



Summary of Judgment

Bolitho v Banksia Securities Ltd (No 18) (remitter) [2021] VSC 666

11 October 2021

The Honourable Justice John Dixon has today found that a litigation funder and five lawyers (**‘contraveners’**) engaged in egregious conduct in connection with a fraudulent scheme, intending to claim more than \$19 million in purported legal costs and funding commission from the settlement sum in a group proceeding. Justice John Dixon noted that the contravener’s conduct had shattered confidence in, and expectations of, lawyers as an honourable profession, and corrupted the proper administration of justice.

His Honour concluded that the contraveners’ actions were appalling breaches of their respective duties to the court, particularly the paramount duty and overarching obligations imposed on them by the *Civil Procedure Act 2010* (Vic). Justice John Dixon ordered that they pay damages of \$11,700,128 to approximately 16,000 group members, plus the costs of the remitter on an indemnity basis.¹

His Honour further ordered that:

- Mr Norman O’Bryan SC and Mr Michael Symons (barristers) be removed from the roll of persons admitted to the legal profession;
- Mr Anthony Zita and Mr Alex Elliott (solicitors) each show cause as to whether they are fit and proper to remain on the roll of persons admitted to the legal profession; and
- the reasons for judgment and the record of the trial be referred to the Director of Public Prosecutions for any further investigation and action thought appropriate.

Background

In November 2018, the Court of Appeal remitted the Banksia Securities Limited group proceeding to the Trial Division to consider an application by Australian Funding Partners Limited (**‘AFP’**) to be reimbursed \$5.2 million in legal costs and to be paid \$14.1 million in litigation funding commission, following a \$64 million settlement reached in December 2017.

In March 2019, the court-appointed Contradictor alleged breaches of the overarching obligations, fiduciary duty, professional conduct rules and the funding agreement, such that AFP ought not be entitled to recover any or all of those amounts. Those allegations were rejected and fiercely defended by AFP, Mr O’Bryan and Mr Symons until the trial of the remitter commenced, where they each withdrew their respective defences.

¹ Estimated at trial to exceed \$10 million.

Findings

In reasons published today, Justice John Dixon found that:

- After avoiding being formally restrained from acting as solicitor and senior counsel while they each held an investment in AFP by false representations to other practitioners and the court, Mr Mark Elliott (managing director of AFP) and Mr O'Bryan circumvented the court's ruling, including by appointing Mr Zita as 'post box' solicitor.
- Following the in-principle settlement, Mr Mark Elliott, Mr O'Bryan and Mr Symons demanded that the other parties agree to settlement terms that were adverse to the interests of group members, including requiring the other parties to support court approval of AFP's \$19.3 million claim, while broad confidentiality requirements prevented the court and other parties from careful assessment of that claim.
- Mr Mark Elliott reverse engineered the \$5.2 million costs claim into 'fee targets' that each of Mr O'Bryan, Mr Symons and Mr Zita then met; none of whom having issued invoices for their fees prior to the settlement.
- Mr O'Bryan and Mr Symons each contrived backdated costs agreements and invoices, to appear as if their fees were legitimately incurred. Each of them included hundreds of hours of time for work that had never been performed.
- Mr Mark Elliott, Mr O'Bryan and Mr Symons deceived the court as to the legitimacy of AFP's claim, including authoring a misleading opinion of counsel, and procuring a report from an expert costs lawyer, Mr Peter Trimbos, by misleading him into concluding the legal fees were legitimate, resulting in court approval of the \$19.3 million claim.
- Mr Mark Elliott, Mr O'Bryan and Mr Symons, supported by Mr Zita and Alex Elliott, waged a campaign of intimidation against a group member who appealed the approval of the settlement in order to preserve their own interests, including by issuing financial threats against that group member and her legal representatives.
- Active steps were taken to avoid the proper administration of justice and conceal fraudulent scheme in both the appeal and the remitter hearing.
- Mr Mark Elliott was a highly unethical and dishonest person who demonstrated total disregard for his professional obligations and his duties as an officer of the court.
- Mr O'Bryan and Mr Symons each acted contrary the strictest of ethical and professional duties as barristers, in the arrogant and defiant belief that their conduct would go undetected. Mr O'Bryan, in particular, abused his standing and influence as senior counsel to deceive the court and other lawyers into trusting his representations concerning his fees, and in seeking to collude with other witnesses to the remitter. They have left a stain on the integrity of barristers as a profession.
- Mr Zita acted in gross dereliction of his duty to his client and group members by allowing himself to be controlled throughout the litigation. He failed to exercise independent forensic judgment or perform work advancing their interests in the four years that he acted as their solicitor. He, too, has left a stain on the integrity of his profession.

- Mr Alex Elliott was his father's 'right hand man' and knowingly and actively assisted Mr Mark Elliott execute the fraudulent scheme and deceive the court.
- Mr Trimbos's conduct allowed AFP's illegitimate claim to succeed undetected. He failed to act as an independent expert witness and did not make proper enquiries concerning how legal costs had been calculated or to confirm they were referable to work actually performed.

His Honour noted that although the conduct of the contraveners was appalling, the remitter had demonstrated the capacity of the civil justice system to self-regulate, particularly in the context of group proceedings and litigation funding, through the commitment of the judiciary and the profession in protecting the proper administration of justice. Ultimately, despite the best efforts of the contraveners, the spoils were never divided.

The proceeding will be relisted on a date to be fixed, for applications for non-party cost orders against the estate of Mr Mark Elliott and entities associated with Mr O'Bryan and the Elliott family.

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.