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20/06/2012

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pp 00207-00214

PUBLIC
HEARING

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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

Reference: Operation E09/350

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON WEDNESDAY, 20 JUNE, 2012

AT 10.40AM

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This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: Yes, Mr Naylor.

MR NAYLOR: Commissioner, I have an application.

THE COMMISSIONER: Yes.

MR NAYLOR: The application, Commissioner, is that Mr Diekman will be stood down for the time being from giving further evidence today. Can I indicate for the record Mr Diekman has for the last seven years been consulting a psychiatrist, Dr Robyn McGregor at Annandale in respect of an anxiety condition. I can't give your Honour details about the nature of that condition. I can indicate that an appointment has been arranged for 5 o'clock this afternoon. I am in this situation, Commissioner, at the present time I perceive that my client is suffering from - can I say that his anxiety - I am unable at the present time to obtain instructions. I have very real concerns, Commissioner, that Mr Diekman is in a state of mind at the moment to give evidence, to equip himself in the witness box in a manner that is fair to him so I would ask that he be stood down for the remainder of the day so that he can seek medical attention, seek medical advice. I am hoping that once that has occurred that he might then be in a position to give instructions and to continue giving evidence.

THE COMMISSIONER: Mr Naylor, it is unfortunately the case that if - that sometimes when persons are in the witness box for the length of time that Mr Diekman has been in the witness box and where the pressure is put on the witness as undoubtedly pressure has been put on Mr Diekman and where the witness is taken to documents which seem to contradict what the witness has previously said orally, that a witness does become very anxious, that's part of the adversarial procedure that we're all used to. You are not in a position to provide any medical document at this stage?

MR NAYLOR: No, no, I'm not, Commissioner, and - - -

THE COMMISSIONER: I mean, it would have been, I suppose in theory possible for you to have or for Mr Diekman to have arranged to see someone last night.

MR NAYLOR: Telephone calls were made yesterday, Commissioner. They weren't responded to. Telephone calls have been made again this morning. The first appointment that can be obtained is 5 o'clock this afternoon although we have been trying to bring it forward but our call to try and do that has not been returned. I don't make the application lightly, Commissioner, and it's made against the background that Mr Diekman has been seeing this psychiatrist for the last seven years. Now, I accept we don't have a medical report but I ask only that he, he be stood down for, for today.

THE COMMISSIONER: Are you actually saying to me that you cannot get instructions? Is that what you're saying?

MR NAYLOR: Yes, yes.

THE COMMISSIONER: That you're not able to get instructions. Can you - I'm afraid I'm going to have to ask you what you mean by that.

10 MR NAYLOR: All, all I can say, Commissioner, without breaching Mr Diekman's privilege is that I have sought instructions about certain matters and I cannot at the moment obtain an answer. I unfortunately can't take the matter to - - -

THE COMMISSIONER: Well, there are - the inability of Mr Diekman to give answers may be ascribed to the fact that there are no answers unless other - well, I don't want to go further than that but I'm sure you understand what I mean.

20 MR NAYLOR: Yes, yes, Commissioner.

THE COMMISSIONER: I mean, there may also be - I need to know, if that is the case, if that is the reason for an inability to give instructions then Mr Diekman's evidence as far as I am concerned should continue. If, however, he is genuinely suffering from some kind of medical condition then I might be of a different view so I'm - the problem is as you - and I don't, I mean you - it might be very difficult for you to assess you not being particularly - you not being, as far as I am aware, a qualified psychiatrist or psychologist, are you able to assist me any further on this? I mean, I don't mean to ask you any unfair question but I am trying to get sufficient facts so
30 that I can be as far as possible about this.

MR NAYLOR: I can't take the matter any further in terms of providing the Commission with information about the matters in respect of which I can't obtain instructions.

THE COMMISSIONER: Well when you say you can't get instructions I'm not sure what that means. Does that mean - are you prepared to elaborate further on that? If you're not, I understand that but I mean I need to know that.
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MR NAYLOR: No, I can't elaborate further on that, Commissioner.

THE COMMISSIONER: Because you're not being able to get instructions may not mean a problem with coherent thought. It might be just that you can't get instructions because the individual concerned is just not willing to reveal what some might think are the true facts.

MR NAYLOR: Can I indicate Commissioner what my perception of the situation is? My perception is that I have sought instructions from Mr Diekman in relation to certain matters and his present state of mind, I've described it as anxiety ridden is such that he cannot find a way to provide answers to those matters about which I've sought instructions. He is paralysed as it were by anxiety which is my impression, they're my words, such that he just cannot take the matter further.

10 THE COMMISSIONER: And how long do you – I suppose you have no idea for how long this condition will last.

MR NAYLOR: I don't. Well I know that he's had a condition for the last seven years. What I can say is this, that every effort will be made if the application is granted for Mr Diekman only to see a psychiatrist today and hopefully after that he will be in a position to give instructions and to proceed with giving evidence. If, if that is the way (not transcribable)

THE COMMISSIONER: Well let me put this to you, Mr Naylor.

20 MR NAYLOR: Yes, Commissioner.

THE COMMISSIONER: Is there any difficulty in Mr Diekman simply being asked for his version at this stage without in effect cross examining him, but simply questioning him and then stopping if we – if that's completed before the end of the day and then recalling him later. I understand that the intention is anyway to recall him later. But it will be later than a day or two. It will be much later. So what I am in effect putting to you is the notion that he simply be lead without being cross-examined today so that we can see exactly what his version is and then he would be
30 asked at a later time to explain anything which Mr Strickland considers necessary. What do you say about that?

MR NAYLOR: Commissioner, I very much appreciate that opportunity, but may I say have concerns about Mr Diekman's capacity in his present state of mind to give evidence in that way.

THE COMMISSIONER: All right. Thank you. Mr Strickland.

40 MR LLOYD: Perhaps before Mr Strickland speaks, Mr Commissioner, because he'll obviously clean up at the end, obviously Mr Diekman is not my client.

THE COMMISSIONER: That I understand. I'm surprised that you're standing Mr Lloyd.

MR LLOYD: And I'll say this is the reason why, Mr Commissioner. At the end of the day whatever evidence is given by Mr Diekman needs to be considered by you as the Commissioner and fundamentally two of the

criteria you will be looking at in making findings in relation to his demeanour, reliability and credibility will be called upon to be made. Those findings particularly on the evidence he may give this morning it'll have crucial significance for my client because I apprehend broadly knowing the allegations that are being made against my client as opening by Counsel Assisting are in effect that Mr Diekman paid bribes one way or another to my client for being given favourable treatment in the tendering process. Now I'm horrified to think that this Commission with all its fairness, it's usual fairness would consider continuing with the evidence of the witness
10 which may now be regarded (not transcribable) as unreliable.

THE COMMISSIONER: Mr Lloyd, I don't - these are matters which you can raise at the end. This is not a matter I don't think in which you have standing.

MR LLOYD: Look could I make this suggestion to everybody for your consideration, Mr Commissioner, undoubtedly under the legislation controlling this Commission officers can issue subpoenas and it would be I would have thought an easy matter for one of the officers with the
20 assistance of the legal representatives of Mr Diekman to ring the psychiatrist and obtain the existing medical records.

THE COMMISSIONER: Mr Lloyd, I don't - I'm not interested in that and I really do not think it appropriate for you to make those submissions.

MR LLOYD: So be it, Mr Commissioner.

THE COMMISSIONER: This is a matter Mr Naylor has told us what he has attempted to do and I accept that. We're not investigating that further
30 that's a matter for Mr Diekman and Mr Naylor.

MR LLOYD: So be it.

MR O'MAHONEY: Mr Commissioner, my name is O'Mahoney and I seek leave to appear on behalf of Mr Anthony Morris.

THE COMMISSIONER: Yes, Mr O'Mahoney. You have leave. Mr Strickland.

40 MR STRICKLAND: Well, your Honour, I oppose the application. In my submission Mr Diekman has answered questions over two days, he's answered them in, in a way that indicates that for the most part he's understood the questions, he's given the answers, have they been intelligible? I accept and I accept in - my learned friend says that he is anxious or highly anxious or even paralysed with anxiety but there's nothing before you that could - would indicate that he has - he suffers from some psychiatric or psychological condition which, which, which of itself makes his answers unreliable.

I propose in line of what you're - what has fallen from you, Mr Commissioner, that I would simply lead him through material that I need to lead him through for the efficient running of the hearing. I can indicate that I will most certainly finish that today and there are other matters that I will leave until the remainder.

10 THE COMMISSIONER: Mr Strickland, I'm seriously thinking of, of not proceeding with Mr Diekman today but asking him to be here tomorrow subject to any psychiatric evidence which may require a different decision on that. I'm - I do think that in the light of what Mr Naylor has said that there could be reflections cast on his - on the credibility of any evidence that he may give today and I would prefer that not to arise.

MR STRICKLAND: If that be so, there's just one issue, we - Mr Poller is present we can call him but we are not in a position to call him immediately. The reason is, is because it takes a long time to get the documents together - - -

20 THE COMMISSIONER: I understand that.

MR STRICKLAND: - - - necessary to show him so, and - - -

THE COMMISSIONER: How long would you need?

30 MR STRICKLAND: Well I would need to get instructions on that. Although it looks easy it takes us quite some time to get the relevant documents together. We've done that for this witness and I, I couldn't imagine it could take place - I'll need to get, I'll need to get a couple of minutes instructions to how long we'll need. If I could do that?

40 THE COMMISSIONER: Yes. Mr Naylor, I, I, I will - I will uphold your application.

MR NAYLOR: If the Commission; please.

THE COMMISSIONER: But I think you should understand and Mr Diekman should understand that if he is - that is if there is an attempt to argue that he should not be questioned tomorrow I will need more than the kind of doctor's certificate that I have seen from time to time over many, many years that is attempted to be used to stop witnesses from giving evidence. I will need a reasoned report and may well require the psychiatrist to attend for questioning tomorrow.

MR NAYLOR: Yes, Commissioner.

THE COMMISSIONER: Because the application is only acceded to in regard to today. Mr Diekman will be - is required to be here at 10.00am tomorrow morning.

MR NAYLOR: If the Commissioner pleases.

THE COMMISSIONER: And at 10.00am tomorrow morning you can tell me what your attitude is then in the light of what you have explained now.

MR NAYLOR: Yes, Commissioner.

THE COMMISSIONER: Yes. The Commission - - -

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MR NAYLOR: One other, one other matter, Commissioner. Might there be non-publication orders in respect of the fact that Mr Diekman has been suffering from a psychiatric condition and his current treatment. Just for the time being.

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THE COMMISSIONER: All right. I will, I must say I instinctively resist that. I don't think that's anything to be ashamed of, to suffer from anxiety problems. It's something that is known to occur throughout the population. And I mean I don't think it's in any way, in any way lessens Mr Diekman's reputation. I think the public have an interest in knowing why the hearing is not continuing with Mr Diekman.

MR NAYLOR: I hear what you say, Commissioner. I make the application only on the basis of his embarrassment.

THE COMMISSIONER: Yes. So I will not make, I won't make a suppression order.

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MR NAYLOR: Thank you, Commissioner.

THE COMMISSIONER: This Commission will now adjourn.

SHORT ADJOURNMENT

[10.57am]

THE COMMISSIONER: Mr Strickland.

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MR STRICKLAND: Yes, thank you for the adjournment. I've got some instructions, Mr Commissioner.

THE COMMISSIONER: Yes.

MR STRICKLAND: If we could have until 2 o'clock and be ready to proceed then with Mr Poller.

THE COMMISSIONER: Yes. Very well we'll adjourn until 2 o'clock. I understand the reason is the preparation of the documents.

MR STRICKLAND: There's a large number of documents that we need to show and we just hadn't, we'd anticipated that would be tomorrow morning.

THE COMMISSIONER: Yes. We'll adjourn until 2.00pm.

LUNCHEON ADJOURNMENT

[11.11am]