



## Summary of Judgment

### BOTSMAN v BOLITHO & ORS

[2018] VSCA 278

1 November 2018

Today, the Court of Appeal (Justice Tate, Justice Whelan and Justice Niall) allowed an appeal against the approval of a settlement of two proceedings insofar as the settlement involved the distribution from the Settlement Sum of \$64 million of a payment of commission to a litigation funder of \$12,800,000 (plus GST) and the payment of legal costs and disbursements in the sum of \$5,225,000 (including GST).

The two proceedings arose out of the failure of Banksia Securities Limited ('Banksia'). Banksia was a rural non-bank lender that collapsed and, as a result, owed its debenture holders around \$600 million. Its failure gave rise to two proceedings against Trust Company (Nominees) Limited ('Trust Co'), a trustee appointed by Banksia to oversee its business. The first, brought by Laurence Bolitho as lead plaintiff, was a group proceeding and alleged that Trust Co had breached duties to the debenture holders. The second proceeding was brought by Banksia (in liquidation) and alleged that Trust Co had breached duties to Banksia. That proceeding was conducted by special purpose receivers ('the SPR') who had been appointed for that purpose.

In December 2017, both proceedings were compromised and the settlement was recorded in a single deed ('the Deed of Settlement and Release'). Mr Bolitho brought an application by summons for approval of the settlement of the group proceeding. The SPR made a separate application seeking authorisation to settle their proceeding. Both applications were returnable before a judge in the Trial Division. The judge concluded that the settlement was fair and reasonable and granted both applications.

Ms Botsman, a debenture holder, sought leave to appeal to the Court of Appeal. Today, this Court granted leave and allowed the appeal on the basis that the extensive confidentiality regime ordered by the judge impeded the ability of the parties and group members to make submissions on the reasonableness of the claimed commission and costs. A contractual obligation on the SPR to support the settlement meant that the judge was denied the benefit of a proper contest on the reasonableness of those matters. The problems occasioned by the confidentiality regime, and the potential for a conflict of interest between the litigation funder and the group members, could have been addressed by the appointment of a contradictor. The judge erred in refusing to do so.

Although the Court of Appeal concluded that there was a miscarriage in the process by which the distributions for the funder's commission and legal costs were approved, it upheld the

judge's finding that the Settlement Sum of \$64 million is fair and reasonable. The Court took the view that, under the Deed of Settlement and Release, the application by Mr Bolitho in the group proceeding for the approval of the settlement (including the Settlement Sum) was distinct from the application by the litigation funder for its commission and recovery of legal costs and disbursements. In addition, the Court concluded that it is within the Court's power under ss 33V and 33ZF of the *Supreme Court Act 1986* to approve the settlement of the group proceeding and authorise the SPR to settle their proceeding while, at the same time, declining to approve the distributions in respect of the funder's commission and legal costs and disbursements.

The Court remitted the matter of the funder's commission and the recovery of legal costs and disbursements for determination by a different judge in the Trial Division. It also remitted the issue of the procedure to be adopted for a Settlement Scheme for payment to the group members of the Settlement Sum once the commission and legal costs have been deducted.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.