

## CASE APPRAISAL

IN THE MATTER OF A DISPUTE BETWEEN:

**SEAN BUTLER**

And

**FTI CONSULTING (AUSTRALIA) PTY LTD**

### INTRODUCTION

1. The circumstances in which Mr Butler and FTI Consulting (Australia) Pty Ltd (“**FTI**”) are presently in dispute are set out in FTI’s letter to Australian Small Business and Family Enterprise Ombudsman (“**ASBFEO**”) dated 13 November 2018 at section 1, page 1 and I shall not repeat them in detail. In summary:
  - a. Mr Butler had interests in Lighthouse Beach Holdings Pty Ltd (“**Lighthouse Beach**”) and Butler Constructions Pty Ltd (“**Butler Constructions**”).
  - b. Prior to 18 July 2011, Butler Constructions traded as the Lighthouse Beach Resort (“**Resort**”).
  - c. Bankwest (pursuant to securities granted by Lighthouse Beach and Butler Constructions to the bank) appointed partners of the firm Taylor Woodings (which business was sold to FTI on 3 April 2013) as receivers and managers of Lighthouse Beach and Butler Constructions on 18 July 2011 (as well as to National Hotel Property Ltd – another company in which Mr Butler had an interest but which is not directly relevant to the limited issue in relation to which I have been instructed).
  - d. Mr Butler has made various allegations of misconduct on the part of FTI as agent of Bankwest in carrying out its duties as receiver and manager of the companies associated with the Resort.
2. When referring to events during the receivership in 2011, I will refer to the receivers as “Taylor Woodings”.

3. Mr Butler has now sought the involvement of the ASBFEO in relation to his dispute with FTI and Bankwest and to that end was requested by ASBFEO to identify one issue for “neutral evaluation”. In Mr Butler’s email of 4 December 2018 (1.01pm) to ASBFEO,<sup>1</sup> he identified that issue as his assertion that:

Bankwest receivers told an interested party not to proceed with writing up an offer for the Hotel even though I subsequently found out that they could have. The buyer then purchased another property and a potential sale was lost potentially costing me millions.

4. In its letter to FTI dated 5 October 2018, ASBFEO identified Mr Butler’s claim against them as being that FTI (then Taylor Woodings) declined receiving offers of sale of the Resort due to advanced negotiations with a party and as a result of that action:
  - a. an alleged suitable buyer (who Mr Butler asserts was Mr Gavan Kelly) was not able to submit an offer nor was he told that the original buyer had fallen through (and given the opportunity to present his offer); and
  - b. the assets of the entities of which Taylor Woodings were the receivers and managers were then sold at a lower value than the alleged buyer was willing to offer.
5. Mr Butler’s claim against Taylor Woodings and Bankwest is accordingly in the nature of a claim for damages for loss of a chance caused by misconduct of Taylor Woodings in carrying out its duties as receivers and managers.
6. I have assumed for the purposes of this advice – based on all of the documentation that I have considered – that the “party” with whom Taylor Woodings were in “advanced negotiations” were, from time to time, some or all of Brian Roland Benari as trustee for the Benari LBH Trust and Simone Investments Pty Ltd and Simon Harold Berns as trustee for the Simon Berns Family Trust.
7. Implicit in all of the documentation with which I have been provided is that any proven misconduct on the part of Taylor Woodings would have caused a loss to Mr Butler or entities associated with him. I have no instructions as to the identity of the precise party or parties whom Mr Butler asserts would have suffered any proven loss. That is not a matter in relation to which my opinion is sought. Furthermore, in appraising, or evaluating, the information with which I have been provided, I proceed on the basis that any proven

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<sup>1</sup> This is one of the attachments to Mr Butler’s email to me of 1 May 2019.

misconduct on the part of Taylor Woodings would have resulted in some person or persons sustaining a loss, not being a negligible loss.

#### THE CASE FOR APPRAISAL

8. Accordingly, the matter I am evaluating is whether, on a balance of probabilities, any conduct on the part of Taylor Woodings and/or their selling agents caused Mr Kelly not to proceed with making an offer for whatever Taylor Woodings was selling as receivers and manager of Lighthouse Beach and Butler Constructions. If, in my non-binding opinion, that was the consequence of Taylor Woodings' conduct, then the quantum of any lost chance suffered by Mr Butler or any person or entity associated with him - being the loss of the chance of recovering damages from Taylor Woodings (now FTI) or Bankwest caused by that misconduct - is not a matter for my determination.

#### THE DOCUMENTATION PROVIDED TO ME

9. The documentation provided to me by ASBFEO and Mr Butler is the following:
  - a. Ms Allen's (of ASBFEO) email to me dated 6 February 2019 and the documents attached thereto. One of those attachments is a 209-page document, the first 10 pages of which is letter dated 13 November 2018 from FTI to ASBFEO setting out their submissions in response to the allegations made against them by Mr Butler. Attached to that 10-page letter are another 199 pages of documents. Those 199 pages are categorised by tag numbers, being tag 1 to tag 11. I refer to that 209-page pdf document as the "FTI Bundle". References herein to page numbers in the "FTI Bundle" are the pdf page numbers in that 209-page pdf document.
  - b. Mr Butler's email to me dated 1 May 2019 and the documents attached thereto. One of those attachments is a 12-page document headed "Bankwest Receivers tell a purchaser not to present an offer even though the property was not sold". I refer to that document hereafter as the "Butler Submission". References herein to page numbers in the "Butler Submission" are the pdf page numbers in that 12-page pdf document.
10. I have considered all of the documentation referred to in the previous paragraph.

11. In regard to those emails and their attachments referring to web pages, given the limited resources made available to me for providing this advice, I have not taken the time to access those web pages.
12. I have however considered Chapters 7, 8 and 9 of The Post-GFC Banking Sector report at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2010-13/postGFCbanking/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2010-13/postGFCbanking/report/index) and the transcript of the Senate hearing on 10 October 2012 at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/a9738ec3-ed79-4cba-9fe2-7bb6e0ac0bd8/0000%22>

#### FTI'S VERSION OF EVENTS AND COMMENTS THEREON

13. Prior to September 2011, Taylor Woodings received a valuation for what it refers to at FTI Bundle p2 as “an ‘as is’ walk in walk out sale in one line market value for the Lighthouse Beach Resort (and its two adjoining properties) of \$8.2m inclusive of GST”.
14. Taylor Woodings commenced marketing the “Resort” in September 2011 with offers to be submitted to the selling agents before 4pm on 28 September 2011. In response to the marketing, they received:
  - a. an offer from Mr Butler on behalf of Butler Constructions for \$9.8 million and \$2 million for a Deed of Restraint<sup>2</sup> which clearly states “This EXCLUDES the two adjoining houses”. I have assumed throughout this appraisal that the two adjoining properties are homes at Carey St and Fraser St in Bunbury adjacent to the Resort.
  - b. an expression of interest from a Mr Green for \$9.8million<sup>3</sup> - but does not appear to include the Carey St and Fraser St properties; and
  - c. an offer from BRNFB Pty Ltd as trustee for the Benari Trust for \$10 million<sup>4</sup> - which expressly includes the Carey St and Fraser St properties.
15. On 3 October 2011, Mr Butler was provided with “recent trading results” – see Taylor Woodings’ letter to Mr Butler dated 10 February 2012 at FTI Bundle p112. As I discuss below, Mr Butler denies ever having received any trading results.

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<sup>2</sup> FTI Bundle – pp13-14

<sup>3</sup> FTI Bundle – p19

<sup>4</sup> FTI Bundle - pp15-18

16. The parties referred to in sub-paragraph 14 above were notified by Taylor Woodings of issues in relation to their earlier offers/expressions of interest and they were given until 10 October 2011 to make revised offers which resulted in:
- a. Mr Green not proceeding;
  - b. an offer described by FTI at FTI Bundle p5 as being from:
    - i. parties including Mr Benari dated 10 October 2011 to purchase units in the Cargill Trust (the trustee of which was Butler Constructions) for \$10 million (and if Butler Constructions was the owner of those homes, then those homes are included in that price); alternatively
    - ii. BRNFB Pty Ltd as trustee for the Benari Trust, Simone Investments Pty Ltd, Simon Harold Berns Family Trust and Lighthouse Beach dated 10 October 2011:
      1. to purchase “the land on which the Resort is located” – and I have accordingly assumed that the Carey St and Fraser St properties were not included in that offer;
      2. to enter into a stock sale agreement with Butler Constructions and Lighthouse Keeper Pty Ltd in respect of the assets comprising the business of the resort;for the aggregate sale price of \$9.491 million.
17. For some undisclosed reason, I have not been provided by either party with a copy of the offer referred to at sub-paragraph 16.b above. It is the only Benari party related offer dealt with by FTI in its 10 page letter that has been excluded from the FTI Bundle. The information contained in sub-paragraph 16.b above is taken from FTI’s description of the offer at FTI Bundle p5.
18. At FTI Bundle pp5-7, FTI describe what they did during what, for the purposes of my appraisal, is a critical period, namely 10 October 2011 to 1 December 2011. See FTI Bundle pp22-45 for the documents they refer to there (i.e. tabs 2-5 inclusive). Reference is made:
- a. (at FTI Bundle p5) to a “a further offer purported to be put forward by an associate or acquaintance of Mr Butler”. Whether this is the offer that Mr Kelly would have made had he not been dissuaded from doing so by Mr Kennedy’s email to him of 15 November is not clear. In that regard, Mr Butler has provided to me an email chain of correspondence between Mr David

Kennedy (the selling agent) and Mr Kelly between 14 and 16 November 2011 being:

- i. Mr Kennedy's email of 15 November 2011 to Mr Kelly stating: "The receiver has advised today that as negotiations are very advanced that they will not be treating on any other offers unless the dealing fails. Thank you for your interest and we will let you know the outcome in due course."
    - ii. Mr Kelly's email to Mr Kennedy of 16 November 2011 responding "Thank you David. If the deal falls over for the receiver, can you call me as we would still be interested."
  - b. (at FTI Bundle pp6-7) to correspondence between Mr Butler and Taylor Woodings (either directly or between their respective solicitors) in which:
    - i. Taylor Woodings deny that there is any goodwill in the business as claimed by Mr Butler and disagree with him on the issue of any need for a deed of restraint;
    - ii. there is reference to a meeting on 30 November 2011 between Taylor Woodings and Mr Butler and his solicitors where Taylor Woodings deny that their selling agent had dissuaded any other parties from making any offers;
    - iii. interested parties are given until 21 December 2011 to present further offers for the purchase of "the Lighthouse Beach Resort" – the Carey St and Fraser St properties are not referred to.
19. The 21 December 2011 deadline was extended to 22 December 2011 and on that day two offers were made, one by entities associated with Mr Butler and the other by interests associated with Mr Benari. Those offers are summarised and commented on by FTI at FTI Bundle pp7-8.
20. A copy of the Butler offer is at FTI Bundle pp48-49 and the Benari offer is at FTI Bundle pp52-108.
21. Relevantly, the Benari offer as described by FTI at FTI Bundle 7 was for:
- a. Brian Benari as trustee for the Benari LBH Trust, Simone Investments Pty Ltd and Simon Harold Berns as trustee for the Berns Family Trust to purchase "the land on which the Lighthouse Beach Resort is situated and the two adjoining properties in Carey Street, Bunbury";

- b. Lighthouse Keeper Pty Ltd to purchase “the assets comprising the business of the Lighthouse Beach Resort”;
- for the total price of \$9.491 plus the value of the stock at the Resort.
22. The reasons why Taylor Woodings rejected the Butler offer are set out at FTI Bundle pp8-9. FTI’s letter to Mr Butler of 10 February 2012 is at FTI Bundle pp111-122 and the reference to the selling agents having told Mr Butler why his offer was rejected on 22 December 2011 is at FTI Bundle p112.
23. On 12 March 2012, Taylor Woodings entered into:
- a. a conditional contract for the sale and purchase “of the land on which the Lighthouse Beach Resort was located”<sup>5</sup>, being the contract documents at FTI Bundle pp125-153 (the “Land Contract”);
  - b. a conditional contract for the sale and purchase of the assets comprising “the business of the Lighthouse Beach Resort with Lighthouse Keeper Pty Ltd”<sup>6</sup>, being the contract documents at FTI Bundle pp156-203. (the “Asset Sale Contract”).
24. “Property” in the Land Contract, is defined in the “Annexure “A” Special Conditions” as including not only the land on which the resort was located, but also the Carey St and Fraser St properties – see FTI Bundle at p130. The definition of “Contract” in the Land Contract (at FTI Bundle p130) means “the REIWA contract for sale of land or strata title by offer and acceptance to which these special conditions are attached.” The “Annexure “A” Special Conditions” are attached to the Land Contract. Accordingly, the reference at FTI Bundle 9 by FTI as the sale of land contract referring only to the “land on which the Lighthouse Beach Resort was located” is arguably wrong.
25. In that regard, the Asset Sale Contract defines “Land Contract” (at FTI Bundle p162) as, relevantly, the “Premises” and “Premises” is defined in the Asset Sale Contract (at FTI Bundle p163) as the land on which the Resort was located as well as the Carey St and Fraser St properties.
26. I have not been provided with the Colliers International valuation for \$8.2 million for the Resort “and its two adjoining properties” referred to by FTI at FTI Bundle 2 in order to assess whether it included the Carey St and Fraser St properties.

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<sup>5</sup> See the description of this contract at FTI Bundle p9

<sup>6</sup> See the description of this contract at FTI Bundle p9

27. The confusion over which entity was purchasing which assets for what price referred to in the contractual documentation at FTI Bundle 125-203 is highlighted by the fact that Taylor Woodings entered into what I have described as the “Land Contract” in its capacity as receiver of Lighthouse Beach Holdings Pty Ltd while it entered into the Asset Sale Contract as receiver of Butler Constructions Pty Ltd. The definition of “Completion” in the Land Contract and Asset Sale Contract is confusing to say the least.
28. At FTI Bundle p10, FTI state that “Settlement of the Lighthouse Beach Resort was completed on 16 July 2102.” I have assumed that that was a settlement of both the Land Contract and the Asset Sale Contract.
29. What transpired between Mr Butler and Taylor Woodings between 12 March 2012 and 16 July 2012 is briefly set out at FTI Bundle p10 and the correspondence referred to there is at FTI Bundle pp206-209.
30. All assets in the Asset Sale Contract (excluding stock) are valued in a schedule included in the Asset Sale Contract at “nil” – FTI Bundle p185. If the Carey St and Fraser St properties were owned at the relevant time by Butler Constructions, then the only reasonable inference to be drawn from the structure by Taylor Woodings of the Land Contract and the Assets Sale Contract is that interests associated with Mr Benari acquired those assets for nil consideration. While those two properties are not expressly included as assets in the aforesaid schedule, there is nothing else in the Land Contract nor in the Asset Sale Contract from which it can be determined what value was attributed by FTI to those two properties.

#### MR BUTLER’S VERSION OF EVENTS AND COMMENTS THEREON

31. At p11 of the 12 page Butler Submission, Mr Butler summarises his position under the heading “Summary” as follows:

The Selling agent told the prospective purchaser Gavan Kelly on 15<sup>th</sup> November 2011: “The receiver has advised today that as negotiations are very advanced that they will not be treating on any other offers unless the dealing fails. Thank you for your interest and we will let you know the outcome in due course.”

Gavan Kelly asked the sales agent on 16<sup>th</sup> November: “If the deal falls over for the receiver, can you call me as we would still be interested.”

The dealing did fail, this was only revealed after my request for a meeting which took two weeks to happen, yet the selling agent did not get back to Gavan but continued to deal with another party, Brian Benari, at a much-reduced price than what Gavin was considering.



Benari was instrumental in this receivership in that he agreed to match a previous offer for \$14m but then reneged on that deal and offered a reduced price which Bankwest refused to accept (I have all this in writing). Bankwest then dealt with Benari in putting the properties on the market (that's documented in emails too) and yet didn't advise me of what was happening. I am an equal owner to Benari yet they ignored my requests for information.

Benari is the CEO of Challenger Financial and during this proceed Challenger awarded other receivership work to Taylor Woodings. There is clearly a conflict of interest here.

Trading accounts for the Lighthouse Hotel were never disclosed despite repeated requests some documented in the emails above. This is grossly irresponsible. Under my management we had trading results for each month within the following month.

I believe the reason the figures were not disclosed is that under the receiver's management profits declined significantly. This is based on my knowledge that bookings reduced after their appointment and because of notes the receiver inadvertently returned to me several years later showing greatly diminished returns. In emails above the receivers indicate profits rose. I believe this to be a lie and investigations should be made over this.

The fact that up to date trading figures were not available is highly irregular and would have diminished the saleability of the property. I was also trying to arrange finance to buy out the receivers and My finance Broker Ray Weir contacted the selling agents to try to get trading results, but his request was denied (I can provide his details to confirm this). This made it virtually impossible for me to salvage things.

32. In regard to the 4<sup>th</sup> paragraph of that document, I have not been provided with any documentation referring to the "previous offer for \$14m" that Mr Butler says Mr Benari had agreed to match. The documents may be the documents referred to in Mr Butler's email to Mr Benari I deal with at paragraph 41.o below, but Mr Butler has not in his emails to me identified which documents he is referring to in both the 4<sup>th</sup> paragraph in paragraph 31 above nor at paragraph 41.o below.
33. In support of the remaining submissions set out in paragraph 31 above, Mr Butler provided to me further emails and attachments to emails under cover of his email to me dated 1 May 2019 (referred to in paragraph 9.b above ).
34. In his email to ASBFEO dated 31 January 2019 responding to the statement by FTI at FTI Bundle p7 that "We provided interested parties with updated trading figures for the Lighthouse Beach Resort for the period of the receivership to date", Mr Butler denies that allegation and in support of that denial refers to two attachments being:
  - a. a page numbered "3" – allegedly a letter from Mr Engelbert (which is notated by Mr Butler as being dated 1 August 2011) presumably to Mr Butler stating: "You will not be, or entitled to, the receipt of information in relation to trade, occupancy levels or otherwise for the Lighthouse unless your assistance on a specific Receiver-requested trading or sale matter expressly warrants same. In

this regard it is the discretion of the Receiver as to whether such information is provided to you.”

- b. Page 7 of FTI Bundle as annotated by Mr Butler suggesting that ASBFEO write to FTI asking for the trading figures they say that they provided to Mr Butler.
35. By her email to FTI dated 1 February 2019, Ms Allen referred to the statement by FTI at FTI Bundle 7 (paragraph 1) and asked FTI to confirm whether that statement meant that trading figures for the Resort had been provided to Mr Butler, and if so whether ASBFEO could be provided with a copy of that correspondence. Ms Allen also asked whether “the interested parties” were only Butler Constructions, Mr Richard Green and Mr Brian Benari.
  36. As the documentation sent to me by Ms Allen did not include any response from FTI to that email, by my email to Ms Allen dated 15 May 2019, I asked whether there had been a response from FTI. During my telephone discussion with Ms Allen on 16 May 2019, I was advised by Ms Allen that FTI had not responded to her 1 February email request and said that she would contact FTI again and get back to me with any response from them. As at the date of preparing this advice, I have not heard back from Ms Allen and have assumed that FTI were unable to respond to her queries.
  37. However, I refer again to what I’ve said at paragraph 15 above.
  38. By his email to FTI dated 12 December 2018, Mr Butler, inter alia, requested FTI to provide to him the trading figures that FTI had said that they had provided to interested parties.
  39. Given the numerous statements Mr Butler has made about never having received any trading figures from FTI, I have assumed that FTI failed to respond to that request as well.
  40. Mr Butler’s 12 December 2018 email to FTI attached 23 pages of documents that he said he had sent to ASBFEO including excerpts from emails. Relevantly they include:
    - a. An email from Mr Kennedy to Mr Kelly dated 14 November 2011 stating “Just spoken to the Receiver. July, Aug and Sep figures are being vetted. The short story is that gross rev for each month exceeds last year and profit is slightly up on each as well. It has been suggested that you work on year end figures and make your offer subject to receipt of trading YTD.”
    - b. The emails between Mr Kennedy and Mr Kelly referred to in paragraph 18.a above.

- c. Email dated 14 November 2011 from Churchlands Holdings Pty Ltd (Mr Kelly's company) to Mr Kennedy (in response to Mr Kennedy's email to him referred to in sub-paragraph 40.a above) stating: "Thank you David. Can you give the pro forma contract to me. Although I could just use one of my precedents, it would be simpler and more uniform to use the Receiver's document. In relation to the financial data, can you also give to me the tax returns and depreciation schedules on the Hotel for the year ending 2009, 2010 and 2011. Regards, Gavan Kelly"

41. In the 12 page document from Mr Butler referred to in sub-paragraph 9.b above (the Butler Submission), Mr Butler has included excerpts from (relevantly for my purposes) the following emails – all of which I have assumed to be true and correct:

- a. 27 October 2011 email from Mr Butler to Messrs Kennedy & Clarke asking whether the Lighthouse Hotel has sold or still available and if so requesting the Information Memorandum and recent trading figures as he has a group who may do a joint venture with him.
- b. 1 November 2011 – Mr Kennedy's response agreeing to provide Information Memorandum on condition that he be notified of the proposed partner.
- c. 2 November 2011 – Mr Butler's email to Mr Kennedy advising that his partner is Mr Gavan Kelly and again asking for trading figures and Mr Kennedy's responsive email on that day stating that he has asked for the updated figures.
- d. 3 November 2011 – Mr Butler's email to Mr Kennedy asking whether hotel is still potentially available and "if so, when will figures be available, P&L for the three months to 30 September 2011 would be good" and also asking about the National hotel.
- e. 8 November 2011 – Mr Butler's email to Mr Kennedy asking for response to his 3 November email and stating that he (Mr Butler) may have partners interested in purchasing "both hotels" and on the same day Mr Kennedy replies "No response yet. Negotiations continuing. Why don't you submit an offer subject to?" Mr Butler responds the same day and again asks for the trading figures to 30 September and says "I will talk to Gavin today and forward on updated financials. Mr Kennedy responds same day "No response yet".

- f. 9 November 2011 – Mr Butler’s email to Mr Kelly stating relevantly that he’s still waiting for trading figures, suggesting Mr Kelly get them from the agent, that he has tried but “the receivers are not releasing them”, that the hotel should net over \$1m pa and that the two houses could be sold separately or “brought (sic)”. On the same day Mr Butler emails Mr Kennedy stating that he’s meeting Mr Kelly “tomorrow” and “can you see if September quarter trading figures are available from the receivers?”
- g. 10 November 2011 – Email from Mr Kennedy to Mr Kelly attaching the report on the Lighthouse Beach Resort stating that the updated trading figures are still not available and suggesting that Mr Kelly make his offer subject to more up to date figures.
- h. 11 November 2011 – Mr Butler’s email to Mr Clarke again asking for the updated trading figures and Mr Clarke’s response stating that his request has been relayed to Taylor Woodings and that he will advise Mr Butler as soon as he has a response.
- i. 11 November 2011 – Mr Kelly’s email to Mr Kennedy stating that “We would like to proceed on this deal”, that “we” need to do due diligence, that he will provide Mr Kennedy with a due diligence checklist, asking for the pro forma contract in Word format, asking whether the figures for July to October “are available for will be available within the next 7 days” as “we” wish to peruse them as part of “our due diligence”. Mr Kennedy emails Mr Kelly in response on the same day “Thanks Gavan. Have forwarded on to the Receiver for response.”
- j. 14 November 2011 – Mr Kennedy’s email to Mr Kelly set out in sub-paragraph 40.a above and on the same day Mr Kennedy’s email to Mr Kelly set out in sub-paragraph 40.c above. Later the same day Mr Kelly emails Mr Butler asking for, inter alia, the identity of the unit holders of the Light House Beach Unit Trust, a copy of the trust deed “or at the very least the last two years tax returns”.
- k. 15 November 2011 at 1.47pm – Mr Butler’s email to Bankwest requesting a meeting to discuss “a number of questions regarding the receivership” including “Is the Lighthouse Hotel, valued at \$14m in 2011, sold? Tenders closed on 28 September almost seven weeks ago.” Whether Bankwest immediately thereafter notified Taylor Woodings and/or Mr Kennedy about

this email is not known, but at 4.58 the same afternoon, Mr Kennedy sent Mr Kelly the email set out in sub-paragraph 18.a.i above.

- l. 16 November 2011 – Mr Kelly’s email to Mr Kennedy set out in sub-paragraph 18.a.ii above. At p5 of the Butler Submission, Mr Butler notates as follows at this point “The Agent did not contact Gavan again for at least another two weeks in which time Gavan’s company purchased another property making them unable to purchase the Lighthouse Hotel as originally planned”.
- m. 22 November 2011 – Mr Butler’s lengthy email to Taylor Woodings and Mr Kennedy complaining generally about a number of aspects of the conduct of Taylor Woodings in its conduct of the receivership of entities associated with him and including the issue the subject of this appraisal, namely the loss of the chance of a higher price being obtained for the assets had Mr Kelly not been dissuaded by Mr Kennedy as agent for Taylor Woodings and Bankwest from making an offer. Taylor Woodings responded to that email by its email of the same dated stating, inter alia, “The Receivers are in advanced discussions with a prospective purchaser for the Lighthouse Beach Resort” and “Please refer to Minter Ellison’s dated 18 August 2011 (copy attached) in relation to your obligations as a director.”
- n. 30 November 2011 12.48pm – a "without prejudice" email from Minter Ellison to Mr Butler’s solicitor at Jackson McDonald (referring to the meeting earlier in the day and Mr Butler’s query as to the status of the sale process) stating that the receivers “are engaged in discussions with a prospective purchaser” and “for reasons of commercial confidence and sensitivity, they are not at liberty to disclose the identity of the prospective purchaser” or whether they are “related to the mortgagor/charger in question.
- o. 30 November 2011 5.45pm - an email from Mr Butler to Mr Benari attaching documents received by Mr Butler “via David Kennedy and another party who was to put in an offer” and “at p6 of Purchase Price \$9,491,000.00 and Lighthouse Keeper, your company? The documents were given to another buyer who was considering putting in an offer and he was subsequently told not to. Is this your document?” Mr Butler notates at p7 of the Butler Submission that Mr Benari never responded to the question.

- p. 1 December 2011 – an email from Mr Butler to Messrs Kenney and Clarke referring to another email (but not copied to me) and stating that the bank had told him “yesterday” that Lighthouse Hotel had not sold and they want to receive “any offers”. He goes on to say “Please don’t use the offer form with brains (sic) price in it. The property was valued at \$14m earlier in the year and Gavin now thinks he can get it for \$9.5m”.
- q. 2 December 2011 – an email from Mr Butler to Jackson McDonald referring to his telephone discussion with Mr Kelly “yesterday” and refers to handwritten notes taken by Mr Butler during that discussion. I have assumed that the document that appears at pp9-10 of the Butler Submission is a typed version of Mr Butler’s handwritten notes. I have read and considered that document. Importantly, it refers to:
- i. the steps allegedly taken by Mr Kelly in support of his claim that, but for Mr Kennedy’s email dissuading him from making any offer as at 15 November, he would have made an offer;
  - ii. their discussion about “the lower price on the pro-forma he has now seen – Get lot (meaning both hotels) for \$13½ m Brian out”;
  - iii. Mr Kelly “wants to buy Lighthouse has backing and will offer”;
  - iv. “the price Gavan was talking was \$14m (it was valued at \$20m three years ago so that seemed cheap)...He is now talking of just above Brian’s offer, a loss to the owners of \$4.5m.”
- r. 8 December 2011 – Mr Butler emails Mr Kennedy requesting updated profit figures for the Lighthouse Hotel. At p 11 of the Butler Submission, Mr Butler notates that he never received a response to that request.
42. Attached to Mr Butler’s 1.5mb email to me dated 1 May 2019 are 3 pages of handwritten notes on Taylor Woodings’ headed note paper dealing with the Senate hearing. The date on which the notes were taken is not clear. If it was shortly before the date on which Mr Engelbert appeared at the Senate hearing on 12 October 2012, then the date the notes were taken may be 10 September 2012. Mr Butler appears to rely on this 3 page document principally for the reference on p2 to the notation “sink boots in to customer”.

## CONSIDERATION

43. Based on all of the above, Mr Butler's principal contention in relation to the loss of a chance claim is that Taylor Woodings deliberately took steps to prevent Mr Kelly from making an offer to purchase the Lighthouse Beach Resort and adjoining two homes for what Mr Butler says was for a price of \$14m so as to proceed with the sale of those assets to parties associated with Mr Butler's former business partner – Mr Benari - for \$9.491m.
44. I have not been provided with any documentation from Mr Kelly stating what offer he would have made for what assets nor what pro forma offer he had been provided with (whether a Mr Benari related offer or some other offer) which may have induced him to make a higher offer than what was on that pro-forma offer. The pro-forma offer I am referring to is that referred to in sub-paragraphs 41.q.ii above. That may or not be the same offer referred to in sub-paragraph 41.p above. It may also be the offer that FTI did not provide a copy of to ASBFEO in their 13 November 2018 letter as referred to by me in paragraph 17 above.
45. Matters (be they alleged facts or my observations) that arguably support the contention that Taylor Woodings deliberately took steps to prevent Mr Kelly from making an offer (the terms of which - leaving aside Mr Butler's hearsay evidence as to what the terms would have been – are unknown) are the following:
- a. Taylor Woodings and/or their selling agents, never provided any trading figures to Mr Butler or Mr Kelly notwithstanding numerous and repeated requests that they do so. That contention is supported by emails on that issue in paragraphs 34 to 41 above inclusive. The only reasonable inference to be drawn from FTI's failure to deal with this criticism anywhere in their 10 page letter (apart from their statement – denied by Mr Butler – as referred to in paragraph 15 above) is that Taylor Woodings were simply not prepared to consider any offer from Mr Butler or any party associated with him, including Mr Kelly. By conducting themselves in that way, Mr Butler and/or his associated entities lost the chance of receiving the benefit of an increased price for the assets that may have been forthcoming had Mr Kelly not been dissuaded from making his offer.
  - b. The statements made by FTI referred to at paragraph 34.a above. If such information would assist a receiver in obtaining the best price for an asset, it is not clear why a person in Mr Butler's position should be denied that

information. There may be an explanation, but FTI have not made any attempt to give one.

- c. The assets ultimately sold to parties related to Mr Benari for \$9.491m in March 2012 (with settlement in July 2012) were the business of the Lighthouse Beach resort and the land on which it was situated as well as the two adjoining homes (the Carey St and Fraser St homes). That price needs to be considered in the context of the offers set out in paragraphs 14, 16, 21 and 23 above.
- d. My observations at paragraphs 27 and 30 above.
- e. The critical emails between Mr Kennedy and Mr Kelly dated 15 and 16 November 2011 – see sub-paragraph 18.a above.
- f. The fact that - in circumstances where the contracts with the Benari interests at FTI Bundle p52-108 were not concluded during the critical two week period after 15 November 2011 (during which time Mr Kelly allegedly could and would have made his offer) and where Mr Kennedy knew that Mr Kelly was interested in making an offer - Mr Kennedy did not tell Mr Kelly to make his offer. A prudent and diligent selling agent would in those circumstances have sourced as many offers as possible. There is no explanation from FTI as to why that did not happen.
- g. The inference that Mr Butler draws from that failure is that Taylor Woodings were determined not to deal with him at all material times and that is not an unreasonable inference to be drawn given the alleged conflict of interest Taylor Woodings had with Mr Benari (the CEO of Challenger Financial) as referred to in sub-paragraph 31 above and the “sink boots in to customer” notation in the Taylor Woodings notes referred to at paragraph 42 above.
- h. The fact that the contracts at FTI Bundle pp125-203 were only finalised in March 2012 raises questions as to the accuracy of Mr Kennedy’s statement in his 15 November email to Mr Kelly that “negotiations are very advanced” and whether or not in the circumstances those statements were misleading or deceptive.
- i. The lack of an explanation by FTI as to why a copy of the Benari contract referred to in paragraph 16.b above was not included in their submission dated 13 November 2018. See my comments in that regard at paragraph 17 above.



- j. The email correspondence between Mr Kennedy and Mr Kelly in mid-November 2011 – in particular the emails referred to in sub-paragraph 41.i and 41.j above. Those emails, coupled with any evidence (accepted at a trial) given by him at that time as recorded in Mr Butler’s typed note referred to in sub-paragraph 41.q above, would be strong evidence supporting a court’s assessment of a high percentage probability that Mr Kelly would have made his offer but for being dissuaded not to do so.
- k. While FTI did invite further offers late in 2011, that invitation was made after Mr Kelly had proceeded with another purchase prior to those invitations being made.
- l. The lack of any explanation by FTI as to why, even if Taylor Woodings were in “advanced negotiations” with another party (presumably the Mr Benari parties) (see sub-paragraph 18.a.i above) or were in “advanced discussions with a prospective purchaser” (presumably the Mr Benari parties) (see sub-paragraph 41.m above) they were still not interested in other offers from other parties.
- m. A not unreasonable inference to be drawn from all the information set out above is that Taylor Woodings were simply not prepared to consider any offer from Mr Butler or any party associated with him, including Mr Kelly. The reasonableness of that inference is supported by the "without prejudice" email to Jackson McDonald referred to at sub-paragraph 41.n above.
- n. Mr Benari’s failure to respond to Mr Butler’s email to him referred to at sub-paragraph 41.o above.

### THE LAW

46. Taylor Woodings were at all material times (as controllers in relation to the sale of assets in question) subject to the provisions of s.420A of the Corporations Law which is as follows:

- (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
  - a. if, when it is sold, it has a market value - not less than that market value; or
  - b. otherwise – the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183, or 184.

47. In *Florgale Uniforms Pty Ltd v Orders* (2004) 11 VLR 54, Dodds-Streeton J, in considering the process required to be undertaken by the controller under s.420A said as follows:

In my opinion, the process of evaluating and balancing the competing costs and benefits and the associated risks of various methods of sale will not, in every case, require a formal comparative analysis or documented calculations. All will depend on the circumstances of the individual case, including the scale of the receivership, the value and nature of the property involved, the receiver's expertise in relation to the type of property, relevant expert advice, the advice or input of proprietors and staff, the trading history and marketing of the company, including during the receivership, and other relevant variables in a realistic commercial context.

48. The primary remedies available for a breach of s.420A are the general law remedies of set-off or account: *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646.

49. Any right to damages against FTI or Bankwest would have to rely on proving that pleaded general law duties owed by Taylor Woodings including any statutory duties pursuant to ss. 180, 181, 182, 183 and 184 of the Corporations Law were breached by Taylor Woodings.

50. The law approaches questions of causation and damages for loss of a chance differently. Here, any damages that Mr Butler (or associated entity) would be entitled to are such damages as would put them in the position they would have been in had Taylor Woodings not dissuaded Mr Kelly from making his offer.

51. In *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, the High Court said (at 349):

On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.

52. In *Heenan v Di Sisto* [2008] NSWCA 25, Giles JA said (at [28]-[29]):

[28] As a general proposition past hypothetical events in the assessment of damages are not decided on the balance of probabilities, by which satisfaction that it is more likely than not that they would in fact have occurred establishes for the assessment that they would have occurred. Rather, the damages are assessed according to the degree of probability that the events would have occurred, provided that the probability is not so low as to be speculative. ...: *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643. ...

[29] There is, however, an initial question of causation: has the negligence or other wrong caused the loss of a chance? This is decided on the balance of probabilities. ...

## CONCLUSION

53. In my opinion, if at any future trial credible evidence was adduced to support the allegation that Mr Kelly would have made an offer for the assets sold for a price significantly in excess of \$9.491m had Mr Kennedy not discouraged him from doing so (by Mr Kennedy's email to Mr Kelly of 15 November 2011), then the likely finding would be that Taylor Woodings breached s.420A because it sold the assets for less than their market value, alternatively that they sold the assets for a price that was not the best price that was reasonably obtainable having regard to all the circumstances existing at that time. That finding would also follow in a case pleaded in negligence or for some other breach of duty on the part of Taylor Woodings. In my opinion, the conduct of Taylor Woodings also arguably breached one or more of ss. 180, 181, 182 and 184 of the Corporations Law entitling Mr Butler (or any relevant entity associated with him connected to the companies under receivership) to damages.
54. Any damages claim would depend on Mr Butler or his associated entities proving that their loss was the loss of the chance of benefitting from an increased sale price of the assets that would have resulted from Mr Kelly making his offer.
55. Fundamental to the success of any such claim, would be the acceptance by the court of Mr Kelly's evidence that he would definitely have made an offer for the assets the subject of whatever offer he was shown in a not insignificant amount more than that offer. As I have said above, I have no instructions as to what offer he was shown.
56. A relevant issue in any loss of chance claim would be what the trading figures for the hotel were for the months of August to October 2011 actually were i.e. had Messrs Butler and Kelly been provided with the financial data they were persistently seeking, what would the quantum of Mr Kelly's offer have been?
57. In that regard I note that at the 7<sup>th</sup> paragraph of his summary document set out at paragraph 31 above, Mr Butler states "I believe the reason the figures were not disclosed is that under the receiver's management profits declined significantly. This is based on my knowledge that bookings reduced after their appointment and because of notes the receiver inadvertently returned to me several years later showing greatly diminished returns."
58. If the evidence will be that the trading figures were down during that period, then the statement by Mr Kennedy to Mr Kelly in the email referred to at sub-paragraph 40.a above is clearly misleading and deceptive. However, that evidence would also adversely affect the court's assessment of the percentage probability of Mr Kelly having proceeded with

the making of his offer and it would also adversely affect the quantum of any damages assessed by the court.

59. Time limitation issues may confront Mr Butler or his associated entities in seeking relief against FTI and/or Bankwest at this point in time, but that is not an issue on which I have been asked to express an opinion and I do not do so.
60. Finally, my non-binding opinions in this matter assume that any potential claim that Mr Butler or his associated entities have are not affected by any deed of settlement signed by him with FTI at any relevant time.

Dated this 24<sup>th</sup> day of May 2019



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