

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates, 2 June – 4 June 2009

Question: bet 172

Topic: Corporations Act – Doug Juvenivic

Hansard Page: E102, 103

Senator Williams asked:

Senator WILLIAMS—Are you familiar with a case that was handed down in the Adelaide Supreme Court of a breach of the Corporations Act by the Commonwealth Bank against a bloke by the name of Doug Juvenivic?

Mr D’Aloisio—I am not personally aware of that.

Senator WILLIAMS—Is no-one in ASIC aware of it? I am talking about the people here in front of me now. I do not expect you to speak for the rest of the tribe.

Mr D’Aloisio—I can check that for you.

Senator WILLIAMS—I could give the judgment here if you like.

Mr D’Aloisio—What is the allegation?

Senator WILLIAMS—What happened is under section 428 of the Corporations Act the Commonwealth Bank sold an asset belonging to Mr Juvenivic and instead of selling it at the market price or auction price or whatever they sold it to a partner of Mr Juvenivic and, according to the judgment, sold it for a lot less than they should have sold it, but it tidied up their books. I do not think that is an uncommon practice where they want to clean up their books and what they write off is tax deductible and those sorts of things. But the case was heard in 2004 and Mr Juvenivic took it on to the High Court seeking compensation. To the best of my knowledge, if you can read some of this language—some solicitors speak in different language from what I am used to—the High Court was not in a position where it could award compensation, even though it was aware of it. If you like, I will give you those two judgments on that case. It clearly highlighted there in simple form the judgment of the Supreme Court and the breach by the Commonwealth Bank under the Corporations Act. I will give that you, if you would like to follow that up.

CHAIR—Are you tabling that?

Senator WILLIAMS—Yes, if that is the process I would be glad to table it.

Mr D’Aloisio—I would be happy to look at it. It is a little unusual in the sense that, if it has gone through a process, a legal set of proceedings right up to the High Court, one would assume that a lot of the issues have been—

Senator WILLIAMS—The issues have been resolved. Mr Juvenivic is in voluntary bankruptcy. He is financially dead in the water. But the point I make is that the judgement has clearly shown that the Commonwealth Bank breached the

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Corporations Act. I have asked whether you were familiar with it. Was anything done about it? If that is not the case, would you follow it up?

Mr D'Aloisio—Yes, I will.

...

Mr D'Aloisio—The ruling is that one is tabled, so we will come back to the committee. The other issue is a normal complaint in private, which we will deal with outside the committee?

CHAIR—Yes.

Mr D'Aloisio—Thank you for the clarification.

Answer:

The decision that was tabled was *Forston Pty Ltd v Commonwealth Bank of Australia* [2008] SASC 49. In this matter the Commonwealth Bank of Australia (CBA) exercised its power as a mortgagee to sell a property when the mortgager defaulted on the loan. Section 420A of the *Corporations Act 2001* requires a mortgagee to take all reasonable care to sell the property for not less than market value when exercising this power. In *Forston*, the court held that the CBA had breached this duty of care. The court also held that, notwithstanding the CBA's breach, the property was sold for market price so no damages were payable.

In circumstances such as those in *Forston*, action that ASIC can take against the mortgagee (or *controller* for the purposes of the Act) for a breach of section 420A of the Corporations Act is limited:

- the Corporations Act does not provide that a person is subject to a civil penalty, nor does it provide that a person is guilty of an offence, if section 420A is breached.
- Technically, ASIC can commence proceedings on behalf of a person to whom a duty is owed under section 50 of the *Australian Securities and Investments Commission Act 2001* to recover damages for a breach of duty. Ordinarily ASIC uses this power only where private remedies are not practically open to those who suffered the loss (for example, ASIC's actions on behalf of Westpoint investors). In this case, Mr Juvenivic had pursued those remedies. In any case, the court held that there was no loss resulting from the breach.

ASIC does not intend to take any action in response to the decision in *Forston*.