

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA

Question No. 57

Senator Williams asked the following question at the hearing on 24 May 2012:

Senator WILLIAMS: I refer to a letter dated 12 August 2009 signed by you, Ms Ingram. It is a response to complaints Mr Mircevski made to the Attorney-General on 17 and 8 July 2009. You refer to a letter dated 19 June 2009 which indicated the conduct of the trustee was not considered inappropriate. What investigations of Mr Pattison led your Bankruptcy Regulation Branch to that conclusion? ... Take me through in brief what you do to investigate such complaints, including what examination is done of the trustee's books?

Ms Ingram: Generally we review the trustee's books every year to 18 months. We review each trustee's operations. If you are referring to what do we do when we receive a request to review a matter, we would go to the trustee and ask him to respond to the allegations, and we would test them. I cannot respond in relation to this particular matter—I do not have the details before me.

Senator WILLIAMS: Would you take it on notice.

Ms Ingram: Yes.

...

Senator WILLIAMS: How many other complaints were received about Paul Pattison before Mr Mircevski sought to have him removed?

Ms Ingram: I do not have those details. We will take it on notice.

Senator WILLIAMS: Why did ITSA oppose a subpoena seeking ITSA's records to support Pattison's removal by the Federal Court?

Ms Ingram: I would have to take that on notice.

...

Senator WILLIAMS: This was a barrister representing Mr Mircevski. I will repeat the question. Why did ITSA threaten or actually seek personal costs orders against volunteer members of the Bar Duty Barristers Scheme—a volunteer scheme where barristers actually donate their time to help the vulnerable? Why did you seek costs?

Ms Ingram: I will have to take on notice the matter in relation to costs.

...

Senator WILLIAMS: Are you actually in control of that property in the Kinglake area that was once Mr Mircevski's? Is that now in ITSA's control?

Ms Ingram: I would have to take that on notice.

The answer to the honourable Senator's question is as follows:

a) In investigating complaints, ITSA follows the process as detailed in Inspector-General Practice Statement 10.1. In short, each element or issue a complainant alleges to have occurred is independently investigated and outcomes are reached either through correspondence or meetings between the parties. The benefits of inspecting the trustee's administrative file are considered on a case by case basis.

Mr Mircevski made a complaint to ITSA on 12 May 2009 in relation to Mr Pattison's conduct as his trustee. Mr Mircevski's complaints focussed on:

- his trustee's fees and expenses, and
- an allegation that his trustee had failed to properly investigate claims made by creditors.

As part of ITSA's subsequent investigation:

- ITSA inspectors reviewed Mr Mircevski's statement of affairs and correspondence from the trustee which set out Mr Mircevski's liabilities against assets, which formed the basis of the

trustee's view that Mr Mircevski was insolvent and he continued to administer the bankruptcy accordingly

- ITSA inspectors received and reviewed the trustee's work in progress records for the administration.

It was noted that the trustee had:

- settled the claims with Mr Mircevski's creditors based on legal advice
- provided advice to both Mr Mircevski and to Mr Mircevski's solicitor (whom he had retained at a later stage), in respect of the costs and fees that would be required to be paid in respect of making a composition or an application for an annulment. Neither proposal was pursued by Mr Mircevski.

Following that investigation on 19 June 2009, ITSA responded to Mr Mircevski in a comprehensive letter. Drawing on the results of the investigations the letter concluded that nothing inappropriate was found in respect of the trustee's conduct.

In August 2009, Mr Mircevski made a complaint to the Attorney-General in respect of his trustee's conduct and this complaint was referred to the Inspector-General for reply. The Inspector-General replied to Mr Mircevski and referred him to the comprehensive response provided in ITSA's letter of 19 June 2009, which had concluded that his trustee's conduct was not considered inappropriate.

b) In the 12 months prior to Mr Pattison's de-registration on 23 April 2012, there were nine complaints received relating to bankrupt estates he was administering. This should be noted in the context of Mr Pattison having carriage of a large volume of matters at the time. Whilst four of these nine complaints were considered to reflect a lack of understanding on behalf of the debtor or creditor and were quickly resolved, five were assessed against the criteria in Inspector General Practice Statement 10.1 as warranting a full investigation into the issues raised. The findings in these investigations did not disclose formal breaches of the law. It should also be noted that it is not unusual to receive complaints given the challenging nature of registered trustee work which often result from aggrieved debtors and creditors not being fully aware of their duties and obligations to assist the trustee in the course of an administration of an estate.

c) ITSA opposed the subpoena as it had no relevance to the application filed by Mr Mircevski against Mr Pattison and ITSA under s 179 of the *Bankruptcy Act 1966* (the Act). ITSA's position was that it ought not be required to make extensive searches, unlimited in terms of time, date or scope, in respect of producing documents which were unrelated to evidence required to found an application under s 179 of the Act. Section 179 relevantly provides that upon the application of the Inspector-General, a creditor or a bankrupt, the Court may inquire into the conduct of a trustee in relation to the particular bankruptcy administration.

The subpoena which was issued on behalf of Mr Mircevski sought an extensive number of documents, none of which appeared relevant to Mr Mircevski establishing that there should be an inquiry into Mr Pattison's conduct in administering Mr Mircevski's bankrupt estate. As drafted, the subpoena required ITSA to form a judgement as to which of the documents it held in relation to Mr Pattison, related to an issue in dispute or was relevant to Mr Mircevski's application. ITSA submitted that this is not the purpose of a subpoena nor is it an appropriate obligation to place upon an addressee of a subpoena.

The Court agreed with ITSA's position and that ITSA ought not be required to produce documents which were unrelated to evidence required to found an application under s 179 of the Act. After hearing submissions, the Court dismissed the subpoena.

d) ITSA did not seek a costs order against the Applicant's barrister in this matter. However, due to significant concerns about the Applicant's barrister not complying with court imposed timeframes to progress the matter and a lack of responses to ITSA's communications over several months, AGS referred the Applicant's barrister to the Rules of Court whereby a "pro-bono appointment does not operate as a shield to costs orders".

ITSA's concerns were initially based on the fact that the Applicant's barrister did not:

- appear at the hearing before Lander, Gilmour and Gordon JJ on 14 November 2011
- give notice to the Court or the parties of his non-appearance.

The Applicant appeared in person on that day.

Further concerns arose when a pattern of non-response to ITSA's communications became apparent. ITSA instructed the AGS to write to the barrister appointed on a number of occasions:

- first on 16 September 2011, advising him of the orders made by Justice Gray on 19 July 2011 and providing him with background documentation to assist his preparation of the case
- again on 14 October 2011, drawing his attention to the fact that his client had failed to comply with the timetable set down by the Court on 19 July 2011
- on 28 October 2011 when still no response had been received, and attempts to locate the barrister to communicate with him directly had yielded no success, (the AGS wrote to the Court and the barrister)
- on 3 November 2011 a further email was sent to the barrister, which drew the barrister's attention to s43(3)(f) of the *Federal Court of Australia Act 1976* and r40.07 of the *Federal Court Rules 2011*, which empower the Court to order a party's lawyer to bear costs personally.

The barrister responded via two separate emails on 6 November 2011 and the AGS responded in turn on 7 November 2011. In this email, the AGS clarified that:

- the barrister's duty as pro-bono counsel is subject to the Rules of Court. His obligations to the Court remained paramount, including his obligation to ensure cases are conducted efficiently and expeditiously; and
- a pro-bono appointment does not operate as a shield to costs orders if they are appropriate. The barrister's paramount duty to the Court remains.

e) Mr Mircevski's interest in the Kinglake property vests in the Official Trustee pursuant to section 58 of the Bankruptcy Act 1966. The Official Trustee's inquiries indicate there may be no equity in the property after taking account of the claims of secured creditors. The Official Trustee has not taken steps to realise the property as it would not benefit the bankrupt estate. The mortgagee has the legal remedy to re-possess and sell the property notwithstanding the bankruptcy.