THE FALL OF EQUITITRUST LIMITED: A CASE STUDY IN MAJOR BANK UNCONSCIONABILITY, ASIC MISFEASANCE AND THE MORAL DECLINE OF CORPORATE AND FIDUCIARY AUSTRALIA

1. INTRODUCTION

Who am I?

My name is Mark McIvor. I am a solicitor of the Supreme Court of Queensland and New South Wales (since early 1980), founder and director of Equititrust Ltd and an Unhappy Australian .

Who is Equititrust Limited?

Equititrust Limited (Equititrust) ,incorporated in 1993 ,is a capital manager ,fiduciary trustee and Responsible Entity charged with the protection of the life savings of 1400 aged Australian investors . (Many of whom have been clients of the predecessor law firm, since formation in 1982) The company boasted a proud and exemplary history of committed innovative capital management, during which time (until 2011) no investor had ever suffered a capital, or interest loss. Prior to the sudden, and capricious, withdrawal of major bank funding Equititrust had a total of $550 m in funds under management (FUM),substantial annual revenues , a trusted reputation and contented investors .

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The achievements of Equititrust, as at the commencement of 2011:

1. Traversing 3 years of Global Financial Crisis with investor capital intact, and all distribution payments made punctually to investors.

2. Navigating the Australia wide ‘run’ ,on mortgage funds created by the Federal Government bank guarantee of banks and other financial service providers.

3. Complying with the capricious, and sudden, withdrawal of it’s primary financier CBA. (CBA demanded repayment of $90m credit line having strongly fostered a prior approval of $185m).

4. A capital and revenue commitment by Equititrust to protect investors of over $100m.

5. Additional third party capital support of $30m provided by related party security providers to ensure available liquidity to protect investors.

6. The only privately owned mortgage fund in Australia with an impeccable record for investor protection, and a founder’s capital commitment of 20% of funds under management to support investors.

7. $76m in retained earnings in its balance sheet and a full $1 unit price.

2. THE FALL OF A TRUE FIDUCIARY

The 'concatenation of events' during 2011 ,causing the fall of Equititrust, are a compelling indictment on the arrogant unconscionability of the major banks, the systemic incompetence of the regulatory system, the routine breach of fiduciary duties and professional codes by large insolvency and law firms acting as bank 'enforcers', and the greed and moral turpitude, at large in Australian business.

What happened?

During the course of 2011 , Equititrust's proud history, reputation, balance sheet and investors' interests were decimated, and the company rendered insolvent, as a result of:

1. Unconscionable conduct by major bank.

2. Misfeasance of ASIC.

3. Offences relating to dishonesty committed by senior bank employees and insolvency practitioners.

4. Director misconduct, and gross breach of fiduciary duties.

5. Gross negligence of an international accounting firm.

8. Misleading and deceptive conduct regarding ASIC by various parties to ensure victimisation of Equititrust, and its founder, by ASIC.

9. Routine breaches of fiduciary duty, and professional misconduct, by major law firms
10.Gross mismanagement and negligence by 2 Equititrust employees (ex-MFS executives).

What resulted?

1. A carefully planned and essential metamorphosis to a diversified fund manager (with asset management expertise and wealth advisory alliances), was prevented .

2. A proposed transition to the ASX to underpin investor value, and distinguish from the discredited mortgage fund industry, was purposefully derailed.

3. A strategy to 'roll up' frozen mortgage funds (launched in October 2010 to a new Board), to propel investor and corporate value ,and reposition as a property investment banking group was determinedly thwarted by improper conduct.

4. Aged Australians have been disrespected, and their life savings lost.

5. The company's balance sheet has been decimated.

6. Routine breaches of the Criminal Code Qld (Offences Relating to Dishonesty) have been committed by a senior banking executive and insolvency practitioner, as against the rights of related (and supportive) third party creditors.

7. Investor, shareholder and creditor losses totalling in excess of $200 m have occurred.

8. Improper and coercive tactics are currently being deployed by major insolvency and law firms in a 'time guzzling' frenzied attempt to overwhelm legitimate legal rights, and silence' opposition.

9. Corporate criminals ,and their comprehensive fraudulent network, have sought to profit, at the expense of aged Australians and Equititrust's reputation.

3. HOW COULD THIS HAPPEN IN OUR FINANCIAL SERVICES INDUSTRY?

A Macro Perspective

To fully comprehend how such an event could occur one must examine in penetrating fashion the root cause of the Global Financial Crisis, the aggregation of retail banking in Australia over the last 30 years, the absence of a proper standard of fiduciary care by the financial services industry, the dysfunctional regulatory system purporting to protect investors, the ascendancy of greed, and the decline in morality of sectors of corporate and professional Australia.

A National Calamity

The GFC was a Global Fiduciary Crisis as greedy financial corporates primarily banks),and their 'army' of non-mutual advisory 'minions', sought to profit ,at the expense of others. A fiduciary is a person, or entity, bound to act for another's benefit. Our High Court has determined that the essence of 'fiduciary' comes from the heart, not from a set of rules, that can be twisted and altered, to suit the occasion. The failed mortgage fund industry is a national calamity that has claimed the greatest loss of retiree wealth since Federation. Hard questions must be asked, and answered, to get to the bottom of the banks' throwing money at fund managers up to 2007,and improperly demanding repayment in 2008,and thereafter. In the context of the Discussion Paper due from CAMAC on the 30th June 2012,promoting a moratorium to restructure viable MIS (Managed Investment Schemes) the actions of the banks, and regulators, is appalling. The Mortgage Fund Industry has been grossly impacted by the banks' actions in response to BASLE III.

The Aggregation of Retail Banking

The aggregation of retail banking has been a strong trend in Australia for over 30 years. It reached a compelling conclusion ,post GFC ,with the substantial decrease in regional banking capacity and finance supply, independent of the major banks arising from the Government's support for our major banks. The loss of St George Bank, Bankwest, Aussie Home Loans, Wizard Home Loans, RAMs Home Loans and substantial independent finance has created a

dangerously powerful, and oligopolistic banking system. The G20 describes our banking system as the 'most lucrative in the world' and a 'potential moral hazard'. The 'potential' is in full bloom, as demonstrated by this Senate Enquiry.

Dis-intermediation and Reduction in Real Estate Policy

Major banks are purposefully anti-competitive, and pursue an anti-Darwinian theory of 'only the strongest survive'. They pursue aggressive dis-intermediation policies to ensure that investors, and potential customers, do not aggregate under a competitive umbrella. Deceptive ,and misleading, practices are commonly employed to encourage customers to consume debt provided by the banks, when it suits them,(and their shareholders).When it no longer suits them(and shareholders) they eschew, and disrespect long standing relationships, and improperly use the force of their financial capacity to overwhelm customers' rights. The major banks reduction in real estate exposure policy (arising from Basle III regulatory capital changes),since the onset of the GFC, has been an unconscionable, and improper, exercise of banks' financial superiority.

Basle III obliged an increase in capital allocation for commercial real estate exposure. Banks routinely mislead customers to place them in a vulnerable position with full awareness of its intention to aggressively de-leverage. Ignoring long-standing customer relationships , prior binding commercial obligations ,and disregarding the substantial damage to small and medium size businesses, shareholders and communities of investors, banks transferred customers to aggressive recovery divisions, devoid of moral scruples, and rewarded for loan recoveries via improper practice.

Equititrust represents a case study typifying this conduct, and its consequential damage to the fabric of the community.

The Mortgage Fund Industry – A Case Study in Bureaucratic Bungling

<u>History re Legal Profession</u>

Lawyers traditionally were permitted to aggregate clients' money, and lend, as a special exemption to ASIC regulation. This ceased in 1999 as a consequence of the introduction of the Managed Investments Act 1998. As Chairman of the Mortgage Lawyers Association (Queensland),at that time our Association was working actively with the Law Society to educate law firms to be more effective property lenders. We had 60 members and whilst endeavours were being made to increase professionalism in the sector, it was impossible as an unfunded organisation to quickly make an impact. Unfortunately many were not experienced, and ASIC step in as a result of investor loss .

<u>Responsible Entities Licence (RE)</u>

ASIC introduced the Responsible Entity (RE) licensing system, and obliged the legal profession to fall within those guidelines. It was relatively easy to gain an RE Licence. (Having studied a Law degree for 4 years at Queensland University and practised as a lawyer for over a decade before being appreciably involved in lending, I had an opportunity to gain commercial experience. More significantly, I had the privilege of understanding the sanctity of fiduciary relationship .

Fundamental Shortcomings of Legislation

ASIC comprehensively failed to:

1. Introduce any regulatory capital structure, and;

2. Ensure Responsible Entity Licences were issued to responsible persons, or corporations.

Essentially, if you filled in a form correctly, you received a licence. A Responsible Entity licence quickly became an oxymoron. The failure to legislate an appropriate capital structure meant that parties successful in gaining a licence had no demonstrable commitment to investors. When banks world wide are obliged to hold only modest equity (Tier 1 Capital of 8%),why would ASIC not have insisted on a capital requirement ?
Aged Australians looking for an opportunity to earn slightly better than major bank interest rate, were led like 'lambs to slaughter'. Correspondingly, the opportunity to build viable alternative finance provision alternatives, at community level, have been decimated. This has simply contributed to the stranglehold major banks hold over the regional communities.

A Micro Perspective

To truly understand the improper conduct of the major banks, and their 'bully boy enforcers' it must been observed 'in action', in a practical context. The 'Equititrust Story' provides such a context. Conscience of the deadline for this submission, I wish to provide considerable confidential detail in that respect, which I shall do under a separate cover, in the form of a micro perspective. I will also assemble relevant supporting documentation, as annexures.

I will endeavour to make observations that represent a neutral commercial judgement, despite being personally involved. Other than the banks, ASIC and persons engaged in overt corporate crime, I will not mention people by name. I shall adopt pseudonyms, so that the various interconnected events can be understood, and the roles of various parties, and organisations, understood.

The events of 2011 surrounding the fall of Equititrust Ltd present a very practical application of bank misconduct, and the extreme cost to regional community members. It is a 'story' full of intrigue including very high monetary loss ,and extreme misconduct. I am returning to the practice of law, and incorporating a multi-discipline law firm to ensure that substantial investor, shareholder and creditor rights are protected.

Mark McIvor
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