Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a)

Submission No. 230

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11 July, 2001

PREVIOUSLY SENT VIA FACSIMILE

The Chairman
Select Committee on Superannuation
And Financial Services
Parliament House
Canberra

Facsimile: (02) 6277 3130

Dear Sir

RE: INQUIRY INTO SOLICITORS' MORTGAGE SCHEMES IN TASMANIA

Thank you for your letter of the 27th June last offering this firm an opportunity to comment upon the evidence of Messrs Dwyer and Clark presented to the Committee on the 15th June last.

I will turn to the actual evidence shortly, however, I would first like to express concern at how Mr Dwyer's comments were able to be first published in the Mercury newspaper on the 13th June before his evidence was in fact taken on the 15th June and with an opportunity to comment only now being offered to this firm. Clearly, Mr Dwyer's comments, which are both incorrect and mischievious, have, unless corrected, the great potential to injure this firm. In our submission, fairness would have entitled us to know the substance of the allegations to be made by Mr Dwyer, if not prior to, certainly no later than the time that they were publicised. That is particularly so when the substance of what he had to say was certainly known, at the latest, by the time the edition of the Mercury appearing on the 13th June was put to print.

With timely advice as to the groundless allegations to be made, we would have had the opportunity to appropriately respond to those allegations, possibly even at the time of the hearing on the 15th June. Such a course would have limited the potential effect from the unfounded allegations, by not allowing them to remain in the public arena uncorrected for a substantial period of time.

Whilst clearly the protection against proceedings for defamation that is afforded by Parliamentary privilege is essential for the proper workings of the parliament and its constituent bodies, that same protection has the potential to cause mischief if not subject to appropriate checks and balances.

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We are grateful to the President of the Law Society of Tasmania, Mr Jackson, for recognising the need to swiftly respond to the incorrect and unfounded allegations made by Mr Dwyer and, to a lesser extent, by Mr Clark.

Turning to the evidence given by Messrs Dwyer and Clark, we repeat, that the essence of what they say is demonstrably untrue and mischievious. Mr Dwyer in particular appears embittered by the experience he suffered many years ago when the Supreme Court proceedings that he was so closely involved in, substantially failed on the basis that he had failed to understand the accounts of this firm. The prosecution was flawed; and it was fundamentally flawed, because Mr Dwyer did not understand the accounts of the firm. He continued to either be unwilling or unable to accept that his understanding was flawed despite the very considerable efforts of the then partners of the firm, the solicitors which the firm had no option but to engage to respond to the baseless allegations made by the Society on the strength of Mr Dwyer's flawed report, and subsequently the counsel that was retained to defend the prosecution that was mounted.

The prosecution that was brought on the basis of Mr Dwyer's advice to the society, alleged professional misconduct on the part of the then partners of the firm. The charges totally failed. It is true that during the course of his judgment, his honour the then Chief Justice, Sir Guy Green, did adversely comment on a small number of isolated events, but the significance of his findings is evident from the following;

1. The Chief Justice found that the allegations of professional misconduct failed in their entirety;

2. His honour specifically refused to characterise any proven conduct on the part of any practitioner of the firm as being either professional misconduct or unprofessional conduct; that being the gravamen of the society's case, and given Mr Dwyer's close involvement in the whole process, it is indeed quite surprising that Mr Dwyer's recollection could be so faulty as to enable him to make the comments that he did and which are reported at the top of page 1188 of Hansard.

3. In relation to the isolated incidents that he adversely commented on, his honour found that the practitioners actions were in fact to the benefit of the clients concerned; the only issue was as to the level of disclosure to the clients concerned not as to whether there was any risk to client's money or whether the firm was obtaining an inappropriate benefit;

4. His honour refused to impose any sanction beyond expressing the court's disapprobation as to the level of disclosure to the particulars clients concerned in the isolated instances. He did not strike any practitioner off the roll; he did not suspend any practitioner from practice; he did not impose any fine whatsoever.

5. With respect to two of the five practitioners charged, his honour ordered that the Law Society pay the legal costs those practitioners had incurred in defending themselves against prosecutions that had absolutely and totally failed. In relation to the other three practitioners, he ordered that the Law Society pay 75 % of their legal costs.

6. The Law Society appealed against the findings of the Chief Justice. In a unanimous decision, the Full Court rejected the Society's appeal.

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7. The amount finally paid by the society to the members of the firm on account of costs exceeded $140,000.

8. Despite recovering that sum towards the costs incurred, the firm remained out of pocket to the extent of hundreds of thousands of dollars in the form of unrecovered costs and the cost of the time when the partners were unable to attend to their usual practice due to the need to respond to the allegations levelled by Mr Dwyer, and continued by the society, in attending to brief solicitors and counsel in relation to the fated proceedings, and attending to give evidence at the hearing.

Given that history, when it was suggested that Mr Dwyer again attend to inspect the accounts of the firm, it was perhaps not surprising that the then members of the firm expressed the view that they would prefer if another accountant conducted whatever audit or inspection the society wished to be conducted.

It is stressed, that there was never a refusal to allow an inspection; there was never a refusal to allow Mr Dwyer to inspect the firm's records, if the Society had of insisted on that course. What there was, was an expression of a wish that someone other than Mr Dwyer conduct any inspection. It is important to note that, at that time the Society did, on occasions, use an alternate inspector in cases where Mr Dwyer was unable to conduct inspections due to conflict or prior involvement. This facility was part of the Random Inspection Scheme from its outset. The firm suggested that the alternate inspector might be an appropriate person to conduct the audit or inspection instead of Mr Dwyer.

Objectively, we would submit that such a course was absolutely reasonable and justifiable. Mr Dwyer had not understood the accounts at the time of his previous inspection. He had continued to refuse, or fail, to understand those accounts despite the lengthy pre trial processes and the hearing itself. There was nothing to suggest that even following the Chief Justice's decision that there was a recognition of any error. Presumably after discussing the matter with its chief expert witness, Mr Dwyer, the society took the unusual step (in a disciplinary proceeding) of not accepting the trial judge's decision and appealing. The whole sorry episode imposed enormous financial and emotional stress on the then members of the firm and its employees, and in no small way caused unnecessary concern amongst clients of the firm.

The firm had little faith that any subsequent inspection would not be attended by circumstances of conflict and mistrust. I would suggest that it was to the Society's credit that, when it carefully considered the matter, it accepted, in a corporate sense, the inappropriateness of requiring Mr Dwyer to conduct a further inspection of the firm's accounts. That is particularly so when exactly the same end could be achieved by a far more suitable and appropriate means.

I would suggest that it was not to Mr Dwyer's credit that he was unable to accept the absolute and objective sense inherent in the compromise proposed by the firm; and took personal affront at the suggestion that he not conduct the next inspection. I would suggest that his failure to accept the decision of the Society (that it was appropriate that an 'independent' accountant inspect the accounts) highlights the very reason why a further inspection by Mr Dwyer would have been inappropriate. That Mr Dwyer clearly carries the grudge to this day merely supports that conclusion.

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In closing, can I say this;

1. Whatever incidents occurred in 1987 and 1988 have nothing whatever to do with any recent difficulties experienced by a small number of the firms that operate mortgage practices.

2. That, when viewed against the objective facts, the comments made by Mr Dwyer are demonstrably untrue and untrue in ways that must cast doubt on his memory and motives.

3. There was no finding of professional misconduct or unprofessional conduct against any member of the firm of Clerk Walker and Stops. The Chief Justice expressly refused to reach that conclusion, supported by the Full Court.

4. On the basis of Mr Dwyer's flawed understanding of the accounts maintained by the firm, the Law Society embarked upon proceedings that were entirely unsuccessful in establishing what they set out to do.

5. Mr Dwyer's advice to the society and perhaps more damningly his refusal to listen to or understand the repeated explanations that were offered to him as why the conclusions he had reached were simply wrong, cost the society in excess of $140,000 in costs that it was required to pay to this firm. Over and above that sum, the firm incurred further legal costs that it was unable to recover totalling more than a further $100,000; the Law Society incurred its own legal costs which would, conservatively have exceeded $100,000. On top of those legal costs, lost productivity imposed further expense on the firm of conservatively a further $150,000.00 whilst practitioners were taken from their usual tasks to respond to the fundamentally flawed allegations, to prepare affidavits in response to the society's allegations and to attend a court hearing that lasted many days. In all, Mr Dwyer's erroneous advice to the society imposed costs totalling approximately one half of a million dollars.

6. It is surprising that Mr Dwyer should have been surprised that he was not welcomed back to the firm. It is perhaps even more surprising that Mr Dwyer was surprised by the Society agreeing that it was more appropriate that an alternative accountant, who did not carry any of Mr Dwyer's baggage, should conduct future inspections of the firm's accounts.

Yours faithfully,
CLERK WALKER & STOPS

Per:

J R HURBURGH