



KordaMentha

2 August 2012

The Committee Secretary
The Senate Economics References Committee
PO Box 6100
PARLIAMENT HOUSE
CANBERRA ACT 2600

Attention: Mr Bryant

Dear Sir

Enquiry into post GFC banking sector – submission by John McArthur Wharton and Elizabeth Mary Wharton (‘the Whartons’)

We refer to your letter dated 15 June 2012 which attached a submission to the Committee from Mr and Mrs Wharton dated 10 June 2012 (‘the submission’). Most of the allegations set out in the submission are directed to BankWest (‘the Bank’) and we understand the Bank will separately respond to those allegations. Insofar as allegations are raised against KordaMentha, and two of the partners of the firm, Richard William Buckby and Robert William Hutson (‘**the Receivers**’), they appear to be as follows:

1. that KordaMentha when appointed as independent accountants in July 2010 “*did not see the corruption by the Bank in the 2008*”
2. that KordaMentha in being appointed as receivers and managers following their appointment as independent accountants, had a major conflict of interest
3. that KordaMentha upon being appointed as receivers and managers withdrew from sale Redrock Station
4. that the Receivers informed Mr Wharton in Townsville in late November 2011 “*that they would have Runnymede sold and all the cattle before Christmas. This shows how fast they intended to move to take away any chance we had of a refinance package*”.

We will deal with each allegation in turn.

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1. Appointment as independent accountants

In early August 2010 KordaMentha accepted an appointment from BankWest to conduct an independent accountant's review of the Wharton Group which comprised Mr and Mrs Wharton. The scope of that review insofar as it concerned livestock was to:

Review and comment on stock including:

- current stock
- sale program
- diversification of stock on the property
- carrying capacity.

The scope of the review did not include an historical analysis of information provided to or available to the Bank in relation to stock in 2008. The stock figures relied upon for the purpose of review were figures supplied by Mr and Mrs Wharton through the financial accounts to 30 June 2010.

In October 2011 KordaMentha were requested by the Bank to provide an addendum to the independent accountant's review conducted in 2010. The scope of that review insofar as it concerned livestock was as follows:

- analysis of sales completed by the Wharton Group post initial review. Review and comment as to stock sold being of correct weight and age expectation
- review and comment on current sale program, current stock held and future security value should sale program continue
- review and comment on the current carrying capacity of stock on security properties.

Again the figures relied upon for the purpose of the review were supplied by Mr and Mrs Wharton. The review did not consider historical stock holdings because that was beyond its scope.

2. Conflict of Interest in appointment as Receivers

As has been noted above, KordaMentha were initially retained by the Bank to conduct an independent accountant's review. In conducting that review, KordaMentha acted independently of both the Bank and the Wharton Group. The review largely relied upon information supplied to KordaMentha by Mr and Mrs Wharton. By the terms of their subsequent appointment as receivers, Messrs Buckby and Hutson are the agents of Mr and Mrs Wharton for the purpose of the care, preservation and realisation of the assets to which they are appointed and the conduct of the receivership for that purpose. The submission does not identify the basis upon which a conflict of interest is said to exist but rather simply makes the assertion of the conflict. It is therefore difficult to respond in particular terms to such a generalised allegation.

We note however that it has been necessary for the Receivers to prosecute two separate Supreme Court Applications against Mr and Mrs Wharton in relation to the conduct of Mr and Mrs Wharton since the appointment of the Receivers in November 2011. In neither occasion has the Court held that the Receivers are in a position of conflict nor have Mr and Mrs Wharton sought orders from the Court to disqualify the Receivers on that basis.

3. Withdrawal of Redrock from sale

The Receivers were appointed on 15 November 2011. Upon their appointment the Receivers were advised by Mr Wharton that selling agents had been appointed to market Redrock Station for sale. The Receivers have a statutory legal duty pursuant to section 85 of the Queensland Property Law Act (PLA) to take reasonable steps to ensure that market value is obtained when selling an asset to which they have been appointed. The Courts have consistently held that that duty is only discharged by receivers undertaking a public sale process over a sufficient period to ensure that the fact of sale comes to the attention of all parties likely to be interested in making an offer to purchase the property in sufficient time to enable any such parties to make such an offer. There is also a duty on receivers to take reasonable steps to ensure that the property the subject of the sale is marketed in the appropriate condition. At the time of their appointment the Receivers discontinued the then selling campaign in order to investigate the most appropriate method of sale and to ensure that the sale process proceeded as required by section 85 of the PLA. As is set out below it has been necessary for the Receivers to obtain orders of the Supreme Court of Queensland on two separate occasions to prevent ongoing disruption to the exercise by the Receivers of their powers in relation to sale.

4. Statements allegedly made to Mr Wharton in November 2011

The Receivers deny that they informed Mr Wharton of an intention to sell Runnymede and all the cattle before Christmas. On 16 November, 2011, Mr Gavan Nolan, a representative of the Receivers and a partner of KordaMentha attended Runnymede and spoke with Mr Wharton regarding the appointment of the Receivers, the implications of that appointment and the preliminary plans of the Receivers in relation to the property. The following day Mr Nolan again attended Runnymede to inspect cattle and to develop an appropriate strategy for mustering and removal of the cattle for sale. On 23 November, 2011 when Mr Nolan again attended Runnymede it was observed that Mr Wharton had removed cattleyard fence panelling such that mustering was not possible. The wet season in North Queensland commenced in early December 2011 and proceeded until March 2012. The removal of the fence panelling resulted in the Receivers being unable to muster and prepare the cattle for sale before the start of the wet season.

The marketing for sale of rural properties normally proceeds over a 5 to 6 week period after agents have been selected and properly briefed. Given the imminent onset of the wet season at the time of their appointment the Receivers did not intend to market either Runnymede or Redrock for sale prior to the end of the wet season and did not state that they intended to do so to Mr Wharton. The receivers had hoped to remove the cattle from Runnymede and Redrock in the period prior to the start of the wet season but were unable to do so by the actions of Mr Wharton. At the conclusion of the wet season in April, 2012, the Receivers representatives again attended at Runnymede. Faced with ongoing interference by Mr and Mrs Wharton with the conduct of the receivership, the Receivers were forced to approach the Supreme Court of Queensland to obtain orders preventing Mr and Mrs Wharton from interfering with the actions of the receivers. A copy of the Supreme Court order made 4 May, 2012 is attached.

Notwithstanding the order made 4 May 2012, Mr Wharton continued to obstruct the Receivers and to refuse access to the Receivers to the properties. It was necessary for the Receivers to obtain further orders from the Supreme Court preventing ongoing interference by Mr Wharton and to deliver up vacant possession of the properties to the Receivers. A copy of the affidavit of Gavan Nolan sworn 8 June, 2012 and filed and served in those proceedings is attached for your reference. None of the matters set out in that affidavit were disputed by Mr and Mrs Wharton. A copy of the orders of the Supreme Court made 20 June, 2012 is attached for your record. A separate Supreme Court application for orders for contempt against Mr Wharton remains outstanding pending a hearing date convenient to all parties.

The history of the matter demonstrates that the Receivers have acted entirely appropriately and within the law and the submission contains nothing to establish otherwise.

Yours faithfully

Bill Buckby
Partner