

Principal Registrar &  
Chief Executive OfficerForm 40 (version 6)  
UCPR 35.1**IN THE SUPREME COURT OF NEW SOUTH WALES No. 69233 of 2020****DIVISION:** EQUITY**LIST:** CORPORATIONS**REGISTRY:** SYDNEY**IN THE MATTER OF: DOUBLE BAY PROPERTY MANAGEMENT PTY LTD (IN LIQUIDATION) ACN 124 733 008**

**Jonathan Philip Henry and Katherine Sozou in their capacity as joint and several liquidators of Double Bay Property Management Pty Ltd (In Liquidation) ACN 124 733 008**  
First Plaintiffs

**Double Bay Property Management Pty Ltd (In Liquidation) ACN 124 733 008**  
Second Plaintiff

**AFFIDAVIT**

Name	Jonathan Philip Henry
Address	Level 12, 20 Martin Place, Sydney NSW 2000
Occupation	Chartered Accountant and Registered Liquidator
Date	28 June 2021

I affirm:

1. I am a chartered accountant, registered liquidator and partner of McGrathNicol and one of the First Plaintiffs in these proceedings.
2. The following facts are within my own personal knowledge except as otherwise stated. Where matters are deposed to based on my information and belief, I have set out the basis of that information and belief and I believe those matters to be true.

Filed on behalf of	The Plaintiffs		
Prepared by	Courtney McDonald, Solicitor		
Law firm	HWL Ebsworth Lawyers		
Tel	+61 2 9334 8716	Fax	+61 2 8507 6582
Email	<a href="mailto:cmcdonald@hwle.com.au">cmcdonald@hwle.com.au</a>		
<b>Address for service</b>	HWL Ebsworth Lawyers, Level 14, Australia Square 264 - 278 George Street, Sydney NSW 2000		



Deponent

Doc ID 849770173/v1



Witness

3. I make this affidavit in support of an Interlocutory Process which seeks orders:
  - 3.1. approving the remuneration of the First Plaintiffs in our capacity as the receivers and managers of certain trust property (as set out below);
  - 3.2. that the remaining funds in the receivership and liquidation be distributed to priority creditors;
  - 3.3. discharging the First Plaintiffs as receivers and managers; and
  - 3.4. releasing the receivers and managers with respect to the receivership.
4. Now shown to me and marked "**Exhibit JPH-2**" (**JPH-2**) is a paginated bundle of documents to which I shall refer to in this affidavit by reference to page numbers. Where I refer in this affidavit to a page number that is a reference to the relevant page(s) in JPH-2 unless otherwise stated.
5. Now shown to me and marked "**Confidential Exhibit JPH-3**" (**JPH-3**) is a paginated bundle of documents to which I shall refer to in this affidavit by reference to page numbers and which I wish to keep confidential. The documents which I wish to keep confidential are concerned with the sale campaign and comprise expressions of interest and communications with potential purchasers which were subject to a confidentiality regime at the time (such that I do not consider that it would be appropriate to have them referred to in open Court).
6. I refer my previous affidavit affirmed 2 March 2020 (**First Affidavit**) together with Exhibit JPH-1 (**JPH-1**) tendered in these proceedings on 3 March 2020.

**Background**

7. As set out in my First Affidavit, Katherine Sozou (**Ms Sozou**) and I were appointed as the joint and several liquidators (**Liquidators**) of:
  - 7.1. Double Bay Property Management Pty Ltd (In Liquidation) ACN 124 733 008 (**DBPM**) on 5 February 2020; and
  - 7.2. Double Bay Property Group Pty Ltd (In Liquidation) ACN 157 680 352 (**DBPG**) on 21 February 2020.(I refer to DBPM and DBPG collectively as the **Companies**).



Deponent



Witness

8. Copies of current searches of the records maintained by the Australian Securities and Investments Commission (**ASIC**) in respect of each of the Companies dated 24 June 2021 is at **page 1** (DBPM) and **page 5** (DBPG).
9. On 3 March 2020, on the application of the Plaintiffs, Justice Gleeson made orders (**3 March Orders**) in these proceedings:
- 9.1. appointing Ms Sozou and me as the joint and several receivers and managers (**Receivers**), without security, of the property, assets and undertakings of the Property Management Unit Trust ABN 94 017 269 317 (formerly known as the LSBB (Property Management) Unit Trust ABN 94 017 269 317) (**Trust**), of which DBPM was the trustee; and
- 9.2. granting Ms Sozou and me (in our capacity as Receivers) all the powers that a receiver has in respect of the business and property of a company under section 420 of the *Corporations Act 2001* (Cth) (**Act**) (other than subsections 420(2)(s),(t), (u) and (w)) as if the reference in that section to "the corporation" were a reference to the Trust.
10. On 6 March 2020, Ms Sozou and I caused a Circular Report to Creditors to be issued to all creditors of the Companies which attached a copy of the 3 March Orders and informed creditors of our appointment as Receivers of the property of the Trust. A copy of that report (in the form addressed to Agentbox Pty Ltd, one of the creditors of DBPM) is at **pages 8 to 11**.

### **Realisation of Trust Assets**

#### *Business of the Trust*

11. As set out in my First Affidavit, following our appointment as liquidators of DBPM, Ms Sozou and I took steps to commence a process for the sale of the real estate business (**Business**) operated by the Companies in the eastern suburbs of Sydney. DBPG was in the business of performing property management and sales agency services and DBPM acted as a real estate property manager charging a fee to landlords of (mostly residential) real property for management of that property.



Deponent



Witness

- 12. The main asset of the Business was the property management agency agreements (together, the **PMA Agreements** and each, a **PMA Agreement**) that had been entered into by DBPM with various property owners (**Rent Roll**) which, as I explained in my First Affidavit, was an asset held by DBPM in its capacity as trustee of the Trust.
- 13. As set out in the First Affidavit:
  - 13.1. as at our appointment as Liquidators, the Rent Roll comprised some 130 plus PMA Agreements;
  - 13.2. as a result of the liquidation of DBPM, some of the counter-party property owners sought to terminate their respective PMA Agreements;
  - 13.3. as at the time of affirming my First Affidavit, McGrathNicol had received more than 30 notices of termination of PMA Agreements from property owners; and
  - 13.4. throughout the course of the liquidation, additional counter-party property owners sought to terminate their respective PMA Agreements.
- 14. For every PMA Agreement which was terminated, the value of the Business diminished and the potential return to creditors of DBPM was reduced.

*Campaign for the sale of the Business*

- 15. Following our appointment as Receivers, Ms Sozou and I took further steps to progress the sale of the Business. In light of the circumstances surrounding the COVID-19 pandemic which had arisen since our appointment as Receivers, the campaign for the sale of the Business was a difficult process. Notwithstanding this, Ms Sozou and I were able to secure a sale of the Business, as set out below.
- 16. As explained in paragraphs 32 to 34 of my First Affidavit, following our appointment as Liquidators (and then as Receivers), Ms Sozou and I took the following steps as part of a campaign for the sale of the Business:
  - 16.1. appointed Matt Ciallella (**Agent**) of MC Rent Roll Broking Pty Ltd, a specialist residential rent roll broker to act as agent on the sale of the Business;



Deponent



Witness

16.2. on advice from the Agent, commenced an expressions of interest sale campaign on 12 February 2020;

16.3. approved marketing materials prepared by the Agent, which included:

16.3.1. an advertisement which was published in the Australian Financial Review (**AFR**) on 12 February 2020 (**page 12**); and

16.3.2. an Information Memorandum (**IM**) for distribution to interested parties (**pages 13 to 34**) including to Natalie Regina Sassoon (**Natalie**), who was employed by DBPM in the role of 'Property Sales Representative' and who is (or was) the spouse of the director of DBPM, Albert Sassoon (**Albert**); and

16.4. retained HWL Ebsworth Lawyers (**HWLE**) to:

16.4.1. advise generally in relation to the liquidation of the Companies and the sale of the Business;

16.4.2. prepare a confidentiality and non-disclosure deed poll to be executed by interested parties in order to, among other things, receive a copy of the IM; and

16.4.3. prepare a contract for the sale of the Rent Roll.

17. Expressions of interest for the sale of the Business closed on 21 February 2020 and, as at that date:

17.1. twenty three (23) prospective parties had approached or registered their interest.

17.2. nine (9) prospective parties had signed the confidentiality deed poll and were provided with a copy of the IM;

17.3. four (4) formal expressions of interest (but not-binding offers) had been received.

18. At **pages 1 to 3** of Confidential Exhibit JPH-3 is a copy of an email from the Agent to me and my staff dated 24 February 2020 which details the four (4) expressions of interest received and referred to in paragraph 17.3 above (but in respect of which I have not referred to the parties' names so as to preserve confidentiality), namely:

.....

Deponent

.....

Witness

- 18.1. Party A (a real estate business), which made a non-binding offer with a price multiplier of \$3.00 for every dollar of the Rent Roll (leading to an indicative purchase price of \$1,179,000) and a retention period of three months;
  - 18.2. Party B (a property management company based in Adelaide, South Australia), which made a non-binding offer of a price multiplier of \$3.00 with a retention period of 4 months;
  - 18.3. Party C (an investment company) which made a non-binding offer of a price multiplier of \$2.50 with no retention period; and
  - 18.4. Party D (a Sydney-based property services company), which made a non-binding offer of a price multiplier of \$2.50 with a 12 month retention period.
19. A "retention period" in a rent roll transaction is a buffer period following settlement of the contract to protect the purchaser from a decline in the value of the rent roll (usually due to loss of property management agency agreements on attempted assignment of such agreements to the new purchaser). During the retention period, a percentage of the indicative purchase price is held in escrow whilst the PMAs (and/or any other assets) are assigned. At the end of the retention period, an adjustment is often made to the purchase price to reflect the actual value of the rent roll at the end of the period.
20. The Agent also recommended shortlisting the above parties (other than Party D, due to the length of the proposed retention period) and issuing a draft contract to those parties by 24 February 2020.
21. Between 21 February and 27 February 2020, my staff (primarily Rajiv Goyal (**Mr Goyal**), who was an employee of McGrathNicol at the time) under my supervision: liaised with the Agent and the short-listed parties (being Party A, Party B and Party C); facilitated negotiations; and considered further bids.

*Negotiations for Sale with Party A*



Deponent

Doc ID 849770173/v1



Witness

- 22. On 27 February 2020, I received an email from Mr Goyal, which set out, among other things, that Party A had submitted a final offer for the purchase of the Rent Roll and that it was the only prospective purchaser which had completed due diligence as at that time. A copy of that email is at **pages 14 to 16** of Confidential Exhibit JPH-3.
- 23. As at this time, the other short-listed parties had not progressed their due diligence or engaged in substantive further negotiations and I formed the view that they were not likely to be potential purchasers of the Business. I therefore instructed my staff members to progress and finalise negotiations with Party A.
- 24. On 28 February 2020, Mr Goyal received a draft Rent Roll sale agreement from an in-house legal counsel for Party A, which included as a schedule, deeds of restraint to be respectively entered into by Natalie and Albert in favour of Party A. A copy of that email attaching the draft agreement is at **pages 17 to 60** of Confidential Exhibit JPH-3. The "Purchase Price" in the draft agreement was defined, in essence, as a multiplier of the value of the Rent Roll based on the PMA Agreements that were on foot as at the date of completion of the sale.
- 25. I subsequently instructed HWLE to review and amend the draft agreement and provide their comments to me and Mr Goyal.
- 26. On 3 March 2020, HWLE emailed a further draft of the proposed sale agreement to Party A, a copy of which is at **pages 61 to 106** of Confidential Exhibit JPH-3.
- 27. I recall that, at or about this time, confirmed cases of COVID-19 in Sydney began being reported by the New South Wales Government Department of Health.
- 28. Between 3 March 2020 and 10 March 2020, negotiations with Party A as to the details of the proposed sale agreement continued. The key issues which came to light in those negotiations included:
  - 28.1. Party A's insistence that Natalie agree to a restraint preventing her from poaching any of the counter-parties to the PMA Agreements and otherwise competing with Party A; and



Deponent



Witness

28.2. the transition of a property manager who was experienced in dealing with the counter-parties to the PMA Agreements, who could oversee the transition of the Rent Roll to Party A and would be able to assist Party A to obtain perfection of the assignment of the assets of the Business.

29. During this time I was concerned that the longer the negotiations continued, the more likely it was that further PMA Agreements would be terminated and, consequently, the sale price offered by Party A would be reduced (as it was based on a multiple of the existing Rent Roll). I was also concerned about the increasing prevalence of COVID-19 cases and its impact on the broader macro-economic environment, including whether uncertainty might cause any proposed sale of the Business to fall through. I was therefore keen to secure the sale of the Business as quickly as possible so as to maximise the price realised from the assets of the Trust, in the interests of the creditors of DBPM.

30. On or immediately prior to 11 March 2020, I instructed HWLE to propose to Party A the following structure for the sale of the Business so as to alleviate Party A's concerns and so as to progress the sale as quickly as possible:

30.1. between signing and completion, DBPM would use its best endeavours to procure Natalie to sign the agreed form of restraint in favour of Party A;

30.2. if Natalie signed the restraint, it would come into effect from completion;

30.3. if Natalie did not sign the restraint:

30.3.1. the parties would rely on the existing post-employment restraint in clause 18 of Natalie's employment contract; and

30.3.2. if Natalie breached the restraint in her employment contract, Party A will, at its cost, have the right to require DBPM to enforce the covenant in her employment contract or, alternatively, take control of the enforcement proceedings against Natalie on behalf of DBPM and Ms Sozou and I would assist in the any enforcement proceedings on request, subject to standard terms as to costs.



Deponent



Witness

- 31. On 12 March 2020, I was copied to an email from Tim Nixon of HWLE to Party A (which I had instructed him to send) which attached a further amended (and near final) version of the proposed agreement for the sale of the Business. A copy of that email and the attached updated draft is at **page 107 to 153** of Confidential Exhibit JPH-3. I was keen to agree the form of the agreement that day, with a view to executing the agreement the next day.
- 32. I am informed by Mr Goyal and verily believe that, on 13 March 2020, he had a telephone call with a representative of Party A regarding the status of the prospective sale and, in that conversation, that gentlemen informed Mr Goyal that Party A was still awaiting final approval from its Board before it would proceed with the transaction and that the fact of the emergence of the COVID-19 pandemic and the associated economic uncertainty was of concern to the directors. A copy of a chain of emails between the representative of Part A and Mr Goyal on 13 March 2020 regarding these issues is at **page 154** of Confidential Exhibit JPH-3.
- 33. I am informed by Mr Goyal and believe that, on 17 March 2020, he received a call from an employee of Party A advising that Party A would no longer be proceeding with the purchase of the Business.

*Subsequent Sale of Business*

- 34. On 16 March 2020:
  - 34.1. Mr Goyal began discussions with Natalie's mother, Anita Simons (**Ms Simons**), who at about this time also expressed an interest in purchasing the Rent Roll; and
  - 34.2. at 2:48pm, I received an email from Rob Webb (**Mr Webb**) of MDW Law, the solicitor for Ms Simons, which contained an offer by Ms Simons (capable of acceptance until 5pm on 18 March) for the purchase of the Rent Roll for \$600,000, which was conditional upon various releases in favour of Natalie including a release from National Australia Bank (**NAB**), which was a creditor of DBPM and whose obligations to NAB were personally guaranteed by Natalie. A copy of that email is at **page 35**.



Deponent



Witness

35. As noted above, by 17 March 2020, Party A had withdrawn from the negotiations for the sale of the Business and the other parties that had previously expressed a potential interest in the Business had not progressed their interest. Accordingly, by this point, the Receivers had no potential purchasers of the Business other than Ms Simons.
36. At approximately 4.07pm on 17 March 2020, Mr Goyal sent an email to Mr Webb (on my instructions) agreeing in-principle to the offer made on behalf of Ms Simons on 16 March 2020 but providing some additional terms which were subject to final documentation and attaching a draft sale agreement. A copy of the chain of correspondence between Mr Goyal and Mr Webb, without attachments, is at **pages 36 to 37**.
37. On 19 March 2020 I received an email from Luton White of MDW Law informing me and Mr Goyal that, among other things, Ms Simons withdrew her offer of 16 March 2020 and instead put forward two alternative offers, being in essence:
- 37.1. Offer One: an offer to purchase the Rent Roll for \$525,000 on the condition that Ms Simons be entitled to prove in respect of her claimed debt in the liquidation of DBPM (including as a creditor of the Trust); or
- 37.2. Offer Two: an offer to purchase the Rent Roll for \$350,000 on the basis that Ms Simons waive her right to prove in the liquidation of DBPM (including as a creditor of the Trust),
- with both offers containing certain additional conditions, including that NAB provide a release in favour of Natalie or a covenant not to sue Natalie. That email is at **pages 38 to 40**.
38. On 20 March 2020:
- 38.1. Ms Simons agreed to increase the purchase price of the Rent Roll to \$400,000 (**Purchase Price**) on the basis of Offer Two (that is, that Ms Simons agreed not to make any claim in the liquidation of DBPM (including as a creditor of the Trust));
- 38.2. I instructed HWLE to prepare an asset sale agreement (**Asset Sale Agreement**) detailing the terms of the sale of the Rent Roll to Ms Simons; and



Deponent



Witness

38.3. I caused to be prepared release forms releasing each of DBPM and DBPG from the security interests over the assets of the Business which had been granted to NAB and registered by NAB pursuant to the *Personal Property Securities Act 2009* (Cth) (**PPSA**).

39. On 20 March 2020 at 2:35pm, I (with the consent of Ms Sozou) instructed Mr Goyal to send an email to Mr Webb (to which I was copied), accepting the offer from Ms Simons and providing a draft asset sale agreement. A copy of that chain of email correspondence, without the attachments is at **pages 41 to 44**.

40. As the Rent Roll was to be sold as a going concern, GST would be payable on the Purchase Price.

41. Between 20 and 26 March 2020:

41.1. Ms Simons' legal representatives conducted further due diligence in respect of the Rent Roll, including enquiring as to:

41.1.1. the status of DBPM's compliance with the requirements for trust accounting in real estate (as required by the *Property and Stock Agents Act 2002* and the *Property, Stock and Business Agents Act 2002*);

41.1.2. the quantum of the rental bonds held by DBPM; and

41.1.3. the current number of PMA Agreements on foot;

41.2. Ms Simons agreed that GST was payable on the Purchase Price;

41.3. further amendments were made to the Asset Sale Agreement by HWLE and the legal representatives of Ms Simons; and

41.4. HWLE engaged with NAB to obtain:

41.4.1. necessary PPSA forms to release the Rent Roll asset from the all-present and after acquired property (**AII-PAP**) security interests held by NAB over the assets and undertaking of DBPM and DBPG pursuant to certain security agreements entered into on or about 24 September 2018; and



Deponent



Witness

41.4.2. NAB’s agreement to release Natalie from personal guarantees granted by Natalie in favour of NAB, which guaranteed the separate obligations of DBPM and DBPG to NAB pursuant to the security agreements,

which were requirements of the Asset Sale Agreement.

42. On 26 March 2020:

42.1. in principle agreement as to the terms of the Asset Sale Agreement was reached between the parties and an execution version of the Asset Sale Agreement was prepared; and

42.2. NAB agreed to the release of the Rent Roll asset from its security interests held over the assets and undertaking of DBPM and DBPG, and the release of Natalie from the personal guarantees granted in favour of NAB.

43. I am of the view that NAB agreed to the releases in paragraph 42.2 because of issues related to questions which we (the Receivers) raised about the validity of NAB's security over the assets of the Trust, having regard to the following:

43.1. NAB granted to DBPM a NAB Business Markets Loan for the amount of \$930,000.00 and a Bank Guarantee Facility with a limit of \$24,750.00 (collectively, the **Facilities**);

43.2. The Facilities were secured by a General Security Agreement between NAB and DBPM (as grantor) dated 24 September 2018 (**GSA**);

43.3. DBPM at all material times operated as trustee of the Trust in operating the Business and, based on my review of the books and records, the funds advanced pursuant to the Facilities were used by DBPM as trustee of the Trust for working capital purposes;

43.4. The GSA did not make reference to any trust and nor does it provide that DBPM entered into the GSA as trustee for the Trust;

43.5. NAB registered the All-PAP (PPSR #201810050043324) granted by DBPM pursuant to the GSA using the ACN of DBPM as the grantor identifier;

43.6. DBPM did not appear to hold any assets in its own right (as opposed to as trustee of the Trust); and



Deponent



Witness

43.7. Neither the GSA nor the above PPSR registration appeared to secure any interest of NAB in the assets held by DBPM as trustee of the Trust.

44. On 27 March 2020, I received an email from Mr Goyal advising that the Purchaser required the execution (and proposed simultaneous completion) of the Asset Sale Agreement to be delayed a further week due to difficulties obtaining finance. A copy of that email is at **page 45**.

45. On or about 2 April 2020, Paddy Hayes of McGrathNicol provided a further updated listing of the current PMA Agreements still under management to HWLE.

46. On 3 April 2020, Mr Nixon of HWLE provided a further updated Asset Sale Agreement which included the details of the PMA Agreements set out in paragraph 45 above.

47. On 7 April 2020:

47.1. Ms Sozou and I executed the Asset Sale Agreement in our capacities as joint and several liquidators of DBPM and DBPG and as the Receivers;

47.2. executed counterparts of the Asset Sale Agreement were thereafter exchanged between HWLE and the solicitor for Ms Simons; and

47.3. release forms from NAB in respect of their security over DBPM and DBPG were received from NAB's solicitors.

A copy of the chain of correspondence exchanging the executed Asset Sale Agreement is at **pages 46 to 47**. The executed Asset Sale Agreement is at **pages 48 to 65**. Executed copies of the PPSA release forms are at **pages 66 to 67**.

48. On 8 April 2020, completion of the sale of the Rent Roll took place and I was informed by HWLE that \$431,200.00 inclusive of GST (**Settlement Payment**) (being the Purchase Price adjusted for agreed costs of management agency services in the amount of \$8,800) was deposited into HWLE's trust account by or on behalf of Ms Simons.

49. Between 9 April 2020 and 14 May 2020, the Receivers (with the assistance of my staff members at McGrathNicol) liaised with Ms Simons to transfer ownership of the Rent Roll to her.



Deponent

Doc ID 849770173/v1



Witness

- 50. On or around 11 April 2020, Mr Goyal instructed HWLE to apply an amount of \$111,524.05 from the Settlement Payment funds which they held in their trust account towards payment of legal costs incurred by the Receivers.
- 51. On 16 April 2020, the amount of \$319,675.95, being the balance of the Settlement Payment minus legal costs, was received into the Receivers' bank account.
- 52. As I explained above, the Rent Roll was essentially the sole asset of DBPM (which was beneficially owned by the Trust) and, following the transfer of the Rent Roll in accordance with the Asset Sale Agreement, there was no further property or assets of the Trust to realise.

**Overview of the Work Performed by Ms Sozou and Me**

*Managing, preserving and realising the Trust Property and dealing with creditors*

- 53. In our capacity as Receivers, Ms Sozou and I (with the assistance of our staff at McGrathNicol) have carried out the following work in connection with the preservation and realisation of the property, assets and undertaking of the Trust:
  - 53.1. attending the premises on which the Business was conducted prior to our appointment as Receivers in order to communicate our appointment as liquidators of the Companies;
  - 53.2. assisting employees as needed including with the relocation of the office at the expiry of the lease held by DBPM as well as the eventual closure of the office;
  - 53.3. liaising with the Companies' staff, suppliers, accountants, clients and relevant government authorities to maintain the continued operation of the Business prior to the execution and completion of the Asset Sale Agreement and, in particular, ensuring the continued and proper administration of the trust account operated by DBPM on behalf of property owners that were counter-parties to the PMA Agreements;
  - 53.4. liaising with labour hire companies in relation to engaging and training of contractors to assist with the continued operation of the Business;
  - 53.5. liaising with insurance brokers in relation to insurance for trading the Business as a going concern and workers' compensation;



.....

Deponent



.....

Witness

- 53.6. developing trading and financial control processes for payroll, payments and document retention matters whilst trading the Business as a going concern;
  - 53.7. reviewing trust and security deeds to understand the structure of the Trust (including making the application to be appointed as the Receivers) and the assets beneficially held by it;
  - 53.8. reviewing PMA Agreements to identify whether the agreements were entered into by DBPM in its capacity as trustee of the Trust or in its own right;
  - 53.9. liaising with the Companies' clients in relation to the liquidation, notice periods, and the proposed sale of the Business;
  - 53.10. conducting preliminary investigations as to creditors' claims particularly in relation to a claim made by Ms Simons as to debt owing to her by DBPM (and her right to prove in the liquidation);
  - 53.11. continually reviewing the status of termination of the PMA Agreements throughout the course of the receivership and, in particular, during the campaign for the sale of the Business; and
  - 53.12. attending to any requests of HWLE and/or the interested purchasers of the Business (including Party A and Ms Simons) in relation to due diligence.
54. I do not consider the above list to be exhaustive; rather it represents the work that I reasonably believe is representative of the work carried out by the Receivers.
55. In dealing with creditors of the Companies and the Trust, Ms Sozou and I (with the assistance of our staff at McGrathNicol) have attended to the following tasks:
- 55.1. preparing and monitoring cash flow forecasts and estimated returns to creditors;
  - 55.2. providing regular updates to NAB, the Companies' secured creditor;
  - 55.3. preparing a remuneration report seeking indicative approval of resolutions for Ms Sozou's and my remuneration in respect of the liquidation of the Companies and the receivership of the property, assets and undertaking of the Trust;



Deponent



Witness

- 55.4. collating responses received from the creditors in relation to the resolution for indicative approval of the Receivers' remuneration; and
- 55.5. attending to enquiries from creditors from time to time.
- 56. Furthermore, in dealing with employees, Ms Sozou and I (with the assistance of our staff at McGrathNicol) have:
  - 56.1. calculated pre-appointment employee entitlements and confirmed these calculations with employees;
  - 56.2. issued notices of our intention to declare a priority dividend to creditors;
  - 56.3. paid post-appointment employee entitlements to employees; and
  - 56.4. prepared superannuation guarantee statements for lodgement with the Australian Taxation Office in relation to pre-appointment and post-appointment superannuation payable to employees.

*Other Statutory Duties*

- 57. Ms Sozou and I have undertaken the following necessary duties, as set out below, associated with our roles as liquidators of the Companies and as Receivers of the property, assets and undertaking of the Trust, including:
  - 57.1. issuing initial statutory reports to the creditors of DBPG on 6 March 2020 and DBPM on 19 February 2020;
  - 57.2. lodging required documents with ASIC and the Australian Taxation Office;
  - 57.3. issuing a further report on 5 May 2020 to the creditors of the Companies (**pages 68 to 121**) which enclosed, amongst other things:
    - 57.3.1. a copy of the 3 March Orders;
    - 57.3.2. a "Notice Inviting Formal Proof of Debt or Claim" which required creditors to lodge any proof of debt with me and Ms Sozou on or before 26 May 2020;
    - 57.3.3. a detailed report of the remuneration incurred by Ms Sozou, me and my staff in the conduct of the liquidation and the receivership of the Trust up to 22 April 2020 (**First Remuneration Report**) (**pages 85 to 103**); and



Deponent



Witness

- 57.3.4. a "Notice of Proposal to Creditors" of the remuneration proposed to be drawn by me and Ms Sozou as set out in the Remuneration Report, and the relevant resolutions which we requested the creditors to vote on, without a meeting;
- 57.4. lodging further reports with ASIC on 4 August 2020 in respect of each of DBPM (**pages 122 to 142**) and DBPG (**pages 143 to 163**) concerning the Liquidators' investigations under section 533 of the Act; and
- 57.5. issuing a further report on 6 November 2020 to the creditors of the Companies (**page 164 to 191**) which enclosed, among other things:
- 57.5.1. a "Notice of Proposal to Creditors - Voting Form" (**pages 167 to 168**) which sought approval of the Receivers' remuneration for the period 23 April 2020 to 10 July 2020;
- 57.5.2. a further detailed report of the remuneration incurred by Ms Sozou and me in the conduct of the liquidation and the receivership of the Trust for the period 23 April 2020 to 10 July 2020 (**Second Remuneration Report**) (**pages 169 to 177**); and
- 57.5.3. a "Notice to Creditor or Person Claiming to be a Creditor of Intention to Declare a Final Dividend" advising that a final dividend is expected to be declared for priority (employee) creditors of DBPM on 18 December 2020 and which requires those creditors to lodge any proof of debt with me and Ms Sozou on or before 27 November 2020.
58. By close of business on 27 November 2020, I had received the following proofs of debt or claims from the following persons claiming to be priority creditors, copies of which are at **pages 192 to 261**:

	<b>Name</b>	<b>Position</b>	<b>Total Entitlements (inc PAYG)</b>
1	Aaron Stern	Leasing Consultant	\$411.61
2	Albert Sassoon	Director	\$3,557.95
3	Anthony Davis	Senior Property	\$216.20



Deponent

Doc ID 849770173/v1



Witness

	<b>Name</b>	<b>Position</b>	<b>Total Entitlements (inc PAYG)</b>
		Manager	
4	Betty Sassoon	Receptionist	\$542.94
5	Elouise Paul	Head of Department	\$3,483.03
6	Gemma Holt	Investment Portfolio Manager	\$187.16
7	Iggy Damiani	Business Development Manager	\$1,192.59
8	Jessica Langton	Junior Property Manager	\$11,670.34
9	Jonathon Bell	Property Manager	\$568.26
10	Mirela Saric	Business Development Manager	\$2,310.70
11	Morgan Serafini	Trust & Office Accountant	\$3,550.15
12	Natalie Sassoon	Customer Service	\$7,254.16
13	Sana El-Hage	Property Management Associate	\$3,883.85
14	Theodore Phillips	Leasing Consultant	\$5,754.24
			\$44,583.18

**Amount of Remuneration Claimed**

*Quantum of discounted remuneration*



Deponent

Doc ID 849770173/v1



Witness

59. As set out in the First Remuneration Report and the Second Remuneration Report, the amount claimed for Ms Sozou and me, both for our work as Liquidators of DBPM and our subsequent work as Receivers, for which we seek to be paid totals \$240,407 excluding GST (**Remuneration Claim Amount**).
60. This amount incorporates a discount from the total amount chargeable based on the time spent by McGrathNicol personnel in connection with the winding up of DBPM and the receivership of the property, assets and undertaking of the Trust which, on a time-recorded basis, totalled \$263,909 (for the period to 22 April 2020) and \$40,407 (for the period to 10 July 2020), totalling \$304,316 (excluding GST).
61. As set out at paragraph 3.1 of the Second Remuneration Report (**page 171**):
- 61.1. there are insufficient funds in the liquidations to provide for total payment of the Remuneration Claim Amount;
- 61.2. in order to preserve a return to priority (employee) creditors of 100c in the dollar, Ms Sozou and I have proposed to discount our fees by a further sum such that, in respect of the period from 23 April 2020 onwards, we will receive payment of the balance of funds available after distribution to priority creditors. At the time of the Second Remuneration Report, we had estimated that the remaining balance would be \$7,300, however we expect that this figure will change; and
- 61.3. accordingly, for the period from 23 April 2020 onwards, Ms Sozou and I intend to seek approval for remuneration in the sum of \$40,407, however we only seek payment of the balance of funds which remain following distribution to priority creditors (which will be a lesser amount).
62. As set out above, the total remuneration claimed, after accounting for discounts and fee caps, is \$240,407 (exclusive of GST).
63. In summary, the Remuneration Claim Amount therefore involves discounted remuneration to the amount otherwise claimable on a time recorded basis by reason of the following:
- 63.1. a discount of \$63,909 (excluding GST) for time spent in the period to 22 April 2020;



Deponent



Witness

- 63.2. a further discount which we are yet to quantify for time spent in the period from 23 April 2020 to 10 July 2020; and
- 63.3. a further discount (which we have not sought to quantify) because no remuneration is sought for the work done by Ms Sozou and me (and our staff) for the period after 10 July 2020.
- 64. As set out in Schedule 2 of the First Remuneration Report and the Second Remuneration Report, the Remuneration Claim Amount comprises an amount sought with respect to three remuneration periods:
  - 64.1. an amount of \$49,228.00 (exclusive of GST) for work ostensibly related solely to liquidation-type tasks for the period from 5 February 2020 to 22 April 2020, (**Remuneration Period 1**).
  - 64.2. an amount of \$64,031.00 (exclusive of GST) for the asset preservation and realisation work for the period from 5 February to 3 March 2020 (**Remuneration Period 2**).
  - 64.3. an amount of \$86,741.00 (exclusive of GST) for the asset preservation and realisation work for the period from 4 March 2020 to 22 April 2020 (**Remuneration Period 3**).
  - 64.4. an amount of \$40,407 (exclusive of GST) for work ostensibly related solely to liquidation-type tasks for the period from 23 April 2020 to 10 July 2020, but for which we only seek to be paid the balance of funds which remain following distribution to priority creditors (**Remuneration Period 4**).
- 65. No remuneration is sought for the work done by Ms Sozou and me (and our staff) for the period after 10 July 2020.
- 66. Although the First Remuneration Report refers, on the front page, to both of the Companies (that is, both DBPM and DBPG) as well as the Trust, as explained on page 2 of the First Remuneration Report, no amount of remuneration was sought with respect to DBPG. That is because:
  - 66.1. essentially all of the work done by Ms Sozou and me (and our staff) in connection with the windings up of the Companies and the receivership of the Trust related solely to the affairs, assets and liabilities of DBPM and the Trust; and



.....

Deponent



.....

Witness

66.2. there was little if any work done in connection with DBPG.

For example, the assets of the Companies were held by DBPM (in its capacity as trustee of the Trust) and not by DBPG and, similarly, the creditors and employees were of DBPM and not of DBPG.

*Approval by creditors*

67. The creditors of DBPM approved the remuneration claimed for the following periods (to the extent that approval by the creditors was permissible) without a meeting:

67.1. Remuneration Period 1 for the sum of \$49,228 (exclusive of GST). At **pages 262 to 320** is the outcome of the proposal to creditors without a meeting which was lodged with ASIC on 27 May 2020.

67.2. Remuneration Period 2 for the sum of \$64,031 (exclusive of GST). At **pages 321 to 379** is the outcome of the proposal to creditors without a meeting which was lodged with ASIC on 3 June 2020.

67.3. Remuneration Period 3 for the sum of \$86,741 (exclusive of GST). At **pages 380 to 438** is the outcome of the proposal to creditors without a meeting which was lodged with ASIC on 3 June 2020

67.4. Remuneration Period 4 for the sum of \$40,407 (exclusive of GST). At **pages 439 to 443** is the outcome of the proposal to creditors without a meeting which was lodged with ASIC on 27 November 2020.

*Drawing of part of the remuneration*

68. As set out in paragraph 3.3 of the Second Remuneration Report, Ms Sozou and I have already drawn \$49,228 (exclusive of GST) of the Discounted Remuneration Claim Amount referable to payment of Remuneration Period 1.

69. Ms Sozou and I drew our remuneration following approval by the creditors on the basis that the work that was the subject of Remuneration Period 1 was related solely to liquidation-type work and was not related to the recovery of the assets beneficially held by the Trust (and therefore we considered that the Court's approval of remuneration was not required for this aspect of the work).



Deponent



Witness

70. I acknowledge that Ms Sozou and I were (or were likely to have been) mistaken in drawing that remuneration without Court approval and now seek the retrospective approval from the Court with respect to that part of the remuneration. I apologise to the Court for that oversight, but my (and, as I am informed by Ms Sozou, her) honestly-held view at the time was that remuneration for liquidation work (as opposed to work more intimately connected with the receivership) was able to be paid to us without Court approval (which is why we distinguished between the work that was the subject of Remuneration Period 1 and other work in the winding up of DBPM).
71. The balance of the Discounted Remuneration Claim Amount (in the sum of \$173,879.20 inclusive of GST / \$158,072.00 exclusive of GST) has not been paid to McGrathNicol (and remains in the Receivers' bank account) pending approval by the Court with respect to that remuneration.

#### **Appropriateness of the Remuneration**

72. As noted in the First Remuneration Report and the Second Remuneration Report, staff employed by McGrathNicol assisted me and Ms Sozou in our role as Receivers. The complexity of each of the tasks to be performed would determine the seniority of the staff member assigned to perform that task so that each task would be done in the most effective and efficient manner as possible.
73. McGrathNicol maintains time records utilising a computerised system. Following our appointment as Liquidators (and then as Receivers), the work undertaken by us and our staff in relation to this matter have been maintained using these time records. A copy of the time records dated 5 February 2020 to 30 October 2020 is at **pages 444 to 477**.
74. Each staff member at McGrathNicol who conducts work in the winding up of DBPM and the receivership of the Trust is required to maintain an electronic record, in which is recorded the actual time spent by that person on the matter, together with a description of work or activity undertaken. The internal records of McGrathNicol in the time recordings accurately reflect and describe the work carried out in the conduct of the winding up and receivership.



Deponent

Doc ID 849770173/v1



Witness

75. At all times, tasks required to be undertaken during the conduct of the winding up and receivership were delegated to and handled by staff with an appropriate level of seniority and knowledge/skill for that specific task such that the level of responsibility of the task matched the seniority of the person who undertook it.
76. I reviewed the remuneration and time recordings in relation to the conduct of the winding up and receivership and, as set out in paragraph 63 above, the total remuneration claimed has been substantially reduced from the total amount on a time-recorded basis.
77. A summary of the remuneration is at pages 5-16 of the First Remuneration Report (**pages 90 to 101**) and pages 2-7 of the Second Remuneration Report (**pages 171 to 176**).
78. From my review of the proposed remuneration sought based on my own knowledge of the work required in respect of the winding up of DBPM and the receivership of the Trust, and having regard also to my experience as an insolvency practitioner more generally, in my opinion:
- 78.1. the time spent by staff members at McGrathNicol fairly reflects the work required to be undertaken in respect of the winding up and receivership; and
- 78.2. the work performed by Ms Sozou and me and our staff was performed in an efficient and timely manner.
79. McGrathNicol acknowledges and adopts, where applicable, the Code of Professional Practice issued by the Australian Restructuring Insolvency & Turnaround Association (**ARITA Code**), including the 4<sup>th</sup> edition which came into effect on 1 January 2020.
80. I have read Practice Statements Insolvency 8: Remuneration of the ARITA Code, which deals with remuneration (**page 478 to 483**). I have regard to and observed these principles and standards of conduct. For example, I consider that the work done during the appointment of Ms Sozou and me as Liquidators and Receivers was necessary and properly performed. As I have set out above, I believe that the work was carried out by a person at McGrathNicol with the appropriate level of experience to perform that work.



Deponent



Witness

81. Having regard to the work conducted by Ms Sozou and me and our staff in the winding up of DBPM and the receivership of the Trust, I believe that the Remuneration Claim Amount is fair and reasonable. I consider that the care, skill and responsibility attached to the work involved justify the level of fees claimed.

**Receipts and Payments to date**

82. Between 5 February to 30 October 2020, the transactions which have been made in relation to DBPM were set out in the statutory reports issued to creditors and are summarised as follows:

82.1. Total receipts of \$527,373 (inclusive of GST), comprising:

- 82.1.1. Cash on hand at appointment in the amount of \$785;
- 82.1.2. Commission income in the amount of \$68,619;
- 82.1.3. Other income in the amount of \$6,346;
- 82.1.4. Proceeds from sale of the Rent Roll in the amount of \$440,000;  
and
- 82.1.5. Secured creditor funding (from NAB) in the amount of \$11,623.

82.2. Total payments of \$307,177.82, comprising:

- 82.2.1. Legal fees in the amount of \$124,884;
- 82.2.2. "Fees: Appointee Fees" in the amount of \$54,151, representing remuneration claimed for Remuneration Period 1 (inclusive of GST);
- 82.2.3. GST in the amount of \$30,452;
- 82.2.4. Wages and salaries in the amount of \$28,178;
- 82.2.5. Broker fees in the amount of \$22,369;
- 82.2.6. Rent in the amount of \$17,614;
- 82.2.7. Settlement costs in the amount of \$8,800;
- 82.2.8. Contractor fees in the amount of \$6,560;
- 82.2.9. Advertising fees in the amount of \$3,805;
- 82.2.10. Trust accounting fees in the amount of \$4,522;



.....

Deponent



.....

Witness

- 82.2.11. Net insurance costs in the amount of \$751;
- 82.2.12. Other expenses in the amount of \$4,329;
- 82.2.13. Employee expenses in the amount of \$157; and
- 82.2.14. Bank fees in the amount of \$606; and

82.3. Net receipts of \$220,194.85.

83. As the remuneration for Remuneration Period 1 has already been paid out to us, the Receivers currently maintain in the receivership bank account the sum of \$220,194.85.

84. The Receivers also forecast the following further receipts and payments prior to their retirement:

84.1. Total receipts of \$24,345, comprising a likely GST refund; and

84.2. Total payments of the balance of the funds of the receivership, comprising:

84.2.1. Post-appointment superannuation on wages and salaries in the amount of \$2,466;

84.2.2. Legal fees and expenses and other costs;

84.2.3. The balance of the Remuneration Claim Amount in the amount of \$173,879.00 (inclusive of GST); and

84.2.4. Distribution to priority creditors in the amount of \$44,583.18.

85. Having regard to the circumstances in which the sale campaign was conducted, and the challenges caused by the emergence of the global COVID-19 pandemic, I consider that the Purchase Price represented the best outcome that could be realistically achieved by the Receivers. Furthermore, there was extensive work that the Receivers (and our staff) needed to undertake in order to sell the assets beneficially owned by the Trust, especially given that the initial proposed purchaser, Party A, withdrew from the proposed sale at a very late stage in the negotiations. Ultimately, these matters increased the work that was required to be undertaken and therefore the remuneration charged by the Receivers.

86. The ongoing trading and then the sale of the Business led to total realisations of about \$515,000 in the receivership of the assets of the Trust.



.....

Deponent



.....

Witness

**Distribution to priority creditors**

- 87. As at 30 October 2020, I was aware of debts owing to the creditors of the Companies totalling an estimate \$1,907,130.54.
- 88. There are no assets to meet claims in the liquidation of DBPG. As set out above, because of the discount to the remuneration claimed by Ms Sozou and me, we are proposing that \$44,583.18 be available to meet the claims of pre-appointment priority creditors in the winding up of DBPM (notwithstanding that the claims of these creditors rank after the remuneration of Ms Sozou and me).
- 89. Based on my review of the books and records of DBPM and the proofs of debts submitted, I consider that the only creditors of DBPM in its capacity as trustee of the Trust are:
  - 89.1. the employee creditors of DBPM set out at subparagraph 58 above, who have made claims for their accrued entitlements as at 5 February 2020, for a total sum of \$44,583.18 inclusive of PAYG;
  - 89.2. various trade and statutory creditors (excluding the superannuation guarantee charge component of the claims of employee creditors set out at paragraph 88.1 above) for \$41,892; and
  - 89.3. possibly, NAB for \$921,524 (for funds advanced to the Companies), which may or may not have a claim against the assets of the Trust).
- 90. In addition, Ms Simons, who appeared to be a creditor of DBPM for the sum of \$903,579.09, agreed not to prove in the liquidation of DBPM pursuant to the terms of the Asset Sale Agreement.
- 91. Ms Sozou and I have not ultimately determined whether NAB is a creditor of DBPM in its own right or as trustee of the Trust or otherwise whether NAB has a claim against the assets of the Trust (which may depend on the terms and validity of NAB's loan agreements and security interests as referred to in paragraph 43 above) because NAB did not submit a proof of debt form in the liquidation of DBPM. (Ultimately, in circumstances where there will be no distribution to non-priority creditors as set out below, this issue is largely academic in any event.)



Deponent



Witness

92. The Purchase Price amount and other recoveries in the receivership were absorbed by the costs of the winding up and receivership (including the legal costs in relation to the sale of the Business and the applications to the Court), the Remuneration Claim Amount, broker fees in relation to the sale of the Business and the ongoing costs of trading the Business.
93. Other than ensuring that there is some amount to meet the claims of priority creditors, the realisation of the assets and property of the Trust are not sufficient to lead to the payment of a dividend to ordinary (non-priority) creditors. Accordingly, Ms Sozou and I have determined that:
- 93.1. a final dividend is likely to be declared for priority creditors of 100 cents in the dollar; and
- 93.2. it is most unlikely that any distribution will be made to unsecured creditors.

**Further work anticipated to be performed**

94. The work associated with realising the assets of the Companies, including those beneficially owned by the Trust, has been completed. I have determined that the whole of the assets of the Companies and the Trust have been realised.
95. Based on my on my experience as an insolvency practitioner, I expect that the following work will be required:
- 95.1. draw the balance of the remuneration once approved by the Court;
- 95.2. pay a first and final dividend to priority creditors;
- 95.3. lodge final accounts as Receivers; and
- 95.4. take steps for the deregistration of the Companies upon the conclusion of the winding up (including lodging necessary documentation with ASIC).
96. As noted above, Ms Sozou and I do not seek any remuneration for the work associated with completing the receivership of the Trust and the finalisation of the winding up of each of the Companies.

**Discharge and release of Receivers**

97. I am not aware of any Trust creditors or other creditors of the Companies, other than those creditors who have lodged proofs of debts and/or whom I have named in the statutory reports.



.....

Deponent



.....

Witness

- 98. To the best of my belief, apart from the drawing down of remuneration prior to the Court's approval (as explained above), there has been no act done or default made by Ms Sozou or me in the administration of the affairs of the Trust or otherwise in relation to the conduct of the receivership which is likely to give rise to any liability to the Trust or to any creditor or beneficiary of the Trust.
- 99. I am not aware of any claim having been made or foreshadowed by any person that there has been any such act or default in the receivership and nobody has raised any issue nor made any allegation or claim against me or Ms Sozou nor against any member of our staff in connection with the affairs of the Companies or the Trust.
- 100. Once I have undertaken the tasks specified in paragraph 95.1 above, Ms Sozou and I will be in a position to retire, as there is no further work for us to do as Receivers.
- 101. For all of the above reasons, I request that the Court grant the relief sought in the Interlocutory Process.

AFFIRMED at Sydney  
 Signature of deponent



Name of witness Courtney McDonald  
 Address of witness Level 14, Australia Square 264-278 George Street, Sydney NSW  
 Capacity of witness Solicitor

This document was signed in counterpart and witnessed over audio-visual link in accordance with section 14G of the *Electronic Transactions Act 2000* (NSW).

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for longer than 12 months

28 June 2021

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.



Deponent



Witness