

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

No. SCI 2012 7185

BETWEEN:

**LAURENCE JOHN BOLITHO & ANOR**

Plaintiffs

AND:

**JOHN ROSS LINDHOLM**

**in his capacity special purpose receiver of Banksia Securities  
Limited (receivers and managers appointed) (in liquidation)  
and others in accordance with the schedule & Ors**

Defendants

**CONTRADICTION'S REVISED LIST OF ISSUES DATED 3 JULY 2020**

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Filed on behalf of:	The Contradictor	
Prepared by:	<b>Corrs Chambers Westgarth</b>	
	Lawyers	Solicitors Code 9973
	Level 25	Tel: (03) 9672 3000
	567 Collins Street	Fax: (03) 9672 3010
	Melbourne	Ref: Craig Phillips 9144431
		Craig.phillips@corrs.com.au
	<b>AUSTRALIA</b>	

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## LEGAL COSTS

- 1 With respect to the legal costs and disbursements which AFPL seeks to recover by this application (**Legal Costs**):
  - (a) were they incurred in the conduct of Supreme Court Proceeding SCI 2012 7185 (**Bolitho Proceeding**) on behalf of Mr Bolitho and the representative group?
  - (b) were they reasonable in the circumstances?
  - (c) were they disproportionate or excessive having regard to the costs incurred by the SPRs in the Bolitho Proceeding and Supreme Court of Victoria Proceeding SCI 2015 01384 (**SPR Proceeding**) (collectively the **two proceedings**), including work relied upon, directly or indirectly, by Mr Bolitho/AFPL in the Bolitho Proceeding?
  - (d) are they required to be supported by valid and enforceable costs agreements and disclosure statements (**Costs Agreements**) between:
    - (i) between (A) Mr Bolitho and (B) Mark Elliott or Portfolio Law;
    - (ii) between (A) Mark Elliott or Portfolio Law and (B) counsel?
  - (e) If so:
    - (i) were they supported by Costs Agreements?
    - (ii) are any of the Costs Agreements with counsel void for the purposes of section 185 of the Legal Profession Uniform Law?
  - (f) have they been calculated and charged in accordance with the Costs Agreements and the funding agreement between Mr Bolitho and AFPL dated 13 March 2014 (**Funding Agreement**)?
  - (g) is AFPL entitled to recover costs incurred:
    - (i) in respect of the appeal by Mrs Botsman in S APCI 2018 0037?
    - (ii) in respect of this remitter?
- 2 Should the Legal Costs be referred out for assessment by an independent expert or referee or by the Costs Court? If not, in what if any sum is AFPL entitled to recover

legal costs and disbursements from the proceeds of the settlement with Trust Co (**Settlement Sum**))?

### **FUNDING COMMISSION**

- 3 Is the “Resolution Sum” within the meaning of the Funding Agreement the \$64 million settlement sum payable by Trust Co under the Settlement Deed in respect of the compromise of both Mr Bolitho’s claim against Trust Co and the SPR’s claim against Trust Co, or some other and if so what sum?
  - (a) Having regard to the terms of the Settlement Deed, is it necessary to apportion the Settlement Sum between the Bolitho Proceeding and SPR Proceeding, and if so, what apportionment or allocation as between them is appropriate?
  - (b) What were the prospects of success of the Bolitho Proceeding and of the SPR Proceeding, separately and comparatively?
  - (c) What were the relative contributions of AFPL and the SPRs towards the practical, financial and evidentiary burden of conducting the two proceedings?
- 4 With respect to AFPL’s claim for a funding commission pursuant to the Funding Agreement:
  - (a) What proportion of group members signed the Funding Agreement?
  - (b) What has been disclosed to and/or agreed by group members relevant to AFPL’s intention to make a claim under the Funding Agreement against each group member in respect of the claim against Trust Co, and the funding commission sought by AFPL?
  - (c) What is the proper construction of the Funding Agreement with respect to AFPL’s entitlement to a payment out of the Settlement Sum?
  - (d) Should any funding commission be calculated on the gross Settlement Sum, or the net Settlement Sum (after deduction of approved legal costs)?
  - (e) Should any funding commission be a GST-inclusive amount, or a GST-exclusive amount?

- 5      ***Financing obligations:*** What financing obligations did AFPL undertake and perform in relation to the Bolitho Proceeding against Trust Co?
- (a)      To what extent was the Bolitho Proceeding against Trust Co financed by others?
  - (b)      What was the quantum of adverse costs liability assumed by AFPL?
  - (c)      During the course of the litigation, what was AFPL's capacity to meet its obligations under the Funding Agreement, including its capacity to meet adverse costs orders?
  - (d)      What security for costs did AFPL relevantly provide in the course of the Bolitho Proceeding against Trust Co?
  - (e)      What litigation costs had been paid by AFPL at the time of the Settlement Deed, and/or what litigation costs had AFPL properly and reasonably incurred?
  - (f)      When did AFPL pay the litigation costs of the Bolitho Proceeding?
  - (g)      On what terms were Mr Bolitho's solicitors and counsel retained to act?
  - (h)      What is a commercially acceptable return on investment for AFPL?



- 6 **Performance obligations:** to what extent did AFPL perform its various obligations under the Funding Agreement in relation to the claims in the Bolitho Proceeding against Trust Co?
- 7 **Court's supervisory role in connection with the funding commission:** With respect to the settlement with Trust Co, is the commission sought by AFPL reasonable and proportionate having regard to the overall Settlement Sum and the amount that will remain for distribution to group members? If not, in what if any sum is AFPL entitled to recover funding commission from the Settlement Sum?
- 8 **Funding equalization order:** Should a funding equalization order be made? Do the interests of justice require the making of the order in circumstances where the debenture holders had, at least in part, "financed" the Bolitho Proceeding through the evidence prepared, filed and paid for by the SPRs such that there was significantly reduced scope for freeriding by debenture holders?

#### **DISSENTING CONDUCT AND CONDUCT ATTRACTING RELIEF UNDER CIVIL PROCEDURE ACT**

- 9 In respect of the applications by Mr Bolitho and AFPL for payment to AFPL from the Settlement Sum for Legal Costs and/or for funding commission (**Applications**) and/or in relation to the proceeding generally, has there been any conduct by AFPL, its directors, employees or agents, by reason of which:
  - (a) AFPL has contravened an overarching obligation under the *Civil Procedure Act* 2010 (Vic) (**CPA**);
  - (b) the Court should refuse the Applications;
  - (c) the court should reduce or disallow AFPL's claims for those payments;
  - (d) the court should order that AFPL pay any and if so what sum into the Settlement Sum;
  - (e) the court should order that AFPL indemnify debenture holders for losses they have suffered or will otherwise suffer by reason of that conduct in any and if so in what sum.
- 10 In respect of the Applications and/or in relation to the proceeding generally, has there been any conduct by Mr O'Bryan AM SC, Mr Symons and/or Mr Zita/Portfolio Law by reason of which:

- (a) any one or more of them has contravened an overarching obligation under the CPA;
- (b) the court should order that any one or more of them pay any and if so what sum into the Settlement Sum;
- (c) the court should order that any one or more of them indemnify debenture holders for losses they have suffered or will otherwise suffer by reason of the conduct of any one or more of them in any and if so in what sum.

#### Particulars

Particulars provided in Annexure A.

- 11 Does the alleged disentitling conduct affect:
  - (a) the Applications;
  - (b) the recovery of commission on a contractual basis;
  - (c) the recovery of legal costs;
  - (d) the recovery of any and what moneys for debenture holders;
  - (e) the need for AFPL to indemnify debenture holders for losses suffered or which they will otherwise suffer by reason of the disentitling conduct?
- 12 Should the allegations concerning the CPA be dealt with in this proceeding or otherwise?

## **ANNEXURE A - Particulars of conduct by AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law**

### **A. Background, context, and duties owed to Mr Bolitho and other group members**

#### **A.1 Background to Bolitho Proceeding and SPR Proceedings**

- 1 The Bolitho Proceeding was commenced on 24 December 2012.
- 2 The SPRs commenced and/or conducted several proceedings relating to the subject matter of the Bolitho Proceeding, as follows:
  - (a) Between September and December 2014, the SPRs conducted public examinations of Trust Co personnel in Supreme Court of Victoria.<sup>1</sup>
  - (b) On 5 November 2014, the receivers of Banksia commenced proceedings against directors and officers of Banksia, its auditors and solicitors, and members of an insurance syndicate. Those proceedings were subsequently taken over by the SPRs.
  - (c) On 27 March 2015, the SPRs commenced the SPR Proceeding against Trust Co.
  - (d) On 27 March 2015, the SPRs commenced a group proceeding against Trust Co on behalf of the McKenzie Family Superannuation Fund (**McKenzie Group Proceeding**).

#### **A.2 Litigation funding arrangements in the Bolitho Proceeding**

- 3 On or about 20 January 2014, BSL Litigation Partners Ltd (now AFPL) was incorporated for the purpose of funding the Bolitho Proceeding.
- 4 At all relevant times, Mr Mark Elliott was:
  - (a) the managing director and secretary of and major shareholder in AFPL; and
  - (b) the directing mind and will of AFPL.

#### Particulars

As to (a), AFPL's Register of Members records that, as at 25 July 2017, entities associated with Mr Elliott held 1,000,000 of 1,812,500 or 55% of issued shares in AFPL.

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<sup>1</sup> Affidavit of David Newman sworn 25 March 2019 (**Newman Affidavit**), paras 37 - 38.

As to (b), Mr Elliott had a high level of responsibility, discretion, autonomy and decision-making power on behalf of AFPL in relation to the Bolitho Proceeding. He considered that he was entitled to “run the litigation as he saw fit”.<sup>2</sup>

All references in this document to the conduct and/or state of mind of AFPL are references to the conduct and/or state of mind of Mr Elliott, unless context otherwise requires.

- 5 From 20 January 2014 to 14 December 2014, Noysue Pty Ltd (**Noysue**), an entity controlled by Ms Sue Noy (the spouse of Mr Norman O'Bryan AM SC), was a major shareholder in AFPL.

#### Particulars

Noysue invested \$500,000 in AFPL on 7 February 2014 [\[NOB.501.001.0006\]](#). AFPL's Register of Members records that Noysue Pty Ltd held 500,000 shares in AFPL from the date of its incorporation until 14 December 2014.

- 6 On or about 13 March 2014, AFPL signed a litigation funding agreement with Mr Bolitho (**Funding Agreement**) [\[AFP.006.001.0014\]](#) (which was subsequently signed by up to 55% of debenture holders<sup>3</sup> (**Funded Group Members**)), pursuant to which (inter alia):
- (a) AFPL agreed to fund the Case Costs (as defined) of the Bolitho Proceeding;<sup>4</sup>
  - (b) AFPL acted as agent for Mr Bolitho and the Funded Group Members; and
  - (c) Mr Bolitho and Funded Group Members agreed that, upon Resolution (as defined), AFPL was entitled to be paid from the Resolution Sum (as defined):
    - (i) “the Case Costs **paid** by AFPL” in relation to the Bolitho Proceeding;
    - (ii) “a further amount, as Consideration for the financing of the Case and performance by [AFPL] of its various obligations under [this Agreement], **being a maximum of** 30% of the Resolution Sum”.<sup>5</sup>

<sup>2</sup> Australian Funding Partners Ltd v Botsman [2018] VSC 303 [67].

<sup>3</sup> Re Banksia Securities Ltd (recs & mgrs apptd) [2017] VSC 148.

<sup>4</sup> Funding Agreement, clause 8.1.

<sup>5</sup> Funding Agreement, clause 12.

- 7 Further, AFPL owed duties to all group members (alternatively, all Funded Group Members) to:
- (a) act in good faith and generally in the interests of group members (alternatively, at least those group members who had signed a Funding Agreement);<sup>6</sup>
  - (b) act consistently with the interests of all group members.<sup>7</sup>
- 8 Further, AFPL:
- (a) was a litigation funder providing financial assistance or other assistance to Mr Bolitho and/or exercising control and/or influence over the conduct of the Bolitho Proceeding or of Mr Bolitho in respect of that proceeding, within the meaning of section 10 of the CPA;
  - (b) owed a paramount duty to the court to further the administration of justice (**Paramount Duty**);<sup>8</sup>
  - (c) owed the following overarching obligations (collectively, the **Overarching Obligations**):
    - (i) to act honestly;<sup>9</sup>
    - (ii) to refrain from making any claim in a civil proceeding that did not have a proper factual or legal basis;<sup>10</sup>
    - (iii) to not take any step in connection with any claim or response to any claim in a civil proceeding unless he reasonably believed it was necessary to facilitate the resolution or determination of the proceeding;<sup>11</sup>
    - (iv) to refrain from engaging in conduct which is misleading or deceptive or likely to mislead or deceive;<sup>12</sup>

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<sup>6</sup> This was implied.

<sup>7</sup> Kelly v Willmott Forests Ltd (in liq) (No 4) (2016) 335 ALR 439 [321]; King v AG Australia Holdings Ltd (2002) 121 FCR 480 at [27] per Moore J.

<sup>8</sup> Civil Procedure Act 2010 (Vic) (CPA) s 16.

<sup>9</sup> CPA s 17.

<sup>10</sup> CPA s 18.

<sup>11</sup> CPA s 19.

<sup>12</sup> CPA s 21.

- (v) to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate;<sup>13</sup> and
- (vi) to minimise delay.<sup>14</sup>

### **A.3 The legal practitioners retained to act for Mr Bolitho and/or other group members and their duties to him and other group members**

9 At relevant times the following persons acted in the following capacities in the Bolitho Proceeding:

- (a) from about December 2012 to December 2014, Mr Elliott acted as solicitor for Mr Bolitho and/or group members in the Bolitho Proceeding;
- (b) from about December 2012 to 29 March 2019, Mr O'Bryan AM SC acted as senior counsel for Mr Bolitho and/or group members in the Bolitho Proceeding;
- (c) from about September 2014 to about April 2019, Mr Symons acted as junior counsel for Mr Bolitho and/or group members in the Bolitho Proceeding;
- (d) from about December 2014 to about May 2019, Mr Zita/Portfolio Law acted as solicitor for Mr Bolitho and/or group members in the Bolitho Proceeding;
- (e) from about December 2012 onwards, Mr Robert Crow also acted as a solicitor for Mr Bolitho in connection with the Bolitho Proceeding (but was not solicitor on the record for Mr Bolitho).

10 At all relevant times, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law (**Bolitho Lawyers**) owed to Mr Bolitho the following duties (**Lawyers' Duties**):

- (a) duties of skill, diligence and competence;<sup>15</sup>
- (b) fiduciary duties, including the duty to avoid conflicts of interest;
- (c) duties to promote and protect his best interests, without regard to their own interests or the interests of any other person;<sup>16</sup>

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<sup>13</sup> CPA s 24.

<sup>14</sup> CPA s 25.

<sup>15</sup> The duties arose at law, Legal Profession Uniform Conduct (Barristers) Rules 2015 (**Barristers' Rules**) r 4(c) and under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (**Solicitors' Rules**) r 4.1.3.

- (d) duties to assist him to understand the issues in the case and his possible rights and obligations, sufficiently to permit him to give proper instructions, including instructions in connection with any compromise.<sup>17</sup>
- 11 Further, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law owed the Lawyers' Duties to each other group member (alternatively, each other Funded Group Member).<sup>18</sup>
- 12 The proper discharge of the Lawyers' Duties required Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law to advise and assist Mr Bolitho to discharge his obligation to represent the claims of the group members he represents in accordance with Part 4A of the *Supreme Court Act* 1986 (Vic) (**SCA**).<sup>19</sup>
- 13 Each of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law:
- (a) was an officer of the court, and a legal practitioner or law practice acting for or on behalf of a party, within the meaning of section 10 of the CPA;
  - (b) owed the Paramount Duty<sup>20</sup> and the Overarching Obligations;
  - (c) owed professional duties to the court to refrain from conduct which is dishonest or otherwise discreditable, prejudicial to the administration of justice, or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;<sup>21</sup>
  - (d) owed professional duties to the court to act with competence,<sup>22</sup> honesty and candour,<sup>23</sup> and independence.<sup>24</sup>

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<sup>16</sup> Barristers' Rules r 35; Solicitors' Rules r 4.1.1 and 12.

<sup>17</sup> Barristers' Rules r 37; Solicitors' Rules r 7.

<sup>18</sup> *Kelly v Willmott Forests Ltd (in liq)* (No 4) (2016) 335 ALR 439 [220], citing *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426 (Wilcox J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 (Sackville J); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480 at [24] and [27] (Moore J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 at [15] (Merkel J).

<sup>19</sup> *Klemweb Nominees Pty Ltd (as trustee for Klemweb Superannuation Fund) v BHP Group Ltd* (2019) 369 ALR 583, [85].

<sup>20</sup> See also the Barristers' Rules r 4(a) and 8, and the Solicitors' Rules r 3.

<sup>21</sup> Barristers' Rules r 9; Solicitors' Rules r 5.

<sup>22</sup> The duty arose at law and under the Solicitors' Rules r 4.1.3 (see also Barristers' Rules r 4(c)).

<sup>23</sup> The duty arose at law, under ss 17 and 21 of the CPA, (in the case of Mr Zita and Mr Elliott) under the Solicitors' Rules r 4.1.2, 19.1 and 19.2, (in the case of Mr O'Bryan and Mr Symons) under the Barristers' Rules rr 8, 24, and 25 (see also r 4(c)).

<sup>24</sup> The duty arose at law, under the Barristers' Rules r 42, and under the Solicitors' Rules r 17.1.

- 14 Further or alternatively, each of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law owed a duty to act consistently with the interests of all group members.<sup>25</sup>
- 15 Further, in connection with settlements of the group proceeding, when AFPL, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law on behalf of Mr Bolitho and group members invoked the court's supervisory jurisdiction under section 33V of the SCA to approve such settlements and deductions from the settlement in respect of costs and commission, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL owed more onerous duties to Mr Bolitho, group members and the Court, arising from the fact that:
- (a) the court assumes a protective role in relation to group members' interests (extending to both the settlement itself and deductions from the settlement);<sup>26</sup>
  - (b) many affected parties, namely the debenture holders (other than Mr Bolitho), were not before the Court but relied heavily on Mr Bolitho, his advisers, and AFPL;<sup>27</sup>
  - (c) solicitors and counsel seeking approval of settlement are under an obligation to make full disclosure to the Court of all matters relevant to the Court's consideration of the matter, which extends to requiring them to reveal benefits or advantages flowing to them from the settlement.<sup>28</sup>

**A.4 Duties owed by AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law arising under or by reason of Funding Agreement, Conflicts Management Policy and Disclosure Statement**

- 16 The Corporations Regulations 2001 (Cth) specify that the providers of litigation funding schemes and arrangements are exempt from the requirement to hold an Australian Financial Services Licence as long as they have appropriate processes in place to manage conflicts of interest.<sup>29</sup>
- 17 Clause 7.3 of the Funding Agreement provides:

*"For the duration of this... Agreement, [AFPL] will:*

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<sup>25</sup> Kelly v Willmott Forests Ltd (in liq) (No 4) (2016) 335 ALR 439 [321]; King v AG Australia Holdings Ltd (2002) 121 FCR 480 at [27] per Moore J.

<sup>26</sup> McKenzie v Cash Converters International Ltd (No 3) [2019] FCA 10 [24]; Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) (2018) 132 ACSR 258 [87].

<sup>27</sup> Botsman v Bolitho [2018] VSCA 278 [300].

<sup>28</sup> Lopez v Star World Enterprises Pty Ltd [1999] ATPR 41-678, 42 670 (Finkelstein J); Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3) [2012] VSC 625 [3] (Pagone J).

<sup>29</sup> Regs 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.



7.3.1. *by implementing the Conflicts Management Policy, comply with the requirements of the Regulations; and*

7.3.2. *provide timely and clear disclosure to the Plaintiff of any material breach of the Regulations by [AFPL] in relation to the subject matter of this... Agreement."*

18 AFPL provided group members with copies of its Conflict Management Policy dated 16 March 2014 (**Conflict Management Policy**) and Disclosure Statement dated 2 June 2014 (**Disclosure Statement**) [[AFP.006.001.0001](#)].

19 The Conflicts Management Policy provides at clause 4 that:

*"our standard agreement with the Lawyers<sup>30</sup> (Standard Lawyers Terms) requires the Lawyers to disclose to each member of the group which has entered into a funding agreement with [AFPL] (Funded Person) the sources of all fees or other income they may receive in relation to the litigation being funded by [AFPL], including providing a budget for all estimated costs and expenses up to the conclusion of a trial in any funded Proceedings".<sup>31</sup>*

20 The Disclosure Statement states at paragraph 4.2:

*"ASIC considers that a divergence of interests may arise because:*

- (a) [AFPL] wishes to keep the legal and administrative costs of the funded litigation low to maximize its return;*
- (b) the lawyers may be seen to have an interest in maximizing their fees; and*
- (c) you have an interest in minimizing the returns of both [AFPL] and the lawyers."*

21 The Disclosure Statement states at paragraph 3.8:

*"We will appoint the lawyers to work for you on the terms of an agreement, known as the Standard Lawyers Terms, between us and the lawyers. The lawyers may also have a retainer agreement directly with you. The lawyers' retainer agreement explains in detail how the lawyers are paid and how their fees are calculated."*

22 The Disclosure Statement states: *"If we identify a conflict which arises during the course of your funded litigation which has not been disclosed to you, we will bring it to your attention."*<sup>32</sup>

23 Clause 13.3 of the Funding Agreement provides:

*"Except in relation to Settlement, which is dealt with below, if the Lawyers notify [AFPL] and the Plaintiff that the Lawyers believe that circumstances*

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<sup>30</sup> "The Lawyers" is not defined in the Conflicts Management Policy.

<sup>31</sup> Clause 4.

<sup>32</sup> Disclosure Statement, clause 4.4.

*have arisen such that they may be in a position of conflict with respect to any obligations they owe to [AFPL] and those they owe to the Plaintiff, the Plaintiff and [AFPL] agree that, in order to resolve that conflict, the Lawyers may:*

*13.3.1 seek instructions from the Plaintiff, whose instructions will override those that may be given by [AFPL];*

*13.3.2 give advice to the Plaintiff and take instructions from the Plaintiff, even though that advice is, and instructions are, or may be, contrary to [AFPL's] interests; and*

*13.3.3 refrain from giving [AFPL] advice and acting on [AFPL's] instructions, where that advice is, or those instructions are, or may be, contrary to the Plaintiff's interests."*

24 Clause 13.5 of the Funding Agreement provides:

*"In recognition of the fact that [AFPL] has an interest in the Resolution Sum, if the Plaintiff:*

*13.5.1 wants to Settle the Class Action for less than [AFPL] considers appropriate; or*

*13.5.2 does not want to Settle the Class Action when [AFPL] considers it appropriate to do so,*

*then the Plaintiff agrees that [AFPL] and Plaintiff must seek to resolve their difference of opinion by referring it to counsel for advice on whether, in counsel's opinion, Settlement of the Class Action on the terms and in the circumstances is fair and reasonable in all of the circumstances."*

25 Clause 13.6 of the Funding Agreement provides:

*"If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and [AFPL] agree that the Lawyers will be instructed to do all that is necessary to settle the Class Action provided that the approval of the Court is sought and obtained."*

26 Each of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law knew of the terms of the Funding Agreement, the Conflicts Management Policy and the Disclosure Statement.

#### Particulars

Mr Elliott provided Mr O'Bryan with the draft Funding Agreement for him to review and settle before it was finalised and executed [\[NOB.500.009.7697\]](#) [\[NOB.500.009.7698\]](#) [\[NOB.500.009.7719\]](#) [\[NOB.500.009.7657\]](#). Mr O'Bryan also reviewed and advised in relation to the Conflicts Management Policy (see his fee slip for June 2014 annexed to the Second Trimbos Report). Mr Symons reviewed the Funding Agreement in 2015 and knew of its terms [\[SYM.001.002.3403\]](#) [\[SYM.001.002.3405\]](#). In December 2016, Mr O'Bryan sent Mr Symons the Conflicts Management and Disclosure Statement that had been prepared for the purposes of the Bolitho Proceeding [\[SYM.002.001.3004\]](#) [\[SYM.002.001.3005\]](#), see also [\[SYM.001.001.7313\]](#). Since the Funding Agreement imposed obligations on "the Lawyers", it should

be inferred that AFPL provided the Funding Agreement to Mr Zita/Portfolio Law. Further, the Funding Agreement was addressed in the confidential settlement opinion dated 8 July 2016 prepared by Mr O'Bryan AM SC and Mr Symons and filed by Mr Zita/Portfolio Law in connection with the Partial Settlement [\[SYM.001.002.3420\]](#) [\[SYM.001.002.3421\]](#).<sup>33</sup> It was also attached to an outline of submissions dated 23 August 2016 filed by Mr O'Callaghan QC (as he then was) in connection with the application for approval of the Partial Settlement.<sup>34</sup> Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law charged for perusing those submissions.<sup>35</sup>

27 In circumstances where the terms of the Funding Agreement, Conflicts Management Policy and Disclosure Statement set out above existed to protect Mr Bolitho and other group members, each of AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law owed a duty to Mr Bolitho and/or other group members (alternatively, other Funded Group Members) to:

- (a) provide budgets for all estimated costs and expenses up to the conclusion of the trial in the Bolitho Proceeding;
- (b) bring to the attention of AFPL, Mr Bolitho and/or other group members conflicts of interest which arose during the course of the Bolitho Proceeding;
- (c) inform Mr Bolitho and/or other group members of their rights when conflicts of interest arose during the course of the Bolitho Proceeding,

and further, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law owed duties to advise Mr Bolitho and/or other group members in a manner that was consistent with the Lawyers' Duties and the Paramount Duty in relation to all such matters, including in relation to any settlement of the claims in the Bolitho Proceeding and the terms of any such settlement.

#### **A.5 Decision in *Bolitho v Banksia Securities Limited (No 4)***

28 On 26 November 2014, the Court found that Mr Elliott and Mr O'Bryan should not continue to act for Mr Bolitho as solicitor and counsel respectively in circumstances where they each had an interest in AFPL (*Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582) (**Bolitho No 4 Decision**), including by reason of the following findings:

<sup>33</sup> Paras 133 to 149 and 178 to 182.

<sup>34</sup> See Mr O'Callaghan's submissions dated 23 August 2016, para 18 and Annexure A (being the Funding Agreement), annexed to the Newman Affidavit, DCN-1, page 1521-1555.

<sup>35</sup> Third Trimbos Report, pages 149, 206 and 275.

- (a) The fair-minded, reasonably informed member of the public (**the Observer**) would form the view that it was important for the proper administration of justice and the judicial process that the Court can rely upon the independence of the lawyers for the parties and that the lawyers will bring a degree of objectivity to the task when advising their clients and presenting the case to the Court.<sup>36</sup>
- (b) The Observer would know that the legislature has seen fit to place a 25 per cent limit on the uplift fee that may be charged by solicitors acting on a “no win no fee” basis and has banned contingency fees, such that a solicitor may not charge as a fee a percentage of the amount obtained by the client from the litigation.<sup>37</sup>
- (c) Although the litigation funding agreement success fee payable under the Funding Agreement would not be payable to Mr Elliott in his capacity as a solicitor, nevertheless it is a contingency fee that would benefit him. The Observer would likely take the view that where the legal practitioner’s interest in the funder is sizeable, it would be inimical to the appearance of justice for lawyers to skirt around the prohibition on contingency fees by this means.<sup>38</sup>
- (d) The Observer would note that there was a greater likelihood for conflict because of the numerous capacities in which Mr Elliott acted. He was the solicitor for Mr Bolitho. He was a director and secretary of AFPL. AFPL stood to make a substantial gain or loss from the litigation. Whilst the Civil Procedure Act requires parties, litigation funders and the court to deal with litigation efficiently and cost effectively, another key requirement is the just resolution of disputes. Justice requires practitioners to observe their ethical duties and obligations to the court. The Court relies upon practitioners to apply an independent and objective mind when conducting a case on behalf of the client. There is a risk that that objectivity might be compromised to some degree where there is a “no win no fee” arrangement because of the fees which the practitioner may have at stake. The more that was at stake, the greater the risk that the lawyer will not bring or will not be seen to be bringing to bear the requisite degree of objectivity that the role of lawyer demands.<sup>39</sup>

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<sup>36</sup> *Bolitho No 4* at [48(z)].

<sup>37</sup> *Bolitho No 4* at [50].

<sup>38</sup> *Bolitho No 4* at [51].

<sup>39</sup> *Bolitho No 4* at [53].

- (e) Similarly, the Observer would form the view that Mr O'Bryan may be influenced by his family's substantial financial interest in the outcome of the case, which might be seen to colour his ability to perform his obligations.<sup>40</sup>
- (f) Although the evidence disclosed that AFPL was paying Mr O'Bryan's fees, his family had a significant interest in AFPL that placed Mr O'Bryan in a compromised position so that the Observer would consider there was a risk that he would be perceived to be unable to apply the necessary independence required as an officer of the Court.<sup>41</sup>
- (g) The prospect of Mr O'Bryan's stance that he would not take any part in advising about settlement did not diminish the risk sufficiently.<sup>42</sup>

29 The Court found that the appropriate orders were ones directed towards Mr Elliott and Mr O'Bryan, but that because no relief had been sought against them, and because they were not represented at the hearing, the Court would initially refrain from making orders, and the Court directed that a copy of the reasons be provided to them for their consideration.

30 Subsequently:

- (a) On 11 December 2014, the solicitors for Mr Godfrey circulated proposed orders, including orders that Mr Elliott and Mr O'Bryan be restrained from acting [\[CBP.004.005.8721\]](#) [\[CBP.004.005.8723\]](#) [\[CBP.004.005.8726\]](#).
- (b) Thereafter, on 11 December 2014, Mr O'Bryan drafted a letter for Mr Zita/Portfolio Law to send to the parties which stated: *"Noysue Pty Ltd has disposed of its shares in the litigation funder. Accordingly the plaintiff does not consider your proposed orders necessary and will oppose them"* [\[CBP.004.007.8509\]](#). Portfolio Law sent a letter in those terms [\[CBP.004.001.4217\]](#)[\[CBP.004.001.4218\]](#).
- (c) In response, on 11 December 2014, the solicitors for Mr Godfrey wrote to Portfolio Law stating: *"So that there is no dispute before her Honour about such matters, may we please have a copy of all written contracts, transfers and communications evidencing the disposal by Noysue Pty Ltd ('Noysue') of its shares in the litigation funder. You would appreciate that the Court would*

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<sup>40</sup> Bolitho No 4 at [62].

<sup>41</sup> Bolitho No 4 at [62].

<sup>42</sup> Bolitho No 4 at [62].

*expect the parties to be able to assure the Court that the terms of any sale of Noysue's shares do not raise further issues for the Court's consideration."*

[\[CBP.004.008.6236\]](#)

- (d) On 12 December 2014, Mr O'Bryan wrote to counsel for Mr Godfrey stating: *"Dear Rob, as discussed with you a few minutes ago, I cannot appear on Monday (or any other day) in respect of any application which is directed to me personally, even if it were by consent (which it will not be). If any party wants me joined to an application or seeks any other relief affecting me, I will insist on being properly served and given an opportunity to defend the application. I will also have to engage my own solicitors and counsel. As I also confirmed a few minutes ago, last night, after she returned from Borneo (where she has been in the jungle & uncontactable for the past three weeks), my wife agreed to sell her interest in the litigation funder. That has now occurred. Having regard to Justice Ferguson's reasons for decision, my wife will not again fund any action in which I appear as counsel. Mark Elliott has been replaced as solicitor by Portfolio Law (Tony Zita). Accordingly I do not consider there is any need for orders joining Elliott or me, or granting injunctions against either of us."* [\[CBP.004.001.9616\]](#).
- (e) On 15 December 2014, Mr Symons prepared submissions, which were filed by Portfolio Law, which stated: *"Upon delivery of the Ruling, Mr Elliott and Mr O'Bryan ceased to act for the plaintiff... Mr O'Bryan's wife has now disposed of her interest in the Litigation Funder. As Mr O'Bryan has no ongoing financial interest in the proceeding, beyond his fees, there is no reason why the plaintiff's new solicitor should be restrained from engaging Mr O'Bryan as counsel in the proceeding"* [\[CBP.004.004.1384\]](#) [\[CBP.004.004.1385\]](#). Mr Elliott/AFPL and Mr O'Bryan reviewed and/or settled those submissions before they were filed [\[CBP.004.002.0943\]](#).
- (f) At the hearing on 15 December 2014, counsel for Mr Godfrey informed that Court that *"events have changed"* because there had been a change of solicitor and Mr O'Bryan had informed the solicitors for the fifth defendant that Noysue had disposed of its interest in the funder (Transcript, page 16, lines 22-27) [\[CCW.004.001.0001\]](#), see also [\[CBP.004.002.1380\]](#) [\[CBP.004.002.2620\]](#). The Court acted on that basis (Transcript, page 17), which was reflected in the Orders dated 15 December 2014 [\[CBP.004.001.3030\]](#),

(collectively the **Bolitho Court Undertakings**).

**A.6 Partial Settlement of Bolitho Proceeding and SPR Proceeding against certain defendants**

31 On 2 June 2016, Alex Elliott of Elliott Legal (on behalf of AFPL and/or Portfolio Law) issued a summons [\[CBP.004.004.1652\]](#) [\[CBP.004.004.1653\]](#) (**Partial Settlement Approval Application**) seeking orders for:

- (a) approval of the Partial Settlement on the terms of the settlement deed;
- (b) approval of Mr Bolitho's claim "for reimbursement" from the settlement sum "in the sum of \$2,550,000 for legal costs and disbursements in respect of the claims which are the subject of the Settlement incurred by [AFPL] on behalf of [Mr Bolitho]";
- (c) approval of the payment of "consideration" (ie, funding commission) to AFPL in the sum of \$1,300,000 from the settlement sum.

32 In connection with the Partial Settlement Approval Application:

- (a) On or about 28 June 2016, Mr Elliott retained Peter Trimbo (an expert costs consultant) to provide an expert report opining upon the reasonableness of the legal costs claimed by AFPL out of the Partial Settlement [\[CBP.004.005.0947\]](#).
- (b) On 30 June 2016, Mr Symons sent by email to Mr Elliott, and Mr Elliott sent by email to Mr Trimbo, the Symons/Portfolio Law February 2015 Costs Agreement, the June 2016 Symons Cost Disclosure Statement, and a series of monthly invoices for the period from November 2015 to June 2016 which contained the Monthly Invoice Representation.

[\[SYM.001.002.9320\]](#) [\[SYM.001.002.9321\]](#) [\[SYM.001.002.9327\]](#)  
[\[SYM.001.002.9333\]](#) [\[SYM.001.002.9338\]](#) [\[SYM.001.002.9341\]](#)  
[\[SYM.001.002.9344\]](#) [\[SYM.001.002.9346\]](#) [\[SYM.001.002.9348\]](#)  
[\[SYM.001.002.9350\]](#) [\[SYM.001.002.9352\]](#) [\[TRI.001.005.0134\]](#)  
[\[TRI.001.005.0136\]](#) [\[TRI.001.005.0142\]](#) [\[TRI.001.005.0148\]](#)  
[\[TRI.001.005.0150\]](#) [\[TRI.001.005.0153\]](#) [\[TRI.001.005.0156\]](#)  
[\[TRI.001.005.0159\]](#) [\[TRI.001.005.0161\]](#) [\[TRI.001.005.0163\]](#)  
[\[TRI.001.005.0167\]](#).

- (c) On or about 1 July 2016, Mr O'Bryan provided to Mr Elliott and Mr Elliott provided to Mr Trimbos the O'Bryan July 2016 Costs Agreement [\[AFP.001.001.1475\]](#) [\[TRI.001.005.0200\]](#) [\[TRI.001.005.0201\]](#) [\[TRI.001.005.0204\]](#).
- (d) On or about 1 July 2016, Mr Elliott emailed Mr Trimbos cc Alex Elliott stating *"I am claiming costs pursuant to the attached Conditional Costs Agreement for the period 21 July 2013 until 5 December 2014"* and requesting that Mr Trimbos consider the reasonableness of his costs having regard to, inter alia, *"the number of folios discovered by the various defendants in this proceeding"* [\[TRI.001.005.0169\]](#) [\[TRI.001.005.0171\]](#).
- (e) Between about late June 2016 or 1 July 2016, Mr O'Bryan caused a series of invoices to be prepared in respect of his fees charged on the matter for the period November 2012 to May 2016, which:
- (i) contained the Monthly Invoice Representation;
  - (ii) he caused to be stamped as "PAID";
  - (iii) he sent by email to Mr Elliott on 1 July 2016 [\[AFP.001.001.1478\]](#) & attachments] [\[AFP.001.001.1478\]](#) & attachments] [\[AFP.001.001.1550\]](#) & attachments] [\[AFP.001.001.1607\]](#) & attachments] [\[AFP.001.001.1668\]](#) & attachments];
  - (iv) Mr Elliott sent by email to Mr Trimbos on 1 July 2016 [\[TRI.001.005.0207\]](#) & attachments] [\[TRI.001.005.0218\]](#) & attachments] [\[TRI.001.005.0279\]](#) & attachments] [\[TRI.001.005.0336\]](#) & attachments] [\[TRI.001.005.0842\]](#) & attachments].
- (f) On 4 July 2016, Mr Elliott sent by email to Mr Trimbos a formal letter of instruction [\[TRI.001.005.0557\]](#) [\[TRI.001.005.0558\]](#) [\[TRI.001.005.0561\]](#) [\[TRI.001.005.0577\]](#) [\[TRI.001.005.0578\]](#), which stated:

*"You are instructed on behalf of the plaintiff in the above proceeding to provide an independent costs assessment on the basis set out below.*

*1. On 24 March 2016, Mr Bolitho, BSL Litigation Partners Limited (BSLLP – the litigation funder for the plaintiff in the group proceeding, **which has incurred and paid all of the legal costs and disbursements in the case to date**), the first defendant Banksia Securities Limited (BSL) and various settling defendants executed a Deed to record a partial settlement of the group proceeding. In respect*



of the group proceeding, the partial settlement concerns the claims brought by Mr Bolitho against RSD and the former directors of BSL.

...

3. Pursuant to the executed Litigation Funding Agreement between Mr Bolitho and BSLLP, **BSLLP is entitled to be reimbursed for legal costs and expenses incurred by Mr Bolitho and paid by BSLLP on his behalf.**

5. You are requested to give your independent opinion as a legal costs expert on whether the legal costs and disbursements incurred by Mr Bolitho to date **and paid on his behalf by BSLLP** are fair and reasonable in respect of the legal work performed and other costs incurred in the case since it commenced in 2012.

6. Legal costs and disbursements incurred by Mr Bolitho **and paid by BSLLP to date** include:

- Counsels fees –Norman O’Bryan SC- \$1,708,740 (incl GST)
- Counsels fees-Michael Symons \$108,000 (incl GST)
- Solicitors Fees-Mark Elliott \$797,500 (incl GST)
- Solicitors Fees -Portfolio Law \$177,997 (incl GST)
- Disbursements (as per schedule attached) \$1,072,177 (incl GST)

*Total \$3,864,414 (incl GST)."*

- (g) On 4 July 2016, Mr Elliott emailed Mr Trimbo stating that his fees for acting as solicitor were "*calculated as follows*" and setting out a number of activities that Mr Elliott said he undertook in the period 21 July 2013 to 15 December 2014, comprising activities for which he quantified his time at **516 hours, plus "Discovered documents (Receivers / Liquidators Hearings+ other material) - approx: 55,000 folios - perusal (20,000 folios) / scan (25,000 folios) / examine 10,000 pages"** for which he did not expressly quantify his time [\[TRI.001.005.0586\]](#) [\[TRI.001.005.0587\]](#).
- (h) On 8 July 2016, Mr Trimbo provided a report (**First Trimbo Report**) opining upon the reasonableness of the costs sought to be recovered by AFPL and Mr Bolitho from the proceeds of the Partial Settlement [\[SYM.001.002.3421\]](#). The First Trimbo Report stated, amongst other things, that Mr Trimbo was instructed that Mr Elliott had reviewed discovered documents, and in that regard Mr Elliott "*perused approximately 20,000 folios (1 folio equals 100 words or part thereof), he scanned approximately 25,000 folios, and he examined 10,000 pages of discovered documents for the*

*purpose of the group proceeding*” (at [31]), for which Mr Trimbo allowed **484 hours** of Mr Elliott’s time (at [32] – [35]).

- (i) On 8 July 2016, Mr O’Byrne and Mr Symons provided an opinion (**Partial Settlement Opinion**) [CBP.004.004.7480] [CBP.004.004.7481] opining upon the reasonableness of the settlement and the costs and commission claimed by AFPL. The Partial Settlement Opinion stated (inter alia):

*“[124] It is the plaintiff’s submission, supported by the expert costs consultant’s report exhibited to the Affidavit of Peter Trimbo dated 8 July 2016, that:*

*(a) The costs incurred by the plaintiff’s solicitors and counsel in the conduct of this proceeding over the last 3½ years are reasonable, given the large number of parties and resulting complexity of the proceeding, the many interlocutory applications heard and determined in the proceeding, the need for extensive case-management of this proceeding, including case-management of this proceeding with each of the Receivers’ and Liquidators’ proceedings, the voluminous documentary and other evidence which has been reviewed as a result of the Receivers’ examinations in 2013 and the liquidators’ examinations in 2014, the preparation for trial (a process which has now lasted for more than 12 months since it was first foreshadowed that the proceeding would be set down for trial in early 2016), and the extent to which the provision of opt-out notices to group members pursuant to the Supreme Court Act 1986 (Vic) has been hard fought between the parties to the proceeding;*

*(b) The solicitors and counsel engaged by the plaintiff have been engaged on their usual terms, subject in the case of the solicitors to permitted uplifts where they have acted pursuant to conditional costs agreements. The Court may be reassured in this respect by the role of the plaintiff’s litigation funder, a sophisticated participant in this case with considerable knowledge and experience of class action litigation, in providing oversight in respect of the engagement of the plaintiff’s solicitors and counsel on reasonable terms...*

...

*[130] The Court should find reassurance as to the reasonableness of the costs from the expert costs consultant’s report exhibited to the Affidavit of Peter Trimbo dated 8 July 2016.”*

- (j) Both the First Trimbo Report and the Partial Settlement Opinion stated that **75%** of Mr Bolitho’s costs in the group proceeding incurred up to that time were attributable of his conduct of the proceeding against the settling defendants.

- (k) The First Trimbo Report and Partial Settlement Opinion were filed by Portfolio Law [\[NOB.500.012.1671\]](#) [\[NOB.500.012.1673\]](#) [\[NOB.500.012.1676\]](#).

33 On 1 August 2016, David O’Callaghan QC (as he then was), acting as amicus in connection with the Partial Settlement Approval Application, filed an outline of submissions [\[SYM.001.002.2237\]](#), which was provided to AFPL and the Lawyer Parties, and which submitted that:

- (a) in relation to the application for approval of a funding commission to AFPL on the basis of a “common fund order”, it was relevant to consider **the extent of the risk assumed by the funder**, and in that regard, it was relevant that **much of the costs of advancing the two proceedings to trial appeared to have been met by the SPR**, given that the bulk of the evidence was prepared in the SPR Proceeding (at [11] – [13]);
- (b) in relation to the application for reimbursement of legal costs, the evidence was inadequate, including because:
  - (i) the evidence (namely the First Trimbo Report) suggested that many of the “*disbursements incurred by the plaintiff and paid by [AFPL] [the funder]*” had not in fact been paid (at [25]);
  - (ii) there was no evidence that Mr Bolitho’s legal representatives had actually spent the time assessed by Mr Trimbo as reasonable (at [30]).

34 On 1 August 2016, Trust Co filed an outline of submissions, which was served on and provided to Mr Bolitho, AFPL and the Lawyer Parties [\[SYM.001.001.7989\]](#) [\[SYM.001.001.7990\]](#). By those submissions, Trust Co submitted that the following matters were relevant to the assessment of whether a “common fund order” should be made and “*the quantum of the fee (if one is approved)*”:

- (a) the Funding Agreement itself did not set a fee (as opposed to setting a maximum commission that may be payable);
- (b) AFPL did not become involved in the proceeding until 13 March 2014 (the proceeding having been commenced on 24 December 2012);

- (c) it appeared that only some, and not all, of the disbursements incurred by Mr Bolitho had been paid by AFPL (having regard to Annexure B to the First Trimbo Report);
- (d) the work done by Mr Bolitho in prosecuting the claims against the settling defendants appeared to have been minimal (at least compared to the work done by the receivers and SPRs). It appeared that Mr Bolitho intended to conduct his case by almost wholly relying on the evidence and work done by the SPRs;
- (e) Mr Bolitho (and therefore AFPL) had effectively been “free-riding” on the work done by Banksia. That work had been done at a very substantial cost. That cost had already been “paid for” by debenture holders (group members), because the costs of preparing this evidence and preparing the cases against the Settling Defendants generally had been paid out of Banksia’s funds, being monies that would otherwise have been available for distribution to debenture holders.

35 At a hearing on 4 August 2016 before Justice Robson in connection with the Partial Settlement Approval Application, Mr O’Bryan informed the Court that, initially, Mr Elliott had acted for Mr Bolitho in the Bolitho Proceeding on a no win-no fee basis, but that:

*“Subsequently in late 2014 Portfolio Law, Mr Zita’s firm, have represented Mr Bolitho and they are acting on ordinary commercial terms and have therefore been paid for since they became solicitors in the ordinary way by the litigation funder.”<sup>43</sup>*

36 Thereafter, in August 2016:

- (a) Mr Symons assisted Mr Elliott to prepare a “25 month summary of my role as solicitor” using Mr O’Bryan’s fee slips as a “precedent” (**Elliott Attendance Records**) [[AFP.001.001.1912](#)] [[SYM.001.002.1429](#)].
- (b) Mr Symons drafted a letter from Mr Elliott to Mr Trimbo briefing him to prepare a supplementary report addressing criticisms made by Mr O’Callaghan QC (as his Honour then was) [[AFP.001.001.1919](#)] [[AFP.001.001.1996](#)], which Mr Symons sent to Mr Trimbo on 12 August 2018. The letter stated: “[D]uring the period in which I acted as solicitor for

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<sup>43</sup> Transcript of hearing on 4 August 2016 [[CCW.005.001.0015](#)], T73:21-27.

*the plaintiff, it was necessary for me to attend each public examination conducted by the receivers and liquidators of Banksia Securities Limited so as to (i) to assess each witness; (ii) see and/or hear each document tendered; (iii) to see the witnesses' responses to the tendered documents; and (iv) to take notes. Mr Bolitho was aware of my need to attend these hearings, and agreed that I should attend. A file-listing of the Dropbox file to which you have access is also appended to this letter. I note that this file-listing largely excludes electronic copies of discovered documents and court books"* [\[SYM.001.002.2208\]](#) [\[SYM.001.002.2209\]](#) [\[SYM.001.002.2235\]](#).

(c) Mr Trimbos prepared a further expert report dated 18 August 2016 (**Second Trimbos Report**) which:

- (i) further opined upon the reasonableness of the costs sought to be recovered by AFPL and Mr Bolitho from the proceeds of the Partial Settlement;
- (ii) annexed the Elliott Attendance Records, and the invoices issued by Mr O'Bryan and Mr Symons. All of Mr O'Bryan's invoices, and all of Mr Symons' invoices from November 2015 to June 2016, contained the Monthly Invoice Representation. All of Mr O'Bryan's invoices were stamped "PAID";
- (iii) was filed by Portfolio Law [\[CBP.004.003.1371\]](#) [\[CBP.004.003.1373\]](#).

37 In fact, as at July and August 2016, AFPL had not paid any fees to Mr O'Bryan or Portfolio Law, and had not paid most of Mr Symons' fees.

#### Particulars

AFPL has admitted that, over the course of the litigation, the following payments were made to Mr O'Bryan, Mr Symons and Portfolio Law [\[AFP.005.001.0296\]](#):

- (1) \$400,000 on 12/12/2016 and \$800,000 on 14/12/2016 to Mr O'Bryan.
- (2) Approximately \$109,000 between 3/10/2016 and 5/10/2016, \$30,000 on 10/11/2016 and \$608,000 on 21/1/2019 to Mr Symons; and
- (3) \$180,000 on 16/12/2016 and \$377,795 on 21/1/2019 to Portfolio Law.

However, AFPL has also prepared a record [\[AFP.001.001.4583\]](#) which states that it made the following payments to Mr O'Bryan, Mr Symons and Portfolio Law:

- (1) \$800,000 on 14/12/2016 to Mr O'Bryan.

(2) \$126,356 on 3/10/2016 and 4/10/2016 to Mr Symons.

(3) \$8,633 on 8/10/2016 to Mr Symons.

(4) \$21,656 on 10/11/2016 to Mr Symons.

(5) \$4,881 on 6/10/2017 to Mr Symons.

(6) \$660,281 on 21/1/2019 to Mr Symons.

(7) \$178,000 and \$2,663 on 16/12/2016 to Portfolio Law.

(8) \$377,795 on 21/1/2019 to Portfolio Law.

Mr Symons has said that he was paid a sum of \$8,438 in 2015 and a sum of \$108,668.75 on 5 October 2016 [[SYM.001.001.7119](#)].

Further particulars may be provided following further discovery.

38 On about 25 August 2016, the court approved the Partial Settlement, including payments of:

(a) about \$2.55 million to Mr Bolitho in respect of costs; and

(b) \$858,000 to AFPL in respect of commission.

## **B. Conduct in relation to the Bolitho No 4 Decision and breaching the Bolitho Court Undertakings**

### **B.1 Overview of contraventions of the CPA**

39 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened:

- (a) the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and
- (b) the Paramount Duty,

by their conduct in connection with the arrangements they made and thereafter implemented by which Mr Elliott/AFPL and Mr O'Bryan continued to maintain the dual interests of funder and legal representative, and which circumvented the Bolitho No 4 Decision and breached the Bolitho Court Undertakings (**Continuing Conflict Contraventions**).

### **B.2 Conduct of AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law**

40 Mr Elliott/AFPL and Mr O'Bryan circumvented and/or acted in contravention of the Bolitho No 4 Decision and the Bolitho Court Undertakings, in that:

- (a) Mr O'Bryan had an arrangement or understanding with Mr Elliott/AFPL pursuant to which he continued to maintain an interest in AFPL and/or the litigation funding enterprise conducted by AFPL, and pursuant to that arrangement or understanding had an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge). That is to be inferred from the following:

- (i) AFPL's Register of Members records that, on 14 December 2014, following the Bolitho No 4 Decision, Noysue (the entity through which Mr O'Bryan's spouse held shares in AFPL) transferred its shares in AFPL to an entity controlled by Mr Elliott, Regent Support Pty Ltd (now MCM (Mt Buller) Developments Pty Ltd) (**Regent Support**) [[AFP.003.001.1062](#)]. A share transfer form was executed by Noysue and Mr Elliott dated 14 December 2014 [[AFP.003.001.1061](#)]. The Register of Members and share transfer form record that the consideration for the transfer was **\$500,000**, but nothing was paid to Noysue by Regent Support Pty Ltd or at its direction by any person or entity in consideration for that transfer at that time. Accordingly, Mr

- O'Bryan continued to have a direct or indirect investment in AFPL in contravention of the Bolitho No 4 Decision.
- (ii) Following the Partial Settlement of Mr Bolitho's claims against certain defendants which was approved by the Court on 25 August 2016, AFPL received a proportion of the settlement proceeds and paid various service providers, but paid Mr O'Bryan only **\$1.2 million** of the **\$1.7 million** that Mr O'Bryan had charged up to that time, so that Mr O'Bryan had a further **\$500,000** directly invested in the outcome of the Bolitho Proceeding by virtue of the fact that his fees remained unpaid in that amount (see paragraph 37 above and [\[AFP.005.001.0296\]](#) [\[SYM.002.004.3331\]](#) [\[SYM.002.004.3332\]](#) [\[CBP.001.012.0164\]](#) [\[CBP.001.012.0165\]](#)). AFPL's financial statements do not record any liability in respect of this sum (see para 47(g)(D) below).
  - (iii) Mr O'Bryan continued to provide funding in respect of the Bolitho Proceeding by acting in the proceeding without seeking payment in respect of his fees until settlements were reached.
  - (iv) As set out in this Annexure A, Mr O'Bryan advanced AFPL's interests at the expense of Mr Bolitho and group members, in a manner which invites the inference that his interests were aligned with AFPL's interests, rather than the interests of Mr Bolitho and group members.
- (b) Mr Elliott/AFPL arranged for Mr Bolitho and group members to be represented by a solicitor on the record, namely Portfolio Law, who would not (and did not) independently represent the interests of Mr Bolitho and group members, but rather, permitted Mr Elliott/AFPL and Mr O'Bryan to continue doing so. That is to be inferred from the following:
- (i) In December 2014, Mr Elliott arranged for Mr Zita, a partner at Portfolio Law, to commence acting for Mr Bolitho as solicitor on the record. Mr Zita and Portfolio Law had no experience in class actions and had inadequate resources, skills, and experience to conduct a complex commercial class action [\[SYM.002.001.6176\]](#) [\[TRI.001.006.1912\]](#) [\[TRI.001.006.1914\]](#) [\[TRI.001.006.1916\]](#).
  - (ii) Mr Elliott, Mr O'Bryan and Mr Zita/Portfolio Law had an arrangement whereby Mr Zita and Portfolio Law effectively acted as a "post box". Pursuant to that arrangement, Mr Zita/Portfolio Law in effect delegated



the role of acting as solicitor for Mr Bolitho and group members to Mr Elliott/AFPL, Mr O'Bryan, and Alex Elliott (a solicitor and director of Mr Elliott's legal firm Elliott Legal).

- (iii) It is to be inferred that Alex Elliott was involved in providing legal services in connection with the Bolitho Proceeding. This inference arises from the fact that he was copied to a large number of emails exchanged between AFPL and the Bolitho Lawyers in the period from 1 July 2016 to 30 January 2018 (**Relevant Period**), provided instructions to Mr Zita [\[CBP.001.006.5811\]](#), operated an email address and telephone line established to receive enquiries from group members [\[CBP.001.006.4733\]](#) [\[CBP.001.006.4734\]](#), and filed some documents that were said to have been filed by Portfolio Law [\[CBP.004.004.1652\]](#). Mr Zita referred enquiries from group members to Alex Elliott rather than answering them himself (see eg [\[CBP.001.006.5815\]](#) [\[CBP.001.006.7752\]](#), [\[CBP.001.006.4725\]](#) [\[CBP.001.013.3413\]](#) and attachments]).
- (iv) In around April 2017, at Mr Elliott's and/or Mr O'Bryan's direction, Mr Zita arranged for a number of email accounts to be created, including [classactions@portfoliolaw.net.au](mailto:classactions@portfoliolaw.net.au) (**General Class Action Email**) and [BolithoClassAction@portfoliolaw.net.au](mailto:BolithoClassAction@portfoliolaw.net.au) (**Bolitho Class Action Email**) to which each of Mr Elliott, Mr O'Bryan, Mr Symons, Mr Zita and Alex Elliott had access (directly or indirectly) and through which they corresponded with each other for the purposes of conducting the litigation, and which facilitated Mr Elliott/AFPL, Mr O'Bryan, Mr Symons and/or Alex Elliott in controlling the litigation by ensuring that they each received all correspondence in connection with the litigation without the need for Mr Zita/Portfolio Law to independently and without direction from one or other of them take charge of that correspondence.

#### Particulars

Mr Zita, AFPL and Mr Symons have admitted in correspondence (and/or documentary records establish) that Mr Elliott, Mr O'Bryan, Mr Symons, Mr Zita, and Alex Elliott had "read and write" access to the General Class Action Email [\[CBP.001.007.1105\]](#) [\[CBP.001.006.0001\]](#) [\[SYM.001.002.3520\]](#) [\[SPR.002.001.0243\]](#) [\[AFP.005.001.1394\]](#), and that Portfolio Law's email system was set up so that emails sent to or from the Bolitho Class Action email were automatically replicated in and/or forwarded to the inbox or sent items of the General Class

Action Email, so that Mr Elliott, Mr O'Bryan, Mr Symons and Alex Elliott had immediate access to such emails [\[AFP.005.001.1394\]](#); [\[CCW.005.001.0001\]](#).

- (c) Mr Elliott/AFPL continued to exercise control over the proceeding and to act as the de facto instructing solicitor. Mr Elliott/AFPL:
  - (i) continued to direct and control the day-to-day aspects of the conduct of the Bolitho Proceeding, such as giving instructions as to what correspondence was to be drafted and sent (see for example [\[CBP.004.005.5544\]](#), [\[CBP.001.006.4733\]](#) [\[CBP.004.001.0237\]](#) [\[CBP.004.001.0238\]](#) [\[CBP.001.006.3311\]](#));
  - (ii) required Mr Zita/Portfolio Law to copy Mr Elliott on all correspondence or forward on to Mr Elliott all correspondence that Mr Zita/Portfolio Law received (see for example [\[CBP.004.003.5364\]](#) [\[CBP.004.005.7912\]](#) [\[CBP.004.005.5544\]](#));
  - (iii) considered that AFPL was empowered under the Funding Agreement to "run the litigation" as AFPL saw fit [\[NOB.500.004.4522 at page 36\]](#);
  - (iv) controlled all settlement negotiations relating to the claims of Mr Bolitho and group members, and exercised that control to refuse to settle the Bolitho Proceeding on otherwise reasonable terms unless the settling parties (including the SPRs) agreed that AFPL would be entitled to recover substantial sums from the settlement by way of costs and commission (see eg [\[CBP.004.004.8528\]](#), [\[CBP.004.005.5249\]](#), [\[CBP.004.008.4529\]](#), [\[CBP.004.004.6285\]](#), [\[CBP.004.008.4451\]](#), [\[CBP.004.006.2249\]](#), [\[CBP.004.008.0837\]](#), [\[CBP.004.001.9880\]](#), [\[CBP.004.007.8528\]](#), [\[CBP.004.007.5344\]](#), [\[CBP.004.007.0707\]](#); [\[CBP.004.008.0851\]](#); see also [\[NOB.500.004.4522 at pages 36, 48-50\]](#));

41 The matters alleged in paragraphs 40:

- (a) were contrary to the Bolitho No 4 Decision and the Bolitho Court Undertakings;
- (b) were not disclosed to the Court;
- (c) were not disclosed to Mr Bolitho and group members; and

- (d) had the effect that Mr Bolitho and group members were deprived of the benefit of independent legal representatives acting in his interests and the interests of group members, as Mr Zita/Portfolio Law and Mr O'Bryan were not in a position to provide (and/or they and Mr Symons did not provide) Mr Bolitho and group members with independent advice when conflicts of interest arose in connection with the terms on which claims in the proceeding were to be settled, and in connection with the applications for approval of costs and commission.

42 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law:

- (a) knew of the Bolitho No 4 Decision and the Bolitho Court Undertakings;
- (b) knew of the matters in paragraphs 40(b) and 40(c);
- (c) must have known that those matters would have the effect (and did have the effect) that the proceeding was conducted in such a way as to circumvent the Bolitho No 4 Decision and the Bolitho Court Undertakings and thereby advance the interests of AFPL over the interest of Mr Bolitho and other group members.

### **B.3 How the conduct contravened the CPA**

43 In the circumstances alleged in paragraphs 28 - 42:

- (a) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct that was misleading or deceptive or likely to mislead or deceive, in that, by reason of the matters alleged in paragraph 30, they permitted the Court to believe that the conflicts of interest identified in the Bolitho No 4 Decision and the Bolitho Court Undertakings had been properly addressed, when in fact they had not been properly addressed;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty, in that they were each involved in an arrangement which:
  - (i) deprived Mr Bolitho and group members of the benefit of an independent solicitor and independent senior counsel acting in the interests of Mr Bolitho and group members;
  - (ii) sought to circumvent the Bolitho No 4 Decision and the Bolitho Court Undertakings, in a manner that constituted an abuse of the court's

processes and/or had the tendency to bring the administration of justice into disrepute;

(iii) facilitated the matters alleged in **Sections C to M** below.

#### **B.4 Losses and consequences of Continuing Conflict Contraventions**

44 The matters alleged in paragraphs 39 to 41 caused or contributed to the matters alleged in **Sections C to M** of this Annexure A, including the losses claimed in paragraphs 65, 74, 78, 98, 149, 159, 165, 173, 180 and 196.

45 Further, in the circumstances where Mr Zita/Portfolio Law did not discharge their responsibilities as solicitor for Mr Bolitho and/or other group members, and failed to discharge the Lawyers' Duties owed to Mr Bolitho and/or other group members, AFPL should not be permitted to recover from group members any part of the fees charged by Mr Zita/Portfolio Law.

## **C. Conduct in relation to Fee Arrangements**

### **C.1 Overview of contraventions of the CPA**

46 By their conduct in connection with entering into and documenting their arrangements in relation to fees, and in failing to ensure that fees claimed from debenture holders/group members were properly incurred:

- (a) AFPL, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive;
- (c) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that costs were reasonable and proportionate; and
- (d) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty,

**(Fee Arrangement Contraventions).**

### **C.2 Conduct of AFPL, Mr Zita/Portfolio Law, Mr O'Bryan and Mr Symons**

47 In relation to the Relevant Period, AFPL, Mr Zita/Portfolio Law, Mr O'Bryan and Mr Symons entered into irregular arrangements in relation to fees (**Fee Arrangements**), which have not been adequately explained by any of them, but which included all or some of the following elements:

- (a) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not disclose to Mr Bolitho or group members their costs or the basis upon which they would charge their fees. Although they did create costs agreements and disclosure statements at various times, they charged their costs on a basis that was different from the basis specified in each of those documents.
- (b) The fee arrangements of Mr O'Bryan and Mr Symons were not accurately recorded in costs agreements and cost disclosure documents which they created for the purpose of obtaining approval of their costs.

- (c) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not adhere to their costs agreements or disclosure documents, and they quantified and charged the substantial majority of their costs only when there was a settlement.
- (d) Mr O'Bryan and Mr Symons created invoices that did not accurately reflect the liability of Mr Bolitho, Mr Zita/Portfolio Law and/or AFPL for the fees of O'Bryan and Mr Symons. Mr O'Bryan and Mr Symons made out their invoices to Mr Zita/Portfolio Law, but they did not issue those invoices to Mr Zita/Portfolio Law. All of the invoices of Mr O'Bryan, and most of the invoices of Mr Symons, were (1) marked with the words "Processed Date" and stated a particular date therein identified, and the date generally suggested that the invoice was issued at or around the end of the month after the work was undertaken;<sup>44</sup> and (2) marked with the words "Due By" and stated a particular date therein identified, being a date that generally suggested that the invoice was due for payment a month after it was issued (**Monthly Invoice Representation**).

Particulars of (a) – (d)

- (A) On 5 February 2015, Mr Zita/Portfolio Law created a Costs Agreement with Mr Bolitho (**Portfolio Law Costs Agreement**), which Portfolio Law sent to Mr Crow (on behalf of Mr Bolitho) on 8 April 2015 [\[CBP.004.004.8309\]](#) [\[CBP.004.004.8310\]](#) [\[CBP.004.008.0464\]](#) [\[CBP.004.008.0465\]](#). The Portfolio Law Costs Agreement stated that:
  - (i) "Our fees and disbursements may be in the range of \$80,000 to \$200,000."
  - (ii) "Our fees will be calculated as follows. Those members of the firm that work on your matter will record the time they spend and charge account to [specified] hourly rates."
  - (iii) "The firm's fees are determined by applying these hourly rates to the units of time recorded by each staff member on your matter."
  - (iv) "In the course of your matter it may be necessary to incur disbursements", including "barrister's fees". "These are payable as and when they fall due for payment. We will not incur any substantial expense without first obtaining your position."
  - (v) "Each month we will render interim accounts and ask that you pay them promptly."

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<sup>44</sup> Save for one of Mr Symons' invoices, which related to a three-month period from September 2016 to November 2016.

- (vi) “Briefing counsel or other experts. It may be necessary for us to engage, on your behalf, the services of another lawyer or expert to provide specialist advice or services, including advocacy services. We will consult you as to the terms of that lawyer’s engagement, but you may be asked to enter into a costs agreement directly with the other lawyer. We estimate the amount payable as likely to be in the range of \$20,000 to \$40,000.”
- (B) On 11 February 2015, Mr Symons created two Costs Agreements, one with Mark Elliott for the period from 3 September 2014 to 7 November 2014 while he was the solicitor on the record for the plaintiff, and one with Portfolio Law relating to work allegedly undertaken following Portfolio Law’s appointment as solicitor in December 2014 and in respect of future work, which Mr Symons sent to Portfolio Law on 11 February 2015 (**Symons / Portfolio Law February 2015 Costs Agreement**) [[CBP.004.009.0069](#)] [[CBP.004.009.0070](#)]. The Symons / Portfolio Law February 2015 Costs Agreement stated:
- (i) “My legal costs will be calculated by reference to my hourly rate and daily rate as set out below: \$250 per hour (or part thereof) (inclusive of GST), and \$2,500 per day (inclusive of GST)”.
  - (ii) “These rates may be reviewed during the period of the retainer and I will notify you in writing as soon as practicable following such review.”
  - (iii) “I (or my clerk) will forward to you an account for work done at the following intervals: (a) once the Work set out above has been completed, or (b) at the end of each calendar month, or (c) at the end of each week in which I have undertaken work on the Matter.”
  - (iv) “The Solicitor will be liable for my fees in this matter”.
- (C) On or about 1 July 2016, at about the time of the Partial Settlement Approval Application, Mr O’Bryan created two documents entitled “Disclosure Statement And Written Offer To Enter A Costs Agreement For A Barrister Retained By A Client”, one dated November 2012 and purporting to contain a Costs Agreement with Mr Bolitho via Mr Elliott (**O’Bryan/Elliott July 2016 Costs Agreement**), and the other dated December 2014 and purporting to contain a Costs Agreement with Mr Bolitho via Portfolio Law (**O’Bryan/Portfolio Law July 2016 Costs Agreement**) (see [[AFP.001.001.1475](#)] and [[TRI.001.005.0200](#)] [[TRI.001.005.0201](#)] [[TRI.001.005.0204](#)]). Both of those documents stated that:
- (i) Legal costs would be charged at the rate of \$990 per hour (including GST) or \$9,900 per day (including GST).
  - (ii) Mr O’Bryan’s estimated fees were unknown but “*not presently expected to exceed \$500,000*”.
  - (iii) “*Should there be any substantial change proposed to anything included in the Disclosure Statement above, the Barrister will*

*notify the Client by his instructing solicitor as soon as practicable of such proposed change. No change will be implemented without the Client's consent."*

- (iv) *"If the Client accepts this offer it will be liable to pay to the Barrister the fees and charges set out in the Disclosure Statement once the relevant services have been rendered by the Barrister."*
- (D) On or about 30 June 2016, at the time of the Partial Settlement Approval Application, Mr Symons created an "after-the-event" cost disclosure statement (**Symons June 2016 Cost Disclosure Statement**). The fact that the document was created on 30 June 2016 is evident from the metadata of the document [\[AFP.002.001.0074\]](#). The document stated:
  - (i) *"Under the Legal Profession Uniform Law (Vic) the Barrister must disclose to the Law Practice (which is engaging the Barrister on behalf of the client) the following information in relation to legal costs."*
  - (ii) *"1. Basis on which the Barrister's legal costs will be calculated – section 174(1)(a) of the Uniform Law. The Barrister will charge on the following basis: per hour \$275 (inc GST); per day: \$2,750 (incl GST)."*
  - (iii) *"2. Barrister's estimated total legal costs – section 174(1)(a). The Barrister estimates that the total legal costs, including his charges and disbursements, for this matter from 1 January 2016 to the approval of the expected partial settlement advised to the Court in December 2015 will be about \$120,000."*
  - (iv) *"3. Barrister's ongoing obligations – section 174(1)(b). The Barrister is required to notify the law practice of any significant change to the Barrister's estimate of his/her total legal costs. The Barrister is required to provide the ongoing disclosure to the law practice as soon as practicable after there is a significant change to the previously provided information."*
- (E) Notwithstanding that the Symons/Portfolio Law February 2015 Costs Agreement and the O'Bryan/Portfolio Law July 2016 Costs Agreement were expressed to be agreements with Portfolio Law, Mr O'Bryan did not provide the O'Bryan/Portfolio Law July 2016 Costs Agreement to Mr Zita/Portfolio, Mr Symons did not provide the Symons June 2016 Cost Disclosure Statement to Mr Zita/Portfolio Law, and Mr O'Bryan and Mr Symons did not issue their invoices to Mr Zita/Portfolio Law. Rather, Mr O'Bryan and Mr Symons provided those documents and invoices directly to Mr Elliott/AFPL at about the time of seeking approval for the Partial Settlement, who forwarded them to Mr Trimpos.
- (F) Portfolio Law did not charge fees in accordance with the Portfolio Law Costs Agreement. In particular:
  - (i) Portfolio Law adopted a basis for charging that was different from what was specified in their Costs Agreement [\[CBP.004.005.5753\]](#). According to Portfolio Law, in March



2015, Portfolio Law began to charge on the basis of the LPRO scale [\[TRI.001.005.1096\]](#). However, for the Relevant Period, Portfolio Law did not charge according to the LPRO scale. Rather, Portfolio Law appears to have charged according to an hourly rate, but without making and/or keeping any contemporaneous record of the time Portfolio Law had actually spent on the activities for which they charged time.

- (ii) Portfolio Law did not render regular accounts.
  - (iii) Portfolio Law did not discuss senior and/or junior counsel fees with Mr Bolitho or obtain his permission before counsel fees were incurred.
  - (iv) Portfolio Law did not consult with Mr Bolitho about the terms on which senior and/or junior counsel were retained.
- (G) In relation to the period from 1 June 2016 to 30 December 2017, Mr O'Bryan did not charge fees in accordance with the O'Bryan/Portfolio Law July 2016 Costs Agreement. In particular:
- (i) Mr O'Bryan charged his fees at escalating rates that exceeded the rates specified in the O'Bryan/Portfolio Law July 2016 Costs Agreement. Mr O'Bryan and Mr Elliott determined those rates as between themselves in November 2017, after an "in principle" settlement had been reached in respect of the claims against Trust Co. [\[NOB.500.001.7493\]](#) [\[NOB.500.001.7427\]](#)  
[\[NOB.500.001.7431\]](#) [\[NOB.500.001.7435\]](#)  
[\[NOB.500.001.7438\]](#)
  - (ii) Mr O'Bryan did not notify Portfolio Law or Mr Bolitho of any change to his hourly rates or his estimate of his legal costs.
  - (iii) Portfolio Law did not consent to Mr O'Bryan's hourly rate or any increased estimate of his costs.
- (H) In December 2017, at about the time of the Trust Co Settlement Approval Application:
- (i) Mr O'Bryan issued invoices for the period from 1 June 2016 to 30 December 2017 which contained the Monthly Invoice Representation.
  - (ii) Mr O'Bryan charged his fees at escalating rates that exceeded the rates specified in the O'Bryan / Portfolio Law July 2016 Costs Agreement.
  - (iii) Mr O'Bryan created and issued an "after-the-event" costs agreement and disclosure statements which purported to give notifications of an increases in Mr O'Bryan's hourly and daily rates to \$1,100/hour (including GST) and \$11,000/hour (including GST) (**O'Bryan December 2017 Costs Agreement**).
  - (iv) The O'Bryan December 2017 Costs Agreement also purported to provide a cost estimate for the Relevant Period of \$2 million, which was generally consistent with the fees actually charged

in Mr O'Bryan's invoices for the Relevant Period (\$2.5 million), therefore conveying the impression that Mr O'Bryan provided notification of a change in his estimated legal costs as required by the O'Bryan/Portfolio Law July 2016 Costs Agreement.

- (I) In relation to the period from 1 September 2016 to 30 December 2017, Mr Symons did not charge fees in accordance with the Symons / Portfolio Law February 2015 Costs Agreement or the Symons July 2016 Cost Disclosure Statement. In particular:
  - (i) Mr Symons did not issue monthly accounts for most of that period as required by the Symons/Portfolio Law February 2015 Costs Agreement. Rather, Mr Symons issued most of his invoices in late November 2017, after an "in principle" settlement was reached with Trust Co.
  - (ii) Mr Symons charged his fees at escalating rates that exceeded the rates specified in the Symons/Portfolio Law February 2015 Costs Agreement or the Symons July 2016 Cost Disclosure Statement. Mr Symons did not notify Portfolio Law of any increases in his rates.
  - (iii) Mr Symons did not notify Portfolio Law of any significant change to the estimate of his legal costs.
  - (iv) Portfolio Law did not consent to any such increases in Mr Symons' rates or any increased estimate of his costs.
- (J) In November and December 2017, at about the time of the Trust Co Settlement Approval Application:
  - (i) Mr Symons issued invoices for the period from 1 January 2017 to 8 December 2017 which contained the Monthly Invoice Representation [[SYM.001.002.6173](#)] [[SYM.001.002.6175](#)].
  - (ii) Mr Symons created and sent to Mr Trimpos, Mr Elliott/AFPL and Mr Zita/Portfolio Law three "after-the-event" cost disclosure statements which purported to give notifications of increases in Mr Symons' hourly rates as follows: \$275/hour (including GST) from 1 September 2016 to 31 December 2016, \$330/hour (excluding GST) from 1 January 2017 to 30 June 2017, \$375/hour (excluding GST) from 1 July 2017 to 31 December 2017 [[SYM.001.003.2842](#)] [[SYM.001.003.2844](#)] (**Symons December 2017 Cost Disclosure Statements**) (as to the fact they were created in December 2017, see [[CBP.001.002.1934](#)] [[CBP.001.002.1935](#)]).
  - (iii) The Symons December 2017 Cost Disclosure Statements purported to notify Portfolio Law of changes to Mr Symons' estimated legal costs. The "estimates" aligned with the fees actually charged in Mr Symons' invoices, therefore conveying the impression that Mr Symons provided ongoing disclosure of his estimated legal costs as required by the Symons/Portfolio Law February 2015 Costs Agreement.

- (e) Mr O'Bryan and Mr Symons agreed with AFPL not to issue regular interim invoices, and did not provide AFPL, Portfolio Law or Mr Bolitho with regular interim statements of the costs they had incurred.

#### Particulars

AFPL has admitted that it entered into "*deferred fee arrangements*" with Mr O'Bryan and Mr Symons [[SYM.001.002.9315](#)].

Mr O'Bryan and Mr Symons have admitted that, following the Partial Settlement, they agreed with AFPL not to issue further invoices until there was a settlement with Trust Co [[CBP.001.002.2894](#)] [[SYM.001.002.5310](#)] [[CBP.001.011.2786](#)] [[SYM.001.002.2427](#)] [[SYM.001.002.2409](#)]. In relation to the Relevant Period, Mr O'Bryan did not issue any invoices until the Trust Co Settlement.

In the case of Mr Symons, it is to be inferred that he initially agreed not to issue invoices until directed to do so by Mr Elliott/AFPL, and that further, in October 2017, he agreed with Mr Elliott/AFPL not to issue any invoices until any settlement was reached. This is to be inferred from the fact that he issued one invoice in October 2017 for his work from September to November 2016 and that he issued no further invoices for the period December 2016 to November 2017 until the Trust Co Settlement was reached.

The "*deferred fee arrangements*" between Mr Elliott/AFPL, Mr O'Bryan and Mr Symons appear to have been consistent with arrangements they agreed on other matters they worked on together over the period from 2012 to 2019. For example, in the *Webster v Murray Goulburn* matter, O'Bryan and Mr Symons did not issue invoices for the majority of their work on the matter and accordingly were not paid fees for more than two years (in the case of Mr Symons) or longer (in the case of Mr O'Bryan). Mr Symons was paid \$32,000 in October 2017, but did not issue invoices for the large majority of his fees until October 2019, at about the time a settlement was reached.

Further particulars may be provided following further discovery.

- (f) AFPL did not monitor or manage the costs incurred on the Bolitho Proceeding by the Bolitho Lawyers as required by the Funding Agreement, and Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not maintain proper records of the time they spent on the matter.

#### Particulars

The parties have been required to provide extensive discovery, and in all the discovery provided to date, there is no evidence of any proper contemporaneous records maintained by Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law of the time they spent on the Proceeding.

Between November and December 2017, Mr O'Bryan altered the hours allocated to particular activities over successive iterations of his fee slips (compare the versions as at 15 November 2017

[\[CCW.003.002.0003\]](#) and [relevant attachments](#) with the final versions attached to the Third Trimbo Report), suggesting that he did not create his fee slips on the basis of accurate contemporaneous records. See further [ATTACHMENT 2](#).

It is evident that Mr Symons did not maintain proper records, because his fee slips appear to be largely based on the draft fee slips of Mr O'Bryan that Mr O'Bryan's secretary sent to Mr Symons on 15 November 2017 [\[CCW.003.002.0003\]](#) and [relevant attachments](#).

It is evident that Mr Zita/Portfolio Law did not maintain proper records. In the discovery provided by Mr Zita/Portfolio Law, it appears that they first began to create billing records for the Relevant Period in around November 2017.

See further [\[CBP.001.011.5464\]](#), [\[CBP.001.002.1535\]](#).

Further particulars may be provided following further discovery.

- (g) There was an arrangement or understanding between AFPL and each of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law with respect to AFPL's liability for their fees, which in substance or effect meant that AFPL would not be liable to pay some or all of their fees unless there was a successful financial outcome in the proceeding and their fees were approved by the Court.

#### Particulars

- (A) At the time of seeking approval of the Partial Settlement, AFPL pressed Mr Zita/Portfolio Law to deliver a bill in a form that could be approved by Mr Trimbo. On 29 June 2016 Mr Elliott sent an email to Mr Zita which stated: *"If I don't have it tomorrow, **you will miss out**"* [\[CBP.004.007.2837\]](#). That gives rise to the inference that AFPL's liability for the fees of Mr Zita/Portfolio Law was conditional upon those fees being approved by Mr Trimbo so that the fees could be recovered by AFPL from the settlement proceeds on approval of the Partial Settlement by the Court.
- (B) AFPL paid Mr O'Bryan in respect of pre-July 2016 fees only after the Partial Settlement was approved and after it received the proceeds of settlement to cover those fees ([\[AFP.005.001.0296\]](#) and paragraph 37 below).
- (C) AFPL paid Mr Symons in respect of most of his pre-July 2016 fees only once the Partial Settlement was approved in October 2016 (but before it received settlement proceeds) ([\[AFP.005.001.0296\]](#) and paragraph 37 below).
- (D) AFPL's accounts do not disclose any liability for the fees of Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law said to have been incurred in the Relevant Period [\[AFP.004.001.0138\]](#); [\[AFP.004.001.0158\]](#); [\[AFP.004.001.0001\]](#). Nor do they disclose any liability for the unpaid portion of the fees charged by Mr O'Bryan up to the time of the Partial Settlement (namely,

\$500,000). See also the **Expert Report of Tony Samuel** dated 30 January 2018, paras 32 – 78. AFPL's FY2017 accounts and its draft FY2018 accounts refer to the fact that the group has "no win / no fee" agreements in place with a number of creditors [[AFP.004.001.0158](#) at page 12]; [[AFP.004.001.0023](#)]. If AFPL was liable for up to \$3 million in respect of Mr O'Bryan's fees in respect of the Bolitho Proceeding, then based on AFPL's FY2017 and draft FY2018 accounts, an issue would arise as to whether AFPL was insolvent at the time those accounts were prepared. The inference is that Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law were retained on a "no win / no fee" basis.

- (E) On or about 21 February 2019, AFPL lodged its finalised accounts for FY2018 [[AFP.004.001.0001](#)], which for the first time stated: *"Litigation funding costs are recognised **when paid or payable**. The consolidated Group has 'no-win / no-fee' agreements in place with a number of creditors, which means the Group does not recognise the related funding costs for these creditors until a court case has been won and costs can be reliably measured. In addition, the Group has certain arrangements in place with various service providers where, irrespective of the outcome of a given case, it is agreed with them that the payment of invoices will be deferred until the conclusion of the case or until some later date. These costs are recognised when they become due and payable in accordance with the terms of the issued invoice and the Group is formally requested to indemnify the recipient and to make payment of the issued invoice."* It should be inferred that the change in AFPL's statutory accounts was introduced in order to provide support for AFPL's position that the Bolitho Lawyers were retained otherwise than on a "no win no fee" basis.
- (F) Mr O'Bryan and Mr Symons said in the First Bolitho Opinion that, in the Bolitho Proceeding, they were engaged on their "usual terms". Mr Elliott, Mr O'Bryan and Mr Symons acted on numerous cases together over the period from 2012 to 2020. Mr O'Bryan has admitted that, in at least three other proceedings involving Mr Elliott and Mr O'Bryan that were unsuccessful, Mr O'Bryan did not charge any fees [[AFP.005.001.1430](#)]. In the *Webster v Murray Goulburn* matter, it was revealed in open court on 7 April 2020 that Mr O'Bryan and Mr Symons did not issue any invoices for at least two years. Mr O'Bryan issued invoices for the totality of his fees and Mr Symons issued invoices for the substantial majority of his fees on 31 October 2019 following an "in principle" settlement of the proceeding.
- (G) AFPL drew a cheque made out to Mr Symons for \$608,031 dated 1 July 2018 [[AFP.003.001.0386](#)]. That amount was different from the amount charged by Mr Symons for the Relevant Period in the invoices he rendered in the total sum of **\$709,726** (see Fourth Trimbos Report, Annexure J). Mr Symons deposited the cheque on 21 January 2019 [[AFP.003.001.0386](#)]. The inference is open that these

arrangements did not reflect payment of Mr Symons' fees in the ordinary course, but rather, reflected a payment to Mr Symons in respect of his fees that was made having regard to issues that arose in the Court of Appeal and the remitter about AFPL's financial capacity and/or the risks assumed by AFPL and/or the capital invested by AFPL in connection with the Bolitho Proceeding. See also [\[SYM.003.001.0010\]](#) [\[SYM.003.001.0003\]](#).

- (H) AFPL also drew a cheque made out to Portfolio Law for \$377,795 dated 1 July 2018. That amount was different from the amount charged by Mr Zita/Portfolio Law for the Relevant Period in the invoices they rendered in the total sum of **\$401,808**. Mr Zita/Portfolio Law did not receive the cheque on or around 1 July 2018, but rather, received it on **21 January 2019** [\[CCW.004.001.0023\]](#). Prior to 21 January 2019, Mr Zita/Portfolio Law did not press AFPL for payment of those fees [\[CCW.004.001.0023\]](#). Mr Zita/Portfolio Law have retained the funds in Portfolio Law's trust account [\[CBP.002.001.0102\]](#). The inference is open that this payment did not reflect payment of the fees of Mr Zita/Portfolio Law in the ordinary course, but rather, reflected a payment to Mr Zita/Portfolio Law in respect of fees that was made having regard to issues that arose in the Court of Appeal and the remitter about AFPL's financial capacity and/or the risks assumed by AFPL and/or the capital invested by AFPL in connection with the Bolitho Proceeding

Further particulars may be provided following further discovery.

- (h) Mr O'Bryan and Mr Symons determined the rates at which they would charge their fees after an "in principle" settlement with Trust Co was reached.

#### Particulars

Mr O'Bryan determined (together with AFPL) the rates he would charge in the Relevant Period in November 2017 [\[NOB.500.001.7493\]](#) [\[NOB.500.001.7427\]](#) [\[NOB.500.001.7431\]](#) [\[NOB.500.001.7435\]](#) [\[NOB.500.001.7438\]](#).

Mr Symons issued invoices for the period for the 2017 calendar year in November and December 2017 [\[SYM.001.003.3392\]](#) [\[SYM.001.003.3393\]](#); [\[SYM.001.002.6173\]](#) [\[SYM.001.002.6175\]](#). There is no evidence that Mr Symons gave any notice to Portfolio Law of any of the rates he applied to those invoices at any time prior to issuing those invoices, those rates being in excess of the rates recorded in the Symons / Portfolio Law February 2015 Costs Agreement **and** in excess of the rates recorded in the Symons June 2016 Cost Disclosure Statement. There is no evidence that Portfolio Law consented to those rate increases in the manner contemplated by the Symons / Portfolio Law February 2015 Costs Agreement and the Symons June 2016 Cost Disclosure Statement.

- (i) The fee arrangements of Mr O'Bryan and Mr Symons were, in substance or effect, arrangements whereby part of the amount payable to each of Mr O'Bryan and Mr Symons was referable or linked to the payments to be received by AFPL from the Trust Co Settlement, being an arrangement that was prohibited under section 183 of the Legal Profession Uniform Law.

#### Particulars

This is to be inferred from (1) the matters in the preceding subparagraphs and (2) the matters in paragraph 67-68 below.

#### 48 The Fee Arrangements:

- (a) were not disclosed and/or explained to Mr Bolitho or group members;
- (b) were concealed from Mr Trimbo and the Court in connection with the Trust Co Settlement Approval Application, as alleged in **Section H and Section I.2.1**;
- (c) were unfair, unreasonable, and detrimental to the interests of Mr Bolitho and group members, in that they exposed Mr Bolitho and group members to the risk of excessive charging;
- (d) were inconsistent with the Portfolio Law Costs Agreement, the Symons/Portfolio Law February 2015 Costs Agreement, the Symons June 2016 Costs Disclosure Statement and the O'Bryan/Portfolio Law July 2016 Costs Agreement, insofar as any of those costs agreements were valid and binding;
- (e) were inconsistent with the obligations imposed under the Funding Agreement for the Bolitho Lawyers' fees to be regulated by "*a retainer agreement [which] explains in detail how the lawyers are paid and how their fees are calculated*" and for AFPL to monitor costs and budgets.

#### **C.4 How the conduct contravened the CPA**

#### 49 In the circumstances alleged in paragraphs 47 to 48:

- (a) Each of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that the cost disclosure documents and invoices that they issued did not accurately reflect their fee



arrangements, the work actually performed and the fees they were properly entitled to charge.

- (b) AFPL contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in it knew that the cost disclosure documents and invoices that Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law issued did not accurately reflect their respective fee arrangements, the work actually performed and the fees they were properly entitled to charge.
- (c) AFPL, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly, in that:
  - (i) they knew that the cost disclosure documents and invoices that Mr O'Bryan and Mr Symons created were inaccurate in material respects;
  - (ii) they knew and intended that those would be relied upon by Mr Trimbo and thereafter (directly or indirectly) the Court in assessing and approving their costs;
  - (iii) It is to be inferred from the matters in paragraphs 47, 33, 34, 67, 68, 69, 70, 71, 92, 93 and 95 that, in relation to the Relevant Period, AFPL, Mr O'Bryan and Mr Symons entered into the Fee Arrangements with the intention of improperly benefiting themselves and each other at the expense of Mr Bolitho and group members.
- (d) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs were reasonable and proportionate, in that:
  - (i) they each failed to enter into and adhere to proper fee arrangements whereby the costs of the litigation were monitored and managed in the interests of group members, and failed to ensure that legal costs were properly incurred; and
  - (ii) Mr Zita/Portfolio Law did nothing to protect the interests of Mr Bolitho and group members in relation to the fee arrangements that were implemented with the solicitor and counsel retained to act for Mr Bolitho, in circumstances where Mr Zita/Portfolio Law acted as solicitor on the record and owed a duty to do so. They did nothing to inform themselves of the fee arrangements in place with counsel, or



the fees charged by counsel. They did nothing to advise Mr Bolitho or other group members about those matters.

- (e) All of the matters in sub-paragraphs (a) to (d) contravened the Paramount Duty, in that they involved AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law failing to act professionally, fairly, and with integrity in connection with their arrangements to recover fees from the group members whose claims they represented.

#### **C.5 Consequences of Fee Arrangement Contraventions**

- 50 In the circumstances alleged in paragraphs 47 to 49, AFPL should not be permitted to recover the legal costs claimed.

#### **D. Liability of AFPL for the conduct of the Bolitho Lawyers**

51 In respect of the conduct alleged in the sections that follow:

- (a) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law advanced the interests of AFPL and their own interests at the expense of Mr Bolitho and group members; and
- (b) AFPL expressly or impliedly consented to Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law acting as AFPL's agent,

in that:

- (c) Under clause 6.3.1 of the Funding Agreement, Funded Group Members instructed "the Lawyers" to comply with all instructions given by AFPL, subject to clause 13.<sup>45</sup> "The Lawyers" is defined in clause 1.1 of the Funding Agreement as "Mark Elliott of Level 2, 90 William Street, Melbourne, 3000 or any other solicitors appointed in their place" (as agreed between funded group members and AFPL). Portfolio Law was appointed in place of Mr Elliott in December 2014.
- (d) Mr Zita/Portfolio Law delegated their role of acting as "the Lawyers" for Mr Bolitho and group members to Mr Elliott and/or AFPL, Mr O'Bryan and Mr Symons as alleged in paragraph 40 and 45 above, including in relation to settlement and recovery of costs and commission (in respect of which there was a conflict between the interests of Mr Bolitho and the interests of AFPL).
- (e) Mr Elliott had a substantial interest in AFPL and was unable to objectively and independently pursue the interests of Mr Bolitho and group members when those interests diverged from the interests of AFPL.
- (f) Mr O'Bryan had an arrangement or understanding with Mr Elliott/AFPL pursuant to which he continued to maintain an interest in AFPL and/or the litigation funding enterprise conducted by AFPL, and pursuant to that arrangement or understanding had an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge) as alleged in paragraph 40. Accordingly, Mr O'Bryan was unable to (and/or did not) objectively and independently pursue the interests of Mr

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<sup>45</sup> Funding Agreement, clause 6.3.1.

Bolitho and group members when those interests diverged from the interests of AFPL.

- (g) Mr Symons took instructions and directions from Mr O'Bryan and Mr Elliott. He did not seek to objectively or independently protect or pursue the interests of Mr Bolitho and group members when those interests diverged from the interests of AFPL. When he thought that group members' interests might be prejudiced by the actions of AFPL, he did not ensure that his client was properly advised, but rather, suggested that AFPL use a different lawyer to take those actions [\[SYM.001.001.2146\]](#).
- (h) In relation to settlement and applications for the approval of costs and commission (in respect of which there was a conflict between the interests of Mr Bolitho and group members and the interests of AFPL), Mr O'Bryan and Mr Symons pursued the interests of AFPL at the expense of Mr Bolitho and group members in the manner alleged in **Sections E to M**.
- (i) AFPL retained Mr Trimbo to prepare the First and Second Trimbo Reports, and Mr O'Bryan AM SC and Mr Symons assisted in procuring favourable reports from Mr Trimbo in the manner, and in the circumstances, set out in paragraphs 31 to 36. Mr Symons provided instructions to Mr Trimbo for the Second Trimbo Report **on behalf of** AFPL. Mr Symons assisted Mr Elliott to create a series of memoranda of attendances purporting to record Mr Elliott's work on the proceeding. It appears that those memoranda were based on Mr O'Bryan's fee slips, rather than on any record kept by Mr Elliott. Mr Symons provided those documents to Mr Trimbo for the purpose of procuring a report from Mr Trimbo that was favourable to AFPL. See: [\[SYM.001.002.2208\]](#) [\[SYM.001.002.2209\]](#) [\[SYM.001.002.2235\]](#) [\[SYM.001.002.1424\]](#) [\[SYM.001.002.1425\]](#) [\[SYM.001.002.1429\]](#) [\[SYM.001.002.1471\]](#) [\[SYM.001.002.1473\]](#) [\[SYM.001.002.2208\]](#) [\[SYM.001.002.2209\]](#) [\[SYM.001.002.2235\]](#) [\[AFP.001.001.1912\]](#).
- (j) The settlement negotiations for the Trust Co Settlement were conducted by Mr Elliott, Mr O'Bryan and Mr Symons (on behalf of AFPL/Mr Bolitho). Mr Elliott and Mr O'Bryan directed and controlled the negotiations about the terms of settlement. Mr Symons drafted the terms of settlement as directed by Mr Elliott and Mr O'Bryan. In email correspondence with the SPRs, Mr Elliott described the deed prepared by Mr O'Bryan AM SC and Mr Symons as "**my deed**" [\[SPR.003.013.0097\]](#).

- (k) No, or no adequate, independent advice was provided to Mr Bolitho and group members about the Adverse Settlement Terms that were being negotiated. The Bolitho Lawyers could have, but did not, trigger the processes in clauses 13.3, 13.5 and 13.6 of the Funding Agreement to achieve the settlement without the Adverse Settlement Terms. Mr Elliott has said that the advice of Mr Bolitho's legal representatives was that he should settle the claims in the proceeding on the terms of the settlement deed [\[NOB.500.004.4522 at page 76\]](#). Mr Crow's time entries for the period from November 2017 to December 2017 [\[TRI.002.001.0538\]](#) disclose that he and Mr Bolitho spoke only with Mr O'Bryan and Mr Elliott in relation to the settlement, neither of whom was independent or impartial.
- (l) Mr Symons drafted and circulated the summons seeking orders for the approval of the settlement and the payments to AFPL, which Mr O'Bryan settled (as alleged in paragraph 76). That summons was filed to bring the following applications contemplated by the Settlement Deed: (1) an application for approval of the settlement (ie, the Bolitho Approval Application); (2) AFPL's application for payment of \$12.8 million plus GST by way of a funder's commission; and (3) AFPL's application for payment of legal costs and disbursements incurred by AFPL in the conduct of the Bolitho Proceeding in the sum of \$4.75 million plus GST. Portfolio Law filed that summons on 7 December 2017.
- (m) AFPL retained Mr Trimbo to prepare the Third Trimbo Report, and Mr O'Bryan AM SC and Mr Symons assisted in procuring a favourable report from Mr Trimbo, including by providing Mr Trimbo with false and misleading information about their fees and fee arrangements in the manner alleged in **Section H**.
- (n) Mr O'Bryan and Mr Symons acted as advocates for AFPL in recovering the costs and commission it claimed from the Trust Co Settlement. Much of the content of the First Bolitho Opinion prepared by Mr O'Bryan AM SC and Mr Symons dated 19 January 2018 was focused on supporting the payments to AFPL in respect of costs and commission. That opinion was exhibited to a confidential affidavit of Mr Zita and filed by Portfolio Law.
- (o) In January 2018, in connection with the Trust Co Settlement, two objections to the settlement were filed by group members / debenture holders, Mr Pitman [\[SYM.002.002.0489\]](#) [\[SYM.002.002.0490\]](#) and Mrs Botsman

[\[SYM.001.002.3056\]](#) [\[SYM.001.002.3057\]](#) [\[SYM.001.002.3058\]](#). Mrs Botsman had signed the Funding Agreement. Mr Pitman had not signed the Funding Agreement. Mr Pitman's principal complaint concerned the payments to AFPL. Mrs Botsman raised complaints about both the payments to AFPL and the quantum of the settlement sum. Mr O'Bryan AM SC and Mr Symons advocated for and pursued the interests of AFPL (and not Mr Bolitho and the group members) in seeking to overcome those objections, notwithstanding that (insofar as the objections related to the payments to AFPL) it was in the interests of group members as a whole, including Mr Pitman, Mrs Botsman and Mr Bolitho, for those objections to be properly considered by the court. In particular:

- (i) Mr O'Bryan AM SC made a concerted effort to persuade Mr Pitman to withdraw his objection. He communicated with Mr Pitman by email and by telephone on 19 January 2018 to persuade him to withdraw his objection [\[NOB.500.001.7137\]](#). He suggested that Mr Elliott instruct Mr Crow (Mr Bolitho's "independent solicitor") to call Mr Pitman to persuade him to withdraw his objection, and provided 10 points to be covered in the telephone call directed at persuading Mr Pitman to withdraw his objection [\[NOB.500.001.7152\]](#), which Mr Elliott forwarded to Mr Crow [\[BOL.001.001.0050\]](#). Thereafter Mr O'Bryan called Mr Crow to query "*whether I had any success with Pitman*".<sup>46</sup> Mr O'Bryan communicated with Peter Heinz of Heinz & Partners (Mr Pitman's solicitor) and suggested that Mr Heinz should call Mr Pitman to persuade him to withdraw his objection [\[NOB.500.005.2787\]](#). He called Mr Newman (Banksia's solicitor) suggesting that Mr Newman arrange for Mr Lindholm to call Mr Pitman to persuade him to withdraw his objection [\[NOB.500.001.7137\]](#).
- (ii) Mr O'Bryan AM SC took an adversarial stance in connection with Mrs Botsman's objection (which was filed by Mr Botsman, her son, who was a barrister): see in particular Mr O'Bryan's comments on Mr Botsman's objection [\[NOB.500.005.2833\]](#) [\[NOB.500.005.2834\]](#), where Mr O'Bryan recommended that his team take issue with the objection on the basis that it "*transgresses numerous rules of evidence*", that it was filed after the date specified in the Notice issued

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<sup>46</sup>

See Mr Crow's fee entry for 18 January 2018 [\[TRI.002.001.0538\]](#).

to group members which was said to amount to an “*egregious failing on the part of counsel*”, and on the basis that Mr Botsman’s calculation of the amount payable to AFPL and Mr Bolitho’s lawyers and the description of that amount as a “*payment to the Plaintiff’s lawyers*” was “*false*”, “*complete nonsense*” and “*easily checked; [but] Botsman too lazy or stupid to do so*”.

- (iii) Mr O’Bryan AM SC and Mr Symons prepared the Second Bolitho Opinion (dated 24 January 2018) to respond to (and refute the issues raised by) the objections of Mr Pitman and Mrs Botsman, including with respect to the payments to AFPL.
- (iv) Mr O’Bryan AM SC and Mr Symons advised AFPL in relation to whether Mrs Botsman was prevented from objecting to the settlement by operation of the Funding Agreement [\[NOB.500.004.2732\]](#) [\[NOB.500.004.2738\]](#).
- (p) At the hearing of the First Approval Application on 30 January 2018 before Justice Croft, AFPL was separately represented by counsel.<sup>47</sup> However, counsel for AFPL did not make submissions in support of the payments to AFPL save to adopt the submissions of Mr O’Bryan AM SC made at the hearing and the confidential opinions of Mr O’Bryan AM SC and Mr Symons.<sup>48</sup> Mr O’Bryan made submissions at the hearing in support of the payments to AFPL.
- (q) In relation to Mrs Botsman’s appeal from the approval of those payments, Mr Bolitho’s legal representatives comprehensively and vigorously opposed each aspect of the appeal from the approval orders which was heard in June 2018.<sup>49</sup> The Contradictor refers further to paragraph 169 below. AFPL did not seek leave to intervene in the appeal: it was content for its interests to be advanced by Mr Bolitho’s legal representatives. AFPL was joined as a party to the appeal by the Court of Appeal, rather than on its own application [\[NOB.500.004.8016\]](#).
- (r) In the appeal, Mr O’Bryan AM SC submitted that: “*Ordinarily because of the control which is since the High Court’s decision in 2006 in Campbells Cash &*

<sup>47</sup> Transcript of hearing on 30 January 2018 [\[SYM.001.001.5122\]](#).

<sup>48</sup> Transcript of hearing on 30 January 2018, 52:27 – 53:2 [\[SYM.001.001.5122\]](#).

<sup>49</sup> Botsman v Bolitho (No 2) [2018] VSCA 348 [19].

*Carry, the effective control which the litigation funder has, or the conduct of the proceeding, including the settlement approval, the class action plaintiff seeks approval for everything, and that's what happened in this case.*<sup>50</sup>

52 The conduct of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law alleged herein was in the course of their agency to act for AFPL and within the actual or apparent scope of their authority pursuant to the express or implied agency alleged in the preceding paragraphs.

53 By reason of the above matters:

- (a) AFPL is liable for the conduct of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law;
- (b) the knowledge of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law is to be imputed to AFPL.

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<sup>50</sup> Transcript of hearing on 19 June 2018, T78:13-19 [[CBP.001.011.1948](#)].

## E. Conduct of AFPL and the Bolitho Lawyers in connection with negotiating the Trust Co Settlement

### E.1 Relevant background

54 Between 9 and 10 November 2017, Mr Bolitho, AFPL, the SPRs and Trust Co negotiated and agreed an “in principle” agreement to settle the Bolitho Proceeding and the SPR Proceeding against Trust Co (**Trust Co Settlement**).

55 In the course of those negotiations, Mr O’Bryan and Mr Elliott required the SPRs to agree to a “*division of the spoils*” of the Trust Co Settlement, whereby they procured the SPRs’ agreement to support payments to AFPL of \$12.8 million plus GST in respect of commission and \$4.75 million plus GST in respect of legal costs [\[SYM.001.001.6313\]](#) [\[SYM.001.001.6715\]](#).<sup>51</sup> There was no proper basis for AFPL and the Bolitho Lawyers to claim those sums or procure the SPRs’ agreement to those sums as a condition of the settlement for the reasons set out in **Sections C, E and F**.

56 Between 10 November 2017 and about 1 December 2017, the parties and/or their legal representatives negotiated the terms of a settlement deed to record the Trust Co Settlement, including the following terms (**Adverse Settlement Terms**) which Mr O’Bryan, Mr Symons and AFPL drafted, settled, directed and/or recommended to Mr Bolitho:

CI	Substance of term	Other points
2.1.3	The Deed was made subject to the making of “Approval Orders”, defined as “the making of the orders sought in the “Bolitho Approval Application” and the “BSL Approval Application”.	Mr O’Bryan and Mr Symons contended in the Court of Appeal that the court could not approve the Settlement Sum but decline to approve the payments to AFPL. They submitted that the Deed recognised “the commercial and... legal reality that the funder's application will be part and parcel of the Bolitho approval application and is therefore bound up with the approval of the settlement”. <sup>52</sup>
2.1.4	The Deed was made subject to the expiry of any appeal period from the making of the Approval Orders (if the Approval Orders were made without	

<sup>51</sup> See also Lindholm Affidavit dated 29 March 2019, [12] – [20].

<sup>52</sup> Transcript of hearing in the Court of Appeal [\[CBP.001.011.1948\]](#) T73-79.



CI	Substance of term	Other points
	an appeal being commenced) and/or the final determination of such an appeal the result of which was that the Approval Orders were made or confirmed.	
2.2	If the Approval Orders were not made, the Deed ceased to have any effect and was to be treated for all purposes as if it had never been made.	
2.4	If the Approval Orders were not made by reason of AFPL's commission, the parties were required in good faith to seek to negotiate an alternative commission, but if the parties were unable to agree, AFPL could, in its sole discretion, give notice that the conditions in clause 2.1 had not been met.	
3.9	AFPL agreed to engage a "suitably qualified external costs consultant" to prepare a report concerning whether the legal costs and disbursements incurred by AFPL had been reasonably incurred and were of a reasonable amount. The parties agreed that the expert report would be filed on a confidential basis.	AFPL and Mr Bolitho's legal representatives ultimately required the settlement terms to provide that the expert costs consultant report be filed on a confidential basis irrespective of whether privilege would otherwise be waived.
3.10	At the settlement approval application, Banksia, the SPRs and Trust Co agreed to instruct their legal representatives to support AFPL's application for payment of \$12.8 million plus GST by way of a funder's commission.	<p>Mr Bolitho's legal representatives and AFPL rejected a clause proposed by the SPRs which:</p> <p>(1) expressed AFPL's commission as "<i>20% of the Settlement Sum</i>" (instead of the quantified figure of \$12.8 million plus GST);</p> <p>(2) provided for the SPRs and Trust Co to instruct their legal representatives to "<i>take all reasonable steps (consistent with their representatives' professional obligations)</i>" to support AFPL's application for payment;</p> <p>(3) provided for the Deed to continue to operate if the court determined that AFPL was entitled to an amount less than 20% of the Settlement Sum.</p>

CI	Substance of term	Other points
3.11	At the settlement approval application and subject to the external cost consultant report filed pursuant to clause 3.9 confirming that the costs and disbursements claimed by AFPL were incurred by AFPL, had been reasonably incurred and were of a reasonable amount, Banksia, the SPRs and Trust Co agreed to instruct their legal representatives to support AFPL's application for payment of \$4.75 million plus GST in costs and disbursements.	Mr Bolitho's legal representatives and AFPL rejected a clause proposed by the SPRs which provided for the SPRs and Trust Co to instruct their legal representatives to support AFPL's application for payment of <i>"the reasonable legal costs and disbursements"</i> incurred by AFPL in the conduct of the Bolitho Proceeding.

57 The Settlement Deed was executed on or about 4 December 2017 [\[SYM.001.003.1860\]](#) [\[SYM.001.003.1861\]](#) [\[SYM.001.003.1884\]](#) [\[SYM.001.002.2489\]](#) [\[SYM.001.002.2500\]](#) [\[SYM.001.002.3930\]](#) [\[SYM.001.002.3938\]](#).

## E.2 Outline of contravention of CPA

58 By their conduct in connection with procuring an agreement containing the Adverse Settlement Terms:

- (a) AFPL contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and
- (b) AFPL, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty,

(together **Settlement Negotiation Contraventions**).

## E.3 Manner in which it is alleged the CPA was contravened

59 In the period from 10 November 2017 to 4 December 2017, in the course of negotiations in connection with the settlement deed:

- (a) Mr Symons drafted;
- (b) Mr O'Bryan AM SC settled and procured;
- (c) AFPL procured and required to be included in the Settlement Deed; and
- (d) one or more of Mr O'Bryan AM SC and Mr Elliott/AFPL advised Mr Bolitho to accept (or procured that Mr Crow advise Mr Bolitho to accept),

the Adverse Settlement Terms, which were not in the interests of Mr Bolitho or other group members.

#### Particulars

- (A) The conduct of each of Mr Symons, Mr O'Bryan and Mr Elliott/AFPL in drafting, negotiating and procuring the Adverse Settlement Terms is set out in **ATTACHMENT 1**.
- (B) With respect to the conduct of Mr O'Bryan and Mr Elliott in procuring the Adverse Settlement Terms, AFPL has advanced the following explanation for rejecting more favourable settlement terms proposed by the SPRs:

*“Clause 2.3 of the 12 November 2017 draft deed was unacceptable because it provided that, even if the representative plaintiff's litigation funder received no funding commission, the settlement would nevertheless be binding. Our client had funded the proceeding **and had procured that certain individuals give valuable undertakings to Trust Co.** The requested amendments to the draft clause 2.3 addressed that issue.”* [\[CBP.001.003.0013\]](#) [\[CBP.001.003.0014\]](#) [\[CBP.001.011.3420\]](#) [\[CBP.001.011.3421\]](#) at para 5(b)].

The “valuable undertakings” were undertakings provided by Mr O'Bryan and Mr Elliott not to take any steps to sue the parent company of Trust Co, Perpetual. That highlights the existence of the conflicts of interest that affected the negotiation of the Settlement Deed, adversely to the interests of Mr Bolitho and other group members.

- (C) With respect to the conduct of Mr O'Bryan, Mr Symons and/or Mr Zita/Portfolio Law in advising Mr Bolitho to accept the settlement terms, Mr Elliott has said that the advice of Mr Bolitho's legal representatives was that he should settle the claims in the proceeding on the terms of the settlement deed [\[NOB.500.004.4522 at page 76\]](#). It is to be inferred that Mr O'Bryan and/or Mr Elliott/AFPL advised Mr Bolitho to settle on the terms of the Deed, and/or that they advised Mr Crow to advise Mr Bolitho to settle on the terms of the Deed. **Further**, Mr O'Bryan and Mr Elliott/AFPL required, as a term of the settlement deed, the parties to support a payment to Mr Bolitho out of the settlement of **\$75,000** – a relatively large payment, and all the more so in circumstances where AFPL had previously paid **\$25,000** to Mr Bolitho in December 2016 in connection with the Bolitho Proceeding [\[BOL.001.004.0001\]](#) [\[BOL.001.004.0002\]](#) [\[BOL.001.004.0005\]](#). The prospect of a settlement which secured a payment of a further **\$75,000** meant that Mr Bolitho was unlikely to objectively assess the terms of settlement from the perspective of all group members.

60 In procuring the SPRs' agreement to the Adverse Settlement Terms, AFPL intentionally withheld from the SPRs the following material matters (**Undisclosed Matters**):

- (a) substantially all the legal costs that AFPL sought to recover from the settlement in respect of the Relevant Period from 1 July 2016 to 30 January 2018 had not been paid by AFPL, Portfolio Law, or Mr Bolitho;
- (b) as at 10 November 2017, substantially all of the legal costs that AFPL sought to recover in respect of the Relevant Period had not been invoiced, fee slips had not been issued, and proper documentation and records had not been kept by Mr O'Bryan, Mr Symons, or Portfolio Law to substantiate those charges;
- (c) Mr O'Bryan and Mr Symons claimed that their fees for the Relevant Period were approximately \$2.5 million and \$700,000 respectively, even though they had not provided any relevant cost estimates to Mr Bolitho, Portfolio Law, or AFPL in respect of the Relevant Period in the manner prescribed by the Uniform Law and/or in accordance with the O'Bryan/Portfolio Law July 2016 Costs Agreement and the Symons/Portfolio Law February 2015 Costs Agreement;
- (d) the invoices that Mr Symons issued on 24 November 2017 charged his fees at escalating rates that had not been disclosed to Mr Bolitho, Portfolio Law, or AFPL prior to that time;
- (e) the invoices that Mr O'Bryan issued in December 2017 charged his fees at escalating rates that had not been disclosed to Mr Bolitho, Portfolio Law, or AFPL at any time prior to about mid to late November 2017.

#### Particulars

AFPL must have known that the Undisclosed Matters were material to the assessment of legal costs, or else AFPL, Mr O'Bryan and Mr Symons would not have sought to conceal those matters in the manner alleged in paragraphs 47, 48, 67-68, 84, 85 and 92.

AFPL must have known that the Undisclosed Matters were material to any funding commission to which AFPL might be entitled, because AFPL must have known that the assessment of a fair and reasonable funding commission was likely to be informed by the extent of risk that it had taken in providing funding. AFPL knew this because:

- (1) that was the effect of the submissions made by Mr O'Callaghan QC (as he then was) and Trust Co on 1 August

2016 in connection with the Partial Settlement Approval Application as alleged in paragraphs 33 - 34;

- (2) on 27 October 2016, Mr O'Bryan circulated to Mr Elliott, other directors and shareholders of AFPL, and Mr Zita an email entitled "*Game Changer: Federal Court steps in to regulate class action funding*", reporting on the decision in *Money Max*, which stated: "*the Court imposed important limitations which give the Court a central role in regulating the return to the litigation funder, including: approving the total return having regard to the risks undertaken by the funder*" [\[CBP.004.001.8881\]](#);
- (3) it was obvious and logical that a funder's return should be based on its risk; and
- (4) they submitted to the Court that AFPL's return was justified by its funding risk. The contradictor refers to paragraphs 134(c), 145 and especially 183 of the First Bolitho Opinion. Para 183 referred to the legal costs and disbursements allegedly incurred by AFPL and stated: "***The magnitude of this funding risk justifies the Funder's Commission now sought.***"

The Contradictor refers further to paragraphs 93 and 105 – 119 below.

61 The Adverse Settlement Terms were not in the interests of group members insofar as:

- (a) They required the SPRs, officers of the court with statutory duties to group members/debenture holders, to instruct their legal representatives to support the payments to AFPL in respect of commission<sup>53</sup> and legal costs,<sup>54</sup> subject only to AFPL procuring a report from a costs consultant, which report the Settlement Deed contemplated would be filed on a confidential basis<sup>55</sup> (so that the SPRs would never see it).
- (b) It was not in the interests of group members/debenture holders for the SPRs (who were appointed by the court to act in the best interests of debenture holders)<sup>56</sup> to be restrained from providing meaningful assistance to the court to evaluate the payments claimed by AFPL/Mr Bolitho's representatives, which were a deduction from settlement proceeds otherwise available to debenture holders. It was not consistent with the SPRs' duties as court-appointed officers to be required to support payments out of settlement proceeds that would otherwise be returned to debenture holders in

<sup>53</sup> Settlement Deed, clause 3.10.

<sup>54</sup> Settlement Deed, clause 3.11.

<sup>55</sup> Settlement Deed, clause 3.9.

<sup>56</sup> *Botsman v Bolitho* [2018] VSCA 278 [260].

circumstances where the SPRs had no capacity to scrutinise the asserted basis for those payments.

- (c) AFPL contended in the High Court, and Mr O'Bryan and Mr Symons contended in the Court of Appeal,<sup>57</sup> that those clauses made the settlement conditional upon the making of all Approval Orders sought by Mr Bolitho, including Approval Orders in respect of the costs and commission.<sup>58</sup> That was self-evidently not in the interests of debenture holders.
- (d) AFPL contended in the High Court, and Mr O'Bryan and Mr Symons contended in the Court of Appeal, that those clauses had the effect that, if the court did not approve AFPL's commission, the settlement was at an end, subject only to a *potential* obligation to negotiate in good faith. That was self-evidently not in the interests of debenture holders.
- (e) Further, irrespective of the conditions attached to the payments to AFPL, it was not in the interests of debenture holders for the Settlement Deed to specify that AFPL would be entitled to payments of \$4.75 million plus GST in respect of legal costs or \$12.8 million plus GST in respect of commission, because those amounts had not been incurred and/or were unreasonable or excessive in the circumstances (by reason of the matters alleged in **Sections B, C and F**).

62 Mr Zita/Portfolio Law had limited if any involvement in the settlement negotiations, but delegated responsibility for the settlement negotiations to Mr O'Bryan, Mr Symons and Mr Elliott/AFPL.

63 Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Mr Elliott/AFPL failed to:

- (a) advise Mr Bolitho and/or other group members that the Adverse Settlement Terms were unreasonable;
- (b) inform AFPL that they considered that the Adverse Settlement Terms were unreasonable;
- (c) take steps to trigger (or advise Mr Bolitho or any other group member to take steps to trigger) clause 13.3 or 13.5 of the Funding Agreement;

<sup>57</sup> Transcript of hearing on 19 June 2018, T76:15-79:28 [[CBP.001.011.1948](#)].

<sup>58</sup> AFPL's Application for Special Leave to Appeal dated 29 November 2018, paras 1(b) and (c), 13 [[CCW.005.001.0183](#)].

- (d) inform Mr Bolitho and Mr Crow and/or other group members of:
  - (i) the matters known to them that were relevant to the assessment of AFPL's funding commission;
  - (ii) all conflicts between (1) their own interests or the interests of AFPL and (2) their duties to Mr Bolitho and/or other group members, including the matters referred to in paragraph 164.

#### **E.4 How the conduct contravened the CPA**

64 In the circumstances alleged in paragraphs 55, 56, and 58 - 63:

- (a) AFPL contravened the overarching obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive, in that it withheld the Undisclosed Matters from the SPRs in circumstances where those matters were material to the assessment of legal costs and any funding commission, and therefore material to the SPRs' agreement to the Adverse Settlement Terms;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty, in that:
  - (i) their respective conduct alleged in paragraphs 55, 56, and 58 - 63 denied the group members the benefits and protections of the procedure established by Part 4A of the SCA, in that it resulted in Mr Bolitho – a representative plaintiff with duties to represent the interests of debenture holders/group members – failing to properly discharge those duties;
  - (ii) the Adverse Settlement Terms sought to require the SPRs and their legal representative to support the payments to AFPL in respect of costs and commission, irrespective of their statutory and professional duties (including duties owed to the debenture holders/group members, and duties owed to the Court);
  - (iii) the evident intention of the Adverse Settlement Terms was to deprive the Court of the benefit of scrutiny from the SPR with respect to the claims for costs and commission. It was prejudicial to the administration of justice for the Court to be denied the benefit of proper scrutiny;

- (iv) the Adverse Settlement Terms sought to procure a result whereby a fair settlement could be abandoned if the Court did not approve the payments to AFPL in respect of costs and/or commission, which was contrary to the Court's protective role in supervising group proceedings and contrary to the interests of Mr Boltho and group members.

## **E.5 Losses resulting from Settlement Negotiation Contraventions**

65 The Settlement Negotiation Contraventions caused or contributed to:

- (a) the Adverse Settlement Terms being included in the Settlement Deed;
- (b) the miscarriage of the First Approval Application;
- (c) the wasted costs of the First Approval Application;
- (d) the costs of the appeal;
- (e) the costs of the remitter;
- (f) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

### Particulars

- (A) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law ought to have informed AFPL and Mr Bolitho that (1) the settlement sum was fair and reasonable but (2) the Adverse Settlement Terms were unfair and unreasonable. They should have triggered the processes in clause 13.3 and 13.5 of the Funding Agreement and required the settlement to be concluded without the Adverse Settlement Terms. The settlement deed did not need to make any provision for AFPL's costs and commission, as those matters should have been the subject of a separate application under section 33V of the *Supreme Court Act* 1986 (Vic) to be properly substantiated by AFPL, without seeking to make such payments a condition of any settlement.
- (B) The SPRs could not, in the proper discharge of their duties to debenture holders and as an officer of the Court, have agreed to support AFPL's claims for costs and commission, if the SPRs had been informed of all or any of the Undisclosed Matters.
- (B) Further or alternatively, if the SPRs had been informed of all or any of the Undisclosed Matters, it is likely that the SPRs would have sought appropriate directions from the Court to facilitate the settlement without the Adverse Settlement Terms, and at the very least:
  - (i) would have assisted the Court in properly scrutinizing AFPL's claims for costs and commission; and/or



- (ii) would have submitted to the Court that a contradictor needed to be appointed to scrutinize the settlement.

**F. Conduct in relation to Mr O'Bryan AM SC and Mr Symons charging more than a fair and reasonable amount**

**F.1 Outline of contraventions of the CPA**

66 By their conduct in connection with seeking to recover from group members fees for Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law that exceeded a fair and reasonable amount (**Overcharging Contraventions**):

- (a) AFPL, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive;
- (b) AFPL, Mr O'Bryan AM SC and Mr Symons contravened the overarching obligation to act honestly;
- (c) AFPL, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to use reasonable endeavours to ensure that legal costs in connection with the civil proceeding were reasonable and proportionate and properly incurred;
- (d) AFPL, Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty.

**F.2 Manner in which it is alleged the CPA was contravened**

**F.2.1 Conduct and state of mind of AFPL, Mr O'Bryan and Mr Symons in claiming excessive fees**

67 In or around late November 2017 and early December 2017, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law issued invoices claiming payment for approximately **\$3.4 million** in Legal Costs in respect of the period from about June/July 2016 up until about 30 January 2018.

68 Mr O'Bryan AM SC and Mr Symons charged more than a fair and reasonable amount for legal costs, within the meaning of section 298(d) of the Legal Profession Uniform Law, and AFPL procured and/or encouraged them to do so, in circumstances where:

- (a) The Funding Agreement provided that, in consideration for the financing of the Case and performance by AFPL of its various obligations under the Funding Agreement, AFPL was entitled to an amount up to a maximum of 30% of any "Resolution Sum" [Funding Agreement, clause 12.1.2].

- (b) Mr Elliott/AFPL and Mr O'Bryan considered that AFPL was entitled to 30% of any settlement [\[SYM.001.002.2689\]](#) [\[SYM.001.002.2690 at point 2\(c\)\]](#) and transcript of hearing in AFPL v Botsman on 25 May 2018, [p142-143, \[ABL.001.0594.00006 at page 3\]](#).
- (c) On 9 November 2017, in the course of negotiating the settlement with Trust Co, Mr O'Bryan stated in an email to Mr Symons, copied to Mr Elliott: *"Provided Mark can do a satisfactory and enforceable deal with Lindholm **on the division of these spoils** (which will be confirmed between them tomorrow), we can do this deal"* [\[SYM.001.001.6715\]](#).
- (d) The following day, on 10 November 2017, Mr Elliott met with Mr Lindholm.<sup>59</sup> At the meeting, Mr Elliott told Mr Lindholm and Mr Newman that AFPL would only settle if the settlement deed entitled AFPL to receive **\$12.8 million (plus GST) for its commission and \$4.75 million (plus GST) for its costs**.<sup>60</sup> Mr Lindholm initialed a document to confirm the SPRs agreed that those amounts could be inserted in the settlement deed,<sup>61</sup> and Mr Elliott circulated that document to Mr O'Bryan, who forwarded it to Mr Symons [\[SYM.001.001.4885\]](#) [\[SYM.001.001.4887\]](#).
- (e) At that time, Mr O'Bryan had not prepared any invoices for the Relevant Period and had not quantified his fees. Mr Symons had issued invoices for July 2016 to November 2016, but had not quantified his fees for the 2017 calendar year.
- (f) The figure of \$12.8 million plus GST for commission and \$4.75 million plus GST for legal costs amounted to a total sum of **\$19.3 million** – approximately **30%** of the total Trust Co Settlement Sum.
- (g) For these reasons and for the reasons that follow it is to be inferred that the figure of \$12.8 million plus GST for commission and \$4.75 million plus GST for legal costs represented Mr Elliott/AFPL's conception of an appropriate **"division of the spoils"** of the Trust Co Settlement having regard to the 30% "funding commission" rate in the Funding Agreement.
- (h) On 19 November 2017 at 5.17pm, Mr Elliott invited Mr Symons to submit invoices for **200 days'** work, in circumstances where there is no evidence that

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<sup>59</sup> Lindholm Affidavit sworn 25 March 2019 [13].

<sup>60</sup> Lindholm Affidavit sworn 25 March 2019 [15].

<sup>61</sup> Lindholm Affidavit sworn 25 March 2019 [15].

Mr Symons had undertaken 200 days' work or informed Mr Elliott he had done so. It is to be inferred that Mr Elliott invited Mr Symons to submit invoices for 200 days' work in respect of the Relevant Period without any basis for believing that Mr Symons had done work for the 200 days.

- (i) On 19 November 2017 at 5.19pm, Mr Elliott emailed Mr O'Bryan stating ***"Norm, I need your invoices and a table of their totals on a month by month basis from 1/7/16 to Xmas 2017. I confirm that they total \$2.65M plus GST"*** [\[NOB.500.001.7553\]](#). There is no evidence that Mr O'Bryan had undertaken \$2.65 million of work or informed Mr Elliott that he had done so. It is to be inferred that Mr Elliott invited Mr O'Bryan to submit invoices for \$2.65 million plus GST in respect of the Relevant Period without any basis for believing that Mr O'Bryan had incurred those fees.
- (j) Between 14 and 15 November 2017, Mr O'Bryan together with his secretary Florence Koh worked on producing Mr O'Bryan's draft invoices and fee slips for the Relevant Period. They prepared a draft which quantified Mr O'Bryan's fees at approximately **\$1,049,300** [\[NOB.500.001.7416\]](#). On 19 November 2017 at 7.09pm, Mr O'Bryan emailed those draft invoices and fee slips to Mr Elliott. Mr Elliott replied to that email stating: ***"Suggest you up your rate to \$15K per day."*** [\[NOB.500.001.7404\]](#).
- (k) Thereafter, Mr O'Bryan instructed his secretary Ms Koh to calculate his fees at different rates for his consideration which he shared with Mr Elliott in the context of discussions about whether the fees were *"close to the mark"* and whether Mr Trimbos would approve the fees [\[NOB.500.001.7427\]](#) [\[NOB.500.001.7431\]](#) [\[NOB.500.001.7416\]](#) [\[NOB.500.001.7421\]](#) [\[NOB.500.001.7435\]](#) [\[NOB.500.001.7438\]](#).
- (l) To the knowledge of Mr Elliott, Mr O'Bryan also changed his fee rate to a GST-exclusive rate, thereby increasing the total fees by 10% [\[NOB.500.001.7504\]](#).
- (m) Between 21 and 23 November 2017, Mr Elliott and Mr O'Bryan exchanged emails in which they discussed various ideas for claiming more fees. On 21 November 2017 at 7.10pm, Mr O'Bryan emailed Mr Elliott stating: *"I will correct my invoices via Florence over the next few days and issue them as 'paid' for Trimbos's purposes (as per the mini settlement). He will find it much easier to justify a rate of \$1100/hr & \$11,000/day, so I will calculate accordingly & increase hours as appropriate."* At 7.14pm Mr Elliott replied

stating: ***“You will struggle for days! Could you charge a cancellation fee as you were expecting 6 months work next year and cleared your diary! Let’s discuss”*** [\[NOB.500.001.7495\]](#). At 7.25pm, Mr O’Bryan replied stating: ***“Maybe we could do a retainer for the trial, payable upfront?”*** At 8.11pm, Mr Elliott replied stating: ***“My recollection is that your costs agreement has a cancellation clause. Estimate of 100 days at \$15K per day x 20% = \$300K. You reasonably need notice for us to cancel the trial booking? Should I ask Trimbos?”*** At 9.21pm, Norman O’Bryan replied, stating: ***“Yes, good idea. Alternatively (or as well), include the outstanding \$1M from the mini settlement in the costs claim for the main settlement. That would look generous & work out the same from our point of view. What is Portfolio receiving? They also need to look respectable.”*** [\[NOB.500.001.7495\]](#).

- (n) From at least 14 November 2017 onwards, Mr O’Bryan prepared various iterations of his fee slips in which he altered the hours allocated to various activities for which he charged, in a manner that suggests that the allocations made by Mr O’Bryan are unlikely to be reliable. See [ATTACHMENT 2](#).
- (o) On 22 November 2017 at 11.09pm, to the knowledge of Mr Elliott, Mr O’Bryan instructed his secretary to add hundreds of hours to his fee slips for *“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial”* [\[NOB.500.001.7416\]](#).
- (p) In respect of Mr O’Bryan’s charges for reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents *“and conferring with instructing solicitors and junior counsel”* about opening submissions and evidence for tender and cross-examination at trial, no such conferrals appeared in the invoices and fee slips of Mr Symons and Portfolio Law, despite a high degree of overlap between the fee entries of Mr O’Bryan and Mr Symons.<sup>62</sup>
- (q) The charges for *“reviewing discovered documents”* and *“conferring with junior counsel and instructing solicitors”* about opening submissions and cross-examination at trial first appear in Mr O’Bryan’s fee slips in September 2016,

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<sup>62</sup> By way of example only: see Mr O’Bryan’s and Mr Symons’ charges dated 2, 3 and 4 July 2017.

when Trust Co's evidence had not yet been filed.<sup>63</sup> It is unclear what work could be undertaken with respect to cross-examination of Trust Co's witnesses without seeing their evidence. Mr O'Bryan also charged significant time in respect of this work in **December 2016** and **January 2017**, at a time when no trial date was listed<sup>64</sup> and Trust Co's evidence still had not been filed.

- (r) There is no evidence of any significant work product from Mr O'Bryan and Mr Symons in the Relevant Period. A large proportion of the fees of each of them relates to reading documents. It was self-evidently unreasonable for Mr O'Bryan and Mr Symons to charge such significant sums for reading documents when they did not generate any significant work product.
- (s) Mr Symons has said that his principal work in the period from July 2017 to October 2017 (a four month period when he charged \$365,000 in total) was *"reviewing the extensive documents produced as part of discovery in the proceeding, and preparing an index for the court book in the proceeding"* [\[AFP.005.001.1420\]](#). Even assuming that Mr Symons spent the hundreds of hours for which he charged reviewing the discovery in the "Receivers' Court Book" and the "Liquidators' Court Book", he must have known it was unreasonable for Mr Bolitho and group members to pay for him to do so, in circumstances where he knew that the fees that Mr Elliott had recovered for acting as solicitor from the proceeds of the Partial Settlement included fees for hundreds of hours of work reviewing that same discovery, as referred to in paragraphs 32(d), 32(f), 32(g), 32(h) and 32(i) above.
- (t) The fees charged by Mr O'Bryan and Mr Symons in the Relevant Period in the amount of **\$2.5 million and \$700,000 respectively (\$3.2 million in the aggregate)** are out of all proportion to the fees charged by counsel for the SPRs in respect of the same period, having regard to their relative contributions. In particular:
  - (i) In the Relevant Period, Mr Bolitho's legal team filed 1 single 12-page reply expert report,<sup>65</sup> whereas the SPRs filed 26 expert reports, witness statements and witness outlines.<sup>66</sup>

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<sup>63</sup> Newman Affidavit, para 50 (he states that Trust Co's evidence was filed in July 2017).

<sup>64</sup> Newman Affidavit, para 59(b) (he states that the trial date had been vacated on 5 December 2016).

<sup>65</sup> SPR-1 tendered in the Court of Appeal.

- (ii) The SPRs undertook the vast majority of interlocutory steps to get the proceedings ready for trial.<sup>67</sup>
- (iii) In the Relevant Period, the SPRs incurred counsel fees of \$1,257,859 plus GST.<sup>68</sup>
- (iv) Further, in the Relevant Period, Mr Redwood charged \$883,444.55, but approximately 20% of that amount related to the proceedings against Banksia's insurers and insurance broker Insurance House.<sup>69</sup> Accordingly, the fees of Mr Redwood excluding fees for the insurance claims were approximately the same as the fees charged by Mr Symons, in circumstances where there is a significant disparity between the work product of Mr Symons and the work product of Mr Redwood, **and** in circumstances where Mr Redwood's hourly rate was higher than Mr Symons' hourly rate.<sup>70</sup>
- (u) At the First Approval Application, Mr O'Bryan and Mr Symons submitted to the court that the evidence was "a joint exercise",<sup>71</sup> that "it was beneficial for us to cooperate with the liquidators throughout the preparation",<sup>72</sup> that "there was the utmost coordination throughout, in particular in relation to the preparation and the filing of all the evidence",<sup>73</sup> when the evidence of the SPRs is that Mr Bolitho's legal representatives had only limited involvement in the preparation of the evidence.<sup>74</sup> Mr O'Bryan and Mr Symons must have known that the fees sought to be claimed by AFPL and Mr Bolitho were excessive having regard to the work undertaken by them and by Mr Zita/Portfolio Law. See also [[NOB.500.005.2480](#)].
- (v) Mr O'Bryan and Mr Symons did not have the conduct of any significant contested interlocutory applications in the Relevant Period, save for (1) the Partial Settlement and Trust Co Settlement (where issues arose relating to both Mr Bolitho's interests and AFPL's interests), (2) engagement in the application by Trust Co to delay the filing of its evidence (where they filed a

<sup>66</sup> Newman Affidavit, paras 64 and 67; see also Further SPR Opinion, paras 38 and 40-43, 52, 54, 59-60, 77, 79.

<sup>67</sup> Newman Affidavit, para 60; Further SPR Opinion, para 73, 74.

<sup>68</sup> Newman Affidavit, para 99.

<sup>69</sup> Newman Affidavit, para 100(e) and 102.

<sup>70</sup> Newman Affidavit, para 101.

<sup>71</sup> Transcript of hearing of First Approval Application, T5:13 [[SYM.001.001.5122](#)].

<sup>72</sup> Transcript of hearing of First Approval Application, T5:20-22 [[SYM.001.001.5122](#)].

<sup>73</sup> Transcript of hearing of First Approval Application, T5:26-28 [[SYM.001.001.5122](#)].

<sup>74</sup> Newman Affidavit, para 88-90.

1.5 page submission opposing an extension) and (3) limited engagement with the SPRs in their intervention in the ASIC v Godfrey proceeding.

- (w) Mr O'Bryan and Mr Symons had only limited engagement with the special referee process over the Relevant Period. Mr O'Bryan recommended that Mr Symons, Mr Zita/Portfolio Law, Mr Elliott and Alex Elliott adopt an approach of "diplomatic nothingness" in relation to the special referee [\[CBP.001.006.0534\]](#).
- (x) The Contradictor refers further to paragraphs 31 to 51 and 77 to 79 of the Further SPR Opinion and paragraphs 60 to 72 and 98 to 101 of the affidavit of Mr David Newman sworn 25 March 2019 (**Newman Affidavit**) and [ATTACHMENT 3](#).
- (y) There are inconsistencies between the fees charged by Mr O'Bryan AM SC and his work on other matters.

#### Particulars

*Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 (5 June 2017); *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187 (9 June 2017); *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 (1 and 2 August 2017); *Goldfields Gas Transmission Pty Ltd v Economic Regulation Authority* [2018] WASC 104 (10 and 11 October 2017).

[\[NOB.501.001.0001\]](#); [\[NOB.501.001.0002\]](#); [\[NOB.501.001.0004\]](#).

Further particulars may be provided following further discovery.

- (z) Mr O'Bryan's fees were not calculated and charged in accordance with the O'Bryan/Portfolio Law July 2016 Costs Agreement (being an agreement prepared by Mr O'Bryan in July 2016 but which he dated December 2014 and issued to AFPL on 1 July 2016, as alleged in paragraph 32(c)). That Costs Agreement specifies that Mr O'Bryan's fees would be charged at the rate of \$990 per hour or \$9,900 per day including GST. Mr O'Bryan's fees were not calculated at those rates.
- (aa) Even assuming that Mr O'Bryan could charge fees at the rates of \$11,000 per day (GST inclusive) from 30 May 2016 as per his backdated 30 May 2016 fee agreement, he did not calculate and charge his fees at that rate. Rather, he



calculated and charged his fees at the rate of \$11,000 per day **plus** GST from 1 June 2016.

- (bb) Mr Symons' fees for the 2017 calendar year were charged at rates that exceeded the rate he was entitled to charge pursuant to the Symons/Portfolio Law February 2015 Costs Agreement.
- (cc) In preparing his own fee slips, Mr Symons had reference to Mr O'Bryan's draft fee slips which were emailed to him by Mr O'Bryan's secretary on 15 November 2017 [\[NOB.500.001.7416\]](#) [\[CCW.003.002.0003 & attachments\]](#). The fact that he used Mr O'Bryan fee slips as the reference point is evident from that there is a high degree of overlap between their fee slips. Despite the high degree of overlap, Mr Symons allocated much more time to some activities than did Mr O'Bryan, when the activities described seem insubstantial. By way of example only, see:
  - (i) the entry for 3 August 2017: *"Conferring with Tony Zita, Mr Elliott and [counsel] re: email to Clayton Utz re: confirmation that Trust Co will give discovery of documents described in paragraph 11 of P J Godfrey's witness statement, advising"*, for which Mr O'Bryan charged **1 hour**, and for which Mr Symons charged **10 hours** [\[CCW.003.002.0144\]](#) [\[SYM.001.003.3393 at page 33\]](#);
  - (ii) the entry for 6 September 2017: *"Conferring with Tony Zita, Mr Elliott, Alex Elliott and [counsel] re: letter from Clayton Utz regarding security for costs - second tranche / Trust Co's total estimated costs, advising"* for which Mr O'Bryan charged **2 hours** and for which Mr Symons charged **1 day** (with the additional task of *"reviewing steps necessary to prepare court book index for circulation"* – which is unlikely to have taken **8 hours**) [\[CCW.003.002.0135\]](#) [\[SYM.001.003.3393 at page 41\]](#).

Further particulars may be provided following further discovery.

69 Mr O'Bryan and Mr Symons must have known that their fees (individually, respectively, and in the aggregate) were excessive and unreasonable:

- (a) in the circumstances described in paragraph 68; and
- (b) in circumstances where Mr O'Bryan and Mr Symons occupied the same chambers and worked closely with each other on a number of matters over

the Relevant Period [\[SYM.001.003.2057\]](#), and therefore each must have known roughly how much time the other was spending on the Bolitho Proceeding.

#### F.2.2 Conduct and state of mind of AFPL with respect to excessive fees

70 AFPL procured, encouraged, assisted or acquiesced in Mr O'Bryan and Mr Symons charging an excessive and unreasonable amount in respect of fees, as follows:

- (a) AFPL's Conflict Management Policy and Disclosure Statement stated that AFPL would monitor costs and budgets [\[AFP.006.001.0001\]](#), but AFPL did not ask Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law to provide budgets or cost estimates or any documentary evidence of costs incurred from time to time [\[CBP.001.002.1535\]](#).
- (b) AFPL entered into the Fee Arrangements with Mr O'Bryan and Mr Symons pursuant to which Mr O'Bryan and Mr Symons were not to deliver invoices or fee slips until after any settlement with Trust Co as alleged in paragraph 47, an arrangement which was unreasonable and unduly exposed group members to the risk of excessive charging.
- (c) AFPL knew that the O'Bryan December 2017 Costs Agreement and the Symons December 2017 Cost Disclosure Documents had been created in December 2017 and not at the times stated or implied by those documents.
- (d) On 10 November 2017, AFPL demanded that the SPR and Trust Co agree to support a claim by AFPL to recover \$4.75 million plus GST in respect of legal costs, in circumstances where AFPL had received no invoices from Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law, and there is no evidence that they had quantified their fees. It is to be inferred that AFPL sought that sum without any proper basis.
- (e) On 19 November 2017, AFPL invited Mr O'Bryan to charge \$2.65 million plus GST and Mr Symons to charge for 200 days of work in respect of the Relevant Period, in circumstances where there is no evidence that Mr O'Bryan and Mr Symons had incurred such fees or informed AFPL that they had done so.
- (f) AFPL knew that Mr O'Bryan's first draft of his invoices and fee slips quantified his fees at only **\$1,049,300** as alleged in paragraph 68(j). In response to the draft invoices that AFPL received from Mr O'Bryan quantifying Mr O'Bryan's

fees at that sum, AFPL invited Mr O'Bryan to charge \$15,000 per day, and AFPL and Mr O'Bryan discussed various other ideas for claiming more fees as alleged in paragraph 68. AFPL knew that neither AFPL nor Portfolio Law had entered into a fee agreement with Mr O'Bryan permitting Mr O'Bryan to charge his fees at that rate (or at the rate of \$11,000 plus GST from 1 June 2016 and \$12,500 plus GST per day from 1 July 2017).

- (g) AFPL knew that, in November 2017, Mr O'Bryan instructed his secretary to alter his fee rate for the whole of the Relevant Period to a GST-exclusive rate, with the effect of increasing his fees for the Relevant Period by 10% as alleged in paragraph 68(l).
- (h) AFPL was intimately involved in all aspects of the Bolitho Proceeding in the Relevant Period, and must have known that the fees AFPL invited Mr O'Bryan and Mr Symons to charge were unreasonable having regard to AFPL's knowledge of their work product in the Relevant Period. AFPL also must have known that much of the work charged by Mr O'Bryan in relation to cross-examination was charged in circumstances where much of the work was charged when evidence was yet to be exchanged and the proceedings were not listed for trial.
- (i) AFPL must have known that Mr O'Bryan's charges for conferring with Mr Zita and Mr Symons about opening submissions and cross-examination at trial were unlikely to be accurate in circumstances where AFPL knew that Mr Zita/Portfolio Law effectively acted as a "post box", and Mr O'Bryan would not have conferred with Mr Zita/Portfolio Law about such matters.
- (j) AFPL knew that Mr Elliott had already recovered fees for hundreds of hours of work for reviewing discovery out of the proceeds of the Partial Settlement, including for review of the "Liquidators' Court Book" and the "Receivers' Court Book". Accordingly, AFPL must have known that it was unreasonable for group members to be asked to pay the significant sums that Mr Symons had charged for that same work.
- (k) AFPL knew from reading the Third Trimbos Report that Mr Trimbos was able to justify Mr O'Bryan's fees as reasonable only because (1) Mr O'Bryan had instructed him that the trial would run for 120 days [\[NOB.500.005.2298\]](#),<sup>75</sup> contrary to court orders and the agreed trial framework pursuant to which the

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<sup>75</sup> Third Trimbos Report, para 95.

trial was set down for only 45-50 days, and (2) Mr Trimbo had accordingly assumed the trial would run for at least 100 days,<sup>76</sup> leading to the obvious conclusion that the fees charged by Mr O'Bryan were unreasonable. Thereafter AFPL continued to seek the full amount claimed by Mr O'Bryan.

- (l) AFPL positively invited Mr O'Bryan to charge a \$200,000 cancellation fee on account of the matter settling [\[NOB.500.005.2262\]](#), in circumstances where there is no evidence that any fee agreement with Mr O'Bryan permitted him to charge a \$200,000 cancellation fee.
- (m) AFPL requested Mr Symons to charge a \$100,000 cancellation fee on account of the matter settling, in circumstances where there is no evidence that any fee agreement with Mr Symons permitted him to charge a \$100,000 cancellation fee [\[SYM.001.003.0235\]](#).
- (n) AFPL requested Mr Symons to charge his fees at the rate of \$450 per hour / \$4,500 per day when Mr Symons had not given notice of any increase in his fees to such a rate [\[SYM.001.003.0235\]](#).
- (o) AFPL would not allow the SPR or group members to see the Third Trimbo Report (see eg [\[TRI.001.006.0661\]](#)[\[SYM.002.002.0505\]](#)[\[SYM.001.002.8843\]](#)). It is to be inferred that AFPL knew it was vulnerable if scrutinised.

Further particulars may be provided following further discovery.

### F.2.3 Purpose and/or effect of conduct by AFPL, Mr O'Bryan and Mr Symons

- 71 It is to be inferred that an effect and purpose of the conduct referred to in paragraph 67 to 70 was to obtain more than a fair and reasonable amount by way of funding commission for AFPL in excess of what was appropriate or necessary to ensure that justice was done in the Bolitho Proceeding by overstating AFPL's liability for legal costs in respect of work undertaken by Mr O'Bryan and Mr Symons on behalf of Mr Bolitho in the Bolitho Proceeding.

### Particulars

The Contradictor refers to and repeats the particulars to paragraph 60.

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<sup>76</sup> Third Trimbo Report, para 95-96.

F.2.4 Conduct of Mr Zita/Portfolio Law with respect to excessive fees charged by Mr O'Bryan and Mr Symons

72 Mr Zita/Portfolio Law acquiesced in Mr O'Bryan and Mr Symons charging more than a fair and reasonable amount in circumstances where:

- (a) the invoices issued by Mr O'Bryan and Mr Symons exhibited to the Third Trimbo Report were addressed to Mr Zita/Portfolio Law, and appeared as if they had been issued to him on a monthly basis and (at least in the case of Mr O'Bryan's fees) had been paid by him;
- (b) this conveyed the impression to the Court and anyone else reading the report that Mr Zita/Portfolio Law had satisfied themselves as to the fees charged, and that in the case of Mr O'Bryan, the invoices had been paid by Mr Zita/Portfolio Law;
- (c) Mr Zita/Portfolio Law filed the report with the exhibits and did nothing to correct the impression alleged in the preceding sub-paragraph;
- (d) Mr Zita/Portfolio Law failed to take any steps to satisfy himself that the fees charged by Mr O'Bryan and Mr Symons were fair and reasonable;
- (e) Mr Zita/Portfolio Law made no enquiries about the costs charged by Mr O'Bryan and Mr Symons;
- (f) the rates charged by Mr Symons exceeded the rates set out in the February 2015 Symons/Portfolio Law Costs Agreement which Mr Zita/Portfolio Law had received;
- (g) Mr Symons had not notified Mr Zita/Portfolio Law of any increase in his rates (save insofar as the First Trimbo Report stated that Mr Symons had increased his rates to \$275/hour (including GST) from 1 January 2016);
- (h) Mr Zita/Portfolio Law did nothing to protect the interests of Mr Bolitho or group members in respect of the fees charged by Mr O'Bryan and Mr Symons;
- (i) Mr Zita/Portfolio Law effectively delegated his responsibilities for acting as solicitor for Mr Bolitho and group members to Mr Elliott/AFPL, Mr O'Bryan and Mr Symons, and accordingly he is responsible for their failure to monitor counsel's fees and ensure that those fees were not excessive.

### F.2.5 How the conduct contravened the CPA

73 In the circumstances alleged in paragraphs 67 to 72:

- (a) Mr O'Bryan and Mr Symons contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that they each represented to any person who read their invoices that:
  - (i) all the work charged by Mr O'Bryan and Mr Symons had been undertaken by them; and
  - (ii) that they were entitled to charge fees at the rates charged,
 when those matters were untrue;
- (b) AFPL contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that it encouraged, assisted or acquiesced in Mr O'Bryan and Mr Symons charging for fees that exceeded a fair and reasonable amount as alleged in paragraph 70;
- (c) Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that it permitted a representation to be conveyed to Mr Trimbo, the Court, and any other person who read the invoices of Mr O'Bryan and Mr Symons that:
  - (i) the invoices had been issued monthly to Mr Zita/Portfolio Law;
  - (ii) Mr Zita/Portfolio Law had satisfied themselves as to the fees charged;
  - (iii) the invoices had been paid by Mr Zita/Portfolio Law,
 when those matters were untrue;
- (d) AFPL, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly, in that they sought recovery of the fees claimed by Mr O'Bryan and Mr Symons from Mr Bolitho and other group members in circumstances where:
  - (i) they must have known the fees were excessive, or alternatively, where they had no honest belief that the fees were reasonable; and

- (ii) they did so with the purpose and/or effect alleged in paragraph 71;
- (e) each of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL contravened the overarching obligation to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the Bolitho Proceeding were reasonable and proportionate;
- (f) each of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL contravened the Paramount Duty to the Court by failing to act professionally, fairly, and with integrity in connection with the fees they sought to recover (through the processes of the Court) from the group members whose claims they represented.

### **F.3 Losses resulting from Overcharging Contraventions**

74 The Overcharging Contraventions caused or contributed to:

- (a) the wasted costs associated with the Third Trimbos Report (which AFPL should not be permitted to recover from the Settlement Sum);
- (b) the miscarriage of the First Approval Application;
- (c) the wasted costs of the First Approval Application;
- (d) the costs of the appeal;
- (e) the costs of the remitter; and
- (f) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

#### Particulars

(1) The wasted costs of the Third Trimbos Report comprise: Mr Trimbos's costs of \$30,000 plus GST, Mr O'Bryan's charges of about 1 day totaling \$8,080 plus GST charged in connection with the report in December 2017 and January 2018, and Mr Symons' charges of about 38 hours totaling \$15,200 plus GST from 22 November 2017 to 4 January 2018.

(2) The fees of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law comprise the significant proportion of the legal costs and disbursements that AFPL has sought to recover from the Settlement Sum, and upon which its claim for a commission is predicated.

(3) If the fees of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law were limited to a fair and reasonable amount, that would also have revealed that AFPL's entitlement to a commission was similarly

limited. It is likely that the court would have approved AFPL's claim for costs and/or commission in a substantially lower sum than was sought and approved in the First Approval Application.

(4) The quantum of the costs and commission claimed by AFPL caused or contributed to the appeal.

(5) Accordingly, if the fees of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law fees were limited to a fair and reasonable amount reflecting the work actually undertaken by them and the rates they were properly entitled to charge, then by about 21 March 2018 or alternatively by about 29 November 2018, the Settlement Sum would have been distributed to debenture holders/group members. Debenture holders have suffered losses from the delay in payment of **\$5 - \$7 million**. The Contradictor refers to paragraph 196(a) below.

(6) In those circumstances, the costs of the remitter would not have been incurred.

(7) Alternatively, if the appeal and the remitter had occurred in any event, the costs of the remitter would have been substantially lower, and the remitter could have been resolved sooner, because substantially less time and cost would have been spent in investigating and seeking explanations for the conduct alleged in paragraphs 67 to 72.



**G. Conduct in relation to issuing the summons for approval of the settlement and the notice to debenture holders**

**G.1 Outline of contraventions of CPA**

75 By their conduct in connection with preparing and issuing a summons and notice to group members which stated that AFPL was seeking “*reimbursement*” of legal costs when AFPL had not in fact paid substantially all of the legal costs for which it claimed “*reimbursement*”:

- (a) AFPL, Mr O’Bryan and Mr Symons contravened the overarching obligation to act honestly;
- (b) AFPL, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to mislead or deceive;
- (c) AFPL, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to only make claims that have a proper basis.

**G.2 Manner in which it is alleged the CPA was contravened**

76 Between 27 November 2017 and 12 December 2017, Mr O’Bryan AM SC and Mr Symons drafted and settled [\[SYM.001.002.4689\]](#) [\[SYM.001.002.4690\]](#) [\[SYM.001.002.4694\]](#) [\[SYM.001.002.4697\]](#) [\[SYM.001.002.4704\]](#) [\[SYM.001.001.8552\]](#) [\[SYM.001.001.8817\]](#) [\[SYM.001.001.8818\]](#) [\[SYM.001.001.8825\]](#) [\[SYM.001.001.8827\]](#) [\[SYM.001.001.8834\]](#) [\[SYM.001.001.8836\]](#) [\[SYM.001.001.8840\]](#), AFPL gave instructions to file or issue [\[SYM.001.002.3621\]](#) [\[SYM.001.002.3491\]](#), and Portfolio Law caused to be filed or issued:

- (a) a summons dated 7 December 2017 (**Summons**) [\[SYM.002.001.5313\]](#) seeking approval of the settlement including the claim for the sum of \$4.75 million plus GST for legal costs and disbursements incurred by AFPL to be paid directly to AFPL by way of “*reimbursement*” for legal costs;
- (b) a notice to debenture holders/group members (**Notice**) informing them that AFPL was seeking “*reimbursement*” of legal costs [\[SYM.002.003.2274\]](#).

77 This conduct contravened the relevant Overarching Obligations in that:

- (a) The Summons and Notice which referenced the “*reimbursement*” of the sum of \$4.75 million plus GST in respect of legal costs and disbursements conveyed to the court, the group members, and the parties that those costs

had in fact been paid by AFPL. That was so because the ordinary meaning of the word “reimbursement” is pay back, refund, or repay.

- (b) That was misleading. AFPL had not paid \$4.75 million plus GST in legal costs and disbursements as suggested by the Summons and Notice.

#### Particulars

AFPL has admitted that all of Mr O'Bryan's invoices for the Relevant Period have not been paid [\[TRI.003.020.0017, para 19\(b\)\]](#).

Mr O'Bryan and Portfolio Law have admitted that, as at March 2019, a sum of approximately **\$500,000** in respect of Mr O'Bryan's pre-July 2016 costs remained unpaid [\[SYM.002.004.3331\]](#)[\[SYM.002.004.3332\]](#) [\[CBP.001.012.0164\]](#)[\[CBP.001.012.0165\]](#).

The Contradictor refers to and repeated paragraph 37 and the documents referred to in that paragraph: [\[AFP.005.001.0296\]](#), [\[AFP.001.001.4583\]](#), [\[SYM.001.001.7119\]](#).

- (c) The misleading impression was fortified by other documents filed in connection with the First Approval Application as set out in paragraph 92 – 93 below.
- (d) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law failed to make any enquiries about the extent to which the costs claimed by AFPL had been paid.
- (e) Further, AFPL, Mr O'Bryan and Mr Symons each knew that AFPL had not paid \$4.75 million plus GST in costs, because:
- (i) AFPL knew what payments it had made in the course of the litigation.
  - (ii) AFPL knew of the Fee Arrangements it had entered into.
  - (iii) Mr O'Bryan knew that none of his own fees sought to be recovered by AFPL (totaling \$3 million) had been paid.
  - (iv) Mr Symons knew that most of his own fees for the Relevant Period sought to be recovered by AFPL had not been paid.
  - (v) Mr Symons knew that Zita/Portfolio Law had not prepared or issued any invoices as late as 20 November 2017 [\[SYM.001.001.6272\]](#), and accordingly he must have known that it was unlikely that Mr Zita/Portfolio Law had been paid.

- (vi) Further, Mr O'Bryan and Mr Symons must have known that most of the fees of the other had not been paid, by virtue of:
  - (A) the Fee Arrangements in place between AFPL, Mr O'Bryan and Mr Symons; and
  - (B) the fact that Mr Elliott, Mr O'Bryan and Mr Symons worked closely together on a number of matters at the relevant time, and must have discussed their fee arrangements on the matters they worked on together.

### **G.3 Losses arising from Summons and Notice Contraventions**

78 The Summons and Notice Contraventions contributed to:

- (a) the miscarriage of the First Approval Application;
- (b) the wasted costs of the First Approval Application;
- (c) the costs of the appeal;
- (d) the costs of the remitter; and
- (e) the delay in debenture holders receiving their proper entitlement to the Settlement Sum.

#### Particulars

If the Summons and Notice had disclosed the true position, namely that legal costs claimed by AFPL had not been paid by it, it is likely that any objector or contradictor to AFPL's claims would have drawn to the court's attention the need for increased scrutiny of the claim for legal costs and the need for the claim for commission to be assessed in light of the funding risk actually assumed by AFPL.

## H. Conduct in relation to providing misleading information to an expert witness and/or procuring a misleading report

### H.1 Outline of contraventions of CPA

79 By their conduct in connection with the Third Trimbo's Report:

- (a) AFPL, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to mislead or deceive;
- (c) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs are reasonable and proportionate; and
- (d) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty,

(Expert Witness Contraventions).

### H.2 Relevant background

80 Clause 3.9 of the Settlement Deed provided:

*"[AFPL] agrees to engage a suitably qualified external costs consultant to prepare an expert report to be filed in the Bolitho Approval Application concerning whether the legal costs and disbursements incurred by BSLLP and claimed in clause 3.11 below have been reasonably incurred and are of a reasonable amount. The Parties agree that the external costs consultant's report will be exhibited to the costs consultant's affidavit as a confidential exhibit."*

81 Clause 3.11 of the Settlement Deed provided:

*"At the hearing of the Bolitho Approval Application and subject to the external cost consultant's expert report filed pursuant to clause 3.9 above confirming that the legal costs and disbursements claimed were incurred by BSLLP, have been reasonably incurred and are of a reasonable amount, BSL, the Liquidators and Trust Co agree to instruct their legal representatives to support BSLLP's application for payment of legal costs and disbursements incurred by BSLLP in the conduct of the Bolitho Proceeding in the sum of \$4.75 million (plus GST)..."*

82 On 24 November 2017, AFPL retained Mr Peter Trimbo's as a suitably qualified external costs consultant to prepare a report to be filed with the court providing his independent opinion as a legal costs expert on the reasonableness of the costs

claimed and incurred by AFPL [\[AFP.001.001.2226\]](#) [\[AFP.001.001.2227\]](#) [\[AFP.001.001.2230\]](#).

- 83 Mr Trimbos prepared a report dated 4 January 2018 (**Third Trimbos Report**), which was filed by Portfolio Law on instructions from AFPL [\[SYM.001.002.3119\]](#). That report triggered the obligation in clause 3.11 of the Settlement Deed, which compelled the SPRs and Trust Co to instruct their representatives to support the costs claimed at the hearing of the First Approval Application.
- 84 The Third Trimbos Report was filed on a confidential basis. AFPL would not allow debenture holders, the SPRs, or the SPRs' solicitors and counsel to see the Third Trimbos Report [\[TRI.001.006.0661\]](#)[\[SYM.002.002.0505\]](#)[\[SYM.001.002.8843\]](#). If the SPRs or their solicitors and counsel had been given access to the report, they would have been well placed to assist the court in assessing the reasonableness of the claimed costs and disbursements<sup>77</sup> and, in particular, could have identified some of the erroneous assumptions that underpinned the report,<sup>78</sup> such as the likely length of the trial, the existence of the SPR Proceeding, the fact that the SPRs had paid for substantially all of the expert evidence in the proceedings, and the fact that Mr O'Bryan's and Mr Symons' fees were out of all proportion with the work evidently undertaken by them, particularly when compared to the work undertaken by counsel for the SPRs.

### H.3 Manner in which it is alleged the CPA was contravened

#### H.3.1 Conduct in respect of providing Mr Trimbos with misleading information

- 85 AFPL, Mr O'Bryan AM SC and Mr Symons provided Mr Trimbos with information and documents that did not reflect the true position with regard to Mr Bolitho's costs. In particular:
- (a) On 24 November 2017, AFPL instructed Mr Trimbos that "*Legal costs and disbursements incurred by Mr Bolitho and paid by [AFPL] from 1 July 2016 to date*" included Mr O'Bryan's fees of \$2,306,500 plus GST, Mr Symons' fees of \$600,000 plus GST and Portfolio Law's fees of \$377,000 plus GST [\[AFP.001.001.2230\]](#) [\[AFP.001.001.3179\]](#). As at 24 November 2017 when the instructions were issued:

<sup>77</sup> *Botsman v Bolitho* [2018] VSCA 278 [260].

<sup>78</sup> See the affidavit of David Newman sworn 25 March 2019 and the Further SPR Opinion paras 38 to 79 and 253 to 254.

- (i) No invoices had been issued by Portfolio Law or Mr O'Bryan.<sup>79</sup>
  - (ii) Only three invoices had been issued by Mr Symons as at that date, for a sum of approximately \$35,000,<sup>80</sup> and AFPL had paid only approximately that sum to Mr Symons in respect of the Relevant Period (see paragraph 77(b) and [\[AFP.005.001.0296\]](#)).
  - (iii) AFPL had not paid anything to Portfolio Law or Mr O'Bryan in respect of the Relevant Period (see paragraph 77(b) and [\[AFP.005.001.0296\]](#)).
- (b) The invoices and fee slips of counsel provided to Mr Trimbo represented that the work set out in those fee slips had been undertaken by them. That was false for the reasons alleged in paragraph 68, which they knew for the reasons alleged in 69 and 70.
  - (c) The invoices issued by Mr O'Bryan and Mr Symons were addressed to Mr Zita/Portfolio Law. In fact, Mr O'Bryan and Mr Symons issued their invoices directly to AFPL and/or Mr Trimbo. They had not sent their invoices to Mr Zita/Portfolio Law and Mr Zita/Portfolio Law had not satisfied themselves that the fees claimed were reasonable.
  - (d) The invoices of counsel contained the Monthly Invoice Representation, which conveyed the impression that the invoices had been issued on a monthly basis and paid by AFPL, the litigation funder, in the ordinary course. In fact, most of Mr Symons' invoices<sup>81</sup> and all of Mr O'Bryan's invoices were issued in late November 2017/early December 2017, after an "in principle" agreement had been reached with Trust Co to settle the proceeding.
  - (e) Mr O'Bryan AM SC's invoices were also stamped as "PAID" when they had not been paid.
  - (f) All of those matters conveyed an implicit assurance that AFPL and Portfolio Law had satisfied themselves as to the work undertaken and charged to their account. That assurance was relevant to anyone reviewing the costs claimed, and was likely to inform the assessment of whether the costs claimed were likely to be reasonable. That assurance was false or

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<sup>79</sup> Affidavit of Mark Elliott sworn 9 May 2019, para 9.

<sup>80</sup> Being the total of invoice 7-37 (\$8,662.50), 7-38 (\$21,656.25) and 7-80 (\$4,881.25).

<sup>81</sup> Mr Symons' invoices numbered 7-72, 7-73, 7-74, 7-75, 7-76, 7-77, 7-78, 7-79, 7-81 and 7-82 were issued in late November 2017/early December 2017.

misleading given that (1) AFPL had not paid the costs (as alleged in paragraph) and had not taken any real risk in respect of them and (2) the invoices were issued only after a significant settlement had been reached, and it was intended that the costs would be paid from the settlement proceeds.

- (g) Mr O'Bryan AM SC provided Mr Trimbo with the O'Bryan December 2017 Costs Agreement, and Mr Symons provided Mr Trimbo with the Symons December 2017 Cost Disclosure Statements [\[SYM.001.003.2842\]](#) [\[SYM.001.003.2844\]](#), which they brought into existence in December 2017 when Mr Trimbo asked for them [\[SYM.001.003.2854\]](#) as alleged in paragraph 47(b) and the relevant particulars of that paragraph.
- (h) The Symons December 2017 Cost Disclosure Statements purported to provide Portfolio Law with disclosure of costs in accordance with the Legal Profession Uniform Law (Vic), including:
  - (i) estimates of the costs that Mr Symons would incur at different points in time throughout the litigation;
  - (ii) notification of increases in Mr Symons' fee rate at different points in time throughout the litigation.
- (i) The Symons December 2017 Cost Disclosure Documents also contained statements that:
  - (i) Mr Symons was required to notify Portfolio Law of any significant change to the basis on which legal costs would be calculated by Mr Symons or any significant change to Mr Symons' estimate of his legal costs. Mr Symons was required to provide the ongoing disclosure to Portfolio Law as soon as practicable after there was a significant change to the previously provided information.
  - (ii) Mr Symons would send Portfolio Law accounts at regular intervals during the matter and at the end of the matter.
- (j) In fact:
  - (i) Mr Symons had not provided Mr Bolitho or Portfolio Law with estimates of the costs that he would incur at different points in time

throughout the litigation as set out in the December 2017 Symons Cost Disclosure Documents;

- (ii) Mr Symons had not notified Mr Bolitho or Portfolio Law of the escalating fee rates that he applied to his fees for the 2017 calendar year;
  - (iii) Mr Symons had not notified Mr Bolitho or Portfolio Law of any change to the basis on which legal costs would be calculated by Mr Symons or any change to any estimate of cost he had previously provided;
  - (iv) Mr Symons had not sent his accounts to Portfolio Law;
  - (v) Mr Symons had not sent his accounts at regular intervals during the matter.
- (k) The O'Bryan December 2017 Costs Agreement was backdated May 2016 and signed by Mr O'Bryan AM SC. It specified that Mr O'Bryan would charge \$1,100 per hour (including GST) and \$11,000 per day (including GST). Under the heading *"Estimate of the total legal costs"*, the document stated:

*"For the presently anticipated scope of the legal services, including preparation for trial, reading, research, attending Court as required, advising, settling Court-related and other litigation documents, appearance at trial (estimated at 5-6 months in total over the following 2-3 years) and related matters – the total estimated amount is unknown but is not presently expected to exceed \$2M."*

- (l) In fact:
- (i) Mr O'Bryan had not informed AFPL, Portfolio Law or Mr Bolitho in May 2016 that he anticipated he would incur \$2 million in costs up to and including trial.
  - (ii) Mr O'Bryan had not informed AFPL, Portfolio Law or Mr Bolitho that he would charge his rates for the Relevant Period at \$1,100 per hour (including GST) and \$11,000 per day (including GST) for the Relevant Period, which rates were higher than the rate specified in the O'Bryan/Portfolio Law July 2016 Costs Agreement.



- (m) Mr O'Bryan AM SC sent an email to Mr Trimbo on 20 December 2017 copied to Mr Elliott, Mr Zita and Mr Symons attaching the O'Bryan December 2017 Costs Agreement backdated to 30 May 2016 [\[SYM.001.003.0203\]](#) [\[SYM.001.003.0204\]](#) and stating:
- (i) *"I believe Mark Elliott signed the counterpart of this for the litigation funder, but I have not been able to locate the signed counterpart. I will continue searching for it".*
  - (ii) *"[M]y work on the Banksia class action continued and my accounts were duly paid by the litigation funder."*
  - (iii) *"I increased my fees on 1 July 2017 to \$1,250/hr; \$12,500/day by notification to my clients, including BSL Litigation Partners Ltd. My fees were paid at that amended rate from that date onwards. No new agreement was signed."*
- (n) These statements were false in that:
- (i) The agreement had not been prepared or signed in May 2016.
  - (ii) Mr Elliott had not signed a counterpart of the agreement.
  - (iii) Mr O'Bryan's accounts had not been paid by AFPL.
  - (iv) Mr O'Bryan had not notified AFPL or Portfolio Law of any increase in his rates to \$1,250/hr or \$12,500/day on 1 July 2017.
- (o) Because the O'Bryan December 2017 Costs Agreements and the Symons December 2017 Cost Disclosure Statements had been created in December 2017 (after most of the work the subject of those documents had been undertaken):
- (i) Mr O'Bryan AM SC's costs agreement was not valid and binding.
  - (ii) Mr O'Bryan AM SC's disclosure statement incorporated into the costs agreement was not a valid cost disclosure under the Uniform Law or the terms of the O'Bryan/Portfolio Law July 2016 Costs Agreement.
  - (iii) Mr Symons' disclosure statements were not valid cost disclosures under the Uniform Law or the terms of the Symons/Portfolio Law February 2015 Costs Agreement.

- (iv) The rates and estimates specified in those documents had not been disclosed in writing to Portfolio Law, AFPL or Mr Bolitho in any other document.
- (v) Mr O'Bryan AM SC and Mr Symons had not calculated and charged their fees in accordance with the terms of relevant agreements.
- (p) None of AFPL, Mr O'Bryan and Mr Symons disclosed to Mr Trimbo the Fee Arrangements they had agreed between themselves, and further, the cost disclosure documents and invoices they provided to him intentionally concealed those arrangements.
- (q) On 29 December 2017, Mr O'Bryan AM SC informed Mr Trimbo that the trial was likely to run for over 120 sitting days [\[SYM.001.003.2828\]](#)<sup>82</sup> (in circumstances where he knew that the trial had been set down for 45-50 sitting days for hearing by the trial judge under the agreed trial plan and framework made by the court after consultation with senior counsel and the other parties' counsel).
- (r) On 1 January 2018, in response to a query by Mr Trimbo about Mr O'Bryan's January 2017 invoice, Mr O'Bryan AM SC informed Mr Trimbo that "***[AFPL] has paid the full amount of the tax invoice (they should hire you as their auditor!), so I will reimburse BSLLP \$22,000 for the 2 days overcharged***" [\[NOB.500.001.7237\]](#). That statement was false as AFPL had not paid the invoice. Mr Elliott/AFPL knew that Mr O'Bryan had made those statements, because Mr O'Bryan copied and forwarded the email to Mr Elliott. Mr Elliott/AFPL did not correct the false statement therein made to Mr Trimbo [\[SYM.001.003.2825\]](#) [\[NOB.500.001.7237\]](#).
- (s) The instructions to Mr Trimbo did not draw his attention to the existence of the SPR Proceeding or the fact that the SPRs had paid for substantially all of the evidence in the proceedings.

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See also Third Trimbo Report, para 95; Further SPR Opinion, para 99.

### H.3.2 Conduct in respect of permitting the Third Trimbo Report to be filed and failing to correct the inaccurate or misleading statements in it

- 86 On 18 December 2017, AFPL instructed Mr Trimbo to exhibit all the invoices briefed to him, including the invoices of Mr O'Bryan and Mr Symons, to his report [\[TRI.001.006.0661\]](#).
- 87 On 3 January 2018, Mr Trimbo sent a draft report to AFPL, Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott [\[NOB.500.005.2312\]](#) [\[NOB.500.005.2314\]](#) [\[NOB.500.005.2354\]](#) [\[NOB.500.005.2457\]](#) [\[NOB.500.005.2458\]](#) [\[SYM.001.003.2295\]](#) [\[SYM.001.003.2297\]](#) [\[SYM.001.003.2333\]](#) [\[SYM.001.003.2336\]](#) [\[SYM.001.003.2337\]](#) [\[SYM.001.003.2439\]](#) [\[SYM.001.003.2440\]](#). Mr O'Bryan and Mr Symons reviewed the draft report and provided feedback [\[SYM.001.002.9173\]](#) [\[SYM.001.002.9527\]](#).
- 88 Mr Zita/Portfolio Law filed the Third Trimbo Report on instructions from AFPL [\[SYM.001.002.3119\]](#).
- 89 On 26 January 2018, Mr Zita/Portfolio Law emailed a copy of the Third Trimbo Report together with all of its annexures to Mr O'Bryan, Mr Symons, AFPL and Alex Elliott [\[SYM.001.001.8488\]](#) [\[SYM.001.001.8489\]](#) [\[SYM.001.001.7601\]](#) [\[SYM.001.001.7602\]](#) [\[SYM.001.001.6623\]](#) [\[SYM.001.001.6624\]](#) [\[SYM.001.001.6623\]](#) [\[SYM.001.001.6624\]](#).
- 90 Having reviewed the report, AFPL, Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law and AFPL failed to ensure that it was accurate and not misleading and, in particular, failed to correct the matters referred to in paragraph 92 to 93 below at any time prior to the hearing on 30 January 2018 or at all.

### H.3.3 Contraventions of overarching obligation not to mislead or deceive

- 91 The Third Trimbo Report commissioned by AFPL and filed with the court by Portfolio Law was misleading, both of itself and in conjunction with other materials that were filed.
- 92 The Third Trimbo Report was misleading because:
- (a) It exhibited and/or relied upon the false and misleading information and documents provided by AFPL, Mr O'Bryan and Mr Symons, as alleged in paragraph 85, including AFPL's letter of instructions, the invoices and fee slips of Mr O'Bryan and Mr Symons, the O'Bryan December 2017 Costs Agreement, the Symons December 2017 Costs Disclosure Statements, and

the information they had provided to him in the course of him preparing his report as set out in paragraph 85.

- (b) The report did not disclose that the legal costs were not calculated and charged in accordance with the Funding Agreement, which provided that AFPL was entitled to be paid out of the Settlement Sum “the Case Costs **paid** by [AFPL]”.<sup>83</sup> The report conveyed the implicit assurance that this condition was satisfied.
- (c) The report did not disclose any of the Fee Arrangements in place between AFPL, Mr O’Bryan and Mr Symons.
- (d) The report:
  - (i) did not disclose that the rates charged by Mr O’Bryan and Mr Symons were not supported by valid cost disclosures under the Uniform Law or under the terms of relevant Costs Agreements.
  - (ii) did not disclose that there were conditional and/or deferred fee arrangements in place.
- (e) Mr Trimbo was likely to have concluded that the costs claimed were consistent with Mr O’Bryan’s and Mr Symons’ cost estimates set out in the O’Bryan December 2017 Costs Agreement and the Symons December 2017 Cost Disclosure Statements which they provided to him in December 2017, when in fact, those cost estimates were prepared after their costs had already been quantified.
- (f) The report stated that “*the hourly rates provided for in the O’Bryan costs agreements are reasonable*”.<sup>84</sup> The report did not disclose the fact that, even assuming that Mr O’Bryan could charge his fees at the rates of \$11,000 per day (GST inclusive) from 1 July 2016 (as per the O’Bryan December 2017 Costs Agreement which Mr O’Bryan had provided to Mr Trimbo), Mr O’Bryan had not calculated and charged his fees at those rates. Rather, he had calculated and charged his fees at the rate of \$11,000 per day **plus GST** from 1 July 2016 and \$12,500 **plus GST** from 1 July 2017.

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<sup>83</sup> Clause 12.1.1.

<sup>84</sup> Third Trimbo Report, para 87.

- (g) The report did not draw attention to the fact that Mr Symons had charged significant time for reviewing the “Receivers’ Court Book” and the “Liquidators’ Court Book”, for which Mr Elliott had also charged significant fees prior to the Partial Settlement.
- (h) The report did not disclose that Mr Zita/Portfolio Law had not calculated and charged their fees in accordance with the Portfolio Law Costs Agreement. In particular, it did not disclose that Mr Zita/Portfolio Law had charged according to the hourly rates specified in that cost agreement but without making any contemporaneous record of the time Portfolio Law had actually spent on the activities for which they charged time, and without rendering regular accounts as required by the Costs Agreement [\[CBP.004.005.5753\]](#). Nor did the report address the fact that Mr Zita/Portfolio Law had previously informed Mr Trimbos that, in March 2015, Mr Zita/Portfolio Law had agreed to charge according to the LPRO scale, rather than on the basis of hourly rates.
- (i) The report was prepared without reference to the SPR Proceeding, and Mr Trimbos was not told that there was a parallel proceeding in which another legal team had undertaken substantial work for the benefit of the Bolitho Proceeding, nor instructed to consider whether the costs claimed by AFPL and Mr Bolitho were reasonable having regard to the work that was undertaken by the SPRs and their legal team for the benefit of both proceedings.<sup>85</sup>
- (j) The report did not disclose Mr Trimbos’s prior retainers to act for or on behalf of Mr Elliott and his associated entities, including *Camping Warehouse v Downer and Webster v Murray Goulburn Cooperative Co Limited*, *Melbourne City Investments v Treasury Wine Estates* (in which Mr O’Bryan and Mr Symons also acted).
- (k) On the bases set out in the preceding sub-paragraphs, the report opined that:
  - (i) costs “incurred to date” by Mr O’Bryan of \$2,326,775, by Mr Symons of \$608,031 and by Portfolio Law of \$377,795 were fair and reasonable;<sup>86</sup> and

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<sup>85</sup> The instructions are at the Third Trimbos Report, Annexure A. See *Botsman v Bolitho* [2018] VSCA 278 [259].

<sup>86</sup> Third Trimbos Report, paras 78 and 164.

- (ii) opined that “anticipated future costs” to finalise the settlement of \$400,796 for professional fees and \$354,260.44 for disbursements were fair and reasonable.<sup>87</sup>

93 The Third Trimbo Report and other materials that were filed in conjunction with it were misleading in that:

- (a) The First Bolitho Opinion stated at para 116(b): *“The Court may be reassured by the role of the plaintiff’s litigation funder, a sophisticated participant in this litigation with access to significant knowledge and experience of litigation, in providing oversight in respect of the engagement of solicitors and counsel on reasonable terms”*. That fortified the assurance that AFPL had satisfied itself as to the reasonableness of the costs charged to its account.
- (b) The Third Trimbo Report drew a distinction between costs *“incurred to date”* and *“anticipated future costs”* to finalise the settlement. The First Bolitho Opinion drawn by Mr Symons and settled with Mr O’Byrne drew a similar distinction in encouraging the court to approve the funding commission because of the funding risk said to have been taken by AFPL as a result of *“paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million”*.<sup>88</sup> That is, the Trimbo Report and the First Bolitho Opinion together created a misleading impression that AFPL had paid legal costs incurred to date in accordance with the due dates stated on the invoices, when in fact, as at the date of the First Bolitho Opinion, AFPL had not paid that amount.
- (c) The Second Bolitho Opinion stated that AFPL had paid Mr Bolitho’s costs and disbursements<sup>89</sup> when that was untrue.
- (d) The Summons and Notice referred to “reimbursement” of legal costs in the sum of \$4.75 million plus GST. The ordinary meaning of the word “reimbursement” is pay back, refund, or repay.
- (e) The First Bolitho Opinion invited the court to apply the principles set out by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at para 80 (**Money Max principles**).<sup>90</sup>

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<sup>87</sup> Third Trimbo Report, para 168.

<sup>88</sup> First Bolitho Opinion, para 70.

<sup>89</sup> Second Bolitho Opinion, para 13.

- (f) The Money Max principles include *“the legal costs expended and to be expended”* by the funder.
- (g) The reference to costs *“to be expended”* is properly to be understood as a reference to the costs that would have been expended by the funder until the conclusion of the trial, if the matter had proceeded to trial.
- (h) In relation to *“the legal costs expended and to be expended”*, the First Bolitho Opinion stated: *“The plaintiff’s legal costs and disbursements, while regarded as reasonable represent a significant expense to BSLLP. The legal costs and disbursements paid by BSLLP or for which it will become liable are in the order of \$7.8 million. It must of course be noted that after the partial settlement the fees for which BSLLP has not been reimbursed are in the order of \$5.3 million. Had the proceeding continued to trial, the costs and disbursements incurred in running the plaintiffs case would have been significantly higher. The magnitude of this funding risk justifies the Funder’s Commission now sought.”*
- (i) The real amount *“expended and to be expended”* by AFPL was very low, because AFPL had entered into deferred and/or conditional fee arrangements with Mr Bolitho’s legal representatives. In relation to the claims against Trust Co in the Bolitho Proceeding, AFPL had *“expended”* an amount in the order of no more than about **\$500,000**<sup>91</sup> out of the total costs claimed of **\$5.225 million**.

#### H.3.4 Contravention of overarching obligation to act honestly – state of mind of Mr O’Bryan, Mr Symons, and AFPL

- 94 By their conduct in procuring the Third Trimbo’s Report and causing or permitting it to be filed and relied upon, each of Mr O’Bryan AM SC, Mr Symons and AFPL contravened the overarching obligation to act honestly, in that they each knew that, or were reckless as to whether, the Third Trimbo’s Report was misleading by reason of the information supplied to him by them as set out in paragraph 85 above.

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<sup>90</sup> First Bolitho Opinion, para 165.

<sup>91</sup> AFPL has discovered a document purporting to be a summary of costs that it has paid in the course of the litigation [[AFP.001.001.4583](#)]. On the basis of that document, it appears that, as at 30 January 2018, AFPL’s “out of pocket” expenses (ie, amounts it had paid for which it had not already been “reimbursed” at the time of the Partial Settlement) were around \$500,000.

95 In particular:

- (a) AFPL, Mr O'Bryan and Mr Symons deliberately concealed their Fee Arrangements from Mr Trimbo by the false and misleading cost disclosure documents and invoices they issued to him.
- (b) AFPL and Mr O'Bryan knew that Mr O'Bryan's invoices for the Relevant Period had not been issued on a monthly basis throughout the litigation and had not been paid. AFPL and Mr Symons knew that Mr Symons' invoices for the 2017 calendar year had not been issued on a monthly basis throughout the litigation and had not been paid. In addition, it is to be inferred that Mr O'Bryan and Mr Symons knew that the invoices of the other had not been issued or paid because:
  - (i) this must have been the subject of discussion between them in the period between 10 November 2017 and 4 January 2018 in the context of discussions about briefing Mr Trimbo, providing him with material, and filing his report;
  - (ii) on 14 November 2017, Mr O'Bryan emailed Florence Koh cc Mr Symons stating *"Florence, can you please send all of my fee memoranda in Banksia to Michael, so he will know what mine look like?"* [NOB.500.001.7416]. It is to be inferred that Mr O'Bryan knew that Mr Symons had not yet issued any invoices. Further, it would have been evident to Mr Symons from the email chain to which he was copied that Mr O'Bryan had not yet issued any invoices;
  - (iii) on 8 December 2017, Mr Elliott emailed Mr Symons, Alex Elliott, Mr Zita and Mr O'Bryan, stating: *"Trimbo will say: when I get the material I will tell you the delivery date! So, show me the material gents."* [SYM.001.002.8281]. Mr Symons replied cc all stating *"Mine will be with you tonight. We need a response from Trimbo on Monday"* [SYM.001.002.8281]. Mr O'Bryan replied to Mr Elliott, Mr Symons and Alex Elliott stating that his material would be provided *"Monday"* [SYM.001.002.8254]. It would have been evident to Mr O'Bryan and Mr Symons from that email exchange that each of them was yet to finalise their invoices, and that neither of them had been paid;
  - (iv) in the circumstances alleged in paragraph 47, Mr O'Bryan and Mr Symons must have known of the Fee Arrangements in place between



each of them and AFPL, and must have known that neither of them had been paid, at least in respect of the large majority of their fees.

- (c) Mr O'Bryan's draft invoices prepared by Mr O'Bryan's secretary Florence Koh on about 14 or 15 November 2017 showed a "processed date" of **15 November 2017**. Ms Koh asked Mr O'Bryan whether that mattered. It is to be inferred that Mr O'Bryan instructed her to alter the "processed date" so that the invoices would appear as if they had been issued on a monthly basis [\[NOB.500.001.7416\]](#). Mr Symons knew of these matters because those emails were forwarded to him [\[NOB.500.001.7416\]](#). It is to be inferred that both Mr O'Bryan and Mr Symons made a deliberate decision to ensure that their invoices appeared as if they had been issued on a monthly basis.
- (d) Mr O'Bryan sent emails to Mr Elliott in which he expressly discussed stamping his invoices as "PAID" for the purpose of procuring a favourable report from Mr Trimbos. On 21 November 2017, Mr O'Bryan emailed Mr Elliott stating: *"I will correct my invoices via Florence over the next few days and issue them as 'paid' for Trimbos's purposes (as per the mini settlement). He will find it much easier to justify a rate of \$1100/hr & \$11,000/day, so I will calculate accordingly & increase hours as appropriate"* [\[NOB.500.001.7495\]](#). On 4 December 2017, Mr O'Bryan emailed Mr Elliott stating that he would complete his invoices over the next few days and asking: *"Do you want the invoices shown as paid or unpaid? I prefer paid & so will Trimbos"* [\[NOB.500.005.2262\]](#). It is to be inferred that (1) Mr O'Bryan deliberately arranged for his invoices to be stamped as "PAID", (2) one purpose of doing so was to procure a favourable report from Mr Trimbos and (3) Mr Elliott/AFPL knowingly assented to this course.
- (e) Mr Symons knew that Mr Symons' disclosure statements in respect of the Relevant Period sent to Mr Trimbos in December 2017 and copied to Mr O'Bryan, Mr Elliott and Mr Zita/Portfolio Law had been created in December 2017. AFPL knew that it had not previously seen copies of those documents. AFPL knew that they had been recently created by Mr Symons.
- (f) Mr O'Bryan knew that the O'Bryan December 2017 Costs Agreement sent to Mr Trimbos in December 2017 and copied to Mr Symons, Mr Elliott and Mr Zita/Portfolio Law had been created in December 2017 and not on 30 May 2016 as stated in that document. AFPL knew that it had not received that

document at any time prior to 20 December 2017, and knew that it had been recently created by Mr O'Bryan.

- (g) Mr O'Bryan and Mr Symons must have discussed the email from Mr Trimbo sent on 18 December 2017 requesting copies of their costs agreements. It is to be inferred that each was aware of the actions of the other in creating cost disclosure documents to support the fees charged.
- (h) AFPL, Mr O'Bryan and Mr Symons knew that the assumption made by Mr Trimbo as to the likely length of trial was inconsistent with court orders and the agreed trial framework, which had been agreed in consultation with Mr O'Bryan, Mr Symons, and Mr Zita/Portfolio Law.
- (i) AFPL, Mr O'Bryan and Mr Symons knew that the fees sought to be recovered by AFPL and Mr Bolitho were excessive and unreasonable.

#### Particulars

The Contradictor refers to and repeat paragraphs 67 to 73, 85 and 109. Further particulars may be provided following discovery and/or subpoenas.

#### H.3.5 Contravention of Paramount Duty

- 96 Justice Croft specifically accepted and relied upon the Third Trimbo Report and the annexed source materials.<sup>92</sup>
- 97 The conduct of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL contravened the Paramount Duty because that conduct:
  - (a) invited and caused an expert witness, who owed duties to the Court, to prepare a misleading report;
  - (b) invited the Court to rely (and in fact the Court did rely) on misleading evidence, such that the Court was invited to (and did) proceed on an incorrect basis;
  - (c) amounted to an abuse of the practices and procedures of the Court established in connection with the settlement of representative proceedings, in which material is often filed on a confidential basis and the Court relies

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<sup>92</sup> Reasons of Justice Croft, para 71(b).

heavily on the solicitors and counsel seeking approval of the settlement to put before it all matters relevant to the Court's assessment of the matter;

- (d) undermined the Court's trust and confidence in the honesty and candour of the solicitors and counsel appearing before it;
- (e) caused the Court not only to approve the costs claimed by AFPL in an excessive amount, but also to approve the commission claimed by AFPL in an excessive amount (as set out in paragraphs 98, 105, 119 and 149);
- (f) was inimical to the administration of justice.

#### **H.4 Losses resulting from Expert Witness Contraventions**

98 The Expert Witness Contraventions caused or contributed to:

- (a) the wasted costs associated with Mr Trimbos's report (which AFPL should not be permitted to recover from the Settlement Sum);
- (b) the miscarriage of the First Approval Application;
- (c) the wasted costs of the First Approval Application;
- (d) the costs of the appeal;
- (e) the costs of the remitter; and
- (f) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

#### Particulars

(1) If the Third Trimbos Report had disclosed the true position with respect to the matters outlined above, the court would have approved those fees in a substantially lower sum than was approved by the court at the First Approval Application.

(2) Further, since the report would have disclosed that Mr Bolitho's legal representatives were acting on a deferred and/or conditional fee basis and that AFPL had not paid most of the fees said to have been incurred, the court would have approved AFPL's commission in a substantially lower sum than was approved by the court at the First Approval Application.

(3) The Court of Appeal asked Mr O'Bryan and Mr Symons about the basis upon which Mr Bolitho/AFPL had withheld the Third Trimbos

Report from the SPRs.<sup>93</sup> The Court of Appeal found that it was not clear where the relevant interests diverged.<sup>94</sup>

(4) In circumstances where there was no apparent basis for Mr Bolitho/AFPL to withhold the Third Trimpos Report and no logical explanation has been provided, it is likely that, if the Third Trimpos Report had been accurate and not misleading with respect to all relevant circumstances, it would have been disclosed to the SPRs.

(5) If the Third Trimpos Report had been accurate and not misleading, and if it had been disclosed to the SPRs and and/or their legal representatives, the SPRs would have been well-placed to assist the court in assessing the reasonableness of the claimed costs and disbursements, such that one of the miscarriages of the First Approval Application (ie, approval of the costs and disbursements without proper scrutiny) would not have occurred.

(6) Accordingly, by about 21 March 2018 and alternatively by about 29 November 2018, the Settlement Sum would have been distributed to debenture holders/group members.

(7) Alternatively, if the appeal and remitter would have occurred in any event, the time and expense of the remitter would have been lower, because it would have been necessary to spend less time and expense in investigating the circumstances set out above in connection with the Third Trimpos Report.

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<sup>93</sup> Transcript of hearing on 8 June 2018, T117-121 [[SYM.001.001.7683](#)].

<sup>94</sup> *Botsman v Bolitho* [2018] VSCA 278 [260].

## I. Conduct in connection with the opinions filed in the First Approval Application

### I.1 Outline of contraventions of CPA

99 Each of Mr Symons, Mr O'Bryan and AFPL contravened:

- (a) the Paramount Duty;
- (b) the overarching obligation to act honestly;
- (c) the overarching obligation not to mislead or deceive,

by their conduct in (respectively) drafting, settling, and giving instructions to file the First and Second Bolitho Opinions (**Settlement Opinion Contraventions**).

### I.2 Manner in which it is alleged the CPA was contravened

100 Mr O'Bryan AM SC and Mr Symons prepared the First and Second Bolitho Opinions in support of the settlement approval application pursuant to section 33V and 33ZF of the *Supreme Court Act* 1986 (Vic). Those opinions were attached to affidavits sworn by Mr Zita as confidential exhibits and filed with the court by Portfolio Law. It is to be inferred that this was done on instructions from AFPL.<sup>95</sup>

101 The purpose of the First Bolitho Opinion was to seek court approval of the settlement and to justify the payments to AFPL in respect of commission and legal costs (including the costs claimed by Mr O'Bryan and Mr Symons, which AFPL had not yet paid).<sup>96</sup> The purpose of the Second Bolitho Opinion was to respond to debenture holders' objections to the settlement and payments to AFPL.

102 Mr Symons and Mr O'Bryan provided AFPL with drafts of the First and Second Bolitho Opinions before they were finalised [\[SYM.001.002.5099\]](#)  
[\[SYM.001.002.5101\]](#) [\[NOB.500.005.2485\]](#) [\[NOB.500.005.2487\]](#)  
[\[NOB.500.005.2619\]](#) [\[NOB.500.005.2621\]](#) [\[SYM.001.002.6694\]](#)  
[\[SYM.001.002.6695\]](#) [\[SYM.001.002.4785\]](#) [\[SYM.001.002.4787\]](#)  
[\[SYM.001.002.4921\]](#) [\[SYM.001.002.3120\]](#) [\[SYM.001.002.3121\]](#) [\[SYM.001.002.1826\]](#)  
[\[SYM.001.002.1828\]](#) [\[SYM.001.002.2697\]](#) [\[SYM.001.002.2698\]](#) [\[SYM.001.002.2151\]](#)  
[\[SYM.001.002.2153\]](#) [\[SYM.001.002.2157\]](#). AFPL reviewed the draft opinions

<sup>95</sup> Australian Funding Partners Limited v Botsman (No 3) [2018] VSC 507 [54], [56].

<sup>96</sup> Pages 1 – 8, 10 – 11 and 15 – 25 are directed at the reasonableness of the settlement sum Counsel for Mr Bolitho submitted that it was unnecessary to analyse the reasonableness of the settlement sum at length because Trust Co was giving all of its financial resources to settle the case. The remainder of the 97 page opinion is mostly directed at the payments to AFPL.

[SYM.002.001.8375]

[SYM.002.001.8378]

[SYM.001.002.3778]

[SYM.001.002.3079].

103 The opinions were misleading in material respects, as set out below.

104 In each relevant respect, Mr O'Bryan AM SC, Mr Symons and AFPL knew the true position, and therefore knew that the opinions were deficient (or were reckless as to whether the opinions were deficient). Further particulars follow.

1.2.1 Misleading statements and/or failure to frankly disclose the true position about counsel fees and fee arrangements in the opinions tendered to the court on the approval application

105 In the First Bolitho Opinion, Mr O'Bryan and Mr Symons stated that the fees sought to be recovered by AFPL and Mr Bolitho on account of legal fees were reasonable,<sup>97</sup> and invited the court to rely upon the Third Trimbo's Report, including the annexures,<sup>98</sup> which was also filed with the court on a confidential basis in the settlement approval application. In the Second Bolitho Opinion, Mr O'Bryan and Mr Symons again invited the court to rely upon the Third Trimbo's Report, and stated that: *"The assertion that the lawyers for the plaintiff are to receive 'an exorbitant premium' is inconsistent with the independent expert review of the legal fees and disbursements conducted by Mr Trimbo's".*<sup>99</sup>

106 Those statements were misleading in circumstances where the Third Trimbo's Report and its annexures were misleading by reason of the matters set out at paragraphs 47, 48, 67, 68, 70, 72, 85, 92 and 93 above.

107 Further, those statements were dishonest in circumstances where AFPL, Mr O'Bryan and Mr Symons knew the claim for legal costs was excessive as set out in paragraph 67 to 71 and knew that the Third Trimbo's Report was misleading as set out in paragraph 95.

108 The First Bolitho Opinion stated at para 116(b):

*"[T]he solicitors and counsel engaged by the plaintiff have been engaged on their usual terms. The Court may be reassured by the role of the plaintiff's litigation funder, a sophisticated participant in this litigation with access to significant knowledge and experience of litigation, in providing oversight in respect of the engagement of solicitors and counsel on reasonable terms."*

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<sup>97</sup> First Bolitho Opinion, para 104 - 118, 183.

<sup>98</sup> First Bolitho Opinion, para 104 - 118.

<sup>99</sup> Second Bolitho Opinion, para 26.

109 That statement was misleading. Portfolio Law's and counsel's retainers and/or costs agreements in respect of the Relevant Period included unusual terms, and there was no basis for the court to be reassured by the role of AFPL in providing oversight in respect of the engagement of solicitors and counsel. That was so because of the Fee Arrangements alleged in paragraph 47. AFPL, Mr O'Bryan AM SC and Mr Symons knew of their own Fee Arrangements. Further, Mr O'Bryan and Mr Symons knew that:

- (a) AFPL's obligation to pay the fees of Portfolio Law, Mr O'Bryan and Mr Symons was deferred until the settlement with Trust Co was approved, and/or (in the case of Mr O'Bryan) was contingent upon the outcome of that approval application;
- (b) it was intended that the fees charged by Portfolio Law, Mr O'Bryan and Mr Symons would be recovered out of the settlement proceeds, so that AFPL had little or no incentive to monitor and manage the costs (in fact, it was in AFPL's interests to maximize the costs in order to justify a substantial payment as consideration).

Further particulars may be provided following further discovery and/or subpoenas.

110 The statement at para 116(b) of the First Bolitho Opinion (referred to at paragraph 108 above) was reproduced in the judgment of Justice Croft at para 71. His Honour said that he was satisfied of the matters set out in para 116(b) on the basis of Mr Trimbo's report and the annexed source materials.

111 Mr O'Bryan AM SC and Mr Symons stated in the First Bolitho Opinion at para 131(e) that, at the time of inviting group members to enter into a Funding Agreement with AFPL, Mr Elliott informed them that "[AFPL] would pay for disbursements (such as Counsel's fees and witness expenses)". Counsel then stated that "Mr Elliott ceased to act as solicitor for the plaintiff in late 2014, and for the last approximately 19 months Mr Bolitho has been represented by Portfolio Law Pty Ltd. Portfolio Law Pty Ltd does not act on a 'no win / no fee' or conditional costs basis. The costs incurred by [AFPL] have therefore been significantly greater than those expected at the time that Mr Elliott wrote to group members."

112 This statement was misleading by reason of the following matters, known to Mr O'Bryan AM SC, Mr Symons and AFPL, which were not disclosed to the court in the First Bolitho Opinion or the Second Bolitho Opinion:

- (a) Although it might have been literally true that Portfolio Law was not acting on a “no win no fee” basis, the fee arrangements that AFPL had struck with Portfolio Law, Mr O’Bryan AM SC and Mr Symons were practically indistinguishable from “no win no fee” arrangements in circumstances where fees were to be recovered out of the settlement proceeds once costs were approved as alleged in paragraph 47.
- (b) By reason of the Fee Arrangements between AFPL, Portfolio Law, Mr O’Bryan AM SC and Mr Symons, AFPL had not paid any of their costs since 1 July 2016, and had only paid costs in respect of all or most of the pre-1 July 2016 period at or about the time that AFPL received settlement proceeds from the Partial Settlement in respect of those costs (as set out in paragraph 37).
- (c) The SPRs had retained substantially all of the witnesses and had paid substantially all of the witness expenses incurred in the conduct of the proceedings.<sup>100</sup>

113 The statement at para 131(e) of the First Bolitho Opinion was reproduced in the judgment of Justice Croft at para 77(e). His Honour said that it should be noted that Mr Elliott ceased to act as solicitor for the plaintiff in late 2014, and for the last approximately 36 months Mr Bolitho has been represented by Portfolio Law. Portfolio Law does not act on a “no win / no fee” or conditional costs basis. The costs incurred by AFPL had therefore been significantly greater than those expected at the time Mr Elliott wrote to group members.

114 Mr O’Bryan AM SC and Mr Symons stated in the First Bolitho Opinion at para 116(c) that *“all legal costs have been incurred in respect of (i) the conduct of this proceeding on behalf of group members; and (ii) the advancement of common questions on behalf of the plaintiff and group members (other than to the relatively minor extent necessary for pleading the plaintiff’s claim in the various iterations of the statement of claim) and defending interlocutory applications which, had they been successful, might have derailed the entirety of the claim and prevented group members from benefitting from its prosecution.”*

115 However the court was not informed that the work charged by Mr O’Bryan AM SC and Mr Symons included work undertaken in the pursuit of AFPL’s interests (and/or

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<sup>100</sup> See footnote 21 to the Further SPR Opinion and the Newman Affidavit, paras 61-68 and 98-99.



the interests of Mr Bolitho's legal representatives), rather than Mr Bolitho's interests and/or other group members

### Particulars

Much of the costs of the Partial Settlement and the Trust Co Settlement were incurred in connection with the pursuit of AFPL's interests. Further, the costs included claims to recover costs incurred in defending the application made in 2014 to restrain Mr Elliott and Mr O'Bryan from acting for Mr Bolitho on the basis of conflicts of interest which made it inappropriate for them to act, which application was successful. Those costs were not incurred on behalf of or in the interests of group members; and that application could not be said to have carried the risk of "derailing the entirety of the claim and preventing group members from benefitting from its prosecution".

- 116 The statement at para 116(c) of the First Bolitho Opinion was reproduced in the judgment of Justice Croft at para 71(c). His Honour said that he was satisfied, on the basis of the opinions set out in Mr Trimpos' Confidential Report and the annexed source materials, that *"all legal costs have been incurred in respect of (i) the conduct of this proceeding on behalf of group members; and (ii) the advancement of common questions on behalf of the plaintiff and group members (other than to the relatively minor extent necessary for pleading the plaintiff's claim in the various iterations of the statement of claim) and defending interlocutory applications which, had they been successful, might have derailed the entirety of the claim and prevented group members from benefitting from its prosecution"*.
- 117 Mr O'Bryan AM SC and Mr Symons stated<sup>101</sup> that AFPL's commission was justified in part because of AFPL *"paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million"*.<sup>102</sup> The Second Bolitho Opinion stated that AFPL had paid Mr Bolitho's legal costs and disbursements.<sup>103</sup>
- 118 That statement was misleading in the following circumstances, which each of Mr O'Bryan, Mr Symons and AFPL must have known:
- (a) The \$7.8 million included \$2.55 million that had been brought to account in the Partial Settlement and had been treated as referable to the claims against the settling defendants, so that it was inappropriate to bring those funds to account in the settlement with Trust Co.

<sup>101</sup> First Bolitho Opinion, paras 134, 145, 181 and 183; Second Bolitho Opinion, para 13.

<sup>102</sup> First Bolitho Opinion, para 70.

<sup>103</sup> Second Bolitho Opinion, para 13.

- (b) Of the balance (ie, the \$5.225 million in costs that were sought to be recovered in the Trust Co settlement), substantially all of those costs had not been paid as alleged in paragraph 93(i) above.<sup>104</sup>
- (c) Mr O'Bryan and Mr Symons did not inform the court as to the amounts that were "paid" compared with the amounts that AFPL was "expected to pay", even though that information would have been readily available from their instructing solicitor and/or AFPL.
- (d) The Third Trimbo Report filed in conjunction with counsel's opinions opined as to the reasonableness of costs and disbursements "incurred to date" and costs and disbursements that were "anticipated to be incurred" in finalising the matter.<sup>105</sup>
- (e) The Third Trimbo Report filed in conjunction with counsel's opinions represented that costs "incurred to date" had been paid (because invoices annexed to the report stated a "Processed Date" which made them appear as if they had been issued monthly, Mr O'Bryan AM SC's invoices were stamped as "PAID", and Mr Elliott instructed Mr Trimbo that the costs "*incurred by Mr Bolitho and paid by AFPL from 1 July 2016 to date*" included Mr O'Bryan's fees of \$2.3 million, Mr Symons' fees of \$600,000, and Portfolio Law's fees of \$377,000).

119 In his Honour's judgment in respect of the First Approval Application, Justice Croft accepted (at para 82(c)) that, in financing the Bolitho Proceeding, AFPL "*paid legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*".

1.2.2 Misleading statements and/or failure to frankly disclose the true position about AFPL's role in funding and thereby facilitating access to justice for debenture holders in the opinions tendered to the court on the approval application

120 The First Bolitho Opinion stated at para 165:

*"It is of primary importance that, absent the provision of litigation funding by [AFPL], this proceeding would have stalled as a result of no established*

<sup>104</sup> AFPL has discovered a document purporting to be a summary of costs that it has paid in the course of the litigation [[AFP.001.001.4583](#)]. On the basis of that document, it appears that, as at 30 January 2018, AFPL's "out of pocket" expenses (ie, amounts it had paid for which it had not already been "reimbursed" at the time of the Partial Settlement) were around \$500,000.

<sup>105</sup> Third Trimbo Report, para 165.

*litigation funder being willing to finance the proceeding, orders for security for costs being made by the Court, and the plaintiff's and group members' inability to finance the proceeding themselves."*

121 The Second Bolitho Opinion stated at para 13:

*"Without the plaintiff's hard work on this case over more than 5 years since 2012, the claims could not have been brought. Without the Funder paying the plaintiff's legal costs and disbursements, bearing the considerable adverse costs risk, and paying security for the defendants' costs, this proceeding could not have been maintained on behalf of debenture-holders."*

122 These statements were misleading in that (as Mr O'Bryan AM SC, Mr Symons and AFPL knew<sup>106</sup>), on 27 March 2015, the SPRs had arranged for a writ to be filed commencing an alternate group proceeding (proceeding S CI 2015 01385 – the **McKenzie Group Proceeding**). Although the SPRs did not serve the writ and had allowed it to lapse, it is to be inferred from the SPRs actions in commencing that proceeding that they could (and would) have pursued the proceeding alongside the SPR Proceeding in order to obtain a remedy for debenture holders without AFPL's involvement.<sup>107</sup> In March 2016, AFPL and Mr Zita/Portfolio Law demanded that the SPRs agree not to serve the McKenzie Group Proceeding on Trust Co, as a condition of agreeing to the Partial Settlement [\[CBP.004.003.6578\]](#) [\[CBP.004.002.5550\]](#) [\[CBP.004.007.8413\]](#) [\[CBP.004.006.9320\]](#); see the settlement deed executed in respect of the Partial Settlement, clause 5.8 [\[CBP.004.001.3964\]](#). It is to be inferred that AFPL made that demand because AFPL perceived that its commercial interests were threatened by the McKenzie Group Proceeding, namely, because the SPRs could have prosecuted that proceeding to secure a remedy for debenture holders without having to pay a funding commission and another set of legal costs.

<sup>106</sup> Mr Robert Crow's invoice dated 28 May 2015 attached to the Second Trimbo's Report includes a charge on 17 April 2015 for: **"Don McKenzie has now issued a separate class action. Looks like we will just battle on."** Mr Crow's invoice dated 27 May 2016 attached to the Second Trimbo's Report includes a charge on 2 March 2016 for: **"T/I Mark Elliott. Reported on recent developments. Trial now adjourned off to commence in March 2017. Explained reasons. They want to get rid of the McKenzie proceedings. Propose issuing a summons arguing it is an abuse of process, as merely duplicates the existing class action we have on foot. Needs Laurie's instructions..."** Mr O'Bryan's March 2016 fee slip attached to the Second Trimbo's Report includes a charge on 1 – 3 March 2016 for **"conferring with Mr Elliott and junior counsel re: issue summons to strike out McKenzie action immediately"**. Mr Symons' March 2016 fee slip attached to that report includes a charge on 1 – 2 March 2016 for **"conferring with Mr Elliott and senior counsel re: issue summons to strike out McKenzie action immediately; drafting letter to David Newman concerning McKenzie proceeding, conferring with Mr Elliott, senior counsel and Tony Zita re: letter and summons, advising."** The McKenzie Group Proceeding is addressed in the Further Bolitho Opinion, paras 21 to 24.

<sup>107</sup> Newman Affidavit, paras 43 to 44, and see also the Responsive SPR Opinion para 36.

- 123 The First Bolitho Opinion and the Second Bolitho Opinion did not draw the court's attention to the McKenzie Group Proceeding in connection with opining that the funding commission was justified by reason of AFPL's role in securing access to justice.

1.2.3 Misleading statements and/or failure to frankly disclose the true position about AFPL's entitlement to commission based on adverse costs risk in the opinions tendered to the court

- 124 The First Bolitho Opinion stated at para 144:

*"In agreeing to finance the group proceeding [AFPL] accepted a very significant adverse cost risk. We have set out above at [117] the costs of Trust Co from the commencement of the proceeding until December 2017 which are said to be in the sum of \$13 million, of the sixth to ninth defendants which were expected to be \$6.33 million by 30 August 2016, and BSL's costs of \$7.7 million, although we note that BSL's reported legal costs and disbursements are unlikely to incorporate all of the legal costs and disbursements incurred by the receivers from the commencement of the proceeding. These figures alone sum to approximately \$27 million in legal fees, without taking into account BSL's own costs of its defence of the claims made against it in the group proceeding or the fourth and fifth defendants' costs of the proceeding."*

- 125 The First Bolitho Opinion stated at para 182:

*"The quantum of adverse costs exposure is addressed at [144] above. We consider it is likely that [AFPL] was exposed to a risk of adverse costs in the order of \$15 million."*

- 126 Mr O'Bryan and Mr Symons did not inform the court of the following matters:

- (a) Trust Co's legal costs incurred in the proceedings included costs incurred in:
  - (i) defending the claims in the Bolitho Proceeding;<sup>108</sup>
  - (ii) defending the claims in SPR Proceeding;<sup>109</sup>
  - (iii) prosecuting third party claims;<sup>110</sup>
  - (iv) pursuing additional remuneration (including the separate question before Croft J and in the Court of Appeal);<sup>111</sup>

<sup>108</sup> Further SPR Opinion, para 252(a).

<sup>109</sup> Further SPR Opinion, para 252(a).

<sup>110</sup> Further SPR Opinion, para 252(a).

<sup>111</sup> Further SPR Opinion, para 252(a).

- (v) other matters, such as the public examinations of Trust Co's and Banksia's officers and issues relating to Trust Co's potential conflict of interest in remaining as trustee after Banksia's collapse;<sup>112</sup>
- (b) the adverse cost risk assumed by AFPL was limited to Trust Co's costs of defending the claims in the Bolitho Proceeding, in respect of which the security for costs that Mr Bolitho/AFPL was ordered to provide was likely to be a reliable guide;<sup>113</sup>
- (c) the expense incurred by Trust Co in defending the claims against it in the Bolitho Proceeding and the SPR Proceeding was predominantly incurred in responding to the evidence filed by the SPRs;<sup>114</sup>
- (d) the SPRs made substantial provision in the orders obtained before Black J for significant adverse costs exposure in respect of Trust Co and other parties (\$10 million);<sup>115</sup>
- (e) the costs of the sixth to ninth defendants of \$6.33 million were primarily referable to the claims against those defendants (including the claims and public examinations brought by the receivers on behalf of Banksia against those defendants), which were settled in the Partial Settlement, in respect of which AFPL had already obtained a commission;<sup>116</sup>
- (f) Banksia's costs of \$7.7 million were primarily attributable to the SPR Proceeding, and no part of those costs would ever have been recoverable from Mr Bolitho/AFPL;<sup>117</sup>
- (g) in connection with the application for approval of the Partial Settlement, Justice Robson had rejected the contention that adverse costs risk was relevant to the assessment of AFPL's commission on the basis that:
  - (i) the commercial risks would have been taken into account by AFPL in determining whether to fund the Bolitho Proceeding;
  - (ii) the Funding Agreement provided AFPL with a right to terminate the agreement at any time;<sup>118</sup>

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<sup>112</sup> Further SPR Opinion, para 252(a).

<sup>113</sup> Further SPR Opinion, para 252(a).

<sup>114</sup> Further SPR Opinion, para 252(a).

<sup>115</sup> Further SPR Opinion, para 252(a).

<sup>116</sup> Further SPR Opinion, para 252(b).

<sup>117</sup> Further SPR Opinion, para 252(c).

- (h) AFPL did not have sufficient assets to meet adverse cost exposure of the magnitude that counsel for Mr Bolitho said that it faced. AFPL had been formed to insulate against adverse cost risk against a background where, prior to AFPL's incorporation, Mr Elliott had been providing litigation funding, and the defendants had indicated an intention to seek security for costs from him personally.<sup>119</sup>

127 Mr O'Bryan, Mr Symons and AFPL must have known and/or recklessly failed to make inquiries as to the matters in paragraph 126.

#### Particulars

(1) AFPL must have known of the matters in paras 126(a) – 126(g), because it considered that it had the day-to-day conduct of the litigation and considered that it was entitled to "run the litigation" as it saw fit, and it was obvious that not all of Trust Co's costs were incurred in connection with the Bolitho Proceeding having regard to the other matters in which Trust Co was engaged in connection with the proceedings.

(2) Mr O'Bryan and Mr Symons must have known of the matters in paras 126(a) – 126(g) because (1) they were Mr Bolitho's legal representatives acting in the Bolitho Proceeding; (2) they had also appeared on Mr Bolitho's behalf in the Trust Co Remuneration Application; (3) they had appeared at the Partial Settlement approval application before Justice Robson.

(3) Mr O'Bryan and Mr Symons must have known of the matters in paras 126(h), because (1) Mr O'Bryan had been involved in the incorporation of AFPL; (2) they were and had been involved in other proceedings AFPL and must have had some knowledge about its financial position; (3) they were each a party to the Fee Arrangements with AFPL from which it can be inferred that AFPL had limited financial capacity.

(4) In the course of negotiations in connection with the Trust Co Settlement, AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law asked the SPRs and Trust Co to provide a range of information to support the approval application (see eg [\[SYM.001.002.7622\]](#)[\[SYM.001.002.7632\]](#)). It would have been a simple matter for them to make enquiries to substantiate the basis of any statement about AFPL's adverse cost risk.

#### I.2.4 Misleading statements and/or failure to frankly disclose the true position about AFPL's entitlement to commission based on security for costs in the opinions tendered to the court

128 The First Bolitho Opinion stated at para 134:

*"In financing this proceeding [AFPL] paid or agreed to pay security for costs in excess of \$1.5 million."*

<sup>118</sup> Re Banksia Securities Ltd (Rec & Mgr Apptd) [2017] VSC 148 [110].

<sup>119</sup> See the submissions of the fifth defendant dated 12 September 2014 filed in the application to restrain Mr Elliott and Mr O'Bryan from acting, paras 27 to 46 and para 64. See also the First Bolitho Opinion, paras 130, 139 and 145.

129 The First Bolitho Opinion stated at para 141:

*“Having been established for the purpose of financing this proceeding [AFPL] has given (or agreed to give) the following security for costs for the benefit generally of all group members:*

- (a) giving security in the sum of \$80,632.27 in respect of an application by the fifth defendant pursuant to consent orders made in March 2014;*
- (b) giving security in the sum of \$80,632.27 for the sixth to ninth defendants’ costs pursuant to orders made by Ferguson J on 17 March 2014;*
- (c) giving initial security in the sum of \$90,000 to Trust Co;*
- (d) pursuant to orders made on 19 September 2017 paying security in the sum of \$480,000 in respect of Trust Co’s costs and incidental to the Trial Preparation Phase by 9 October 2017; and*
- (e) pursuant to the 19 September 2017 orders, being obliged to give \$720,000 by way of security for Trust Co’s costs of and incidental to the Trial Phase of the proceeding by 31 January 2018. ”*

130 Mr O’Bryan and Mr Symons did not draw the court’s attention to the fact that:

- (a) security for costs provided in favour of defendants other than Trust Co had been brought to account in the commission AFPL obtained at the time of the Partial Settlement;
- (b) with respect to the claim against Trust Co, AFPL had only provided security in the sum of \$570,000.

131 The statements at para 134 and 141 extracted above were reproduced in the judgment of Justice Croft in his Honour’s decision on the First Approval Application at paras 82(a) and 83.

132 It is to be inferred from the terms of paragraph 129 that Mr O’Bryan and Mr Symons knew of the matters in paragraph 130. AFPL knew of the matters in paragraph 130 because it had provided that security.

#### I.2.5 Misleading statements and/or failure to frankly disclose the true position and/or failure to make honest and reasonable inquiries about the value of Trust Co’s remuneration claim

133 The First Bolitho Opinion stated at para 55(b):

*“The settlement also achieves a release of Trust Co’s claims for the reimbursement of its expenses incurred since October 2012 and for additional remuneration in respect of Banksia’s receivership. At present, those claims amount to at least \$3.9 million, which would otherwise be expected to diminish the available return to debenture-holders. However, as the period of Trust Co’s claim in respect of which there has been a quantification runs only from October 2012 to February 2014 (ie approximately 16 months), there are*

*an additional 47 months of potential costs for which there has been no quantification. Applying a simple multiplication factor, the benefit to debenture-holders of the elimination of that claim may be in the order of \$12 to \$15 million in total. However, we consider it appropriate to adopt the more conservative estimate calculated at [84.d] and [85] below that the benefit to debenture-holders is likely to be around \$11 million.”*

134 The First Bolitho Opinion stated at para 84(d):

*“While we are not aware of any quantification of the costs of the receivership incurred by Trust Co to which it might seek to recover had the release and discharge not been given, the only available proxy for the approximately 48 months from February 2014 to 30 January 2018 is the expenditure rate of \$900,000 per half-year incurred from September 2013 to February 2014. This rate is more reasonably adopted than simply pro-rating the \$3,960,163 expense incurred in the first 15 or 16 months as it may be expected that significant non-recurring costs were incurred in the first few months of the receivership. Therefore, for the 8 further half-years in the period from February 2014 to 30 January 2018, it is not unreasonable to expect that Trust Co might make a further claim for reimbursement in the order of \$7.2 million.”*

135 The First Bolitho Opinion stated at para 85:

*“In the absence of Trust Co having provided any quantification of its claim for reimbursement for the period from February 2014 to 30 January 2018, it is reasonable to expect that the release and discharge given under cl 5.4.3 of the Deed might effect the release of a total claim in the order of the quantified \$3.96 million and the estimated (but unquantified) \$7.2 million. The claim from which BSL and its Creditors are to be released might therefore be in the order of \$11.16 million.”*

136 The First Bolitho Opinion stated at para 87-88:

*“We are instructed that the liquidators (acting as special purpose receivers) of BSL at present hold approximately \$14 million of cash. We are instructed that, if the settlement is approved, the liquidators intend to retain a sum in the order of \$3 million for the conduct of the BSL Insurance Claims. The remaining \$11 million is expected to be made available for distribution to debenture holders.*

*While it may be merely coincidental that the sum the liquidators will apparently seek to distribute if the settlement is approved equates broadly with the quantum estimated in [85] above, it seems unlikely that the liquidators would not already have sought to undertake a further distribution to debenture-holders if that sum had not been required to meet a possible claim upon BSL by Trust Co.”*

137 The First Bolitho Opinion stated at para 120 that, by reason of (inter alia) the release of the additional remuneration claim, *“it is likely to be misleading to simply characterise the agreed \$12.8 million (plus GST) Funder's Commission as a fraction of the \$64 million Settlement Sum”.*



138 In relation to the statements set out above, the following matters were not drawn to the attention of the court:

- (a) Clause 12.1.2 of Funding Agreement provides that AFPL is entitled to a payment calculated as a percentage on the “Resolution Sum”, defined as “any **money received** or **payment made** to settle, compromise or resolve one or more or all of the Claims” – ie, the Funding Agreement provided for AFPL’s commission to be calculated on a monetary sum.
- (b) Trust Co’s claim for additional remuneration for the period 25 October 2012 to 28 February 2014 sought to apply a methodology based on advice it had received that circumscribed what it sought to recover.<sup>120</sup> Trust Co had confirmed that it did not claim an entitlement to significant future additional remuneration given that the major assets of Banksia had been sold.<sup>121</sup> Trust Co had proposed that its monthly fees from January 2014 onwards would be capped at \$30,000 (if the time based costs were less than \$30,000, the lesser amount would be charged).<sup>122</sup>
- (c) By February 2014, there was very little left for Trust Co to do. Trust Co’s supervisory and protective role was largely superseded and replaced by the independent liquidators in June 2014.
- (d) Trust Co had never suggested that it was entitled to a remuneration of materially more than the \$3.96 million for work performed subsequent to February 2014 in the directions sought before Croft J or in its counterclaim to Banksia’s claim for declaratory relief on the issue. Nor did it particularise any work that it had performed after February 2014. It appears that Mr Bolitho’s legal representatives had made no enquiries with Trust Co or the SPRs as to whether there was any basis for suggesting that the remuneration claim was worth \$11 million or any amount more than \$3.96 million, even though those enquiries could easily have been made.
- (e) The quantum of \$3.96 million claimed by Trust Co was contested, including by Mr Bolitho.<sup>123</sup> The debenture holder committee including Mr Elliott did not and would not support Trust Co’s proposals for additional remuneration.<sup>124</sup>

<sup>120</sup> Affidavit of Joseph Hayes sworn 16 December 2015, paras 114 151 and JH-24 & JH-50

<sup>121</sup> Affidavit of Joseph Hayes sworn 16 December 2015, para 134 and JH-35.

<sup>122</sup> Affidavit of Joseph Hayes sworn 16 December 2015, para 142 and 175, JH-41 and JH-50.

<sup>123</sup> Transcript of hearing on 12 May 2016, page 31, lines 2 – 21 (page 5672 of DCN-1), and Mr Bolitho’s outline of submissions dated 24 March 2016 in the Trust Co Remuneration

- (f) There were good defences to Trust Co's claim for additional remuneration. Banksia alleged that Trust Co was disentitled in equity from receiving additional remuneration, that Trust Co's claim to additional remuneration should be reviewed or reduced to nil, and that Banksia was entitled to recover any additional remuneration paid to Trust Co as loss and damage.<sup>125</sup> Mr O'Bryan and Mr Symons had also submitted that Trust Co's breaches of trust disentitled it to any commission,<sup>126</sup> and Mr Bolitho's statement of claim made reference to the additional remuneration in the particulars of a claim for equitable compensation.<sup>127</sup>
- (g) Trust Co's remuneration claim was made against Banksia. It had relevance to the Bolitho Proceeding only if the claim was successful and Trust Co succeeded in obtaining an order for the remuneration claimed, in which case both the SPRs and Mr Bolitho claimed that Trust Co should disgorge its additional remuneration. On that basis, the Trust Co remuneration claim was simply another potential head of damages in the Bolitho Proceeding, which was compromised by the \$64 million settlement sum. It was inappropriate to treat it separately from the \$64 million settlement sum.
- (h) Trust Co was reluctant to press its claim for additional remuneration. Trust Co offered, in open correspondence and in open court, to withdraw its claim for additional remuneration if Banksia/the SPRs would withdraw Section G of their amended statement of claim.<sup>128</sup>

139 The Contradictor refers further to paragraphs 228 to 239 and 251 of the Further SPR Opinion.

140 AFPL, Mr O'Bryan and Mr Symons:

- (a) must have known the matters in paragraph 138;

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Application, para 30 (see Mr Newman's 25 March 2019 affidavit, exhibit DCN-1 pages 5324 – 5336).

<sup>124</sup> Affidavit of Joseph Hayes sworn 16 December 2015, para 135 and JH-36.

<sup>125</sup> Banksia's amended and restated statement of claim, paras 85 to 90.

<sup>126</sup> Mr Bolitho's outline of submissions dated 24 March 2016 in the Trust Co Remuneration Application, paras 9, 21 – 22, 29 – 31 (see Mr Newman's 25 March 2019 affidavit, exhibit DCN-1 pages 5324 – 5336).

<sup>127</sup> Third Further Amended Statement of Claim dated 15 September 2016, para 69.

<sup>128</sup> Letter from Clayton Utz to Maddocks dated 14 September 2017 [[SPR.003.001.0017](#)] and transcript of hearing on 26 September 2017, page 32 lines 7 to 30. Mr O'Bryan and Mr Symons were both present in court on 28 September 2017. See Mr Newman's 25 March 2019 affidavit, exhibit DCN-1, pages 2172 and 2204.

- (b) alternatively, recklessly failed to make inquiries to ascertain the value of the release of the Trust Co remuneration claim before making the statements in paragraphs 133 to 137.

### Particulars

(1) Mr O'Bryan and Mr Symons appeared on behalf of Mr Bolitho in the Trust Co Remuneration Application in 2016 and filed submissions which challenged Trust Co's entitlement to any remuneration and the quantum claimed. Further, Mr Elliott was on the debenture holder committee that considered proposals submitted by Trust Co for additional remuneration.<sup>129</sup>

(2) As counsel on the record with intimate involvement in the proceeding, Mr O'Bryan and Mr Symons must have known of the matters in paragraph 138.

(3) In the course of negotiations with Trust Co in connection with the Trust Co Settlement, AFPL, Mr O'Bryan and Mr Symons asked Trust Co to provide a range of information to support the First Approval Application. It would have been a simple matter for them to ask Trust Co for more information about the value of the remuneration claim if they were in any doubt about the matter. When Mr Symons did make enquiries with Trust Co's counsel (at AFPL's and/or Mr O'Bryan's request) about the quantum of the Trust Co Remuneration Claim on 17 June 2018, Trust Co's counsel informed Mr Symons that **"\$3.96m is the maximum figure for the reimbursement claim which he regards as reasonable, and he also seems to think that in reality the claim would be lower"** [SYM.001.001.2239]. Those enquiries could have been made before making the statements in paragraphs 133 to 137, particularly given that, in the course of negotiating the settlement deed, AFPL and the Bolitho Lawyers required Trust Co to provide affidavits disclosing various other matters (see eg [SYM.001.002.7622][SYM.001.002.7632]).

(4) Mr Elliott/AFPL instructed Mr Symons to ask Mr Kingston of Maddocks about the value of the Trust Co Remuneration Claim, but there is no evidence that Mr Symons did so [SYM.001.001.2106].

141 The inference is open that the purpose of inflating the value of the release of Trust Co's remuneration claim was to justify a funding commission that exceeded a fair and reasonable amount. This is to be inferred from the following:

- (a) a series of emails exchanged between Mr Elliott and Mr Symons on 11 November 2017 [SYM.001.001.2106], in which:
- (i) Mr Elliott instructed Mr Symons that, when Mr Symons was describing the benefits obtained from the settlement in the settlement deed he was drafting, the **"Trustco fees must be for \$3.9M award plus ANY other claim -let Sam K advise and confirm"**.

<sup>129</sup> See Trust Co's submissions in the Trust Co Remuneration Application dated 27 April 2016, para 14(b), at page 5361 of exhibit DCN-1 to Mr Newman's 25 March 2019 affidavit.

- (ii) Mr Symons queried this, stating: *“Just so I don’t misunderstand, what do you mean by ‘Trustco fees must be for \$3.9M award plus ANY other claim’?”*
- (iii) Mr Elliott replied: *“Cof A confirmed Trust entitlement but claim was only to 2016 and more to come was threatened. **It grosses up \$64M figure and blurs my 20% calculation if we sort of add it in**”.*
- (iv) Mr Symons replied, stating: *“**OK, I understand. The \$64m is effectively \$68m or \$71m**”.*
- (v) Mr Elliott replied stating: *“**It’s definately (sic) \$70M or more. I would like Maddocks to gross up the \$64M at least in words to include the release from Trustco for say \$6M of fees plus the IH settlement if possible**”.*
- (vi) Mr Symons replied stating: *“OK, I understand what I’m doing.”*
- (vii) Mr Elliott replied stating: *“Maddocks will pushback but we must insist.”*
- (b) there is no evidence that Mr Symons asked Mr Sam Kingston of Maddocks to *“advise and confirm”* about the value of the Trust Co remuneration claim;
- (c) Mr Elliott/AFPL knew (as stated in the 11 November 2017 emails) that, in fact, Maddocks would *“push back”* on the suggestion that the release of the Trust Co Remuneration Claim was worth \$6 million (let alone \$11 million as suggested by Mr O’Bryan and Mr Symons in their opinion);
- (d) the statement in para 120 of the First Bolitho Opinion that, by reason of (inter alia) the release of the additional remuneration claim, *“it is likely to be misleading to simply characterise the agreed \$12.8 million (plus GST) Funder’s Commission as a fraction of the \$64 million Settlement Sum”*;
- (e) the statement in para 122(b) of the First Bolitho Opinion that, one way to calculate a fair funding commission would be to calculate AFPL’s commission on a “funding equalization mechanism” basis on the sum of **\$75,160,163**, comprising the \$64 million Settlement Sum plus the **\$11,160,163** asserted value of the release of the additional remuneration claim, to derive a commission of **\$12,852,388**;

- (f) the statement in para 122(c) of the First Bolitho Opinion that the figure referred to in (e) *“suggests that the proposed Funder’s Commission is likely to be reasonable and therefore eligible for Court approval”*; and
- (g) the fact that AFPL would not allow the SPRs or their legal advisers to see the First and Second Bolitho Opinions.

142 In his Honour’s judgment on the First Approval Application, Justice Croft stated at para 92: *“The settlement of the proceeding is in the sum of \$64 million, plus the benefit of the release and discharge granted by Trust Co which was suggested by counsel for the Plaintiff to be likely to have a value to debenture holders in the order of \$11.16 million.”*

I.2.6 Misleading statements and/or failure to frankly disclose the true position about relative contributions of evidence in the opinions tendered to the court

143 The First Bolitho Opinion stated at footnote 27:

*“That is not to say that there has not been significant advantage to the group members through the co-operative approach taken to the preparation of the evidence by the plaintiff in the group proceedings and the liquidators. We note in particular the list of witness statements and expert reports referred to at [13] of the 9 January 2018 affidavit of Lindholm. The expert evidence was commissioned co-operatively, and the lay witness statements were of mutual relevance. It may be noted, for instance, that BSL includes the witness statements of the plaintiff, Mr Bolitho, amongst the evidence upon which it was to rely.”*

144 This statement was misleading in light of the following matters (which were not disclosed to the court in the First Bolitho Opinion or the Second Bolitho Opinion, even though the Second Bolitho Opinion responded to an objection from a debenture holder, Mr Pitman, to the quantum of AFPL’s commission having regard to (inter alia) the contribution of the SPR Proceeding to the settlement, and which AFPL, Mr O’Bryan and Mr Symons must have known):

- (a) in the course of the whole proceeding, Mr Bolitho filed only 1 witness statement and 3 expert reports, whereas the SPRs filed 26 witness statements/witness outlines and 16 expert reports;<sup>130</sup>
- (b) in the Relevant Period, Mr Bolitho filed only a single reply expert report, whereas in that same period, the SPRs filed 15 witness statements/witness outlines and 11 expert reports;<sup>131</sup>

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<sup>130</sup> Exhibit SPR-1 tendered in the Court of Appeal.

<sup>131</sup> Exhibit SPR-1 tendered in the Court of Appeal.

- (c) the extent of assistance by Mr Bolitho's legal representatives was limited to some comments provided by Mr O'Bryan AM SC on advanced drafts of a total of 3 witness outlines and 5 expert reports (which were commissioned by the SPRs), and Mr Symons was not involved in the preparation of evidence at all;<sup>132</sup>
- (d) in the course of the whole proceeding, Mr Bolitho paid for only approximately \$58,475 of the expert evidence necessary in the proceedings,<sup>133</sup> whereas the SPRs incurred expert witness expenses totaling \$1.9 million;<sup>134</sup>
- (e) the matters set out in paragraphs 58 to 72 and 88 to 91 of the affidavit of David Newman sworn 25 March 2019; and
- (f) the matters set out in paragraphs 77 to 79 of the Further SPR Opinion.

#### Particulars

AFPL, Mr O'Bryan and Mr Symons knew of the limited contribution they had made to the evidence in the proceedings. Further, on 10 January 2018, Mr O'Bryan and Mr Symons exchanged emails in which Mr Symons noted that an affidavit filed by Mr Lindholm "*claimed witness statements and expert reports filed by Bolitho as their own (including Laurie Bolitho's witness statement!)*". Mr O'Bryan replied stating: "Yes, but I am not inclined to complain about this because **it makes it easier for us to justify our submission that the preparation and filing of the evidence for BSL and Bolitho was a joint exercise.** Obviously so in the case of Bolitho and inferentially so in respect of all other evidence intended to be jointly relied upon." [\[NOB.500.005.2480\]](#). It is to be inferred that Mr O'Bryan and Mr Symons knew and intended that the Court should be led to believe that they had undertaken more work in relation to the evidence than they had in fact undertaken, as set out in this paragraph.

#### I.2.7 Misleading statements and/or failure to frankly disclose the true position about the funding commission rate in the opinions tendered to the court

145 The First Bolitho Opinion stated at paragraph 173 - 174:

*"Three different funding arrangements have now been disclosed to group members at different times.*

<sup>132</sup> Newman Affidavit, para 89 - 90.

<sup>133</sup> See the Fourth Trimbo Report, paras 166 (\$4,950 in respect of Mr Sutherland) and 168 (\$20,525 in respect of Mr McCann), and the First Trimbo Report, para 107 (\$33,000 in respect of Mr Sutherland). The First Trimbo Report refers to other costs incurred in respect of Grant Thornton and Frontier Economics, but it does not appear that any expert report prepared by those organisations was filed in the proceeding: see SPR-1.

<sup>134</sup> Further SPR Opinion, footnote 21; affidavit of David Newman sworn 25 March 2019, para 98 (which refers to a GST-exclusive figure of \$1,685,184.73).

- (a) *In the 6 June 2014 letter, which enclosed a copy of the litigation funding agreement, group members were told that a funding fee of 30% would be sought.*
- (b) *In the opt-out notice and notice to group members sent according to orders of the Court made on 2 June 2014, group members were told that the plaintiff and BSLLP would seek a ‘common fund’ payment of \$1.3 million (or 25% of the sum for which the partial claim was settled). After making this disclosure, only 5% of group members opted-out.*
- (c) *In the notice to group members sent according to orders of the Honourable Justice Croft made on 8 December 2017, a litigation funding fee of \$12.8 million plus GST.*

*In Money Max at [79(b)] this is referred to as being possibly ‘important to understand the extent to which class members were informed when agreeing to the funding commission rate’. Those group members who accepted the terms of the litigation funding agreement were well aware that a 30% rate could be charged under the litigation funding agreement. Some 5% of group members opted out of the proceeding when the first common funding fee of 25% below. **A significantly lower percentage funding fee is now proposed...***

146 The First Bolitho Opinion stated at paragraphs 187 – 188:

*“For those group members who had agreed to the terms of the litigation funding agreement, the terms of the litigation funding agreement provided that the consideration payable to BSLLP would be up to 30% of the ‘resolution sum’ payable upon the settlement of the proceeding: see [127] above. Proceeding conservatively by treating the Settlement Sum of \$64 million as the limit of the ‘resolution sum’ and had all group members agreed to the terms of the litigation funding agreement, this would have given BSLLP an entitlement of:*

$$\$64 \text{ million} \times 30\% = \$19.2 \text{ million}$$

***There is necessarily a significant benefit to the group members who have signed the litigation funding agreement to pay only two thirds of the consideration to BSLLP that they might have expected to pay had BSLLP sought to enforce the strict terms of the litigation funding agreement.”***

147 The First Bolitho Opinion stated at para 179 and 193 that the funding commission sought was at the “low end” or “near to the bottom of the range” of acceptable and justifiable payments.

148 Mr O’Bryan and Mr Symons did not inform the Court:

- (a) AFPL had demanded that Mr Lindholm agree to a “*division of the spoils*” from the Trust Co Settlement that ensured that AFPL and the Bolitho Team receive approximately 30% of that settlement, being the amount that AFPL and Mr O’Bryan considered they were entitled to under the Funding Agreement. Mr

O'Bryan and Mr Symons must have known that AFPL's demand for costs and commission was made on this basis.

- (b) There was not a "*significant benefit*" or any benefit at all to group members who had signed the Funding Agreement under the common fund order sought by Mr Bolitho/AFPL.
- (c) The funding commission sought by AFPL in fact involved a significant detriment to group members who signed the Funding Agreement, because it involved them paying more than 30% on the proportion of the settlement proceeds that was referable to the Bolitho Proceeding.

### **J.3 Losses resulting from the Settlement Opinion Contraventions**

149 The Settlement Opinion Contraventions caused or contributed to:

- (a) the wasted costs associated with the First and Second Bolitho Opinions (which AFPL should not be permitted to recover from the Settlement Sum);
- (b) the miscarriage of the First Approval Application;
- (c) the wasted costs of the First Approval Application;
- (d) the costs of the appeal;
- (e) the costs of the remitter; and
- (f) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

#### Particulars

(1) The wasted costs associated with the First and Second Bolitho Opinions and the First Approval Application are approximately **\$125,000**, including:

- Mr Symons' fees in respect of research and drafting in connection with the First and Second Bolitho Opinions – approximately **\$57,500** (152 hours);
- Mr O'Bryan's fees in respect of settling the opinion – approximately **\$20,000** (26 hours);
- Mr Symons' fees in respect of preparing for and appearing at the First Approval Application – approximately **\$10,000** (25 hours);



- Mr O'Bryan's fees in respect of preparing for an appearing at the First Approval Application – approximately **\$36,000** (44 hours).

(2) If the opinions had disclosed the true position with respect to all the matters outlined above, the court would have approved costs and commission in a substantially lower sum than was approved at the First Approval Application.

(3) In those circumstances it is likely that Mr Bolitho's legal representatives would have disclosed the First and Second Bolitho Opinions to the SPRs and/or their legal representatives, as there would have been no reason for them to withhold such access.

(4) The exchange of opinions between Mr Bolitho and the SPRs would have avoided one of the miscarriages of the First Approval Application (namely, that the Settlement Sum was treated as referable to the Bolitho Proceeding, without a proper contest as to how the settlement sum might be apportioned between them).<sup>135</sup>

(5) Accordingly, but for the Settlement Opinion Contraventions, by about 21 March 2018 and alternatively by about 29 November 2018, the Settlement Sum would have been distributed to debenture holders/group members.

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<sup>135</sup>

*Botsman v Bolitho* (2018) 57 VR 68 [314] – [322].

## J. Conduct in relation to settlement distribution scheme

### J.1 Outline of contraventions of CPA

150 Each of AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened:

- (a) the Paramount Duty;
- (b) the overarching obligation to act honestly;
- (c) the overarching obligation not to mislead or deceive; and
- (d) the overarching obligation to ensure that legal costs were reasonable and proportionate,

by their conduct in connection with seeking excessive fees for AFPL and Portfolio Law to administer a settlement distribution scheme (**SDS Contravention**).

### J.2 Manner in which it is alleged the CPA was contravened

#### J.2.1 SDS Contravention - conduct of Mr Symons, Mr O'Bryan, Mr Zita/Portfolio Law and AFPL

151 In the First Bolitho Opinion<sup>136</sup> and at first approval hearing on 30 January 2018, Mr Symons, Mr O'Bryan, Mr Zita/Portfolio Law and AFPL sought orders from the court for a settlement distribution scheme with Portfolio Law as "Scheme Administrator" and AFPL as "Scheme Co-ordinator" (**Bolitho Scheme**) which provided for scheme costs of **\$1 million** (clause 6), comprising:

- (a) Portfolio Law's costs of **at least \$354,046**;
- (b) AFPL's costs of **\$48,000** plus GST per month for 11 months (**\$528,000**); plus
- (c) a range of other potential costs, including the costs of engaging an "Expert" to perform an "Expert review" under the scheme, the costs of engaging any "external professional service provider for the purpose of giving effect to the Settlement Scheme", and the costs of engaging counsel in respect of "any application for Judicial Review" under the scheme.

<sup>136</sup> The First Bolitho Opinion referred to the Bolitho Scheme at paras 204 to 208. Para 205(e) stated: "**The Scheme addresses the payment of the costs of distribution**, determination of questions by an expert, and further applications to the Court."

152 It is to be inferred that AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law knew that the scheme costs sought were excessive and/or that there was no proper basis for the costs sought, because:

- (a) On 24 November 2017, in the context of their discussions of maximizing their claims for costs in connection with the Trust Co Settlement, Mr Elliott sent an email to Mr O'Bryan that stated: ***"Another idea is for Portfolio Law to charge \$20 per holder to manage the distribution of \$ etc and to handle inquiries. PT would say he can't comment on it. You could put comment in your submissions. Makes TZ look better as well. He will need help to perform and we could redirect mail and queries"*** [\[NOB.500.001.7413\]](#). Mr O'Bryan replied stating: ***"We definitely need TZ to charge more. His fees look ridiculously low compared to his competitors"*** [\[NOB.500.001.7413\]](#).
- (b) On 8 December 2017 Mr Elliott/AFPL instructed Mr Symons that Portfolio Law would undertake the settlement distribution at \$20 per holder including disbursements, at a total cost of \$321,860 plus GST, and on 10 December 2017 Mr Symons drafted a letter purporting to be a letter from Portfolio Law providing a cost estimate for undertaking the settlement distribution on the basis of the instructions provided by Mr Elliott [\[SYM.001.002.5405\]](#) [\[SYM.001.002.5407\]](#). The letter drafted by Mr Symons stated that this cost estimate included the following tasks: (1) answering all queries from debenture holders by telephone or written correspondence; (2) provide assistance to them where required; (3) bring the register up to date; (4) manage and monitor website communications and (5) liaise with the SPRs. On 11 December 2017 Mr Zita/Portfolio Law sent the letter drafted by Mr Symons to AFPL on Portfolio Law's letterhead [\[AFP.001.001.2527\]](#) [\[AFP.001.001.2528\]](#).
- (c) On 8 January 2018, Mr Elliott/AFPL instructed Mr Symons: ***"BSL signed up over 6000 holders and has the contractual /fiduciary relationships with all holders. BSL wants a fee of \$30k pcm +GST for period ended 31/12/2018 to administer /oversee/co-ordinate and supervise the distribution scheme. Please prepare a suitable scheme ,make JL pay all disbursements of LINK and include it in your opinion"*** [\[SYM.001.001.0001\]](#).
- (d) On 12 January 2018, Mr Symons and Mr Elliott exchanged emails about the costs of the settlement distribution scheme, in which Mr Elliott said that Mr Zita advised that ***"over 1000 envelopes"*** had been returned to sender from the

notice to group members issued in December 2017, and Mr Symons responded: *“It’s actually very valuable information – **it makes it seem like there could well be a great deal more work in the settlement than might otherwise be assumed**”* [SYM.001.002.5099]. Mr Elliott replies *“Yes, lots to do. **Increase BSL fee to \$48,000 pcm plus disbursements of approx. \$70k to LINK**”* [SYM.001.002.5084].

- (e) Mr Symons drafted the Bolitho Scheme [SYM.001.002.4025] [SYM.001.002.4026] and Mr O’Bryan settled it. The Bolitho Scheme that Mr Symons drafted provided for scheme costs of up to **\$1 million** as alleged in paragraph 151, comprising:
  - (i) a set of costs for Mr Zita/Portfolio Law as “Scheme Administrator” and a further set of costs for AFPL as “Scheme Co-ordinator” (see clause 11.1(a) and (b));
  - (ii) “Administration Disbursements”, which were not quantified in the Bolitho Scheme but which were defined to include *“barrister’s fees”* (see the definitions in clause 2.1, and clause 11.1(g)).
- (f) There is no evidence that Mr O’Bryan, Mr Symons or Mr Zita/Portfolio Law sought to satisfy themselves that there was a proper basis for the costs sought. It appears that the first time Mr Symons made enquiries about the basis for the costs sought was on **5 February 2019** in the course of the remitter [CBP.001.007.5438].
- (g) Having regard to the matters alleged in paragraphs 40 and 152(a), Mr O’Bryan and Mr Symons knew that Mr Zita/Portfolio Law were likely to delegate their work under the Bolitho Scheme to AFPL and/or Elliott Legal and/or Mr O’Bryan.
- (h) On 1 February 2018, Mr Elliott emailed Mr Symons directing that he make changes to the Bolitho Scheme because it *“**Looks busier and justifies fees**”*. Mr Symons replied on the same day: *“Will do”* [SYM.002.002.1704].
- (i) It is to be inferred that AFPL and Mr O’Bryan intended that Mr O’Bryan would be able to recover additional revenue from the Bolitho Scheme because:
  - (i) Mr Elliott had proposed that Mr Zita/Portfolio Law be appointed to act as Scheme Administrator in the context of his discussions with Mr O’Bryan about ideas for maximising claims for costs from the Bolitho

settlement, and in that regard had said to Mr O'Bryan "*he will need help to perform*";

- (ii) in the *Camping Warehouse v Downer* matter, where Elliott Legal was appointed "Scheme Administrator" of the settlement distribution scheme, Elliott Legal paid Mr O'Bryan a "monthly retainer" of \$9,900 per month [\[NOB.503.001.0047\]](#) [\[NOB.503.001.0049\]](#) [\[NOB.503.001.0051\]](#) [\[NOB.503.001.0053\]](#) [\[NOB.503.001.0055\]](#) [\[NOB.503.001.0057\]](#) [\[NOB.503.001.0059\]](#), inviting the inference that Mr Elliott and Mr O'Bryan intended to enter into similar arrangements in relation to the Bolitho Scheme.

- (j) In the period between 31 January 2018 and 22 May 2019, AFPL progressively decreased its estimate of the "Administration Costs" from \$1 million to \$690,800 plus GST, and ending at \$396,000 plus administration costs and disbursements of \$110,000. These reductions give rise to the inference that there was no proper basis for the sum initially sought.

153 At the first approval hearing on 30 January 2018, Mr O'Bryan, Mr Symons and Portfolio Law sought to have orders made in terms of the Bolitho Scheme on instructions from AFPL [\[SYM.001.002.3778\]](#).

#### J.2.2 Breach of Trust SDS Contravention

154 In seeking approval of the Bolitho Scheme with Portfolio Law as scheme administrator, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL did not inform the court that, in respect of the Partial Settlement, at AFPL's direction, Portfolio Law, in breach of trust, had transferred to AFPL the net settlement proceeds of \$1.75 million that it was required to hold in its trust account for group members pursuant to the Funding Agreement and the terms of settlement entered into in respect of the Partial Settlement,<sup>137</sup> thereby placing the settlement proceeds at risk.

155 It is to be inferred that Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL knew that the transfer of the settlement proceeds to AFPL had occurred in breach of an express trust, because:

- (a) they each knew of the terms of the Funding Agreement;

<sup>137</sup>

See the contradictor's outline of submissions dated 15 February 2019.

- (b) in the First Bolitho Opinion, Mr O'Bryan and Mr Symons referred to the fact that AFPL "*was left holding*" the net proceeds of the Partial Settlement,<sup>138</sup> without expressly drawing to the court's attention that the funds had been transferred out of Portfolio Law's trust account to AFPL without any direction from the court permitting that to occur;
- (c) after the Contradictor made enquiries with AFPL and Portfolio Law about this matter, AFPL transferred the settlement proceeds back to Portfolio Law.<sup>139</sup>

### J.2.3 How the conduct contravened the CPA

156 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs were reasonable and proportionate, in that they sought orders for the Bolitho Scheme in circumstances where:

- (a) they had made no enquiries to satisfy themselves that the costs were reasonable and proportionate;
- (b) having regard to the matters in paragraphs 151 - 152, the costs were not reasonable and proportionate.

157 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct that was misleading or deceptive or likely to mislead or deceive, in that:

- (a) they represented that Mr Zita/Portfolio Law would act as Scheme Administrator, when in fact AFPL and Mr Zita/Portfolio Law intended that Mr Zita/Portfolio Law would direct mail and enquiries to AFPL and/or Elliott Legal, and that the role of Mr Zita/Portfolio Law would be limited to answering telephone calls in accordance with a script that was prepared by AFPL and/or Elliott Legal [\[ABL.001.0627.00038\]](#) [\[ABL.001.0627.00039\]](#) [\[ABL.001.0627.00040\]](#);
- (b) they represented that the costs of the Bolitho Scheme were reasonable, in circumstances where the costs were unreasonable and excessive;
- (c) they did not inform the Court of the matters in paragraph 154, which matters it was important for the Court to know, given the significant task entrusted to the Scheme Administrator under the scheme.

<sup>138</sup> First Bolitho Opinion, para 207.

<sup>139</sup> Affidavit of Anthony Zita sworn 26 February 2019, para 7.

158 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to act honestly, in that:

- (a) they had no honest and reasonable basis for seeking the costs of the Bolitho Scheme, as set out in paragraph 152. Mr Zita/Portfolio Law had not provided any information to substantiate the costs claimed. Rather, those costs were quantified by Mr Elliott/AFPL, and Mr Symons (rather than Mr Zita/Portfolio Law) drafted a letter purporting to justify and substantiate the sum chosen by Mr Elliott/AFPL. AFPL had not provided any information to substantiate the costs that it sought to recover from the Bolitho Claim. Mr Zita/Portfolio Law, Mr Symons and Mr O'Bryan asked no questions about the costs that were sought to be recovered from the Scheme;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law engaged in the conduct in paragraphs 151 - 153<sup>152</sup> for the purposes of obtaining for themselves and/or each other excessive scheme administration costs.

### **J.3 Losses resulting from the SDS Contraventions**

159 The SDS Contraventions caused or contributed to:

- (a) the wasted costs associated with the Bolitho Scheme (which AFPL should not be permitted to recover from the Settlement Sum);
- (b) the costs of numerous interlocutory hearings in the course of the remitter concerned with successive iterations of the Bolitho Scheme.

#### Particulars

If the SPRs and/or the court had been informed of the matters referred to in paragraphs 151 and 154 at the First Approval Application, it is likely that the court would have directed the SPRs to distribute the funds. Whilst there were ultimately no funds to distribute until May or June 2019 by reason of appeals from the settlement approval, debenture holders have incurred wasted expense (comprising the SPRs' and the Contradictors' costs) in dealing with successive iterations of the Bolitho Scheme.

**K. Conduct in submitting to the court that there were no conflicts of interest in order to resist the appointment of a contradictor**

**K.1 Relevant background**

160 After the Notice was issued, Mrs Botsman (a debenture holder) objected to the settlement and contended that the payments to AFPL should not be approved and that a contradictor should be appointed [[SYM.001.002.3056](#)] [[SYM.001.002.3057](#)] [[SYM.001.002.3058](#)].

161 At the first approval hearing on 30 January 2018, Mr Keith Pitman (a debenture holder) appeared and contended that the payments to AFPL should not be approved and that a contradictor should be appointed [[SYM.001.001.5122](#) from page 24 onwards].

**K.2 Outline of contraventions of CPA**

162 Mr O'Bryan and Mr Symons contravened the overarching obligation not to mislead or deceive by their conduct in submitting to the court that there was no conflict and that the appointment of a contradictor was unwarranted (**No Contradictor Contravention**).

**K.3 Manner in which it is alleged the CPA was contravened**

163 Mr O'Bryan and Mr Symons positively submitted to the court at the First Approval Application, both in the Second Bolitho Opinion<sup>140</sup> and in oral submissions on 30 January 2018,<sup>141</sup> that there was no conflict and that the appointment of a contradictor was therefore unwarranted. The Second Bolitho Opinion was attached to an affidavit sworn by Mr Zita and filed with the court by Portfolio Law.

164 That submission was incorrect and misleading in circumstances where there were numerous actual or potential conflicts between the interests of Mr Bolitho/other group members and the interests of AFPL and/or Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law in that:

- (a) The Fee Arrangements that AFPL entered into with Mr O'Bryan AM SC, Mr Symons and Portfolio Law as alleged in paragraph 47 above left AFPL with little or no incentive to manage costs and fees, particularly in circumstances where greater fees appeared to magnify the funding risk assumed by AFPL, thereby inflating the funding commission to which it might be entitled (and

<sup>140</sup> Second Bolitho Opinion, paras 19 – 22.

<sup>141</sup> Transcript on 30 January 2018, page 36 lines 5-9 [[SYM.001.001.5122](#)].



diminishing the funds from the settlement available to be returned to debenture holders).

- (b) The Adverse Settlement Terms were in the interests of AFPL, but were detrimental to the interests of Mr Bolitho and/or other group members.
- (c) Mr O'Bryan AM SC, Mr Symons and Portfolio Law had a direct financial interest in the payments sought by AFPL in respect of legal costs, because AFPL had not paid those costs, and had limited capacity to do so and/or did not intend to do so and/or was not obliged to do so until the settlement proceeds were received.
- (d) The claim for what was, in effect, a common fund order and the claim for legal costs gave rise to a potential conflict of interest between AFPL and group members.
- (e) There was a powerful interest on the part of AFPL, with respect to its commission, to treat all of the settlement sum as referable to the Bolitho Proceeding and to minimise the significance of the SPR Proceeding. Given that the SPR Proceeding was brought for the benefit of, and paid for by, the debenture holders there was a significant potential for conflict.<sup>142</sup>
- (f) It was not in the interests of debenture holders/group members for them to pay excessive amounts in respect of legal costs and disbursements, commission, or scheme administration costs.

#### **K.4 Losses resulting from the No Contradictor Contravention**

165 The No Contradictor Contravention caused or contributed to:

- (a) the miscarriage of the First Approval Application;
- (b) the wasted costs of the First Approval Application;
- (c) the costs of the appeal;
- (d) the costs of the remitter; and
- (e) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

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<sup>142</sup> *Botsman v Bolitho* [2018] VSCA 278 [332] - [333].

Particulars

- (1) If Mr O'Bryan and Mr Symons had disclosed to the court that there were conflicts of interest and that the appointment of a contradictor was warranted, it is highly likely that Justice Croft would have appointed a contradictor.
- (2) If a contradictor had been appointed, the claims for costs and commission would have been properly scrutinized. It is likely those claims would have been approved in a substantially lower sum, and debenture holders/group members would have received their proper entitlement to the Settlement Sum sooner.
- (3) Mr Pitman and Mrs Botsman informed the court that they would not persist with their objections if a contradictor was appointed and concluded that the settlement was fair and reasonable.
- (4) Accordingly, if a contradictor had been appointed, there would have been no appeal from the settlement approval, and debenture holders would have received their proper entitlement to the Settlement Sum in about March 2018 after expiry of the appeal period. On that basis, debenture holders have suffered losses of **at least \$5 million** as particularized in paragraph 196 below.

**L. Conduct by AFPL, Mr Zita/Portfolio Law, Mr O'Bryan and Mr Symons in connection with the appeal by Mrs Wendy Botsman**

**L.1 Relevant background**

166 On 20 March 2018, Mrs Wendy Botsman filed an application for leave to appeal against the approval decision, contending (inter alia) that the funding commission and legal costs were excessive and had not been properly scrutinised.

167 On 18 July 2018, AFPL was joined as a party to the appeal.

**L.2 Outline of contraventions of CPA**

168 By their conduct in connection with Mrs Botsman's appeal as set out below (together the **Appeal Contraventions**):

- (a) AFPL, Mr O'Bryan and Mr Symons contravened the overarching obligation not to mislead or deceive;
- (b) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to only take steps necessary to facilitate the resolution or determination of the proceeding;
- (c) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty.

**L.3 Manner in which it is alleged the CPA was contravened**

**L.3.1 Conduct tending to interfere with the due administration of justice**

169 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law, contravened the Paramount Duty and/or the overarching obligation to only take steps that were reasonably necessary to facilitate the resolution or determination of the dispute, by attempting to:

- (a) prevent or dissuade Mrs Botsman from pursuing her appeal; and
- (b) prevent or dissuade the SPRs and/or their counsel from providing assistance to the Court of Appeal in the consideration of Mrs Botsman's appeal.

**Particulars of (a) and (b)**

(1) In March 2018, AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law engaged in a course of conduct designed to

intimidate Mrs Botsman and deter her from pursuing her appeal.<sup>143</sup> Mr Elliott sent an email to Mrs Botsman intending to intimidate her into dropping her appeal.<sup>144</sup> Mr O'Bryan and AFPL instructed that a letter be sent to Mr Botsman threatening him with personal costs in connection with the appeal [\[NOB.500.003.4094\]](#) [\[NOB.500.003.4117\]](#). Mr Symons and Mr O'Bryan drafted that letter [\[NOB.500.004.7557\]](#) [\[NOB.500.004.7560\]](#) [\[SYM.001.002.1758\]](#) [\[SYM.001.002.1759\]](#), which Mr Zita sent [\[CBP.001.013.2762\]](#) [\[CBP.001.013.2763\]](#) [\[CBP.001.013.2765\]](#). Mr O'Bryan also directed that an application be made for security for costs against Mrs Botsman immediately following service of the application for leave to appeal, to ensure that Mr Botsman was “*nervous before the end of the day*” [\[NOB.500.004.5801\]](#) [\[NOB.500.004.8063\]](#). Thereafter, Mr Symons drafted a letter for Portfolio Law to send to Mrs Botsman to put her on notice of Mr Bolitho’s costs and the “*significant additional costs being incurred by the sixteen other parties to the application for leave to appeal*”, and to enquire about her assets [\[NOB.500.004.2747\]](#) [\[NOB.500.004.2748\]](#). Mr Symons drafted, Mr O'Bryan settled and Mr Zita/Portfolio Law filed the application for security for costs [\[NOB.500.004.5785\]](#) [\[NOB.500.003.3350\]](#) [\[NOB.500.003.3351\]](#) [\[NOB.500.004.2268\]](#) [\[NOB.500.004.2269\]](#) [\[NOB.500.003.3396\]](#) [\[NOB.500.003.3397\]](#) [\[NOB.500.004.8264\]](#). Mr O'Bryan and Mr Symons persisted with the application for security for costs despite the fact that even AFPL was worried that “*an individual with no \$ doing it for the greater good will get lots of sympathy*” [\[NOB.500.004.2695\]](#), see also [\[SYM.001.003.0019\]](#).

(2) AFPL commenced and pursued to conclusion a proceeding against Mrs Botsman claiming an injunction restraining her from continuing with her appeal and damages (AFPL v Botsman).

(3) The injunction proceeding against Mrs Botsman was brought on the basis that the terms of the Funding Agreement, which Mrs Botsman signed, prohibited Mrs Botsman from seeking leave to appeal.<sup>145</sup> Mr O'Bryan and Mr Symons provided AFPL with advice and assistance in connection with that proceeding.

(4) When the appeal was part heard and Mr Redwood (counsel retained by the SPR) was in the middle of submissions to the Court of Appeal,<sup>146</sup> Mr O'Bryan and Mr Symons drafted and Mr Elliott/AFPL sent a letter to the SPRs contending that the submissions made by the SPRs’ counsel amounted to a breach of the terms of the settlement deed by the SPRs in respect of which AFPL was entitled to terminate and sue the SPRs for damages [\[NOB.500.003.9554\]](#) [\[NOB.500.003.9555\]](#) [\[NOB.500.004.6850\]](#) [\[NOB.500.004.6851\]](#) [\[SYM.001.002.2297\]](#) [\[SYM.001.002.2299\]](#) [\[NOB.500.003.5728\]](#) [\[NOB.500.003.5729\]](#). Mr Elliott also sent an email to the SPR and his solicitor (cc Mr O'Bryan) which stated that the SPR needed to sack Mr Redwood, appoint another counsel to “*show and tell*” the Court of Appeal that the SPR supported AFPL’s claim for costs and

<sup>143</sup> Australian Funding Partners Limited v Botsman (No 3) [2018] VSC 507.

<sup>144</sup> Australian Funding Partners Ltd v Botsman (No 3) [2018] VSC 507 [21], [28] – [31], [34] – [35], [49], [54] – [56], [70] – [71].

<sup>145</sup> Australian Funding Partners Ltd v Botsman [2018] VSC 303 [14].

<sup>146</sup> See transcript of hearing on 8 June 2018 [\[SYM.001.001.7683\]](#), page 132-145.

commission, “agree between ourselves” what their respective submissions would say about the Court’s power to alter the funding commission, and file an affidavit in support of the funding commission and the “implied apportionment of the settlement sum” [\[SYM.001.002.1429\]](#). It is to be inferred that AFPL, Mr O’Bryan and/or Mr Symons intended to intimidate the SPR and/or Mr Redwood in circumstances where Mr Redwood had not completed his submissions [see also [SYM.001.001.1276](#)].

170 The conduct alleged in paragraph 169:

- (a) was not reasonably necessary to facilitate the resolution or determination of Mrs Botsman’s appeal;
- (b) sought to deny debenture holders/group members of the benefit of the resolution of Mrs Botsman’s appeal according to the substantive merits;
- (c) had the tendency to deny the Court of Appeal the benefit of proper assistance in resolving Mrs Botsman’s appeal;
- (d) constituted an abuse of the processes of the Court in seeking to compel another party to the appeal (being a party who was an officer of the Court, with duties to the group members whose rights were at stake in the appeal) to file submissions and evidence in support of AFPL’s position in the appeal;
- (e) undermined, rather than promoted, the administration of justice, and had the tendency to bring the administration of justice into disrepute.

#### L.3.2 Misleading the Court of Appeal – conduct and state of mind of AFPL

171 In the appeal, AFPL:

- (a) submitted that the primary judge’s discretion to approve the distribution to AFPL was properly exercised [\[SYM.001.001.0251 at para 9\]](#);
- (b) adopted the contention that the value of the settlement included both the cash component and the benefit of the release from Trust Co’s remuneration claim which was submitted to hold a value of \$11.16 million [\[SYM.001.001.0251 at paras 3, 12 and 13\]](#);
- (c) submitted that “as the primary judge recognised, **AFPL assumed significant risks**, including substantial adverse costs exposure, in funding the proceedings”, which AFPL submitted comprised the following: “AFPL: (a) paid or agreed to pay security for costs in excess of \$1.5 million; (b) accepted liability for adverse costs against all defendants, with the quantum of that

*possible liability likely to exceed \$15 million; (c) paid legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million”* [[SYM.001.001.0251](#) at para 15];

- (d) did not otherwise correct any of the misleading conduct referred to in paragraphs 67 - 73, 76-77, 85, 92, 93, 100 to 148 and 163 to 164 above;
- (e) thereby misled the Court of Appeal;
- (f) did so with knowledge of the matters alleged in paragraphs 17 - 25, 28, 33, 34, 35, 37, 40, 41, 42, 47, 48, 54-59, 60, 62, 63, 67, 68, 70, 71, 72, 76, 77, 80 - 96 100 - 148, 151 - 155, 163, 164, 169, 171 and 172 above.

### L.3.3 Misleading the Court of Appeal – conduct and state of mind of Mr O’Bryan, Mr Symons and Portfolio Law

172 In the appeal, Mr O’Bryan and Mr Symons:

- (a) submitted that *“leave to appeal should be refused in any event because ‘no substantial injustice will be done if the decision stands’”* [[CBP.001.007.7222](#) at para 2];
- (b) adopted and endorsed the Third Trimbo Report and counsel’s opinions;<sup>147</sup>
- (c) prepared and filed submissions in “reply” to AFPL, which submitted that AFPL’s “invested capital” was \$8.6 million to \$9.3 million *“in respect of the proceeding as a whole”* (depending on whether account was taken of the staging of agreed security for costs).<sup>148</sup> Those figures (1) assumed that AFPL had actually invested or allocated capital in respect of the liabilities it says it had incurred; (2) sought to collapse any distinction between the claims that were settled in the Partial Settlement and the claims that were settled against Trust Co, conflating both the costs and the commission in order to, effectively, rewrite the Partial Settlement; (3) excluded GST from the commission (the numerator) but included GST in the “invested capital” (the denominator);

<sup>147</sup> See in particular Mr Bolitho’s written case dated 20 April 2018, paras 1(f), 2, 3, 28-29, 31 [[CBP.001.007.7222](#) at para 2], the transcript of the hearing on 8 June 2018 pages 116-117, 121:3-13, 125:3-128:15, 130:26-131:8 [[SYM.001.001.7683](#)], and the transcript of the hearing on 19 June 2018, page 58:15-68:11, 81:6-85:14, 87:14-88:30 [[CBP.001.011.1948](#)].

<sup>148</sup> Mr Bolitho’s submissions dated 30 August 2018 [[TRI.003.012.0009](#)].

- (d) did not otherwise correct any of the misleading conduct referred to in paragraphs 67 - 73, 76-77, 85, 92, 93, 100 to 148 and 163 to 164 above;
- (e) thereby misled the Court of Appeal;
- (f) did so with knowledge of the matters alleged in paragraphs 28, 33 - 37, 40, 41, 42, 47, 48, 51, 52, 54, 60, 62, 63, 67, 68, 69, 71, 72, 76, 77, 80-85, 87 - 96, 100 and 148 above.

#### **L.4 Losses resulting from the Appeal Contraventions**

173 The Appeal Contraventions caused or contributed to:

- (a) the costs of the appeal;
- (b) the costs of the remitter; and
- (c) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

#### Particulars

(1) In circumstances where AFPL, Mr O'Bryan and Mr Symons knew of the true position with respect to the relevant circumstances, as alleged in paragraphs 171(f) and 172(f), there was no proper basis for Mr Bolitho or AFPL to resist the appeal. The appeal should have been resolved without undue delay or expense. The duty of candour they each owed as officers of the court should have compelled them to correct their misleading conduct by disclosing the true facts and consenting to orders that the approval of the amounts sought by AFPL in respect of costs and commission be set aside.

(2) In those circumstances, it is likely that the appeal would have been resolved sooner, resulting in an earlier distribution to debenture holders/group members.

**M. Conduct in relation to breaches of fiduciary duty**

**M.1 Outline of alleged contravention of CPA**

174 By their conduct alleged in each of the preceding **Sections B to L**, each of AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law and AFPL contravened the Paramount Duty by:

- (a) failing to meet duties they each owed to manage and/or avoid conflicts of interest; and
- (b) pursuing their own interests and the interests of each other in seeking to secure for themselves and/or each other payments that exceeded a fair and reasonable amount in respect of (1) legal costs, (2) commission and/or (3) scheme administration costs, to detriment of the interests of debenture holders/group members,

(together, **Fiduciary Duty Contraventions**).

**M.2 Manner in which it is alleged the Paramount Duty was contravened**

M.2.1 Significant breaches of fiduciary duty

175 The conduct of AFPL, Mr O'Bryan and Mr Symons alleged in paragraphs 40 to 173 had the purpose and/or effect of securing for themselves and/or each other payments that exceeded a fair and reasonable amount in respect of any one or more of (1) commission, (2) legal costs, and/or (3) scheme administration costs, to the detriment of group members.

Particulars

The purpose of the conduct is to be inferred from the nature of the conduct, the circumstances in which the conduct was engaged in, and the likely effect of the conduct. The conduct alleged above, taken as a whole and in the circumstances set out above, gives rise an inference that it was engaged in for the purpose of obtaining the excessive payments that were sought to be obtained by the conduct.



176 By reason of the matters alleged in the paragraphs 40 to 175, in connection with the Trust Co Settlement and the application for approval of that settlement including approval of payments from the Settlement Sum, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law:

- (a) acted to pursue the interests of AFPL and/or their own interests in a manner that gave rise to actual conflicts with the duties they each owed to Mr Bolitho and other group members (as set out in paragraphs 10, 12 and/or 27 above);
- (b) failed to act in good faith and in the interests of Mr Bolitho and other group members, but rather, sacrificed the interests of Mr Bolitho and/or other group members in favour of their own interests and the interests of AFPL (in the manner set out in paragraphs 40 to 173 above);
- (c) did so without fully informing Mr Bolitho and/or other group members of all material facts relating to the benefits they and AFPL sought to obtain from the settlement with Trust Co (being the facts alleged to constitute the true position in connection with each of the Contraventions set out above);
- (d) failed to meet ordinary standards of honest behaviour; and
- (e) committed significant breaches of fiduciary duty.

#### M.2.2 Conduct of AFPL in assisting or procuring breaches of fiduciary duty

177 Further, AFPL:

- (a) knew of the fiduciary duties owed by Mr O'Bryan, Mr Symons, and Mr Zita/Portfolio Law;
- (b) engaged in the conduct alleged in paragraphs 40 to 173 above, which conduct had the purpose and/or effect alleged in paragraph 175 above;
- (c) knew of the matters in paragraphs 17 - 25, 28, 33, 34, 35, 37, 40 - 42, 47, 48, 51, 54, 60, 62, 63, 67, 68, 70, 71, 72, 76, 77, 80 - 96, 100 - 148, 151 - 155, 163, 164, 169, 171 and 172 above;
- (d) accordingly:
  - (i) had sufficient knowledge of the elements comprising the significant breaches of fiduciary duty of Mr O'Bryan, Mr Symons, and Mr Zita/Portfolio Law;

- (ii) facilitated, assisted and/or procured those significant breaches of fiduciary duty.

M.2.3 Conduct of AFPL in failing to comply with Funding Agreement, Conflicts Management Policy and Disclosure Statement

178 Further, AFPL failed to comply with the Funding Agreement, Conflicts Management Policy and Disclosure Statement, in that:

- (a) AFPL circumvented the Bolitho No 4 Decision and the Bolitho Court Undertakings as alleged in paragraphs 39 to 43;
- (b) AFPL's Conflict Management Policy and Disclosure Statement stated that AFPL would monitor costs and budgets, but there is no evidence that AFPL asked Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law to provide budgets or advance cost estimates or any documentary evidence of costs incurred from time to time [\[CBP.001.011.5669\]](#) [\[CBP.001.011.5670\]](#) [\[SYM.001.001.4116\]](#) [\[SYM.001.001.4119\]](#) [\[CBP.001.011.5464\]](#) [\[CBP.001.002.1535\]](#);
- (c) AFPL entered into the Fee Arrangements with Mr O'Bryan and Mr Symons as alleged in paragraph 47 above, arrangements which were unreasonable and unduly exposed group members to the risk of excessive charging;
- (d) there is no evidence that AFPL ever informed Mr Bolitho and/or other group members of the conflicts of interest identified in paragraph 164;
- (e) AFPL induced or assisted Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law to breach their professional and fiduciary duties to Mr Bolitho and/or other group members as set out in paragraph 177, contrary to express provisions in the Funding Agreement and AFPL's Conflicts Management Policy and Disclosure Statement, which stated that the safeguards in place to manage conflicts of interest included that *"the lawyers are to act for you and not [AFPL] (and you should be aware that the lawyers owe fiduciary and ethical duties to their clients)"*<sup>149</sup> and that *"we seek to ensure that your interests are adequately protected by acknowledging and accepting that the professional and fiduciary duties owed to you by the lawyers (being funded by [AFPL] to pursue your claim) take precedence over any duties or obligations those lawyers may owe to [AFPL]"*<sup>150</sup>

<sup>149</sup> AFPL's Disclosure Statement, para 4.7(b).

<sup>150</sup> AFPL's Disclosure Statement, para 4.27(e).

#### M.2.4 How the conduct contravened the Paramount Duty

179 The conduct of AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law alleged in paragraph 39 to 178 contravened the Paramount Duty in that:

- (a) the conduct undermined the court's expectation that it should have the assistance of independent legal representation for the litigating parties, acting with good faith, untainted by divided loyalties, which is central to the preservation of public confidence in the administration of justice;
- (b) the conduct denied the group members the benefits and protections of the procedure established by Part 4A of the SCA, in that it resulted in Mr Bolitho – a representative plaintiff with duties to represent the interests of 16,000 debenture holders/group members – failing to discharge those duties by seeking to recover excessive payments from group members;
- (c) it was inimical to the administration of justice for Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL to misuse their position and the processes of the court to seek to obtain for themselves payments which exceeded a fair and reasonable amount at the expense of vulnerable group members who had little or no ability to contradict the payments and who relied heavily upon Mr Bolitho, his lawyers, and AFPL.

#### **M.3 Losses resulting from Fiduciary Duty Contraventions**

180 The Fiduciary Duty Contraventions caused or contributed to:

- (a) the wasted costs associated with drafting and negotiating the Settlement Deed (which AFPL should not be permitted to recover from the Settlement Sum);
- (b) the miscarriage of the First Approval Application;
- (c) the wasted costs of the First Approval Application;
- (d) the costs of the appeal;
- (e) the costs of the application to the High Court for special leave to appeal;
- (f) the costs of the remitter; and
- (g) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum.

Particulars

The Contradictor refers to and repeats paragraph 194 and 196 below. By about 21 March 2018 and alternatively by about 29 November 2018, the Settlement Sum would have been distributed to debenture holders/group members.

## **N. Conduct in connection with the remitter**

### **N.1 Outline of contraventions of CPA**

181 AFPL contravened:

- (a) the overarching obligation not to mislead or deceive;
- (b) the overarching obligation to ensure that legal costs are reasonable and proportionate; and
- (c) the Paramount Duty,

by its conduct in:

- (a) discovering the O'Bryan December 2017 Costs Agreement and the Symons December 2017 Cost Disclosure Statements, which documents were discovered by AFPL and Mr Bolitho on or about 13 February 2019 in a manner that suggested they were created in advance of costs being incurred, without any explanation that the documents were in fact created after-the-event, in December 2017; and
- (b) resisting the Contradictor's efforts at ascertaining when the documents had been created and served on AFPL,

(together the **Misleading Discovery Contraventions**).

### **N.2 Manner in which it is alleged the CPA was contravened**

182 Prior to the directions hearing on 1 February 2019 in this remitter, the Contradictor proposed orders which included orders for AFPL and Mr Bolitho to discover and produce:

- (a) any costs agreements with Mr O'Bryan or Mr Symons or cost disclosure statements issued by them;
- (b) documents evidencing or recording case budgets prepared by, for, or on behalf of Mr Bolitho;
- (c) all communications between Mr O'Bryan or Mr Symons and AFPL or the solicitors for Mr Bolitho relating to the costs incurred by counsel or expected to be incurred by counsel in conducting the Bolitho Proceeding [\[SYM.001.001.5424\]](#) [\[SYM.001.001.5425\]](#).

- 183 AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law consented to that order, and on 1 February 2019, orders were made for AFPL and Mr Bolitho to discover those documents (**1 February 2019 Orders**).
- 184 Between 8 and 11 February 2019, in connection with the 1 February 2019 Orders for discovery, Mr O'Bryan and Mr Symons provided AFPL with copies of the O'Bryan December 2017 Costs Agreement and the Symons December 2017 Disclosure Statements [\[CBP.001.011.5464\]](#) [\[SYM.001.001.0058\]](#) [\[SYM.001.001.0060\]](#) [\[SYM.001.003.1440\]](#) [\[SYM.001.003.1441\]](#) [\[SYM.001.003.1447\]](#).
- 185 On or about 13 February 2019, AFPL provided a joint list on behalf of AFPL and Mr Bolitho of documents falling within the discovery categories ordered by the court [\[AFP.003.001.1289\]](#), which Mr Zita/Portfolio Law confirmed was "*a complete list of Mr Bolitho's discoverable documents and consistent with his discovery obligations*" [\[CBP.001.011.5240\]](#) [\[CBP.001.011.5241\]](#) [\[CBP.001.013.4646\]](#), and which included the following documents [\[CBP.001.014.1219\]](#) (together the **Costs Agreements**):

No	Date	Document
3	30 May 2016	Costs Agreement between Norman O'Bryan AM SC and Laurie Bolitho
6	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 January 2016
7	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 September 2016
8	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 January 2017
9	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 July 2017

- 186 On 18 February 2019, the Contradictor requested Portfolio Law and AFPL to produce the covering emails by which the Costs Agreements were sent to AFPL and/or Portfolio Law [\[SYM.001.003.1964\]](#) [\[CBP.001.013.4666\]](#).
- 187 On 22 February 2019, AFPL refused to provide the covering emails [\[SYM.001.002.9315\]](#).

- 188 Accordingly, the Contradictor made an application to the court for discovery of those documents, and on 1 March 2019, AFPL and Mr Bolitho were ordered to produce them.
- 189 On or about 8 March 2019, in response to the 1 March 2019 Orders, AFPL and Mr Bolitho discovered email communications between Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law, AFPL and Mr Trimbos dated 18 to 20 December 2017 (**December 2017 Trimbos Communications**) [\[SYM.002.002.8943\]](#) [\[SYM.002.002.8946\]](#) [\[SYM.002.002.8955\]](#) [\[SYM.002.002.8959\]](#) [\[SYM.002.002.8937\]](#) [\[SYM.002.002.8939\]](#) in which:
- (a) Mr Trimbos asked Mr O'Bryan AM SC and Mr Symons to email to him their costs agreements for the Relevant Period;
  - (b) Mr O'Bryan replied in the manner alleged at paragraph 85(l), attaching a Costs Agreement which was dated 30 May 2016 and signed by him;
  - (c) Mr Symons and Mr Trimbos exchanged a series of emails in which Mr Symons provided undated and unsigned disclosure statements for the Relevant Period, which purported to provide estimates of costs to be incurred at different points in time.
- 190 Between 8 and 19 March 2019, the Contradictor pressed Mr Zita/Portfolio Law and AFPL to advise when the Costs Agreements had been created and/or served on Portfolio Law and AFPL [\[SYM.001.002.3065\]](#) [\[SYM.001.002.1920\]](#) [\[SYM.001.002.1921\]](#) [\[SYM.001.001.8314\]](#) [\[SYM.001.001.8316\]](#).
- 191 On 19 March 2019, Portfolio Law admitted that Mr O'Bryan SC's and Mr Symons' written costs agreements in respect of the period between the 2016 settlement and the settlement hearing on 30 January 2018 were prepared in December 2017, in response to the request made by Mr Trimbos for a written record of the terms which had been agreed with the funder in respect of their fees [\[CBP.001.012.0164\]](#) [\[CBP.001.012.0165\]](#).
- 192 By their conduct alleged in the preceding paragraphs, AFPL:
- (a) contravened the overarching obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive, in that it:
    - (i) caused or permitted the Costs Agreements to be discovered without informing the Contradictor that the Costs Agreements were created in

December 2017 and not on the dates stated or implied by the documents;

- (ii) failed to ensure that AFPL and Mr Bolitho discovered the December 2017 Trimbo's Communications, which were "*communications between Mr O'Bryan or Mr Symons and AFPL or the solicitors for Mr Bolitho relating to the costs incurred by counsel or expected to be incurred by counsel in conducting the Bolitho Proceeding*" within the meaning of the 1 February 2019 Orders; and
- (b) contravened the overarching obligation to act honestly, in that it must have intended for the Contradictor to accept the veracity of the Costs Agreements;

#### Particulars

The intention is to be inferred from the conduct in (1) discovering the Costs Agreements without any explanation or qualification as to the timing of their creation; (2) failing to discover the December 2017 Trimbo's Communications despite the fact that they were within the terms of the 1 February 2019 Orders; and (3) resisting orders for the discovery of emails or covering letters attaching the Costs Agreements.

- (c) contravened the overarching obligation to ensure that legal costs were reasonable and proportionate, in that there was no proper basis to resist informing the Contradictor that the Costs Agreements were in fact created in December 2017 and not on the dates stated or implied by the documents;
- (d) contravened the Paramount Duty, in that it carried the risk that the court would again be misled in the assessment of the claims by AFPL and Mr Bolitho for recovery of Legal Costs.

### **N.3 Losses resulting from Misleading Discovery Contraventions**

- 193 The Misleading Discovery Contraventions caused or contributed to wasted costs incurred in the remitter, in that time and expense was spent in correspondence with AFPL and Portfolio Law in connection with the Costs Agreements and in returning to Court on 1 March 2019 to seek discovery of the correspondence by which those documents were served.



**O. Losses arising from contraventions of Civil Procedure Act**

194 But for the contraventions of the Paramount Duty and Overarching Obligations alleged above:

- (a) Mr Bolitho would have been represented by independent lawyers, who would have acted in his interests and in the interests of other group members, operating as an effective check on the ability of AFPL to advance AFPL's interests to the detriment of Mr Bolitho and other group members, and further or alternatively matters would have been properly referred to Mr Bolitho's independent solicitor when the conflicts identified in paragraph 164 arose;
- (b) the Settlement Deed would not have contained terms that (1) sought to make the settlement conditional upon approval of payments to AFPL (as submitted in the Court of Appeal and now submitted in the High Court) and (2) procured the support of the SPRs to the payments to AFPL, as such terms were not in the interests of Mr Bolitho or other group members, and his lawyers would not have recommended that he agree to them (and would not have proposed them and would not have drafted them) and AFPL would not have insisted on them or procured that his lawyers recommend that he agree to them;
- (c) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law would have disclosed the true position to Mr Bolitho and/or other group members about the costs that had been properly incurred and/or paid, and this would have been relevant to Mr Bolitho and group members in deciding whether to support (or object to) the costs and commission sought;
- (d) AFPL would have disclosed the Undisclosed Matters to the SPRs, and the SPRs, and the SPRs would not have agreed to support AFPL's claims for costs and commission and/or would have sought appropriate directions from the Court to facilitate the settlement without the Adverse Settlement Terms and/or would have assisted the Court in properly scrutinising AFPL's claims for costs and commission;
- (e) AFPL, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law would have disclosed the true position to (1) Mr Trimbo and (2) the court with respect to all of the matters outlined above;
- (f) the court would have approved reasonable costs and funding commission in a significantly lower sum than currently claimed by AFPL;

- (g) a contradictor would have been appointed to review the settlement and the claim for costs and commission;
- (h) it is likely that the contradictor would have concluded that the Settlement Sum was fair and reasonable, and that there would have been no appeal from the approval of the Settlement Sum;
- (i) debenture holders would have received their proper entitlement upon expiration of the appeal period following approving the settlement in about March 2018;
- (j) the wasted costs of the Third Trimbo's Report, the First and Second Bolitho Opinion, the Bolitho Scheme and the First Approval Application would not have been incurred;
- (k) the costs of the appeal would not have been incurred;
- (l) the costs of this remitter would not have been incurred, or alternatively, the remitter would have been resolved more quickly and at less expense;
- (m) the costs of the High Court special leave application would not have been incurred.

**P. Relief sought under the Civil Procedure Act**

195 All of the conduct outlined above was conduct in connection with a civil proceeding, being a civil proceeding in which the court was asked (and is asked) to exercise a power in relation to a civil proceeding (being the power under sections 33V and 33ZF of the Supreme Court Act 1986 (Vic)) within the meaning of section 28 of the CPA.

196 By reason of the contraventions of the Paramount Duty and Overarching Obligations alleged above:

- (a) debenture holders/group members have suffered losses of **at least \$5 million**;

Particulars

(1) But for the Contraventions, debenture holders/group members would have received their proper entitlement to the Settlement Sum by about **21 March 2018** (assuming there had been no appeal) or alternatively by no later than **29 November 2018** (assuming there had been an appeal).

(2) In fact, part of the Settlement Sum (**\$42 million**) was distributed to group members in about **June 2019**, with the balance (**\$22 million**) held by the SPRs on account of claims of that fund by AFPL and in respect of costs of the remitter.

(3) Assuming that debenture holders have been kept out of proceeds of **\$64 million**, they suffered losses up to June 2019 of **\$7 million**, and continue to suffer losses on the \$22 million held by the SPRs at the rate of **\$6,027 per day**.

(4) Assuming that debenture holders have been kept out of proceeds of **\$50 million**, they suffered losses up to June 2019 of about **\$6 million**, and continue to suffer losses on the \$12 million held by the SPRs at the rate of **\$3,288 per day**.

(5) Assuming that debenture holders were kept out of proceeds of **\$44 million**, they suffered losses up to June 2019 of more than **\$5 million**, and continue to suffer losses on the \$2 million held by the SPRs at the rate of **\$548 per day**.

(6) Further particulars may be provided prior to the hearing.

- (b) substantial costs have been incurred by the SPRs and the Contradictors before Justice Croft, the Court of Appeal, and on remitter;
- (c) an order should be made under ss 28 and 29(1) of the CPA to reduce or disallow AFPL's commission;

- (d) an order should be made under ss 28 or 29 of the CPA for AFPL, Mr O'Bryan AM SC, Mr Symons and/or Mr Zita/Portfolio Law to be required to compensate debenture holders for their losses materially contributed to by contraventions of the Overarching Obligations, including for penalty interest in respect of the delay in the payment of an amount claimed in the civil proceeding;
- (e) an order should be made under s 29 of the CPA for AFPL, Mr O'Bryan AM SC, Mr Symons and/or Mr Zita/Portfolio Law to be required to pay the costs of the Contradictors (on remitter) and the SPRs (at the First Approval Application, in the Court of Appeal, in the High Court, and in the remitter) to be paid on an indemnity basis to ensure that debenture holders are not required to pay those costs.

**Q. Relief sought under section 33ZF of the Supreme Court Act**

197 Further or alternatively, in the premises set out above, it is appropriate or necessary to ensure that justice is done in the proceeding for the court to reduce or disallow entirely AFPL's claims for costs and/or commission, in that:

(a) AFPL:

- (i) was an agent for the Funded Group Members;
- (ii) has acted improperly and dishonestly in connection with the Trust Co settlement by reason of the conduct of its managing director and further or alternatively its agents, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law as alleged above;
- (iii) is therefore disentitled from recovering any commission or remuneration from the group members out of the Trust Co settlement;

(b) further or alternatively:

- (i) by reason of the significant breaches of fiduciary duties owed to Mr Bolitho and/or other group members in connection with the Trust Co settlement as alleged in paragraphs **Sections B to O** above, Mr O'Bryan, Mr Symons and/or Mr Zita/Portfolio Law are disentitled from recovering any remuneration from group members out of the Trust Co settlement (namely, their claims for costs and disbursements);
- (ii) by reason of its conduct by which it assisted and/or procured those significant breaches of fiduciary duty as alleged in paragraph 177 above, AFPL is disentitled from recovering any profit or commission out of the Trust Co settlement;
- (iii) the court should exercise its power under section 33ZF of the SCA to prevent AFPL, Mr O'Bryan AM SC, Mr Symons and/or Mr Zita/Portfolio Law from obtaining any benefit which it would be inequitable in the circumstances for them to obtain (namely, their claims for costs and disbursements);

- (c) further or alternatively:
- (i) for the reasons set out above, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL failed to properly discharge their duties to Mr Bolitho and other group members in connection with the Trust Co settlement;
  - (ii) by analogy with equitable principles relevant to fiduciaries and trustees, the court should consider whether, having regard to their respective conduct as particularized, it is just to order that any allowance be paid out of the settlement sum in respect of the claim for costs of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law and the claim for commission of AFPL;
  - (iii) in all of the circumstances, having regard to the respective conduct of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and AFPL as particularised relative to applicable normative standards, the court should exercise its discretion to disallow their costs and/or commission as deductions from the Settlement Sum, or alternatively, to reduce them.

Particulars of (c)(i) - (iii)

198 With respect to all of the conduct alleged above (collectively, individually, and in any combination):

- (a) Each of Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law and AFPL breached the Paramount Duty and the Overarching Obligations, and further, AFPL is responsible for the contraventions of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law by reason of the matters alleged in **Section D**.
- (b) Each of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law breached their duty to act with independence,<sup>151</sup> and/or to avoid any compromise to their integrity and professional independence.<sup>152</sup>
- (c) Each of Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law and AFPL contravened their paramount duty to the court to further the administration of justice.<sup>153</sup>

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<sup>151</sup> Barristers' Rules r 42; Solicitors' Rules r 17.1.

<sup>152</sup> Barristers' Rules r 23; Solicitors' Rules r 4.1.4.

- (d) Each of Mr O'Bryan AM SC, Mr Symons, Mr Zita/Portfolio Law and Mr Elliott/AFPL engaged in conduct that was prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.<sup>154</sup>
- (e) Each of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law breached their duties of care, skill, competence and diligence owed to Mr Bolitho and/or other group members at law.
- (f) There was conduct by each of Mr O'Bryan AM SC, Mr Symons and Mr Zita/Portfolio Law that was capable of constituting unsatisfactory professional conduct and/or professional misconduct under ss 295 to 298 of the Legal Profession Uniform Law.
- (g) There was an abuse of process by AFPL, Mr Elliott, Mr O'Bryan AM SC, Mr Symons and/or Mr Zita/Portfolio Law.
- (h) It is appropriate or necessary to ensure that justice is done in the proceeding for the court to either reduce or disallow entirely the claim for AFPL in respect of costs and commission pursuant to section 28 of the CPA and/or section 33ZF of the SCA.

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<sup>153</sup> CPA s 16; Barristers' Rules r 23; Solicitors' Rules r 3.1.  
<sup>154</sup> Barristers' Rules r 8; Solicitors' Rules r 5.1.

## ATTACHMENT 1

- 1 On **9 November 2017** at 6.55pm, Mr Symons emailed Clayton Utz cc Mr Newman and Mr Zita making an offer to settle the claimed in both the Bolitho Proceeding and the SPR Proceeding against Trust Co, on terms that included payment of a settlement sum of \$64 million and a requirement that *“Trust Co will support the application for approval, including the plaintiffs’ claims for legal fees and the litigation funder’s fee as agreed between the plaintiffs”* [[SYM.001.001.5639](#)].
- 2 On **9 November 2017** at 8.17pm, Clayton Utz replied making a counter-offer to settle on broadly the same terms as those outlined in Mr Symons’ earlier email, but also including a requirement for *“- An undertaking from Norman O’Bryan and Mark Elliott and their associated entities that they will not fund, assist, procure, encourage or otherwise be involved in any proceedings against Perpetual Limited in connection with Perpetual Limited not indemnifying Trust Co or making any contribution in respect of an adverse judgment in relation to these proceedings”* [[SYM.001.001.5639](#)].
- 3 At 9.18pm Mr Symons forwarded the email to Mr O’Bryan, Mr Elliott and Mr Zita [[SYM.001.001.7114](#)].
- 4 At 9.57pm, Mr O’Bryan emailed Mr Symons and Mr Elliott stating: *“I think Perpetual should pay for any undertaking to be given by any of us. It clearly has value for them”* [[SYM.001.001.6313](#)].
- 5 At 10.10pm, Norman O’Bryan replied, copying Mark Elliott: ***“Provided Mark can do a satisfactory and enforceable deal with Lindholm on the division of these spoils (which will be confirmed between them tomorrow), we can do this deal. Michael, pls draft an acceptance of this counter offer, conditional on that deal being done tomorrow”*** [[SYM.001.001.6715](#)].
- 6 At 10.57pm, Mr Elliott replied stating that the counter-offer should include a condition requiring *“Trustco to support payment of \$75K to class action plaintiff out of proceeds”* [[SYM.001.001.5479](#)].
- 7 At 11.33pm Mr Symons sent an email to Clayton Utz cc Mr Newman and Mr O’Bryan and bcc to Mr Elliott conveying acceptance of the offer on the conditions proposed by Mr O’Bryan and Mr Elliott [[SYM.001.001.5639](#)].



- 8 On **10 November 2017**, Mr Elliott informed Mr Crow (Mr Bolitho's independent solicitor) that there was a "possibility" of a settlement that would represent approximately 10 cents in the dollar to each debenture holder. Mr Crow agreed to seek instructions to settle on that basis [\[TRI.002.001.0538 at page 37\]](#).
- 9 On **10 November 2017**, Mr Elliott met with Mr Lindholm and said that Mr Bolitho and AFPL would only settle if the settlement deed entitled AFPL to receive \$12.8 million plus GST for commission and \$4.75 million plus GST for costs (Confidential affidavit of John Lindholm sworn 29 March 2019 para 15). Mr Lindholm initialled a document recording those figures [\[SYM.001.001.4887\]](#).
- 10 At 3.23pm, Mr Elliott emailed a copy of that document to Mr O'Bryan, who forwarded it to Michael Symons [\[SYM.001.001.4885\]](#).
- 11 At 4.47pm Clayton Utz emailed Mr Symons cc Mr Newman, Mr Zita, Mr O'Bryan and others, stating that Trust Co accepted the plaintiffs' offer [\[SYM.001.001.4876\]](#). Mr O'Bryan forwarded that email to Mr Elliott.
- 12 At 4.55pm Mr Elliott replied to Mr O'Bryan and Mr Symons, stating: "*MS. The plaintiffs have reached an agreement as contemplated in our joint offer*" [\[SYM.001.001.4876\]](#). Mr Elliott replied stating: "*So I've just heard*" [\[SYM.001.001.4880\]](#).
- 13 At 5.03pm Mr Symons replied to Clayton Utz stating: "*I am instructed that the plaintiffs have reached an agreement and that the condition is satisfied. I now propose to send an email to the Associate to the Honourable Associate Justice Eftim advising that the matters have settled, subject to the execution of formal terms and the obtaining of Court approval*" [\[SYM.001.001.4697\]](#).
- 14 At 5.20pm Mr Elliott forwarded that email to Mr Crow, stating: "*See below regarding Trustco. We are agreed, its just come through. The headline figure is approx. \$85M and the **debenture holders will get at least 10 cents each (possibly by Xmas)**. Can you please **let LB know about the terms (and about his fee!)**. Lets discuss the details on Monday*" [\[BOL.001.001.0004\]](#).
- 15 On **11 November 2017** at 8.26am Mr Elliott emailed Mr Symons re: "Settlement Deed", stating: "*MS, Suggest you talk to JR Liquidator has put a deal to IH and Leggatt-7 days to agree I think. Prefer that they be in your Deed. **Trustco fees must be for \$3.9M award plus ANY other claim** -let Sam K advise and confirm*" [\[SYM.001.001.2106\]](#).

- 16 At 8.44am Mr Newman emailed Mr O'Bryan, Mr Symons and others in relation to preparing a draft settlement deed [\[SYM.001.001.3662\]](#) [\[CBP.001.002.3878\]](#). At 9.06am Mr Elliott emailed Mr Newman re: "Settlement" stating: *"Please put me on the cc list with Norm and MS otherwise we will lose too much time on turnaround via Portfolio Law"* [\[CBP.004.010.0045\]](#).
- 17 At 4.43pm Mr Symons emailed Mr Elliott in response to his email of 8.26am that day, stating: *"Just so I don't misunderstand, what do you mean by 'Trustco fees must be for \$3.9M award plus ANY other claim'"*. At 4.46pm Mark Elliott replies: *"Cof A confirmed Trust entitlement but claim was only to 2016 and more to come was threatened. **It grosses up \$64M figure and blurs my 20% calculation if we sort of add it in**"*. At 5.11pm Michael Symons replied: *"OK, I understand. **The \$64m is effectively \$68m or \$71m.**"* At 5.13pm, Mark Elliott replied: *"It's definately \$70M or more. I would like Maddocks to gross up the \$64M at least in words to include the release from Trustco **for say \$6M of fees plus the IH settlement if possible**"*. At 5.21pm, Mr Symons replied: *"OK, **I understand what I'm doing.**"* At 5.43pm, Mr Elliott replied: *"**Maddocks will pushback but we must insist**"* [\[SYM.001.001.2106\]](#).
- 18 On **12 November 2017** at 10.14am, Mr Newman circulated a draft settlement deed [\[SYM.001.001.2064\]](#) [\[SYM.001.002.7622\]](#). Clause 2.3 of that deed provided:
- "2.3. At the hearing of the Bolitho Settlement Approval Application, BSL, the Liquidators and Trust Co agree to instruct their legal representatives **to take all reasonable steps (consistent with their representatives' professional obligations)** to support BSLLP's application for payment of 20% of the Settlement Sum; provided, however, **that Bolitho and BSLLP acknowledge and agree that the terms of this Deed will continue to operate if the Court determines that BSLLP is entitled to payment of an amount less than 20% of the Settlement Sum.**"*
- 19 At 11.11am Mr Symons emailed Mr O'Bryan and Mr Elliott re "Settlement Deed" attaching suggested amendments (marked up) to the settlement deed. [\[SYM.001.001.2014\]](#) [\[SYM.001.001.2015\]](#). At 11.23am he emailed Mr Elliott stating: *"In my mark-up I've introduce a concept of a 'Settlement Benefit to Creditors' and changed your fee to be the sum of \$12.8 million rather than 20% of Settlement Sum"* [\[SYM.001.001.0894\]](#).
- 20 At 12.28am Mr Elliott emailed Mr Symons cc Norman O'Bryan and Alex Elliott stating: *"MS, We need to **identify other settlement benefits to list. The proviso in clause 2.3 is unacceptable.** I think that we must insist that the insurance claim is also settled and added to the settlement benefit description. What about the \$1.76M BSL still holds in trust-where do we mention that? **I want our costs listed and the quantum agreed and the same clause about all parties supporting it in court.**"*

**GST is confirmed as payable. If Court rejects BSL funding fee the settlement deal fails. Not negotiable”** [\[SYM.001.001.0894\]](#).

21 At 4.44pm Mr Symons emailed Mr O'Bryan and Mr Elliott cc Alex Elliott attaching a further marked up draft settlement deed [\[SYM.001.003.1463\]](#) [\[SYM.001.003.1467\]](#).

22 Between 5.05pm and 5.53pm Mr Elliott and Mr Symons exchanged further emails about the settlement deed [\[SYM.001.003.1182\]](#) [\[SYM.001.001.1420\]](#) [\[SYM.001.001.1722\]](#) [\[SYM.001.003.1182\]](#) [\[SYM.001.001.1420\]](#) [\[SYM.001.003.1182\]](#) [\[SYM.001.001.1420\]](#) [\[SYM.001.001.0929\]](#) [\[SYM.001.001.0933\]](#) [\[SYM.001.001.0894\]](#).

23 On **12 November 2017** at 6.35pm, Mr Symons emailed Maddocks, Mr Redwood, Mr Zita, Mr O'Bryan and Mr Elliott attaching a revised draft deed. That deed contained a number of provisions favourable to AFPL's interests but adverse to the interests of Mr Bolitho and other group members [\[SYM.001.001.0492\]](#) [\[SYM.001.001.0494\]](#). AFPL and Mr Elliott/AFPL reviewed and settled the email and revised deed before it was sent [\[SYM.001.003.0920\]](#) [\[SYM.001.003.0925\]](#) [\[SYM.001.003.0942\]](#) [\[SYM.001.001.0635\]](#). That deed contained the following amendments to the deed circulated by Mr Newman:

“Background...

I. In the course of prosecuting and defending their respective claims made in the Bolitho Proceeding and BSL Proceeding, and related proceedings, the Parties have incurred significant legal costs and disbursements in the following sums and have respectively been exposed to significant adverse costs risks:

I.1 BSLLP on behalf of Bolitho: \$7.3 million (in respect of which \$2.55 million were paid pursuant to a partial settlement approved by the Honourable Justice Robson on 26 August 2016);

I.2 Liquidators on behalf of BLS: [\$10 million]; and

I.3 Trust Co: [\$15 million].

J. The Parties agree that by giving effect to the terms set out in this Deed the Creditors of BSL, including the Group Members, will receive the Settlement Benefit.”

“Settlement Benefit means the Settlement Sum of \$64 million to be paid by Trust Co in accordance with cl 3 below, the release of all claims to remuneration by Trust Co in accordance with cl 4.4.3 below, being the claim for approximately \$3.9 million which was the subject of the Remuneration Proceeding and any other or further claim by Trust Co for remuneration, and the avoidance of further litigation costs in respect of the Proceedings which would otherwise be paid by BSL and deplete its existing funds of approximately \$14 million available to meet Creditors', including Group Members', claims.”

"2.3. At the hearing of the Bolitho Settlement Approval Application, BSL, the Liquidators and Trust Co agree to instruct their legal representatives to take all reasonable steps (consistent with their representatives' professional obligations) to support BSLLP's application for payment of 20% of the Settlement Sum \$12.8 million (plus Goods and Services Tax) by way of a funder's commission from the funds available to BSL upon the payment of the Settlement Sum pursuant to clause 3.1 below or from the funds held in the Portfolio Law Trust Account upon the payment of the Settlement Sum pursuant to clause 3.2 below, as the case may be.; provided, however, that Bolitho and BSLLP acknowledge and agree that the terms of this Deed will continue to operate if the Court determines that BSLLP is entitled to payment of an amount less than 20% of the Settlement Sum.

2.4 At the hearing of the Bolitho Settlement Approval Application, BSL, the Liquidators and Trust Co agree to instruct their legal representatives to support BSLLP's application for payment of legal costs and disbursements incurred by BSLLP in the conduct of the Bolitho Proceeding in the sum of \$4.75 million (plus Goods and Services Tax) from:

2.4.1 in the first instance, from the sum of approximately \$1,757,500 presently held on trust by BSLLP for Group Members; and

2.4.2 the remainder from the funds available to BSL upon the payment of the Settlement Sum pursuant to clause 3.1 below or from the funds held in the Portfolio Law Trust Account upon the payment of the Settlement Sum pursuant to clause 3.2 below, as the case may be.

...

2.6 Subject to clause 2.7 below, if the Court does not make orders giving effect to payments to BSLLP in the sum of \$12.8 million by way of a funder's commission and in respect of legal costs and disbursements incurred by BSLLP in the Bolitho Proceeding as referred to in clauses 2.3 and 2.4 above respectively and to Bolitho as referred to in clause 2.5 above in the course of making orders on the Settlement Approval Application approving the Settlement, then the rights and obligations under this Deed shall no longer operate and this Deed will be at an end.

2.7 Should each of Bolitho and BSLLP agree in writing within five business days of the making of orders on the Settlement Approval Application approving the Settlement which are inconsistent with clause 2.6, Bolitho and BSLLP may agree to waive the operation of clause 2.5."

- 24 At 7.27pm Mr Redwood emailed Mr Symons, Mr Newman and Mr O'Bryan with some comments about a particular aspect of the draft settlement deed. Mr Symons forwarded the email to Mr Elliott. Mr Elliott forwarded the email to Mr O'Bryan stating: "Norm, Do you need to talk to JR. **I will not allow Maddocks to hold us hostage again like they did with the mini settlement!**" Mr O'Bryan replied stating: "JR doesn't have any control over this process and we should ignore him (as Lindholm does). I think we should say that, unless they settle the IH claim within a few days, the \$64M comes to Portfolio and we will deal with it, seek court approval

and distribute it. **Leave them out in the cold this time around**" [\[NOB.500.001.7618\]](#).

25 On that date (ie **12 November 2017**), Mr Symons charged 1 day for:

*"Amending initial draft settlement deed circulated by David Newman; conferring with Mr Elliott; conferring with senior counsel and Jonathon Redwood re: same, advising; preparing further amended versions of settlement deed incorporating Jonathon Redwood's proposed amendments; drafting email to David Newman; conferring with Mr Elliott, Alex Elliott and senior counsel re: same, advising."*

26 On **13 November 2017** at 12.04pm, Mr Redwood emailed Mr Symons, Mr O'Bryan and his instructors attaching a revised draft deed [\[SYM.001.002.2318\]](#) [\[SYM.001.002.2322\]](#). His email stated:

*"(b) whilst more a matter for submissions in our view, we are content to include the concept of a 'Settlement Benefit' in the Deed along the lines suggested in addition to making such points by way of submissions at the approval application.*

*(c) The Liquidator is unable to agree to all of the changes to clause 2.3 suggested. In particular, Banksia and the Liquidators (and we strongly expect Trust Co also) will not agree to taking the risk (perhaps small though it is) of the Deed falling over if BSLLP's application for the amount of its funding fee and costs is not approved by the Court. The Liquidators have agreed to support BSLLP's application but ultimately it is subject to Court approval. The Liquidators also cannot agree to a fixed sum for the legal costs and disbursements of \$4.75 million. This is not because of any disagreement with the amount; rather, it is because the Liquidators do not have the information or visibility necessary to support such an amount. Fundamentally, as you would appreciate, the funder will get their reasonable costs of conducting the Bolitho Proceeding (as per [65]-[74] of Robson J's decision) and the Liquidators will support that but it of course will be for BSLLP to adduce evidence as to the reasonableness of the sum sought."*

27 The draft revised deed attached to Mr Redwood's email provided for Banksia, the liquidators and Trust Co to instruct their legal representatives to support AFPL's application for payment from the Settlement Sum to AFPL of \$12.8 million by way of funder's commission and **"the reasonable legal costs and disbursements incurred by AFPL in the conduct of the Bolitho Proceeding."**

28 The deed also provided:

*"2.4. Bolitho and BSLLP acknowledge that the payments in clause 2.3 are subject to the approval of the Court and agree that if a lesser amount is approved by the Court this Deed will continue to operate and bind all the parties to this Deed."*

29 At 12.11pm Mr Symons forwarded Mr Redwood's email and draft settlement deed to Mr Elliott, stating: *"Please see below. I've just spoken to Norman. His view is that*

*you should talk to Lindholm, and we should not otherwise respond.”* [\[SYM.001.002.2263\]](#) [\[SYM.001.002.2267\]](#). At 12.14pm Mr Elliott replied: *“Agree. I will call him soon. Radio silence.”* Mr Symons forwarded that email to Mr O’Bryan [\[SYM.001.002.2146\]](#).

30 At 3.07pm, Mr Elliott emailed Mr Redwood stating:

*“Please send me a mark up with your suggested changes to our deed using the clean version of the deed that we circulated over the weekend.*

*i cannot be expected to work with your redraft of an unidentified version of the deed, circulated (selectively) today.*

*Are you in possession of the settlement offer initialled by myself and JL? You need it to understand what JL has agreed with me..*

**We** *do agree with your suggested clause 3.2*

*Otherwise, **we** reject all of your suggested material amendments (and covering email comments).”* [\[AFP.001.001.2112\]](#) [\[AFP.001.001.2122\]](#) (emphasis added)

31 At 3.51pm Mr Newman emailed Mr Redwood, Mr Symons and Mr O’Bryan cc Mr Kingston, Mr Elliott and Mr Lindholm stating: *“As requested by Mark, please see attached document comparing Jonathon’s most recent version to the clean version circulated by Michael last night”* [\[SYM.001.002.1896\]](#) [\[SYM.001.002.1900\]](#).

32 At 4.35pm-4.37pm, Mr Newman and Mr Lindholm emailed Mr Elliott offering to meet to discuss the deed [\[SPR.003.013.0038\]](#) [\[SPR.003.013.0044\]](#) [\[SPR.003.013.0091\]](#).

33 At 5.42pm, Mr Elliott replied, stating: *“The deed we sent is what **we** want/need to get this deal done. Plus, your suggested clause 3.2 dealing with funds distribution. We don’t need a meeting tomorrow. Typos, grammar and spelling mistakes excepted, **all other material changes made by JR are rejected.** Happy to chat on phone.”* [\[SPR.003.013.0085\]](#).

34 At 5.42pm, Mr Newman replied to that email stating: *“Mark, Can I call you first thing in the morning and do a ‘page turn’ to see how far apart we really are?”* [\[SPR.003.013.0097\]](#).

35 At 5.51pm, Mr Elliott replied stating: *“Just send my deed to Trustco. Otherwise tell them it is off”* [\[SPR.003.013.0097\]](#).

36 On 13 November 2017, Mr Crow spoke with Mr Bolitho. Mr Bolitho informed Mr Crow that he had spoken with Mr O’Bryan. Mr Bolitho **“confirmed his instructions**



***to settle on the basis that represents not less than 10 cents in the dollar for all debenture holders.”***

- 37 On **13 November 2017**, Mr Symons charged 1 day for: *“Drafting settlement deed, conferring with Mr Elliott re same.”*
- 38 On **14 November 2017** between 7.32am and 9.36am, Mr Elliott, Mr Symons and Alex Elliott exchanged emails about the settlement deed [\[SYM.001.001.9152\]](#). At 9.11am Mr Elliott emailed Mr Symons cc Alex Elliott stating: *“Please add some words under legal costs recovery to the effect: BSLLP agrees to engage a suitably qualified cost consultant to provide a written report to confirm that the claimed costs and disbursements have been properly incurred and are reasonable etc”* [\[SYM.001.002.1536\]](#).
- 39 On **14 November 2017** at about 9.54am, Mr Symons emailed Mr Mark Elliott and Mr Alex Elliott attaching a further revised draft settlement deed, which Mr Mark Elliott forwarded to Mr Newman [\[SYM.001.001.8995\]](#) [\[SYM.001.001.8996\]](#) [\[SYM.001.001.9013\]](#). The revised deed included the following revisions:
- “2.3. BSLLP agrees to engage a suitably qualified costs consultant to prepare an expert report to be filed in the Settlement Approval Application concerning whether the legal costs and disbursements incurred by BSLLP and claimed in clause 2.5 below have been reasonably incurred and are of reasonable amount. The Parties agree that to the extent to which any part of filing of the cost consultant’s expert report might otherwise effect a waiver of privilege, that part of the cost consultant’s expert report filed pursuant to this clause may be filed with the Court on a confidential basis.
- ...
- 2.5 At the hearing of the Bolitho Settlement Approval Application and subject to the cost consultant’s expert report filed pursuant to clause 2.3 above confirming that the legal costs and disbursements incurred by BSLLP have been reasonably incurred and are of reasonable amount, BSL, the Liquidators and Trust Co agree to instruct their legal representatives to support BSLLP’s application for payment of legal costs and disbursements incurred by BSLLP in the conduct of the Bolitho Proceeding in the sum of \$4.75 million (plus GST).”
- 40 At 2.55pm Mr Lindholm emailed Mr Elliott, Mr Newman, Mr Kingston and others stating: *“Dave has sent your email to me. We have discussed your amendments to the deed and attach a version with some minor changes tracked. Your changes remain marked up but they are agreed except where marked otherwise”* [\[SYM.001.001.8909\]](#) [\[SYM.001.001.8911\]](#). At 4.23pm Mr Elliott forwarded the email and its attachment to Mr Symons for comments.

- 41 At 4.45pm – 4.46pm Mr Symons and Mr Elliott conferred about their response to the draft deed circulated by Mr Lindholm [\[SYM.001.001.8885\]](#).
- 42 At 4.51pm Mr Elliott replied to that email responding to the changes suggested by Mr Lindholm [\[SYM.001.001.8815\]](#), and thereafter forwarded the email to Mr O'Bryan and Mr Symons.
- 43 On **15 November 2017** at 3.12am Mr Elliott emailed Mr Newman and Mr Lindholm stating: *"Please ignore the email below sent at 4:52pm yesterday. None of your suggested amendments / additions to the deed are agreed **by Mr Bolitho**"* (emphasis added) [\[AFP.001.001.2145\]](#).
- 44 Between 11.05am and 11.57am Mr Elliott and Mr Symons exchanged emails about the settlement deed [\[SYM.001.001.8305\]](#) [\[SYM.001.001.8350\]](#). At 11.57am Mr Elliott emailed to Mr Newman cc Alex Elliott attaching an amendment drafted by Mr Symons and stating *"This suggested amendment should assist with our discussion regarding clause 3.2"* [\[AFP.001.001.2141\]](#).
- 45 On **15 November 2017** at 3.18pm, Mr Elliott emailed Mr Newman and Mr Lindholm [\[AFP.001.001.2143\]](#) stating:
- "Can I get an update please? I intend to request Portfolio Law to open dialogue directly with Trustco shortly on behalf of the class action. Can I assume that we are agreed on the deed given that I have had no further response from you? If so, i will provide the penultimate draft we exchanged to Trustco to get the discussion going. Please advise where you are at by 4pm today. I await your urgent reply."*
- 46 At 3.44pm Mr Newman replied stating: *"Mark, The deed is not agreed. We are still considering"* [\[AFP.001.001.2143\]](#). At 3.50pm Mr Elliott replied: *"Dave. We don't believe you. We believe that you have parked the deed discussion while you explore your options and suit yourselves-your usual MO. We will open dialogue with Trustco on our own behalf forthwith"* [\[AFP.001.001.2143\]](#). At 3.57pm, Mr Newman replied, stating: *"That's offensive. We have sought to negotiate the deed with you in good faith, but you have been unwilling to compromise on any material term. You are of course welcome to open a dialogue with Trust Co, but no deed containing a clause not agreed by us should be provided to them without our consent"* [\[SPR.003.013.0281\]](#).
- 47 On **16 November 2017** at 1.24pm, Mr Kingston emailed Mr Mark Elliott, Mr Alex Elliott, Mr Lindholm and Mr Newman attaching an updated draft deed. His email stated that the changes made by AFPL and Mr Bolitho's legal representatives were agreed except for some minor points. The draft deed attached to the email did not



propose any material change to the provisions drafted by Mr Bolitho's counsel relating to the SPRs instructing their representatives to support AFPL's payment claims, or the provision that sought to make the deed conditional upon the court approving those claims.

48 On **16 November 2017** at 4.33pm, Mr Kingston emailed Mr Mark Elliott, Mr Newman, Mr Lindholm and Mr Alex Elliott confirming the SPRs' agreement to the terms of the deed [\[SYM.001.001.8212\]](#) [\[SYM.001.001.8215\]](#).

49 On **16 November 2017**, Mr Crow spoke with Mr Elliott. Mr Elliott advised:

*"Liquidator still wants to pursue Insurance House. That claim may still settle but hasn't yet. If it doesn't then the class action is to get the Trustco money and pay the associated costs and expenses and then distribute to debenture holders **about 6 to 7 cents in the dollar** and the liquidator will then keep his part of the money until settled with Insurance House **and then distribute another 3 or 4 cents. Is a Settlement Deed. He will email to me when received.**"*

50 Mr Bolitho or Mr Crow were not consulted about the terms of the settlement deed with respect to AFPL's claims for costs and commission in the period from 10 November 2017 to 16 November 2017. Mr Bolitho and Mr Crow were not consulted about the position taken by AFPL, Mr O'Bryan and Mr Symons as outlined above.

51 At 6.17pm Mr Kingston provided the draft settlement deed to Clayton Utz [\[CBP.001.007.2144\]](#) [\[CBP.001.007.2146\]](#).

52 On **17 November 2017**, Mr Elliott emailed Mr Crow re Deed, stating: *"As discussed, please find attached a draft deed of settlement. Please provide any comments either by email or give me a call when convenient. We await the comments of Trustco. Counsel is still hopeful of resolution by Xmas"* [\[BOL.001.001.0010\]](#).

53 On **24 November 2017**, Clayton Utz emailed Mr Newman and Mr Kingston cc Mr Elliott and Portfolio Law attaching a proposed revised settlement deed [\[SYM.001.001.4841\]](#) [\[SYM.001.001.4843\]](#) [\[SYM.001.001.4868\]](#) [\[SYM.001.001.4871\]](#). Clayton Utz proposed a revised form of drafting for the following clauses in the earlier version of the deed, as follows:

Bolitho version	Trust Co version
cl 2.6: <i>"Subject to clause 2.8 below, if the Court does not make orders giving effect to payments to BSLLP in the sum of \$12.8 million by way of a funder's commission and in respect of legal costs and disbursements incurred by</i>	cl 2.1 <i>"Subject to clauses 2.3 and 2.4, This Deed is subject to and conditional upon each of the following conditions being satisfied:</i>  <i>... 2.1.3 the making of the Approval</i>

<p><i>BSLLP in the Bolitho Proceeding as referred to in clauses 2.4 and 2.5 above respectively and to Bolitho as referred to in clause 2.6 above in the course of making orders on the Settlement Approval Application approving the Settlement, then the rights and obligations under this Deed shall no longer operate and this Deed will be at an end."</i></p>	<p><i>Orders in the Proceedings."</i></p> <p><i>cl 2.2: "In the event that any of the conditions in clause 2.1 are not met:</i></p> <p><i>2.2.1 this Deed, save for this clause 2 (including any documents provided pursuant to this clause 2) and clause 13, shall cease to have any effect and shall be treated for all purposes as never having been made and never having had any effect;</i></p> <p><i>2.2.2 no party shall rely upon any term of this Deed, save for this clause 2 (including any documents provided pursuant to this clause 2) and clause 13, for any purpose whatsoever in the Proceedings; and</i></p> <p><i>2.2.3 each party shall bear its own costs and disbursements incurred in connection with this Deed."</i></p>
<p><i>cl 2.7: "Should each of Bolitho and BSLLP agree in writing within five business days of the making of orders on the Settlement Approval Application approving the Settlement which are inconsistent with clause 2.7, Bolitho and BSLLP may agree to waive the operation of clause 2.7."</i></p>	<p><i>cl 2.4 "In the event that the precondition in clause 2.1.3 is not met, that is, the Court does not make either of the Approval Orders (whether at first instance or on appeal):</i></p> <p><i>2.4.1 by reason of the quantum of the funder's commission claimed by BSLLP pursuant to the application referred to in clause 3.10 below, BSLLP and BSL must in good faith negotiate an alternative funder's commission that the Court is likely to approve;</i></p> <p><i>2.4.2 for any reason other than the quantum of the funder's commission claimed by BSLLP, the Parties must in good faith negotiate an alternative proposal for settlement of the Banksia Proceedings to submit to the Court that the Court is likely to approve."</i></p>

54 On **25 November 2017** at 8.58am, Mr Elliott emailed Mr O'Bryan, Mr Symons and Alex Elliott [[SYM.001.001.4837](#)] stating:

*"Most of the suggested amendments look ok to me*

*However, there are some big issues that we need to discuss and agree our position:*

*1. Are we still trying to get court approval in 2017? In Cl 2.7 Trustco think they are filing material in Feb 2018!*

**2. CI 2.4-if the court rejects the funders' fee or legal fees quantum must [we] agree to lower it?**

3. Do we retain our suggested clause 2-6-2.8?If so, we must then reject suggested CI 3.15

4. Do we agree that in the interim no further steps will be taken in the case – CI 3.13?

5. Will we settle if any of the \$4M third party contributions go missing-CI 4.2?

6. When we agree to provide our Undertakings .Do they only get provided when the settlement \$ are tendered.”

55 At 12.36pm and 3.11pm Mr Elliott sent further emails to Mr O'Bryan and Mr Symons about the draft deed [[SYM.001.001.4702](#)] [[SYM.001.001.4378](#)], both of which stated that **“if the Approval Orders are not made on terms acceptable to Bolitho and BSLLP then the deed will cease to have any effect”**.

56 At 3.54pm Mr O'Bryan emailed Mr Elliott and Mr Symons cc Alex Elliott stating: *“I suggest the following amendments to the draft settlement deed”* [[SYM.001.001.3649](#)]. His suggestions included:

**“2.4.1: BSLLP will undertake to negotiate reasonably, but if an acceptable (to BSLLP) amount by way of commission cannot be agreed between the parties and/or approved by the court, the settlement is off.”**

57 At 4.51pm, Mr Symons replied with various comments including: **“Clause 2.4.1 – agree with Norman”** [[SYM.001.001.3649](#)].

58 At 7.42pm, the Bolitho Class Action Email Address emailed Clayton Utz, David Newman and Sam Kingston cc Mark Elliott stating: *“We are instructed to respond to the further draft settlement deed as follows”* [[SYM.001.001.2194](#)]. The responses included:

**“3. If the Approval Orders are not made on terms acceptable to Bolitho and BSLLP (acting reasonably and after giving due and proper consideration) then the deed will cease to have any effect.”**

59 At 8.16pm Mr Elliott forwarded the email to Mr O'Bryan, Mr Symons and Alex Elliott [[SYM.001.001.2194](#)].

60 At 8.18pm Mr O'Bryan replied stating *“Good work”* [[SYM.001.001.2194](#)].

- 61 On **26 November 2017** at 1.20am, Mr Symons emailed Mr O'Bryan cc Mr Elliott and Alex Elliott attaching draft settlement deed [\[SYM.001.001.2119\]](#) [\[SYM.001.001.2123\]](#).
- 62 At 11.35am Mr Elliott replied to Mr Symons, Mr O'Bryan and Alex Elliott providing comments, including: *"4. Clause 3.9-should we require the entire Trimbo's affidavit and expert report to be confidential? I suggest so."* Mr O'Bryan replied stating: *"I am happy with Mark's suggestions so please dispatch after amendments"* [\[SYM.001.001.1496\]](#). Mr Symons replied stating: *"I think that the expert report should be confidential, but the affidavit should not. I think Trimbo's needs to say in his affidavit 'the legal costs and disbursements claimed were incurred by BSLLP, have been reasonably incurred and are of a reasonable amount' and the affidavit (but not the exhibit) needs to be provided to the other parties to ensure that they are obliged to provide the support referred to in cl 3.11"* [\[SYM.001.001.1970\]](#). Mr Elliott and Mr O'Bryan replied stating they agreed [\[SYM.001.001.1496\]](#) [\[SYM.001.001.2054\]](#).
- 63 Between 2.32pm and 3.49pm Mr Symons drafted and Portfolio Law sent an email to Clayton Utz and Maddocks attaching a revised draft deed [\[CBP.001.008.4192\]](#) [\[CBP.001.008.4197\]](#).
- 64 On 28 November 2017, Portfolio Law emailed Clayton Utz, Mr Newman and Mr Kingston stating: *"Dear Colleagues, We are instructed that Mr Bolitho requires the deed of settlement to be executed by all parties by 4pm on Thursday 30 November 2017. Otherwise, our settlement discussions will be at an end and we will resume with our preparation for the trial of this proceeding commencing on 12 February 2018. We await your urgent confirmation that our further draft of the deed of settlement is acceptable to all parties"* [\[CBP.001.001.0926\]](#) [\[CBP.001.008.4043\]](#).
- 65 Thereafter the deed of settlement was finalised and executed without material changes relevant to the Adverse Settlement Terms.

## ATTACHMENT 2 - EVOLUTION OF NORMAN O'BRYAN'S CHARGES OVER THE PERIOD FROM 15/11/17 – 4/1/18

	A		B		C		D	
Month	15/11/17 draft bills	Hours charged (arrived at by dividing total bill by hourly rate)	19/11/17 direction to Florence Koh to add GST	Hours charged (arrived at by dividing total bill by hourly rate)	24/11/17 draft bills with rate increase to \$12,500 + GST from 1/7/17	Hours charged (arrived at by dividing total bill by hourly rate)	4/1/18 Invoices in Third Trimbos Report	Hours charged (arrived at by dividing total bill by hourly rate)
Jun-16	\$80,300	73	\$88,330	73	\$88,330	73	\$134,310	111
Jul-16	\$116,600	106	\$128,260	106	\$128,260	106	\$128,260	106
Aug-16	\$93,500	85	\$102,850	85	\$102,850	85	\$153,670	127
Sep-16	\$67,100	61	\$73,810	61	\$158,510	131	\$158,510	131
Oct-16	\$39,600	36	\$43,560	36	\$140,360	116	\$140,360	116
Nov-16	\$89,100	81	\$98,010	81	\$98,010	81	\$158,510	131
Dec-16	\$39,600	36	\$43,560	36	\$116,160	96	\$116,160	96
Jan-17	\$3,300	3	\$3,630	3	\$160,930	133	\$136,730	113
Feb-17	\$36,300	33	\$39,930	33	\$124,630	103	\$88,330	73
Mar-17	\$18,700	17	\$20,570	17	\$105,270	87	\$84,700	70
Apr-17	\$16,500	15	\$18,150	15	\$102,850	85	\$107,690	89
May-17	\$22,000	20	\$24,200	20	\$133,100	110	\$133,100	110
Jun-17	\$47,200	43	\$51,920	43	\$135,520	112	\$135,520	112
Jul-17	\$78,100	71	\$85,910	71	\$97,625	71	\$121,000	88
Aug-17	\$46,200	42	\$50,820	42	\$140,250	102	\$140,250	102
Sep-17	\$113,300	103	\$124,630	103	\$141,625	103	\$141,625	103
Oct-17	\$105,600	96	\$116,160	96	\$132,000	96	\$132,000	96
Nov-17	\$36,300	33	\$39,930	33	\$45,375	33	\$140,250	102
TOTAL	\$1,049,300	954	\$1,154,230	954	\$2,151,655	1,723	\$2,350,975	1,876
DIFFERENCE					+769		+153	
TOTAL NUMBER OF HOURS ADDED TO BILLS					+922			

Increased  
rate  
applied  
from  
1/7/17 of  
\$1,250/hr  
+ GST

### ATTACHMENT 3 – Comparison of counsel fees in the Relevant Period

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
June 2016	<p>Application by Mr Bolitho for approval of the Partial Settlement with the D&amp;Os (2 June 2016).</p> <p>Directions hearing before Justice Robson in the Bolitho Group Proceeding. Orders made in relation to notice to group members (2 June 2016).</p> <p>Application by the Special Purpose Receivers in the Supreme Court of Victoria in proceeding S CI 2016 2175 seeking approval of the Partial Settlement with the D&amp;Os (3 June 2016).</p> <p>Directions Hearing before Justice Croft for the Trustee Fee Application (6 June 2016) and judgment (21 June 2016). Orders made for filing and service of further and better particulars and evidence (24 June 2016).</p> <p>Document tranche produced by Banksia by way of discovery (7 June 2016).</p>	<p>Mr O'Bryan works on the upcoming settlement approval hearing. He drafts an opinion for the settlement approval. He advises Mr Zita re: why does the contradictor need anything other than submissions which the parties will file in support of settlement. He confers with Mr Redwood and junior counsel re expert reports, which he reads and edits over the course of several days.</p>	<p>Norman O'Bryan - <b>\$134,310</b></p> <p>Michael Symons - <b>\$29,425</b></p> <p><b>Total counsel fees: \$163,735</b></p>	<p>Preparing material for Trustee Fee Application.</p> <p>Preparing material for Partial Settlement Approval Application.</p> <p>Preparing for and attending at directions hearing</p> <p>Preparing documents for discovery by Banksia.</p> <p>Corresponding with all parties in answer to discovery requests.</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p>	<p>Mr Redwood - \$15,450 (for the period April – May 2016)</p> <p>Charles Scerri QC - \$70,500</p> <p>Kate Anderson - \$12,636.37</p> <p><b>Total counsel fees: \$98,586</b></p>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
July 2016	<p>- Document tranche produced by Banksia by way of discovery (22 July 2016).</p> <p>- Trust Co files to appeal the decision of Justice Croft in the Trustee Fee Application in proceeding S APCI 2016 103 (Trustee Remuneration Application Appeal) (20 July 2016).</p>	<p>Mr O'Bryan works on the settlement approval hearing. He confers with Mr Zita re: information to be forwarded to costs consultant. Mr O'Bryan confers with the costs consultant re accounts. Mr O'Bryan settles a letter from BSLLP (now AFPL) to the costs consultant. Mr O'Bryan confers with the costs consultant re: proposed amendments to the report. Mr O'Bryan continues to work on the settlement approval opinion.</p> <p>Mr Symons collates documents required for costs expert. He drafts instructions to costs expert concerning division of costs between the claims subject to the proposed partial settlement and the remaining claims. He drafts further amendments to the further settlement opinion and the affidavit of Mr Zita exhibiting the settlement opinion.</p>	<p>Norman O'Bryan - <b>\$128,360</b></p> <p>Michael Symons - <b>\$8,662.50</b></p> <p><b>Total counsel fees: \$137,023</b></p>	<p>Producing documents by way of discovery to Clayton Utz.</p> <p>Preparing and considering court material for:</p> <ul style="list-style-type: none"> <li>- Trustee Remuneration Application Appeal; and</li> <li>- Partial Settlement Application.</li> </ul> <p>Briefing experts for Banksia Proceedings.</p> <p>Exchanging correspondence with Portfolio Law regarding preparation for the Bankia and Bolitho Partial Settlement Approval Applications.</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p>	<p>Mr Redwood - \$55,045<sup>1</sup></p> <p>Kate Anderson - \$10,454.55</p> <p><b>Total counsel fees: \$65,495.55</b></p>

<sup>1</sup> One fifth of \$275,225 charged for the five month period from July to November 2016.



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
		<p>Mr O'Bryan advises Mr Zita how to respond to a request from Maddocks for his sworn affidavit, including its confidential exhibits.</p> <p>Mr O'Bryan advises in relation to communications with Chris and Wendy Botsman and settles responsive emails. Mr O'Bryan advises Mr Elliott and Mr Zita re: how to handle Chris Botsman's request for additional information and access to confidential advice.</p> <p>Mr O'Bryan works on obtaining further discovery from Trust Co.</p> <p>Mr O'Bryan confers with counsel for Trust Co about potential settlement of the action against Trust Co.</p>			
August 2016	Amicus Curiae's submissions in the Partial Settlement Approval Applications (1 August 2016). See pages 1289 to 1313 of exhibit 'DCN-1'.	Mr O'Bryan works on the settlement approval hearing. He advises in relation to requests for information filed for the settlement approval hearing, particularly his	<p>Norman O'Bryan - <b>\$153,670</b></p> <p>Michael Symons - <b>\$21,656.25</b></p>	<p>Preparing and considering material for:</p> <ul style="list-style-type: none"> <li>- Trustee Remuneration Application Appeal; and</li> <li>- Partial Settlement Approval Application.</li> </ul>	<p>Mr Redwood - \$55,045<sup>2</sup></p> <p>Kate Anderson - \$25,454.57</p> <p><b>Total counsel fees: \$80,500</b></p>

<sup>2</sup> One fifth of \$275,225 charged for the five month period from July to November 2016.



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>RSD's submissions in the Partial Settlement Approval Applications (1 August 2016). See pages 1314 to 1328 of exhibit 'DCN-1'.</p> <p>Trust Co's submissions in the Partial Settlement Approval Applications (1 August 2016). See pages 1329 to 1335 of exhibit 'DCN-1'.</p> <p>Mr Godfrey's submissions in the Partial Settlement Approval Applications (3 August 2016). See pages 1336 to 1338 of exhibit 'DCN-1'.</p> <p>Hearing of the Partial Settlement Approval Applications before Justice Robson. Orders made for approval of settlement and costs (4 August 2016 and 25 August 2016). See pages 1339 to 1510 of exhibit 'DCN-1'.</p> <p>Mr Bolitho's supplementary submissions in the Partial Settlement Approval Application (18 August 2016). See pages 1511 to 1520 of exhibit 'DCN-1'.</p>	<p>opinion and Peter Trimbo's reports. He reads submissions filed by other parties. He continues to handle communications with Chris Botsman. He works on a letter of instructions to Peter Trimbo to produce a further report. He works on the report.</p> <p>Mr Symons collates materials for the costs experts. He drafts a letter of instruction to the costs expert. He creates a folder structure and provides finalised documents to the costs expert.</p> <p>Mr Symons analyses the opt-outs and compares the opt outs with the register. He undertakes research concerning orders for funding equalization mechanisms in other cases.</p> <p>Mr Symons drafts notes on contradictor's submissions.</p> <p>Mr O'Bryan drafts and settles amendments to the pleadings. He gives directions with respect to</p>	<p><b>Total counsel fees:</b> <b>\$175,326</b></p>	<p>Attendance at the hearing before Justice Robson in the Partial Settlement Approval Application.</p> <p>Briefing experts.</p> <p>Preparing documents for discovery by Banksia.</p> <p>Corresponding with all parties regarding discovery including:</p> <ul style="list-style-type: none"> <li>- Discussions with the Receivers about discovery requests;</li> <li>- Discussions with Clayton Utz about the adequacy of Trust Co's discovery.</li> </ul>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Amicus Curiae's supplementary submissions in the Partial Settlement Approval Application (23 August 2016). See pages 1521 to 1572 of exhibit 'DCN-1'.</p> <p>Orders of Justice Robson in the Partial Settlement Approval Applications (26 August 2016). See pages 1573 to 1576 of exhibit 'DCN-1'.</p> <p>Document tranche produced by Banksia by way of discovery (31 August 2016).</p>	setting dates to progress the proceeding against Trust Co. He reviews evidence.			
<b>September to December 2016: Second phase of evidentiary preparation by SPRs<sup>3</sup></b>					
September 2016	- Directions hearing before Justice Croft in the Bolitho Group Proceeding and BSL Trust Co Proceeding. Orders made for timetabling of proceeding including provision for preparation of pleadings, court book and evidence of witnesses at trial (8 September 2016). See pages 1577 to 1640 of exhibit 'DCN-1'.	Mr O'Bryan confers with Mr Elliott re: Banksia website needs updating following settlement approval. Mr O'Bryan works on a request for further security for costs from Trust Co. Mr O'Bryan appears before Croft J. Mr O'Bryan requests transcripts of the Banksia directors' examinations.	<p>Norman O'Bryan - <b>\$158,510</b></p> <p>Michael Symons - <b>\$4,881.25</b></p> <p><b>Total counsel fees: \$163,391</b></p>	<p>Preparing material for the Trustee Remuneration Application Appeal.</p> <p>Preparing for and attending at directions hearings</p> <p>Preparing lay evidence for use in the Banksia Proceedings.</p>	<p>Charles Scerri QC - \$32,318.18</p> <p>Mr Redwood - \$55,045<sup>4</sup></p> <p>Kate Anderson - \$6,272.73</p> <p><b>Total counsel fees: \$38,645</b></p>

<sup>3</sup> Further SPR Opinion, para 38.

<sup>4</sup> One fifth of \$275,225 charged for the five month period from July to November 2016.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<ul style="list-style-type: none"> <li>- Expert report of David Blackburn (14 September 2016).</li> <li>- Witness Statement of John Lindholm (15 September 2016)</li> <li>- Witness statement of Warren Shaw (21 September 2016).</li> <li>- Banksia's Amended Defence to the Third Further Amended Statement of Claim dated 15 September 2016 filed in the Bolitho Group Proceeding (28 September 2016).</li> </ul>	Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).		<p>Preparing Banksia's Amended Defence to the Third Further Amended Statement of Claim in the Bolitho Group Proceeding.</p> <p>Correspondence with Clayton Utz in relation to the proposed amendments to Banksia's pleadings in the BSL Trust Co Proceeding.</p> <p>Briefing counsel to settle Banksia's amended pleading in the BSL Trust Co Proceeding.</p> <p>Corresponding with all parties regarding discovery of documents referenced in Banksia's expert evidence.</p>	
October 2016	<p>Banksia's Second Further Amended Third Party Notice filed in the Bolitho Group Proceeding (17 October 2016).</p> <p>Amended defence of the Ninth Third Party to the Second Further Amended Third Party Notice filed in the</p>	Mr O'Bryan works on Trust Co's application for further security for costs. Mr O'Bryan works on the pleading. Mr O'Bryan works on the court book index. Mr O'Bryan confers with Mr Elliott about Trust Co's discovery.	<p>Norman O'Bryan - <b>\$140,360</b></p> <p><b>Total counsel fees: \$140,360</b></p>	<p>Preparing material for the 2016 Banksia Amendment Application.</p> <p>Preparing lay evidence.</p> <p>Briefing experts.</p> <p>Preparing Banksia's pleadings and summons in the Bolitho Group</p>	<p>Mr Redwood - \$55,045<sup>5</sup></p> <p>Robert Dick - \$37,000</p> <p><b>Total counsel fees: \$92,045</b></p>

<sup>5</sup> One fifth of \$275,225 charged for the five month period from July to November 2016.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Bolitho Group Proceeding (21 October 2016).</p> <p>Banksia files a summons seeking leave to file its amended pleading (2016 Banksia Amendment Application) (27 October 2016).</p> <p>Witness outline of Neil Mathison (28 October 2016).</p>	<p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged)</p>		<p>Proceeding and 2016 Banksia Amendment Application.</p> <p>Correspondence with Clayton Utz in relation to the proposed amendments to Bankia's pleadings.</p> <p>Corresponding with other parties regarding discovery.</p>	
November 2016	<p><b>The trial listed for May 2017 is vacated.</b></p> <p>Hearing of the Trustee Remuneration Application Appeal before the Court of Appeal (2 November 2016). See pages 1641 to 1702 of exhibit 'DCN-1'.</p> <p>Witness outline of Trevor Goode (4 October 2016);</p> <p>Witness outline of Nicholas Carr (4 October 2016)</p> <p>Witness outline of Peter Keating (4 October 2016).</p> <p>Trust Co files its amended Third Party Notice in the BSL</p>	<p>Mr O'Bryan works on the pleadings and discovery requests. He prepares for a directions hearing. He works on issues about the release of the settlement sum. He reads expert evidence and witness outlines and confers with Mr Redwood about them. He advises Mr Elliott about the contradictor's fees. He reads Trust Co's defence and the documents referred to in Trust Co's defence. He reviews the documents in the proposed court book (3 days).</p>	<p>Norman O'Bryan - <b>\$158,510</b></p> <p><b>Total counsel fees: \$158,510</b></p>	<p>Preparations for and attending Trustee Fee Application Appeal.</p> <p>Preparing material for the 2016 Banksia Amendment Application.</p> <p>Preparing lay evidence.</p> <p>Briefing experts.</p> <p>Preparing and considering pleadings in the BSL Trust Co Proceeding.</p> <p>Correspondence with Clayton Utz in relation to the proposed amendments to Bankia's pleadings.</p>	<p>Mr Redwood - \$55,045<sup>6</sup></p> <p>Robert Dick - \$37,635.47</p> <p>Kate Anderson - \$5,545.45</p> <p>Charles Scerri QC - \$9,250.00</p> <p>Prue Bindon - \$4,850.00</p> <p><b>Total counsel fees: \$112,326</b></p>

<sup>6</sup> One fifth of \$275,225 charged for the five month period from July to November 2016.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Trust Co Proceeding (4 November 2016).</p> <p>Reply to the Third Defendant's Defence in the Bolitho Group Proceeding (7 November 2016).</p> <p>Banksia files its submissions in relation to the 2016 Banksia Amendment Application (4 November 2016). See pages 1703 to 1780 of exhibit 'DCN-1'.</p> <p>Trust Co files its submissions in relation to the 2016 Banksia Amendment Application (4 November 2016). See pages 1781 to 1836 of exhibit 'DCN-1'.</p> <p>Trust Co's submissions in relation to issues for the upcoming directions hearing (9 November 2016). See pages 1837 to 1857 of exhibit 'DCN-1'.</p> <p>Directions hearing before Justice Croft (11 November 2016). See pages 1858 to 1871 of exhibit 'DCN-1'.</p> <p>Expert report of Jeff Hall (14 November 2016).</p>			<p>Corresponding with Clayton Utz in relation to disputes about the scope of discovery.</p> <p>Preparing for and attending at directions hearing</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
December 2016	<ul style="list-style-type: none"> <li>- Amended Defence of the Third Defendant (Trust Co) to the Third Further Amended Statement of Claim filed in the Bolitho Group Proceeding (5 December 2016).</li> <li>- Judgment of the Court of Appeal in the Trustee Remuneration Application Appeal (16 December 2016).</li> <li>- Witness outline of Rupert Smoker (1 December 2016);</li> <li>- Witness outline of Sten Silavecky (1 December 2016); and</li> <li>- Witness outline of Michael Britton (1 December 2016).</li> <li>- Expert report of Clynton Hardy (15 December 2016).</li> </ul>	<p>Mr O'Bryan reads expert evidence and witness outlines and confers with Mr Redwood about them.</p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p>	<p>Norman O'Bryan - <b>\$116,160</b></p> <p><b>Total counsel fees: \$116,160</b></p>	<p>Consideration of the Court of Appeal's judgement in the Trustee Remuneration Application Appeal and implications for proceedings.</p> <p>Considering pleadings filed in the Bolitho Group Proceeding and implications for proceedings.</p> <p>Preparing lay evidence.</p> <p>Briefing experts.</p> <p>Commencing work on Court Book index for the Banksia Proceedings.</p> <p>Corresponding with Clayton Utz in response to discovery requests.</p> <p>Correspondence with Clayton Utz in relation to the proposed amendments to Bankia's pleadings in BSL Trust Co Proceeding and timetabling.</p>	<p>Robert Dick - \$15,790.92</p> <p>Kate Anderson - \$727.27</p> <p>Mr Redwood - \$43,600</p> <p><b>Total counsel fees: \$60,118</b></p>
January 2017	Considering documents in answer to Trust Co discovery requests.	Mr O'Bryan reads transcripts, witness statements, and discovered	Norman O'Bryan - <b>\$137,000</b>	Considering documents in answer to Trust Co discovery requests.	Jonathan A Redwood - \$10,173 <sup>7</sup>

<sup>7</sup> One third of \$30,520.00 charged in the period January - March 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	Correspondence with Clayton Utz in relation to the proposed amendments to <b>Banksia's</b> pleadings in BSL Trust Co Proceeding.  Preparing <b>Banksia's</b> restated Statement of Claim in the BSL Trust Co Proceeding.	documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).  Mr Symons reviews the court book index and conferring with senior counsel, his instructors and the SPR team about pleadings and the court book.	Michael Symons - <b>\$8,300</b>  <b>Total counsel fees: \$145,079</b>	Correspondence with Clayton Utz in relation to the proposed amendments to Banksia's pleadings in BSL Trust Co Proceeding.  Preparing Banksia's restated Statement of Claim in the BSL Trust Co Proceeding.	<b>Total counsel fees: \$10,173</b>
February 2017	<b>Banksia</b> files its restated and consolidated statement of claim in the BSL Trust Co Proceeding (9 February 2017).  Document tranche produced by <b>Banksia</b> by way of discovery (13 February 2017).  Directions hearing before Justice Croft in the Bolitho Group Proceeding and BSL Trust Co Proceeding. Orders made providing for timetable	Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).  Mr O'Bryan advises with respect to communications with the SPRs. Mr O'Bryan	Norman O'Bryan - <b>\$88,330</b>  Michael Symons - <b>\$35,029.50</b>  <b>Total counsel fees: \$123,359</b>	Corresponding with Clayton Utz in answer to discovery requests.  Correspondence with Clayton Utz in relation to the proposed amendments to Banksia's pleadings in the BSL Trust Co Proceeding.  Preparing Banksia's restated Statement of Claim in the BSL Trust Co Proceeding.	Jonathan A Redwood - \$10,173 <sup>8</sup>  <b>Total counsel fees: \$10,173</b>



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	of proceedings including provision for pleadings, court book, evidence and next directions hearing (24 February 2017). See pages 1872 to 1908 of exhibit 'DCN-1'.	<p>confers with respect to the appointment of a special referee. Mr O'Bryan works on discovery requests. Mr O'Bryan confers with respect to a part payment to Mr Bolitho.</p> <p>Mr Symons reviews documents included in draft Banksia Court Book. He confers with Mr Elliott and senior counsel re: draft letter to SPRs. He confers with his team about letters from Maddocks to others, and about Maddocks' list of issues. He reviews Banksia's additional discovery. He reads an amended pleading received from Maddocks. He appears at the directions hearing.</p>		<p>Preparing material for the First Remuneration Application.</p> <p>Preparing for and attending at directions hearing.</p>	
March 2017	<p>Anthony Nolan appointed as Special Referee for the Banksia Proceedings (1 March 2017). See pages 1909 to 1915 of exhibit 'DCN-1'.</p> <p>Attendance at special referee conference (6 March 2017).</p>	<p>Mr O'Bryan confers with respect to the appointment of a special referee. Mr O'Bryan reads documents referred to in amended pleadings.</p> <p>Mr O'Bryan reads transcripts, witness</p>	<p>Norman O'Bryan - <b>\$84,700</b></p> <p>Michael Symons - <b>\$13,612.50</b></p>	<p>Preparing and considering material for the First Remuneration Application</p> <p>Preparing and considering material for the Waiver Application.</p>	<p>Robert Dick - \$1,000.00</p> <p>Jonathan A Redwood - \$10,173<sup>9</sup></p> <p><b>Total counsel fees: \$11,173</b></p>



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Trust Co files its defence and counter claim in the BSL Trust Co Proceeding (8 March 2017).</p> <p>Defence of the Tenth and Eleventh Third Parties to the third party notice (Banksia) in the Bolitho Group Proceeding (17 March 2017).</p> <p>Special Purpose Receivers file their remuneration approval application for the period from 6 October 2015 to 30 September 2016 (First Remuneration Application) (20 March 2017).</p> <p><b>Banksia</b> seeks further and better particulars from Trust Co (23 March 2017).</p> <p>Defence of the Twelfth Third Party to the third party notice (Banksia) in the Class Acton (24 March 2017).</p> <p>Attendance at special referee conference (30 March 2017).</p> <p>Judgement of Justice Robson in the Partial Settlement Approval Applications (31 March 2017).</p>	<p>statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p> <p>Mr Symons works on discovery issues and other issues concerning the special referee.</p> <p>Mr Symons reads Trust Co's defence and counterclaim and confers with Mr Zita, Mr Mark Elliott, Mr Alex Elliott and senior counsel re: same.</p> <p>Mr Symons prepares an interest calculation and confers with Mr Elliott re: same.</p>	<p><b>Total counsel fees: \$98,312</b></p>	<p>Preparation for and attendance at special referee conferences.</p> <p>Considering pleadings filed in the Bolitho Group Proceeding and BSL Trust Co Proceeding and implications for proceedings.</p> <p>Corresponding with Clayton Utz regarding disputes about scope of documents to be produced.</p> <p>Corresponding with Clayton Utz regarding request for further and better particulars.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	Trust Co files its Further Amended Third Party Notice in the BSL Trust Co Proceeding (31 March 2017).				
April 2017	<p>SPRs file their remuneration approval application for the period from 1 October 2016 to 31 March 2017 (Second Remuneration Application).</p> <p>Attendance at special referee conference (20 April 2017).</p> <p>Special Referee Report (21 April 2017).</p> <p>Directions hearing before Justice Croft in the Bolitho Group Proceeding and BSL Trust Co Proceeding. Orders made in relation to the Special Referee (26 April 2017). See pages 1916 to 1966 of exhibit 'DCN-1'.</p> <p>Banksia's Reply to the Ninth, Tenth, Eleventh and Twelfth Third Parties' Defences filed in the Bolitho Group Proceeding (26 April 2017).</p> <p>Defence of the Second Third Party (Godfrey) filed in the</p>	<p>Mr O'Bryan works on issues relating to the special referee appointment. Mr O'Bryan reads pleadings.</p> <p>Mr O'Bryan reads quantum discovery documents.</p> <p>Mr O'Bryan confers about a draft letter to Trust Co. He confers with Mr Zita re: "<i>Mr Bolitho does not wish to attend conference on 20 April 2017... but will fully support liquidators' discovery requests.</i>"</p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p>	<p>Norman O'Bryan - <b>\$107,690</b></p> <p>Michael Symons - <b>\$11,253</b></p> <p><b>Total counsel fees: \$118,943</b></p>	<p>Preparing for and attendance at special referee conference.</p> <p>Attendance at the First and Second Remuneration Applications Hearings before Justice Gleeson.</p> <p>Preparing material for the Second Remuneration Application.</p> <p>Preparing and considering pleadings in the BSL Trust Co Proceeding and Bolitho Group Proceeding.</p> <p>Preparing for and attending at directions hearing.</p> <p>Corresponding with insurance parties in relation to mutual further discovery requests.</p> <p>Corresponding with Clayton Utz in relation to</p>	<p>Mr Redwood - \$29,975<sup>10</sup></p> <p><b>Total counsel fees: \$29,975</b></p>

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One half of 59,950.00 billed for the period April – May 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>BSL Trust Co Proceeding (28 April 2017).</p> <p>Defence of the Seventh Third Party (Santilla) filed in the BSL Trust Co Proceeding (28 April 2017).</p> <p>Defence of the Eighth Third Party (MB+M) filed in the BSL Trust Co Proceeding (28 April 2017).</p> <p>First and Second Remuneration Applications heard before Gleeson (28 April 2017). See pages 1967 to 1980 of exhibit 'DCN-1'.</p> <p>- Defence of the Seventh Third Party to the Third Part Notice (Trust Co) in the Bolitho Group Proceeding (28 April 2017).</p> <p>- Defence of the Eighth Third Party to the Third Part Notice (Trust Co) in the Bolitho Group Proceeding (28 April 2017).</p>	<p>Mr Symons confers with Mr Zita, Mr Mark Elliott, Mr Alex Elliott and senior counsel re: subpoena issued by Clayton Utz to Banksia.</p> <p>Mr Symons reads various pleadings in the Banksia claim and confers with Mr O'Bryan, Mr Elliott and Mr Alex Elliott re: same.</p> <p>Mr Symons works on a letter to Trust Co and confers with Mr O'Bryan and Mr Elliott re: same.</p>		<p>requests for further and better particulars.</p> <p>Corresponding with Clayton Utz in relation to production of documents under a confidentiality regime.</p>	
May 2017	Banksia makes discovery of documents to insurance parties (1 May 2017).	Mr O'Bryan deals with communications with the special referee. He confers with Mr Zita, Mr Elliott and junior counsel re: "advise	Norman O'Bryan - <b>\$133,100</b>	<p>Preparing material for the Waiver Application.</p> <p>Preparing documents for discovery by Banksia.</p>	<p>Robert Dick - \$56,100.00</p> <p>Prue Bindon - \$13,783.34</p>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Defence of the Sixth Third Party (Lipshut) filed in the BSL Trust Co Proceeding (3 May 2017).</p> <p>Trust Co responds to Banksia's request for further and better particulars (3 May 2017).</p> <p>Further and Better Particulars filed in the BSL Trust Co Proceeding (3 May 2017 and 29 May 2017).</p> <p>Defence of the Sixth Third Party to the Third Party Notice (Trust Co) in the Bolitho Group Proceeding (4 May 2017).</p> <p>Judgement of Justice Gleeson in the First and Second Remuneration Applications (5 May 2017).</p> <p>Banksia's Second Further Amended Third Party Notice filed in the Bolitho Group Proceeding (8 May 2017).</p> <p>Defence of the Ninth Third Party (Harwood Andrews) filed in the BSL Trust Co Proceeding (9 May 2017).</p>	<p><i>Tony Nolan that Mr Bolitho has no outstanding pleadings or discovery matters". Mr O'Bryan deals with communications with Trust Co re their evidence.</i></p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p> <p>Mr Symons works on issues arising in connection with the special referee.</p> <p>Mr Symons reviews the court book index and documents for inclusion and confers with Mr Zita, Mark Elliott and senior counsel re: same. He drafts an email to be sent by Mr Zita requesting that the liquidators/SPRs provide a copy of their present draft of the court book.</p>	<p>Michael Symons - <b>\$11,797.50</b></p> <p><b>Total counsel fees: \$144,898</b></p>	<p>Considering the judgment of Justice Gleeson in the First and Second Remuneration Applications.</p> <p>Preparing and considering pleadings filed in the BSL Trust Co Proceeding and implications for proceedings.</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p> <p>Corresponding with Clayton Utz in relation to proposed amendments to pleadings and timetabling.</p> <p>Corresponding with Clayton Utz in relation to production of documents under the confidentiality regime.</p>	<p>Mr Redwood - \$54,500<sup>11</sup></p> <p><b>Total counsel fees: \$124,383</b></p>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Defence of the Eighth Third Party to the Third Party Notice (Trust Co) in the Bolitho Group Proceeding (9 May 2017).</p> <p>Defence of the First Third Party (RSD) filed in the BSL Trust Co Proceeding (11 May 2017).</p> <p>Defence of the First Third Party to the Third Party Notice (Trust Co) in the Bolitho Group Proceeding (11 May 2017).</p>	Mr Symons reads letters sent by Clayton Utz and Trust Co about the delay by Trust Co in filing their evidence and confers with his team about those letters.			
June 2017	<p>Attendance at special referee conference (8 June 2017).</p> <p>Special Referee Report (12 June 2017).</p> <p>Trust Co' files its reply to the third parties defences in the BSL Trust Co Proceeding (14 June 2017).</p> <p>Trust Co makes an application for an extension of time in which to file its evidence (Extension Application) (14 June 2017).</p>	<p>Mr O'Bryan works on issues relating to the timing of Trust Co's evidence, etc.</p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p>	<p>Norman O'Bryan - <b>\$135,520</b></p> <p>Michael Symons - <b>\$28,314</b></p> <p><b>Total counsel fees: \$168,834</b></p>	<p>Corresponding with Sparke Helmore in relation to discovery requests.</p> <p>Briefing experts.</p> <p>Preparing material for the ASIC Application.</p> <p>Considering documents produced by other parties in discovery.</p> <p>Preparing and considering pleadings in the BSL Trust Co Proceeding.</p> <p>Considering lay and expert evidence filed by other</p>	<p>Robert Dick - \$1,100.00</p> <p>Mr Redwood - \$24,525<sup>12</sup></p> <p><b>Total counsel fees: \$25,625</b></p>

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One half of \$49,050.00 billed for the period May – June 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Trust Co's submissions in relation to Trust Co's Extension Application (14 June 2017). See pages 1981 to 1991 of exhibit 'DCN-1'.</p> <p>Mr Bolitho's submissions in relation to Trust Co's Extension Application (14 June 2017). See pages 1992 to 1993 of exhibit 'DCN-1'.</p> <p>Directions hearing before Justice Croft in the Bolitho Group Proceeding and BSL Trust Co Proceeding where Banksia makes an application for leave to join Insurance House to the BSL Trust Co Proceeding (Joinder Application). Orders made for discontinuance of Third Defendant's claims against multiple third parties as well as provision for preparation of pleadings, court book and evidence at trial (16 June 2017). See pages 1994 to 2064 of exhibit 'DCN-1'.</p> <p>Trust Co files its Further Amended Defence in the Bolitho Group Proceeding (23 June 2017).</p>	<p>Mr Symons also works on issues relating to the timing of Trust Co's evidence. He attends the conference with Tony Nolan. He drafts submissions about the extension of time. He works on a combined position paper. He reads correspondence from others about Trust Co's extension of time. He appears before Croft J. He reads Trust Co's amended pleadings. He confers with his team about ASIC's proceeding against Patrick Godfrey and reads the material in that proceeding. He reads the witness statement of Lee Renouf.</p>		<p>parties in the Banksia Proceedings and implications for the proceeding.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Trust Co files its Third Further Amended Third Party Notice in the Bolitho Group Proceeding (23 June 2017).</p> <p>Banksia files an application seeking discovery of certain documents from Trust Co in which privilege is claimed (Waiver Application) (23 June 2017).</p> <p>Banksia files its submissions for the Joinder Application (26 June 2017). See pages 2065 to 2086 of exhibit 'DCN-1'.</p> <p>Trust Co files its submissions in response to the Joinder Application (28 June 2017). See pages 2087 to 2089 of exhibit 'DCN-1'.</p> <p>Insurance House files its submissions in response to the Joinder Application (28 June 2017). See pages 2090 to 2095 of exhibit 'DCN-1'.</p> <p>Provision of Insurance Parties' evidence:</p> <ul style="list-style-type: none"> <li>- Expert Report of Jayson Symonds dated 6 June 2017;</li> </ul>				

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<ul style="list-style-type: none"> <li>- Supplementary Expert Report of Darren Backshall dated 13 June 2017</li> <li>- Expert Report of Darren Backshall dated 7 December 2016;</li> <li>- Witness outline of Neil Sheppard dated 14 June 2017;</li> <li>- Witness Statement of Christine Pistone dated 13 June 2017;</li> <li>- Witness Statement of Damian Lynch dated 21 June 2017; and</li> <li>- Witness Statement of Rick McDougall dated 21 June 2017.</li> </ul> <p>Provision of Trust Co evidence:</p> <ul style="list-style-type: none"> <li>- Witness Statement of Lee Renouf (29 June 2017);</li> <li>- Witness Statement of Stenick Silavecky (30 June 2017); and</li> <li>- Witness Statement of Geoffrey Grenville Skewes (30 June 2017).</li> </ul>				



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	Banksia's submissions in the Joinder Application (26 June 2016). See pages 2096 to 2117 of exhibit 'DCN-1'.  Orders of Justice Croft dismissing the Joinder Application (30 June 2017). See pages 2118 to 2119 of exhibit 'DCN-1'.				
<b>July to November 2017: Third phase of evidentiary preparation by SPRs<sup>13</sup></b>					
July 2017	Provision of Trust Co evidence:  Witness Statement of Angela Clancy (14 July 2017);  Witness Statement of Patrick John Godfrey (17 July 2017);  Expert Report of Philip Patrick Carter (21 July 2017);  Expert Report of Robert Officer (21 July 2017);  Expert Report of Campbell Jackson (21 July 2017);  Expert Report of Michael McCreadie (21 July 2017);  Expert Report of Campbell Jaski (21 July 2017); and	Mr O'Bryan confers with Mr Elliott, junior counsel and Mr Redwood re: Sten Silavecky's witness statement and subpoenas issued to various parties.  Mr O'Bryan reads additional discovered documents.  Mr O'Bryan reads witness statements of Geoffrey Screw, Angela Clancy, Patrick Godfrey and confers with Mr Elliott, junior counsel and Mr Redwood.  Mr O'Bryan reads Robert Officer's report and Wayne Lonergan's report and confers with Mr Redwood.	Norman O'Bryan - <b>\$121,000</b>  Michael Symons - <b>\$79,200</b>  <b>Total counsel fees: \$200,200</b>	Corresponding with Sparke Helmore in relation to discovery requests.  Briefing experts for Banksia Proceedings.  Preparing material for the ASIC Application.  Considering documents produced by other parties in discovery.  Preparing and considering pleadings in the BSL Trust Co Proceeding.  Considering lay and expert evidence filed by other parties in the Banksia Proceedings and	Mr Redwood - <b>\$44,962.50<sup>14</sup></b>  <b>Total counsel fees: \$44,962.50</b>

<sup>13</sup> Further SPR Opinion, para 41.

<sup>14</sup> One half of \$89,925 billed for the period July – August 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Expert Report of Wayne Lonergan (25 July 2017).</p> <p>Trust Co' files its second further amended third party notice in the BSL Trust Co Proceeding (3 July 2017).</p> <p>Trust Co files its amended defence and counterclaim in the BSL Trust CO Proceeding (3 July 2017).</p> <p>Defence of the First Third Party to the second further amended third party notice filed in the BSL Trust Co Proceeding (10 July 2017).</p> <p>Banksia files its amended reply and defence in the BSL Trust Co Proceeding (12 July 2017).</p> <p>Documents produced by the insurance parties by way of discovery (19 July 2017).</p> <p>Witness Statement of Martin Campbell dated 21 July 2017.</p> <p>Orders of Justice Sifris in the BSL Trust Co Proceeding for timetabling of proceeding including provision for filling of submissions (27 July</p>	<p>Mr O'Bryan reads Trust Co's evidence for trial.</p> <p>Mr O'Bryan reads a chronology prepared by Warren Shaw and confers with Mr Redwood and his own team.</p> <p>Mr O'Bryan confers with Mr Redwood and Kevin McCann and drafts further reply evidence.</p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p> <p>Mr Symons reads the witness statements of Skewes, Silavecky, Clancy and Godfrey, and the expert reports of McCreddie, Carter and Officer.</p> <p>Mr Symons confers with his team and Mr Redwood re: subpoenas issued by</p>		<p>implications for the proceeding.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	2017). See pages 2120 to 2121 of exhibit 'DCN-1'.	Clayton Utz to Ernst & Young and KPMG. He reviews documents in the Receivers' court book (numerous days charged).  Mr Symons confers with Mr O'Bryan, Mr Elliott and Mr Zita about whether ASIC conducted examinations under s 19 of the ASIC Act in respect of Patrick Godfrey or other directors and if so, Mr Bolitho will seek access to the transcript.			
August 2017	Application by Banksia to intervene in proceeding VID690/2017 between ASIC and Godfrey (ASIC Application) (2 August 2017).  Banksia files an amended summons in the Waiver Application (9 August 2017).  Defence of the Ninth Third Party to the second further amended third party notice filed in the BSL Trust Co Proceeding (11 August 2017).	Mr O'Bryan considers Banksia's amended pleadings.  Mr O'Bryan works on obtaining further discovery from Trust Co.  Mr O'Bryan and Mr Redwood work on Kevin McCann's reply evidence.  Mr O'Bryan reads Campbell Jackson's report and Clynton Hardy's second report, and confers with Mr Redwood.	Norman O'Bryan - <b>\$140,250</b>  Michael Symons - <b>\$75,900</b>  <b>Total counsel fees: \$216,150</b>	Preparation for and attendance at special reference conferences.  Considering pleadings filed in the BSL Trust Co Proceeding.  Preparing material for the: - Chaucer Approval Application; and - ASIC Application.  Attendance at the hearing before Justice Black in the Chaucer Approval Application.	Prue Bindon - <b>\$12,116.66</b>  Eloise Dias - <b>\$8,907.50</b>  Mr Redwood - <b>\$109,454.02</b> <sup>15</sup>  Robert Dick - <b>\$22,207.73</b>  <b>Total counsel fees: \$152,685</b>

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One half of \$89,925 billed for the period July – August 2017 plus one third of \$193,474.55 billed for the period August – October 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Expert report of Campbell Jackson (15 August 2017).</p> <p>Special reference conference (15 August 2017).</p> <p>Application by the Special Purpose Receivers in the Supreme Court of New South Wales seeking approval of the settlement with Chaucer (Chaucer Approval Application) (21 August 2017).</p> <p>Hearing before Justice Black for the Chaucer Approval Application and judgment (21 August 2017).</p> <p>Orders of Justice Croft in the Bolitho Group Proceeding dismissing the claims against Chaucer Syndicates Limited (23 August 2017). See pages 2122 to 2123 of exhibit 'DCN-1'.</p> <p>Witness statement of Dan Fitzgerald (31 August 2017).</p> <p>Special reference conference (31 August 2017)</p> <p>Expert report of: Clynton Hardy (22 August 2017);</p>	<p>Mr O'Bryan and Mr Redwood confer re: witness division (Trust Co). Mr O'Bryan, Mr Zita and junior counsel confer re: what steps, if any, are required before the matter is ready for trial.</p> <p>Mr O'Bryan reads transcripts, witness statements, and discovered documents and confers with junior counsel and instructing solicitors concerning opening submissions, evidence for tender and cross-examination at trial (numerous days charged).</p> <p>Mr Symons reviews Trust Co's discovery and documents in the liquidators' court book. Mr Symons confers with others re: a letter from Trust Co's lawyers about discovery. Mr Symons reads Campbell Jackson's report (1.5 days). Mr Symons reviews experts' reports "<i>to identify causation theory</i>". He reads Clynton Hardy's</p>		<p>Briefing experts.</p> <p>Preparing lay evidence.</p> <p>Corresponding with Clayton Utz in relation to disputes about the scope of discovery, and provision of further discovery requests.</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	Mark Parris (31 August 2017); and David Blackburn (31 August 2017).	report. He confers with Mr O'Bryan and Mr Elliott about the pleadings. He undertakes research concerning causation principles. He reviews Banksia's witness outlines.			
September 2017	Trust Co files its submissions in the Waiver Application (4 September 2017). See pages 2124 to 2139 of exhibit 'DCN-1'. Banksia's submissions in reply in the Waiver Application (11 September 2017). Attendance at special referee conference (14 September 2017). Application by Banksia to file amended pleadings (2017 Banksia Amendment Application) (14 September 2017). Banksia's submissions in the 2017 Banksia Amendment Application (14 September 2017). See pages 2140 to 2145 of exhibit 'DCN-1'.	Mr O'Bryan confers with Mr Elliott with respect to a further mediation. Mr O'Bryan works on obtaining further discovery from Trust Co and further documents under subpoena. Mr O'Bryan works on Trust Co's request for further security for costs. Mr O'Bryan confers with Mr Redwood re trial plans relating to Great Southern Proceedings. Mr O'Bryan reads Story's supplemental report. He confers with Mr Redwood re Grant Sutherland. Mr O'Bryan confers with Mr Redwood and junior counsel re: trial framework. Mr O'Bryan reads BSL supplementary position	Norman O'Bryan - <b>\$142,000</b> Michael Symons - <b>\$110,137.50</b> <b>Total counsel fees: \$280,803</b>	Preparing material for discovery by Banksia. Preparing for and attending at directions hearing. Briefing experts. Preparing the proposed Court Book index for the Banksia Proceedings. Attendance before Justice Sifris in the Waiver Application. Preparation of summonses for examination in the Liquidator Proceeding. Preparing and considering material for the: - 2017 Banksia Amendment Application; and	Robert Dick - \$44,800.27 Mr Redwood - \$64,491 <sup>16</sup> <b>Total counsel fees: \$109,291</b>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Special Referee Report (19 September 2017).</p> <p>Orders of Justice Croft for security for costs against Mr Bolitho in favour of Trust Co. (19 September 2017). See pages 2146 to 2148 of exhibit 'DCN-1'.</p> <p>Banksia issues subpoena to KPMG (19 September 2017).</p> <p>Banksia issue subpoena to Gippsland Secured Investments Limited (Receivers and Managers Appointed) (19 September 2017).</p> <p>Expert report of John Story (20 September 2017).</p> <p>Trust Co files its submissions in the 2017 Banksia Amendment Application (20 September 2017). See pages 2149 to 2155 of exhibit 'DCN-1'.</p> <p>Banksia's reply submissions in the 2017 Banksia Amendment Application (22 September 2017). See pages 2156 to 2171 of exhibit 'DCN-1'.</p>	<p>paper (April 2015) in relation to causation loss, and confers with Mr Elliott and junior counsel re: Banksia loss calculation plus interest will be over \$220 m by the time of trial. Mr O'Bryan confers with Mr Redwood re: Banksia interest calculation. He confers with junior counsel re interest calculation.</p> <p>Mr O'Bryan confers with Mr Redwood re: combined position paper.</p> <p>Mr O'Bryan reads special referee's report to Court. Mr O'Bryan confers with Mr Redwood and Maddocks re: Trust Co's behaviour in other debenture collapses.</p> <p>Mr O'Bryan confers with other counsel on the objections template and proposed orders. Mr O'Bryan confers with junior counsel re preparation of court book index.</p> <p>Mr O'Bryan reviews dropbox folder "Audit documents in Trust Co CB index" and confers with</p>		<p>- Waiver application.</p> <p>Corresponding with Clayton Utz in relation to discovery disputes, particularly in respect of 'other' debenture funds.</p> <p>Correspondence with Clayton Utz in relation to Banksia's amended pleading.</p> <p>Preparing and serving subpoenas for production of documents.</p> <p>Considering documents produced by other parties in discovery.</p>	

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Directions hearing before Justice Croft in the Bolitho Group Proceeding and BSL Trust Co Proceeding. Order for trial to be conducted in accordance with Electronic Hearing Protocol and to be referred to mediation (26 September 2017). See pages 2172 to 2290 of exhibit 'DCN-1'.</p> <p>Hearing before Justice Sifris for the Waiver Application (18 September 2017) and judgment. Order for dismissal of the Banksia's amended summons (28 September 2017). See pages 2291 to 2296 of exhibit 'DCN-1'.</p> <p>On 28 September 2017 Banksia makes an interlocutory application in the Liquidator Proceeding for orders that summons for examinations be issued to:</p> <ul style="list-style-type: none"> <li>- Bob Arnold;</li> <li>- Natalie Gatis;</li> <li>- Paul Wells;</li> <li>- Craig Shepherd; and</li> <li>- Mark Ubergang.</li> </ul>	<p>junior counsel, Mr Elliott and Alex Elliott re same.</p> <p>Mr O'Bryan appears before Croft J re Banksia amended pleading application.</p> <p>Mr O'Bryan confers with Rob Crow re: need time with Laurie Bolitho before case commences on 12 February so that he is ready for lines of cross examination.</p> <p>Mr Symons reads Banksia's reply evidence and "<i>re-reads elements of Trust Co's expert evidence</i>". He reads the expert report of Campbell Jackson (a further 1 day on top of the 1.5 days charged for this in the previous month).</p> <p>He confers with Mr Zita, Mr Elliott, Alex Elliott and senior counsel re: letter from Clayton Utz re security for costs.</p> <p>He spends numerous days on the court book index.</p> <p>He undertakes further work re: document management</p>			



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	Provision of Insurance Parties evidence: - Witness Statement of Warren Sinnott dated 15 September 2017; - Witness Statement of Michael Hall dated 15 September 2017; - Expert Report of Michelle Jones dated 15 September 2017; - Witness Statement of Stephen Brown dated 19 September 2017. - Witness Statement of Neil Mathison dated 20 September 2017. Documents produced by Trust Co (4 September 2017). Documents produced by the insurance parties by way of discovery.	to provide documents to Simone Jacobson. He reviews documents. He confers with senior counsel and others about discovery. He confers with his team about mediation. He reads Story's supplementary report. He confers with Mr Zita, Mark Elliott and senior counsel re: issue subpoena to obtain all ASIC s19 transcripts in respect of Mr Godfrey or other directors or officers of Banksia. He undertakes research on <i>"best and most recent discussion of liability and causation principles for breaches of trust / fiduciary duty"</i> .			
October 2017	Amended Restated and Consolidated Statement of Claim filed in the BSL Trust Co Proceeding (3 October 2017).	Mr O'Bryan reviews a list of issues for trial. He confers with other counsel about the list of issues, trial plans, trial	Norman O'Bryan - <b>\$132,000</b>	Preparing material for discovery and examinations.	Mr Redwood - \$140,341 <sup>17</sup> Robert Dick - \$5,500.

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One third of \$193,474.55 billed for the period August – October 2017 plus one half of \$141,700.00 billed for the period October – November 2017.



Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Attendance at special referee conference (3 October 2017).</p> <p>Further Amended Reply and Defence to the Amended Defence and Counterclaim filed in the BSL Trust Co Proceeding (3 October 2017).</p> <p>Banksia issue subpoena to South Eastern Secured Investments Limited (Receivers and Managers Appointed) (ACN 071 637 477) (11 October 2017).</p> <p>Banksia issue subpoena to Angas Securities Limited ACN 091 942 748 (11 October 2017).</p> <p>Attendance at special referee conference (12 October 2017).</p> <p>Banksia issue subpoena to Deutsche Bank Aktiengesellschaft T/A Deutsche Bank AG (20 October 2017).</p> <p>Witness Statement of Warren Shaw (27 October 2017);</p>	<p>timetable, court book, and expert evidence.</p> <p>Mr O'Bryan reviews and settles Sutherland's assumed facts and confers with Mr Redwood. He confers with junior counsel re Campbell Jackson's report. He reads Sutherland draft expert report and witness statement. He reads the supplementary witness statement of Warren Shaw. He reads Jeff Hall's report and reviews and settles it. He confers with Mr Redwood about all of the evidence he reads.</p> <p>Mr O'Bryan drafts objections to witness statement of Stenick Silavecky and confers with Mr Redwood / junior counsel.</p> <p>Mr O'Bryan confers with Mr Redwood, Maddocks, Mr Elliott and junior counsel re: do any witnesses give evidence (or does evidence exist) as to how BSL</p>	<p>Michael Symons - <b>\$99,825</b></p> <p>Simone Jacobson - <b>\$36,300</b></p> <p><b>Total counsel fees: \$268,125</b></p>	<p>Preparing amended pleadings in the BSL Trust Co Proceeding.</p> <p>Preparation for mediation.</p> <p>Preparing Court Book index for Banksia Proceedings and corresponding with NuLegal.</p> <p>Preparation and service of subpoena documents.</p> <p>Corresponding with Clayton Utz and the Receivers regarding inspection of hard copy documents.</p> <p>Correspondence with Clayton Utz in relation to request for further and better particulars.</p> <p>Briefing experts.</p> <p>Preparing lay evidence.</p> <p>Preparation for and attendance at meeting of Debenture Holder Committee.</p> <p>Preparation for and attendance at special referee conference</p>	<p>Prue Bindon - \$13,150.</p> <p><b>Total counsel fees: \$158,991</b></p>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Witness Statement of Shane Templar (27 October 2017); and</p> <p>Witness Statement of Robert Arnold (27 October 2017).</p> <p>Attendance at special reference conference (26 October 2017).</p> <p>Trust Co issues a request for further and better particulars in the BSL Trust CO Proceeding (26 October 2017).</p> <p>Public examination of Paul Wells (26 October 2017).</p> <p>Attendance at pre-mediation conference with Associate Justice Eftim (30 October 2017).</p> <p>Expert report of Jeff Hall (31 October 2017).</p>	<p>accounted for debenture rollovers / class action.</p> <p>Mr O'Bryan confers with Mr Redwood, Maddocks and junior counsel re BFG.002.002.0298 documents produced by ASIC in response to subpoena – who discovered them – want to put them to Silavecky in cross examination.</p> <p>Mr O'Bryan confers with Mr Redwood re Britton I am currently concerned about statewide.</p> <p>Mr O'Bryan works on a Banksia Bolitho settlement discussion. He confers with the associate to Eftim J, Mr Zita and junior counsel re pleadings / quantum analysis for mediation. He attends a pre-mediation conference. He confers with Mr Redwood re offer at informal non-lawyer get together with Trust Co.</p> <p>Mr Symons reviews documents and works on the court book index over numerous days. He works</p>			

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
		on the trial plan. He works on the list of issues. He works on an issue about interest rates. He works on seeking documents from Trust Co about their behaviour in other debenture issues collapses. He researches causation principles. He reviews documents returned on the ASIC subpoena.			
November 2017	<p>Further Amended Defence and Counterclaim filed in the BSL Trust Co Proceeding (1 November 2017).</p> <p>Witness outline of Paul Wells (1 November 2017).</p> <p>Witness statement of Donald McKenzie (1 November 2017).</p> <p>Banksia issues subpoena to the Receivers (2 November 2017).</p> <p>Two day mediation before Justice Efthim (9 and 27 November 2017).</p> <p>Expert Report of Barry Honey (8 November 2017).</p>	<p>Mr O'Bryan confers with Mr Redwood re: whether to publicly examine Paul Wells.</p> <p>He confers with other counsel re court book index.</p> <p>Mr O'Bryan confers with other counsel about mediation and settlement, particularly with respect to causation and loss. He prepares for the mediation. He attends the mediation. He confers with a range of people about the successful mediation. He confers with junior counsel and Mr Elliott re: \$75,000 payment to Mr Bolitho. He confers with</p>	<p>Norman O'Bryan - <b>\$140,000</b></p> <p>Michael Symons - <b>\$69,112.5</b></p> <p><b>Total counsel fees: \$209,112.50</b></p>	<p>Preparation for and attendance at mediation.</p> <p>Considering pleadings filed in the BSL Trust Co Proceeding.</p> <p>Preparing lay evidence for use in the Banksia Proceedings.</p> <p>Preparation and service of subpoena documents.</p> <p>Briefing experts for Banksia Proceedings.</p> <p>Preparing material for the Third Remuneration Application.</p> <p>Negotiating deed of settlement.</p>	<p>Mr Redwood - <b>\$70,850<sup>18</sup></b></p> <p><b>Total counsel fees: \$70,850</b></p>

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One half of \$141,700.00 billed for the period October – November 2017.

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
	<p>Expert Report of Brian Morris (8 November 2017).</p> <p>Expert Report of Michael Potter (24 November 2017).</p>	<p>David Newman, Mr Elliott and junior counsel re: draft settlement deed. He confers with Mr Elliott re: his email to Rob Crow – let Laurie Bolitho know about the terms and his fee. He reviews junior counsel's / Mr Redwood's amendments to initial draft settlement deed circulated by David Newman. He confers with Mr Elliott, Alex Elliott, Mr Zita, junior counsel and Mr Redwood re: same. He works on the settlement deed over the course of several days. He works on settlement arrangements including court approval documents.</p> <p>Mr Symons researches the duties of trust companies. He works on the court book index. He reviews Trust Co's complete discovery. He works on issues relating to causation, quantum and loss. He attends the mediation. He drafts the settlement deed in conference with Mr Elliott and Mr O'Bryan. He</p>			

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
		collates documents for inclusion in the brief to the expert.			
December 2017	<p>Mr Bolitho files a summons seeking approval of the settlement with Trust Co (Bolitho Approval Application) (7 December 2017).</p> <p>Banksia files the originating process seeking approval of the settlement with Trust Co in proceeding S CI 2017 5023 (Banksia Approval Application) (8 December 2017).</p> <p>Directions hearing before Justice Croft in the Bolitho Group Proceeding. (7 December 2017). See pages 2297 to 2344 of exhibit 'DCN-1'.</p> <p>Orders of Justice Croft for discontinuance of Trust Co's claims against the Seventh Third Party (14 December 2017). See pages 2345 to 2347 of exhibit 'DCN-1'.</p>	<p>Mr O'Bryan works on the settlement deed and confers with Mr Elliott, Mr Zita, Alex Elliott and junior counsel re: same.</p> <p>Mr O'Bryan reviews and settles the summons, "procedural orders", and amended notice and confers with Mr Elliott and junior counsel re: same.</p> <p>Mr O'Bryan prepares for the settlement hearing.</p> <p>Mr O'Bryan researches and confers with Mr Elliott re: tax payable on the settlement sum.</p> <p>Mr O'Bryan confers with Mr Trimbos re: costs agreement dated 30 May 2016.</p> <p>Mr O'Bryan reads and confers with Peter Trimbos re: cost expert report.</p> <p>Mr Symons drafts amendments to the deed of settlement in conference with Mr Elliott, Alex Elliott</p>	<p>Norman O'Bryan - <b>\$72,875</b></p> <p>Michael Symons - <b>\$47,775</b></p> <p><b>Total counsel fees: \$120,650</b></p>	<p>Preparing material for the Bolitho and Banksia Approval Applications.</p> <p>Negotiating deed of settlement.</p> <p>Preparing for and attending at directions hearing</p>	<p>Robert Dick - \$6,600.00</p> <p>Prue Bindon - \$3,850.00</p> <p><b>Total counsel fees: \$10,450</b></p>

Date	Event (DCN-1)	Bolitho work as per counsel fee slips	Bolitho counsel fees	SPR work per DCN-1	SPR counsel fees as per DCN-1
		and senior counsel. He drafts correspondence to David Newman. He drafts the summons, notice and procedural orders. He confers with Alex Elliott concerning clarifying amendments to the notice. He researches recent decisions approving class action settlements. He plans the structure of the opinion.			