

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/04/2021 12:41:35 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: QUD114/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
LIGHTSPEED FINANCE PTY LTD ACN 148 868 786 & ANOR
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 15/04/2021 1:34:19 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement



No.

of

★

Federal Court of Australia
 District Registry: Queensland
 Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

LIGHTSPEED FINANCE PTY LTD ACN 148 868 786 AND MARK JAMES FITZPATRICK

Respondents

Important Facts giving rise to the claim:

1. The first respondent is the holder of Australian Credit Licence number 433524 permitting the first respondent to engage in credit activities other than as a credit provider.
2. The second respondent was at all times material to this proceeding:
 - (a) the sole director;
 - (b) the owner of 90% of the shares;
 - (c) the controlling mind;
 of the first respondent.
3. Between January and March 2017 the first respondent facilitated the provision of credit in an amount of \$90,000 (**Loan**) by Mr Stephen Broomhall to Mr Christopher Nelson Birnie (**Mr Birnie**) and Ms Nabilla Elghalemi (**Ms Elghalemi**), secured by a mortgage (**Mortgage**) over property owned by Ms Elghalemi at 104 Todd Street, Torbanlea in Queensland (**Property**).
4. Mr Birnie on two occasions made declarations in writing, provided to the first respondent, that the purpose of the loan was "predominantly for business purposes":
 - a. on 29 January 2017 in the application for finance;
 - b. on 21 February 2017 in a declaration attached to the legal documentation.
5. The due diligence report prepared by the first respondent on 6 February 2017 included the following comment:

Clients looking at financing the completion works of their home, which is currently at lock up stage, tradesman invoices are on hand and will be paid at disbursements to complete the works
6. Mr Birnie and Ms Elghalemi defaulted on repayment of the Loan.
7. On 13 June 2018 Mr Broomhall obtained an order for possession of the Property.
8. On 6 December 2019 Mr Broomhall sold the Property for \$200,000. None of the proceeds of sale were paid to Mr Birnie or Ms Elghalemi.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission
Prepared by (name of person/lawyer)	Hugh Copley
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9. On 4 December 2018 the Australian Financial Complaints Authority (**AFCA**) made a determination in respect of the first respondent (**First AFCA Determination**). Mr Birnie accepted that determination on 10 December 2018.
10. The First AFCA Determination required that, if Mr Birnie accepted the determination:
 - a. the first respondent pay Mr Broomhall an amount equal to the loan debt (to Mr Broomhall's satisfaction) within 14 days of Mr Birnie's acceptance;
 - b. Mr Birnie, within seven days after the first respondent confirms payment of the loan debt, pay the first respondent \$65,082.20.
11. On 12 July 2019 AFCA made a further determination in respect of the first respondent (**Second AFCA Determination**). Mr Birnie accepted that determination on 24 July 2019.
12. The Second AFCA Determination required that, if Mr Birnie accepted the determination:
 - a. the first respondent pay Mr Broomhall an amount equal to the loan debt (to Mr Broomhall's satisfaction) within 14 days of Mr Birnie's acceptance; and
 - b. Mr Birnie, within seven days after the first respondent confirms payment of the loan debt, pay the first respondent \$43,485.45.
13. The first and second respondents did not give effect to the First AFCA Determination, or the Second AFCA Determination.

Relief sought from Court

14. Declarations, pursuant to section 166 of the *National Consumer Credit Protection Act 2009* (**Act**), or pursuant to section 21 of the *Federal Court of Australia Act 1976*, that the first respondent breached section 47(1)(m) of the Act by failing to give effect to the determination of the Australian Financial Complaints Authority made on 12 July 2019 in respect of the first respondent being an obligation prescribed by regulation, namely Regulation 11A(2)(c) to the National Consumer Credit Protection Regulations 2010 (**Regulations**).
15. An order pursuant to sections 178 and 179 of the Act that the first respondent pay compensation to Christopher Nelson Birnie and Nabilla Elghalemi in respect of the first respondent's breach of section 47(1)(m) of the Act.
16. An order pursuant to sections 167(1) and 167(2) of the Act that the first respondent pay to the Commonwealth a pecuniary penalty by reason of the first respondent's contravention referred to in paragraph 1, being a contravention of a civil penalty provision.
17. Declarations, pursuant to section 166 of the Act, or section 21 of the *Federal Court of Australia Act 1976*, that the second respondent:
 - a. was involved in the contravention by the first respondent of section 47(1)(m) of the Act, referred to in paragraph 1; and
 - b. is taken, by reason of section 169(b) of the Act to have contravened section 47(1)(m) of the Act in the way referred to in paragraph 1.
18. An order pursuant to sections 178 and 179 of the Act that the second respondent pay compensation to Christopher Nelson Birnie and Nabilla Elghalemi in respect of second respondent's breach of section 47(1)(m) of the Act.
19. An order pursuant to sections 167(1) and 167(2) of the Act that the second respondent pay to the Commonwealth a pecuniary penalty by reason of the second respondent's contravention referred to in paragraph 4(b), being a contravention of a civil penalty provision.

Primary legal grounds for relief sought

20. Sections 47(1)(a) and (m) of the Act provide:

47 General conduct obligations of licensees

General conduct obligations

(1) A licensee must:

(a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and

...

(m) comply with any other obligations that are prescribed by the regulations.

21. Regulation 11A of the Regulations provides:

11A Obligations of licensees—cooperation with AFCA

(1) For the purposes of paragraph 47(1)(m) of the Act, a licensee must comply with the obligations in subregulation (2).

(2) The licensee must take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which the licensee is a party, including by:

(a) giving reasonable assistance to AFCA in resolving the complaint; and

(b) identifying, locating and providing to AFCA any documents and information that AFCA reasonably requires for the purposes of resolving the complaint; and

(c) giving effect to any determination made by AFCA in relation to the complaint.

(3) Subregulation (2) does not apply to superannuation complaints (within the meaning of Chapter 7 of the Corporations Act 2001).

Note: For provisions relating to superannuation complaints, see Division 3 of Part 7.10A of the Corporations Act 2001.

22. Accordingly, a failure to give effect to a determination made by AFCA is a breach of section 47(1)(m) of the Act.

23. By section 47(4) of the Act, a contravention of section 47(1)(m) is, since 13 March 2019, a contravention of a civil penalty provision.

24. Accordingly, by failing to give effect to the Second AFCA Determination, the first respondent contravened section 47(1)(m) of the Act, being a civil penalty provision.

25. By section 169(2) of the Act a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision. Accordingly, by reason of his being involved in the first respondent's contravention of section 47(1)(m) of the Act, the second respondent is taken to have contravened that provision.

26. By sections 178 and 179 of the Act, the Court may order a person to pay compensation to another person if the first person contravened a civil penalty provision and the second person has suffered loss and damage as a result of that contravention. The applicant may apply for orders on behalf of the second person.

27. By reason of the contravention by the first and second respondents of section 47(1)(m) of the Act, each of Mr Birnie and Ms Elghalemi has suffered loss and damage.

28. By section 167 of the Act, the Court may order a person to pay a penalty to the Commonwealth by reason of a contravention of a civil penalty provision of the Act.

The harm suffered by Mr Birnie and Ms Elghalemi

29. By reason of the contravention by the first and second respondents of section 47(1)(m) of the Act, Ms Elghalemi has suffered the following loss and damage:

a. \$220,000 for the loss of the property.

Certificate of lawyer

I Hugh Copley certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date:



Signed by Hugh Copley

Lawyer for the Applicant