

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-55"

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
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Ref: 03 3000 9288
Attention: Ross McClymont
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "**JH-55**" now produced and shown to Joseph David Hayes at the time of swearing his affidavit on 16 December 2015.



Exhibit "JH-55"

Letter from Clayton Utz to Ashurst
dated 18 September 2015

By Email

18 September 2015

Mr Michael Sloan/Mr Ross McClymont
Partners
Ashurst
Level 26, 181 William Street
MELBOURNE VIC 3000

michael.sloan@ashurst.com
ross.mcclymont@ashurst.com

Dear Michael and Ross

**The Trust Company Nominees Ltd (formerly known as Permanent Nominees (Aust) Ltd) (Trust Co.) and Banksia Securities Limited (Receivers and Managers Appointed) (In Liquidation) (Banksia)
Additional Remuneration Entitlement of the Trustee**

As you are aware, we act for Trust Co. the trustee for Banksia and Cherry Fund Limited (Receivers and Managers Appointed) (CFL). We refer to:

- (a) the Trust Deed for First Ranking Debenture Stock dated 12 December 1994 between Banksia and Trust Co. as amended from time to time (**Banksia Trust Deed**);
- (b) the appointment of Anthony McGrath, Joseph Hayes, Matthew Caddy and Rob Kirman of McGrathNicol (**Receivers**) as receivers and managers of Banksia on 25 October 2012;
- (c) the Joint Memorandum of Advice of Joseph G Santamaria SC and Gregory J Ahern dated 8 July 2013 and the Joint Memorandum of Advice of Alan C Archibald QC and Gregory J Ahern dated 7 October 2013, which opinions were prepared at the request of the Receivers together with the Supplementary Joint Memorandum of Advice of Alan C Archibald QC and Gregory J Ahern dated 21 November 2013 (**Counsel's Opinions**);
- (d) Trust Co.'s letter of request for additional remuneration to the Receivers dated 9 December 2013;
- (e) the Agreement for Additional Remuneration signed by Trust Co. and the Receivers dated 10 December 2013;
- (f) Trust Co.'s letters to the Receivers dated 9 January 2014, 7 February 2014 and 29 April 2014, in relation to Trust Co.'s claim for payment of its additional remuneration entitlement, all of which contained a detailed explanation of Trust Co.'s entitlement to be paid post appointment additional remuneration under and in accordance with the terms of the Banksia Trust Deed, with specific reference to Counsel's Opinions.

1. **Background**

- 1.1 Since December 2013, Trust Co. has, promulgated its view that as trustee, it is open to it and Banksia and Cherry Fund to agree on payment of Trust Co.'s post appointment additional

remuneration to be paid to it for services provided as trustee, under the relevant provisions of the trust deeds. This position is supported by Counsels' Opinions obtained by your client.

- 1.2 On 10 December 2013, the Receivers (as Controllers appointed by Trust Co. under the Banksia Trust Deed), agreed to the amount of Trust Co.'s post appointment additional remuneration pursuant to clause 18.02 of the Banksia Trust Deed and executed the Amended Additional Remuneration Agreement (**Banksia Remuneration Agreement**) on behalf of Banksia. The Banksia Remuneration Agreement agreed to payment to Trust Co. of additional remuneration of \$3,050,812 (excluding GST) for the period from 25 October 2012 to 31 August 2013.
- 1.3 Notwithstanding the terms of the Trust Deed, the Receivers formed the view that they were required to consult with the Banksia Debenture Holder Committee as to the remuneration owed to Trust Co., being a committee formed by the Receivers to assist them in matters of the receivership.
- 1.4 Shortly after the execution of the Banksia Remuneration Agreement and following the Receivers' consultation with the Banksia Debenture Holder Committee, the Receivers advised Trust Co. that the Banksia Debenture Holder Committee refused to "approve" the payment by Banksia to Trust Co. of Trust Co.'s additional remuneration in accordance with the Banksia Remuneration Agreement.
- 1.5 The Receivers then recommended to Trust Co. that it submit a revised proposal for payment of its additional remuneration with respect to Banksia.
- 1.6 On 20 December 2013, Trust Co. submitted to the Receivers a revised proposal for its additional remuneration under clause 18.02 of the Banksia Trust Deed, pursuant to which it offered to accept payment from Banksia of a compromised amount of \$3,115,221 (excluding GST) for the period from 25 October 2012 to 30 November 2013.
- 1.7 On 9 January 2014, Trust Co. updated the 20 December 2013 revised proposal and submitted to the Receivers that Banksia pay to Trust Co. the compromised sum of \$3,115,221 (excluding GST) for the period from 25 October 2012 to 30 November 2013.
- 1.8 Following consultation again by the Receivers with the Banksia Debenture Holder Committee, the Banksia Debenture Holder Committee advised the Receivers that it did not support Trust Co.'s revised proposal for payment by Banksia of the compromised sum of \$3,115,221 (excluding GST) for the period from 25 October 2012 to 30 November 2013 and further, that it was appropriate that any additional remuneration to be paid by Banksia to Trust Co., be approved by the court.
- 1.9 On 7 February 2014, Trust Co. proposed a further proposal to the Receivers and noted that as trustee, Trust Co. is entitled to the post enforcement additional remuneration by virtue of the terms of the Banksia Trust Deed. Trust Co. relied upon Counsels' Opinions obtained by the Receivers in seeking payment. In the spirit of achieving an agreed outcome, Trust Co. sought to address the concerns and feedback from the Banksia Debenture Holder Committee, without acknowledging that the Banksia Debenture Holder Committee had any powers to "approve" Trust Co.'s additional remuneration which is payable under the Banksia Trust Deed.
- 1.10 In the interests of reaching a resolution of the matter, Trust Co. advised the Receivers on 7 February 2014, that it would be prepared to accept payment from Banksia of a compromised sum of \$2,647,931 (excluding GST) for the period 25 October 2012 to 30 November 2013, being a discount of 15%, with fees capped at \$60,000 for December 2013 and from January 2014 onwards, any future monthly fees would be subject to a cap of \$30,000 per month (or

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the lesser of time base costs). This offer of 7 February 2014 was made by Trust Co. in the spirit of achieving an agreed outcome between Banksia and Trust Co. and Trust Co. reserved all its rights to claim its full fee entitlement if Banksia did not agree to pay the compromised sum.

- 1.11 The Receivers forwarded Trust Co.'s revised compromise proposal of \$2,647,931 (excluding GST) to the Banksia Debenture Holder Committee. Despite strong recommendations by the Receivers that it be accepted, the Banksia Debenture Holder Committee advised the Receivers that Trust Co.'s revised proposal was "not accepted".
 - 1.12 On 29 April 2014, at the request of the Receivers, Trust Co. submitted to the Receivers a final additional remuneration proposal. The proposal set out a detailed and complete explanation of Trust Co.'s entitlement to the full amount of additional remuneration payable under and in accordance with the Banksia Trust Deed, with specific reference to Counsels' Opinions. Trust Co. also noted that Banksia was obliged under the Banksia Trust Deed to pay on demand the additional remuneration claimed.
 - 1.13 The 29 April 2014 proposal claimed payment under the Banksia Trust Deed of the full amount of additional remuneration in the sum of \$3,839,617 (excluding GST). However, in the interests of Banksia, Trust Co. would accept the terms of its proposal set out in the 7 February 2014 letter if payment be made without the expense of making a court application.
 - 1.14 On 1 May 2014, the Receivers again consulted with the Banksia Debenture Holder Committee. Subsequent to that meeting, the Receivers informed Trust Co. that the Banksia Debenture Holder Committee rejected Trust Co.'s compromised offer. The Banksia Debenture Holder Committee informed the Receivers they required directions be sought from the court.
2. **Demand for Payment and Offer**
- 2.1 As at the date of this letter, Trust Co.'s additional remuneration payable under the Trust Deed remains unpaid and no application has been made to the court for directions by the Receivers.
 - 2.2 Trust Co.'s position remains that it is not necessary for the Receivers to make such application in circumstances where the contractual terms of the Banksia Trust Deed provide a clear mechanism for payment by Banksia of Trust Co.'s post appointment additional remuneration to be paid to it as trustee for services it has performed and undertaken in consequence of having to enforce the Trust Deed. This position is supported and confirmed by Counsels' Opinions.
 - 2.3 The Banksia Trust Deed does not oblige Trust Co. to consult with any of the Banksia debenture holders, let alone a committee formed by the Receivers which has no statutory powers or contractual rights in respect of payment of Trust Co.'s additional remuneration under the Banksia Trust Deed.
 - 2.4 In saying this, as noted above, Trust Co. has on 2 occasions in December 2013 and in February 2014, offered to accept a compromise of its fees in an attempt to resolve this issue.
 - 2.5 Trust Co. has now formed the view that it is left with no option but to demand payment under the Banksia Trust Deed of Trust Co.'s additional remuneration agreed by Banksia on 10 December 2013 in the sum of \$3,050,812 (excluding GST).

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2.6 In the event that the payment of the additional remuneration referred to in paragraph 2.5 above is not received by close of business Wednesday, 23 September 2015 and Trust Co. is required to make application to the court, Trust Co. will seek payment by Banksia of the additional remuneration under the Banksia Trust Deed for the period up to February 2014 as follows:

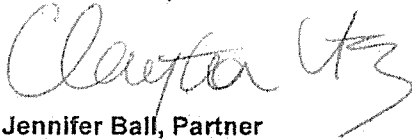
- (a) \$3,050,812 (excluding GST), for the period from 25 October 2012 to 31 August 2013; and
- (b) \$789,351 for the period from 1 September 2013 to 30 November 2013; and
- (c) the capped fee of \$60,000 for December 2013; and
- (d) the capped fee of \$30,000 a month for the months of January 2014 and February 2014,

making the total sum of additional remuneration of \$3,960,163 for the period of 25 October 2012 to February 2014, plus costs.

2.7 In the meantime, Trust Co. reserves all its rights to claim the full amount of its additional remuneration under the Banksia Trust Deed and reserves all of its rights to serve any other demands for payment of its additional remuneration in accordance with the Banksia Trust Deed.

We look forward to hearing from you.

Yours sincerely



Jennifer Ball, Partner
+61 2 9353 4214
jball@claytonutz.com

Enc:
Our ref 12818/80154803.002

Notice of Demand Under Trust Deed

TO: Banksia Securities Limited ABN 45 004 736 458 (Receivers and Managers appointed)
(in Liquidation)
c/- McGrathNicol
Level 31
60 Margaret Street
Sydney NSW 2000

WHEREAS:

- A. By the Trust Deed for First Ranking Debenture Stock dated 12 December 1994 as amended from time to time (**Trust Deed**) between Banksia Securities Limited (formerly North Central Securities Limited) ABN 45 004 736 458 (**BSL**) and The Trust Company (Nominees) Limited ABN 14 000 154 441 (formerly Permanent Nominees (Aust) Limited) (**Trust Co.**), Trust Co. agreed for consideration as expressly provided for in the Trust Deed to act as trustee of the Trust Deed upon and subject to the terms and conditions contained in the Trust Deed.
- B. BSL defaulted in its obligations pursuant to the Trust Deed and an event of default occurred on 25 October 2012.

PARTICULARS

On 25 October 2012, BSL's Board issued a written request to Trust Co. for it to appoint a Controller pursuant to the terms of the Trust Deed. That request constituted an event of default under the Trust Deed and resulted in the appointment by Trust Co. of Anthony Gregory McGrath, Joseph David Hayes, Matthew Wayne Caddy and Robert Michael Kirman (**Receivers**) as receivers and managers of BSL on 25 October 2012

- C. Subsequent to the occurrence of an Enforcement Date, Trust Co. sought payment from BSL of its post appointment additional remuneration incurred by or on behalf of Trust Co. as trustee of BSL pursuant to clause 18.02 of the Trust Deed for the period from 25 October 2012 to 31 August 2013.

PARTICULARS

Letter dated 9 December 2013.

- D. On 10 December 2013, BSL agreed to pay Trust Co., as trustee of BSL additional remuneration in the sum of \$3,050,812 (excluding GST) for the period from 25 October 2012 to 31 August 2013, commensurate with Trust Co.'s additional duties and responsibilities performed or undertaken by Trust Co. in consequence of enforcing the Trust Deed.

PARTICULARS

The Additional Remuneration Agreement dated 10 December 2013 signed by the Receivers of BSL.

TAKE NOTE THAT pursuant to clauses 18.01, 18.02, 18.03 and 18.04 of the Trust Deed, Trust Co. hereby demands immediate payment of the agreed additional remuneration in the sum of \$3,050,812 plus GST.

PLEASE NOTE that Trust Co. hereby reserves all its rights under the Trust Deed including the right to make further other demands.

Dated 18 September 2015.

Signed for and on behalf of The Trust Company (Nominees)
Ltd ABN 14 000 154 441

Jennifer Bell

By its Solicitor

Jennifer Bell

1 Bigh Street

Sydney NSW