*

*Exhibit Attachments 35 to 87 – These submissions start with the first Tenant introduction.*



# 1 Overview

## 1.1 Complaint

On or around August 2008 the bank approved a number of loan facilities amounting to \$3,700,000 of which \$1,250,000 was initially funded to refinance the complainant's existing debts with another financial firm. The balance of the loan facilities was to be progressively funded to assist the complainant with the construction of a commercial property.

No, only \$1,007,500 of the \$1,250,000 went towards pay-out of the existing debt. Most of the balance was construction-related for the development of the building phase such as building design, pricing, permits, etc. So it could be said that construction funding had already begun at the land loan settlement.

The construction loan was subject to a number of prefunding conditions. In particular, the construction loan had a prefunding condition requirement that a fixed price and time building contract was to be in place with the construction to commence by 28 February 2009.

The very first two prefunding conditions required bank approval of the tenant and the fixed-price contract before any construction was made available. I had presented these but neither were reviewed for acceptance by the bank. I did not personally have the funds to start construction by 28 February 2008 but had already spent \$1.38m of my own funds on foundations and site work on the property in preparation.

In November 2008, the complainant sought to vary the existing approval, seeking further funds and an amendment to the original construction purpose. The complainant was seeking to change the construction purpose to a cold storage facility.

No. In November 2008 I sought extra funds in addition to the \$1.25m allocated as a 'land loan' to pay for an up-grade of the dry goods warehouse to a cold storage warehouse to accommodate the prospective tenant, Dockside Coldstore, which I had in hand. A cold storage office/warehouse is in the same usage category as a dry goods office/warehouse, the only real difference is that the cold store has additional warehouse insulation and refrigeration. To justify my contention I quote the Urban Planner and Bankwest itself:

(a) In his 11 May 2009 letter (Exh 62), [REDACTED], Senior Urban Planner, stated:

"You are advised that Council issued the above planning permit for the development of two warehouse buildings. Your intended use of the buildings for cold storage purposes is included in the broader definition of warehouses in the Hobsons Bay Planning Scheme".

(b) then in the later Bankwest Variation of Facilities of 7 August 2009, under Section 3, it states that the purpose of the variation was:

"Originally provided to assist with the refinance from La Trobe Financial and the construction of a Cold Storage Facility".

This statement confirms that the bank had indeed contemplated the funding of a cold storage warehouse.

The complainant also sought to vary the terms and conditions of the construction loan including specific prefunding conditions.

No, in November 2008 there was no variation requested to the prefunding conditions, only an increase in the construction funds to pay for the extra insulation and refrigeration to change the design from a standard warehouse to a cold store warehouse. There was, however, a request for the approval of the proposed tenant, but this was not a change in the prefunding conditions.

The bank declined the complainant's requests to vary the original approval on 3 August 2009.

Yes. [REDACTED], Business Development manager informed me by phone that Bankwest Credit had declined my construction loan application, but it was not the variation they rejected, it was the project funding.

Subsequent to the bank's declined decision a number of short term extensions to the loan term (relating to the initial funding) were approved by the bank, with the final loan expiry date being 1 February 2010.

A Receiver and Manager was appointed on 19 July 2010 who arranged the sale of the property and the repayment of the outstanding debt (13 December 2010).

Yes. Four days after the loan was rejected, I received an unsolicited 'Variation of Facilities' letter. It offered a 3 month loan extension and new facilities of \$20,000 which would be deposited into my interest reserve account so that I could continue to pay interest. It cleverly started with "We are pleased to advise that we have agreed to provide additional facilities to you", but dropped any mention of the construction loan, the very reason for my application in the first place.. Facing certain default on interest payments, I was forced to accept.

The complainant says:

The bank did not respond within an appropriate time frame with regards to requests to vary the construction loan including the conditions of approval.

Yes. The request to review Dockside Coldstore as a prospective tenant and the associated cost increase was made on 27 November 2008. The Credit review came on 22 April 2009, an unconscionably long and costly 5 months later.

This impacted the businesses cashflow.

Yes. Not only did it take Bankwest 5 months to review the Dockside tenancy, but in excess of an additional 3 months to advise rejection via a phone call on 3 August 2009. Those 8 wasted months cost me in unrealised rental income, loan interest and business overheads, not to mention a lost opportunity to find alternative funding.

The bank's actions were misleading with regards the complainant's ability to vary the loan approval's conditions including amending its initial expiry date.

Yes. Other than the ultimate verbal loan rejection, the one and only 'bank action' during the entire approval process was the Credit Review of 22 April 2009. That review began with "There are a couple of issues before we can progress" and concluded with "Happy to discuss further as required. "I responded immediately with 19 emails in reply to his questions and concerns. The Credit manager misled me by saying he was happy to discuss further when in fact he never did. Contrary to his promise, he ignored my 19 important submissions which he himself had requested, and only replied 3 months later, not to discuss, but to reject my construction loan application instead.

The initial funding had a loan term expiry date of 15 months from drawdown and the complainant believed this would be extended upon expiry.

No. At no time did I expect or request an extension of the initial 15 month term. It would have been pointless when the loan was prematurely rejected after only 11 months into the term, 4 months before maturity.

The bank failed to respond in a timely manner to a request as to whether a Heads of Agreement for a potential lease satisfied one of the key prefunding conditions.

No. The question as to whether a Heads of Agreement for a potential lease satisfied one of the key prefunding conditions was never raised during the approval process. In fact, it had even been described as a 'lease' in the bank instructions to the panel valuer. As to the question if it satisfied one of the prefunding conditions, the H of A was intentionally detailed and agreed to by both Dockside and myself so that the title could be renamed as "Lease" after the mandated bank approval of its content. It would have been irresponsible and a waste of the solicitor's and the principals' time to formally commit to a binding lease agreement (or any other prefunding condition) which subsequently could have had several amendments or even been rejected entirely – as it ultimately was.

But most importantly, to avoid any short-term dispute over its significance, the opening statement of the Heads of Agreement read:

*"At the request of the Guarantors, the Tenant offers to lease from the Landlord and the Landlord agrees to lease to the Tenant the Premises upon the following terms and conditions as evidenced by their signatures hereunder".*

This statement satisfied the prefunding condition of "Agreements to Lease". Given the above, and the opportunity the Credit Risk Manager had in his only project review of 22 April 2009, there can be little doubt that the significance of the title "Heads of Agreement" was not a bank concern. But if so, could have readily been rectified if asked to.

This lack of response impacted the ability to satisfy other prefunding conditions as per the loan contract.

Yes. The lack of bank response applied to the entire approval process and not just

the contents of the Heads of Agreement. Following the contract's prefunding condition for a Lease or an Agreement to Lease, the itemised conditions list called for a Building Contract, a Building Tripartite Agreement, Licences, Construction Insurance, Quantity Surveyor's Report etc. I could not acquire these if the terms of the proposed lease and the tenant were not first bank approved. How, for example, could I enter into a contract to construct a specific-use building if the proposed occupant had not yet been reviewed, much less approved.

Prefunding conditions could have been satisfied had the bank varied the original approval.

Yes. After approval of Dockside Coldstore and the increase in funding for additional insulation and refrigeration, I would have been ready to firm up the fixed price construction quote I had received from the registered builder, Varcon Constructions, and then enter into the prefunding requirement of a Building Tripartite Agreement with both the builder and the bank. Most permits, approvals and contractors were in place and ready for activation.

## **1.2 Issues and key findings**

### **Did the bank respond in a timely manner to the complainant's requests to vary the loan contracts?**

The bank met its obligations regarding a request to vary the terms and conditions of the existing approved loans. The timeliness of their response was not unreasonable based upon the complexity and additional information required to complete their assessment.

No. My initial 27 November 2008 request for a review of Dockside Coldstore was limited to their suitability as an acceptable tenant and the approval of the increased expense for warehouse insulation and refrigeration needed to transform the standard warehouse design into a cold store. These 2 items, although costly, were not complex items to figure but comprised simply of 2 additional amounts which had already been priced by outside contractors. So I must question the reasoning behind the duly researched conclusion that the bank's response time of 5 months (27 November 2008 – 22 April 2009) to review, and then an additional 3 months to reject the application was a reasonable time for the bank to consider variation of the loan contract, when the original review and approval took only 2 weeks.

### **Did the complainant meet the prefunding conditions regarding the construction finance?**

The complainant failed to meet all the prefunding conditions relating to the construction finance loan. Accordingly, the bank was entitled to withdraw their prior approval regarding the advancement of further funding.

It was impossible to meet even the second construction prefunding condition listed in the Facility Terms because the bank did not meet its own prefunding condition that every Significant Agreement (such as leases, builders, valuers etc) must first be bank

approved before they are accepted as a valid prefunding condition. Following the contract's prefunding requirement for a Lease, the itemised list calls for a Building Contract, a Building Tripartite Agreement, Licences, Construction Insurance, Quantity Surveyor's Report etc. I could not acquire these if the terms of the H of A and the tenant itself were not first bank approved. How, for example, could I enter into a contract with a builder to construct a specific use building if the proposed occupant had not yet been reviewed for suitability, much less approved.

### **Did the bank mislead the complainant regarding varying the loan contract and its conditions?**

There is no evidence to support the view the bank misled the complainant regarding the extension of loan term or the varying the approval conditions.

I do not know why it is claimed that I asked for an extension of the loan terms. I never did! I still had 4 months left on the 15 month term when the loan was rejected, so why would I ask for an extension when I did not need one?

But I was indeed misled by the Credit Risk Manager by a representation he made in his April 22 2009 review of the cold store and its proposed tenant. This review was the one and only official contact I had with the bank during the entire approval process. It began with "There are a couple of issues before we can progress" and concluded with "Happy to discuss further as required." I responded with 19 emails in reply to his questions and concerns without a response. The Credit manager misled me by saying he was happy to discuss further when in fact he never did. Contrary to his promise, he ignored my 19 significant submissions which he himself had requested, and only replied 3 months later, not to discuss his concerns, but to reject my construction loan application instead. Therefore, both he and the Business Development Manager must have missed the letter of intent from Fernhurst Refrigerated Transport, wishing to sub-lease 1000 pallet spaces from Dockside, boosting their revenue by a huge \$450,000 pa. This omission by neglect was a major blow to my application. But under the AFCA rules, it is not the content of those 19 submissions that is at issue here, but the fact that I relied on the Credit Manager's word that he would end the 5 months of neglect, and give me the opportunity, as required by several contract and banking regulations, to negotiate and allow me to interact before any final decision was made.

### **Was the bank entitled to appoint a Receiver and Manager?**

The bank appointed a Receiver and Manager as the loan facility had expired and events of default had occurred. Under the bank's documentation it was entitled to appoint the Receiver and Manager.

Yes. I was unable to continue servicing the debt.

### **Did the bank meet its obligation to a customer encountering financial difficulty?**

The bank met its obligation regarding a customer who was encountering financial difficulty. The bank extended the term of the existing loan a number of times during which the complainant had the opportunity to seek and arrange refinance with another

financial firm or alternatively sell the property.

Yes, The bank's refusal to communicate for 5 months and then take another 3 months to abruptly reject my application left me twisting in the wind had gradually drained my available resources through overheads, interest payments, living expenses etc. I was unable to find another lender because I did not have money to pay for a new establishment fee, valuation, living expenses and possibly wait another year for a reply. Besides, the stigma of a prior default would have hurt especially in the middle of the GST when property values plummeted.

### **1.3 Recommendation**

The recommendation is in favour of the bank. The bank is not required to compensate the complainant.

## **2 Reasons for recommendation**

### **2.1 Did the bank respond in a timely manner to the complainant's requests to vary the loan contracts?**

**The timeliness of bank's response to the complainant's request was reasonable.**

The timeliness of bank's response in advising the complainant the loan variation request was declined in my view was not unreasonable because of the complexity of the proposed transaction.

No. My initial 27 November 2008 request for a review of Dockside Coldstore was limited to two items. Their suitability as an acceptable tenant and the approval of the increased expense for warehouse insulation and refrigeration needed to transform the standard warehouse design into a cold store. The insulation and refrigeration, although costly, were not complex items to figure because they comprised simply of 2 amounts which I had expediently estimated and supplied to the bank along with confirmation from outside contractors. So I must question the reasoning behind the duly researched conclusion that the bank's response time of 5 months (27 November 2008 – 22 April 2009) to review, and then an additional 3 months to reject the application was a reasonable time for the bank to consider variation of the loan contract, when the original evaluation and approval took only two weeks.

The nature of the request was a significant change from the original approval, which required a new credit assessment to be completed by the bank.

No. The change from a dry good warehouse to a cold store warehousing could be considered 'significant' only from a cost perspective and not evaluation. It essentially involved the inclusion of additional warehouse insulation and refrigeration. These two costs items did involve a new credit assessment, but only to determine if the required increase in the construction loan was justified by the increase in rental income, and if the proposed tenant was able to pay it. This calculation does not

require significant evaluation on the bank's part especially since I had already supplied these figures among the many submissions I had sent. It should be noted that the cost of the refrigeration could have been excluded to become a 'tenant expense' instead of being added to the loan amount if the Bankwest Credit Manager had kept his word to discuss further, as promised in his review of 22 April 2009.

Although the complainant commenced communications initially with the bank in late November 2008, further significant information was required by the bank to evaluate the new proposal. This information was provided progressively. Accordingly, the bank was entitled to thoroughly assess the request which was seeking additional funding, a change of construction purpose to a cold storage facility (which is a special purpose property) and numerous changes in the existing prefunding conditions.

No. In order to assess the change the bank did not need information sent progressively over time. It needed to precisely know the cost of the additionally required insulation and refrigeration which was required to change the design from a standard warehouse to a cold store. All this information was supplied in December 2008, followed by a later suggested option for an owner/builder to substitute for the existing proposed contractor to save money. But none received a reply until the Credit review of 22 April 2009, by which time some of my suggested options were misconstrued as actual requested changes. An example of this is that I insisted on being an owner/builder, making it a probable reason for rejection, when this was only a later suggestion. The existing fixed price construction quote from an independent certified builder of 19 December 2008 had been overlooked. Much misunderstanding could have been avoided if the bank had responded after a submission was made to it.

The claim that there were "numerous changes in the existing prefunding conditions" is patently untrue and a gross exaggeration. With the exception of the owner/builder suggestion mentioned above, I did not ask for a single change in the prefunding conditions and would like to know how this claim originated.

There is clear evidence the complainant communicated regularly with the bank including the provision of additional information between November 2008 and July 2009 until the bank advised the complainant of their credit decision to decline the loan request. Communications details that the complainant was fully aware that the requested amendments to the original loan terms and conditions had not been approved. The fact that the bank sought further information including arranging a valuation in February 2009 does not in itself support that the bank was to ultimately approve the requested variations.

I was never under the illusion that the bank had, or was about to, approve my loan and know only that two of the bank's own financial advisors to the Credit Manager had recommended cold store approval on two separate occasions, and even prepared a prototype letters of offer for a Credit review.

*This is an extremely important aspect of my complaint and refers to internal*

*Bankwest documents submitted to AFCA on 16 October. For details please refer to the attached "Kelgon v Bankwest Case History for Ombudsman Review".*

But to be clear on the extent of communications and their timing, my records show that following my introduction of a tenant on 27 November 2008 and my supply of a fixed-price building contract on 19 December 2008, I received a brief email on 30 December 2008 from the Business Development Manager in which he barely mentioned my Dockside tenancy proposal and merely reiterated the terms of the original approval instead. I received no further correspondence from Bankwest until the 22 April 2009 Credit review, and then nothing again until the termination phone call on 3 August 2009. Although it was incumbent on me to provide all relevant information to help in assessing the proposed tenant and viability of the loan, it was essential for Bankwest to cooperate and respond to my submissions for guidance along the way to prevent me from proceeding on a path that would turn out to be a waste of time and resources. After all, a non-response in many cases is deemed as an approval, as exemplified in Bankwest's own General Terms for Business Lending which says:

**1.2 Facility Review (c) & (d) – paraphrased.**

If we give you written notice informing you of the revised conditions which may apply to the Facilities, and you do not reply within 14 days, you will be deemed to have accepted the revised conditions.

Another concern I have is that the bank may have lost some of my submissions prior to the all-important Credit review of 22 April 2009.

9

After I read the [REDACTED] (Bankwest Senior Case Manager) 30 July 2000 letter to me in response to my original AFCA complaint, and also the 16 October 2000 Bankwest evidentiary submissions to ACFA, it appeared that the bank had either mislaid or lost some or all of my submissions up to the beginning of February 2009, because none of them had been mentioned or referenced. If so, that would constitute a massive void in the bank's ability to accurately respond to my complaint and explain why the Credit Manager on 22 April 2009 asked basic questions to which I had already supplied answers. All this, including the lack of bank cooperation, could have been due to the disarray and internal confusion that I was told had occurred internally following the finalisation of the Bankwest purchase by CBA in December 2008.

The length of time a bank takes to decide on their credit decisions for a loan request will depend upon the complexity of the transaction. In this case the original approval clearly articulated the terms and conditions of the initial approval including prefunding conditions relating to the construction finance. The subsequent request to vary the loan approval was a significant change to the original approval including numerous additional risks associated with the change. Of particular note, one of the prefunding conditions detailed a fixed price fixed time building contract was required and that construction was to commence 28 February 2009 and be completed within 12 months. The subsequent variations being sought was looking to change this scenario to an owner builder scenario with some fixed price components. Owner builder



scenarios are by their nature a potentially higher risk proposition.

I have already responded to these claims, but I will briefly do so again.

The bank assessed and approved the original loan 2 weeks after application. The funds were to construct a speculative warehouse wherein the tenant, or his fit-out requirements, were unknown. The change requested was for additional funds to add insulation and refrigeration to the design so that the building could be used as a cold store because I had a prospective tenant for that purpose. These additions are not complex or difficult to evaluate, just costly. But the additional rental income would have justified the extra cost.

The original approval was based on drawings showing a bare office and warehouse envelope, devoid of internal improvements or partitioning. This is typical of a speculative project and the bank was aware that I had to find tenant(s) or buyer(s) because it was one of the prefunding conditions. If this was not specifically mentioned, it was implied that any tenant or buyer (if I was fortunate enough to find one during the GST) would need additional installations to suit their specific needs. I presumed these considerations would be addressed later by the bank.

The request for extra construction funds is not unusual even in specific-use construction where all requirements are known ahead of time with detailed drawings and specifications in place. My request, however, was for the addition of two specific building items, and not the result of a cost overrun.

A fixed-price construction quote was submitted in December 2008 but was either ignored or lost because its existence has never been acknowledged. It would have made a huge difference to the 22 April 2009 credit review if it had.

The owner builder scenario was only an option to save money, not a requested change, and submitted well after the fixed-price quote from a certified builder was sent.

The 28 February commencement requirement could not be met because the Significant Agreement tenant (see definition below) I introduced back on 27 November and the fixed-price builder, had not yet been reviewed or approved by the bank, violating some of Bankwest's own General Terms for Business Lending which include:

## **22.1 General Definitions**

Significant Agreement means:

- (a) Each agreement listed as a condition precedent in the Facility Terms.
- (c) Each contract for Building Works.
- (e) Each Lease
- (f) Each agreement to which you are a party the termination of which would have a material and adverse impact on your ability to operate your business; and
- (g) Each agreement we may request from you at any time or which we notify you is to be a Significant Agreement.

## **23.1 Interpretations – General**

- (k) An agreement, representation or warranty in favour of 2 or more persons is for the benefit of them jointly and severally.
- (i) An agreement, representation or warranty on the part of 2 or more persons binds them jointly and severally.

### **17.1 Attorney Appointment** (abbreviated)

You irrevocably appoint us and each of our 'Authorised Officers' as your attorney with the power:

- (a) (i) At any time to do everything in his reasonable opinion is necessary or expedient to exercise any of our rights in relation to the Facility Terms.
- (ii) To correct errors in any amount or rate or correct manifest errors in any Facility Document or drawdown notice.

### **14.2 Information Undertakings**

You must:

- (g) Notify us of the occurrence of any Event of Default or Potential Event of Default.
- (k) If you lease any Security Property to any person, give us prompt notice, and in any event within 5 days of:
  - (iii) the granting of a lease, including the renewal of an existing lease.

### **14.3 Significant Agreement Undertakings**

You must:

- (b) Ensure, if we have reviewed or approved an unsigned Significant Agreement, that each such Significant Agreement is signed in the form in which we have reviewed or approved;
- (c) give us prompt notice, and in any event, within 5 days, of any of the following:
  - (iii) any request to amend or waive any term of any Significant Agreement.

### **1.2 Facility Review** (paraphrased)

- (c) & (d) If we give you written notice informing you of the revised conditions which may apply to the Facilities (Conditions Notice), and you do not reply within 14 days, you will be deemed to have accepted the revised conditions.

These Bankwest General Terms form a part of the contract, and even though they mainly refer to my obligations to the bank, Clause 23.1 confirms that a contract is for the benefit of both parties and binds them jointly and severally.

### **The bank is entitled to determine their credit risk**

The complaint has raised a number of question specific to the credit risk assessment of the finance request and the ultimate decline by the bank. The complainant disagrees with some of the aspects of the loan assessment.

AFCA has the power to consider only some types of complaints about financial firms. We do not have the power to consider complaints about a financial firm's assessment of the credit risk posed by a borrower unless the financial firm has been negligent or has breached a legal duty or obligation. This means we usually can't consider complaints when a financial firm has refused to provide a loan.

In this instance in my view the bank was entitled to decline the loan variation requests accordingly AFCA does not have the power to consider the issues identified or the reasons for the loan decision.

Before declining a loan the Bankwest Credit Manager was obligated to consider due diligence and financial reports from those charged with scrutinising my application on the bank's behalf. My progress was followed by [REDACTED], Business Development Manager, and [REDACTED], Business relationship Manager, both Bankwest Authorised Officers and Bankwest Attorneys who actually composed the

original Loan Offer of 24 April 2008. But just 6 days after receiving the second of two independent and thorough credit reports from the Attorneys recommending approval of the cold store project, the Credit Manager issued a curt single page letter of rejection. What new information, and from whom, did he receive in those 6 days to induce him to contradict the advice of the Bankwest Officers who were uniquely tasked with gathering and reporting information on my case.

So I am not complaining about a financial firm's assessment of the credit risk posed by a borrower, but questioning if the Credit Manager himself had been misled.

## **2.2 Did the complainant meet the prefunding conditions regarding the construction finance?**

The loan agreement included a number of prefunding conditions with regards the proposed construction finance loan of \$1,950,000. These needed to be satisfied prior to any further advancement of funds. A number of key prefunding conditions were not satisfied:

### Building contract

The builder needed to be acceptable to the bank with the building contract being a fixed price and fixed time contract. Building works were required to commence by 29 February 2009. Practical completion was to also be 12 months from construction commencement with completion to be no later than 28 February 2010.

A formal fixed price building contract was not executed by the complainant.

### Lease/ Agreement to lease (rental income)

Formal leases and agreement to lease were required prior to the construction commencement. These leases needed to detail a net annual rental income of \$215,000. There was a requirement for the leases to be vetted and found acceptable to the bank.

I am delighted to see that it is acknowledged that vetting of precondition submissions was a bank requirement before approval and the release of construction funds.

Although there were letters of intent regarding lease agreements and a head of agreement to lease (which the bank did not accept) no formal leases were executed.

On the top of the first page of the Heads of Agreement it says:

“At the request of the guarantors, the Tenant offers to lease from the Landlord and the Landlord agrees to lease to the Tenant the premises upon the following terms and conditions as evidenced by their signatures hereunder”.

This must have been overlooked but it plainly carries the strength of a lease for bank processing purposes.

### Qualifying Pre-Sales Contracts

Qualifying presales contracts (unconditional) of at least \$2,325,000 (Net sale price

GST exclusive) were required.

The presales condition was not satisfied.

As a number of key prefunding conditions were not satisfied fully the bank was entitled not to proceed with the funding of the construction finance.

According to the loan contract itself, none of the prefunding conditions, could possibly have been satisfied until the bank carried out some kind of review of the proposed tenant. This review precondition precedes the other preconditions but was delayed until the Credit review of 22 April 2009, 5 months after I introduced a tenant – see item 1.2 ‘Issues and Key Findings’.

Although the complainant has requested AFCA to review the bank’s commercial analysis of the requested amendments to the initial approval, these issues are part of the bank’s risk analysis/credit decision which AFCA do not have the power to review.

I am not asking AFCA to review the bank’s risk analysis, just the circumstances under which the loan was declined despite strong internal recommendations to approve it. I have addressed this elsewhere.

### **2.3 Did the bank mislead the complainant regarding varying the loan contract and its conditions?**

#### **The bank did not misled the complainant**

The complainant believes the bank’s actions were misleading in that the bank misled him to understand a variation to the loan term for the initial funding would occur. The initial loan funding had an expiry date of fifteen months from drawdown.

No, I was never misled into understand that a variation to the loan term for the initial funding would occur. I was, however, misled into thinking that the Credit Manager, after reviewing my application on 22 April 2009, would keep his word and be “Happy to discuss further as required”. He broke his word and never did give an opportunity to discuss. His only subsequent communication to me was to reject my application 3 months later.

The complainant also believed they were misled on the basis the bank continued to seek further information specific to the complainant’s variation requests, suggesting an approval would be forthcoming.

No. The one and only request for further information I received from the Credit Department was the in its review of 22 April 2009. Although delighted that I finally had an encouraging cold store application review, one that I could readily and compliantly respond to, I was under no illusion that this meant project approval.

AFCA can investigate a claim that a bank misled a complainant and caused them to suffer loss. If we find that the complainant was misled, we will consider how much worse off they are because they relied on the misleading conduct and compensate them for that loss. The remedy for misleading conduct is not to make the misrepresentation come true.

In my view there is no evidence to support that the bank's actions misled the complainant regarding the likelihood the initial loan term being extended upon expiry or that the requested variations to the loan contract would be approved. The bank sought numerous information to enable an assessment of the complainant's requests. Please refer to my response to this elsewhere throughout this document.

Seeking further information is normal commercial practice as part of a loan assessment and does not suggest an approval will be forthcoming. Seeking further information more likely suggests the bank had not decided whether to approve the requested changes.

The bank sought some information only once during the entire process, and then refused to discuss further as had been promised. I hoped that the loan would be approved but never took it for granted.

The complainant has advised the bank staff led him to believe a variation to the loan term would be extended upon its expiry.

The complainant has detailed that bank staff verbally advised an extension to the loan term was not an issue quoting the bank staff as saying, "don't worry about the deadline – it's flexible". The complainant has however not provided any evidence to support this claim.

No. My quote of "It's Flexible" refers to the mandated 28 February start of construction and not the loan term. During a phone conversation with the Business Development Manager I mentioned that I had sent him 3 emails warning that the start date could not be met because I had not even received a review and approval of the cold store tenant and therefore could not satisfy some other prefunding conditions to activate construction funding. That is when he replied "Don't worry it's flexible", meaning the construction start date, and not the loan term. At that point there was no reason to ask for any extension because, at that point, I still had months remaining. The fact that the start of construction was never an issue raised by the bank bears out my contention that bank disarray as a result of the CBA takeover lead to inattention to some bank responsibilities such as a timely credit review of my project.

In my view the complainant who appears to be an experienced operator, would have had an understanding of the bank's lending process specific to construction finance. Accordingly, he should have been aware that at no stage had an approval been provided to vary the original loan contract in line with the requests.

Yes, I am RMIT graduate in civil engineering and designed and built around 40 bank-funded commercial buildings over the years through my own construction company. I designed, sub-contracted and paid for the existing foundation and site work valued at \$1.37m previously installed on the property. The Bankwest loan was to complete the building which was fortunately designed to accommodate a cold storage facility, if required.

And yes, all of my past projects were funded according to standard bank regulations and protocols. I chose Bankwest for this loan because it had a good track record for construction lending and also its interaction with clients. The bank's dealings in my

case showed uncharacteristically bad behaviour. No builder, for any construction purpose, could wait 5 months for a review, and then another 3 months for approval or rejection and pay its staff and overheads in the meantime. When pressed for answers, the Business Development Manager told me on several occasions that there was something strange going on at the Credit Department and that he had a difficult time dealing with them. Now why would a banks behaviour change so much for the worse that Senate Hearings and even a Royal Commission were held to investigate impropriety? Was it coincidental that this trend started just after the CBA purchased Bankwest in December 2008 and could potentially influence the direction of its operation?

### **How we assess complaints**

AFCA is not a court of law. We do not have the power to take or test evidence on oath, or to require third parties to give evidence. If we find we need information from a third party, and that information needs to be tested, we may not be able to continue considering your complaint.

When we assess complaints, we consider available documents, the recollections of the parties, and all relevant circumstances. We give more weight to contemporaneous documentary information (that is, documents prepared at the time of the event).

If there are no relevant documents, we will decide what is most likely to have occurred based on the information provided to us. If there are conflicting recollections and these are evenly weighted, we may find that a claim cannot be established.

In my view I have not found the claim to be established that the bank engaged in misleading conduct.

When bank's Credit Manager finally reviewed my cold store application he said "There are a couple of issues before we can proceed". He listed a few issues he needed to be addressed and then concluded with "Happy to discuss further as required". I sent 19 submissions in reply but he was not happy enough to reply or discuss any of them. Was his statement, on which I relied, not misleading?

### **The complainant was bound by the initial loans' terms and conditions**

If a person signs a document that they know contains contractual terms and which they understand will affect their legal relationship with the financial firm, then the person is legally bound by those terms. It is irrelevant whether or not the person read the document before signing it. The only exception to this is if there are circumstances which would make it unfair for the financial firm to enforce the contract, for example if the person was misled into signing the document.

There are also contractually binding 'Implied Terms' which are not in the contract yet mandate a timely response if one party has an enquiry or requests information, especially when neglect would impede the success of the enterprise.

In this instance the complainant accepted the initial construction loan's term and conditions including the prefunding conditions. The prefunding conditions were not satisfied, and the bank did not progress with the loan funding relating to the construction finance. The bank was entitled to complete their credit assessment and

declined the complainant's requests to vary the contracts.

As mentioned earlier, none of the prefunding conditions could be satisfied because the tenant and cost increase had to be reviewed and approved first. A construction contract, for example, could not be reasonably signed and committed to if the occupant had not previously been vetted and accepted by the bank.

The bank was entitled to complete their credit assessment but not a lengthy 5 months after a request to do so. The bank's only excuse could have been that at the time the personnel could not properly process my loan request because of disarray after CBA purchased Bankwest in December 2008. But I should not have to bear the damaging and fatal consequence of that.

## **2.4 Was the bank entitled to appoint a Receiver and Manager?**

### **The bank was entitled to appoint the Receiver and Manager.**

I am satisfied that when the bank appointed the Receiver and Manager on 21 July 2010, it had provided the complainant with a period of around six months to repay the facility. I am also satisfied that under section 14.1 of the Memorandum of Common Provisions document, the bank was entitled to appoint the Receiver.

In relation to the Receiver and Manager, we can only consider whether the Receiver and Manager was validly appointed by the bank, having regard to the loan terms and conditions and statutory notice requirements.

If the Receiver and Manager was not validly appointed, we can consider what loss the complainant has incurred as a direct result of an "illegal" appointment

At the time of the appointment of the Receiver and Manager the complainant was in default of the loan agreement as it had expired on 1 February 2010, the complainant had failed to make scheduled repayments of interest for four months and the loan facility balance of \$1,358,844 was in excess of the expired limit of \$1,250,000. Demands had been issued seeking repayment. In the circumstances, I am satisfied the bank was entitled to appoint the receiver and manager.

Strictly speaking, at that stage the bank was entitled to appoint the receiver. But it was not entitled to previously disregard contract law and normal banking practice which includes regular client contact in the interest of mutual success. Common law says:

*There is an implied term of a general duty of cooperation in all contracts that each party agrees to do all things necessary to enable the other party to have the benefit of the contract (Butt v McDonald)*

## **2.5 Did the bank meet its obligation to a customer encountering financial difficulty?**

### **The bank has obligations to its customers experiencing financial difficulty.**

AFCA can review whether a financial firm has acted appropriately when responding to a complainant's request for financial difficulty assistance.

We will consider how the financial firm has responded to the complainant's financial difficulty in the past, including whether it complied with its obligations at law and under relevant industry codes.

As with individuals, the aim of any assistance should be to assist the small business to overcome its financial difficulties. Provided that genuine consideration has been given to the request for assistance, it is a commercial decision for a financial services provider as to whether it agrees to vary, refinance or restructure any existing contracts. AFCA has no power to review such a decision, or to require the bank to vary the contract.

If the small business is unable to meet the bank's credit assessment requirements, then I would not expect the bank to accept further risk. In such circumstances, assistance may take the form of providing the business with a reasonable time to refinance or working with the business to achieve an orderly winding up of assets. I had no financial difficulties until Bankwest drained my resources by refusing to adequately communicate, allowing overheads and interest to accrue. The bank extended the original land loan so I could continue paying interest and temporarily avoid default.

### **The bank met its financial difficulty obligations**

In my view the bank met its financial difficulty obligations because it allowed a sufficient period of time for the complainant to address the expired loan facility and events of default of the expired facility.

The loan contract expired 1 February 2010 and the Receiver and Manager was not appointed until 21 July 2010. The Receiver and Manager also did not proceed with the sale of the freehold for a further three months. The complainant had the ability during this period to address the expired facility by refinancing with another financial firm or alternatively repaying the debt through the sale of assets.

But they did prevent my default by extending the land loan so that I could continue to pay their interest. It was impossible to find alternative financing after my 1 February 2010 default because the associated stigma left prospective financiers wondering what was wrong with the project if Bankwest had to turn it down. Also, I had no money left to pay for a new establishment fee or a panel valuation. One of the two tenants I had presented for approval had an occupancy deadline of January 2010 and could not wait after learning that I was unable to get financing. Besides, by then we were in the middle of the Global Financial Crisis.

In the end I was forced to borrow \$100,000 at 25% interest from a lender of last resort to avoid defaulting but, as could be expected, eventually defaulted on that too and lost my house as a result. A sad story that could have been avoided.

## **3 Supporting information**

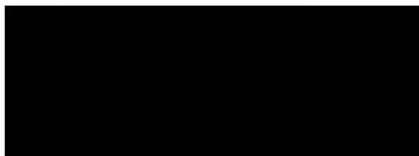
### **3.1 Summarise the key references**



- > Offer letter dated 14 August 2008
- > Offer letter variation 27 August 2008 – **This letter does not exist.**
- > Offer letter variation 7 August 2009
- > Offer letter variation 11 November 2009
- > Memorandum of Common provisions
- > General terms for Business Lending

### 3.2 Loan details

Date of original loan agreement	Account number	Loan amount	Balance	Balance outstanding
			As at 1 July 2010	
14 August 2008	XXX919-8	\$1,250,000	\$1,339,642	Repaid



**Case Manager**  
**Australian Financial Complaints Authority**