

# Senate Select Committee on Superannuation and Financial Services

## Main Inquiry Reference (a)

Submission No. 137

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**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:JON011KR

9 May 2001

The Secretary  
Senate Select Committee on Superannuation  
and Financial Services  
Parliament House  
CANBERRA ACT 2600

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Dear Sir,

Solicitors' Mortgage Schemes in Tasmania

I refer to the advertisement in The Mercury Newspaper on Saturday, 28 April 2001 inviting submissions in respect of these schemes.

My submission is attached.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

Enc.

**SUBMISSION OF PATRICK CLIVE TOOMEY**

**TO**

**THE SENATE SELECT COMMITTEE**

**ON SUPERANNUATION AND FINANCIAL SERVICES**

**ON**

**SOLICITORS' MORTGAGE SCHEMES IN TASMANIA**

**TOOMEY MANING & CO  
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## A. Legal Framework

### 1. Legal Profession Act 1993

#### 1.1 The Law Society of Tasmania

The Law Society of Tasmania (the "Society") is responsible in its own right, and by way of the Council of the Society (the "Council"), to supervise and regulate the Solicitors' Mortgage Schemes (the "Schemes") under the *Legal Profession Act 1993* (the "Act") and the *Rules of Practice 1994* (the "Rules").

The Rules require that a firm or legal practitioner corporation operating a Scheme, referred to as a controlled fund operator and a controlled fund, are required to be registered with the Society (Rule 67(1)). The Society has the power under Rule 72 to suspend or revoke registration of a controlled fund operator.

Section 111(1)(a) of the Act authorises the Society to apply to the Supreme Court for an order declaring a firm or legal practitioner corporation to be in default. If a default order is made, a Court fund is established (section 111(2) of the Act).

#### 1.2 The Council of the Law Society

The Council established under the *Law Society Act 1962* is continued under section 7 of the Act. Section 109 of the Act provides the Council with the power to protect money or other property belonging to a person. This is done by the Council serving a notice on the manager of an authorised deposit-taking institution in which a firm or legal practitioner corporation keeps a trust financial institution account prohibiting the deposit-taking institution from permitting a withdrawal from, or any other dealing with, that account unless the Supreme Court otherwise orders.

If a default order has been made in respect of a legal practitioner or the Council believes it is necessary for the protection of money or other property belonging to a person, the Council may apply to a judge under section 119 of the Act. That provision provides for the management of the practice of the legal practitioner.

Rule 74(2) of the Rules states that the books of account of a controlled fund operator are subject to the accounting provisions in Part 3 of the Rules. Despite section 17(1)(e) of the Act, which states that the Council may make rules for regulating the keeping, inspection and audit of records relating to money received, held or paid for on behalf of clients, Part 3, Rule 47 requires the Council to appoint trust account inspectors only. The accounts of every legal practitioner who holds a practising certificate must be inspected by a trust account inspector at least once every twelve months (Rule 50). A trust account inspector is required to report to the Council under Rule 52 if the trust account inspector:

(a) *finds those records to be in disorder at any time during the accounting period; or*

- (b) *considers that there should be a closer examination of the records; or*
- (c) *has reasonable grounds to suspect that-*
  - (i) *there is irregularity in the accounts; or*
  - (ii) *the legal practitioner has failed to keep the accounts in accordance with this Part.*

### 1.3 The Solicitors' Trust

Section 97(1) of the Act provides that the function of the Solicitors' Trust (the "Trust") is to administer and manage the Guarantee Fund. The purpose of the Guarantee Fund is primarily to pay funds into the Court fund established to satisfy claims by investors who have suffered loss by investing in the Schemes. The Trust may be ordered by the Court to pay money from the Guarantee Fund to the Court fund where a default order has been made. If the Trust is so ordered, it may apply to the Court for an order to recover that amount or a lesser amount from the defaulting firm or legal practitioner corporation (section 111(8) of the Act).

In addition, upon the Court making a default order in respect of a firm or legal practitioner corporation, the rights and interests of any person arising from any loss incurred in respect of which the default order was made are assigned to the Trust (section 113 of the Act).

The Society is dependent on there being a surplus in the Guarantee Fund for a substantial part of its operating expenditure (section 108(2)(b)(iii) of the Act). The Society receives 35% of the surplus in the Guarantee Fund over \$3.5 million.

## 2. Corporations Law

The Schemes, along with similar ones in other States, were exempted by the then Australian Securities Commission (the "ASC") from complying with the Corporations Law. The decision by the ASC to exempt the Schemes from complying with Divisions 2 and 5 of Part 7.12 and section 1078 of the Corporations Law followed a public hearing on 26 March 1992. Submissions were received from the Society as to why the Schemes should be exempt from the requirements of the Corporations Law.

### 2.1 Submissions of the Society to the ASC

Attached and marked "TM&Co-1" is a copy of the Society's written submission to the ASC.

#### 2.1.1 Regulatory function of the Society in 1992

In its submission to the ASC, the Society considered that its existing methods of regulation, control and supervision provided a desirably high measure of protection for all clients and investors. The Society claimed that the risk of uncompensated loss by reason of either negligence or dishonesty on the part of solicitors was very low and that the systems in place provided for indemnification of the public in the event that loss was occasioned by either negligence or dishonesty. The Society stated at page 12:

*The Society has long taken the view that it is not enough for it to establish funds sufficient to indemnify clients who, but for the funds, would suffer loss. It has acted to ensure that the risk of any loss being experienced is reduced by the application in due measure of supervisory, preventative controls, particularly in relation to the loss of monies invested by clients with the profession.*

One such control was the system of public complaints. If the Society believed it warranted, it would direct a legal practitioner to produce the practitioner's books of account to an accountant and a solicitor. In addition, the trust account of the firm may have been made subject to management by nominees of the Society.

#### 2.1.2 Interest payments

The Society stated at page 7:

*With contributory mortgage funds the risk of delayed payment of interest by mortgagors is usually formally with the investors but in most instances firms voluntarily effect payment to investors on the due date while reserving to themselves entitlement to benefit from the penalty rates.*

#### 2.1.3 Compulsory professional indemnity insurance

The Society said that it was conscious that the public was more likely to suffer loss due to negligence of practitioners than by dishonesty and for that reason a compulsory professional indemnity insurance system was in place. The Society stated at page 12:

*In the view of the Society, when loss is occasioned in the course of taking mortgage security by reason of some act of negligence on the part of the solicitor concerned it is only an isolate[d] transaction which will be affected. That being so then, in all but the most extreme cases of rare, very large mortgages, the cover so provided will be sufficient to ensure indemnification of the investor with only a sum of excess to be paid by the solicitor concerned.*

#### 2.1.4 Sufficiency of funds

At page 14, the Society referred to the personal resources of the defaulting practitioner, the fidelity bond (which is no longer required), the Guarantee Fund and the professional indemnity insurance and stated that the sums available from these resources:

*provide substantial assurance that should there be any default by solicitors whether by reason of negligence or dishonesty and whether in relation to mortgage investments or a wide range of other matters, clients who have invested with or deal with solicitors will be indemnified.*

*That assurance does not provide a guarantee that the loss could never be so large as to remain not wholly compensated for. But, coupled with the supervisory and investigatory roles of the Society, it is extremely unlikely that any deficiency could occur on such a scale as to leave any member of the public without full compensation.*



### 2.1.5 Protection for investors

The Society stated at page 16:

*Investors enjoy a high degree of protection against the risk of loss whether occasioned by negligence on the part of the solicitor either in proffering advice or in giving effect to advice which has been given and accepted.*

The submissions continue at page 16 to conclude that the financial protection provided to the public from loss occasioned by a legal practitioner's negligence or misconduct provided an:

*unusually high degree of protection for all clients and investors.*

Relief from compliance with the Corporations Law was granted because of the presence of sufficient prudential controls:

*This usually means that the following three features are present:*

- (a) there is a self-regulatory body which regulates the conduct of its members and undertakes inspections of a surveillance/audit type;*
- (b) there is a fidelity fund; and*
- (c) there is professional indemnity insurance.*

*It would normally be expected that the self-regulatory organisation also undertakes some vetting of entrants into the industry, for example, by setting entry qualifications.*

*(ASIC's Policy Statement 56: Prospectuses).*

### 3. Trustee Act 1898

The firms that were offering the Schemes were trustees of the money that had been placed with them for investment. For as Professor Finn stated, as quoted in Dal Pont, G. and Chalmers, D., *Equity and Trusts in Australia and New Zealand*, LBC Information Services, 1996 at page 283:

*Any person who has property vested in him and who is subject to an equitable obligation to hold and/or to deal with that property for the benefit of another or for a purpose recognised by law - is a trustee of that property.*

As such, each firm was required to comply with the *Trustee Act 1898*.

In addition to preserving existing legal and equitable obligations (section 7 of the *Trustee Act 1898*), the *Trustee Act 1898* imposes certain other obligations upon trustees. One such obligation is to exercise the care, diligence and skill that a prudent person engaged in the profession of acting as trustee would exercise in managing the affairs of another person (section 7(1)(a) of the *Trustee Act 1898*). For example, for an uninsured loan, whilst Rule 66 of the Rules requires a security valuation to be obtained, section 12B(1)(a)(i) of the *Trustee Act 1898* requires that it be obtained from an independent valuer as instructed by the trustee.

For a trustee to comply with its prudential obligations, it would assess adequately the ability of the mortgagors to service and continue to service the loans by, in addition to obtaining credit checks and references in respect of the mortgagors, requiring the mortgagors to provide and where

provided, the trustee to properly examine:

- (a) prior to the granting of the loans:
  - (i) income and expenditure statements;
  - (ii) assets and liabilities statements;
  - (iii) business plans;
  - (iv) feasibility studies;
  - (v) proof of capacity to meet interest payments;
  - (vi) the purposes for which the loans were required;
  - (vii) where the securities involved development and resale, the extent to which the development had been pre-sold; and
  - (viii) the actual cost to the mortgagors of acquiring the securities.
- (b) after the granting of the loans:
  - (i) income and expenditure statements;
  - (ii) assets and liabilities statements;
  - (iii) updated business plans;
  - (iv) updated feasibility studies; and
  - (v) reports of actual results for comparison with original plans and feasibility studies.

The purpose of the loan is important in prudential requirements being met. The investment itself may constitute a breach of trust by reason of its inherent nature. For example, in *Fouche v The Superannuation Fund Board* [1951-1952] 88 CLR 609 a twofold hazard existed attaching to the erection of a building and the carrying on of a business in the building after erection. The hazardous nature of the security was sufficient to establish a breach of these requirements.

## B. The operations of Solicitors' Mortgage Schemes

### 1. Nature of the Solicitors' Mortgage Schemes

A Scheme operated by investors placing money with a firm which then:

- (i) matched a particular investor or group of investors with a particular mortgage and the money was repaid when the mortgage was repaid (a contributory mortgage); or
- (ii) pooled the money and lent it to mortgagors (a pooled mortgage); or
- (iii) combined (i) and (ii) above.

The Schemes operated in Tasmania generally came within the third category and as such, were a hybrid of the contributory mortgage scheme and the pooled mortgage scheme. An investor's money will not necessarily be matched to a single mortgagor or property. It will be divided and pooled with other investors' money to be lent to mortgagors.

In the hybrid example, the money an investor placed with a firm for investment can, at any time, be lent to a different mortgagor upon different security and replaced with another investor's money by means of a book-keeping entry only. This may be done without the knowledge, approval or consent of the investor, that is, an investor's money may be switched from one loan to another at the whim of the firm.

Investors were led to believe variously by the firms operating the Schemes and by their financial advisors that their funds were secure, able to be repaid on short notice and offered an attractive interest rate. In fact, for a period spanning several years beginning in 1995, the Trust invested some of its own funds in the Schemes of various firms.

## 2. Financial advantages for firms

### 2.1 Double legal fees

Firms acted for both the mortgagee (the investors) and the mortgagors (the borrowers). If the firms did not inform the investors of this, they were in breach of Rule 12 of the Rules. By acting for both parties, there were conflicts of interest and duty. By charging legal fees for acting for the mortgagors, this was also a conflict of interest.

### 2.2 Procuration fees

If firms charged mortgagors a procuration fee without the knowledge or consent of the investors, notwithstanding Rule 12 of the Rules, these fees would be an unauthorised commission in the hands of the firms as trustees.

### 2.3 Collection fees

As was recognised by the Society in its submissions to the ASC in 1992, firms offering the Schemes received a fee for managing the receipt and payment of interest. The collection fee was charged as a deduction from the interest collected. If the investor consented to this, it was an authorised commission. Firms appeared to believe that they could unilaterally alter this fee.

### 2.4 Penalty interest differential

The practice of the firms voluntarily effecting payment to investors on the due date while reserving to themselves entitlement to benefit from the default or penalty rate allowed them to hide the existence and the extent of a mortgagor not paying interest. Firms paid the interest to the investors on the due date without informing them that the mortgagor had not paid. The investors were not able to make an informed decision about the continuation of their investments. Substantial profits for the firms were able to be generated from this practice. For example, every \$1 million at an interest rate differential of 2% per annum would result in a windfall of \$20,000.00 per annum for the firm.

### 2.5 Trailing commissions

Following the introduction of the *Managed Investments Act* 1998, some firms which had previously operated the Schemes transferred the performing loans in their mortgage registers to a registered scheme. It was usual for the registered schemes to pay to those firms a trailing commission. Unless the firms involved had the prior authority of the investors to retain this

commission, such would be an unauthorised commission. The sums involved may be substantial. For example, if \$30 million of mortgages were transferred to the registered scheme, and the trailing commission was 0.5% per annum, the firm would receive a maximum of \$150,000.00 per annum.

### 3. Defective operations of some Schemes

#### 3.1 Prudential requirements

To avoid a breach of trust, the prudential requirements should have been implemented by the firms offering the Schemes. An examination of the records provided shows that these requirements were not met by McCulloch & McCulloch or by Piggott Wood & Baker.

#### 3.2 Co-mingling of funds and the penalty interest differential

It is a breach of trust for a firm (as trustee) to mix its funds with those of its investors. This has occurred where partners of a firm have invested directly in that firm's Scheme and also where the penalty interest differential (being funds belonging to the firm) are invested through the Scheme.

#### 3.3 Unauthorised fees and commissions

A trustee is in breach of trust if it does not disclose that it is making unauthorised fees and commissions and if it does not pay the fees and commissions to the investors.

### 4. Supervision by the Law Society

Whilst the Council had power to provide under the Rules that Schemes be audited (section 17(1)(e) of the Act), it chose to constrain examination to a narrowly defined inspection. Any defect in a Scheme which would have been uncovered by an audit and not by the inspection results from the Society's voluntary circumscription of its own powers.

A properly conducted audit would have revealed the extent of the breaches of trust occurring within certain Schemes, for example:

- (i) the lack of compliance with prudential requirements;
- (ii) the conflicts of interest and the taking of unauthorised commissions; and
- (iii) the lack of independent valuations.

The failure of the Society to detect these breaches is prima facie evidence of its failure to meet its supervisory obligations under both the Act and the Corporations Law.

### 5. What amounts to a default

#### 5.1 The broad interpretation

Under section 111 of the Act, for the Supreme Court to grant an order declaring a firm or legal

practitioner corporation to be in default, there must have been a fiduciary default, which is defined under section 3 of the Act as a defalcation, misappropriation or misapplication of money or other property held on trust by a legal firm or a legal practitioner corporation. A misapplication of money necessarily includes a negligent application of money or the application of money in breach of trust.

## 5.2 The narrow interpretation adopted by the Society

In addition to dishonesty, only a breach of the Rules amounts to a “fiduciary default” according to the Society. It maintains that any loan made prior to the commencement of the Rules on 31 December 1994 which would have warranted a default order had the loan been made after that date, cannot be the subject of such an order.

## 6. What happens on default

### 6.1 The broad interpretation

Section 111(1) of the Act authorises certain specified persons to apply to the Court for an order declaring a firm to be in default. There is no express power of the Court to order a firm to be in default. Therefore, the Court, from section 111(1) of the Act, only has power to make a declaration that a firm is “in default” and the Act does not vest the Court with the power to make a limited default order.

Having declared a firm to be in default, a Court fund is established pursuant to section 111(2) of the Act. Section 111(3) of the Act then provides:

*If a Court fund is established in respect of a firm or legal practitioner corporation, a right to claim against the firm or legal practitioner corporation is a right to claim against that Court fund.*

An investor who has suffered loss by reason of a fiduciary default and who has a claim against the firm, can claim against the Court fund whether or not the particular loan gave rise to the default order. This is analogous to a company not satisfying a statutory demand which results in a winding up order.

### 6.2 The narrow interpretation adopted by the Society

When a Court makes a default order, that order is limited to the loans which gave rise to the order and only those investors whose money was invested in those loans can claim against the Court fund.

### 6.3 The Society as opposed to investors obtaining default orders

To enable the Society to factually support an application for a default order it can use its unfettered investigatory powers under section 58 of the Act. Unfortunately, for a person who has suffered loss as a result of a fiduciary default to support a like application, that person would have

to commence proceedings in the Supreme Court and progress at least through to discovery, an expensive process for a person who has already suffered loss.

## 7. Actions of the Law Society after default

### 7.1. Andrew David Hurburgh - Macquarie Law

On 23 December 1996, Andrew David Hurburgh was struck off the Roll of Practitioners of the Supreme Court of Tasmania. The Society applied to the Court for a default order under section 111 of the Act. On 21 January 1997, the Court made an order declaring Andrew David Hurburgh to be in default. A Court fund was established. However, the Court fund was insufficient to satisfy all claims made against it and the Trust was required to contribute from the Guarantee Fund. As the Court fund was not in surplus, the investors did not receive compensation for interest lost.

Whilst the payments made by the Trust to investors depleted the Guarantee Fund, it appears that no steps had been taken by the Trust prior to the collapse of the professional indemnity insurer to replenish the Guarantee Fund under section 111(8) of the Act by claiming the funds from the firm; in effect, the professional indemnity insurance.

### 7.2 McCulloch & McCulloch

On 7 November 1997, the Court ordered, upon application from the Society, that McCulloch & McCulloch was in default. The Society limited its application to four loans that were clearly in breach of the Rules. Three further loans have now been added to the default order. Investors in these loans will not receive compensation for interest lost.

### 7.3 Lewis Driscoll & Bull

The practitioner involved in the Scheme that failed in the firm Lewis Driscoll & Bull was Thomas Peter Baron. Mr Baron was involved in many of the loans the subject of the default orders in the McCulloch & McCulloch Scheme.

### 7.4 Piggott Wood & Baker

The Scheme operated by Piggott Wood & Baker has resulted in significant losses to investors. Although there is ample evidence to establish numerous breaches of trust, the Society has not made any application to the Court for default orders. The investors are left with the choice of applying to the Court for default orders, instituting proceedings against the firm in person or accepting their losses. Many investors do not have sufficient funds to apply to the Court or institute proceedings. For the investors who have instituted proceedings against the firm, co-operation from the Society has not been forthcoming.

A writ variously claiming: damages for breach of contract, negligence, negligent misstatement, misleading or deceptive conduct; and restitutionary compensation for breach of trust, was lodged with the Supreme Court on 28 July 2000. Attached and marked "TM&Co-2" is a copy of the writ.

#### 7.5 Dealings with the Society in respect of McCulloch & McCulloch

On 8 April 1998 and 22 May 1998, my firm lodged complaints against McCulloch & McCulloch with the Society. Despite various dealings with the Society, a proper response is yet to be received from the Society. Attached and marked "TM&Co-3" is a bundle of correspondence between my firm and the Society.

Due to the refusal of the Society to provide my firm with details of and documents relating to its investigations in accordance with section 58(10) of the Act, on 18 December 1998, a writ was lodged with the Supreme Court against the Society. Attached and marked "TM&Co-4" is a copy of the writ.

#### 7.6 Dealings with the Society in respect of Piggott Wood & Baker

Due to the refusal of the Society to provide the McCulloch & McCulloch information, that for Piggott Wood & Baker was sought relying on a different right. Each investor was entitled to inspect relevant documents due to their relationship with that firm being one of beneficiaries and trustee, a fiduciary relationship. One of the fiduciary duties of a trustee is that of disclosure, arising out of which is the beneficiaries' correlative right to inspect.

Piggott Wood & Baker failed to comply with the request for information and a complaint was lodged with the Society in relation to its failure. The Society invited both parties to attend an informal conference to resolve the conflict. Despite them agreeing to attend, the Society failed to organise the conference. Attached and marked "TM&Co-5" is a bundle of correspondence relating to the request for information.

### 8. Examples of breaches by some firms offering the Schemes

#### 8.1 McCulloch & McCulloch

McCulloch & McCulloch were either, or both, in breach of the Rules and in breach of trust by lending:

- (a) money to mortgagors without obtaining valuations - Lots 30 & 31 Wolstenholme Drive, Sorell; Toby's Hill Road, Cygnet; Frogmouth Lane, Primrose Sands; Scenic Drive, Lewisham; Subdivision Huon Road, Geeveston; Land at Cygnet, Lot 2, Toby's Hill Road, Cygnet; and Jetty Road, Eaglehawk Neck;
- (b) on high risk mortgages based upon speculative projections - several properties at Sorell;
- (c) to a business partner - Thomas Peter Baron; and
- (d) on a series of valuations that had been inflated to enable an amount equal to or in excess of the respective purchase prices to be lent - "The Barracks", "The Lodge" and Weston Hill Road Subdivision.

SUBMISSIONS OF THE LAW SOCIETY OF TASMANIA  
TO AUSTRALIAN SECURITIES COMMISSION

PUBLIC HEARING ON SOLICITORS' MORTGAGE INVESTMENT  
SCHEMES

THE SCOPE OF THE ASC ENQUIRY

The enquiry relates to the operation of "Solicitors' Mortgage Investment Schemes". The phrase is drawn from ASC terminology and the Society will not attempt to further define or refine it.

) As the Society understands the interest of the ASC, the phrase is used to refer to situations in which solicitors assume responsibility for the selection, placement and management of the monies of clients and investors on mortgage security.

The ASC is responsible under the Corporations Law (inter alia) to ensure the issue in due form of prospectuses in all circumstances where the lodgment and issue of prospectuses is required, unless the ASC grants an exemption from the obligation. That obligation extends to all circumstances in which "prescribed interests" (such as "contributory mortgages" are perceived to be) arise. The Society does not disagree with that perception.

) However, it notes that the determination of issues as to whether, in the absence of exemption, solicitors will be subject in many of their dealings to the prospectus provisions will be a contentious matter difficult of determination.

Further, because the authority and responsibility of the ASC in relation to the operations of the profession is limited, the Society understands that the ASC is not concerned as to the wide diversity of other circumstances in which solicitors can be involved in the making, placement and management of investments for clients such as:

- a. Investing money on securities or in purchases nominated by clients, with or without the advice of the solicitor;
- b. Taking security for monies due to clients, either upon sale (such as to secure a portion of the purchase price) or otherwise to secure monies (such as trading or other debts) due to clients; and



- c. Making available their services or those of companies under their control as nominees to hold property in trust for clients.

That being so, the Society can foresee the possibility that when the full scope of the financial responsibilities of solicitors is recognised and the extent of the supervisory and regulatory controls and of the indemnification systems is appreciated, the Inquiry may choose to bring in a recommendation that the Corporations Law should not apply to the legal profession because it is sufficiently controlled under State laws.

### "SOLICITORS MORTGAGE INVESTMENT SCHEMES"

The Society is of the view that:

- \* its existing methods for the regulation, control and supervision of the accounts of solicitors which (inter alia) extend to the supervision of monies received for investment on mortgage; to their application; and to the maintenance and preservation of the securities taken, provides a desirably high measure of protection for all clients and investors;
- \* the practice of solicitors in this State in effecting and managing mortgage securities provides a high standard service for the benefit of both mortgagors and mortgagees;
- \* the risk of uncompensated loss by reason of either negligence or dishonesty on the part of solicitors, although it cannot be said to be non-existent, is very low;
- \* the systems in place provide for indemnification of the public in the event that loss is occasioned by either negligence or dishonesty, and whether occasioned in relation to mortgage securities or by reason of other matters, provide not only a substantial assurance of the availability of indemnification for the public, but a measure of security not available to the public in its dealings with other institutions.

## THE COMMITTEE

In preparing to respond to the invitation of the Australian Securities Commission ("the ASC") to make submissions in writing and orally upon the enquiry of the ASC into "Solicitors' Mortgage Investment Schemes", the Council of the Law Society of Tasmania ("the Society") appointed a Committee (the Committee") comprising six representatives of firms well known to engage in mortgage investments on a large scale to which three other similarly experienced practitioners were co-opted. For reasons of organisational convenience, representatives were drawn from the Southern region of the State.

The Committee included representatives of most of the "major firms" (as hereafter identified). It included four persons who had been President of the Society; and three who had been members of the Solicitors' Trust ("the Trust").

As later enquiry made of practitioners by the Chairman was to establish, collectively the members of the Committee were well informed as to the mortgage practices of solicitors in this State. The information of individuals was most detailed in relation to the operations of their own firms but all had a good insight into the size of operations and methodologies adopted by other firms.

## THE COMMITTEE'S SURVEY

The Committee commissioned a survey directed principally to all firms thought to control mortgage investments on a significant scale. Enquiry was also directed to a selection of firms thought not to engage in such practices. In settling the list of firms of whom enquiry was to be made the Chairman was guided by the advice of the most experienced of the "random auditors" who had served the Society.

As at 30th June 1991, the structure of the legal profession in Tasmania, so far as self employed solicitors authorised to deal directly with the public on their own account was concerned was as follows:

	<u>South</u>	<u>North</u>	<u>North/ West</u>	<u>State</u>
Firms *	30	9	10	49
Single Practitioners	45	7	9	61
<hr/>				
Practices	75	16	19	110
Practitioners	157	49	42	248

\* Two or more practitioners.

Because unlike most Mainland States, Tasmania has a decentralised population, it is common practice to identify three regional areas. The North-West is the most decentralised region and the last to develop.

Enquiries were direct to, and the responses received from firms, were as follows:

	<u>South</u>	<u>North</u>	<u>North/ West</u>	<u>State</u>
Practitioners	105	47	33	185
<hr/>				
Firms	22	9	9	40
Single practitioners	9	2	2	13
<hr/>				
Replies	31	11	11	53
Percentage response	100%	100%	100%	100%

Having noted the geographical spread of enquiries made the Society does not propose to make further reference to regional considerations. To do so would all too readily lead to the identification of particular firms.

In circulating his questions to the firms and individuals asked to respond to the enquiries of the Society, the Chairman invited firms to state either in their written replies or personally, by communication either to the Chairman or the Executive Director, the quantum of mortgage funds under the management of the firm. All responded. But some preferred to do so by providing the information to one or other of the named individuals rather than recording it in the written responses for the consideration of the entire Committee. That they should have chosen to do so is not at all unreasonable.

However, what has been disclosed is sufficient to enable the Society to provide the information which appears in the submission. In some respects it would have been possible for the information provided by this submission to be more detailed but to provide that detail would constitute an unreasonable intrusion upon the privacy of the firms concerned and, in the view of the Society, would serve no useful purpose. In consequence in what follows some care has been taken to avoid particularity in reference to firms by consideration of their size; or the size of funds managed; or the regional base of the firm, in order to avoid both identification of firms and inaccuracy in the identification of firms.

The survey indicates that:

- Tasmanian solicitors manage and control schemes providing for the investment of nearly \$200,000,000 in mortgages.
- Nine firms (56 partners) - herein referred to as "major firms" - control approximately 60% of those funds.
- Each of those firms controls in excess of \$10,000,000.
- No one firm controls a high percentage of the total available funds.
  
- Twelve other firms (54 partners) control funds ranging in size from \$1,000,000 to \$10,000,000 with three only of those firms (19 partners) each controlling in excess of \$5,000,000.

- Nineteen firms (54 partners) control funds of less than \$1,000,000 and three of those firms (6 partners) manage funds of less than \$100,000.
- Thirteen of the firms surveyed (21 practitioners) do not manage any investment schemes.

Other matters to arise from the survey are as follows:

1. Only one firm - a major firm - operates a mortgage management company as provided for in the Solicitors Account Rules;
2. All the members of that firm are directors of the mortgage management company and the directors give their personal guarantee to investors as to repayment of monies borrowed as presently required by the Rules;
3. Two other firms - both major firms - effect their lending through and take securities in the name of, companies controlled by the firms;
4. All three of those firms and one other firm conduct pooling arrangements in which there is no attribution of particular securities to particular investors;
5. One other major firm lends in the name of, and holds securities in the name of, a company controlled by the firm;
6. All major firms (other than the firm conducting a mortgage management company) - 9 in all - manage mortgage funds on a contributory mortgage basis;
7. Twenty-four other firms manage funds on a contributory mortgage basis;

8. Most firms require either a minimum period for the investment of monies or a minimum period of notice as a prerequisite to repayment. In nearly every instance firms seek to pay out investors promptly after request made and without requiring adherence by the investor to the terms of any formal arrangement;
9. Most firms managing pool systems and contributory mortgage funds formally document their arrangements with investors;
10. Most investors receive clear of all expenses, an interest return equal to or greater than that payable on funds managed by trustee companies;
11. Investors seeking such a return do so upon dealing with individuals who are usually well known to their clients and ordinarily persons well known and of long standing in the community and having a substantial interest in it;
12. The return so available to investors is usually comparable with the return offered by major corporations administered by persons unknown to the investor with the investment supported only by lesser securities such as debentures and "floating charges";
13. Most firms receive a fee for managing the receipt and payment of interest which is usually expressed as a percentage of interest payable;
14. Pooled fund operators bear the risk of delay in the receipt of interest from mortgagors; and the risks of non-payment of principal and interest;
15. With contributory mortgage funds the risk of delayed payment of interest by mortgagors is usually formally with investors but in most instances firms voluntarily effect payment to investors on the due date while reserving to themselves entitlement to benefit from penalty rates.

## TASMANIA - A SPECIAL CASE?

The Society is not sufficiently informed as to the role played by the profession in other States in the provision of mortgage finance to know to what extent economic and social structures differ. But what is clearly known is that the role traditionally played by the legal profession in Tasmania in the provision of mortgage finance is an important one in the community interest, as well as playing a significant part in the professional practices of many in the profession.

## THE HISTORY OF LOSS

The practice of solicitors in Tasmania in managing investments on mortgage of and for clients has a long history. It can be seen recorded in the records of the Registry of Deeds and of the Lands Title Office. It also appears in other historical records such as the recent publication "The Whitehead Correspondence": Correspondence of a pastoralist from the Nile of the 1870's.

On the whole the history has been a most honourable one. The legal profession has had its defaulters but has not had its record marred by the traumatic and substantial collapses which have characterised the corporate life of Australia from its early days.

In the history of the legal profession in Tasmania there have certainly been clients who have suffered loss and who have not been fully compensated. But the last known loss not wholly satisfied occurred in the decade of the 1960's. Since 1972 clients have suffered loss but always, so far as is collectively known to the Committee, there has been complete compensation. That that has been the case is a consequence of the substantial reforms of the early 1970's.

Questions have arisen from time to time as to whether the liability to compensate for the breach of duty has been occasioned in the course of practice such as to render partners in the professional partnership liable. Such questions may still arise and it is unlikely that any action of the ASC will alter

that. But when, as recently in Sutherland v Archer & Ors such a question has arisen and been determined in favour of the investor, compensation in full has been available to be had.

### CONTROL AND INDEMNIFICATION

That the history of uncompensated loss has been so limited in recent decades is due to a number of developments of recent times all of which have occurred against an historic background as society has increasingly moved towards control of the actions of individuals.

From the establishment of the Supreme Court of Tasmania in 1824 pursuant to the Charter of Justice, the Court has been invested with power to admit persons as barristers and as solicitors of the court; and that power has carried with it disciplinary powers. Later some disciplinary powers were conferred on the Court pursuant to legislation regulating the role of the legal profession in the community. In this century the operative legislation has been the Legal Practitioners Act 1896 and its successor the Legal Practitioners Act 1959 ("the Act"). Proposals which have been under consideration by the Society and the State Government for the re-enactment of the Legal Practitioners Act contemplate no less stringent controls than have been known in recent decades.

The Legal Practitioners Act by section 76 has preserved to the Court and its Judges their traditional disciplinary control over solicitors. The Court from time to time exercises its power and, when the occasion for its exercise is made out, may result in sanctions ranging from admonition through to striking off.

In recent times the standards of conduct required of practitioners in relation to dealings with investing clients have been reviewed and propounded in judgments of the Supreme Court of Tasmania (The Law Society of Tasmania v Walker & Ors Full Court No. 56 of 1988; and also No. 17 of 1989).

Controls of more immediate relevance and concern are as follows:



(A) PRACTICING CERTIFICATES

Section 74 of the Act proscribes it as an offence for any non-practitioner to act as a solicitor; and section 23 of the Act makes it an offence for any practitioner to practice when not authorised to do so by a current practicing certificate. Any practitioner in breach of that obligation may be prosecuted on indictment before the Supreme Court of Tasmania; and punished as for a crime. Section 54 provides that no practicing certificate may be issued to any practitioner unless a fidelity bond is in place and lodged with the Registrar. On application for a practicing certificate by a practitioner who has not within twelve months beforehand been named in such a certificate, the certificate sought may not be issued until the applicant has satisfied the Court as to the circumstances attending his failure to take out or renew such a certificate; and as to his conduct and employment in the interim.

(B) THE FIDELITY BOND

The fidelity bond referred to is taken out by the Law Society and lodged with the Registrar. It remains as was provided for on the enactment of the legislation in 1962: a bond for \$40,000. It is no longer regarded as a primary means of protecting the public against loss. That role is now performed by the Solicitors' Guarantee Fund.

(C) THE SOLICITORS' GUARANTEE FUND

By amendments enacted in 1970 provision was made:

- (a) For portion of the monies held from time to time by solicitors in their trust accounts to be deposited in interest-bearing accounts;
- (b) For interest so generated to be paid to the Solicitors Trust (a statutory corporation);

- (c) For the Solicitors' Guarantee Fund to be built up to (currently) \$3,305,249 or "such greater amount as is determined by the Minister and the Law Society";
- (d) For the Solicitors Trust on demand of the Law Society in the event of any fidelity bond becoming forfeit to pay into Court so much of the Solicitors' Guarantee Fund as is nominated; and
- (e) For the monies so paid into Court to be available to meet the claims of clients in relation to the loss of monies received on trust by the defaulting solicitor.

As at 31st December 1991 the amount in the Solicitors' Guarantee Fund stood at c.\$3,500,000. The view of the Society is that, because of the ever present risk of inflation and a desire to be prudent, it would prefer that the reserve be higher but so remote is the risk of any greater loss that the Society always has to persuade the State Attorney General that any increase is warranted. An increase to \$3,750,000 is presently being sought.

#### (D) INDEMNITY INSURANCE

The Society has long been conscious that the public is more likely to suffer loss by reason of the negligence of practitioners than by any act of dishonesty. For that reason there is in place a system of compulsory professional indemnity insurance. The terms of that insurance are as negotiated by the Law Society of New South Wales. The terms are special in that:

- (a) for each practitioner in practice the sum insured is \$1,100,000 as a minimum for each and every claim;
- (b) the concept of "the assured" extends to "each service or administration company or trust insofar as its activities are carried out in connection with the practice" and the concept of "the practice" extends to everything done in connection with "the business of practicing as a solicitor ... provided that any fees or other income which accrue from any activities described above inure to the benefit of the firm ...".

In the view of the Society, when loss is occasioned in the course of taking mortgage security by reason of some act of negligence on the part of the solicitor concerned it is only an isolate transaction which will be affected. That being so then, in all but the most extreme cases of rare, very large mortgages, the cover so provided will be sufficient to ensure indemnification of the investor with only a sum of excess to be paid by the solicitor concerned.

\* RISK REDUCTION/MINIMISATION

\* The Society has long taken the view that it is not enough for it to establish funds sufficient to indemnify clients who, but for the funds, would suffer loss. It has acted to ensure that the risk of any loss being experienced is reduced by the application in due measure of supervisory, preventative controls, particularly in relation to the loss of monies invested by clients with the profession.

The methods in force are as follows:

(A) THE SOLICITORS ACCOUNT RULES

The standards by which solicitors are required to record and account for all financial dealings with their clients monies are set forth in "Solicitors Account Rules" (Rules of Practice No. 209 of 1977);

(B) HALF-YEARLY ACCOUNT RULES

Each firm is required to present to the Society half-yearly a report by an accountant approved by the Society for that purpose. Reports are reviewed by a committee of the Society and irregularities appearing therefrom are the subject of enquiry and investigation;

(C) RANDOM INSPECTION

Over and above the half-yearly reports the Society retains the services on a full-time basis of an accountant well experienced in the examination of the financial records of solicitors. His engagement is to work throughout the State inspecting the trust account records of solicitors on a random basis and without notice. His services are available to assist members of the profession who seek guidance and direction. It is thought that by having an overview on a State basis through its inspector that the overview is likely to bring to attention any unsatisfactory accounting practices not recognised as such by the solicitors concerned or their approved accountants;

(D) PEER SCRUTINY

Recent experience of the Committee in predicting in large measure the outcome of the survey which has been conducted confirms what has long been the experience of members: peer scrutiny has often identified unsatisfactory practitioners long before their improper practices have been capable of being demonstrated. Alone it is by no means sufficient to either result in exposure or prevent loss, but in the judgment of the Society it does much to limit loss;

(E) PUBLIC COMPLAINTS

The Society maintains a standing committee "the Investigating Committee") which has the responsibility of receiver every complaint directed to the Society and thereafter directing its management until it is finally determined. Responses vary according to circumstance but wherever it seems warranted the traditional practice of the Society pursuant to the Rules of Practice has been to direct the practitioner under investigation - usually without any notice - to forthwith produce his books of account to an accountant and a solicitor nominated for the purpose by the Society. Further, when it has been

considered appropriate, management of the trust account of the firm has been entrusted to nominees of the Society pending the satisfactory resolution of the investigation.

Inquiry of the Investigating Committee has indicated that, with the exception of two clearly established incidents of defalcation which resulted in both striking off and substantial terms of imprisonment, in the past decade complaints touching on investment matters have been rare and, even including the two defalcation situations, no uncompensated losses have been involved.

### THE SUFFICIENCY OF THE AVAILABLE FUNDS

The sums available through:

- (a) The personal resources of any defaulting practitioner and those of his partners (if any);
- (b) The fidelity bond; and
- (c) The Solicitors' Guarantee Fund; and
- (d) Professional Indemnity Insurance

provide substantial assurance that should there be any default by solicitors whether by reason of negligence or dishonesty and whether in relation to mortgage investments or a wide range of other matters, clients who have invested with or deal with solicitors will be indemnified.

That assurance does not provide a guarantee that the loss could never be so large as to remain not wholly compensated for. But, coupled with the supervisory and investigatory roles of the Society, it is extremely unlikely that any deficiency could occur on such a scale as to leave any member of the public without full compensation.

In addition, to remove any doubt that there may be in the matter, the Society proposes to request Government to amend the Act to ensure that the resources of the Solicitors' Guarantee Fund are available to provide indemnification in the event of loss arising from the operation of any "company funds" subject to the provisions of the Solicitor's Account Rules.

In consequence it can be said that persons investing with solicitors are exposed to far less risk of loss than persons dealing with any other financial institution in the community - including some banks.

Furthermore, the protection afforded to clients of solicitors extends well beyond circumstances capable of being regulated and controlled by the ASC; and provides a protection in the event of loss which the ASC is unable to provide.

### THE PRESENT

Action by the State Parliament in association and co-operation with the Law Society has produced a most desirable state of affairs in relation to members of the public investing on mortgages through solicitors in Tasmania.

- \* Members of the public are free to deal with solicitors or not as they please.
- \* Investing members of the public have freedom to choose between a large number of "service providers".
- \* Investors are able to select the service best suited to the needs of the individual investor.
- \* Most investors enjoy the advantage of dealing with persons not only well known to the individual investor but persons well known over a long term within the community.

- \* Members of the public are able to enjoy a high rate of return on investments - commonly better than that offered by major institutions; while at the same time enjoying a high measure of security if the investment is made as contemplated and substantial assurance against loss if the monies are not applied as expected or authorised.
- \* Investors enjoy a high degree of protection against the risk of loss whether occasioned by negligence on the part of the solicitor either in proffering advice or in giving effect to advice which has been given and accepted.
- \* Members of the public enjoy such protection to a degree not available in dealings with the principal forms of investment institution in this community.
- \* Borrowers also commonly have the advantage of dealing with persons who are either well known to them personally or at least recognised by the borrower as persons well known in the community over a long period; and
- \* Borrowers also have the advantage of dealing with solicitors of knowing that, if they are negligently advised to undertake the particular borrowing from the solicitor as lender (or agent for the lender), that the solicitor will be accountable to them for the negligent advice.

By the exercise of the responsibilities cast on it by the State legislature the Society exercises a measure of power and control over the financial activities of its members which is not to be found elsewhere in the private sector of the community.

Further, it has established a system for the financial protection of the public in the event of loss occasioned by its members whether occasioned by their negligence or by their misconduct. That provides an unusually high degree of protection for all clients and investors; and not only for those who authorise the investment of their monies on mortgage.

The authority and responsibility of the Society extend over a far wider field of professional activity and investment responsibility than falls within the purview of the ASC.

That authority and responsibility embraces everything within the range of the authority of the ASC.

The exercise of that authority and responsibility by the Society is more comprehensive and effective than anything likely to be available to or through the ASC in preventing and in minimising loss to investors.

Further the exercise of that authority and responsibility is attended by provision for indemnification in the event of loss which not only cannot be provided by the ASC in the same degree but cannot be provided at all.

The Society therefore proposes that the ASC for the time being should continue its present exemption as provided for in its Class Order of 21st November 1991.

At the very least the provisions of that Class Order should extend to all practitioners of the Supreme Court of Tasmania and associated companies in respect of conduct in Tasmania.

### THE FUTURE

The Society is not content that matters should forever remain unchanged and it is grateful that the fact of the pending enquiry has prompted it to again review the investment practices of solicitors.

Having done so it recognises that there would be legitimate cause for concern for the community, the Society and the ASC should any situation develop in which solicitors by solicitation promote the investment of funds with a view to investment in securities other than investment in mortgages of real estate and other than on a conservative basis as has long been the tradition in the profession.



The Society therefore has prepared a draft of Rules which it contemplates proposing for adoption to the State Government. (A copy is annexed). For the time being the Society intends to defer seeking a proclamation of those draft Rules as the proposal may come to be modified in light of deliberations before the ASC or the outcome of its enquiry.

The essence of the proposal can be shortly stated. It is:

- (a) That the financial management of investments for clients by solicitors shall remain tightly controlled as in the past;
- (b) That solicitors controlling funds limited to investment on first mortgages and second mortgages of real estate (as defined) and the deposit of monies shall continue to be exempt from the prospectus requirements of the ASC; and
- (c) That companies wholly controlled by solicitors shall be similarly exempt but only if wholly subject to control under the Solicitors Account Rules as if a firm of solicitors and if limited to investments on first and second mortgages of real estate and the deposit of monies.

Conversely any solicitor who conducts funding through associated or controlled companies outside the authority of the Law Society or who controls funds not limited to investments on first and second mortgages shall remain subject to the control of the ASC.

Dated the 24th March 1992

THE LAW SOCIETY OF TASMANIA

per:



C.R. LESLIE

CHAIRMAN - SPECIAL COMMITTEE

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: CRD:6046:JON021YE

8 April 1998

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**By Hand Delivery**

Dear Madam,

McCulloch & McCulloch  
Mortgage Trust Fund  
"Kidbrook", Arthur Highway, Sorell

I act for several clients who have invested money with McCulloch & McCulloch (the "Firm"). Mr Alistair McCulloch has advised each of my clients that their money has been invested upon the security of a Mortgage over a property of approximately 63ha known as "Kidbrook", Arthur Highway, Sorell. The registered proprietor of that land is Thomas Peter Baron ("Baron") of Lewis Driscoll & Bull. Baron has defaulted in the repayment of the money. There will be a substantial loss on the sale of the property.

In this letter I set out a complaint against the Firm and against Baron in relation to the Mortgage and associated transactions.

Summary

My complaint in summary is as follows:

1. The Firm has advanced money which exceeds two-thirds of the security valuation without mortgage insurance being obtained.
2. The Firm has lent on the basis of a security valuation which was obtained by the borrower, not by the Firm itself.
3. The Firm has lent on the basis of a valuation which is negligent and wrong on its face.
4. The Firm has lent on the basis of a security valuation for an amount in excess of the purchase price of the property.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

5. The Mortgage, when taken in the context of several other transactions undertaken by Mr Alistair McCulloch of the Firm, suggests that the Firm was investing its clients' money with a business partner of Mr McCulloch in circumstances which raise concerns about the conduct of the Firm's mortgage practice.
6. Baron invested funds which appear to belong to his clients in properties purchased by business associates of his, in sums well in excess of the purchase price.

**Relevant Facts**

- A.
  1. The land in question is described in Certificate of Title Volume 251707 Folio 1.
  2. By Transfer No. B921685 Wayne Emmerson Paul transferred the property "Kidbrook" to Baron for the consideration of \$535,000.00.
  3. The Firm advanced to Baron the sum of \$452,000.00 secured by a Mortgage registered No. B921686 dated 27 February 1996 in the amount of \$450,000.00.
  4. Upon instructions from Baron, M E Johnstone & Associates provided a valuation dated 15 February 1996 in which they valued the property at \$675,000.00.
  5. The valuation obtained from M E Johnstone & Associates stated that the total area of the property was 63.82ha which may be subdivided into two rural parcels the minimum balance being 40ha capable of use as a tourism venture. According to information obtained from the relevant Council, no enquiries had been made of the Council as to the possibility of the use of the land for this purpose.
- B. By a Transfer dated 29 October 1997 Alistair and Quentin McCulloch and Baron sold to Dessipur Pty Ltd land at Sorell described in Certificates of Title Volume 126997 Folio 1 and Volume 144725 Folio 99. The consideration for the Transfer was \$200,000.00. By Mortgage dated 29 October 1997 Dessipur Pty Ltd granted a Mortgage over the land to Baron for the amount of \$320,000.00.
- C. By Transfer dated 5 July 1993 Baron purchased land at Sorell described in Certificate of Title Volume 110657 Folio 1 from Mr & Mrs Prebble. The consideration for the purchase was \$145,000.00. On 6 July 1993 Alistair and Quentin McCulloch granted to Baron registered Mortgage No. B671875 securing the amount of \$275,000.00.
- D. By Transfer dated 21 October 1996 Alistair and Quentin McCulloch acquired from Baron a one-quarter share each in land at Sorell described in Certificate of Title Volume 124719 Folio 1 for the consideration of \$1.00. Alistair and Quentin McCulloch thereby obtained the entire interest in the property which they had previously owned jointly with Baron. By Transfer dated 18 November 1996 Alistair and Quentin McCulloch transferred the property to Dessipur Pty Ltd for a consideration of \$220,000.00. On 18 November 1996 Dessipur Pty Ltd granted Mortgage registered No. B994853 to Baron as security for an advance of \$246,000.00.

*Complaint*1. *Lending in Excess of Two-Thirds*

The sum of \$452,000.00 which was advanced upon security over "Kidbrook" is in excess of two-thirds of the security valuation of \$675,000.00. The amount advanced exceeds the amount secured under the Mortgage, being \$450,000.00 (which is precisely two-thirds of the security valuation). A copy of a letter to Mr McCulloch on this subject and his reply are attached.

2. *Independence of Valuation*

The Firm failed to obtain a valuation itself in respect of the property but relied upon a valuation arranged by the borrower, Baron, and provided to the Firm.

3. *Negligent Valuation*

The valuation relied upon by the Firm was questionable in that it suggested that a property of 63.82ha could be divided into two parcels of 40ha each and that it could be used for a certain purpose without indicating that there was any approval for that purpose. Further, the valuation was for an amount well in excess of the purchase price.

4. *Mortgage to Associates*

The series of transactions described above indicates that Baron had been engaged in business in association with the partners of the Firm. In each of the transactions described, the amount secured by the Mortgage was well in excess of the consideration given for the Transfer.

The matters set out in this letter suggest that a fiduciary breach may have been committed by the Firm in relation to the Mortgage over "Kidbrook" and by Baron in relation to transactions B, C and D above. In each case it seems that the funds lent may have been misapplied.

Should you wish to discuss any of the matters set out in this letter please contact me.

Yours faithfully,  
TOOMEY MANING & CO

Per: CRD

cc- P.C. Toomey

Enc.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: CRD:6046:JON020YE

6 April 1998

McCulloch & McCulloch  
Solicitors  
G P O Box 1096L  
HOBART TAS 7001

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- Tel. (03) 6224 9911
- Fax. (03) 6224 9966

Attention: Mr A McCulloch

By Facsimile: (03) 6224 0261

Dear Sir,

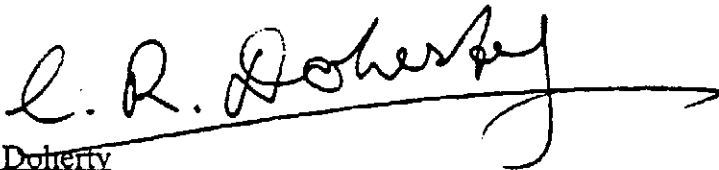
Mortgage to T P Baron: "Kidbrook", Arthur Highway, Sorell.

I enclose a copy of a notice of demand which Mr Wallace has provided to me.

The notice of demand states that the principal sum is \$452,000.00. This is contrary to the amount indicated on the face of the mortgage. Please advise which figure is correct.

Yours faithfully,  
TOOMEY MANING & CO

Per:



C.R. Doherty

Enc.

**COPY****McCULLOCH AND McCULLOCH**

Solicitors

5 Heathfield Avenue  
Hobart, Tasmania 7000  
GPO Box 1096L Hobart 7001

Alistair McCulloch, LL.B.

Telephone: (03) 6234 9022

Fax: (03) 6224 0261

FACSIMILE TRANSFERTO: TOOMEY MANING AND CO

ATTENTION : C R DOHERTY

FROM: ALISTAIR McCULLOCHDATE: 7TH APRIL 1998

TIME: \_\_\_\_\_

NO. OF PAGES: 1 (INCLUDING THIS HEADER)MESSAGE:Re: Mortgage to T P Baron - "Kidbrook" Arthur Highway Sorell

I confirm the Mortgage shows \$450,000.00, but in actual fact, the advance was made for the sum of \$452,000.00.

Yours faithfully  
McCULLOCH AND McCULLOCHPer: *Alistair McCulloch*

(Alistair McCulloch)

PRIVACY AND CONFIDENTIALITY NOTICE

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**COPY**

TO: Thomas Peter Baron  
11 Elizabeth Street  
HOBART Tasmania 7000

NOTICE OF DEMAND

TAKE NOTICE that the following properties are under Mortgage to DAVID ALISTAIR JAMES McCULLOCH and QUENTIN JOHN McCULLOCH:-

"Kidbrook" Sorell under Memorandum of Mortgage Number B921686 for the principal of FOUR HUNDRED AND FIFTY TWO THOUSAND DOLLARS (\$452,000.00)

TAKE NOTICE that the abovementioned Mortgages are On Demand and accordingly you are advised that we hereby demand all principal and interest monies due and payable under the Mortgages to be paid to this office no later than the 20th day of March 1997.

Failure to do so will result in Notice of Sale being issued against you for immediate sale by the Mortgagee.

DATED this 13th day of March 1997.

WALLACE WILKINSON AND WEBSTER

Per: 

Solicitors for the Mortgagee

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000. G.P.O. BOX 1133  
AUSDOC DX111. TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240

Our ref: C98/45:JMM/BB

29 April 1998

**PRIVATE & CONFIDENTIAL:**

Toomey Maning & Co  
30 Davey Street  
HOBART TAS 7000  
Attention: Mr P C Toomey

Dear Sir

## COMPLAINT - McCULLOCH & McCULLOCH : T P BARON

I advise that a copy of your letter of complaint dated 8 April 1998 was forwarded to Mr A McCulloch and Mr T P Baron for their explanation. I enclose a copy of their responses dated 28 April 1998 and 20 April 1998 respectively, for your perusal and comment.

Would you please give this matter your urgent consideration and let me have your response to these letters prior to 4.00 p.m. on Monday 4 May 1998.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

Encl.



# McCULLOCH & McCULLOCH

Solicitors

Alistair McCulloch, LL.B.

Telephone (03) 6234 9022  
Fax (03) 6224 0261

5 Heathfield Avenue,  
Hobart Tasmania 7000  
GPO Bcx 1096L 7001

28th April 1998

Your Ref:

Our Ref: AM.JT

## PRIVATE AND CONFIDENTIAL

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART Tasmania 7000

DELIVER BY HAND

Dear Mrs Martin

### 1. LENDING IN EXCESS OF TWO THIRDS

The Conditions of Investment with each investor were that we could invest money on first and/or second mortgage.

The security valuation obtained and addressed to McCulloch and McCulloch was in the sum of \$675,000.00. The Mortgage was dated the 27th day of February 1996. "The Principal Sum" in the mortgage was and is defined to mean "all moneys and damages which now or in the future are owing ... by the Mortgagor to the Mortgagees ..."

It is nothing to do with whether the loan was insured. The sum of \$450,000.00 of "the principal sum" is within the definition of first mortgage and the sum of \$2,000.00 of "the principal sum" is within the definition of second mortgage (it not being deferred to a first mortgage) in the Rules of Practice.

The loan was subject to Mr Preston's audit and I also refer to my earlier letters in regard to it.

### 2. INDEPENDENCE OF VALUATION

The valuation is made to McCulloch and McCulloch and the valuer knew the purpose for which it was obtained and the reliance of the lender on it to advance loan funds. There is no requirement that McCulloch and McCulloch had to engage a different valuer than one already engaged by a Borrower.

### 3. NEGLIGENT VALUATION

If is was negligent then the valuer may have to accept responsibility. However, a right of action may now have eluded any borrowers as a transfer of the mortgage pursuant

The Law Society of Tasmania

28th April 1998

---

to S.58 and S.60 of the Land Titles Act has taken place at the request of the alleged complainants and their solicitors.

4. MORTGAGE TO ASSOCIATES

The alleged transactions are referring to Mortgages by Baron except C in Toomey Maning and Co's letter.

The consideration on the face of the Mortgage relates to moneys advanced for purchase and renovations and improvements to the building purchased.

I cannot answer in respect of these other matters but no fiduciary defaults have occurred.

Also the letter from the solicitors does not disclose the alleged complainants and I would be pleased if the solicitors could advise who they are acting for.

Yours faithfully  
MCCULLOCH AND McCULLOCH

Per: 

(Alistair McCulloch)

# LEWIS, DRISCOLL & BULL

---

## BARRISTERS AND SOLICITORS

ESTABLISHED 1885

FIRST FLOOR, 11 ELIZABETH STREET, HOBART, TASMANIA 7000 PH (03) 6236 9988 FAX (03) 6236 9229  
BOX 200 B, C.P.O., HOBART, TAS. 7001 DX 120 HOBART

TPB:MLV

20th April, 1998.

The Executive Director,  
The Law Society of Tasmania,  
28 Murray Street,  
HOBART.

Dear Mrs. Martin,

**re: TOOMEY MANING & CO.**

I confirm receipt of your letter of 15th April at approximately 4.50 pm. on 15th April, 1998.

The letter of complaint from Toomey Maning & Co. ("Toomey") apparently deals with two separate matters.

As to the first - "McCulloch & McCulloch Mortgage Trust Fund 'Kidbrook', Arthur Highway, Sorell" - I am aware that Toomey act for several investors in my Mortgage to McCulloch & McCulloch and in my view, this is a private matter unrelated to my practice.

As to the second - Toomey have not previously indicated that they have any interest in my other borrowings from McCulloch & McCulloch, and I am not aware they have any interest in any lendings by my firm Lewis, Driscoll & Bull. I do not have authority, written or verbal, to disclose client information. However, I hereby provide the following information.

I respond as to "Kidbrook" as follows.

### **Relevant Facts:**

- A.
1. The title reference is correct - this may be confirmed by McCulloch & McCulloch, who acted for me.
  2. I confirm that the property was transferred to me by W. E. Paul for the consideration of \$535,000.00.
  3. I believe McCullochs advanced total mortgage funds of \$452,000.00.
  4. M. E. Johnson & Associates provided the valuation at \$675,000.00.
  5. I believe that the valuation obtained from M. E. Johnson & Associates stated the total area at 63.82ha and that the property might be subdivided into two rural parcels and capable of use as a tourism venture, under which zoning it could be further subdivided.

The "Relevant Facts" are in error at Fact 5: The Council was well aware of subdivisional discussions. However, I do point out that their then Planning Officer, Mr. Steve Mars, is no longer with the Council. A Development Application for

subdivision into two lots was lodged and advertised. The Council at the time believed that the Application complied but some doubt subsequently was raised requiring further clarification of the Planning Scheme. The matter was not finalised. A Landscape Architect was engaged to carry out the Environmental Impact Study and Development proposal for Council.

B. and D. are somewhat confused. Both refer to property at Weston Hill, Sorell and I respond as follows in chronological order.

- D. I confirm the first sentence of Fact D. The Transfer from myself to McCullochs for consideration of \$1.00 was to achieve adjustment of financial matters between ourselves.

I confirm that the Mortgage from Dessipur Pty. Ltd. to this firm on 18th November, 1996 was for \$246,000.00, with a lesser amount being advanced at that time.

- B. The property comprised in this Transfer to Dessipur Pty. Ltd. was Certificate of Title Volume 126997 Folio 1. The consideration for the Transfer was \$200,000.00 and the subsequent mortgage given by Dessipur Pty. Ltd. on 29th October, 1997 was for \$320,000.00. I advise the maximum amount under this Mortgage was never advanced.

- C. This Fact relates to property known as Sorell Barracks, at Sorell, which I also consider a personal matter.

I assume the facts stated are correct - this matter was of course handled by McCulloch & McCulloch, who have the file and could confirm the accuracy of those facts. However, the expenditure of some \$150,000-\$200,000 on the property has not been noted.

I do point out that the 1997 Government valuation for this property is approximately \$300,000. The property is capable of stratum title as two separate units and I believe, capable of stratum into five separate holiday units because of compliance with all necessary fire requirements.

**As to the Complaint,** I respond as follows.

1. This is a matter of reply for McCulloch & McCulloch. A copy of Toomey's letter to McCullochs was referred to in their letter and a copy enclosed with yours, but I do not have a copy of McCullochs' reply.
2. I do not see the relevance of whether the valuation was obtained by myself or McCullochs. There is no requirement under the Rules of Practice for lenders to obtain the security valuation directly, and in any event, the valuation would in the usual course of practice be paid for by the borrower.
3. The valuation was provided on my instructions and considering the matters raised therein, gave me no reason to doubt its reliability at the time.
4. I confirm that McCullochs and I had been engaged in some joint venture activities, but these activities were not funded by this firm.

**In reply to the summary:**

I have responded to 1, 2, 3, and 4 above.

As to 5, I am not and was not at the relevant time a business partner of the director/guarantor or shareholder. I have never been a business partner of the director/guarantor and was not at that time a business partner of any past or present shareholder.

As to 6 - apart from my joint venture with McCullochs in the Weston Hill property, I currently have no "business associates".

I took particular care to sever all business connections prior to any lending.

I have always endeavoured to ensure that any lending by Lewis, Driscoll & Bull is carried out "at arms length" and have the same stringent requirements of borrowers known to me to those not. All borrowers of this firm have, for some time, been advised to obtain independent legal advice prior to signing their mortgages.

As to my lending in excess of purchase price, I believe all lending has complied with the Rules.

I submit that the assumptions made in the penultimate paragraph of Toomey's letter are unfounded.

Yours faithfully,

LEWIS, DRISCOLL & BULL

Per: 

T. P. BARON

Your Ref:

Our Ref: CRD:6046:JON024YE

4 May 1998

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- Tel. (03) 6224 9911
- Fax. (03) 6224 9966

**By Hand Delivery**

Dear Madam,

Complaint: McCulloch & McCulloch/T P Baron

I refer to your letter of 29 April 1998 enclosing letters from McCulloch & McCulloch and T P Baron. I set out my response, as you have requested, in this letter.

*General Comment*

I do not consider that either firm has addressed the issue of primary concern forming the basis of my complaint: that the two firms have been involved in lending clients' funds to business associates of the partners upon valuations well in excess of the purchase prices for the properties concerned.

*Detailed Comment: McCulloch & McCulloch*

1. Lending in excess of two-thirds. The explanation set out in paragraph one of McCulloch's letter is irrelevant and inconsistent with the Notice of Demand of 13 March 1997 and McCulloch's advice of 7 April 1998. No second mortgage is recorded as being granted to McCulloch by Baron over Kidbrook.

*2. & 3. Valuation*

The valuation was obtained from a valuer who was, it is believed, consistently used by both firms and who provided valuations well in excess of purchase prices. This, coupled with the obviously negligent valuation of Kidbrook, should have alerted McCulloch to the inappropriateness of relying upon the valuation of M E Johnson. McCulloch has ignored the question of the valuation being negligent on its face.

4. *Mortgage to Associates*

No reason is given for McCulloch's inability to answer "in respect of these other matters" and nothing is provided in support of the contention that no fiduciary default occurred. In this case, the assertion contained in my letter has not been meaningfully challenged.

*Detailed Comment: Lewis Driscoll & Bull*

The interest of my firm in other borrowings by Baron from McCulloch is not relevant to the complaint which has been made. In any event, the relevance of other transactions between Baron and McCulloch is apparent from my previous letter. Given that these other transactions may have affected the interests of investors in Kidbrook, I reject the comments of Mr Baron in this regard.

Baron's comments concerning subdivision discussions with the Council do not appear to address the issue raised in my letter - the valuation refers to the use of the property for a tourism venture, an issue not addressed by Baron. The attached copy of a letter of 4 April 1997 from Mr Steve Mars of the Sorell Council to Dobson Mitchell & Allport (attachment A) confirms the very preliminary nature of Baron's discussions with the Council and the inability of the land to be treated as a rural subdivision and directly contradicts the contents of the valuation report.

Baron's comments concerning sections B, C and D also seem not to address the issues contained in my letter. None of the matters raised by Baron negates the fact, demonstrated in my letter, that McCulloch and Baron have had close business ties. Baron's denial of being a business partner with Dessipur Pty Ltd or with any shareholder of that company is contradicted by the search copies of Certificate of Title, Volume 109062 Folio 99 and of the company, copies of which are attached (attachments B & C).

Further, Baron's letter admits past business connections with McCulloch.

In summary, I consider that nothing in either the letter of McCulloch & McCulloch or Lewis Driscoll & Bull in any way detracts from the matters and the complaint set out in my letter of 8 April 1998.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey



Municipal Offices:  
12 Somerville Street  
Sorell Tasmania 7172  
Phone (002) 65 2201  
Fax (002) 65 1127

Our Ref: 5935403:jp

Your Ref:

Enquiries to: Mr S Mars

4 April 1997

Dobson Mitchell & Allport  
GPO Box 20A  
HOBART 7001

Dear Sir

**RE: "KIDBROOK", ARTHUR HIGHWAY, SORELL - OWNER T P BARON**

I refer to your letter 25 March 1997. I confirm that the land in question is zoned Rural (40ha). It is not possible to subdivide the land under the current provisions within the planning scheme.

I have discussed the future of this land at length with Mr Baron and have offered the opinion that special qualities of such that should and appropriate tourism based venture be proposed I believe an amendment to the Planning Scheme could be supportable. Obviously this would depend on the nature and quality of any proposal submitted.

The property has legal frontage to the Arthur Highway. I would however reserve my comments on the suitability of that access to further development dependent upon the type of proposal submitted.

A subdivision application was previously submitted on behalf of Mr Baron with approval for a one lot only subdivision under clause 6.9.3(c) of the Sorell Planning Scheme 1993. This however did not proceed as it was discovered that the clause could not be applied.

Yours faithfully

STEVE MARS  
MANAGER PLANNING SERVICES





**RESULT OF SEARCH**  
**LAND TITLES OFFICE, TASMANIA**  
Issued pursuant to the Land Titles Act 1980.

SEARCH OF TORRENS TITLE			
VOLUME		FCUC	
109062		99	
SECTION		DATE OF ISSUE	
1		16-Dec-1993	
Page 1		of 1	

SEARCH DATE : 20-Mar-1998  
 SEARCH TIME : 10.48 am  
 REQUESTED BY :

DESCRIPTION OF LAND

Parish of SORELL, Land District of PEMBROKE  
 Lot 99 on Sealed Plan 109062  
 Derivation : Part of 570 Acres Gtd. to Thomas Augustus Wolstenholme,  
 Earl of Macclesfield and Henry Goodford.  
 Prior CT 106465/1

SCHEDULE 1

THOMAS PETER BARON and PAULA DIANE BARON (jointly as between  
 themselves) of one undivided 1/2 share and HAYDN JAMES  
 DODGE and SHEILA ANNE DODGE (jointly as between themselves)  
 of one undivided 1/2 share as tenants in common

SCHEDULE 2

Reservations and conditions in the Crown Grant if any  
 SP109062 COVENANTS in Schedule of Easements  
 SP109062 FENCING COVENANT in Schedule of Easements  
 SP109062 SEWERAGE AND/OR DRAINAGE RESTRICTION  
 B623929 MORTGAGE to David Alistair James McCulloch & Quentin John  
 McCulloch Registered 2-Aug-1993 at noon (MF:2111/610)

REGISTERED DEALINGS AND NOTATIONS

no unregistered dealings or other notations

Section 1274B

This extract has been prepared by the Australian Securities Commission from information it obtained, by using a data processor, from the national database. If you believe that this extract contains any error or omission please advise the A.S.C. promptly. The Information Division of the Australian Securities Commission is certified under the Australian Quality Standard AS 3901 (International Standard ISO 9001).

----- COMPANY IDENTIFICATION -----

Australian Company Number	076 190 899	Docimage No
Current Company Name	DESSIPUR PTY LTD	-----
Incorporated in	TASMANIA	
Registration Date	30/10/1996	
Principal Activity	PROPERTY DEVELOPMENT AND CONSULTANCY	

----- CURRENT COMPANY DETAILS -----

Period from	30/10/1996	
Name	DESSIPUR PTY LTD	
Name Start	30/10/1996	
Type	AUSTRALIAN PROPRIETARY COMPANY	011 985 830
Status	REGISTERED	
Class	LIMITED BY SHARES	
Subclass	PROPRIETARY COMPANY	

----- COMPANY ADDRESSES -----

Type	CURRENT REGISTERED OFFICE	011 971 146
Start Date	12/11/1996	
Address	10 GORDON ST SORELL TAS 7172	
Type	PREVIOUS REGISTERED OFFICE	011 985 830
Start Date	30/10/1996 To 11/11/1996	
Address	4TH FL PENNEYS BUILDING STE 421 210 QUEEN ST BRISBANE QLD 4000	
Type	CURRENT PRINCIPAL PLACE OF BUSINESS	076 190 89G (AR 1996)
Start Date		
Address	10 GORDON ST SORELL TAS 7172	
Type	PREVIOUS PRINCIPAL PLACE OF BUSINESS	011 985 830
Start Date		
Address	4TH FL PENNEYS BUILDING STE 421 210 QUEEN ST BRISBANE QLD 4000	

----- COMPANY OFFICE HOLDERS -----

NOTE: A date or address shown as UNKNOWN has not been updated since the ASC took over the records in 1991. For details, order the appropriate historical state or territory documents, available in microfiche or paper format.

Role	CURRENT DIRECTOR	010 882 987
Appointed	07/11/1996	
Name	GRAEME NEIL WOOLLEY	
Born	07/12/1942 HOBART TAS	
Address	80 GEORGE ST DULCOT TAS 7025	

		Docimage No
Role	CURRENT DIRECTOR	
Appointed	01/01/1997	076 190 89G
Name	HAYDN JAMES DODGE	(AR 1996)
Born	28/07/1966 HOBART TASMANIA	
Address	LOT 19 WOLSTENHOLME DR SORELL TAS 7172	
Role	PREVIOUS DIRECTOR	011 971 147
Appointed	30/10/1996	
	Ceased 30/10/1996	
Name	GARY KEVIN MITCHELL	
Born	27/03/1960 BRISBANE QLD	
Address	204 ALICE ST BRISBANE QLD 4000	
Role	CURRENT SECRETARY	010 882 987
Appointed	07/11/1996	
Name	GRAEME NEIL WOOLLEY	
Born	07/12/1942 HOBART TAS	
Address	80 GEORGE ST DULCOT TAS 7025	
Role	PREVIOUS SECRETARY	011 971 147
Appointed	30/10/1996	
	Ceased 30/10/1996	
Name	GARY KEVIN MITCHELL	
Born	27/03/1960 BRISBANE QLD	
Address	204 ALICE ST BRISBANE QLD 4000	

----- CURRENT SHARE STRUCTURE -----

Class	ORD	076 190 89G
	ORDINARY SHARES	(AR 1996)
Number of Shares Issued	1	
Total Nominal Value	1.00	
Face Value per Share	1.00	
Total Paid on Shares Issued	1.00	
Total Unpaid on Shares Issued	0.00	
Total Paid on Premiums	0.00	
Balance of Share Premium Account	0.00	
Number of Shares Entitled to	0	
Average Exercised Price per Share	0.00	

----- SHARE HOLDERS -----

Class	ORD	No of Shares	1	076 190 89G
Paid	FULLY	Beneficial Held	YES	(AR 1996)
Name	HAYDN JAMES DODGE			
Address	LOT 19 WOLSTENHOLME DR SORELL TAS 7172			

----- REGISTERED CHARGES -----

There are no current charges recorded in the ASC's Australian Register of Charges for this corporation.

NOTES:

- \* This extract may not contain all charges registered prior to the start of the Corporations Law. Please check STATE/TERRITORY records held by the ASC.
- \* This extract may not contain provisional charges which lapsed prior to 1991.
- \* For details of provisional charges deleted after 1991, order the relevant DOCIMAGE documents. These details will NOT appear in a Charges Extract.
- \* For details on the amounts and property relating to charges, or details of

Docimage No

documents for Satisfactions, Assignments or Changes, print a CHARGES EXTRACT.

----- ASC DOCUMENTS RECEIVED -----

NOTES:

- \* Documents already listed under Registered Charges are not repeated here.
- \* Data from Documents with no Date Processed are not included in this Extract.
- \* Documents with "\*\*\*\*" pages have not yet been imaged and are not available via DOCIMAGE. Imaging takes approximately 2 weeks from date of lodgement.
- \* The document list for a current/historical extract will be limited unless you requested ALL documents for this extract.

Document List period requested - All documents

Form Type	Date Received	Date Processed	Effective Date	Pages	Docimage No
316 -316 -316C -316L	22/01/1997	27/02/1997	17/01/1997	4	076 190 89G (AR 1996)
304 -304A	14/11/1996	14/11/1996	07/11/1996	4	010 882 987 NOTIFICATION OF CHANGE TO OFFICEHOLDERS OF AUSTRALIAN COMPANY
207 -207	14/11/1996	14/11/1996	07/11/1996	3	010 882 988 NOTIFICATION OF ALLOTMENT OF SHARES
203 -203A	05/11/1996	06/11/1996	30/10/1996	1	011 971 146 NOTIFICATION OF CHANGE OF ADDRESS
215 -215	05/11/1996	06/11/1996	30/10/1996	1	011 971 147 NOTIFICATION OF INITIAL APPOINTMENT OF OFFICEHOLDERS
209 -209	05/11/1996	05/11/1996	30/10/1996	1	011 971 148 NOTICE OF REDEMPTION OF REDEEMABLE PREFERENCE SHARES
370 -370	05/11/1996	06/11/1996	05/11/1996	2	011 971 149 NOTICE OF RETIREMENT OR RESIGNATION BY DIRECTOR OR SECRETARY
201 -201C	30/10/1996	30/10/1996	30/10/1996	3	011 985 830 APPLICATION FOR REGISTRATION AS A PROPRIETARY COMPANY
204 -204	30/10/1996	30/10/1996	30/10/1996	1	011 977 035 CERTIFICATE OF REGISTRATION DIVISION 1 PT 2.2

----- ANNUAL RETURNS -----

Year	Return Due Date	Extended Due Date	AGM Due Date	Extended AGM Date	AGM Held Date	O/Stand
1996	31/01/1997	30/04/1997				N
1997	31/01/1998					Y

.....  
HISTORICAL COMPANY EXTRACT  
16 190 899 DESSIPUR PTY LTD  
.....

Year	Return Due Date	Extended Due Date	AGM Due Date	Extended AGM Date	AGM Held Date	O/Stand
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\*\*\* END OF REPORT \*\*\*

PRINTED BY LAWPOINT ON 18 MAR 1998 AT 11:54am FOR KVL REF 6046 - JONES

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000. G.P.O. BOX 1133  
AUSDOC DX111. TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240

Our ref: C98/45:JMM/BB

13 May 1998

**PRIVATE & CONFIDENTIAL:**

Toomey Manning & Co  
30 Davey Street  
HOBART TAS 7000  
**Attention: Mr P C Toomey**

Dear Sir

**McCULLOCH & McCULLOCH : T P BARON**

Thank you for your letter of 4 May 1998 in response to the letters from McCulloch & McCulloch and T Baron dated 28 April 1998 and 20 April 1998 respectively.

As you know the Law Society is currently conducting an extensive investigation into the McCulloch & McCulloch and Baron mortgage practices, and your complaint along with a number of other complaints naturally forms part of that investigation.

The Society has briefed senior counsel to conduct the investigation on its behalf and your complaint has been forwarded to counsel for consideration as part of the total investigation of the McCullochs and Mr Baron.

The Society is most concerned that these investigations are dealt with expeditiously and that investors are kept fully informed.

I will report to you again in due course.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:JON020KL

22 May 1998

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- Tel. (03) 6224 9911
- Fax. (03) 6224 9966

## PRIVATE AND CONFIDENTIAL

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

BY HAND DELIVERY

Dear Madam,

### McCulloch & McCulloch, McCulloch & Associates Mortgage Trust Fund

This firm acts for various contributors ("investors") including Mr P H Dobson, Mrs M E Mulligan, Mr L N Vallance and M & J Latimer in respect of the following mortgage loans ("in

Mortgagor	Property
T P Baron	"Kidbrook", Arthur Highway, Sorell
T P Baron	"Sweetwater Farm", Shark Point Road, Sorell
T P Baron	"The Lodge", Main Road, Brighton
T P Baron	Land at Weston Hill Subdivision, Sorell
T P Baron	"The Barracks", 31 Walker Street, Sorell
H J Dodge	15-17 Castray Esplanade, Battery Point
T P Baron & Carlar Pty Ltd	Green Valley Road, Bagdad
T P Baron	Scenic Drive, Lewisham
T P Baron	Lots 30 & 31 Wolstenholme Drive/Shark Point Road, Sorell
S A Dodge	Lots 2 & 3 Wolstenholme Drive/Shark Point Road, Sorell
T P & P D Baron	"Sweetwater Farm", Shark Point Road, Sorell
T P Baron & H Dodge	Shark Point Road, Sorell
H J & S A Dodge	Lot 28 Wolstenholme Drive/Shark Point Road, Sorell
T P & P D Baron	Frogmouth Road, Primrose Sands

By a series of letters (attachment A) McCulloch & McCulloch was requested to provide copies of all documents and a list of the names and addresses of all other investors for each of these investments.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

By its solicitors, Wallace Wilkinson & Webster, McCulloch & McCulloch advised in two letters (attachment B) that:

1. my clients must first identify what are their documents (as opposed to what are McCulloch & McCulloch's) and
  - (a) in one letter states that McCulloch & McCulloch shall retrieve them and make them available, and
  - (b) in another of the same date states that instructions will be sought as to their retrieval, and
2. McCulloch and McCulloch was not able to give any details of other clients of that legal firm.

The notice sent out on or about 3 April 1995 to some investors by McCulloch & McCulloch (attachment C) suggests that firm considers that it was acting as agent on behalf of each investor. Upon being invited to advise if it thought the relationship was other than one of principal and agent, McCulloch & McCulloch has chosen not to respond. On the basis that this is the relationship, formal demand on behalf of each investor (attachment D) has been made to inspect (which as you are aware includes the right to copy) all documents in the possession of McCulloch & McCulloch relating to the specified business conducted by it on behalf of each respective investor. No reply has been received.

In addition, it appears that without prior notification or authority, investments which were made through the original firm McCulloch & McCulloch (of which Alistair and Quentin McCulloch were partners) were transferred to McCulloch & McCulloch (of which Alistair McCulloch is the sole proprietor) and have now been transferred to McCulloch & Associates (of which Quentin McCulloch is the sole proprietor). An example of these transfers is set out in the correspondence to Mr L N Vallance (attachment E).

Complaint is made against both McCulloch & McCulloch and McCulloch & Associates for

- (i) refusing to provide copies of documents and to provide a timely reply to the demand to inspect
- (ii) refusing to provide details of other investors, and
- (iii) transferring trust funds between firms without prior notification or authority,

all as detailed above.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

encls.



TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: CRD:6046:JON120YE

1 October 1998

Mrs J Martin  
Executive Director  
Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

By Hand Delivery

Dear Madam,

McCulloch & McCulloch

I refer to previous correspondence concerning the mortgage register conducted by Messrs McCulloch & McCulloch and to the complaints dated 8 April 1998 and 22 May 1998 which I have submitted in respect of Messrs McCulloch & McCulloch and Mr Thomas Peter Baron. My complaints related, among other things, to fiduciary defaults.

I understand that investigations have been carried out by the Law Society pursuant to its obligations under Section 58(1) of the *Legal Profession Act 1993* into the matters the subject of my complaints and that certain reports have been obtained.

In accordance with Section 58(10) of the *Legal Profession Act 1993* I request that you provide me with:

(a) full details of:

- (i) the progress of the investigation into the matter; and
- (ii) the person or persons conducting the investigation; and
- (iii) the documents and records being examined; and


(b) copies of any documents, records or reports relating to the investigation free of charge.

TOOMEY MANING & CO BARRISTERS and SOLICITORS

Please respond to this letter within 7 days.

I look forward to hearing from you.

Yours faithfully,  
TOOMEY MANING & CO

Per:   
P.C. Toomey

c.c. Gunson Pickard & Hann  
Barristers & Solicitors  
DX 116  
HOBART

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: CRD:6046:JON127YE

16 October 1998

Mrs J Martin  
Executive Director  
Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

## By Hand Delivery

Dear Mrs Martin,

McCulloch & McCulloch

I refer to our telephone conversation of 9 October 1998.

I understand the Law Society was awaiting advice from Mr Gunson concerning Mr Toomey's letter of 1 October 1998.

I look forward to receiving your response as soon as possible.

Yours faithfully,  
TOOMEY MANING & CO

Per:

C R Doherty

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133  
AUSDOC DX111. TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
EMAIL: taslawsoc@vision.net.au

Our ref: D3.9, C98/45:JMM/TL

26 October 1998

## STRICTLY PRIVATE & CONFIDENTIAL

Attention: Mr C Doherty  
Toomey Maning & Co.  
30 Davey Street  
HOBART TAS 7000

Dear Sir

### McCULLOCH & McCULLOCH

I refer to your letter of 1 October 1998 and your request for information pursuant to Section 58(10) of the Legal Profession Act 1993.

In relation to paragraph (a) of your request I provide the following information:-

- (i) The Council of the Law Society has instructed its Counsel to commence action in the Supreme Court to prosecute David Alistair James McCulloch, Quentin John McCulloch and Thomas Peter Baron under Section 64 of the Legal Profession Act 1993.
- (ii) The following persons are conducting the investigation -
  - Peter Joyce
  - Rob Phillips
  - John McCallum
  - Peter Manser
  - Bridget McLaughlin
- (iii) The following documents are being examined:-
  - Report of P Joyce (as Manager of McCulloch & McCulloch) dated 20 August 1998.
  - Letter dated 1 September 1998 from R.J. Phillips and accompanying Proof of Evidence of Haydn James Dodge.

- Report from John McCallum re "Sweetwater Farm/Walstoneholme Farm" Subdivision.
- Trust Account records of McCulloch & McCulloch; and McCulloch and Associates.

In relation to paragraph (b) of your request, the Society anticipates being in a position to respond to you in the near future, once the matter has been considered by Counsel.

Yours faithfully

  
JAN MARTIN  
EXECUTIVE DIRECTOR

c.c. Mr D Gunson - Gunson Pickard and Hann

Your Ref:

Our Ref: CRD:6046:JON014BCO

7 December 1998

Mrs Jan Martin  
Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

By Facsimile: (03) 6223 8240

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

Dear Mrs Martin,

Supreme Court Proceeding No 1024 of 1998  
Peter Henry Dobson and Others against McCulloch, The Law Society of  
Tasmania and Peter John Joyce

I refer to the abovementioned proceeding.

In that proceeding, access to certain documents is sought from each of the defendants.

Obviously, if certain documents have been returned to the McCullochs and they are no longer in the possession of the Law Society or Mr Joyce, there is little point in pursuing the relief in question against the Law Society or Mr Joyce.

Accordingly, please advise whether documents relating to the practice of McCulloch & McCulloch, other than those to which my request under section 58(10) of the *Legal Profession Act* relates, remain in the possession of the Society or Mr Joyce or if they have been returned to Mr Alistair McCulloch.

I look forward to receiving your prompt reply.

Yours faithfully,  
**TOOMEY MANING & CO**

Per:

C R Doherty

cc: Gunson Pickard & Hann

# THE LAW SOCIETY

O F T A S M A N I A

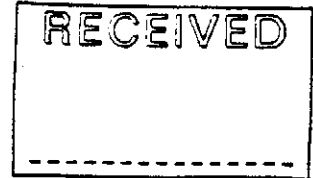
28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001.  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: taslawsoc@vision.net.au

Our ref: C98/45 JMM/BB

16 March 1999

PRIVATE & CONFIDENTIAL:

**FAKED**  
16.3.99



Mr P C Toomey  
C/- Toomey Maning & Co  
30 Davey Street  
HOBART TAS 7000

Dear Sir

## COMPLAINT - McCULLOCH & McCULLOCH - "KIDBROOK"


I refer to our meeting of 8 February 1999 at which we discussed your request for information on behalf of your clients pursuant to Section 58(10) of the Legal Profession Act 1993. I apologise for the delay in responding formally.

I am now in a position to confirm that copies of valuations, ledger cards, copies of accounts and details of amounts advanced in respect of the "Kidbrook" property, as they relate to your clients, will be made available. Arrangements have been put in place for this information to be collected and provided to you as soon as possible.

In previous correspondence of 26 October 1998 I made reference to other documents being examined by the Society. In relation to those documents I confirm :-

1. that the Proof of Evidence of H J Dodge forms part of legal advice sought from Counsel for proceedings reasonably anticipated by the Council of the Law Society. The document is therefore privileged;
2. the report of J McCallum - re Sweetwater Farm / Wolstenholme Drive does not relate to the complaint;
3. the report of P Joyce does not relate to the complaint.

Yours faithfully

  
JAN MARTIN  
EXECUTIVE DIRECTOR

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133 7001,  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: [taslawsoc@vision.net.au](mailto:taslawsoc@vision.net.au)

Our ref: C98/45:JMM/BB

29 March 1999

**PRIVATE & CONFIDENTIAL:**

Mr P C Toomey  
Toomey Maming & Co  
30 Davey Street  
HOBART TAS 7000

Dear Sir

## **COMPLAINT - McCULLOCH & McCULLOCH**

I refer to our recent telephone conversation concerning your complaint dated 22 May 1998 against McCulloch & McCulloch on behalf of Mr P H Dobson, Mrs M E Mulligan, Mr L N Vallance and M & J Latimer in respect of a number of mortgage loans including "Sweetwater Farm", Shark Point Road, Sorell.

By letter of 26 October 1998 the Society advised you that it was, as part of its investigation of McCulloch & McCulloch examining a report from J McCallum in relation to the "Sweetwater Farm / Walstoneholme Farm" Subdivision. This report had been prepared for the Solicitors' Trust and a copy made available to the Law Society for the purpose of briefing Counsel in the prosecution of the McCullochs. As such the report is therefore privileged. However, as advised in the "Kidbrook" complaint, copies of valuations, ledger cards, copies of accounts and details of amounts advanced in respect of the various properties listed in your letter of 22 May 1998 (as they relate to your clients) will be made available.

I will advise you as soon as this information is assembled.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR



**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:JON001KT

21 July 1999

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**BY HAND DELIVERY**

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

Dear Madam,

McCulloch & McCulloch, McCulloch & Associates  
Mortgage Trust Fund

I refer to the complaint contained in my letter of 22 May 1998, a copy of which (exclusive of annexures) is attached. I have not yet received a response to the third item of complaint.

Would you please advise me of the outcome of that complaint. No doubt the Society in its investigation will have had regard to Section 13 of the Trustee Act 1898.

In the circumstances it is appropriate that an urgent and complete reply is provided.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:JON020KL

22 May 1998

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- Tel. (03) 6224 9911
- Fax. (03) 6224 9966

## PRIVATE AND CONFIDENTIAL

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**BY HAND DELIVERY**

Dear Madam,

McCulloch & McCulloch, McCulloch & Associates  
Mortgage Trust Fund

This firm acts for various contributors ("investors") including Mr P H Dobson, Mrs M E Mulligan, Mr L N Vallance and M & J Latimer in respect of the following mortgage loans ("investments"):

Mortgagor	Property
T P Baron	"Kidbrook", Arthur Highway, Sorell
T P Baron	"Sweetwater Farm", Shark Point Road, Sorell
T P Baron	"The Lodge", Main Road, Brighton
T P Baron	Land at Weston Hill Subdivision, Sorell
T P Baron	"The Barracks", 31 Walker Street, Sorell
H J Dodge	15-17 Castray Esplanade, Battery Point
T P Baron & Carlar Pty Ltd	Green Valley Road, Bagdad
T P Baron	Scenic Drive, Lewisham
T P Baron	Lots 30 & 31 Wolstenholme Drive/Shark Point Road, Sorell
S A Dodge	Lots 2 & 3 Wolstenholme Drive/Shark Point Road, Sorell
T P & P D Baron	"Sweetwater Farm", Shark Point Road, Sorell
T P Baron & H Dodge	Shark Point Road, Sorell
H J & S A Dodge	Lot 28 Wolstenholme Drive/Shark Point Road, Sorell
T P & P D Baron	Frogmouth Road, Primrose Sands

By a series of letters (attachment A) McCulloch & McCulloch was requested to provide copies of all documents and a list of the names and addresses of all other investors for each of these investments.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

By its solicitors, Wallace Wilkinson & Webster, McCulloch & McCulloch advised in two letters (attachment B) that:

1. my clients must first identify what are their documents (as opposed to what are McCulloch & McCulloch's) and
  - (a) in one letter states that McCulloch & McCulloch shall retrieve them and make them available, and
  - (b) in another of the same date states that instructions will be sought as to their retrieval, and
2. McCulloch and McCulloch was not able to give any details of other clients of that legal firm.

The notice sent out on or about 3 April 1995 to some investors by McCulloch & McCulloch (attachment C) suggests that firm considers that it was acting as agent on behalf of each investor. Upon being invited to advise if it thought the relationship was other than one of principal and agent, McCulloch & McCulloch has chosen not to respond. On the basis that this is the relationship, formal demand on behalf of each investor (attachment D) has been made to inspect (which as you are aware includes the right to copy) all documents in the possession of McCulloch & McCulloch relating to the specified business conducted by it on behalf of each respective investor. No reply has been received.

In addition, it appears that without prior notification or authority, investments which were made through the original firm McCulloch & McCulloch (of which Alistair and Quentin McCulloch were partners) were transferred to McCulloch & McCulloch (of which Alistair McCulloch is the sole proprietor) and have now been transferred to McCulloch & Associates (of which Quentin McCulloch is the sole proprietor). An example of these transfers is set out in the correspondence to Mr L N Vallance (attachment E).

Complaint is made against both McCulloch & McCulloch and McCulloch & Associates for

- (i) refusing to provide copies of documents and to provide a timely reply to the demand to inspect
  - (ii) refusing to provide details of other investors, and
  - (iii) transferring trust funds between firms without prior notification or authority,
- all as detailed above.

Yours faithfully,

**TOOMEY MANING & CO**

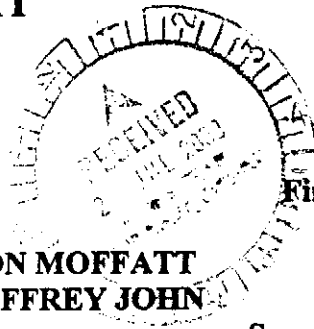
Per:

**P C Toomey**

encls.

**WRIT**

IN THE SUPREME COURT OF TASMANIA  
HOBART REGISTRY



No. **525** of 2000

**HELEN THERESE ALOMES**

**Firstnamed Plaintiff**

**HILARY MARY BROWN & JOHN PEARSON MOFFATT  
AS TRUSTEES FOR THE ESTATE OF GEOFFREY JOHN  
BROWN**

**Secondnamed Plaintiff**

**BRUCE CAMPBELL CLENNETT & IRENE WINNIFRED  
CLENNETT**

**Thirdnamed Plaintiff**

**COWLEYS HOLDINGS PTY LTD (ACN 009 502 890)  
AS TRUSTEE FOR COWLEYS INTERIOR SUPPLIES  
PTY LTD SUPERANNUATION FUND**

**Fourthnamed Plaintiff**

**SYDNEY MARCUS COWLEY & GWENDOLINE MAY  
COWLEY**

**Fifthnamed Plaintiff**

**DEMERARA PTY LTD (ACN 005 260 560)**

**Sixthnamed Plaintiff**

**DEMERARA PTY LTD (ACN 005 260 560)  
AS TRUSTEE FOR DEMERARA STAFF SUPER-  
ANNUATION FUND**

**Seventhnamed Plaintiff**

**AVERY CAROLINE DREW**

**Eighthnamed Plaintiff**

**G & L MANAGEMENT PTY LTD (ACN 069 182 609)  
AS TRUSTEE FOR G & L MANAGEMENT PTY LTD  
SUPERANNUATION FUND**

**Ninthnamed Plaintiff**

**GEOFFREY HALL & CHRISTOPHER DAVID JONES  
AS TRUSTEES FOR THE ESTATE OF LEILA MARY  
HALL**

**Tenthnamed Plaintiff**

**JACKMAN INVESTMENTS PTY LTD (ACN 009 508 669)**

**Eleventhnamed Plaintiff**

**ERNEST REX LINCOLN & UNA JOAN LINCOLN**

**Twelfthnamed Plaintiff**

**MACQUARIE NOMINEES PTY LTD (ACN 009 484 539)  
AS TRUSTEE FOR P H DOBSON TRUST**

**Thirteenthnamed Plaintiff**

**COLIN RICHARD McMULLEN**

**Fourteenthnamed Plaintiff**

---

Filed on behalf of the Plaintiffs

**TOOMEY MANING & CO**  
Barristers & Solicitors  
30 Davey Street  
HOBART Tas. 7000

DX 107, HOBART  
Tel: (03) 6224 9911  
Fax: (03) 6224 9966  
Ref: Mr C R Doherty

<b>NEVILLE MAURICE NEWMAN &amp; MARGARET ISABEL NEWMAN</b>	<b>Fifteenthnamed Plaintiff</b>
<b>MARGARET ISABEL NEWMAN</b>	<b>Sixteenthnamed Plaintiff</b>
<b>JOHN SYDNEY PALMER &amp; SHIRLEY ELLIOT PALMER</b>	<b>Seventeenthnamed Plaintiff</b>
<b>JOHN ANTHONY COTTERELL SOLOMON</b>	<b>Eighteenthnamed Plaintiff</b>
<b>NEIL THOMAS TATE &amp; BERYL TATE AS TRUSTEES FOR N &amp; B TATE SUPER- ANNUATION FUND</b>	<b>Nineteenthnamed Plaintiff</b>
<b>WILLIAM ANTHONY VERMEY &amp; ELIZABETH GOLDIE VERMEY AS TRUSTEES FOR VERMEY FAMILY TRUST</b>	<b>Twentiethnamed Plaintiff</b>
<b>W COOGAN &amp; CO PTY LTD (ACN 009 475 923)</b>	<b>Twenty-firstnamed Plaintiff</b>
<b>JEAN YOUD</b>	<b>Twenty-secondnamed Plaintiff</b>

**PIGGOTT WOOD & BAKER (A Firm) Defendant**

To Piggott Wood & Baker  
Barristers & Solicitors  
199 Macquarie Street  
Hobart in Tasmania 7000

**ENDORSEMENT OF CLAIM**

The plaintiffs' claim against you is for damages or other relief for:

- (a) breach of contract;
- (b) negligence;
- (c) negligent misstatement;
- (d) breach of trust; or
- (e) misleading or deceptive conduct

as particularised in the Statement of Claim annexed hereto and costs to be taxed.

**TOOMEY MANING & CO**

Per:

  
**Practitioner for the Plaintiffs**

The plaintiffs' addresses are as set out in the list annexed to this Writ and marked "A".

The plaintiffs' address for service of documents is: 30 Davey Street, Hobart in Tasmania  
7000

**TAKE NOTICE that:**

- (1) If you wish to dispute the plaintiffs' claim or any part of it or for any reason wish to take part in this action, you or your practitioner must, within eight (8) days following the service of this writ on you, lodge a notice of appearance at a Registry of the Supreme Court and serve a sealed copy of the notice on the plaintiffs at the address for service of documents.
- (2) Forms of notice of appearance may be obtained from any Registry of the Court. These are located at Salamanca Place, Hobart, Cameron Street, Launceston and Alexander Street, Burnie.
- (3) If you fail to lodge and serve a notice of appearance within the time stated, the plaintiffs may obtain a judgment without further notice to you.

**FILED 28 July 2000**

  
REGISTRAR.

“A”

Firstnamed Plaintiff: 1 Walgett Place, Glenorchy in Tasmania, 7010.

Secondnamed Plaintiff: 32 York Street, Sandy Bay in Tasmania, 7005.

Thirdnamed Plaintiff: 392 Arthur Highway, Sorell in Tasmania, 7172.

Fourthnamed Plaintiff: c/- Moore Robsons, 30 Davey Street, Hobart in Tasmania, 7000.

Fifthnamed Plaintiff: 53 Lipscombe Avenue, Sandy Bay in Tasmania, 7005.

Sixthnamed Plaintiff: c/- Malcolm Gray Pty Ltd, 97 Murray Street, Hobart in Tasmania, 7000.

Seventhnamed Plaintiff: c/- Malcolm Gray Pty Ltd, 97 Murray Street, Hobart in Tasmania, 7000.

Eighthnamed Plaintiff: 19 Grange Avenue, Tarooma in Tasmania, 7053.

Ninthnamed Plaintiff: c/- Malcolm Gray Pty Ltd, 97 Murray Street, Hobart in Tasmania, 7000.

Tenthnamed Plaintiff: c/- Moore Robsons, 30 Davey Street, Hobart in Tasmania, 7000.

Eleventhnamed Plaintiff: 443 Sandy Bay Road, Sandy Bay in Tasmania, 7005.

Twelfthnamed Plaintiff: 33 West Shelley Beach, Orford in Tasmania, 7190.

Thirteenthnamed Plaintiff: c/- Moore Robsons, 30 Davey Street, Hobart in Tasmania, 7000.

Fourteenthnamed Plaintiff: 37 Stirling Avenue, Blackmans Bay in Tasmania, 7052.

Fifteenthnamed Plaintiff: 10 Manresa Court, Sandy Bay in Tasmania, 7005.

Sixteenthnamed Plaintiff: 10 Manresa Court, Sandy Bay in Tasmania, 7005.

Seventeenthnamed Plaintiff: Unit 3, 9 St Stephen's Avenue, Sandy Bay in Tasmania, 7005.

Eighteenthnamed Plaintiff: 19 Grange Avenue, Tarooma in Tasmania, 7053.

Nineteenthnamed Plaintiff: 1 Clutha Place, South Hobart in Tasmania, 7004.

Twentiethnamed Plaintiff: 672 Sandy Bay Road, Sandy Bay in Tasmania, 7005.

Twenty-firstnamed Plaintiff: 79 Collins Street, Hobart in Tasmania, 7000.

Twenty-secondnamed Plaintiff: 9 Lyndhurst Avenue, North Hobart in Tasmania, 7000.

**IN THE SUPREME COURT OF TASMANIA**  
**HOBART REGISTRY**

No. of 2000

**HELEN THERESE ALOMES & OTHERS**

**Plaintiffs**

**PIGGOTT WOOD & BAKER (A Firm)**

**Defendant**

**STATEMENT OF CLAIM**

**Factual Background**

1. At all material times the defendant was a firm conducting the practice of barristers and solicitors.
2. At all material times the defendant was a controlled fund operator conducting a contributory mortgage fund ("the Contributory Mortgage Fund").
3. At all material times each of the plaintiffs was a client of the defendant.

**PARTICULARS**

Each of the plaintiffs paid money to the defendant for the purpose of investment upon first mortgage security as set out in the First Schedule annexed hereto.

4. Prior to the plaintiffs investing money, the defendant provided to each of them or their agents a form of application ("the Application") to deposit money with it, which the plaintiffs duly completed.

**PARTICULARS**

- (a) The Application was one page in length and contained spaces for the person completing it to specify name, address, Tax File Number details and the principal to be invested.
- (b) The Application contained:
  - (i) conditions of investment; and
  - (ii) conditions relating to the payment of interest.
- (c) Attached to the Application was another document entitled "PWB Mortgage Register Information Sheet" ("the Information Sheet") setting out further terms and conditions of the Application.

---

Filed on behalf of the Plaintiffs

**TOOMEY MANING & CO**  
Barristers & Solicitors  
30 Davey Street  
HOBART Tas. 7000

DX 107, HOBART  
Tel: (03) 6224 9911  
Fax: (03) 6224 9966  
Ref: Mr C R Doherty



- (d) Particulars of the plaintiffs' individual applications are set out in the First Schedule annexed hereto.
5. By the Application and the Information Sheet, contracts were formed between each of the plaintiffs and the defendant ("the Contracts"), whereby the plaintiffs would pay money to the defendant in consideration of the defendant lending the money in accordance with the terms of the Contracts.
6. Among the terms of each of the Contracts were the following:
- (a) All monies lent to borrowers would be secured by way of first mortgage over real estate in Tasmania in accordance with the *Rules of Practice 1994*.
  - (b) First mortgages were limited to:
    - (i) 66% of the security valuation if the mortgage was not insured;
    - (ii) 80% of the security valuation if the mortgage was insured; or
    - (iii) 50% of Government valuation if there was no independent security valuation.
  - (c) The rate of interest payable to each of the plaintiffs would be determined by market forces and would be subject to variation during the term of the loan.
  - (d) One month's notice would be required for both partial and total withdrawal of money.
  - (e) Upon the expiration of one month's notice as aforesaid, the money would be repaid by the defendant in part or in full in accordance with the notice.

#### PARTICULARS OF PARAGRAPH 6(e)

The term of the Contracts as alleged in paragraph 6(e) is to be implied from the express terms of the Contracts and from the need to give the Contracts that business efficacy which the parties must have intended them to have.

7. The defendant received money paid to it by each of the plaintiffs for investment as an agent.

#### PARTICULARS

The agency arose by implication of law from the circumstances set out in paragraph 3 above and the particulars subjoined thereto and from the terms and conditions of the Contracts.

8. The defendant received money paid to it by each of the plaintiffs for investment as a trustee.

PARTICULARS

The trust arose by implication of law from the circumstances set out in paragraph 3 herein and the particulars subjoined thereto and from the terms and conditions of each of the Contracts.

9. The defendant lent money of the plaintiffs (hereinafter collectively referred to as "the Money") to various borrowers, including those listed in the Second Schedule annexed hereto ("the Borrowers").

**The defendant's Breach of Contract**

10. On various dates the defendant breached the Contracts ("the Breaches") in that it variously:
- (a) failed to obtain valuations which had been prepared for it independently of the Borrowers;
  - (b) lent certain of the Money on inadequate security;
  - (c) lent money to certain of the Borrowers in excess of 50% of the government valuation;
  - (d) lent money to certain of the Borrowers relying on a security valuation which had been carried out over 3 months before the loan was made; and
  - (e) failed to repay the Money to the plaintiffs upon them having given one month's notice to withdraw the Money.

PARTICULARS

Particulars of the Breaches and the dates on which they occurred are set out in the Third Schedule annexed hereto.

11. As a result of the Breaches the plaintiffs have suffered loss and damage.

PARTICULARS

Particulars of the loss and damage suffered by the plaintiffs as a result of the Breaches are set out in the Fourth Schedule annexed hereto.

**The defendant's Negligence**

12. As a result of the matters set out herein, each of the plaintiffs and the defendant stood in the relationships of:
- (a) client and solicitor;
  - (b) principal and agent; and

(c) beneficiary and trustee.

13. It was reasonably foreseeable by the defendant that the plaintiffs would suffer loss if the defendant did not take reasonable care in investing the Money.

### PARTICULARS

The foreseeable loss was the loss of interest and part or all of the Money.

14. As a result of the matters set out herein, the defendant stood in a relationship of proximity to each of the plaintiffs.
15. In agreeing to invest the plaintiffs' money the defendant assumed a responsibility to take reasonable care to ensure that none of the Money and the interest payable thereon would be lost.
16. The plaintiffs, upon paying the Money to the defendant, became vulnerable to the defendant in that the defendant assumed all control over the Money and the management thereof.
17. As a result of the matters referred to in paragraphs 12 to 16 above the defendant owed each of the plaintiffs a duty to take reasonable care in investing the Money ("the Duty").
18. In breach of the Duty the defendant failed to take reasonable care in investing the Money and was negligent in that it:
- (a) lent certain of the Money to the Borrowers in excess of 50% of the government valuation;
  - (b) failed to obtain valuations which had been prepared for it independently of the Borrowers;
  - (c) failed to seek advice from the valuer as to what percentage of the valuation should be lent;
  - (d) failed adequately to assess the ability of the Borrowers to service the loans;
  - (e) lent certain of the Money to the Borrowers relying on security valuations which had been carried out over 3 months before the loan was made;
  - (f) failed to properly assess the valuations;
  - (g) failed to act on the advice contained within the valuations;
  - (h) failed to enquire as to the actual cost to the Borrowers of acquiring the securities;
  - (i) lent certain of the Money on improper security;
  - (j) lent certain of the Money on inadequate security;

- (k) failed to procure guarantees from the directors of Borrowers which were corporations;
- (l) made further advances of money to Borrowers who were already in default under the terms of their mortgages to the defendant;
- (m) made further advances of money to Borrowers who were already in default under the terms of their mortgages to the defendant for the purpose of paying interest due under the mortgages;
- (n) failed to advise the plaintiffs when Borrowers had gone into default under their mortgages to the defendant; and
- (o) transferred money from performing loans to non-performing loans, that is to loans where the Borrowers were in default.

#### PARTICULARS

Particulars of the negligence are set out in the Fifth Schedule annexed hereto.

19. As a result of the negligence of the defendant referred to in paragraph 18, the plaintiffs have suffered loss and damage.

#### PARTICULARS

Particulars of the loss and damage suffered by the plaintiffs as a result of the defendant's negligence are set out in the Fourth Schedule annexed hereto.

#### **The defendant's Negligent Misstatement**

20. Further or in the alternative, by the Contracts the defendant represented to the plaintiffs that one month's notice was required for both partial and total withdrawal of funds ("the Negligent Representation").
21. As a result of the Negligent Representation, the plaintiffs believed that they could withdraw some or all of the Money as requested upon giving one month's notice.
22. In the premises the defendant knew or ought to have known that:
- (a) the plaintiffs would rely on the Negligent Representation; and
  - (b) the plaintiffs would be induced thereby to invest the Money.
23. As a result of the matters referred to in paragraphs 20 to 22 above the defendant owed each of the plaintiffs a duty of care ("the Duty of Care").
24. Acting on the faith of the Negligent Representation and induced thereby, the plaintiffs invested the Money.
25. In breach of the Duty of Care the defendant negligently made the Negligent Representation in that it:

- (a) failed to inform the plaintiffs that:
  - (i) there was a risk that the Money and the interest thereon may not be fully recoverable in the event of default by a borrower, even after a mortgagee sale; and
  - (ii) repayment of the Money and the interest payable thereupon was not personally guaranteed by the defendant.
- (b) failed to provide to the plaintiffs all information that the plaintiffs or their advisors would reasonably require, and reasonably expect to be provided, for the purpose of making an informed assessment of:
  - (i) the risk in investing the Money with the defendant; and
  - (ii) the rights of the plaintiffs to be repaid the Money.

PARTICULARS

The defendant failed to inform the plaintiffs that:

- (a) the Money was not able to be repaid at the expiration of one month; and
- (b) any repayment of the Money was subject at all times to the availability of funds.

26. In truth and in fact the Negligent Representation was false and untrue.

PARTICULARS

The plaintiffs, upon giving one month's notice to withdraw the Money, were informed by the defendant that:

- (a) the Money was not able to be repaid at the expiration of one month; and
- (b) any repayment of the Money was subject at all times to the availability of funds.

Further particulars are set out in the Sixth Schedule annexed hereto.

27. The defendant:

- (a) has failed to repay and continues to fail to repay the Money in accordance with the plaintiffs' demands; and
- (b) has ceased remitting interest to the plaintiffs on certain of the Money lent.

PARTICULARS

Particulars are set out in the Sixth Schedule annexed hereto.

28. As a result of the matters aforesaid, the plaintiffs have suffered loss and damage.

## PARTICULARS

Particulars of the loss and damage suffered by the plaintiffs as a result of the defendant's negligence are set out in the Fourth Schedule annexed hereto.

### **The defendant's Breach of Trust**

29. Further or in the alternative, as a result of the matters set out herein, the defendant as trustees owed the plaintiffs a duty ("the Trustee Duty") to:
- (a) exercise the care, diligence and skill that a prudent person or firm engaged in the profession of acting as trustees would exercise in managing the affairs of another person; and
  - (b) comply with the provisions of the *Trustee Act 1898* ("the Act").
30. In breach of the Trustee Duty the defendant:
- (a) did not exercise the care, diligence and skill that a prudent person or firm engaged in the profession of acting as trustees would exercise in managing the affairs of another person; and
  - (b) did not comply with the provisions of the Act
- and as a consequence committed breaches of trust in that it:
- (c) breached section 7(1) of the Act by lending certain of the Money on improper security;
  - (d) lent certain of the Money on inadequate security;
  - (e) breached section 12B(1)(a)(i) of the Act by failing to obtain valuations which had been prepared exclusively for it and independently of the Borrowers;
  - (f) breached section 12B(1)(b) of the Act by failing to properly insure itself against all loss that may arise by reason of the default of the Borrowers;
  - (g) lent certain of the Money to the Borrowers in excess of two thirds of the security valuation;
  - (h) failed to seek advice from the valuer as to what percentage of the valuation should be lent;
  - (i) failed adequately to assess the ability of the Borrowers to service the loans;
  - (j) lent certain of the Money relying on security valuations which had been carried out over 3 months before the loans were made;
  - (k) failed to properly assess the valuations;

- (l) failed to act on the advice contained within the valuations;
- (m) failed to enquire as to the actual cost to the Borrowers of acquiring the securities;
- (n) failed to procure guarantees from the directors of Borrowers which were corporations;
- (o) made further advances of money to Borrowers who were already in default under the terms of their mortgages to the defendant;
- (p) made further advances of money to Borrowers who were already in default under the terms of their mortgages to the defendant for the purpose of paying interest due under the mortgages;
- (q) failed to advise the plaintiffs when the Borrowers had gone into default under their mortgages to the defendant;
- (r) transferred money from performing loans to non-performing loans, that is to loans where the Borrowers were in default;
- (s) mixed its own general moneys with the plaintiffs' money and with other investors' money in the Contributory Mortgage Fund.

#### PARTICULARS

Particulars of the defendant's breaches of trust are set out in the Fifth Schedule annexed hereto.

31. As a result of the breaches of trust by the defendants referred to in paragraph 30, the plaintiffs have suffered loss and damage.

#### PARTICULARS

Particulars of the loss and damage suffered by the plaintiffs as a result of the defendant's breaches of trust are set out in the Fourth Schedule annexed hereto.

#### **Misleading or Deceptive Conduct**

32. Further or in the alternative, by the Contracts the defendant represented to the plaintiffs that one month's notice was required for both partial and total withdrawal of funds ("the Misleading Representation").
33. As a result of the Misleading Representation, the plaintiffs believed that they could withdraw some or all of the Money as requested upon giving one month's notice.
34. In addition to the matters referred to in paragraphs 32 and 33 above, the defendant failed to inform the plaintiffs that:
- (a) there was a risk that the Money and the interest thereon may not be fully recoverable in the event of default by a borrower, even after a mortgagee sale;

(b) the Money was not guaranteed by the defendant.

35. In the alternative to paragraph 34 above, the defendant failed to provide to the plaintiffs all information that the plaintiffs or their advisors would reasonably require, and reasonably expect to be provided, for the purpose of making an informed assessment of:

(a) the risk in investing the Money with the defendant; and

(b) the rights of the plaintiffs to be repaid the Money.

#### PARTICULARS

The defendant failed to inform the plaintiffs that:

(a) the Money was not able to be repaid at the expiration of one month; and

(b) any repayment of the Money was subject at all times to the availability of funds.

36. As a result of the Misleading Representation and as a result of the matters referred to in paragraphs 34 and 35, the plaintiffs believed that there was no risk that any part of the Money could be permanently lost.

37. Further or in the alternative, at the time of making the Misleading Representation and as a result of the matters referred to in paragraphs 34 and 35, the defendant knew or ought to have known that the plaintiffs would rely thereon and be induced thereby to invest the Money.

38. Relying on the faith of the Misleading Representation and the matters referred to in paragraphs 34 and 35 and induced thereby, the plaintiffs invested the Money.

39. The Misleading Representation and the matters referred to in paragraphs 34 and 35 were:

(a) in the course of trade and commerce; and

(b) misleading or deceptive or likely to mislead and deceive

("the Misleading or Deceptive Conduct").

#### PARTICULARS

(a) The defendant conducted, among other things, the business of lending clients' money to Borrowers on the security of first mortgages, for which they received a collection cost on the interest charged on the loans.

(b) The plaintiffs, upon giving one month's notice to withdraw the Money, were informed by the defendant that:

(i) the Money was not able to be repaid at the expiration of one month; and

(ii) any repayment of the Money was subject at all times to the availability of funds.



Further particulars are set out in the Sixth Schedule annexed hereto.

40. As a result of the matters referred to in paragraphs 32 to 39 above, the plaintiffs have:

- (a) permanently lost some or all of the Money; and
- (b) not received the interest payable on the Money

and as a consequence thereby have suffered loss and damage.

#### PARTICULARS

Particulars of the loss and damage suffered by the plaintiffs as a result of the defendant's Misleading or Deceptive Conduct are set out in the Fourth Schedule annexed hereto.

41. As a result of:

- (a) the defendant's breaches of the Contracts;
- (b) the defendant's negligence;
- (c) the defendant's negligent misstatement;
- (d) the defendant's breaches of trust; and
- (e) the defendant's misleading or deceptive conduct

the plaintiffs have further suffered the loss of the use of the Money and interest payable thereupon.

#### PARTICULARS

Particulars of the plaintiffs' loss of the use of the Money and interest will be provided prior to trial.

#### **The Unauthorised Fees**

42. The plaintiffs repeat the allegations contained in paragraphs 5, 7 and 8 herein and the particulars subjoined thereto.

43. The Borrowers, in addition to interest payable on the Money lent by the defendant on the plaintiffs' behalf, were charged by the defendant:

- (a) a negotiation fee; and
- (b) all legal costs claimed by the defendant as mortgagee by for procuring the mortgages

("the Unauthorised Fees").

PARTICULARS

Particulars of the Unauthorised Fees will be provided after discovery in these proceedings.

44. The defendant:

- (a) did not inform the plaintiffs that it was charging the Borrowers the Unauthorised Fees; and
- (b) did not obtain the plaintiffs' consent to charge the Unauthorised Fees to the Borrowers.

45. As a result of the matters referred to in paragraphs 42 to 44 above, the defendant has become indebted to the plaintiffs for a proportionate amount of the Unauthorised Fees paid by the Borrowers to the defendant ("the Debt").

PARTICULARS

Particulars of the Debt will be provided after discovery in these proceedings.

AND the plaintiffs Claim:

- A. Damages for breach of contract.
- B. Alternatively, damages for negligence.
- C. Alternatively, damages for negligent misstatement.
- D. Alternatively, restitutionary compensation and interest for breach of trust.
- E. Alternatively, damages for misleading or deceptive conduct pursuant to s 37 of the *Fair Trading Act 1990*.
- F. Alternatively, other relief for misleading or deceptive conduct pursuant to s 41 of the *Fair Trading Act 1990*.
- G. Alternatively, compensation pursuant to section 12C of the *Trustee Act 1898*.
- H. The Debt.
- I. Damages pursuant to the principles enunciated by the High Court in *Hungerfords & Ors v Walker & Ors* (1990) 171 CLR 125.
- J. Interest.
- K. Costs.
- L. Such further orders as the Court deems meet.

DATED this 28<sup>th</sup> day of July 2000.

TOOMEY MANING & CO

Per:

Practitioner for the plaintiffs

TO: Piggott Wood & Baker  
Barristers & Solicitors  
199 Macquarie Street  
The Defendant

**THE FIRST SCHEDULE**

<b>Plaintiff</b>	<b>Initial investment paid to defendant</b>	<b>Date of Application to invest</b>
Helen Therese Alomes	\$15,000.00	29/1/1996
Hilary Mary Brown & John Pearson Moffatt	\$120,000.00	Circa 1993
Bruce Campbell Clennett & Irene Winnifred Clennett	\$60,000.00	21/4/1998
Cowleys Holdings Pty Ltd	\$295,615.00	Circa July 1993
Sydney Marcus & Gwendoline May Cowley	\$19,000.00	Circa August 1993
Demerara Pty Ltd	\$220,000.00	17/10/1996
Avery Caroline Drew	\$35,000.00	7/4/1995
G & L Management Pty Ltd	\$100,000.00	21/7/1995
Geoffrey Hall & Christopher David Jones	\$840,000.00	11/9/1992
Jackman Investments Pty Ltd	\$50,000.00	Circa November 1992
Ernest Rex & Una Joan Lincoln	Not known	Circa 1995
Macquarie Nominees Pty Ltd	\$40,000.00	9/11/1994
Colin Richard McMullen	\$39,561.95	15/9/1997
Neville Maurice Newman & Margaret Isabel Newman	\$60,000.00	Circa 1996

Plaintiff	Initial investment paid to defendant	Date of Application to invest
Margaret Isabel Newman	\$40,000.00 approximately	Circa 1996
John Sydney & Shirley Elliot Palmer	\$18,000.00	5/6/1996
John Anthony Cotterell Solomon	\$40,000.00	28/2/1994
Neil Thomas Tate & Beryl Tate	\$74,153.82	10/1/1996
William Anthony Vermey & Elizabeth Goldie Vermey	\$100,000.00	Circa April 1995
W Coogan & Co Pty Ltd	\$200,000.00	22/9/1996
Jean Youd	\$39,661.00 approximately	Prior to 1983

Further particulars will be supplied after discovery and interrogation these proceedings.

**THE SECOND SCHEDULE**

<b>Plaintiff</b>	<b>Principal amount initially advanced</b>	<b>Principal amount current</b>	<b>Date of initial advance</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
Helen Therese Alomes	\$15,000.00	\$12,825.40	7/8/1997	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	\$36,000.00	\$30,780.97	26/6/1997	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	\$36,000.00	\$460.00	26/6/1997	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
Bruce Campbell Clennett & Irene Winnifred Clennett	\$25,000.00	\$25,000.00	29/5/1998	T K Maxwell	Steele's Island, Carlton Beach
Cowleys Holdings Pty Ltd	\$15,000.00	\$12,825.40	7/8/1997	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Cowleys Holdings Pty Ltd	\$22,000.00	\$3,000.00	23/10/1995	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive
Cowleys Holdings Pty Ltd	\$25,500.00	Nil	27/10/1995	Charles Brignall	P3503C Britains Road, Garden Island Creek

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
Cowleys Holdings Pty Ltd	\$10,000.00	\$49,000.00	28/6/1996	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Cowleys Holdings Pty Ltd	\$40,000.00	\$48,000.00	30/10/1995	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Sydney Marcus & Gwendoline May Cowley	\$19,000.00	\$16,800.00	1/2/1994	L V Smith	1,2 & 3/29 Dempster Street, Claremont
Sydney Marcus & Gwendoline May Cowley	\$10,000.00	\$22,000.00	10/6/1994	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort
Sydney Marcus & Gwendoline May Cowley	\$10,000.00	\$2,219.73	29/11/1996	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
Demerara Pty Ltd	\$18,000.00	\$18,000.00	17/10/1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
Demerara Pty Ltd	\$132,000.00	\$132,000.00	25/10/1996	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
Demerara Pty Ltd	\$50,000.00	\$50,000.00	17/10/1996	M & P Barwick	"Woodlands", Tea Tree Road; P2263 Tea Tree Road; Lot 103 Peta Court, Old Beach; Lot 52 Gravillia Place, Old Beach; "Clives Hill", Baskerville Road, Old Beach
Demerara Pty Ltd	\$35,000.00	\$35,000.00	5/7/1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Demerara Pty Ltd	\$44,000.00	\$42,751.34	13/12/1996	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Demerara Pty Ltd	\$2,000.00	\$1,744.00	23/9/1997	G A & D E Shaw	"Tahara"; Archers Manor
Avery Caroline Drew	\$35,000.00	\$35,000.00	21/12/1995	T K Maxwell	Steele's Island, Carlton Beach

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
Avery Caroline Drew	\$12,500.00	\$12,500.00	16/10/1998	Island Hotels Pty Ltd	"Flinders Island Lodge"
G & L Management Pty Ltd	\$35,000.00	\$31,760.00	21/7/1995	G A & D E Shaw	"Tahara"; Archers Manor
G & L Management Pty Ltd	\$65,000.00	\$65,000.00	21/7/1995	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Geoffrey Hall & Christopher David Jones	\$83,000.00	\$109,500.00	26/8/1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Geoffrey Hall & Christopher David Jones	\$68,000.00	\$67,119.61	16/1/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Geoffrey Hall & Christopher David Jones	\$840,000.00	\$48,990.00	11/9/1992	G A & D E Shaw	"Tahara"; Archers Manor
Geoffrey Hall & Christopher David Jones	\$84,000.00	\$84,000.00	13/9/1993	M R Ransley	Lot 3 Esplanade & Lot 3 Rheban Road, Orford
Geoffrey Hall & Christopher David Jones	\$20,000.00	\$20,000.00	4/6/1997	Wribass Pty Ltd	The Boulevard, Shearwater
Geoffrey Hall & Christopher David Jones	\$7,500.00	\$95.00	4/9/1996	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel



Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
Geoffrey Hall & Christopher David Jones	\$60,000.00	\$55,900.00	14/8/1995	ACN 062 197 022/ L P D Excavations Pty Ltd	The Boulevard, Shearwater
Geoffrey Hall & Christopher David Jones	\$6,500.00	\$8,300.00	30/5/1997	R B Warfield	Corner of George & Richards Streets, Lefroy
Jackman Investments Pty Ltd	\$55,000.00	\$53,866.69	25/11/1996	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Jackman Investments Pty Ltd	\$14,000.00	\$14,000.00	21/10/1998	Jiltre Pty Ltd as trustee for Underwood Family Trust	Riviera Hotel, Beauty Point
Jackman Investments Pty Ltd	\$30,000.00	\$30,000.00	9/12/1994	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Ernest Rex & Una Joan Lincoln	\$23,000.00	\$30,500.00	13/9/1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Ernest Rex & Una Joan Lincoln	\$20,000.00	\$20,000.00	28/7/1998	Wribass Pty Ltd	The Boulevard, Shearwater
Ernest Rex & Una Joan Lincoln	\$14,000.00	\$14,500.00	17/9/1996	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Ernest Rex & Una Joan Lincoln	\$35,000.00	\$35,500.00	11/6/1997	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Macquarie Nominees Pty Ltd	\$35,000.00	\$30,000.00	21/12/1995	T K Maxwell	Steele's Island, Carlton Beach

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
Macquarie Nominees Pty Ltd	\$2,000.00	\$6,000.00	25/7/1997	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Colin Richard McMullen	\$39,500.00	\$33,773.57	15/9/1997	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Neville Maurice Newman & Margaret Isabel Newman	\$60,000.00	\$60,000.00	Circa 1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Margaret Isabel Newman	\$40,000.00	\$1,172.40	13/7/1998	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
John Sydney & Shirley Elliot Palmer	\$5,000.00	\$4,560.00	19/2/1998	G A & D E Shaw	"Tahara"; Archers Manor
John Sydney & Shirley Elliot Palmer	\$40,000.00	\$6,210.59	23/3/1996	W & DC Caminada	67 Salisbury Crescent, Launceston
John Anthony Cotterell Solomon	\$30,000.00	\$380.00	4/9/1996	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
John Anthony Cotterell Solomon	\$40,000.00	\$36,330.00	17/2/1997	G A & D E Shaw	"Tahara"; Archers Manor
John Anthony Cotterell Solomon	\$40,000.00	\$31,700.00	29/3/1994	N J & K Slater & Wribass Pty Ltd	1 & 2/282 Invermay Road; Lot 2 Hurst Street, Lulworth
Neil Thomas Tate & Beryl Tate	\$74,000.00	\$63,271.99	1/3/1996	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
William Anthony Vermey & Elizabeth Goldie Vermey	\$30,000.00	\$30,000.00	Circa December 1995	T K Maxwell	Steele's Island, Carlton Beach
William Anthony Vermey & Elizabeth Goldie Vermey	\$20,000.00	\$20,000.00	Circa 1995	L A J Trust/L R & A C Pybus	Lot 26 Blackstone Road, Blackstone Heights

Plaintiff	Principal amount initially advanced	Principal amount current	Date of initial advance	Borrower/ mortgagor	Security
W Coogan & Co Pty Ltd	\$182,000.00	\$74,000.00	17/9/1996	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
W Coogan & Co Pty Ltd	\$25,000.00	\$43,000.00	22/5/1996	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
W Coogan & Co Pty Ltd	\$100,000.00	\$81,227.55	25/9/1996	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
W Coogan & Co Pty Ltd	\$60,000.00	\$26,160.00	16/10/1997	L V Smith	1, 2 & 3/29 Dempster Street, Claremont; 2/73 Lennox Avenue, Lutana; 22 Summerhill Road, West Hobart; 1/73 Butler Avenue, Moonah and 12 Winbourne Road, West Moonah
W Coogan & Co Pty Ltd	\$70,000.00	\$70,000.00	3/11/1997	L H & S Wrangmore	85-87 Granville Street, West Launceston
W Coogan & Co Pty Ltd	\$15,000.00	\$14,596.87	19/3/1998	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive
W Coogan & Co Pty Ltd	\$103,000.00	\$92,900.00	19/3/1996	Banksia Homes & Developments and PTK Pty Ltd	Balmoral Avenue, Riverside, Launceston

<b>Plaintiff</b>	<b>Principal amount initially advanced</b>	<b>Principal amount current</b>	<b>Date of initial advance</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
W Coogan & Co Pty Ltd	\$10,000.00	\$9,100.00	5/9/1997	ACN 062 197 022/ L P D Excavations Pty Ltd	Cheamery Road, Sulphur Creek
W Coogan & Co Pty Ltd	\$45,000.00	\$45,000.00	10/9/1997	Eagle Interlink Pty Ltd	Lady Barron, Flinders Island
Jean Youd	\$75,000.00	\$75,000.00	2/12/1994	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort

Further particulars will be supplied after discovery and interrogation in these proceedings.

**THE THIRD SCHEDULE**

A. The defendant breached its Contracts with the defendants as set out in the table below:

Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Demerara Pty Ltd</li> <li>• G &amp; L Management Pty Ltd</li> <li>• Geoffrey Hall &amp; Christopher David Jones</li> <li>• John Sydney &amp; Shirley Elliot Palmer</li> <li>• John Anthony Cotterell Solomon</li> </ul>	<ul style="list-style-type: none"> <li>• B575942</li> <li>• 8/9/1992</li> </ul>	G A & D E Shaw	"Tahara"; Archers Manor	<ol style="list-style-type: none"> <li>1. Valuation for mortgage carried out by Mantach Whitmore (valuer) on 26/8/1992 on the instructions of the mortgagor.</li> <li>2. Valuation for mortgage carried out by R L Jones (valuer) on 23/4/1993 on the instructions of the mortgagor.</li> <li>3. Valuation for mortgage carried out by Mantach Whitmore (valuer) on 14/12/1995 on the instructions of the mortgagor.</li> <li>4. Valuation for mortgage carried out by R L Jones (valuer) on 31/1/1996 on the instructions of the mortgagor.</li> <li>5. Valuation for mortgage carried out by Mantach Whitmore (valuer) on 4/11/1997 on the instructions of the mortgagor.</li> </ol>
<ul style="list-style-type: none"> <li>• Cowleys Holdings Pty Ltd</li> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B809737</li> <li>• 13/2/1995</li> <li>• \$374,000.00</li> </ul>	<ul style="list-style-type: none"> <li>• Wayne Dobson Homes Pty Ltd (In liq)</li> </ul>	2 & 3/90 Clarence Street, Bellerive	6. No valuation obtained. Government valuation \$190,000.00 in 1995. Over 50% of government valuation lent.

Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>Geoffrey Hall &amp; Christopher David Jones</li> </ul>	<ul style="list-style-type: none"> <li>B868507</li> <li>8/3/1996</li> <li>\$13,000.00</li> </ul>	<ul style="list-style-type: none"> <li>R B Warfield</li> </ul>	Corner of George & Richards Streets, Lefroy	<ul style="list-style-type: none"> <li>7. Valuation for mortgage carried out by R L Jones (valuer) on 15/1/1996 on the instructions of the mortgagor's finance brokers.</li> <li>8. Over two thirds of valuation amount of \$18,000.00 lent.</li> </ul>
<ul style="list-style-type: none"> <li>Geoffrey Hall &amp; Christopher David Jones</li> <li>Ernest Rex &amp; Una Joan Lincoln</li> </ul>	<ul style="list-style-type: none"> <li>C90312</li> <li>22/7/1998</li> </ul>	<ul style="list-style-type: none"> <li>Wribass Pty Ltd</li> </ul>	The Boulevard, Shearwater	<ul style="list-style-type: none"> <li>9. Valuation for mortgage carried out by R L Jones (valuer) on 17/7/1998 on the instructions of the mortgagor.</li> </ul>
<ul style="list-style-type: none"> <li>Hilary Mary Brown &amp; John Pearson Moffatt</li> <li>Geoffrey Hall &amp; Christopher David Jones</li> <li>John Anthony Cotterell Solomon</li> </ul>	<ul style="list-style-type: none"> <li>B962804</li> <li>5/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>David Paul Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 2</li> </ul>	Bridport Hotel	<ul style="list-style-type: none"> <li>10. Valuation for mortgage carried out by R L Jones (valuer) on 24/4/1996 over 3 months old.</li> <li>11. Valuer instructed by the mortgagor.</li> </ul>
<ul style="list-style-type: none"> <li>Hilary Mary Brown &amp; John Pearson Moffatt</li> <li>Geoffrey Hall &amp; Christopher David Jones</li> <li>John Anthony Cotterell Solomon</li> </ul>	<ul style="list-style-type: none"> <li>B962992</li> <li>18/11/1996</li> </ul>	<ul style="list-style-type: none"> <li>David Paul Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 2</li> </ul>	Bridport Hotel	<ul style="list-style-type: none"> <li>12. Valuation for mortgage carried out by R L Jones (valuer) on 7/11/1996 on the instructions of the mortgagor.</li> </ul>

Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Cowleys Holdings Pty Ltd</li> <li>• G &amp; L Management Pty Ltd</li> <li>• Ernest Rex &amp; Una Joan Lincoln</li> <li>• Macquarie Nominees Pty Ltd</li> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B943691</li> <li>• 1/7/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Amaranth Enterprises Pty Ltd &amp; M &amp; R Pestrucchi Pty Ltd</li> </ul>	3 Brooke Street, Hobart	<p>13. Valuation for mortgage carried out by R L Jones (valuer) on 28/6/1996 on the instructions of the mortgagor.</p> <p>14. Valuation for mortgage carried out by R L Jones (valuer) on 28/5/1996 on the instructions of the mortgagor.</p> <p>15. Valuation for mortgage carried out by R L Jones (valuer) on 30/7/1996 on the instructions of the mortgagor.</p> <p>16. Valuation for mortgage carried out by R L Jones (valuer) on 29/8/1996 on the instructions of the mortgagor.</p> <p>17. Valuation for mortgage carried out by R L Jones on 25/10/1996 on the instructions of the mortgagor.</p>
<ul style="list-style-type: none"> <li>• Helen Therese Alomes</li> <li>• Hilary Mary Brown &amp; John Pearson Moffatt</li> <li>• Cowleys Holdings Pty Ltd</li> <li>• Demerara Pty Ltd</li> <li>• Geoffrey Hall &amp; Christopher David Jones</li> <li>• Jackman Investments Pty Ltd</li> <li>• Colin Richard McMullen</li> <li>• Neil Thomas Tate &amp; Beryl Tate</li> <li>• W Coogan &amp; Co P/L</li> </ul>	<ul style="list-style-type: none"> <li>• B868489</li> <li>• 1/3/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	18. Particulars to be supplied after discovery in these proceedings.



Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Helen Therese Alomes</li> <li>• Hilary Mary Brown &amp; John Pearson Moffatt</li> <li>• Cowleys Holdings Pty Ltd</li> <li>• Demerara Pty Ltd</li> <li>• Geoffrey Hall &amp; Christopher David Jones</li> <li>• Jackman Investments Pty Ltd</li> <li>• Colin Richard McMullen</li> <li>• Neil Thomas Tate &amp; Beryl Tate</li> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B962858</li> <li>• 29/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	19. Particulars to be supplied after discovery in these proceedings.
<ul style="list-style-type: none"> <li>• Helen Therese Alomes</li> <li>• Hilary Mary Brown &amp; John Pearson Moffatt</li> <li>• Cowleys Holdings Pty Ltd</li> <li>• Demerara Pty Ltd</li> <li>• Geoffrey Hall &amp; Christopher David Jones</li> <li>• Jackman Investments Pty Ltd</li> <li>• Colin Richard McMullen</li> <li>• Neil Thomas Tate &amp; Beryl Tate</li> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• C17015</li> <li>• 23/7/1997</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	20. Valuation for mortgage carried out by R L Jones (valuer) on 27/6/1997 on the joint instructions of David Paul Krushka and the defendant.

Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Demerara Pty Ltd</li> <li>• Demerara Pty Ltd</li> <li>• Geoffrey Hall &amp; Christopher David Jones</li> <li>• Ernest Rex &amp; Una Joan Lincoln</li> <li>• Neville Maurice Newman &amp; Margaret Isabel Newman</li> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B868668</li> <li>• 23/4/1996</li> </ul>	<ul style="list-style-type: none"> <li>• John Keith Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 4</li> </ul>	35 Main Road Bridport	<ul style="list-style-type: none"> <li>21. Valuation for mortgage carried out by R L Jones (valuer) on 10/3/1996 on the instructions of the mortgagor.</li> <li>22. Valuation for mortgage carried out by R L Jones (valuer) on 9/8/1996 on the instructions of the mortgagor.</li> <li>23. Valuation for mortgage carried out by R L Jones (valuer) on 7/11/1996 on the instructions of the mortgagor.</li> </ul>
<ul style="list-style-type: none"> <li>• Bruce Campbell Clennett &amp; Irene Winnifred Clennett</li> <li>• Avery Caroline Drew</li> <li>• Macquarie Nominees Pty Ltd</li> <li>• William Anthony Verney &amp; Elizabeth Goldie Verney</li> </ul>	<ul style="list-style-type: none"> <li>• B868275</li> <li>• 21/12/1995</li> </ul>	<ul style="list-style-type: none"> <li>• T K Maxwell</li> </ul>	Steele's Island, Carlton Beach	<ul style="list-style-type: none"> <li>24. Valuation for mortgage carried out by R L Jones (valuer) on 13/7/1995 over 3 months old.</li> <li>25. Valuer instructed by the mortgagor.</li> <li>26. \$15,000.00 was advanced on the mortgage on 15/2/1996 to pay interest due from the mortgagor.</li> <li>27. \$10,000.00 was advanced on the mortgage on 15/5/1996 to pay interest due from the mortgagor.</li> </ul>
<ul style="list-style-type: none"> <li>• Cowleys Holdings Pty Ltd</li> <li>• Jean Youd</li> </ul>	<ul style="list-style-type: none"> <li>• B868139</li> <li>• 16/11/1995</li> </ul>	<ul style="list-style-type: none"> <li>• Everworth (Tas) Pty Ltd (In liq)</li> </ul>	Rutherglen Holiday Resort	<ul style="list-style-type: none"> <li>28. Valuation for mortgage carried out by R L Jones on 28/7/1995 over 3 months old.</li> <li>29. Valuer instructed by the mortgagor.</li> </ul>

Plaintiffs	Mortgage No. Date Principal Sum (if relevant to the breach)	Borrower/ Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Cowleys Holdings Pty Ltd</li> <li>• Jean Youd</li> </ul>	<ul style="list-style-type: none"> <li>• B868139</li> <li>• 16/11/1995</li> </ul>	<ul style="list-style-type: none"> <li>• Everworth (Tas) Pty Ltd (In liq)</li> </ul>	Rutherglen Holiday Resort	<p>30. Part of loan moneys were advanced to pay interest due from the mortgagor on mortgage B770900 on 16/11/1995.</p> <p>31. Part of loan moneys were advanced to pay interest due from the mortgagor on mortgage B770900 on 19/2/1996.</p>
<ul style="list-style-type: none"> <li>• Cowleys Holdings Pty Ltd</li> <li>• Jean Youd</li> </ul>	<ul style="list-style-type: none"> <li>• B770900</li> <li>• 10/6/1994</li> </ul>	<ul style="list-style-type: none"> <li>• Everworth (Tas) Pty Ltd (In liq)</li> </ul>	Rutherglen Holiday Resort	<p>32. Valuation carried out by R L Jones (valuer) on 11/2/1994 over 3 months old.</p> <p>33. Valuer instructed by the mortgagor's finance brokers for valuation dated 11/2/1994.</p> <p>34. Valuation carried out by R L Jones (valuer) on 9/8/1994 on the instructions of the mortgagor.</p> <p>35. Valuation carried out by R L Jones (valuer) on 3/1/1995 on the instructions of the mortgagor.</p> <p>36. Valuation carried out by R L Jones (valuer) on 13/3/1995 on the instructions of the mortgagor.</p>

Further particulars will be supplied after discovery and interrogation in these proceedings.

**THE FOURTH SCHEDULE**

The plaintiffs have suffered loss and damage as set out below:

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Helen Therese Alomes	\$12,825.40	15/11/1998	\$1,938.79	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	\$30,780.97	15/11/1998	\$4,652.61	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	\$460.00	15/11/1999	\$1,789.83	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
Bruce Campbell Clennett & Irene Winnifred Clennett	\$25,000.00	15/11/1998	\$3,122.42	T K Maxwell	Steele's Island, Carlton Beach
Cowleys Holdings Pty Ltd	\$12,825.40	15/11/1998	\$1,938.79	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Cowleys Holdings Pty Ltd	\$3,000.00	15/2/1999	\$311.46	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/mortgagor	Security
Cowleys Holdings Pty Ltd	Nil	15/11/1998	\$1,050.07	Charles Brignall	P3503C Brittain's Road, Garden Island Creek
Cowleys Holdings Pty Ltd	\$49,000.00	N/A	Nil	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Cowleys Holdings Pty Ltd	\$48,000.00	N/A	Nil	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Sydney Marcus & Gwendoline May Cowley	\$16,800.00	15/8/1999	\$1,138.68	L V Smith	1,2 & 3/29 Dempster Street, Claremont
Sydney Marcus & Gwendoline May Cowley	\$22,000.00	15/11/1998	\$2,747.73	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort
Sydney Marcus & Gwendoline May Cowley	\$2,219.73	15/5/1999	\$566.92	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Demerara Pty Ltd	\$18,000.00	15/11/1998	\$2,248.14	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Demerara Pty Ltd	\$132,000.00	15/11/1998	\$16,486.44	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
Demerara Pty Ltd	\$50,000.00	N/A	Nil	M & P Barwick	"Woodlands", Tea Tree Road; P2263 Tea Tree Road; Lot 103 Peta Court, Old Beach; Lot 52 Gravillia Place, Old Beach; "Clives Hill", Baskerville Road, Old Beach
Demerara Pty Ltd	\$35,000.00	15/11/1998	\$4,371.41	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Demerara Pty Ltd	\$42,751.34	15/11/1998	\$6,461.91	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Demerara Pty Ltd	\$1,744.00	15/5/1999	\$161.64	G A & D E Shaw	"Tahara"; Archers Manor
Avery Caroline Drew	\$35,000.00	15/11/1998	\$4,371.41	T K Maxwell	Steele's Island, Carlton Beach
Avery Caroline Drew	\$12,500.00	15/2/2000	\$421.15	Island Hotels Pty Ltd	"Flinders Island Lodge"
G & L Management Pty Ltd	\$31,760.00	15/5/1999	\$2,900.25	G A & D E Shaw	"Tahara"; Archers Manor
G & L Management Pty	\$65,000.00	N/A	Nil	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Geoffrey Hall & Christopher David Jones	\$109,500.00	15/11/1998	\$13,676.25	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Geoffrey Hall & Christopher David Jones	\$67,119.61	15/11/1998	\$10,145.20	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/mortgagor	Security
Geoffrey Hall & Christopher David Jones	\$48,990.00	15/5/1999	\$4,339.05	G A & D E Shaw	"Tahara"; Archers Manor
Geoffrey Hall & Christopher David Jones	\$84,000.00	15/11/1998	\$10,491.38	M R Ransley	Lot 3 Esplanade & Lot 3 Rheban Road, Orford
Geoffrey Hall & Christopher David Jones	\$20,000.00	15/5/1999	\$1,707.07	Wribass Pty Ltd	The Boulevard, Shearwater
Geoffrey Hall & Christopher David Jones	\$95.00	15/11/1999	\$371.18	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
Geoffrey Hall & Christopher David Jones	\$55,900.00	15/5/1999	\$3,800.83	ACN 062 197 022/ L P D Excavations Pty Ltd	The Boulevard, Shearwater
Geoffrey Hall & Christopher David Jones	\$8,300.00	N/A	Nil	R B Warfield	Corner of George & Richards Streets, Lefroy
Jackman Investments Pty Ltd	\$53,866.69	15/11/1998	\$8,142.01	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Jackman Investments Pty Ltd	\$14,000.00	N/A	Nil	Jiltre Pty Ltd as trustee for Underwood Family Trust	Riviera Hotel, Beauty Point



Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Jackman Investments Pty Ltd	\$30,000.00	N/A	Nil	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Ernest Rex & Una Joan Lincoln	\$30,500.00	15/11/1998	\$3,798.84	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Ernest Rex & Una Joan Lincoln	\$20,000.00	15/5/1999	\$1,707.07	Wribass Pty Ltd	The Boulevard, Shearwater
Ernest Rex & Una Joan Lincoln	\$14,500.00	N/A	Nil	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Ernest Rex & Una Joan Lincoln	\$35,500.00	N/A	Nil	B J & M E Forsyth	Coles Bay Caravan Park, Coles Bay
Macquarie Nominees Pty Ltd	\$30,000.00	15/11/1998	\$3,746.91	T K Maxwell	Steele's Island, Carlton Beach
Macquarie Nominees Pty Ltd	\$6,000.00	N/A	Nil	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
Colin Richard McMullen	\$33,773.57	15/11/1998	\$5,104.92	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Neville Maurice Newman & Margaret Isabel Newman	\$60,000.00	15/11/1998	\$7,493.82	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Margaret Isabel Newman	\$1,172.40	15/11/1998	\$4,604.07	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
John Sydney & Shirley Elliot Palmer	\$4,560.00	15/5/1999	\$416.73	G A & D E Shaw	"Tahara"; Archers Manor
John Sydney & Shirley Elliot Palmer	\$6,210.59	15/5/1999	\$2,378.52	W & DC Caminada	67 Salisbury Crescent, Launceston
John Anthony Cotterell Solomon	\$380.00	15/11/1999	\$1,494.86	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
John Anthony Cotterell Solomon	\$36,330.00	15/5/1999	\$3,317.08	G A & D E Shaw	"Tahara"; Archers Manor

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
John Anthony Cotterell Solomon	\$31,700.00	15/5/1999	\$3,270.04	N J & K Slater & Wribass Pty Ltd	1 & 2/282 Invermay Road; Lot 2 Hurst Street, Lulworth
Al Thomas Tate & Beryl Tate	\$63,271.99	15/11/1998	\$9,563.60	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
William Anthony Vermey & Elizabeth Goldie Vermey	\$30,000.00	15/11/1998	\$3,746.91	T K Maxwell	Steele's Island, Carlton Beach
William Anthony Vermey & Elizabeth Goldie Vermey	\$20,000.00	N/A	Nil	L A J Trust/L R & A C Pybus	Lot 26 Blackstone Road, Blackstone Heights
W Coogan & Co Pty Ltd	\$74,000.00	N/A	Nil	Amaranth Enterprises Pty Ltd & M & R Pestrucchi Pty Ltd	3 Brooke Street, Hobart; 430 Nelson Road, Mt Nelson
W Coogan & Co Pty Ltd	\$43,000.00	15/11/1998	\$5,370.60	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
W Coogan & Co Pty Ltd	\$81,227.55	15/11/1998	\$12,277.63	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
W Coogan & Co Pty Ltd	\$26,160.00	15/11/1998	\$4,219.05	L V Smith	1, 2 & 3/29 Dempster Street, Claremont; 2/73 Lennox Avenue, Lutana; 22 Summerhill Road, West Hobart; 1/73 Butler Avenue, Moonah and 12 Winbourne Road, West Moonah
W Coogan & Co Pty Ltd	\$70,000.00	N/A	Nil	L H & S Wrankmore	85-87 Granville Street, West Launceston
W Coogan & Co Pty Ltd	\$14,596.87	15/11/1998	\$1,555.36	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive
W Coogan & Co Pty Ltd	\$92,900.00	15/11/1999	\$4,654.63	Banksia Homes & Developments and PTK Pty Ltd	Balmoral Avenue, Riverside, Launceston
W Coogan & Co Pty Ltd	\$9,100.00	15/2/2000	\$294.40	ACN 062 197 022/ L P D Excavations Pty Ltd	Cheamery Road, Sulphur Creek
W Coogan & Co Pty Ltd	\$45,000.00	15/11/1999	\$2,246.23	Eagle Interlink Pty Ltd	Lady Barron, Flinders Island

Plaintiff	Principal outstanding as at 15/5/2000	Date interest ceased	Interest outstanding* as at 15/5/2000 and continuing	Borrower/ mortgagor	Security
Jean Youd	\$75,000.00	15/11/1998	\$9,367.30	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort

\* Based on the following interest rates:

Period from	Period to	Interest Rate (per annum)
15/8/1997	15/10/1998	7.95% (Defendant)
15/10/1998	15/11/1999	6.75% (Defendant)
15/11/1999	15/2/2000	6.227% (Perpetual Trustees)
15/2/2000	15/5/2000	6.669% (Perpetual Trustees)

Further particulars will be supplied after discovery and interrogation in these proceedings.

**THE FIFTH SCHEDULE**

A. The defendant breached its duty to the plaintiffs and was negligent as set out in paragraph A to the Third Schedule annexed herewith and further as set out in the table below:

Plaintiffs	<ul style="list-style-type: none"> <li>• Mortgage No.</li> <li>• Date</li> <li>• Principal Sum (if relevant to the breach)</li> </ul>	Borrower/Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Bruce Campbell Clennett &amp; Irene Winnifred Clennett</li> </ul>	<ul style="list-style-type: none"> <li>• B868275</li> <li>• 21/12/1995</li> </ul>	<ul style="list-style-type: none"> <li>• T K Maxwell</li> </ul>	Steele's Island, Carlton Beach	1. Defendant advanced \$25,000.00 of the plaintiff's money to the mortgagor on 29/5/1998 when the mortgagor had been in default since 12/9/1996.
<ul style="list-style-type: none"> <li>• Geoffrey Hall &amp; Christopher David Jones</li> </ul>	<ul style="list-style-type: none"> <li>• B962858</li> <li>• 29/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	2. Defendant advanced \$68,000.00 of the plaintiff's money to the mortgagor on 16/1/1998 when the mortgagor had been in default since 19/8/1997.  3. Defendant advanced \$10,500.00 of the plaintiff's money to the mortgagor on 19/6/1998 when the mortgagor had been in default since 19/8/1997.
<ul style="list-style-type: none"> <li>• Jackman Investments Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B962858</li> <li>• 29/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	4. Defendant advanced \$7,000.00 of the plaintiff's money to the mortgagor on 18/9/1997 when the mortgagor had been in default since 19/8/1997.

Plaintiffs	<ul style="list-style-type: none"> <li>• Mortgage No.</li> <li>• Date</li> <li>• Principal Sum (if relevant to the breach)</li> </ul>	Borrower/Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Ernest Rex &amp; Una Joan Lincoln</li> </ul>	<ul style="list-style-type: none"> <li>• B868668</li> <li>• 23/4/1996</li> <li>• B868668</li> <li>• 23/4/1996</li> </ul>	<ul style="list-style-type: none"> <li>• John Keith Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 4</li> </ul>	35 Main Road Bridport	<ul style="list-style-type: none"> <li>5. Defendant advanced \$500.00 of the plaintiff's money to the mortgagor on 11/6/1998 when the mortgagor had been in default since 19/8/1997.</li> <li>6. Defendant advanced \$500.00 of the plaintiff's money to the mortgagor on 22/6/1998 when the mortgagor had been in default since 19/8/1997.</li> <li>7. Defendant advanced \$3,000.00 of the plaintiff's money to the mortgagor on 5/8/1998 when the mortgagor had been in default since 19/8/1997.</li> <li>8. Defendant advanced \$500.00 of the plaintiff's money to the mortgagor between 8/1998 and 11/98 when the mortgagor had been in default since 19/8/1997.</li> </ul>
<ul style="list-style-type: none"> <li>• Colin Richard McMullen</li> </ul>	<ul style="list-style-type: none"> <li>• B962858</li> <li>• 29/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	<ul style="list-style-type: none"> <li>9. Defendant advanced \$39,500.00 of the plaintiff's money to the mortgagor on or about 15/9/1997 when the mortgagor had been in default since 19/8/1997.</li> </ul>

Plaintiffs	<ul style="list-style-type: none"> <li>• Mortgage No.</li> <li>• Date</li> <li>• Principal Sum (if relevant to the breach)</li> </ul>	Borrower/Mortgagor	Security	Breach by defendant
<ul style="list-style-type: none"> <li>• Margaret Isabel Newman</li> </ul>	<ul style="list-style-type: none"> <li>• Not known</li> </ul>	<ul style="list-style-type: none"> <li>• R &amp; B Property Developments Pty Ltd (In liq)</li> </ul>	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect	10. Defendant advanced \$40,000.00 of the plaintiff's money to the mortgagor on 13/7/1998 when the mortgagor had been in default since 19/8/1997.
<ul style="list-style-type: none"> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B868668</li> <li>• 23/4/1996</li> </ul>	<ul style="list-style-type: none"> <li>• John Keith Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 4</li> </ul>	35 Main Road Bridport	11. Defendant advanced \$1,000.00 of the plaintiff's money to the mortgagor on 7/4/1998 when the mortgagor had been in default since 19/8/1997.
<ul style="list-style-type: none"> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• B962858</li> <li>• 29/9/1996</li> </ul>	<ul style="list-style-type: none"> <li>• Leoni Jayne Krushka as trustee for DP &amp; LJ Krushka Family Trust No. 3</li> </ul>	Sunny Hills Country Club, Ravenswood	12. Defendant advanced \$15,000.00 of the plaintiff's money to the mortgagor in or about 9/1999 when the mortgagor had been in default since 19/8/1997.
<ul style="list-style-type: none"> <li>• W Coogan &amp; Co Pty Ltd</li> </ul>	<ul style="list-style-type: none"> <li>• Not known</li> </ul>	<ul style="list-style-type: none"> <li>• L V Smith</li> </ul>	1,2 & 3/29 Dempster Street, Claremont	13. Defendant advanced \$60,000.00 of the plaintiff's money to the mortgagor on 16/10/1997 when the mortgagor had been in default since 17/5/1996.

Further particulars will be supplied after discovery and interrogation in these proceedings.



- B. The defendant failed to assess adequately the ability of the Borrowers to service or to continue to service the loans, in that the defendant did not:
- (a) require the Borrowers' to provide or where provided properly examine:
    - (i) prior to the granting of the loans:
      - (A) income and expenditure statements;
      - (B) assets and liabilities statements;
      - (C) business plans;
      - (D) feasibility studies;
      - (E) proof of capacity to meet interest payments;
      - (F) the purposes for which the loans were required;
      - (G) where the securities involved development and resale, the extent to which the development had been pre-sold; and
      - (H) the actual cost to the Borrowers of acquiring the securities.
    - (ii) after the granting of the loans:
      - (A) income and expenditure statements;
      - (B) assets and liabilities statements;
      - (C) updated business plans;
      - (D) updated feasibility studies; and
      - (E) reports of actual results for comparison with original business plans and feasibility studies.
  - (b) obtain credit checks and references in respect of the Borrowers.

**THE SIXTH SCHEDULE**

- A. Each of the plaintiffs gave one month's notice to the defendant to withdraw the Money as set out in the table below:

<b>Plaintiff</b>	<b>Date of request of withdrawal of funds</b>
Helen Therese Alomes	24/5/2000
Hilary Mary Brown & John Pearson Moffatt	15/1/1999
Bruce Campbell Clennett & Irene Winnifred Clennett	7/12/1998
Cowleys Holdings Pty Ltd	27/6/2000
Sydney Marcus & Gwendoline May Cowley	27/6/2000
Demerara Pty Ltd	11/6/1999
Avery Caroline Drew	16/11/1998 and 19/6/2000
G & L Management Pty Ltd	24/11/1998
Geoffrey Hall & Christopher David Jones	13/11/1998
Jackman Investments Pty Ltd	28/11/1998
Ernest Rex & Una Joan Lincoln	21/11/1998 and 20/6/2000
Macquarie Nominees Pty Ltd	16/11/1998

<b>Plaintiff</b>	<b>Date of request of withdrawal of funds</b>
Colin Richard McMullen	Advised by telephone in or about April 1999
Neville Maurice Newman & Margaret Isabel Newman	29/5/2000
Margaret Isabel Newman	On or about 19/7/00
John Sydney & Shirley Elliot Palmer	4/2/2000
John Anthony Cotterell Solomon	4/12/1998
Neil Thomas Tate & Beryl Tate	4/8/1999
William Anthony Verney & Elizabeth Goldie Verney	1/12/1998
W Coogan & Co Pty Ltd	Advised by telephone on 13/10/1998
Jean Youd	19/9/1999

Further particulars will be supplied after discovery in these proceedings.

- B. The defendant informed the plaintiffs that the Money was not able to be repaid at the expiration of one month and that any repayment of the Money was subject to the availability of funds, as set out in the table below:

<b>Plaintiff</b>	<b>Date of defendant's letter to plaintiff</b>
Helen Therese Alomes	11/3/1999 and 20/6/2000
Hilary Mary Brown & John Pearson Moffatt	7/2/1999

<b>Plaintiff</b>	<b>Date of defendant's letter to plaintiff</b>
Bruce Campbell Clennett & Irene Winnifred Clennett	15/12/1998
Cowleys Holdings Pty Ltd	Not known
Sydney Marcus & Gwendoline May Cowley	8/2/1999
Demerara Pty Ltd	15/12/1998 and 12/7/1999
Avery Caroline Drew	15/12/1998 and 7/2/1999
G & L Management Pty Ltd	Not known
Geoffrey Hall & Christopher David Jones	15/12/1998 and 18/12/1998
Jackman Investments Pty Ltd	15/12/1998 and 8/2/1999
Ernest Rex & Una Joan Lincoln	15/12/1998 and 8/2/1999
Macquarie Nominees Pty Ltd	Not known
Colin Richard McMullen	26/4/1999
Neville Maurice Newman & Margaret Isabel Newman	13/6/2000
Margaret Isabel Newman	Not known
John Sydney & Shirley Elliot Palmer	7/2/1999
John Anthony Cotterell Solomon	15/12/1998 and 7/2/1999

<b>Plaintiff</b>	<b>Date of defendant's letter to plaintiff</b>
Neil Thomas Tate & Beryl Tate	17/8/1999
William Anthony Vermey & Elizabeth Goldie Vermey	15/12/1998
W Coogan & Co Pty Ltd	7/2/1999
Jean Youd	5/10/1999

Further particulars will be supplied after discovery and interrogation in these proceedings.

- C. The defendant has ceased remitting interest to the plaintiffs as set out in the table below:

<b>Plaintiff</b>	<b>Date interest ceased</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
Helen Therese Alomes	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Hilary Mary Brown & John Pearson Moffatt	15/11/1999	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
Bruce Campbell Clennett & Irene Winnifred Clennett	15/11/1998	T K Maxwell	Steele's Island, Carlton Beach

<b>Plaintiff</b>	<b>Date interest ceased</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
Cowleys Holdings Pty Ltd	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Cowleys Holdings Pty Ltd	15/2/1999	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive
Cowleys Holdings Pty Ltd	15/11/1998	Charles Brignall	P3503C Brittain Road, Garden Island Creek
Sydney Marcus & Gwendoline May Cowley	15/8/1999	L V Smith	1,2 & 3/29 Dempster Street, Claremont
Sydney Marcus & Gwendoline May Cowley	15/11/1998	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort
Sydney Marcus & Gwendoline May Cowley	15/5/1999	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
Demerara Pty Ltd	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport

Plaintiff	Date interest ceased	Borrower/ mortgagor	Security
Demerara Pty Ltd	15/11/1998	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
Demerara Pty Ltd	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Demerara Pty Ltd	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Demerara Pty Ltd	15/5/1999	G A & D E Shaw	"Tahara"; Archers Manor
Avery Caroline Drew	15/11/1998	T K Maxwell	Steele's Island, Carlton Beach
Avery Caroline Drew	15/2/2000	Island Hotels Pty Ltd	"Flinders Island Lodge"
G & L Management Pty Ltd	15/5/1999	G A & D E Shaw	"Tahara"; Archers Manor

<b>Plaintiff</b>	<b>Date interest ceased</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
Geoffrey Hall & Christopher David Jones	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Geoffrey Hall & Christopher David Jones	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Geoffrey Hall & Christopher David Jones	15/5/1999	G A & D E Shaw	"Tahara"; Archers Manor
Geoffrey Hall & Christopher David Jones	15/11/1998	M R Ransley	Lot 3 Esplanade & Lot 3 Rheban Road, Orford
Geoffrey Hall & Christopher David Jones	15/5/1999	Wribass Pty Ltd	The Boulevard, Shearwater
Geoffrey Hall & Christopher David Jones	15/11/1999	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
Geoffrey Hall & Christopher David Jones	15/5/1999	ACN 062 197 022/ L P D Excavations Pty Ltd	The Boulevard, Shearwater
Jackman Investments Pty Ltd	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Ernest Rex & Una Joan Lincoln	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport



<b>Plaintiff</b>	<b>Date interest ceased</b>	<b>Borrower/ mortgagor</b>	<b>Security</b>
Ernest Rex & Una Joan Lincoln	15/5/1999	Wribass Pty Ltd	The Boulevard, Shearwater
Macquarie Nominees Pty Ltd	15/11/1998	T K Maxwell	Steele's Island, Carlton Beach
Colin Richard McMullen	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
Neville Maurice Newman & Margaret Isabel Newman	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
Margaret Isabel Newman	15/11/1998	R & B Property Developments Pty Ltd (In liq)	31 Brisbane Street, Launceston; 133 Poplar Parade, Young Town; 51 Packham Street, Newnham; 16-18 Howick Street, Launceston; 81 West Tamar Road, Riverside; 6 Mountain View Court, Prospect
John Sydney & Shirley Elliot Palmer	15/5/1999	G A & D E Shaw	"Tahara"; Archers Manor
John Sydney & Shirley Elliot Palmer	15/5/1999	W & DC Caminada	67 Salisbury Crescent, Launceston

Plaintiff	Date interest ceased	Borrower/ mortgagor	Security
John Anthony Cotterell Solomon	15/11/1999	David Paul Krushka as trustee for DP & LJ Krushka Family Trust No. 2	Bridport Hotel
John Anthony Cotterell Solomon	15/5/1999	G A & D E Shaw	"Tahara"; Archers Manor
John Anthony Cotterell Solomon	15/5/1999	N J & K Slater & Wribass Pty Ltd	1 & 2/282 Invermay Road; Lot 2 Hurst Street, Lulworth
Neil Thomas Tate & Beryl Tate	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood
William Anthony Vermey & Elizabeth Goldie Vermey	15/11/1998	T K Maxwell	Steele's Island, Carlton Beach
W Coogan & Co Pty Ltd	15/11/1998	John Keith Krushka as trustee for DP & LJ Krushka Family Trust No. 4	35 Main Road, Bridport
W Coogan & Co Pty Ltd	15/11/1998	Leoni Jayne Krushka as trustee for DP & LJ Krushka Family Trust No. 3	Sunny Hills County Club, Ravenswood

Plaintiff	Date interest ceased	Borrower/ mortgagor	Security
W Coogan & Co Pty Ltd	15/11/1998	L V Smith	1, 2 & 3/29 Dempster Street, Claremont; 2/73 Lennox Avenue, Lutana; 22 Summerhill Road, West Hobart; 1/73 Butler Avenue, Moonah and 12 Winbourne Road, West Moonah
W Coogan & Co Pty Ltd	15/11/1998	Wayne Dobson Homes Pty Ltd (In liq)	2 & 3/90 Clarence Street, Bellerive
W Coogan & Co Pty Ltd	15/11/1999	Banksia Homes & Developments and PTK Pty Ltd	Balmoral Avenue, Riverside, Launceston
W Coogan & Co Pty Ltd	15/2/2000	ACN 062 197 022/ LPD Excavations Pty Ltd	Cheamery Road, Sulphur Creek
W Coogan & Co Pty Ltd	15/11/1999	Eagle Interlink Pty Ltd	Lady Barron, Flinders Island
Jean Youd	15/11/1998	Everworth (Tas) Pty Ltd (In liq)	Rutherglen Holiday Resort

Further particulars will be supplied after discovery and interrogation in these proceedings.

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: [taslawsoc@vision.net.au](mailto:taslawsoc@vision.net.au)

Our ref:C98/45:JMM/VMC

16 August 1999

PRIVATE & CONFIDENTIAL

Mr P C Toomey  
Messrs Toomey Maning & Co  
Barristers and Solicitors  
30 Davey Street  
HOBART TAS 7000

Dear Sir

**McCULLOCH & McCULLOCH**

I refer to your letter of 21 July 1999 seeking a response to the third item of complaint contained in your letter of 22 May 1998 namely "transferring trust funds between firms without prior notification or authority.....".

This particular matter of complaint is one of the issues being addressed by the Society's Counsel as part of the overall investigation of McCulloch and McCulloch. The Society is awaiting receipt of Counsel's advice.

The Society will be in a position to respond to your specific complaint when that advice is to hand and has been considered by Council.

I will contact you at that time.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: [taslawsoc@vision.net.au](mailto:taslawsoc@vision.net.au)  
ABN 79607763856

Our ref: C98/45:JMM/VMC  
Your ref: PCT:JON001KT

8 February 2001

PRIVATE & CONFIDENTIAL

Mr P C Toomey  
Messrs Toomey Maning & Co  
Barristers and Solicitors  
30 Davey Street  
HOBART TAS 7000

Dear Sir

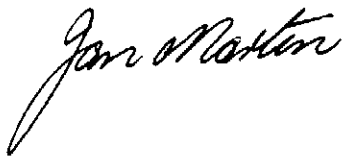
## **COMPLAINT AGAINST McCULLOCH & McCULLOCH**

I refer to previous correspondence in relation to your above complaint.

At its meeting on Tuesday 6 February 2001 the Society's Investigations Committee again considered the matter.

From that meeting I am instructed to advise you that in the absence of any further material from you, the Society has resolved to close the file.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref: C98/45:JMM/VMC

Our Ref: PCT:JON027DJW

14 February 2001

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

**BY HAND DELIVERY**

Dear Madam,

McCulloch & McCulloch, McCulloch & Associates  
Mortgage Trust Fund

I refer to your letter of 8 February 2001 presumably dealing with the third item of complaint contained in my letter of 22 May 1998, namely "transferring trust funds between firms without prior notification or authority".

The Society has at no time indicated that it needed any further material in order to deal with this complaint.

To enable me to supply whatever is necessary, and to avoid forwarding material that the Society has had access to, in accordance with section 58(10) of the *Legal Profession Act* 1993 please provide me with -

- (a) full details of -
- (i) the progress of the investigation into the matter; and
  - (ii) the person or persons conducting the investigation; and
  - (iii) the documents and records being examined; and
- (b) copies of any documents, records or reports relating to the investigation free of charge.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
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ABN 79607763856

Our ref: C98/45:JMM/VMC  
Your ref: PCT:JON027DJW

14 February 2001

PRIVATE & CONFIDENTIAL

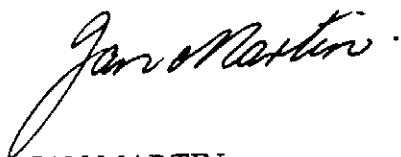
Mr P C Toomey  
Messrs Toomey Maning & Co  
Barristers and Solicitors  
30 Davey Street  
HOBART TAS 7000

Dear Sir

**McCULLOCH & McCULLOCH, McCULLOCH & ASSOCIATES  
MORTGAGE TRUST FUND**

I acknowledge receipt of your letter of 14 February 2001, and will contact you further in due course regarding this matter.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

**WRIT**

IN THE SUPREME COURT OF TASMANIA

Hobart Registry

No. 1533 of 1998

( **PATRICK CLIVE TOOMEY**  
 ( c/- 30 Davey Street, Hobart in Tasmania Plaintiff  
 (   
 BETWEEN: ( - and -  
 (   
 ( **THE LAW SOCIETY OF TASMANIA**  
 ( c/- 28 Murray Street, Hobart in Tasmania Defendant

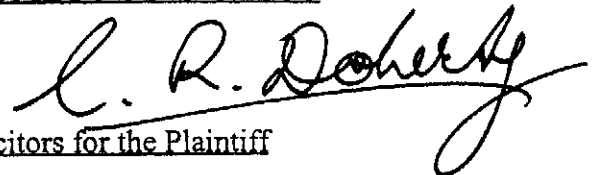
TO: The Law Society of Tasmania  
C/- 28 Murray Street, Hobart in Tasmania

**ENDORSEMENT OF CLAIM**

The Plaintiff's claim against you is for a declaration, further particulars of which are set out in the Statement of Claim attached hereto, and costs to be taxed.

**TOOMEY MANING & CO**

Per:



Solicitors for the Plaintiff

The Plaintiff's address is: C/- 30 Davey Street, Hobart in Tasmania 7000

The Plaintiff's address for service of documents is: 30 Davey Street, Hobart in Tasmania 7000

**TAKE NOTICE** that:

- (1) If you wish to dispute the Plaintiffs' claim or any part of it or for any reason wish to take part in this action you or your Solicitors must, within eight days following the service of this writ

Filed on behalf of the Plaintiff

**TOOMEY MANING & CO**  
Barristers & Solicitors  
30 Davey Street  
HOBART TAS 7000

DX 107, HOBART  
Tel: (03) 6224 9911  
Fax: (03) 6224 9966  
Ref: Mr C R Doherty



on you, lodge a notice of appearance at a Registry of the Supreme Court and serve a sealed copy thereof on the Plaintiffs at their address for service of documents (Note A).

- (2) Forms of notice of appearance may be obtained from any Registry of the Court. These are located at Salamanca Place, Hobart, Alexander Street, Burnie and Cameron Street, Launceston.
- (3) If you fail to lodge and serve a notice of appearance within the time stated, the Plaintiffs may obtain a judgment without further notice to you.

FILED this 18<sup>th</sup> day of December, 1998.

*f. ap. Neal*  
REGISTRAR

NOTE:

- (A) Service of a sealed copy of appearance may be effected by prepaid post.

IN THE SUPREME COURT OF TASMANIA

Hobart Registry

No.

of 1998

( PATRICK CLIVE TOOMEY Plaintiff  
(  
BETWEEN: ( - and -  
(  
( THE LAW SOCIETY OF TASMANIA Defendant

**STATEMENT OF CLAIM**

1. The Plaintiff was at all material times a legal practitioner.
2. The Plaintiff, at all material times, was representing persons who had paid money to the firm of McCulloch & McCulloch for the purpose of investment.
3. The Plaintiff made a complaint ("Complaint) against practitioners pursuant to Section 57 of the *Legal Profession Act* 1993 ("Act")

PARTICULARS

The Complaint was:

- (a) made against David Alistair James McCulloch, Quentin John McCulloch and Thomas Peter Baron;
  - (b) in writing dated 8 April 1998;
  - (c) lodged with the Executive Director of the defendant on or about 8 April 1998; and
  - (d) relating to a fiduciary default on the part of the practitioners against whom the Complaint was made.
4. The Council of the defendant ("Council") investigated the Complaint.
  5. The Council authorised Peter John Joyce to take and retain possession of certain documents and records in the possession of David Alistair James McCulloch and Quentin John McCulloch.

---

Filed on behalf of the Plaintiff

**TOOMEY MANING & CO**  
Barristers & Solicitors  
30 Davey Street  
HOBART TAS 7000

DX 107, Hobart  
Tel: (03) 6224 9911  
Fax: (03) 6224 9966  
Ref: Mr C R Doherty

6. In respect of the investigation referred to in paragraph 4 ("Investigation"), pursuant to Section 58(10) of the Act the plaintiff requested the Council to provide him with:
- (a) full details of:
    - (i) the progress of the Investigation of the matter; and
    - (ii) the person or persons conducting the Investigation; and
    - (iii) the documents and records being examined; and
  - (b) copies of any documents, records or reports relating to the Investigation.

PARTICULARS

The request was contained in a letter dated 1 October 1998 addressed to the Executive Director of the defendant.

7. Upon making the request referred to in paragraph 6, the plaintiff became entitled to be provided by the Council with copies of any documents, records or reports relating to the Investigation free of charge by virtue of Section 58(10)(b) of the Act.
8. In breach of its obligations pursuant to Section 58(10) of the Act the defendant failed to provide the plaintiff with copies of any documents, records or reports relating to the Investigation.

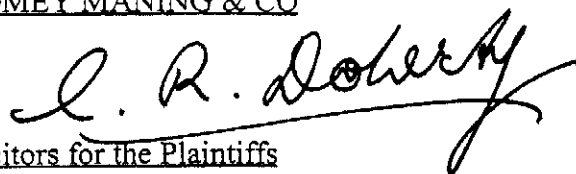
**AND THE PLAINTIFF CLAIMS**

- A. A declaration that the plaintiff is entitled to be provided with copies of any documents, records or reports relating to the Investigation.
- B. Costs to be taxed.

DATED this 18<sup>th</sup> day of December 1998.

TOOMEY MANING & CO

Per:



Solicitors for the Plaintiffs

TO: The Law Society of Tasmania  
28 Murray Street, Hobart in Tasmania

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:6365:DOB019KT

20 May 1999

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**BY HAND DELIVERY**

Dear Madam,

Piggott Wood & Baker  
Mortgage Trust Fund

I act for the following clients (the Investors) who have invested money with Piggott Wood & Baker (the Firm):

D & J Larke - ATF D& J Larke Superannuation Fund  
Jack & Irene Livingston - ATF J & I Livingston Superannuation Fund  
Albert KW Ng & Samantha SG Ng  
S J & B A Morgan - ATF Morgan Superannuation Fund  
Southern Star Service Stations Pty Ltd - ATF James Superannuation Fund  
Demerara Pty Ltd  
B C & I W Clennett  
S M & G M Cowley  
Cowley Holdings Pty Ltd - ATF Cowleys Interior Supplies Pty Ltd Superannuation Fund  
Pauline Ann Baker  
Estate of Leila Mary Hall  
R B & R J Skeggs  
P H Dobson Trust  
John Anthony Cotterell Solomon  
Avery Caroline Drew  
Johnson F & Stephanie Dean

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Because the Investors had variously not been paid interest on their investments or not had their investments repaid after having given the required notice, the Investors authorized Robert Edward Gray, chartered accountant, and me to inspect, examine and take copies of all documents in the Firm's possession, custody or power relating to -

- (i) any money paid to the Firm by each of the Investors, or
- (ii) any investment made by the Firm or by any of the partners of the Firm on behalf of each of the Investors.

The Investors are entitled to inspect due to their relationship with the Firm being one of beneficiaries and trustee. One of the fiduciary duties of a trustee is that of disclosure, arising out of which is the beneficiaries' correlative right to inspect.

The attempt to exercise this right is detailed in the attached exchange of correspondence with the Firm, which summarized is:

22 December 1998	Initial request to inspect.
18 January 1999	Agreement by the Firm to the inspection but with it reserving the right to refuse inspection.
17 February 1999	Provided to the Firm a list of information that would be sought in the inspection.
17 February 1999	The Firm claimed some of the information covered in the list is either irrelevant or would if provided result in a breach of confidence that the Firm owed to third parties.
22 February 1999	Requested the Firm to advise which items (and why) on the list fall into these two categories.
9 March 1999	The Firm declined to provide this advice.
17 March 1999	Proposal from the Firm stating (inter alia) that documents <i>it considers</i> the Investors are entitled to inspect shall be available for inspection.
18 March 1999	Request for date for inspection on the basis that the documents to be inspected are those the Investors are entitled to inspect.
6 May 1999	The Firm advised that the documents will be ready for inspection on 12 May 1999.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

The only documents provided for inspection on the agreed inspection day of 18 May 1999 were -

- (i) copies of
  - (a) titles,
  - (b) mortgages (and related security documents),
  - (c) valuations,
  - (d) mortgage loan status reports (previously sent to the Investors),
  - (e) investment account ledgers (incomplete), and
  - (f) spreadsheet summarizing the mortgages for each of the Investors; and
- (ii) originals of each of the Investors' files (incomplete as to contents).

It may again be claimed by the Firm that allowing inspection of all accounting records that deal with the Investors' investments would result in a breach of the Firm's duty of confidentiality owed by it to third parties. As the Firm ought to have been well aware of its duty of disclosure to the Investors (inclusive of their right to inspect) it was incumbent on the Firm to have kept its accounting records in such a manner that by complying with one duty it would not expose itself to a breach of the other.

Complaint is made against the Firm for -

- (i) unreasonably delaying the inspection of documents,
  - (ii) not providing for inspection documents which the Investors were entitled to inspect, and
  - (iii) not keeping the Investors' accounting records in a proper form and manner;
- all as detailed above.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:6365:DOB023KT

24 June 1999

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**By Facsimile: 6223 8240**

Dear Madam,

Piggott Wood & Baker  
Mortgage Trust Fund

Would you please advise me as a matter of urgency when I may expect to receive a response to the complaint made in my letter of 20 May 1999.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:6365:DOB002GM

2 July 1999

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

By Facsimile: 6223 8240

Dear Madam,

Piggott Wood & Baker  
Mortgage Trust Fund

I refer to my letter of 24 June 1999.

Would you please advise me in writing as a matter of urgency when I may expect to receive a response to the complaint made in my letter of 20 May 1999.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
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bigpond.com
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- Fax: (03) 6224 9966



# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:6365:DOB001KT

14 July 1999

## PRIVATE AND CONFIDENTIAL

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

By Facsimile: 6223 8240

Dear Madam,

Piggott Wood & Baker  
Mortgage Trust Fund

I refer to my letters of 24 June 1999 and 2 July 1999.

Please advise me *in writing as a matter of urgency* when I may expect to receive a response to the complaint made in my letter of 20 May 1999.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
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# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: taslawsoc@vision.net.au

Our ref: C99/45:JMM/VMC

16 July 1999

PRIVATE & CONFIDENTIAL

Messrs Toomey Maning & Co.  
Barristers and Solicitors  
30 Davey Street  
HOBART TAS 7000

Attention Mr P C Toomey

Dear Sir

## **COMPLAINT – PIGGOTT WOOD & BAKER – MORTGAGE TRUST FUND**

I refer to your correspondence of 20 May 1999, and your conversation with Mr Philip Jackson on 5 July 1999.

This matter was further considered by the Investigations Committee on 12 July 1999. At that meeting it was resolved that you be invited to specify specifically what documents you claim your clients are entitled to inspect and of which inspection has been denied by Piggott Wood & Baker.

You are also requested to identify how Piggott Wood & Baker are alleged to be in breach of the Rules of Practice in the keeping of the accounting records relating to your client's investments in their mortgage investment fund specifying any particular Rules of Practice which you allege Piggott Wood & Baker failed to comply with.

The next meeting of the Investigations Committee is on 26 July 1999 and a response before that date is desirable.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:DOB003KT

21 July 1999

## PRIVATE AND CONFIDENTIAL

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

- 30 Davey Street,  
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**BY HAND DELIVERY**

Dear Madam,

### Piggott Wood & Baker - Complaint No. C99/45

Dealing with the matters raised in your letter of 16 July 1999 seriatim:

#### 1. Documents entitled to inspect

The members of the Investigations Committee ought to be well aware of what documents my clients are entitled to inspect. A convenient summary of the law in this regard is contained in Halsbury's Laws of Australia, paragraphs 430-4230 to 430-4265 inclusive, a copy of which summary is enclosed (attachment A).

The checklist provided to Piggott Wood & Baker on 17 February 1999 (and included in my letter of 20 May 1999 to your Society) sets out the documents and/or the nature of the contents of documents which my clients are entitled to inspect. Piggott Wood & Baker refused to advise which information on the checklist it considered my clients were not entitled to access.

My letter of 20 May 1999 to your Society details what was provided by Piggott Wood & Baker prior to that date. On 15 June 1999 Piggott Wood & Baker forwarded a copy of certain information it had extracted from some of its borrowers' ledgers. What has been provided for inspection (in the main, copies and not originals) is only a small part of what my clients are entitled to inspect.

If by your invitation "to specify specifically what documents" my clients are entitled to inspect, you are seeking a list of actual documents, without inspection such is impossible.

#### 2. Breach of Rules of Practice

It appears that the Investigations Committee believes that the complaint that Piggott Wood & Baker has not kept its accounting records in a proper form and manner must necessarily

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

involve a breach of a rule of the Rules of Practice. This was not the substance of the complaint.

To reiterate: the complaint was that Piggott Wood & Baker kept its accounting records in such a manner that it is now unable to comply with its duty of disclosure to my clients without breaching its duty of confidentiality owed by it to third parties.

Whilst a breach of the Rules of Practice has not been asserted in this complaint, only an inspection of Piggott Wood & Baker's accounting records would identify any such breach.

By the delay in replying to the complaint (almost two months), the telephone conversation between Mr Philip Jackson and myself on 5 July 1999 and the nature of the questions raised by the Investigations Committee, my clients now have the impression that the Society is looking for ways in which it can avoid having to properly and expeditiously deal with the complaint.

Your written assurance that this impression is incorrect together with your advice as to a date by which the Society shall provide a final reply to the complaint is requested.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P.C Toomey

## (ii) Beneficiaries' Right to Information

[430-4230] **Beneficiaries' right to information and accounts** A trustee must furnish to a beneficiary (including a potential object of a discretionary power<sup>1</sup> and a beneficiary with a contingent interest),<sup>2</sup> or a person authorised by the beneficiary,<sup>3</sup> full information concerning the trustee's management of the trust fund generally or the beneficiary's share of the trust when requested to do so by the beneficiary.<sup>4</sup> The beneficiary is conferred the correlative right to inspect the trust accounts and all the documents relating to the trust,<sup>5</sup> to have those accounts and documents examined by an agent appointed for that purpose,<sup>6</sup> and to seek the assistance of the court in enforcing this right.<sup>7</sup> This right is essential to the beneficiary's right to secure the proper administration of the trust,<sup>8</sup> in that its exercise serves to monitor the trustee's performance in managing the property and to highlight any irregularities.<sup>9</sup>

No legal professional privilege attaches to communications between a legal practitioner and a trustee as against the beneficiaries who have a joint interest with the trustee in the subject matter of the communications.<sup>10</sup>

Although there is authority to the effect that a trustee is also obliged to inform and explain to each beneficiary of full age and capacity his or her rights under the trust instrument,<sup>11</sup> it is unlikely that this extends to informing all persons who may possibly take under a discretionary power as to the nature and extent of that possibility.<sup>12</sup>

A trustee is entitled to receive from the inquiring beneficiary the costs, if any, of furnishing the information either in advance or by guarantee.<sup>13</sup> However, a trustee who declines to furnish the required information will be personally liable for the costs of proceedings instituted to obtain it.<sup>14</sup>

### Notes

1. *Chaine-Nickson v Bank of Ireland* [1976] IR 393; *Spellson v George* (1987) 11 NSWLR 300 at 316-17 per Powell J. See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432-3 per Mahoney JA (queried whether a potential object of a discretionary power could exercise such a right. In this context, his Honour reserved the question of whether one of a large number of possible beneficiaries could make a request for information, in view of the fact that the class of possible beneficiaries may be extensive and that the persons who are or may be a member of that class may not be clearly defined).

2. *Re Tillott; Lee v Wilson* [1892] 1 Ch 86; (1891) 65 LT 781; *Re Dartnall; Sawyer v Goddard* [1895] 1 Ch 474; [1895-99] All ER Rep 890; (1895) 72 LT 404, CA.
3. *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740; *Low v Bouverie* [1891] 3 Ch 82 at 99; [1891-94] All ER Rep 348 per Lindley LJ, CA.
4. *Walker v Symonds* (1818) 3 Swan 1 at 58; 36 ER 751 per Lord Eldon LC; *Re Tillott; Lee v Wilson* [1892] 1 Ch 86; (1891) 65 LT 781; *Re Page; Jones v Morgan* [1893] 1 Ch 304 at 309; (1892) 62 LJ Ch 592; 41 WR 357 per North J; *Re Dartnall; Sawyer v Goddard* [1895] 1 Ch 474; [1895-99] All ER Rep 890; (1895) 72 LT 404, CA; *Kelly v Bruce* (1907) SALR 174; *O'Rourke v Darbishire* [1920] AC 581 at 626; [1920] All ER Rep 1 per Lord Wrenbury, HL; *Manning v FCT* (1928) 40 CLR 506; [1928] ALR 165; (1928) 2 ALJ 143; *Re Pennell (dec'd)* [1945] VLR 302 at 305-6; [1946] ALR 75 per O'Bryan J; *Butt v Kelson* [1952] Ch 197 at 204; [1952] 1 All ER 167 per Romer LJ, CA; *Re Fairbairn (dec'd)* [1967] VR 633 at 637-40 per Gillard J; *Randall v Lubrano* (unreported, SC(NSW), Holland J, 31 October 1975); *Chaine-Nickson v Bank of Ireland* [1976] IR 393; *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356 per Hope JA, CA(NSW); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 431 per Mahoney JA, CA(NSW); *Morris v Morris* (1993) 9 WAR 150 at 152-3 per Seaman J.

The (SA) Trustee Act 1936 s 84B requires trustees to keep records relating to the administration of the trust and, at the request of the Public Trustee, another trustee of the trust or a beneficiary of the trust, to produce such records for inspection of the inquirer.

There are no equivalent provisions in the other jurisdictions.

5. *Clark v Earl of Ormonde* (1821) Jac 108 at 120; 37 ER 791 per Eldon LC; *Simpson v Bathurst; Shepherd v Bathurst* (1869) 5 Ch App 193 at 202; 23 LT 29 per Hatherley LC; *Re Cowin; Cowin v Gravett* (1886) 33 Ch D 179; *O'Rourke v Darbishire* [1920] AC 581 at 619; [1920] All ER Rep 1 per Lord Parmoor, HL; *Re Pennell (dec'd)* [1945] VLR 302 at 305-6; [1946] ALR 75 per O'Bryan J; *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918; [1964] 3 All ER 855; [1965] 2 WLR 229, CA; *Re Fairbairn (dec'd)* [1967] VR 633 at 640 per Gillard J.
6. *Re Pennell (dec'd)* [1945] VLR 302 at 306; [1946] ALR 75 per O'Bryan J.
7. *Spellson v George* (1987) 11 NSWLR 300 at 318 per Powell J. Where the court's assistance in enforcing the trustee's obligation to account is invoked, the court is concerned with only two questions. First, whether the plaintiff is one of the beneficiaries, and second, whether the defendant trustee has failed to observe his or her obligation to account: *Spellson v George* (1987) 11 NSWLR 300 at 316-7 per Powell J.
8. *Spellson v George* (1987) 11 NSWLR 300 at 316-7 per Powell J.
9. *Re Tillott; Lee v Wilson* [1892] 1 Ch 86 at 88; (1891) 65 LT 781 per Chitty J; *Re Pennell (dec'd)* [1945] VLR 302; [1946] ALR 75; *Re Fairbairn (dec'd)* [1967] VR 633 at 640 per Gillard J. This may include a balance sheet and profit and loss statement of a private company in which trust funds have been invested: *Chaine-Nickson v Bank of Ireland* [1976] IR 393.
10. *Attorney-General (Ontario) v Ballard Estate* (1994) 119 DLR (4th) 750 at 751 per Lederman J, Ontario Court (General Division); *Samson Indian Band and Nation v Canada* (1995) 125 DLR (4th) 294 at 300-3, Fed C of Canada.  
As to legal professional privilege see PRACTICE AND PROCEDURE.
11. *Hawkesley v May* [1956] 1 QB 304; [1955] 3 All ER 353.
12. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432 per Mahoney JA, CA(NSW).
13. *Re Bosworth; Martin v Lamb* (1889) 58 LJ Ch 432 at 433 per Kekewich J; *Strauss v Wykes* [1916] VLR 200 at 203-4 per Madden CJ, SC(VIC), Full Court; *Re Fairbairn (dec'd)* [1967] VR 633 at 640 per Gillard J; *Chaine-Nickson v Bank of Ireland* [1976] IR 393; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 431 per Mahoney JA, CA(NSW).

14. *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740; *Re Holton's Settlement Trusts; Holton v Holton* (1918) 88 LJ Ch 444; 119 LT 304.

**[430-4235] Nature of beneficiary's right** The beneficiary's right to information is not premised on a beneficiary first raising an allegation, or establishing a prima facie case of fraud or some other similar breach of trust.<sup>1</sup> The right in this respect is proprietary in the sense that it is annexed to his or her beneficial interest in the trust property,<sup>2</sup> and in that trust documents are the property of the trust.<sup>3</sup> However, it falls short of a full beneficial interest with the right to call for immediate delivery of the records into the permanent possession of the beneficiary.<sup>4</sup> Upon the termination of trust, the trustee must hand over the trust documents and accounts to the beneficiaries if so required.<sup>5</sup>

#### Notes

1. *Spellson v George* (1987) 11 NSWLR 300 at 316 per Powell J.
2. *Re Simersall; Blackwell v Bray* (1992) 35 FCR 584 at 589; 108 ALR 375 at 380 per Gummow J; *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259 at 271; 70 ALJR 772 per Dawson and Toohey JJ.
3. *O'Rourke v Darbishire* [1920] AC 581 at 626; [1920] All ER Rep 1 per Lord Wrenbury, HL; *Butt v Kelson* [1952] Ch 197 at 204; [1952] 1 All ER 167 at 171 per Romer LJ, CA; *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 937; [1964] 3 All ER 855; [1965] 2 WLR 229 per Salmon LJ, CA; *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356 per Hope JA, CA(NSW).  
As to the definition and characterisation of 'trust documents' see [430-4255].
4. *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356 per Hope JA, CA(NSW); *Re Simersall; Blackwell v Bray* (1992) 35 FCR 584 at 589-90; 108 ALR 375 at 380-1 per Gummow J.
5. *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356 per Hope JA, CA(NSW).  
As to termination of a trust see [430-2500]-[430-2520].

### (iii) Limitations on Beneficiaries' Right to Demand Information

**[430-4240] Reasons for decisions** A trustee acting in good faith is under no duty to disclose reasons for his or her exercise of a discretionary power or the information (even if committed to writing) which may bear upon or affect those reasons,<sup>1</sup> subject to contrary intention expressed in the trust instrument.<sup>2</sup> There are four main reasons for denying beneficiaries a right to reasons:

- (1) such a right would be inconsistent with the proposition that the trustee's exercise of a discretionary power cannot be challenged in the absence of mala fides;<sup>3</sup>
- (2) a duty to give reasons would add to the trustee's existing onerous obligations;<sup>4</sup>
- (3) a trustee of a discretionary trust cannot properly exercise his or her confidential role to determine to whom to make a distribution if there is likely to be an investigation for the purpose of seeing whether he or she has exercised that discretion in the best possible manner;<sup>5</sup> and

- (4) knowledge of the reasons for the trustees' decisions by the beneficiaries may embitter the relationship between trustees and beneficiaries, and that between beneficiaries inter se.<sup>6</sup>

If the reasons for a trustee's exercise of a discretionary power are divulged of necessity in litigation (through discovery or subpoena for example), the court will not consider those reasons in assessing the propriety of the exercise of that discretion.<sup>7</sup> However, if a trustee of his or her own volition divulges reasons for the exercise of a discretionary power (for example, in order to avoid adverse inferences being drawn), the court may assess the validity of those reasons.<sup>8</sup>

#### Notes

1. *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448-9; 20 LJ Ch 588; 42 ER 330, Ch; *Re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 at 928-9, 933 per Harman LJ, at 936-7 per Salmon LJ; [1964] 3 All ER 855; [1965] 2 WLR 229, CA; *Tierney v King* [1983] 2 Qd R 580 at 583 per Matthews J, SC(QLD), Full Court; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 434 per Mahoney JA, at 444-5 per Sheller JA, CA(NSW); *Morris v Morris* (1993) 9 WAR 150 at 153-4 per Seaman J.
2. *Butt v Kelson* [1952] Ch 197; [1952] 1 All ER 167, CA; *Re Pennell (dec'd)* [1945] VLR 302; [1946] ALR 75; *Tierney v King* [1983] 2 Qd R 580, SC(QLD), Full Court; *Equitable Group Ltd v Pandal Nominees Pty Ltd* (1984) 3 ACLC 546, SC(NSW).  
As to a trustee's discretion see [430-4340].
3. *Re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 at 928-9 per Harman LJ, at 936-7 per Salmon LJ; [1964] 3 All ER 855; [1965] 2 WLR 229, CA; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 441-2 per Sheller JA, CA(NSW).
4. *Re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 at 937; [1964] 3 All ER 855; [1965] 2 WLR 229 per Salmon LJ, CA.
5. *Re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 at 935-6; [1964] 3 All ER 855; [1965] 2 WLR 229 per Danckwerts LJ, CA.
6. *Re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 at 935 per Danckwerts LJ, at 937 per Salmon LJ; [1964] 3 All ER 855; [1965] 2 WLR 229, CA.
7. *Karger v Paul* [1984] VR 161 at 166 per McGarvie J.
8. *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448; 20 LJ Ch 588; 42 ER 330 at 333-4; *Re Koczorowski* [1974] Qd R 177 at 183 per Dunn J; *Karger v Paul* [1984] VR 161 at 165-6 per McGarvie J; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718-19 per Robert Walker J.

**[430-4245] Application to court to review acts and decisions of trustee**  
In Queensland and Western Australia, the trustee legislation provides that any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property<sup>1</sup> (and in Queensland, a person who has a right of due administration in respect of any trust)<sup>2</sup> and who is aggrieved<sup>3</sup> by any act, omission or decision of a trustee or other person in the exercise of any power conferred by the trustee legislation<sup>4</sup> (and in Queensland, any power conferred by law or by the trust instrument), or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved, may apply to the court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision.<sup>5</sup> The legislation effectively gives the court power in proper cases to order a trustee to give reasons for what he or she has done or failed to do.<sup>6</sup> Although it does not empower



the court to order a trustee to give reasons for proposed acts or omissions, where the trustee states his or her reasons for a proposal to take a particular course, the court can examine their validity.<sup>7</sup>

Although the right to review a decision conferred by the legislation is not to be read down or unduly confined,<sup>8</sup> the object of the jurisdiction is not the substitution of a judge's opinion for that of a trustee.<sup>9</sup> The court will exercise its jurisdiction cautiously,<sup>10</sup> and the applicant carries a heavy onus of satisfying the judge that the trustee has not exercised a sound discretion.<sup>11</sup> The court will entertain an application by an interested party where some defect in the manner in which the trustee is conducting his or her duties can be shown, being a defect arising out of some want of good faith or some erroneous approach in law or principle.<sup>12</sup> A far heavier onus lies on an applicant whose challenge is simply on the grounds of lack of prudence and wisdom in the trustee's decisions.<sup>13</sup> The court will not concern itself with minor or ordinary decisions that the trustee may have made; it must be shown that there is a decision of real significance in the affairs of the trust, and as to which there are real and substantial grounds for questioning its correctness, before the court will embark upon an investigation of what, if any, directions ought to be given.<sup>14</sup> In examining the proposed exercise of a trustee's discretion, the court will consider such questions as the object of giving the trustee that discretion, and whether the discretion is being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject.<sup>15</sup> If the accuracy of the conclusion reached is the only matter which is challenged, then the person who challenges must show cogent reasons why his or her challenge should succeed.<sup>16</sup>

On any such application, the court may:<sup>17</sup>

- (1) if any question of fact is involved, determine that question or give directions as to the manner in which that question is to be determined; and
- (2) if the court is being asked to make an order which may adversely affect the rights of any person who is not a party to the proceedings, direct that that person is to be made a party to the proceedings.

The court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed, and may make such order, including orders as to costs, as the circumstances require.<sup>18</sup> An order of the court pursuant to this jurisdiction does not disturb any distribution of the trust property made without breach of trust before the trustee became aware of the making of the application to the court, or affect any right acquired by any person in good faith and for valuable consideration.<sup>19</sup>

### Notes

1. That the applicant must, in order to have standing, have an interest in trust property means that there must in fact be a trust in existence, beyond dispute. The fact of existence of a trust does not fall to be determined under this jurisdiction: see *Re Whitehouse* [1975] Qd R. 65 at 65 per Hanger CJ, at 68 per Stable J, SC(QLD), Full Court.
2. Therefore, the Queensland provision, unlike its Western Australian counterpart, extends to objects of a discretionary trust: see [430-800].

3. The phrase 'who is aggrieved' does not place any technical obstacle in the way of those who approach the court other than a simple requirement that they have a proper interest in the determination of the matter. It does, however, serve to exclude 'mere busybodies': *Re Whitehouse* [1982] Qd R. 196 at 204 per Macrossan J, SC(QLD), Full Court.
4. In Western Australia, if the trustee is exercising only the power conferred by the trust instrument, the provision cannot be invoked: *Re Havill (dec'd)* [1968] NZLR 217 at 223 per Macarthur J (interpreting an equivalent provision to the Western Australian provision). See further note 5 below. Hence, there may arise the issue of whether a power contained in the trust instrument excludes the statutory power, in which case, the trustee can be said to be exercising only the power conferred by the trust instrument: see, for example, *Re Havill (dec'd)* [1968] NZLR 1116, CA(NZ).
5. (QLD) Trusts Act 1973 s 8(1)  
(WA) Trustees Act 1962 s 94(1).
6. *Re Koczorowski* [1974] Qd R. 177 at 183 per Dunn J.
7. *Re Koczorowski* [1974] Qd R. 177 at 183 per Dunn J.
8. *Re Whitehouse* [1982] Qd R. 196 at 203 per Macrossan J, SC(QLD), Full Court.
9. *Tierney v King* [1983] 2 Qd R. 580 at 582-3 per Matthews J, SC(QLD), Full Court.
10. *Re Koczorowski* [1974] Qd R. 177 at 183 per Dunn J.
11. *Re Whitehouse* [1982] Qd R. 196 at 204 per Macrossan J, SC(QLD), Full Court; *Tierney v King* [1983] 2 Qd R. 580 at 583 per Matthews J, SC(QLD), Full Court.
12. *Re Koczorowski* [1974] Qd R. 177 at 184-5 per Dunn J.
13. *Re Koczorowski* [1974] Qd R. 177 at 184-5 per Dunn J.
14. *Re Koczorowski* [1974] Qd R. 177 at 184-5 per Dunn J.
15. *Re Koczorowski* [1974] Qd R. 177 at 185 per Dunn J.
16. *Re Koczorowski* [1974] Qd R. 177 at 185-6 per Dunn J.
17. (QLD) Trusts Act 1973 s 8(3)  
(WA) Trustees Act 1962 s 94(3).
18. (QLD) Trusts Act 1973 s 8(1)  
(WA) Trustees Act 1962 s 94(1).
19. (QLD) Trusts Act 1973 s 8(2)  
(WA) Trustees Act 1962 s 94(2).

**[430-4250] Application to review discretion as to allocation of repair costs between income and capital** In South Australia the trustee legislation provides that an interested party may apply to the court for the review of the exercise of a trustee's statutory discretion to allocate the cost of repairs to the trust property between income and capital, and on any such application there is no presumption that the trustee has exercised his or her discretion properly.<sup>1</sup> The court has the power to direct how the payments made as aforesaid are to be borne between the parties interested in the trust property.<sup>2</sup>

#### Notes

1. (SA) Trustee Act 1936 s 25A(2).
2. *Ibid* s 25A(2).

**[430-4255] Documents that are not trust documents** As a general rule, the right of a beneficiary to have on request inspection of documents or disclosure of information in relation to the trust is limited to documents and

information which is the property of the trust.<sup>1</sup> It does not extend to documents or information as to which the beneficiary has no proprietary interest.<sup>2</sup> That a document is the property of the trustee, or came into existence in relation to the administration of the trust or the discharge of the trustee's duties, does not in itself make it a trust document.<sup>3</sup> Trust documents have the following characteristics in common:<sup>4</sup>

- (1) they are in the possession of the trustee as trustee;
- (2) they contain information about the trust which the beneficiaries are entitled to know; and
- (3) the beneficiaries have a proprietary interest in the documents and are therefore entitled to see them.

Financial statements and books of account of the trust are clearly trust documents,<sup>5</sup> as is written advice given by a solicitor to the trustee summarising the state of the trust fund.<sup>6</sup> The following are not trust documents:

- (1) documents prepared by a trustee for his or her own purposes which would not be required to be handed over to the beneficiaries on the winding up of the trust;<sup>7</sup>
- (2) communications passing between individual trustees and appointors;<sup>8</sup>
- (3) correspondence and minutes of the meetings of the trustees;<sup>9</sup>
- (4) communications made to and from a beneficiary;<sup>10</sup> and
- (5) documents which are likely to reveal motives and reasons for decisions or the subjective process of reasoning.<sup>11</sup>

#### Notes

1. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432 per Mahoney JA, CA(NSW).
2. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432 per Mahoney JA, CA(NSW).
3. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432-3 per Mahoney JA, CA(NSW).
4. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 938; [1964] 3 All ER 855; [1965] 2 WLR 229 per Salmon LJ, CA.
5. *Re Fairbairn (dec'd)* [1967] VR 633; *Re Simersall; Blackwell v Bray* (1992) 35 FCR 584 at 588; 108 ALR 375 at 379 per Gummow J; *Morris v Morris* (1993) 9 WAR 150 at 154-5 per Seaman J.
6. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 933-4; [1964] 3 All ER 855; [1965] 2 WLR 229 per Harman LJ, CA. However, it cannot be assumed that all documents derived from the relationship of solicitor and client (the trust) are necessarily trust documents: *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 435 per Mahoney JA, CA(NSW). Whether or not the client is charged for the creation of the document, and whether or not the document was created for the client's benefit and protection, are the principal determinants of the issue: *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 355-6 per Hope JA, CA(NSW).
7. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 433, 435 per Mahoney JA, CA(NSW).
8. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 934; [1964] 3 All ER 855; [1965] 2 WLR 229 per Harman LJ, CA.
9. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 934; [1964] 3 All ER 855; [1965] 2 WLR 229 per Harman LJ, CA.

10. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 934 per Harman LJ, at 935 per Danckwerts LJ; [1964] 3 All ER 855; [1965] 2 WLR 229, CA; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 433 per Mahoney JA, CA(NSW). A trustee who has consulted some beneficiaries as to their views is not obliged to inform the other beneficiaries of what the former have said: *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 435 per Mahoney JA, CA(NSW).
11. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 933 per Harman LJ, at 937-8 per Salmon LJ; [1964] 3 All ER 855; [1965] 2 WLR 229, CA (considered the situation where a trust document contains information which the beneficiaries are not entitled to know, such as reasons for decisions, and concluded that any part of a document that contains material that beneficiaries are not entitled to know is automatically excluded from the document in its character as a trust document); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 444-6 per Sheller JA, CA(NSW).

**[430-4260] Discovery of non-trust documents** Where a beneficiary seeks discovery of documents in a legal action against the trustee, the trustee must disclose those documents if they are in his or her possession or control and are relevant to the issues in the action, whether or not they are trust documents,<sup>1</sup> subject to the doctrine of legal professional privilege.<sup>2</sup> This is because proceedings for discovery are not premised on the existence of a proprietary right in the items sought to be discovered.<sup>3</sup>

#### Notes

1. *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 at 938; [1964] 3 All ER 855; [1965] 2 WLR 229 per Salmon LJ, CA.
2. As to the doctrine of legal professional privilege see PRACTICE AND PROCEDURE.
3. *AT & T Istel Ltd v Tully* [1993] AC 45 at 65-6; [1992] 3 All ER 523; [1992] 3 WLR 344 per Lord Lowry, HL.

**[430-4265] Confidentiality** Where a document is disclosed in the context of the administration of the trust on the basis of, or which of its nature requires, non-disclosure to the beneficiaries, the beneficiaries will not be entitled to access that document.<sup>1</sup> A settlor may, for example, impose a condition of confidentiality on the trustee, whether pursuant to the trust deed<sup>2</sup> or under a supplementary memorandum of wishes.<sup>3</sup> The delivery of a separate memorandum of wishes by the settlor, even if not expressed to be confidential, may indicate an intention on the settlor's behalf that the information contained in it is not to be disclosed to the beneficiaries.<sup>4</sup> An overriding public interest is necessary to justify disclosure contrary to the requirement of confidentiality.<sup>5</sup> The onus of establishing such public interest lies on the person seeking disclosure.<sup>6</sup>

Where the information sought to be disclosed is confidential business information, the court may require the beneficiary who seeks access to it to file a written undertaking not to make known the contents of any of the documents furnished to him or her except for the purposes permitted by the court.<sup>7</sup>

#### Notes

1. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 418 per Kirby P, at 434 per Mahoney JA, CA(NSW).

2. *Tierney v King* [1983] 2 Qd R 580, SC(QLD), Full Court.
3. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, CA(NSW).
4. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 437 per Mahoney JA, at 446 per Sheller JA, CA(NSW).
5. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 447 per Sheller JA, CA(NSW) (the public interest which his Honour would appear to have had in mind is that which upsets the equitable obligation of confidence).  
As to the equitable obligation of confidence see EQUITY [185-1260]-[185-1290].
6. *A v Hayden* (1984) 156 CLR 532 at 546-7; 56 ALR 82; 59 ALJR 6 per Gibbs CJ.
7. *Morris v Morris* (1993) 9 WAR 150 at 155 per Seaman J.

PIGGOTT WOOD & BAKER

Checklist in respect of each mortgaged property

- 1. Purchase
  - Purchaser
  - Vendor
  - Purchase Price
  - Date
  - Transfer
  
- 2. Mortgage Assessment
  - A. *Valuation*
    - Valuation
      - Date
      - Amount
      - Valuer
    - Instructions to Valuer
    - Valuer's PI insurance - check of Valuation
  
  - B. *Borrower's financials*
    - Income/expenditure statements
    - Assets & liabilities statements
    - Feasibility studies
    - Business plans
    - Analysis of capacity to pay
    - Company searches
    - Defaulted on any PWB loans (details)
    - Borrowing purpose
    - Pre-existing borrowings from PWB
    - Pre-sales of units/lots
      - purchasers
      - amounts
      - dates
      - contracts
  
- 3. Mortgage
  - Directors' guarantees
  - Collateral security
  - Amount
  - Date
  - Mortgage
  - Procurations fees

## 4. Ledger Information

Original investors in mortgage

- Names
- Amounts

Investor changes

- Dates
- Names
- Amounts

Payment history

Interest payments by PWB

- Dates
- Amounts

Subsequent borrowings from PWB

## 5. Administration

A. *Before default*

Currency of insurance

Reviews of actual against

- feasibility studies
- business plans

Updating

- income/expenditure account
- valuations
- feasibility studies
- business plans

B. *After default*

Interest payments by PWB

Further loans

Knight Frank reports

Vern Robinson reports

Other reports - internal & external

Rates & land tax arrears

Asset realization actions

Debt realization actions

- personal covenants
- personal guarantees

## 6. Investors

Completed investment application forms

Information provided to investor when investing

Correspondence from and to PWB.

# THE LAW SOCIETY

O F T A S M A N I A

28 MURRAY STREET, HOBART 7000, G.P.O. BOX 1133, HOBART, 7001  
AUSDOC DX 111, TELEPHONE: (03) 6234 4133 (03) 6233 3002 FAX: (03) 6223 8240  
e-mail: taslawsoc@vision.net.au

Our ref:C99/45:JMM/VMC

26 October 1999

PRIVATE & CONFIDENTIAL

Mr P C Toomey  
Messrs Toomey Maning & Co  
Barristers and Solicitors  
30 Murray Street  
HOBART TAS 7000

Dear Sir

## **COMPLAINT – PIGGOTT WOOD & BAKER MORTGAGE FUND**

I refer to the above matter.

On 26 July 1999 the Law Society received correspondence from the Legal Ombudsman as a result of representations made by you on 20 July 1999 and before the Society's consideration of your letter of 21 July 1999.

After further consideration the Investigations Committee have resolved that both you and Piggott Wood & Baker be invited to attend an informal conference in order to resolve the conflict. It is emphasised that this is not a compulsory conference under Section 59 of the Legal Profession Act 1993.

I would be obliged to receive your response to the above proposal within 14 days in order to arrange the conference if appropriate.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR



# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: PCT:DOB008KT

3 November 1999

**PRIVATE AND CONFIDENTIAL**

Mrs J Martin  
Executive Director  
The Law Society of Tasmania  
28 Murray Street  
HOBART TAS 7000

**BY HAND DELIVERY**

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

Dear Madam,

Piggott Wood & Baker - Complaint No. C99/45

I refer to your letter of 26 October 1999.

I am quite willing to attend the proposed conference.

Yours faithfully,  
TOOMEY MANING & CO

Per:

P C Toomey

YOUR REF: CRD:6365:DOB002YE  
OUR REF: KBP/DT P0036633  
DIRECT LINE: (03) 6235 9363  
DIRECT E-MAIL: kbprocter@murdochclarke.com.au



MURDOCH CLARKE BARRISTERS  
AND  
SOLICITORS

24 May 2000

Messrs Toomey Maning & Co  
Barristers & Solicitors  
DX 107  
HOBART

ATTENTION MR C R DOHERTY

Dear Sirs,

RE: PIGGOTT WOOD & BAKER – INSPECTION OF DOCUMENTS

We refer to your letter dated 18th April, 2000.

Our clients advised the Law Society, by letter of 29th October, 1999, that they were prepared to participate in the conference which had been proposed.

They are still prepared to do that.

Yours faithfully,  
MURDOCH CLARKE

Per:-

K.B. PROCTER

PARTNERS  
R J BADENACH  
DM WHITEHOUSE  
F B DIXON  
A J DENEHEY  
KB PROCTER  
D F EGAN  
P KUZIS  
B A BAKER  
G P GEASON

ASSOCIATES  
R C MANNING  
S K KEMPTON  
A G BURROWS-CHENG  
R S REID  
C A BADENACH  
M A NETTLEFOLD  
P G ZEEMAN  
WE HODGMAN

CONSULTANTS  
KM DRAKE  
B M LEVIS



**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

Your Ref:

Our Ref: CRD:6365:DOB013BCO

25 May 2000

Mrs Jan Martin  
Law Society of Tasmania  
DX 111  
HOBART

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

Dear Mrs Martin,

Piggott Wood & Baker: Inspection of Documents

I enclose a copy of a letter which I have received from Murdoch Clarke.

Given that Piggott Wood & Baker indicated, in October last year, that it was willing to participate in the meeting which you proposed, do you intend to arrange the meeting?

I look forward to hearing from you.

Yours faithfully,  
TOOMEY MANING & CO

Per:

C R Doherty

Enc.

YOUR REF CRD:6365:DOB002YE  
OUR REF KBP/DT P0036633  
DIRECT LINE: (03) 6235 9363  
DIRECT E-MAIL: kbprocter@murdochclarke.com.au

M  
C

MURDOCH CLARKE BARRISTERS  
AND  
SOLICITORS

24 May 2000

**COPY**

Messrs Toomey Maning & Co  
Barristers & Solicitors  
DX 107  
HOBART

ATTENTION MR C R DOHERTY

Dear Sirs,

RE: PIGGOTT WOOD & BAKER – INSPECTION OF DOCUMENTS

We refer to your letter dated 18th April, 2000.

Our clients advised the Law Society, by letter of 29th October, 1999, that they were prepared to participate in the conference which had been proposed.

They are still prepared to do that.

Yours faithfully,  
MURDOCH CLARKE

Per:-



K.B. PROCTER

PARTNERS  
R J BADENACH  
DM WHITEHOUSE  
F B DIXON  
A J DENEHEY  
K B PROCTER  
D F EGAN  
P KUZIS  
B A BAKER  
G P GEASON

ASSOCIATES  
R C MANNING  
S K KEMPTON  
A G BURROWS-CHEN  
R S REID  
C A BADENACH  
M A NETTLEFOLD  
P G ZEEMAN  
WE HODGMAN

CONSULTANTS  
K M DRAKE  
B M LEVIS



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ABN 79607763856

Our ref: C99/45:JMM/VMC  
Your ref: CRD:6365:DOB013BCO

26 May 2000

Mr C R Doherty  
Messrs Toomey Maning & Co  
Barristers and Solicitors  
DX 107  
HOBART

Dear Mr Doherty

## **PIGGOTT WOOD & BAKER – INSPECTION OF DOCUMENTS**

I acknowledge receipt of your letter of 25 May 2000.

I will contact you again following the next Investigations Committee meeting to be held on Monday 5 June 2000.

Yours faithfully



JAN MARTIN  
EXECUTIVE DIRECTOR