

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-54"

Date sworn: 16 December 2015
Filed on behalf of: The Plaintiffs
Prepared by:
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This is the exhibit marked "JH-54" 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-54"

CFL February Fee Proposal

5 February 2013

Cherry Fund Limited
(receivers and managers appointed)
C/- the Receivers and Managers
Level 31, 60 Margaret Street
SYDNEY NSW 2000

Dear Messrs McGrath, Hayes, Caddy and Kirman

The First Ranking Debenture Stock Trust Deed between Cherry Fund Limited ("Cherry Fund") and The Trust Company (Nominees) Limited as Trustee of Cherry Fund ("Trustee") dated on or about 26 November 2003 ("Cherry Fund Trust Deed")

Additional Remuneration Entitlement

We refer to:

- the Cherry Fund Trust Deed;
- the appointment of McGrathNicol as receivers and managers of Cherry Fund (Receivers) on 30 October 2012;
- the Joint Memorandum of Advice of Alan C. Archibald QC and Gregory J. Ahern dated 7 October 2013 prepared at the request of the Receivers, in their capacities as receivers and managers of Banksia Securities Limited (Banksia) and Cherry Fund, together with their Supplementary Joint Memorandum of Advice dated 21 November 2013 (together, **Counsel's Opinion**); and
- other discussions.

We set out below an explanation of our additional remuneration claim as allowed for by the Trust Deed with respect to work that we have undertaken in relation to the Cherry Fund receiverships in the period up to and including 31 December 2013 (the Period).

1. BACKGROUND

- 1.1 In October 2012, the Trustee appointed McGrathNicol to conduct an urgent review of Cherry Fund's forecast cashflows, following the appointment of receivers to Banksia Securities Limited. On 30 October 2012, the Trustee appointed McGrathNicol as receivers and managers of Cherry Fund.
- 1.2 Since the appointment of Receivers, the Trustee has overseen the realisation of Cherry Funds' assets. The Trustee has approved four distributions paid to Cherry Fund members totalling 100c in the dollar. Those distributions were as follows:

- (a) 32c/\$ in May 2013;
 - (b) 20c/\$ in August 2013;
 - (c) 10c/\$ in December 2013; and
 - (d) 38c/\$ in January 2014.
- 1.3 In approving each distribution, the Trustee assessed the financial position of Cherry Fund including the forecast cashflow prepared by the Receivers, to determine an appropriate distribution. This process took into account a careful analysis of likely receipts and costs of the company, in the context of a desire to maximise the returns to debenture holders as quickly as possible.
- 1.4 A significant amount of Cherry Fund's assets were linked to the Banksia Mortgage Fund. The Trustee oversaw and approved the process of extricating value for Cherry Fund's assets connected with BMF during the second half of 2013. This process ultimately resulted in the fourth and largest distribution to Cherry Fund debenture holders.
- 1.5 During the Period, the Trustee caused the publication of 7 circulars and one report to debenture holders of Cherry Fund. These reports were assessed and approved by the Trustee. The Trustee provided strategic input into these to enhance the value of them to the debenture holders.
- 1.6 On 31 October 2012, Cherry Fund published special purpose financial reports for the half year ended 31 December 2012. The Trustee approved the execution of these accounts and provided significant input into the financial and other disclosures therein.
- 1.7 The Trustee attended Cherry Fund debenture holder meetings in December 2012 in Kyabram, Shepparton and Ballarat. The Trustee subsequently attended two further meetings in Kyabram with debenture holders. The Trustee also participated in, and contributed to, Debenture Holder Committee meetings that were conducted in respect of both the Banksia and Cherry Fund receiverships.
- 1.8 The Trustee briefed ASIC about Cherry Fund throughout the Period, including three briefings with Commissioner John Price.
- 1.9 During the Period, the Trustee was represented by senior staff, experienced in administering external administrations of debenture issuing finance companies. Key staff associated with the discharge of the Trustee's duties included:
- (a) David Grbin, Group Executive General Manager, Corporate Clients;
 - (b) Other members of the Board of the Trustee – John Atkin, then Chief Executive Officer, The Trust Company and Andrew Cannane, General Manager Corporate Clients;
 - (c) Rupert Smoker – Head of Corporate and Debt Capital Markets Trustee Services;

- (d) Alexander Pampel – Head of Projects, Debt Capital Markets; and
- (e) Tatiana Guskova – Manager, Debt Capital Markets.

2. AGREEMENT FOR ADDITIONAL REMUNERATION

2.1 This letter

Our intention is to reach an agreed position with Cherry Fund in relation to the quantum of our additional remuneration payable to us under clause 18.1 of the Cherry Fund Trust Deed.

2.2 Additional Remuneration Agreement

Enclosed is an unexecuted agreement between The Trust Company (Nominees) Limited, in its capacity as trustee under the Cherry Fund Trust Deed, and Cherry Fund, in respect of additional remuneration payable to us in respect of the Period and thereafter (Additional Remuneration Agreement).

2.3 Amount Sought

The Trustee seeks additional remuneration, taking into account the following factors:

- the nature of the tasks performed by the Trustee summarised in paragraphs 1.2 – 1.8 above;
- during the Period, the Trustee did not use time-based costs for its staff as the various tasks were performed; and
- the Trustee has drawn on its experience in similar receiverships in developing what it considers an appropriate remuneration proposal.

2.4 The Trustee considers that an appropriate remuneration amount for the Period is \$50,000 (exclusive of GST).

2.5 The Trustee proposes that for the period from 1 January 2014 until the end of the Cherry Fund receivership, the Trustee's remuneration is set at \$3,000 per month (exclusive of GST).

3. CONCLUSION

As detailed above, we claim additional remuneration pursuant to clause 18.1 of the Cherry Fund Trust Deed. We request that the Receivers consider the terms of this letter and indicate their agreement by executing the Additional Remuneration Agreement, enclosed with this letter, within 7 days of the date of this letter.

Yours sincerely



Rupert Smoker
Head of Corporate and Debt Capital Markets Trustee Services

Cherry Fund Limited
(both receivers and managers appointed)
C/- the Receivers and Managers
Level 31, 60 Margaret Street
SYDNEY NSW 2000

Attention: A McGrath, J Hayes, M Caddy and R Kirman, in their capacity as receivers and managers of Cherry Fund Limited (receivers and managers appointed) (the Receivers)

Additional Remuneration Agreement

We refer to the trust Deed for First Ranking Debenture Stock dated 26 November 2003 between Cherry Fund Limited (**Cherry**) and The Trust Company (Nominees) Limited (formerly known as Permanent Nominees (Aust.) Limited) (**Trustee**) (as supplemented from time to time) (**Cherry Trust Deed**).

Pursuant to clause 18.1 of the Cherry Trust Deed, we ask Cherry to agree to pay to the Trustee the sum of \$50,000 (excluding GST) on account of their additional remuneration in consequence of enforcing the Cherry Trust Deed for the period from 25 October 2012 to 31 December 2013.

We note that payment of this sum will occur immediately after this agreement is executed.

Further, and pursuant to clause 18.1 of the Cherry Trust Deed, we ask Cherry to agree to pay to the Trustee for the period of 1 January 2014 onwards, a fixed monthly fee of \$3,000 (excluding GST) per month. This agreement is subject to change in agreement between the Trustee and in consultation with the receivers and managers from time to time.

Yours faithfully

(signature over page)

EXECUTED and DELIVERED for and on behalf of **The Trust Company (Nominees) Limited ACN 000 154 441**, in its capacity as Trustee under the Trust Deed (as defined in this document), by its attorneys under power of attorney dated 30 July 2010, who state that they have received no notice of revocation of the power of attorney:

Signature of Group A authorised person

Signature of Group A / B authorised person

Name of Group A authorised person

Name of Group A / B authorised person

Position of Group A authorised person

Position of Group A / B authorised person

Signature of witness

Signature of witness

Name of witness

Name of witness

WE AGREE to the terms of the enclosed letter.

The Receivers have power to execute this agreement on behalf of Cherry. Nothing contained in this document gives rise to any adoption of, or acceptance of any personal liability on the part of the Receivers in connection with, this agreement.

**EXECUTED by CHERRY FUND LIMITED
(RECEIVERS AND MANAGERS
APPOINTED) BY ITS JOINT AND
SEVERAL RECEIVER AND MANAGER
FOR AND ON BEHALF OF THE JOINT
AND SEVERAL RECEIVERS AND
MANAGERS:**

Signature of receiver and manager

Name

Signature of witness

Name of witness

