



Summary of Judgment

Bolitho v Banksia Securities Ltd (No 6) [2019] VSC 653

30 September 2019

The Hon. Justice John Dixon has today dismissed applications by Norman O’Bryan AM SC, Michael Symons and Anthony Zita (**the legal representatives**), in relation to the partial settlement of a class action commenced against Banksia Securities Limited (receivers and managers appointed) (in liquidation).

The legal representatives, who previously acted for the lead plaintiff in the class action, Mr Bolitho, each sought orders limiting the scope of the role of a contradictor appointed by the court to assist in considering the approval of legal costs and litigation funding commission arising from the partial settlement.

Background

In January 2018, the court approved a partial settlement of the class action as it related to the defendant The Trust Company (Nominees) Limited, in the amount of \$64 million. A group member subsequently appealed the approval to the Court of Appeal. The Court of Appeal confirmed the settlement sum but remitted the issue of approving the legal costs and funding commission charged by the litigation funder (Australian Funding Partners Limited) back to a trial judge to properly scrutinise these claims.

The court appointed a contradictor whose list of issues relevant to assessing whether the legal costs and funding commission should be approved included allegations of “disentitling conduct” by the plaintiff’s legal representatives and/or the litigation funder (and its managing director) that ought result in the court exercising its jurisdiction to disallow some or all of the legal costs and funding commission claimed.

The allegations raised issues of breaches of fiduciary duty, breaches of professional conduct rules, contravention of overarching obligations under the *Civil Procedure Act* and breaches of the funding agreements.

Application

The legal representatives’ sought to limit the contradictor’s role in the proceeding, principally in relation to the allegations of disentitling conduct. They contended that the scope of the contradictor’s role was limited and that the contradictor’s allegations were beyond the scope of the remitter from the Court of Appeal and should be struck out.

In addition, Mr O’Bryan sought orders setting aside a subpoena issued by the contradictor that sought documents from other proceedings.

Determination

Justice John Dixon declined to make orders limiting the contradictor's role finding that no basis to constrain the contradictor to the role of *amicus curie*. In the context of a class action settlement approval, where the court has a protective role on behalf of all group members, a contradictor has on behalf of and for the benefit of group members, the rights and powers of a party to the dispute.

His Honour considered that, on the materials identified by the contradictor to date, there were serious questions raised for a trial regarding the conduct of the legal representatives that if proved at trial were pertinent considerations for the court's deliberations.

Justice John Dixon set aside the subpoena to Mr O'Bryan for want of a legitimate forensic purpose.

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.