

NOTICE OF FILING

Details of Filing

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v OAK
CAPITAL MORTGAGE FUND LIMITED (ACN 161 407 058) & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



CONCISE STATEMENT

No VID of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Australian Securities and Investments Commission
Plaintiff

Oak Capital Mortgage Fund Limited (ACN 161 407 058) & Another
Defendants

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 The Plaintiff (**ASIC**) alleges that the Defendants (**OCMF** and **OCWF**, respectively and **Oak Parties**, collectively) engaged in unconscionable conduct in contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by implementing and maintaining systems for the purpose of avoiding regulation by the *National Credit Code* (Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**)) (**Credit Code**) in providing loans to consumers.
- 2 From about 2019 to date (**Relevant Period**), the Oak Parties' provided up to 47 loans, totalling \$37,005,732 which were secured by residential properties and either should, or likely should, have only been made subject to the application of the Credit Code or should not have been made at all. Loan applicants were deprived of the protection of the Credit Act, the Credit Code and other consumer protection legislation, and the Oak Parties avoided appropriate accountability and gained situational power, particularly for loans in default. Some borrowers who managed to discharge their loans were worse off. Others who could not afford to repay their loans, lost everything. Additionally, the Oak Parties charged exorbitant fees and interest, exceeding \$3.3 million in interest and \$2 million in fees.

The Oak Parties

- 3 The Oak Parties are non-bank lenders, specialising in short-term lending, and marketing themselves as offering 'flexible lending solutions', including 'low-doc' or urgent finance, in as little as 72 hours. The Oak Parties fund loans by raising capital from investors via their respective contributory mortgage funds.
- 4 The Oak Parties do not hold, and have never held, Australian credit licences under the Credit Act. For that reason, they are not permitted to provide loans to individuals wholly or predominantly for personal, domestic or household purposes, or for any other purpose set out in s 5(1)(b) of the Credit Code (referred to as a **Code Purpose**).

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|--|--|-----|-----------------|
| Filed on behalf of (name & role of party) | Australian Securities and Investments Commission (the Plaintiff) | | |
| Prepared by (name of person/lawyer) | John Fogarty | Ref | 03148818-492510 |
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Oak Loans

- 5 The loans made by the Oak Parties during the Relevant Period (**Oak Loans**) were always structured so that a company was named as 'borrower' and one or more individuals (typically the director(s) of the company and/or the registered proprietor of the security property) was named as 'guarantor(s)'. This was a requirement even in circumstances where the named company borrower had no discernible interest in the subject of the transaction, was not trading, had no assets or had only been established days before applying for, or obtaining, the loan.
- 6 The Oak Loans the subject of this proceeding had the following qualities:
- (a) the average quantum advanced was approximately \$790,000;
 - (b) the loans were short term, typically around 12 months and no longer than 24 months;
 - (c) they were subject to high interest rates, which were an average of 11.60% at the lower rate, and an average of 23.22% at the higher rate;
 - (d) there were high associated fees ranging from 2.2% to 50.1% of the principal amount advanced;
 - (e) the loans were interest-only, meaning that if payments were required during the loan term, they were interest payments only. Many loans were made with interest pre-paid or capitalised, such that during all or part of the loan term, no recurring interest payments were required. In all cases, the total amount of the loan was due at the expiration of the loan term;
 - (f) the loans were secured against real property, usually registered in the name of, and proffered by, the guarantor; and
 - (g) the loans were referred and arranged by brokers — the Oak Parties rarely dealt directly with a loan applicant.
- 7 The Oak Loans the subject of this proceeding are identified in Schedule 1 of the accompanying Statement of Claim.

The Oak Parties' business model

- 8 ASIC alleges that, during the Relevant Period, the Oak Parties maintained and implemented a business model (**Oak Business Model**) with the following elements:
- (a) the Oak Parties made loans with the qualities listed in paragraph 6 above;
 - (b) '*asset based*' lending — the Oak Parties only made loans secured against real property. The loan applicant was not required to show that the loan could be discharged through income. Instead, it was the circumstances of the secured asset that primarily determined whether the Oak Parties would advance a loan and for what price;

- (c) *interposition of a company borrower* — the Oak Parties required that the named borrower always be a corporation; and
 - (d) *requiring declarations as to non-Code purpose* — the Oak Parties required loan applicants to declare, acknowledge and/or agree, at multiple stages in the loan application process, that the loan was wholly or predominantly for business or investment purposes only.
- 9 The Oak Business Model was implemented by the Oak Parties in the typical loan application process as follows:
- (a) **Step 1:** a broker submitted a 'loan scenario';
 - (b) **Step 2:** the Oak Party assessed the 'loan scenario'. That assessment did not depend upon the existence or characteristics of the corporate borrower. In some cases documents even referred to the borrower as 'TBA Pty Ltd'. The Oak Party then provided a 'quote' to the broker and requested a completed application form. The application form required the applicant to name a corporate borrower, state an "exit strategy" and sign a 'business or investment purpose declaration';
 - (c) **Step 3:** the loan applicant signed and the broker submitted the application form and provided any additional documents or information requested by the Oak Party. Sometimes the application form identifies a natural person as the borrower;
 - (d) **Step 4:** the completed loan application was assessed by the Oak Party, a valuation of the proposed security was obtained, credit checks were carried out, any further documents were requested (which could include an "exit strategy" letter). If accepted, a 'letter of offer' or 'formal offer' (**Offer Document**) was issued. The valuation (and resulting loan to value ratio), determined whether the Oak Party would advance the loan and was a core consideration in determining the applicable interest rates. The Offer Document required further acknowledgment about the purpose of the loan and permitted the Oak Party (or its related entities) to charge certain fees associated with further progressing the loan application;
 - (e) **Step 5:** the loan applicant signed and the broker returned the Offer Document;
 - (f) **Step 6:** the Oak Parties determined funding arrangements for the loan by obtaining funding from investors. Their solicitors were instructed to draw up loan documentation and issued them to the loan applicant's nominated independent solicitor for execution by the borrower and guarantor(s);
 - (g) **Step 7:** once the loan documentation was executed, settlement was arranged and the loan funds could be drawn down.

B. RELIEF SOUGHT FROM THE COURT

- 10 ASIC seeks declarations, injunctions, orders that certain contractual provisions are void, pecuniary penalties, publicity orders and ancillary orders against the Oak Parties, as set out in the Originating Process.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 11 ASIC contends that the Oak Parties, by devising and implementing the Oak Business Model, engaged in a system of conduct, that was unconscionable in contravention of s 12CB of the ASIC Act, by reason of the following circumstances.
- 12 **First**, by engaging in asset-based lending as set out in paragraph 8(b) above, the Oak Parties were able to ignore and/or avoid considering whether the company borrower's actual income or assets could repay the loan at the end of the term. Instead, the Oak Parties relied on the value of the security property (which was commonly the owner-occupied residence of the guarantor) and a requested "exit strategy" which stated, in almost every case, how the guarantor's (and not the company's) assets and/or income would discharge the loan.
- 13 **Second**, the Oak Parties' requirement that a company be the named borrower, where necessary, operated as a device designed to avoid the regulation of the Credit Code and did not reflect the actual commercial reality of the proposed loan. In this connection, the requirement applied even when: (i) a corporate borrower was wholly or predominantly unnecessary to, did not benefit from or have an interest in the transaction; (ii) the Oak Parties were on notice of facts indicating that the corporate borrower was established solely to take out the loan and had no means to repay the loan; and (iii) all parties knew and intended that the loan would be repaid by the guarantor's, or another natural person's, income and/or assets.
- 14 **Third**, obtaining the non-Code Purpose declarations referred to in paragraph 8(d) above did not comprise a genuine attempt to ascertain whether the loan was wholly or predominantly for a Code Purpose or not. Rather, the purpose of obtaining the non-Code Purpose declarations was to provide the Oak Parties with a basis to assert a non-Code purpose (and, consequently, the non-application of the Credit Code), even when, on the objective facts, this could not have been the case. In this connection, the non-Code Purpose declarations: (i) were included in standard form documents prepared by the Oak Parties; (ii) consisted in each case of a bare declaration only and it was not necessary for loan applicants to substantiate how any business or investment purpose necessitated the transaction for which the loan was sought; and (iii) were obtained even when the Oak Parties were on notice of facts indicating a whole or predominant Code Purpose and/or that the declaration was false.
- 15 **Fourth**, the Oak Parties knew, or ought to have known, that loan applicants who came to them could be in poor financial circumstances and possibly in desperate need of finance. There was therefore a risk that they would establish or utilise a corporate borrower even if it was unnecessary, and make standard form declarations even if they were not true. Moreover, and in any event, a short-term, high interest, high-fee, asset-based loan, that was often secured by owner-occupied residential property, is an inherently risky transaction.
- 16 **Fifth**, the requirements at paragraphs 8(c) and (d) above were not reasonably necessary to protect the Oak Parties' interests. They could have, but did not, assess whether it was truly the corporate borrower, or instead the natural person guarantor(s), who would repay the loan at the expiration of the loan term. They could have, but did not, critically consider whether there was any reasonable basis to accept, and rely upon, declarations

as to non-Code Purpose, particularly in the face of clear indications that the loan was, in fact, wholly or predominantly for a Code Purpose.

- 17 **Sixth**, the result of the Oak Business Model was that the Oak Parties treated certain loans as unregulated in circumstances where those loans ought, by their nature, to have been treated as regulated. The Credit Code, and other statutes that regulate licensed lending, comprise important consumer protection legislation enacted to: protect borrowers from imprudent and unsuitable transactions; confer rights and entitlements to borrowers; and create accountability systems to ensure lenders do not exploit their in-built position of power. Lenders must adhere to responsible lending practices. Fees and interest that can be charged are limited. Borrowers have access to dispute resolution by the Australian Financial Complaints Authority. The Oak Parties' motivation to avoid those measures can only have been profit.

D. THE HARM SUFFERED

18 As noted above:

- (a) the Oak Parties benefited from their contravening conduct: for the Oak Loans the subject of this proceeding, the Oak Parties received fees and interest totalling in excess of \$5,380,000. Further, the Oak Parties were paid management fees derived from their management and use of investors' funds.
- (b) there was significant harm caused to consumers and/or consumers were unnecessarily exposed to significant risk. In some cases, those who could not afford to repay their loans lost everything; and
- (c) the Oak Parties obtained an unfair advantage in the lending marketplace as against other lenders who do not seek to treat as unregulated, loans that, by their nature, ought to enjoy the protections afforded by the Credit Code.

This Concise Statement was prepared by E A Bennett SC, A L Ounapuu and L Stevens, of counsel.

Schedule of parties

No: of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Australian Securities and Investments Commission
Plaintiff

Oak Capital Mortgage Fund Limited (ACN 161 407 058)
First Defendant

Oak Capital Wholesale Fund Limited (ACN 622 106 692)
Second Defendant

Certificate of lawyer

I, John Fogarty, certify to the Court that, in relation to the Concise Statement filed on behalf of the plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 29 October 2024

A handwritten signature in black ink, appearing to read 'Jwf', is positioned above the typed name.

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Signed by John Fogarty
Lawyer for ASIC