

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

S CI 2015

IN THE MATTER OF BANKSIA SECURITIES LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ABN 45 004 736 458

BETWEEN

ANTHONY GREGORY MCGRATH, JOSEPH DAVID HAYES, MATTHEW WAYNE CADDY AND ROBERT MICHAEL KIRMAN AS RECEIVERS AND MANAGERS OF BANKSIA SECURITIES LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ABN 45 004 736 458

First Plaintiffs

BANKSIA SECURITIES LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ABN 45 004 736 458

Second Plaintiff

AFFIDAVIT OF JOSEPH DAVID HAYES "JH-18"

Date sworn: 16 December 2015
Filed on behalf of: The Plaintiffs
Prepared by:
Ashurst Australia
Level 26
181 William Street
MELBOURNE VIC 3000

Solicitor's Code: 53
DX: 388
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03 3000 9288
Attention: Ross McClymont
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "**JH-18**" now produced and shown to Joseph David Hayes at the time of swearing his affidavit on 16 December 2015 .


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Exhibit "JH-18"

Santamaria Advice dated 8 July 2013

Banksia Securities Ltd. (in receivership)

The Trust Company (Nominees) Limited

Claim for Fees

Joint Memorandum of Advice

1. Banksia Securities Limited (in receivership) (**Banksia**) issued debentures to retail investors in accordance with Chapter 2L of the *Corporations Act 2001 (the Act)*. Pursuant to the terms of the debenture trust deed (**Trust Deed**), The Trust Company (Nominees) Limited (**Trust Co**) was appointed by Banksia, in accordance with the provisions of the Act, to act as the debenture trustee. Under the terms of the Trust Deed, Trust Co was granted a fixed and floating charge over the assets of Banksia to secure repayment of the debenture amounts to retail investors. Banksia raised money through the issue of debentures and on-lent the money to borrowers looking for alternative sources of finance. Throughout the course of 2012, Trust Co raised concerns regarding the Banksia Grip and Banksia's low level of capitalisation, low level of provisioning and high level of non-performing assets. On 25 October 2012, Banksia invited Trust Co to appoint receivers to Banksia, and Trust Co appointed McGrathNicol & Partners (**Receivers**).
2. In addition to its annual remuneration, Trust Co has charged fees (on an hourly basis) for the work undertaken prior to the appointment of the Receivers to Banksia.
3. More recently, Trust Co has made a claim for the payment of fees for work done by it during the period of the receivership. As we understand it, the work the subject of the claim has been described in the document produced by Trust Co entitled '*Banksia Receivership: The Trust Company's fee position paper (Draft)*' (**Position Paper**). The Position Paper seems to be in the form of several slides from a PowerPoint

presentation. The Position Paper provides (a) 'Background' and (b) 'Receivership: First 3 months'. Thereafter, the Position Paper contains three pages entitled:

- (a) 'Key Activity 1: Loan Book Sale';
- (b) 'Key Activity 2: Stakeholder Engagement (sic);
- (c) 'Key Activity 3: Ongoing Responsibility for the conduct of the Receivership'.

In each of the 'Key Activity' pages, Trust Co has described the work which it has done since the commencement of the receivership. For example, under Key Activity 1, it has referred to two approvals which it provided, the first on 18 April 2013 and the second on 17 May 2013. Similarly, under 'Key Activity 2' it has referred to its attendance at meetings of the Creditors Committee of Representatives, including a meeting held on 27 March 2013. Finally, under 'Key Activity 3', it has referred to its role in 'oversighting and approving the receivership budget', its briefing of ASIC and its provision to the Receivers of strategic input.

4. Trust Co has made a request to the Receivers for additional remuneration in respect of these activities. In doing so, it has referred to clause 18.02 of the Trust Deed. (The Trust Deed is said to be between North Central Securities Ltd. and Permanent Nominees (Aust.) Ltd. We have not followed through the corporate trail but, as we understand it, Trust Co is the successor in office to the Trustee under that Trust Deed.)
5. Clause 18.02 of the Trust Deed provides:

The Company after an Enforcement Date will also pay on demand such additional remuneration as shall be commensurate with any additional duties and responsibilities performed or undertaken by the Trustee in consequence of enforcing this Deed as shall from time to time be agreed between the Company (or any Controller or liquidator thereof) and the Trustee and in the absence of agreement such additional remuneration shall be the amount (if any) by which commission calculated in accordance with the scale of commission for the time being lawfully chargeable by trustee companies in

Victoria on any corpus sum actually received by the Trustee would exceed the amount of the recurrent fee payable pursuant to Clause 18.01 in respect of the half-yearly or other agreed period in which sums (if any) are received by the Trustee PROVIDED HOWEVER that where any sum to which this Clause 18.02 would apply if it were paid to the Trustee is paid direct to Debentureholders and not to the Trustee such sum shall be deemed to be received by the Trustee for the purposes of this Clause 18.02.

6. We are asked to provide an opinion in respect of the following matters:
- (a) whether Trust Co has a lawful entitlement to be paid additional fees, as a consequence of enforcing the terms of the Trust Deed;
 - (b) if Trust Co has a lawful entitlement to be paid additional fees, how those amounts should be calculated;
 - (c) the extent to which any additional fees chargeable by Trust Co should be negotiated by the Receivers with Trust Co, having regard to the nature and extent of additional services provided by Trust Co in respect of the administration of Banksia;
 - (d) whether it would be appropriate for judicial advice to be sought for the approval of any additional fees payable to Trust Co.

7. We refer to the first of these matters. Clause 18.02 makes provision for the payment of additional remuneration. The opening words of this clause provide that such additional remuneration 'shall be commensurate with any additional duties and responsibilities performed or undertaken by the Trustee in consequence of enforcing this Deed.' Clause 18.02 contains two bases for determining the amount of any "commensurate" additional remuneration. The first is by agreement reached between the Trustee and the Company (or any Controller or Liquidator) with the term "Controller" being defined in the Trust Deed to include a receiver or receiver and manager. In the absence of any agreement, the second basis is that 'such additional remuneration shall be the amount (if any) by which commission *calculated in*

accordance with the scale of commission for the time being lawfully chargeable by trustee companies in Victoria on any corpus sum actually received by the Trustee would exceed the amount of the recurrent fee payable pursuant to Clause 18.01....'
[emphasis added]

8. We consider that the 'commensurate' requirement in clause 18.02 applies equally to each basis for determining the amount of any additional remuneration, such that the amount of any additional remuneration must not be disproportionate to the nature and extent of the additional duties and responsibilities performed or undertaken by the Trustee. In our view, if the second basis of calculation were, in its strict application, to result in the Trustee's receiving an amount by way of additional remuneration that was disproportionate to the duties and responsibilities performed or undertaken, such amount would offend the 'commensurate' requirement provided for in clause 18.02. In our view, the Trustee would not be entitled to demand or receive from the Company (or the relevant Controller or Liquidator) such part of the additional remuneration that was not commensurate with the additional duties and responsibilities performed or undertaken. Further, as to the second basis, the words '(if any)' in clause 18.02 have the effect that any amount determined pursuant to a 'scale of commission' is to be reduced by the amount of the recurrent fee payable to the Trustee under clause 18.01. The Position Paper provides that the annual fee payable to Trust Co under clause 18.01 is \$85,620.00 (excluding GST).
9. We now address the operation of clause 18.02 in the present circumstances. We understand that there is, at present, no agreement in place between Trust Co and Banksia regarding the amount of additional remuneration for the additional tasks undertaken by Trust Co, but that Trust Co has submitted a proposal (contained in the Position Paper) for consideration by the Receivers.

10. It would seem that the relevant persons to negotiate any agreement with Trust Co would be the Receivers (in their capacity as 'Controller' of Banksia). However, the extent to which the directors of Banksia should be involved or consulted in any such negotiation is a matter that we suggest consideration be given by our instructing solicitors.
11. In the absence of any agreement between Trust Co and Banksia, the question for consideration is whether the second basis has any operative effect. As observed, the amount of any additional consideration under the second basis is to be calculated '*in accordance with the scale of commission for the time being lawfully chargeable by trustee companies in Victoria on any corpus sum actually received by the Trustee..*'
12. The first issue for consideration is the meaning to be given to the words '*for the time being*'. We consider that these words are to be given an ambulatory meaning, and that the relevant 'time' is when the Trustee is seeking to be paid additional remuneration and not the date that the Trust Deed was entered into.
13. As we understand the position, following the coming into effect of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009 (Cth)*, there is no scale of commission for Victorian trustee companies other than the scale of commission applicable to State Trustees Ltd. We have been briefed with a copy of the Victorian Government Gazette dated 23 August 2012. That document contains a scale of fees and charges applicable to State Trustees Ltd for, among other things, trust administration. That scale provides for a capital commission of 5.5% on the gross value of any assets of the trust and an income commission of 6.6% of the gross trust income received. That is not an applicable scale for present purposes. In our view, it applies to a trust where there are assets (or funds under management) which are being invested and where income is being derived by the trust from the investment

of those assets. The trust in respect of debenture holders does not have funds or assets under management which are invested on behalf of the debenture holders. An issue of debentures under Chapter 2L of the Act involves a series of individual lenders each advancing an amount by way of loan to the debenture issuer (as borrower) with each lender receiving individually from the debenture issuer a "debenture" (recording the terms upon which the loan is to be repaid). The individual lenders are not advancing amounts by way of capital investment to an investment manager or trustee which are pooled and, then, invested on their behalf. In the present case, if all the loans had been repaid (with interest) to the debenture holders in the absence of any default, Trust Co would only receive by way of fees the annual fee under the trust deed for undertaking its supervisory role. No percentage commission would have been chargeable on the loan amount repaid to the debenture holder.

14. Further, there is no scale of commission in the State Trustees' scale of fees that would apply to "any corpus sum actually received by the Trustee" (as those words appear in clause 18.02) in circumstances where there has a default under the Trust Deed. We note that, in the Position Paper, Trust Co states that: 'At the time of execution of the Trust Deed this commission rate was up to 5.5% of any sum received by the Trustee through the realisation of assets through the enforcement of the Trust Deed.' Whether or not this is reference to an historical scale of commission that applied to trustee companies in Victoria in December 2012, it seems to indicate that Trust Co has interpreted the words "any corpus sum actually received by the Trustee" to mean any sum received by the Trustee through the realisation of assets through the enforcement of the Trust Deed. We have asked our instructing solicitors to confirm whether, in fact, there was an applicable scale of commission in operation in 1994 that applied to

Victorian trustee companies in respect of the performance of debenture trustee duties and responsibilities.

15. In the absence of an applicable scale of commission being in operation at the time Trust Co has requested additional remuneration, our view is that the second basis of determining or calculating additional remuneration in clause 18.02 is making reference to a standard which has no relevant content or operation. Accordingly, in the absence of an agreement reached between Trust Co and the Receivers regarding additional remuneration, it is our view that Trust Co does not have an entitlement under the Trust Deed to claim amounts by way of additional remuneration.
16. Accordingly, we answer the question in paragraph 6(a) above 'No' and 6(b) 'Does not arise'.
17. As to matter in paragraph 6(c) above, we consider that the commensurate requirement in the opening words of clause 18.02 would oblige the Receivers (and the directors if relevantly involved in the negotiations) to make an assessment of the nature and extent of any additional duties and responsibilities.
18. In this regard, we consider that the decision of Waddell CJ in Eq in **Re Trust Company of Australia Ltd. and Barclays Commercial Property Trust** (Supreme Court of New South Wales, 19 March 1993, unreported) (**Barclays Property Trust**) provides some assistance as to the exercise to be undertaken in assessing the nature and extent of any additional duties and responsibilities in the context of a claim for additional remuneration. In that case, Trust Company of Australia Limited (**Trust Company of Australia**) was the trustee of an unlisted property trust known as 'Barclays Commercial Property Trust' (formerly the Australia Wide Property Trust). Trust Company of Australia had made an application to the New South Wales Supreme Court for additional remuneration in respect of additional work duties it

performed in the period from August 1990 to December 1992. Trust Company's position in that case was that it had been called upon during that period to carry out duties which were 'very much in excess of those ordinarily involved in acting as trustee of a property trust and that the remuneration provided by the Trust Deed [was] inadequate.'

19. The additional work undertaken by Trust Company of Australia Limited during that period is described in the judgment of Waddell CJ in Eq. The additional work included carrying out all the duties of a manager for a two month period and undertaking work in relation to the restructuring of the trust and making all the arrangements necessary to obtain a listing of the trust on stock exchanges. Trust Company of Australia sought to be paid for the additional work it undertook during the period from August 1990 to December 1992 by reference to an hourly rate. The hourly rate adopted by Trust Company of Australia produced an amount of \$134,533.00 for the additional work. Trust Co then discounted that amount to remove the profit component of the hourly rate. The amount sought by Trust Company of Australia for the additional duties performed was \$90,000.00 which represented the cost to Trust Company of Australia of the additional work without any profit margin. The Court considered that it was appropriate that Trust Company of Australia be paid this amount for the additional work performed.
20. In this regard, we understand that Trust Co charged an hourly rate for the additional work it had undertaken prior to the appointment of the Receivers. In its Position Paper, Trust Co proposes that it be paid the amount of \$4.23 million for the additional duties and responsibilities performed, being 1% of the distributions made to debenture holders (less the amount of its annual fee -- listed as being \$90,000 on the fee calculation page of the Position Paper).

21. The Position Paper sets out "Reference Points" in respect of the calculation of the fee for the additional work. The first reference point is the fee charged by responsible entities and fund managers of "distressed entities/funds" where, on average, the fee charged was 1.42% per annum (excluding GST) on the gross value of the assets. It is not apparent to us why the commission approach adopted by responsible entities and fund managers to managed investment schemes and managed funds is a relevant reference point in determining the amount of additional remuneration payable to a debenture trustee for undertaking additional work in seeking to recover the loan amounts owed to the individual debenture holders. In saying this, we have taken into account, for present purposes, the following factors:

- (a) the requirement under clause 18.02 that the additional remuneration be commensurate with the additional duties and responsibilities performed;
- (b) the fact that, if the individual loans had been repaid (with interest) in the usual course by the debenture issuer, in the absence of any default, Trust Co would not have been entitled to charge a percentage commission on the repaid loans (which is to be contrasted with a managed fund or investment trust where a percentage capital commission is payable on the funds or assets under management);
- (c) the work undertaken by the Receivers.

22. The second reference point in the Position Paper is Trust Co's own schedule of fees for large personal estates where a percentage commission is payable on the gross value of assets of the estate and a percentage commission on the income earned in the estate. Again, it is not apparent to us why that schedule of fees is necessarily relevant in determining the amount of additional remuneration to Trust Co in the present circumstances in its capacity as a debenture trustee under Chapter 2L of the

Act. The observations made by us in paragraph 21(a) to (c) apply equally to this second reference point. Further, we note from our instructions that the Act (as amended by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth) provides that a licensed trustee company must ensure that an up-to-date schedule of the fees that it generally charges for the provision of 'traditional trustee company services' (which includes trustee services for estates) is published at all times on its website (s 601TAA). We note that the definition of 'traditional trustee company services' does not include services provided by a debenture trustee (s 601RAC(3)).

23. The third reference point in the Position Paper refers to other examples where clause 18.02 has been invoked. As to those other examples (which the Position Paper states involves debenture holders) we are not aware of the particular circumstances of those examples and so are not able to make any meaningful observation about them.
24. We refer to paragraph 6(d) above. In light of our advice, we do not think such advice should be sought. Of course, it is open to either party to approach the court on an Originating Motion to seek an authoritative interpretation of the Trust Deed. We point out, however, that the Supreme Court has inherent jurisdiction to hear and determine an application by a trustee for payment of additional remuneration for additional work undertaken (see the Barclays Property Trust case). In the absence of agreement being reached between Trust Co and the Receivers regarding the amount of additional remuneration, the making of such an application to the Court is an option.

Dated: 8 July 2013

96 Santamaria

J.G. Santamaria

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G.J. Ahern

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