IN THE MATTER OF BANKSIA SECURITIES LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

WRITTEN SUBMISSIONS OF THE SPR

A. INTRODUCTION

1. By his interlocutory process dated 22 October 2024, the SPR seeks a suite of orders and directions in relation to the conduct of the special purpose receivership. The overarching objective of the relief sought is to bring the special purpose receivership to substantial completion and facilitate a final, significant distribution to debenture-holders in the near future.

2. These submissions are rather lengthy with the aim of synthesising into a single document the more material matters that emerge from the necessarily voluminous material contained within, and exhibited to, the affidavits.[1]

3. The most significant event that has occurred in the special purpose receivership since this matter was last before the court is that the SPR has settled (subject to the approval of this Court) the rights and claims of debenture-holders against each of: (i) the Elliott Entities;[2] (ii) Michael Symons; and (iii) Anthony Zita. Accordingly, the SPR has now settled with **each** of the judgment debtors under the Remitter Judgment and the Elliott Non-Party Costs Orders (save for Portfolio Law, which is addressed later in these submissions).

4. The effect of these settlements (if approved) is that the SPR will have recovered, in total, approximately $17 million on behalf of debenture-holders in enforcing the Remitter Judgment.[3] Combined with existing funds held by the SPR, it is anticipated that this would allow the SPR to make a final distribution to debenture-holders of approximately $20 million.[4] For context, it is convenient to make some overarching observations about this level of recovery.

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1 Defined terms have the same meaning as used in the affidavits of Mr John Ross Lindholm.

2 Comprising Decoland Pty Ltd (**Decoland**), MCM (Mt Buller) Pty Ltd (**MCM**), Elliott Legal Pty Ltd (**Elliott Legal)**, Alexander Elliott, and the Estate of Mark Elliott.

3 The SPR has incurred costs of approximately $2,654,122.39 in taking the enforcement steps following the Remitter Judgment which have resulted in recoveries of $17 million. The net return to debenture holders is therefore approximately $14.4 million.

4 Open Lindholm Affidavit, [121] – [125].

5. First, a distribution of approximately $20 million represents more than 3 cents per dollar of principal owed to debenture-holders. This would take the overall recovery following the collapse of Banksia to almost 95 cents in the dollar of outstanding principal.[5] Whilst this does not take into account lost interest from the time value of money, the level of recovery for debenture-holders has been, on any view, very substantial, and has significantly exceeded the initial expectations given by the original receiver at the commencement of the private receivership. Moreover, if approved, the directions would bring the total recovery from the claims pursued by the SPR to approximately **$100 million**.[6]

6. Secondly, from a financial perspective, debenture-holders are clearly better off as a result of the Remitter and enforcement steps that have been taken by the SPR. Although Dixon J observed that the Remitter was "laborious, costly and delayed",[7] and uncovered shocking misconduct that brought the administration of justice into disrepute, the Remitter will have resulted in: (i) an increase in the proceeds from the Trust Co settlement available for distribution to debenture-holders of approximately $20 million (being the funding commission and costs initially successfully claimed by AFP before Croft J); and (ii) further recoveries in enforcing the Remitter Judgment of approximately $17 million. That is, the Remitter will have resulted in *additional* recoveries of approximately **$37 million** to debenture-holders.[8] From a financial standpoint at least, there is no doubt that debenture-holders are vastly better off by reason of the orders made in the Remitter than if the fraudulent conduct revealed in the Remitter had been left uncovered. It is important that is understood by debenture-holders given the history of the Banksia proceedings.

7. In that context, should the directions be given and a final distribution made to debenture-holders, it is anticipated that the SPR will be in a position to swiftly finalise the receivership and bring a final application to: (i) deal with any outstanding matters, including any further modest remuneration; and (ii) formally discharge the special purpose receiver.

Overview of Orders sought in this Application

8. The orders sought in this application can be broadly divided into four categories.

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5 Open Lindholm Affidavit, [125].

6 Of course, the costs of the special purpose receivership have been large (approximately $20 million), but the net return to debenture-holders is still approximately $80 million once those costs are taken into account.

7 *Bolitho v Banksia Securities Ltd (No 18) (Remitter)* [2021] VSC 666 at [3].

8 Again, the costs of the Remitter and the subsequent enforcements steps of the SPR have been very significant. But once those costs are taken into account debenture-holders still remain vastly better off economically.

9. *First*, the SPR seeks orders confirming his power to settle, and directions that he was justified in so settling, with each of the parties identified above (**orders 1 to 6** of the Interlocutory Process). He also seeks an order that the amounts recovered under each of those settlements be distributed to debenture-holders on a *pari passu* basis (**order 14**).

10. *Second,* the SPR seeks the Court's imprimatur for his decision to proceed to finalise the receivership and to:

    (a) make a final distribution to debenture-holders (**order 15**);

    (b) not take any further action in relation to possible claims that debenture-holders may have, including against the Legal Practitioners Liability Committee and Portfolio Law (**orders 7 and 8**); and

    (c) to regularise the funding of the special purpose receivership by a direction that he was justified and acting reasonably in paying the costs, expenses, and remuneration of the receivership from the funds held by him on behalf of debenture-holders (**order 9**).

11. *Third*, the SPR seeks the Court's guidance as to how to deal with the substantial sum of unpresented payments held by him from previous distributions and which are expected to increase following any further distribution. The SPR proposes that his future remuneration, costs, and expenses of the special purpose receivership be paid from those amounts (**order 10**) and that the balance be paid to a registered charitable organisation of his choosing (**order 17**).

12. *Finally*, the SPR seeks that the Court approve and fix his remuneration for the period between 1 March 2022 and 31 July 2024 (**orders 11 to 13**).

Material

13. The SPR relies on the following material in support of the application:

    (a) his open affidavit sworn 22 October 2024 (**Open Lindholm Affidavit**) which exhibits a bundle of documents at JRL-26 (**Open Exhibit**);

    (b) his confidential affidavit sworn 22 October 2024 (**Confidential Lindholm Affidavit**) and its confidential exhibit JRL-7 (**Confidential Exhibit**);

    (c) a confidential affidavit of Nick Mellos sworn 22 October 2024 (**Mellos Affidavit**), which relevantly exhibits:

(i) an expert report prepared by him dated 20 March 2024 (**Mellos Report**); and

(ii) a supplementary report prepared by him dated 24 June 2024 (**Supplementary Mellos Report**); and

(d) an affidavit of Samuel Roadley Kingston sworn on 22 October 2024 (**Kingston Affidavit**).

14. Further, there are six confidential opinions of counsel that are exhibited to the Confidential Lindholm Affidavit and which are relevant:

(a) the confidential joint opinion of Mr Redwood SC and Mr Grady dated 10 August 2022 that was provided to this Court during the application by the SPR for directions filed on 28 July 2022 (**Directions Application Opinion**), which is at pages 7 to 57 of Confidential Exhibit JRL-7;

(b) the confidential joint opinion of Mr Redwood SC and Mr Grady dated 8 March 2023 addressing a global settlement offer that was made to the SPR and strategy in the receivership generally (**Global Offer Opinion**), which is at pages 58 to 82 of Confidential Exhibit JRL-7;

(c) the confidential joint opinion of Mr Redwood SC and Mr Grady dated 2 June 2023 addressing the application to settle with the O'Bryan Entities (**O'Bryan Entities Settlement Opinion**), which is at pages 83 to 112 of Confidential Exhibit JRL-7;

(d) the confidential joint opinion of Mr Redwood SC and Mr Grady dated 1 November 2023 addressing an earlier offer made by the Elliott Entities and strategy in the receivership generally (**Elliott Offer Opinion**), which is at pages 113 to 132 of Confidential Exhibit JRL-7;

(e) the confidential joint opinion of Mr Redwood SC and Mr Grady dated 22 March 2024 addressing the condition precedent in clause 2.2 of the settlement deed (**CP Opinion**), which is at pages 133 to 149 of Confidential Exhibit JRL-7; and

(f) a supplementary confidential joint opinion of Mr Redwood SC and Mr Grady dated 25 June 2024 addressing condition precedent in clause 2.2 of the settlement deed (**Supplementary CP Opinion**) which is at pages 150 to 156 of Confidential Exhibit JRL-7.

15. We are acutely conscious as to the volume of this affidavit material; hence, these submissions draw attention to the more salient paragraphs and exhibits in the affidavit material, including the confidential opinions of counsel.

Confidentiality

16. Confidentiality is sought over the Confidential Lindholm Affidavit and the Confidential Lindholm Exhibit (containing the 5 confidential opinions of counsel) and the Mellos Affidavit pursuant to s 8 of the *Courts Suppression and Non-Publication Orders Act 2010* (NSW).

17. Mindful of the open justice principle and the high degree of public interest in the Banksia proceedings, it is respectfully submitted that suppression is necessary to prevent prejudice to the SPR and the administration justice insofar as the Confidential Lindholm Exhibit and Confidential Lindholm Affidavit address: (i) the SPR's reasons for settlement; (ii) without prejudice correspondence; (iii) confidential advice he has obtained from counsel; and (iv) his confidential and sensitive deliberations with counsel and the Committee.

18. Confidentiality is sought over the expert reports of Mr Mellos because Mr Mellos relied on information supplied by the Elliott Entities under conditions of confidentiality.

19. At the same time, these submissions endeavour to expose as much of the content of the confidential opinions and the SPR's process of reasoning as is consistent with a balance between open justice and the circumstances justifying a degree of confidentiality. Furthermore, it is proposed that debenture-holders can obtain access on request to the confidential material upon provision of an undertaking.

Service and Circular to debenture-holders

20. It is proposed that a copy of this application, each non-confidential affidavit, and these submissions be served on:

    (a) the Elliott Entities, Mr Symons, and Mr Zita;

    (b) ASIC;

    (c) the LPLC;

    (d) each current member of the Committee of debenture-holders; and

    (e) Mr Christopher Botsman.

21. Consistently with past practice and assurances, a copy of the confidential affidavits will be provided to ASIC and also to the members of the Committee, and to Mr Botsman, upon receipt of a signed confidentiality undertaking.

22. It is also further proposed that a circular, in a form substantially the same as that exhibited as Annexure 1 to these submissions, be sent to each debenture-holder informing them of this application and of the settlements. That is important given the size, significance, and sensitivity of the proposed settlement in light of the misconduct and the proposed final distribution. That circular invites any debenture-holder who objects to or has concerns about any of the relief sought in this application to inform the SPR by 22 November 2024. Any responses that are received will be provided to the Court. The circular will also indicate to debenture-holders that they can obtain a copy of the confidential affidavits if they so request upon receipt of a signed confidentiality undertaking, including the expert reports of Mr Mellos.[9]

Contradictor/Amicus?

23. It is not known whether any party or debenture-holder will appear to oppose all or any of the relief sought in this application, although the SPR is not aware at this time of any party who proposes to do so. It is therefore appropriate to consider whether the appointment of a contradictor or amicus is warranted in this case.

24. There are at least two issues which can reasonably be regarded as contentious and in relation to which countervailing arguments can be made. The first is whether the settlement with the Elliott Entities is fair and reasonable in all the circumstances and whether the SPR should be given the direction sought in the Interlocutory Process. The second is the appropriate course to take in relation to the surplus of unpresented payments in the receivership and whether the proposal advanced by the SPR in this application ought to be adopted.

25. It is ultimately a matter for the Court to determine whether it considers that it would be assisted by the appointment of a contradictor or amicus curae, and whether that assistance justifies the associated expense to debenture-holders. The SPR does not propose that a contradictor be appointed, but equally he does not seek to be heard to oppose that course if the Court considers that it would be appropriate. However, in weighing whether this matter justifies a contradictor/amicus, it is respectfully submitted the Court should also take into

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[9] We are mindful of the observations in *Botsman v Bolitho* (2018) 57 VR 68 at [244]-[246] and [263].

account that it will have the benefit of the candid and reasoned views of counsel for the SPR in the opinions filed with the Court and that it would be open to the Court to direct that counsel candidly address any further issues of concern to the Court.

26. Further, both the SPR in his affidavits, and counsel in these submissions, have sought to candidly expose and consider any relevant countervailing considerations. As will be apparent to the Court from the confidential opinions, we have taken a robust view and the SPR has made informed decisions cognisant of alternative options and areas of reasonable disagreement. In other words, the Court can be satisfied that the material before it does expose the countervailing perspective and that the SPR at all critical moments has had those countervailing perspectives squarely brought to his attention by counsel.

27. It may be that the desirability of a contradictor or amicus should be reassessed once it is known whether there are any substantive objections by debenture-holders (including Mrs Botsman) and ASIC has confirmed that it will not seek leave to intervene as on prior occasions.

Structure of these submissions

28. The evidence filed by the SPR assumes a degree of familiarity with the special purpose receivership and the Banksia Proceedings. This Court, having appointed the SPR and supervised the receivership over many years, is familiar with the background to the claims made by the SPR, the Remitter Judgment, and the SPR's attempts at enforcing the Remitter Judgment. Those matters were summarised by Black J in the most recent application before this Court, being the application for directions that the SPR was justified in not accepting a global settlement offer made by the judgment debtors: *In the matter of Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2022] NSWSC 1106 at [2]–[12] (**Directions Judgment**).

29. Relying on that assumed background, we summarise the material events in the special purpose receivership since the Directions Judgment in **Section B** of these submissions. Those events provide the critical factual context for the relief sought in this application. We also summarise the current state of the recoveries made by the SPR and the amount that remains owing to debenture-holders.

30. We then:

    (a) address the reasons why the Court ought to direct that the SPR was and is justified in entering into each of the settlements in **Section C**;

(b) deal with matters relating to the SPR's proposal to make a final distribution and bring the special purpose receivership to an end in **Section D**;

(c) outline the options available to the Court and the SPR in respect of unpresented payments from the distribution of previous settlement proceeds in **Section E;** and

(d) consider the SPR's claim for remuneration in **Section F.**

B. STATUS OF THE RECEIVERSHIP

B.1 Relevant Events in the Receivership

31. It will be recalled that, on 28 July 2022, the SPR filed an application in this Court for a direction that he was justified in not accepting a proposal made by the judgement debtors to compromise: (i) his rights on behalf of debenture-holders to enforce the Remitter Judgment; and (ii) related claims against third parties for non-party costs orders and insurance recoveries, for the sum of $12 million (**First Global Settlement Offer**). The application was heard in August 2022. Black J gave the direction sought.[10]

32. Since that time, the following key events have occurred in the special purpose receivership:

(a) the SPR has continued to negotiate with each of the judgment debtors, culminating in a series of individual settlements;

(b) simultaneously with (a), the SPR continued to prosecute the Non-Party Costs Summons;

(c) the appeal brought by Alex Elliott against the Remitter Judgment was abandoned and dismissed; and

(d) Norman O'Bryan brought an application for leave to appeal, which was ultimately dismissed.

33. We expand on these matters below.

Settlement negotiations continue

34. It will be recalled by the Court that, in general terms, the First Global Settlement Offer was rejected by the SPR because the parties to that offer did not: (a) disclose their respective

[10] See the Directions Judgment.

contributions to the settlement sum; and (ii) make disclosure, or make adequate disclosure, of their individual financial positions. In the Directions Judgment, Black J said:[11]

> I am satisfied that the direction sought by the SPR should be made, to the effect that the SPR is not justified in accepting the Confidential Settlement Offer in its present form. In summary, **it seems to me that the SPR is correct that he does not have sufficient basis to make a reasoned assessment of that proposal, without greater transparency as to which parties are contributing to that proposal and in which amounts, and as to the asset positions of the contributing and non-contributing parties, so as to form a view whether the discount to the judgment in the Remittal is justified in the relevant circumstances**.
> (Emphasis added)

35. His Honour continued:[12]

> In order to make a rational assessment of the Confidential Settlement Proposal, and whether the discount it allows against the amount of the judgment in the Remitter is appropriate, it seems to me that the SPR would need access at least to the respective contributions of the Defendants and the Non-Parties to the amount of any settlement and adequate disclosure of their financial positions. If he does not have that information, then there is a significant risk that too large a discount may be allowed in respect of one or more parties of a judgment which could ultimately have been enforced against that party or parties in full.

36. Following the Directions Judgment, the SPR continued to engage in settlement discussions initially on a global basis, and then with each party individually. The course of those negotiations and discussions are extensively set out at 51 to 93 of the Confidential Lindholm Affidavit.

37. The contributors to the First Global Settlement Offer ultimately (and belatedly) disclosed to the SPR their respective contributions to the settlement offer in February 2023. The contributions are set out at paragraph 75 of the Confidential Lindholm Affidavit. Having disclosed the contributions, the offer was put again (**Second Global Settlement Offer**).

38. The SPR sought the opinion of counsel in March 2023 as to whether, in our opinion, the Second Global Settlement Offer was fair and reasonable in all the circumstances. The Global Offer Opinion is set out at pages 58 to 82 of the Confidential Exhibit. In that opinion, we:

    (a) consider the appropriateness of each of the proposed individual contributions in turn (at [50]-[102]) and the settlement generally at [103]-[105]); and

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11 Directions Judgment, at [59].
12 Ibid, at [54].

(b) set out a number of alternative steps that were open to the SPR to take as part of a broader enforcement strategy (at [106]-[107]).

39. Following the Global Offer Opinion, the SPR resolved to reject the Second Global Settlement Offer and communicated that to the Elliott Entities on 14 March 2023 and to instead focus on progressing the Non-Party Costs Summons, while simultaneously negotiating with the judgment debtors on an individual basis as and when appropriate.[13]

The Non-Party Costs Summons proceeds

40. The SPR continued to prosecute the Non-Party Costs Summons, seeking orders that each of the Elliott Entities and O'Bryan Entities pay the SPR's and the Contradictor's costs of the Remitter. A chronological account of the course of that application is provided at [41] – [50] of the Open Lindholm Affidavit.

41. The Elliott Entities repeatedly defaulted on the directions and orders made by the Court, whereas the O'Bryan Entities vigorously defended the application. For that reason, the application as against the O'Bryan Entities was severed from the application as against the Elliott Entities and the applications were heard separately.

42. The hearing of the application as against the Elliott Entities occurred before Dixon J on 15 November 2022. The orders were ultimately unopposed at the hearing.[14] On 1 March 2023, Dixon J granted the application and made orders that each of the Elliott Entities pay the SPR and the Contradictor's costs of the Remitter on the indemnity basis.[15] His Honour reserved the costs of the application and indicated that he would publish reasons for making the orders against the Elliott Entities together with reasons in relation to the balance of the Non-Party Costs Summons.

43. The application as it related to the O'Bryan Entities was set down for hearing in early 2023. The application was vexed by the fact that the O'Bryan Entities contended that they were not bound by the factual findings made in the Remitter Judgment and, therefore, sought to challenge certain aspects of those findings. They filed evidence that was not led in the Remitter.[16]

44. The SPR filed, but ultimately abandoned, an application for the preliminary determination of the threshold issue of whether Noysue and Noysy were bound by the findings in the

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13 Confidential Lindholm Affidavit, [80] – [81].
14 *Lindholm v Elliott & Ors* [2023] VSC 442 at [7]-[8].
15 Open Lindholm Exhibit, pages 68 to 70.
16 Open Lindholm Affidavit, [42]-[43]

Remitter.[17] The matter was further delayed by an unsuccessful recusal application: *Bolitho & Anor v Banksia Securities Limited (No 19)* [2022] VSC 761.

45. Ultimately, shortly prior to the trial of the Non-Party Costs Summons, the SPR settled with the O'Bryan Entities.

The SPR enters into settlements with Mr O'Bryan and Trimbos

46. On 27 March 2023, the SPR executed a deed of settlement with the O'Bryan Entities by which those entities would pay to the SPR the sum of $1.25 million.[18] The trial of the Non-Party Costs Summons was vacated pending the hearing and determination of an approval application in relation to that settlement.

47. Shortly thereafter, on 24 May 2023, the SPR entered into a deed of settlement with the estate of Mr Trimbos. The salient terms of that deed were that the SPR comprised his rights to enforce the Remitter Judgment against the estate in exchange for the swift payment of the balance of the proceeds of Mr Trimbos' insurance policy, being $1,413,197.13. No further payment was required to be made by Mr Trimbos' estate.[19]

The Supreme Court of Victoria approves the O'Bryan and Trimbos settlements and publishes reasons for the Elliott Costs Orders

48. The SPR applied to the Supreme Court of Victoria for, inter alia: (i) orders approving the settlement with Noysue and Noysy under s 33V(1) of the *Supreme Court Act 1986* (Vic); (ii) a direction that the SPR was justified in settling with the O'Bryan Entities on the terms of the deed of settlement; and (iii) a direction that the SPR was justified in settling with the Trimbos estate on the terms of the deed of settlement.[20]

49. Dixon J made orders approving the settlement, and giving the directions sought by the SPR, on 31 July 2023: *Lindholm v Elliott & Ors* [2023] VSC 442 (**Approval Judgment**). Those reasons for judgment also addressed the court's reasons for making the non-party costs orders against the Elliott Entities. Those reasons dealt with the last of the claims before the Supreme Court of Victoria for determination.

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17 Ibid, at [43]-[46].

18 Open Lindholm Affidavit, [51]. A copy of the deed of settlement is at pages 75 to 92 of the Open Lindholm Exhibit.

19 Open Lindholm Affidavit, [54]. A copy of the deed of settlement is at pages 97 to 108 of the Open Lindholm Exhibit.

20 The summons was filed on 28 April 2023 and was amended on 2 June 2023 to include orders in relation to the settlement with Mr Trimbos: Open Lindholm Affidavit, [52] and [55].

50. We note certain findings that were made by the court in the Approval Judgment that are relevant to the further claims against Decoland which we discuss later in these submissions. Relevantly, Dixon J found that:

(a) Mr Elliott exercised complete control over Decoland such that it was at all times his alter ego: [54];

(b) Decoland was the "real funder" of the Bolitho proceeding and of AFP's claim and defence in the Remitter. In addition to initial capital, Decoland provided funds to AFP on an ad-hoc basis via a loan account when required to meet expenses. Those payments totalled at least $2,130,000: [57];

(c) Decoland made payments to AFP to fund its claim and defence in the Remitter with knowledge that its claim and defence lacked a proper basis: [58]; and

(d) Decoland was the entity that was to principally receive the fruits of the fraudulent scheme uncovered in the Remitter: [59].

51. The Court concluded (at [63]) that Decoland was "*knowingly involved in, and assisted, the conduct of AFP and Elliott in abusing the processes of the court and using these processes as an instrument of the fraud that they attempted*". Each of these findings are relevant to the prospective claim against Decoland for knowing assistance in AFP and the Lawyer Parties' breaches of fiduciary duties which is discussed later in these submissions.

Mr O'Bryan commences an appeal

52. Somewhat surprisingly, on 2 September 2023, Mr O'Bryan filed an appeal from the Approval Judgment. The application for leave to appeal was unorthodox. It did not seek to set aside or vary the orders approving the settlement with the O'Bryan entities. Instead, Mr O'Bryan sought orders that certain factual "findings" made about him in the reasons for judgment be "set aside" by the Court of Appeal.[21]

53. The factual findings that Mr O'Bryan sought to impugn mostly related to the allegation that he retained, through his wife, a financial interest in AFP – in other words, the same findings that Noysue and Noysy sought to challenge in the Non-Party Costs Summons before that application settled. He also sought to set aside certain 'findings' that was a participant in a "fraudulent scheme".

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[21] A copy of the application for leave to appeal is at pages 118 to 122 of the Open Lindholm Affidavit.

54. The SPR filed a notice of objection to the competency of the appeal on 20 September 2023, which was amended on 13 October 2023.[22] The SPR also filed an application for the appeal to be struck out or summarily dismissed (or, in the alternative, for an order that Mr O'Bryan pay security).[23] In summary, the objection alleged that the appeal was incompetent because:

(a) it was not an appeal from an "*operative judicial act*",[24] such as a judgment or order, that Mr O'Bryan contends ought to be reversed or varied. Rather, it was a purported appeal from certain findings expressed in the Court's reasons for judgment;[25]

(b) Mr O'Bryan lacks standing as a person affected by the orders made against the Elliott Entities that would enable him to appeal from those orders; and

(c) Mr O'Bryan is barred from bringing the appeal by the terms of the O'Bryan Settlement Deed.

55. The parties filed evidence and written submissions in relation to the competency objection. The SPR's objection to competency and application was heard on 10 May 2024. On 13 June 2024, the Court of Appeal struck out the application for leave to appeal and ordered that Mr O'Bryan pay the SPR's costs on the standard basis: *O'Bryan v Lindholm* [2024] VSCA 130. The Court of Appeal concluded and agreed with the SPR that a "determination" for the purposes of s 17(2) of the *Supreme Court Act 1986* (Vic) (being the enactment that confers the right to appeal) connotes the finalisation of a matter or other operative decision that affects rights, duties, or liabilities. Whatever its precise scope, it does not extend to the findings made in the relevant paragraphs that Mr O'Bryan sought to challenge. The Court of Appeal also concluded that Mr O'Bryan's appeal was inconsistent with the release embodied in the settlement deed entered into by the O'Bryan Entities.

The Second Elliott Appeal is abandoned

56. At the time of the Directions Judgment, Alex Elliott had an extant appeal against the orders and findings made against him in the Remitter Judgment (**Second Elliott Appeal**). Black J noted that the SPR, in assessing the Global Settlement Offer, had regard to:[26]

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22 A copy of the amended notice of objection to competency is at pages 221 to 240 of the Open Lindholm Affidavit.

23 A copy of the application is at pages 241 to 242 of the Open Lindholm Affidavit.

24 *Driclad Pty Ltd v FCT* (1968) 121 CLR 45 at 64.

25 The High Court has emphasised that "an appeal is against orders, not reasons for judgment": *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26 at [34] (per Kiefel CJ, Gordon and Steward JJ);

26 Directions Judgment, at [19].

> …the benefit of that course in avoiding continuing costs in the Second Elliott Appeal and avoiding any risk of an adverse result and a costs order that would diminish the return to debenture holders if that appeal was successful.

57. The existence of the appeal and the risk and costs associated with that appeal was a material factor in the SPR's deliberations.

58. Following the Directions Judgment, Mr Elliott persistently failed to comply with multiple orders of the Court of Appeal for the filing of material.[27] As a result, the Court of Appeal confirmed on 6 December 2022 that the appeal was taken to be abandoned by operation of rule 64.45(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and vacated the trial dates.[28] On 2 May 2024, the Court of Appeal made orders dismissing the application for leave to appeal and ordering that Mr Elliott pay the SPR's costs of the application on the indemnity basis.[29]

B.2 Summary of Recoveries and Amounts Outstanding

59. As recorded in the Directions Judgment (at [11]), at the time that application was made the SPR had recovered $3,012,738.93 from the LPLC on account of the insurance policies of Mr O'Bryan and Mr Symons.

60. Since the Directions Judgment, the SPR has:[30]

(a) recovered the sum of $464,828.83 from the LPLC on account of the available proceeds of Portfolio Law/Mr Zita's insurance policy;

(b) recovered a payment of $375,683.30 from Portfolio Law;

(c) recovered the sum of $1,413,197.13 from the LPLC on account of the available proceeds of Mr Trimbos' insurance policy; and

(d) recovered the sum of $1,251,858.51 from the O'Bryan Entities pursuant to the settlement that was reached with them.

61. Accordingly, the total recoveries made by the SPR to date in enforcing the Remitter Judgment are $6,518,306.73 (which recoveries remain undistributed to debenture-holders).

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27 Mr Lindholm summarises that conduct at [29] – [33] of the Open Lindholm Affidavit.
28 Open Lindholm Affidavit, [33].
29 Open Lindholm Affidavit, [40].
30 Open Lindholm Affidavit, [19]

Total Amount Outstanding.

62. The Remitter Judgment required each of the judgment debtors to pay:

(a) compensation in the sum of $11,700,127, plus interest; and

(b) the SPR's and the Contradictors' costs of the Remitter, and the SPR's costs of the Botsman Appeal, on the indemnity basis.

63. The SPR has not had his or the Contradictors' costs assessed but deposes that, based on the actual legal costs incurred and his expectation that he would recover at least 90% of those costs upon a taxation, he considers the value of the costs order to be approximately $9.54 million.[31]

64. We have expressed the view that this is a conservative estimate.[32] The various arguments by the Elliott Entities as to a greater discount have been carefully considered and rejected (at considerable expense to debenture holders).[33] As emphasised, it is to be recognised that the costs of the Remitter are in no ordinary category. They constitute costs incurred by debenture-holders, in the first instance, to get to the bottom of a massive fraud perpetrated upon them by, in effect, a judicial inquiry under the *Civil Procedure Act 2010* (Vic). Much of that cost was attributable to wholly untenable positions taken by the Elliott Entities and their legal representatives for an extended period of time in the Remitter, and consequential delay. It would be a remarkable thing in these special circumstances if debenture-holders were left bearing *any* of the costs associated with the Remitter. There is no basis whatsoever for suggesting that any of the costs were not properly incurred. Furthermore, there is a strong argument that debenture-holders would be entitled to very substantial interest on the costs of the Remitter even though they have not yet been assessed by the SPR due to his protracted negotiations with the Elliott Entities.[34] That interest since October 2021 would well exceed $2 million.

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31 Open Lindholm Affidavit, [17]-[18]

32 Joint opinion of counsel dated 2 June 2023 on the application to approve the settlement with the O'Bryan Entities, at [17], a copy of which is at page 87 of the Confidential Lindholm Exhibit.

33 Ibid, at [16] to [27].

34 The general position in Victoria is that interest on costs runs from the date the costs are assessed, however the court has a discretion under s 101 of the *Supreme Court Act 1986* (Vic) to fix some other date. That discretion can be exercised where there has been an abuse of process: *Knowles v Gutteridge* (Unreported, Supreme Court of Victoria, 30 July 1993, Hampel J). It is difficult to conceive of a more compelling case to exercise the discretion than the circumstances of this case, especially where the delay has been largely attributable to the Elliott Entities.

65. Mr Lindholm deposes that he has allocated each of the recoveries to date to the Compensation Component, save for half of the proceeds of the settlement with the O'Bryan Entities. Accordingly, as at 30 September 2024, the total amount that remains outstanding under the Remitter Judgment is:

(a) compensation, including interest, of $8,219,710.05;[35] and

(b) costs of *at least* $8.91 million;[36]

(c) being a total of *at least* $17.1 million.

66. Consequently, the shortfall on the total liability to debenture holders would be at least **$6.8 million** if the settlements with the Elliott Entities, Mr Zita and Mr Symons are approved.[37] This cannot be regarded as an insignificant amount. It is more than three times the total remuneration of the SPR for the court-appointed receivership.

67. In addition, there are various costs orders that have been made in favour of the SPR that remain unpaid, including:[38]

(a) the costs of the First Elliott Appeal;

(b) the costs of the Second Elliott Appeal;

(c) the costs of the Non-Party Costs Summons;

(d) the costs of the O'Bryan Appeal;

(e) the costs of AFP's application for special leave to the High Court of Australia; and

(f) the costs order against AFP in respect of the Insurance House settlement proceeding.

68. These unpaid costs orders alone amount to approximately $1,000,000 of debenture-holders' money.[39]

69. We adhere to the view that it scandalous that these costs orders remain unmet.[40] In the case of AFP, the costs orders were made long before it was placed into external administration.

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35 Open Lindhom Affidavit, [21] and see the calculations at page 47 to 48 of the Open Lindholm Exhibit.

36 This includes the SPR's costs of the appeal of Mrs Botsman in accordance with Dixon J's reasons in *Lindholm v Elliott & Ors (No 2)* [2023] VSC 572; Open Lindholm Affidavit, [20].

37 Open Lindholm Affidavit, [22].

38 Open Lindholm Affidavit, [23]-[24].

39 Ibid.

40 Elliott Offer Advice, [7] to [8], a copy of which is at page 114 of the Confidential Lindholm Exhibit.

70. In a real sense, it must be acknowledged that any shortfall would be rightly regarded by many debenture-holders as unacceptable, if not galling. At the same time, the SPR is required to act prudently in doing his best to get as much of the amount owing into the hands of debenture-holders as soon as is reasonably possible. This calls for difficult judgments where the judgment debtors have taken various steps to structure their affairs in a way that seeks to insulate them from financial accountability for their misconduct. In our view, the circumstances of this case expose a serious defect in the law, but it is a defect that only Parliament can redress as has occurred in other jurisdictions. The SPR's recovery efforts are constrained by the existing state of Australian law.[41]

C. SETTLEMENT DIRECTIONS

C.1 Applicable Principles

71. This Court has previously held in this proceeding that the "*broad remedial and protective jurisdiction*" conferred on the Court by s 283HB includes a power to give directions to the SPR.[42] The jurisdiction and power to make the orders sought in this application, and the principles to be applied in exercising that power, have been previously considered:

(a) by Black J in *Re Banksia Securities Limited (in liquidation) (receivers & managers appointed)* [2018] NSWSC 629 at [17]-[20]; and

(b) by Dixon J in *Banksia Securities Limited v Insurance House Pty Ltd (Settlement Approval)* [2020] VSC 123 (***Insurance House***) at [12]-[27].

72. We respectfully adopt those expositions of the relevant principles as detailed in paragraph 70 above.

73. Dixon J summarised the standard of review in *Insurance House* as follows:

> Following an extensive review of the authorities, including Re One.Tel, the Court of Appeal identified seven principles relevant on such applications. For present purposes, the court concluded that the discrete consideration of an application under s 477(2B) first required review of the liquidator's proposal on which the court should satisfy itself that there was no error of law or grounds for suspecting bad faith or impropriety. It must then weigh up whether there was any good reason to intervene. The court will always pay due regard to the commercial judgment of the liquidator and the attitude of creditors are also important. It is ordinarily expected that a liquidator would have obtained appropriate legal advice in relation to the

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41 Directions Judgment at [28].

42 *Re Banksia Securities Limited (in liquidation) (receivers and managers appointed)* [2018] NSWSC 629 at [17]-[20].

proposed compromise and the nature and content of that advice is a relevant consideration.

74. Courts recognise that they are generally unqualified and ill-equipped to second-guess the business and commercial decisions of liquidators/receivers.[43] It is different, however, when a compromise of legal proceedings is involved. This involves a combination of legal issues and commercial judgment. The rationality of any commercial judgment must be heavily informed by legal advice as the subject-matter of the compromise concerns a matter the liquidator/receiver is unqualified and ill-equipped to assess without appropriate legal advice. Put another way, a highly relevant consideration in the exercise of that commercial judgment must be the legal advice received by the liquidator/SPR even though a wider range of considerations can rationally be taken into account.

C.2 Elliott Settlement

75. This part of the submissions addresses the proposed settlement with the Elliott Entities.

76. The SPR executed a settlement deed with each of the Elliott Entities and other associated parties on 22 December 2023 (**Elliott Entities Settlement Deed**).[44] The Elliott Entities are defined in the deed as Mr Alexander Elliott, Mr Maximillian Edward Elliott in his capacity as executor of the deceased estate of Mark Edward Elliott, Elliott Legal Pty Ltd, MCM (Mount Buller) Developments Pty Ltd, and Decoland Holdings Pty Ltd.

77. Importantly, the definition of Elliott Entities does not include the principal judgment debtor, AFP, because it was placed into liquidation shortly after the Remitter Judgment in January 2022. The liquidator for AFP in his reports to creditors concluded that there were no assets available to make any distribution to creditors (including the major creditor, the debenture-holders), but expressed the view that viable claims might exist against AFP's legal advisors, ABL, for very substantial legal fees received in respect of and during the course of the Remitter when baseless claims and defences were asserted by AFP, but that he would require funding to undertake further investigations before forming any definitive view in that regard. As far as we are aware, the liquidator has not received any funding to undertake those further investigations.[45]

78. The expert reports by Mr Mellos usefully set out basic information as to each of the Elliott Entities and their related parties, including their known assets and liabilities, and their

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43 *Re McDermott and Potts (in their capacities as a joint and several liquidators of Lonnex Pty Ltd (in liq))* [2019] VSCA 23.

44 A copy of the deed of settlement is at pages 4 to 19 of the Open Lindholm Exhibit.

45 We address these matters in our Directions Opinion at Confidential Lindholm Exhibit, pp 53-56.

interrelationship. We do not repeat that information here (including by reason of confidentiality considerations), but something brief should be said about the history and structure of Decoland.

79. Decoland was incorporated in 1990. At the relevant times its directors were Mark Elliott and his wife, Pina Elliott. They are also equal shareholders in the company. Alex Elliott became a director on 19 February 2020 following Mark Elliott's death. Decoland is the trustee of three trusts: the Elliott Family Trust (**EFT**); the Elliott Equities Investments Trust (**EEIT**); and the MEE Superannuation Fund (**MEESF**).[46]

80. In relation to those trusts:

(a) the EEIT was settled by a Deed of Settlement dated 1 September 2001. The primary beneficiaries are Mr Elliott's immediate family – his wife Pina and his children Alex, Maximilian, Edward, and Olivia (but excluding Mark Elliott himself);[47]

(b) the EFT was settled by a Deed of Settlement dated 29 June 1990. The beneficiaries and Mr Elliott and his immediate family members (as above);[48] and

(c) the date of the settlement of the MEE Superannuation Fund is not known. The beneficiaries are Mark and Pina Elliott.[49]

81. For the most part, the SPR has known little about the commercial activities and assets of Decoland. However, publicly available information has shown that Decoland has extensive property interests in Flinders, Victoria.[50] As will be seen, the Mellos reports confirm that Decoland has very substantial assets, most of which it would appear are held on trust for the EEIT.

Some important context

82. A significant roadblock to achieving a settlement with the Elliott Entities has long been their opaque financial affairs and their intransigent refusal to make full and proper disclosure of their financial position. As we previously observed (see, for example, [50] of the Directions Judgment) the Elliott Entities have persistently breached court orders for

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46 Mellos Report, [5.1.1] (page 13).
47 Mellos Report, [5.3.1] (page 18).
48 Mellos Report, [5.3.1] (page 16).
49 Mellos Report, [5.4.1] (page 24).
50 Confidential Lindholm Affidavit, [139].

discovery of documents relevant to their financial position. This is a very serious matter. The conduct is apt to be described as a contumacious disregard of the orders of the Court.[51]

83. The wholly inadequate financial disclosure of the Elliott Entities was a key reason why the SPR rejected the First Global Settlement Offer, and a fundamental part of this Court's reasoning for giving the direction sought by the SPR that he was justified in rejecting that offer.

84. The SPR comprehensively chronicles the course of the negotiations with the Elliott Entities following the Directions Judgment at 51 to 93 of the Confidential Lindholm Affidavit. In correspondence following the Directions Judgment, the SPR repeatedly reinforced the need for fulsome financial disclosure to be made.[52]

85. Three aspects of the negotiations leading to the ultimate settlement are critical and require emphasis in order to understand the terms of the settlement that were reached.

86. *First*, following the Directions Judgment, the Elliott Entities made *some* limited further disclosure of their financial affairs, mostly comprising financial statements of Decoland, MCM and Elliott Legal. As we observed in the Global Offer Opinion,[53] those financial statements do not provide any accounting notes, are unaudited, and are not supported by any documents that would permit the statements to be verified. The statements had also been prepared by the Elliott Entities' accountant (Mr De Bono) who was a witness on behalf of the primary wrongdoer in the Remitter, AFP.

87. Needless to say, the limited documents that were provided fell well short of the standard of disclosure necessary for the SPR to accept a settlement proposal that involved a very significant discount on the amount owed to debenture-holders for the fraud inflicted upon them.

88. Nevertheless, the limited financial disclosure and the discussions tended to reinforce the impression, which the SPR conveyed at the Directions Application before this Court, that:

    (a) Decoland was an entity of substantial means that likely had assets capable of satisfying the entire outstanding liability to debenture-holders;

    (b) MCM had some limited means; and

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51 *He v Sun* (2021) 104 NSWLR 518.
52 See for example letter of 11 October 2022, at page 168 to 169 of the Confidential Lindholm Exhibit.
53 At [95], a copy of which is at page 76 of the Confidential Lindholm Exhibit.

(c) Elliott Legal, Alex Elliott, and Estate of Mark Elliott were unlikely to have significant assets against which the SPR could enforce the Remitter Judgment or non-party costs.

89. Accordingly, the financial disclosure that was made buttressed the SPR's view that the best means of achieving substantial recovery on behalf of debenture holders was through Decoland and its considerable assets.

90. *Second*, the fact that the Elliott family's very considerable wealth was concentrated within Decoland presented a practical problem for the SPR. Decoland had not been a defendant to the Remitter and was not a judgment debtor under the Remitter Judgment. Rather, it was liable only for the costs of the Remitter by reason of the non-party costs order that had been made against it. The SPR, therefore, was unable to recover the Compensation Component from Decoland. This was, it is submitted, primarily a product of the unusual way in which the Remitter proceeded as an inquiry conducted under s 29 of the *Civil Procedure Act*. The findings made in the Approval Judgment (which we summarised at [50]-[51] above) strongly suggest that, had Decoland been a defendant to the Remitter and such orders had been sought, it would have been held liable for the Compensation Component.

91. For that reason, in correspondence with the Elliott Entities, the SPR advanced the existence of a further, separate claim against Decoland for liability as an accessory to the breaches of fiduciary duty by AFP and the Lawyer Parties (**Further Decoland Claim**).[54] The breaches of fiduciary duty by AFP and the Lawyer Parties were set out in the Remitter Judgment. The SPR's claim would have relied upon similar factual allegations to those made in the Non-Party Costs Summons to establish that Decoland knowingly assisted those breaches.

92. *Third*—and critically—on 1 August 2023 (almost 2 years after judgment in the Remitter) Alex Elliott raised, through his solicitors and for the first time, an issue that he asserted was a "significant impediment" to the SPR enforcing his non-party costs order against Decoland (and, presumably, any judgment obtained in a further proceeding for knowing assistance).[55] Mr Elliott asserted that, at all times, Decoland carried on business only as trustee of various trusts (including the EEIT and the MEE Super Fund). Accordingly, he contended that Decoland did not own any assets in its own right. The argument that was therefore belatedly

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54 See for example in the letter dated 14 March 2023, which is at pages 291 to 294 of the Confidential Lindholm Exhibit.

55 Letter from Strongman & Crouch dated 1 August 2023, pages 295 to 299 of the Confidential Lindholm Exhibit.

advanced on behalf of Mr Elliott and the other beneficiaries of the trusts can be summarised as follows:[56]

(a) the SPR could only enforce against the assets of Decoland held on trust to the extent that Decoland had a right of indemnity out of those trust assets to meet its liability to debenture-holders;

(b) as a matter of law, a trustee's right of indemnity only extends to expenses or liabilities that are "properly incurred" or "not improperly incurred";

(c) the findings in the Remitter Judgment and the Non-Party Costs Judgment demonstrate that Decoland had engaged in serious misconduct and was party to a "fraudulent scheme";

(d) Decoland's liability to debenture-holders was therefore not "properly incurred"; and

(e) accordingly, Decoland had no right of indemnity against the trust assets to meet its liability to debenture-holders.

93. In other words, having delayed and obfuscated for almost 2 years following the Remitter Judgment, the Elliott Entities sought to make a 'silk purse from a pig's ear' by deploying the very misconduct at the heart of Remitter by the same individuals that also controlled the Elliott Entities to shield the principal assets of the Elliott Entities from debenture-holders.

94. In the Elliott Offer Opinion, we observed, after setting out the general principles regarding levying execution against trust assets, that the Elliott Entities were broadly and technically correct to assert that the SPR's ability to recover from any assets of Decoland held on trust is dependent upon Decoland having a right of exoneration from those assets to meet its liability to debenture-holders under the Remitter Judgment.[57] This was, therefore, an issue of significance.

95. We return to this issue later in these submissions, but it is necessary at the outset to refer to one aspect of our advice which influenced the non-financial terms of the ultimate settlement that was reached.

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56 The argument is developed in the following letters from Strongman & Crouch dated: 1 August 2023 (pages 295 to 299 of the Confidential Lindholm Exhibit); 5 September 2023 (pages 309 to 311 of the Confidential Lindholm Exhibit); and, 12 October 2023 (pages 312 to 316 of the Confidential Lindholm Exhibit).

57 Elliott Offer Opinion at [28], page 118 of the Confidential Lindholm Exhibit.

96. At [29] to [35] of the Elliott Offer Opinion[58], we identified that the argument advanced by Mr Elliott was based on two predicate, yet entirely unverified, assumptions. The first was that each of the assets of Decoland are, in truth, held on trust for one of its various trusts (and accordingly that none of Decoland's assets are beneficially owned by it). The second was that the respective trusts are legitimate and valid trusts that were properly constituted and reflect the real legal and beneficial ownership of the assets of Decoland.

97. While these matters might readily be assumed in ordinary commercial dealings, there were several aspects of this case that meant that the SPR was simply unable to accept those assumptions at face value and without proper verification. They included the notorious commercial reputation of Mark Elliott, the findings made in the Remitter about the control exerted by Mr Elliott over his financial affairs, and the repeated breaches of discovery obligations by the Elliott Entities. In particular, those assumptions could not be blindly accepted in circumstances where they were inherently self-serving, would disadvantage debenture-holders, and were raised for the first time very late in negotiations.

98. In the Elliott Offer Opinion, we said that (at [35]):

> Ultimately, we consider that the SPR would need to independently verify these assumptions through access to underlying, contemporaneous documents before he could proceed on the basis that all of the assets legally held by Decoland are held on trust for beneficiaries, and that those trusts are lawful and valid. These are not assumptions that can be verified and substantiated by verbal assurances from any of the advisors acting, directly or indirectly, for the Elliott Entities.

99. Later, at [86], we stated that any settlement with the Elliott Entities should include "*a sworn affidavit from an independent financial accountant (selected by and satisfactory to the SPR) as to the financial position of each of the Elliott Entities that is consistent with an inability of the Elliott Entities to contribute materially more than $11 million as judgment debtors*".[59]

The Terms of the Settlement

100. The salient financial terms of the Elliott Entities Settlement Deed are as follows:

(a) the Elliott Entities are to pay the sum of $8 million to the SPR from their own financial resources;

[58] Pages 118 – 119 of the Confidential Lindholm Exhibit.
[59] Page 131 of the Confidential Lindholm Exhibit.

(b) the Elliott Entities are to direct the LPLC to pay to the SPR the sum of $2 million and to take all necessary steps within their power to procure that payment (cl 3.1);

(c) the Elliott Entities guarantee to the SPR the payment of the sum of $2 million by the LPLC (cl 3.3); and

(d) on and from payment of the settlement sum, the parties mutually release each other and their related parties from all claims.

101. The deed incorporated certain conditions precedent, such as the approval of this Court. The conditions also included the following provisions:

> This Deed is subject to and conditional upon each of the following conditions being satisfied:
>
> 2.1 not later than 9 February 2024 or such later date as the SPR and the Elliott Parties agree, Mr Richard De Bono, as the accountant for the Elliott Entities, meeting with an independent financial accountant selected by the SPR and agreed by the Elliott Entities and providing reasonable access to the Elliott Entities' available books and records on a confidential basis to assist the independent financial accountant to assess their financial position;
>
> 2.2 within 14 days of the meeting referred to in clause 2.1, the SPR must confirm whether (in his absolute discretion but acting reasonably) the financial position of the Elliott Entities is substantially consistent with the representations made in the letters of Strongman and Crouch dated 1 August 2023 and 12 October 2023. If the SPR confirms his satisfaction that the financial position of the Elliott Entities is substantially consistent, this condition is satisfied.

102. The SPR deposes to the reasons for the inclusion of those conditions at [28] of the Confidential Lindholm Affidavit.

The Approach to Assessing the Settlement

103. The considerations governing the assessment of the settlement with the Elliott Entities are more complex than other settlements reached by the SPR in the special purpose receivership. The settlement, if approved, would compromise a bundle of separate rights that debenture-holders have or may have against the Elliott Entities. The starting point in assessing the adequacy of the settlement is to first identify the particular rights that are being compromised. They are:

(a) the right to enforce the Remitter Judgment (both the Compensation Component and Costs Component) against Alex Elliott;

(b) non-party costs orders against each of Decoland, Elliott Legal, MCM, and the Estate of Mark Elliott;

(c) the Further Decoland Claim; and

(d) various miscellaneous costs orders, including the costs of the First Elliott Appeal and the costs of the Second Elliott Appeal.

104. Because those rights include a mix of judgment debts and unadjudicated claims, the proper approach to the assessment of the reasonableness of the settlement sum is necessarily multifactorial. The analysis as it concerns the compromise of the various judgment debts requires a more anodyne assessment of the quantum of the offer relative to:

(a) the financial resources of each of the judgment debtors; and

(b) the cost, delay, and risk involved in taking the steps necessary to enforce that judgment and the likelihood that any of those steps could elicit higher recovery along the way, including an assessment of the prospects of the trust argument advanced by Mr Elliott.

105. The compromise of the Further Decoland Claim, of course, requires careful consideration of the prospects, risk, cost, and recovery timeframe of those claims, including the prospect of a favourable settlement.

106. We discuss each of these considerations below.

The Financial Position of the Elliott Entities

107. The SPR outlines his understanding of the financial position of the Elliott Entities from the information available to him at [128] to [141] of the Confidential Lindholm Affidavit. It is convenient, however, to start with the report of Mr Mellos.

Mellos Report

108. The SPR selected Mr Nick Mellos of Grant Thornton as the independent financial accountant appointed by the SPR for the purposes of clause 2.2 of the settlement deed. He met with the Elliott Entities' accountant and prepared a report for the SPR (the Mellos Report).[60]

109. The Mellos Report confirmed that the Elliott Entities were of substantial means, with combined assets exceeding $76 million and a net asset position of approximately $54

[60] Confidential Lindholm Affidavit, [37].

million.[61] As suspected, most of that wealth was concentrated in Decoland. The Flinders Property alone was valued at in excess of $40 million.

110. The financial position of Decoland was far greater than it had disclosed in the financial statements that it provided to the SPR. The primary reason for the understatement appears to be that the financial reports recorded key assets, including the Flinders Property, at historical cost, contrary to applicable accounting standards. Critically, Mr Mellos opined that the books and records of the Elliott Entities may not be consistent with accounting standards or compliant with section 286 of the *Corporations Act*.[62]

111. Mr Mellos considered the central question of whether the assets of Decoland were held on trust for one or more of the various trusts of which it was the trustee. He set out the facts and circumstances in favour of and against that proposition at section 5.3.3 of his report. He fairly concluded that:

> Based on the information I have received to date, I am unable to definitively conclude that significant assets listed in the EEIT financial statements are assets of the trust.

112. Mr Mellos' report raised a number of other concerns and curiosities regarding the financial position of the Elliott Entities. It is only necessary to refer to two other matters for present purposes.

113. *First,* MCM engaged in a number of highly questionable and concerning transactions during FY23 that had the effect of impairing the SPR's capacity to recover the Elliott Costs Order against it. It loaned almost all of its cash to MCM Partner Pty Ltd, an entity controlled by Pina Elliott. MCM Partner purportedly then used those funds to buy out the other shareholders of MCM. The effect of these transactions is that an easily recoverable asset (cash) was replaced with an asset of doubtful recoverability (a related part loan).[63]

114. *Second*, Mr Mellos observed at 5.3.3 that Alex Elliott "appears to exert influence over the assets of the EEIT". This raised issues around the veracity of that trust.

Status of the condition precedent following the first report

115. Given the conclusions reached in the Mellos Report, we gave an opinion to the SPR as to whether, acting reasonably, he could consider that the conditions precedent at 2.2 and 2.3 of the settlement deed were satisfied. In other words, did the Mellos Report establish that

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61 See the summary table at page 3 of the Mellos Report.
62 Mellos Report, page 33.
63 Mellos Report, pages 31 and 32.

the financial representations made by the Elliott Entities, including as to the trust issues, were substantially true?

116. We set out our views on the proper construction of clause 2.2 at [17] and [18] of the CP Opinion.[64]

117. We identified that the central questions were: (i) whether the trusts were valid; (ii) whether the assets of Decoland are, in fact, held on trust; and (iii) whether the net assets of the assets beneficially owned by the Elliott Entities are limited to $5 million.

118. We noted that, in order to conclude that the trusts were not valid, the SPR would bear the burden of establishing one of the following: (i) fraud in the establishment of the trusts or the purpose for which they were established; (ii) that the trust documents are not genuine; (iii) that the trusts are shams; or (iv) that the trusts are illusory.

119. We set out the relevant legal principles in relation to those concepts at [32] to [36] of the CP Opinion,[65] including the limitations inherent in the prevailing approach under Australian law. We concluded (at [37]) that we did not consider that there was sufficient evidence for the SPR to conclude that the EEIT, EFT and/or MEESF were likely to be shams or illusions. We therefore opined that the SPR, acting reasonably, could be satisfied that the trusts are valid.

120. The more important question was the capacity in which Decoland owned its considerable assets. We surveyed the proper approach under Australian law to identifying the capacity in which an asset is owned at [40] to [46].[66]

121. We set out the competing evidence and considerations discussed in the Mellos Report at [47] to [59] and said that:

> Weighing all these matters, we consider that on the basis of the information currently known, a court in contested litigation would more likely than not find that Decoland does not own the Flinders Property on trust for the EEIT and would give a declaration to that effect. In other words, we consider it more likely than not that the Elliott entities would fail to meet their burden of establishing on the balance of probabilities that the Flinders Property is held on trust (to the detriment of debenture holders) on the material they have supplied. Compounding these matters is their inability to adduce any evidence from Mark Elliott and the inference that could be drawn (contrary to the ordinary inference) that Mark Elliott was otherwise dishonest in how he structured and recorded his business affairs, including in respect of the trusts.

[64] Page 136 of the Confidential Lindholm Exhibit.
[65] Ibid pp 140 – 141
[66] Ibid pp 141 – 143.

122. Accordingly, we concluded that the SPR could not, acting reasonably, be satisfied that the assets of Decoland were held on trust or that the combined net assets beneficially owned by the Elliott Entities were $5 million or less and that condition precedent 2.2 had not been satisfied. We set out the options that we considered were therefore open to the SPR at [66] to [75].[67] One of those options including waiving the condition precedent.

Further documents and the Supplementary Mellos Report

123. The SPR deposes to his consideration of the CP Opinion and the steps that he took in response at [38] to [40] of the Confidential Lindholm Affidavit.

124. Further documents were sought and provided by the Elliott Entities to Mr Mellos and Mr Mellos prepared the Second Mellos Report.[68]

125. The further documents and information considered by Mr Mellos are set out at section 2 of the report. Mr Mellos opined that:

> Having considered the additional documents received since the First Report and my observations as detailed in Section 2 of this Report, such documents provide more direct and contemporaneous evidence in support of the claims made by the Elliott Entities. Accordingly, I am of the view, taken as a whole, the books and records provided by the Elliott Entities are consistent with the contention that the Flinders Property is held on trust for the EEIT.

126. We gave a further opinion to the SPR considering whether, in light of these developments and the Second Mellos Report, the SPR could now consider the condition precedent to be satisfied (being the Supplementary CP Opinion). After considering the further documents and the views reached by Mr Mellos in the Supplementary Mellos Report, we concluded (at [24] to [25]):

> Although there remains no direct evidence of the Flinders Property being acquired as a trust asset, in our view, in light of the further documents it is open to permit an inference to be drawn that the asset was intended to be owned by Decoland on trust for the EEIT. In other words, weighing all the relevant matters, whilst the matter is far from tolerably clear, we consider that the Elliott Entities should have reasonable prospects of being able to establish on the balance of probabilities that the Flinders Property is an asset of the EEIT.
>
> We therefore consider that the SPR can rationally be satisfied that the representation by the Elliott Entities that the Flinders Property is owned by Decoland on trust for the EEIT is substantially true. That is to say, we consider there is a body of evidence available capable of rationally sustaining that conclusion.

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[67] Pages 146 – 148 of the Confidential Lindholm Exhibit.

[68] Confidential Lindholm Affidavit, [41]; and the Supplementary Mellos Report.

127. Following that advice, the SPR formed the view that the condition precedent had been satisfied.[69]

128. We cannot leave this issue without observing that it is inexplicable that the Elliott Entities did not provide plainly relevant and probative evidence far earlier than they did. The failure to provide highly relevant material until *after* Mr Mellos has prepared his comprehensive and costly first report was highly unsatisfactory and yet again very substantially increased the costs borne by debenture holders. There can be no satisfactory explanation for why those documents were not provided far earlier to either the SPR or to Mr Mellos.

Conclusions regarding the financial position of the Elliott Entities

129. Despite the highly unsatisfactory way in which this settlement has unfolded over an unnecessarily protracted period of time, ultimately the evidence available to the SPR appears to establish that the likely financial position of the Elliott Entities is as follows:

(a) combined, the net assets beneficially owned by the Elliott Entities is approximately $5.9 million.[70] That mostly comprises an illiquid related party loan owed by MCM Partner Pty Ltd (an entity controlled by Pina Elliott) to MCM;

(b) material uncertainty surrounds whether the transaction giving rise to that related party loan could be unwound in an insolvency context, or whether the loan itself is recoverable. The recoverability of that loan must be regarded as doubtful. The financial statements of MCM Partner disclose that its net asset position on 30 June 2023 was $3,423,383 (being less that the quantum of the loan), but that includes its shares in MCM which are recorded at a value of approximately $6.1 million.[71] MCM is unlikely to have such value in circumstances where the development it undertook is at completion, and where its net asset position is $5.5 million (including the loan owed to it by MCM Partner). Mr Mellos opines that the consideration paid for the shares in MCM was excessive.[72]

(c) the combined position includes modest asset positions held by Elliott Legal ($132,734), Decoland in its own right ($300,000), and the Estate of Mark Elliott ($27,327);

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69 Confidential Lindholm Affidavit, [42].
70 Mellos Report, page 3.
71 Mellos Report, page 32.
72 Ibid.

(d) Alex Elliott apparently has a negative asset position of -$141,385; and

(e) Decoland has very substantial assets held by it on trust, and those assets are far greater than the entire amount owing to debenture-holders for its central role in the underlying misconduct.

130. It follows that an assessment of the prospects of recoverability of the Remitter Judgment from the Elliott Entities ultimately turns on an assessment of the prospects of:

(a) the Further Decoland Claim; and

(b) the SPR being able to enforce the Elliott Costs Order, and any judgment in the Further Decoland Claim, against the assets of Decoland that are held on trust.

131. We address both these matters below.

The claims for equitable compensation against Decoland

132. At [50] to [51] of these submissions, we adverted to the findings that were made against Decoland in the Non-Party Costs Summons. Those findings described the key role that Decoland played in facilitating and enabling the fraudulent scheme at the heart of the Remitter Judgment. We note, of course, that Decoland did not ultimately contest the Non-Party Costs Summons.

133. We otherwise address the prospects of the Further Decoland Claim at [81] to [92] of the Global Offer Opinion,[73] where we also consider the *Anshun* estoppel issue raised by the Elliott Parties in correspondence. That opinion was provided prior to the reasons for judgment in being delivered in the Non-Party Costs Summons. Unsurprisingly, with the benefit of those reasons, we adhere to the views expressed in our earlier opinion.

The trust assets

134. It is beyond doubt that a judgment creditor cannot execute against assets held by the debtor on trust. However, a judgment creditor can be subrogated to a trustee's right of indemnity in respect of trust assets and seek relief from a Court to give effect to that right. But the creditor takes that right as they find it - they can have no better right to the assets than the trustee itself has or had.[74]

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[73] Pages 73 – 76 of the Confidential Lindholm Exhibit.

[74] *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at [34] (per Kiefel CJ, Keane and Edelman JJ).

135. At face value, it is difficult to see how the Elliott Entities deploying the very misconduct as the heart of the Remitter as a means to avoid the consequences of that misconduct is consistent with equitable principle. But the historical preoccupation of equity has been the preservation of the trust estate. Moreover, the High Court has emphasised that courts are not free to develop and apply equitable principles at a high level of abstraction by reference to general notions of unfairness or unconscionability.[75] In saying that, it must also be recognised that equity has long been concerned to protect innocent third parties that deal with trustees.

136. The right of indemnity is sometimes described as extending only to expenses that are "properly incurred". The contention advanced by the Elliott Entities, simply put, is that because Decoland's liability to debenture-holders arose wrongfully and by reason of its participation in a fraudulent scheme, it cannot have been "properly incurred". But the position is nowhere near that straightforward because what is meant by "properly incurred" in this context is uncertain and unsettled.

137. We set out our view of the relevant principles under Australian law and provide an opinion on the central question of whether Decoland would have an indemnity over the trust assets to meet its liability to debenture-holders at [36] to [60] of the Elliott Offer Opinion.[76]

138. We also identify a separate but overlapping source of recovery at [43] to [46].[77]

139. We further addressed a separate potential claim against Decoland's directors at [61] to [63].[78]

140. We adhere to those views. For present purposes, it is relevant to observe that clearly those are matters of considerable complexity that are attended by material risk.

The SPR's Reasoning

141. The SPR comprehensibly and candidly exposes his process of reasoning for agreeing to settle with the Elliott Entities on the terms of the Elliott Settlement Deed at [21] to [28] of the Confidential Lindholm Affidavit.

142. The SPR has acknowledged that the settlement sum is below the amount that was advised by counsel as being fair and reasonable, but rightly states that he considers the settlement

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[75] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [74]-[84]; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at [20] (per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ)

[76] Pages 119 – 125 of the Confidential Lindholm Exhibit.

[77] Ibid p 121.

[78] Ibid pp 125 – 126.

to constitute substantial economic recovery on behalf of debenture holders. The SPR correctly has regard to the fact that—in weighing the options facing him—the Banksia litigation has been long-running and that the debenture-holders are an ageing demographic.

143. The SPR directly engages with the views of counsel at [25] to [28] of the Confidential Lindholm Affidavit. He deposes that he has carefully considered the advice of counsel (and previous advices) and has taken that advice into account. He identifies the options that counsel has advised are open to him, including the further enforcement steps he could take to seek to recover the Remitter Judgment or extract a higher offer. He identifies the differences between the settlement deed and the views of counsel.

144. The SPR explains, in detail, why after careful consideration he resolved to settle the claims against the Elliott Entities notwithstanding those differences at [26] to [28]. In particular, at [27], he identifies a number of wider considerations bearing upon his assessment of the options available to him. Those are relevant considerations open to the SPR to weigh in the calculus in his judgment. The important point is that it is certainly not a case of the SPR ignoring legal advice or taking a course of action fundamentally inconsistent with that advice.

145. The advice of counsel has evidently been obtained at critical junctures and considered carefully and given real weight. It is not the only relevant consideration the SPR has taken into account. He has identified the areas in which the settlement is inconsistent with the advice of counsel and set out the commercial considerations that, in his judgment, justified that departure. Consistently with the authorities identified above, the Court ought to pay due regard to the experienced commercial judgment of the SPR. That is especially so given the SPR's experience and track record in the receivership, having already recovered over $85 million on behalf of debenture-holders.

146. It can be fairly concluded from the SPR's reasoning that his judgment as to whether to accept the settlement offer was finely balanced. Further, as is evident from the opinions of counsel, it is a matter on which reasonable minds can differ. More pointedly, the SPR has faced a situation of agonising complexity where no wholly satisfactory outcome is available and where it is therefore virtually impossible to avoid criticism from all debenture-holders.

147. However, it is also evident on the face of the SPR's candid exposition of his reasoning that he has followed a proper process in determining to settle with the Elliott Entities on the terms of the Elliott Settlement Deed. He has taken account of relevant considerations and nothing in the process of reasoning set out by the SPR suggests that his view on the

reasonableness of the settlement was informed by extraneous or irrational considerations. Nor can there be any sensible suggestions of bad faith or impropriety on his part. He has explained how he weighed the competing considerations.

148. The SPR has also had regard to two other considerations that favour the settlement.

149. First, it has the support of the committee of debenture-holders.[79] The committee, which was constituted at the commencement of the receivership, has unanimously supported the settlement. It is of some significance that Mr Pitman has expressed support for the settlement. It is true that the committee is comprised of elderly members without any legal qualifications or experience. Nor has the committee been provided and considered opinions of counsel. At the same time, they are each debenture holders with an intimate familiarity with the course of the litigation and the acutely difficult decisions that have had to be made. The wider sentiment of debenture holders and any serious objections to the settlement can be more reliably ascertained by the dissemination of a balanced and informative circular as attached to these submissions. Overall, the support of the committee should be regarded as relevant matter of some weight, but not a decisive or significant factor in favour of settlement. Put differently, the absence of any opposition from the Committee is a plainly relevant consideration.

150. Second, the SPR has had regard to the demographic profile of debenture-holders.[80] It has been observed on multiple occasions in both this Court and the Supreme Court of Victoria that many of the debenture-holders are elderly and, in fact, many have died since the commencement of the Banksia Proceedings. It has been over 10 years since Banksia collapsed, and, after years of protracted and exceptionally stressful litigation, the SPR is understandably concerned to finalise the receivership and to ensure that any further significant distributions are made without further undue delay. That consideration must of course be weighed against other factors, such as the prospect of substantial further recovery, but it is plainly a relevant consideration.

151. There are countervailing considerations that tell against the reasonableness of the settlement with the Elliott Entities. Much of that arises from the analysis in the Elliott Offer Opinion as to prospects of successful further recovery. The Elliott Entities are clearly *capable* of contributing substantially more or meeting their total liability in full. So much is apparent from the $8 million they are contributing since on the information they have provided to

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79 Confidential Lindholm Affidavit, [24]. And see Section F of the Confidential Lindholm Affidavit which sets out the views of the Committee.

80 Confidential Lindholm Affidavit, [22].

the SPR, according to Mr Mellos, this well exceeds the financial resources available to the Elliott Entities that are not apparently held on trust. The Elliott Entities have not explained the sources of their contribution to the settlement. It could also be said that the increase in the settlement amount from the offer rejected pursuant to the Directions Judgment is only $1.75 million. Whilst that is not an insignificant amount, once the additional costs from August 2022 to December 2023 and the time value of money (interest) is taken into account, the net benefit to debenture holders could be regarded as marginal. However, that would be to overlook that the settlement proposed now is based on much better information (albeit imperfect) about the Elliott Entities.

152. We consider that it would equally have been open to the SPR to reject the settlement and to take vigorous enforcement steps against the Elliott Entities along the lines that we outlined at [106] to [107][81] of the Global Offer Opinion. It is not the case that such an approach would inevitably have committed the SPR to lengthy and costly litigation (although there is a risk it may have done). But it was a matter for the SPR to balance those considerations and form a judgment on which approach was in the best interests of debenture-holders; a task that he has performed responsibly and diligently.

153. The mere fact that reasonable minds may differ as to the appropriate settlement sum, or the optimal enforcement approach, is not to the point. It is not for counsel, or for the court, to substitute its own view for that of the SPR where competing reasonable courses of action are open. Rather, the court's role is to determine whether the SPR's decision was within the range of acceptable decisions by assessing whether he has acted reasonably, has followed a proper process, has been guided by relevant considerations and has reached a decision that is rational and open. For the reasons set out above, the Court ought to find that he did, and give the directions sought by the SPR.

C.3 Symons Settlement

154. The settlements with Mr Symons and Mr Zita can be dealt with in much shorter compass. In both cases, the decision to settle was significantly more clear-cut.

155. The SPR entered into a deed of settlement with Mr Symons and his trustee in bankruptcy on 4 March 2024.[82]

156. The salient terms of the deed are that:

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[81] Pages 79 – 80 of the Confidential Lindholm Exhibit.

[82] The settlement deed is at pages 34 to 46 of the Open Lindholm Exhibit.

(a) Mr Symons will pay to the SPR the sum of $250,000;

(b) the deed is conditional upon the settlement being approved by this court;

(c) the SPR will withdraw his proof of debt in Mr Symons bankruptcy following payment of the settlement sum; and

(d) the parties mutually release each other and their related parties from all claims.

157. The SPR rightly recognises the settlement sum to be paid by Mr Symons is low.[83] It represents a small fraction of the amount that Mr Symons was ordered to pay. It does not result in a substantial return to debenture-holders. That is likely to be galling to debenture-holders, particularly given Mr Symons role as a key player in the events examined in the Remitter.

158. Further, the fact that Mr Symons—a bankrupt with no known assets—can procure a payment of $250,000 might be said to support an inference that he has access to further funds. Mr Symons has not disclosed the source of the funds being used to settle with the SPR. But an equally open inference is that the payment is being made with the support of third parties who would not otherwise be obliged to contribute those funds.

159. However, none of these matters alter the simple reality that Mr Symons has now been bankrupt for almost three years, and the administration has not produced any return to creditors. There is no expectation that any dividend will be paid in the future,[84] noting that Mr Symons is due to be discharged from his bankruptcy in November.

160. It must be noted that, unlike a normal liability, Mr Symons discharge from bankruptcy would not necessarily have the effect of discharging his liability under the Remitter Judgment. That is because the discharge of a bankrupt from bankruptcy does not release the bankrupt from "*a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party*": s 153(2) of the *Bankruptcy Act 1966* (Cth). It is not necessary to embark on a detailed examination of that provision or the nature of the conduct giving rise to Mr Symons' liability under the Remitter Judgment here. The practical effect of the provision would be to permit the SPR to enforce the Remitter Judgment at some future time against Mr Symons, were he to acquire assets against which execution could be levied. However, this does not and should not alter the SPR's calculus. It is clearly not in

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83 Confidential Lindholm Affidavit, [30]

84 Confidential Lindholm Affidavit, [182].

debenture-holders interest to prolong the special purpose receivership on the speculative basis that Mr Symons may, at some indeterminate future time, come into assets.

161. The SPR otherwise outlines his reasons for accepting the settlement with Symons at [29] to [31] of the Confidential Lindholm Affidavit. Importantly, he deposes to the steps he would otherwise take but for the settlement at [30].

162. It is plain that in determining the settle with Mr Symons, the SPR has acted reasonably and followed a proper process. The determinative factor is that the evidence available to the SPR establishes that the recovery achieved by the settlement, whilst modest, is a better outcome for debenture-holders than would otherwise be obtained. For that reason, the SPR made the only decision reasonably open to him to make on the information before him.

C.4 Zita Settlement

163. The SPR entered into a deed of settlement with Mr Zita on 27 February 2024.[85]

164. There were terms of the settlement deed that:

(a) Mr Zita would pay to the SPR the sum of $95,000;

(b) the settlement sum would be paid in three instalments;

(c) the deed is conditional upon the settlement being approved by the court; and

(d) the parties mutually release each other and their related parties from all claims.

165. Although a short extension was granted in relation to the final instalment required to be made, Mr Zita has now paid the settlement in full.[86]

166. The settlement sum paid by Mr Zita is paltry. The SPR properly recognises this.[87] It represents an infinitesimal fraction of the amount he was ordered by the court to pay to debenture-holders.[88] This miserable recovery bears no resemblance to his moral culpability as a key contravener who enabled much of the wrongdoing described in the Remitter Judgment.

167. Once again, however, the evidence available to the SPR discloses that Mr Zita does not have substantial assets. The SPR has prepared an analysis of Mr Zita's financial position

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85 A copy of the settlement deed is at pages 20 to 32 of the Open Lindholm Exhibit.
86 Open Lindholm Affidavit, [12].
87 Confidential Lindholm Affidavit, [32].
88 The settlement sum represents 0.45% of the judgment debt, not including interest.

which is at pages 755 to 756 of the Confidential Lindholm Exhibit. It is not necessary to descend into those matters in any detail. It suffices to say that:

(a) Mr Zita has self-disclosed his net asset position as being $114,504;

(b) the SPR's own analysis, including information obtained from kerbside valuations of properties in respect of which Mr Zita has an interest, estimates that Mr Zita's net asset position is between $348,000 (low estimate) and $1 million (high estimate); and

(c) Mr Zita's primary assets are his interest in three properties. Each of those properties is co-owned with third parties as tenants in common.[89]

168. The SPR outlines the course of negotiations that led to the settlement at [145] to [177] of the Confidential Lindholm Affidavit. He also sets out his reasons for accepting the settlement at [32] to [34].

169. The SPR's assessment is that the settlement sum is larger than the potential return that debenture-holders would receive if he was to petition for Mr Zita's bankruptcy. The SPR estimates that any bankruptcy trustee would incur costs of approximately $75,000 to $100,000 in administering Mr Zita's estate. The bankruptcy trustee would face the practical problem of having to realise Mr Zita's interest in three co-owned properties, either through negotiations with the co-owners or seeking a sale. Any sale will incur a Capital Gains Tax Liability. The SPR would then rank equally with other unsecured creditors if any dividend was made.

170. Even taking the SPR's low estimate of Mr Zita's financial position, the settlement sum represents only one-third of his net assets. While that could be regarded as scandalous, it must be balanced against the following matters. First, the SPR's judgment is that it represents the best offer that can be procured from Mr Zita through negotiation.[90] It is therefore a choice between accepting this settlement or proceeding to seek the bankruptcy of Mr Zita. Second, as discussed above, the SPR's assessment is that a bankruptcy is unlikely to lead to a better return. Even if it did, any better return is likely to be marginal and, in the context of this matter, immaterial to debenture-holders. Third, the timing of any return is uncertain. It would prolong the special purpose receivership for little practical gain.

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89 Confidential Lindholm Affidavit, [143].
90 Confidential Lindholm Affidavit, [34].

171. The SPR's decision, whilst based on a hard-nosed commercial assessment, is rational and reasonable and one that is open to the SPR, with his considerable experience, to make.

D. FINALISING THE RECEIVERSHIP

172. As was seen above, a powerful consideration in the SPR's reasoning in accepting the settlements was the prospect of a distribution to debenture-holders in the near term that would bring the special purpose receivership to practical completion.

173. The SPR seeks the Court's imprimatur for that approach, through orders:

(a) approving a final distribution to debenture-holders of the remaining funds held by the SPR; and

(b) giving a direction to the SPR that he justified in not pursuing possible claims against the LPLC and Portfolio Law.

174. If those orders are made, that the SPRs work will be practically complete and, after making the final distribution and dealing with any remaining matters, the SPR will be in a position to seek his formal discharge as special purpose receiver.

175. On no view is the SPR acting with undue haste or seeking to finalise the receivership for its own sake. Three matters have weighed on the SPR in deciding on this approach.

176. *First*, the history of this matter is protracted and regrettable. Banksia collapsed 12 years ago. The Bolitho class action was commenced in 2014. The debenture-holders have endured much over that time, including a "laborious, costly and delayed" Remitter process,[91] which uncovered that the people entrusted to vindicate their rights arising from the collapse had instead attempted to perpetrate a fraud upon them. The SPR's view, which is entirely reasonable and rational, is that more than a decade of extremely stressful litigation is enough.[92]

177. *Second*, and as has been underscored in the past, debenture-holders are an elderly demographic group. To the extent it is possible to do so, funds ought to be distributed to them as soon as practicable.

178. *Third*, the SPR has received clear and persistent feedback from the Committee of debenture-holders that they wish to see the special purpose receivership finalised as soon as possible. Although care must be taken in assuming that the Committee speaks for all

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91 *Bolitho v Banksia Securities Ltd (No 18) (Remitter)* [2021] VSC 666 at [3].
92 *Rozenblit v Vainer* (2018) 262 CLR 478 at [42].

debenture-holders, it is nevertheless a factor that the SPR is entitled to take into consideration.

179. *Further*, as we highlighted at the start of these submissions, from a financial standpoint the special purpose receivership has been a success. The SPR was appointed for the overarching purpose of responsibly pursuing any viable claims of Banksia and its debenture-holders so as to enlarge the overall recovery for debenture holders. In fact, the SPR has made recoveries in excess of $100 million and almost 95c in the dollar of outstanding principal will have been returned to debenture-holders. At the time of the SPR's appointment, no one anticipated that that level of recovery would result from the SPR's discharge of his duties in accordance with his terms of appointment. The SPR has also had to navigate issues of exceptional complexity and sensitivity over an extended period of time.

Process

180. The SPR proposes to administer the distribution in the same manner as the nine distributions that have previously been made to debenture-holders. That is, he proposes to engage Link Market Services to facilitate a distribution of the available funds on a *pari passu* basis.[93] Mr Lindholm estimates that Link will be able to finalise a distribution within 30 days of provision of the funds and at a cost of approximately $80-85,000.[94]

181. The SPR estimates that he will be able to distribute approximately $19.8 million. That represents approximately 3 cents in the dollar of principal.[95]

182. In order to be in a position to make a final distribution, the SPR seeks directions confirming his decision not to take further recovery action against the LPLC and Portfolio Law and to regularise the funding of the special purpose receivership. We address each of these matters below.

LPLC

183. Each of Mr O'Bryan, Mr Zita, Mr Symons, Mr Trimbos and Elliott Legal were covered by a policy of insurance with the Victorian statutory insurer, the LPLC. Each policy had a limit of $2 million including defence costs.

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93 Open Lindholm Affidavit, [121]-[129]
94 Ibid, [127].
95 Open Lindholm Affidavit, [125].

184. To date, the LPLC has paid out the sum of $4,890,764.89, comprising:[96]

(a) $1,558,191.39 on account of the available proceeds of Mr O'Bryan's insurance policy after defence costs;

(b) $1,454,547.54 on account of the available proceeds of Mr Symons' insurance policy after defence costs;

(c) $464,828.83 on account of the available proceeds of Portfolio Law/Mr Zita's insurance policy after defence costs; and

(d) $1,413,197.13 on account of the available proceeds of Mr Trimbos' insurance policy after defence costs.

185. If the settlement with the Elliott Entities is approved, it is anticipated that the LPLC will pay out a further $2 million on account of Elliott Legal's policy; that is, the LPLC will have contributed almost $7 million to the Remitter Judgment.

186. The SPR has articulated possible further claims against the LPLC that would, if made and successful, expand the available insurance moneys that could be paid to the SPR. In summary, those claims are that:

(a) the claims made in the Remitter did not constitute a single 'claim' for the purposes of the policies, but instead constituted multiple claims some or all of which do not attract the operation of the aggregation clause in the policy. It was therefore open for the insured, and therefore the SPR, to recover multiples of the policy limit;

(b) some or all of the defence costs incurred by Mr O'Bryan, Mr Symons and Mr Zita were incurred unreasonably and therefore should not reduce the amounts payable under those policies. The defence costs incurred by those individuals eroded the amounts payable under the policies by approximately $2.5 million;

(c) there were potential multiple notifications in respect of different claims in different policy years such that separate policies might be engaged; and

(d) the prospect of a separate claim against the Lawyers Parties in relation to the conduct in the Partial Settlement, which would attract the operation of the policies.

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[96] Open Lindholm Affidavit, [19].

187. We address these claims in detail and give our views on the prospects of those claims at [142] to [198] of the Directions Opinion.

188. The SPR has considered that advice.[97] He has balanced the prospects of further recovery against the costs and delay involved in prosecuting the further claims and the corresponding delay to the making of a final distribution to debenture-holders and finalising of the receivership. In his commercial judgment, the benefits to debenture-holders in making a final distribution and ending the receivership outweigh the prospects of additional recovery at further expense and delay. In forming that judgment, he has regard to the adversarial approach adopted by the LPLC to date and expects, quite reasonably, that any claims would be defended.[98]

189. It would equally have been open to the SPR to conclude that taking further steps against the LPLC would be well justified. In fact, it must be acknowledged that further steps could have been taken in the years following the Remitter Judgment to progress these claims to resolution. Nevertheless, as matters stand today, it is reasonable and rational for the SPR to conclude that, in his judgment, it is not in the interests of debenture-holders to progress these claims at the expense of a swift distribution and finalisation of the receivership. That is particularly so when the prospects of those claims are certainly challenging and the LPLC has already contributed almost $7 million to the Remitter Judgment.

Portfolio Law

190. The position in relation to Portfolio Law can be dealt with in short compass.

191. Mr Zita was formerly a partner of that firm but, having been struck off, no longer has any interest in the business. The firm is now owned and operated by a sole principal unconnected to the conduct of Mr Zita or the firm in the Banksia Proceedings.

192. Portfolio Law has asserted that is has suffered considerable reputational damage following the Remitter Judgment which has impacted its earnings.[99] Its new principal has made a statutory declaration stating that its net assets are $24,304. That includes a considerable taxation liability that is the subject of a payment plan.[100]

193. The SPR is not aware of any information that would suggest that the position disclosed by Portfolio Law is incorrect or incomplete. Even allowing for the possibility that Portfolio

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97 Confidential Lindholm Affidavit, [48].
98 Confidential Lindholm Affidavit, [49] to [50].
99 Letter from Portfolio Law dated 16 May 2023; page 728 to 729 of the Confidential Lindholm Exhibit.
100 Statutory declaration, pages 672 to 676 of the Confidential Lindholm Affidavit.

Law may have understated its financial position, it is clearly not in the interests of debenture-holders to incur further costs in seeking to enforce the Remitter Judgment against an impecunious company.

194. The SPR deposes to the likely costs of a liquidator appointed to Portfolio Law.[101] The SPR has, rightly, formed the judgment that further enforcement steps are unlikely to result in meaningful recovery. Respectfully, no other conclusion is reasonably open on the evidence.

Funding

195. On 29 February 2016, Black J made orders that the privately appointed receivers and managers of Banksia release to the SPR the sum of $10 million for the payment of, inter alia, future remuneration, costs and expenses of the SPR in prosecuting the Banksia Proceedings.[102]

196. Further orders have made by this court for additional amounts to be released to the SPR by the receivers on 19 February 2018 and 8 February 2021.[103]

197. The last of the funds approved by this court were exhausted on 11 April 2023.[104]

198. As is evident from the matters canvassed in these submissions and disclosed on the face of the affidavit material filed in support of this application, there has been significant, complex work undertaken in enforcing the Remitter Judgment and negotiating with the judgment debtors. Since the exhaustion of the funds approved by this court, the SPR has paid the expenses incurred in undertaking that work from other funds held by him, including the insurance proceeds paid to the SPR on account of Mr O'Bryan and Mr Symons' policies.

199. The SPR, retroactively, seeks an order that he was justified in taking that approach; that is, paying the expenses of the special purpose receivership from those funds. Each of the payments made from those funds is enumerated in the table at pages 326 to 327 of the Open Lindholm Exhibit.

E. UNPRESENTED PAYMENTS

200. The SPR presently holds $4.08m in respect of unpresented payments from previous distributions, representing 0.7% of the total funds that have been distributed to debenture-

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101 Confidential Lindholm Affidavit, [163].
102 *Re Banksia Securities Limited* [2016] NSWSC 357 at [26] to [39]
103 Open Lindholm Affidavit, [112].
104 Ibid.

holders.[105] Unsurprisingly, the percentage of unpresented payments has steadily risen with each distribution, and 6.8% of the funds distributed in May 2021 (being the last distribution) remain unpresented.[106]

201. The SPR summarises the size of those accounts at [89] of the Open Lindholm Affidavit. Relevantly:

(a) 31 accounts have unpresented and outstanding payments greater than $10,000;

(b) 130 accounts have outstanding payments of more than $4,000 but less than $10,000; and

(c) 14,474 accounts have outstanding payment of less than $4,000.

202. Of the 14,474 accounts that are owed less than $4,000 by reason of unpresented payments, the average amount owed is $187.77.[107]

203. The SPR has recently undertaken steps to identify the current contact details of those debenture-holders who have not presented payments from prior distributions (or their estate). The SPR has rightly been mindful of the costs of that exercise and has sought to ensure that the steps taken are reasonable and proportionate.[108]

204. The process adopted by the SPR thus far has been as follows:[109]

(a) the SPR instructed his staff to investigate the details of the holders of accounts with balances greater than $10,000. Those steps are set out at paragraph [95] of the Open Lindholm Affidavit; and

(b) he engaged Link to conduct skip traces for the holders of accounts with outstanding payments of greater than $4,000 but less than $10,000.

205. Those efforts have been successful. The details of 204 debenture-holder accounts have been identified, representing unpresented payments of $2,099,568 that can now be forwarded to the correct address or contact.

206. In light of the success of the trace efforts, the SPR has engaged Link to conduct skip traces in relation to accounts with a balance of greater than $3,000. That process will cost $37,000

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105 Open Lindholm Affidavit, [88].
106 Ibid.
107 Open Lindholm Affidavit, [89] and [94].
108 Open Lindholm Affidavit, [92].
109 Open Lindholm Affidavit, [92] to [95].

and is expected to be completed by no later than 15 November 2024.[110] The SPR does not propose to take any steps in relation to accounts with balances of less than $3,000. The SPR sets out the reasons for this view at [100] of the Open Lindholm Affidavit.

207. Critically, the SPR estimates that after completing the remaining steps there will remain unpresented payments totalling at least $1.5 million, though this may increase following the Final Distribution (**Undistributed Funds**).[111] This raises the question of what ought to be done with those payments.

Options regarding the unpresented balance

208. The SPR seeks the court's guidance as to the manner in which he ought to deal with the Undistributed Funds following the final distribution.

209. We identify three options that are reasonably open:

(a) the SPR rateably distributes those funds to active debenture-holders as part of the proposed final distribution;

(b) the funds are paid into a statutory unclaimed moneys scheme, such as that administered by ASIC or the Victorian Register of Unclaimed Money; or

(c) the option proposed by the SPR (or some variation thereof), being:[112]

(i) the funds are first paid to meet any remaining remuneration or expenses incurred by the SPR; and

(ii) the balance is paid to a charitable organisation.

210. In addition, some combination of these three options is a possibility. For example, it would be possible to pay some of the Undistributed Funds into a statutory unclaimed moneys scheme to allow for the possibility that some small number of debenture-holders entitled to those funds might come forward and pay the balance to a charitable organisation and/or to active debenture holders.

211. It is to be emphasised that although the SPR has identified a manner of dealing with the Undistributed Funds which he considers, in his judgment, an appropriate way of dealing

110 Open Lindholm Affidavit, [103].
111 Open Lindholm Affidavit, [102].
112 Open Lindholm Affidavit, [106] to [109].

with the funds, he ultimately seeks the court's guidance and advice. We make the following submissions to assist the court in that regard.

Power and principles

212. There is no doubt that this court has the power to give directions in relation to the Undistributed Funds. One source is the court's wide power under s 283HB(1)(g) of the *Corporations Act* to make any order the Court considers appropriate to protect the interests of debenture-holders.

213. Further, in circumstances where the SPR does not hold the funds in his hands for his own benefit, but rather for and on behalf of the debenture-holders, he is properly classified as a trustee of those funds. The Court has a well-established inherent jurisdiction to give directions or advice to a trustee. That power is reflected in s 63 of the *Trustee Act 1925* (NSW).

214. Whatever the source of power, the overriding principle governing the exercise of the power is analogous – that is, the interests of the debenture-holders/beneficiaries.

215. The ultimate question is which course of action best protects the interests of debenture-holders in circumstances where it is impossible, impractical, and/or uneconomic to distribute some part of the available funds to certain debenture-holders.

216. We address each of the options below.

Reallocation to known, active debenture-holders.

217. The distribution of the Undistributed Funds to active debenture holders would ensure that the funds remain within the general class of persons who suffered loss as a result of the collapse of Banksia and the conduct of the Banksia class action.

218. A reallocation of funds in this way would have the effect, strictly speaking, of diverting funds from some debenture-holders to others. That would result in certain debenture-holders receiving more than their strict rateable entitlement to the funds held by the SPR. However, it would not be right to characterise this as a windfall gain where those debenture-holders would still be receiving less than their full principal entitlement and it would not confer any preference over other debenture-holders where the predicate for taking this course is that there are no other debenture-holders that would exercise any right to those funds.

219. Two practical matters should be noted.

220. First, the amount that would actually be paid to the active debenture holders is not significant. Surplus funds of $1.5 million would be immaterial to most debenture-holders. At the same time, the general philosophy of the special purpose receivership (including applications for approval of remuneration) has been not to regard amounts of this magnitude as immaterial on the basis that 'it all adds up' in the context of a larger distribution.

221. *Second*, the whole of the unpresented surplus cannot be distributed to active debenture holders as part of the final distribution, because the final distribution itself is likely to itself produce unpresented payments. Accordingly, this option is likely to still leave the SPR with a surplus of unpresented payments that will need to be dealt with in some way. This point should not be overstated. Given the steps that have been taken by the SPR, it is reasonable to think the list of active debenture-holders the SPR now has available to him is such that it is unlikely that the final distribution will produce a large amount of unpresented payments, in which case there would be no real difficulty in diverting that fairly modest amount to unclaimed funds.

Unclaimed moneys

222. The payment of the funds to a government unclaimed moneys scheme has the virtue of ensuring that the funds remain held for the benefit of the debenture-holders entitled to those funds.

223. However, experience and common-sense would suggest that very little of those funds will ever be claimed. The SPR has already taken considerable steps to locate those debenture-holders with accounts over $4,000 (and, more recently have begun to locate those debenture holders with accounts over $3,000), to no avail.

224. Further, the average undistributed sum owed to a debenture-holder holding an account with a balance under $3,000 is approximately $1,714.16.[113]

225. The transfer of the Undistributed Balance to an unclaimed moneys scheme is likely to result in a large number of *de minimus* sums that are unlikely to be claimed and will ultimately end up being paid into Consolidated Revenue.

The SPR's proposed approach

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[113] Open Lindholm Affidavit, [100].

226. The SPR proposes that the Undistributed Funds be paid first on account of any outstanding costs and remuneration of the special purpose receivership, with the remainder to a charitable organisation of his choosing.

227. Some authorities in the class actions context have considered the court's power to grant relief analogous to a *cy-pres* order.

228. The *cy-pres* doctrine permits a court, upon the failure of a charitable trust, to give effect to the intention of the settlor as near as is practicable by applying the trust to a purpose as close as possible to the original purpose of the trust.[114] Generally, in order for a court to order a *cy-pres* scheme, there must be either: (a) a case of initial impracticality or impossibility and either an out-and-out intention to benefit charity or a general charitable intention and a possible mode of effectuating that intention; or (b) a case of supervening impracticability or impossibility; or (c) a case where a trust has exhausted its original purpose and a surplus remains.[115]

229. It is not contended that the court can or should make a *cy-pres* order in the strict sense. But the principles governing such schemes have been considered and applied by analogy in similar contexts, including the class actions regime in Australia. In *Evans v Davantage Group Pty Ltd*,[116] Beach J considered how a settlement scheme administrator ought to deal with a surplus that remained after the settlement sum was distributed to class members. His Honour did not doubt that he had power to make a *cy-pres* type orders under the broad power contained in s 33V(2) of the Federal Court Act, but also under the court's equitable jurisdiction to make orders in relation to the administration of a trust fund.[117]

230. As was observed in that case, the court is not dealing with a fixed trust, but rather one that must be administered in the context of the relevant statutory scheme, which here is Chapter 2L of the Act.[118]

231. The difficulty with a *cy-pres* type order that commits the balance to charity is that those funds do not ensure for the direct benefit of the specific debenture-holders that are entitled to them. However, in *Evans*, Beach J considered that a payment to a relevant charity would confer an *indirect benefit* in the broad sense.[119] His Honour went on to say:[120]

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114 *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396 at 414-415
115 Heydon, J D, *Jacobs' Law of Trusts in Australia*(2016, 8th ed) at 182 [10–70].
116 *Evans v Davantage Group Pty Ltd (No 4)* [2021] FCA 1634
117 Ibid, at [53].
118 Ibid.
119 Ibid, at [87]
120 Ibid, at [106].

> Let me say something about the notion of an indirect benefit. Now the concept of providing indirect benefits to the group members through the making of a cy-prés type order is a tricky one. And if a charity is being proposed, what is the nexus required with the group members, their claims and the nature and context of the rights that they have sought to vindicate? And does such a charity have to provide some indirect benefit to group members? If so, what does indirect entail? I would take a broad and pragmatic approach to such questions, and I see no need to drill down on their detail for present purposes.

232. In our submission, there is much to commend in his Honour's analysis and approach. The question is how best to protect the interests of debenture-holders and achieve the statutory objects of Chapter 2L in circumstances where it is impossible and/or uneconomic to distribute part of the funds to debenture-holders.

233. As a demographic profile, debenture-holders are generally elderly and mostly concentrated in the local area around Kyabram. Kyabram is a small regional town with a population of less than 10,000 people. Taking a broad brush approach, the distribution of the Undistributed Funds to charitable organisations that work in and around that community can readily be said to confer at least an indirect benefit on the debenture-holders. Certain members of the Committee have presented a proposal to the SPR for a worthy recipient of the funds.[121]

234. Similarly, the proposal to meet future expenses and remuneration from the Undistributed Funds is a practical and reasonable proposal. It avoids some provision having to be made from the amount that could otherwise be distributed on account of those anticipated costs. The SPR estimates his future remuneration to be approximately $50-75,000. Mr Kingston estimates the legal expenses to be approximately $200,000.[122] In the context of this receivership, they are not substantial sums.

F. REMUNERATION

235. This Court last approved the SPR's remuneration on 13 July 2022 for the period 1 May 2021 to 28 February 2022. On that occasion it approved the SPR's remuneration in the sum of $126,067.90.

236. The established practice was for this Court to approve the SPR's remuneration in six-month periods. That has not occurred.

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121 Open Lindholm Affidavit, [108].
122 Kingston Affidavit, [16].

237. The SPR is seeking approval of his remuneration incurred between 1 March 2022 and 31 July 2024 in the sum of $198,538 plus GST. In support of his claim for remuneration the SPR has:

(a) exhibited invoices that identify each unit of time for which remuneration is claimed and a description of the work performed; and

(b) prepared three remuneration reports: for the period between 1 March 2022 and 30 April 2023;[123] for the period between 1 May 2023 and 30 November 2023;[124] and finally, for the period between 1 December 2023 and 31 July 2024.[125]

Relevant principles

238. The relevant principles applicable for court approval of remuneration were conveniently summarised by Gleeson JA in *Banksia 3* at [36]-[46] and more recently by Anastassiou J in *ASIC v Dawson* [2021] FCA 301 applying the reasoning of Brereton J from *In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396 at [6].

239. The overarching question is what amount of remuneration is a "fair recompense" or a "fair and reasonable reward" for the work actually performed by the receiver. That involves a broad assessment of whether the remuneration sought is 'reasonable' – both in terms of whether the work carried out was reasonably necessary and whether the amount charged for that work was reasonable. The work must also have been "properly incurred" in the sense of being within the scope of appointment and incurred without bad faith, misconduct, or breach of duty. The SPR bears the onus of proving reasonableness of the amount, but it may be assumed that the SPR's work was properly incurred absent some credible suggestion or evidence to the contrary.

Work for which remuneration is claimed

240. The key events in the special purpose receivership are set out in Section A of the Open Lindholm Affidavit and were summarised at paragraphs [31] to [58] above.

241. The work for which the SPR claims remuneration is detailed in the invoices and the remuneration reports and summarised at paragraphs [133] to [161] of the Open Lindholm Affidavit.

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123 Pages 334 to 346 of the Open Lindholm Exhibit.
124 Pages 347 to 359 of the Open Lindholm Exhibit.
125 Pages 360 to 375 of the Open Lindholm Exhibit.

242. We summarise some key aspects of the work performed below.

Enforcement of Remitter Judgment

243. The SPR has performed work in enforcing the Remitter Judgment, principally managing the Non-Party Costs Summons and the Second Elliott Appeal. The Non-Party Costs Summons was prosecuted to judgment as against the Elliott Entities. The application as against the O'Bryan Entities settled shortly before trial. There were a number of interlocutory applications in that proceeding, including a recusal application and an application for determination of a preliminary question.

244. The Second Elliott Appeal was ultimately abandoned after the SPR filed its written case. The SPR was also engaged in the O'Bryan Appeal, including taking steps to have it struck out as incompetent. The SPR was involved in giving instructions and reviewing court documents in relation to those matters.

245. Mr Lindholm summarises the work involved and sets out the documents that were filed in these various applications and appeals at [145] of the Open Lindholm Affidavit.

Settlement negotiations

246. Significant work has been undertaken in participating in without prejudice discussions with a view to settling the claims remaining in the Banksia Proceedings and evaluating the merits of settlement proposals. This includes:

(a) consideration of the Global Settlement Offer and the preparation of the Directions Application in this Court. The Directions Applications required three affidavits of the SPR to be prepared and filed;[126]

(b) negotiating settlements with the O'Bryan Entities and Mr Trimbos' estate;

(c) the preparation of an application to the Supreme Court of Victoria to approve the settlements with the O'Bryan Entities and the Trimbos estate. Those applications required 4 affidavits of the SPR to be prepared and filed;[127] and

(d) the protracted negotiations with the Elliott Entities, which are set out in Section E of the Confidential Lindholm Affidavit.

Updates to the Register

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126 Open Lindholm Affidavit, [147].
127 Open Lindholm Affidavit, [145(b)].

247. The SPR also continued to take steps to update the Register and contact debenture holders with unpresented or withheld payments from all distributions.

Committee attendances and dealings with debenture holders

248. The SPR has been required to organise and chair nine meetings of the Committee of debenture-holders during the Approval Period.[128] He has also prepared and issued 30 letters to the members of the Committee providing substantial updates on the progress of the special purpose receivership.[129]

249. The SPR has also had to engage in correspondence and other attendance on members of the Committee and debenture-holders from time to time, which are set out at [74] to [87] of the Open Lindholm Affidavit and [94] to [127] of the Confidential Lindholm Affidavit.

The remuneration claimed is fair and reasonable and ought to be approved

250. This Court has previously approved Mr Lindholm's remuneration on a time-cost basis. The SPR deposes to his view that this remains the appropriate method for determining the SPR's remuneration.[130] There has been no material change in the special purpose receivership that would render that approach inappropriate.

251. The time spent by the SPR, and the amount charged for that time, is fair and appropriate. That is so for the following reasons.

252. First, and most importantly, the Court can readily conclude from a general impression of the material filed in this application that the amount claimed by the SPR is, on its face, modest. The SPR seeks approval for remuneration of less than $200,000 over an 28-month period, being less than $8,000 per month. That is a plainly meagre amount when regard is had to the complexity of the receivership, the difficult strategic decisions that have been made during the Approval Period, the ongoing negotiations with separate parties, and multiple court applications.

253. No issues of proportionality can be said to arise.

254. Second, the SPR has filed extensive evidence about the work that has been performed during the Approval Period. That evidence establishes that the work was necessary and properly incurred. In no sense has any of the work travelled beyond the object of the SPR's

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128 Open Lindholm Affidavit, [72].
129 Open Lindholm Affidavit, [73].
130 Open Lindholm Affidavit, [136] to [140].

appointment: namely, to vigorously pursue and protect the interests of debenture holders in the Remittal and to deal with matters incidental to that pursuit.[131]

255. Third, the Committee has unanimously approved the remuneration sought in this application.[132] That approval, of course, is not sufficient to establish that the remuneration for which approval sought in this Honourable Court is reasonable. Nonetheless, the SPR respectfully submits that the fact that the Committee has approved the remuneration is a relevant factor that ought to weigh in favour of reasonableness in the Court's assessment of that question.

256. Fourth, Mr Lindholm in an experienced insolvency professional and life member of ARITA who has deposed that he has regard to ARITA's Code of Professional Practice in the conduct of his practice, and that in his opinion the remuneration is reasonable and has been properly and necessarily incurred.[133]

257. Finally, the personal involvement of Mr Lindholm in the work performed was reasonable and necessary. It is common in applications for approval of remuneration by insolvency practitioners for courts to seek to ensure that work is beyond performed by staff at the appropriate level of experience (and therefore costs). Courts have often criticised liquidators for doing work themselves, or having senior staff perform work, that could have adequately been done more cheaply by more junior staff. No such concern can arise here. As is evident from the material, the work that has been necessary has involved difficult and complex strategic decision which have appropriately been considered and made by the SPR as the appointee.

22 October 2024

J A REDWOOD

M GRADY

131 Contrast, for example, the situation in *In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396 where Brereton J declined to allow remuneration to cover work outside the purpose of appointment.

132 Open Lindholm Affidavit at [156] to [161].

133 Ibid, [137].

ANNEXURE A

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2024

Circular to Debenture Holders

Dear Sir/Madam

Banksia Securities Limited
(Receivers and Managers Appointed) (In Liquidation) (Special Purposes Receivers Appointed)
ACN 004 736 458 (Banksia)

IMPORTANT NOTICE RE PROPOSED SETTLEMENTS AND FINAL DISTRIBUTION

The purpose of this circular is to provide an important update on the special purpose receivership and to give notice of an application that I have filed in the Supreme Court of New South Wales seeking:

- Court approval of the settlement of all claims against:
  - Elliott Legal Pty Ltd, MCM (Mt Buller) Developments Pty Ltd, Decoland Holdings Pty Ltd, Alexander Christopher Elliott and Maximilian Elliott on behalf of the estate of Mr Mark Edward Elliott (**Elliott Entities**) for $10 million;
  - Mr Michael Symons for $250,000; and
  - Mr Tony Zita for $95,000.
- Directions that I am justified in not pursuing potential claims against the Legal Practitioners Liability Committee (**LPLC**) or Portfolio Law Pty Ltd (**Portfolio Law**);
- Approval for me to make a final distribution to debenture holders of approximately **$19.3m** (**Final Distribution**);
- Directions that I am justified in paying my remuneration, costs and expenses incurred from the realisations in the special purpose receivership, and subsequently from unpresented payments from previous distributions to debenture holders;
- Directions as to how I should deal with unpresented payments from previous distributions to debenture-holders, which I propose to first apply in payment of my remuneration and expenses of the special purpose receivership, and to pay the balance to charity; and
- Approval of my remuneration incurred as SPR of Banksia from 1 March 2022 to 31 July 2024 in the sum of $198,538 excl GST.

The application is listed for hearing on ## 2024. Details about the application and how you can express your views on the settlement are set out below.

If the Court makes the orders that are sought in the application, it will bring all matters relating to the Banksia Proceedings to an end, and the purpose of my appointment as SPR will be fulfilled. Once all necessary steps are taken, I would then apply to the Supreme Court of New South Wales seeking to be discharged from my appointment.

Copies of this circular and documents identified below are available on the Banksia Securities webpage https://kpmg.com/au/en/home/creditors/banksia-securities-limited.html (**Banksia Webpage**).

1. Background

As you know, on 11 October 2021 in *Bolitho v Banksia Securities Ltd (no 18) (Remitter)* [2021] VSC 666 (**Remitter Judgment**), the Supreme Court of Victoria ordered, amongst other things, that the defendants pay the following amounts to me on behalf of debenture holders:

- Compensation of approximately **$11.7m** (**Compensation Component**); and
- The following costs on an indemnity basis:
  - My costs of the Botsman Appeal and the Remitter; and
  - The Contradictor's costs of the Remitter,

  (**Costs Component**).

The Costs Component has not been taxed (the Court process for fixing the amount recoverable), but the costs actually incurred total approximately **$10.6m**. On a taxation, I expect to recover at least 90% of the total amount of the costs actually incurred. Overall, it is reasonable to assume that up to approximately **$9.54m** would be recoverable. This does not take into any interest debenture-holders that may be owed on the Costs Component. The Compensation Component and the Costs Component exceeds **$20m**.

The defendants liable for both the Compensation Component and the Costs Component included the Australian Funding Partners Pty Ltd (in liquidation)(**AFP**) and Mr. Alexander Elliott. AFP was placed into liquidation shortly after the Remitter Judgment in January 2022. The liquidator of AFP has issued reports determining that AFP is insolvent and cannot make any contribution to the Compensation Component and Costs Component. The liquidator also concluded that he would need funding to undertake any further investigations to determine whether any viable claims exist against third parties, including AFP's legal advisors for the Remitter Judgment who received very substantial legal fees. Based on my inquiries, it also appears that the Estate of Mr. Mark Elliott and Mr. Alexander Elliott do not hold any assets I can enforce the Remitter Judgment against. Consequently, I have needed to pursue other entities associated with these primary wrongdoers for recovery of the Remitter Judgment.

On 1 March 2023, on my application, Dixon J made orders requiring the Elliott Entities to pay the Costs Component. Dixon J published his reasons on 31 July 2023 in *Lindholm v Elliott & Ors* [2023] VSC 442. The Elliott Entities are entities closely related to AFP, the late Mr. Mark Elliott and Mr. Alexander Elliott. The Supreme Court of Victoria determined that those entities were used by AFP and Mr. Mark Elliott in committing the fraud upon debenture-holders set out in the Remitter Judgment.

There have been appeals from the orders made by Dixon J by Mr. Alexander Elliott and Mr. Norman O'Bryan, but those appeals are now resolved. In short summary:

- On 2 May 2024, the Court of Appeal made orders of its own motion dismissing the appeal against the Remitter Judgment brought by Mr. Alexander Elliott.
- On 13 June 2024, the Court of Appeal made orders striking out an appeal filed by Mr O'Bryan challenging certain findings made by Dixon J in his reasons for judgment granting non-party costs against the Elliott Entities.

Since the Remitter Judgment, I have recovered the following amounts on behalf of debenture-holders:

Source	Amounts Paid to SPR
LPLC (on account of Mr O'Bryan's insurance)	$1,558,191.39
LPLC (on account of Mr Symons' insurance)	$1,454,547.54
Portfolio Law	$375,683.30
LPLC (on account of Portfolio Law's insurance)	$464,828.83
Mr O'Bryan, Noysue and Noysy (**O'Bryan Entities**)	$1,251,858.54
LPLC (on account of Mr Trimbos' insurance)	$1,413,197.13
Mr Zita (instalments paid under the deed of settlement that is yet to be approved by the Court)	$95,000.00
Total	**$6,613,306.73**

Considering the realisations to date and interest on the Compensation Component, the amount that is outstanding to

debenture-holders under the Remitter Judgment is approximately $17.1 million.

There are also several costs order of AFP and the Elliott Entities that have not been paid. The costs orders amount to approximately $1 million.

If the settlements against the Elliott Entities, Mr Michael Symons and Mr Tony Zita are approved, it would take the recoveries to approximately $17m from the enforcement steps I have undertaken over the last three years. I have spent approximately $2.3million in undertaking those enforcement steps.

2. Settlement Approval

At various times, proposals to resolve all outstanding claims relating to the Banksia Proceedings have been made. However, no global settlement was reached. In his judgment in *In the matter of Banksia Securities Ltd (recs and mgrs. apptd) (in liq)* [2022] NSWSC 1106, Black J acknowledged that, while it was finely balanced, my decision to reject one such global settlement proposal was justified and reasonable in all the circumstances. Black J's judgment is available on the Banksia Webpage.

I subsequently entered into individual settlements with the O'Bryan Entities and the Trimbos Estate. The settlements were approved by Dixon J in the Supreme Court of Victoria on 31 July 2023. Dixon J's judgment is available on the Banksia Webpage.

I have now entered into conditional settlements with the Elliott Entities, Mr Zita and Mr Symons which, if approved, will bring the Remitter and enforcement of the Remitter Judgment to an end.

I consider that the settlements are in the interests of debenture holders. In my view, the receipt by debenture holders of the proceeds of these settlements soon is better than seeking to pursue potentially higher sums which may not be received for quite some time (possible years) and only after further considerable expense. It also allows for a final distribution to be made to debenture-holders in the near term ,and for the Banksia Proceedings and the special purpose receivership to be finalized. I have had particular regard to the ageing demographic profile of debenture holders and the length and acute difficulty of the Banksia litigation in forming this view. I recognise that many debenture-holders may take the view that they should be paid the Remitter Judgment in full given the misconduct inflicted upon debenture-holders uncovered in the Remitter. I wish to reassure debenture-holders that I have taken many steps to enforce as much of the Remitter Judgment for them as possible. Ultimately, I have had to take into account the assets that are available for me to enforce the Remitter Judgment against and the time, cost and uncertainty in taking any further enforcement steps. I am satisfied that the level of recovery of approximately 70% of the total amount owing from the Remitter Judgment is appropriate in light of the time, cost and uncertainty in obtaining any further amount from further enforcement steps and the risk that even less, perhaps significantly less, would be available for distribution at a later time if I take further steps.

2.1 Elliott Settlement

I have agreed to settle all claims against the Elliot Entities for $10m. The settlement sum includes a payment of $2 million by the LPLC (guaranteed by the Elliott Entities). The settlement with the Elliot Entities is subject to court approval.

The settlement was also subject to an independent financial accountant verifying the accuracy of representations made by the Elliot Entities during negotiations about their financial position. I appointed Mr Nick Mellos of Grant Thornton as the financial accountant for that purpose. Mr Mellos produced two reports to me and, on the basis of those reports, I am satisfied that the financial position of the Elliott Entities is substantially consistent with the representations they have made to me.

My assessment is that the benefits of settling with the Elliott Entities now for the settlement sum outweigh the benefits of taking further enforcement steps which, although might result in a higher sum for debenture holders, are complex, risky and will potentially take significant time and cost to resolve. More specifically:

- Most of the Elliott Entities' assets are held on trust. The Elliott Entities have raised complicated legal issues to assert that I would not be able to access the substantial assets held by them on trust to meet debenture-holders claims. There is a risk that if those arguments were successful, the return to debenture holders from enforcement steps would be minimal.
- An independent financial accountant has confirmed that in his view, the Elliott Entities' net asset position in

respect of assets that are not held on trust is substantially less than the $10m offered. However, I note that their total assets held of trust are significantly greater than $10 million.

- In deciding not to pursue further enforcement steps against the Elliot Entities, I have taken into account matters including the following:
    - The detailed legal advices of Senior Counsel and junior counsel;
    - the Elliott Entities are likely to vigorously defend further enforcement steps taken against them given their historical conduct in the Banksia proceedings and the considerable resources available to them. Debenture holders would face further costs and delay without a guarantee of securing any additional satisfactory return;
    - the likely significant delay, in a higher interest rate economic environment, may result in a lesser return to debenture holders than an earlier distribution that can be made if the claims are settled;
    - any further litigation involves material risk; and
    - the offer is the result of extensive negotiations and represents the highest possible amount that can be obtained at this time without further court proceedings.

2.2 Symons Settlement

I have agreed to settle all claims against Mr Symons for $250,000. I acknowledge that this sum is low, but my assessment is that the settlement with Mr Symons will result in debenture holders receiving a greater return from Mr Symons than continuing to pursue enforcement steps against him. More specifically:

- As noted above, I have already received the balance of Mr Symons' insurance policy ($1,454,547.54).
- Mr Symons is bankrupt and all claims against him are stayed in accordance with the *Bankruptcy Act 1996* (Cth). Mr Symons does not appear to me to have any assets and there is no obvious greater source of financial recovery for debenture holders than the settlement sum in the present circumstances, particularly as the insurance proceeds have been received.
- Mr Symons' trustee in bankruptcy has confirmed that the prospect of any dividend to unsecured creditors is uncertain.

2.3 Zita Settlement

I have agreed to settle all claims against Mr Zita for $95,000. I acknowledge that this sum is very low, but my assessment is that the settlement with Mr Zita will result in debenture holders receiving a greater return from Mr Zita than what would be received if I took steps to bankrupt Mr Zita. More specifically:

- As noted above, I have already received the balance of Portfolio Law's insurance policy ($464,828.83). That policy applies to claims against Mr Zita.
- The offer represents a larger potential return than the potential dividend in any bankruptcy in view of the likely costs that would be involved in any bankruptcy administration of Mr Zita.

2.4 Directions not to pursue further claims

I am seeking directions that I am justified in:

- not pursuing any further enforcement steps against Portfolio Law; and
- not pursuing any claims that debenture-holders may have against the LPLC.

While I have not settled the claims of debenture holders against Portfolio Law, I have received $840,512.13 (including the proceeds of its insurance policy) from or on behalf of Portfolio Law towards the Remitter Judgment. From my investigations, Portfolio Law is of little or no value and there is little prospect of me receiving any further funds if I were to apply to wind-up Portfolio Law.

Whilst debenture-holders have claims against the LPLC in relation to the insurance policies held by Mr O'Bryan, Mr Symons, Mr Zita, and Elliott Legal, I also consider that the costs, delay and uncertainty of pursuing any further

potential claims against the LPLC outweigh the potential benefits. Those claims have material risk and will be resisted.

Final Distribution

I propose to make a final distribution of approximately $19.3 million (**Final Distribution**) which includes the proposed settlement proceeds (i.e $10,345,000) as well as the following:

- $7,663,666.67 held by Maddocks as the balance of the funds from the Trust Co Settlement and the amounts received from and on behalf of Portfolio Law, the O'Bryan Entities and Trimbos Estate; and
- $1,359,405.54 as the 'SPR Litigation Fund', being the account from which I am funded by the orders of Black J.

The Final Distribution amounts to approximately 3 cents in the dollar owed to each debenture holder, and would bring the recoveries for debenture holders to approximately 94.5 cents in the dollar of principal invested.

Subject to Court approval, I anticipate that the final distribution can be made prior to 31 December 2024 (or shortly thereafter). Your dividend will be deposited into your nominated bank account or, if this is not possible, a cheque will be sent to your last known address. Please notify any change of address or circumstances to Link on (02) 8767 1029 or by writing to banksia@linkmarketservices.com.au. If you know of any debenture holder who has changed address, please bring this letter to their attention.

4.1 Unpresented Payments

The previous nine distributions have been undertaken by Link Market Services (**Link**) to all debenture holders on a *pari passu* basis. To date, $4,088,401, or 0.7% of the total amount distributed, has not been claimed by certain debenture holds (**Unpresented Payments**). Despite attempts, I have not been able to locate or contact those debenture holders about their unclaimed entitlements.
Should you have any queries in relation to previous distributions, please contact Link on (02) 8767 1029 or by writing to banksia@linkmarketservices.com.au.

I have engaged Link to conduct skip tracing exercises in respect of those debenture holders who have Unpresented Payments with a value of greater than $3,000. To date, these activities have located 204 debenture holders with Unpresented Payments totalling approximately $2.1m.

Despite undertaking the steps set out above, I anticipate that a significant balance of Unpresented Payments will remain of approximately $1.5 million. I have considered how these proceeds should be dealt with, including whether they should be paid into the ASIC Unclaimed Moneys Fund. However, in my view, it is unlikely that much, if any, of the funds would ever be claimed if I were to pay those funds to ASIC.

Another option is to distribute the Unpresented Payments rateably to active debenture-holders that have participated in recent distribution.

I consider the most appropriate course is to, subject to Court approval:

- pay my further expenses and remuneration of the special purpose receivership from those funds so that I can distribute the maximum amount as part of the Final Distribution;
- Request Link to return the balance of the unpresented payments; and
- pay the remaining balance to a registered charitable organisation.

I invite the views of debenture holders in relation my proposed treatment of the remaining unpresented funds.

3. Funding to conclude the special purpose receivership

I have previously received funding from Banksia's formers Receivers in accordance with orders made by the Supreme Court of New South Wales. Those funds have been exhausted.
I have subsequently incurred significant costs] in taking a range of enforcement steps. However, if the settlements summarized above are approved by the Court, there will be only limited steps remaining in the special purpose receivership.

The funding that I have received from the Receivers is exhausted, and I have been funded since April 2023 from the proceeds recovered from the LPLC on behalf of Mr O'Bryan and Mr Symons. I will seek directions from the Court in relation to my past funding, and that I would be justified in funding any further remuneration and expenses from the remaining balance of the Unpresented Payments. This will ensure that my further remuneration and expenses do not impact the dividend debenture holders who been claiming funds from distributions.

4. Notice to debenture holders

The hearing seeking the above orders is scheduled for ## 2024. Copies of all non-confidential material filed in support of the approval application will be available on the Banksia Webpage, including the submissions in support of the application.

The Committee has resolved to support my application on the basis that it would bring the Banksia Proceedings to a close and facilitate the Final Distribution being made as soon as possible. The views of the Committee and any debenture holders will form part of the material put before the Supreme Court of New South Wales.

If you would like to express any view on orders sought which you would like communicated to the Court, including to object to any or all or the orders sought, please contact Hannah McConalogue by:

- Telephone: (03) 9288 6461;
- Email: hannah1@kpmg.com.au; or
- Post: GPO Box 2291U, Melbourne, VIC 3001

I am required to file any further evidence and submissions by ## 2024. As such, I ask that any comments on the settlement be sent to KPMG by no later than **5pm on ## 2024**.

Should any debenture holder wish to be heard in respect of the application, you are requested to provide notice to the Court at the following email address: ##. Ms McConalogue can assist any debenture holders having any difficulty providing notice to the Court.

If you would like to receive any of the confidential material you can contact Ms McConalogue, but because it is confidential you will need to enter into a confidentially undertaking .

Should you know of any debenture holder who has changed address, please bring this letter to their attention.

Yours faithfully
Banksia Securities Limited

John Lindholm
Special Purpose Receiver