

14 June 2012

Mr S Butler  
National Hotel Property Pty Ltd  
5 Henley Place  
Attadale WA 6156

Dear Mr Butler

**National Hotel Property Pty Ltd's  
dispute with Bank of Western Australia Limited  
Case number: 280158**

I refer to the above dispute with Bank of Western Australia Limited (BankWest).

**The dispute**

From the information I have reviewed it appears that you are lodging the dispute on behalf of National Hotel Property Pty Ltd (the Company). You say that you are the director and beneficial owner of the Company.

The Company is currently under External Administration and Receivers from Taylor Woodings have been appointed to the Company.

You have raised the following concerns regarding the actions of the Receivers in selling property belonging to the Company:

- That further work was not commenced on the property prior to the property being placed on the market.
- The property was only advertised on the market for three weeks.
- You submitted a conditional offer for \$4,500,000.00; however, you were advised that for the offer to be accepted, it must be \$5,000,000.00. You say that the Receivers subsequently accepted an offer of \$3,600,000.00 from another party.
- That the Receivers have cooperated with Mr Brian Benari, who owns 50% of the property, to sell the property.

You further say that Mr Benari has breached his fiduciary duties as a business partner by agreeing to the sale of the property at half the valuation without consulting you.

You are seeking the following from BankWest to resolve your dispute:

- BankWest to appoint new Receivers or allow you to sell the property yourself.
- BankWest and the Receivers to return plans, specifications and costing materials which they have no charge over.
- Cancellation of the Contract of Sale for the property.
- Refund of the fees charged by the Receivers and their solicitors
- Investigation of BankWest and the Receivers.

### **Our procedures and jurisdiction**

The Financial Ombudsman Service (FOS)'s Terms of Reference set out the types of disputes that we can consider. The first step in our process is to check whether your dispute falls within our Terms of Reference.

#### *Authority*

Where a Company is in liquidation, under External Administration or Receivership, we require the authority of the liquidator, administrator or receivers to be able to consider the dispute.

#### *Claim amount*

Under our Terms of Reference we are not able to consider disputes where the value of the claim in the dispute exceeds \$500,000 and the maximum we are able to award is \$280,000 for each claim.

#### *Third party actions*

FOS only has jurisdiction to consider disputes if the Financial Services Provider (FSP) concerned is a member of FOS. We have the jurisdiction to review the actions of your FSP as it has provided you with a direct financial service.

In this instance, we are able to consider the actions of BankWest, and if applicable, we can require it to compensate you for any financial loss you have incurred as a result of an error or breach of obligation it owed to you.

Please note that FOS is unable to review the actions of a third party to the dispute.

### **How this applies to your dispute**

From the information I have reviewed it appears that your complaint is in relation to the actions of the Receivers. The actions of the Receiver are those of the Company as it is appointed as the Company's agent. We are unable to review the Receivers actions as it has not provided you with a direct financial service and it is not a member of FOS.

We cannot review the Contract of Sale which was entered into by the Receivers, the fees charged by the Receivers, nor can we compel the Receivers to return assets or investigate the Receivers' actions.

Further, you have claimed that the Receiver has accepted an offer for the property that is approximately \$900,000 under the value of what you offered. Therefore, it appears that your claim for loss would exceed \$500,000, which is our claim amount limit.

As outlined above, we are also unable to consider the actions of a third party to the dispute. Therefore, we cannot review the actions of Mr Benari in approving the sale of the property, and we cannot compel BankWest to take any actions as against Mr Benari.

### **Conclusion**

I confirm that FOS is unable to consider the dispute for the following reasons:

1. The Company is currently under Receivership and we have not received the authority of the Receivers to consider the dispute.
2. We are unable to review any claims in relation to the actions of the Receivers, Taylor Woodings, as it is not an FSP which is a member of our service.
3. We cannot consider a claim of loss which exceeds \$500,000.
4. We cannot review the actions of a third party to the dispute or compel BankWest to take any actions against a third party.

### **If you disagree with our assessment**

If you have any information which establishes that your dispute comes within our Terms of Reference, please write to me again within 30 days. If you would like more information about our jurisdiction, our Terms of Reference and our Operational Guidelines are available at [www.fos.org.au](http://www.fos.org.au).

If I do not hear from you by **7 July 2012** I will close our file and we will not consider the matter further.

If you have any questions in relation to this letter, you can telephone me on 1300 78 08 08 or email me at [info@fos.org.au](mailto:info@fos.org.au) and please quote your case number.

Yours sincerely



**Josephine Tan**  
**Senior Dispute Officer**  
**Financial Ombudsman Service**