

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S CI 2012 07185

LAURENCE JOHN BOLITHO

First Plaintiff

AUSTRALIAN FUNDING PARTNERS PTY LIMITED
(ACN 167 628 597)

Second Plaintiff

v

BANKSIA SECURITIES LIMITED (ACN 004 736 458)
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) & ORS (according to the attached
Schedule)

Defendants

JUDGE: John Dixon J
WHERE HELD: Melbourne
DATE OF HEARING: 19 August 2020
DATE OF RULING: 20 August 2020
CASE MAY BE CITED AS: Bolitho & Anor v Banksia Securities Limited & Ors (No 10)
MEDIUM NEUTRAL CITATION: [2020] VSC 524

PRACTICE AND PROCEDURE - Overarching obligations - Whether a *prima facie* case to answer for breach of overarching obligations by an expert witness and a solicitor instructing a litigation funder exists - Where court proposes to make orders on its own motion - Joinder of parties - Directions proposed - *Civil Procedure Act 2010* (Vic) ss 10, 16-18, 21, 24, 28 and 29.

<u>Appearances</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Second Plaintiff	Mr S Horgan QC with Mr C Tran of counsel	Arnold Bloch Leibler
For the First Defendant	Mr R Dick SC with Mr M Grady of counsel	Maddocks
As Contradictor	Mr P Jopling QC with Ms J Collins of counsel	Corrs Chambers Westgarth

Appearances

Counsel

Solicitors

For the Third Defendant

Mr C Hibbard of counsel

N/A

For Alexander Elliott, Elliott Legal
Pty Ltd and Decoland Holdings
Pty Ltd

Mr G Kozminsky of
counsel

Garland Hawthorn Brahe
Lawyers

For Noysue Pty Ltd and Noysy Pty
Ltd

Mr J Rudd of counsel

Hope & Co Lawyers

HIS HONOUR:

- 1 On 17 August 2020, I completed hearing the evidence on the questions remitted by the Court of Appeal.¹ The proceeding presently stands adjourned for the parties to file written final submissions and for final oral addresses commencing on 17 September 2020.
- 2 At the conclusion of the evidence, counsel for the SPR foreshadowed that a summons would be issued against certain persons seeking non-party costs orders, in anticipation of costs orders in the remitter proceeding being made against the second plaintiff (**AFPL**) and the second and third defendants. There was evidence before the court that AFPL would be unlikely to be able to pay such costs.
- 3 The SPR anticipates that costs orders in the proceeding will permit the SPR to restore to the monies available for distribution to debenture holders funds that have been expended in two ways since the settlement of the group proceeding was initially approved by Croft J: funds spent in paying the costs of the SPR in both the appeal by Mrs Botsman from the original settlement approval order and this subsequent remitter proceeding, and funds spent financing the costs of the Contradictor that I appointed.²
- 4 In substance, the SPR's non-party costs application is for orders that:
 - (a) the estate of Mark Elliott, deceased;
 - (b) Alexander Christopher Elliott (**Alex Elliott**);
 - (c) Elliott Legal Pty Ltd (ACN 169 412 391) (**Elliott Legal**);
 - (d) Decoland Holdings Pty Ltd (ACN 007 431 405) (**Decoland**);
 - (e) Noysue Pty Ltd (ACN 167 179 044); and

¹ *Botsman v Bolitho* (2018) 57 VR 68. See *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 and *Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174 for details of the subject matter of the remitter.

² The Contradictor's costs are, in the first instance, being paid by the SPR out of funds that would otherwise be available for distribution to debenture holders.

(f) Noisy Pty Ltd (ACN 061 266 475),

each pay the costs of and incidental to the proceeding on an indemnity basis, or such portion of those costs as the court considers to be just and equitable in all the circumstances.

5 The basis upon which the application is made is set out in the affidavit of David Charles Newman sworn 17 August 2020, and I refer to paragraphs 54 to 89 of that affidavit in this context.

6 Presently, the estate of Mark Elliott, deceased, does not have a legal representative. His son, Maximilian Edward Elliott has advertised his intention to apply for a grant of administration of the estate in circumstances where Mark Elliott's spouse and sole beneficiary upon intestacy, his wife Pina Gabrielle Elliott, is incapable of obtaining a grant.

7 In the context of his application, the SPR sought discovery of three categories of documents from Alex Elliott and Decoland, being:

- (a) any deed of trust in which Alex Elliott or Mark Elliott is a beneficiary or trustee, or have been a beneficiary or trustee in the previous two years;
- (b) any deed of trust in which Decoland is trustee or has been a trustee in the previous two years; and
- (c) financial statements or other documents evidencing the current financial position of Decoland (including in its capacity as trustee of any trust).

8 Alex Elliott and Decoland each appeared on the return of the summons and counsel, on their behalf, resisted this application for discovery.

9 Counsel submitted on behalf of Alex Elliott that there was presently no basis upon which discovery could be ordered, as he was not a party to the remitter proceeding and the application for a non-party costs order was premature and could not support orders for discovery. On the proceeding presently before the court, the discovery was

irrelevant to any issue, even in the widest sense explained in *Peruvian Guano*.³

10 Without ruling on that particular contest, I have adjourned the SPR's summons on the basis that it may be brought back at any time, but will otherwise be listed for further directions when I deliver judgment in the remitter proceeding.

11 In response to the application for discovery against them, Alex Elliott and Elliott Legal applied for orders that the SPR give particulars of the allegation in paragraph 62 of Mr Newman's affidavit, which reads (referring to preceding paragraphs):

On the basis of this evidence, there are grounds for the Court to conclude that Mr Alex Elliott, as one of its officers, knowingly participated in and assisted with the conduct alleged by the Contradictor in the Remitter, including the fraudulent scheme to enrich AFPL and the Lawyer Parties at the expense of debenture-holders.

The particulars sought were:

- (a) precisely what conduct alleged by the Contradictor is it said that Alex Elliott and/or Elliott Legal participated in or assisted in;
- (b) precisely what acts or omissions by each of Alex Elliott and/or Elliott Legal is said to constitute that participation or assistance; and
- (c) the material on which the first defendant will rely to establish those matters.

12 This request raised a concern that has been exercising my mind since the close of evidence: whether there were grounds for the court, of its own motion and on the basis of the evidence adduced on the trial of the remitter, to consider, for the reasons discussed below, making orders against Alex Elliott and/or Mr Peter Trimbos, the latter being the cost consultant retained by AFPL as an expert witness for the approval application and the remitter.

13 Section 10 of the *Civil Procedure Act 2010* (Vic) (CPA) provides that overarching obligations relevantly apply to:

³ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

- (a) any legal practitioner or other representative acting for or on behalf of a party;
- (b) any law practice acting for or on behalf of a party; and
- (c) any person who provides financial assistance or other assistance to any party insofar as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to, an insurer, and a provider of funding or financial support, including any litigation funder.

14 The evidence supports a *prima facie* conclusion that Alex Elliott is, by reason of this section, bound by the overarching obligations under the CPA.

15 Section 16 of the CPA imposes on each person to whom the overarching obligations apply a paramount duty to the court to further the administration of justice in relation to any civil proceeding. Relevantly, the overarching obligations include:

- (a) the obligation to act honestly at all times in relation to a civil proceeding (s 17);
- (b) the obligation not to make any claim in a civil proceeding that does not, on the factual and legal material available to the person at the time of making the claim, have a proper basis (s 18);
- (c) the obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive (s 21); and
- (d) the obligation to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute (s 24).

16 In paragraph 61 of his affidavit, Mr Newman gives examples from the evidence of conduct that, if proved, could establish that Alex Elliott breached each of these overarching obligations. The relevant conduct is based upon documents and was not contested by any party to the remitter during the trial.

- 17 Alex Elliott is a director of two companies that hold a substantial interest in AFPL. AFPL's solicitor has previously deposed to receiving instructions from Alex Elliott regarding the conduct of the litigation, and documents exhibited to Mr Newman's affidavit indicate that AFPL's solicitors received information from him as recently as this week. I can reasonably infer that Alex Elliott has followed, or, at least been advised about, the progress of the remitter hearing.
- 18 The conduct identified by Mr Newman is by way of example only. Alex Elliott's participation in the events alleged against AFPL and Mark Elliott appears to have started by at least 1 June 2016. There were many documentary references that, absent explanation, permit an inference that Alex Elliott was actively involved, or was complicit, in the conduct of AFPL and Mark Elliott that is the foundation of the allegations made by the Contradictor. The contradictor has tendered an *aide memoir* in the form of a chronology.⁴ A search of that document for the word 'Alex' identifies most, if not all, relevant communications sent to or received by Alex Elliott, which number in the hundreds.
- 19 AFPL has not explained Alex Elliott's role in the proceeding, despite express contentions by the Contradictor on more than one occasion that he could provide an explanation of events, and clear invitations being made that the court should, in the absence of evidence from him, consider the principles in *Jones v Dunkel*⁵ when drawing inferences. Further, the substance of allegations of breach of overarching obligations by Alex Elliott will substantially, if not exclusively, be based on complicity in like conduct as is alleged against Mark Elliott, which has been particularised by the contradictor in great detail in the Revised List of Issues dated 21 July 2020.⁶
- 20 Beyond the numerous documentary references to Alex Elliott's participation, Mr Anthony Zita of Portfolio Law, the solicitor engaged by AFPL to act for the plaintiff in the group proceeding in place of Elliott Legal, said:

⁴ Accessible in the Online Review Book as AID.010.026.0001.

⁵ (1959) 101 CLR 298.

⁶ Accessible in the Online Review Book as PLE.010.002.0001.

And Alex worked for his father, did he not?---Yes, he did.

He worked both for AFPL and for Elliott Legal?---He did work, yes, in terms of worked for them. I'm not sure about being paid by them, but he worked for them, yes.

He worked for both entities?---Yes, yes.

And he was something of his father's right-hand man, was he?---He was.

And how old was he at this time in 2018?---He probably would have been about 26, I think, 25, 26.

And lived in Melbourne at that time?---Yes, he did, yes.

Have you had any contact with him since 2018?---Yes, I have, yes.

And he's still in Melbourne, and still working for AFPL and for Elliott Legal, to the best of your knowledge?---To the best of my knowledge, yes.

21 It is premature for me to now set out my findings on the evidence adduced before me, and I do not intend to do so. However, the evidentiary references to Alex Elliott being involved in the dealings, some of which were highlighted by Mr Newman in his affidavit, draw my attention to my responsibilities to the proper administration of justice. There is a basis for the court's obligation to more carefully examine the conduct of one of its officers in the dealings and circumstances that will be proved in this proceeding.

22 Those matters are sufficient to suggest that, *prima facie*, Alex Elliott may have a case to answer that he has engaged in conduct in breach of the overarching obligations.

23 Were I satisfied that Alex Elliott engaged in conduct in breach of an overarching obligation, s 28 of the CPA is relevant:

28 Court may take contravention of overarching obligations into account

- (1) In exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligations.
- (2) Without limiting subsection (1), in exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.

24 The reference in this section to 'exercising any power in relation to a civil proceeding' is not simply to the exercise in the court's discretion as to costs under s 24 of the

Supreme Court Act 1986 (Vic), but also to the exercise of powers under Part 4A of that Act in the context of AFPL's application at first instance for approval of a funding commission and litigation costs.⁷ It is arguable that I may take into account any contravention of the overarching obligations when exercising a discretion to award costs against a non-party.

25 The court has power to make certain orders if it is satisfied that a person has contravened an overarching obligation. Such orders may include that the contravening person pay costs, expenses, or compensation, or any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.⁸

26 In *Yara Australia Pty Ltd v Oswal*,⁹ the Court of Appeal said of exercising the power under s 29 of the CPA:

Yet as we have observed, sanctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities. But we would not wish it to be thought that a judicial officer at first instance must undertake a substantial inquiry when considering whether there has been a contravention of the Act. As the sanction for a breach will usually lie in an appropriate costs order, a judge may at the conclusion of the reasons for judgment immediately invite oral submissions as to why there should not be a finding that the Act was contravened. The judge may in a relatively brief way deal with that issue in providing succinct reasons for a finding that there has been a breach of the Act and how that finding affects the orders for costs that are to be pronounced.¹⁰

27 Judd J when quoting this passage in *ACN 005 490 540 Pty Ltd v Robert Frederick Jane Pty Ltd* added:

While a 'substantial inquiry' is obviously undesirable, some inquiry is necessary. It will be noticed at once that the enquiry in *Yara*, however summary, was informed by the reasons for judgment. That will not always

⁷ In the remitted proceeding, AFPL indicated it will no longer press its application for payment of a funding commission or reimbursement of most of the legal costs incurred in the proceeding.

⁸ *Civil Procedure Act 2010* (Vic) s 29.

⁹ (2013) 41 VR 302.

¹⁰ *Ibid*, 311 [27].

suffice. The seriousness of the allegations, and likely consequences, emphasise that caution is required in reaching a conclusion, on a summary basis, that an actionable breach has occurred.

...

Facts which justify an order for indemnity costs against a party do not automatically translate into a basis for such an order against that party's legal practitioners. The court must be satisfied that the conduct of the practitioners was in breach of a relevant duty or overarching obligation, and that the breach justified a personal order for costs. Some enquiry is necessary, beyond that which will suffice for an order for indemnity costs against a party.¹¹

28 I am satisfied that the court's jurisdiction to determine, on its own motion, whether it is appropriate to make orders under s 29 in respect of the conduct of Alex Elliott has been enlivened.

29 In this context, some preliminary observations are warranted. First, the evidentiary basis for any findings will be the evidentiary record taken on the trial of the remitter. Secondly, if findings are to be made against Alex Elliott, he is a necessary party to the proceeding. Thirdly, although the jurisdiction under s 29 of the CPA is compensatory, the motion may result in punitive consequences. He is entitled to procedural fairness.

30 I am not presently inclined to the view that initiating an inquiry on the court's motion warrants a comprehensive articulation by me of the material particulars of the alleged contraventions before Alex Elliott is required to explain his conduct. Such an approach does not appear to me to be consistent with the paramount duty owed to the court by its officers, whether in its inherent jurisdiction to ensure the proper administration of justice, or under s 16 of the CPA.

31 The court is entitled to demand a full, frank and honest explanation from its officers of any circumstances in the relationship between it and its officers that may imperil the proper administration of justice. This obligation is not to be compared with providing information in response to allegations of wrongdoing. It is of a fundamentally different character. Although Alex Elliott is yet to be afforded an opportunity to address the court as to how the matter should now proceed, speaking generally and in advance of any submissions, any unwillingness to provide such an

¹¹ [2016] VSC 217, [15], [24]. See also *Giles v Jeffrey* [2016] VSCA 314, [140].

explanation may be a relevant consideration casting doubt on whether a person is fit and proper to be an officer of the court.

32 There will be considerable, if not complete, overlap between the material allegations on which the SPR will rely in seeking a non-party costs order and the circumstances of possible breach of overarching obligations for which the court expects an explanation. There is also considerable overlap between the material allegations upon which the contradictor proceeds against AFPL, particularly through the actions of Mark Elliott and the circumstances of possible breach of the overarching obligations for which the court expects an explanation. The matters to be explained by Alex Elliott are to be found in the trial record of the remitter, with guidance through that material from the Revised List of Issues and the opening addresses of counsel for the contradictor and the SPR. They encompass the period from the time that Mr Zita was first instructed, including the settlement with Trust Co, the application for approval of the settlement, Mrs Botsman's appeal against that approval and the subsequent remitter. This material is I believe already available to Alex Elliott. If not, it can be forthwith made available by the solicitors for the SPR.

33 The application by the Alex Elliott, Elliott Legal and Decoland for identification of the material on which the SPR will rely to establish its allegations that non-parties pay costs, or on which the court may rely in investigating breaches of the overarching obligations on its own motion, is readily answered. It is likewise the record of the trial of the remitter, namely the transcript and exhibits.

34 Presently, I cannot see any difficulty with proceeding in this manner. Subject to any further submission that he may wish to proffer, rather than demand further particulars, as an officer of the court who is subject to the highest duty of fidelity to the court, Alex Elliott should provide an affidavit giving a full and proper explanation of the circumstances of his involvement in the group proceeding. If proffered, his explanation can be considered and evaluated. In that context, the court will be sufficiently informed to invite submissions and give direction on whether, why and how ss 28 and 29 of the CPA apply.

35 I will list the proceeding for directions to consider whether, and when, Alex Elliott should provide that explanation and whether he seeks to cross-examine Peter Trimbos or Mr Zita, or call any other evidence.

36 Peter Trimbos is subject, as an expert witness, to some of the overarching obligations under the CPA by force of s 10(3). Mr Trimbos gave evidence in the proceeding by the tender of five written reports and was cross-examined on those reports. There is a case for Mr Trimbos to answer that in his participation in the settlement approval application, particularly in his evidence before Croft J by his report dated 4 January 2018, he engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in breach of s 21 of the CPA.

37 Briefly, Mr Trimbos represented to the court in proffering his opinion in respect of the claim for the plaintiff's costs in the group proceeding that:

- (a) he understood and agreed to be bound by the Expert Code of Conduct;
- (b) he was independent of AFPL;
- (c) he was not an advocate for AFPL;
- (d) he applied an objective process in his independent assessment of the claim for costs that enabled him to opine that claimed items of costs had been reasonably incurred and were of a reasonable amount;
- (e) his opinions involved the application of specialised knowledge based on his training, study or experience;
- (f) he had identified the facts, matters and assumptions on which each opinion expressed in his reports was based;
- (g) he had made all the inquiries which he believed were desirable and appropriate, and that no matters of significance which he regarded as relevant had, to his knowledge, been withheld from the court;

- (h) he did not need to qualify any opinion expressed in his reports without which the report was or might have been incomplete or inaccurate; and
- (i) he did not need to state whether any opinion expressed in the report was not a concluded opinion because of insufficient research or insufficient data or for any other reason.

38 Based on the evidence before the court on the remitter, including Mr Trimbos' later reports and his oral evidence under cross-examination in particular, and in the absence of any further explanation, there are grounds for the court to find that each of the representations noted in the preceding paragraph was at best misleading and at worst deceptive. Mr Trimbos may have breached the overarching obligation under s 21 of the CPA not to engage in conduct which is misleading or deceptive or likely to mislead or deceive.

39 Mr Trimbos' circumstances differ from those of Alex Elliott. Although the provisions of the CPA are engaged by reason of his status as an expert witness, Mr Trimbos is also a practising solicitor and an officer of the court. As with Alex Elliott, before it identifies the precise particulars of conduct that may move it to grant relief under the CPA, the court is entitled to a full and proper explanation of the circumstances of Mr Trimbos' involvement in the application before Croft J for approval of the settlement, Mrs Botsman's appeal against that approval and the subsequent remitter. While Mr Trimbos may be content to rest on his explanation given in evidence, any full explanation proffered should address the matters raised in paragraphs 37 and 38 of these reasons.

40 At this stage, I am not intending to limit the particulars of conduct that may be the subject of this further enquiry. The SPR and the Contradictor may wish to make submissions identifying more precisely what relief might be sought, pursuant to ss 28 and 29 of the CPA, for the ultimate benefit of debenture holders.

41 I will order that Alexander Christopher Elliott be added as the fifth defendant and Peter Trimbos be added as the sixth defendant, pursuant to s 29(2)(b) of the CPA for

consideration by the court, on its own motion, whether any, and if so what, order under ss 28 or 29(1) of the CPA should now be made in the interests of justice.

42 The proceeding, insofar as it concerns these added defendants, is listed for directions on 27 August 2020 at 9:30am.

43 I further direct that the solicitors acting for the SPR forthwith:

- (a) serve a copy of these reasons for ruling and my accompanying order on the added defendants; and
- (b) facilitate access to the Online Review Book for the added defendants and, if applicable, their legal representatives.

CERTIFICATE

I certify that this and the 11 preceding pages are a true copy of the reasons for ruling of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 20 August 2020.

DATED this 20th day of August 2020.



SCHEDULE OF PARTIES

S CI 2012 07185

BETWEEN:

LAURENCE JOHN BOLITHO	First Plaintiff
AUSTRALIAN FUNDING PARTNERS PTY LIMITED	Second Plaintiff
- and -	
JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE RECEIVER OF BANKSIA SECURITIES LIMITED (ACN 004 736 458) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)	First Defendant
NORMAN O'BRYAN SC	Second Defendant
MICHAEL SYMONS	Third Defendant
ANTHONY ZITA AND PORTFOLIO LAW PTY LTD	Fourth Defendant