

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-27"

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-27**" now produced and shown to Joseph David Hayes at the time of swearing his affidavit on 16 December 2015.



Exhibit "JH-27"

Supplementary Archibald Advice dated

21 November 2013

BANKSIA SECURITIES LTD (IN RECEIVERSHIP)

THE TRUST COMPANY (NOMINEES) LIMITED

CLAIM FOR ADDITIONAL REMUNERATION

SUPPLEMENTARY JOINT MEMORANDUM OF ADVICE

1. On 7 October 2013, we provided a Joint Memorandum of Advice (**Joint Memorandum**) to our instructing solicitors regarding the claim by The Trust Company (Nominees) Limited (**Trust Co**) for additional remuneration in respect of the receiverships of both Banksia Securities Limited (in receivership) (**Banksia**) and Cherry Fund Limited (**Cherry Fund**). This claim for additional remuneration claim has been made on McGrathNicol & Partners (**Receivers**) in their capacity as the receivers of both Banksia and Cherry Fund. Our instructing solicitors act on behalf of the Receivers. We understand that a copy of our Joint Memorandum of Advice has been provided by the Receivers to Trust Co.
2. We are instructed that following the receipt of our Joint Memorandum, Trust Co has asked the Receivers whether, in preparing the Joint Memorandum, we considered section 61(2) of the *Trustee Companies Act 1984* (Vic) (being one of the transitional provisions inserted into that Act by the *Trustee Companies Legislation Amendment Act 2010* (Vic)). We are further instructed that Trust Co has indicated to the Receivers that it (Trust Co) has received (its own) advice to the effect that by virtue of section 61(2), the scale of commission contained in section 21(1) of the *Trustee Companies Act 1984* prior to the repeal of section 21(1) in May 2010 continues to apply for the purposes of clause 18.02 of the Banksia Trust Deed.
3. On the basis of this advice, we understand that Trust Co has said to the Receivers that in determining the amount of any additional remuneration for the purposes of clause

18.02, more weight should be given to the scale of commission that was contained in section 21(1) prior to its repeal than was reflected in our Joint Memorandum. In the Joint Memorandum, we expressed the opinion that the scale of commission that was in effect up to May 2010 (being the scale set out in section 21(1)) was '*a relevant matter that can be taken into account by the Receivers in seeking to negotiate an amount of additional remuneration with Trust Co.*' (see paragraph 11; see also paragraph 48). This opinion was expressed on the basis that the scale of commission in section 21(1) was repealed as and from 11 May 2010 for all Victorian trustee companies except State Trustees Limited.

4. In contending that the scale of commission contained in section 21(1) prior to its repeal continues to apply for the purposes of clause 18.02, Trust Co is not maintaining, as we understand its position, that it would automatically be entitled to charge a fee for additional work at the rate of 5.5% (being the maximum rate that was set out in section 21(1)). We also note that Trust Co's position regarding the continued operation of the 'section 21(1)' scale of commission does seem to be different from the position it adopted in its revised fee position paper (described in paragraph 20(a) of the Joint Memorandum as the 'Second Position Paper'). As we noted in paragraph 26(d) of the Joint Memorandum, in the Second Position Paper Trust Co stated that it had been advised by Senior Counsel that '*whilst the relevant charging provision of the Act has been repealed, the Trustee could turn to its published rate as a suitable scale comparison for commission rates that could be applied.*'
5. In our opinion, section 61(2) of the *Trustee Companies Act* 1984 does not apply in the present circumstances. As such, the scale of commission that was contained in section 21(1) did not continue post May 2010 to be an applicable statutory scale of

commission for the purposes of clause 18.02 of the Banksia Trust Deed. What follows in this memorandum are our reasons for holding this opinion. As to the relevance of the scale of commission in section 21(1) that was in effect up to May 2010, we hold to the view expressed in the Joint Memorandum that this previous scale of commission is a relevant matter that can be taken into account by the Receivers in seeking to negotiate with Trust Co an amount of additional remuneration.

6. As noted above, section 61(2) is a transitional provision. It was inserted into the *Trustee Companies Act* by the *Trustee Companies Legislation Amendment Act 2010* together with other transitional provisions (being those set out in sections 61(1), 61(3) and 61(4)). Each of the transitional provisions uses different language as each is directed towards addressing a particular transitional concept. The transitional concept to which section 61(2) is directed is the continuance of any entitlement to fees or commissions that existed under the *Trustee Companies Act* prior to the commencement (in May 2010) of the *Trustee Companies Legislation Amendment Act*.

7. Section 61(2) is in the following terms:

‘Despite the commencement of the **Trustee Companies Legislation Amendment Act 2010**, any entitlement of a trustee company to fees or commissions that existed under this Act immediately before that commencement continue to exist and may be dealt with as if this Act, as in force before that commencement, continued to apply.’ [Emphasis added]

8. As the text of this section makes plain, the intention of section 61(2) is that any ‘entitlement’ of a trustee company to fees or commissions that existed under the *Trustee Companies Act* prior to the commencement of the *Trustee Companies Legislation Amendment Act* shall continue to exist and that any such entitlement may be dealt with as if the provisions in the *Trustee Companies Act* relating to that

entitlement (which had been repealed by the *Trustee Companies Legislation Amendment Act*) continued to apply.

9. We have underlined in the above text of section 61(2) what we consider to be the key operative words of that section for present purposes. What is clear from those underlined words is that the entitlement to fees or commissions, to which section 61(2) is directed, is any entitlement that existed 'under' the *Trustee Companies Act* prior to the commencement of the *Trustee Companies Legislation Amendment Act*. It would seem therefore that section 61(2) is addressing any entitlement to fees or commissions that may have existed under Part IV (headed 'Commissions and Charges') of the *Trustee Companies Act* prior to the repeal of Part IV in May 2010 by the *Trustee Companies Legislation Amendment Act*. As noted in the Joint Memorandum, Part IV included section 21(1). It is the scale of commission that was contained in section 21(1) prior to the repeal of that section in May 2010 that Trust Co is contending continues to exist for the purposes of clause 18.02 of the Banksia Trust Deed.
10. Accordingly, the question for present purposes is whether by reason of the terms of clause 18.02 of the Banksia Trust Deed, Trust Co had any relevant 'entitlement' to fees or commissions 'under' section 21(1) of the *Trustee Companies Act* prior to the commencement of the *Trustee Companies Legislation Amendment Act* in May 2010, under which amendment Act section 21(1) was repealed as and from 11 May 2010.
11. In order to address this question, the terms of section 21(1) need to be considered. Whilst the text of that section is set out in paragraph 33 of our Joint Memorandum, we set out as follows the terms of that section for the sake of convenience:

'In respect of *an estate committed* (whether before or after the commencement of this section) *to the administration or management of a trustee company* as executor, administrator, trustee or as sole guarantor or surety or as guardian of any minor in any other capacity, *the trustee company shall be entitled to receive out of the estate*, in addition to all moneys properly expended by the trustee company and chargeable against the estate, *a commission* to be fixed from time to time by the directors of the trust company but not in any case exceeding-

- (a) \$5.50 for every \$100 of the gross value of the estate; and
- (b) \$6.60 for every \$100 of income received by the trust company on account of the estate.

(Emphasis added).

12. A trustee company is 'entitled' (and only entitled) to a commission 'under' section 21(1) in respect of '*an estate committed (whether before or after the commencement of this section) to the administration or management*' of that trustee company. Only entitlements in respect of such of an estate committed to the administration or management of a trustee company that existed prior to 11 May 2010 are preserved and continued under section 61(2) of the *Trustee Companies Act*.
13. In the Joint Memorandum, we expressed the opinion (to which we hold) that:
- (a) absent the potential operation of clause 18.02, it was not readily apparent to us how the terms of section 21(1) could, on their face, be read as applying to amounts received by '*the Trustee through the realisation of assets through the enforcement of the Trust Deed.*' (see paragraph 35); and
 - (b) it would be straining the language of section 21 to construe the words '*an estate committed (whether before or after the commencement of this section) to the administration or management of a trustee company*' to encompass proceeds received by a debenture trustee from enforcing a charge against the assets of the debenture issuer where those proceeds, upon receipt, are then

distributed to the debenture holders in repayment (or part repayment) of the individual loans made by them to the debenture issuer (see paragraph 37).

14. In essence, the opinion expressed in the Joint Memorandum was that it seemed to us that the terms of section 21(1) did not apply, on their face, to the proceeds received by Trust Co as a result of any enforcement action taken. We said however in the Joint Memorandum that while the terms of a statutory scale of commission may not operate on their face to a given set of circumstances, it would be open to contracting parties to agree that the terms of such a statutory scale are to apply in any event to a particular set of circumstances set out in their contract (see paragraph 39). As to the operation of clause 18.02 in this regard, we expressed the opinion in the Joint Memorandum (again to which we hold) that:

- (a) in the absence of agreement on the question of the amount of any additional remuneration, the apparent intention of clause 18.02 was to apply the statutory scale of commission applicable to new estates 'at the time' the demand for additional remuneration was made ; and
- (b) on this basis, the applicable scale of commission (up to May 2010) would have been the scale of commission contained in section 21(1),

(see paragraphs 40 to 48 and in particular paragraphs 42 and 45).


15. In essence, the opinion we expressed in the Joint Memorandum on this issue was that the apparent intention of clause 18.02 was that in the event of enforcement action being undertaken and a demand for additional remuneration being made by Trust Co, if no agreement could be reached on the question of the amount of additional remuneration, clause 18.02 sought to apply the applicable statutory scale (if there be

one in force) in respect of new estates at the time the demand for additional remuneration was made.

16. In the present circumstances, the question of additional remuneration arose after 25 October 2012 (being the appointment date of the Receivers). At that time, there was no applicable statutory scale in force as section 21(1) had been repealed.
17. Hypothetically speaking, had a demand for additional remuneration been made by Trust Co under clause 18.02 prior to 11 May 2010, any entitlement to additional remuneration that was determined by reference to the applicable statutory scale would have arisen by reason of the contractual agreement between Banksia and Trust Co (as reflected in clause 18.02) to apply the applicable statutory scale to amounts received by Trust Co from the enforcement of the charge and not by reason of an estate being committed to the administration or management of Trust Co for the purposes of section 21(1).
18. As such, any entitlement to additional remuneration that was referenced to the applicable statutory scale would have been a contractual entitlement 'under' clause 18.02 and not a statutory entitlement 'under' section 21(1) in respect of an estate committed to the administration or management of Trust Co. Accordingly, even if section 21(1) had not been repealed and remained in force today, any entitlement to additional remuneration (arising from a demand or claim being made under clause 18.02) that was referenced or determined in accordance with the applicable statutory scale would be not be an entitlement to fees or commissions 'under' section 21(1) in respect of an estate committed to the administration or management of Trust Co' but rather an entitlement under clause 18.02 of the Banksia Trust Deed.

19. As a relevant statutory entitlement on the part of Trust Co under section 21 could not arise in our view from the operation of clause 18.02 of the Banksia Trust Deed, the transitional provision in section 61(2) does not apply. Accordingly, in our opinion, the statutory scale that was contained in section 21(1) as at 10 May 2010 does not continue to apply (in any lawful operative sense) for the purposes of clause 18.02. While we did not expressly refer to section 61(2) in our Joint Memorandum, the opinion we have expressed in this memorandum regarding section 61(2) is consistent with and a logical extension of the opinions we expressed in the Joint Memorandum regarding section 21(1).
20. For the sake of completeness, we also note that even if the position was (which we do not consider to be the case) that prior to 11 May 2010 the receipt of any proceeds by Trust Co following any enforcement action constituted an 'estate' for the purposes of section 21(1) such that an entitlement to fees and commissions arose under section 21(1), there was no relevant estate as at 10 May 2010 (as no enforcement action had been taken) and accordingly, there was no relevant entitlement that was preserved and continued by reason of section 61(2). In our view, the 'entitlement' to fees or commissions to which section 21(1) referred was an actual and present entitlement in respect of an estate actually committed to the administration or management of a trustee company and not any future entitlement that might arise in the event of any future estate that might be committed to the administration or management of a trustee company. Were the word 'entitlement' in section 21(1) to encompass future entitlements that might arise, then by reason of the operation of section 61(2) the repeal of section 21 would have rendered redundant and the transfer of the regulation of fees and commissions from the States and Territories to the Commonwealth of no effect (as to which transfer see paragraphs 28 to 31 of the Joint Memorandum).

21. Further, we also consider that prior to the appointment of the Receivers on 25 October 2012, Trust Co did not have any relevant entitlement to additional remuneration 'under' clause 18.02 of the Banksia Trust Deed. The terms of clause 18.02 make provision for a potential future entitlement to additional remuneration. However, for that potential future entitlement to mature into any actual entitlement, enforcement action must first occur followed by a claim or demand by Trust Co for additional remuneration in respect of any additional duties and responsibilities performed or undertaken by it in consequence of enforcing the Banksia Trust Deed.



We so advise.

Dated: 21 November 2013

A.C. Archibald

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G.J. Ahern

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