



EASTWOOD SECURITIES

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17th March 2021

Director
AFCA Review Secretariat
Financial System Division
The Treasury
Langdon Crescent ACT 2600

Dear Sir/Madam,

Response to the review of the Australian Financial Complaints Authority.

Eastwood Securities Mortgage Fund (ESMF) is a Managed Investment Scheme (ARSN 146 451 792). The Fund Trustee is Melbourne Securities Corporation Limited (ACN 160 326 545, Australian Financial Services License No. 428289). Melbourne Securities is a professional Trustee Services company.

Eastwood Securities Mortgage Fund is managed by Eastwood Securities Pty Ltd ACN 143 030 540 which holds Australian Credit Licence number 385467. Eastwood Securities is appointed as a Corporate Authorised Representative of MSC Advisory Pty Ltd (Australian Financial Services Licence number 480649), a related party to the Trustee.

ESMF is a very small (Non-ADI) credit provider in the "Private Lending Sector" and is one of many hundreds of similar businesses that make up this multi-billion dollar sector of the financial services industry. Hence our perspective and experience will no doubt be different to that of larger providers of financial services.

Context of our submission:

Eastwood Securities Pty Ltd is required to be a member of an external dispute resolution service provider under the terms of its credit license and trustee agreement with Melbourne Securities, in its role as trustee of ESMF, the Fund.

We have recently concluded a complaint review process with AFCA that gives us great concern about the appropriateness of the process and timeliness of performance of AFCA, especially as it relates to small financial service providers such as Eastwood Securities compared to much larger corporate service providers.

During the ten years of operation of ESMF there have been several occasions where matters have been taken to AFCA and its predecessor which did not progress for various reasons. However, we have recently experienced a complaint management process which now draws attention to concerns about the process and timeliness for FCA complaint review and management.

I note that in public material, Treasury refers to the service provided by AFCA as 'Free' and 'Fast' as well as binding. We will provide evidence that the process is far from fast and it does cost the financial institution and the Investor who provides funds for private lending, significantly. For the financial institution that is a member of AFCA, the cost is both direct and based on opportunity cost.

In our most recent experience it is questionable how AFCA actually helped the borrower or brought any value to this issue and whether the borrower would have been better off if AFCA rejected the complaint at first instance (as we originally submitted). It seems to me to be a case where Eastwood Securities has done (almost) everything right but has really been the victim of the system.

We do acknowledge that on various occasions staff at AFCA have verbally and in writing acknowledged and apologised for various frustrations with and delays in the complaint handling process. Our interpretation of the events we experienced is that if nothing more, AFCA is greatly under resourced and inexperienced to handle the volume and complexity of work that is expected of it.

Issues of Concern:

1. Jurisdiction: After initially rejecting the complaint against Eastwood Securities (Complaint number 645255), AFCA agreed to proceed with the matter following the court reversing an earlier default judgement on "technical grounds". Unfortunately no consideration was given by AFCA solicitors for what the technical grounds might be and whether the initial default judgement had merit at the time the orders were given.
 - a. To address this issue greater due diligence should be given the full picture not just one element of the matter (refer to attached chronology of events & court transcript – para 50 indicating the court had made a technical error). In cases such as this the court should have applied the 'Slip Rule' and not altered the initial judgement.
2. Vexatious Complainants: It is greatly too easy to lodge a complaint without any tangible proof of 'cause'. There appears to be little or no validation of complaints before the matter enters the formal review process. The fundamental issue is that there is a strong view by borrowers that once their loan goes into default, there must have

been a fault with the lender either in compliance with 'Best Interest Duty' or 'Responsible Lending'.

The credit complaints review process is heavily skewed in the trust that the complainant is making an honest complaint based on accurate information and legitimate claims. Unfortunately this is not always the case and AFCA appears not to have processes in place to discern these vexatious matters from legitimate ones. Like all services that are available at no charge to the end user, they are open to abuse. In the case of AFCA, there is significant risk that numerous complainants use the AFCA service for what are truly commercial legal matters and not matters of Credit Code violation.

- a. To address this issue AFCA needs better quality controls over its investigation process to assess more rapidly when complainants are acting in a misleading manner at the early stages of hearing a complaint.
3. Timeliness for responses by Complainants and Industry Members: It is noted that complainants were invariably provided 30 days to respond to requests for information or responses to information provided by the lender and were often provided extensions of time.
 - a. That the time for responses be reduced to a more appropriate period such as one week rather than one month (30 days).
4. Absolute Timeliness to conclude a complaint review: The complaint we dealt with most recently (Case Number 645255) took a total of 18 months from 18th June 2019 to the 14th December 2020 to be resolved to the extent that we could recommence internal loan management processes. We believe that this matter could have been settled within six months hence reducing the cost impact on both AFCA, our company and the complainant;
 - a. Legal costs of \$7,266.60 were incurred in addressing jurisdictional matters at the outset of the matter,
 - b. Approximately 420 hours of staff time (mainly directors) at a cost of \$250.00 phr resulting in cost to the business of \$105,000.00, and
 - c. Unrecoverable loan costs of \$269,306.00 due to cost blow-out primarily due to the length process of debt recovery resulting form a lengthy review process.
5. Lack of Confirmation of Communication: Complainants are not required to confirm receipt of correspondence from AFCA. On numerous occasions the complainant claimed no receipt of information and was always provided additional time to address the issue at hand. This repeated use of delaying tactics by the complainant was a significant contributor to this matter being drawn out to an unacceptable time frame.
 - a. AFCA should implement a confirmation of receipt of communications with all parties to a complaint.
6. Lack of Consideration for Variations in Business Size and Type: There is a significant difference in structure, size, resources and regulatory environment between 'ADI' and 'non-ADI' lenders. It must be acknowledged that small businesses have limited resources compared to larger corporates when it comes to managing AFCA complaint matters.

Furthermore, there is no consideration for the difference in how loans are funded between banks and private mortgage funds. It should be noted that in 'private lending' there is a need to consider the investor, usually elderly and dependent on that

investment for income, is behind the credit arrangement. Such third parties do add a complexity that at present is not part of the complaint management consideration.

- a. In our situation, the Eastwood Securities Mortgage Fund is reliant on numerous small to medium size investors to fund loans. As a result, AFCA should apply a priority to matters where a third party such as a private investor is exposed to loss or hardship as a result of a credit complaint.
7. Opportunities for Rejection of AFCA Recommendations: It is believed that the opportunity for the complainant to reject the AFCA Recommendation resulting from a complaint review is significantly lenient. It was established on numerous occasions during our complaint process that the complainants in question had no new information to contribute and simply kept sending the same limited material in response to requests for further information by AFCA. This exacerbated the already lengthy time delays in the review process.
- a. AFCA should require greater onus on the complainant to demonstrate, at that time, what new evidence will be provided.

In order to assist in understanding the nature of the issues addressed above as they relate to Case Number 645255, I have also attached the following relevant documents;

1. Application letter from complainant,
2. Actual complaint to AFCA (outlook item),
3. AFCA Recommendation dated 4 June 2020,
4. AFCA Determination (Ombudsman's report) dated 12 October 2020,
5. Chronological listing of events – default management

Delivering Against Statutory Objectives:

Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

- 1.1 Is AFCA's dispute resolution approach capable of producing consistent, predictable and quality outcomes?

Our limited experience with the complaint review process does not enable us to comment on the aspects of consistency and predictability.

We would however comment that the outcome at both the Case Managers Recommendation and the Ombudsmans' Determination demonstrated a quality outcome.

- 1.2 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints affective?

Our limited experience with the complaint review process does not enable us to comment on the aspect of systemic issue determination.

- 1.3 Do AFCA's funding and fee structures impact on competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate

any impacts on competition while balancing the need for a sustainable fee-for-service model?

As a small participant in the external dispute resolution system, annual membership fees for our company are small and acceptable.

Our issue in regard to fees and their impact on competitiveness stems from the fee levied for case management. For a matter that ran for 18 months and that should never have been considered by AFCA, then could have been dealt with in 6 months, we were levied \$11,355.00 for a matter where we were found not to have breached any lending regulations. We find this totally unacceptable.

I draw your attention to other Australian statutory bodies (eg. The Australian Therapeutic Goods Administration) where performance criteria are established for file review activities. I strongly recommend that where a fee for service is expected to be charge that appropriate performance criteria by that agency are established.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Peter G Schembri', with a horizontal line underneath.

Peter G Schembri
Director, Operations

Recommendation

Case number	645255
Complainant	Mr Michael Dews & Mrs Jacqueline Dews
Financial firm	Eastwood Securities Pty Ltd

1 Overview

1.1 Complaint

In April 2018, the financial firm (lender) provided the complainants (Mr and Mrs D) with a loan for \$1,020,000 (loan).

The loan is secured by a residential property (property).

The lender had obtained default judgement against Mr and Mrs D, but that judgement has since been set aside by the Court.

This complaint is about whether the lender:

- acted as a responsible lender when it approved the loan,
- met its financial difficulty obligations.

1.2 Issues and key findings

Did the lender act responsibly when it provided the loan?

The lender acted responsibly when it provided the loan. The lender made reasonable enquiries and the loan was both suitable and affordable.

Did the lender meet its financial difficulty obligations?

In the circumstances, the lender met its financial difficulty obligations as it requested details of the complainants' financial circumstances and attempted to reach an arrangement with them.

Did the lender breach any other obligations owed to the complainants?

The lender continued and recommenced enforcement action while this complaint was open with AFCA. This was in breach of its member obligations under AFCA's Rules.

What is an appropriate outcome for the complaint?

The lender should compensate the complainants a total of \$3,000 non-financial loss compensation for the stress and inconvenience incurred as a result of the lender continuing and recommencing enforcement action while this complaint was open with AFCA.

1.3 Recommendation

This recommendation is substantially in favour of the lender. The complainants remain liable for the outstanding debt under the loan.

Within 14 days of both parties accepting this recommendation the lender should credit a total of \$3,000 non-financial loss compensation to the loan to reduce its balance.

If the complainants are continuing to experience financial difficulty, the following also applies:

- within 14 days of both parties accepting this recommendation, the complainants should provide details to the lender of their current financial position, together with a reasonable repayment arrangement acceptable to the lender for the repayment of the debt
- if the lender requires more information to make its assessment, it should write to the complainants identifying the information required. The complainants should, in turn, co-operate with the lender's reasonable requests for information
- the parties should work together to come to a repayment arrangement. In doing so the lender should have regard to its obligations for dealing with customers in hardship contained in the National Credit Code and/or the Code of Banking Practice
- the lender must consider the complainants' proposal but is not obliged to accept it if the lender does not consider it to be reasonable
- if no statement of financial position is provided by the complainants within 14 days of acceptance of this recommendation or if no arrangement is made within a further 14 days, and the loan remains in arrears, then the lender may be entitled to continue recovery action under the terms of the loan once the complaint is closed.

If the recommendation is not accepted by both parties, the lender is not required to do any of the above.

2 Reasons for recommendation

2.1 Did the lender act responsibly when it provided the loan?

The lender acted responsibly when it provided the loan

When a lender provides consumer credit, it must comply with the “Responsible Lending” provisions of the National Consumer Credit Protection Act 2009 (National Credit Act). Details of the lender’s obligations are set out in section 3.1 below.

The relevant time for the assessment is at the time of lending. If the consumer was initially able to meet their obligations under a credit contract but experienced difficulties after a change in their circumstances, this is considered a complaint about financial difficulty.

The complainants say the lender did not act responsibly when it provided the loan for several reasons. Details of the complainants’ claims are set out in section 3.2 below.

For the reasons set out below, the lender acted responsibly when it provided the loan because it was:

- provided after the lender made reasonable enquiries
- suitable for the complainants’ purposes
- affordable, and
- not inappropriate for any other reasons.

The lender made reasonable enquiries

The available information shows the lender did not just rely on the figures from the application when it approved the loan. Rather, the lender obtained several documents to verify the complainants’ financial position at the time of the lending. Among other things, the lender received or obtained:

- detailed explanation of debts owed and the compromised amount payable if finance approved
- Trust Deed Family Trust
- Family Trust financial accounts as at 30 June 2017
- account statements for debts held by other financial firms
- rate notices
- personal transaction account statements for an account held by other financial firms
- credit reports
- ASIC company extract

By obtaining this information, the lender complied with its obligation to make reasonable enquiries and verify the information provided on the loan application.

The loan was not unsuitable for its stated purpose

Based on the available information, both parties freely entered into a short term 12-month arrangement with the expectation that sale of the new sub-divided lot would discharge a substantial component, if not all, of the loan.

The lender made reasonable enquiries and the loan offered was suitable in meeting the complainants' objective of completing the sub-division.

Accordingly, the loan was suitable for the complainants.

The loan was affordable

AFCA conducted a serviceability assessment for the loan based on the available information about the complainants' financial position at the time of lending.

Based on the available information, Mrs D is the sole director of a company (company) that is the trustee for Mr and Mrs D's Family Trust (Trust). Mr D is employed by the Trust and is paid a management fee. The Trust appears to have been the complainants' principal source of income. There is no information to indicate the lender was not entitled to rely on the Family Trust's 30 June 2017 financial accounts that it received.

Based on AFCA's review, the complainants demonstrated capacity to repay the loan over the short term pending substantial debt reduction from the sale of the new lot.

AFCA's serviceability assessment shows the complainants had an overall monthly surplus of \$2,213 when making the monthly repayments required under the loan. This means the complainants were able to meet the loan repayments without experiencing financial difficulty. Details of AFCA's serviceability assessment are set out in section 3.3 below.

2.2 Did the lender meet its financial difficulty obligations?

The lender has obligations to customers in financial difficulty

The lender is required to genuinely consider a request for assistance from a customer in financial difficulty. The customer must also be willing to work with the lender and propose a realistic repayment plan that will repay the debt within a reasonable timeframe.

The lender met its financial difficulty obligations

The lender's contact notes and its emails with the complainants (detailed in section 3.4 below) support the conclusion that it attempted to give genuine consideration to the complainants' financial difficulty.

In particular:

- on 12 September 2018, the complainants first expressed that they were experiencing hardship during a phone call with the lender. Prior to this, the complainants had made promises to pay and advised that while the cash flow was not up to where projected, they expected funds to come in.
- on 19 September 2018, the lender requested the complainants provided additional information regarding their financial position.
- After following up on 24 September 2018, the lender again requested financial information from the complainants on 4 October 2018.
- on 5 October 2018, Mr D advised he was working full time again.
- on 8 October 2018, Mr D provided the lender with an updated cash flow statement.
- on 8 October 2018, after receiving the financial information from the complainants, the lender advised that a deed of forbearance would be the best option to catch up the arrears.

In the circumstances, the lender did not breach its financial difficulty obligations as it requested details of the complainants' financial circumstances and attempted to reach an arrangement with them.

2.3 Did the lender breach any other obligation owed to the complainants?

The lender continued and recommenced enforcement action

The lender continued and recommenced enforcement action while the complaint was open with AFCA. A timeline of the relevant events is set out in section 3.5 below.

Based on the available information, following AFCA's jurisdictional review, the lender was not notified of the complainants' extension request by AFCA until some seven days after the request was made. In this instance there was a five-day period between 5 September 2019 (deadline for reply by the complainants) and 10 September 2019 where AFCA made contact with the lender.

However, regardless of this 5-day period, the lender recommenced recovery action even though it had not received any automated email notification from AFCA about the complaint's closure. The lender has had previous complaints with AFCA and its predecessor scheme in which email notifications in this regard were sent to it confirming closure.

The lender continued or commenced recovery action in breach of AFCA Rule A.7.1 when it:

- filed a Notice of Motion for Default Judgment for Possession on 18 June 2019
- filed a Notice of Motion for Default Judgment for Possession on 6 September 2019
- filed a Notice of Motion for Writ for Possession on 9 September 2019.

All of the above actions were taken by the lender while the complaint with AFCA was open. The relevant provisions of AFCA's Rules are set out in section 3.6 below.

2.4 What is an appropriate outcome for the complaint?

The lender should compensate the complainants for their non-financial loss

AFCA is able to award non-financial loss to compensate for stress or inconvenience caused by an error of a financial firm. The maximum amount we can award for non-financial loss is \$5,000 for each claim.

In this complaint, the complainants are likely to have suffered a degree of stress and inconvenience. It is therefore appropriate for the lender to pay the complainants a total of \$3,000 (\$1,500 each) for the stress and inconvenience they experienced as a result of the lender continuing enforcement action while the complaint was open with AFCA. This should be applied to the loan to reduce its outstanding balance.

3 Supporting information

3.1 The bank has obligations as a responsible lender

A lender must not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer. The provision of credit will be unsuitable if:

- the consumer could not comply with their financial obligations under the credit contract, or only with substantial hardship, or
- the credit does not meet the customer's requirements and objectives.

Meeting the responsible lending obligations requires taking three steps:

- making reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
- taking reasonable steps to verify the consumer's financial situation; and
- making a final assessment about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

3.2 The complainants' position

The complainants say the lender acted irresponsibly when it provided the loan as:

- Mr D was bankrupt at the time of the initial application that was declined, and the lender used all the same documents they supplied for the initial application,
- Mr D was released from bankruptcy on 31 January 2018. The trustee had objected to his release for a few years but because he was going to pay \$40,000 from the proceeds of the loan, he agreed
- the loan was not affordable for them at the time it was provided, and
- they were instantly placed into financial difficulty and were unable to make repayments for the loan.

3.3 Serviceability assessment

AFCA's serviceability assessment

Details	Amount
Monthly income	
PAYG income	\$5,206
Business trading cash	\$10,501
Total monthly income	\$15,707

Details	Amount
less monthly expenses	
New loan	\$10,158
Living expenses	\$3,336
Total monthly expenses	\$13,494
Surplus	\$2,213

This assessment is made on the following bases:

- the complainants PAYG income of \$31,959 and \$38,125 as paid to them by the Family Trust
- business trading cash available after tax is based on the trading to 30 June 2017 plus depreciation added back (\$126,018)
- new loan repayments based on the amount of \$1,020,000 at 11.95%
- living expenses using the Housing Expenditure Measure's (HEMs) data for the third quarter in 2017 for two people with two dependents (\$770 per week or \$40,040 per annum)

3.4 Timeline of contact between lender and complainants

Timeline of relevant contact

Date	What happened
18 July 2018	The lender called the complainants as the loan was two months (\$21,410.42) in arrears with another payment (\$10,705.21) due on 26 July 2018. Complainants make promise to pay: \$7,500 on 20 July 2018, \$7,500.00 on 25 July 2018 and \$8,000 on 3 August 2018.
20 July 2018	<p>Mr D emailed the lender remittance for payment. He said he had only paid \$5,000 and a second payment would be made the following week. He said he realised they were not up to the cashflow prediction they had sent the lender but would be back on track by the week of 3 August 2018 and requested the lender give them that time.</p> <p>The lender replied to Mr D requesting more information regarding the complainants proposed payments. It advised that as of 26 July 2018 they would be three months payment in arrears, being \$32,115.63 (\$27,115.63 less the \$5,000 paid). It requested the complainants provide it with a proposed payment program to catch up the arrears.</p>
24 July 2018	Mr D emailed the lender advising that he had updated the cashflow and payment program to reflect what would be coming in between then and 3 August 2018. He said he had had a few unavoidable changes in work flow

Date	What happened
	and he had to have a couple of days off due to a family matter and these things had impacted the amount and timing of incoming monies.
8 August 2018	<p>The lender emailed the complainants regarding arrears as only \$5,000 had been paid to loan since settlement. Arrears owing \$29,722.50</p> <p>The lender called the complainants. Mr D advised that four jobs he had scheduled had all been delayed and were now underway. He was driving and unable to talk so said he would email that night with details regarding payments.</p>
9 August 2018	The lender emailed the Mr D to advise it had not received the promised payments (of \$3,000 on 26 July 2018, \$7,500 on 30 July 2018, \$6,000 on 1 August 2018, \$6,000 2 August 2018 and \$5,000 on 8 August 2018) and the loan was \$29,722.50 in arrears
10 August 2018	Mr D emailed the lender saying that projects he had depended on for cashflow had been delayed, with one being cancelled completely and that this had impacted heavily on the forecast he had previously sent. He attached another cash flow projection. He said he expected to have the council approval for the subdivision within the next four weeks and he would send it when received.
22 August 2018	Notice of default issued to the complainants.
3 September 2018	Mr D emailed the lender saying he would call the following day or day after and that he was waiting for an answer on a payment. He said he was trying to arrange payments as quickly as he could.
7 September 2018	Mr D emailed the lender twice asking if it could send him a letter stating the arrears and what dates the money was due on its letterhead.
10 September 2018	The lender emailed Mr D the statement he had requested
12 September 2018	The lender spoke to Mr D via telephone who advised 1. He has had no work other than a \$54,000 contract which had been delayed. 2. He had a substantial workers compensation claim which had been three years in process and that he recently applied for an interim payment on the grounds of hardship. 3. He had hoped that the interest on the loan could be capitalised. 4. That the renovations identified by the valuer had not been done and the house remained in a poor state of repair 5. That he did not

Date	What happened
	<p>have any funds to complete the proposed land division. 6. Mrs D's father was very ill in Wales and he did not want to bother her with this issue and he had borrowed money from a family member to pay for her and his daughter to travel to Wales. The lender informed Mr D of the state of arrears and that legal recovery action was imminent. Mr D requested that he be given another week to explore his options. The lender informed Mr D that complainants may wish to consider giving their agreement to handing over formal possession of the security property to the lender who in turn would allow the complainants to market the sale of the property themselves. The lender further informed Mr D that if during the sales process they were able to catch up the interest, possession of the property could be restored to them. It said this process would allow them up to three months to pay outstanding arrears so as to retain the property. Mr D said he would consider their options and let the lender know their decision on 17 September 2018.</p>
18 September 2018	<p>The lender emailed Mr D and requested he call it that day to discuss a longer-term solution and that it may have a proposition that would assist.</p>
19 September 2018	<p>Mr D emailed the lender and attached four emails regarding his financial information.</p> <p>The lender replied to Mr D via email that it was clear from the information he had provided that there would not be any funds available in the short term to ease the loan arrears. It said the best way forward would be a forbearance arrangement with the mortgage that would allow the complainants the opportunity to further explore the land division opportunity that may be available to them. It requested they provide additional information and said when all of the information was provided, it would see if it could provide a deed of forbearance which would allow an agreement for it to take possession as mortgagees, complete the land division and then upon sale of the new allotment, bring the loan back into order. It said if that could be achieved, it could also extend a temporary interim moratorium on interest payments pending the unit sale (and/or a refinance based on the increased value of the security).</p> <p>The lender emailed Mr D saying it had attempted to call him. It requested he return its call urgently.</p>
20 September 2018	<p>The lender emailed Mr D advising that once the information requested in its email of 19 September 2018 was provided, it could be presented to its credit committee with the aim of having the pending loan default action against him deferred.</p>

Date	What happened
	<p>Mr D emailed the lender regarding the council approval process. He attached approval documents from a water company.</p> <p>The lender emailed Mr D requesting contact details for people who would be able to assist in gaining the approvals. It also asked him to provide some contact details of local real estate agents who could give appraisals of what the property may value at with a land division in place.</p>
24 September 2018	<p>The lender called Mr D to chase up the requirements of its email dated 19 September 2018. Mr D stated that he would have the required information including surveyor details to it by 25 September 18.</p>
25 September 2018	<p>The lender emailed Mr D requesting an update regarding their telephone conversation the day before.</p>
4 October 2018	<p>The lender emailed Mr D advising that whilst it is prepared to consider assisting with the subdivision of the property dependent upon satisfactory advice from the surveyor and council, it requires interest payments to be made even if they are less than the overdue amount. It said it also required an update on his current work status and income in order to review the complainants' loan circumstances. It asked Mr D to advise when a portion or all of the interest payments could be made including the amount in order to assist in preventing debt recovery action.</p>
5 October 2018	<p>Mr D emailed the lender saying he was working full time again, so he would put something together and would be able to give it a full understanding of where they are at financially.</p>
8 October 2018	<p>Mr D emailed the lender an updated cashflow projection.</p> <p>The lender emailed Mr D following its telephone conversation with him and proposed the best way forward to catch up arrears and bring the loan into order is to enter into a deed of forbearance. It said this would give it voluntary possession of the complainants' home with an agreement that they be permitted to remain in residence for a period of up to six months and that during that six month period they as borrowers would make weekly partial interest payments (to be determined and agreed) and that the complainants would do all things to facilitate and assist the creation of a subdivision of land. At the end of the six-month period the new allotment be sold with full sale proceeds to be applied to the reduction of the outstanding loan plus interest plus costs. At this time the property could be returned to the complainants on the basis that they are able to refinance the</p>

Date	What happened
	outstanding balance or arrange with the lender for a new loan to repay the outstanding balance.
11 October 2018	Mr D emailed the lender advising he was waiting on his solicitor to review the documents and arrange settlement.
12 October 2018	The lender emailed Mr D following a conversation with him that day confirming that it had been instructed by its solicitors to prepare an application for possession to the Court due to the complainants' non-payment of interest and that this application would be served on them within the coming weeks. It said notwithstanding this action it remained its intention to enter into a deed of forbearance with them to allow completion of a land division. It also noted Mr D's advice of making an interest payment during the week ended 19 October 2018.
26 October 2018	Statement of claim filed by the lender.
1 November 2018	<p>The lender emailed the complainants following a discussion with Mr D regarding voluntary possession under a deed of forbearance. The email outlined the key points for discussion in an upcoming meeting.</p> <p>Mr D responded via email that the proposal outlined by the lender looked fine and the he would discuss with Mrs D and get back to the lender.</p>
13 November 2018	<p>The lender emailed Mr D the deed of forbearance and asked if payment had been made.</p> <p>Mr D replied to the lender advising that payment had been made the day before.</p> <p>The lender emailed Mr D confirming payment received.</p>
14 November 2018	The lender emailed Mr D and asked him if he had read through the deed. It said it had commissioned surveyors to start on the project and it would be appropriate to have the deed in place prior to that.
15 November 2018	Mr D emailed the lender saying he had looked through the document and was regarding what would happen if they missed a payment date. He noted that the lender had been more than accommodating on previous occasions and asked if it would still have discretion regarding this.

Date	What happened
	The lender emailed Mr D advising that under the deed, it would allow the complainants a week to remedy any default.
16 November 2018	The lender emailed Mr D to ask if he had the survey report from Mr H yet. Mr D emailed the lender the survey report.
22 November 2018	The lender emailed Mr D to advise it had not yet received the signed deed.
23 November 2018	Mr D emailed the lender and advised Mrs D was away, so he could not sign the document until the following Monday. The lender replied to Mr D's email following its telephone conversation with him. It advised it required payment of \$3,000 as per their arrears agreement, the deed to be signed and returned, Mrs D to make herself available for service of the default notice and the council application signed and returned.
17 December 2018	Mr D emailed the lender advising he had missed a call from it. He said he would be making a payment of \$2,000 that day. He said the documents the lender had sent looked fine and he would send remittance once the payment was made.
9 January 2019	Mr D emailed the lender saying he had not made a payment for a few weeks because he was waiting for the payment he was expecting in late December. He said they had pretty much been living on thin air but he was hoping it would come in over the coming week. He said he would let it know when it was confirmed.
14 January 2019	The lender attempted to call Mr D on his mobile. No answer and no message left.
15 January 2019	Mr D emailed the lender saying he missed its call and was having trouble with his phone. He said they had an appointment with a solicitor booked and would send the signed documents to it after the appointment. He also said he would be paying money in two days' time and would send a remittance once done.

Date	What happened
18 January 2019	<p>Mr D emailed the lender saying there was a delay as the solicitor had not read the documents. He said they would send the documents on the following Monday.</p> <p>Default judgement obtained by the lender.</p>
23 January 2019	<p>Writ for possession issued</p>
25 January 2019	<p>Mr D emailed the lender stating \$620 was a realistic rental figure.</p>
29 January 2019	<p>Sheriff's notice to vacate issued requiring complainant to vacate property by 11.30am on 12 March 2019</p>
5 February 2019	<p>The lender emailed Mr D a copy of the new deed of forbearance for consideration. It advised its concern that the complainants had on three or four occasions promised to make a substantial interest payment but not made those promised payments. It asked him to advise when they would be making the payment.</p>
7 February 2019	<p>Mr D emailed the lender saying he thought it had just tried to call him, but he was in a phone black spot. He asked it to send him an email.</p> <p>The lender sent Mr D an email asking him to provide an update regarding interest payment.</p>
8 February 2019	<p>Mr D emailed the lender saying he was at the same place as the day before with very little phone coverage, that they would be seeing a solicitor and that he would let it know regarding the payment as soon as he received confirmation it had been released.</p>
27 February 2019	<p>The lender sent Mr D an email requesting an update regarding the deed.</p>
5 March 2019	<p>Mr D emailed the lender advising he was having trouble meeting up with the solicitor because of conflicting work hours.</p>
11 March 2019	<p>Deed of forbearance signed.</p> <p>Mr D emailed the signed deed of forbearance to the lender.</p>

Date	What happened
12 March 2019	The lender emailed Mr D thanking him for providing the deed and advising that they were waiting for the promised partial lump sum payment as per the deed and the weekly amount.
15 March 2019	Mr D emailed the lender advising he would make a payment that day and would send through remittance once done.
16 March 2019	The lender emailed Mr D stating it had not received the \$620 due on 11 March 2019 under the deed and that it also required the next \$620 payment by 18 March 2019.
8 April 2019	The lender emailed Mr D requesting a certificate of currency of insurance as theirs was due to expire on 11 April 2019.
29 April 2019	Mr D emailed the lender to advise he would catch up the weekly payments at the end of the week.
15 May 2019	Mr D emailed the lender advising that due to Mrs D's health issues, they had placed the business on hold. He said he had taken a job offer that allowed him to work with flexible hours and included a company car. He said he would be earning the same amount of money every week and not be dangling on promises of payment. He said he had paid two weeks of the rent and this job would allow him to pay two weeks each week until they are caught up. He thanked the lender for its patience and understanding.
16 May 2019	The lender relied to Mr D's email advising it was good news regarding Mr D's job, but its lawyers were now handling the file, so he would need to contact them directly to discuss those matters.
11 June 2019	The complainants lodged this complaint with AFCA.
18 June 2019	<p>The Court was made aware of the existence of the AFCA complaint and the deed of forbearance, including the provisions in the deed that say the complainants agreed not to stop the eviction and not to filing a complaint with AFCA.</p> <p>The Court proceeded to make orders:</p> <ul style="list-style-type: none"> • setting aside the January 2019 default judgment

Date	What happened
	<ul style="list-style-type: none"> that a new default judgment should not be entered by the Court while AFCA was considering the complaint.

3.5 Timeline of AFCA complaint and subsequent enforcement action

Timeline of relevant events

Date	What happened
11 June 2019	The complainants lodged this complaint with AFCA. The lender was notified by email from AFCA of this complaint.
18 June 2019	The lender filed a Notice of Motion for Default Judgment for Possession. The Court set aside the January 2019 default judgment and made orders that a new default judgment should not be entered by the Court while AFCA was considering the complaint. Enforcement action then ceased.
6 August 2019	AFCA sent a Rules assessment to both parties excluding the complaint pursuant to paragraph C.2.1. of AFCA's Rules. The complainants were given until 5 September 2019 to provide further information or reasons why we should reconsider our decision to close the complaint.
3 September 2019	The complainants contacted the case worker seeking an extension of time and to advise that they wished to engage legal representation.
6 September 2019	The lender filed a Notice of Motion for Default Judgment for Possession.
9 September 2019	The lender filed a Notice of Motion for Writ for Possession. After receiving the appropriate completed authority form so that AFCA could deal with the representative going forward, an extension was granted until 13 September 2019.
10 September 2019	AFCA called the lender and advised that the complaint had not been closed on 5 September 2019 as previously indicated. AFCA also advised that the complainants had engaged a lawyer and sought additional time which was

Date	What happened
	granted. In response, the lender advised that it had recommenced legal action against the complainants. At this time, AFCA reminded the lender that the file had not been closed and that all recovery action needed to cease.
13 September 2019	The complainants emailed AFCA saying that the lender was still engaging in recovery action. AFCA contacted the lender querying its recovery action and noting the previous discussion on 10 September 2019 that all recovery action must be stopped. The lender queried when the complaint would be closed. In response, AFCA advised that given it had breached AFCA's Rules by engaging in recovery action whilst the complaint was open, this also needed to be investigated.
17 October 2019	The lender notified AFCA it has ceased enforcement action.

3.6 Relevant provisions of AFCA's Rules

Restrictions on financial firms during a complaint

A.7.1 While AFCA is considering a complaint, the Financial Firm is subject to the following restrictions.

- a) The Financial Firm must not begin legal proceedings against the Complainant, anyone else joined as a party to the complaint or Other Affected Party about any aspect of the subject matter of the complaint.
- b) The Financial Firm must not seek judgment or take other action to pursue debt recovery legal proceedings that the Financial Firm began before the Complainant submitted the complaint to AFCA, other than to the minimum extent necessary to preserve the
- c) The Financial Firm must not take any action to:
 - (i) recover a debt the subject of the complaint, including enforcement of a default judgment obtained in Court,
 - (ii) protect any assets securing that debt, (iii) assign any right to recover that debt, or
 - (iv) list a default on a Complainant's credit file.

AFCA's exclusions of a complaint

A.4.5 If AFCA excludes a complaint, AFCA will give written reasons to the Complainant and specify the timeframe within which the Complainant may object to this decision.

A.4.6 If the Complainant objects within the specified timeframe, AFCA will review the decision if AFCA is satisfied that the objection may have substance. If this is the case, AFCA will inform the Financial Firms involved in the complaint and provide them with an opportunity to make submissions before AFCA makes a final decision as to whether to consider the complaint.

3.7 Matters not considered

AFCA has based its assessment on the loan being regulated

AFCA notes that the loan refinanced a line of credit held by the complainants but that we do not have information showing what the majority of those line of credit funds were used for. Both the lender and the complainants say the purpose of the loan was predominantly to refinance the complainants' line of credit, which was their home loan. If this is correct, the loan is regulated.

However, in the absence of information showing what the line of credit funds were used for (and if they were indeed used to purchase the complainants' home), AFCA cannot determine whether or not the loan is regulated.

In any event, as the parties are in agreeance, for AFCA's assessment it has been assumed that the loan is regulated, which requires the lender to comply with higher and more stringent guidelines than is necessary for unregulated loans.



██████████
Case Manager

Australian Financial Complaints Authority

Determination

Case number	645255
Complainants	Mr Michael Dews & Mrs Jacqueline Dews
Financial firm	Eastwood Securities Pty Ltd

1 Determination overview

1.1 Complaint

In April 2018, the financial firm (lender) provided the complainants (Mr D and Mrs D) with a loan for \$1,020,000 (loan). The loan is secured by the complainants' residential property (property).

The loan term was for 12 months and required monthly interest repayments of \$10,157.50. It was the parties' intention that during the 12-month period after the loan was advanced, the complainants would sub-divide and sell a portion of the property.

The complainants did not make the required interest repayments due to the loan and the lender eventually commenced proceedings for possession of the property. In January 2019, the lender obtained default judgement against the complainants. That default judgement has since been set aside by the court.

This complaint is about whether the lender:

- acted responsibly when it approved the loan
- met its financial difficulty obligations, or
- has made any other error in its dealings with the complainants.

On 4 June 2020, an Australian Financial Complaints Authority (AFCA) case manager provided the parties with a recommendation on the issues in dispute. The recommendation was substantially in favour of the lender and a copy of it has been attached to this determination. The complainants have rejected the recommendation for reasons set out in section 2.

1.2 Issues and key findings

Were the findings of the recommendation correct?

The substantive findings contained in the recommendation were correct and are adopted in this determination. However, I consider the complainants are entitled to \$4,000 for non-financial loss compensation as a result of the lender's continued debt collection activity while this complaint was open.

Do the complainants' further submissions change the outcome?

The complainants' further submissions do not change the outcome. I am satisfied the available information shows the lender acted responsibly when it approved the loan. I am also satisfied the lender acted appropriately when the loan first fell in arrears.

I also agree the lender did not act appropriately when it continued with enforcement action while this complaint remained open. The complainants are entitled to non-financial loss compensation as a result.

1.3 Determination

This determination is substantially in favour of the lender. The lender did not make any error when it provided the loan to the complainants.

However, the complainants are entitled to an award of non-financial loss compensation for reasons outlined in section 2. Therefore, within 14 days of the date the complainants accept this determination, the lender should reduce the loan by \$4,000.

The complainants remain liable to the lender for the remainder of the loan. If the complainants are continuing to experience financial difficulty, the following also applies:

- within 14 days of the complainants accepting this determination, they should provide the lender with details of their current financial position, together with a reasonable repayment arrangement for the repayment of the loan (which I note is due and payable in full)
- if the lender requires more information to make its assessment, it should write to the complainants identifying the information required. The complainants should, in turn, co-operate with the lender's reasonable requests for information
- the parties should work together to come to an arrangement. In doing so the lender should have regard to its obligations for dealing with customers in financial hardship
- the lender must genuinely consider the complainants' proposal but is not obliged to accept it if the lender does not consider it to be reasonable
- if no statement of financial position is provided by the complainants within 14 days of acceptance of this determination or if no arrangement is made within a further 14 days, the lender may exercise any rights it has under the loan contract once this complaint is closed.

If the complainants do not accept or respond to this determination, the lender may exercise any rights it has under the loan contract once this complaint is closed.

2 Reasons for determination

2.1 Were the findings in the recommendation correct?

The recommendation was correct

I have decided this case on its merits, having regard to the relevant law, good industry practice, codes of practice and previous AFCA decisions. I have taken into account all the material submitted by the parties, both before and after the recommendation. I am satisfied that the documentation I have relied on has been provided to both parties.

I am satisfied that the case manager's recommendation contains an accurate summary of the complaint, the issues to be determined, any applicable paragraphs of the Rules and any relevant law.

The recommendation was substantially in the lender's favour

The key findings in the attached recommendation include:

- The lender complied with its obligations under the *National Consumer Credit Protection Act 2009* (NCCPA) when it approved the loan because it made reasonable enquiries about the complainants' financial circumstances, the loan was suitable for the complainants' purposes and the loan was affordable.
- An AFCA industry advisor (advisor) conducted an independent serviceability assessment based on the documents available to the lender and was satisfied the loan was both suitable and affordable and it was reasonable for the lender to rely on the income figures provided by the complainants in their application.
- The lender met its financial difficulty obligations to the complainants once it became aware the complainants were in financial difficulty.
- The lender continued with enforcement action against the complainants while this AFCA complaint was open, which was in breach of AFCA's Rules. The complainants were entitled to an award of \$1,500 non-financial loss compensation each as a result (total of \$3,000).

The complainants rejected the recommendation

The complainants rejected the recommendation for several reasons including:

- In November 2017, the lender initially rejected their loan application however, this initial application was not included in AFCA's investigation.
- The lender made it clear the application could be lodged but as a condition of approval Mr D would need to be released from bankruptcy. This was always part of the process.
- Part of the information they supplied to the lender in support of the loan application was information showing they were in receipt of family allowance payments and other benefits. Based on the lender's calculations which ultimately led to the approval, they would not have been eligible for any benefits and would have been

breaking the law in receiving benefits. This is a red flag and the lender did not make sufficient enquiries in this regard and it manipulated the final assessment.

- The lender's Australian Securities and Investment Commission (ASIC) checks on the company would have shown that the company had been deregistered due to non-payment of the annual fees. They had to apply to ASIC to reregister the company so that the loan application could proceed, and this should have been a red flag to the lender regarding their ability to afford the loan repayments.
- The disbursement of the loan funds showed that they were behind in their council rates by approximately \$15,000.
- The non-financial loss compensation of \$3,000 is inadequate given the legal fees they have incurred.

Neither party rejected the findings in the recommendation regarding the lender's financial difficulty obligations or continued enforcement action while the AFCA complaint was open. I have reviewed these findings and agree with them. As I agree with them and they have not been disputed, I will not discuss them any further below.

2.2 Do the submissions change the outcome?

The lender acted responsibly when it approved the loan

Section 3.1 of the attached recommendation accurately sets out in detail the lender's obligation to act responsibly when it assesses a loan application.

In forming my view that the lender acted responsibly in this instance, I have considered all of the information available to the lender at the time it made its decision. I have also referred the lender's file to AFCA's industry advisor to review.

I acknowledge the complainants' position that there were "red flags" that ought to have indicated that the lending was not affordable. However, I disagree that these factors result in the lending being irresponsible.

In this instance, the lender is not a mainstream lender (such as a bank) and specifically markets itself as a financial firm who provides loans to consumers that may not qualify for lending with a traditional bank. On its website, the lender states:

[We] can provide loan structures to borrowers who have been refused by banks and other lenders or for borrowers who do not have time to satisfy the red tape process.

It is undisputed that Mr D was previously bankrupt. Whether or not a financial firm agrees to lend money to a consumer who has previously been bankrupt is a question for the risk appetite of that financial firm. However, it was entirely appropriate that before agreeing to advance the loan, Mr D be discharged from bankruptcy. This was because the ownership of the property needed to revert to the complainants (Mrs D) and in order for this to occur, Mr D's bankruptcy trustee needed to agree. The trustee

would only do so upon receipt of \$40,000, which is what part of the loan funds were used for.

I also do not consider the fact the complainant's company (who was the corporate trustee of the family trust) needed to be re-registered is a red flag. Often companies are deregistered because they fail to pay ASIC's company registration fee – this is a nominal amount.

The complainants say the lender's initial decision to decline the loan ought to be regarded as a red flag. The fact that a loan application is initially declined, and then later approved, does not mean the ultimate decision to approve the loan is irresponsible. Between November 2017 when the loan was initially declined to April 2018 when the loan was funded, the lender obtained additional information from the complainants. Also, during this period, Mr D was discharged from bankruptcy.

The lender was well-aware of the complainants' financial circumstances. I note that as part of their application to the broker, the complainants provided a three-page letter that explained, in detail, their financial circumstances and that Mr D was previously bankrupt. An extract of the letter included:

... we just want to clear everything up, as far as debts and move on with our lives.

To do this we need to move forward with the sub-division of property, which has been previously approved, although due to the time past the council advise we reapply as it will be a much faster process, due to the law changes since our original approval. We plan on using the refinance to pay out the existing mortgage and the caveators who are registered on title. As part of this I will be discharged from the bankruptcy. We will finalise the sub-division and sell the land as a means of paying out the refinance. This will leave us with our existing house and no debts.

The lender was aware of the complainants' past problems but was prepared to assist them with their strategy to sub-divide their property for the purpose of repaying longstanding business debt.

The loan was affordable and not unsuitable for the complainants

In order to determine whether the lender appropriately assessed the loan application, AFCA conducted its own independent serviceability assessment for the loan based on the available information about the complainants' financial position at the time of lending. Based on AFCA's review, the loan met the complainants' needs as they demonstrated capacity to repay the loan over the short term pending substantial debt reduction from the sale of the new subdivided property. Further, AFCA's serviceability assessment shows the complainants had an overall monthly surplus of \$2,213 when making the monthly repayments required under the loan.

I am satisfied the information available to the lender showed the complainants were able to meet the loan repayments without experiencing financial difficulty. AFCA's serviceability assessment is contained in section 3 of the attached recommendation.

I also asked the advisor to review the complainants' reasons for rejecting the recommendation and consider whether that would change his view. The advisor does not consider the complainants' reasons for rejecting the recommendation change his view. I agree with the advisor's view. The information shows the lender requested a substantial amount of financial information from the complainants and reasonably formed the view they could afford the loan repayments.

It is also important to note that the loan was intended to be paid in full in 12 months. During those 12 months, the complainants were required to make interest only repayments, but the full amount of the loan was due to be repaid within those 12 months. This has not occurred. I understand the sub-division has not been finalised. The loan is significantly in arrears, with the last repayment having been made on 9 July 2019. It appears that the only viable way for the complainants to repay the loan to the lender is for the property to be sold.

The lender should compensate the complainants for their non-financial loss

The complainants say the amount of non-financial loss compensation awarded in the recommendation was inadequate as they have incurred legal fees and stress and inconvenience.

The lender is not required to compensate the complainants for their legal fees. This is because the legal fees incurred by the complainants were incurred prior to the AFCA complaint being opened and prior to the financial firm's error in continuing enforcement action. In each instance when AFCA was notified of the financial firm's continued enforcement action, the financial firm was notified and ceased this enforcement action at its own cost.

The case manager correctly noted that AFCA can award non-financial loss to compensate for stress or inconvenience caused by an error of a financial firm. The case manager also correctly noted that the maximum amount we can award for non-financial loss is \$5,000 for each claim.

I agree with the case manager's findings in the recommendation that the complainants suffered a degree of stress and inconvenience as a result of the lender continuing enforcement action while this complaint was open. However, I consider the amount of non-financial loss should be increased to a total of \$4,000 (\$2,000 each). If the complainants accept this determination, this amount should be applied to the loan to reduce its outstanding balance.

3 Supporting information

3.1 AFCA's approach to this complaint

This complaint has been determined based on what is fair in all the circumstances, having regard to the relevant law, good industry practice, codes of practice and previous decisions of AFCA or its predecessor schemes (which are not binding).

A full exchange of the relevant information has taken place between the respective parties. Each party has had the opportunity of addressing any issues raised.

All the provided material has been reviewed and considered. The parties have raised numerous issues in their submissions to AFCA. However, commentary in this determination is restricted only to those issues considered relevant to the outcome.




Ombudsman
Australian Financial Complaints Authority

Recommendation

Case number	645255
Complainant	Mr Michael Dews & Mrs Jacqueline Dews
Financial firm	Eastwood Securities Pty Ltd

1 Overview

1.1 Complaint

In April 2018, the financial firm (lender) provided the complainants (Mr and Mrs D) with a loan for \$1,020,000 (loan).

The loan is secured by a residential property (property).

The lender had obtained default judgement against Mr and Mrs D, but that judgement has since been set aside by the Court.

This complaint is about whether the lender:

- acted as a responsible lender when it approved the loan,
- met its financial difficulty obligations.

1.2 Issues and key findings

Did the lender act responsibly when it provided the loan?

The lender acted responsibly when it provided the loan. The lender made reasonable enquiries and the loan was both suitable and affordable.

Did the lender meet its financial difficulty obligations?

In the circumstances, the lender met its financial difficulty obligations as it requested details of the complainants' financial circumstances and attempted to reach an arrangement with them.

Did the lender breach any other obligations owed to the complainants?

The lender continued and recommenced enforcement action while this complaint was open with AFCA. This was in breach of its member obligations under AFCA's Rules.

What is an appropriate outcome for the complaint?

The lender should compensate the complainants a total of \$3,000 non-financial loss compensation for the stress and inconvenience incurred as a result of the lender continuing and recommencing enforcement action while this complaint was open with AFCA.

1.3 Recommendation

This recommendation is substantially in favour of the lender. The complainants remain liable for the outstanding debt under the loan.

Within 14 days of both parties accepting this recommendation the lender should credit a total of \$3,000 non-financial loss compensation to the loan to reduce its balance.

If the complainants are continuing to experience financial difficulty, the following also applies:

- within 14 days of both parties accepting this recommendation, the complainants should provide details to the lender of their current financial position, together with a reasonable repayment arrangement acceptable to the lender for the repayment of the debt
- if the lender requires more information to make its assessment, it should write to the complainants identifying the information required. The complainants should, in turn, co-operate with the lender's reasonable requests for information
- the parties should work together to come to a repayment arrangement. In doing so the lender should have regard to its obligations for dealing with customers in hardship contained in the National Credit Code and/or the Code of Banking Practice
- the lender must consider the complainants' proposal but is not obliged to accept it if the lender does not consider it to be reasonable
- if no statement of financial position is provided by the complainants within 14 days of acceptance of this recommendation or if no arrangement is made within a further 14 days, and the loan remains in arrears, then the lender may be entitled to continue recovery action under the terms of the loan once the complaint is closed.

If the recommendation is not accepted by both parties, the lender is not required to do any of the above.

2 Reasons for recommendation

2.1 Did the lender act responsibly when it provided the loan?

The lender acted responsibly when it provided the loan

When a lender provides consumer credit, it must comply with the “Responsible Lending” provisions of the National Consumer Credit Protection Act 2009 (National Credit Act). Details of the lender’s obligations are set out in section 3.1 below.

The relevant time for the assessment is at the time of lending. If the consumer was initially able to meet their obligations under a credit contract but experienced difficulties after a change in their circumstances, this is considered a complaint about financial difficulty.

The complainants say the lender did not act responsibly when it provided the loan for several reasons. Details of the complainants’ claims are set out in section 3.2 below.

For the reasons set out below, the lender acted responsibly when it provided the loan because it was:

- provided after the lender made reasonable enquiries
- suitable for the complainants’ purposes
- affordable, and
- not inappropriate for any other reasons.

The lender made reasonable enquiries

The available information shows the lender did not just rely on the figures from the application when it approved the loan. Rather, the lender obtained several documents to verify the complainants’ financial position at the time of the lending. Among other things, the lender received or obtained:

- detailed explanation of debts owed and the compromised amount payable if finance approved
- Trust Deed Family Trust
- Family Trust financial accounts as at 30 June 2017
- account statements for debts held by other financial firms
- rate notices
- personal transaction account statements for an account held by other financial firms
- credit reports
- ASIC company extract

By obtaining this information, the lender complied with its obligation to make reasonable enquiries and verify the information provided on the loan application.

The loan was not unsuitable for its stated purpose

Based on the available information, both parties freely entered into a short term 12-month arrangement with the expectation that sale of the new sub-divided lot would discharge a substantial component, if not all, of the loan.

The lender made reasonable enquiries and the loan offered was suitable in meeting the complainants' objective of completing the sub-division.

Accordingly, the loan was suitable for the complainants.

The loan was affordable

AFCA conducted a serviceability assessment for the loan based on the available information about the complainants' financial position at the time of lending.

Based on the available information, Mrs D is the sole director of a company (company) that is the trustee for Mr and Mrs D's Family Trust (Trust). Mr D is employed by the Trust and is paid a management fee. The Trust appears to have been the complainants' principal source of income. There is no information to indicate the lender was not entitled to rely on the Family Trust's 30 June 2017 financial accounts that it received.

Based on AFCA's review, the complainants demonstrated capacity to repay the loan over the short term pending substantial debt reduction from the sale of the new lot.

AFCA's serviceability assessment shows the complainants had an overall monthly surplus of \$2,213 when making the monthly repayments required under the loan. This means the complainants were able to meet the loan repayments without experiencing financial difficulty. Details of AFCA's serviceability assessment are set out in section 3.3 below.

2.2 Did the lender meet its financial difficulty obligations?

The lender has obligations to customers in financial difficulty

The lender is required to genuinely consider a request for assistance from a customer in financial difficulty. The customer must also be willing to work with the lender and propose a realistic repayment plan that will repay the debt within a reasonable timeframe.

The lender met its financial difficulty obligations

The lender's contact notes and its emails with the complainants (detailed in section 3.4 below) support the conclusion that it attempted to give genuine consideration to the complainants' financial difficulty.

In particular:

- on 12 September 2018, the complainants first expressed that they were experiencing hardship during a phone call with the lender. Prior to this, the complainants had made promises to pay and advised that while the cash flow was not up to where projected, they expected funds to come in.
- on 19 September 2018, the lender requested the complainants provided additional information regarding their financial position.
- After following up on 24 September 2018, the lender again requested financial information from the complainants on 4 October 2018.
- on 5 October 2018, Mr D advised he was working full time again.
- on 8 October 2018, Mr D provided the lender with an updated cash flow statement.
- on 8 October 2018, after receiving the financial information from the complainants, the lender advised that a deed of forbearance would be the best option to catch up the arrears.

In the circumstances, the lender did not breach its financial difficulty obligations as it requested details of the complainants' financial circumstances and attempted to reach an arrangement with them.

2.3 Did the lender breach any other obligation owed to the complainants?

The lender continued and recommenced enforcement action

The lender continued and recommenced enforcement action while the complaint was open with AFCA. A timeline of the relevant events is set out in section 3.5 below.

Based on the available information, following AFCA's jurisdictional review, the lender was not notified of the complainants' extension request by AFCA until some seven days after the request was made. In this instance there was a five-day period between 5 September 2019 (deadline for reply by the complainants) and 10 September 2019 where AFCA made contact with the lender.

However, regardless of this 5-day period, the lender recommenced recovery action even though it had not received any automated email notification from AFCA about the complaint's closure. The lender has had previous complaints with AFCA and its predecessor scheme in which email notifications in this regard were sent to it confirming closure.

The lender continued or commenced recovery action in breach of AFCA Rule A.7.1 when it:

- filed a Notice of Motion for Default Judgment for Possession on 18 June 2019
- filed a Notice of Motion for Default Judgment for Possession on 6 September 2019
- filed a Notice of Motion for Writ for Possession on 9 September 2019.

All of the above actions were taken by the lender while the complaint with AFCA was open. The relevant provisions of AFCA's Rules are set out in section 3.6 below.

2.4 What is an appropriate outcome for the complaint?

The lender should compensate the complainants for their non-financial loss

AFCA is able to award non-financial loss to compensate for stress or inconvenience caused by an error of a financial firm. The maximum amount we can award for non-financial loss is \$5,000 for each claim.

In this complaint, the complainants are likely to have suffered a degree of stress and inconvenience. It is therefore appropriate for the lender to pay the complainants a total of \$3,000 (\$1,500 each) for the stress and inconvenience they experienced as a result of the lender continuing enforcement action while the complaint was open with AFCA. This should be applied to the loan to reduce its outstanding balance.

3 Supporting information

3.1 The bank has obligations as a responsible lender

A lender must not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer. The provision of credit will be unsuitable if:

- the consumer could not comply with their financial obligations under the credit contract, or only with substantial hardship, or
- the credit does not meet the customer's requirements and objectives.

Meeting the responsible lending obligations requires taking three steps:

- making reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
- taking reasonable steps to verify the consumer's financial situation; and
- making a final assessment about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

3.2 The complainants' position

The complainants say the lender acted irresponsibly when it provided the loan as:

- Mr D was bankrupt at the time of the initial application that was declined, and the lender used all the same documents they supplied for the initial application,
- Mr D was released from bankruptcy on 31 January 2018. The trustee had objected to his release for a few years but because he was going to pay \$40,000 from the proceeds of the loan, he agreed
- the loan was not affordable for them at the time it was provided, and
- they were instantly placed into financial difficulty and were unable to make repayments for the loan.

3.3 Serviceability assessment

AFCA's serviceability assessment

Details	Amount
Monthly income	
PAYG income	\$5,206
Business trading cash	\$10,501
Total monthly income	\$15,707

Details	Amount
less monthly expenses	
New loan	\$10,158
Living expenses	\$3,336
Total monthly expenses	\$13,494
Surplus	\$2,213

This assessment is made on the following bases:

- the complainants PAYG income of \$31,959 and \$38,125 as paid to them by the Family Trust
- business trading cash available after tax is based on the trading to 30 June 2017 plus depreciation added back (\$126,018)
- new loan repayments based on the amount of \$1,020,000 at 11.95%
- living expenses using the Housing Expenditure Measure's (HEMs) data for the third quarter in 2017 for two people with two dependents (\$770 per week or \$40,040 per annum)

3.4 Timeline of contact between lender and complainants

Timeline of relevant contact

Date	What happened
18 July 2018	The lender called the complainants as the loan was two months (\$21,410.42) in arrears with another payment (\$10,705.21) due on 26 July 2018. Complainants make promise to pay: \$7,500 on 20 July 2018, \$7,500.00 on 25 July 2018 and \$8,000 on 3 August 2018.
20 July 2018	Mr D emailed the lender remittance for payment. He said he had only paid \$5,000 and a second payment would be made the following week. He said he realised they were not up to the cashflow prediction they had sent the lender but would be back on track by the week of 3 August 2018 and requested the lender give them that time. The lender replied to Mr D requesting more information regarding the complainants proposed payments. It advised that as of 26 July 2018 they would be three months payment in arrears, being \$32,115.63 (\$27,115.63 less the \$5,000 paid). It requested the complainants provide it with a proposed payment program to catch up the arrears.
24 July 2018	Mr D emailed the lender advising that he had updated the cashflow and payment program to reflect what would be coming in between then and 3 August 2018. He said he had had a few unavoidable changes in work flow

Date	What happened
	and he had to have a couple of days off due to a family matter and these things had impacted the amount and timing of incoming monies.
8 August 2018	<p>The lender emailed the complainants regarding arrears as only \$5,000 had been paid to loan since settlement. Arrears owing \$29,722.50</p> <p>The lender called the complainants. Mr D advised that four jobs he had scheduled had all been delayed and were now underway. He was driving and unable to talk so said he would email that night with details regarding payments.</p>
9 August 2018	The lender emailed the Mr D to advise it had not received the promised payments (of \$3,000 on 26 July 2018, \$7,500 on 30 July 2018, \$6,000 on 1 August 2018, \$6,000 2 August 2018 and \$5,000 on 8 August 2018) and the loan was \$29,722.50 in arrears
10 August 2018	Mr D emailed the lender saying that projects he had depended on for cashflow had been delayed, with one being cancelled completely and that this had impacted heavily on the forecast he had previously sent. He attached another cash flow projection. He said he expected to have the council approval for the subdivision within the next four weeks and he would send it when received.
22 August 2018	Notice of default issued to the complainants.
3 September 2018	Mr D emailed the lender saying he would call the following day or day after and that he was waiting for an answer on a payment. He said he was trying to arrange payments as quickly as he could.
7 September 2018	Mr D emailed the lender twice asking if it could send him a letter stating the arrears and what dates the money was due on its letterhead.
10 September 2018	The lender emailed Mr D the statement he had requested
12 September 2018	The lender spoke to Mr D via telephone who advised 1. He has had no work other than a \$54,000 contract which had been delayed. 2. He had a substantial workers compensation claim which had been three years in process and that he recently applied for an interim payment on the grounds of hardship. 3. He had hoped that the interest on the loan could be capitalised. 4. That the renovations identified by the valuer had not been done and the house remained in a poor state of repair 5. That he did not

Date	What happened
	<p>have any funds to complete the proposed land division. 6. Mrs D's father was very ill in Wales and he did not want to bother her with this issue and he had borrowed money from a family member to pay for her and his daughter to travel to Wales. The lender informed Mr D of the state of arrears and that legal recovery action was imminent. Mr D requested that he be given another week to explore his options. The lender informed Mr D that complainants may wish to consider giving their agreement to handing over formal possession of the security property to the lender who in turn would allow the complainants to market the sale of the property themselves. The lender further informed Mr D that if during the sales process they were able to catch up the interest, possession of the property could be restored to them. It said this process would allow them up to three months to pay outstanding arrears so as to retain the property. Mr D said he would consider their options and let the lender know their decision on 17 September 2018.</p>
18 September 2018	<p>The lender emailed Mr D and requested he call it that day to discuss a longer-term solution and that it may have a proposition that would assist.</p>
19 September 2018	<p>Mr D emailed the lender and attached four emails regarding his financial information.</p> <p>The lender replied to Mr D via email that it was clear from the information he had provided that there would not be any funds available in the short term to ease the loan arrears. It said the best way forward would be a forbearance arrangement with the mortgage that would allow the complainants the opportunity to further explore the land division opportunity that may be available to them. It requested they provide additional information and said when all of the information was provided, it would see if it could provide a deed of forbearance which would allow an agreement for it to take possession as mortgagees, complete the land division and then upon sale of the new allotment, bring the loan back into order. It said if that could be achieved, it could also extend a temporary interim moratorium on interest payments pending the unit sale (and/or a refinance based on the increased value of the security).</p> <p>The lender emailed Mr D saying it had attempted to call him. It requested he return its call urgently.</p>
20 September 2018	<p>The lender emailed Mr D advising that once the information requested in its email of 19 September 2018 was provided, it could be presented to its credit committee with the aim of having the pending loan default action against him deferred.</p>

Date	What happened
	<p>Mr D emailed the lender regarding the council approval process. He attached approval documents from a water company.</p> <p>The lender emailed Mr D requesting contact details for people who would be able to assist in gaining the approvals. It also asked him to provide some contact details of local real estate agents who could give appraisals of what the property may value at with a land division in place.</p>
24 September 2018	The lender called Mr D to chase up the requirements of its email dated 19 September 2018. Mr D stated that he would have the required information including surveyor details to it by 25 September 18.
25 September 2018	The lender emailed Mr D requesting an update regarding their telephone conversation the day before.
4 October 2018	The lender emailed Mr D advising that whilst it is prepared to consider assisting with the subdivision of the property dependent upon satisfactory advice from the surveyor and council, it requires interest payments to be made even if they are less than the overdue amount. It said it also required an update on his current work status and income in order to review the complainants' loan circumstances. It asked Mr D to advise when a portion or all of the interest payments could be made including the amount in order to assist in preventing debt recovery action.
5 October 2018	Mr D emailed the lender saying he was working full time again, so he would put something together and would be able to give it a full understanding of where they are at financially.
8 October 2018	<p>Mr D emailed the lender an updated cashflow projection.</p> <p>The lender emailed Mr D following its telephone conversation with him and proposed the best way forward to catch up arrears and bring the loan into order is to enter into a deed of forbearance. It said this would give it voluntary possession of the complainants' home with an agreement that they be permitted to remain in residence for a period of up to six months and that during that six month period they as borrowers would make weekly partial interest payments (to be determined and agreed) and that the complainants would do all things to facilitate and assist the creation of a subdivision of land. At the end of the six-month period the new allotment be sold with full sale proceeds to be applied to the reduction of the outstanding loan plus interest plus costs. At this time the property could be returned to the complainants on the basis that they are able to refinance the</p>

Date	What happened
	outstanding balance or arrange with the lender for a new loan to repay the outstanding balance.
11 October 2018	Mr D emailed the lender advising he was waiting on his solicitor to review the documents and arrange settlement.
12 October 2018	The lender emailed Mr D following a conversation with him that day confirming that it had been instructed by its solicitors to prepare an application for possession to the Court due to the complainants' non-payment of interest and that this application would be served on them within the coming weeks. It said notwithstanding this action it remained its intention to enter into a deed of forbearance with them to allow completion of a land division. It also noted Mr D's advice of making an interest payment during the week ended 19 October 2018.
26 October 2018	Statement of claim filed by the lender.
1 November 2018	<p>The lender emailed the complainants following a discussion with Mr D regarding voluntary possession under a deed of forbearance. The email outlined the key points for discussion in an upcoming meeting.</p> <p>Mr D responded via email that the proposal outlined by the lender looked fine and the he would discuss with Mrs D and get back to the lender.</p>
13 November 2018	<p>The lender emailed Mr D the deed of forbearance and asked if payment had been made.</p> <p>Mr D replied to the lender advising that payment had been made the day before.</p> <p>The lender emailed Mr D confirming payment received.</p>
14 November 2018	The lender emailed Mr D and asked him if he had read through the deed. It said it had commissioned surveyors to start on the project and it would be appropriate to have the deed in place prior to that.
15 November 2018	Mr D emailed the lender saying he had looked through the document and was regarding what would happen if they missed a payment date. He noted that the lender had been more than accommodating on previous occasions and asked if it would still have discretion regarding this.

Date	What happened
	The lender emailed Mr D advising that under the deed, it would allow the complainants a week to remedy any default.
16 November 2018	The lender emailed Mr D to ask if he had the survey report from Mr H yet. Mr D emailed the lender the survey report.
22 November 2018	The lender emailed Mr D to advise it had not yet received the signed deed.
23 November 2018	Mr D emailed the lender and advised Mrs D was away, so he could not sign the document until the following Monday. The lender replied to Mr D's email following its telephone conversation with him. It advised it required payment of \$3,000 as per their arrears agreement, the deed to be signed and returned, Mrs D to make herself available for service of the default notice and the council application signed and returned.
17 December 2018	Mr D emailed the lender advising he had missed a call from it. He said he would be making a payment of \$2,000 that day. He said the documents the lender had sent looked fine and he would send remittance once the payment was made.
9 January 2019	Mr D emailed the lender saying he had not made a payment for a few weeks because he was waiting for the payment he was expecting in late December. He said they had pretty much been living on thin air but he was hoping it would come in over the coming week. He said he would let it know when it was confirmed.
14 January 2019	The lender attempted to call Mr D on his mobile. No answer and no message left.
15 January 2019	Mr D emailed the lender saying he missed its call and was having trouble with his phone. He said they had an appointment with a solicitor booked and would send the signed documents to it after the appointment. He also said he would be paying money in two days' time and would send a remittance once done.

Date	What happened
18 January 2019	<p>Mr D emailed the lender saying there was a delay as the solicitor had not read the documents. He said they would send the documents on the following Monday.</p> <p>Default judgement obtained by the lender.</p>
23 January 2019	<p>Writ for possession issued</p>
25 January 2019	<p>Mr D emailed the lender stating \$620 was a realistic rental figure.</p>
29 January 2019	<p>Sheriff's notice to vacate issued requiring complainant to vacate property by 11.30am on 12 March 2019</p>
5 February 2019	<p>The lender emailed Mr D a copy of the new deed of forbearance for consideration. It advised its concern that the complainants had on three or four occasions promised to make a substantial interest payment but not made those promised payments. It asked him to advise when they would be making the payment.</p>
7 February 2019	<p>Mr D emailed the lender saying he thought it had just tried to call him, but he was in a phone black spot. He asked it to send him an email.</p> <p>The lender sent Mr D an email asking him to provide an update regarding interest payment.</p>
8 February 2019	<p>Mr D emailed the lender saying he was at the same place as the day before with very little phone coverage, that they would be seeing a solicitor and that he would let it know regarding the payment as soon as he received confirmation it had been released.</p>
27 February 2019	<p>The lender sent Mr D an email requesting an update regarding the deed.</p>
5 March 2019	<p>Mr D emailed the lender advising he was having trouble meeting up with the solicitor because of conflicting work hours.</p>
11 March 2019	<p>Deed of forbearance signed.</p> <p>Mr D emailed the signed deed of forbearance to the lender.</p>

Date	What happened
12 March 2019	The lender emailed Mr D thanking him for providing the deed and advising that they were waiting for the promised partial lump sum payment as per the deed and the weekly amount.
15 March 2019	Mr D emailed the lender advising he would make a payment that day and would send through remittance once done.
16 March 2019	The lender emailed Mr D stating it had not received the \$620 due on 11 March 2019 under the deed and that it also required the next \$620 payment by 18 March 2019.
8 April 2019	The lender emailed Mr D requesting a certificate of currency of insurance as theirs was due to expire on 11 April 2019.
29 April 2019	Mr D emailed the lender to advise he would catch up the weekly payments at the end of the week.
15 May 2019	Mr D emailed the lender advising that due to Mrs D's health issues, they had placed the business on hold. He said he had taken a job offer that allowed him to work with flexible hours and included a company car. He said he would be earning the same amount of money every week and not be dangling on promises of payment. He said he had paid two weeks of the rent and this job would allow him to pay two weeks each week until they are caught up. He thanked the lender for its patience and understanding.
16 May 2019	The lender replied to Mr D's email advising it was good news regarding Mr D's job, but its lawyers were now handling the file, so he would need to contact them directly to discuss those matters.
11 June 2019	The complainants lodged this complaint with AFCA.
18 June 2019	<p>The Court was made aware of the existence of the AFCA complaint and the deed of forbearance, including the provisions in the deed that say the complainants agreed not to stop the eviction and not to filing a complaint with AFCA.</p> <p>The Court proceeded to make orders:</p> <ul style="list-style-type: none"> • setting aside the January 2019 default judgment

Date	What happened
	<ul style="list-style-type: none"> that a new default judgment should not be entered by the Court while AFCA was considering the complaint.

3.5 Timeline of AFCA complaint and subsequent enforcement action

Timeline of relevant events

Date	What happened
11 June 2019	The complainants lodged this complaint with AFCA. The lender was notified by email from AFCA of this complaint.
18 June 2019	The lender filed a Notice of Motion for Default Judgment for Possession. The Court set aside the January 2019 default judgment and made orders that a new default judgment should not be entered by the Court while AFCA was considering the complaint. Enforcement action then ceased.
6 August 2019	AFCA sent a Rules assessment to both parties excluding the complaint pursuant to paragraph C.2.1. of AFCA's Rules. The complainants were given until 5 September 2019 to provide further information or reasons why we should reconsider our decision to close the complaint.
3 September 2019	The complainants contacted the case worker seeking an extension of time and to advise that they wished to engage legal representation.
6 September 2019	The lender filed a Notice of Motion for Default Judgment for Possession.
9 September 2019	The lender filed a Notice of Motion for Writ for Possession. After receiving the appropriate completed authority form so that AFCA could deal with the representative going forward, an extension was granted until 13 September 2019.
10 September 2019	AFCA called the lender and advised that the complaint had not been closed on 5 September 2019 as previously indicated. AFCA also advised that the complainants had engaged a lawyer and sought additional time which was

Date	What happened
	granted. In response, the lender advised that it had recommenced legal action against the complainants. At this time, AFCA reminded the lender that the file had not been closed and that all recovery action needed to cease.
13 September 2019	The complainants emailed AFCA saying that the lender was still engaging in recovery action. AFCA contacted the lender querying its recovery action and noting the previous discussion on 10 September 2019 that all recovery action must be stopped. The lender queried when the complaint would be closed. In response, AFCA advised that given it had breached AFCA's Rules by engaging in recovery action whilst the complaint was open, this also needed to be investigated.
17 October 2019	The lender notified AFCA it has ceased enforcement action.

3.6 Relevant provisions of AFCA's Rules

Restrictions on financial firms during a complaint

A.7.1 While AFCA is considering a complaint, the Financial Firm is subject to the following restrictions.

- a) The Financial Firm must not begin legal proceedings against the Complainant, anyone else joined as a party to the complaint or Other Affected Party about any aspect of the subject matter of the complaint.
- b) The Financial Firm must not seek judgment or take other action to pursue debt recovery legal proceedings that the Financial Firm began before the Complainant submitted the complaint to AFCA, other than to the minimum extent necessary to preserve the
- c) The Financial Firm must not take any action to:
 - (i) recover a debt the subject of the complaint, including enforcement of a default judgment obtained in Court,
 - (ii) protect any assets securing that debt, (iii) assign any right to recover that debt, or
 - (iv) list a default on a Complainant's credit file.

AFCA's exclusions of a complaint

A.4.5 If AFCA excludes a complaint, AFCA will give written reasons to the Complainant and specify the timeframe within which the Complainant may object to this decision.

A.4.6 If the Complainant objects within the specified timeframe, AFCA will review the decision if AFCA is satisfied that the objection may have substance. If this is the case, AFCA will inform the Financial Firms involved in the complaint and provide them with an opportunity to make submissions before AFCA makes a final decision as to whether to consider the complaint.

3.7 Matters not considered

AFCA has based its assessment on the loan being regulated

AFCA notes that the loan refinanced a line of credit held by the complainants but that we do not have information showing what the majority of those line of credit funds were used for. Both the lender and the complainants say the purpose of the loan was predominantly to refinance the complainants' line of credit, which was their home loan. If this is correct, the loan is regulated.

However, in the absence of information showing what the line of credit funds were used for (and if they were indeed used to purchase the complainants' home), AFCA cannot determine whether or not the loan is regulated.

In any event, as the parties are in agreeance, for AFCA's assessment it has been assumed that the loan is regulated, which requires the lender to comply with higher and more stringent guidelines than is necessary for unregulated loans.



Case Manager
Australian Financial Complaints Authority

Paramount Mortgages
Elevation Building
Suite 25
6 Meridian Place
Baulkham Hills NSW 2153

22 November 2017

Att: [REDACTED]

Dear [REDACTED]

RE: Michael Dews

Most of our financial woes began in late 2009. I was running a successful business installing commercial cladding and building facades. We had been engaged on many large projects by some of Australia's best known corporate companies and commercial builders. Companies such as Macquarie Bank, Deloitte Touche Tohmatsu and builders such as Grocon, Brookfield Multiplex and Lend Lease.

In 2009 I decided to move into a larger factory with which in hindsight was not the best decision, mainly due to a lag in feeling the full effect of the GFC. My rent doubled and even though it was good to start with it only took about 6 months to start feeling the pinch with the increased overheads. When I moved there I believed we had ridden out the GFC but it actually hit us a bit later, as I was reasonably cashed up when we moved and had existing contracts which were not affected.

Early in 2010 I was awarded a contract at The University of Wollongong working for a large window company, who I had worked for since around 2005. They were expanding their business and had started taking on a much larger workload. That project was approximately 50% complete when they asked me to do another large job for them at UNSW. By mid 2010 our relationship was in good shape and they asked me to take the contract at Nepean Hospital. In total these 3 contracts came to around \$2.5M. Around November 2010 the Director of the company was starting to become irrational, not only with me but with everyone. He was obviously suffering some sort of anxiety but nobody guessed it was financial. I had never had a problem with payment. This problem became worse and by Christmas I was really starting to worry what was going to happen with them and as a consequence, us.

By mid January all payments from them ceased and it became worse as I had to instigate a claim through the NSW security of payment tribunal, which ended up costing us around \$12,000.00. The claim totalled \$577,321.00 and my advice was that we would win the

case before the tribunal. Unfortunately, before that could happen, the other company went into voluntary administration and ultimately liquidation, leaving us as an unsecured creditor and we received nothing. As you can imagine this devastated us financially.

At that time I had large supplier bills to pay. One in particular was CSR, who I had personal guarantees with and unfortunately they put a lot of pressure on me and threatened me with personal bankruptcy. By the end of February it became clear that I needed to sort something out as we were struggling to pay personal bills as well. I spoke with my then accountant who arranged a phone call with Andrew Aravanis who is a bankruptcy trustee. He ended up persuading me to file for bankruptcy and this was finalised on 25 February 2011. After the bankruptcy my wife took over the directorship of the company.

My wife had been to the bank the day earlier to plead for hardship allowance but she was not successful and they directed her to make 3 months of clean payments before they would consider any relief. This proved almost impossible and actually took us until November 2012 to achieve this milestone. We continued the payments until February 2013 and again approached the bank but were once again not successful. The bank officer we met was extremely helpful but was being overruled from above. He actually advised us to lodge a complaint with FOS. We lodged a FOS complaint the next day.

We continued struggling through and we managed to continue payments on the mortgage until November 2013 by using whatever money came in and going without anything which wasn't an essential. We eventually had to seek Centrelink benefits, which is no easy thing when you are associated with a company. We are no longer on any benefits other than the family allowance.

The FOS dispute commenced in February 2013 and was not finalised until January 2015. The dispute was extremely complex due to the files we received from FOS in October 2013 changing the direction of the complaint and the investigation. The FOS investigation could not conclusively prove any wrongdoing by the bank and ultimately favoured the bank. Had we have known that FOS wasn't a government ombudsman service but a private service which is funded by the banks we may not have lodged the complaint. We formally rejected the adjudication and the bank agreed to commence in house investigations which didn't formally end until May this year. They closed the investigation and advised we seek legal advice. We did this and that is how we are at this point now.

In July 2015 I was diagnosed with squamous cell carcinoma (cancer), which I was operated on for in August 2015 and I'm pleased to say the operation was successful and I am now clear from any cancer. This was obviously a very stressful time and was made worse by the passing of my father from cancer only 3 days prior to my diagnosis. It was after this that we decided to attempt to get our lives moving forward and try to get some regularity in our financial situation.

For the past 2 years we have set up regular payments for council rates, electricity and water supply. Although we were offered a loan from a friend to purchase a vehicle, we didn't accept. We have had a small car on hire since December 2015 at a rate of \$175.00 per week and have not missed any payments. We knew that if we could not afford the weekly payment we could simply hand the car back. We have learnt through the hardship how to live frugally and realise, although it's a complete turnaround from our lifestyle before this happened, there are more important things in our lives than material items.

This all took a toll on our quality of life and we are at the point now we just want to clear everything up, as far as debts and move on with our lives.

To do this we need to move forward with the sub-division of our property, which has been previously approved, although due to the time past the council advised we reapply as it will be a much faster process, due to the law changes since our original approval. We plan on using the refinance to pay out the existing mortgage and the cavaetors who are registered on the title. As part of this I will be discharged from the bankruptcy. We will finalise the sub-division and sell the land as a means of paying out the refinance. This will leave us with our existing home and no debts.

We've fought the fight for far too long now. Our daughters, who both have special needs, were 15 and 8 when we started and they're 21 and 14 now. They've had to suffer too much due to our determination to see right happen but it's taking too big a toll on our lives. We haven't given up on having the matter resolved properly with the bank, for what was wrongly done to us but we need to separate our families life from what is in reality a financial dispute, which has engulfed us for nearly 7 years.

If you require any further information please let us know.

Kind Regards

Michael and Jackie Dews

Chronology of Events – Dews default

Date:	Action:	Outcome:
27th July 2018	NOD issued by ESPL	
26th Oct 2018	Statement of Claim filed with Supreme Court	
1st Nov 2018	General discussion & emails with Dews re 1st draft forbearance deed.	
28th Nov 2018	NOD served on J Dews by process server	
19th Jan 2019	2nd draft forbearance deed provided to Dews	
21st Jan 2019	Possession Order made in favour of Eastwood Securities	
23rd Jan 2019	Supreme court issued possession order in favour of ESPL.	
25th Jan 2019	M Dews proposes a weekly rental of \$620 in lieu of full interest payments (ref hardship consideration).	This was built into the forbearance deed.
29th Jan 2019	Notice to vacate prepared by Sheriff's office.	
11th March 2019	Forbearance Deed signed by Dews	
12th March 2019	Initial eviction date.	Eviction stayed until further notice
13th May 2019	Notice to Vacate provided by Sheriff's office.	
7th June 2019	Online complaint made to AFCA at 4:22pm	
10th June 2019	Second eviction date.	Did not occur as this was a public holiday.
11th June 2019	AFCA complaint notice 645255 received by ESPL	
	Sheriff's Dept notifies that a stay of eviction has been set till 5pm 18th June and then further to 25/6 at 11:30am.	
13th June 2019	Affidavit by J Dews lodged with Supreme Court	
14th June 2019	Notice of motion lodged (by Dews) with Supreme Court seeking to extend stay of eviction, set aside default judgement & allow cross claim against defendant.	Court date set for 18th June
18th June 2019	Supreme Court sets aside judgement of 18/1/2019 'due to irregularities'. Dews also	

	advised to prepare a defence as ESPL statement of claim was still current.	
20th June 2019	Supreme Court orders that AFCA Complaint is afoot & court should not be entertaining an application for default.	
6th August 2019	AFCA writes to Dews advising Forbearance Deed up held and situations is non-jurisdictional.	Dews have to 5th Sept to provide cause to review case
9th Sep 2019	Possession Order made in favour of Eastwood Securities	
17th Sep 2019	AFCA complaint notice 667573 received by ESPL regarding taking legal action while case 645255 still 'live'.	
18th Sep 2019	ESPL reply by email refuting breach of rule A.7	
19th Nov 2019	AFCA writes to ESPL stating our forbearance deed was entered into under a "common mistake" and that ESPLK had breached AFCA rule A.7	ESPL now waiting for appointment of AFCA case worker. ESPL refutes that it breached rule A.7

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 REGISTRAR BRADFORD

TUESDAY 18 JUNE 2019

10 **2018/00329335 - EASTWOOD SECURITIES PTY LIMITED v
JACQUELINE DEWS**

Ms S Jin for the Plaintiff
Defendant appeared in person

15 ---

JIN: Ms Jin for the plaintiff and respondent to the motion.

20 REGISTRAR: Yes, Ms Dews, is it, listed in for today.

JIN: Registrar, if I could assist. Ms Dews has put in an application to extend the stay of an eviction.

25 REGISTRAR: What's your position?

JIN: We are opposing.

REGISTRAR: Is there a dispute that's been lodged with AFCA?

30 SPEAKER: Yes, there is.

DEFENDANT: Yes, and I've also applied for Legal Aid representation and I had an email from Legal Aid, 10.30 yesterday evening asking for a little more information.

35 REGISTRAR: They need more information?

DEFENDANT: Just a little more, yeah. The application has been passed, like they've marked it urgent. I've never--

40 REGISTRAR: What I'm going to do is stand the matter in the list, but can I raise something with you that you might have to get some instructions on? I note that the judgment in this matter was entered on 18 January. That to me seems almost impossible to have occurred because of this, on the same day
45 the Court issued to your firm a requisition to prevent the entry of judgment until you replied to that requisition which was replied to on 21 January. On my reading of the file there's an irregularity and the default judgment of 18 January should be set aside because of that irregularity. I'll allow you however to have
50 a look at the file and maybe get some instructions, but that would be my inclination, to set aside the default judgment. It's nothing that your firm has

done, it is something that has happened in the registry which should not have happened. It might be your lucky day Ms Dews.

5 Can I stand it in the list for time being? Re-mention it when you've got some instructions in relation to those matters, I'll just stand it down for the time being.

DEFENDANT: Thank you very much your Honour, thank you.

10 MATTER STOOD IN LIST

REGISTRAR: Yes?

15 JIN: Registrar, I've made some enquiries. In relation to the requisition notice, there was one indeed issued, but I'm informed that it was responded to, and the way in which it works is that if a requisition is issued, it allows for the keeping of the date. So the results that are on file, it's dated 21 January, but the date is indeed, of the default judgment, the 18th.

20 Perhaps more importantly, an affidavit in response to the material that was filed yesterday was filed on line. I'm not sure if that is on the Court file.

REGISTRAR: What affidavit is that?

25 JIN: The affidavit of Stephanie Sue(?) Young(?) Yin(?).

REGISTRAR: No, I don't have that.

JIN: I have a copy here.

30 REGISTRAR: Can I indicate that I can't see how the default judgment can stand because it cannot possibly be on 18 January when requisition was answered on 21 January.

35 JIN: There's a forbearance stay that's annexed to the affidavit that I just mentioned which--

40 REGISTRAR: That doesn't matter because somebody sends out a requisition on the 18th, it's replied to on the 21st, there is no way that this Court could enter a default judgment on 18 January.

SPEAKER: Excuse me Registrar, we wouldn't have signed the forbearance--

45 REGISTRAR: That's irrelevant for the time being. Do you have a copy of that affidavit you're referring to, if you want to hand it up? Let me just have a look. Do you have a copy of this affidavit by any chance?

SPEAKER: Yes.

50 REGISTRAR: You do? All right. What were you referring me to?

JIN: It's specifically annexure A.

REGISTRAR: All right then, okay. Yes, what do you have to say about that?
What do you wish to say about that?

5

JIN: If I could take you Registrar to para 10 of that affidavit, it refers to cl 3 of the deed which effectively precludes Ms Dews from making this application. It's the plaintiff's position that the eviction is postponed to now 25 June be allowed to continue.

10

REGISTRAR: Right, okay.

SPEAKER: We have the deed from--

15

REGISTRAR: Sorry, I don't know where your involvement is though because Ms Dews is the defendant.

SPEAKER: I'm her husband.

20

DEFENDANT: I actually put in my affidavit that I would like if my husband could be a defendant as well. He's a co-borrower and all - apart from--

REGISTRAR: But you own the property?

25

SPEAKER: Yes.

DEFENDANT: Yes.

REGISTRAR: Personally, only in your name?

30

DEFENDANT: Yes, his name was on the title but he had a bankruptcy and his name was meant to revert back to the title. I had to buy out his share from the trustee.

35

REGISTRAR: Just let me read your affidavit then, that's your affidavit of 13 June?

DEFENDANT: Yes, yes and I never--

40

REGISTRAR: Just take a seat and I'll read that.

DEFENDANT: --received a default notice.

REGISTRAR: You have a copy of this affidavit that I'm reading?

45

JIN: I do.

REGISTRAR: Right. Who was your solicitor?

50

DEFENDANT: We heard that witness just ..(not transcribable).. signing of the

deed of forbearance with Mr Paul Burgess. He's located at Panania.

REGISTRAR: Okay, thank you. Did you lodge an AFCA complaint?

5 DEFENDANT: Yes, we did.

REGISTRAR: Did you receive anything back from them?

10 DEFENDANT: Yes, we received an acknowledgement of receipt of the complaint and it said that all - any legal or collections activity was to stop upon receipt of the letter, and then yesterday we returned home to find the sheriff had left a note folded outside the front door just on the doorstep outside the front door saying that there was a new notice for an eviction.

15 REGISTRAR: When is the next eviction date?

DEFENDANT: The 25th of this month.

20 REGISTRAR: Do you have with you a copy of any material from AFCA?

DEFENDANT: Yes.

25 REGISTRAR: Did they send anything to the plaintiff? Did AFCA send anything to the plaintiff?

JIN: I believe--

DEFENDANT: Yes, yes.

30 SPEAKER: Want me to take that up?

REGISTRAR: That's the document, if want to hand that up, yes, thank you. Do you know if Eastwood responded to AFCA?

35 JIN: I don't believe they have, Registrar. Could I mention that that action is also precluded under the forbearance--

REGISTRAR: Sorry?

40 JIN: That is also precluded under the forbearance stay, if that has any bearing.

FOR JUDGMENT SEE SEPARATE TRANSCRIPT

From: info@afca.org.au
To: [Peter](#)
Subject: New post-IDR referral: Mr Michael Dews & Mrs Jacqueline Dews, case number 645255
Date: Tuesday, 11 June 2019 9:34:56 AM

Complainant: Mr Michael Dews & Mrs Jacqueline Dews
Case Number: 645255
Financial Firm: Eastwood Securities Pty Ltd
Your ref:

A complaint against Eastwood Securities Pty Ltd has been lodged with the Australian Financial Complaints Authority (AFCA) in the name of Mr Michael Dews & Mrs Jacqueline Dews. The AFCA case number is provided above.

What happens next?

Before we start investigating the complaint, we're referring the complaint to you, to allow you an opportunity either to resolve the complaint directly with the complainant or to provide a complete (EDR) response outlining Eastwood Securities Pty Ltd's position.

Our complaints process

If this is your first complaint with AFCA or you are not familiar with how we deal with complaints, we encourage you to familiarise yourself with our process and the fees that apply. To do this, visit the [member section](#) on our website as well as our [process page](#). You can also contact our Registration Team on 1300 56 55 62.

Timeframe

The amount of time that Eastwood Securities Pty Ltd has to respond depends on the type of complaint and what's happened previously. Relevant information provided to us by the complainant is outlined below.

Date the complainant first complained	07 Jun 2019
How the complainant complained	We received an email today stating they are evicting is on Tuesday 11 June 19. I called stating I haven't had notice. They are not canceling eviction and we have nowhere to go
Has there been a final written response?	No
Have legal proceedings	Yes

commenced?	
Product(s) and Issue(s)	Credit/Financial Difficulty

Based on this information, Eastwood Securities Pty Ltd has already had an opportunity to complete its internal dispute resolution (IDR) process, or legal proceedings have commenced. Therefore, the Registration & Referral period will be 21 days.

What you need to do

By 02 Jul 2019, we need you to either:

- confirm that the complaint has been resolved with the complainant directly, or
- provide a response to us and to the complainant outlining Eastwood Securities Pty Ltd's position. As this is your complete (EDR) response, please include all available supporting documentation.
- provide a completed [credit facilities table](#) for the complainant and if it is related to a small business please provide a copy of a recent company or business name search
- as the case appears to be about financial difficulty, documentation should include:
 - loan contracts
 - account statements from when the account fell into arrears
 - contact records from when the account fell into arrears, including notices sent to the complainant
 - details of previous requests for financial difficulty assistance and how you responded, including correspondence and any information you relied upon such as a statement of financial position
 - if legal proceedings have commenced, please confirm what stage they are up to and provide copies of documents filed with the court

If you disagree

If you believe that Eastwood Securities Pty Ltd is not the entity that the complainant intended to lodge a complaint against, or if you disagree with the above information about the timeframe in which Eastwood Securities Pty Ltd needs to respond, please write to us within five days. We will then review the information and let you know the outcome.

If we do not hear from you within five days, we will assume the information is correct and the complaint will proceed accordingly.

AFCA Jurisdiction

At this stage we have not assessed whether we have jurisdiction under our rules to consider the complaint. This will occur at the next stage of our process if the matter is not resolved by you.

If you believe that the complaint is outside our rules, you can ask us to review this now. If the complaint is assessed as being outside our rules, we will close the complaint and there will be no charge to Eastwood Securities Pty Ltd. However, if the

complaint is assessed as being within our jurisdiction, the complaint will progress and the fee incurred will be in accordance with our fee schedule.

Complaint information

The below information has been provided to us by the complainant about the complaint.

Complainant name(s)	Mr Michael Dews & Mrs Jacqueline Dews
Complainant date(s) of birth	01 Mar 1964 & 02 Apr 1967
Complainant address(es)	[REDACTED]
Contact person details	Mr Michael Dews [REDACTED]
Interpreter	
Reference type	No Reference Provided
Reference	
	<p>I have been notified today that we are being evicted on Tuesday 11 June, next Tuesday. Other than the email today we have not received any notification. I called and checked with the sheriff office and it is booked for 11:30am. We have struggled to pay the repayments from the first 2 months and it has been impossible to keep up the payments. We believe the loan shouldn't have been approved as it has worsened our financial situation. The lender asked us to accept a statement of claim as part of a deal. We did this and didn't respond because we thought it was part of the process they were helping us with. After the allowed time elapsed they got a default judgment without our knowledge. They then issued a deed of forbearance which they got us to sign under extreme duress. If we didn't sign it we would have been evicted the next day.</p>

Complaint summary	I'm asking that an urgent stay of proceedings be applied so that we have time to seek advice on options and if we have to allow us time to find somewhere else to live. We are a family of 4 and still have a daughter in school. If we are removed from our home in 24 years next Tuesday we have nowhere to live. Most of our family live either in rural areas or overseas. I paid a nominal agreed rent payment last week and was paying another two payments tonight. Please help us as I have tried talking to the financial institution and their solicitor but they will not stop the eviction. The solicitor told me it's not their responsibility to tell us about the eviction. We have had no notice until today when I sent them an email telling them I was doing 2 payments tonight. They responded with an email telling me that we would be evicted on Tuesday. I would like to have the default judgment overturned as the loan is definitely irresponsible lending. The writ number is 2018/00329335 issued on 23/01/2019 Please help us and stay the eviction notice. My number is [REDACTED]
Claim amount	
Outcome requested	Stay the eviction notice to allow time to investigate an irresponsible lending case against the lender. Have the default judgment set aside so that we can have the case properly investigated. The loan has made our financial situation unbearable.

Any further information provided by the complainant is accessible via this direct link to [645255](#) in Secure Services.

Collections or recovery action

If this complaint is about a debt, Eastwood Securities Pty Ltd must suspend any collection activity or recovery action in relation to the debt, including enforcement of default judgment where applicable, now that the complaint is lodged with us. This is in accordance with our Operational Guidelines.

Next steps

Please ensure that you provide your response by **02 Jul 2019**.

If you confirm that the complaint has been resolved with the complainant directly, we will contact the complaint to confirm and close our file.

Otherwise, the complaint will progress to the Case Management stage of our process and we will investigate it.

If you have any questions, please quote the case number when you:

- call: 1300 56 55 62
- email: info@afca.org.au

Regards

**Registration & Referral Unit
Australian Financial Complaints Authority**

IMPORTANT The contents of this email (including any attachments) are confidential and may contain privileged information. Any unauthorised use of the contents is expressly prohibited. If you have received this email in error, please notify us immediately by Telephone: 1800 931 678 (local call) or by email and then destroy the email and any attachments or documents. Our privacy policy is available on our website.