AustLII

Supreme Court of Victoria

Bolitho v Banksia Securities Ltd (No 18) (remitter) [2021] VSC 666 (11 October 2021)

Last Updated: 14 October 2021

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL COURT

GROUP PROCEEDINGS LIST

S CI 2012 07185

LAURENCE JOHN BOLITHO First Plain

AUSTRALIAN FUNDING PARTNERS PTY LTD Second Plain

v

BANKSIA SECURITIES LIMITED Defenda

(RECEIVERS AND MANAGERS APPOINTED)

(IN LIQUIDATION) & ORS

(according to the attached Schedule)

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	27–30 July 2020;
	3-–4, 13–14, 17, 19, 27 August 2020;
	2, 9, 15 September 2020;
	8, 13, 19, 21, 30 October 2020;
	2, 20, 25–27, 30 November 2020;
	1–3, 8–11 December 2020;

	16–18 March 2021
DATE OF JUDGMENT:	11 October 2021
CASE MAY BE CITED AS:	Bolitho v Banksia Securities Ltd (No 18) (remitter)
MEDIUM NEUTRAL CITATION:	[2021] VSC 666

ADMINISTRATION OF JUSTICE – Paramount duty to court and overarching obligations – Group proceeding – Litigation funder, counsel, solicitor/law firm and expert witness – Fraudulent scheme to obtain grossly inflated legal costs and litigation funding commission from settlement payment – Repeated contraventions of duty and obligations – Where conduct corrupted the proper administration of justice – Content of paramount duty – Where solicitor on record played only a post-box role – Where targeted destruction of documents discovered – *Civil Procedure Act 2010* (Vic) ss 10, 16–19, 21, 24.

ADMINISTRATION OF JUSTICE – When overarching obligations apply – Whether legal practitioner acting for or on behalf of a party – Whether a person exercising any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding – *Civil Procedure Act 2010* (Vic) s 10.

ADMINISTRATION OF JUSTICE – Paramount duty to court – Whether breach of fiduciary duty to client is a breach of paramount duty to court – Whether solicitor and counsel for lead plaintiff in group proceedings have fiduciary duty to unrepresented group members when negotiating, documenting and seeking court approval of a settlement – Where solicitor on record played only a post-box role – *Civil Procedure Act 2010* (Vic) s 16.

ADMINISTRATION OF JUSTICE – Overarching obligation to act honestly – Content of obligation – *Civil Procedure Act 2010* (Vic) s 17.

ADMINISTRATION OF JUSTICE – Overarching obligations not to mislead or deceive – Content of obligation – *Civil Procedure Act 2010* (Vic) s 21.

ADMINISTRATION OF JUSTICE – Overarching obligation to ensure costs are reasonable and proportionate – Extent to which obligation requires a person subject to overarching obligations to monitor costs of another person – Whether costs must be incurred – *Civil Procedure Act 2010* (Vic) s 24.

EVIDENCE – Expert witness – Paramount duty to court and overarching obligations – Costs lawyer engaged to opine on reasonableness of legal costs – Expert falsely represented compliance with Expert Code of Conduct – Expert not independent and acted as advocate – Failure by expert to make appropriate enquiries, apply specialised knowledge and disclose all facts, matters and assumptions relied on in preparing report – Where contraventions materially contributed to deception of the court by other contraveners – *Civil Procedure Act 2010* (Vic) ss 10, 16, 21.

LEGAL PRACTITIONERS – Barristers – Removal from Supreme Court roll on court's own motion – Where party to fraudulent scheme – Deliberate breach of paramount duty and overarching obligations under the *Civil Procedure Act 2010* (Vic) – Whether fit and proper persons to remain on the Supreme Court roll – Where defendants concede removal appropriate – *Legal Profession Uniform Law* (Vic) s 23.

PRACTICE AND PROCEDURE – Death of party – Where contravener of overarching obligations dies after joinder to proceeding – Whether jurisdiction to order compensation abated upon defendant's death – Whether contravention of overarching obligations constitutes a cause of action – *Administration and Probate Act 1958* (Vic) s 29; *Civil Procedure Act 2010* (Vic) s 29.

PRACTICE AND PROCEDURE – Discovery – Obligations of parties and practitioners to the proper administration of justice – Where targeted destruction of documents discovered – *Civil Procedure Act 2010* (Vic) s 16.

PRACTICE AND PROCEDURE – Group proceeding – Litigation funding– Determination of fair and reasonable amount in funding commission by reference to risk to litigation funder's capital – Expert evidence considered.

REMEDIES – Contraventions of overarching obligations – Where appropriate in the interests of justice to award compensation to group members who suffered loss caused by contraventions – Whether contravening conduct materially contributed to loss – Whether legal costs or other costs or expenses of any person arising from the contravention – *Civil Procedure Act 2010* (Vic) s 29.

REMEDIES – Contraventions of overarching obligations – Award of compensation –Quantification of compensation considered – Appropriate counterfactual considered – Penalty interest – *Civil Procedure Act 2010* (Vic) s 29; *Penalty Interest Rates Act 1983* (Vic).

REMEDIES – Contraventions of overarching obligations by multiple parties – Whether judgment for

compensation ought to be limited to the proportionate responsibility of each individual contravener – Whether considerations of causal potency and relative culpability of contraveners relevant when court makes an order it considers appropriate in the interests of justice – *Civil Procedure Act 2010* (Vic) s 29; *Wrongs Act 1958* (Vic) Part 4AA.

APPEARANCES:	**Counsel**	**Solicitors**
As Contradictor	Mr P J Jopling AM QC with Ms J Collins	Corrs Chambers Westgarth
For the first plaintiff	No appearance	
For the second plaintiff	Mr S R Horgan QC with Mr C J Tran	Arnold Bloch Leibler
For the first defendant	Mr R Dick SC with Mr J A Redwood SC and Mr M Grady	Maddocks
For the second defendant	Mr D J Batt QC with Mr M P Costello (27 July – 3 August 2020) Mr A Myers AM QC with Mr J Rudd (16 March 2021) No appearance (4 August – 11 December 2020, 17-–18 March 2021)	MinterEllison (27 July – 13 August 2020)

For the third defendant	Mr R G Craig SC with Mr C Hibbard (27 July – 13 August 2020) No appearance (14, 17 August 2020 – 18 March 2021)	Moray & Agnew (27 July – 13 August 2020)
For the fourth defendant	Mr C G Juebner with Ms G S J Berlic	Colin Biggers & Paisley
For the fifth defendant	Mr A Palmer QC with Mr A Aleksov	Garland Hawthorn Brahe Lawyers
For the sixth defendant	Mr A P Trichardt	Lander & Rogers

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1 In 1837, Lord Langdale observed:

With respect to the task, which I may be considered to have imposed upon counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honourable and important services which they constantly perform as ministers of justice, acting in aid of the judge before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience, and learning, but also by considerations affecting the general interests of justice.[1]

2 On 9 November 2017, Mr Michael Symons of counsel put an offer of $64 million to settle two proceedings against the trustee of an investment scheme. Later that evening, his leader, Mr Norman O'Bryan SC emailed Mr Symons, his instructing solicitor, Mr Anthony Zita, and the managing director of the litigation funder, Mr 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.[2]

3 The events described in this judgment would have shattered Lord Langdale's confidence, his expectation of lawyers as an honourable profession. The idiomatic 'division of the spoils' was apposite. The spoils, had they been obtained, would have been ill-gotten. The conduct in winning and dividing them was dishonourable. The truth was obfuscated. The perpetrators went to extraordinary lengths to conceal their misdeeds. Others stood by, failing in their duty to protect. About 16,000 elderly investors in a failed company had suffered substantial financial loss. The process of exposing these misdeeds was laborious, costly and delayed. The victim was the proper administration of justice.

4 Two of the investors in the failed scheme refused to accept that the litigation funder and legal team were claiming reasonable and proportionate deductions from the settlement. Their objections ultimately thwarted the proposed division of the spoils and exposed the misconduct to be described in these reasons.

A.1. Summary of conclusions

5 The Court of Appeal approved the settlement sum of $64 million, but remitted for the determination of this court, the application by the litigation funder, now second plaintiff, Australian Funding Partners Pty Ltd ('**AFP**').[3] AFP sought court approval of a funding commission of $12.8 million (plus GST) and legal costs and disbursements of $4.75 million (plus GST) to be deducted from the settlement sum. However, AFP substantially abandoned this application during the remitter. By final submissions, AFP no longer sought a funding commission at all. Its claim for legal costs and disbursements shrank to a modest amount for reimbursement of various expenses.

6 The Contradictor's case was that AFP was disentitled from recovering any amount (including its claims for costs) by reason of its dishonesty and misconduct, and the dishonesty and misconduct of its agents, Mr Norman O'Bryan SC (the second defendant) ('**O'Bryan**'), Mr Michael Symons (the third defendant) ('**Symons**') and Mr Anthony Zita and his firm, Portfolio Law (the fourth defendant) (collectively, '**Zita**') (together, the '**Lawyer Parties**'). The Contradictor claimed that AFP and the Lawyer Parties breached the paramount duty and overarching obligations under the *Civil Procedure Act 2010* (Vic) and should be ordered to pay compensation for the delay in distribution to debenture holders of their just entitlements, and to pay the costs of the remitter on an indemnity basis. Identical claims were made against, and relief sought from, Mr Alex Elliott (the fifth defendant) ('**Alex Elliott**'), and the expert witness retained by AFP, Mr Peter Trimbos (the sixth defendant) ('**Trimbos**').

7 I will enter judgment as follows:

1. The second plaintiff's application is dismissed.

2. The second plaintiff and the second to sixth defendants pay to the first defendant, in his capacity as special purpose receiver of the rights and entitlements of debenture holders in Banksia Securities Ltd:

(a) compensation of $11,700,128;

(b) the first defendant's costs of and incidental to the appeal, and the costs of and incidental to the remitter, to be assessed on an indemnity basis; and

(c) the Contradictor's costs of and incidental to the remitter, to be assessed on an indemnity basis.

3. The second plaintiff is entitled to set off the sum of $234,375 against any sum payable under paragraph 2.

4. The names and other particulars of the second defendant and the third defendant be removed from the roll of persons admitted to the legal profession kept by the court.

5. The fourth defendant and the fifth defendant shall each show cause, on a date to be fixed, whether, in the context of the findings expressed in these reasons, he is a fit and proper person to remain on the roll of persons admitted to the legal profession kept by this court.

6. The first defendant's application (by summons filed 18 August 2020) for costs orders against non-parties is adjourned to a date to be fixed.

7. The Prothonotary is directed to provide copies of the following documents to the Director of Public Prosecutions:

(a) the Revised List of Issues filed 27 October 2020;

(b) the exhibits tendered at the trial of the remitter;

(c) the transcript from all hearings in the remitter since 27 July 2020, including the trial, case management hearings and applications;

(d) the outlines of closing submissions relied on by each party; and

(e) these reasons.

A.2. Dramatis personae and abbreviations

8 For clarity and convenience, I have identified in bold, on the first occasion of reference to a person, company, transaction, event or case to whom or which there will be frequent reference throughout the reasons, the abbreviation to be used. No disrespect is intended where formal titles have not been used. An index of these defined terms appears at the end of these reasons. I have reproduced extensively from contemporaneous documents, extracting only relevant sections and omitting formal parts, save where necessary, and retaining typographical errors as they originally appeared.

A.3. Structure of these reasons

9 The structure of these reasons will be apparent from the table of contents. I will first explain the relevant background, before identifying the evidence that was called or tendered, and my findings about the reliability and credibility of that evidence.

10 I will then set out, in a narrative form, my findings of fact drawn from the evidence. These findings are followed by an exposition of the legal principles that I have applied.

11 Finally, I will address consecutively my findings on contraventions alleged, causation, compensation and the defences that were taken, finishing with observations about remaining miscellaneous matters.

2. BACKGROUND

B.1. Banksia's collapse

12 Banksia Securities Ltd ('**Banksia**') was an unlisted public company, previously based in Kyabram, Victoria, that acted as a non-bank property lender. It raised the capital to lend to its borrowers from members of the public, who, in consideration for their investment, were issued with debentures in Banksia, pursuant to Chapter 2L of the *Corporations Act 2001* (Cth). It is common ground that many of Banksia's debenture holders are elderly residents of regional Victoria.

13 Under Chapter 2L of the *Corporations Act*, Banksia was required to enter into a trust deed and appoint a trustee to oversee its operation. The Trust Company (Nominees) Ltd ('**Trust Co**'), a subsidiary of Perpetual

Ltd, served as the trustee during the relevant period.

14 In October 2012, Banksia collapsed. On 25 October 2012, certain partners of McGrathNicol were appointed as receivers and managers to Banksia by Trust Co ('**Receivers**').

15 At the time of its collapse, Banksia owed approximately $663 million to more than 16,000 debenture holders. Banksia's assets included its outstanding loans made to third party borrowers, which totalled approximately $527 million at the time of the Receivers' appointment.

16 In November 2012, Mr Mark Elliott ('**Mark Elliott**') and O'Bryan decided to commence a group proceeding against various defendants arising out of the collapse. Mark Elliott and O'Bryan travelled to Kyabram and found a lead plaintiff, Mr Laurence Bolitho.

17 On 24 June 2014, Ferguson J ordered that Banksia be wound up in insolvency and appointed Mr John Ross Lindholm and Mr Peter Damien McCluskey of Ferrier Hodgson as liquidators.

18 On 30 September 2015, the Supreme Court of New South Wales (Black J) appointed the liquidators as special purpose receivers over specified property of Banksia ('**SPRs**' or '**SPR**'),[4] being its rights and entitlements in the various proceedings commenced by the Receivers and Mr Bolitho, which are discussed below.[5] The SPR has been in control of Banksia for the purpose of the litigation during the relevant period.

B.2. Commencement of the Bolitho proceeding

19 Mr Bolitho tentatively agreed to act as the lead plaintiff in the proposed group proceeding, but wanted independent advice. Mark Elliott and O'Bryan contacted Mr Robert Crow, a solicitor based in Shepparton, Victoria, who advised Mr Bolitho. He formally agreed to become the lead plaintiff representing a group defined as the debenture holders who suffered losses arising from Banksia's collapse. On 24 December 2012, Mark Elliott filed a writ commencing the group proceeding ('**Bolitho proceeding**').

20 Banksia and Trust Co were each named as defendants to the proceeding, as were Banksia's former auditor, Richmond Sinnott & Delahunty ('**RSD**'), and five of Banksia's former directors: Mr Patrick Godfrey, Mr Nicholas Carr, Mr Peter Keating, Mr Neil Mathison and Mr Geoffrey Skewes. O'Bryan drew the writ. Symons was soon retained as O'Bryan's junior.

21 The Bolitho proceeding alleged that Trust Co had failed to comply with the duties set out in s 283DA of the *Corporations Act*, including exercising reasonable diligence to ascertain whether Banksia had complied with its obligations under the legislation and the trust deed, and that its assets were sufficient to repay the value of debentures as and when they fell due.

22 The proceeding was settled in two stages. Mr Bolitho first settled with the defendants other than Banksia and Trust Co. That settlement, approved by Robson J,[6] is referred to in these reasons as the '**Partial Settlement**'. Mr Bolitho then settled with the remaining defendants, which Croft J approved,[7] and which is referred to in these reasons as the '**Trust Co Settlement**'.

B.3. Incorporation of AFP

23 In 2013, Mark Elliott was funding the plaintiff's costs and disbursements in the Bolitho proceeding on a no win/no fee basis. He unsuccessfully sought litigation funding.

24 Motivated by demands from the defendants for security for costs, on 20 January 2014, Mark Elliott incorporated AFP (then as a public company limited by guarantee) to act as a litigation funder. At its inception, a total of 1,000,000 shares were issued at a price of $1.00 per share, held equally by AMEO Investments Pty

Ltd ('**AMEO**') (an entity controlled by the Elliott family) and Noysue Pty Ltd ('**Noysue**') (an entity controlled by the O'Bryan family).

25 On 7 February 2014, Noysy Pty Ltd (as trustee for the Susanorman Family Trust) ('**Noysy**') transferred $500,000 to AFP in consideration for Noysue's subscription for shares. Noysue's director was Ms Susan Noy, O'Bryan's wife. Later that month, Mark Elliott transferred almost all of his investment in AFP from AMEO to another of his companies, Decoland Holdings Pty Ltd ('**Decoland**').

26 In January and February 2014, three other investors subscribed to shares in AFP: Willjo Pty Ltd (an entity associated with Mr William Crothers) ('**Willjo**'), 4Tops Investments Pty Ltd (an entity associated with Mr Simon Tan) ('**4Tops**'), and Fleming International Pty Ltd (an entity associated with Mr Stephen Hill) ('**Fleming**').

27 AFP's share register as at 18 February 2014 was as follows:

Shareholder	Ultimate shareholder(s)	Total shares	Total interest
AMEO	Mark Elliott Pina Elliott	50,000	4.5
Noysue	Susan Noy	500,000	45
Willjo	William Crothers Joanne Crothers	50,000	4.5
4Tops	Simon Tan	20,000	2
Decoland	Mark Elliott Pina Elliott	450,000	41
Fleming	Stephen Hill	30,000	3
	TOTAL	**1,100,000**	**100**

28 Willjo, 4Tops, and Fleming paid $10.00 per share: ten times greater than the price paid by AMEO and Noysue.

B.4. The Funding Agreement

29 During the relevant period, the *Corporations Regulations 2001* (Cth) specified that an entity that provided litigation funding was exempt from the usual requirement under the *Corporations Act*, for financial service providers to hold an Australian financial services licence, so long as it had appropriate processes in place, and followed certain procedures, to manage conflicts of interest.[8]

30 On 13 March 2014, AFP and Mr Bolitho entered into the '**Funding Agreement**', which enabled AFP access to this exemption.

31 Clause 6.3 relevantly included:

6.3. For the duration of this ... Agreement, the Plaintiff instructs the Lawyers to:

6.3.1 subject to clause 13, comply with all instructions given by [AFP] or as is set out in this ... Agreement.

32 Clause 7.3 provided:

For the duration of this... Agreement, [AFP] will:

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 [AFP] in relation to the subject matter of this ... Agreement.

33 Clause 12 stated:

12.1. Subject to any necessary Court order, the Plaintiff acknowledges and agrees that upon Resolution, [AFP] is entitled to be paid from the Resolution Sum as follows:

12.1.1. the Case Costs paid by [AFP] in relation to the Class Action to which the Resolution Sum relates; and

12.1.2. a further amount, as Consideration for the financing of the Case and performance by [AFP] of its various obligations under this [AFP] Agreement, being a maximum of 30% of that Resolution Sum.

34 Clause 13.2 included:

[AFP] will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings, however the Plaintiff may override any instruction given by [AFP] in so far as it concerns any Claim of the Plaintiff by the Plaintiff giving instruction s to the Lawyers.

35 Clauses 13.3 and 13.4 stated:

13.3 Except in relation to Settlement, which is dealt with below, if the Lawyers notify [AFP] and the Plaintiff that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to [AFP] and those they owe to the Plaintiff, the Plaintiff and [AFP] 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 [AFP];

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 [AFP's] interests; and

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

13.4 Nothing in sub-clause 13.3 entitles the Plaintiff to breach, or authorises the breach, of any terms of this ... Agreement.

36 Clauses 13.5 and 13.6 dealt with conflicts of interest in relation to a settlement:

13.5. In recognition of the fact that [AFP] has an interest in the Resolution Sum, if the Plaintiff:

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

13.5.2. does not want to Settle the Class Action when [AFP] considers it appropriate to do so;

then the Plaintiff agrees that [AFP] 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.

13.6. If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and [AFP] 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.

37 In addition to the Funding Agreement, and as contemplated by cl 7.3, AFP provided group members with copies of its '**Conflicts Management Policy**' dated 16 March 2014 and '**Disclosure Statement**' dated 2 June 2014. These policies promised transparency and discipline in monitoring the charging of legal fees.

38 The Conflicts Management Policy relevantly included the following item:

4. Our standard agreement with the Lawyers (**Standard Lawyers Terms**) requires:

(a) the Lawyers to disclose to each member of the group which has entered into a funding agreement with AFP (**Funded Person**) the sources of all fees or other income they may receive in relation to the litigation being funded by AFP, including providing a budget for all estimated costs and expenses up to the conclusion of a trial in any funded Proceedings;

39 The Disclosure Statement stated:

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.

...

3.10 As well as providing funding for the claim, we usually also investigate the claim and provide project management services, which include discussing strategy with the lawyers and monitoring costs and budgets. We will also provide any other non-legal assistance which you or your lawyers may reasonably request.

...

4.1 ASIC considers that a conflict of interest may arise where there is a divergence between the interests of [AFP], you and the lawyers in relation to your funded litigation. The conflicts may be actual or potential, present or future.

4.2 ASIC considers that a divergence of interests may arise because:

(a) [AFP] wishes to keep the legal and administrative costs of the funded litigation low to maximise its return;

(b) the lawyers may be seen to have an interest in maximising their fees; and

(c) you have an interest in minimising the returns of both [AFP] and the lawyers.

...

4.4 ... 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.

...

4.27 [AFP seeks] to ensure that the interests of group members are adequately protected by (amongst other things):

...

(b) carrying out our [Conflict Management] Policy;

(c) appointing a Senior Officer who is responsible for implementing, monitoring, and managing the [Conflict Management] Policy. That senior officer is Diane Jones and her contact details are set out in paragraph 2.6 above;

(d) seeking to identify actual or potential conflicts in relation to the litigation in a timely manner [and] disclosing them to group members;

(e) acknowledging and accepting that the professional and fiduciary duties owed to you by the lawyers (being funded by [AFP] to pursue your claim) take precedence over any duties or obligations those lawyers may owe to [AFP];

(f) disclosing the sources of all fees or other income [AFP] and the lawyers may receive in relation to your funded litigation;

(g) disclosing any material relationship between [AFP] and the lawyers or any claimant in accordance with the [Conflicts Management Policy];

(h) providing, in the funding agreement, the procedure that will be applied in deciding whether to accept any settlement offer in relation to your claims.

40 On 13 March 2014, the same day that Mr Bolitho entered into the Funding Agreement, Mark Elliott informed debenture holders of the demands for security for costs, and the necessary involvement of AFP as litigation funder. He described AFP as having a group of experienced and financially strong investors, who had subscribed $2 million in paid-up capital.

41 In the letter, Mark Elliott further disclosed that:

> (a) a company associated with his family was a significant investor;
>
> (b) Mr Bolitho had agreed with AFP that it would be entitled to a 30% fee, plus the recovery of its legal costs and disbursements, from the 'net proceeds'[9] of any settlement or judgment obtained in the group proceeding; and
>
> (c) he would continue as solicitor on a 'no win no fee' basis with the funder paying expenses and security for costs.

42 On 8 June 2014, Mark Elliott wrote to debenture holders, encouraging them to sign up to the Funding Agreement.

B.5. Elliott Legal

43 Mark Elliott was the solicitor on the record for Mr Bolitho until 5 December 2014. On 6 May 2014, Mark Elliott, as its sole director, incorporated Elliott Legal Pty Ltd ('**Elliott Legal**'). In April 2015, Elliott Legal took over the conduct of Mark Elliott's legal practice. Alex Elliott, Mark Elliott's son, was a director of Elliott Legal from 16 May 2016 to 5 June 2017, and was an employee solicitor from June 2016. On 19 February 2020, Alex Elliott and Mr Richard Earl were appointed as directors of Elliott Legal, following the death of Mark Elliott.

B.6. Litigation by Receivers and SPRs

44 In July, August and December 2013, September 2014, and March 2015, the Receivers conducted examinations of 21 individuals and sought production of documents from various persons, generating 21 volumes of documents about Banksia's management and financial affairs ('**Receivers' Court Book**').

45 On 12 June 2014, the Receivers commenced a proceeding against Banksia directors Mr Godfrey, Mr Keating, Mr Carr, Mr Skewes and Mr Geoffrey Lipshut; Banksia's senior financial officer, Mr Wesley Santilla; Banksia's auditor between 2000 and 2008, Maxwell Brown & Mountjoy; Banksia's auditor from 2008 to 2012, RSD; and Banksia's solicitors, Harwood Andrew ('**BSL proceeding**'). The BSL proceeding advanced substantially similar claims against Banksia's former directors and advisors to those made in the Bolitho proceeding.

46 In 2014 and 2015, the SPRs, on legal advice, believed that the Bolitho proceeding was at risk of being dismissed or struck out. There were good grounds for the SPRs' belief. Between May 2013 and April 2014, Mr

Bolitho had filed or proposed to file four separate iterations of his statement of claim in the Bolitho proceeding, arising from objections taken to the pleading by various defendants.

47 In light of that concern, together with the desire to maximise potential avenues of recovery, the SPRs (and, prior to their appointment, the Receivers) took steps to protect the valuable claims available to debenture holders. Between September and November 2014, the SPRs conducted further public examinations of Trust Co and former Banksia personnel, who produced several tranches of documents.

48 On 27 March 2015, the SPRs commenced two further proceedings. The first was the '**Banksia proceeding**', a claim by Banksia alleging that Trust Co had breached Chapter 2L of the *Corporations Act* and continued to act as trustee despite having a conflict of interest. Although the Bolitho proceeding made claims against Trust Co, it did not allege a breach of statutory conflict at the time the Banksia proceeding was commenced. The claims against Trust Co in both the Bolitho proceeding and the Banksia proceeding were settled in the Trust Co Settlement in November 2017 for $64 million. As part of the settlement, Trust Co and the SPRs agreed to support AFP's claims for legal costs and disbursements of $4.75 million (plus GST), and a funding commission of $12.8 million (plus GST). The BSL proceeding and the Bolitho proceeding claims against all defendants except for Trust Co and Banksia, were compromised as part of the Partial Settlement in April 2016. The BSL proceeding and the Banksia proceeding, whose ultimate beneficiaries were the debenture holders in Banksia, are collectively referred to in these reasons as the '**Banksia proceedings**'.

49 The SPRs also commenced the '**McKenzie proceeding**', a group proceeding on behalf of all debenture holders in Banksia. The McKenzie proceeding made substantially similar allegations to those made in the Bolitho proceeding, save that it also made the breach of statutory conflict allegation made in the Banksia proceeding. Although the McKenzie proceeding was filed, it was never served on Trust Co.

50 The SPRs retained Maddocks as solicitors (Mr David Newman) and counsel including Mr Robert Dick SC and Mr Jonathon Redwood

51 On 29 February 2016, the Supreme Court of New South Wales ordered the Receivers to release $10 million to the SPRs for the payment of all past and unpaid remuneration of the SPRs in respect of the Banksia proceedings, and all future remuneration of the SPRs in continuing to prosecute the Banksia proceedings ('**SPR Litigation Fund**').[10] A further $6 million was released into the SPR Litigation Fund on 19 February 2018.[11]

100. **THE EVIDENCE ON THE REMITTER AND ITS ASSESSMENT**

C.1. The course of the remitter

52 On 1 November 2018, the Court of Appeal allowed an appeal by Mrs Wendy Botsman against the approval of the Trust Co Settlement.[12] The Court of Appeal was satisfied that the settlement sum of $64 million represented all funds available to Trust Co, including remaining limits from all responsive policies of insurance and all contributions from third parties joined by it, and that there were no other sources of funds or assets available to contribute to any settlement or adverse judgment.

53 The settlement was approved in part. The Court of Appeal did not approve AFP's funding commission and legal costs claims from the settlement sum, finding that the primary judge erred by not appointing a contradictor. The Court of Appeal remitted those claims made under the Deed of Settlement and Release in the Trust Co Settlement ('**Settlement Deed**') together with approval of a settlement distribution scheme to a different judge of the Trial Division for determination pursuant to ss 33V and 33ZF of the *Supreme Court Act 1986* (Vic).

54 AFP was the moving party in the remitter for court approval of its commission and legal fees. In discussion at the initial case management conference, I directed the parties (then only Mr Bolitho, the SPRs and Trust Co) to identify all the issues that each party sought to have resolved in the remitter, in a collective statement of issues that was limited only by the relationship of the issue to the subject matter of the remitter order. The parties remained free to contend that an issue ought to be resolved in that parties' favour, or did not properly arise, at the hearing.

55 I appointed Mr Peter Jopling AM QC and Ms Jennifer Collins as '**Contradictor**' for the purposes of the remitter. Later, Mr Craig Phillips of Corrs Chambers Westgarth ('**Corrs**') was appointed as independent solicitor instructing the contradicting counsel.

56 Clause 2.1 of the Settlement Deed provided that the settlement was subject to, and conditional on, the court approving the settlement ('approval orders', as defined in the deed). If the approval orders were made, the settlement would become effective from the expiry of any appeal period, or the determination of any application for leave to appeal and/or appeal, if made.

57 On 29 November 2018, AFP filed an application in the High Court of Australia for special leave to appeal the Court of Appeal's decision. There could be no settlement sum while an appeal was extant. The High Court ultimately dismissed AFP's application for special leave to appeal on 17 May 2019.

58 On 1 February 2019, I made extensive case management directions.[13]

59 By 1 March 2019, the Contradictor raised matters of 'disentitling conduct' in a proposed list of issues it circulated to the court and the parties on a confidential basis. The Contradictor contended that certain conduct of AFP and the Lawyer Parties was relevant to the court's discretion under s 33ZF of the *Supreme Court Act* to reduce or disallow AFP's claims for legal costs and disbursements and a funding commission. The Contradictor revised the list of issues several times as it inspected discovery from the parties and further parties were joined into the remitter as respondents. The trial of the remitter proceeded on the basis of the identified issues in the Revised List of Issues, as amended.

60 On 29 March 2019, O'Bryan announced at a case management conference that he had returned his brief for Mr Bolitho and that Symons, then overseas, would also return his brief once he returned to Australia. The extensive further directions made that day and what followed, procedurally, are noted in *Bolitho v Banksia Securities Ltd (No 6)* ('***Bolitho No 6***').[14]

61 On 16 April 2019, the Contradictor provided substantial particulars of the disentitling conduct by serving a Revised List of Issues.

62 On 17 May 2019, I ordered that the settlement sum be paid to the SPRs by Trust Co. On 22 May 2019, I approved an interim settlement distribution scheme for the SPRs to distribute $42 million to debenture holders, with $22 million retained on trust by the solicitors for the SPRs, pending resolution of the remitter.[15] That distribution occurred on 13 June 2019.

63 On 29–30 May 2019, I heard an application by O'Bryan, Symons and Zita, then not parties to the remitter, for orders that sought to constrain the Contradictor from relying on the allegations of disentitling conduct. The primary submission was that the Contradictor had acted in excess of, and outside of, the scope of its proper role in making 'and seeking to prosecute' those allegations. They submitted, with technical precision, that they had no notice as non-parties, as distinct from their role as legal representatives for Mr Bolitho, that the orders

were being sought. They contended the Revised List of Issues was, by the allegations of disentitling conduct, improper and prejudicial, and created procedural unfairness that would 'be aggravated and compounded if the remitter continues to proceed in accordance with the Contradictor's intentions'.

64 The primary submission failed.[16]

65 I then joined AFP, O'Bryan, Symons and Zita to the proceeding. I gave further trial preparation directions, including ordering AFP and the Lawyer Parties to make extensive discovery and setting the trial of the remitter down to commence on 27 July 2020, on an estimate of 16 days.

66 Mark Elliott deliberately destroyed documentary evidence from his computer and email accounts, and from Alex Elliott's computer and email accounts. Mark Elliott, Alex Elliott, O'Bryan and Symons did not discharge their discovery obligations, forcing protracted interlocutory disputes concerning discovery.

67 On 13 February 2020, Mark Elliott died. From this point in time, AFP's instructions were provided to its solicitors by its remaining directors, Mr Crothers, Mr Tan and Alex Elliott.

68 On 29 June 2020, Trimbos, a costs lawyer who had filed four previous expert reports on behalf of AFP in the proceeding which opined that the legal costs claimed were fair and reasonable, issued a further supplementary expert report, in which he recanted his earlier reports, and claimed that he had been misled.

69 Until that point, AFP had sought nearly $20 million in costs and commission in the remitter, and strenuously denied the Contradictor's allegations of disentitling conduct.

70 However, on 14 July 2020 — two weeks prior to trial — AFP filed a document that made extensive admissions, including of dishonesty by AFP, O'Bryan and Symons, but continued to press claims for legal costs and commission in a lesser sum of nearly $7 million. AFP contended, with considerable optimism, that the evidence of O'Bryan and Symons provided a proper basis for them to do so. As my findings make clear, AFP never had a proper basis for its claim, which was a fraud. The directors of AFP consulted Alex Elliott about those admissions, and he approved them.

71 When these admissions were made, AFP appeared, and now appears, to be a shell company. For more than 18 months, AFP engaged solicitors and counsel and vigorously contested the Contradictor's allegations, presumably incurring substantial legal expenses, while causing substantial erosion of funds held by the SPR that otherwise would have been available for distribution to the debenture holders. Although AFP was entitled to defend itself against the allegations made by the Contradictor, it ultimately did not make its substantial admissions until an appreciable time after Mark Elliott's demise. This raises questions about AFP's remaining directors' and Alex Elliott's motivation in pressing AFP's claim at all following the decision of the Court of Appeal. Some questions remain to be resolved.

72 The trial of the remitter commenced on 27 July 2020.

73 On 3 August 2020, when the Contradictor completed its opening address, O'Bryan, by his counsel, announced to the court that he did not maintain any defence to the allegations in the Revised List of Issues dated 21 July 2020 and its particulars, consented to entry of judgment against him, accepted that his name should be removed from the roll of persons admitted to the legal profession by the court ('**Roll**'), and abandoned all claims to unpaid fees.

74 On 13 August 2020, Symons, by his counsel, also announced to the court, in substantially the same terms

as O'Bryan, that he took the same course.[17]

75 On 13 August 2020, AFP abandoned its claim for a funding commission and most of its claim for legal costs and disbursements. From this time, AFP advanced a limited claim for reimbursement of various expenses and disbursements totalling $234,375.71, costs paid to Mr Crow of $28,604.60, and some proportion of costs of $401,808.00 paid to Zita.

76 On 17 August 2020, the SPR foreshadowed that a summons would be issued seeking non-party costs orders against:

(a) the estate of Mark Elliott, deceased;

(b) Alex Elliott;

(c) Elliott Legal;

(d) Decoland;

(e) Noysue; and

(f) Noysy.

77 This application was supported by an affidavit of Mr Newman sworn 17 August 2020. For the reasons set out in *Bolitho v Banksia Securities Ltd (No 10)*,[18] I ordered that Alex Elliott and Trimbos be added to the proceeding as the fifth defendant and the sixth defendant respectively.

78 Trimbos died on 24 September 2020. Subsequently, on 2 November 2020, pursuant to r 16.03(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* ('**Rules**'), Ms Katerina Peiros was appointed as representative of Trimbos's estate, deceased, for the purpose of this proceeding. Without intending any disrespect, and unless expressly stated otherwise, I will refer to the sixth defendant in these reasons as Trimbos, including after Ms Peiros's appointment.

79 The Contradictor further revised the list of issues on 10 September and 27 October 2020. The trial resumed with further evidence on 30 October 2020. The evidence was completed on 11 December 2020. On 18 March 2021, following closing submissions, I reserved my decision.

80 The relevant events arising during the remitter are otherwise recited later in section L of these reasons.

C.2. The evidence

81 A substantial volume of documents sourced from the SPR and extracted from the defendants were tendered and collected in an electronic database that served as the court book during the trial and became the exhibit. The database also contains numerous affidavits that were tendered. The following witnesses gave evidence:

(a) Mr Crow, a solicitor;

(b) Mr Keith Pitman, a group member;

(c) Mr Gregory John Houston, an economist, and Mr Sean McGing, an actuary, gave concurrent evidence as experts;

(d) Mr Antony Bryn Samuel, a chartered accountant and valuer;

(e) Mr Lindholm, a chartered accountant and official liquidator;

(f) Mr Newman, a solicitor;

(g) Mr Samuel Roadley Kingston, a solicitor;

(h) Trimbos, an expert costs solicitor;

(i) Zita, a solicitor;

(j) O'Bryan, unemployed;

(k) Mr Richard Thomas De Bono, a chartered accountant; and

(l) Alex Elliott, a solicitor.

82 I have not summarised the evidence. Rather, relevant evidence from each witness has been considered in context in the narrative that follows.

83 My findings in respect of the evidence of Trimbos, Mr Houston, Mr McGing, Mr Samuel, and Mr De Bono are, when appropriate, stated later in these reasons where their evidence is considered in its context.

84 I accepted the evidence of Mr Lindholm, Mr Newman and Mr Kingston, who gave evidence for the SPR. I found their evidence to be thorough, consistent with contemporaneous documents, credible and reliable. Only Mr Newman was substantively cross-examined, by counsel for Symons (prior to his capitulation), but that cross-examination was both unhelpful in seeking to establish a case that was abandoned and was unsupported by evidence from Symons or witnesses on his behalf. I have disregarded it.

85 The SPR also tendered two opinions prepared by Mr Dick SC and Mr Redwood, in response to the court's orders, that analysed thoroughly the legal issues in the Bolitho proceeding and the Banksia proceeding, the relative merits of the two proceedings, and the cooperation between the two legal teams.

86 I largely accepted the evidence of Mr Crow, who I considered to be a credible and reliable witness. That said, I was left with the impression that Mr Crow was largely kept in the dark by Mark Elliott and was seriously misled by him into obtaining Mr Bolitho's instructions to accept the Trust Co Settlement offer on false premises. This enabled Mark Elliott to achieve his commercial objectives. I also accepted the evidence of Mr Pitman, which was unchallenged.[19]

AFP and Elliott Legal

87 As stated earlier, it is probable that AFP is now a shell, supported by loan accounts with its remaining directors and shareholders. On 14 July 2020, AFP, in consultation with Alex Elliott, filed extensive admissions to the allegations made against it and the Lawyer Parties, including admissions of dishonesty by AFP, O'Bryan and Symons. Yet, despite abandoning almost all of its claims by the second week of trial, AFP remained represented by solicitors and counsel (both senior and junior) throughout the remitter. Mark Elliott was AFP's managing director and secretary, and its major shareholder through his control of AMEO and Decoland. AFP did not call, as witnesses on its behalf, any of its directors, nor Alex Elliott.

88 Elliott Legal was Mark Elliott's law firm and formerly acted for Mr Bolitho prior to a decision of Ferguson JA, set out in section D of these reasons, which found that Mark Elliott was conflicted and could not act as both funder and solicitor. As is later reasoned, I find that Mark Elliott was always the 'real' solicitor, despite the court's decision, and he exercised control over Zita until he ceased acting in the course of the remitter. I am satisfied that Elliott Legal was at all times the personal solicitor to AFP, even when other solicitors were retained. When it occurred to Mark Elliott that independent solicitors were needed once Mrs Botsman instituted her appeal, AFP retained, and continues to retain, Mr John Mengolian of Arnold Bloch Leibler ('**ABL**').

89 I am satisfied to the requisite standard that Mark Elliott was the directing mind and will of both AFP and Elliott Legal until his death. They were both his alter egos. There was no evidence of any distinction between the roles played by both Mark Elliott and Alex Elliott for AFP, on the one hand, and Elliott Legal on the other. It was not necessary to draw a distinction when considering AFP's liability, or Alex Elliott's position, between conduct labelled as that of Elliott Legal and conduct labelled as that of AFP.

Mark Elliott

90 The central player in these events was Mark Elliott. It was plain that Mark Elliott, together with O'Bryan, masterminded the misconduct at the heart of the fraud attempted against the settlement fund. So much will become clear in the analysis of the documents put in evidence.

91 Due to his death, the court could not hear from Mark Elliott in the witness box. However, in final submissions, the Contradictor described him in these terms:

Mark Elliott held in contemptuous disregard his clients, the Court, his colleagues, and the administration of justice. He was driven by greed and prepared to do anything to obtain financial reward for himself, without concern as to whether his actions were lawful...

He was an odious individual who heaped shame on the legal profession, and the exposure of his conduct should act as a lesson to all lawyers that conduct of this kind will be found out, and will not be countenanced.

92 As will emerge through these reasons, this strong language was warranted. Mark Elliott was the architect of one of the darkest chapters in the legal history of this State. He fraudulently inflated his claim for fees at the time of the Partial Settlement, and encouraged O'Bryan and Symons to do the same in respect of their fees in the Trust Co Settlement. He destroyed relevant documents to avoid disclosure of his conduct. He swore false affidavits. He attempted to intimidate litigants, unrepresented group members and other officers of the court, to pursue his own financial interests and conceal his wrongdoing. He provided false information and instructions to AFP's solicitors, intending to hamper the Contradictor's investigations.

93 The totality of the evidence that I am about to set out leaves me persuaded to the requisite standard of the following matters:

> (a) Mark Elliott was a highly unethical and dishonest person, with a 'win at all costs' mentality, who demonstrated total disregard for his professional obligations and his duties as an officer of the court. Alex Elliott described his father's approach and attitude as 'don't give anyone anything unless they, you know, claw it from you' and '[h]e just wasn't going to give anyone a leg up if they didn't, you know, absolutely try really hard to get it';
>
> (b) Mark Elliott's initial reaction to the Contradictor's requests for documents and information in April/May 2019 about the Trust Co Settlement, the report of Trimbos, the settlement approval application, and the role of Alex Elliott, was to obfuscate. He achieved this initially through

non-observance of court orders, making false affidavits, and implementing strategies that attempted to isolate the Contradictor from the court. As the Contradictor pressed its demands, Mark Elliott scaled up (or doubled down) in his response;

(c) Mark Elliott deliberately destroyed inculpatory documents sought by the Contradictor from his own computer and from Alex Elliott's device. His intention in doing so was to thwart the Contradictor's investigation and retain the opportunity to receive very substantial sums of money from the settlement sum; and

(d) consequently, there was no discovery of internal or private emails between Mark Elliott and Alex Elliott during the critical period from the in-principle agreement of the Trust Co Settlement to Mrs Botsman's appeal.

94 Later in these reasons, I will explain Mark Elliott's targeted destruction of documents in greater detail.[20] I am comfortably satisfied that the practice that Mark Elliott admitted was not a process of managing documents, as he claimed. He fully appreciated that discovery of documents from his devices would prove his involvement, as the mastermind, in the nefarious conduct that is described herein.

95 AFP filed two affidavits sworn by Mark Elliott and dated 23 April 2019 and 9 May 2019. The Contradictor submitted, with considerable force, that the affidavits were telling for their omissions, admissions, and statements that were revealed to have been deliberately false by documentary evidence that emerged in discovery. Most of these criticisms will be noted in context throughout the narrative, but some general observations are presently appropriate:

(a) in neither affidavit did Mark Elliott attempt to provide the court with a frank account, either in relation to the questions raised by the 29 March 2019 order, or more generally;

(b) Mark Elliott obfuscated and was non-responsive; and

(c) some deliberately false statements have been identified.

O'Bryan and Symons

96 O'Bryan was senior counsel for Mr Bolitho between December 2012 and March 2019. Until the trial of the remitter, he had practised as a member of the Victorian Bar for many years, much of that time as a member of the inner bar. He was a sought after advocate and previously a member of the Order of Australia.[21]

97 Symons was briefed as junior counsel in the Bolitho proceeding from September 2014. He signed the bar roll in May 2013, after earlier serving as an associate to a judge of this court. Much of his work as a barrister consisted of briefs in commercial group proceedings involving O'Bryan, Mark Elliott/AFP and Zita.

98 After returning their briefs early in the remitter, O'Bryan and Symons fiercely resisted the Contradictor's allegations of disentitling conduct on technical and procedural grounds. They also sought to set aside the order that they provide the court with an explanation of their conduct. They never offered the court a true explanation of their conduct, putting debenture holders to the great expense of proving their involvement in a fraudulent scheme. It was only at trial, after the Contradictor's opening submissions had laid bare the true extent of their appalling conduct, that they capitulated and purported to express remorse for their actions.

99 As members of counsel, O'Bryan and Symons were not ordinary litigants. They each had a sophisticated understanding of the law and were subject to the strictest of ethical and professional duties. In spite of that,

their deception of the court and debenture holders was in the arrogant and defiant (but ultimately erroneous) belief that their conduct would go undetected. They have each left a stain on the integrity of barristers as a profession. O'Bryan's conduct, in particular, deserves strong condemnation. His seniority, standing and influence meant that the court and other legal practitioners treated his representations to them with an intensified level of trust.

100 The capitulations by O'Bryan and Symons meant that they did not give evidence in their own cases. As the Contradictor submitted, the failure by O'Bryan and Symons to give evidence provides a strong basis for the court to:

(a) infer that any evidence they might have given would not have assisted them or AFP; and

(b) more confidently draw against them adverse inferences that are available from other evidence tendered in the case.

101 Although O'Bryan did not give evidence in his own case, Alex Elliott issued a subpoena for him to give evidence in Alex Elliott's defence. As discussed later in these reasons, I limited the issues on which O'Bryan could give evidence, and his evidence was necessarily confined.

Zita

102 Zita is a solicitor of many years standing. Zita submitted that I should accept him as a credible and reliable witness: He provided full and frank affidavits; made many concessions against his interest at the earliest opportunity; and was, in evidence, a truthful witness who sought to respond to questions to the best of his knowledge and recollection.

103 The Contradictor observed, correctly, that when giving evidence in his own case, Zita showed, in a limited number of instances, an appreciation of the matters in issue in the remitter and of his own errors. However, by and large, he failed to properly recognise and accept the true gravity of his conduct, even when it was squarely put to him in the witness box. His evidence was unsatisfactory and inconsistent with his duty of candour to the court. Zita often gave evidence that was inconsistent with, and sometimes entirely contradictory to, answers he had given to his cross-examiner mere minutes earlier. Zita's statements concerning his interactions with Mark Elliott, O'Bryan and Alex Elliott were particularly unreliable.

104 I made no finding of dishonesty against Zita. However, his role in the scheme was not that of an innocent third party. Zita acted in gross dereliction of his duty to the court, Mr Bolitho, and the 16,000 group members he represented. It is a matter of great concern to the court that until Zita's conduct was exposed in the remitter and the prospect of a substantial monetary liability became apparent, he appeared unaware that it was inimical to the proper administration of justice for him to allow himself to be used in the way that he had.

105 The circumstances uncovered by the Contradictor could not have occurred had Zita refused to acquiesce and allow himself to be controlled by Mark Elliott in conducting the litigation. He was irresponsible in his attention to the representations that were made under his hand and on his firm's letterhead, particularly in relation to the interests of Mr Bolitho. He did not know whether the letters he sent and the documents he filed were true or false. His attitude to the discharge of his responsibilities was extraordinarily casual. Zita's ineptitude and lack of experience and forensic judgment rendered him incompetent to represent to the court that he acted as the solicitor on the record in the Bolitho proceeding. He, too, has left a stain on the integrity of his profession.

Alex Elliott

106 Alex Elliott, the son of Mark Elliott, is a legal practitioner. He became involved in the Bolitho proceeding from early 2016, suggesting in evidence that at that time, he was performing 'mainly administrative sort of things', and following Mark Elliott to meetings and attending court with him.

107 Alex Elliott submitted in closing that I should accept him to be a credible and reliable witness; a young, inexperienced practitioner, dominated by his father, and in awe of O'Bryan. He submitted that he was, and had been, in an anxious and depressed state that affected his capacity to give evidence including difficulties, at times, in concentration and memory. His final submissions were substantially dependent on acceptance of his evidence in the manner in which he gave it.

108 Alex Elliott gave evidence under cover of a certificate under s 128 of the *Evidence Act 2008* (Vic).

109 Alex Elliott started working for AFP in 2014, while he was a law student. When Mark Elliott initially involved Alex Elliott in the conduct of the Bolitho proceeding, his duties primarily involved assisting with 'book building' activities and contributing to the process of sending correspondence to group members in the Bolitho proceeding. He graduated in law in October 2015, began working with his father at Elliott Legal in March 2016, was admitted to practise on 13 December 2016, and has held a practising certificate since 11 May 2017. Alex Elliott was a director of Elliott Legal between 16 May 2016 and 5 June 2017 but has remained in its employ as a solicitor.

110 Alex Elliott and AFP both described Alex Elliott's role in the proceeding as that of a 'personal assistant'. That characterisation was false. I am satisfied that he provided legal services in connection with the litigation. Alex Elliott's attempt to define himself by this description — apparently initially coined by Mark Elliott, which first appeared in the 12 April 2019 letter from ABL to the Contradictor,[22] and adopted by Alex Elliott in evidence — was a ruse, designed to divert the Contradictor's gaze away from his role in the proceeding.

111 Zita accepted that Alex Elliott was his father's 'right hand man'. Zita's interactions with Alex Elliott put him in a suitable position to assess the extent to which Mark Elliott relied on his son in managing the family interests. Zita's evidence accurately reflected the true nature of their relationship. He was a contributor to the legal team. Zita submitted that I should regard Alex Elliott as cautious to ensure that his evidence was always consistent with his case theory, rather than forthright or responsive. His failure to comply with his obligations to make discovery increased the expense and delayed the finalisation of the hearing.

112 Alex Elliott contended that he was not knowingly complicit in the deception of others, and that he did not act dishonestly. Although he was at various times privy to enough information to have made it possible for him to work out that deception was being practised by others, he attempted to explain his failure to identify that deception by the complexity of the deception, his very limited legal experience, the trust he understandably and reasonably placed in others, and his natural deference to the judgment of those others. If others, such as Trimbos and Zita, did not notice any irregularities in the fees of counsel, it was unrealistic — he claimed — to think that he should have done so. He was, in short, unwitting, limited and lacking control and influence.

113 Throughout the course of these reasons, I reject Alex Elliott's attempt to explain away his knowing involvement. The evidence established a very different picture from the innocent bystander he attempted to depict. Alex Elliott was active in the work undertaken in the proceeding, acting under the direction of his father.

114 The Contradictor submitted, and I agree for reasons I will develop, that Alex Elliott was an unsatisfactory witness. He was evasive in the witness box. He dissembled. His recall of relevant matters and events was selective. He was often unable to recall recent events in which he was actively involved. His evidence was

self-serving and directed at confronting the documentary evidence put to him in a way that he perceived would be forensically advantageous to himself. He was often vague and answered questions in a manner that attempted to avoid scrutiny.

115 Alex Elliott demonstrated that his primary concern was self-preservation arising from his joinder to the remitter, about which he clearly felt aggrieved. In particular:

> (a) despite the very detailed particularisation of the allegations against him, AFP and the Lawyer Parties, including charges of fraudulent conduct by his father and AFP, he showed no empathy or concern for the 16,000 debenture holders adversely affected;
>
> (b) he frequently referred to the fact that the remitter had been traumatic for him, without showing any insight into the gravity of the events in which he had played a part; and
>
> (c) he failed to offer up a frank account of what had occurred. It was not until re-examination that he was prepared to concede any possible responsibility for any aspect of what had occurred.

116 Finally, he made no admissions until shortly prior to opening his case. Initially, he maintained that AFP's admissions were not binding on him, despite the fact that AFP had consulted with him about them beforehand. On 24 November 2020, he abandoned that position, substantially adopting AFP's admissions relevant to its own misconduct and the misconduct of the Lawyer Parties. Despite that, he did not concede any complicity in that misconduct.

4. THE BOLITHO NO 4 DECISION

117 The Bolitho and Banksia proceedings were managed by Ferguson J until her Honour's appointment to the Court of Appeal, whereafter they were managed by Croft J.

D.1. Application to restrain Mark Elliott and O'Bryan from acting

118 On 28 February 2014, Ferguson J ordered that Mr Bolitho provide security for costs to Mr Godfrey in the sum of $80,632.27. On 13 March 2014, Mark Elliott confirmed to Mr Godfrey's solicitors that the security had been paid. He also disclosed the existence of the Funding Agreement:

> The funding agreement has been entered into by Laurence Bolitho with International Litigation Partners Limited ACN 167 628 597, an unlisted public company incorporated in the State of Victoria ("ILP")
>
> I am one of the directors of ILP.

119 Mr Godfrey's solicitors immediately expressed their concern:

> The Funding Agreement raises serious concerns for our client.
>
> Our searches reveal that Ameo Investments Pty Ltd is a shareholder of ILP and that you are the sole director and shareholder of Ameo Investments Pty Ltd.
>
> Our searches also reveal that Noysue Pty Ltd is also a shareholder of ILP, and that Ms Susan Noy, who we understand is Norman O'Bryan SC's wife, is the sole director and shareholder of Noysue Pty Ltd.
>
> Accordingly, it appears that both you and your client's senior counsel have a direct financial interest in this litigation.
>
> This arrangement gives the impression that the performance of the paramount duties to the Court owed by, and the independence expected of, Mr Bolitho's lawyers is likely to be compromised because of the financial benefits they or their spouse will receive from the proceeding over and above legitimate fees that they could charge pursuant to retainer agreements.

Would you please inform us whether Mr Bolitho will continue to retain Mr O'Bryan SC and yourself as his legal advisers in this proceeding. If so, please confirm how you say our client's concerns will be addressed. As part of this, we would expect to receive a copy of the Conflicts Management Policy of ILP referred to in the Funding Agreement. Would you please also provide us with a copy of the retainer agreement referred to in paragraph 13.1 of the Funding Agreement.

120 On 20 June 2014, Mr Godfrey applied to restrain Mr Bolitho from continuing to retain Mark Elliott and O'Bryan as solicitor and counsel respectively.

D.2. The decision

121 On 26 November 2014, Ferguson JA ruled on Mr Godfrey's application, finding that the proper administration of justice required that Mark Elliott and O'Bryan be restrained from acting for Mr Bolitho. Her Honour delivered reasons for judgment on the application ('**Bolitho No 4 decision**').[23]

122 Ferguson JA noted that the relevant test for restraining a practitioner from acting was whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required a lawyer to be prevented from acting, taking into account the interests of protecting the integrity of the judicial process and the due administration of justice, including the appearance of justice.[24]

123 Her Honour's reasons then recorded, in some detail, facts that were matters of public record, and thus known to the hypothetical observer, that could inform the future discharge of the due administration of justice.[25] These included that:

> (a) Mark Elliott and Ms Noy (O'Bryan's wife) each had a substantial interest of approximately 45% in AFP;
>
> (b) although O'Bryan held no direct interest in AFP, in most families, what is good or bad financially for a wife is good or bad for her husband, and vice versa;
>
> (c) Mark Elliott was acting as the solicitor on the record for Mr Bolitho and O'Bryan was retained as his senior counsel;
>
> (d) the Funding Agreement provided that a fee of up to 30% of any settlement or judgment, valued at a significant amount, in excess of $100 million, would be payable to AFP. It conferred a great deal of control of the conduct of the proceeding on AFP, instead of Mr Bolitho;
>
> (e) a litigation funding fee payable under the Funding Agreement would benefit the owners of AFP;
>
> (f) the legislature had, at that time,[26] prohibited contingency fees, such that a solicitor may not charge as a fee a percentage of the amount obtained by the client from the litigation. However, the solicitor was entitled to seek an uplift fee of 25% if charging the client on a no win, no fee basis;
>
> (g) Mark Elliott wore a number of hats in the litigation and could be influenced by the substantial financial interest that rested on the outcome of the case. This magnified the likelihood of conflict of interest, including with ethical duties and obligations to the court;
>
> (h) O'Bryan, too, could 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; and

(i) it was important for the proper administration of justice and the judicial process that the court could rely upon the independence of the lawyers acting for the parties, and that lawyers brought a degree of objectivity to the task when advising their clients and presenting the case to the court.

124 Ferguson JA was satisfied, based on the evidence before her, that the test for restraining a practitioner was satisfied. In doing so, her Honour rejected Mr Bolitho's submission that any possibility of conflict must be grounded in reality and could not be theoretical:

[C]ounsel contended that there is no appreciable risk of conflict. In this regard, he observed that Mr O'Bryan is a senior member of the Bar and has obviously formed the view, given the professional obligations that he has under the Bar rules, that in accordance with his professional judgement he does not believe that the possibility of conflict is sufficiently appreciable for him to take the step of returning his brief in this matter. He observed that there has been no particular concrete example of why that judgement by Mr O'Bryan has been wrong.

...

I also do not accept counsel's submission that there is a mere hypothetical risk of conflict. As with Mr Elliott, the Observer would form the view that Mr O'Bryan may be influenced by his family's substantial financial interest that rests on the outcome of the case. Again, it is the perception that that interest may be seen to colour his ability to perform his obligations, not necessarily that it would. Mr O'Bryan is not acting on a 'no win no fee' basis, as the evidence discloses that Mr Elliott and now [AFP] are paying counsel's fees. Consequently, in his case, it is only the significant interest that his family has in [AFP] that puts him into a compromised position so that the Observer would view the risk that he will or will be perceived to be unable to apply the necessary independence required as an officer of the court, a real rather than theoretical risk that cannot be overlooked. As with Mr Elliott, whilst that risk is lessened to some extent by the undertaking that Mr Bolitho is willing to give and the legislative oversight that the Court has in a group proceeding, it does not reduce the risk sufficiently to make it a matter of no significance such that it can be ignored. The prospect of Mr O'Bryan's stance that he would not take any part in advising about settlement also does not diminish the risk sufficiently.[27]

125 Although her Honour concluded that Mark Elliott and O'Bryan should be restrained from acting, she did not pronounce any orders at that time. Rather, she directed that they consider the reasons. The proceeding was listed for directions on 15 December 2014. I pause to observe that the court identified the requirements for the proper administration of justice in the Bolitho proceeding in explicit terms from the outset.

D.3. Developments following the Bolitho No 4 decision

126 Before the directions hearing, Mark Elliott and O'Bryan responded to the Bolitho No 4 decision in two significant ways. First, Mark Elliott arranged for Zita to act as solicitor on the record for Mr Bolitho. How that came to occur will be explored later in these reasons. Second, Mark Elliott and O'Bryan organised the paper divestment of Ms Noy's shares in AFP to a company controlled by Mark Elliott.

O'Bryan retained a financial interest in AFP

127 I am satisfied that O'Bryan did not dispose of Ms Noy's stake in AFP, but rather made an arrangement or reached an understanding with Mark Elliott that maintained his family's interest in AFP, pursuant to which:

(a) Regent Support Pty Ltd ('**Regent Support**'),[28] an entity controlled by Mark Elliott, held the AFP shares as bare trustee for Noysue; and

(b) O'Bryan retained an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge).

128 There was no evidence of the interrelationship of financial dealings between Ms Noy and O'Bryan (or entities controlled by one or both of them) and Mark Elliott (or any of his entities). O'Bryan's absence from the witness box was explained in his capitulation statement.[29] Beyond that statement, Ms Noy's absence, and that of any other person able to explain a money trail (if there was one) was never explained. However, in the absence of an explanation, I am satisfied that there was a sufficient commonality of interest between wife and husband, such that the more probable inference was that O'Bryan gained financial benefit from dealings by, or in the name of, Ms Noy and her related entities. It is in this sense that I speak of O'Bryan's financial interest in AFP. Absent any explanation to the contrary, I can also more comfortably infer, from the following matters, that Noysue remained beneficially interested in AFP.

129 On 11 December 2014, following the Bolitho No 4 decision, Noysue executed an instrument of transfer of its shareholding in AFP to Regent Support (Mark Elliott signed the transfer form) for a stated consideration of $500,000. On 14 December 2014, the transfer was recorded in AFP's register of members.

130 However, despite the execution of these documents, I find that the share transfer form misrepresented the transaction, insofar as it implied that the beneficial interest in AFP was transferred away from Noysue. Its significance otherwise was not explained. All that was transferred was the bare legal title to the shares. I am satisfied that O'Bryan's family retained a financial interest in AFP. Noysue retained the beneficial interest in its investment, held by Regent Support as a bare trustee.

131 I am satisfied that O'Bryan, Noy, Noysue or Noysy, or any entity associated with O'Bryan, did not ever receive consideration for the transfer for the following reasons.

132 First, there was no evidence that the amount of $500,000 was paid in consideration for the shares. O'Bryan attempted to rely on a series of payments from AFP and other Elliott family entities to O'Bryan's family entities in 2016, a year after signing the share transfer form:

(a) On 9 February 2016, Decoland made a payment of $300,000 to a bank account operated by Noysy.

(b) On 24 May 2016, Decoland made a payment of $300,000 to a bank account operated by Noysy.

(c) On 26 May 2016, AFP made a payment of $1 million to a bank account operated by Noysy.

133 O'Bryan was refused leave to re-open his case and put this submission.[30] Importantly, in seeking to re-open his case, he did not propose to enter the witness box and explain these transactions. He merely sought to invite the court to draw inferences from the documentary evidence alone.

134 There was no explanation of these payments by any person with knowledge, nor were they for the precise amount of $500,000. The share transfer was in December 2014 and there was no evidence of any agreement, arrangement or understanding that these payments were deferred consideration for the shares. To the contrary, it is probable that the payments related to different transactions not related to the share transfer:

(a) the payment on 9 February 2016 was made four days after Noysue paid $400,000 to Decoland. The net transaction in early February 2016 was therefore a payment of $100,000 from Noysue to Decoland;

(b) it is probable that the two payments in May 2016 related to settlement of another matter, a group proceeding against Downer EDI Ltd in which Elliott Legal acted as solicitors and O'Bryan and Symons acted as counsel ('**Downer proceeding**'). The evidence showed that the payment on 26 May 2016 was part of O'Bryan's fees in that proceeding. The approval of that settlement required the defendants to pay the settlement sum by 24 May 2016, from which AFP was entitled to a funding commission of $825,000. The more probable purpose of the payment by Decoland to Noysy on the same day was to remit the O'Bryan family share of the funding commission derived from the Downer proceeding settlement, rather than consideration for Noysue's shares in AFP 16 months after the transaction documents were executed.

135 Second, the surrounding circumstances of the share transfer are not consistent with a bona fide divestment by Noysue of its beneficial interest in AFP. In February 2014, Noysue acquired 500,000 shares for $1 each. Eleven days later, a further 100,000 shares were issued to Willjo, 4Tops, and Fleming for $10 a share: ten times the price paid by Noysue.

136 On 5 December 2014, a settlement offer of $11 million was made on behalf of the defendants who would ultimately become parties to the Partial Settlement. Under the Funding Agreement, AFP considered itself entitled to 30% of any settlement in the Bolitho proceeding. At the time this settlement offer was discussed, Mark Elliott's position was that AFP was entitled to 30% of the entire amount, rather than taking into account an apportionment between the Bolitho proceeding and the BSL proceeding, as ultimately occurred. Mark Elliott and O'Bryan would therefore have expected that a settlement of $11 million could have earned a funding commission of $3.3 million. Anticipated revenue of such an amount would have been material to the value of Noysue's shares on 11 December 2014.

137 The Contradictor submitted that a rational and arm's length seller in the same position as Ms Noy would have demanded more than $500,000 for its shares in AFP. There is no evidence that either Ms Noy or O'Bryan were motivated to accept the same price they had paid for the shares, despite the materially different position of AFP at that time. It is highly improbable that O'Bryan would relinquish his family's interest for the same price it paid merely so that he could continue to act as senior counsel in the case. There was also no evidence of whether Regent Support could pay for the shares. It was not a party to any of the subsequent payments that were conveniently gathered into O'Bryan's purported explanation.

138 O'Bryan might have submitted that an honest and ethical disposition of the shares, in the light of the Bolitho No 4 decision, would be at the purchase price, rather than a price inflated by reference to the fruits of the Bolitho proceeding, and that these surrounding circumstances offer weak support for the inference against him.

139 There are two answers to this suggestion. First, Noysue received nothing at all for the shares, save that the paper transaction disguised its retained beneficial ownership. Second, having regard to O'Bryan's subsequent conduct, I find it improbable that he contemplated an honest and ethical disposition. In due course, my findings will reveal that O'Bryan was motivated to retain the opportunity to share in profits earned by AFP, as litigation funder, at a later time when it paid dividends to its shareholders. It would also be incongruous to contemplate Mark Elliott and O'Bryan arranging an honest and ethical disposition in the context of the other part of the strategy to circumvent the Bolitho No 4 decision, the engagement of an ineffective solicitor to disguise Mark Elliott's continued control of the litigation.

140 I am satisfied that the share transfer was a paper transaction implementing the arrangement or understanding between Mark Elliott and O'Bryan, designed to feign compliance with Ferguson JA's

conclusions on O'Bryan's involvement as counsel and as an investor in AFP. It was never intended to effect a change in the beneficial ownership of AFP. The evidence regarding the payments made by Mark Elliott's interests to O'Bryan's interests referred to above does not support a finding, on the balance of probabilities, that they were consideration for the shares. In substance, O'Bryan maintained a financial stake in AFP and, consequently, the outcome in the Bolitho proceeding.

The representations to Mr Godfrey's counsel and solicitors

141 On 11 December 2014, Mr Godfrey's solicitors wrote to Portfolio Law requesting copies of:

All written contracts, transfers and communications evidencing the disposal by Noysue Pty Ltd of its shares in the litigation funder.

142 Their communication concluded with:

You would appreciate that the Court would 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.

143 The request went unanswered. Later that day, Mr Godfrey's solicitors circulated proposed orders, including orders that Mark Elliott and O'Bryan be restrained from acting while they retained their respective interests in AFP.

144 O'Bryan instructed Zita to reply in the following terms:

As you know, my firm has now replaced Mr Elliott as solicitor for the plaintiff. 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.

Zita sent the letter as directed, amending the first paragraph to read:

We are instructed that Noysue Pty Ltd has disposed of its shares in the litigation funder.

Although the statements were qualified as instructions, Zita conceded under cross-examination that he made no attempt to independently verify their truthfulness.

145 Also on 12 December 2014, counsel for Mr Godfrey emailed O'Bryan about the Bolitho No 4 decision:

Can you give me a call at your convenience.

The solicitors are writing a lot about orders arising from the Judge's November Ruling (latest version I have been given is attached).

I gather events have largely overtaken things.

I am conscious of the need for you to appear on Monday ... so I'm looking for a way to clean up the matter on the papers. If we can sort out the primary position between us (i.e. form of orders other than costs) then I can tell the Judge that a form of order is agreed save as to costs and that the rest can be done on the papers.

146 O'Bryan replied to Mr Godfrey's counsel the same day:

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. However, I don't represent Elliott, only Bolitho.

Unless this can be sorted out shortly, alternative counsel will need to be engaged for Bolitho for Monday.

147 Four observations must be made about O'Bryan's email:

(a) it was a communication between counsel;

(b) it represented that Ms Noy had agreed to, and had, sold her interest in AFP;

(c) it stated that Mark Elliott 'had been replaced' as Mr Bolitho's solicitor by Portfolio Law; and

(d) it conveyed that O'Bryan sought to avoid, as unnecessary, formal orders restraining either him or Mark Elliott.

148 The second and third statements were grossly misleading. By sending this email, O'Bryan deceived counsel for Mr Godfrey. This was an egregious breach of the trust that characterises communications between counsel about the efficient conduct of civil litigation, it being a necessary practice at the Bar for counsel to trust, at face value, communications from other counsel. I am satisfied that Mark Elliott caused these false representations to be made to Mr Godfrey's solicitors.

149 Later that day, Mr Godfrey's solicitors filed submissions in support of his proposed orders. The submissions relevantly included the following statements:

Events since the Court's Reasons

...

3. The Court proceeded on the basis that before any further orders would be made concerning Mr O'Bryan QC and Mr Elliott, they would be given a further opportunity to be heard or an opportunity to voluntarily withdraw as the lawyers for Mr Bolitho without the need for the making of formal Orders. Counsel for Bolitho at the hearing dealt with the substance of the application rather than the form.

4. On 8 December 2014, there was a change of solicitor for Bolitho.

5. Yesterday afternoon, Bolitho's new solicitors informed Godfrey's solicitors for the first time that Noysue Pty Ltd had disposed of its shares in the litigation funder. Though no evidence has been provided in relation to the disposal, Godfrey intends to proceed on that basis.

6. The proposed orders retain utility because they allow for further changes in circumstances (e.g. the funder ceasing to fund Bolitho).

150 O'Bryan's false representations were now before the court. In full knowledge of that fact, O'Bryan conveyed his response to the submissions in an email to Mark Elliott and Symons:

Paragraph 6 of these submissions for Godfrey is nonsensical.

What does it actually mean?

As to para [33] of Ferguson J's judgment, Michael (who will appear on Monday as counsel for Bolitho only, not for me or Mark) might consider it appropriate to submit that, in circumstances where Bolitho had made it quite clear that he desired Mark & me to continue in our roles in the case, it would have been wholly inappropriate for either of us to have "intervened" in the manner her Honour seems to suggest in para [33].

For a lawyer to get between the client and the judge in his/her own cause is fundamentally wrong always and in all circumstances.

Both I and Mark have stood aside (as was appropriate in my opinion) until this issue is resolved. Now that it has been resolved (by Mark withdrawing as solicitor and my wife disposing of her interest in the funder), there is no need for, and no purpose served by, Godfrey's proposed orders.

In my case, I have informed counsel for Godfrey that I object to being joined to a summons following the delivery judgment for the sole purpose of the grant of an injunction against me without giving me the opportunity to be heard (not in Bolitho's proceeding, but the proceeding against me). I also informed counsel for Godfrey that I insist upon service of the proceeding upon me, following which I will engage my own solicitor and counsel to represent me. Perhaps Michael might mention those matters, if it becomes necessary on Monday.

151 Symons, appearing for Mr Bolitho and now instructed by Zita, drafted submissions contending that no orders were necessary to give effect to the Bolitho No 4 decision. The submissions relevantly included the following:

9. Upon delivery of the Ruling, Mr Elliott and Mr O'Bryan ceased to act for the plaintiff. The voluntary withdrawal by the plaintiff's previous solicitor and senior counsel means that there is no need for any order to give effect to the Ruling.

10. 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. There is no longer "due cause to prevent Mr O'Bryan from continuing to act as counsel in the proceeding". Therefore, in the absence of conflict, the plaintiff should be permitted his choice of counsel and allowed to engage Mr O'Bryan.

152 There was no evidence that Symons sought to independently verify these matters. The basis for them were the assertions of Mark Elliott and O'Bryan. Perhaps Symons took those assertions on trust, but if he did, Symons did not proffer that or any other explanation.

D.4. The directions hearing

153 At the directions hearing on 15 December 2014, Symons submitted that orders implementing her Honour's decision were unnecessary.

154 The SPRs submitted:

From our perspective Mr Elliott has done the appropriate thing and appointed new solicitors, and we understand the situation with Mr [O'Bryan] has been resolved so we say it's time to move on, and we don't seek anything further.

155 Mr Godfrey's counsel maintained his position that an order be made:

If I can address the order, Your Honour. Your Honour, paragraph 1 was to formalise the correct form of the application and obviously to allow those who were proposed to be joined right of appeal, should they be chosen, if they chose to appeal.

Now, Your Honour, if those parties no longer wish to appeal because events have changed. Your Honour knows that [Mark] Elliott — there was a change of practitioner and that [O'Bryan] has informed my instructing

solicitors that [Noysue] has disposed of its interest in the funder. If that renders those orders unnecessary so be it.

156 Ferguson JA concluded that there was no utility in making the formal order:

What I've done in one of the other matters where a similar thing happened is recorded something in Other Matters. I don't think there's a lot of utility in making the orders. I'll hear what Mr Symons has to say, but unless he's pressing me to make these orders for the reasons that you suggest for purposes of appeal then I can't see a lot of utility in it...

But what I can do is record in whatever orders are made, in Other Matters, that the reason that there weren't orders made is because circumstances have changed and then it's on the record going forward.

157 The court's order noted in the 'Other Matters' section of the order:

No formal order was made to restrain Mr Elliot [sic] or Mr O'Bryan SC from continuing to act in the proceeding. By the time the proceeding returned to Court for final orders:

1. Mr Elliot [sic] had ceased to act as solicitor for Mr Bolitho; and

2. Mr O'Bryan SC's wife had divested her shareholding in the Litigation Funder.

158 What occurred before Ferguson JA at this directions hearing typified how counsel are relied on by judges to assist them in expeditiously effecting the due administration of justice, and provided a practical demonstration of the trust that counsel place in their communications about the disposition of a matter in court and the trust that the court places in counsel. Her Honour said as much in thanking those who had acted in the Bolitho proceeding while she had been the docket judge.

159 Mark Elliott, O'Bryan and Symons (who did not defend the allegation) induced the court, on a false premise, to accept that there was no need for formal orders precluding Mark Elliott and O'Bryan from acting for Mr Bolitho whilst holding an interest in AFP. The court was misled into adopting that false premise because Mark Elliott, O'Bryan and Symons deceived it, and their fellow practitioners, into believing that events had changed.

160 Judicial power is frequently exercised on the basis of statements by legal practitioners, rather than on formal evidentiary proofs, relying on them to honour their solemn duty to the court. The justice system would not function properly if a lawyer could not be taken at their word. Like any good deception, it was partially true, but the changes in circumstances were not what Mr Godfrey's representatives, or the court, believed had occurred. The final orders on the application were based on the submissions of counsel, who did not base them on evidence that these changes had been made.

161 As will become apparent, the deliberate actions of Mark Elliott, O'Bryan and Symons, in response to the Bolitho No 4 decision, circumvented Ferguson JA's ruling that Elliott and O'Bryan could not act as solicitor and counsel respectively while simultaneously maintaining a financial interest in the litigation funder.

162 In flagrant breach of the reasons expressed by the court on the application, Mark Elliott exercised control over the solicitor role, and O'Bryan continued to act as counsel, while they each continued to maintain a financial interest in AFP. In doing so, they failed to act with honesty and with integrity by deceiving the court, an utter debasement of this fundamental tenet of the administration of justice. As the litigation progressed, they were emboldened by their 'achievement', to the detriment of the debenture holders.

5. **USING ZITA TO CIRCUMVENT THE BOLITHO NO 4 DECISION**

E.1. Mark Elliott retains Zita to act as Mr Bolitho's solicitor

163 Mark Elliott and Zita knew each other as students at Melbourne University in the 1980s, but they had not spoken for many years. In early December 2014, apparently by coincidence, they met at a social function and arranged to catch up.

164 The next day, they met in the CBD and discussed the Bolitho proceeding. Zita recalled that Mark Elliott explained that he was both the lawyer and litigation funder in the proceeding, but was not able to continue as the solicitor because of his financial interest in the funder. Mark Elliott asked Zita to act in his stead. Zita said that he had no experience in group proceedings, it was a large proceeding, and he would need counsel to do it. Mark Elliott explained that O'Bryan and Symons were briefed and remarked that he shouldn't worry because 'these guys will be on tap for you'. Zita expressed concern about counsel's fees and Mark Elliott explained he would be responsible for them.

165 At the meeting, Zita agreed that Portfolio Law would take on the case and become the solicitor on the record for Mr Bolitho. On 8 December 2014, Portfolio Law filed a notice of change of solicitor in the Bolitho proceeding.

166 Around this time, Zita read the Bolitho No 4 decision. He also read the Funding Agreement, and knew that once Portfolio Law was engaged, they were the 'Lawyers' as defined in the Funding Agreement. Zita accepted that he owed duties to Mr Bolitho and the group members.

E.2. Zita's role as solicitor

167 The Contradictor submitted that Mark Elliott arranged for Zita to assume the role of solicitor on the record in the Bolitho proceeding because he intended and expected that Zita would not independently represent the interests of Mr Bolitho and group members, but would acquiesce in Mark Elliott exercising control as the de facto solicitor. Throughout the remitter, the Contradictor characterised Zita's role as a 'post-box' solicitor: not expected to, and did not, discharge the function of an independent and competent solicitor, but rather acted as conduit for Mark Elliott, O'Bryan and Symons to run the litigation as they saw fit.

168 Zita's description of his role as solicitor supported this characterisation:

> The relationship between me, [O'Bryan] and [Symons] was not the normal relationship between solicitor and barristers. By that I mean that normally the solicitor engages the barrister and instructs the barrister what should be done, whether it is the giving of advice, preparing pleadings or appearing in Court. The barrister then sends their invoice to the solicitor for payment.
>
> In the [Bolitho proceeding], I did not provide instructions to the barristers to give advice, prepare pleadings or to appear at hearings. [O'Bryan] and/or [Symons] would usually tell me what they wanted me to do and I would do it. [Mark Elliott] also gave me instructions about what I should do from time to time. They would decide who would appear at various hearings, what pleadings needed to be prepared and when and what advice was required and who would prepare it. [O'Bryan] and [Symons] had made arrangements with respect to their fees directly with [Mark Elliott], so that I was never asked to pay their invoices.

169 Zita accepted that he did not make any strategic decisions and that Mark Elliott, O'Bryan or Symons authored all of the significant correspondence that he sent. This was because, he said, he was not experienced in group proceedings and therefore trusted Mark Elliott, Symons and O'Bryan to guide him. He placed much trust in O'Bryan, whom he regarded as an experienced and respected member of the bar.

170 Zita admitted that he did not verify any of the statements made in letters that he sent prepared by Mark Elliott, O'Bryan or Symons. He did not seek any instructions from Mr Bolitho, or give him any advice about the matters set out in correspondence sent on his behalf. He conceded that he could not point to one single instance in the course of the whole proceeding in which he stood up to Mark Elliott, in writing, in the interests

of Mr Bolitho and told him that he would not go along with his instructions.

171 In his own terms, Zita stated that he:

Effectively provided [Mark Elliott], [O'Bryan] and [Symons] with the ability to have a solicitor on the record and undertake the work they instructed the firm to do, but without taking charge of the case and making them accountable to me. I know now that I did not act with sufficient rigour as a solicitor on the record for [Mr Bolitho] in the [Bolitho proceeding].

172 Zita further deposed that the dynamic of Mark Elliott and O'Bryan making decisions persisted for the entire time that he was the solicitor on record. Either of them would determine the strategy and would then tell him what to do.

173 Numerous examples of the dynamics of the post-box relationship are set out throughout these reasons.

Lack of experience and expertise

174 Zita conceded that he was not as diligent as would ordinarily be expected of a solicitor handling a group proceeding and was 'largely dependent' on other members of the team:

In this remitter proceeding, I have spent a lot of time reflecting on my involvement in the [Bolitho proceeding]. I say that because [Mark Elliott] offered me the opportunity to become involved as solicitor on the record for Bolitho after he could no longer act in circumstances where:

(a) I had no experience in class actions and was therefore reliant on experienced class action barristers (which I told [Mark Elliott] at our meeting at Syracuse restaurant on 4 December 2014);

(b) [Mark Elliott] had not previously asked me to do any legal work for him; and

(c) there were many experienced class action solicitors out there who could have taken over and who would have been far more qualified than me.

175 With the benefit of hindsight, Zita accepted that as the solicitor on record he 'had an obligation to monitor counsel's fees', although he pointed to 'difficulties' in that regard, as he was 'inexperienced in group proceedings and did not provide instructions to counsel in the usual way'. Zita agreed with O'Bryan's statement that the SPRs had the 'infrastructure to do the evidence, including expert witnesses', and that Portfolio Law did not have such capacity.

176 Zita's lack of group proceeding experience was reflected elsewhere. In December 2017, in response to a request by Trimbos for a copy of his curriculum vitae, Zita emailed Symons stating:

The only problem is that my credentials will only take one page!

The curriculum vitae ultimately provided described Zita as conducting and supervising Portfolio Law's commercial litigation teams. The firm was said to 'handle issues', including structuring business and commercial ventures, contractual disputes, construction law and corporate disputes. The document did not refer to either Zita or Portfolio Law as having any experience in group proceeding litigation.

177 Zita was assisted in his role in the Bolitho proceeding by Mr Raymond Mizzi. Mr Mizzi's resume disclosed that he obtained a Bachelor of Commerce in 1982, followed by a Masters of Taxation in 1993. He obtained a Bachelor of Laws in 2008 and had practised at two law firms prior to being employed at Portfolio Law. His resume similarly does not refer to group proceeding litigation, and lists his areas of practice as 'commercial law, commercial litigation and general law'. Mr Mizzi did not give evidence, although he was available if required.

178 Zita's lack of expertise could be problematic. One early example occurred in December 2014, when O'Bryan instructed Zita to send proposed orders, prepared by him, to the court for the upcoming directions hearing following the Bolitho No 4 decision. O'Bryan expressly instructed Zita on how to generate the document ultimately provided to the court to avoid the presence of any metadata linking O'Bryan to the document:

Tony, In response to the Associate's request earlier today, please send a pdf version (created by you, not me, for reasons I will explain) of these proposed orders to Ferguson J's associates & copy all other parties to the class action.

179 The following day, Mr Mizzi sent the proposed orders to the court. Three minutes later, O'Bryan responded:

This was supposed not to show me as the author but it does!

The response from Mr Mizzi was repentant:

My sincere apologies for this error. If there is any way I can fix this for you please let me know.

O'Bryan replied:

Too late now, I am afraid.

Hopefully by the time our enemies work this out, we will have fixed this problem.

Creation of the Portfolio Law email accounts

180 Zita's role as 'post-box' solicitor was most effectively implemented by the use of two generic email accounts, ostensibly managed by Portfolio Law, which allowed the rest of the Bolitho legal team to control and manage the solicitor role. Initially, after coming on record, Zita and Mr Mizzi used their personal '@portfoliolaw.com.au' email accounts. However, in around April 2017, Zita arranged for two email accounts to be created:

(a) BolithoClassAction@portfoliolaw.net.au ('**Bolitho class action email**'); and

(b) classactions@portfoliolaw.net.au ('**general class action email**').

It was around this time that the proceeding started to become more active, after a long period during which Trust Co prepared its evidence.

181 Zita explained that only he and Mr Mizzi had direct access to the Bolitho class action email used to send and receive correspondence in the Bolitho proceeding. Mark Elliott, Symons and Alex Elliott each had access to the general class action email. The email accounts were set up so that emails sent to or from the Bolitho class action email were automatically replicated in the inbox or sent items folders of the general class action email. Accordingly, any email correspondence sent or received by Zita in relation to the Bolitho proceeding would automatically be accessible to Mark Elliott, O'Bryan, Symons and Alex Elliott. Similar arrangements were in place for other group proceedings in which Portfolio Law was retained.

182 Zita said either Mark Elliott or O'Bryan came up with the idea of 'giving access to all emails'. He recalled Mark Elliott saying that O'Bryan was frustrated that Zita was not responding to emails quickly enough. The documentary evidence showed that both Mark Elliott and O'Bryan were both perturbed by their inability to access communications in real time. Some examples:

(a) On 7 December 2014, days after he had agreed to become the solicitor, Mark Elliott demanded that Zita blind copy him to the first piece of inter-party correspondence sent by

Portfolio Law:

FYI.

Offer of settlement by all Defendants except TrustCo received Friday pm.

I will send draft reply for you to send tomorrow.

Please "blind" cc on all correspondence

(b) On 4 December 2015, O'Bryan emailed Zita requesting Trust Co's discovery which had been 'promised weeks ago'. Zita replied to O'Bryan and Symons that day, stating:

Gents

I received a disc containing TrustCo discovered documents last Friday afternoon.

I will arrange to have the disc duplicated and provide you with a copy.

O'Bryan responded:

These very important things are taking us far too long to process.

(c) In June 2016, while on holiday overseas, Mark Elliott issued Zita with a directive:

Please copy me on ALL emails

Trust me, i can have a better break if I am in the loop!

183 Zita accepted that he did not ever himself draft correspondence or emails, when his cross-examiner put the proposition, adding '[n]o, but I read the emails. I went through them'. He suggested that the email arrangement reduced his need to reflect on correspondence and determine how to respond, as the other members of the Bolitho legal team read the correspondence and told him what to say in reply. His cross-examiner suggested that the whole reason the system was set up was to short circuit him. He denied the suggestion replying, 'no, we had to read the emails and go through them', before conceding that he could not point to any occasion when he went through an email and drafted a response.

184 This particular evidence illustrated an unsatisfactory aspect seen commonly through Zita's evidence. When cross-examined on an issue, he tended to initially assert a very general proposition, supportive of the notion that he had done no wrong, that could not be sustained when the specific proposition was analysed in detail. A credible witness would have accepted more readily than Zita was prepared to, that he failed to properly assist Mr Bolitho because all he did was Mark Elliott's bidding.

185 Alex Elliott stated that the Bolitho class action email and general class action email addresses were established because Zita wanted to set up a system whereby he could give clarity to the barristers regarding correspondence that was coming in and going out. He said Zita agreed with Mark Elliott and O'Bryan that there needed to be greater oversight with correspondence, after an occasion in which Zita failed to forward an urgent application.

186 Alex Elliott was involved with the creation of the email accounts.

(a) On 26 April 2017, Alex Elliott's personal (Gmail) email account received an email, with the subject line 'Test from Bolitho'. Alex Elliott replied stating 'yep, needs signature'.

(b) On 2 May 2017, an email was sent from Alex Elliott's Gmail account to the Bolitho class action email address with the subject 'tester'.

187 Alex Elliott claimed Zita requested his assistance with establishing the email addresses, and that his assistance was limited to a 'high level'; namely, explaining to Zita's IT contact about filtering all of the emails into a central pool. I do not accept this account to be a satisfactory explanation. I am satisfied that Mark Elliott directed Alex Elliott to assist Zita with setting up the email accounts. He wanted them created, recognising the benefits to him and O'Bryan. The purpose of this arrangement was to assist them to exercise control over the conduct of the litigation, as they could immediately consider, and respond to, all correspondence.

188 Alex Elliott claimed he monitored the general class action email for his father at his request. If he saw an email arrive, he would usually print it off to give to Mark Elliott, or he read it himself and discussed it with his father. Alex Elliott said that 'no one' sent emails from the general class action email. However, his statement was contradicted by documents showing that in at least January and May 2018, emails were sent from that address by members of the Bolitho legal team, including at least one email from O'Bryan to the Banksia legal team.

189 Mark Elliott, O'Bryan and Symons bypassed the need for Zita to deal with any correspondence by which the proceeding was conducted, beyond placing draft letters, virtually all of which were drafted by O'Bryan and Symons, onto his letterhead and sending them out as directed. This facilitated Mark Elliott/AFP, O'Bryan and Symons efficiently and expeditiously achieving their real objective of controlling the litigation.

190 Two observations must be made about this practice.

191 First, I was satisfied that Mark Elliott and AFP adopted a sophisticated and effective system to conceal their control over the litigation, knowing that this system was in breach of the Bolitho No 4 decision. Having deceived Mr Godfrey's counsel and the court,[31] Mark Elliott's use of the general class action email, if obvious to other practitioners, would likely have been seen as a flagrant breach of the spirit of the Bolitho No 4 decision. The combination of the deception of practitioners and the court, as part of an opportunity to prosecute personal interests as later occurred, was egregious.

192 Secondly, Zita, Symons and Alex Elliott were, for reasons explained elsewhere throughout the narrative, in various ways complicit in this deceptive arrangement.

E.3. Zita was a 'post-box' solicitor

193 In final submissions, Zita acknowledged that his principal shortcoming was that he failed to 'exercise sufficient independent judgment when acting for Mr Bolitho. He acknowledged that he 'made no substantive, independent forensic decisions and he worked as directed by other members of the Bolitho legal team'. However, Zita submitted that these shortcomings were ameliorated, as the $64 million settlement was in the best interests of Mr Bolitho and the group members. O'Bryan, Symons and Mark Elliott were better placed than him to negotiate and document the Trust Co Settlement; and Mr Bolitho was independently advised by Mr Crow and agreed to the terms.

194 I do not accept this submission. It was not the quantum of the sum being paid that was the issue. I find, as the Contradictor submitted, that Mark Elliott arranged for Zita to become the solicitor on the record in the Bolitho proceeding because of his inexperience and ineptitude. Mark Elliott and O'Bryan wanted a solicitor who would do as he was told. Zita's lack of experience in group proceedings and Portfolio Law's inadequate resources, skills, and experience commended them to Mark Elliott, because he wanted a solicitor who would not bring an independent judgment to bear in the conduct of the litigation. Mark Elliott had no need for, and no

intention to finance, the resources of a firm of solicitors capable of competently handling large scale complex commercial litigation.

195 I am satisfied that by engaging Zita, Mark Elliott facilitated his control of the litigation in order to advance his own interests, particularly when it mattered most for Mr Bolitho and group members to have independent representation, namely, in relation to the two settlements reached in the proceeding.

196 As will become apparent, the relationship between Zita and Mark Elliott/O'Bryan would not change during the course of the Bolitho proceeding. Zita conceded that he did whatever Mark Elliott, O'Bryan and Symons told him to do, all the way through the litigation, and did not exercise any independent judgment.

6. THE PARTIAL SETTLEMENT

197 In addition to Trust Co, the defendants to the Bolitho proceeding and the Banksia proceedings included Banksia's former auditors, directors and officers. From late 2014, various and protracted discussions took place concerning the resolution of the claims made by Mr Bolitho and the SPRs against the defendants other than Trust Co. The compromise of those claims for $13.25 million ultimately culminated in the Partial Settlement.

198 Although the Partial Settlement was not the subject of the remitter, several of its features have background relevance to the Trust Co Settlement. First, the circumstances demonstrated that Mark Elliott was controlling the solicitor role in the Bolitho proceeding, contrary to the Bolitho No 4 decision. Second, the legal costs and disbursements were calculated in a manner consistent with what occurred later in the Trust Co Settlement, and were, perhaps, a 'dry run' for Mark Elliott.

199 I find that Mark Elliott, O'Bryan and Symons saw the Banksia proceedings and the McKenzie proceeding as potential threats to AFP's commercial interests in the Bolitho proceeding. They knew that a competing set of proceedings could erode AFP's funding commission from any settlement or judgment in relation to the claims against Trust Co, who they identified as the defendant with the 'deep pockets'. Mark Elliott observed in 2015, in an early revelation of his strategic thinking:

Liquidator will arm wrestle us for any $ recovered from Trustco but we get all the interest. ie $70M. We will claim our 30% on all proceeds received from all defendants we have sued (but particularly Trustco) and will try and resist sharing with anyone else particularly the Liquidator re Trustco receipts.

200 Mark Elliott and O'Bryan also saw an opportunity. The expense of the litigation could be borne by the liquidators/SPRs, rather than AFP. When the SPRs applied to the Supreme Court of New South Wales for funds to be set aside from the receivership for the conduct of the Banksia proceedings, Mark Elliott briefed counsel to appear on behalf of Mr Bolitho and support that application, which was ultimately successful.

201 Later in these reasons, I will show that Mark Elliott and O'Bryan exploited this opportunity, allowing AFP to ride on the SPRs' coattails.[32] AFP avoided substantial financial commitment to the costs and expenses of preparation of the Bolitho proceeding for trial.

F.1. Early unsuccessful settlement attempts

202 On 5 December 2014, a number of the defendants to the Bolitho proceeding made a settlement offer of $11 million. While these negotiations did not lead to a settlement, several features can be noted.

203 First, Mark Elliott made ambit claims for legal costs that were unsupported by documentary evidence of work in progress and never investigated or assessed by Zita or anyone else. Mark Elliott's claim ranged between $1 - 2 million. When cross-examined, Zita admitted that at the time, he did not know what the

plaintiff's costs were and did not ask Mark Elliott for evidence in this regard. He did not seek instructions from Mr Bolitho or ask him about any of the matters in the letter he sent, drafted by Mark Elliott, advancing that claim.

204 Second, the SPRs considered, from the outset of those negotiations, it was likely that AFP and Mr Bolitho would claim a funding commission and reimbursement of legal costs from any settlement agreed. Evidently, they were concerned about the proportionate attribution of any settlement sum to the two proceedings.

205 Correspondence with the SPR at the time when these matters were canvassed ought to have alerted Zita to a number of issues of significant potential for conflict between interests of AFP/Mark Elliott and the interests of Mr Bolitho and group members. These issues were the absence of evidence of the legal costs being claimed, the apportionment of any settlement between the separate proceedings, the number of 'signed up' group members and the proper entitlement to a funding commission. In that correspondence, the SPRs were focussed on maximising the return to debenture holders from any settlement. Zita displayed no interest in that identical question.

206 Zita knew that the Funding Agreement provided an obligation to pay the funding commission (up to 30% of the settlement sum) and understood that he was representing the interests of all group members. However, he never asked for the details of group members that had signed up to the Funding Agreement, albeit he was told the percentage. He conceded that it was in the interests of group members to ensure that any funding commission was limited to no more than AFP's proper entitlement.

207 Third, AFP adopted an uncompromising attitude in negotiations to maximise its return. Zita received firm instructions:

O'Bryan to Zita:

No dialogue: $1M by way of costs or no deal.

Zita to O'Bryan:

I did say a 'bit of dialogue' and I think '$1M by way off costs or no deal' qualifies.

I am happy to communicate our position subject to what you guys say.

O'Bryan to Zita, copying Mark Elliott:

I am in court tomorrow.

We should not compromise our $1M by one cent.

Mark Elliott to Zita and O'Bryan:

I was thinking that we should ask for more!

208 Mark Elliott's final comment — 'I was thinking that we should ask for more!' — makes it clear that the $1 million sought from the settlement did not represent a genuine calculation of Mr Bolitho's legal costs and disbursements and that Mark Elliott negotiated by forcefully pressing ambit claims. These claims were not resisted or vetted in any way by Zita, who, instead, facilitated them.

209 Zita agreed that concerning himself with costs was one of his responsibilities, but did not recall whether it occurred to him to ask a question about those that were being demanded at the time. He agreed that O'Bryan and Mark Elliott's approach to him was 'very strong and demanding'. Additionally, Zita thought that the costs would be looked at and awarded according to what was 'fair and reasonable'. He said that he 'could have' told

O'Bryan and Mark Elliott as much, albeit no file notes reflected such a conversation. I have not accepted Zita's speculation, such as this response, as credible evidence.

210 Fourth, the SPRs' correspondence alerted Mark Elliott and O'Bryan to the position that they were taking in respect of offers by defendants to settle both proceedings, which adversely affected the quantum of returns they considered possible for AFP. The SPRs required any settlement sum to be apportioned between the two proceedings. AFP, in contrast, needed to maximise the amount of any settlement sum that was referable to the Bolitho proceedings to maintain the expected quantum of their return. The SPRs were intent on identifying the precise return for debenture holders through their litigation, and were not interested in accumulating funds subject to 'ballpark' claims to be resolved at a later time. These considerations influenced the manner in which Mark Elliott conducted later negotiations in the Trust Co Settlement.

F.2. Negotiating the Partial Settlement

211 In December 2015, all the parties to the Partial Settlement agreed to a compromise on an in-principle basis. The deed for the Partial Settlement provided that, of the settlement sum, $8,050,000 was attributable to the BSL proceeding and $5,200,000 to the Bolitho proceeding.

212 From the in-principle agreement, four months of protracted negotiations between the parties produced an executed deed in April 2016. Three issues emerged as critical for Mark Elliott and the Lawyer Parties: the quantification of AFP's claims for commission, the claim for legal costs, and the discontinuance of the McKenzie proceeding.

213 As noted earlier,[33] the SPRs commenced the McKenzie proceeding on 27 March 2015. It was a second, or competing, group proceeding on behalf of an apparently identical group of debenture holders. Mark Elliott and the Lawyer Parties felt threatened by this development and its implications for the Bolitho proceeding. So much was confirmed by Zita in his evidence. Zita was aware that in 2015, Mark Elliott and O'Bryan were not happy about the issue of that proceeding, albeit he did not know why and whether they perceived it as a threat to their commercial interests.

214 Mark Elliott demanded that the SPRs abandon the McKenzie proceeding as a necessary precursor to any compromise. O'Bryan prepared a draft summons in the McKenzie proceeding which sought to permanently stay the proceeding, or alternatively dismiss it without adjudication on the merits or strike it out as an abuse of process. Further, Mark Elliott and O'Bryan instructed Zita to demand that the SPRs support claims by Mr Bolitho for costs and disbursements of $2.55 million and a funding commission of 25% as part of the settlement approval application.

215 Unsurprisingly, the SPRs were puzzled by Mr Bolitho's concern about the McKenzie proceeding. Each proceeding advanced the same claims on behalf of the same group, the debenture holders. The SPRs' position was that the McKenzie proceeding had not been served, was commenced as 'insurance', and was not an abuse of process.

216 Mark Elliott's single minded focus on his own commercial interests was undisguised. Later that day, Zita sent that letter to the other parties that had been drafted by Mark Elliott and settled by O'Bryan. Three observations can be made about this letter.

217 First, the obligations sought to be imposed on the SPRs differed significantly to those of the defendants. Instead of being obliged to support, and to instruct their lawyers to support, the application to approve the Partial Settlement in the Bolitho proceeding, the SPRs would also be contractually bound to:

(a) support AFP's application for reimbursement of its legal costs in the fixed sum of $2.55m;

(b) support AFP's application for a 25% funding commission from the portion of the settlement attributable to the Bolitho proceeding; and

(c) support any future application made by AFP for a 25% funding commission from any other settlement that might be reached in the Bolitho proceeding.

218 Second, and critically, there was no evidence that Zita sought to interrogate the amount in legal costs identified by Mark Elliott to be included in the deed. As will become apparent, had he done so, he would have discovered there was no supporting documentation for it. None of the Lawyer Parties, including Zita, had issued invoices for any material amounts prior to AFP's demand for a $2.55 million reimbursement.

219 In cross-examination, Zita could 'not recall' that Mr Newman sought evidence that the costs had been incurred. However, on 15 March 2016, Mr Newman wrote to Portfolio Law stating:

In order for us to obtain instructions in relation to your client's proposed clause 7.5.3, can you please provide evidence of the legal costs and disbursements incurred by your client in the sum of $2.55m.

As you will appreciate, absent that information our client is unable to agree to support your clients application.

Our client has not previously requested this information as it had been agreed that our client would not oppose your client's application for reimbursement, on the basis that your client would be responsible for putting the relevant material before the court in due course.

220 That afternoon, Zita forwarded this email to Mark Elliott, saying 'Let's have a chat'. Mark Elliott responded:

Please reply as follows:

Dear Mr Newman

Our client will accept the position of your client that it does not/will not oppose his application for reimbursement of legal costs and disbursements on the basis that he will provide the necessary supporting material to the court.

Our client requires the suggested wording in clause 7.5.3 in respect of the reduced litigation funding fee of 25% payable to BSLLP.

Up yours.

221 Save for (appropriately) removing the final two words of the suggested draft, Zita emailed Mr Newman in those terms.

222 Zita accepted in evidence that he did not convey that he would provide the SPRs with evidence they requested. He agreed that although he stated that 'our client will accept', he did not seek, or otherwise have, those instructions from Mr Bolitho, notwithstanding that costs were a matter of concern for Mr Bolitho and group members. His instructions, as I have just set them out, were from Mark Elliott.

223 Zita could not recall whether it was at the time of this exchange that Mark Elliott informed him the supporting material to be provided to the court would be in the form of a costs consultant's report. He could not recall any active discussions on that matter, or the mention of Trimbos's name, until after the settlement was achieved. Zita denied that Mark Elliott told him that he did not want Mr Newman scrutinising the costs. I am satisfied that, at this point, Zita had no basis, beyond his instructions from Mark Elliott, to expect that

APF's demands were consistent with the interests of Mr Bolitho and the group members. He had no idea how Mark Elliott's most recent costs demand had been assessed, if at all. Rather, he had every reason to suspect the prospect of conflict between funder and group members.

224 Mark Elliott remained dissatisfied that his commercial interests were adequately protected and instructed Zita to demand further amendments, providing drafts of the correspondence to be sent. When cross-examined, Zita conceded that the correspondence conveyed the impression that it was Mr Bolitho who was seeking the changes, although in reality he had not sought instructions from Mr Bolitho.

225 Third, notwithstanding the SPRs' assurance that the McKenzie proceeding would not be served, Mark Elliott and the Lawyer Parties nonetheless demanded a condition to this effect be inserted into the settlement deed.

226 Zita's evidence was that it did not occur to him at that stage that the McKenzie proceeding may have been in his client's interests. He understood that group members were exposed to a funding commission in the Bolitho proceeding, but he did not then understand that had the SPRs run the McKenzie proceeding instead, there would not have been a funding commission. Although he initially suggested that 'you don't want two of the same proceedings on foot', he agreed with his cross-examiner that in light of the cost of the commission, he should have identified the best interests of the group members. Further, he agreed that he did not recall the conflict provision in the Funding Agreement that he might have used had he disagreed with Mark Elliott over the issue.[34]

227 Seeking to avoid his cross-examiner's suggestion that it would have been more beneficial for the McKenzie proceeding to run and the Bolitho proceeding to be discontinued, Zita thought he had been told the McKenzie proceeding had slightly different grounds or members, and he believed that Mr Bolitho's claim was to be preferred on the advice of counsel and Mark Elliott.

228 The following exchange then took place:

COUNSEL: You never stopped to reflect on that issue, did you?---I relied on counsel on that - - -

You never - so what is your position? 'I don't have to bring any independent thought to this process. I just rely on everybody else'?---No.

I mean, we're coming close to my suggestion that you're the postbox?---No.

Or worst still, you're an automaton who just pressed the button called 'Send' on a computer?---No, no, I worked - - -

In the questions I'm asking you at this point in time where are you bringing your independent and objective thought process to this matter about whether McKenzie should be discontinued or not?---In the various discussions and meetings that we had with counsel and the - - -

Where? Point me to one single file note where you challenged counsel about this issue? Point me to one single file note?---I accept that.

There aren't any, are there?---No.

229 Zita ultimately accepted that he did no independent research into the McKenzie proceeding, nor did he write to Mr Bolitho and the group members explaining the issues concerning the competing proceeding. Rather, he followed the instructions of Mark Elliott, but uncomprehendingly.

230 Mr Newman also failed to see Zita's issue as solicitor for Mr Bolitho. Mr Newman sent this message:

I'll need you to explain why it's an issue - I can't see how it's an issue for Bolitho

Zita provided the exchange to Mark Elliott via SMS, and his reply was immediate:

Get fucked

Call me

Zita considered Mark Elliott's language as 'just normal' and a reflection of his personality, adding that he was 'not sure' why Mark Elliott was so determined about the issue.

231 Mark Elliott then instructed Zita concerning the deed:

Thanks Tony

Tell him the deal is off

In a separate email sent that evening, Mark Elliott instructed Zita to issue the foreshadowed summons, seeking that the McKenzie proceeding be struck out as an abuse of process, first thing the next day.

232 Asked whether, at that point, he thought about the interests of his client and the group members, Zita claimed that he raised Mr Bolitho's interest in the McKenzie proceeding during a discussion with Mark Elliott at the time. That was not evidenced by any contemporaneous document. I am satisfied that Zita rarely, if ever, thought through the interests of the plaintiff and group members beyond his instructions from Mark Elliott. Zita agreed with his cross-examiner that his exchanges with Mark Elliott evidenced strong indications of Mark Elliott telling him how to run the Bolitho proceeding.

233 On 18 March 2016, Mr Newman sent Zita the following email with a further proposal:

I'm still unsure as to why the McKenzie proceeding issue is a 'deal breaker' for Mr Bolitho, as our client's position is intended to protect the interests of the debenture holders he represents.

234 Mr Newman's proposal was evidently suitable to Mark Elliott. On 21 March 2016, Zita requested and received an execution version of the deed in the form that was ultimately signed.

235 The Contradictor submitted that Mark Elliott and O'Bryan saw the McKenzie proceeding as a threat to AFP's commercial interests. If the SPRs had pursued that proceeding, it would have enabled the same remedy that was sought in the Bolitho proceeding to be secured for debenture holders, without the attendant funding commission and further set of legal costs payable to AFP and the Lawyer Parties respectively. The financial consequences of that scenario were so dire for AFP and the Lawyer Parties that Mark Elliott and O'Bryan considered it imperative that the McKenzie proceeding be abandoned.

236 I am satisfied, by reference to these two examples (the demand for costs and commission and the abandonment of the McKenzie proceeding) at the time of the Partial Settlement, that Zita acted solely on Mark Elliott's instructions, without reference to Mr Bolitho (or Mr Crow). By so doing, he advanced the interests of AFP, Mark Elliott and O'Bryan in the Partial Settlement in conflict with the best interests of Mr Bolitho and the group members. Such conduct continued after the Partial Settlement.

F.3. Application for approval of the Partial Settlement

237 On 2 June 2016, Alex Elliott filed a summons in the Bolitho proceeding, seeking approval of the Partial Settlement sum of $5,200,000 insofar as it related to the Bolitho proceeding, including approval of deductions of:

> (a) $2,500,000 for Mr Bolitho's legal costs and disbursements incurred by AFP on his behalf; and

(b) $1,300,000 for AFP's funding commission.

238 At this time, none of the Lawyer Parties had issued invoices for any material amount in legal costs. As the Contradictor put it, there was not a scintilla of a proper basis for a claim of $2.55 million in reimbursement of legal costs.

239 Alex Elliott contended — and I accept — that he filed the summons in the technical sense only, meaning that he physically lodged the summons with the Registry and received stamped copies of the document for service. He did this because Zita, who was not in the city that day, asked him to, as Alex Elliott was in William Street at the time. He was not admitted to practise at the time the summons was filed, nor did he prepare it or review it for accuracy before it was filed.

240 Alex Elliott suggested that he was copied into emails in this period because Mark Elliott wanted to give him 'exposure' and 'to show him how things got done', so that he could follow the course of the negotiations leading to the Partial Settlement. Mark Elliott expected him to read them, which he did, but he did not comment or 'provide anything substantive'. He accepted that Mark Elliott wanted him to be across everything that he sent to him. Each of Zita, O'Bryan and Symons also copied Alex Elliott into emails they sent.

241 Although his explanation that he was receiving training may be so, I am satisfied that Alex Elliott was being incorporated into working on the Bolitho legal team, albeit not yet as a lawyer. I accept that his early involvement was inconsequential, save that it demonstrated that Mark Elliott plainly regarded Alex Elliott as trustworthy in implementing his strategy of control over Zita's work. In that sense, his function was akin to a paralegal. He provided legal services. It extended beyond acting as a personal assistant.

242 Alex Elliott's involvement in the notice distributed to group members informing them of the application for approval of the Partial Settlement illustrated his role in this period. Mark Elliott tasked Zita with the job of distributing the notice. The Contradictor submitted, and I agree, that Mark Elliott gave Alex Elliott the job of supervising this mailout. Mark Elliott, who was then on an overseas holiday, was clearly conscious of the importance of the deadline, and had little faith in Zita's ability to complete the mailout within the deadline.

243 The notice to group members invited recipients to contact Portfolio Law via the info@banksiaclassaction.com.au email address, which was monitored by Alex Elliott. Group members were also invited to access further information about the Bolitho proceeding at banksiaclassaction.com.au. That website stated that the 'legal team' could be contacted at info@banksiaclassaction.com.au.

244 On 20 June 2016, Zita emailed Mark Elliott stating that he was receiving calls from group members responding to the notice. Mark Elliott instructed:

Send me everything, as always

Refer all callers to Alex at info@banksia email address or on [phone number of AFP/Elliott Legal]

245 As Zita received phone messages from group members, he forwarded them to info@banksiaclassaction.com.au. Alex Elliott returned the calls. He stated that it was like working in a call centre and described the conversations in the following way:

It was mostly I guess debenture holders not understanding the notice and having to talk them through that they weren't liable for legal costs was always the main issue. That was what people cared about really most... They were always, you know, interested in funny questions, 'When are we going to get paid? Am I liable for costs?' You know, 'What is this action?' Just all of those sort of queries.

246 Zita accepted that group members were entitled to think that somebody from Portfolio Law would call them back, and that a personal assistant would not be capable of returning those calls, as they would have no knowledge of the matter. Zita agreed that someone within the legal team would need to speak with group members.

247 That Mark Elliott entrusted the responsibility for communicating with group members to Alex Elliott, rather than Zita, illustrated Zita's actual role in the Bolitho proceeding. Mark Elliott never intended that the inexperienced and ill-equipped Zita, who had no knowledge of the matter or the ability to answer questions, do so. Mark Elliott covertly controlled that task, an aspect of the role of solicitor in the Bolitho proceeding, by delegating it to Alex Elliott. Group members, and others, were misled by the contact information for Portfolio Law being given out.

248 On 8 July 2016, Mr Bolitho filed Trimbos's report opining on the legal costs and disbursements sought to be deducted from the Partial Settlement ('**First Trimbos Report**'). On 18 August 2016, Mr Bolitho filed a further supplementary report by Trimbos, ('**Second Trimbos Report**'). What occurred between the Bolitho legal team and Trimbos, and in the hearing for the approval of the Partial Settlement is considered in section I of these reasons.

249 The court approved the Partial Settlement on 26 August 2016.[35]

250 On 9 December 2016, the settlement sum was paid to Portfolio Law's trust account. In anticipation of payment, Mark Elliott directed Zita to transfer the funds to AFP. Despite the terms of the settlement deed approved by the court, which required Portfolio Law to retain the net settlement sum on behalf of debenture holders, Zita transferred the entire settlement sum to AFP, in breach of trust.[36]

7. THE TRUST CO SETTLEMENT

251 Between 9 November 2017 and 4 December 2017, Mr Bolitho, the SPRs and Trust Co negotiated, and documented by the Settlement Deed, the Trust Co Settlement, to compromise the allegations made against Trust Co in each of the Bolitho proceeding and the Banksia proceeding.

G.1. Winning the spoils: In-principle settlement and demands of Mr Lindholm

252 Efthim AsJ mediated the proceedings commencing on 9 November 2017. Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott all attended the mediation on behalf of Mr Bolitho, who also attended, accompanied by Mr Crow. During the mediation, Mark Elliott told Mr Lindholm that he would confirm the amount that AFP sought for its commission and costs once the other terms of the settlement were agreed.

253 That evening, Symons put an offer to Clayton Utz, Trust Co's solicitors, by email, copied to Mr Newman and Zita, that the plaintiffs in both proceedings would accept $64 million, including a condition 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.

254 At 10:10pm, O'Bryan emailed Symons, Mark Elliott and Zita (emphasis added):

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.

255 On 10 November 2017, Mr Crow spoke with Mark Elliott regarding the settlement negotiations. Mark Elliott told Mr Crow a settlement representing an additional 10 cents in the dollar for debenture holders was likely. Mr

Crow said he believed that Mr Bolitho would agree to a settlement on that basis.

256 That afternoon, Mark Elliott met with Mr Lindholm and Mr Newman and stated that AFP required a funding commission of $12.8 million (plus GST) and its costs of $4.75 million (plus GST). Mark Elliott did not identify any methodology for calculating AFP's commission figure, or otherwise agree with Mr Lindholm on an apportionment of the settlement sum between the Bolitho proceeding and the Banksia proceeding. Rather, Mark Elliott told Mr Lindholm he could take it or leave it.

257 Mr Lindholm considered the commission demanded by AFP was high, but within tolerable limits for court approval. He calculated that after deducting the expenses sought by AFP, approximately $45 million (a little over six cents in the dollar) could be distributed to debenture holders. Mr Lindholm considered that the benefits to debenture holders, many of whom were elderly, of a prompt distribution of that amount, outweighed the risks of not settling and continuing with the proceedings. In particular, he was 'acutely conscious' that AFP's commission was subject to court approval, and it would need to persuade the court the commission it sought was appropriate, and that debenture holders would be notified of the application.

258 Mark Elliott asserted at the meeting with Mr Lindholm that Mr Bolitho's legal costs were reasonable, but would be the subject of an independent assessment process, and were, in any event, a matter between AFP and Mr Bolitho. Mr Lindholm considered that the claimed legal costs were also high, but he was prepared for those amounts to be included in the Settlement Deed, as they would be the subject of an independent report by an external costs assessor and would be subject to scrutiny by the court in the settlement approval application.

259 At the time of this meeting, Mr Lindholm did not know that O'Bryan and Mark Elliott had decided to require the SPRs to agree to a 'division of the spoils' of the settlement, on the basis demanded. In addition, Mark Elliott did not disclose to Mr Lindholm at that time that:

> (a) substantially all the legal costs that AFP sought to recover from the settlement had not been paid by AFP, Portfolio Law or Mr Bolitho;
>
> (b) O'Bryan and Symons had not provided any cost estimates to Mr Bolitho, Portfolio Law or AFP in respect of the relevant period, as required by the *Legal Profession Uniform Law* (Vic) and/or the *Legal Profession Act 2004* (Vic);
>
> (c) the legal costs had not been invoiced or been properly documented by O'Bryan, Symons or Portfolio Law. Neither AFP nor Zita had received any invoices or fee slips from counsel and Zita had not submitted any invoices of his own; and
>
> (d) none of the Lawyer Parties had maintained contemporaneous records of either the time spent or the work done.

260 Mr Lindholm stated that had he known this information, he would not have thought that an independent costs assessor's report or the scrutiny of the court would be sufficient to protect the debenture holders.

261 Mr Lindholm accepted the amounts identified by Mark Elliott to be included in the Settlement Deed.

262 AFP's claims for $19.3 million in total (inclusive of GST) equated to approximately 30% of the settlement sum, the same percentage that AFP asserted to be its entitlement under the Funding Agreement. The Contradictor submitted that Mark Elliott and O'Bryan engineered these claims by working backwards; first, calculating 30% of the settlement sum, and then dividing up that amount by identifying figures for costs that

would be sufficient to justify the remainder of the 'spoils' as a commission.

263 Clayton Utz notified Symons, copying the other parties, that Trust Co accepted the plaintiffs' offer. O'Bryan immediately forwarded Clayton Utz's email to Mark Elliott, who forwarded it to Mr Crow:

See below regarding Trustco

We are agreed, its just come through

The headline figure is approx. $85 M 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

264 On 13 November 2017, Mr Crow spoke with Mr Bolitho about the settlement. Mr Bolitho explained that O'Bryan had phoned to tell him they had reached a settlement, and that after O'Bryan explained the terms to him. He confirmed that he was happy to settle, on the basis that the settlement sum represented not less than 10 cents in the dollar for all debenture holders.

265 As the Contradictor submitted, Mark Elliott's email was manifestly false in two respects.

266 First, the settlement was for $64 million. Mark Elliott's 'headline figure' included a series of 'settlement benefits' later described. The representation implied that there was a cash payment of $85 million, which was grossly misleading.

267 Secondly, debenture holders could never have received a return of 10 cents in the dollar from the settlement if Mark Elliott's plan succeeded. The deductions sought by AFP were for more than $19 million, or almost a third of the settlement sum. Returns to group members were calculated from the net cash value of the settlement. A distribution of 10 cents in the dollar required a net cash value of at least $65 million. This was not disclosed to Mr Bolitho, or Mr Crow. Mark Elliott did not explain the true return for debenture holders to Mr Bolitho until he was committed to an in-principle settlement.

268 On 16 November 2017, Mark Elliott explained to Mr Crow that the estimated return of 10 cents was predicated on Insurance House (the final remaining third party in the Banksia proceedings) agreeing to contribute to the settlement.

269 I find that AFP, Mark Elliott and O'Bryan procured the in-principle settlement on the 'take it or leave it' basis presented by them to satisfy their own financial interest (the spoils) without Mr Bolitho's instructions, and further on terms expressly contrary Mr Bolitho's instructions to O'Bryan.

G.2. Negotiating the Settlement Deed

270 In summary, what was significant about these negotiations for understanding the future conduct of the parties, was that O'Bryan, Symons and AFP facilitated the inclusion of several terms into the Settlement Deed that were adverse to the interests of Mr Bolitho and group members ('**Adverse Settlement Terms**'), including that:

> (a) the SPRs and Trust Co were required to support AFP's application for commission and legal fees sought, in precise sums, and without any evidence to assess the reasonableness of the costs for themselves – relying only on a cost consultant's opinion (which consultant was instructed by AFP and whose opinion was confidential);

(b) the Settlement Deed was made subject to the court making the 'Approval Orders', which included the approval of AFP's commission and legal costs in the precise sums sought;

(c) if the 'Approval Orders' were not made, the Settlement Deed would terminate; and

(d) if the court made the 'Approval Orders' except in respect of AFP's commission, the parties were required in good faith to seek to negotiate an alternative commission, but if the parties were unable to agree, AFP could, in its sole discretion, terminate the Settlement Deed.

271 On 11 November 2017, Mark Elliott emailed Mr Newman requesting to be copied to email communication concerning the Settlement Deed.

272 On the same day, Mark Elliott and Symons exchanged emails regarding the Settlement Deed:

Mark Elliott:

MS

Suggest you talk to JR [Jonathon Redwood]

Liquidator has put a deal to IH [Insurance House] 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

Let's discuss Tuesday pm

Symons:

Just so I don't misunderstand, what do you mean by "Trustco fees must be for $3.9M award plus ANY other claim"?

Mark Elliott:

C of 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

Symons:

Ok, I understand. The $64m is effectively $68m or $71m.

Mark Elliott:

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

Symons:

Ok, I understand what I'm doing.

Mark Elliott:

Maddocks will pushback but we must insist

273 An aspect of this email exchange needs to be explained. The reference to 'Trustco fees' was to Trust Co's contention that it was entitled to remuneration from October 2012 (the appointment of receivers to

Banksia) to February 2014 for work it did in enforcing the terms of the Banksia trust deed. In addition to that claim, which Trust Co quantified at $3.96 million, Trust Co had suggested a further entitlement to additional amounts for work performed after February 2014. As part of the in-principle settlement, Trust Co agreed to provide a release in respect of any claim for remuneration arising out of its role as trustee. However, as will be explained later in these reasons,[37] those claims had little relevance the Bolitho proceeding. Mark Elliott's motivation was, as he said, to 'gross up' the size of the settlement and make it appear more valuable than it was.

274 On 12 November 2017, Mark Elliott, O'Bryan and Symons exchanged several emails about necessary amendments to an initial draft of the Settlement Deed. Mark Elliott emailed Symons (copying 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.

275 In the initial draft, there was no term requiring the SPRs and Trust Co to unconditionally support AFP's claim for reimbursement of legal costs and its funding fee from the settlement sum, or that the Settlement Deed would be terminated if neither was approved by court. Clause 2.3 provided that Banksia/the SPRs and Trust Co agreed to instruct their legal representatives to take all reasonable steps (consistent with their representatives' professional obligations) to support AFP's application for commission of 20% of the settlement sum, but if the court determined that AFP was entitled to lesser payment, the terms of the deed would continue.

276 Mark Elliott's reference to identifying 'other settlement benefits to list' was to gross up the value of the settlement. He was keen to identify all 'settlement benefits' that could artificially inflate the perceived quantum of the settlement. Mark Elliott also wanted control of the settlement funds.

277 Later that afternoon, Symons proposed amending cl 2.3 such that:

> (a) the SPRs and Trust Co would be contractually obliged to support a specific dollar figure in funding commission for AFP ($12.8 million plus GST), rather than 20% of the settlement sum;
>
> (b) Bolitho and AFP would not agree that the Settlement Deed would continue to operate if the court approved an amount less than 20% of the settlement sum; and
>
> (c) the support that the legal representatives of the SPRs and Trust Co would give to the approval application was not to be limited by their professional obligations.

278 Second, Symons included cll 2.6 and 2.7 entitling Mr Bolitho to terminate the Settlement Deed if AFP did not receive $12.8 million in funding commission or a reimbursement of legal costs. The amended draft now

proposed that the settlement sum be paid to Portfolio Law, rather than Maddocks, unless the SPRs' claim against Insurance House settled within five days of the Settlement Deed being executed.

279 Next, the recitals to the Settlement Deed were substantially amended to refer to the 'settlement benefits' and other matters urged by Mark Elliott, including a definition of settlement benefit that added Trust Co's release of its remuneration claim for approximately $3.9 million, which was the subject of separate litigation, and any other or further claim by Trust Co for remuneration, to the cash sum of $64 million.

280 That evening, Symons sent an amended deed to Mr Newman. Mr Redwood immediately responded to Symons' email, commenting that requiring that the settlement sum be paid to Portfolio Law if the Insurance House claim was not settled within five days of the deed being executed appeared impractical and inexplicable.

281 Symons forwarded Mr Redwood's email to Mark Elliott, which he discussed with O'Bryan the following morning:

Mark Elliott:

Do you need to talk to JR [Jonathon Redwood]

I will not allow Maddocks to hold us hostage again like they did with the mini settlement!

O'Bryan:

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.

Mark Elliott:

That's what the Deed tries to do

Are you happy with it?

O'Bryan:

Yes indeed.

We should insist on it.

282 That afternoon, Mr Redwood sent a further amended version of the Settlement Deed. The amendments were described in the covering email, and included deleting Mr Bolitho's cll 2.3 to 2.7 and replacing them with:

2.3 At the hearing of the Bolitho Settlement Approval Application, [Banksia, the SPRs] and Trust Co agree to instruct their legal representatives to support [AFP's] application for payment from the Settlement Sum to [AFP] of:

(a) $12.8 million by way of a funder's commission;

(b) the reasonable legal costs and disbursements incurred by [AFP] in the conduct of the Bolitho Proceeding.

2.4 Bolitho and [AFP] 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.

283 Symons forwarded this email to Mark Elliott:

Please see below. I've just spoken to Norman. His view is that you should talk to Lindholm, and we should not otherwise respond.

Mark Elliott responded:

Agree

I will call him soon

Radio silence

284 Later that day, Mark Elliott sent the following email to Mr Redwood:

... Are you in possession of the settlement offer initialled by myself and JL? You need it to understand what JL has agreed with me...

Otherwise, we reject all of your suggested material amendments (and covering email comments)

At 4:35pm, Mr Newman, Mr Lindholm and Mark Elliott had the following exchange:

Mr Newman:

I've spoken with John.

I'm happy to work through these amendments with you and see if we can agree a document to go to trust Co tonight or ASAP tomorrow.

Mr Lindholm:

I can meet at midday tomorrow if need be.

Mark Elliott:

The deed we sent is what we want/need to get this deal done...

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

Mr Newman:

Can I call you first thing in the morning and do a "page turn" to see how far apart we really are?

Mark Elliott:

Just send my deed to Trustco

Otherwise tell them it is off

285 According to Zita, in the period 9 November 2017 to 12 November 2017, he read the emails sent to him, including attachments, but not in any detail. Scanning them in this way, he saw nothing in them that caused him concern, and he did not have any input to the changes to the draft Settlement Deed that were being circulated. In respect of protecting the interests of Mr Bolitho and group members, he relied on counsel (O'Bryan and Symons) and did not exercise independent judgment.

286 On the morning of 14 November 2017, Mark Elliott and Symons discussed further amendments. Later that

morning, Symons sent Mark Elliott (copying Alex Elliott) an amended draft. A few minutes later, Mark Elliott forwarded the email to Mr Newman (copying Alex Elliott):

Further draft deed attached for your consideration.

Alex Elliott, having reviewed the draft, commented:

Does clause “N” change to 10 days as well given 3.1.1?

287 That afternoon, Mr Lindholm sent a fresh email to Mark Elliott (copying Mr Newman):

Dave [Newman] 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.

...

We would like to send the Deed to Clayton Utz as soon as possible, so please let us know if you are comfortable with these changes.

288 Mark Elliott responded to Mr Lindholm’s email with various suggested amendments. However, at 3:12am the following morning, he withdrew that response:

Please ignore the email below ...

None of your suggested amendments/additions to the deed are agreed by Mr Bolitho

289 Later on the morning of 15 November 2017, Symons and Mark Elliott had a further exchange concerning the draft Settlement Deed and agreed on a compromise response, which Mark Elliott sent to Mr Newman (copied to Alex Elliott). That afternoon, Mark Elliott pressed Mr Newman and Mr Lindholm to agree. Mr Newman responded:

The deed is not agreed.

We are still considering.

Mark Elliott:

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.

Mr Newman:

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

290 On 16 November 2017, Mr Kingston circulated an updated version of the draft by email to Mark Elliott (copied to Alex Elliott and Mr Newman):

Mark Elliott forwarded the email to Symons and Alex Elliott:

Please review and tell me if ok?

Alex Elliott provided feedback:

There is no limitation period on approval date (I suppose 2.1.1 “The Settlement Approval Applications being commenced within 14 days of the date of this deed”) – Is that enough?
What happens if the Court does not make the necessary orders to distribute to all debenture holders pursuant to 3.2.2?
291 Symons circulated his further comments on the draft Settlement Deed, and responded to Alex Elliott’s suggestions.

Mark Elliott replied directly to Symons:

Send me your comments only so I can forward them

292 Mark Elliott then responded to Mr Kingston’s email and forwarded Symons’ proposed changes to Mr Kingston, Mr Newman, Mr Lindholm and Alex Elliott:

All

I don’t think that these will be controversial.

Please let me know if I am wrong

Mr Kingston emailed the draft to Clayton Utz and Zita (via the Bolitho class action email).

293 On 24 November 2017, Clayton Utz circulated proposed amendments to the Settlement Deed. Trust Co was largely content with the proposed draft. However, it sought to impose an obligation on AFP to negotiate in good faith if its funding commission was rejected by the court.

294 On 25 November 2017 at 8:58am, Mark Elliott emailed O’Bryan and Symons (copying Alex Elliott):

Most of the suggested amendments look ok to me

However, there are some big issues that we need to discuss and agree our position:

...

2. Cl 2.4-if the court rejects the funders’ fee or legal fees quantum must we agree to lower it?

At 12:36pm, Mark Elliott emailed O’Bryan:

Is our response as simple as:

...

3. If the Approval Orders are not made on terms acceptable to Bolitho and BSLLP then the Deed ceases to have any effect.

At 1:13pm, Mark Elliott forwarded this email to Symons and Alex Elliott:

Anything else to add?

At 3:54pm, O’Bryan emailed Mark Elliott and Symons (copying Alex Elliott):

I suggest the following amendments to the draft settlement deed.

...

2.4.1: [AFP] will undertake to negotiate reasonably, but if an acceptable (to [AFP]) amount by way of commission cannot be agreed between the parties and/or approved by the court, the settlement is off.

At 4:51pm, Symons indicated his approval with O'Bryan's proposed change.

295 At 7:42pm, Zita (from the Bolitho class action email) emailed Clayton Utz, Mr Newman and Mr Kingston (copying Mark Elliott) stating:

We are instructed to respond to the further draft settlement deed as follows:

...

3. If the Approval Orders are not made on terms acceptable to Bolitho and [AFP] (acting reasonably and after giving due and proper consideration) then the deed will cease to have any effect.

296 Zita agreed that the effect of these amendments was that the Settlement Deed terminated if AFP was not satisfied with the court's approval, and no one could rely on the deed, which was a significant change made between the versions of the document. He accepted that Mr Bolitho should have been informed and advised about this change and he should have sought his instructions.

297 On 26 November 2017, Symons emailed O'Bryan (copying Mark Elliott and Alex Elliott) an updated version of the Settlement Deed incorporating the changes identified in Zita's email to Clayton Utz. Later that day, Symons, O'Bryan, Mark Elliott and Alex Elliott exchanged emails about the draft:

Mark Elliott:

Well done

Comments:

...

4. Clause 3.9-should we require the entire Trimbos affidavit and expert report to be confidential? I suggest so.

...

Wait for NHOB's comments and then lets send via TZ this pm with an explanatory note

O'Bryan:

I am happy with Mark's suggestions so please dispatch after amendments.

Symons:

I'm making these changes now. I think that the expert report should be confidential, but the affidavit should not. I think Trimbos 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.

O'Bryan:

Agreed

Mark Elliott:

Agree

Symons:

I've attached an amended version.

If you're happy with it, I suggest that Tony sends it with an email which says ...

O'Bryan:

Agreed

Mark Elliott:

Me too

Good to go

298 Symons sent Zita (copying O'Bryan, Mark Elliott and Alex Elliott) the draft covering email and updated draft Settlement Deed for him to circulate to Clayton Utz and Maddocks, which he sent. Zita stated that did not make any mark ups to the circulated draft. The amended Deed included the following clauses:

3.9 [AFP] 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.

...

3.11 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 [AFP], have been reasonably incurred and are of a reasonable amount, [Banksia, the SPRs] and Trust Co agree to instruct their legal representatives to support [AFP's] application for payment of legal costs and disbursements incurred by [AFP] in the conduct of the Bolitho proceeding in the sum of $4.75 million (plus GST) ...

299 The role of the cost consultant, as will become apparent, had significant consequences for the approval application. Mr Lindholm's agreement to sign the Settlement Deed was predicated on the knowledge that a costs expert would opine on the reasonableness of Mrs Bolitho's legal costs. The stipulation that the cost consultant's report be confidential meant that the instructions, assumptions and methodology applied by the cost consultant was not open to critique by the other parties to the approval application.

300 The Contradictor submitted that this was a deliberate act on the part of Mark Elliott and the Lawyer Parties to avoid scrutiny over their claims. In particular, the Contradictor relied on Symons' email suggesting that the body of Trimbos's affidavit would need to state that AFP's costs were reasonably incurred and were of a reasonable amount, as that would be sufficient to satisfy the contractual obligation and would ensure that the exhibited report remained confidential. I agree and I so find.

301 Symons sent a further email to Mark Elliott and O'Bryan (copying Alex Elliott) suggesting a further amendment to permit provision on request of a copy of the Settlement Deed to group members. Mark Elliott preferred that inspection be slightly more onerous for group members:

Is it enough to say that the deed can be inspected at the offices of Portfolio Law by prior arrangement?

302 On 28 November 2017, Zita emailed Clayton Utz and Maddocks in terms dictated by Mark Elliott (copying the Bolitho class action email):

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

303 On 29 November 2017, Mr Kingston responded to Zita's email and attached an updated version of the Settlement Deed with minor amendments. Mark Elliott emailed Zita (copying Alex Elliott):

Please reply to the email below as follows:

Dear Colleagues

The "minor comments on the deed" suggested BSL are acceptable to our client.

In addition, we request the following additional minor changes to the deed:

...

2. Clause 13-amend to permit inspection of the deed by any Group Member at the offices of Portfolio Law during business hours

...

As instructed, Zita duly communicated with Clayton Utz and Maddocks.

304 Clayton Utz sent further proposed changes to the Bolitho class action email address on 30 November 2017, Zita replied the same day, stating amongst other things:

I am instructed that Mr Bolitho agrees to execute a deed in the form circulated by Maddocks on 29 November 2017 at 8:37am subject to the amendments referred to in my email of that day at 11.11am.

Mr Bolitho does not consider that any of the other amendments now proposed by Clayton Utz on behalf of Trust Co are necessary or appropriate.

In the alternative, Mr Bolitho will inform the Court at the directions hearing listed for Friday 8 December 2017 that the parties are unable to agree terms of settlement and are continuing to prepare for trial ...

Zita did not draft this email. Symons did, and Mark Elliott settled it.

305 On 1 December 2017, Clayton Utz emailed Maddocks and the Bolitho class action email address. It confirmed that Trust Co agreed to execute the Settlement Deed in the form circulated by Maddocks on 29 November 2017, with the amendments referred to in Zita's email of the same day and minor amendments concerning an indemnity that Banksia was to provide to Trust Co. The form and content of the Settlement Deed was now agreed. The Settlement Deed was finally signed on 4 December 2017.

G.3. Zita's involvement in the Trust Co Settlement

306 In his affidavits, Zita deposed:

I did not provide any advice to [Mr Bolitho] about the Deed of Settlement and Release. I considered that to be the job of his independent lawyer, [Mr Crow]. The general terms of the settlement deed were discussed at the mediation with [Mr Bolitho].

I did not give [Mr Bolitho] any advice in relation to ... the Adverse Settlement Terms. I believe that [Mr Crow] gave [Mr Bolitho] advice. It was [Mr Crow's] role to give [Mr Bolitho] advice; he was the independent lawyer appointed to advise [Mr Bolitho].

I did not take part in negotiating the settlement terms included in the Trustco Deed of Settlement and Release with the SPRs and Trust Co. I was copied into some emails between the parties; but I did not make amendments to the draft terms. I did not provide any advice to [Mr Bolitho].

307 The Contradictor submitted that this evidence, coming from the solicitor on the record for Mr Bolitho, was extraordinary. Zita was cross-examined at length about his involvement in the settlement negotiations. He conceded that:

(a) he did not have any discussions with Mark Elliott or the other Lawyer Parties about the specific terms in the Settlement Deed that were negotiated and ultimately agreed to by the parties;

(b) he not discuss the Settlement Deed with Mr Bolitho;

(c) he did not engage in any analysis of the Settlement Deed or have any input to the changes that were proposed;

(d) he wholly relied on counsel (and Mark Elliott) to conduct the negotiations over the Settlement Deed and did not request to be 'kept in the loop' of any discussions concerning the Settlement Deed that he was not copied in or otherwise a party to;

(e) he was not asked to provide any comments on the Settlement Deed, and was not involved in all the communications between Mark Elliott, O'Bryan, Symons and Alex Elliott concerning the deed;

(f) the extent of Mark Elliott's involvement in the negotiations did not cause 'alarm bells' to go off for Zita that his role may be inconsistent with the Bolitho No 4 decision, which he had read;

(g) he did not turn his mind to whether the conflict provisions in the Funding Agreement might be triggered by reason of AFP's demands that the settlement be conditional upon approval of its claims for legal costs and funding commission;

(h) his client and the group members expected him to bring an independent and objective mind to bear on the proceeding and expected that he was charged with protecting their interests; and

(i) he regretted his behaviour and allowing Mark Elliott, O'Bryan and Symons to manipulate him.

308 Zita claimed to recognise that he had an important duty under the Funding Agreement to protect the interests of group members when they diverged from those of AFP. His cross-examiner put to him that Ferguson JA's express concern in the Bolitho No 4 decision was that Mark Elliott, as funder, should not control the conduct of the proceeding as solicitor, and that Zita was appointed to ensure there was an independent person charged with protecting the group members' interests, as distinct from those of AFP. Zita was asked how, in light of this finding, he could think that it was appropriate, as the solicitor on record, to leave it to Mark Elliott to be in charge of the settlement negotiations. Zita claimed that he did not leave control of the negotiations to Mark Elliott, he left it to 'counsel, Elliott and Mr Crow to explain the terms'. This response was classic dissembling. Zita was concealing that he was Mark Elliott's puppet, his post-box.

309 Zita agreed that the 16,000 debenture holders were entitled to think that he took an active role in ensuring that the Settlement Deed protected their interests. He denied that by having no input into the discussions about the amendments to the Deed he acted in derogation of his duties to his clients. He also denied that in abrogating his responsibilities as the solicitor on record to Mark Elliott, O'Bryan and Symons, he was in breach of his duty to his client, the group members and the court. I cannot accept these denials.

310 Zita said he read the amendments made by Mark Elliott and O'Bryan, but considered that it was in the interests of the debenture holders to settle the matter. This was a key plank of his defence. That is, he was focused on the fact that they achieved a good result in securing the ultimate settlement sum. Although, critically, he was 'not sure' if commission being charged out of the whole settlement sum rather than the

portion of the settlement relating to the Bolitho proceeding fell into that description. He did not turn his attention to that issue at the time.I am satisfied that he did not turn his attention contemporaneously to any of the matters set out in the preceding paragraphs. That evidence was all *ex post facto* reconstruction. I reject it.

311 Zita acknowledged that he 'could have done things better', but denied that he was 'a convenient front' for Mark Elliott and O'Bryan to get around the Bolitho No 4 decision. Again, I reject this denial. I am satisfied that is precisely what he was. By failing to make that concession as he ought to have, Zita was dissembling. He regretted his behaviour and he regretted allowing Mark Elliott, O'Bryan and Symons to manipulate him, but regret fell well short of a proper response to the breach of his duties to the court.

312 I have elaborated on Zita's responses in cross-examination in some detail to illustrate his character as a witness and his attitude to the breach of his duties.

313 The cross-examiner suggested to Zita that he was not involved in the amendment that would give AFP 'sole discretion' to terminate the deed if it was unable to secure an acceptable funding commission. Zita disagreed, which was the subject of the following exchange:

Did you - when did you really notice that change, Mr Zita?---The change to - - -

Come on, be honest with us. You only noticed this in the context of this remitter, didn't you?---No, I didn't notice it then, no. I noticed earlier than that because there were discussions - - -

When? When?---I can't remember exactly, Mr Jopling.

Where do your notes record that you noted this change?---No.

You can't point to it, can you?---No.

...

Did you sit down and write out what the differences were between the document we looked at in the first instance and this final version?---No, I didn't write it out, no.

And you didn't write down what the differences were and you didn't write down whether they were in - whether you should reflect on whether they were in the interests of your client or not, did you?---No.

Because you just did what Elliott and O'Bryan told you to do?---No.

Well, where do we find any reflection by you on the differences between these two deeds and these particular paragraphs that I've been taking you to?---That's a different question, though, Mr Jopling.

Answer that question then. Where do we find it?---There's nothing in writing, no, but I did consider it.

You can't tell us when you considered it?---Obviously at the time that these exchanges - - -

You're just guessing, Mr Zita?---I'm not guessing, no, because - - -

I put it to you that you are just guessing?---I disagree, Mr - - -

Well, show me a note where you reflected on this?---Those versions came through my - - -

Show me a note where you reflected on this?---There's no note.

You can't, can you?---No.

And you can't show me a time entry where you reflected on this, can you, in your records?---I don't know off-hand.

The documentary evidence provided a sound basis for the cross-examiner's propositions. Zita was reconstructing events and, to a degree, obfuscating because if he did notice that change, he did nothing to protect the position of Mr Bolitho, which he conceded.

314 Zita's evidence about his consideration of the settlement terms demonstrated the superficiality in his conduct. When pressed by his cross-examiner on the extent to which he independently interrogated the outcome of the settlement, Zita gave the following evidence:

Did you ever read the amendments that had been agreed to by Elliott and O'Bryan to check whether they were in the interests of your clients?---I read them, yes.

Did you ever consider whether they were in the interests of your clients?---I considered that it was in the interests of the debenture holders to settle the matter. That's what I considered.

You were simply focused on the $64 million sum, were you; is that right?---I was focused on the fact that we achieve a good result, yes. In your eyes you were just focused on the dollar sum?---No, in my eyes I was focused that we achieve a good result for the debenture holders, and I just wanted to get the settlement through.

So in your eyes you achieved a good result for the - - -?---Not we; we with the SPRs cooperatively achieved a good result.

So far as your evidence is you felt you achieved a good result?---Yes.

A good result whereby commission was charged on the whole settlement and not just the portion of the settlement that related to the case that you ran?---That was negotiated by Mr Elliott.

That wasn't a good result for your clients, was it?---I'm not sure.

Well, Mr Zita, are you sitting here today telling his Honour on your oath as an officer of this court that that was a good result for your clients?---Well, there was a contractual requirement, you know.

A contractual requirement that you didn't consider whether it was in the interests of your clients?---But they had an obligation to pay a litigation funder's fee. It was all subject to the court approval and verification - - -

Mr Zita, Mr Zita, Mr Zita, the commission was being charged on the whole sum, was it not?---Yes.

The whole 64 million?---Yes.

...

Did you think it was in the interests of your clients, Bolitho and all the group members, that they be charged commission on the entire settlement sum?---Then or now you mean, sorry?

Well, let's start with then?---I didn't really turn my mind to it.

315 Other than to counsel, Zita deflected his responsibility at almost every other opportunity to Mr Crow or to the safety net of court approval of the settlement:

At the time of the Trust Co Settlement did it occur to you that this was the very time that you needed to be vigilant in protecting the group members' interests from Mr Elliott?---I thought I did that by Mr Bolitho getting advice from Mr Crow.

You keep coming back to that?---Yes.

But you remember that you were also acting for all the group members who had signed the litigation funding agreement; correct?---Yes, yes.

And I repeat to you: at the time of the Trust Co Settlement did it occur to you that this was the very time when you needed to be at your most vigilant best in protecting the group members from Elliott sacrificing their interests in favour of his own commercial interests?---I was comforted by the fact that it was subject to court approval. So I thought that process would be followed in due course.

316 Zita knew that Mr Crow was not the solicitor on the record, not involved in the negotiations or discussions about the Settlement Deed, and not a party to the various iterations of the deed exchanged between the parties. Mr Crow had limited knowledge of the litigation. Zita never communicated with Mr Crow or Mr Bolitho during the negotiations following the mediation to understand whether (and if so, what) advice Mr Bolitho was receiving, and whether Mr Crow was sufficiently informed to give that advice. For example, Zita could not recall providing Mr Crow with a copy of the first version of the draft deed.

317 That Mr Bolitho had independent access to Mr Crow was irrelevant. Zita owed obligations to Mr Bolitho and also to all group members:

So you accept, do you not, that you were the solicitor on the record in the proceeding for Bolitho and the group members?---Yes.

And you accept that Crow wasn't solicitor on the record obviously for Bolitho and the group members?---Yes.

And you accept it was your role to be Bolitho and the group members' solicitor therefore?---Yes.

And it was as their solicitor that you ultimately wanted to charge hundreds of thousands of dollars for your own fees to Bolitho and the group members; correct?---Correct.

And you were charging those fees for giving them advice about the conduct of the proceeding, amongst other things, were you not?---Well, for conducting the proceeding, yes.

For your stewardship of the proceeding - - -?---Yes.

On their behalf?---Yes.

318 When pressed about the conflict of interests, Zita stated as follows:

Didn't you think that there was bubbling up to the surface a conflict between what you thought you should have been thinking was in the interests of your clients and what was in the interests of Mr Elliott?---At that time? At that time, Mr Jopling?

Let's start with that time?---No, I didn't. No.

And that was negligent on your part, wasn't it?---It was careless, yes.

Negligent? Negligent? Nods don't get up on transcripts?---It was careless.

Do you have a problem in acknowledging that that was negligent, do you?---No, I just said it was careless.

What, is that a step down from negligent?---No, it's the fact that I could have done things better.

...

Do you accept now that you were really a convenient front for Elliott and O'Bryan to get around the court's ruling that Elliott should cease to be the solicitor?---I don't accept that. What I accept is that I could have done things better.

319 As is later explained, this inquiry was not about exercising care, or not being negligent, it was about discharging the paramount duty and the overarching obligations. Zita's concession demonstrated that he failed to appreciate the distinction.

320 Zita claimed that it was around the time of mediation that he first became aware that AFP would seek $4.75 million in costs and $12.8 million in commission (plus GST) from the Trust Co Settlement. He stated that, at that time, he discussed costs with Mark Elliott generally, but did not ask him to provide supporting documents or tell Mark Elliott what he thought the costs should be. He had no idea of the total legal costs or how they were calculated and did not discuss them with Mr Bolitho. He didn't even know what his own costs would be.

321 I reject Zita's claim that he thought that he was acting in the best interests of Mr Bolitho and group members in connection with the Trust Co Settlement. It was wishful thinking. I am satisfied that his involvement in the settlement negotiations was limited to acting as a conduit for communications between Mark Elliott/O'Bryan/Symons, the SPRs and Trust Co. I accept his counsel's submission that Zita 'did not engage with the settlement with Trust Co in any meaningful way'. In failing to do so, Zita's conduct was beyond careless, as contended by Zita. It amounted to a gross abrogation of the duties he owed to Mr Bolitho and group members.

G.4. Alex Elliott's involvement in the Trust Co Settlement

322 Alex Elliott attended the mediation on 9 November 2017. He characterised his involvement as 'sitting on the sidelines' and recalled little other than making 'basic chit chat' with Mr Bolitho.

323 Following the in-principle settlement, Alex Elliott helped Mark Elliott to keep track of the various iterations of the subsequent Settlement Deed, which he downplayed to the task of checking the cross-referencing. He knew that AFP and the Bolitho team were insistent that the claim for funding commission had to be approved at the same time that the settlement was approved. He saw no problem of conflict arising, apparently because no one else did:

No. I mean I was, I was just an observer really. I mean the SPR agreed to it, Rob Crow agreed to it, counsel for Bolitho agreed to it. Counsel for the SPR agreed to it. It just seemed like a clause that everyone was happy to agree to.

324 Alex Elliott told his cross-examiner that he did not recall engaging in any substantive analysis of the terms of the settlement, as that was not really his role. Alex Elliott gave this description of his involvement in the settlement negotiations:

I recall the period quite well because there were so many variations of the settlement deed going back and forth between the SPRs, Trust Co, I guess the Bolitho camp, and part of my, I guess, job from dad was just to make sure that certain, I guess clauses or paragraphs weren't left out or not marked up properly, I guess, when they got received from the other side because there was always, you know, the risk that, I guess you could get the settlement deed back and it wouldn't be marked up so you wouldn't know what was coming in or out of the deed. So that was what I was doing now, just cross-referencing a clause that had been changed and because there were so many different clauses going in and out of that deed, all the numbering was always off.

325 Alex Elliott downplayed his role. He was copied into nearly every email concerning the Settlement Deed negotiations. His father sought his views on the amendments proposed by Maddocks and Clayton Utz on a number of occasions. Alex Elliott's comments in response were not picking cross-referencing errors or identifying covert amendments by the other parties not marked up (a nonsense suggestion), but were potential legal issues that could arise from the provisions as drafted.[38]

326 Alex Elliott knew that Mark Elliott demanded that the Adverse Settlement Terms be included in the Settlement Deed. He knew that the sum for legal costs was identified by a negotiation between Mark Elliott and Mr Lindholm; that AFP had included a substantial litigation funding commission in the deed; and that the

SPRs and Trust Co were required to support AFP's application for these precise sums for commission and legal fees. That Alex Elliott knew these facts from this time will become relevant in examining his later conduct.

327 Alex Elliott knew that the funding commission of $12.8 million (plus GST) depended on a common fund order being made in AFP's favour. Though he claimed not to have appreciated the significance of capital outlay for a funder in late 2017 when he was at the mediation, I do not accept this as a truthful statement. He understood the difference between a funding equalisation order and a common fund order. He recalled Mark Elliott, O'Bryan and Symons discussing in his presence the decision of the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* ('***Money Max***'),[39] and he read the decision at that time, although he did not summarise it in a note for Mark Elliott.

328 Alex Elliott described *Money Max* as a 'big moment in time' in the industry, as 'it allowed you to get a commission from group members that hadn't signed up'. I am satisfied Alex Elliott understood the principles discussed in *Money Max.* He appreciated the concept of litigation risks in providing funding. For a common fund order, his view was that the 'commission was really underpinned by the contractual claim', which would work out to approximately 17% of any total settlement, given the number of group members that had signed the Funding Agreement; the case had been run by AFP since 2014, which entitled it to 20% of the claim. As to the relationship between AFP's expenses and the commission, Alex Elliott gave this dissembling response:

I sort of looked at it as AFPL, they'd bought a case on behalf of Mr Bolitho and they ran it from 2014 until the end of 2017 and I guess I didn't consider, I guess, the various factors of how they ran it and what consequences that may have and, you know, seeing now the arguments about whether fees are deferred or, you know, all these no win no fee things or whatever. I didn't appreciate that at the time, that that would have I guess a significant impact on the funding commission. To me it was like, 20% was like the low end of the range and it was agreed, I guess, by the SPR and by AFPL and everyone involved and, you know, whether the costs were X or Y or Z it wasn't really something I thought about as, I guess, a critical integer in the make up of it.

329 I do not accept that Alex Elliott failed to consider the relevance of the costs and capital outlay.

G.5. Conclusions

330 I am comfortably satisfied that:

(a) Mark Elliott controlled the settlement discussions for Mr Bolitho and group members, contravening the Bolitho No 4 decision that he could not be the solicitor and litigation funder at the same time;

(b) Mark Elliott and the Lawyer Parties did not seek instructions from Mr Bolitho while negotiating the Settlement Deed. To the contrary, they acted against Mr Bolitho's express instructions by agreeing to a settlement that would return less than 10 cents in the dollar to debenture holders;

(c) Mark Elliott directed that the Adverse Settlement Terms be included. For Mr Bolitho, Symons substantially drafted, and O'Bryan settled, the Adverse Settlement Terms on instructions from Mark Elliott;

(d) Mark Elliott and O'Bryan procured Mr Bolitho's agreement to the Settlement Deed, including the Adverse Settlement Terms; and

(e) Alex Elliott reviewed the various iterations of the Settlement Deed, and knew of the Adverse

Settlement Terms;

(f) Zita had virtually no involvement in the settlement negotiations, other than sending correspondence that was drafted by others. He surrendered his responsibility as Mr Bolitho's solicitor to Mark Elliott, O'Bryan and Symons and acquiesced in any direction they gave.

8. THE LAWYER PARTIES' FEE ARRANGEMENTS

331 The usual process expected of solicitors and barristers, when retained by a client, is as follows:

(a) the solicitor will issue to the client, and the barrister to the solicitor, a costs agreement/costs disclosure statement[40] setting out the terms on which they each agree to act and making the appropriate disclosures regarding their estimated costs, usually calculated by reference to time-costed attendances;

(b) the solicitor and barrister will each maintain contemporaneous records of the work performed and time spent in the course of their retainer;

(c) the solicitor and barrister (the latter through their clerk) will issue invoices at regular intervals setting out the cost of their services, by reference to and including their contemporaneous records of work performed and time spent; and

(d) the invoices will be paid by the client (or a third-party payer) in the manner required by the costs agreement.

332 The Lawyer Parties' fee arrangements looked nothing like this process. The Contradictor contended for, and I find, the following factual conclusions substantiated by the evidence:

(a) throughout the Bolitho proceeding, O'Bryan and Symons prepared various pro forma costs agreements and disclosure documents describing the manner in which they would record and invoice their fees and expect payment, but did not in truth reflect the true arrangements as between O'Bryan/Symons and AFP;

(b) contrary to these costs agreements, O'Bryan and Symons were retained in the Bolitho proceeding on an illegal contingency fee arrangement, by which the quantum of their fees was consequent on the outcome in the proceeding. They were instructed by AFP to issue invoices totalling specified amounts (or '**fee targets**') following settlement;

(c) O'Bryan and Symons did not prepare these 'costs agreements' at the commencement of their retainer, but as an after-the-fact reconstruction. The 'costs agreements' were 'produced' to support the fees they claimed when court approval was sought. This enabled Mark Elliott and the Lawyer Parties to retrospectively increase their rates and achieve the fee targets set by AFP;

(d) O'Bryan and Symons prepared documents to make it appear as if they were engaged according to the terms of their costs agreements throughout the Bolitho proceeding, but their practice was to generate and issue their invoices only after settlements had been agreed against various defendants shortly before court approval was sought, including claims for hundreds of hours of work not actually performed;

(e) Zita:

(i) was retained in the Bolitho proceeding on a 'no win no fee' basis, contrary to the terms of its costs agreement; and

(ii) charged his fees in the Bolitho proceeding on the basis of speculative guesswork, rather than a proper assessment of the work he had actually undertaken;

(f) the Lawyer Parties' fee arrangements were not disclosed or explained to Mr Bolitho or other group members; and

(g) AFP did not properly monitor or manage the costs incurred on the Bolitho proceeding by the Bolitho legal team, as required by the Funding Agreement.

333 Prior to trial, AFP made various admissions of the allegations in the Revised List of Issues concerning the Lawyer Parties' fee arrangements and counsel's overcharging. In the following narrative that sets out the evidence supporting these findings, I have taken those admissions into account, although I have not recorded them all in these reasons.

H.1. Costs agreements

334 On 5 February 2015, Zita issued a costs agreement to Mr Bolitho for the Bolitho proceeding, which relevantly included the following terms:

...

Those members of the firm that work on your matter will record the time they spend and charge according to the following rates.

Partner Hourly rate of $ 550.00 including GST

Senior Associate Hourly rate of $ 440.00 including GST

Lawyer / Consultant Hourly rate of $ 330.00 including GST

Paralegal Hourly rate of $ 198.00 including GST

Clerk Hourly rate of $ 132.00 including GST

The firm's fees are determined by applying these hourly rates to the units of time recorded by each staff member on your matter. Time is recorded in 6 minute units.

...

In the course of your matter it may be necessary to incur disbursements, which are fees, expenses and charges such as ... 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 permission.

...

Each month we will render interim accounts and ask that you pay them promptly.

...

335 Although Portfolio Law's costs agreement was, in terms, issued to Mr Bolitho, Zita emailed it to AFP/Mark Elliott.

336 Symons produced two costs agreements dated 11 February 2015, being:

(a) an agreement with Mark Elliott for the period 3 September 2014 to 7 November 2014, when Mark Elliott was the solicitor acting for Mr Bolitho; and

(b) an agreement with Portfolio Law from 11 February 2015.

337 The terms of his costs agreement with Portfolio Law relevantly included the following:

My legal costs will be calculated by reference to my hourly rate and daily rate as set out below:

(a) $250 per hour (or part thereof) (inclusive of GST); and

(b) $2,500 per day (inclusive of GST).

...

These rates may be reviewed during the period of the retainer and I will notify you in writing as soon as practicable following such a review.

....

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.

...

The Solicitor will be liable for my fees in this matter.

338 Symons' purported 'cost disclosure statements', addressed to Portfolio Law, stated:

The Barrister is required to notify the law practice of any significant change to the basis on which legal costs will be calculated by a Barrister or any significant change to the Barrister's estimate of his/her total legal costs. The Barrister is required to provide ongoing disclosure to the law practice as soon as practicable after there is a significant change in the previously provided information.

The statements also provided estimates of Symons' total fees for acting in the matter at various points in time.

339 O'Bryan produced a costs agreement prepared on 1 July 2016 for the Bolitho proceeding, unsigned and backdated to December 2014, that relevantly included the following terms:

CLIENT: Laurie Bolitho (Portfolio Law, solicitors)

...

1. Basis on which legal costs will be calculated

Written advice or advice in conference, including reading, research and preparation :
$990 (incl. GST) *per hour*

Court or Tribunal Appearance:
$9,900.00 (incl. GST) *per day or part thereof*

...

Drawing or settling documents or pleadings, including all necessary reading, conferring, drafting and preparation:
$990.00 (incl. GST) *per hour*.

...

2. Estimate of the total legal costs

for the present scope of the legal services, including reading brief, advising, settling documents, and related matters—
the estimated amount is unknown but is not presently expected to exceed $500,000.

...

3. Billing

the Barrister will render a fee slip for payment by the Client following the completion of each stage of the legal services.
...

Should there be any substantial change proposed to anything included in the Disclosure Statement above, the Barrister will notify the Client via his instructing solicitor as soon as practicable of such proposed change. No change will be implemented without the Client's consent.

340 None of these costs agreements reflected the real fee arrangements that were in place between AFP and the Lawyer Parties. The evidence in the remitter overwhelmingly demonstrated that the Lawyer Parties were each a party to an impermissible contingency fee arrangement with AFP. In particular:

> (a) O'Bryan and Symons both confirmed in writing that, notwithstanding the terms of their costs agreements, they were retained on a 'no win no fee' arrangement in group proceedings funded by AFP;
>
> (b) contrary to the terms of their costs agreements, the Lawyer Parties did not regularly issue invoices nor receive payment; and
>
> (c) O'Bryan and Symons each acted as if they had appropriately disclosed increases to their fee rates or cost estimates during the course of the litigation (and had given contemporaneous notice of that fact to Mr Bolitho). In truth, Symons falsified his costs disclosure documentation at the time of the Trust Co Settlement to make it appear as if he increased his rates with proper notification. O'Bryan similarly adopted retrospective increases to his rates at the time of the Trust Co Settlement, and represented that he had properly notified Portfolio Law of the increase. Each of them adjusted his rates to reach a predetermined fee target in the expectation that Trimbos would opine that the rates were fair and reasonable.

H.2. The real fee arrangement between AFP and O'Bryan/Symons

341 AFP admitted that:

> (a) it entered into the fee arrangements with O'Bryan and Symons pursuant to which O'Bryan and Symons were not to deliver invoices or fee slips until after any settlement with Trust Co; and
>
> (b) AFP's Conflicts Management Policy and Disclosure Statement required that it monitor costs and budgets, but AFP did not ask O'Bryan, Symons or Zita to provide budgets or cost estimates or any documentary evidence of costs incurred from time to time.

'No win no fee' declarations to AFP's auditors

342 In March 2017, CFMC Assurance (AFP's auditors) ('**CFMC**') were preparing AFP's audited financial statements for FY16.

343 On 1 March 2017, and likely as a result of a query from CFMC, Mark Elliott requested in an email (copied to Alex Elliott) that O'Bryan provide him with confirmation that he was owed an outstanding amount in fees for the Downer proceeding:

Can I please trouble you for a statement re your Downer fees showing me that you billed $1.32m incl GST on 4/3/2016

$1M has been paid and $320K is owing

You are a creditor as at 30/06/2016

All the invoices I got from you have a paid stamp on them!

O'Bryan responded the next day:

My clerk must have made a mistake!

344 On 3 March 2017, after a prompting email from his personal assistant, Ms Florence Koh, O'Bryan, who was overseas at the time, instructed Ms Koh as follows:

You will need to sort this out with Mark, Florence.

I have no access to materials to enable me to create any documents here.

Mark can tell you what he needs & you can create it please.

Elliott replied the same day:

Florence

I will draft what I need from you

345 On 7 March 2017, Mr Richard De Bono (AFP's accountant) forwarded a request for information from the audit department at CFMC to Mark Elliott. The audit request was for the agreements between AFP and O'Bryan and Symons that allowed AFP to delay payment for services upon settlement of cases and to not pay if the case was not won.

346 Mark Elliott then changed the form of the statement that AFP needed from O'Bryan to reflect this requirement and emailed Ms Koh. On 14 March 2017, Ms Koh returned a formal letter to AFP, on O'Bryan's personal letterhead, as requested, backdated it to 1 July 2014, stating:

I confirm that, notwithstanding any term to the contrary contained in my various pro forma retainer arrangements, I am providing my services as senior counsel in respect of the various legal cases for which [AFP] is acting as the litigation funder, on the basis of a 'no win/no fee' arrangement in each case.

347 On 31 March 2017, Mark Elliott signed AFP's audited financial statements for FY16. In the notes to the financial statements ('Statement of significant accounting policies'), the following statement was included about 'Litigation funding costs':

Litigation funding costs are recognised when incurred. 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 until a court case has been won and costs can be reliably measured.

348 Although Mark Elliott signed the audited financial statements in late March, CFMC sought further documentation concerning the status of counsel's unpaid fees in proceedings where AFP acted as litigation funder. On 5 April 2017, Mark Elliott forwarded Symons his earlier email exchange with O'Bryan and Ms Koh and sought a letter in the same terms. Later that evening, Symons emailed Mark Elliott with the subject 'BSL Litigation Partners Ltd' stating:

I confirm that, notwithstanding any term to the contrary contained in my various pro forma retainer arrangements, I am providing my services in respect of the various legal cases for which BSL Litigation Partners Ltd is acting as the litigation funder, on the basis of a "no win/no fee" arrangement in each case.

349 These documents make plain that O'Bryan and Symons each accepted that the fee agreement with AFP was a 'no win no fee' arrangement, and that the 'pro forma' cost agreements they each produced did not reflect their real fee agreement. Neither had rendered a fee slip since the Partial Settlement.

350 On 29 November 2017, a senior accountant from CFMC emailed Mark Elliott an information request concerning AFP's FY17 audit, seeking confirmation that these arrangements were still in place. Later that day, Mark Elliott confirmed that the 'no win no fee' arrangements remained in place for FY17.

351 On 4 December 2017, Mark Elliott signed AFP's audited financial statements for FY17. The note concerning litigation funding costs remained substantially the same as it appeared in the FY16 financial statements.

Arrangements in other AFP-funded group proceedings

352 The Contradictor also pointed to the fee arrangements that existed in other group proceedings in which AFP and counsel were involved.

353 In the Downer proceeding, O'Bryan issued invoices for fees of approximately $1.3 million for work performed between December 2014 and February 2016. O'Bryan's invoices each had 'Processed' and 'Due By' dates and 'PAID' stamps that made them appear as if they had been both issued and paid monthly. However, as with the Bolitho proceeding, the documentary record revealed that those invoices were not issued until 4 March 2016, following an in-principle settlement of the proceeding. Symons also issued invoices for the majority of his fees on the same day.

354 Following the remitter, two further group proceedings in which Elliott Legal, AFP, counsel and/or Portfolio Law were involved were compromised, being those against Sirtex Medical Ltd ('**Sirtex proceeding**') and Murray Goulburn Co-Operative Co Ltd ('**Murray Goulburn proceeding**') in the Federal Court. In both proceedings, O'Bryan did not issue any invoices until after a settlement had occurred, while Symons issued the a small number of invoices during the litigation, but awaited a settlement before billing the majority of his fees. Unlike in the Bolitho proceeding or the Downer proceeding, however, O'Bryan's invoices for each proceeding were issued with 'Processed' and 'Due By' dates that post-dated settlement and did not appear as if they had been progressively issued through the life of the matter. In other words, they were not artificially backdated to seem as though they were issued monthly. This revealed the real nature of counsels' billing practice for Mark Elliott's matters.

355 On 14 March 2017, Mark Elliott emailed Mr Crothers, the litigation funder in the Murray Goulburn proceeding and a shareholder, through Willjo, in AFP, stating:

Can I please get a transfer from you to Elliott Legal P/L (Westpac A/C 033 364 817418) of say, AUD $50,000 on account of costs and disbursements already incurred in this matter?

I have an invoice to pay from our junior barrister Michael Symons of approx .. $40,000

In addition, I have outstanding Court fees and transcript costs to pay

Of course, I confirm that Norman and I are on a no win/no fee arrangement and therefore, remain hungry!

Symons' retainer with AFP

356 On 26 February 2018, Mark Elliott invited Symons to agree to a formal retainer with AFP:

I would like to talk to you about a retainer arrangement with AFPL

You will get paid for Banksia this week-spend it wisely.

Are you interested in working for AFPL for say, $800k pa payable quarterly for the next 2 years?

I would seek your undivided attention to all matters as directed-24/7/365.

If you work for anyone else you must rebate me $2:$1 for all fees rendered.

I would ask for your reasonable assistance in seeking cost recovery when we win a case!

It would certainly make the paperwork easier and give you certainty of income and regular cashflow

Commencement date is 1/1/2018 for an agreed initial period of 2 years renewable by agreement thereafter.

Lets discuss

Symons replied later that day:

Thank you. I'm interested, but there are a few things to discuss. Maybe we can have a chat on Wednesday.

357 On 1 March 2018, Symons substantively responded to Mark Elliott's offer:

I would like to accept, subject to the following:

1. I would like it to be recorded/agreed that while there's a retainer in place with AFPL, my obligations are to the various representative plaintiffs who are funded by AFPL but not to AFPL itself;
2. I am prepared to make myself at least as available as I do at present. ... assuming that 24/7/365 is broadly reflective of me working about as hard as I have over the last couple of years, I'm comfortable with that.

100. I am comfortable with turning down appearance work / time-sensitive work on the basis that it is inconsistent with the proposed retainer – and I have taken on less and less of that work over the last two years for that reason. However, I do not want to stop doing the odd piece of tax or other advisory work, which is not time-sensitive and which does not interfere with the proposed retainer. ... I don't think that any agreement as to a rebate is necessary.

4. I still have a considerable amount of time to recover in re: work in 2017 on the ongoing proceedings (MGC, SRX, MYR). I'd like to discuss how that will work with you.
5. I also note that the suggested $800k (which I assume is not inclusive of GST) is equivalent to me working 5 days a week for 40 weeks in the year at a rate which Trimbos has regarded as justifiable based on my experience etc. to date. While I have not always historically billed as much time as I have worked – in part because not all the work has been directly related to a particular matter, I'm likely to work closer to 6 days a week and for say 48 weeks a year. I'm very comfortable with the retainer being set at $800k, but I'd like to discuss what will happen in the event of a successful cost recovery which actually reflects my time worked.

Very happy to chat.

358 On 3 March 2018, Mark Elliott replied with the following:

Hi

My response is:

a. Noted

b. Agreed

c. Agreed

4. Not included. SRX-suggest that you defer till later for bonus points. Myer and MGC-ok to charge. For 2018 , any MGC fees to be netted off against $800K until AFPI assumes funding role-need to discuss!
5. Plus GST. TBA % share if/when we recover more than 40 hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?

MS-the retainer is not meant to enrich me at your expense. Its simply my way of recognising your valuable contribution, focusing your efforts and dissuading you from seeking work elsewhere.

Lets discuss

359 On 5 March 2018, Symons accepted Mark Elliott's proposal:

Very good. Looks like everything is sufficiently agreed to me. We can discuss (d) at an appropriate time.

360 I note several features of this agreement.

> (a) In paragraph (d) of the 3 March 2018 email, Mark Elliott suggested to Symons by the reference to 'bonus points' that if he deferred issuing his invoices in the Sirtex proceeding, he would be permitted by AFP to make a larger claim for fees if and when there was a settlement.
>
> (b) In paragraph (e) of the 3 March 2018 email, Mark Elliott clarified that the arrangement would assume a 40 hour working week, but if and when they were able to successfully inflate Symons' claims for costs at the time of settlement on any of the group proceeding matters they were working on together, they would each share a percentage of any windfall 'spoils'.
>
> (c) In respect of the same paragraph, Mark Elliott's comment 'I trust that you will agree that it worked well for you on the Banksia matter?' confirmed that this proposed term of the retainer — AFP intended sharing any successful recovery of a greater amount in legal fees attributable to Symons than he had actually worked — had been adopted in the Bolitho proceeding. The email suggested that Mark Elliott and Symons both understood that Symons had not done the work to earn the fees that he charged in the Bolitho proceeding and that he received a 'bonus' component from the settlement sum. Symons' fee documentation was ultimately constructed retrospectively based on sharing a portion of the spoils and with no reference to any work product.
>
> (d) The prospect of conflicting loyalties was identified in paragraph (a) of the email of 1 March 2018. That Symons recorded and Mark Elliott 'noted', in a private email exchange, some sense of obligation by Symons was inadequate to constitute Symons giving his absolute loyalty to the relevant group proceeding plaintiff. He had also promised AFP his undivided attention to all matters as directed.
>
> (e) Symons acknowledged he had been substantially occupied with briefs in AFP-funded proceedings for a number of years, such that he had turned down other work. The evidence

indicates that between 2014 and 2017, Symons invoiced for small amounts on AFP-funded matters (other than Banksia) every three to four months.

361 I am satisfied, as the Contradictor submitted, that Mark Elliott agreed earlier with Symons that AFP would promptly pay his periodically issued invoices for small amounts, recognising Symons' need for cashflow. However, this arrangement disadvantaged AFP's business model. This was because invoices were issued throughout the litigation, meaning the retrospective documentation of fees if and when a settlement was achieved was too complex. Mark Elliott was looking to streamline his system for sharing the spoils of settlements.

362 In addition, Mark Elliott appreciated that Symons was an integral part of his team and his business model. It was imperative that Symons went along with the illegal contingency arrangement, and that he supported the recovery of costs through court approval proceedings — even though he was supposed to be independent from AFP and acting for the lead plaintiff, who represented the group members. While O'Bryan was incentivised to do this by having a (concealed) stake in the litigation funding business, Mark Elliott needed an arrangement to align Symons' interests with those of AFP. This suggested arrangement served that purpose.

363 Symons accepted the proposed retainer arrangement and was paid the quarterly fee in 2018. He did not disclose that arrangement to Mr Bolitho.

H.3. The real fee arrangement between AFP and Zita

364 Apart from two invoices that Zita rendered in March and June 2015 for relatively immaterial amounts, he only issued two invoices for the Bolitho proceeding:

(a) On 1 July 2016, Portfolio Law issued an invoice for $177,993, following the Partial Settlement. It did not receive a substantial payment toward that invoice until December 2016, after the settlement sum had been paid.

(b) On 8 December 2017, Portfolio Law issued an invoice for $377,795, following the Trust Co Settlement. For present purposes, it is enough to note that it did not receive payment until after the settlement was approved; the circumstances of that payment are analysed later in these reasons.[41]

365 Despite the lengthy delays between the issue of these invoices and their payment, Zita's evidence was that he did not press AFP for payment once the invoices were issued. He gave various reasons for why, including that:

(a) he was 'simply flat-chat running the class action claim and doing other things';

(b) he 'didn't have time' to do his bills;

(c) his billing practices were 'hopeless' and he was 'running behind'; and

(d) he 'made a call' that AFP was 'a good client, likely to be a long term client' and didn't press for payment to keep the relationship positive.

366 Zita dissembled in the witness box in an attempt to distance himself from the fee arrangements adopted between Portfolio Law and AFP that were inconsistent with his costs agreement. For the following reasons, I am satisfied that AFP engaged Zita on a 'no win no fee' arrangement.

367 First, Zita was not 'flat chat' with work in the Bolitho proceeding. His undemanding role as post-box

solicitor would have afforded ample time to regularly render invoices and follow up to ensure prompt payment.

368 Second, Portfolio Law resembled a typical suburban firm of solicitors at the relevant time. It had three partners (only two of whom were practising solicitors) and three employee solicitors. Zita's evidence was that the firm generated an annual revenue of approximately $1.5 – $1.6 million in FY18, excluding fees billed on the Bolitho proceeding. The invoices issued by Portfolio Law for the Bolitho proceeding were substantial amounts, relative to the firm's financial performance. They were unlikely to be overlooked by Zita, or his fellow partners, when reviewing outstanding debtors.

369 Third, Zita suggested that Portfolio Law's other shareholders, directors and staff regarded the Bolitho proceeding as being subject to different fee arrangements than the usual matters that Zita was responsible for:

Did you have anybody in charge of accounts at your office?---Yes, we did.

Yes. Were they chasing you to send out these bills?---Yes. do that, have you?---Not these bills. Just generally chasing me about billing.

Where were they chasing you about this billing?---No, not about this bill, just billing.

And your fellow directors and shareholders at board meetings, do the minutes reveal that they were frustrated that you hadn't sent out a bill for 14 months in this matter?---Not for this matter, but other matters generally.

I asked you about this matter?---I don't know about that.

370 Fourth, one of Zita's explanations was that Portfolio Law did not require prompt payment of its invoices from AFP because it wished to keep its relationship a positive one. However, advancing capital to fund the proceeding was ostensibly the entire purpose of AFP's involvement. It was contractually obliged to fund legal costs and disbursements, in consideration for a commission if and when there was a successful outcome. As the Contradictor submitted, if AFP were genuinely performing its role and taking on the risk itself (as it wanted to appear to be doing) in order to qualify for a lucrative funding commission, it would make no sense for a solicitor to assume the burden of providing credit, or a form of litigation funding, to the litigation funder. Rather, the billing that occurred went hand in glove with a clandestine 'no win no fee' arrangement in which quantum was dependent on the outcome.

371 Fifth, the second iteration of a spreadsheet created to calculate Portfolio Law's fees[42] revealed an attempt to calculate an additional amount that was 25% higher than the total for the attendances specified in the document. In an evasive exchange during cross-examination, Zita conceded that this formula was included in Portfolio Law's fee spreadsheet to ascertain what an uplift fee would amount to, and that Mark Elliott was likely behind a suggestion for him to do so:

Were you proposing to charge an uplift fee?---No.

What's the 25 per cent about then?---That was just in relation to what it would look like if an uplift fee was applicable. But I was never going to charge that.

...

But you were thinking, 'How would it go if I had an uplift fee'?---Yes, I was. I was - - -

Why were you thinking about an uplift fee?---I wasn't, because that was - the situation was put to me that some class actions get an uplift fee, and I just thought what it was going to look like. I was never going to charge - - -

Who put that to you?---Just generally speaking.

Mr Zita, you're making this up on the spot?---No, I'm not making it up, no.

Mr Zita, Mr Elliott put it up to you, didn't he?---No, he didn't.

So who put it up to you? Name the person?---I can't remember who it was.

Name the person?---I don't know who it was.

I put it to you you're lying?---No. I don't know who it was.

...

Who else did you know who was doing class action work? What other solicitors?---No other solicitors.

Yes. So no other solicitor floated the idea of an uplift fee to you, did they?---No.

So how many litigation funders did you associate with?---One. Who was that?---BSL.

Elliott, correct?---Yes.

And I put it to you that it was Elliott who floated the idea with you?---I can't recall.

It's most likely that it was Elliott, is it not?---Could be.

Not could be. It's most likely that that's who it was: yes or no?---Most likely, yes.

The fact that Zita was contemplating invoicing for an uplift is consistent with Zita understanding that the firm was engaged on a 'no win no fee' agreement.

372 Sixth, the fact that Portfolio Law had a signed a costs agreement stating that Mr Bolitho, not AFP, would be liable for its fees in the usual manner, was irrelevant. It was correct that Portfolio Law's costs agreement was not a sham document, retrospectively created at the time of a settlement approval application, as counsel's were. However, Zita conceded that he failed to comply with many of its terms, including recording time spent on work performed, regularly issuing invoices or obtaining instructions before incurring substantial disbursements. The terms were only honoured in the breach. It strained credulity for Zita to claim that the terms of the costs agreement supported a finding that they were in fact the terms on which he was retained.

373 Seventh, Zita submitted that the fact that AFP's auditors did not specifically request confirmation that Zita was engaged on a no win no fee arrangement, as they did in respect of O'Bryan and Symons, supported a conclusion that he was was engaged on a traditional fee arrangement. I did not find this to be the case. It was clear from the correspondence that the auditors only asked for written confirmation of the fee arrangements in respect of three legal service providers, and Zita was not one of them. It is evident that Mark Elliott was not inclined to provide the auditors with more than the bare minimum to answer their questions. As he complained to his accountant, Mr De Bono, at the time:

I cannot answer all of this! I want a new auditor please ... I just need a better auditor who makes my life easy and doesn't act like a cop.

374 Finally, by its own admission, AFP conceded that it only ever intended to pay Portfolio Law's invoice once it recovered the deductions from the settlement proceeds.

H.4. The Partial Settlement

375 The Contradictor demonstrated that the Lawyer Parties' contravening fee arrangements began with the Partial Settlement.

376 On 8 May 2016, following the execution of the Partial Settlement deed in April 2016, Mark Elliott emailed O'Bryan:

I will start getting our evidence ready for Court approval

We have asked for $2.55M incl GST

Fees and Disbursements to date are say $910K incl GST

If you bill $1m plus GST=$1.1M

I should stay low profile as I was removed as the solicitor and Robson hates me so I will bill say $200K plus GST=$220K

MS can bill $100K and so can Tony =$220K

Approval disbursements (Ads, registry fees, SCV, Trimboss and VTS)=$100K

That's it!If you agree can you start on your bills

I will talk to MS and Tony and get Trimboss lined up

O'Bryan replied:

Bills for much more than $1M will be ready by end of the week.

I will discount them down to $1M to reflect the non-recovery of TrustCo etc.

Mark Elliott:

Thanks

Can you send me a similar retainer to Downer as well?

377 The inference from this dialogue is that neither of Mark Elliott nor O'Bryan had issued any invoices — let alone quantified their fees — for the period in which they had acted as solicitor and counsel respectively for the Bolitho proceeding. More fundamentally, as the Contradictor submitted, it revealed that Mark Elliott and O'Bryan intended to gouge costs out of a settlement without regard to the legal requirements in respect of costs agreements and disclosure or any relation to work product. First, Mark Elliott would nominate a figure: 'we have asked for $2.55M incl GST'. Next, they would devise a plan to split the amount up between themselves. Then, and only then, would they retrospectively create supporting documentation to appear as if the claims were legitimate: 'If you agree can you start on your bills'.

378 The summons seeking approval of the Partial Settlement was issued on 2 June 2016. The summons sought approval of a $2.55 million deduction from the settlement to 'reimburse' AFP for legal fees and disbursements. None of the Lawyer Parties had quantified their legal costs at this time.

379 On 27 June 2016, Portfolio Law sent Mark Elliott a Word document with the title 'Tax Invoice to Mr Laurence John Bolitho.docx', which I infer was a copy of the invoice requested. Mark Elliott was unimpressed with the form of the document and responded:

I cant use this!

Please give me a proper bill with annexed itemised costs

If I don't have it tomorrow, you will miss out

380 Zita denied that Mark Elliott's use of the words 'miss out' was meant to convey that Zita might not be paid:

I understood Mark's comment in his email on 29 June 2016 to be a reflection of his unusual sense of humour; Portfolio Law was always going to be paid for the work that it did.

381 Although Portfolio Law's costs agreement provided that legal fees would be charged according to the time spent working on the matter, its invoice charged in accordance with the Legal Practitioner Remuneration Order. Zita stated that a decision was made in March 2015 to charge on that basis, because it meant that he and Mr Mizzi did not need to record their time.

382 On 30 June 2016, Symons emailed Mark Elliott:

I've attached my two original cost disclosures, the revised cost disclosure (for the period from 1 Jan 2016), and the invoices from Nov 2015 to 29 Jun 2016.

The 11 February 2015 cost disclosure provided to Portfolio Law should be sufficient for the work performed in 2015. Please let me know if not.

Attached to the email were copies of his invoices for November 2015 to June 2016 totalling approximately $110,000, together with a copy of the costs agreements he had issued to Mark Elliott and Portfolio Law earlier that year. Symons' invoices replicated the style of O'Bryan's invoices that are discussed below, save that they were not stamped as 'PAID'.

383 On 1 July 2016, O'Bryan emailed Mark Elliott attaching a costs agreement created that day and the following email exchange ensued:

O'Bryan:

G'day.

All my fee documents will be ready later this morning. I'll email them to Tony to send to Trimbos & cc you.

Given the volume of work involved, I have dropped the fee rates to $990/hour & $9,900/day (both including GST) to make it easier for Trimbos to opine that my rate is reasonable for silk of my standing (he had a problem with the $1,100/hour, $11,000/day in Downer). **Please use the attached fee agreements, reflecting this rate & delete the earlier ones.**

The bills total around $1.65M (incl.GST), so $1.5M excl. GST. Discounted by 20% for Trust Co work, gives $1.2M excl. GST in total.

[emphasis added]

Mark Elliott:

Send to me please

I am sending to Trimbos but TZ is doing the brief

O'Bryan:

OK, will do.

Mark Elliott:

Just spoke to Trimboss

He is happy with that drip feed from me

Got him going on MS and TZ's bills as we are worried about deadline

O'Bryan:

Good.

You'll have mine later this morning

Mark Elliott:

Can you please let me know either way if they are coming today?

I want to let Trimbos know

O'Bryan:

Ready shortly

Mark Elliott:

Ok

Can you give me a total

O'Bryan:

$1,553,400 + $155,340 GST = $1,708,740

384 Between 4:59pm and 5:28pm, O'Bryan sent Mark Elliott five separate emails that collectively attached 42 invoices for the period December 2012 to May 2016, totalling approximately $1.7 million.

385 Each of the invoices:

(a) was issued to Portfolio Law;

(b) included a 'Processed Date' and a 'Due By' date that represented that the invoice had been prepared and issued at the end of the month for which the work described appeared to have been undertaken;

(c) had been stamped as 'PAID';

(d) was not issued through a barristers' clerk; and

(e) did not direct payments by electronic funds transfer to a bank account maintained by a barristers' clerk, but rather directly to an account in O'Bryan's name.

386 On 1 July 2016, Mark Elliott issued his own invoice for work undertaken as solicitor prior to the Bolitho No 4 decision. Despite having earlier stated that his costs would be approximately $200,000 (plus GST) as he 'kept a low profile', the invoice totalled $797,500. The invoice did not identify attendances in the proceeding. It was a lump sum invoice.

Invoice for legal costs & disbursements –Bolitho v Banksia Securities Ltd & Oths SCI 2012 7185

To our professional costs of and incidental to the conduct of this legal proceeding on behalf of you from 21 July 2013 until 15 December 2014:

All emails, telephone calls, correspondence and attendances to/from you
All emails, telephone calls, correspondence and attendances to/from the defendants solicitors
All conferences and time spent conferring with counsel
All attendances at SCV – directions hearing and matter hearings
Perusing/scanning/examining documents discovered by the defendants

Total hours – 780 hours @ $750 per hour	= $585,000
Plus, uplift of 25% of agreed hourly fee	= $146,250
Total	= $731,250

But say, (inclusive of uplift)	= $725,000
Plus GST	= $ 72,500
Total	**= $797,500**

Thank you for your instructions in this matter.

387 As noted elsewhere,[43] the court appointed amicus curiae for the Partial Settlement approval application was critical of the form of Mark Elliott's invoice. Mark Elliott identified the solution to this criticism in an email to O'Bryan (copied to Symons) on 7 August 2016:

MS will assist me this week to do a 25 month summary of my role as solicitor using NHOB precedent

388 On 12 August 2016, Symons sent Mark Elliott an email with the subject: 'revised (and hopefully final) cost docs', attaching a document he had prepared called 'Elliott billing memoranda'. This document set out a schedule of purported attendances by Mark Elliott between July 2013 and December 2014, created using O'Bryan's fee slips from that period.

389 O'Bryan and Symons both assisted Mark Elliott's claim for fees from the Partial Settlement by retrospectively creating documentation justifying his claim, drawn from O'Bryan's contrived records. This revised invoice represented that Mark Elliott spent significant time undertaking discovery review. As is analysed in section I of these reasons, time apparently spent on document review enabled Trimbos to opine that the costs of Mr Bolitho's solicitors and counsel were reasonable given (inter alia) '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'.

H.5. The Trust Co Settlement

390 When the in-principle Trust Co settlement agreement was reached, neither O'Bryan nor Zita had invoiced for any part of the period following the Partial Settlement. Symons had not issued any invoices since November 2016.

Wrapping up: The Banksia Expenses Spreadsheet

391 Around 10 November 2017, Symons circulated an electronic calendar invitation to O'Bryan for a meeting on 14 November 2017 at 2:30pm described as 'michael & mark & alex re banksia wrap-up'. Both O'Bryan and Alex Elliott denied any recollection of Alex attending the meeting, or that such a meeting ever occurred, but I reject their denial.

392 At this important meeting, Mark Elliott, Alex Elliott, O'Bryan and Symons, but not Zita, discussed the necessary work to obtain court approval for the Trust Co Settlement, including how the claims for costs and commission would be justified ('**Wrap-Up Meeting**'). Mark Elliott initially intended to seek settlement approval prior to Christmas. O'Bryan was due to travel to Sri Lanka for a holiday on 15 November 2017 and would not return until 10 December 2017. He was a necessary participant.

393 Following the Wrap-Up Meeting, Mark Elliott confirmed the division of the spoils from the Trust Co Settlement between himself and the Lawyer Parties in a spreadsheet, which recorded the various other disbursements incurred in the proceeding ('**Banksia Expenses Spreadsheet**').

394 Mark Elliott worked backwards from the $4.75 million (plus GST) in legal costs to which Mr Lindholm agreed. After first taking into account the disbursements already expended, he used the Banksia Expenses Spreadsheet to record and manage individual fee targets for each of the Lawyer Parties and to then instruct Trimbos. He concluded that the total of $4.75 million (plus GST) required that:

(a) O'Bryan bill $2.56 million (plus GST);

(b) Symons bill $600,000 (plus GST); and

(c) Zita bill $377,000 (plus GST).

395 On 21 November 2017, Max Elliott sent Alex Elliott and Mark Elliott the first available iteration of the Banksia Expenses Spreadsheet. Two minutes later, Mark Elliott forwarded this version of the spreadsheet to O'Bryan and Symons (copied to Alex Elliott) seeking comments.

396 On 24 November 2017 at 9:58am, Alex Elliott sent an updated version of the Banksia Expenses Spreadsheet to Mark Elliott:

Updated expenses spreadsheet

changes include:

...

Amended Normans bill to $1,956,050(+GST) and changed the date to commence from 1 June 2016
I spoke with TZ – I asked for an estimate of costs, but he didn't have any indication – he will go through every appearance with Ray this weekend, and he will have all invoices by Monday. I said to him that I am meeting with Peter T on Monday, he will be left behind if he doesn't produce.

397 Later in these reasons,[44] I analyse how this spreadsheet was concealed from the Contradictor, the unsatisfactory documentary record associated with the Banksia Expenses Spreadsheet and to Mark Elliott's practice of document destruction after the remitter commenced.

O'Bryan's fee documentation

398 I find that on 14 November 2017, following the Wrap-Up Meeting, O'Bryan discussed the need to generate invoices for the Bolitho proceeding with Ms Koh. She emailed O'Bryan that evening, stating:

Please see attached. I have described "Attendances for the month of X per attached memorandum". Also, I accidentally set the processed date for invoices June and July 2016 as 15 November 2017 and the rest of the invoices defaulted to today's date (14 Nov). Does that matter?

O'Bryan responded:

Thanks, Florence, but I need each tax invoice to have the same sorts of dates as the original set (i.e. between 5 and 14 days into the following month please).

Can you redo them with those dates on them?

399 This email exchange was critical:

(a) Ms Koh sent O'Bryan draft invoices for the Bolitho proceeding on 14 November 2017, using a private billing system maintained by O'Bryan, rather than one operated via his clerk.

(b) The billing system defaulted the 'processed' date of an invoice to the present day, but could be manually backdated if desired.

(c) Ms Koh (correctly) apprehended that O'Bryan might be concerned if the 'processed' date for each invoice was left at its default setting.

(d) O'Bryan instructed Ms Koh to reissue the invoices with modified 'processed' dates to make them appear as if they had been issued monthly throughout the litigation, rather than at the conclusion.

400 Two minutes later, O'Bryan sent a further email to Ms Koh, copying Symons:

Florence, can you please send all of my fee memoranda in Banksia to Michael, so he will know what mine look like?

401 I am satisfied that O'Bryan intended that Symons record attendances in his own invoices consistently with O'Bryan's attendances. This collusion would have been obviated by accurate, contemporaneous records of the work actually performed. The email to Symons included the earlier exchange between O'Bryan and Ms Koh concerning the invoice dating issue, putting him on notice not only that this issue required his careful attention, but also as to what O'Bryan was doing.

402 On 15 November 2017, Ms Koh emailed Symons copies of O'Bryan's fee memoranda for the periods November 2012 to May 2016, and June 2016 to November 2017. Ms Koh replied to O'Bryan's email of the previous evening, stating:

Please see attached with different dates. As for attendances for the month of Nov, I dated the tax invoice 14 November as not realistic to date in December. Ta

O'Bryan promptly replied:

Thanks Florence

403 At 10:30am, Ms Koh and O'Bryan exchanged further email:

Ms Koh:

Just wondering whether I am to generate tax invoice (like what I emailed you earlier) for the memo of attendances from Nov 2012 to May 2016. If so, FYI, the invoice number will be from 6-151 onwards (as the Nov 2017 invoice number is 6-150). Does that matter?

Also, we need to ensure that tax invoice address reflects Melbourne Chambers until we moved here in January 2016. May need Nathan to amend the address for the template invoice for that period (that's he did for us previously). Ta

Safe travels and enjoy Sri Lanka!

O'Bryan:

The invoices need to follow the number sequence and the date sequence all the way from beginning to November 2017 please Florence.

Ms Koh:

Hi Norman, okay will redo from Nov 2012. Kindly advise whether the total amount on each invoice for attendances from Nov 2012 to May 2016 will be exactly the same as what you billed Bolitho v Banksia & Ors last year OR I am to calculate per your rates - $990 per hour and $9,900 per day. Ta

O'Bryan:

No need to redo the ones already done last year, Florence – leave all of them as is.

Just do new ones (following the same number & date sequence) since May 2016 please (at the rate of $1100/hr and $11,000/day).

Make sure they are all showing the correct address for Dawson Chambers.

404 This email exchange persuaded me that O'Bryan intended, and Ms Koh was alive to ensuring, that the invoices appeared as if they had been routinely issued throughout the litigation. So much is plain from the care taken by Ms Koh to avoid future dating the invoice for November 2017, in ensuring that the invoice number sequencing was consistent for the Trust Co Settlement when compared to the invoices issued for the Partial Settlement, and drawing to O'Bryan's attention that the address on his earlier invoices would require amending to reflect the physical address of his chambers at that time.

405 O'Bryan's practice of issuing invoices in his own name, and not through his clerk, is inconsistent with the usual billing practices of barristers in Victoria. O'Bryan apparently only issued invoices personally for AFP-funded group proceedings. Copies of invoices issued in other briefs held by O'Bryan in the same period, which he discovered, showed that he billed his fees for other clients in the ordinary way: through his clerk, who issued invoices that directed payment to the clerk's trust account on O'Bryan's behalf. O'Bryan kept two sets of books; one administered by his clerk, and the other for invoices despatched under his own name and hand, and without reference to his clerk. Why he adopted that practice is obvious. It is highly improbable that a clerk would be complicit in a deception of the kind evidenced by these emails. A competent costs consultant would have drawn this unusual feature of the documentary record to the attention of the court.

406 At 5:04pm that day, Ms Koh sent O'Bryan amended versions of his invoices at the rate of $1,100 per hour (inclusive of GST). He forwarded them to Mark Elliott that evening. These invoices are the first of the various iterations that were discovered in the remitter. However, before turning to those invoices, I will note a further revealing aspect of the email exchange between Ms Koh and O'Bryan.

407 As O'Bryan's invoices for the Partial Settlement and his costs agreement issued on 1 July 2016 demonstrate, his charge-out rate (including GST) was $990 per hour/$9,900 per day. O'Bryan had reduced his rate from $1,100 per hour/$11,000 per day, after Trimbos raised concern that the rate might not be considered reasonable when preparing his report for the Partial Settlement.

408 It is probable — having regard to Ms Koh's reference to that previous rate, together with O'Bryan's instructions to issue the invoices for the Trust Co Settlement at a higher rate of $1,100 per hour/$11,000 per day — that the two previous versions of O'Bryan's invoices (being those sent by Ms Koh at 6:18pm the day before and 10:14am on 15 November 2017) were based on the rate of $990 per hour/$9,900 per day. Ms Koh recalculated the invoices at the increased rate on O'Bryan's instruction. Ms Koh specifically drew the rate to his attention in an email:

Bolitho v Trust Co - new set of 18 invoices from June 2016 to Nov 2017 - rate: $1100 per hour / $11,000 per day

409 I am satisfied that the 'first version' of O'Bryan's invoices for the Trust Co Settlement, attached to Ms Koh's email of 15 November 2017 at 10:14am, were for the following hours and amounts:

FIRST VERSION		
(15 November 2017 at 10:14am)		
Month	**Total (inc GST)**	**Hours Charged**[45]
June 2016	$72,270	
July 2016	$104,940	1
August 2016	$84,150	
September 2016	$60,390	
October 2016	$35,640	

November 2016	$80,190	
December 2016	$35,640	
January 2017	$2,970	
February 2017	$32,670	
March 2017	$16,830	
April 2017	$14,850	
May 2017	$19,800	
June 2017	$42,570	
July 2017	$70,290	
August 2017	$41,580	
September 2017	$101,970	1
October 2017	$95,040	
November 2017	$32,670	
TOTAL	**$944,460**	**9**

410 The 'second version' of O'Bryan's invoices, sent to him by Ms Koh on 15 November 2017 at 5:04pm, were for the following amounts:

SECOND VERSION				
(15 November 2017 at 5:04pm)				
Month	**Total (inc GST)**	**Hours Charged[46]**	**Increase / Decrease (from First Version)**	
			Total	**Hours**
June 2016	$80,300	73	+ $8,030	-
July 2016	$116,600	106	+ $11,660	-
August 2016	$93,500	85	+ $9,350	-
September 2016	$67,100	61	+ $6,710	-
October 2016	$39,600	36	+ $3,960	-
November 2016	$89,100	81	+ $8,910	-
December 2016	$39,600	36	+ $3,960	-
January 2017	$3,300	3	+ $330	-
February 2017	$36,300	33	+ $3,630	-
March 2017	$18,700	17	+ $1,870	-
April 2017	$16,500	15	+ $1,650	-
May 2017	$22,000	20	+ $2,200	-
June 2017	$47,200	43	+ $4,630	-
July 2017	$78,100	71	+ $7,810	-
August 2017	$46,200	42	+ $4,620	-
September 2017	$113,300	103	+ $11,330	-
October 2017	$105,600	96	+ $10,560	-
November 2017	$36,300	33	+ $3,630	-

TOTAL	**$1,049,300**	**954**	**+ $104,840**	**-**

411 On 19 November 2017 at 5:19pm, Mark Elliott emailed O'Bryan:

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

Please advise.

Mark Elliott already had a copy of O'Bryan's invoices. O'Bryan forwarded the 'second version' prepared by Ms Koh to him on the evening of 14 November 2017. Mark Elliott knew that those invoices only totalled $1.09 million, less than half of the $2.65 million that Mark Elliott had allocated to O'Bryan from the 'spoils'. At 7:09pm that evening, O'Bryan responded:

I will send you some drafts.

They need more work- also need to go back to collect the missing portion from round one (25%)?

412 What O'Bryan meant by his reference to invoices needing 'work' is obvious. He had only documented fees of $1.09 million. O'Bryan needed to increase the quantum of his fees by more than 240% to justify Mark Elliott's allocation to him in the Banksia Expenses Spreadsheet, his fee target. O'Bryan's reference to 'round one' was a nod to the remainder of costs not claimed at the time of the Partial Settlement, which the Bolitho legal team claimed were incurred in respect of the prosecution of claims against Trust Co.[47]

413 Mark Elliott and O'Bryan then began to discuss different methods to inflate O'Bryan's fees. Mark Elliott sent O'Bryan a separate email with the subject 'Banksia fees':

Suggest you up your rate to $15K per day

414 That suggestion was made despite the fact that O'Bryan had no costs agreement in place to permit him to charge $15,000 per day. The falsified costs agreement created in July 2016, backdated to December 2014 to support the Partial Settlement, permitted a maximum of $9,900 a day (inclusive of GST). I pause to observe that Mark Elliott's dishonesty is nakedly on display. He was intending to defraud the debenture holders by urging O'Bryan to charge his fees at a substantially higher hourly rate, because he knew that AFP's litigation funding fee depended on the apparent investment in legal costs.

415 O'Bryan thought Mark Elliott's suggestion to unilaterally and impermissibly increase his rate by more than 65% above his 'fee agreement' was a good one. Three minutes later, O'Bryan forwarded the earlier email to Ms Koh and stated:

Dear Florence, please redraw these accounts accordingly: $1500/hr & $15,000/day plus GST.

Mark will check & confirm.

The next day, Ms Koh responded to O'Bryan:

Just re-confirming that your rates are PLUS GST as per your email below (as opposed to inclusive of GST which was what we have been doing). That is, for instance, fees for month of June 2016 is $109,500 - plus GST it will be $120,450. Kindly advise.

O'Bryan replied:

Yes please Florence

416 O'Bryan's costs agreement, and the earlier iterations of his fee slips, provided a rate that was GST inclusive. O'Bryan's directive would instead now calculate and add GST, which had the practical effect of

further inflating his invoices by 10%. In the space of four days, O'Bryan intentionally altered his GST-inclusive daily fee rate from $9,900, then to $12,100, and then to $16,500, in an effort to reach Mark Elliott's fee target. He did this with Mark Elliott's knowledge and assent, and without any discussion with his purported instructing solicitor or notice to his client.

417 In a separate email chain with Ms Koh, O'Bryan added:

I also need to compute more time for evidence preparation for trial.

I don't have adequate computer access for do this for the next few days, so please proceed with the current work and I will increase later.

418 As is discussed later in section Q of these reasons, the documentary evidence, the unchallenged evidence of Mr Lindholm, Mr Newman and Mr Kingston, and the opinions of Mr Dick SC and Mr Redwood persuaded me that O'Bryan had limited involvement in the preparation of evidence for trial. The work he undertook in trial preparation from mid-September 2017 onwards was already reflected in the draft bills that he and Ms Koh had prepared on about 14 and 15 November 2017. O'Bryan had no proper basis to 'compute more time for evidence preparation for trial'. What O'Bryan actually had in mind when writing this email was that he needed to add more time to his bills to meet his $2.56 million target from the 'spoils'. Again, as will shortly become clear, by the ordinary standards of reasonable and honest people, what O'Bryan was seeking to achieve was dishonest.

419 O'Bryan may have had second thoughts as to whether Trimbos would opine that $15,000 plus GST was a fair and reasonable rate. Later that evening, after receiving a copy of the Bankia Expenses Spreadsheet from Mark Elliott, the following email exchange ensued:

O'Bryan:

Looks good.

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.

Mark Elliott:

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

O'Bryan:

Maybe we could do a retainer for the trial, payable up-front?

Mark Elliott:

My recollection is that your costs agreement had 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?

O'Bryan:

Yes, good idea.

Alternatively (or as well), include the outstanding $1M from the mini settlement [Partial 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.

420 This stark email exchange — plainly never intended to see the light of day let alone be read in open court — is remarkable in its contempt for the proper management of the entitlements of group members. I am persuaded that:

> (a) Mark Elliott thought that O'Bryan could not sufficiently increase the quantum of his bills by adding additional hours alone, and would need to rely on other means to reach the $2.56 million target;
>
> (b) Mark Elliott suggested, and O'Bryan was open to, the idea of charging a cancellation fee, despite O'Bryan's costs agreement not permitting him to charge such a fee. I am satisfied that Mark Elliott's 'recollection' of the terms of O'Bryan's costs agreement was feigned. It was designed to convey that, if O'Bryan ultimately charged a cancellation fee, it could be substantiated by creating a fabricated costs agreement containing a cancellation clause;
>
> (c) Mark Elliott's objective was to ensure that AFP could substantiate and recover all of the $4.75 million (plus GST) in costs that he had demanded in the Settlement Deed. It did not matter if that occurred by way of a cancellation fee for counsel, or by asserting that the quantum of those costs included amounts outstanding from the period prior to the Partial Settlement. As long as the agreed division of the 'spoils' was achieved and mirrored the Settlement Deed, it would all 'work out the same from our point of view', as O'Bryan had suggested;
>
> (d) O'Bryan, knowing full well that Zita had done nothing other than to act as a post-box for Mark Elliott and counsel, was concerned to ensure that Portfolio Law's fees 'look[ed] respectable', in the sense that they were within the range of what an instructing solicitor properly performing their retainer in a complex Commercial Court group proceeding would be entitled to charge, and did not arouse any suspicion from the court, when compared with the fees charged by others;
>
> (e) O'Bryan intended, with Mark Elliott's knowledge and concurrence, to deliberately mislead Trimbos and the court by stamping his falsified and unpaid invoices 'PAID', in order to lend legitimacy to the amounts claimed in costs and to avoid any suggestion that AFP had not acted as a litigation funder; and
>
> (f) none of these matters were canvassed with Zita, let alone Mr Bolitho or other group members.

421 By the ordinary standards of reasonable and honest people, what O'Bryan was seeking to achieve was dishonest. I am satisfied to the requisite standard that his specific intention was to document what he was not entitled to. He fabricated invoices not just for his own financial benefit, but for the benefit of AFP and the legal team. There was no evidence that he believed he was entitled to calculate his fees in this manner. But he did not stop there.

422 AFP admitted that it made a similar request of Symons that he also charge a $100,000 cancellation fee.

423 On 22 November 2017 at 8:40am, after confirming that Trimbos would be available to act as a costs expert in the settlement approval application, Mark Elliott forwarded that confirmation to O'Bryan and stated:

FYI

Should I ask him [Trimbos]:

1)attitude towards a cancellation fee by you

2)if $15K per day is ok?

O'Bryan replied at 11:49am:

Sure, but I reckon he will say no to both.

Better that I increase the hours to the max extent possible at the $11k rate (which he will accept).

424 At 11:08pm, O'Bryan emailed Ms Koh the foreshadowed amendments to his fee memoranda:

can you please add the following narrative to the following memoranda of attendances in the new set of memoranda you prepared (attached):

"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" – 1 day for each entry

on each of the following dates please:

Sept 2016: 11, 12, 13, 22, 25, 27 and 30

Oct 2016: 11, 12, 13, 25, 26, 28, 29 and 31

Dec 2016: 11, 12, 14, 17, 18 and 19

Jan 2017: 3, 4, 7, 8, 9, 13, 15, 16, 18, 19, 22, 23 and 25

Feb 2017: 1, 2, 3, 4, 6, 18 and 19 March 2017: 20, 21, 22, 23, 25, 26 and 27

April 2017: 8, 9, 10, 12, 13, 14 and 30

May 2017: 3, 4, 6, 7, 13, 14, 15, 17 and 18

June 2017: 2, 5, 9, 17, 18 and 25

August 2017: 1, 2, 16, 17, 18 and 24

& please recalculate

425 By this email, O'Bryan directed Ms Koh to add an additional 76 days of time to his fee memoranda. She was to add the template entry for reviewing discovery, witness statements and submissions, and preparing opening submissions, tender lists and cross-examination material. This direction was consistent with O'Bryan's intention to increase his hours 'to the max extent possible', in order to document his entitlement to fees of $2.65 million, without encountering too much resistance from Trimbos.

426 On 23 November 2017, Ms Koh responded to O'Bryan's request from the night before. The table attached to Ms Koh's email was in the following form:

Bolitho v Trust Company Nominees Ltd & Ors

(Rate: $1,500 p/hr & $15,000 p/day plus of GST)

Month	Hours / Days	Total	Total plus GST
June 2016	33 hours + 4 days	$109,500	$120,450
July 2016	36 hours + 7 days	$159,000	$174,900
August 2016	55 hours + 3 days	$127,500	$140,250
September 2016	31 hours + 10 days	$196,500	$216,150
October 2016	26 hours + 9 days	$174,000	$191,400
November 2016	31 hours + 5 days	$121,500	$133,650
December 2016	16 hours + 8 days	$144,000	$158,400
January 2017	3 hours + 13 days	$199,500	$219,450
February 2017	33 hours + 7 days	$154,500	$169,950
March 2017	17 hours + 7 days	$130,500	$143,550
April 2017	15 hours + 7 days	$127,500	$140,250
May 2017	10 hours + 10 days	$165,000	$181,500
June 2017	42 hours + 7 days	$168,000	$184,800
July 2017	31 hours + 4 days	$106,500	$117,150
August 2017	32 hours + 7 days	$153,000	$168,300
September 2017	53 hours + 5 days	$154,500	$169,950
October 2017	76 hours + 2 days	$144,000	$158,400
November 2017	23 hours + 1 day	$49,500	$54,450
	Total	**$2,584,500**	**$2,842,950**

427 At 1:04pm, O'Bryan forwarded the table to Mark Elliott:

I don't think Trimbos will accept this rate.

At 1:05pm, O'Bryan sent a further request to Ms Koh:

Thanks Florence. Can you also calculate at the $1100/$11000 rate?

Ms Koh replied:

Table for $1100/$11000 rate attached.

428 The amended table was in the following form:

Bolitho v Trust Company Nominees Ltd & Ors

(Rate: $1,100 p/hr & $11,000 p/day plus of GST)

Month	Hours / Days	Total	Total plus GST
June 2016	33 hours + 4 days	$80,300	$88,330
July 2016	36 hours + 7 days	$116,600	$128,260
August 2016	55 hours + 3 days	$93,500	$102,850
September 2016	31 hours + 10 days	$144,100	$158,510
October 2016	26 hours + 9 days	$127,600	$140,360
November 2016	31 hours + 5 days	$89,100	$98,010

December 2016	16 hours + 8 days	$105,600	$116,160
January 2017	3 hours + 13 days	$146,300	$160,930
February 2017	33 hours + 7 days	$113,300	$124,630
March 2017	17 hours + 7 days	$95,700	$105,270
April 2017	15 hours + 7 days	$93,500	$102,850
May 2017	10 hours + 10 days	$121,000	$133,100
June 2017	42 hours + 7 days	$123,200	$135,520
July 2017	31 hours + 4 days	$78,100	$85,910
August 2017	32 hours + 7 days	$112,200	$123,420
September 2017	53 hours + 5 days	$113,300	$124,630
October 2017	76 hours + 2 days	$105,600	$116,160
November 2017	23 hours + 1 day	$36,300	$39,930
	Total	**$1,895,300**	**$2,084,830**

429 At 3:37pm, O'Bryan forwarded the amended table to Mark Elliott stating:

This will be more appropriate for Trimbos, I reckon.

If he will allow a cancellation fee, this is close to the mark.

There will be more work in December (and January too if we don't get approval before Xmas).

At 4:49pm O'Bryan made a further request of Ms Koh:

Sorry, Florence, one last request.

Can you calculate from 1/7/17 at $1250/hr; $12,500/day?

At 5:51pm, Ms Koh replied:

Please see attached table.

At 11:03pm, O'Bryan forwarded the further amended table to Mark Elliott:

This is close to correct.

Ask Trimbos whether he will accept these rates.

430 The further amended table constituted the 'third version' of O'Bryan's invoices for the Trust Co Settlement, which were for the following amounts:

THIRD VERSION				
(22 November 2017 at 11:03pm)				
Month	**Total (inc GST)**	**Hours Charged[48]**	**Increase / Decrease (from Second Version)**	
			Total	**Hours**
June 2016	$88,330	73	+ $8,030	-
July 2016	$128,260	106	+ $11,660	-
August 2016	$102,850	85	+ $9,350	-

September 2016	$158,510	131	+ $91,410	+
October 2016	$140,360	116	+ $100,760	+
November 2016	$98,010	81	+ $8,910	-
December 2016	$116,160	96	+ $76,560	+
January 2017	$160,930	133	+ $157,630	+ 1
February 2017	$124,630	103	+ $88,330	+
March 2017	$105,270	87	+ $86,570	+
April 2017	$102,850	85	+ $86,350	+
May 2017	$133,100	110	+ $111,100	+
June 2017	$135,520	112	+ $88,320	+
July 2017	$97,625	71	+ $19,525	-
August 2017	$140,250	102	+ $94,050	+
September 2017	$141,625	103	+ $28,325	-
October 2017	$132,000	96	+ $26,400	-
November 2017	$45,375	33	+ $9,075	-
TOTAL	**$2,151,655**	**1723**	**+ $1,102,355**	**+ 7**

431 This trail of emails established to my satisfaction that, by a process of trial and error and retrospectively increasing his rates until he landed on $12,500 per day (plus GST) from 1 July 2017, and adjusting the claim for the hours that he worked at that rate, O'Bryan got quite close to the fee target, and he expected that he would get closer still to the target by the time of the settlement approval hearing, because he proposed to bill another $150,000 up to the time of the settlement approval application.

432 I pause to record that although this documentary trail was deliberately destroyed by Mark Elliott, O'Bryan did not do likewise. It provided compelling, direct evidence of the fraudulent conduct of O'Bryan and Mark Elliott. O'Bryan chose not to offer any explanation to the court. Mark Elliott took his explanation to his grave, his death occurring at a time when he was destroying documents and falsely propounding a spurious long-standing document destruction practice.[49] Throughout the course of the appeal and the remitter, O'Bryan knew what his own documents would reveal. It is not clear why O'Bryan maintained his defence despite the damning documentary evidence against him, which he had discovered. He only capitulated after the Contradictor, in his four-day opening address, presented the case against him.

433 On 24 November 2017 at 3:51pm, Mark Elliott circulated a further version of the Banksia Expenses Spreadsheet to O'Bryan and Symons (copied to Alex Elliott) stating:

All

See attached

Norm-OK for your $200K cancellation fee

Counsel hourly rates approved by PT

Fees for December OK if properly described

Lets discuss

O'Bryan replied:

Looks good - I will get Florence to amend accounts accordingly

434 On 4 December 2017, Mark Elliott enquired of O'Bryan:

When can I get your invoices please?

Don t forget the $200K cancellation fee for Feb-July 2018

I will also need the December estimate

O'Bryan replied:

I will endeavour to complete these over the next few days.

Am in the bush at present with limited wifi.

Do you want the invoices shown as paid or unpaid?

I prefer paid & so will Trimbos.

435 The version of O'Bryan's invoices ultimately provided to Trimbos were stamped as 'PAID', as they were for the Partial Settlement. I am satisfied that Mark Elliott conveyed his approval to this suggestion, and that O'Bryan subsequently directed Ms Koh to apply 'PAID' stamps to each of the invoices, in order to conceal the contingency fee arrangement by falsely representing that AFP had paid his fees prior to settlement.

436 O'Bryan's invoices were added to the folder that Alex Elliott maintained and which Alex Elliott then delivered to Trimbos.[50]

437 On 18 December 2017, during preparation of his expert report for the approval application, Trimbos requested costs agreements that related to work undertaken in the matter from 1 July 2016 to date from O'Bryan, Symons and Zita. Trimbos subsequently forwarded that email to Mark Elliott stating:

As you can see from my email below, I have asked Norman, Michael and Tony for copies of their costs agreements. Can you please ask Robert Crow for his costs agreement(s) for work undertaken since 1 July 2016.

For the purposes of putting all of the costs invoices before the Court, do I need to include all the invoices that you have briefed me with in my report (as I did in my 2016 Report and Supplementary Report) will those invoices be provided to the Court by some other means?

438 On 20 December 2017, O'Bryan responded to Trimbos's email, attaching a costs agreement dated 30 May 2016 (emphasis added):

My fee disclosure and costs agreement dated 30 May 2016 is attached.

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.

In any event, my work on the Banksia class action continued and my accounts were duly paid by the litigation funder.

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.

439 O'Bryan's email was further confirmation of my finding that he was dishonest and was fabricating the true state of affairs in relation to his fee arrangements so that Trimbos would provide an expert report that could be

placed before the court on the approval application:

(a) The costs agreement attached to the email was created by O'Bryan at the time he sent it to Trimbos, and not on 30 May 2016 as he claimed.

(b) The costs agreement had never been signed by Mark Elliott.

(c) AFP had not 'duly paid' O'Bryan's fees, nor could it have, as O'Bryan had not issued his invoices for the relevant period until approximately a week prior to the email being sent and AFP could not pay such a large account other than from the settlement funds when received.

(d) He did not notify Mr Bolitho of the purported increase to his rates as of 1 July 2017, nor was he ever paid at that increased rate.

440 On 4 January 2018, Trimbos issued his third report in the Bolitho proceeding, opining on the reasonableness of AFP's legal costs in the Trust Co Settlement ('**Third Trimbos Report**'). A copy of O'Bryan's final invoices were included as an annexure to the report, constituting the 'fourth version' of his invoices for the Trust Co Settlement, and were for the following amounts:

FOURTH VERSION				
(4 January 2018)				
Month	**Total (inc GST)**	**Hours Charged**[51]	**Increase / Decrease (from Third Version)**	
			Total	**Hours**
June 2016	$134,310	111	+ $45,980	+
July 2016	$128,260	106	-	
August 2016	$153,670	127	+ $50,820	+
September 2016	$158,510	131	-	
October 2016	$140,360	116	-	
November 2016	$158,510	131	+ $60,500	+
December 2016	$116,160	96	-	
January 2017	$136,730	113	- $24,200	-
February 2017	$88,330	73	- $36,300	-
March 2017	$84,700	70	- $20,570	-
April 2017	$107,690	89	+ $4,840	+
May 2017	$133,100	110	-	
June 2017	$135,520	112	-	
July 2017	$121,000	88	+ $23,375	+
August 2017	$140,250	102	-	
September 2017	$141,625	103	-	
October 2017	$132,000	96	-	
November 2017	$140,250	102	+ $94,875	+
TOTAL	**$2,350,975**	**1876**	**+ $199,320**	**+ 1**

441 The following table identifies the ultimate difference between the first version and fourth version of O'Bryan's fees:

EVOLUTION OF O'BRYAN'S FEES						
11 November 2017 to 4 January 2018						
Month	**First Version**		**Fourth Version**		**Diff.**	
	Total (inc GST)	**Hours Charged**	**Total (inc GST)**	**Hours Charged**	**Total (inc GST)**	**Hours Charged**
June 2016	$72,270	73	$134,310	111	+ $62,040	+
July 2016	$104,940	106	$128,260	106	+ $23,320	
August 2016	$84,150	85	$153,670	127	+ $69,520	+
September 2016	$60,390	61	$158,510	131	+ $98,120	+
October 2016	$35,640	36	$140,360	116	+ $104,720	+
November 2016	$80,190	81	$158,510	131	+ $78,320	+
December 2016	$35,640	36	$116,160	96	+ $80,520	+
January 2017	$2,970	3	$136,730	113	+ $133,760	+ 1
February 2017	$32,670	33	$88,330	73	+ $55,660	+
March 2017	$16,830	17	$84,700	70	+ $67,870	+
April 2017	$14,850	15	$107,690	89	+ $92,840	+
May 2017	$19,800	20	$133,100	110	+ $113,300	+
June 2017	$42,570	43	$135,520	112	+ $92,950	+
July 2017	$70,290	71	$121,000	88	+ $50,710	+
August 2017	$41,580	42	$140,250	102	+ $98,670	+
September 2017	$101,970	103	$141,625	103	+ $39,655	
October 2017	$95,040	96	$132,000	96	+ $36,960	
November 2017	$32,670	33	$140,250	102	+ $107,580	+
TOTAL	**$944,460**	**954**	**$2,350,975**	**1876**	**+ $1,406,515**	**+ 9**

442 As was the case for the invoices he issued for the Partial Settlement, O'Bryan's final invoices for the Trust Co Settlement:

(a) were generated using O'Bryan's privately owned billing system, rather than through his clerk;

(b) appeared as if they had been issued monthly and were due for payment within 30 days; and

(c) were marked attention to Portfolio Law, despite never being sent to, or sought by Zita.

443 These 'irregularities' were opened at length by the Contradictor before O'Bryan capitulated. O'Bryan gave no explanation, whether by evidence or submission, that might support an alternative conclusion. I infer that

he considered his duty of candour with the court to be compromised.

Symons' fee documentation

444 As noted above, O'Bryan asked Ms Koh on 14 November 2017 to provide Symons with initial versions of his fee memoranda. On 19 November 2017, Mark Elliott told Symons the quantum of the 'spoils' that he would receive:

You have already billed me to end November 2016

I confirm that you have /will have done 200 days work on this matter since then until Xmas?

Do you want to withdraw Invoice 7-58,lets discuss

When will I get your invoices?

445 The Contradictor submitted that, at the time, Symons was charging at a rate of $300 per hour/$3,000 per day (inclusive of GST) in other proceedings funded by AFP. At this rate, 200 days enabled Symons to invoice for $600,000, that being Mark Elliott's allocation to him from the spoils. I am satisfied that Mark Elliott's invitation to Symons to withdraw one bill, being invoice 7-58 that was issued by Symons in October 2017 for a small sum, was an example of the piecemeal invoicing practice discussed earlier, that Mark Elliott preferred to avoid. He intended Symons reverse that invoice in order to substitute it with a larger bill for the same period.

446 Symons discovered a Microsoft Excel spreadsheet that he used to prepare his fee memoranda in group proceedings funded by AFP. It first set out the details of the client (lead plaintiff), matter description, and dates for the period worked. It allowed input of the usual information for time-costed attendances, including the date, narrative and hours/days worked.

447 I am satisfied that Symons used his spreadsheet to created his fee memoranda after Mark Elliott invited him to submit his invoices on 19 November 2017. Symons could not undertake this by reference to contemporaneous records. None have been discovered because he kept none during the litigation. He relied on O'Bryan's fee memoranda forwarded to him by Ms Koh on 15 November 2017. I accept the Contradictor's submission that the evidence demonstrated that Symons documented his fee invoices as follows:

> (a) Symons reviewed O'Bryan's draft fee memoranda to identify the activities he would charge for. In some cases, Symons amended the narrative for the activity so it differed from O'Bryan's own description;
>
> (b) Symons adjusted the hours charged for various activities compared to the time charged by O'Bryan, sometimes allocating much more time to an activity than recorded by O'Bryan in his draft memoranda; and
>
> (c) Symons then falsely inflated the quantum of his invoices by adding numerous days and hours for discovery review and preparing the court book for trial, particularly in January–February and July–November 2017. As I will show, no such work was undertaken.

448 The following table contains a comparison of some example time entries contained in O'Bryan's draft fee memoranda to those included in O'Bryan's final invoices, with the changes underlined:

Date	O'Bryan		Symons	
	Narrative	**Time**	**Narrative**	**Time**
13/2/17	Conferring with Tony Zita, Mr Elliott and	3 hrs	Conferring with Tony Zita, Mr Elliott and	1 day

	junior counsel re: Sparke Helmore's response to list of issues, advising; conferring with Tony Zita, Mr Elliott and junior counsel re: Maddocks' letter attaching further source documents of Banksia produced in response to recent discovery requests, advising; conferring with Tony Zita, Mr Elliott, Alex Elliott and junior counsel re: Maddocks' email to Court attaching list of issues, proposing draft combined position paper and orders for hearing on 24 February 2017, advising.		senior counsel re: Sparke Helmore's response to list of issues, advising; conferring with Tony Zita, Mr Elliott and senior counsel re: Maddocks' letter attaching further source documents of Banksia produced in response to recent discovery requests, advising; conferring with Tony Zita, Mr Elliott, Alex Elliott and senior counsel re: Maddocks' email to Court attaching list of issues, proposing draft combined position paper and orders for hearing on 24 February 2017, advising; reviewing Banksia's additional discovery.	
8/6/17	Reviewing amended orders and position paper; conferring with junior counsel, Mr Elliott, Tony Zita and Alex Elliott re: same, advising.	3 hrs	Amended proposed orders and position paper; conferring with senior counsel, Mr Elliott, Tony Zita and Alex Elliott re: same, advising.	5 hrs
14/6/17	Conferring with Jonathon Redwood re: instructions from Mr Bolitho to oppose any extensions from Trust Co unless there is clear evidence justifying it, advising; reviewing submissions regarding extension of time; conferring with junior counsel, Mr Elliott, Tony Zita and Alex Elliott re: same, advising; conferring	3 hrs	Conferring with senior counsel re: instructions from Mr Bolitho to oppose any extensions from Trust Co unless there is clear evidence justifying it, advising; drafting submissions regarding extension of time; conferring with senior counsel, Mr Elliott, Tony Zita and Alex Elliott re: same, advising;	1 day

	with Jonathon Redwood re: proposed email from Maddocks to associates, whether it would assist if Banksia arrange for combined position paper and consolidated draft orders for directions hearing on 16 June 2017, advising.		conferring with senior counsel re: proposed email from Maddocks to associates, whether it would assist if Banksia arrange for combined position paper and consolidated draft orders for directions hearing on 16 June 2017, advising.	
3/7/17	Conferring with Mr Elliott, junior counsel and Jonathon Redwood re: subpoenas issued by Clayton Utz to Ernst & Young and KPMG, advising.	1 hr	Conferring with Mr Elliott, senior counsel and Jonathon Redwood re: subpoenas issued by Clayton Utz to Ernst & Young and KPMG, advising; reviewing documents contained in Receivers' Court Book for inclusion in Court Book.	5 hrs
24/10/17	Conferring with associate to Efthim J, Tony Zita and junior counsel re: our up to date pleadings / class action quantum analysis for the mediation, advising.	1 hr	Conferring with associate to Efthim J, Tony Zita and senior counsel re: our up to date pleadings / class action quantum analysis for the mediation, advising; reviewing documents returned on ASIC subpoena.	1 day

449 The arbitrary addition of hundreds of hours of time to his invoices did not demonstrate an entitlement to invoice $600,000. He would, as Mark Elliott had cautioned O'Bryan, 'struggle for days' to inflate his invoices by this method. To achieve his fee target, Symons adopted the same approach as O'Bryan and retrospectively increased his fee rates from the hourly rate of $250 including GST, that was prescribed by his costs disclosure. Symons amended the spreadsheet and calculated his fees at an hourly rate of $375 *plus* GST from 1 July 2017.

450 Alex Elliott received copies of Symons' invoices and added them to the folder with which Trimbos was briefed.

451 Symons' invoices:

(a) were produced using O'Bryan's privately owned billing system, rather than through a clerk;

(b) appeared as if they had been regularly generated on a monthly basis during the litigation, with a payment deadline of 30 days following issue;

(c) were marked attention to Portfolio Law. Symons did not send them to Portfolio Law, and Zita never asked to see them; and

(d) did not seek payment in respect of any fees in connection with the settlement approval application.

452 A stark example of Symons' deceit, exposed in the documentary trail, was seen in his email exchange with Mark Elliott on 28 March 2018 regarding his first invoice under the AFP retainer:

Symons:

I intend to send an invoice for the January – March 2018 quarter tomorrow on the basis of the agreed retainer.

Is there anything in particular you would like as the narrative, or is "Fees pursuant to retainer for the period 1 January 2018 to 31 March 2018"sufficient?

Mark Elliott:

Do we need to adjust for Jan Banksia fees?

Symons:

You tell me. There's perhaps 10 days of Banksia time in the relevant period.

Mark Elliott:

No double counting

You tell me!

Symons:

Understood

453 On 3 April 2018, Symons issued his invoice for the first quarter of 2018. The invoice was for $160,000 (plus GST), rather than the agreed quarterly amount of $200,000 (plus GST). Symons deducted $40,000 to take into account that he had worked for 10 days on the Bolitho proceeding in January 2018. When Symons earlier invoiced AFP for his fees in the proceeding, the bill that Symons submitted to Trimbos in respect of January 2018 claimed fees for approximately 18 days of work on the settlement approval application. This is a reference to the same 'Banksia time' that he referred to in April 2018. Symons and Mark Elliott both recognised that the additional 8 days included in the Bolitho invoice was not time that Symons had spent working on that matter. It was the 'bonus points' that Symons was entitled to under the contingency fee arrangement with AFP.

454 Returning to the fees invoiced against the settlement sum, on 18 and 19 December 2017, Symons responded to Trimbos's email requesting copies of his costs documentation for the Bolitho proceeding, attaching four separate disclosure statements.

455 Symons' costs agreement/disclosure statement dated 11 February 2016 provided for an hourly rate of $250 (inclusive of GST). The costs disclosures attached to Symons' email purported to notify Portfolio Law of four distinct increases to that rate, which are summarised in the following table:

No	Period	Rate
1	1/9/2016 to trial	$275 per hour including GST
2	1/1/17 to trial	$330 per hour plus GST
3	1/7/17 to trial	$375 per hour plus GST
4	9/12/17 to settlement approval	9 – 31 December 2017: $375 per hour plus GST From 1 January 2018: $400 per hour plus GST

456 Symons presented the costs agreements/disclosures to Trimbos as if they had been issued throughout the litigation. That was not the case. As O'Bryan had done, Symons dishonestly backdated copies of the costs disclosures to appear that way. In truth, the costs disclosures were not created until Trimbos requested them, and Symons deliberately intended to mislead Trimbos as to the true arrangements concerning his fees.

457 As I have explained in greater detail with O'Bryan, I am satisfied to the requisite standard that Symons' specific intention was to document fees that he was not properly entitled to and not just for his own financial benefit but for the benefit of AFP and the legal team. By the ordinary standards of reasonable and honest people, what Symons was seeking to achieve was dishonest.

458 These 'irregularities' were opened at length by the Contradictor before Symons capitulated. Symons gave no explanation, whether by evidence or submission, that might support an alternative conclusion. I infer that he considered his duty of candour with the court to be compromised.

Zita's fee documentation

459 Zita conceded that Portfolio Law did not keep contemporaneous records of the time its fee earners spent working on the Bolitho proceeding nor did it render regular accounts, as required under its costs agreement with Mr Bolitho.

460 The Banksia Expenses Spreadsheet provided that Portfolio Law would charge $377,000 plus GST. In his evidence in chief, Zita stated:

Shortly after the mediation Mark and I agreed that Portfolio Law would charge between $350,000 and $400,000 for the work it did since the Partial Settlement. Based on that agreement with Mark, I ultimately decided to charge $377,395.00.

461 In cross-examination, Zita conceded that Mark Elliott told him to bill this amount and he 'just accepted it', but maintained that this was 'a fair figure' based on the work he performed:

Now, what was that figure based on, Mr Zita?---Just based on what I thought was fair and reasonable for the work that I had done.

But how could you say that at that time, because you hadn't kept any contemporaneous records; do you agree with me?---Yes.

Your offsider Mizzi hadn't kept any contemporaneous records?---Agreed.

And you hadn't started the work of working up your bills at that time; correct?---Correct.

So how can you say it was a reasonable estimate?---Just based on the amount of work that I knew I undertook - - -

...

...how could you have even guessed at a figure at that time when you had no contemporaneous records and you hadn't even begun the process of sitting down and trying to work out what your figure was because Elliott was telling you to get on with it ASAP?---Understand that.

So I put it to you that this was the figure that Elliott told you you were going to charge; correct?---No.

Well, I repeat: how could you as a responsible solicitor who kept no time records, who'd made no attempt at this date to work out what his bills should look like, how could you say for an 18-month period you were owed 377,000?---I spent a lot of time on the matter, Mr Jopling.

Sorry?---I spent a lot of time on the matter.

We'll come to that. But at this point in time when you had no contemporaneous records, you'd issued no invoices, people were harassing you to issue your invoices, how could you say at that time you had any inkling about what was fair and reasonable for you to charge?---Just based on the amount of time I put in.

But you had no idea what time you had put in at that point in time, I suggest to you?---I knew how much time it occupied with - - -

You mean - but you had no contemporaneous records?---No, I don't. No.

So I repeat: as a responsible legal practitioner, probably confronting many thousands of your Banksia clients on this very video right now in country Victoria, do you think you can responsibly say that you could arrive at that figure at that date?---Not the exact figure, no. No.

But the person who could arrive at what he wanted you to charge was Elliott; correct?---Well, he negotiated, yes.

462 It is plain that Mark Elliott, Alex Elliott, O'Bryan and Symons considered that Zita was the weakest link in their scheme.

463 On 20 November 2017, Symons emailed Zita (copying Mark Elliott) stating:

I have asked Florence to create a skeleton of the narrations (based on Norman's memoranda) which appear to be applicable to you for the work in Banksia from June 2016 to November 2017. You may find it helpful to use these narrations as the basis for creating your own memoranda, and adding and deleting items as you go.

Mark Elliott replied:

Thanks MS

TZ-please get on to this asap as we are under a lot of pressure to finalise by Xmas

464 On 24 November 2017, Alex Elliott emailed Mark Elliott an updated version of the Banksia Expenses Spreadsheet and commented, concerning Zita:

I spoke with TZ – I asked for an estimate of costs, but he didn't have any indication – he will go through every appearance with Ray this weekend, and he will have all invoices by Monday. I said to him that I am meeting with Peter T on Monday, he will be left behind if he doesn't produce.

465 Zita denied that there was any suggestion he would not be paid if he did not have his fees documented in time:

You remember that conversation, don't you?---Which conversation, about being left behind?

The conversation you had with Alex Elliott where he said to you unless you can produce a bill that can be approved by Trimbos you won't get paid, you'll be left behind?---No.

So that's all a lie, is it?---I was never going to be left behind. I was to be paid for the work that I did.

Sorry, when I say 'left behind', you had to get your documentation - - -?---Yes, yes, yes.

In order to get it into Trimbos?---Yes.

To give it to the court to get approval?---Absolutely.

And that's what I meant by you were going to be left behind?---Yes, yes.

So you were getting a hurry-up from Alex?---Yes, yes.

You agreed the figure; you now needed to do the paperwork?---Yes.

Alex Elliott similarly denied that he told Zita that Portfolio Law would not be paid if its invoice was not issued in time.

466 I reject both denials. I am satisfied that Mark Elliott intended Alex Elliott to convey that Portfolio Law would not receive any of the Trust Co Settlement funds unless it issued a satisfactorily detailed invoice by the deadline imposed. Both Alex Elliott and Zita understood that Mark Elliott was prone to threaten to get what he wanted.

467 After his conversation with Alex Elliott, Zita and Mr Mizzi reconstructed the time that Portfolio Law had spent on the matter, by reference to their email inboxes and Symons' draft memoranda. To do so, they created a spreadsheet ('**Portfolio Law Spreadsheet**') which recorded the number of units that each of them spent:

(a) reading emails;

(b) reading discovery, witness statements and other documents; and

(c) attending directions hearings and conferences with counsel.

468 Three iterations of the Portfolio Law Spreadsheet were ultimately prepared. The 6 December 2017 version preceded Portfolio Law's invoice to Mr Bolitho on 8 December 2017 for $377,795. That invoice was consistent with the Banksia Expenses Spreadsheet. Zita later completed the Portfolio Law Spreadsheet, there being two further versions dated 29 December 2017 and 2 January 2018.

469 Zita stated that the Portfolio Law Spreadsheet was prepared over the course of two weeks. It was initially populated with the details of every email that he and Mr Mizzi had sent or received concerning the Bolitho proceeding, separated into different sheets depending on who had sent or received the email. Zita and Mr Mizzi then reviewed each email listed (and any attachments), estimated how long it would have taken each of them to read it, and inserted the corresponding number of units into the spreadsheet. An example of these entries appears below:

From	Subject	Received	Size	Attachment	Time	Rate	Total	Time	Rate	Tota
Mitchell Grady	Banksia Securities Limited (Receivers and Managers	2/03/2017	433KB	Perusal of Annexure A	0.8	550	440.00	0.8	330	264

	Appointed) (In Liquidation) v The Trust Company (Nominees) Limited [MADDOCKS-M.FID2721635]									
Mitchell Grady	RE: In the matter of Banksia Securities Limited (Receivers and Managers Appointed (In Liquidation) - Supreme Court of Victoria Proceedings S CI 2012 07185, S CI 2014 05875 and S CI 2015 01384 [MADDOCKS-M.FID2536785]	7/10/2016	291KB	Perusal Amended 3rd Party Notice	0.6	550	330.00	0.6	330	198

470 The 6 December 2017 version of the Portfolio Law Spreadsheet suggested that Zita and Mr Mizzi had each spent an identical amount of time reading each email, but they 'kept reviewing' the time allocated for items in the spreadsheet because, as Zita conceded, 'we couldn't claim it', meaning that the Portfolio Law Spreadsheet needed to total exactly $377,795, being the amount of the invoice already issued.

471 Ultimately, Zita conceded in cross-examination that the units of time recorded in the Portfolio Law Spreadsheet were 'time estimates' that the court could not 'place much weight on', as 'they were speculative reconstructions at best'. Zita agreed that group members should not be paying for 'guestimates' of Portfolio Law's fees.

472 As to the other categories of charges included in the Portfolio Law Spreadsheet, Zita stated:

> (a) the charges for reviewing discovery were estimates of the amount of time he thought he had spent on those tasks. Zita had no contemporaneous records nor notes of reviewing discovery and accepted that the figure billed for that task amounted to a 'wild stab';
>
> (b) he included charges for reviewing transcripts of examinations by ASIC that involved him looking at the documents on his computer screen, without making notes or other work product. Zita conceded that the changes to the time allocated to this task in the Portfolio Law Spreadsheet was done to ensure that the itemised attendances reflected the value of Portfolio Law's invoice, rather than adjusting the time actually spent reviewing those documents; and
>
> (c) he used Symons' draft fee slips to identify and charge for conferences with counsel. Zita conceded that if Symons' fee slips were inaccurate — which, for reasons already identified, they plainly were — any errors would have been carried across into the Portfolio Law Spreadsheet.

473 I pause to note that reviewing transcripts of examinations and reading/perusing/examining the discovery collated from the public examinations (the Receivers' Court Book) were popular work items claimed by all lawyers on the Bolitho legal team. There is no evidence that any of them did any such work, save for Ms Simone Jacobson.

474 During cross-examination, the Contradictor took Zita to an email from Trust Co's solicitors dated 28 September 2017, attaching its client's witness statements. Zita identified these statements in the Portfolio Law Spreadsheet. Zita:

(a) agreed that nobody asked him to look at the witness statements;

(b) did not highlight, annotate or generate any work product when reviewing the documents;

(c) recorded himself in the last iteration of the Portfolio Law Spreadsheet as having charged 4 hours for reading the documents; and

(d) estimated the amount of time he took reviewing the documents two months after undertaking the work and conceded that his recollection was unlikely to be accurate after such a lengthy period.

475 I pause to observe that whatever arrangement may be agreed between a lawyer and client, in my view the court cannot countenance legal practitioners charging on the basis of reconstructed guess-work. Commonly, in order to give business efficacy to any legal costs agreement, the paying party reasonably expects that the charging party will be able to produce not only a contemporaneous, genuine and accurate record of time spent but also sufficient work product in some form to corroborate the claim and justify the expense.

476 While practitioners may agree between themselves or with their client to charge in some other way, that arrangement may not be acceptable to a court when it is asked, or required by law to give its imprimatur or to declare that the costs were reasonably incurred, where a third party has to pay such costs. In such a case, the lawyer's duty to the court, to the proper administration of justice, demands that the practitioner provide genuine, contemporaneous time-based and properly verified records. That is the case in respect of costs sought to be recovered from a settlement sum in a group proceeding, although that is not the only such circumstance.

477 Zita said that the figure that he and Mark Elliott agreed on was 'just based on what I thought was fair and reasonable for the work I had done'. Plainly that was acceptable to AFP because it paid Zita on receipt of the invoice (albeit in unusual circumstances discussed later), but that was AFP's choice. While Zita may have believed that he was entitled to some remuneration for being a post-box in aid of Mark Elliott's ruse for working around the Bolitho No 4 decision, objectively assessed his costs claim cannot be found to be reasonable; Zita had no contemporaneous records of his time spent on the matter, and created the invoice in the manner that I have described.

478 What was sought in the remitter was the court's imprimatur: an order permitting the disbursement of those costs from the settlement sum against the collective interests of all group members. This could only be on the basis that the costs claim was reasonable and in all of the circumstances ought fairly be permitted. The fact that the costs have been paid is a matter between AFP and Zita. Neither AFP nor Zita persuaded me that the costs could reasonably be considered recoverable from the settlement fund. Further, I would not countenance charging against the settlement sum any activity on the part of a solicitor that paid no regard to the interests of their client and amounted to conduct deserving of the soubriquet 'post-box'.

479 I pause to note that dishonest overcharging was not alleged against Zita in respect of the $377,795 invoice. Zita may have believed he was entitled to some measure of compensation for his post-box duties as the 'nominal' solicitor on the record, but I am satisfied that Zita overestimated the value of his own work to reach the fee target set by Mark Elliott. There is a further observation that I must make. Irrespective of whether Zita kept contemporaneous records, I was not persuaded that he meaningfully reviewed documents, read emails or perused correspondence. Such activity was inconsistent with the evidence of his role in the proceeding. By his own concessions, Zita:

(a) was not expected to (and did not) have any strategic input into the case;

(b) left it to Mark Elliott and counsel to run the litigation, and only did what they told him to do;

(c) did not carefully read documents and correspondence he was asked to file and/or send;

(d) did not proof any witnesses;

(e) did not prepare any memoranda of advice;

(f) did not supervise the barristers;

(g) did not compose the letters he sent; and

(h) did not apply any independent judgment in the matter, leaving all matters of judgment to others.

480 The documentary record and Zita's evidence at trial supported only one conclusion: beyond perfunctory attendances and disbursements, no monetary value can properly be ascribed to Zita's discharge of the function of solicitor on the record in the Bolitho proceeding. Zita could not point to any work of use to Mr Bolitho or group members, if indeed such work was done at all. Zita was working for AFP/Mark Elliott as the post-box to disguise the non-compliance with the Bolitho No 4 decision. I cannot accept the proposition that group members ought to remunerate Zita for his abdication of responsibility to Mr Bolitho and group members.

481 I add that, insofar as O'Bryan and Symons directed Zita, they did so as the delegate and agent of AFP, in breach of their fiduciary duties, as discussed later in these reasons.[52]

H.6. Overcharging by O'Bryan and Symons

Admissions

482 Notably, despite its admissions, AFP continued to falsely, and unreasonably, deny the core allegation that O'Bryan and Symons charged more than a fair and reasonable amount, or that AFP procured and/or encouraged them to do so. AFP opened its defence by stating that 'the Lawyer Parties have deposed to having done work, and there is a large volume of documentary evidence demonstrating that work was done', which was a reference to 46 folders that O'Bryan discovered in the remitter that he asserted constituted his work product in the period from 1 June 2016 to 30 January 2018.

483 If AFP's advisers had examined them in the same way that the Contradictor had, it would have discovered O'Bryan's claim to be patently false. On the basis that O'Bryan and Symons continued to deny the allegation of overcharging, AFP continued to press for their costs. AFP submitted that 'the precise sum of costs' payable to the Lawyer Parties 'should be determined after the court makes its findings, whether by

taxation or reference to the Costs Court or after further evidence as to quantum'.

484 However, circumstances changed for AFP when O'Bryan and Symons offered no defence to the allegations in the Revised List of Issues dated 21 July 2020, and did not contest findings being made against them on the basis of those allegations. They expressly abandoned any claim for unpaid fees. On 4 August 2020, AFP abandoned its application for referral to the Costs Court. Without evidence from Mark Elliott, O'Bryan and Symons, AFP was left without evidence to maintain, contrary to the compelling evidence of the documentary trail, that O'Bryan and Symons charged a fair and reasonable amount, and that AFP did not procure and/or encourage them to do otherwise.

485 O'Bryan and Symons did not contest the Contradictor's allegations concerning their improper fee arrangements. They each expressed their deep regret for their conduct, implicitly acknowledging the truth of the allegations made against them. O'Bryan abandoned his claim against AFP for unpaid fees.

486 Given the centrality of the fee arrangements and overcharging contraventions to the conduct of AFP, O'Bryan and Symons overall, I accept the Contradictor's submission that AFP, O'Bryan, and Symons should be taken to have belatedly conceded that there was no proper basis for the fees they sought to recover from the Trust Co Settlement. Before saying a little more about that conduct, the Contradictor put the following submission, which I accept:

It causes one to ponder about the complicit nature of the understanding or arrangement between O'Bryan, Symons, and AFP, whereby each agreed to hold out for the payment of counsel's fees until the last possible moment, which saw each of them capitulate in early August 2020, when neither a mediation nor a settlement appeared possible. Each of them has always been cognisant of the true facts, but would appear to have been determined to force the Contradictors to prove what they always knew. That conduct is the very conduct the CPA was designed to stamp out.

The Court should reject AFP's submission that it was in no position to make admissions and concessions until after O'Bryan and Symons publicly capitulated. It was Mark Elliott who invited O'Bryan and Symons to charge fees that he determined based on a 'division of the spoils' (including cancellation fees). And even after Mark Elliott's death, AFP inexplicably continued to maintain its claim for legal costs, only seeking an updated report from Trimbos shortly prior to the trial. It should be borne in mind that AFP is no ordinary litigant. AFP was a litigation funder and a professional user of the Court's services.

Key instances of overcharging

487 The substantial majority of fees recorded in counsel's contrived fee slips were for reading documents: approximately half of O'Bryan's charges relate to 'reviewing discovered documents', while a significant proportion of Symons' charges related to 'reviewing' the discovery, witness statements, witness outlines, and expert reports. The fraudulent scheme relied on projecting an image of counsel studiously analysing shelves of lever arch folders of material constituting the Receivers' Court Book for full days at a time, for months on end, without generating any work product. It further required that this absence of work product, and the fact that the real work in connection with these documents had been performed by the Banksia legal team, remain undiscovered by Trimbos, and therefore unquestioned by the court.

488 It is difficult to imagine an activity that would generate a clearer evidentiary trail than a legal team preparing for an upcoming trial in a group proceeding in the Commercial Court. Ordinarily, one sees email exchanges between instructing solicitors and counsel and between counsel, memoranda on case theories, research topics and cross-examination issues, task lists, annotations to documents, file notes of calls to witnesses and conferences with counsel, discovery plans, lists of issues, chronologies. Put simply, a trial that is properly prepared generates work product.

489 No such evidence existed in this case until approximately September 2017, two months before the successful mediation with Trust Co. At this point, O'Bryan decided it was necessary to retain a second junior. Ms Jacobson was briefed to primarily assist with the preparation of the court book, discussed below.[53]

490 The Contradictor prepared for trial expecting that O'Bryan and Symons would vigorously maintain their defences and contend that their fee slips were not dishonestly inflated as I have described. The Contradictor forensically analysed the work claimed by counsel in each fee slip — necessarily and regrettably at considerable expense to debenture holders —and identified where those charges did not, or could not, relate to work they actually performed. The Contradictor included much of that scrutiny in its written closing submissions, where a detailed analysis of O'Bryan and Symons' fraudulent billing practice on a month-by-month basis was laid bare. The Contradictor also presented a detailed analysis of Ms Jacobson's work, which provided a stark comparison with the claims of O'Bryan and Symons.

491 In light of counsel's capitulations and the findings I have made concerning their fee arrangements, it is not necessary to fully traverse the Contradictor's submissions concerning what it termed the 'Overcharging Contraventions' in great detail. The full proof supporting my findings is found in the record of the trial. It is sufficient to identify some prime examples of dishonest charges by each of O'Bryan and Symons.

O'Bryan's charges for trial preparation

492 As earlier recounted, on 22 November 2017 from his holiday in Sri Lanka, O'Bryan directed Ms Koh to add 76 days to his invoices in September-–October, December 2016, January–June and August 2017, each with the following narrative:

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.

In the course of the various versions of his invoices, O'Bryan later revised this charge down to 65 days.

493 Even in the absence of the documents demonstrating how he manufactured his invoices, O'Bryan's claim of 'trial preparation' is clearly an artifice, for the following reasons.

494 First, despite the uniform narrative for each attendance referring to a conferral with instructing solicitors and junior counsel, corresponding attendances do not appear in Symons' fee slips or the Portfolio Law Spreadsheet for having conferred with O'Bryan, as would have occurred if the attendances were legitimate. The reason for this oversight in the fraudulent scheme is apparent from the chronology of how the fee documentation was prepared. O'Bryan provided Symons with a copy of the 'first version' of his fee slips so that Symons could see 'what mine looked like'.[54] Symons in turn used O'Bryan's drafts to create a skeleton set of narratives for Zita to use in his own preparation. However, the 76 days of trial preparation were not added to O'Bryan's fee slips until the 'third version'. Accordingly, Symons and Zita each prepared their fee documentation to reach their own respective targets without knowing that O'Bryan had separately recorded extensive conferrals with them.

495 The discrepancy between O'Bryan's invoices and those of Symons and Portfolio Law ought to have put a competent costs consultant on notice that the fees were contrived or at least inaccurate. This required no effort, insight or information other than review of the invoices.

496 Second, it is most improbable, if not impossible, that O'Bryan worked on pre-trial tasks such as reviewing

witness statements and preparing tender lists and opening submissions from as early as September 2016 and into the 2016/2017 summer break as:

(a) Trust Co had not yet filed its evidence. It did not begin to do so until June 2017; and

(b) on 8 September 2016, Croft J ordered that the trial commence on 1 May 2017, before vacating that trial date in December 2016. On 9 February 2017, the trial was re-listed to commence on 22 February 2018.

497 In any event, consistent with the usual approach of senior counsel to a brief to appear in a future trial, listed months in advance, following a yet-to-be-completed mediation, the evidence suggests that O'Bryan did not commence trial preparation until much later than his fee invoices suggest:

(a) Alex Elliott confirmed in his evidence that the Lawyer Parties did not start preparing for trial until 'the second half of 2017';

(b) on 25 July 2017, O'Bryan drafted a factual chronology of a mere 14 paragraphs, which he sent to Symons, Mark Elliott and Alex Elliott stating:

> Here is a small start on the chronology of key events that we will need for the trial. Lots to do here! Do we need more hands on deck? If so, whose?

(c) O'Bryan did not discuss cross-examination with Mr Redwood until approximately 15 August 2017, when a document described as 'Witness Division' identifies that O'Bryan would be primarily responsible for the cross-examination of three witnesses: Mr Silavecky (2–3 day estimate), Mr Lefort (1 day estimate) and Mr Godfrey (2–3 day estimate). There is no evidence of any preparation for cross-examination following that conversation, other than taking a draft witness outline of Mr Silavecky prepared by the Banksia legal team in November 2016 and changing the title to 'STENIC SILAVECKY XXN NOTES'; and

(d) on 13 October 2017, O'Bryan created a document entitled 'Banksia trial opening submissions' containing the following page of content:

> Banksia trial opening submissions
>
> We need a thorough analysis of Ch 2L of the Corporations Act, including legislative history, including especially the key provisions we rely upon (esp. 283DA).
>
> Address M Leeming J's comment (Equity: Ageless in the Age of Statutes (2015) Journal of Equity 108, cited by Edelman J in *ACCC v Chrisco* [2015] FCA 1204; (2015) 239 FCR 33) that:
>
> [quote from journal article]

O'Bryan's charges for periods otherwise occupied

498 Due to his practice of running two books of accounts — one for his barrister's practice billed through his clerk, and one for another practice billed at his direction through his private system— O'Bryan may have thought it unnecessary to ensure there were no discrepancies between his attendances. However, when both systems are reviewed and compared, together with discovered documents and other publicly available

information, many of O'Bryan's attendances are clearly manufactured, having regard to his other activities. I will point out three examples.

499 First, in respect of his bill for January 2017, O'Bryan initially directed Ms Koh to add 13 days of attendances, using his omnibus narrative. Ultimately, the final invoice included charges for 9 days of trial preparation work between 1 – 25 January 2017, O'Bryan having presumably determined that the prospect of a barrister working for 13 business days during the court's summer vacation on a matter not listed for trial was implausible.

500 However, the most probable inference reasonably open was that O'Bryan did not work on the Bolitho proceeding during this period. Aside from no evidence of work product generated by O'Bryan in January 2017, O'Bryan emailed Mr Redwood on 25 January 2017 that he would be 'back on deck' in the week following Australia Day, a common return to work date for barristers taking the January vacation.

501 Second, O'Bryan increased the number of hours charged in his May 2017 bill by 500% from 20 hours in the 'first version' to 110 hours in the 'fourth version'. However, his discovery revealed that O'Bryan issued invoices in 15 different matters in which he was briefed for periods that included work in May 2017. Of those invoices, $180,000 was billed exclusively in May 2017, and the Contradictor further submitted that, when averaged over their respective periods, O'Bryan's bills exceeded $300,000 for the month. Wherever O'Bryan's fees ultimately fell for the month of May 2017, it is impossible to accept that he spent an additional 11 days working on the Bolitho proceeding, particularly when the trial was not listed to commence for a further 10 months.

502 Finally, O'Bryan's initial draft of his bill for June 2017 included 43 hours, which he increased to 112 hours in the final invoice, including full days on 2, 5 and 9 June 2017. However, for this month, O'Bryan's false accounting was contradicted by publicly available information:

> (a) In an email to counsel briefed in the Bolitho proceeding, O'Bryan noted that he was in a trial in Sydney in the week of 5 June 2017 and would be unable to attend a conference in that week. A published judgment of the Federal Court records that O'Bryan was in trial that week in Sydney, appearing for the Australian Competition and Consumer Commission before Moshinsky J on 5-8 June 2017.[55] However, O'Bryan's invoice for June 2017 included full days of trial preparation on 2 and 5 June 2017. In other words, O'Bryan's bills charged for two full days of work, a total of $22,000 plus GST, that purportedly fell not only on the last business day before he prosecuted a four day trial in the Federal Court as senior counsel, but also on the first day of that trial itself.
>
> (b) On 9 June 2017, O'Bryan appeared before the Court of Appeal in an application for leave to appeal and appeal in the group proceeding against Myer Holdings Ltd, in which AFP and Zita also acted as funder and instructing solicitors respectively ('**Myer proceeding**'). That hearing continued on 20 July 2017, according to the reported judgment.[56] O'Bryan invoiced in the Bolitho proceeding a full day of trial preparation on 9 June 2017, when on the same day he was advancing a case to overturn a decision of the Trial Division in another AFP-funded group proceeding.

503 In the absence of explanation and in the context of the whole of the evidence, these matters supported strong inferences, certainly by reference to the applicable standard of proof, that O'Bryan dishonestly falsely accounted for his fees.

Symons' charges for discovery review and preparation of court book

504 Symons' primary method of workshopping his invoices to reach his fee target of $600,000 (plus GST) was to include substantial attendances for reviewing discovery and preparing the court book for trial.

505 The documentary evidence demonstrated that he did not undertake this work.

506 First, the discovery supported as the most probable inference that O'Bryan and Symons adopted an approach to preparing the court book that was consistent with their general modus operandi in the litigation: piggy-backing on work done by others. On 29 July 2016, O'Bryan instructed Ms Koh to review the index of court books prepared in advance of the public examinations conducted by Banksia's receivers and liquidators, and identify any documents that had been discovered by Trust Co, presumably expecting that repository to be comprised of the critical documents in the case. This required no effort on the part of Symons.

507 On 8 September 2016, the court ordered that the SPRs, not Mr Bolitho, prepare and serve the first draft of the court book index for the other parties to provide comments.

508 On 15 November 2016, O'Bryan obtained a soft copy of the index to the Receivers' Court Book and sent it to Symons and Ms Koh. Three days later, Symons emailed O'Bryan and Ms Koh attaching 'a first cut of a merged index', which merged together the index to the Receivers' Court Book and the index to Trust Co's discovery from the liquidators' court book. The discovery demonstrated that Symons had a significant software competency, and I am satisfied that the task of merging and de-duplicating two lists of documents would not have taken him a total of 6.5 hours as his fee slip claimed for the task.

509 On 18 November 2016, O'Bryan instructed Ms Koh to review the pleadings in the Banksia proceedings to ensure that all documents referred to were in the merged index. Despite O'Bryan's direction to Ms Koh, Symons' invoices included extensive attendances for the draft court book, including reviewing the merged index and cross-referencing against other sources of documents.

510 Symons' attendances to this task were a fiction. For the following reasons, I am satisfied that it was Ms Koh who undertook work on the court book in this period.

511 First, as one would expect, this task produced an evidentiary trail of work product. A printed version of the merged index was first marked up with handwritten annotations, which were subsequently incorporated into a separate Word document. Both documents were created by Ms Koh: the handwriting on the printed document is an obvious match to notes made by Ms Koh when instructed by O'Bryan to identify Trust Co's discovered documents in the Receivers' Court Book and the liquidators' court book, while the metadata of the electronic document records Ms Koh as the author.

512 Second, Symons had zero work product to show for his hundreds of hours of court book preparation. On 19 December 2017, following a phone call to discuss documents referred to in his fee memoranda, Symons sent Trimbos the following email:

Attached is a scan of the copy of a print-out of the index I was working on in late January / early February.

The attachment to that email was a scanned copy of the merged index that Ms Koh had worked on in November 2016. Showing some desperation, Symons passed off the handwritten annotations of O'Bryan's secretary as his own work product, and billed group members tens of thousands of dollars in fees for it.

513 Third, Symons confirmed in an email to O'Bryan (copied to Mark Elliott) sent in January 2017, that apart from the work performed by Ms Koh, he had undertaken little work on the court book:

Aside from creating a merged list of documents based on the receivers' and liquidators' court books, and Florence cross-referencing documents in the pleadings, development of the Court Book index has not progressed. In particular, I haven't started the task of going through the actual documents (in the folders in your room) to remove those for which we have no need.

514 In subsequent emails exchanged between the three, O'Bryan indicated that it was not necessary to spend much time identifying documents not deemed to be relevant from the court book index and instructed Symons:

Let's do a quick & dirty for the time being

515 Despite that direction, Symons still included several days of attendances for reviewing documents and working on the court book from 30 January to 3 February 2017. It is improbable that Symons ignored O'Bryan's instructions and performed this work when it was deemed to be unnecessary. I am persuaded that Symons did not work on the court book in this period.

516 AFP admitted that it knew Mark Elliott had already recovered out of the proceeds of the Partial Settlement, fees for hundreds of hours of work for reviewing discovery, including for review of the court book prepared by the liquidators for public examinations and the Receivers' Court Book. Whether Mark Elliott had actually done that work can be doubted, as there was no evidence of any benefit, for example, culling of irrelevant/duplicate documents, or lists of key documents in instructions to counsel to also review in the discovery.

517 As I will later develop, the evidence persuaded me that the Banksia legal team prepared the evidence and Mr Bolitho's legal representatives had very limited involvement. They later engaged Ms Jacobsen to prepare the draft court book. Yet, at the settlement approval application, O'Bryan and Symons submitted, falsely, to the court that the evidence was 'a joint exercise', that 'it was beneficial for us to cooperate with the [SPRs] throughout the preparation', and that 'there was the utmost coordination throughout, in particular in relation to the preparation and the filing of all the evidence'.

H.7. A further motivation for overcharging: AFP's claim for a commission

518 Aside from the obvious personal motivations of O'Bryan and Symons for inflating their claims for legal fees, the overcharging by counsel had a further critical purpose. It provided support for AFP's claim for a funding commission. AFP admitted that it/Mark Elliott and O'Bryan considered that AFP was entitled to 30% of any settlement. 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 which closely approximated to 30% of the total settlement sum.

519 AFP's entitlement to a funding commission had been the subject of some controversy during the application for approval of the Partial Settlement. On 1 August 2016, Trust Co filed submissions in respect of AFP's claim, noting that:

> (a) AFP did not become involved in the proceeding until 13 March 2014;
>
> (b) it appeared that only some, and not all, of the disbursements incurred by Mr Bolitho had been paid by AFP;
>
> (c) the work done by Mr Bolitho in prosecuting the Bolitho proceeding did not appear to be substantial when compared to that of the SPRs in the Banksia proceedings, and meant that AFP had effectively been 'free-riding' on the work done by the SPRs; and
>
> (d) as the fees in connection with the Banksia proceedings were paid from debenture holders'

funds, it was not evident why group members should be asked to pay a further 25% of any sum that may otherwise be available for distribution to them in the BSL proceeding.

520 On the approval application for the Partial Settlement, O'Bryan and Symons submitted that a funding commission to AFP of $1.3 million, being 25% of the settlement sum attributed to the Bolitho proceeding, would 'provide a return to the funder which is commensurable with the risk accepted by it'.

521 Accordingly, by the time of the Trust Co Settlement, each of AFP, O'Bryan, Symons and Alex Elliott were alive to the need to demonstrate AFP's entitlement to a funding commission and to counter submissions such as those just noted.

522 Further, on 26 October 2016, the Full Court of the Federal Court delivered its reasons for judgment in *Money Max*. The next day, O'Bryan forwarded a bulletin to Mark Elliott and other investors in AFP about the decision, noting that the court's approach to making a 'common fund order' set out in that decision involved 'approving the total return having regard to the risks undertaken by the funder'.

523 Alex Elliott stated he knew AFP was seeking a common fund order from the Trust Co Settlement, and that the risks taken by a litigation funder were relevant to the court's assessment of such a claim. He had read *Money Max* and understood its implications for litigation funding,[57] including that a factor in the determination of an appropriate funding commission was the quantum of the legal costs expended, and to be expended, by the litigation funder.[58]

524 The quantum of the legal fees, together with the misleading representation that they had been paid, allowed AFP to deceive the court when claiming it was entitled to a funding commission of $12.8 million (plus GST). In truth, those costs were not legitimate, nor had they been paid by AFP. That was Mark Elliott's fraudulent construct.

525 AFP, Mark Elliott, Alex Elliott, O'Bryan and Symons each continued through until the trial of the remitter to perpetrate the deception that millions of dollars in legal fees had been legitimately incurred and paid to justify AFP's commission claim. AFP and the family entities of Mark Elliott and O'Bryan, by their respective legal and beneficial interests in AFP, stood to make a substantial windfall if they succeeded in defending the approval of that entitlement to claim that funding commission.

H.8. Zita's acquiescence to the overcharging

526 Zita admitted that he did not properly scrutinise counsel's fees, including by failing to consider the reasonableness of their costs or confirming they had charged at rates that had been properly disclosed in their costs documentation. Contrary to the Portfolio Law costs agreement, he did not discuss the terms of counsel's retainer, including fees, with Mr Bolitho, nor did he obtain his client's permission before counsel fees were incurred. He conceded that as instructing solicitor for Mr Bolitho, it was important that he do so to properly protect his client's interests. By not doing so, Zita agreed that he had acted with gross dereliction of his duty to his clients.

527 While conceding his failures, Zita also sought to exculpate himself. He contended that by the time he became involved, the fee arrangement as between AFP and O'Bryan/Symons was already in place, and he assumed that he did not need to concern himself with it. Accordingly, there was nothing to put him on notice that the fees charged by counsel were excessive.

528 Zita's evidence illustrated the risk where an instructing solicitor merely acts as a post-box. It was not open to Zita to say he was not put on notice that counsel's fees were, to say the least, irregular, when he did not show any interest whatsoever in what the terms of the retainers were, or the work that counsel were

performing. Nothing put him on notice because of his dereliction in not monitoring the arrangements with counsel as required by his costs agreement.

529 Together with Zita's concessions, I am satisfied that Zita acquiesced in O'Bryan and Symons charging more than a fair and reasonable amount for the following reasons:

> (a) The invoices issued by counsel were exhibited to the Third Trimbos Report, which was filed by Zita. Zita did nothing to correct the misleading impressions those invoices conveyed. By his own admission, he did not even read the Third Trimbos Report before it was filed.
>
> (b) The invoices were addressed to Zita and appeared as if they had been issued to him on a monthly basis. This conveyed to the court that Zita had maintained oversight of counsel's fees during the litigation and had satisfied himself as to the fees charged. In truth, Zita had no involvement at all in counsel's fee arrangements, and counsel did not send their invoices to him for review or payment.
>
> (c) Zita did not obtain a copy of O'Bryan's costs documentation until 20 December 2017, when he incidentally received it as a passive participant in an email exchange between Trimbos and O'Bryan. Zita conceded that he did not know whether O'Bryan's fees were calculated in accordance with his costs agreement, because he never asked for that documentation.
>
> (d) Rates charged by Symons exceeded the rates in the cost agreement which Zita received in February 2015. When Zita received copies of Symons' costs documentation on 18 and 19 December 2017 as a recipient to an email exchange between Trimbos and Symons, he did nothing to stop Trimbos relying on three subsequent costs disclosures purported to have been given to Portfolio Law, notifying it of increases to Symons' rates, when no such notice had been given at the time.

530 Zita's relegation of the role of solicitor for Mr Bolitho and group members to that of a post-box, and surrendering control of the proceeding to Mark Elliott, allowed the overcharging by counsel to occur. He is responsible for his failure to monitor counsel's fees and ensure that those fees were not excessive.[59]

1. **EXPERT EVIDENCE FROM TRIMBOS**

531 Trimbos was an Australian legal practitioner who was accredited by the Law Institute of Victoria as a specialist in costs law. He graduated in law from Monash University in 2003 and was admitted to practise in April 2004. Between February 2007 and February 2013, he was an employee of Harris Costs Lawyers. In March 2013, he commenced practise as a sole practitioner costs lawyer.

532 Trimbos described his practice as comprised of preparing bills of costs, costs assessments, advice as to costs and objecting to bills of costs in both party/party and solicitor/client costs disputes. He had also prepared expert reports for use in costs-related litigation, including applications for security for costs. He claimed experience in costing commercial litigation, including large-scale commercial disputes. His only experience in assessing the fairness and reasonableness of legal costs in group proceedings came from being retained by Mark Elliott/AFP. Prior to the Bolitho proceeding, he had only prepared a report for a group proceeding on one prior occasion.

533 On 4 January 2018, Zita filed the Third Trimbos Report that opined on the reasonableness of the legal costs purportedly incurred by AFP that it sought to deduct from the Trust Co Settlement sum.

I.1. Patterns set in the Partial Settlement

534 To properly appreciate the relationship that developed between Trimbos, Mark Elliott/AFP and the court by the Third Trimbos Report, the narrative must return to the application to approve the Partial Settlement, when AFP relied on the First and Second Trimbos Reports. Patterns in the relationship between Trimbos and Mark Elliott appear to have been set at this initial stage, and the fee arrangement practices later adopted by Mark Elliott and the Lawyer Parties in the Trust Co Settlement then emerged. Although AFP's claims for legal costs and funding commission from the Partial Settlement were approved and have been paid, it was beyond the scope of the remitter to make findings concerning the circumstances in which that occurred.

First Trimbos Report

535 On 28 June 2016, following in-principle agreement to the Partial Settlement, Mark Elliott retained Trimbos to opine on the reasonableness of the plaintiff's legal costs claimed in connection with the claims that were settled. Although Mark Elliott told Trimbos that he would be formally engaged by Zita, Mark Elliott and O'Bryan exercised control of the process of obtaining his evidence.

536 On 1 July 2016, Mark Elliott sent the following email to Trimbos (copied to Alex Elliott), which only related to the fee claim of Elliott Legal:

Dear Mr Trimboss

Tony Zita from Portfolio Law has asked me to send you the attached supporting material.

I understand that you have already been granted access to the drop box portal containing the pleadings and other documentation in this case.

I had conduct of this case as solicitor for the Plaintiff from 24 December 2012 until 5 December 2014

As my private practice has since been acquired by Elliott Legal P/L, Elliott Legal P/L has rendered the attached account to the plaintiff in respect of my legal services.

I am claiming costs pursuant to the attached Conditional Costs Agreement for the period 21 July 2013 until 5 December 2014.

I am a commercial solicitor admitted to practise in Victoria in 1985.I was partner in the international law firm Minter Ellison for 9 years (from 1990-1999),General Counsel at Computershare Ltd from 1999-2003 and have extensive corporate and litigation experience having acted for the Trustees of Tattersalls Ltd, DFO Stores, ANL Limited, Pasminco Limited and Computershare Limited.

I conducted this case in the Supreme Court of Victoria for Mr Bolitho in his capacity as representative plaintiff against Banksia Securities Limited and the attached schedule of parties on a no win/no fee basis. Inclusive in my agreed hourly charge out rate is all administration costs and office disbursements incurred by me including telephone ,mail ,courier, photocopying, secretarial and word processing expenses. On that understanding I requested and the client agreed to pay an uplift fee of 25% payable on him achieving a successful outcome in the litigation. A detailed schedule of work undertaken by me during the relevant period will be forwarded to you shortly

Specifically, I ask that you please consider the following issues:

1) my hourly rate of $750 plus GST as agreed in the attached costs agreements in the context of my no win/no fee arrangement, complexity and difficulty of the matter and the all inclusive nature of the fee (as outlined above).My hourly rate should be assessed in an absolute sense but also in the context of market rates for a senior practitioner in a large city law firm conducting a matter requiring the care and attention of a practitioner with over 30 years of litigation and commercial experience.

2)the need for most of the work done on the file to be done by a senior practitioner

3)the need for senior and junior counsel to be continuously engaged having regard for the complexity of the issues involved

4)the regular involvement of Mr Bolitho and his independent solicitor Mr Crow of Riordans in the proceeding and the need to obtain their agreement throughout to the steps being taken (and disbursements incurred) in the conduct of the proceeding .

5)the number of folios discovered by the various defendants in this proceeding.

Please conduct a review of the file via the drop box portal to satisfy yourself on some of the above issues.

The account for legal costs rendered by Elliott Legal P/L to Mr Bolitho is in the sum of $725,000 plus GST .

A schedule of other disbursements incurred by me and by Portfolio Law on behalf of the plaintiff in this case is also attached for your consideration. A folder of all relevant original invoices will be forwarded to you by courier on Monday.

The claim by Mr Bolitho is litigated funded by BSL Litigation Partners Limited (formerly named International Litigation Partners Limited) pursuant to the attached Litigation Funding Agreement dated 13 March 2014.

Attached to the email was a copy of a conditional costs agreement between Mark Elliott and Mr Bolitho, a copy of the Funding Agreement, a bill of costs and a Microsoft Excel spreadsheet listing disbursements. The bill of costs, dated 1 July 2016, was in a lump sum form, totalling $797,500 (including GST).

537 What was noticeable, and worth repeating, was that the fourfold increase in Mark Elliott's costs, from the estimate identified in his email to O'Bryan on 8 May 2016 compared with this invoice,[60] which was substantially achieved by the additional claim for 'perusing/scanning/examining documents' provided by the SPRs following public examinations.

538 That day, O'Bryan created his costs agreements and prepared his fee slips, as earlier discussed.[61] Mark Elliott sent Trimbos a copy of O'Bryan's cost agreements, followed later by O'Bryan's fee slips prepared earlier that day. As occurred in the Trust Co Settlement, O'Bryan's invoices were stamped 'PAID'.

539 On 4 July 2016, Mark Elliott responded to Trimbos's request for further explanation of Elliott Legal's bill of costs:

The attached invoice for legal costs rendered to Mr Bolitho is in the sum of $585,000 plus 25% uplift plus GST for the period 21 July to 15 December 2014 and was calculated as follows:

1. Taking instructions and conferring with client /solicitor retained by client by telephone, email and in conference over a 72 week period- 40 hours

2. Considering emails received by me- approx. : 600 emails @average of 2 units each=120 hours

3. Preparing emails sent by me- approx : 500 emails @average of 2 units each=100 hours

4. Conferring and conferences with Senior & Junior Counsel -60 hours

5. Attending Directions Hearings in SCV-8 hearings (3hours each) =24 hours

6. Attending Receivers Hearings and Liquidators Hearings in SCV- (total 10 days@8 hours each)=80 hours

7. Attending Hearings in SCV-4 days @10 hours per day=40 hours

8. Phone calls-approximately 6-8 per week x 70 weeks x average of 1 unit per call=52 hours

9. Discovered documents(Receivers/Liquidators Hearings + other material)- approx:55,000 folios -perusal (20,000 folios) /scan (25,000 folios) /examine 10,000 pages

10. Plus 25% uplift as provided in Costs agreement 11. Plus GST at 10%

Please let me know if your require anything further

540 The same day, AFP formally instructed Trimbos. O'Bryan settled the retainer letter. Despite what Mark Elliott had previously told Trimbos, Zita did not play any role in briefing Trimbos. The letter:

> (a) instructed him on behalf of the plaintiff to provide an independent costs assessment on the basis set out by AFP in connection with the plaintiff's application for court approval of the attached settlement deed, by which the plaintiff would receive $5.2 million;
>
> (b) stated that AFP has incurred and paid all of the legal costs and disbursements in the case from its commencement in 2012 to date;
>
> (c) stated that orders would be sought that the court approve a 25% funding consideration for AFP ($1.3 million) and reimbursement of legal costs and disbursements incurred by AFP on the plaintiff's behalf in respect of the settled claims;
>
> (d) identified legal costs and disbursements described as incurred by Mr Bolitho and paid by AFP:

- Counsels fees - Norman O' Bryan SC- $ 1,671,890 (incl GST)
- Counsels fees - Michael Symons $126,356 (incl GST)
- Solicitors Fees - Mark Elliott $797,500 (incl GST)
- Solicitors Fees - Portfolio Law $180.001 (incl GST)
- Disbursements (as per schedule attached) $956,691 (incl GST)

Total $3,732,438 (incl GST)

> (e) instructed him to assume that 75% of the plaintiff's costs to date were attributable to the costs incurred against the settling defendants and that the proceeding would continue only against Trust Co;
>
> (f) instructed him to assume that:
>
> > (i) Banksia would have no substantial ongoing role, although it was the source of most discovered documents;
> >
> > (ii) considerable forensic work had been involved in the claims against RSD;
> >
> > (iii) Mr Godfrey, a defendant, had conducted a vigorous defence of the claims made against him; and
> >
> > (iv) the other defendants had demanded as much time and attention from the plaintiff's solicitors and counsel;
>
> (g) the claim for disbursement incurred by Mr Bolitho and paid by AFP included various junior counsels' fees and significant disbursements for the provision of legal, advertising and registry services in respect of 'the conduct of this large and complex class action'.

541 Between 4 July and 8 July 2016, Trimbos, Mark Elliott and O'Bryan exchanged several emails regarding evidence to support the legal costs claimed. Trimbos queried the accuracy of the total of O'Bryan's fees, as identified in the letter of instruction:

Trimbos:

I attach copies of your fee slips/memoranda of fees for February and May 2013.

Can you call me today or tomorrow ... to discuss your work undertaken on:

- 13/2/13 - Reading all company searches of Banksia and related documents - 1 day: What and how many documents did you read over the 1 day?

- 11, 12 & 14/5/13 - Reviewing BSL Review and Completion Accounts and audit papers - 1 day x 3 : What are the BSL Review and Completion Accounts and audit papers?

Trimbos:

I attach a pdf copy of a Statement of Account as at 3/2/15 to Mark from your clerk.

It includes a fee slip from you (No. 5007561 dated 21/8/14) in relation to RSD's application for leave to appeal heard 21/8/14. These costs have been included by Mark as part of the general disbursements and are not as part of your fees.

I forward to you the zip folder of your fee slips for 2014.

At items 4 and 5 of your fee slip No. 5007561 (see attached Statement of Account) for the RSD appeal work, you charged your time to prepare for and appear the hearing on 21/8/14. How does this differ from your time charged in your fee slip for work undertaken in August 2014 for 19 to 21 August for "Preparation and appearance in VSCA - 2 days"?

O'Bryan:

Sorry, Peter, this is an error on my part. I had understood the fee slip from my clerk had been cancelled, but I have checked this morning & discovered that is not so.

I will correct the August 2014 summary to eliminate the double counting of this item.

O'Bryan:

Please find attached my amended August 2014 fee slip to correct the error identified below.

Trimbos:

I attach a table, that I prepared for my report, of Norman's fee slips emailed to me on Sunday 1/7/16, including the amendment to August 2014 below. This does not include Norman's fee slip for $27,500 that Mark has included in the Schedule of Disbursements.

As you can see the total of these fee slips is $1,644,390. This is short of the $1,072,177.00 that BSLLP has instructed me on 4/7/16 that BSLLP has paid towards Norman's fees (even allowing for the amended fee slip and the $27,500). [sic]

Are you happy for me to use my figure of $1,644,390 or are there some additional fees of Norman's that I have missed or have not been given to me?

Mark Elliott:

When you are ready I will re-do the letter of instruction with all the figures corrected and confirmed

Talk tomorrow

O'Bryan:

Dear Peter, I have checked my arithmetic and agree your figure below is correct.

Apologies for my incorrect addition (back to primary school for me!)

542 On 7 July 2016, Symons sent Trimbos an extract of the draft opinion of counsel in support of the settlement approval dealing with the question of legal costs 'for information'. The draft, which was circulated prior to Trimbos having issued a version of his report to AFP and the Lawyer Parties, relevantly stated:

It is the plaintiff's submission, supported by the expert costs consultant's report exhibited to the Affidavit of Peter Trimbos dated 8 July 2016, that: 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 multitude 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... The solicitors and counsel engaged by the plaintiff have been engaged on their usual terms... All legal costs have been incurred in respect of the conduct of this proceeding on behalf of group members...

The Court should find reassurance as to the reasonableness of the costs from the expert costs consultant's report... While Mr Trimbos' opinion does not displace the Court's own assessment of whether the fees and disbursements are reasonable, Mr Trimbos' opinion is of particular relevance in considering the following matters stated by J Forrest J in Downie at [181], (drawing upon statements of Gordon J in Modtech and Osborn JA in Matthews), which it is necessary for the Court to consider...

We are not in a position to do more than adopt Mr Trimbos' opinion that the costs incurred are reasonable, the work was undertaken efficiently and appropriately, and that the charges of the plaintiff's solicitor and counsel were reasonable and appropriate for practitioners of their standing... Nonetheless, it is for the Court to decide if it is satisfied that Mr Trimbos' opinion is correct and should be adopted.

543 On 8 July 2016, four days after he was briefed, Trimbos provided Mark Elliott, O'Bryan and Symons with a draft of the First Trimbos Report, seeking their comment before finalising it. Trimbos ignored his instructions to opine on the apportionment of the costs between claims against the settling defendants and the claims against Trust Co. On receipt of the report, Mark Elliott separately emailed O'Bryan and Symons:

Mark Elliott:

Looks ok to me

He makes no comment about the 75/25 split –we said tell us if you diasgaree, is silence ok?

O'Bryan:

I have asked him to express an "I do not disagree with the split" opinion, which he is prepared to do.

Symons:

Is 75:25 the agreed number? I think in our opinion [confidential counsel's opinion in support of approval] it is at present 70:30

Mark Elliott:

Yes, we need 75:25 for the maths to work

Please change your opinion

544 Shortly afterwards, Trimbos replied in the earlier email chain proposing to amend his report to state that he was not able to either agree or disagree with the 75% assumption, unless he reviewed not only the court documents but also the plaintiff's solicitors' file and documents discovered by all parties. O'Bryan responded

with a suggested alteration to the proposed amendment, seeking Trimbos's confirmation that it accurately expressed his opinion:

Thanks, Peter.

I have corrected a few typos in the attached version and slightly altered the language of the final paras.

Please let me know if this accurately expresses your opinion.

If not, we should delete this section.

Thanks for your assistance.

545 In substance, O'Bryan's proposed amendments suggested that Trimbos could not confirm the accuracy of the 75% assumption unless he reviewed materials as he suggested, but the materials were voluminous. Significantly, the amendments provided that Trimbos was, however, able to say that, based upon the summaries of the costs and disbursements which he had reviewed, he did not disagree with the 75% assumption.

546 Trimbos responded:

Thanks Norman,

I agree with your amendments.

Mark, I should have the sworn affidavit ready to be collected by 12pm. How do you want to arrange collection.

Mark Elliott replied:

Thanks Peter

Can you please courier it to Norman

Add it to you fee

547 The First Trimbos Report was filed later that day. In addition to the paragraphs dealing with 'the 75% assumption', which were included as amended by O'Bryan, Trimbos's report concluded that every aspect of Mark Elliott's costs prior to the delivery of the Bolitho No 4 decision was, in his opinion, reasonable. His reasoning was a recitation of the claim, followed with an expression of conclusionary opinion based on his (unidentified) experience. In particular, it was unclear whether the experience on which he drew was gained in the Costs Court or in commercial litigation practice. I will not pause to critique the merits of the opinions expressed.

548 For example:

b. Considering emails and correspondence

It is reasonable for Mr Elliott to have spent on average 2 units of time reading each email. In my experience most emails are relatively short and do not require more than a unit of time to read but other emails can occupy much more than a unit of time as they may contain lengthy correspondence or have large attachments. On average, spending 2 units of time reading each email is in my opinion reasonable and hence spending 120 hours of time in total during the course of the group proceeding on the approximately 600 emails and correspondence received by Mr Elliott is in my opinion reasonable.

...

e. Attending Receivers' Hearings and Liquidators' Hearings in Supreme Court

It is reasonable in my opinion for a solicitor to spend up to eight hours per day at Receivers' Hearing or Liquidators' Hearing as this time allowance takes into account not only the time spent in the hearing but also the time spent preparing for the hearing and the time spent conferring with counsel prior to and after the hearing. It is reasonable in my opinion for Mr Elliott to have spent 80 hours at such hearings.

549 Trimbos accepted as reasonable Mark Elliott's estimate of time spent on reviewing discovered documents:

I am also instructed that 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. I address each of these aspects of Mr Elliott's work in respect of the discovered documents below.

550 Trimbos opined that it was reasonable for a practitioner to have expended 936 hours in total for considering these documents, and therefore it was reasonable for Mark Elliott to claim 780 hours in total. Trimbos accepted Mark Elliott's hourly rate as billed, and concluded it was reasonable for him to charge a total base fee of $702,000 (being $750 per hour x 936 hours). Once an uplift fee of 25% and GST was added, he found that a total of $965,250 was justified. Accordingly, he concluded that the claim of $797,500 (including GST) actually charged by Mark Elliott was a fair and reasonable amount.

551 Trimbos expressed these opinions from a lump sum invoice, without sighting any contemporaneous records or work product from Mark Elliott in support of his claims for costs, nor did he appear to ask for any such documentation. As will become apparent, having approved Mark Elliott's claims for 'perusing', 'scanning' and 'examining' the documents obtained by the Receivers and the SPRs, Trimbos later approved Symons' claims to have undertaken the same work in the Trust Co Settlement.

Second Trimbos Report

552 On 16 June 2016, the court appointed Mr David O'Callaghan QC as amicus curiae in the Partial Settlement approval application.

553 On 1 August 2016, Mr O'Callaghan QC submitted that the question of quantifying a reasonable funding commission for AFP required assessing the extent of the risk assumed by the funder, and in that regard:

> (a) the bulk of the evidence to be relied on by Mr Bolitho was prepared by the Banksia legal team for the purpose of the Banksia proceeding, rather than his own lawyers;
>
> (b) the First Trimbos Report suggested that many of the disbursements incurred by Mr Bolitho had not in fact been paid; and
>
> (c) there was no evidence that the Bolitho legal team had actually spent the time assessed by Mr Trimbos as reasonable.

554 Mr O'Callaghan QC was (appropriately) critical of the adequacy of the First Trimbos Report. In particular, he observed that Trimbos:

> (a) did not describe or summarise the content of any of the documents that he relied on;
>
> (b) nowhere identified with precision or in any sufficient detail the work actually performed that he said was reasonable; and
>
> (c) used a repetitive form of words as an apparent path of reasoning that begged more questions than it answered. Notably, the conclusion that a charge was fair and reasonable was

not reasoned to identify what Trimbos actually reviewed and, as a result, each of the opinions expressed could not be tested or evaluated, falling short of the type of detail required to enable the court to determine whether the fees were in fact fair and reasonable.

555 On 4 August 2016, the court heard the Partial Settlement approval application. In submitting that the Partial Settlement should be approved, O'Bryan submitted about AFP's support of the Bolitho proceeding (emphasis added):

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**.

556 This statement was, at best, misleading. O'Bryan sought to adduce further evidence from Trimbos concerning the reasonableness of the legal costs claimed in response to the matters raised by Mr O'Callaghan's submissions.

557 On 7 August 2016, Mark Elliott emailed O'Bryan (copying Symons) stating:

Spoke to Trimbos yesterday

He will do a further report by Thursday 18 August if we get him all he needs by next Friday

He has asked for a copy of the Dropbox index-MS please arrange

MS will assist me this week to do a 25 month summary of my role as solicitor using NHOB precedent

Trimbos suggested that we annex all solicitor and barrister work descriptions to his report-any objection?

Agreed to defer Frontier account as it relates to Trustco

For all hearings I attended, he will say costs are reasonable if my instructions to him are that I needed to attend to assess each witness, to see/hear each document tendered and to see their response to each tendered document, to take file notes and that Bolitho was aware of my need to attend and agreed.

I will provide to him a new list of disbursements incurred and I will let you know what junior barrister work details I am missing asap

Anything else?

558 On 12 August 2016, Symons sent Mark Elliott an email with the subject: 'revised (and hopefully final) cost docs'. In addition to a draft letter of instruction to Trimbos, Symons attached a document he had prepared called 'Elliott billing memoranda'. As foreshadowed, this document set out a schedule of purported attendances by Mark Elliott between July 2013 and December 2014, using O'Bryan's fee slips from that period as the precedent.

559 Later that day, Symons sent these documents to Trimbos (copying Mark Elliott):

Please see attached correspondence from Mark Elliott and appended documents.

560 The further letter of instruction restated the concerns raised by Mr O'Callaghan QC (they had already been brought to Trimbos's attention), before relevantly stating:

Please note the following additional instructions for the purpose of preparing the supplementary report:

...

(c) during the period in which I acted as solicitor for 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; and

(d) 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.

561 On 18 August 2016, Trimbos finalised the Second Trimbos Report, and a copy was filed with the court. The Second Trimbos Report sought to address the amicus curiae's submissions, and included an annexure of copies of memoranda of work performed by Mark Elliott, about which he stated:

I have reviewed the description of work undertaken and the time spent on each task by Mr Elliott as contained in his memoranda. I have also reviewed the court documents to evaluate the reasonableness of the time spent and fees claimed by Mr Elliott on the group proceeding. I refer to and rely upon paragraphs 23 to 40 of my Report and repeat that in my opinion the total fees of $797,500 (GST inclusive) actually charged by Mr Elliott is a fair and reasonable amount.

562 Trimbos addressed the particular example in the amicus's submissions of Mark Elliott's attendances at the Receivers' public examination hearings, but failed to offer any considered reasoning and avoided the real issue:

> (a) He said that it was not practical nor feasible for his report to address every individual item of work undertaken by Mark Elliott on behalf of the plaintiff.
>
> (b) Trimbos noted that he was instructed by Mark Elliott that his attendances at the Receivers' hearings was with the plaintiff's consent.
>
> (c) He opined that it was reasonable for Mark Elliott to attend these hearings but even if it were not reasonable, Mark Elliott would be entitled to be paid for his attendances on the basis of the plaintiff's approval.

563 An unqualified opinion, based on unverified instructions from Mark Elliott — who had a vested interest in the approval of his fees — with no involvement from the 'independent' solicitor required by the Bolitho No 4 decision, falls well short of compliance with the Expert Code of Conduct.

564 On 26 August 2016, the court approved the Partial Settlement and, as the court's reasons show, it relied on both of Trimbos's reports.[62]

565 I make two observations about the events that followed Mr O'Callaghan's submissions.

566 First, Symons created evidence for the purpose of demonstrating that the legal costs claimed were reasonable, when he manufactured billing memoranda to justify Mark Elliott's fees. That document was then used as if it were a contemporaneous record. The Lawyer Parties never explained how it was created, despite Mark Elliott, O'Bryan and Symons knowing that Mr O'Callaghan QC had criticised the lack of evidence. This was grossly improper because it led to the court and the amicus being misled.

567 Second, that Trimbos was not astute to this deception points to his lack of objective enquiry into reviewing the fees of Mark Elliott. His methodology was inadequate and his reporting of it failed to warn the court of the deficiencies in his instructions and his approach to his task using those instructions. It seems he was persuaded to advocate for AFP. A comparison of Mr Trimbos's report in the Downer proceeding with the First Trimbos Report, shows that Trimbos used his report in the Downer proceeding as a template, deploying a formulaic methodology to justify the fees charged by reference to the volume of the discovery. That formula

enabled him to generate the First Trimbos Report in a short space of time, approving legal fees of $3.6 million only 4 days after he was formally retained.

568 Against that background I turn to his role in preparing the Third Trimbos Report relied on for the approval of the Trust Co Settlement.

I.2. Third Trimbos Report

569 Mark Elliott negotiated two significant arrangements that were critical for him to secure the approval of the Trust Co Settlement.

570 First, AFP/Mark Elliott engaged a compliant cost consultant who would seem independent. That costs consultant would be Trimbos, whom he knew from past experience was suited to his purpose.

571 Second, Mark Elliott ensured that the mechanics of the settlement would preclude or discourage scrutiny of Trimbos's report. He thought it critical that Trimbos was subject to minimum oversight. This was achieved in two ways, as was detailed in section G. When negotiating the Settlement Deed, Mark Elliott insisted that Trimbos's report be confidential, thus eliminating scrutiny of its content and reasoning. Mark Elliott ensured that the SPRs and Trust Co were contractually obliged to support AFP's claim for legal costs.

The letter of instruction

572 On 21 November 2017, Mark Elliott informed Trimbos of AFP's intention to engage him again and of the tight timeframe in which he was required to prepare his report. Trimbos confirmed his availability.

573 On 24 November 2017, Mark Elliott emailed Trimbos (copied to Alex Elliott) a letter of instruction on AFP's letterhead, together with a copy of the Banksia Expenses Spreadsheet.

Preparing Trimbos's brief

574 On 4 December 2017, Mark Elliott emailed Trimbos (copied to Alex Elliott) providing him with a copy of an executed counterpart of the Settlement Deed and a revised draft of the Banksia Expenses Spreadsheet, which had been prepared with Alex Elliott's assistance. As I explained in section H, counsel had not issued their invoices at this stage. Mark Elliott informed Trimbos that a folder of most of the invoices referred to in the spreadsheet would shortly be provided.

575 On 8 December 2017, Symons was settling the form of directions for filing and serving material for the approval application with Mark Elliott, Alex Elliott and Zita and discussing getting materials to Trimbos for preparation of his report. Alex Elliott knew that AFP was pressing O'Bryan, Symons, and Zita for their invoices, for which Trimbos was waiting. On 11 December 2017, Mark Elliott told Symons (copying Alex Elliott) that he would brief Trimbos separately, and requested that Symons give Trimbos access to all of the documents reviewed in the case. Separately, Mark Elliott emailed Trimbos a copy of O'Bryan's 'summary table of fees', copying Alex Elliott.

576 Later that afternoon, Symons emailed Trimbos:

The bulk of the discovered documents in the case are available from this dropbox link: ...

Before you download it, I note that the folder contains 27 gigabytes of documents and, even with the compression of many documents, just under 20,000 files.

577 Later that day, Mark Elliott emailed Trimbos (copying Alex Elliott) foreshadowing the delivery of a file of invoices and background material that supported the Banksia Expenses Spreadsheet, including the Lawyer Parties' invoices/fee slips. Mark Elliott told Trimbos that his report would be a confidential exhibit to his

affidavit and that debenture holders would only be permitted to peruse the affidavit.

578 On 12 December 2017, Portfolio Law emailed directly to Alex Elliott a lump sum tax invoice dated 8 December 2017, claiming costs of $377,795 (plus GST) for:

Professional costs for services rendered in respect of this matter including all necessary attendances as per the excel spreadsheets for the period 1 August 2016 to 8 December 2017.

579 Alex Elliott forwarded the email to Mark Elliott. He also emailed Trimbos that day to inform him a file of invoices and background material would be couriered to him. Alex Elliott delivered that file to Trimbos on 13 December 2017, after receiving all of the invoices from the Lawyer Parties.

Trimbos's requests for information

580 Following receipt of these materials, Trimbos requested from the Lawyer Parties the documents referred to in their costs documentation:

(a) On 15 December 2017, Trimbos sought from Mark Elliott and Alex Elliott itemised details supporting invoices from Mr Crow;

(b) On 15 December 2017, apparently in response to a phone call, Symons emailed Trimbos (copying Zita, Mark Elliott, O'Bryan and Alex Elliott) providing copies of the pleadings filed by Mr Bolitho, Banksia and Trust Co, and a list of all documents stored on the Dropbox folder to which he had previously been provided access.

(c) On 18 December 2017, Trimbos requested that the Lawyer Parties provide him with copies of their costs agreements.

(d) On 19 December 2017, Trimbos asked Zita to provide a dot point summary of his professional experience.

(e) On 19 December 2017, Trimbos asked Symons to provide several documents that he identified, including pleadings, correspondence, proposed orders and an opinion. He further requested that Symons send him copies of indexes of documents discovered by Trust Co.

Deploying the Third Trimbos Report in the approval application

581 On 2 January 2018, Trimbos provided O'Bryan with an update on his report:

My understanding is that my affidavit/report must be filed by this Friday.

In relation to providing you with a draft of my report, I'm aiming to send it to you (and Michael, Mark and Tony Zita) by this evening or Wednesday morning at the latest. I am hoping to swear it up and give to Tony on Thursday, as I am away in Sydney on Friday to Sunday and on annual leave from Monday 8 January 2018.

Do you have enough time to review my draft (about 35 pages) if I get it to you this evening or tomorrow morning at the latest?

O'Bryan replied:

Yes indeed, Peter. Whenever you are ready.

582 On 3 January 2018, Trimbos provided a draft of the Third Trimbos Report by email to O'Bryan, Zita, Mark Elliott and Alex Elliott. Despite each of the recipients knowing that it contained misleading information, nobody responded to Trimbos's request for comment, except for O'Bryan:

Your report is very comprehensive and looks excellent to me ...

I will chase up McCann's invoice (just as I chased up its payment for him in 2016). I know for certain that the invoice was received and paid.

583 Zita and Alex Elliott each said, in evidence, that they may have 'skimmed' the draft report. Zita said he did not read the letter or the annexures containing the documents relied on. Alex Elliott did so for the purposes of proof-reading, but he did not make any substantive comment or do anything in particular with the draft.

584 On 4 January 2018, the Third Trimbos Report was filed as a confidential exhibit to an affidavit of Trimbos affirmed that day. In the body of his affidavit, Trimbos expressed the summary of his opinion to be that:

> (a) the plaintiff's solicitors (Portfolio Law) had incurred fair and reasonable legal costs in the Bolitho proceeding of $3,467,179.55 (GST inclusive), comprising:
>
> (i) professional fees in the sum of $387,929.30; and
>
> (ii) disbursements in the sum of $3,079,250.25;
>
> (b) the costs the plaintiff was likely to incur in finalising the proceeding and distributing the funds was the sum of $755,056.44 (GST inclusive), comprising:
>
> (iii) professional fees in the sum of $400,796.00; and
>
> (iv) disbursements in the sum of $354,260.44.
>
> (c) the costs assessed in the Second Trimbos Report were fairly and reasonably incurred by the plaintiff, being $3,575,114.82 at that time; and
>
> (d) in the Partial Settlement, the court had approved the sum of $2.55 million to be paid to AFP by way of reimbursement for the costs it had incurred in relation to the settling defendants at that time, leaving a difference of $1,025,114.82 to be recovered in respect of costs incurred on the Trust Co claims.

585 As will later become clear, counsel relied significantly on Trimbos's report to justify AFP's claims for legal costs and funding commission, with multiple references to it in their confidential opinion filed in support of the Trust Co Settlement.

586 The confidential exhibit containing the Third Trimbos Report was not available to the SPRs, the Banksia legal team, Mr Bolitho or group members.

I.3. Procuring misleading evidence from Trimbos

Misleading instructions

587 In the letter of instruction, Mark Elliott made significant statements, including, in respect of the Partial Settlement, that:

> (a) AFP had incurred and paid all of the legal costs and disbursements in the Bolitho proceeding at the point where it settled with various defendants in March 2016;
>
> (b) the court's approval of $2.55 million from the settlement sum was a reimbursement for approximately 70% of the legal costs and disbursements paid by AFP up to 30 June 2016 that were estimated to have been attributable to the settling defendants, which Trimbos had

previously assessed to be fair and reasonable; and

(c) AFP sought to recover the remaining 30% from the Trust Co Settlement sum ($1,025,115) and asked Trimbos to confirm that assumption/calculation.

588 Trimbos was instructed:

[T]o give your independent opinion as a legal costs expert on whether the legal costs and disbursements incurred and/or to be incurred by Mr Bolitho from 1 July 2016 to the court approval date (scheduled for 20 December 2017) and paid or to be paid on his behalf by [AFP] are fair and reasonable in respect of the legal work and other costs associated with the group proceeding against the third defendant Trustco during this period.

The letter identified that the legal costs and disbursements incurred by Mr Bolitho and paid by AFP from 1 July 2016 to the date of the letter included:

• Counsels fees – Norman O'Bryan SC- $2,306,500 plus GST

• Counsels fees - Michael Symons $600,000 plus GST

• Solicitors Fees - Portfolio Law $377,000 plus GST

• Registry Services - Portfolio Law $305,340 plus GST

• Disbursements - (as per schedule attached) $339,883 plus GST

Total $4,318,205 (including GST)

589 Contrary to these instruction, at that time:

(a) it was false to represent that AFP had incurred and paid all of the legal costs and disbursements when the Partial Settlement approval application was heard. AFP admitted that substantially all of the legal costs and disbursements that AFP was seeking to recover had not been paid at that time;

(b) the percentage of the legal costs attributed to the claims against the settling defendants when the Partial Settlement approval application was heard was 75%, not 70%;

(c) O'Bryan and Zita had not issued any invoices, nor had they been paid for the relevant period; and

(d) Symons had only issued 3 invoices in the relevant period, for a total of $35,000 (which had been paid by AFP), approximately 5% of the amount he was said to have charged and been paid.

590 In evidence, Alex Elliott agreed that the letter of instructions to Trimbos contained numerous incorrect statements. When he was asked why he did not raise those issues with his father, he variously said that:

(a) he had no recollection of reading the letter, though he conceded he 'would have skimmed through it';

(b) he did not know 'what had been paid, what hadn't been paid', though he was managing the Banksia Expenses Spreadsheet, which clearly identified this information;

(c) he 'didn't appreciate the significance that it was a misleading representation to Trimbos',

though he agreed it was important for accurate information to be given to an expert witness whose report would be relied on by the court; and,

(d) he might have thought that the letter only sought to indicate to Trimbos that the disbursements were paid directly by AFP, rather than Portfolio Law, though he later resiled from that position, stating 'I don't recall at the time thinking anything of that sentence'.

591 Alex Elliott was, again, dissembling and I reject his denial in substance that he was aware that the instructions were false and misleading. Mark Elliott actively involved Alex Elliott in the preparation of Trimbos's brief, including co-ordinating counsel's fee documentation.

592 Between 18 and 20 November 2017, Alex Elliott participated in discussions over email and in-person between Mark Elliott and Mr De Bono concerning AFP's FY17 accounts, which were then not yet finalised. As AFP intended to recover legal costs it purportedly expended prior to the Partial Settlement, it was necessary for its accounts (which were publicly available) to reflect the expenditure it intended to recover. From those discussions, I am satisfied that Alex Elliott knew (if he did not already know) that the FY17 accounts did not recognise any invoices issued by the Lawyer Parties between July 2016 and June 2017, following the Partial Settlement.

593 At this time, Alex Elliott was also involved, together with his brother, Max Elliott, in finalising the Banksia Expenses Spreadsheet, which would be used to instruct Trimbos. On 24 November 2017, and at the instruction of his father, he reduced the amount recorded for O'Bryan's fees from $2.56 million to $1.96 million and changed the date to commence from 1 July 2016 to 1 June 2016. Alex Elliott claimed that he had no reason to doubt the legitimacy of the amounts his father had provided him, but I cannot accept that statement. Senior counsel's fees decreased by $600,000 in the three days since originally being entered into the 21 November 2017 version of the Banksia Expenses Spreadsheet, which plainly suggested to a prudent solicitor, and to Alex Elliott had he not known already, that further inquiry about the legitimacy of the fee invoicing process was warranted.

594 On 29 November 2017, Mr De Bono copied Alex Elliott into an email to Mark Elliott, forwarding an enquiry from the auditor about the 'no win no fee' agreements with O'Bryan and Symons that were in place the previous year. The auditor sought confirmation that those arrangements remained in place. Mr De Bono commented:

I expect the arrangements stay in place as was last year.

Mark Elliott replied:

Confirmed.

595 Alex Elliott claimed to have no recollection of the email, implausibly contending that he didn't think O'Bryan or Symons were engaged on a no win no fee arrangement. I was persuaded that he was, again, dissembling.

596 I am satisfied Alex Elliott was monitoring these communications as Mark Elliott had tasked him to maintain the spreadsheet and prepare a tabulated, hard copy folder of invoices to brief to Trimbos. He knew which invoices were missing and when, and in what circumstances, they were received.

Misleading invoices, fee slips and costs agreements

597 Trimbos's brief contained O'Bryan and Symons' contrived costs agreements, invoices and fee slips explained in section H of these reasons. By briefing Trimbos with that material, AFP induced him into the false

belief that O'Bryan and Symons:

(a) had entered into enforceable cost agreements;

(b) made proper cost disclosures; and

(c) issued invoices billing for work legitimately performed and contemporaneously recorded.

In relying on those falsified documents, the Third Trimbos Report was misleading.

598 AFP/Mark Elliott and O'Bryan's deliberate intention to mislead Trimbos was illustrated by this email exchange on 1 January 2018, in which they joked about their deception, following Trimbos having identified an apparent duplicate entry in O'Bryan's January 2017 invoice:

O'Bryan to Trimbos (blind copying Mark Elliott):

[AFP] 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.

Mark Elliott to O'Bryan:

Thanks Norm. Just send the cheque when able!

O'Bryan:

It's in the mail... Happy new year to you & yours. Are you at the beach?

Mark Elliott:

I will check the box daily. However things do go missing...

599 In truth, O'Bryan's fees had not been paid and both he and Mark Elliott fully appreciated the benefit to them and AFP of Trimbos thinking otherwise, as he clearly did, contrary to the facts.

600 Zita acknowledged that in respect of Portfolio Law's fees, the Third Trimbos Report was misleading in that it:

(a) stated that Trimbos has been advised by Zita that Portfolio Law charged for the work pursuant to its costs agreement;

(b) relied on the Portfolio Law Spreadsheet, and in particular, proceeded on the basis of an assumption that the spreadsheet contained reliable records of the work undertaken and time spent by Zita and Mr Mizzi;

(c) did not disclose that Portfolio Law had not calculated and charged their fees in accordance with its cost agreement, in that Portfolio Law had charged according to the hourly rates specified in that cost agreement but without making any contemporaneous records of the time actually spent working on the matter; and

(d) did not address the fact that Portfolio Law had previously informed Trimbos that, in March 2015, the firm had agreed to charge according to the Legal Practitioner Remuneration Order, rather than on the basis of hourly rates as provided under its costs agreement.

601 When cross examined, Zita conceded that the Portfolio Law Spreadsheet was at best a speculative reconstruction and that he could not charge on the basis of the hourly rates specified in the costs agreement

without keeping proper contemporaneous records. He conceded that he never informed Mr Bolitho that he was proposing to depart from that costs agreement, and that he did not send his invoice or the Third Trimbos Report to Mr Bolitho.

Misleading information about the length of trial

602 On 29 December 2017, O'Bryan and Trimbos exchanged emails in relation to the anticipated length of the trial:

Trimbos:

When was the trial scheduled/listed to begin and for how many sitting days was it initially fixed for? How many days in total was it expected to run for?

...

Tony Zita has forwarded the trial plan to me which shows that the trial was listed to commence in early February 2018 and run for about 50 days.

O'Bryan:

Correct, Peter. We were to sit 50 Days with 4 days each week over about 13 weeks (3.3 months).

I reckon that was light on because there were 15 separate parties, all of whom were calling lay and expert evidence. I would have cross-examined Trust Co's witnesses for at least 25 days by myself!

Trimbos:

How long do you estimate the trial may have taken?

O'Bryan:

Assuming no settlements (i.e. all principal and third party claims and cross-claims had run their full course), it would have run at least 120 sitting days, Peter.

So 24 x 5 day sitting weeks or 30 x 4 day sitting weeks. Personally, I had ruled a line through my diary until September 2018 entitled 'Banksia trial'.

In fact, it's still there, in case the settlements don't get approved.

O'Bryan forwarded his exchange with Trimbos to Mark Elliott, Symons and Zita with the comment 'FYI'.

603 This information was false and misleading, as was admitted by AFP, Alex Elliott and Zita. In February 2017, the proceedings were set down for trial on an estimate of 11 weeks (44 sitting days). In September 2017, counsel for the parties in the Bolitho proceeding and the Banksia proceeding conferred to develop a trial plan. The agreed estimate for the trial under that plan was 50 days.

604 O'Bryan had no basis to tell Trimbos that he believed the proper estimate was 120 days. Trimbos arbitrarily fixed on 100 days. The consequence was that Trimbos concluded that O'Bryan's artifice of 'trial preparation' fees was reasonable. O'Bryan's motivation was clear: his claim for 65 days' preparation time appeared more reasonable if the trial estimate was doubled from 50 to 100 days. The Banksia legal team could not correct this assumption because Trimbos's report was kept from them.

605 Symons and Zita sent the trial plan to Trimbos but did not challenge the revised estimate given by O'Bryan when it appeared in the draft report. Zita conceded that he should have been more vigilant. As for Mark Elliott/AFP, O'Bryan and Symons, each understood that an extended trial estimate supported the reasonableness of the costs claim, which in turn supported the claimed funding commission. Their conduct

caused Trimbos to rely on false information about the length of trial, which contributed to the Third Trimbos Report misleading the court on the approval application.

Misleading information about the Banksia proceedings

606 AFP and Alex Elliott (but not Zita) admitted that the Third Trimbos Report was misleading because it did not reference the Banksia proceedings. 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 was he instructed to consider whether, having regard to that work, the costs claimed by AFP and Mr Bolitho were reasonable.

607 This omission from Trimbos's instructions assisted AFP/Mark Elliott and the Lawyer Parties. A consistent thread of Trimbos's reasoning was that the costs were reasonable, having regard to the nature, scale and complexity of the Bolitho proceeding. The nature, scale and complexity of the Bolitho proceeding was quite different from the image projected by the Third Trimbos Report, once the participation of the Banksia legal team was acknowledged. Further, given the source of the discovery and the overlap in the two sets of proceedings, the issue of duplication of costs was not confined to examining the work of the Bolitho legal team alone, as Trimbos did. The question for an expert costs consultant on the approval application necessarily required assessment of the possibility of duplication as between the respective legal teams acting in the Bolitho and Banksia proceedings.

608 I am satisfied to the requisite standard that the omission by AFP/Mark Elliott, and the Lawyer Parties, of any reference to the Banksia proceedings in the instructions to Trimbos was deliberate. It was quite inadequate to do no more than include the pleadings in the documents briefed. Mark Elliott intended to conceal the true facts from the court on the settlement approval by focussing Trimbos's opinion solely on the position of AFP and the Bolitho proceeding. It is probable that he anticipated that Trimbos would not ask sufficient questions in the time allowed for him to complete the report. The result that Mark Elliott intended was that the court receive a report that expressed an opinion focussed solely on the costs incurred by Mr Bolitho, fully understanding that the interrelationship between the proceedings precluded assessment of the reasonableness of the costs unless they were jointly assessed.

609 The most probable inference open on the evidence was that each of the Lawyer Parties and Alex Elliott knew, from the content of the report, that AFP, through Mr Bolitho, made the following submission to the court: Trimbos had assessed the nature, scale and complexity of the Bolitho proceeding without reference to the Banksia proceedings. They each understood, and intended, that this omission would render more probable the court's approval of the claim for their costs, and that such approval supported the claimed funding commission.

610 I am satisfied, for reasons expressed in section Q, that AFP/Mark Elliott and the Lawyer Parties knew the Banksia legal team had undertaken and paid for substantially all the legal work necessary to advance both proceedings for trial. They sought to persuade the court that the preparation and filing of the evidence for both proceedings was a joint exercise.

611 Assessing the reasonableness of the costs claimed by the Bolitho legal team was necessarily misleading in the circumstances, notwithstanding that the judge knew of the Banksia proceedings and of the involvement of another legal team.

I.4. Deficiencies in Third Trimbos Report

612 In addition to the conduct of AFP, Mark Elliott, Alex Elliott and the Lawyer Parties, Trimbos himself caused the misleading Third Trimbos Report to be filed and used on the application resulting in the court being led into error. To examine his conduct, it is convenient to start by noting several aspects of the Third Trimbos

Report.

613 Trimbos stated that he understood and agreed to be bound by the Expert Code of Conduct. In so doing, he represented to the court that:

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

614 He noted that:

> (a) the facts, matters and assumptions upon which the report proceeds were detailed in the body of his report;
>
> (b) there were no questions outside his expertise; and
>
> (c) his report did not contain any qualifications that rendered any part incomplete or inaccurate, or any opinion that was not concluded due to insufficient information.

615 For the following reasons, these representations were false and misleading.

Trimbos was not independent of AFP

616 I am satisfied that Trimbos was not independent of AFP. To the contrary, he was expected to, and did, advocate for AFP's claim for legal fees to be approved.

617 First, Trimbos had been retained by AFP/Mark Elliott to prepare expert evidence concerning costs in group proceedings (in which O'Bryan and Symons were also briefed as counsel) on six other occasions,[63] prior to the Third Trimbos Report being filed. He made no disclosure to the court in his report about his previous engagements, an omission that was admitted by AFP, Alex Elliott and Zita to have rendered the Third Trimbos Report misleading.

618 I reject Trimbos's assertion in his affidavit that his prior work for Mark Elliott did not compromise his independence. It was not for him to make that assessment. It was a question for the court. In failing to disclose previous engagements involving Mark Elliott, it was impossible for the court to properly consider Trimbos's independence.

619 Importantly, in addition to his impartiality, it was critical for the court to be able to assess Trimbos's independence in the context of his collective experience as an expert costs lawyer. Was it sufficiently varied,

such that his opinion would not be affected by a disproportionate number of engagements for Mark Elliott, relative to other clients?

620 Contrary to the common practice of many experts, Trimbos did not identify previous retainers as an expert witness, by a curriculum vitae or similar document. Instead, he gave a broad description of his experience in the body of the report:

My practice comprises of ... preparing expert reports for use in proceedings relating to costs, including reports in support of and in opposition to applications for security for costs. I have previously prepared similar reports to this report as to the fairness and reasonableness of legal costs incurred in group proceedings... My practice in legal costs extends to both State and Commonwealth jurisdictions and includes Appeals. The majority of matters which I have costed have involved commercial litigation. I am therefore familiar with the matters necessary for preparation of commercial proceedings in this Honourable Court (including class actions) and of the nature of group proceedings.

621 This description implied that Trimbos's background was more experienced and diverse than was actually the case. In his affidavit, he asserted that his work for Mark Elliott did not form a large part of his practice, Trimbos identified seven other commercial proceedings in which he had done cost consulting work since 2013, before adding 'I also did a lot of solicitor client costs disputes'. Trimbos did not specify which of those proceedings (if any) were group proceedings and whether his involvement in them preceded the Third Trimbos Report. There was no evidence that he had been retained in respect of group proceedings other than by, or for, Mark Elliott.

622 It is important to bear in mind, when considering the following findings, that Mark Elliott told Trimbos that his report would be confidential. Knowing that it would not be subject to scrutiny necessarily brought his duty to the court into sharp focus.

623 Second, irrespective of whether Trimbos's methodology in the Third Trimbos Report was consistent with his approach in other matters, I am satisfied that he did not properly understand or discharge his duty to assist the court impartially. Rather, he discharged his role and assisted AFP by producing reports that were favourable to it, without proper independent objective assessment of the facts he was asked to assume.

624 Trimbos's partiality is best demonstrated by his dual role as 'independent' expert witness, on one hand, and informal advisor, on the other. On 23 November 2017, following Mark Elliott's separate exchange with O'Bryan concerning the possibility of charging a cancellation fee, Mark Elliott had the following email discussion (copied to Alex Elliott) with Trimbos:

Mark Elliott:

I have encountered 2 issues that I need your preliminary advice on please

Senior Counsel was booked for the 100 day trial of this matter starting Feb 12 2018 onwards

He has asked for a cancellation fee if the matter settles

I have negotiated him down to $200K

Junior counsel also wants $100K

I will pay them both

Do you think that that is 'fair and reasonable' and able to be included in the court costs award?

Secondly, Both senior and junior counsel want fees on account for December 2017.Can you accept an estimate of their fees (with proper description included) and opine on if it is "fair and reasonable" for me to

have paid them albeit ,in advance?

Please consider and revert asap so that I can finalise their invoices.

Trimbos:

In relation to a cancellation fee for counsel, what are the rates (hourly/daily) being charged by senior and junior counsel?

In relation to taking into account future work to be undertaken by counsel in December, as long as the description of the anticipated work is sufficient to allow me to understand what they are going to do and how much time they will be spending on each task, I do not think that it will be a problem for the purposes of my report.

Mark Elliott:

SC is $1,250 per hour and $12,500 per day (since 1/7/2017) and was $1,100 per hour and $11,000 per day from 1/7/2016 until then

JC is $450 per hour and $4,500 per day

625 Trimbos and Mark Elliott subsequently spoke about the proposed cancellation fee, in which Mark Elliott stated that counsel had blocked off their diaries for a few months. Trimbos claimed that while he said a cancellation fee could be charged in-principle, he had not yet formed a view on whether the quantum of that fee would be reasonable. The basis for this opinion was not revealed and I am not aware that cancellation fees are acknowledged in rulings of the Costs Court. I reject that evidence as a false reconstruction of the conversation. Mark Elliott sought from, and required, Trimbos's approval of a cancellation fee in a specific amount, as it informed whether the quantum of O'Bryan's invoices could reach Mark Elliott's fee target. Mark Elliott confirmed in an email to O'Bryan the following day that a cancellation fee of $200,000 was 'OK' for that purpose. I am satisfied that if Trimbos had indicated his approval of a cancellation fee at all, it was for a precise figure.

626 Trimbos's provision of 'kerbside advice' in this manner tainted his independence. He could not provide impartial evidence on the issues to which he had been asked to opine on, when he had separately advised AFP on what would and wouldn't fall within his view of fair and reasonable legal costs in that same proceeding. Under the Expert Code of Conduct, Trimbos was required to give primacy to his duty to the court. In acting as an advocate for AFP, he failed to do so. Further, he failed to identify these communications in his report as a source of instructions.

627 Had Trimbos informed the court that he was Mark Elliott's costs consultant of choice, and of the extent to which he provided his services to Mark Elliott entities, a proper assessment of his independence might have been open to the court.

No process of assessment by application of specialised knowledge

628 To properly express independent expert opinion on whether the costs incurred by AFP were fair and reasonable, Trimbos, to comply with the Expert Code of Conduct, had to undertake an objective process of independent assessment by applying his specialised knowledge in costs law. His opinion involved no such methodology.

629 In identifying his approach, Trimbos referred to and relied on a number of documents, which relevantly included:

(a) his letter of instruction;

(b) Portfolio Law's costs agreements, invoices and spreadsheets of work undertaken;

(c) counsel's fee slips and memoranda of fees; and

(d) documents discovered and produced upon subpoena, about which he stated:

> I did not review each of these documents as this would have been impractical given that there are almost 20,000 documents in the dropbox, but as I describe herein below, I sampled some of these documents to evaluate the reasonableness of the time taken by the plaintiff's solicitors and counsel to review same..

630 Next, Trimbos noted two previous authorities commenting on expert evidence from cost consultants. After referring to an extract of Sackville J's decision of *Courtney v Medtel Pty Ltd (No 5),*[64] he stated:

> I will also address in this report the reasonableness of the hourly rates charged in the costs agreements that are relevant to the fees charged by the plaintiff's solicitors, whether the fees charged have been calculated in accordance with the relevant costs agreement and whether significant costs have been inappropriately or unnecessarily incurred.

631 Under the heading 'My Approach and Explanation of the Basis of My Opinion', Trimbos opined on each of the Lawyer Parties' costs.

632 Starting with Portfolio Law, he noted that he had received the Portfolio Law Spreadsheet, which he observed 'predominantly list[s] the emails sent and received ... but also list[s] documents reviewed and attendances at hearings and on counsel'. Trimbos gave the following explanation for how he reviewed the Portfolio Law Spreadsheet:

I firstly reviewed all of the items of work in each spreadsheet. My review comprised of considering the description of the work that was undertaken and the amount of time undertaken on that item of work. I considered whether the work related to the group proceeding and whether the time claimed for the item of work was reasonable. I did not review ... every item of work contained in the spreadsheets as that would be impractical. However, I selected at random some emails and documents that I had access to as samples of the work undertaken by Portfolio Law and reviewed these documents to evaluate the reasonableness of the time claimed... I selected or sampled on average one letter or document per 2 pages of the spreadsheet.

633 At first blush, Trimbos's 'sampling' approach appeared an appropriate methodology for a large group proceeding. However, when reviewing how he applied it to individual attendances, Trimbos's approach was manifestly inadequate. Take the following attendance for Zita perusing a witness statement that was sampled by Trimbos:

By way of example, I have access by dropbox to the Witness Statement of Joseph Hayes dated 4 December 2015. The spreadsheet headed 'Perusals' shows that Portfolio Law has charged 2.5 hours for Mr Zita to peruse this witness statement. My review of this witness statement shows that it comprises of 141 paragraphs and is of 51 pages in length. In my opinion a claim of 2.5 hours to peruse this document is reasonable.

All Trimbos did was confirm the existence of the 51 page document referenced in Zita's work description and consider whether it could take two and a half hours to peruse it.

634 The assessment of the amount of time required to read a document was no more than Trimbos's subjective opinion. Trimbos did not articulate a reasoning process that assessed objectively whether Zita's charge for doing so was a fair and reasonable cost that ought to be borne by group members. He did not consider:

> (a) how the witness statement related to issues in the proceeding, to the statements of other witnesses and to documents. Was it self-contained or did it involve time-consuming cross-referencing?;
>
> (b) whether any work product was created by Zita in the course of reviewing the document evidencing that he had reviewed the document, and that it was reasonable for him to have done so;
>
> (c) what relevance the document had to the litigation, such that it was necessary for anybody to read it;
>
> (d) whether Zita's role in the litigation made it necessary for him to read the document; or
>
> (e) whether any other lawyer had charged for reading the document, and if so, whether it was necessary for Zita to have also charged for reading it.

635 Trimbos in his report did not display any objective assessment involving his specialised knowledge as a costs lawyer at all. Neither did he demonstrate the application of any knowledge or experience as a commercial litigator. After confirming the document existed and that the attendance charged was a reasonable amount of time for reading a document of that length, he simply accepted that it was a fair and reasonable cost in the Bolitho proceeding.

636 Another example from the Third Trimbos Report concerned Zita's charges for reviewing discovery:

[T]he spreadsheet headed 'Discovery' shows that Portfolio Law has charged 40.5 hours in total for the time taken by Zita to peruse the 21 volumes of the Court Book filed in the Supreme Court in relation to the ASIC examination of the officers and directors of the first... This equates to an average of 2 hours per volume of the Court Book. In my opinion it is reasonable for [Zita] to have spent 40.5 hours in total perusing the 21 volumes of the Court Book.

637 Again, Trimbos's analysis is limited to his subjective conclusion as to a reasonable amount of time for a person to review 21 folders of documents. His opinion involved no objective process of independent assessment, applying specialised knowledge, as to why it was necessary for Zita to review the Receivers' Court Book, what it contained, whether it was reasonable for Zita to have charged time for that task, and, relevantly, whether any other member of the Bolitho legal team had charged for the same work.

638 Trimbos's failure to undertake any assessment on this question meant that he did not identify duplicated charges for discovery review. As discussed in section H, Symons charged significant time for reviewing the Receivers' Court Book, as did Mark Elliott in his claim for fees from the Partial Settlement, which were approved by Trimbos as fair and reasonable.

639 Trimbos contended in his affidavit that:

[S]imply because [Mark Elliott] had reviewed certain documents, that does not mean that [Symons] should not review them. It can be reasonable for junior counsel to review the same documents, particularly if significant time has elapsed since those documents were first reviewed by the instructing solicitor.

640 The Contradictor submitted, and I accept, that Trimbos's explanation is not acceptable. When cross-examined, Trimbos conceded that duplicated work is prima facie unreasonable and that for numerous lawyers to review the same set of documents was an 'obvious case of unreasonable work'. Mark Elliott, Symons and Zita each used the same task — discovery review — to falsely inflate the fees being claimed against the settlement funds. Trimbos could not see that.

641 Trimbos's failings extended to interrogating the work of counsel. In respect of the omnibus attendance record that O'Bryan inserted into his fee slips for 65 days of work, Trimbos opined in his report that this charge might appear to be prima facie unreasonable, but the charge was reasonable because Trimbos relied on O'Bryan's misrepresentation about the length of the trial. He did not ask to see any work product to support the fees, and none emerged during the remitter trial.

642 Trimbos conceded that his 'sampling' approach was not appropriate in circumstances where he could have, but did not, ask to see any evidence of work product. Had he done so, it would have become immediately obvious that no such evidence existed. Trimbos sampled the records of counsel superficially. He did not thoroughly investigate the samples he chose. I reject Trimbos's assertion in his affidavit that his sampling process was adequate or that he 'did like to choose the bigger items'. His failure to identify those attendance records, which appeared 65 times in identical terms, for further investigation highlights the deficiency in his approach.

643 Trimbos also failed to compare the work of Ms Jacobson and the work claimed by Symons. He concluded that there was no significant duplication between the work of the two junior counsel, and stated:

My review of Symons' memoranda of fees shows that during the period of time Ms Jacobson was briefed he was occupied on almost every day for most of the day on preparing for the mediation and trial and that he did not have sufficient capacity to undertake the work that Ms Jacobson was doing.

644 Trimbos's conclusion ignored the fact that Symons had charged significant fees for reviewing discovery and working on the court book throughout 2017, before Ms Jacobson was briefed. The absence of any objective process of assessment is clearly apparent; Trimbos did not examine the fee slips or the underlying work product, either at all or at least properly, to make this assertion.

645 In this context, I find that:

(a) Trimbos sought no evidence of any work product from Mark Elliott, Symons or Zita to substantiate their fees charged for the same work.

(b) Instead, Trimbos adopted a formulaic approach to quantify the time they might have reasonably spent reading the discovery, without satisfying himself that the time was both actually spent by each of them on the task, and if so, that it was reasonably spent. This approach involved neither an objective process of independent assessment nor the application of specialised knowledge.

(c) Trimbos did not identify any duplicated work or charges, which an objective analysis of the invoices would have revealed to be the case for discovery.

(d) Had he done so, he ought to have found that these costs were not fair and reasonable, as:

(i) there was no satisfactory evidence that Mark Elliott, Symons or Zita undertook any discovery review work of significance. Such work was done by the Banksia legal team and Ms Jacobson; and

(ii) time reasonably spent by the second reviewer should ordinarily be limited to only those documents that the first reviewer considered warranted perusal by counsel. His opinion that Zita and Symons' fees were reasonable cannot be accepted as transparently reasoned from his expertise.

646 Trimbos's evidence about his usual practice as a cost consultant demonstrated his failure to apply his specialised knowledge based on his tertiary qualifications in law and/or 10 years' experience (at the time of his third report). Importantly, his evidence was that this specialised knowledge and experience was limited. He was not an experienced commercial litigation solicitor in complex matters or experienced in the work of barristers, except through the limited prism of costs assessment. His process for assessing whether costs in a group proceeding were fair and reasonable was not the same process that he would undertake for a taxation or an assessment, but there were 'similarities', particularly as the question of 'reasonableness' was in issue in all three.

647 Trimbos drew a distinction between a 'taxation' and an 'assessment' in his evidence. He described his methodology on a taxation in the following way:

I review the entire file to prepare a detailed bill of costs. The bill of costs sets out an itemised list of costs by reference to each task in the matter. The items in the bill are listed in chronological order and include a short description of the task undertaken and the appropriate amount for each task [either on an *inter partes* or solicitor/client basis].

If costs are calculated on a [solicitor/client] basis, I review the entire file against the invoices/time records. After the bill of costs is prepared, the parties then seek to resolve the matter by negotiating the amounts claimed in the bill of costs. If resolution fails, the taxation proceeds to the Costs Court.

The Costs Court will then go through each disputed item in the bill of costs and make a determination as to what sum will be allowed, based upon the basis of costs to be applied and the scale of costs in question or hourly rates.

648 For an assessment, Trimbos stated that he would:

[S]till go through the entire file and timesheets in the same way I would for a taxation. However, the difference is that I will not prepare a bill of costs. Rather, I aggregate the cost of each item of work undertaken and provide that aggregate total as the lump sum amount that I assess the costs at.

I assess each task undertaken based upon what I expect the Costs Court would allow for the work applying the relevant basis of costs for each item of work undertaken and the applicable scale of costs or hourly rate.

649 Trimbos described an 'assessment' of costs in this context as 'a term of art' used by costs lawyers to describe the process of reviewing a file and arriving at a lump sum amount. It was not the same as an 'assessment' in the context of a taxation or review of costs.

650 As noted earlier, Trimbos's experience was disclosed in his report in broad terms, such that the full extent of his experience in undertaking taxations or assessments in either context was unclear. I pause to observe that Trimbos's evidence made clear that in contemporary practice, most costs disputes before the Costs Court resolve and there are few judgments/rulings defining costing principles and creating precedents for a cost consultant's opinions or assessments. Mostly, their assessments are used in negotiations with other costs consultants and legal practitioners, and are not checked against an independent judgment or assessment of a court.

651 While the evidence of one costs consultant is insufficient to draw general conclusions about costs

practice, there may be grounds for concern that the costing process has become self-contained, as between costs consultants themselves and the solicitors by whom they are retained and whose costs claims they assess, and does not properly represent opinion evidence about Costs Court practice on any particular issue. When a court is declaring the reasonableness of costs to be borne by persons who are not parties to this process, this limitation needs to be carefully considered. It raises concerns about the true nature of the specialised knowledge being asserted.

652 What was certain was that the process Trimbos undertook for the Third Trimbos Report, bore no similarity to either of the practices he described. His reasoning was generally not founded on principles stated by, or practices endorsed by, the Costs Court. There were no references to such matters.

653 Apart from identifying minor instances of double counting, Trimbos did not challenge any item charged by O'Bryan, Symons or Portfolio Law in the Third Trimbos Report. Further, he opined that 'no significant portion of the fees charged' by O'Bryan, Symons or Portfolio Law was 'inappropriately or unnecessarily incurred' and concluded that none of the fees should be reduced. It was not apparent how Trimbos's experience in taxations or assessments supported the opinions he expressed or on what basis he reasoned from the assumed facts, through the prism of his expertise to his stated conclusion.

654 For the purposes of either a taxation or an assessment, the key question is whether the costs are reasonable. That is not a term of art. It is defined by statute to mean costs that are proportionately and reasonably incurred, and are proportionate and reasonable in amount.[65] In determining whether costs are reasonable, it is necessary to consider:

(a) the level of skill, experience, specialisation and seniority of the lawyers concerned;

(b) the extent to which the matter involves a level of complexity, novelty, urgency or an issue of public interest;

(c) the total time spent and the number and importance of documents involved in the matter;

(d) the quality of the work done; and

(e) the terms of the retainer, costs agreement and instructions.

655 Accordingly, to determine whether costs are reasonable, it is critical to review the file and examine the work product referable to the fees charged. Trimbos was provided with a Dropbox link to a substantial volume of documents, but did not reveal whether or how he used that material. Although he had access to Zita's file and requested counsel provide copies of certain documents, his opinion involved no application of specialised knowledge in considering whether that source material demonstrated that the fees to which it related were fair and reasonable.

656 In failing to adopt such an assessment, Trimbos relied on the word of the Lawyer Parties as to the authenticity and accuracy of their fee slips representing work that had been performed, and failed to inquire into the substantial part of the work the Lawyer Parties said they undertook. He ticked it off against his own, almost non-existent, experience in commercial litigation. Trimbos accepted when cross-examined that he had no real knowledge of the work involved in running a large, complex group proceeding. It was not evident on what basis he could opine that the time charged by counsel or Portfolio Law was reasonable. So much is apparent by his opinion concerning the reasonableness of Portfolio Law's costs in general:

In my experience in costing commercial litigation it is usual practice for law firms to have a team of lawyers working on such matters. In particular, with large complex commercial matters such as group proceedings, it is not unusual to have teams of up to 4 or 5 lawyers working on the matter...

[I]t is also important to consider the reasonableness of the hourly rates charged by the lawyers working on the matter and whether there has been an unreasonable amount of duplication of work between the lawyers working on the matter. There will always be a reasonable amount of duplication of work when two lawyers are working on a matter together as it is important for each lawyer to be aware of the communication and information coming into and emanating from the firm...

My review of the spreadsheets and my sampling of various emails ... shows that [Zita] and Mr Mizzi worked as a team in an appropriate and efficient manner. There was not excessive and unreasonable duplication... A good indication of this is that Portfolio Law ... charged for the junior member of their team at an amount of only approximately 10.6% of the partner's costs. This, in my experience and opinion, is a very efficient and reasonable use of a more junior practitioner's time on a matter.

657 Several problems emerge from this extract:

(a) Trimbos proffered an opinion, based on his experience in costing commercial litigation, that it is not unusual to have four or five lawyers working on any given matter. It was not a proposition based on Costs Court rulings or practice. The fact that it may not be uncommon for large teams of lawyers to work together in commercial litigation may be no more than a reflection of the choices made by solicitors in particular circumstances in their own interests. Its commonality provided no justification for any assessment whether the costs of four or five lawyers on a matter is reasonable. The observation was wholly irrelevant to whether the legal costs in the Bolitho proceeding were fair and reasonable. To properly apply his specialised knowledge in opining on potential issues raised by multiple lawyers working on a matter, Trimbos would have needed to objectively assess issues specific to the Bolitho proceeding, including its size, complexity and existing allocation of work within the Bolitho legal team.

(b) The statement '[t]here will always be a reasonable level of duplication when two lawyers are working on a matter together' exhibited the same defect. Aside from being flawed when expressed at the level of generality he adopted, the statement involves no objective assessment of what factors specific to the Bolitho proceeding may mean that a level of duplication is fair and reasonable, and, if so, to what degree.

(c) While there may be categories of litigation where a 90/10 division of time between a partner and a junior lawyer is appropriate, a Commercial Court group proceeding is unlikely to be one of them. When Trimbos described approximately 90% of work being undertaken at the partner level as 'a very efficient and reasonable use of a more junior practitioner's time on a matter', I seriously wondered whether Trimbos possessed the requisite specialised knowledge to give expert evidence on costs in this proceeding.

658 Had Trimbos's limited experience in large commercial litigation, and specifically group proceedings, been drawn to the court's attention, it may have weighed his opinions accordingly, instead of being drawn into error.

659 I could not be persuaded that Trimbos applied sufficient expertise in reaching the views he expressed in the Third Trimbos Report. I am in no doubt that Mark Elliott not only knew of Trimbos's approach as a costs consultant, but that he repeatedly retained him for that express reason. Mark Elliott deliberately exploited Trimbos's uncritical acceptance of assumptions and compliant methodology in order to mislead the court. Mark Elliott's methodology with Trimbos bore similarities with his use of Zita.

Failure to make inquiries and identify facts and assumptions relied on

660 I have already identified that Trimbos's methodology failed to properly interrogate the legal costs that he sampled in preparing the Third Trimbos Report. It follows that by doing so, he failed to make all inquiries that he believed were desirable and appropriate. Two further examples illustrate this criticism.

661 First, Trimbos ought to have appreciated the need to seek further and proper instructions about the Banksia proceeding from the materials with which he was instructed. For example, the pleadings in the Banksia proceedings, the trial plan and the Settlement Deed were documents that would have put a prudent costs consultant on notice of an overlap between the proceedings, possibly relevant to the reasonableness of the claimed legal costs. More directly, Trimbos knew about the Banksia proceeding from his report about costs in the Partial Settlement. He conceded that he thought it was unusual that he had not been instructed about the nature or existence of the Banksia proceeding, yet he did not make any inquiries about the work performed by the Banksia legal team relative to that of the Bolitho legal team.

662 Second, Trimbos assumed (and relied on the fact) that attendances were contemporaneously recorded in the Portfolio Law Spreadsheet. I cannot reconcile how an expert costs consultant could have drawn that assumption:

> (a) The Portfolio Law Spreadsheet had obviously not been extracted from a billing or time recording system, as one would ordinarily expect from a firm of solicitors practising in commercial litigation. It was a manually created spreadsheet with attendance record entries sourced from data extracted from emails sent and received during the relevant period. A document of that type reeks of reconstruction, for which a spreadsheet is most apt. Its meta data would have instantly revealed its history. An expert applying specialised knowledge ought to have immediately apprehended the possibility that it was not a contemporaneous record and inquired of Portfolio Law accordingly.
>
> (b) Trimbos was provided with two different iterations of the Portfolio Law Spreadsheet, which recorded different times and amounts allocated to the various activities. This ought to have further suggested to a competent expert a further inquiry was necessary.

663 In his subsequent fifth report that I will later address,[66] Trimbos said that, had he known that Portfolio Law's time records in the spreadsheets were not contemporaneous records, he would need to do 'a completely different exercise than what I did'. This statement confirms a further failing by Trimbos as an expert. He did not express in his reports his assumption that Portfolio Law's legal costs were drawn from authentic contemporaneous records. Trimbos conceded in oral evidence that he should have done so. The court had no way of knowing that, relying on an unproven assumption, Trimbos undertook only a cursory assessment of Portfolio Law's fees.

664 That he did neither in the context of asserting compliance with the Expert Code of Conduct made his report misleading. What Trimbos suspected about the Portfolio Law Spreadsheet was irrelevant when assessing his misleading conduct. Objectively, opinions reached on the assumption that the spreadsheet was an accurate contemporaneous record, when it was not, will induce, or are capable of inducing, error.

665 Despite some recognition of the intractable problems of false instructions in his fifth report, in cross-examination Trimbos speculatively resisted the suggestion that the words appearing in Portfolio Law's costs agreement, 'will record the time they spend and charge', required the firm to keep contemporaneous records, prompting the following exchange:

HIS HONOUR: Is that a common practice, Mr Trimbos? Is that a common practice for a provision in a costs agreement about recording time to be interpreted as estimating it at the end of the matter or when the bill is prepared, rather than contemporaneously recording it?---It hasn't come up in my practice before the issue of when - in terms of obviously solicitor/client - when the times are recorded...

COUNSEL: Mr Trimbos, you can hardly be saying to his Honour that at the end of a two-year matter or a three-year matter we're going to sit down and have a look and record our time? Is that really the evidence that you want to give this court as a costs expert?---If the - - -

Answer my question, Mr Trimbos?---I am... What I'm trying to say is that most firms obviously do record their time contemporaneously but some don't and they then do go back. Whether it's at the end of the matter, or whether it's two months down the track or three or four months down the track, they can go back through the file, and, as what's happened in this case, they can obviously look at particular emails and say, 'That looks like I may have spent one unit on that'; look at documents, 'I may have spent an hour preparing that document'; if they have got file notes of their attendances, the file note of the attendance may have the time.

666 If it is to be the practice of costs consultants to accept time records reconstructed from a file, years after the fact, as both a proper discharge of a contractual obligation to record time and a reliable indicator of time spent for assessing the reasonableness of costs, that practice and the principles that support it will need to be explicitly identified in a report. That practice was not disclosed in the Third Trimbos Report, and, so far as I am aware, does not have the imprimatur of a court.

667 Likewise, Trimbos did not express in his reports his assumption that the fee slips of O'Bryan and Symons were prepared contemporaneously and were authentic, nor the qualification that the 'sampling approach' he undertook was appropriate only on the assumption that the time marked was recorded contemporaneously. When the same proposition was put to Trimbos in cross-examination in respect of counsel's fee slips, the following exchange occurred:

HIS HONOUR: Why was it possible that as an independent costs consultant providing an independent report to the court that you were able to be misled?---I don't quite understand your question. Why was it possible?

Yes. It would either seem to me to come from an uncritical acceptance of instructions and information that's provided to you or an inadequate process that you adopted in forming your opinion?---Your Honour, with counsel's fees in particular it's accepted - if counsel has marked whatever time they have marked it's accepted that that's the time they spent. The next issue is whether it was a reasonable - - -

Who accepts that? Costs consultants?---Costs consultants, the Costs Court, it's just accepted, whereas with solicitors the solicitors have to provide the source material. So they have to provide the file note.

And what's the basis for this acceptance? Let's just deal with counsel first? Where does this acceptance come from?---It's just tradition. It's just accepted that counsel will not mislead their client or will not mislead their solicitor instructing them, and they will faithfully and truthfully record the time they have spent on the matter on particular tasks.

So the court should understand that, over quite a long period of time and you're saying as a matter of general practice, whatever counsel records on a time costs charging basis is just accepted and is never questioned or sought to be verified?---Well, I won't say never. I mean obviously it's always open for a party to object and put counsel to the test. But the starting point is, if counsel has marked a certain amount of time on a task, that that's accepted, but then there might be a dispute about whether it was reasonable to have spent that time ...

668 Trimbos did not express in his reports his evident assumption that anything counsel said was to be accepted at face value, without reference to any evidence of work product. The court was not given an opportunity to decide to proceed by placing absolute trust in counsel. When O'Bryan's misleading trial

estimate was put to Trimbos in cross-examination, he was reluctant to accept that he should have checked O'Bryan's instruction:

COUNSEL: But why didn't you go back to Mr Zita and say, 'I've got a conflict here. I've got a barrister who says it's going to run for 100 days, and I've got all the trial counsel telling the judge it's going to run for 45, 50 days. I need to sort this out'? You didn't do that, did you?---No, I didn't.

Why didn't you do that?---I spoke to Mr O'Bryan. He advised me - - -

You accepted O'Bryan's word as the gospel, did you?---Mr O'Bryan is senior counsel of many years' experience.

Did you accept O'Bryan's word as gospel?---On that point, yes...

And you knew that the combined counsel team had told his Honour Justice Croft it would run 45 to 50 days, and yet you were willing after the matter had settled to accept O'Bryan's statement that it would run for 100 days. Why?---Once again, Mr O'Bryan is senior counsel of many years' experience...

Do you now regret that you solely relied on the word of one man when you had an agreed trial plan signed off on by all counsel?---Yes, I do.

And, really, you weren't properly exercising your duty, were you, by just relying on the word of one man?---Well, it wasn't just one man. If was, once again, senior counsel...

669 Trimbos rejected his cross-examiner's suggestion that by accepting O'Bryan at his word, he was lazy. Although it was not apparent from his report that 'tradition' dictated that such an assumption be made in the case of counsel, I am in no doubt that the assumption is regularly made.

670 I do not think that lazy was an apt description for Trimbos's conduct. There is a wider issue, which causes me to pause and observe that, as egregious an example as it was, I am insufficiently naïve to accept that the conduct of O'Bryan and Symons in recording fees not referable to time spent is isolated to those two barristers. Traditional acceptance of fee documentation from counsel as negating the need for independent review is not, in my view, an assumption that should again be made by a costs lawyer in this court, whether it be in an expert report or in a matter before the Costs Court. The assumption lacks the imprimatur of the court. The court requires detailed and transparent disclosure of all assessment processes whenever it is being asked to approve, certify or assess legal costs.

671 Trimbos stated that when he was briefed to prepare his subsequent reports and was instructed that not all counsel's fees had been paid, he did not consider that whether the Lawyer Parties' fees had actually been paid was relevant to the question of whether they were reasonable. Assessing reasonableness requires consideration of the terms of retainers, costs agreement and instructions. A costs expert briefed with documentation identifying a traditional fee arrangement ought to apprehend possible issues with, and make further inquiries about, that arrangement, when breach of the contractual payment terms is identified.

672 Trimbos's rejection of the relationship between the reasonableness of legal costs and the payment of those costs prompts a further observation. Expert costing evidence in a group proceeding links to a litigation funder's claim for a funding commission, because the quantum of capital actually placed at risk by the funder is relevant. That was so in this case, but the quantum of legal costs and disbursements incurred and paid will also be relevant to the court when considering other funding arrangements.

10. THE APPLICATION FOR SETTLEMENT APPROVAL

J.1. The summons and notice to group members

673 From the end of November 2017 as negotiations of the terms of the Settlement Deed resolved, the Bolitho legal team began preparations for the settlement approval application. Initially, two documents were developed:

> (a) a summons dated 7 December 2017, seeking approval of the Trust Co Settlement pursuant to s 33V of the *Supreme Court Act*, including approval of AFP's claims for $4.75 million (plus GST) in legal costs and disbursements and $12.8 million (plus GST) in funding commission; and
>
> (b) a notice to group members informing them of the Trust Co Settlement.

674 On 27 November 2017, Alex Elliott communicated with Symons about a notice to group members. Later that evening, Symons circulated two versions of the notice to Mark Elliott, O'Bryan and Alex Elliott for comment. On 1 December 2017, Alex Elliott circulated a draft timetable to O'Bryan, Symons, Mark Elliott and Zita regarding steps to be taken ahead of the settlement approval and invited comment. Symons:

Alex, that's very helpful. I suggest it be amended as attached.

675 On 4 December 2017, Symons circulated to Mark Elliott, Alex Elliott, O'Bryan and Zita a draft email for Portfolio Law to send to the parties. I pause to note that while Alex Elliott participated in discussions with counsel about the form and timing of these documents, Zita's simple task was to send a pre-drafted email.

676 On 7 December 2017, the summons was filed seeking approval of the settlement.

677 Alex Elliott conceded in cross-examination that the costs were not being 'reimbursed' to AFP, as it had not paid them. I earlier explained why the summons and the notice were both misleading.[67]

J.2. The script

678 The notice to group members was expected to, and did, generate enquiries from them. At Mark Elliott's request, Alex Elliott prepared a script that he presumed Zita would use when responding to group members. Alex Elliott stated, irrelevantly, that in drafting the script he sourced information from the notice to group members and the 'Banksia class action' website maintained by AFP, specifically from the 'Q&A' page. Although he knew that the script was going to be used to communicate with group members, he said he never really turned his mind to 'the content of it that much'.

679 On 14 December 2017, Alex Elliott emailed Mark Elliott, with the subject line 're Banksia', stating:

Have a read in your spare time –should send to TZ + CO.

680 The attached document set out a script of information for group members. Amongst other things, it stated:

THE SETTLEMENT – MAIN POINTS:

The trustee has agreed to pay $64m and release its existing claims for remuneration in the amount of $3.96m + to settle its claims in both the class action and liquidators' proceeding...

The settlement approval application will occur on 30 January 2018.

If the settlement is approved, a distribution will occur within 6 weeks of approval...

How much did the defendants pay?

To settle the claims made in both the Banksia Group Proceeding and the Liquidators' proceeding, the trustee will:

pay $64 million;

release Banksia from an existing claim for $3.96m for additional remuneration in respect of additional work performed by the trustee in a period of 16 months from 25 October 2012 to February 2014; and

release Banksia from any further claims for remuneration (as yet unquantified)

What are the legal costs and disbursements:

Subject to approval by the Supreme Court and an external costs consultant report filed in the settlement approval application, the legal costs and disbursements are $4.75M (+GST)

How do I know if the legal costs are fair and reasonable?

No legal costs can be paid without from the settlement proceeds without the approval of the Supreme Court of Victoria.

The Plaintiff has engaged a suitably qualified external costs consultant to prepare an expert report to be filed in the settlement application concerning whether the legal costs and disbursements incurred and claimed have been reasonably incurred and are of a reasonable amount. ...

Why does the litigation funder receive $12.8M?

The litigation funder will not receive any payment without approval of the Supreme Court... The funder has paid all legal costs and disbursements, provided security for costs and indemnified the Plaintiff against all adverse costs in the event that the class action claims no not succeed. The Plaintiff will submit that the payment is just and equitable in remunerating the funder for the significant financial expense and adverse exposure undertaken in commencing and maintaining the Plaintiffs class action claims.

681 The script also conveyed, misleadingly, that costs had in fact been paid by AFP.

682 Alex Elliott dissembled about the script. I am satisfied that by the time that he was drafting the script, he understood the relationship between the funding commission and investment by AFP in the litigation. He understood that unless it appeared that AFP had taken on a substantial risk, the commission it sought to obtain from the settlement would not be approved. Alex Elliott read the decision in *Money Max*. He knew AFP was seeking a common fund order so the commission was referable to a percentage of the whole of the settlement sum. He understood that expenditure on legal costs was a major component of the risk the court took into consideration under *Money Max* principles. He also recognised that if the funding commission was approved that would be a very good result for AFP and for the Elliott family, acknowledging that he was, and is, a beneficiary of two family trusts through which AFP's shares were held.

683 He was being careful to be consistent. He was not cavalier and indifferent to the accuracy of information he was including in the script. Alex Elliott was, as the Contradictor submitted, lacking candour in the witness box. I do not accept his evidence in this respect. I am satisfied that Alex Elliott turned his mind to communicating the message that Mark Elliott wanted.

684 The script demonstrated that Alex Elliott recognised the proper basis for Trust Co's remuneration clam. In the version he sent to Zita, the release from Trust Co was described as follows:

- release Banksia from any further claims for remuneration (not unquantified) but say $30k pcm from March 2014 to date = over $1M.

685 During his cross-examination, I commented that a typographical error could have resulted in '$1m' appearing instead of '$11m'. Although Alex Elliott latched onto this suggestion, it is clear from the terms of the script that the reference to $1 million is not a typographical error. Alex Elliott recognised that the Trust Co

remuneration claim could not possibly be worth more than the $30,000 per month that Trust Co had said that it would charge.

686 When cross-examined, Alex Elliott claimed that 'what was in the script came from my father', but examination of the various versions of the script in evidence does not bear this out. Alex Elliott knew that Trust Co's remuneration claim was not worth $11 million. Mark Elliott plainly wanted the value of the remuneration claim to be maximised. It is probable that Alex Elliott saw the reference to $30,000 in the file and independently inserted it into the script.

687 Together with the script, Alex Elliott also sent Zita a document titled 'Protocol', which provided:

1. All returned mail to be provided to [AFP] the following business day ...

2. All written correspondence to be provided to [AFP] the following business day.

3. All telephone inquiries to be handled by Portfolio Law in accordance with the agreed script

4. Any telephone inquiries unable to be answered should be put in writing and sent to info@banksiaclassaction.com.au.

5. All other inquiries should be directed to info@banksiaclassaction.com.au

NO EXCEPTIONS TO THE ABOVE.

688 This arrangement was consistent with that used for the Partial Settlement, discussed in section F.3. Zita would have no role beyond addressing the most perfunctory of queries. For anything else, group members were directed to write to an email address managed by Alex Elliott. The words 'NO EXCEPTIONS TO THE ABOVE', which Alex Elliott said were written by his father, again demonstrated Mark Elliott's control over Zita.

689 Zita followed the protocol.

J.3. The proposed settlement distribution scheme

690 As part of the Trust Co Settlement, AFP and the Lawyer Parties sought orders that the settlement sum be distributed in accordance with a settlement distribution scheme, with Zita to act as 'Scheme Administrator'. In addition to Portfolio Law's role, the scheme identified AFP as 'Scheme Co-ordinator', and provided for the scheme's costs of $1 million, comprising:

(a) Portfolio Law's costs of at least $354,046;

(b) AFP's costs of $528,000 (plus GST), or $48,000 per month for 11 months; and

(c) the 'Administration Disbursements', which were not quantified but were defined to include 'barrister's fees'.

691 Mark Elliott designed the proposed settlement distribution scheme, when looking for additional methods to recover funds for the division of the spoils. On 24 November 2017, Mark Elliott emailed O'Bryan:

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.

O'Bryan replied:

We definitely need TZ to charge more. His fees look ridiculously low compared to his competitors.

692 On 8 December 2017, Mark Elliott emailed Symons (copying Alex Elliott):

Portfolio Law will plan, co-ordinate and implement the process for the distribution of the net settlement proceeds to all debenture holders-**refer to deed as its now our obligation**

PL will answer all queries by stakeholders, liaise with the registry and SPR and answer all holder queries-by phone and correspondence, monitor the website and phones and provide assistance to holders as required

The fee is $321,860 plus GST being $20 per holder(16,093 holders) including disbursements

We seek court approval to it

The Liquidator will pay the registry and mail out costs

693 On 10 December 2017, Symons emailed Mark Elliott (copying Alex Elliott), attaching a letter, purporting to be from Portfolio Law to AFP, providing a cost estimate for undertaking the settlement distribution on the basis of the instructions provided by Mark Elliott. The letter, drafted by Symons, stated that the cost estimate:

> (a) was $332,159.50 (plus GST), equating to a 'per debenture holder' basis of $20 (ex GST);
>
> (b) included answering all queries from debenture holders by telephone or written correspondence, and providing assistance to them where required, bringing the register up to date, managing and monitoring website communications, and liaising with the SPRs; and
>
> (c) assumed that 40% (6,400) of debenture holders would each require between 12 and 18 minutes of paralegal/solicitor time in completing the settlement distribution, while a further 10% (1,600) would require between 54 and 132 minutes of solicitor/paralegal time, including issuing and considering correspondence, obtaining documents and liaising with the registry.[68]

The letter was subsequently amended to include Portfolio Law's additional task of operating a call centre to answer debenture holder enquiries.

694 On 11 December 2017, Zita sent the letter drafted by Symons to AFP on Portfolio Law's letterhead. It was attached to the Third Trimbos Report, accepted by Trimbos as Zita's costing, and filed with the court as evidence in support of the costs of the scheme.

695 In evidence, Zita conceded that he blindly adopted the letter contrived for him by Symons and sent it out, without making any enquiries to satisfy himself that its contents were accurate. Zita conceded that he 'just relied on what was... told to me by the funder in terms of the costs associated with the scheme'.

696 I accept that evidence. It was corroborated by the course of events, the contemporaneous documents, and AFP's admission that Mark Elliott, not Zita, quantified the costs of administering the scheme. I find that Symons crafted a fictional document to justify the fees purported to be claimed by Zita, who conceded in cross-examination that the letter was inaccurate.

697 On 8 January 2018, Mark Elliott instructed Symons:

[AFP] signed up over 6000 holders and has the contractual/fiduciary relationships with all holders. [AFP] 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.

698 On 12 January 2018, Symons and Mark Elliott exchanged emails about the costs of the settlement distribution scheme, in which Mark Elliott said Zita had advised him that 'over 1000 envelopes' containing the notice to group members issued in December 2017 had been returned to Portfolio Law as undelivered.

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.

Mark Elliott replied:

Yes, lots to do. Increase BSL fee to $48,000 pcm plus disbursements of approx. $70k to LINK.

699 On 16 January 2018, Alex Elliott assisted Mark Elliott with the scheme by locating and emailing him a definition for 'Administration Expenses' from a settlement distribution scheme in the 'Pearson case' in the Federal Court.

700 On 1 February 2018, Mark Elliott emailed Symons directing that he make changes to the scheme, including:

Maybe do 3 or more tranches with 1st to no changes/confirmed list,2nd to list with changes made by say 1 June and 3rd to lost holders say ad hoc/monthly from 1 July until end 2018

Looks busier and justifies fees

Must cap PL fee to include legal costs as well for review and Court assistance/reports

Estimate total cost at 11 X $48K plus $100K in disbursements.

Symons replied on the same day:

Will do

701 There was no basis for the costs that were sought. The first time Symons made enquiries about the basis for the costs sought was on 5 February 2019 in the course of the remitter. Zita admitted that did not seek to compare what the SPRs would charge for distributing the settlement with the costs of the scheme. It would appear the first time he made that enquiry was shortly prior to trial, when he was told that the SPRs had incurred costs of $181,000 to undertake the distribution.

702 Zita did not even read the scheme or ask to see a copy of it before the approval hearing. He did not check what was specified in the scheme with respect to its costs. He did not satisfy himself that the costs sought by AFP were reasonable or make any enquiries about the work AFP would be undertaking on the scheme.

703 In his June 2020 affidavit, Zita attempted to justify the fees he had sought from the settlement distribution scheme by magnifying the work involved in effecting payment. He said:

Portfolio Law was to send information out to debenture holders, receive the documents back, authorise the cheques for debenture holders and do whatever other work was required... The cheques were to be issued from the Portfolio Law trust account; Portfolio Law would have had to individually type each cheque in, and I would have had to sign each cheque and Portfolio Law would then have to post the cheque to the intended recipient or deposit the cheque into their account.

704 In Zita's 11 December 2017 letter (attached to the Third Trimbos Report), he purported to justify Portfolio Law's fees on the basis of six tasks. Zita's affidavit addressed only one of those tasks. When cross-examined, Zita said that he was going to take 'some [of] the calls that came in, the more difficult calls and all that sort of stuff'. Zita then stated that he and Mark Elliott discussed establishing a call centre, but that it would not be operated from Portfolio Law's offices, and that it would have its own direct number.

705 I am satisfied that Mark Elliott's decision to establish an external call centre reflected his intention that Portfolio Law have minimal responsibility in relation to the first two tasks described in Zita's letter, just as Mark Elliott had arranged for the Partial Settlement. I reject Zita's evidence of a role in the scheme for Portfolio Law. It cannot be reconciled with his concession that he lacked the expertise and experience to assume the role of scheme administrator, or with Mark Elliott and O'Bryan's evident lack of faith in Zita's skill and competence.

706 Zita also asserted in his affidavit that he sought a role in the scheme arising from a concern about 'unpresented cheques as a result of previous distributions'. However, he conceded in cross-examination that he had no personal knowledge of the process the SPRs had undertaken to distribute their share of the proceeds of the Partial Settlement.

707 Zita and Alex Elliott conceded that Portfolio Law was not going to be responsible for bringing the register up to date. That was the fourth task referred to in the 11 December 2017 letter. Alex Elliott said that he understood he would be involved in the work of updating the register. Zita conceded that maintaining and monitoring the Banksia website was AFP's responsibility. Zita would not have any real responsibility for the fifth task referred to in the letter.

708 Cross-examined about the sixth task referred to in the letter (liaising with the SPRs), Zita said:

That was in relation to obviously they had done distributions before so they could help us in relation to any queries that came in or any updating of the register that happened. So I saw this as a cooperative approach rather than us and them.

I was not persuaded that the sixth task could involve real work for Portfolio Law. It reflected Mark Elliott's expectation that Portfolio Law would rely upon the SPRs in relation to the scheme, just as they had relied upon the SPRs in relation to the litigation generally.

709 In cross-examination, Zita conceded that:

(a) he applied no independent thought to the settlement scheme and did not read it before the approval hearing;

(b) he did not think that he could do a better job than the SPRs of distributing the Trust Co Settlement proceeds;

(c) he had no idea how to undertake a settlement scheme; and

(d) the SPRs were better qualified for the role.

710 Zita properly conceded in cross-examination that most of the matters in his 11 December 2017 letter were not going to be done by him, or were beyond his capabilities and those of his firm. This concession was not disturbed by re-examination. Zita denied that the fees payable to Portfolio Law amounted to 'money for jam'. I am satisfied that Zita considered that to be the case. His sole focus in issuing the letter to AFP was on compliantly doing Mark Elliott's bidding.

711 Mark Elliott's suggested role for AFP to act as the 'Scheme Coordinator' and inclusion of counsel's fees in the scheme, were further methods to plunder from the settlement sum at the expense of group members. A competent entity acting as scheme administrator would be sufficient.

712 In the Downer proceeding, where Elliott Legal was appointed 'Scheme Administrator' of the settlement distribution scheme, Elliott Legal paid O'Bryan a 'monthly retainer' of $9,900 per month. No evidence or

submission identified legal issues in the distribution of an investor group proceeding settlement sum that would require one day a month of senior counsel's time, such that a retainer was thought necessary. As the Contradictor submitted, that was a cynical cash grab. There was every reason to expect that Mark Elliott intended to implement similar arrangements in this scheme.

713 This scheme was not approved in January 2018. During the approval hearing, the SPRs informed Croft J that they were concerned the costs had not been adequately disclosed to debenture holders, and that the SPRs had undertaken previous distributions in a far shorter period and at a fraction of the costs proposed. Although Mark Elliott and the Lawyer Parties sought to resolve those issues following the hearing, the filing of Mrs Botsman's appeal saw those discussions abandoned.

714 The Court of Appeal remitted the approval of a settlement distribution scheme. As noted earlier,[69] I approved a scheme for a further distribution administered by the SPRs. In the period between 31 January 2018 and 22 May 2019, AFP 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 progressive reductions in the costs strongly support the inference that there was no proper basis for the sum initially sought.

715 When the settlement distribution scheme came before me, no proper basis could be identified for having any party but the SPR undertake the distribution.[70] Zita claimed in his affidavit in support that his involvement in the scheme reflected Mr Bolitho's desire for 'a personalised approach', but he conceded in cross-examination that he had no discussions with Mr Bolitho about administering the settlement proceeds to achieve 'a personalised approach'. When asked how he would achieve a 'personalised approach' in circumstances where he did not have the requisite skills to administer a scheme, he said 'well, by taking – you know, addressing any debenture holders' calls'. This evidence contradicted the suggestion that calls were to be directed to a call centre external to his firm. It was nonsense.

Breach of trust

716 The Funding Agreement provided that the 'Lawyers' (ie. Portfolio Law) were to immediately pay settlement proceeds into a trust account and hold them on trust to be dispensed to group members in accordance with the Funding Agreement or any court order. That account was constituted as a trust account and Portfolio Law was the trustee. AFP, Alex Elliott and Portfolio Law admitted that, in respect of the Partial Settlement, Portfolio Law transferred to AFP the net settlement proceeds of $1.75 million that it was required to hold in this trust account pursuant to the Funding Agreement and the terms of the Partial Settlement.

717 The Contradictor contended that Zita's conduct was in breach of trust and ought to have been disclosed to the court during the approval hearing, given that Portfolio Law sought to be appointed Scheme Administrator. Notably:

> (a) in the first opinion, O'Bryan and Symons referred to the fact that AFP 'was left holding' the net proceeds of the Partial Settlement, without expressly drawing to the court's attention that the funds had been transferred out of Portfolio Law's trust account to AFP, absent any order of the court permitting that to occur;
>
> (b) after the Contradictor made enquiries with AFP and Portfolio Law about this matter, AFP transferred the settlement proceeds back to Portfolio Law.

718 Zita submitted that:

(a) on 20 September 2016, O'Bryan asked Mark Elliott and Symons whether they had instructions from Mr Bolitho regarding the disbursement of the Partial Settlement sum;

(b) Mark Elliott forwarded that email to Zita and asked:

> What will you need from Bolitho so you can pay it all to [AFP]?
>
> Please draft asap and I will get Bolitho to sign.

(c) on 4 October 2016, Mr Bolitho provided a written authority to Zita, authorising him to transfer the Partial Settlement sum to AFP;

(d) on 12 December 2016, Zita transferred the $5.24m settlement sum from Portfolio Law's trust account to AFP. Zita did not realise he had done anything wrong by making the transfer, as it was done in accordance with Mr Bolitho's authority and on his written instructions;

(e) the fact that AFP, and not Portfolio Law, held the Partial Settlement sum was expressly referred to in drafts of the Settlement Deed, and was not the subject of any query by the Banksia legal team; and

(f) when the issue was raised by the Contradictor at a directions hearing in the remitter in early 2019, AFP transferred the funds back into the Portfolio Law Trust Account with interest.

719 I am satisfied that those funds were transferred in breach of a trust created by a court order. Zita's failure to appreciate that a lead plaintiff in a group proceeding was not able to give instructions about the manner in which settlement funds for and on behalf of group members could be handled, is a further example of his lack of experience or expertise.

J.4. The first opinion

720 On 19 January 2018, O'Bryan and Symons issued a confidential joint opinion in support of the approval application. The opinion was a confidential exhibit to an affidavit sworn by Zita on instructions from AFP. No other party, including the SPRs, were privy to the opinion.

721 The purpose of the opinion was to present counsel's independent and forthright view about the proceeding and that the Trust Co Settlement was fair and reasonable, to aid the court to determine whether to approve the settlement, in the exercise of its protective jurisdiction. For present purposes, what is significant is what the opinion did not reveal. It did not reference any considerations weighing against approval of the costs and commission sought by Mr Bolitho/AFP. As these reasons catalogue, there were many. Counsel's opinion was fundamentally misleading and induced the court into error.

722 O'Bryan and Symons only put one side of the story to the court. Having contractually constrained the SPRs into silent support for the funding commission and legal costs, O'Bryan and Symons drafted the opinion to reflect a narrative that advanced AFP's interests, rather than those of the debenture holders for whom they acted. The Bolitho legal team knew the assertions in the opinions were vulnerable if scrutinised by the SPRs.

723 AFP and Alex Elliott admitted that Symons and O'Bryan provided AFP with drafts of the first opinion before it was finalised. They also admitted that, in the case of each relevant misleading statement, O'Bryan, Symons and Mark Elliott knew the true position, and therefore that the opinion was deficient.

Preparation of the opinion

724 Alex Elliott was copied in on the emails regarding the first opinion. On 12 January 2018, O'Bryan emailed Symons (copying Mark Elliott and Alex Elliott), attaching a draft and stating:

We need to check all the facts & figures and the internal cross-references carefully.

725 On 14 January 2018, Mark Elliott sent Symons an email with the subject 'jobs' (copying Alex Elliott):

MS

Lots to do this week:

Finalise Banksia opinion
SDS for Banksia

Symons and Mark Elliott exchanged emails with each other directly in response to this list. On 16 January 2018, Mark Elliott replied to the chain, adding Alex Elliott as a recipient, and stated:

Please send latest draft of Banksia opinion.

726 On 17 January 2018, O'Bryan emailed Symons, Mark Elliott and Alex Elliott regarding the settlement opinion, stating:

How is this progressing, lads?

Mark Elliott replied:

Very well. MS has done a great job. We have provided minor comments. SDS very close. TZ ready to file on Friday.

727 In cross-examination, Alex Elliott denied that he had provided any comments on the first opinion, stating that 'I didn't make any comment on the opinion of counsel', 'I didn't have... any sort of contributing aspect to this settlement' and, because it was the opinion of counsel, he had no ability or duty to correct statements in the opinion that were clearly wrong and known by him to be so. He stated that although he could not specifically recall, he may have been asked to assist with internal cross-referencing, as he did similar tasks 'in other things'.

728 I reject that denial. It was self-serving. I am satisfied that Alex Elliott participated in checking the first opinion. I accept that he saw his role as a minor one, but he was part of the team.

729 First, O'Bryan was not directing his request only to Symons. I note that the email tendered demonstrates that O'Bryan added Mark Elliott and Alex Elliott as recipients to an earlier exchange that he had with Symons, rather than being included by virtue of the 'reply all' function. He included Alex Elliott as he intended that he assist with the proofing exercise.

730 Second, Alex Elliott contended that when his father said 'we' in his email, he was referring to himself, and not the two of them. Although Alex Elliott initially sought to substantiate his assertion by stating that he was overseas when it was sent, he conceded that he received the draft of the first opinion four days before he travelled overseas. I reject his denial. Mark Elliott's reference to 'we' was intended to include his right hand man. It certainly wasn't a reference to Zita, who hadn't been included in the email correspondence concerning the draft.

731 The emails tendered demonstrated that Mark Elliott relied on Alex Elliott heavily in the period before he travelled overseas. He was not copied to emails concerning the opinion and the settlement distribution scheme merely as a passive recipient, but was given tasks to perform. Tellingly, once Alex Elliott departed overseas on 16 or 17 January 2018, he ceased to be copied to any emails concerning the draft first opinion.

732 On 19 January 2018, the first opinion was filed by Portfolio Law. In contrast to Alex Elliott, and despite making the affidavit to which the filed opinion was exhibited, Zita did not read the opinion before it was filed, or prior to the approval hearing. Zita's cross-examination on this topic is revealing and appropriate to set out at length:

And so [by failing to read the opinion] you weren't being vigilant, I put to you, to protect the interests of the group members from Elliott and O'Bryan?---I always relied on the court's supervisory power.

What are you there for? Just decoration?---It's not - - -

What are you there for? You don't read counsel's opinion. What are you doing in the case? Just putting your hand up for big licks of money?---No, that's not the case at all.

Well, you didn't read the opinion before the application for approval was conducted in front of Justice Croft. So how can you just say to me, 'Oh, it was in the opinion'? You didn't know what was in the opinion?---I just relied on counsel, who know the matter better than I do in terms of the pros and cons of it all, the reasons for accepting...

...

The court wasn't told that everything was made conditional in the way in which we've been discussing here today, was it?---Well, the court had the settlement deed, I think. So - - -

The court was not told about Elliott's conduct where he said, 'I'm going to walk away from everything unless you agree to do this'?---Probably not, no, no.

What do you mean 'probably not'. You know they weren't told that?---I can't remember what was said.

If you had been vigilant about the interests of your client you would have got up and you would have said to O'Bryan, 'You can't say this, you can't do this, this is wrong', would you not?---If I felt it was wrong, yes.

Yes, if you had done your job and you had read the opinion you would have known it was wrong, wouldn't you?---I don't know. I can't - I don't remember what the opinion said, Mr Jopling.

Mr Zita, are you honestly standing here today on your oath as an officer of the court in front of his Honour telling his Honour you don't know what it said?---I know the general parameters of what it said. I don't know each specific clause of what it said.

Mr Zita, this is a disgraceful performance that you were engaging in, then as now, where you're failing to acknowledge your own negligence in this case, is it not?---No.

733 Zita ought properly have agreed with the last proposition put to him by his cross-examiner. The false and misleading representations made in the opinion would not have been conveyed had Zita not acquiesced in Mark Elliott's control over his role as the solicitor. Portfolio Law was his conduit through which the opinion was placed before the court.

False and misleading statements in the first opinion

Reliance on the Third Trimbos Report

734 In the first opinion, O'Bryan and Symons invited the court to rely on the Third Trimbos Report, including its annexures, which attached copies of the Lawyer Parties' invoices and fee slips. They stated that the fees sought to be recovered by AFP and Mr Bolitho on account of legal fees were reasonable, and expressly invited the court to examine their invoices and fee slips to satisfy itself of that fact.

735 Those statements were dishonest, as my findings in sections H and I above describe. AFP/Mark Elliott,

Alex Elliott, O'Bryan and Symons knew the claim for legal costs was contrived, and that the Third Trimbos Report misleadingly opined on them. O'Bryan and Symons falsely stated in the opinion:

We are not in a position to do more than adopt Mr Trimbos' opinion that the costs incurred are reasonable, the work was undertaken efficiently and appropriately, and that the charges of the plaintiff's solicitor and counsel were reasonable and appropriate for practitioners of their standing.

736 This was a deliberate lie. O'Bryan and Symons were both in a position to do more. They could have discharged their paramount duty to the court and told the truth. They were each under a duty to ensure that the court did not rely either on the false and misleading Third Trimbos Report or on their own false opinion about it. They could readily have discharged that duty, because they had knowingly given false and misleading information to Trimbos, and it was in their power to correct the misapprehension on which the court was being invited to proceed. They did not. Instead, they induced the court to rely on the false and misleading fee agreements, disclosure statements, invoices and fee slips that they had contrived for that purpose. Not only had the work not been undertaken efficiently and appropriately, but there was no evidence demonstrating what, if any, actual work had been undertaken.

The Lawyer Parties' fee arrangements

737 The first opinion stated:

[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.

These assertions were dishonest statements by O'Bryan and Symons.

738 For the reasons set out in section H, nothing about the Lawyer Parties' fee arrangements resembled the terms commonly used by solicitors or counsel. In respect of counsel, their fee documentation was a work of fiction; while Portfolio Law had performed no services of monetary value in consideration for the fees it sought to charge.

739 AFP provided no oversight over the Lawyer Parties' costs, as they well knew. To have done so would have been contrary to its own interest. Mark Elliott's practices in dividing the spoils have been described. O'Bryan and Symons stated in the opinion that, at the time of inviting group members to enter into a Funding Agreement with AFP, Mark Elliott informed them that:

[AFP] would pay for disbursements (such as Counsel's fees and witness expenses).

They continued:

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 [AFP] have therefore been significantly greater than those expected at the time that Mr Elliott wrote to group members.

740 These statements were, again, misleading. AFP/Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott each knew that to be the case, but did not disclose the truth to the court. O'Bryan and Symons were engaged on illegal contingency fee arrangements, while Zita agreed to a no win no fee arrangement with AFP. These arrangements were plainly distinguishable from the fee agreements and disclosure statements that formed the basis for Trimbos's opinion. AFP's funding commission claim was rendered significantly misleading. The Lawyer Parties, not AFP, had financed the legal costs.

741 Further, AFP/Mark Elliott's business model was to avoid financing the litigation, both in terms of legal

costs and by taking advantage of the Banksia legal team doing the bulk of trial preparation work, funded out of resources that would otherwise be available to debenture holders. AFP enjoyed significantly defrayed costs as a result, because the SPRs assumed the burden of conducting the litigation, and paid the expenses of preparing evidence, retaining experts, attending to interlocutory issues, and ensuring both proceedings were properly prepared.

742 It was manifestly wrong to say that AFP had incurred significantly greater costs than those expected in June 2014. To the contrary, the appointment of the SPRs and the litigation funding they provided was a windfall gain for AFP and the Lawyer Parties, a matter about which I will say more in section Q of these reasons.

743 O'Bryan and Symons also asserted that:

[A]ll 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.

744 This statement was false. The legal costs had not been incurred, they had been contrived.

Implying that AFP had paid legal costs and disbursements

745 The Third Trimbos Report distinguished between 'costs incurred to date' (or 'fees marked to date') and 'anticipated or prospective fees' for work that was yet to be performed or billed at the time the report was filed, such as the attendance to the settlement approval application.

746 O'Bryan and Symons deployed that language in the first opinion to mislead the court into assuming that AFP had paid the costs save for those falling into the latter category. Some examples include (emphasis added):

In financing the proceeding, [AFP]:

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. **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.

...

[AFP] paid legal costs and disbursements, or will be liable for anticipated costs and disbursements, in the order of $7.8 million. This is a very significant expenditure on the costs of the proceeding for a litigation funder established as an ad hoc litigation funder for a proceeding which would have foundered in the absence of litigation funding.

...

The plaintiff's legal costs and disbursements, while regarded as reasonable **represent a significant expense** to [AFP]. The legal costs and disbursements **paid by [AFP] 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 [AFP] 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.

747 O'Bryan, Symons and Mark Elliott chose language to achieve a deliberate and calculated deception of the court. O'Bryan and Symons intended that Croft J would read the Third Trimbos Report and infer that AFP had paid all of the legal costs incurred up to the point the report had been issued, because:

(a) counsel's invoices appeared to have been issued monthly;

(b) all of O'Bryan's invoices were stamped as 'PAID';

(c) the instructions to Trimbos annexed to the report stated that all the costs had been paid; and

(d) the purpose of a litigation funder is to pay the legal costs.

748 AFP/Mark Elliott, O'Bryan and Symons deployed that misleading impression to their full advantage in seeking to justify AFP's funding commission. The documentary evidence confirmed that they were acutely aware that it was material for the court to know what funding had actually been provided by AFP. The first opinion stated:

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

749 Those statements were deceptive. O'Bryan, Symons and Mark Elliott knew that the SPRs had the means to, and did, finance the proceeding. In addition to the Banksia proceedings, any remedy unique to the Bolitho proceeding could have been pursued in the McKenzie proceeding. AFP was not the saviour of group members for its role in the Bolitho proceeding. Not only would debenture holders have been able to access identical relief in proceedings funded and run by the SPRs, they would not have paid a funding commission or duplicated legal costs.

Adverse cost risk

750 The first opinion sought to exaggerate the adverse cost risk that AFP faced in funding the Bolitho proceeding. It stated that:

In agreeing to finance the group proceeding [AFP] accepted a very significant adverse cost risk. [Trust Co's costs] from the commencement of the proceeding until December 2017 [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 [Banksia's] costs of $7.7 million... These figures alone sum to approximately $27 million in legal fees, without taking into account [Banksia'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.

Counsel later concluded:

We consider it is likely that [AFP] was exposed to a risk of adverse costs in the order of $15 million.

751 These figures were grossly inflated. O'Bryan and Symons did not draw the court's attention to the following pertinent matters:

(a) the amount of Trust Co's legal costs that were referred to was not limited to defending the claims in the Bolitho proceeding. It was a global figure for all proceedings following Banksia's collapse, which included the Banksia proceedings, the third party claims it made in each

proceeding, its claim for additional remuneration and the public examinations of its officers;

(b) the expense incurred by Trust Co was predominantly incurred in defending the claims in the Banksia proceeding, in responding to the evidence filed by the SPRs (addressed in section Q). The SPRs made a substantial provision ($10 million) for its potential adverse costs exposure in respect of Trust Co and other parties;

(c) the adverse cost risk assumed by AFP — limited to Trust Co's costs of defending the claims in the Bolitho proceeding — was likely more reliably assessed by reference to the security for costs that Mr Bolitho/AFP was ordered to provide;

(d) AFP had no exposure to pay the $6.33 million in costs of the sixth to ninth defendants. Those claims were settled in the Partial Settlement, in respect of which AFP had already obtained a commission; and

(e) Banksia's costs of $7.7 million were primarily attributable to the Banksia proceeding, and no part of those costs would ever have been recoverable from Mr Bolitho/AFP.

752 AFP/Mark Elliott, O'Bryan and Symons knew that Mr Bolitho would not be ordered to pay costs that were not occasioned by the conduct of his claim against Trust Co. To suggest otherwise in the first opinion was misleading.

753 Further, AFP did not have sufficient assets to meet adverse cost exposure of the magnitude that Mr Bolitho actually faced. AFP was formed to insulate the funder against adverse cost risk against a background where, prior to AFP's incorporation, Mark Elliott had been providing litigation funding, and the defendants had indicated an intention to seek security for costs from him personally.

754 Mark Elliott, O'Bryan and Symons knew that AFP would never have satisfied an adverse costs order in the vicinity of $15 million. O'Bryan and Symons knew that AFP was not like a regular litigation funder, because it was significantly undercapitalised. In reality, AFP was a notional funder. The Bolitho proceeding was funded primarily by the SPRs using debenture holder's funds.

755 I am comfortably persuaded that AFP/Mark Elliott, O'Bryan and Symons deliberately misled the court by their statements in the first opinion about AFP's adverse cost risk.

Security for costs

756 O'Bryan and Symons further embellished AFP's funding risk in respect of the security for costs it had provided. The first opinion stated:

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

...

Having been established for the purpose of financing this proceeding [AFP] 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.

757 Counsel did not draw to Croft J's attention that the $160,000 in security for costs provided in favour of defendants other than Trust Co had not only been brought to account in the commission AFP obtained at the time of the Partial Settlement, but it had been released back to AFP as part of that settlement. At the time of the Trust Co Settlement, AFP's security for costs risk was limited to $570,000. It did not pay the final tranche of $720,000 because the proceeding compromised.

758 AFP, O'Bryan and Symons knew that it was relevant for the court to assess the relative risk undertaken by AFP in providing security for costs. It was incumbent upon them to draw the court's attention to the fact that, insofar as security for costs was concerned, AFP had undertaken a relatively low risk, and this favoured a lower funding commission.

Trust Co's remuneration claim

759 A satellite issue following Banksia's collapse was whether Trust Co remained entitled to its professional fees for acting as Banksia's trustee, pursuant to cl 2L of the *Corporations Act*, following the appointment of the Receivers. Trust Co contended it was entitled to $3.96 million for services between October 2012 and February 2014, and an unquantified amount for its fees thereafter.[71]

760 As set out in section G, Mark Elliott demanded that Trust Co's abandoned claim be quantified and referred to in the Settlement Deed as a 'Settlement Benefit', to artificially inflate the value of the settlement. The first opinion adopted that approach, stating as follows:

[55b] 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.

...

[84d] 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.

...

[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.

...

[87] 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.

[88] 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.

761 I am satisfied that AFP/Mark Elliott, O'Bryan, Symons and Alex Elliott knew that the Trust Co remuneration claim was not worth $11 million. They deliberately overstated the value of the release of the Trust Co remuneration claim to justify AFP's excessive commission:

> (a) Trust Co itself never suggested that it was entitled to a remuneration of materially more than $3.96 million for work performed subsequent to February 2014, nor did it particularise any work that it had performed after this point.
>
> (b) By February 2014, the Receiver had sold the major assets of Banksia, and there was very little left for Trust Co to do. Trust Co conceded as much. Trust Co's role was largely superseded and replaced by the independent liquidators in June 2014.
>
> (c) Although Trust Co claimed it had implemented a 'time based' charging system for charging fees after February 2014, it was never contemplated that its monthly fees would be as high as they had been for the initial period following the Receivers' appointment. In February 2014, Trust Co proposed that its monthly fees from January 2014 onwards would be capped at $30,000, unless the amount of any time based costs was less. Mark Elliott, who was on the debenture holder committee that considered proposals submitted by Trust Co for additional remuneration in 2013 and 2014, knew this. He shared that information with O'Bryan. They knew that there was no evidentiary basis for suggesting that the remuneration claim was asserted to be more than $5.4 million: $3.96 million plus $30,000 for each month between January 2014 and January 2018.
>
> (d) In any event, the $3.96 million claimed by Trust Co was contested by the Receivers, who quantified the claim in the lesser sum of $2,767,931. The debenture holder committee did not and would not support Trust Co's proposals for additional remuneration.
>
> (e) Mark Elliott, O'Bryan and Symons considered Trust Co's claim for additional remuneration to be unmeritorious. O'Bryan described it as a 'scam', and because 'TrustCo laboured under a basic conflict of interest and duty at all times', it was disentitled to any commission.

762 Alex Elliott knew from the first opinion that AFP's funding commission was sought to be assessed on the basis that the total settlement value was $75 million, including an asserted value of $11 million for the release of Trust Co's remuneration claim. That figure conflicted with the information contained in the script he

prepared for Zita. He claimed indifference to resolving the discrepancy even after he learned that Trust Co's junior counsel had confirmed that '$3.96m is the maximum figure for the reimbursement claim which he regards as reasonable' and that 'in reality the claim would be lower'.[72]

763 Alex Elliott turned a blind eye because it was his father's notion, and for that reason he accepted it. He maintained that it was not his role as a first year solicitor to raise with his father or with counsel any discrepancy between the information his father gave him about the value of the claim, and the value attributed to the claim by counsel in the opinion.

764 O'Bryan and Symons expressly invited the court to assess AFP's funding commission by adding the asserted $11 million value of the release of Trust Co's remuneration claim to the $64 million settlement sum. That revealed their motive to follow Mark Elliott's wishes rather than provide independent advice as the court believed it was receiving. The first opinion stated:

[I]t 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

765 This statement was consistent with Mark Elliott's vision that the $64 million settlement be 'gross[ed] up' in order to 'blur my 20% calculation'.[73]

766 To suggest that any appropriately quantified release for Trust Co's remuneration ought bear on AFP's funding commission claim was false and misleading:

> (a) Trust Co made no claim for remuneration in the Bolitho proceeding. It sought payment of its fees from Banksia, which would, if successful, have been paid by funds held by the SPRs for the benefit of debenture holders. It was only relevant because of an allegation in the Banksia proceeding, which was to be jointly tried with the Bolitho proceeding. It was not an attribute capable of being ascribed a value for AFP's purposes.
>
> (b) The Funding Agreement provided for AFP's commission to be calculated on a monetary sum, not on a wider concept of value. Clause 12.1.2 of the Funding Agreement provided that AFP was 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'. A remuneration claim forgone was not 'money received'.

Relative contributions of Banksia and Bolitho legal teams

767 The first opinion sought to address the issue of multiplicity of proceedings by stating:

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... The expert evidence was commissioned co-operatively, and the lay witness statements were of mutual relevance. It may be noted, for instance, that [Banksia] includes the witness statements of the plaintiff, Mr Bolitho, amongst the evidence upon which it was to rely.

768 This statement was misleading. As counsel for the SPRs observed in their opinion filed in the remitter:

With all due respect, we consider aspects of this paragraph distort the true position. Whilst it properly recognises the relevance of the lay witness statements, solely prepared and filed by the SPRs and Receivers on behalf of Banksia, to the Bolitho claim and the 'significant advantage' to the Bolitho claim of the 'co-operative approach' taken to the preparation of evidence, the last two sentences, without more, do not accurately reflect the true position...

To say the expert evidence was 'commissioned cooperatively' could be interpreted as implying an evenness of contribution when it is incontrovertible that substantially all of the expert evidence was 'commissioned', prepared and paid for by the SPRs. The last sentence also inverts the more salient fact that Bolitho had indicated it intended to rely on most or all of the 43 witness outlines, witness statements and expert reports filed by Banksia. As noted, the witness statement of Mr Bolitho was irrelevant to Banksia's case against Trust Co.

769 AFP/Mark Elliott, O'Bryan and Symons deliberately misled Croft J about their contribution to the preparation of evidence. That was evident from the objective facts, the unchallenged evidence of the SPRs, and the documentary evidence.

770 I have considered the SPRs unchallenged evidence concerning respective contributions to the joint trial of the Bolitho proceeding and the Banksia proceedings in section Q.3. In that later analysis, I express my reasons for concluding that it was misleading to suggest the contributions of the Bolitho legal team were capable of being described as equal to those of the Banksia legal team.

771 The inequality in contributions was recognised by the Bolitho legal team. On 18 October 2017, Mark Elliott, Alex Elliott and the Lawyer Parties exchanged emails in which Mark Elliott said:

Do we need to follow up on the progress of our reply evidence?

O'Bryan replied:

Redwood tells me it is all in hand.

772 On 10 January 2018, after reviewing an affidavit made by Mr Lindholm, Symons commented in an email to Mark Elliott and O'Bryan:

[the SPRs] claim witness statements and expert reports filed by Bolitho as their own (including Laurie Bolitho's witness statement!).

773 O'Bryan responded:

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.

774 O'Bryan and Symons knew of the significance of the SPRs financing the preparation of both proceedings to AFP's funding commission, and that AFP was intentionally accepting the benefit of that contribution to avoid financing the litigation itself. O'Bryan and Symons did not disclose this in their opinion. They deceived the court about their own contribution to the work undertaken and paid for by the SPRs.

Funding commission rate

775 The first opinion stated:

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

(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 [AFP] 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...

...

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 [AFP] 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 [AFP] an entitlement of:

$64 million x 30% = $19.2 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 [AFP] that they might have expected to pay had [AFP] sought to enforce the strict terms of the litigation funding agreement.

776 The first opinion further noted that the funding commission sought by AFP was at the 'low end' or 'near to the bottom of the range' of acceptable and justifiable payments.

777 These statements were misleading. The common fund offer sought was of no benefit, let alone a 'significant' one, to group members who had signed the Funding Agreement. O'Bryan and Symons knew, and did not inform the court, that:

> (a) The quantum of AFP's claims for legal fees and funding commission had been reverse engineered with reference to the 30% specified in the Funding Agreement. Mark Elliott had demanded that Mr Lindholm agree to a 'division of the spoils' from the Trust Co Settlement that ensured a total deduction of $19.2 million, delivering approximately 30% of the settlement sum to AFP and the Lawyer Parties. O'Bryan and Symons knew that AFP's demand for costs and commission was made on this basis.
>
> (b) The funding commission sought by AFP was calculated as a percentage of the total settlement sum, rather than the proportion of the settlement proceeds that was referable to the claims in the Bolitho proceeding.

Statements regarding recoverability from Trust Co and Perpetual

778 Next, and relevantly for the following section, the first opinion identified the issue of recovering any judgment from Trust Co as a critical factor for why the settlement sum of $64 million was fair and reasonable.

779 It observed that Trust Co had filed evidence in support of the settlement from two senior executives of Perpetual, including its Managing Director, who stated that:

> (a) Trust Co's limit under the only policy of insurance held that was responsive to the claims was $75 million, inclusive of defence costs;
>
> (b) Trust Co had incurred costs of approximately $13 million in defending the Bolitho proceeding and the Banksia proceeding, which had eroded the limit of the policy to approximately $61

million;

(c) Trust Co had recovered a further $4 million from third party claims in the proceeding, which would be contributed to the settlement sum;

(d) Trust Co otherwise had no material assets available, or source of funds, to contribute to the settlement; and

(e) if judgment was entered against Trust Co in either proceeding:

> [N]either Perpetual, nor any of Perpetual's related bodies corporate ... would indemnify Trust Co, or provide Trust Co with any financial assistance, or any other assistance, to satisfy any damages awarded in respect of such judgment or order.

780 Counsel observed that:

(a) the settlement sum of $64 million represented the limit of the assets it had available; and

(b) the statement that Perpetual would refuse to provide Trust Co with any financial assistance in the event of a judgment that exceeded its available assets ought to be taken as its true intention, given it had been proffered from its Managing Director. It had no reason to resile from the statement, even if it became public, as it had largely ceased acting as a corporate trustee for debenture holders, and would not suffer any adverse reputational consequences as a result.

J.5. Objections to the Trust Co Settlement

781 Prior to the approval application hearing, two group members lodged objections with the court: Mr Keith Pitman and Mrs Wendy Botsman.

Mr Pitman

782 The Contradictor relied on an affidavit from Mr Pitman who was not required for cross-examination. Mr Pitman, who was 84 years old, has served on the Banksia debenture holder committee established by the Receivers and the SPR from June 2014.

783 In December 2017, Mr Pitman received a copy of the notice to group members regarding the Trust Co Settlement, and noted that certain documents were confidential, but were available for inspection by group members at the offices of Portfolio Law, including the Settlement Deed and 'the external [costs] consultant's affidavit'. He decided to object to the payments for legal costs and funding commission.

Access to documents

784 Between 8 and 17 January 2018, Mr Pitman made four separate, but unsuccessful attempts to obtain copies of the confidential documents from Portfolio Law.

785 Mr Pitman provided Portfolio Law with a copy of his objection to the settlement. Zita then forwarded a copy to Mark Elliott, Alex Elliott, O'Bryan and Symons:

Gents

Subject to instructions I am happy to call Keith Pitman

O'Bryan responded:

Don't call him, Tony. He has not complied with the orders and we should first discuss how to deal with him.

786 On 25 January 2018, Mr Pitman emailed Zita a copy of his communication to the court, which recounted in detail his inability to access documents referred to in the notice from Portfolio Law. Zita forwarded this on to Mark Elliott, Alex Elliott, O'Bryan and Symons, O'Bryan replied:

Is what he alleges true, Tony?

787 Zita responded by providing the group with a copy of the phone messages Zita had received from Mr Pitman earlier that month, and stating that he would check with the receptionist regarding Mr Pitman's allegations of being refused inspection of documents.

Mark Elliott:

He has the Deed already via Norm

Give him the 3rd FASOC asap

He can have the Trimbos 3 page affidavit but not the confidential exhibit-give it to him

O'Bryan:

The notice of settlement (published by Court order) clearly states that the cost consultant's affidavit will be available for inspection at Portfolio Law.

We must give it to him or we risk the settlement approval (not to mention raising suspicions as to why it has been kept secret).

This is a fuck up that we must fix quickly today so far as we are able to

O'Bryan promptly forwarded a copy of the Third Trimbos Report to Mr Pitman.

788 At trial, the Contradictor did not press that Zita's failure to provide the documents to Mr Pitman was dishonest or deliberate. That concession was properly made. It was never the Bolitho legal team's intention to keep documents that had been expressly recognised in the notice as being available for inspection from group members.

789 Zita's failure to respond to Mr Pitman's correspondence was not part of the deception played on group members and the court. What it demonstrated was Zita's incompetence. His failure came at this point in the litigation when Zita plainly owed a duty to unrepresented group members.

Pressure to withdraw objection

790 Mr Pitman's objection relevantly stated:

My reasons for writing is that I wish to object to the huge amount of the $12.8 million (plus GST) that the Funder is seeking. We assume that the Funder is Mr Mark Elliott as the Class Action Notice to Group Members did not state who the Funder was. This document was neither signed nor dated...

As I understand it Mr Elliott's involvement began when he learnt of the Banksia collapse. He approached several investors in the Kyabram area requesting that they become a Plaintiff so he could mount a Class Action, and as it would appear Mr Bolitho obliged. The remainder of the investors had no say in these proceedings.

As an experienced lawyer Mr Elliott would have known that the Receivers would mount similar legal action anyway to pursue the various Defendants for damages as has been done, with the results in all probability, being the same or with similar outcomes without the exorbitant $12.8 million plus GST Funder fee Mr Elliott is now seeking.

It appears to me that Mr Elliott invited himself into this Receivership/Liquidation as he certainly wasn't instructed either by the Receivers or the investors except Mr Bolitho, therefore I feel that Mr Elliott's payments/fees should be as follows:

1. Mr Elliott should only be paid at standard legal rates commensurate to his level of qualifications based on time he has expended on this case. Whilst he has no doubt added to the successful outcomes and his efforts are appreciated, his claim for $12.8 million plus GST seems grossly excessive.

2. Mr Elliott be reimbursed the $4.75 million plus GST for the Plaintiffs legal costs and disbursements less any of Mr Elliott's personal/professional fees (if any) that he may have incorporated into the above costs and disbursements. As at the time of writing I have not been able to obtain a copy from Portfolio Law of these costs and disbursements to verify the above, however I hope to do so prior to Court Proceedings on 30th Jan 2018.

3. Mr Elliott not be reimbursed for costs associated with his unsolicited mail out to Investors as reiterated earlier in this letter as he did this without instructions from the Liquidators or Investors...

I intend to appear in Court on 30th Jan 2018 to argue my case on behalf of all investors in Banksia Securities Ltd. I await your reply as to what time and in which court I will be required to attend.

791 O'Bryan suggested that the easiest way to deal with Mr Pitman would be to inform him of the risk that his opposition posed to the settlement and implicitly encourage him to withdraw it. In a separate email exchange to Mark Elliott:

O'Bryan:

Do you know Pitman?

Is it best for you to speak to him and/or Rob Crow?

Mark Elliott:

Sure, i know him

He is an old fool

I will talk to Doug [a debenture holder] and seek his advice!

O'Bryan:

OK

I reckon the key is to convince him that:

a. He threatens the settlement and if the case runs (as it then will) it could go another 2-3 years before it completes (assuming Croft can find the 6 months for the trial this year). If we lose, the DB holders get nothing. Even if we win, they certainly won't get as much as the settlement now is worth to them. The net value is likely to be less than the current value, even when the funding fee is paid.

b. You are not the funder – if he had bothered to read the notice he would have seen that (put that gently!)

c. You are not entitled to any legal fees.

d. The liquidators' case is actually crap – that's where the money has been wasted, not the class action...

f. The funding fee is very reasonable when compared to any other substantial class action ever successfully concluded in Australia.

g. Ditto the legal fees...

i. In light of the above (but most importantly (a)), he should withdraw his objection.

Mark Elliott:

Noted.

O'Bryan:

Final point:

TC has spent $13M in legals to date; Receivers & liquidators about the same between them. We have those figures on oath. If we go to trials & appeals, you could add 60-85% again.

If we lose, or even if only the liquidators lose, the DB holders will effectively fund out of their own pockets another $20 – 30M in legals because TC will be entitled to all its costs out of the bankrupt BSL estate.

If that happens, all the $$ in the receivers' & liquidators' bank accounts will go to TC, not the DB holders.

That should convince him.

792 On 18 January 2018, Mark Elliott forwarded Mr Crow a draft of the first opinion. He suggested providing a copy to the lawyers who Mr Pitman had retained to advise him about the Trust Co Settlement, before adding:

Whatever it takes to get Pitman to FO is approved

793 On 19 January 2018, Mr Pitman spoke to O'Bryan twice by phone. During the first call, O'Bryan informed him that he should withdraw his objection as it threatened the settlement. Mr Pitman recounted his difficulties in receiving copies of the confidential documents and O'Bryan told him he would provide him with the documents referred to in the notice.

794 O'Bryan later emailed Mr Pitman a copy of the Settlement Deed. He forwarded his communication to Mark Elliott, who replied:

Does he know to keep Deed confidential?

No one is meant to get a copy!

795 Meanwhile, Mr Pitman learned that Mrs Botsman would be objecting to the settlement. Late that evening, O'Bryan phoned Mr Pitman again to discuss his objection. Mr Pitman's unchallenged evidence, which I accept, was that O'Bryan tried to persuade him to withdraw the objection. Mr Pitman told O'Bryan that he would not withdraw the objection and mentioned that Mrs Botsman's objection meant that his objection would not risk jeopardising the settlement in and of itself.

796 On 28 January 2018, Mr Pitman sent a further email to the court concerning his interactions with the Bolitho legal team in the preceding week. After confirming that he had received the documents referred to in the notice, he stated:

I would also wish to bring to your attention that I have been contacted by two lawyers. One aggressively and the other politely to withdraw my Submission ... I am at a loss as to why these lawyers contacted me as the 'Class Action Notice to Group Members' invites submissions.

Mrs Botsman

797 On 19 January 2018, Mr Chris Botsman emailed Zita and the court attaching an objection to the Trust Co Settlement on behalf of his mother, Mrs Botsman. Mr Botsman first took issue with the reasonableness of the settlement sum itself, although that submission was misconceived. Next, he identified her concern with the quantum of AFP's claims for legal fees and funding commission:

[T]he payment of $17.6 million to the Plaintiff's lawyers is extravagant, if, as habitually occurs in these cases, and as I understand occurred in this case, the class action lawyers utilised the work undertaken by the lawyers for the special purpose receiver on behalf of Banksia. That being so, the fee of $4.75 million to the Plaintiff's lawyers is extravagant.

How can the special purpose receiver justify a settlement that involves such a meagre return to debenture holders ($44.62 million representing 26% of the claimed sum) and such a spectacular return to the Plaintiff's lawyer ($17.6 million) where the Plaintiff has had its claims struck out and the vast bulk of the valuable legal work has been undertaken by the lawyers for the special purpose receiver...

The unedifying impression created is that in exchange for the Plaintiff's lawyers agreeing to the Settlement Sum, the lawyers for the Special Purpose Receiver agreed not to object to the eyewatering claim being made by the Plaintiff's lawyers. This quid pro quo benefits the lawyers at the expense of debenture holders.

The postulated total recovery for debenture holders of 88.69 cents for each $1 dollar of debentures held by them make no allowance for interest. Meanwhile the lawyers acting for the Plaintiff and Banksia will recover all their fees as well as, in the case of the lawyers for the Plaintiff, an exorbitant premium.

798 Mr Botsman's objection concluded by:

> (a) submitting that a contradictor should be appointed to represent the interests of debenture holders, and noting that it would be inconsistent not to appoint a contradictor for the Trust Co Settlement when one had been appointed for the Partial Settlement approval hearing;
>
> (b) objecting to the size of the settlement sum relative to the amount claimed and the strength of Banksia's claim against Trust Co; and
>
> (c) objecting to the division of the settlement sum by 'incorporating an extravagant payment to the plaintiff's lawyers'.

799 Despite O'Bryan's initial dismissive response in private communications with the Bolitho legal team, Mark Elliott agreed that a second opinion from counsel be filed to respond to Mr Botsman's objection.

J.6. The second opinion

800 On 24 January 2018, Zita filed a supplementary confidential joint opinion by O'Bryan and Symons. The second opinion noted that neither objector was privy to the information and reasoning contained in the first opinion to avoid waiver of legal privilege, possibly a dubious justification.[74]

801 In the second opinion, counsel opined:

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.

That the plaintiff and the litigation funder should be fairly remunerated by orders of the Court for their outlays, assumption of considerable risks, and efforts, which have resulted in what is in our opinion the best settlement possible, is entirely consistent with legal principle and precedent and cannot on any reasonable view of the matter be said to "beggar belief"'.

802 In respect of Mrs Botsman's objection, counsel noted:

Had Mr Botsman sought further information from the plaintiff's solicitors (or from us) in relation to the Trust Co settlement, it is probable that Mr Botsman's concerns might have been addressed without the need for the

filing of any formal objection.

803 O'Bryan and Symons again invited the court to rely upon the Third Trimbos 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 Trimbos.

Counsel further noted:

It is important to reiterate that the Funder's Commission is not a premium payable to solicitors and counsel who have worked at regular rates but a payment to the plaintiff's litigation funder who has borne the expenses and risks of bringing a significant proceeding on behalf of over fifteen thousand debenture-holders.

804 Finally, resisting appointment of a contradictor, O'Bryan and Symons stated:

While a contradictor or an amicus has been appointed in several cases, the appointment of a contradictor or amicus curiae in respect of a proposed settlement is not the norm. It is an appropriate step where there are particular features of a settlement which introduce the possibility of a conflict of interest...

Trust Co [suggested a Contradictor be appointed in the Partial Settlement to address] the manner in which the settlement sum was to be split between the [Bolitho proceeding] and the [BSL proceeding] and a perceived conflict arising from Mr Elliott's role prior to December 2014 as the solicitor for the plaintiff as well as his involvement in the Funder established to fund the proceeding as concerned the recovery of legal fees by Mr Elliott. That conflict was resolved upon the approval of the partial settlement and is not present in the final settlement.

While the appointment of an amicus curiae/contradictor was an appropriate step in relation to the partial settlement, the particular features justifying the appointment of an amicus curiae or contradictor are not present in relation to the proposed Trust Co settlement.

805 These submissions were intentionally misleading, ignoring egregious conflicts noted elsewhere in these reasons.

J.7. The approval hearing and reasons

806 On 30 January 2018, Croft J heard the approval application. In addition to counsel for the parties to the Bolitho proceeding and the Banksia proceeding, AFP was separately represented, and Mr Pitman appeared in person.

807 O'Bryan tendered the Third Trimbos Report and the first and second opinions in support of the approval application.

808 Following O'Bryan's submissions, Mr Pitman addressed the court, reading from Mr Botsman's objection letter and stating his submissions were consistent with the views of Mrs Botsman. He submitted that it seemed unlikely that Perpetual would 'disclaim' responsibility for Trust Co's liability and that a contradictor should be appointed, stating:

The position I take today is that I will withdraw my objection — and Mr Botsman will too — if a contradictor considers that the settlement is fair and reasonable to debenture holders.

809 In concluding, Mr Pitman said:

About 80 per cent of the bank's investors are over 55 years of age. I, myself [am] nearly 82, and most are in their 70s or 80s. In an age where income and equality is making news all over the world, it beggars belief that already wealthy lawyers should profit at the expense of retirees who stand to receive a partial return on investments that in many cases they could not afford to lose.

810 Croft J addressed Mr Pitman's concerns. His Honour explained that he was satisfied on the material that the $64 million settlement sum was the extent of the available resources. Mr Pitman stated:

Well, I have to accept that, I guess.

811 After explaining that he was satisfied on the materials filed in support of the settlement that the legal fees and funding commission were fair and reasonable, Croft J approved the settlement.

812 On 16 February 2018, his Honour published his reasons for approving the settlement. The reasons record that Croft J relied on the Third Trimbos Report, and the opinions of O'Bryan and Symons. His Honour quoted extensively from their opinions, including their assertions that:

> (a) the Lawyer Parties were engaged on their 'usual terms' and the court should take comfort from the involvement of AFP as 'a sophisticated participant' in the proceeding, who had provided 'oversight' in respect of their engagement;[75]
>
> (b) AFP had:
>
> > (i) 'paid' or was 'expected to pay' legal costs of 'approximately $7.8 million';
> >
> > (ii) 'paid or agreed to pay security for costs in excess of $1.5 million'; and
> >
> > (iii) accepted a 'possible liability' of adverse costs that was 'likely to exceed $15 million'.[76]
>
> (c) 'all legal costs incurred' had been in respect of 'the conduct of this proceeding on behalf of group members';[77] and
>
> (d) Trust Co's release of its remuneration claim was 'likely to have a value to debenture holders in the order of $11.16 million'.[78]

813 O'Bryan and Symons persuaded Croft J not to appoint a contradictor.[79] O'Bryan and Symons led the judge into error.[80]

11. THE APPEAL FROM APPROVAL OF SETTLEMENT

K.1. AFP's response to Mrs Botsman's appeal

814 On 20 March 2018, Mrs Botsman filed an application for leave to appeal the settlement approval decision. She was assisted by her son, a barrister practising in New South Wales. Mrs Botsman contended that the settlement sum was inadequate and that AFP claimed an excessive funding commission and excessive legal costs that had not been properly scrutinised.

815 AFP, O'Bryan, Symons, and Zita admitted to conduct during the course of Mrs Botsman's appeal application that was intended to prevent or dissuade Mrs Botsman from pursuing her appeal, and later to prevent or dissuade the SPRs and their counsel from making submissions to the Court of Appeal in support of Mrs Botsman's appeal. However, these admissions were belatedly made on 14 July 2020, shortly before the trial in the remitter.

816 Save for that admission, at first blush, it might appear as though the conduct of AFP and the Lawyer Parties was not unusually aggressive, by modern litigation standards. However, I am satisfied that Mark Elliott, O'Bryan and Symons saw the appeal as a direct threat to the success of their scheme to achieve and

then divide up ill-gotten spoils from the Bolitho litigation. Its objective was to thwart the proper administration of justice and retain their illegitimate financial gains. Their conduct must be evaluated in that context. It could never be consistent with the overarching purpose of the *Civil Procedure Act*. This was the beginning of a concerted campaign, over the course of two years and three months, to conceal their misconduct. AFP, Mark Elliott, the Lawyer Parties and Alex Elliott's response to the prospect that their nefarious activities might be exposed was 'attack is the best form of defence'.

A strategy to crush Mrs Botsman

817 On 21 March 2018, before service of the application confirmed Mrs Botsman to be the applicant, O'Bryan prepared a draft summons for Mr Bolitho to seek security for costs in the appeal. O'Bryan forwarded the draft to Zita, Mark Elliott and Alex Elliott, and copied Symons.

818 Within minutes, Alex Elliott responded, emailing O'Bryan and Symons and copying Mark Elliott (emphasis original):

Please see attached a security for costs judgment handed down on 5 March 2018 in the Victorian Court of Appeal by Kyrou and Niall JJA

The applicant was ordered to give security in the form of a personal undertaking and a charge in favour of the respondents over the applicants house

"The application for leave to appeal should be stayed pending the proffering of the written undertaking"

819 When his cross-examiner asked why he had undertaken that research to find a recent security for costs judgement, Alex Elliott claimed it was '[j]ust out of general interest,' and that he was 'just trying to impress [O'Bryan]'. I do not accept this statement as truthful. Alex Elliott also stated that:

I took a much greater interest at this point and onwards in the, I guess, appeal and sort of everything that followed from there, yeah.

820 Alex Elliott thought an application for security for costs on the appeal was appropriate:

It just seemed like the usual course of litigation. I guess, you know, my experience in the past had been that, I guess plaintiffs and defendants throw as many obstacles as they can in the way to I guess try and distract or limit I guess the effectiveness of certain proceedings and applications

...

it wasn't something that I considered was unusual.

821 From 23 to 26 March 2018, Mark Elliott, O'Bryan, and Symons planned in numerous email discussions how they would prevent, stymie or discourage Mrs Botsman's appeal. Alex Elliott was also copied into the majority of these discussions, which were actioned by Zita in his post-box function.

822 On 23 March 2018, after consulting with Mark Elliott, O'Bryan instructed Zita (copying Mark Elliott, Symons and Alex Elliott), to respond to an email from Mr Botsman enquiring about further settlement with third parties:

Mr Bolitho is not (and has never been) involved in the conduct of any of the third party proceedings in the Banksia case, all of which have been commenced and conducted by the Banksia liquidators on behalf of Banksia itself. Any questions you have about the third party proceedings should be directed to the liquidators.

The third party proceedings also have nothing to do with the settlement of the class action, which we understand is the only matter the subject of your leave application.

Accordingly there is no basis for any delay in the service on Mr Bolitho (via our firm) of your application for leave to appeal.

Please serve it immediately so that Mr Bolitho may respond to it promptly.

If it is not served today, Mr Bolitho will approach the Court for appropriate relief.

823 Later that morning, O'Bryan emailed Symons, copying Mark Elliott, Alex Elliott, and Zita:

We need to prepare an application for a speedy VSCA hearing of the Botsman leave application, supported by a short affidavit from Tony which gives the chronology since the settlement judgment, exhibits all the silly communications to & from Botsman & says that Bolitho and other debentureholders are very aggrieved at being held out from their money.

If we need further evidence of the latter, I am confident Laurie & Rob Crow (do they know what's happening?) will get it for us.

824 Between Friday, 23 March, and Sunday, 25 March, Mark Elliott, O'Bryan and Symons discussed strategy by email. On 25 March 2018, Mark Elliott asked:

What advantage is there to him in delay?

O'Bryan replied:

It makes it more likely (he considers) that we will offer a larger bribe to be rid of him.

It worked for Nick Bolton several times.

Mark Elliott then replied to O'Bryan only:

If he serves on Tuesday what's next?

O'Bryan replied:

Applications for speedy hearing & security for costs.

We need papers (applications & affidavits) ready to be filed & served on Tuesday, minutes after we are served.

He needs to be nervous before the end of the day.

825 Immediately after replying to Mark Elliott, O'Bryan forwarded the draft summons again to Zita, Mark Elliott and Alex Elliott, and copying Symons, instructing in the body of the email that the application be ready to go as soon as the appeal was served.

826 On Monday, 26 March 2018, not having yet been served, Zita obtained a copy of Mrs Botsman's appeal documents, although the documents were served a few hours later. O'Bryan immediately emailed Symons and Zita, copying in Mark Elliott and Alex Elliott, and instructed him to draw the applications for expedition and security for costs.

827 Mark Elliott then developed a further response related to compliance with the Funding Agreement, emailing Symons and copying Alex Elliott and Zita:

Our records indicate:

Wendy D Botsman, [street address redacted] Magill, SA, 5072

Debenture Face Value: $24,661.62

We think that she signed [a Funding Agreement] with [AFP] at 30%

We will confirm asap with a copy of it when possible

Symons:

Fantastic, thank you

Mark Elliott:

MS

Just checking whether WB is allowed to appeal?

LFA (clauses 6, 7.2 and 16)?

Still trying to confirm if she signed

828 Ten minutes later, Mark Elliott emailed Symons focussing on the Funding Agreement. Mark Elliott emphasised provisions requiring compliance by signatories with the legal advice provided by the Lawyer Parties, and the instructions given by AFP about the conduct of the proceeding.[81] He suggested to Symons that cl 13.6 might assist.[82]

829 Later that day, Alex Elliott confirmed to his father that Mrs Botsman was a signatory to the Funding Agreement, and forwarded a copy of Mrs Botsman's signed acknowledgement and acceptance to Mark Elliott. Mark Elliott in turn forwarded the documents to O'Bryan and Symons, copying Zita. He wrote:

All

Is this relevant to the discussion!!!!!

Symons replied:

I reckon!

Mark Elliott then instructed Symons and O'Bryan:

Draft away

She owes me 4 weeks interest plus costs already!

830 O'Bryan proposed an aggressive strategy to seek a restraining injunction:

So I suggest that AFP engages Minter Ellison (or similar high fee firm & barristers) to enforce its rights under the LFA.

AFP should issue a separate proceeding in the SCV for an injunction to stop the appeal & damages & costs.

First we need to be absolutely certain that we have the right person & the LFA is still on foot.

831 Mark Elliott confirmed the details as instructed. He confirmed Mrs Botsman had signed the Funding Agreement and had not opted out.

832 The argument conceived in this discussion — that the Funding Agreement could be used to restrain Mrs Botsman — would become AFP's main argument in its claim against Mrs Botsman that she be restrained from pursuing her appeal.

833 Symons considered other strategies to disadvantage Mrs Botsman. Was there compliance with the *Civil Procedure Act*? Was there compliance by Mr Botsman with the *Legal Profession Uniform Conduct (Barristers)*

Rules 2015? That evening, Symons sent around a list of his suggestions in an email to O'Bryan, Mark Elliott and Alex Elliott with his suggested course of action:

1. Tomorrow, Tony writes to the Court of Appeal again and asks if there have been any Forms 4A and 4B filed, or any alternative declaration given in compliance with ss 41 and 42 of the Civil Procedure Act 2010 given;
2. Assuming the answer is no, Tony writes to both Chris Botsman and Wendy Botsman asking where they are;

100. Tony sends the letter/email asking about security for Mr Bolitho's costs;

4. Tony sends a letter to the Court of Appeal saying that Mr Bolitho agrees with the need for expedition, and requesting that a timetable be set down which allows for the hearing of the application for leave to appeal within the next 3-4 weeks.

834 Mark Elliott, O'Bryan and Symons then prepared correspondence to Mr Botsman and Mrs Botsman to foreshadow the interlocutory applications and apply pressure on costs.

835 Symons suggested an email for Mr Botsman:

Once served, should Tony perhaps reply:

Dear Mr Botsman

I would be grateful if you could identify an address for service of the Applicant, Wendy Diane Botsman. I apprehend that you act as counsel for Wendy Diane Botsman, and that in acting as counsel you do so in your capacity as a barrister or legal practitioner.

I understand that a barrister to whom the *Legal Profession Uniform Conduct (Barristers) Rules 2015* apply may not be the address for service of any document or accept service of any document.

Mr Bolitho expects shortly to seek to file and serve certain applications in respect of the application for leave to appeal which has been commenced in Wendy Diane Botsman's name. However, a proper address for service upon Ms Botsman is required to ensure that Ms Botsman's address for service is properly disclosed on Mr Bolitho's applications when they are filed and to ensure that service of those applications is effective.

O'Bryan approved and Mark Elliott instructed Zita to send the email, which he did.

836 Symons confirmed to Mark Elliott that Mrs Botsman's address as stated on the AFP register of debenture holders was confirmed by the Australian Electoral Commission.

837 Symons sent a further email to O'Bryan, Mark Elliott and Alex Elliott enclosing a second draft email to Mr Botsman, and a draft letter to Mrs Botsman personally, stating:

Dear Mr Botsman

I refer to my email sent earlier today concerning the Applicant's address for service. Please now see attached letter which will also be sent by post to the Applicant in proceeding S APCI 2018 0037.

We note that the register of debenture holders indicates that Ms Botsman resides at [redacted], Magill in the State of South Australia. A search of the Australian Electoral Commission records filed today indicates that Ms Botsman continues to reside at that address.

The attached letter to Mrs Botsman as settled and sent is set out below.

838 Mark Elliott agreed and O'Bryan settled the draft letter to Mrs Botsman, and sent it to Symons (copying Mark Elliott, Alex Elliott, Zita and the Bolitho class action email). The full text of the letter conveys the lengths that these parties were willing to go to protect themselves (O'Bryan's edits underlined):

Dear Ms Botsman

Botsman v Bolitho (representing the debenture holders in Banksia Securities Ltd (in liquidation))

Supreme Court of Victoria Court of Appeal proceeding S APCI 2018 0037

I am a director and principal of Portfolio Law Pty Ltd. Portfolio Law Pty Ltd acts as the solicitor for Mr Laurence Bolitho (who represents the debentureholders in Banksia Securities Ltd (in liquidation)) in respect of ~~an~~ your application for leave to appeal from the decision of the Court approving the settlement of the group proceeding, recently commenced ~~by you~~ in the Supreme Court of Victoria (**application for leave to appeal**).

I have today been served with the papers in respect of the application for leave to appeal by a Mr Christopher Botsman, a barrister practising in New South Wales. I ~~apprehend~~ assume that Mr Botsman is acting as your counsel in this application for leave to appeal and that you have not engaged a solicitor. Would you please confirm whether my assumption in this regard is correct?

By operation of r 13(e) of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, ~~r 13(e) means that~~ Mr Botsman is unable to accept service of documents in this proceeding on your behalf.

It is therefore necessary for me to send this letter to you directly.

The purposes of this letter are:

> (i) to inform you that the First Respondent, Mr Bolitho whom I represent, expects to make an application to the Court shortly for you to provide security for his costs of your application for leave to appeal;
>
> (ii) to advise you of the likely quantum of Mr Bolitho's costs;
>
> (iii) to note the prospect of significant additional costs being incurred by the sixteen other parties to the application for leave to appeal;
>
> (iv) to seek information from you concerning your assets available to satisfy any adverse costs order made in the application for leave to appeal;
>
> (v) to ~~seek~~ invite any proposal you may wish to make in relation to giving the First Respondent security for his costs of the application for leave to appeal.

First Respondent's likely costs

Based on my experience, I expect that Mr Bolitho's costs of the application for leave to appeal will be at a minimum approximately $160,000 (including disbursements such as Counsels' fees, but excluding GST). Should the giving of security for costs not be agreed, ~~and if it is~~ it will be necessary for Mr Bolitho to bring an application for security for his costs~~,~~ and that figure will be the subject of more detailed quantification and may well be higher. Further, should a formal Court application for security for costs be ~~brought~~ required, Mr Bolitho will need to commission expert evidence on this topic, and he will also seek security in respect of those costs, assuming his security application is successful. I note that I have been informed by Mr Botsman today that

you intend to make a preliminary application for access to confidential documents. That application will likely be opposed and I have factored that application into the likely costs ~~of the application~~ estimate in respect of which security will be sought.

Costs of other parties

I note that there are sixteen other respondents to the application for leave to appeal. As presently advised, I do not know how many of those respondents will be actively involved in the application for leave to appeal. However, at minimum, I expect that the Second and Third Respondents will be actively involved in the application for leave to appeal. Other of the respondents will likely have limited involvement. On this basis, I expect that the respondents' collective costs of the application for leave to appeal ~~may well exceed~~ will be in the range of $500,000 - $1 million.

Your financial position and proposal concerning the giving of security for the First Respondent's costs of the application for leave to appeal

I would be grateful if by 4pm on 29 March 2018 you could:

> (a) provide full and complete information and evidence concerning your personal financial position and your unencumbered assets available to satisfy any adverse costs orders in this proceeding. This ~~may~~ would include details of your personal bank account balances, ~~any pre-existing personal debt, any~~ shares, ~~or~~ any other securities or valuable and fungible assets held by you, any real property which you hold and whether that real property is subject to any encumbrances, and if so the ~~extent~~ financial value of ~~that~~ any encumbrances, and any prior ranking personal debts or liabilities you have; and
>
> (b) any proposal you may have for ~~the~~ giving security for the First Respondent's costs of the application for leave to appeal (in the sum of $160,000), which may obviate the need for Mr Bolitho to apply to the Court for an order for security.

Yours faithfully

Tony Zita

839 In the final exchange of emails that evening, O'Bryan, Mark Elliott and Symons (copying Alex Elliott, Zita and the Bolitho class action email mailbox) discussed the importance of getting the letter to Mrs Botsman quickly. O'Bryan urged that the letter be issued quickly to 'spook her on SFC ASAP'. O'Bryan also proposed:

I have a good mate in Adelaide who could print this there & have it hand-delivered tomorrow if required.

840 Symons suggested hiring a process server and then emailed Zita:

I discussed with Mark the possibility of us doing a search to see what real property Wendy Botsman owns. I think it would be good to annex a search to the letter.

Tony, do you know how to do this?

841 Mark Elliott initially expressed some reservation about rushing the correspondence, asking 'what's the hurry? Don't spook them too soon I need time to get Minters going' and expressing his worry that Mrs Botsman, as an individual with no money, would get sympathy. However, it appears his fears were allayed because he could not even wait for Zita to send the correspondence to Mrs Botsman. Shortly after 8.00am the

next morning, on Tuesday, 27 March 2018, Mark Elliott personally emailed Mrs Botsman directly to inform her that certain information was to be disclosed to her in relation to her appeal. Later, in the AFP injunction proceeding, the judge found that in sending that email Mark Elliott intended to intimidate Mrs Botsman.[83] The evidence on the remitter was different to that before the injunction court. I am satisfied to the requisite standard that the whole strategy that I am presently describing, not just the email, was intended to intimidate Mrs Botsman into abandoning her application and this was the intention of all parties to the strategy not just Mark Elliott.

842 Later in the day, Mr Botsman replied to the earlier correspondence from Portfolio Law. He confirmed that he was appearing for Mrs Botsman on a direct-access basis and that the Barristers' Conduct Rules permitted any applications or discussions in relation to the appeal to be directed to him. In particular, Mr Botsman wrote:

In those circumstances, there should be no need to communicate with the applicant.

843 Zita forwarded Mr Botsman's correspondence to the Bolitho class action email account. To that email, Zita attached the letter to Mrs Botsman (O'Bryan's settled draft with edits accepted on Portfolio Law's letterhead), and in the body of the email Zita wrote:

Dear All,

This is the letter we intend to send.

Considering the below e-mail from Mr Botsman, are any amendments necessary.

844 From Zita's correspondence, and the drafting history of the letter to Mrs Botsman, it is clear that by using the term 'all', Zita was referring to O'Bryan, Symons, Mark Elliott and Alex Elliott, and that each of them had access to the Bolitho class action email account operated by Portfolio Law.

845 Less than an hour later, and despite having already recognised that in light of Mr Botsman's email it was inappropriate to send the letter directly to Mrs Botsman, Zita sent the letter (unchanged) to Mrs Botsman, and forwarded a copy to Mr Botsman. During cross-examination, Zita said that he had 'no doubt' that the letter would have caused Mrs Botsman distress and he expressed his regret at not exercising better judgment when sending the letter to Mrs Botsman. He apologised to her from the witness box.[84]

846 Mr Botsman promptly replied to Portfolio Law:

I note that your 1:20pm email to the applicant, attaching a letter forecasting an application for security for costs (Letter), was sent after:

1. My mother received an unsolicited email at 8:04am this morning from Mark Elliott, referring to the need to provide the applicant with "important information";
2. I sent you an email at 12:07pm indicating that correspondence should be directed to me and inviting Mark Elliott to call me to discuss the "important information"; and

100. I called your office at about 1pm and was told that you were unavailable but that you would call me back.

I assume from the timing of events that the important information that Mark Elliott wished to convey concerned the amount of security he intends to seek for Mr Bolitho's costs.

I also note that although the Letter refers to 16 other parties, you are in receipt of correspondence from me indicating that the number of parties to the appeal will reduce on account of settlements in the third-party proceedings.

847 Several minutes later, O'Bryan, having access to the Bolitho class action email account, forwarded Mr Botsman's email to Mark Elliott, Alex Elliott and Symons. Later that afternoon, Symons supplied Zita with another draft email, addressed to the Court of Appeal Registry. The email requested confirmation and copies of any overarching obligations certificates filed on behalf of Mrs Botsman in relation to the appeal. Symons also copied his draft to Mark Elliott, Alex Elliott and O'Bryan. Mark Elliott instructed Zita to send the email immediately.

848 On 29 March 2018, Keith Pitman emailed other members of the debenture holders' committee in relation to the appeal:

Just to let you know that Chris lodged his Appeal last Monday. He is flying overseas today and will be away for a month, so I imagine the case won't be listed for some time. He told me if Elliott hadn't stuffed around with his huge mailout fee the cheques would have gone out and he (Chris) wouldn't have been able to get his Appeal in. One of the main issues in his Appeal is that he claims Elliott should only get a $5.4 mil. Funder Fee. He quotes Legal reasons for his claim, so I hope he is right. Last Sunday I had a call from Eleonora Symmonds wanting to know what is happening and a visit yesterday from Rob Lea as well.

Rob thinks we should have a meeting of current and past Committee members say at Ferrier Hodgson's offices after the appeal hearing and I agree with him, to discuss where all this is heading. I have put it to John Lindholm and am awaiting his reply.

For those of you that can't make it I guess we could Teleconference as well.

I hope John can get us a Press Release A.S.A.P. as I would imagine a lot of investors are starting to worry as to where there cheques are.

849 This email came to Mark Elliott's attention and he forwarded it to O'Bryan, Symons and Alex Elliott, prompting O'Bryan to ask:

Whose side is Pitman on?

Mark Elliott replied:

Not ours.

Application to restrain the appeal

850 By 28 March 2018, Mark Elliott followed O'Bryan's advice to engage a 'high fee firm & barristers' and AFP retained ABL, and senior and junior counsel, to represent AFP when seeking an injunction to restrain Mrs Botsman's appeal. O'Bryan and Symons provided significant assistance to that legal team, including drafting and settling the pleadings and submissions.

851 On 29 March 2018, AFP sought an injunction to restrain Mrs Botsman from continuing the appeal, damages from Mrs Botsman in respect of delay in receipt of AFP's commission and legal costs under the settlement claimed at $5,289.04 per day, plus costs of the hearing, on the grounds that Mrs Botsman's appeal was in breach of the Funding Agreement.

852 On 4 April 2018, ABL wrote to Mr Botsman (emphasis added):

If your client does have a right of appeal pursuant to s 33ZC(5) of the Act (which our client denies), her commencement of an application for leave to appeal is in breach of the litigation funding agreement on the basis articulated in the statement of claim. The existence of a right to object to the settlement does not gainsay the conclusion that an appeal from orders of the Court approving a settlement constitutes a breach of the litigation funding agreement.

The relief sought by our client in this Proceeding is intended to protect its private rights arising under the litigation funding agreement. But for your client's actions in breach of the litigation funding agreement, our client would have the benefit of the Deed. Absent the payment into Court of a sum sufficient to make good the loss which may be sustained, the only means by which our client's private rights may be protected is by your client being restrained from bringing the application for leave to appeal.

Any loss which your client might say that she could possibly suffer by being so restrained by our client is limited to principal of $4,439.16 and interest of $3,589.333, totally the sum of $8,028.49. Your client's holding of debentures issued by Banksia Securities Limited represents approximately 0.004% of the claims of all debenture holders. **It should also be noted that the distribution of approximately $44 million to the other 22,000 debenture holders (or 99.996% of debenture holders) is delayed by your client's application for leave to appeal in circumstances where our client considers that the application is without merit.**

Despite having been a party to, and having received the benefit of, the funding agreement for more than three years, your client has not once previously suggested that the litigation funding agreement is unenforceable. If your client intends to allege that the litigation funding agreement is unenforceable, please articulate the basis for this view at the earliest possible opportunity. Estoppel, amongst other defences, will be relied upon in reply.

AFP's amended statement of claim alleged that Mrs Botsman, by applying for leave to appeal the settlement approval order, was depriving the plaintiff and the lawyers engaged and all other group members of the benefits of the Funding Agreement, in breach of cll 16.1, 9.1, 9.2 and 9.3 of the Funding Agreement. AFP claimed that Mrs Botsman's conduct caused resulting loss to AFP, including $5,225,000 for reimbursement of legal costs and disbursements incurred by AFP in the conduct of the Bolitho proceeding.

853 The AFP injunction application ran over two days from 24 to 25 May 2018, which included cross-examination of Mark Elliott. On 7 June 2018, the judge dismissed the application. The history of the AFP injunction proceeding, the substance of the legal arguments raised by the parties, and the reasons for its dismissal, are dealt with at length in the court's reasons for judgment[85] and need not be repeated here.

854 On 6 September 2018, the judge ordered that AFP pay Mrs Botsman's costs on a standard basis. In so ordering, the judge found that Mark Elliott intended to intimidate Mrs Botsman into dropping the appeal by commencing the injunction proceeding, but was not satisfied that intimidation was the predominant purpose, and concluded that the exceptional circumstances necessary to warrant costs on an indemnity basis were absent.

855 Some passages from the costs decision are pertinent:

AFPL contends that Mrs Botsman conflates Mr Bolitho, Portfolio Law and Zita on the one hand, and AFPL on the other. AFPL submits that there is no evidentiary foundation for that conflation. AFPL says that Portfolio Law does not act for AFPL in this proceeding. AFPL says that it was represented by Elliott Legal Pty Ltd at the approval hearing. ABL acts for AFPL in this proceeding.

AFPL submits that, under cross-examination, Mark Elliott denied giving any instructions to Zita about the correspondence which Mrs Botsman complains about. Mark Elliott expressly denied giving Zita instructions to send the letter that demanded she provide Zita details of her personal financial affairs.

Mark Elliott categorically denied that the proceeding against Mrs Botsman had been commenced for any improper or collateral purpose. He said that it had been commenced for the sole purpose of vindicating AFPL's contractual rights and to recover damages for the loss AFPL had suffered due to Mrs Botsman's

breach of contract. Mark Elliott said that none of the communications between AFPL and Mrs Botsman were intended to put pressure on Mrs Botsman.

During cross-examination of Mark Elliott, he admitted that he was aware that there was an intention for Portfolio Law to send a letter requesting security for costs on the appeal, and he knew that before the letter was sent. It was put to Mark Elliott that he was aware that Zita's letter was to be sent at or around the time it was sent. Mark Elliott denied this. It was put to Mark Elliott that the letter was something Portfolio Law would have sought his instructions about. Mark Elliott disagreed. I doubt the correctness of Mark Elliott's answer. Mark Elliott admitted he was aware that Mr Bolitho would seek an order against Mr Botsman for compensation for losses, but denied he gave instructions to Portfolio Law to send the letter to Mr Botsman.

Mark Elliott denied that Zita told him in advance that $160,000 was his estimate of costs and asked Mark Elliott if he agreed with his estimate.[86]

856 Each of Mark Elliott's denials during cross-examination was a bold-faced lie in open court. Mark Elliott lied both to disguise the extent of his control over the Bolitho proceeding, and to maintain the illusion of Portfolio Law as an independent and autonomous legal representative. Mark Elliott falsely represented AFP as a credible and reasonable party acting in the interests of the group members. His silence as to the involvement of O'Bryan and Symons also served to maintain their image as independent and responsible counsel.

857 Only the correspondence known to Mrs Botsman and Mr Botsman was tendered to that court, but it was as a direct result of the efforts of Mrs (and Mr) Botsman to pursue the appeal that the Contradictor was appointed and discovery of private correspondence between Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott revealed in this proceeding is the basis for the findings I just expressed. Although the judge was clearly satisfied that there was intimidation and that Mark Elliott was not a reliable witness, it was not possible for his Honour to understand the magnitude of the perfidy presented in his court, the full extent of the impropriety of the AFP injunction proceeding, and AFP and Mark Elliott's deliberate and false representations in the course of it. His Honour could not have known the role that this misleading conduct played in attempting to conceal the impropriety that permitted the spoils of the settlement approval application to be initially awarded.[87]

858 This is, however, now clear from the correspondence between the Lawyer Parties referred to in these reasons and I find that:

> (a) Mrs Botsman was correct to conflate Mr Bolitho, Portfolio Law and AFP. The evidentiary foundation for that conflation has been firmly established in the remitter by the Contradictor;
>
> (b) Mark Elliott did provide instructions to Zita in every instance of the correspondence that Mrs Botsman complained about;
>
> (c) AFP did commence the proceeding against Mrs Botsman as an attempt to restrain the appeal, against the interests of the group members;
>
> (d) Each of the communications between AFP and Mrs Botsman were conceived, planned and executed strategically to intimidate Mrs Botsman; and
>
> (e) Mark Elliott was aware of the letter requesting security for costs, controlled its timing (which was an important aspect of the strategy conceived and discussed between Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott), and personally approved of its content including the $160,000 estimate for costs.

859 Mark Elliott also knew that all of the correspondence in question had been drafted/settled by O'Bryan and Symons, in direct conflict with their obligations to represent the interests of the group members, as is discussed in greater depth elsewhere in these reasons.

860 Despite concerns raised, in the 12-month history of the AFP injunction proceeding, at no point did the full truth emerge. AFP, Mark Elliott, O'Bryan and Symons used the AFP injunction proceeding not only to maintain the deception which lay at the core of establishing a fund of 'spoils' for their personal benefit, but also to deceive the court with an entirely new falsehood. AFP, Mark Elliott, O'Bryan and Symons framed the AFP injunction proceeding as a righteous vindication of AFP's rights under the Funding Agreement and, by extension, a protection of the benefits of the settlement owed to all group members. It is now clear that not only was the proceeding properly dismissed, but there was no proper basis for bringing it. The entire proceeding was an elaborate and arrogant bluff designed to intimidate Mrs Botsman to withdraw her appeal and which attempted to subvert the course of justice.

861 From the correspondence I have set out, and from further emails in evidence that were exchanged between Mark Elliott, O'Bryan, Symons and Alex Elliott when circulating and settling draft documents (pleadings and submissions) in relation to the AFP injunction proceeding, I am satisfied that O'Bryan and Symons provided significant assistance to AFP with the AFP injunction proceeding. I am satisfied that Zita and Alex Elliott (to whom I'll come shortly) materially collaborated in this deception.

862 Not only was the façade maintained against the court of a responsible AFP protecting its separate interests and those of all group members, it was also maintained against other members of the legal profession whom the Lawyer Parties were aware might compromise their deception. For example, on 3 April 2018, Mr Redwood requested copies of the AFP injunction proceeding documents from O'Bryan. O'Bryan replied:

I am not involved in that case, Jonathon. The funder has started it, using ABL and separate counsel. I don't have the papers but will see if I can get hold of them.

863 From the commencement of the AFP injunction proceeding, Alex Elliott was closely involved in the proceeding, clearly participating as an active solicitor.

864 On 18 April 2018, Alex Elliott emailed Mark Elliott a list of 28 comments on Mrs Botsman's defence. In evidence, Alex Elliott said he discussed the matters with Mark Elliott, then typed the list, as well as adding some of his own comments. The second item on the list stated:

Para 5(a) – it is contrary to public policy for AFP to provide binding instructions on behalf of WB – this must be read in conjunction with 13.2 and 13.3 – doesn't it?) –see 6.3.1 LFA

865 Alex Elliott's analysis in the email of the legal issues in the proceeding was competent, revealing the insight and strategy of a lawyer identifying and countering the strengths and weaknesses of the opposing party's case. Two days later, on 20 April 2018, AFP filed its reply in the AFP injunction proceeding.

866 On 1 May 2018, Symons described Alex Elliott as 'AFP's solicitor' in private correspondence to Mark Elliott while discussing the appeal. It is clear that within the inner circle, Alex Elliott was working alongside Mark Elliott instructing ABL in the AFP injunction proceeding.

867 On 8 May 2018, Alex Elliott provided a witness statement in the AFP injunction proceeding. He described his occupation as 'legal practitioner', and gave evidence of the losses claimed by AFP.

868 On 13 June 2018, Alex Elliott emailed Mark Elliott discussing the differences between the court approving

a proposed settlement and exercising its powers to deduct funding commission under the applicable legislation, as well as the court's powers given the Settlement Deed, citing case authority in support of the propositions. Alex Elliott explained that his father 'would have' asked him to look into this issue because the Court of Appeal asked the parties to make submissions about the court's power to amend the Settlement Deed.

869 Alex Elliott, as its solicitor, allowed AFP to make grossly misleading and false representations to the court. He knew of the greater deception. In reliance on AFP's submissions, and the evidence of Mark Elliott and Alex Elliott, the court was misled into making findings in the costs ruling that, although expressing suspicion of some wrongdoing, did not reflect the extent of the misconduct by AFP and the Lawyer Parties.

870 Despite Mark Elliott having lied to the court and knowing that the court's concerns about his truthfulness were well-founded, and with suspicions mounting about AFP's motivations and the extent of involvement of the Lawyer Parties, AFP continued this particular strategy in its campaign to silence Mrs Botsman. On 3 October 2018, AFP applied to the Court of Appeal for leave to appeal the AFP injunction judgment. Before that application could be heard by the Court of Appeal, it allowed Mrs Botsman's appeal, and ordered this remitter. On 14 January 2019, the Court of Appeal refused AFP leave to appeal on the basis that the relief it sought was futile.[88]

871 I pause to observe that this conduct, which as these reasons record, continued until their capitulation, significantly aggravated the culpability of the conduct contravening the *Civil Procedure Act*.

872 In summary, I am persuaded that:

> (a) the Lawyer Parties breached their fiduciary duty acting for AFP against Mrs Botsman who was, in substance, their client.
>
> (b) AFP and Alex Elliott were knowingly involved in that breach of fiduciary duty and sought to secure millions of dollars for AFP and thereby for its shareholders, the majority of which were entities associated with the Elliott family.
>
> (c) AFP sought to prevent Mrs Botsman from pursuing the appeal from the Trust Co Settlement in circumstances where AFP, Alex Elliott and the Lawyer Parties all knew that there was merit in the issues she raised in the appeal, because those issues had a tendency to expose their improper dealings and would endanger their access to the spoils accumulated in the settlement approval.

Security for costs application

873 After commencing the AFP injunction proceeding, AFP, Mark Elliott and the Lawyer Parties implemented the other aspects of their strategy to pressure Mrs Botsman into dropping the appeal, beginning with the Bolitho security for costs application.

874 On 8 April 2018, Symons drafted the application, an affidavit and a supporting calculation for the security needed. Symons was aware of the deception staged by the security for costs application, and noted that the calculation needed to be updated for actual charge-out rates. Clearly, Trimbos's report in January did not reflect the actual rates. Throughout the rest of the day, Mark Elliott, Symons and O'Bryan exchanged further emails discussing the costs estimate most likely to be allowed by the court and to settle the application. O'Bryan wrote:

We should calculate on scale because the court will not allow more by way of security.

Mark Elliott replied:

Trimbos is too busy on MGC

MS could call him for a kerbside

Just low ball as they will not want to lodge any SFC at all

Are we sure we can get SFC from an individual (old lady) doing it for the class?

O'Bryan wrote:

No, not certain, but a good chance.

She is not "doing it for the class"

She is doing it because her idiot son asked/told her to, so as to give him some work to do & (he hopes) make him famous.

She does not claim to be acting in any representative capacity.

More about this in our submissions.

Symons replied:

I've spoken to Trimbos about it:

a. I'm going to apply a discount of 15% to counsel rates, and may consider reducing Norman's rate to scale (which is $880 or similar per hour).

b. I'm going to apply a discount of 20% to Portfolio Law, after first reducing Tony's hourly rate to scale (which is approx. $404 an hour). I'm not going to apply any loading

875 This correspondence also shows Trimbos offering his kerbside assistance to the Lawyer Parties generally and for their benefit, outside of his formal brief as expert, illustrating the continuing and close nature of his relationship with AFP, as discussed earlier in these reasons.[89]

876 O'Bryan gave his approval for Symons' approach and shortly after distributed the settled affidavit by email to Mark Elliott, Symons, and Alex Elliott (copying Zita and the Bolitho class action email account).

877 Symons adopted O'Bryan's edits and circulated a final draft. The affidavit was drafted for Zita and stated:

The following counsel have been retained on behalf of the First Respondent at the following rates:

1. Norman O'Bryan SC - $10,000 per day and $1,000 per hour; and
2. Michael Symons - $4,000 per day and $400 per hour.

The counsel engaged have acted for Mr Bolitho in the Banksia group proceeding for several years. Counsel have the requisite expertise in class actions and major litigation of this nature.

For the purpose of estimating the First Respondent's costs, I have assumed that neither the schedule of Portfolio Law's rates nor counsels' rates will change for the duration of the matter.

...

For the purpose of preparing the Estimate, I have assumed:

...

4. I have not applied any loading in respect of skill, care and responsibility, as ordinarily permitted under the Supreme Court scale in respect of complex litigation of this kind, as concerns the fees estimated in respect of work to be performed by Portfolio Law. On the basis that I have not applied any loading, I have assumed that 80% of Portfolio Law's anticipated fees will be allowed if a taxation of those legal costs were to be performed on the standard basis;
5. counsel for the First Respondent will be Mr O'Bryan SC and Mr Symons and their rates will also remain unchanged;
6. fees in respect of Mr O'Bryan SC's work will be recoverable at the Supreme Court scale rate for Senior Counsel of $8,539 per day and $854 per hour. I have made no amendment in respect of Mr Symons' fees on the basis that they are considerably less than the maximum rate allowed under the Supreme Court scale for Junior Counsel;
7. I have assumed that 85% of anticipated disbursements calculated on the basis referred to in paragraph (f) above will be allowed on a taxation performed on the standard basis;

...

The amount of costs (excluding GST) which I estimate the First Respondent will incur up to and including 8 June 2018 is as follows:

	Portfolio Law	**Counsel**	**Total**
Costs already incurred:	$2,889.60	$8,453.40	$11,325.00
Future costs:	$27,432.00	$145,873.60	$173,305.60
Total:			$184,630.60

Based on my experience conducting litigation of this kind and my knowledge of the matters raised on this application for leave to appeal, I consider this to be a realistic estimate of the First Respondent's likely costs which would be recoverable on a taxation conducted on the standard basis in respect of the application for leave to appeal.

878 On 9 April 2018, Zita swore the affidavit. On 10 April 2018, Portfolio Law filed the application and the affidavit on behalf of Mr Bolitho. When cross-examined, Zita conceded that he had obediently done as he was told without ever questioning O'Bryan or Mark Elliott's instructions. Zita admitted that, if he had exercised his own independent judgment, he 'wouldn't have adopted that strategy'.

Threat of personal costs order

879 The parties exchanged submissions on the Bolitho security for costs application in late April 2018. While finalising Mr Bolitho's submissions, the Lawyer Parties conceived of another way to increase the pressure on Mrs Botsman.

880 On 26 April 2018, O'Bryan circulated the latest draft of Mr Bolitho's submissions on the security application to Symons, Mark Elliott and Alex Elliott (copying Zita and the Bolitho class action email account). O'Bryan wrote:

We should now threaten personal costs orders against Botsman & Withers.

If we don't threaten we can't recover them.

881 Mr Withers was a barrister at the New South Wales Bar who also appeared for Mrs Botsman. One of the Lawyer Parties replied using the general class action email:

Can we increase SFC estimate?

Symons responded:

If we have a basis for quantifying it before Monday, then we should. I think it's more important that we get these submissions and affidavit in asap.

O'Bryan replied:

I agree

Plus a letter threatening personal costs (if not sent already).

882 Mark Elliott confirmed his approval. Symons settled the submissions and a supplementary affidavit and sent them to Zita (copying O'Bryan, Mark Elliott and Alex Elliott). O'Bryan also replied to note the case of *1165 Stud Road Pty Ltd v Power (No 2)*(**'1165 Stud Rd'**),[90] noting:

esp at [80] g ii

This was overturned on appeal but no doubt cast on this principle.

883 In the passage referred by O'Bryan, the judge addressed matters courts have previously taken into account when applying *Knight v FP Special Assets Ltd.*[91] In *1165 Stud Rd*, the court considered whether to award costs personally against a non-party, including for breaches of overarching obligations under the *Civil Procedure Act*. The Court of Appeal set aside the primary judge's decision.[92] O'Bryan was counsel in that proceeding both at first instance and on appeal. In this context, O'Bryan's suggestion to threaten Mr Botsman and Mr Withers with personal costs orders and to indorse conduct intended to intimidate Mrs Botsman and pervert the course of justice seems a remarkable display of arrogance.

884 Symons then circulated a detailed draft letter addressed to Mr Botsman and Mr Withers, counsel in the appeal, stating Mr Bolitho's intentions to seek non-party costs orders against each of them. O'Bryan settled the letter but his only substantial edit was to remove Mr Withers as a recipient. O'Bryan explained that he:

dropped Withers out of it so as to avoid any suggestion that we are trying to scare off any lawyer who may represent her & are denying her legitimate representation.

O'Bryan added:

[The letter] is equally effective if directed against CB alone.

I doubt that Withers is being paid or has looked at this rubbish closely.

885 Symons sent the final draft to Zita who sent the letter. In cross-examination, Zita agreed that the letter was very threatening in its tone and terms, and that he had chosen to exercise no independent judgment when he sent it. Zita expressed regret at the words used as well as the threat made in the letter, and apologised to Mr Botsman from the witness box for the stress it may have caused.

886 The letter stated:

Dear Mr Botsman,

Botsman v Bolitho, Supreme Court of Victoria Court of Appeal proceeding S APCI 2018 0037 ("application for leave to appeal")

I refer to the application for leave to appeal, the application for security for costs made in respect of the application for leave to appeal and your submissions filed on Mrs Botsman's behalf in respect of the application for security for costs.

The purpose of this letter is to place you on notice that the First Respondent, Mr Bolitho, may if the application for leave to appeal fails or, should leave be granted, if the appeal is unsuccessful, seek a non-party costs order against you. Such an application will be made pursuant to r 63.23 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) (the Rules) and the Court's inherent jurisdiction. The First Respondent also intends to give consideration to whether the conduct of the application for leave to appeal may give rise to any entitlement to make application pursuant to s 30 of the Civil Procedure Act 2010 (Vic) for orders pursuant to s 29 of the Civil Procedure Act 2010 (Vic).

The Court's jurisdiction is enlivened in circumstances in which:

(a) the party to the litigation is an insolvent person or "man of straw";

(b) where the non-party has played an active part in the conduct of the litigation;

(c) the non-party has an interest in the subject matter of the litigation; and

(d) the interests of justice require that an order be made.

On the basis of the submissions dated 23 April 2018 and filed on Mrs Botsman's behalf in respect of the application for security for costs, it appears that Mrs Botsman is a "[person] of straw" who is unable to comply with any order for security for costs and therefore, we assume, unable to satisfy any adverse costs order.

It appears from the documents filed to date in respect of the application for leave to appeal that Mrs Botsman has played no active part in the conduct of the application for leave to appeal, but instead you have had the entire conduct of the litigation on Mrs Botsman's behalf. Mrs Botsman has made no affidavit in support of the submission made by you that an order requiring her to give security for the First Respondent's costs would stultify the application for leave to appeal, despite Mrs Botsman bearing the onus of proof in relation to that submission.

Indeed, Mrs Botsman's only involvement in the proceeding has been to:

(a) execute a litigation funding agreement with the First Respondent's litigation funder; and

(b) execute the final form of the objection made on her behalf by you but not filed in accordance with the orders of the Court made on 8 December 2017.

I have been informed that in a separate proceeding commenced by the First Respondent's litigation funder by which it seeks to enforce the litigation funding agreement executed by Mrs Botsman, Mrs Botsman has not complied with her obligation to file an overarching obligations certificate pursuant to s 41 of the *Civil Procedure Act 2010* (Vic). Nor have the legal practitioners acting on Mrs Botsman's behalf in that proceeding complied with their obligation to file a proper basis certificate.

It appears that the only active participants in the application for leave to appeal are yourself and perhaps Mr Withers.

It is at this stage unclear what interest you may have in the conduct of the application for leave to appeal, however, the proceeding appears to be intent upon raising questions which you consider to be of some ill-defined public interest, rather than vindicating any right in a manner which is in Mrs Botsman's interest. It is apparent, however, as articulated in the written cases filed in opposition to the application for leave to appeal and the First Respondent's submissions in respect of the security for costs application, that the application for leave to appeal is without merit.

I also note that an offer was made to Mrs Botsman by the First Respondent personally which would have materially improved her position and avoided any further prejudice being suffered by other debenture holders as a result of the application for leave to appeal. No response to that offer has been received, and I do not know whether that offer was even brought to Mrs Botsman's attention. As you are aware, the First Respondent reserves its right to rely upon that letter in respect of an application for his costs of the application for leave and the appeal on an indemnity basis.

As noted in the First Respondent's submissions in relation to security for costs, the submission made on the Applicant's behalf that the First Respondent's (and presumably other Respondents' costs) of the application for leave to appeal might be paid from the Settlement Sum otherwise available for distribution to debenture holders is scandalous and likely to bring the administration of justice into disrepute. In the circumstances, it appears likely that it will be in the interests of justice for a costs order to be made against you personally.

As identified above, the purpose of this letter is to place you on proper notice as to the prospect of such an application being made in due course.

887 I pause to note the reference in the penultimate paragraph that costs might be paid out of the settlement funds and how Zita dismissed this argument as so 'scandalous and likely to bring the administration of justice into disrepute' that it justified a personal costs order. There was no genuine basis for that assertion. Its sole purpose was to intimidate Mr Botsman. If there was another purpose, Mr Bolitho would have later adopted the same argument after Mrs Botsman was successful in the appeal.[93] During cross-examination, Zita agreed that those words should not have been used.

Security for costs

888 Alex Elliott was actively following and participating in the strategy. On 27 April 2018, he emailed Mark Elliott, attaching a PDF file of a case, noting 'Niall J ordered SFC in Court of Appeal in March this year'.

889 On 29 April 2018, Mrs Botsman responded:

I have read your letter dated 26 April 2018 addressed to my son (**Letter**).

I am writing to correct certain assertions contained in the Letter.

I own debentures in Banksia. My son does not own, and never has owned, Banksia debentures. I was introduced to Banksia by my sister, Alison Slimmon (nee Kittle). Other members of my family invested in Banksia debentures, namely, my sister Deirdre Rattray (nee Kittle) and my late parents, John and Barbara Kittle.

In response to the notice from your firm advising group members of settlement I objected to the settlement because I did not think it was fair. I signed the letter of objection dated 19 January 2018 and personally mailed that letter to the Supreme Court of Victoria. My reasons for objecting to the settlement are set out in the letter that I signed. My reasons for seeking leave to appeal are set out in the grounds of appeal. I am bringing that appeal for the benefit of myself, my family and other holders of Banksia debentures.

You assert in your letter that I have had no active role in the litigation. If you mean by that assertion that I have not represented myself, then your assertion is true. Otherwise, it is denied. You state that my son has had the entire conduct of the litigation on my behalf. That statement is true. My son is a lawyer. Because he is my son and because he is a lawyer, he is appearing for me pro bono. Mr Withers is appearing for me on the same basis. I understand that the law in Victoria provides that although they are appearing for me pro bono, if I succeed in my appeal, my son and Mr Withers may be able to recover their costs.

Your assertion that my son is bringing this appeal out of some ill-defined public interest is incorrect. I repeat: I am bringing this appeal for the benefit of myself: my family; and other debenture holders.

Your assertion that your offer to settle the appeal was not brought to my attention is incorrect. As for my failure to accept that offer, I do not see how I can accept an offer that would improve my position relative to other debenture holders when my purpose in seeking leave to appeal includes benefitting my family and other debenture holders. It would be inconsistent for these purposes for me to accept preferential treatment.

I am aware of and fully support the actions being taken on my behalf in this proceeding and in the separate claim against me by the litigation funder.

890 Symons communicated to O'Bryan some concerns about the application going before the Court of Appeal the following morning. Symons noted that (emphasis added):

It seems unlikely that Mrs Botsman would be able to mortgage her house to satisfy an adverse costs order **if she is a retired nurse** as no bank could lend to her while complying with the Code of Banking Practice. **Her only option would be to sell. It must be pretty unpalatable to the Court to put a retired nurse into a position of possibly being forced to sell.**

O'Bryan replied to Symons that as there was no evidence before the court concerning that point, he didn't propose to raise that matter.

891 The Court of Appeal dismissed Mr Bolitho's application for security for costs on 7 May 2018.[94]

Further interlocutory matters

892 AFP undertook to Croft J, in the AFP injunction proceeding, to appear at a hearing in the appeal proceeding and inform the Court of Appeal about the progress of the AFP injunction proceeding. On 1 May 2018, Mark Elliott instructed Symons to appear for AFP at a directions hearing in the appeal listed for the following day. Symons appreciated that the Court of Appeal would see his conflict of interest, but suggested that the perception could be managed. He responded:

For the same reasons as it was not appropriate for me/Norman to draw the statement of claim enforcing AFP's rights against Wendy Botsman, I don't think I should be announcing an appearance for AFP while also being engaged by Bolitho in re: the appeal.

I'll discuss it further with Norman when he returns from a meeting, but I can draft a statement concerning the progress of AFP's proceeding against Botsman which we as counsel for Bolitho can say we've been asked to hand up to satisfy the obligations.

As it's necessary for someone to be in attendance at the hearing for AFP (I note that the undertaking is to attend, not to appear), I think it would be sufficient for Tara Privitelli/Alex to be in Court as AFP's solicitor so that we can say that "in accordance with the undertaking, AFP's solicitor is in attendance and has asked us to hand up a statement to the Court which informs the Court of the status of the proceeding brought by AFP against Mrs Botsman".

893 Symons drafted the statement. O'Bryan settled it. In the format for filing, the document stated at the bottom that ABL was its author. The statement was handed up to the Court of Appeal at a directions hearing on 2 May 2018.

Disclosure of confidential documents

894 On 7 May 2018, Mrs Botsman filed an application for the production of the Third Trimbos Report, counsel's second opinion, and two affidavits sworn by Zita tendered to the court in the approval proceeding.

895 On 8 May 2018, O'Bryan told Symons and Mark Elliott he had no objections to handing over the confidential documents. He reasoned:

I don't consider that he will obtain any forensic advantage, or that we will suffer any forensic disadvantage, from him having access to the three documents he wants. He wants:

1. The Trimbos costs report. In my view that report amply demonstrates the different nature of the work which we undertook on behalf of Bolitho to the work that was undertaken by Lindholm's team. In any event, it will be extraordinarily complicated and difficult for Botsman to make any sense of, or introduce any of this material into evidence, before the Court of Appeal.

2. The supplementary confidential joint opinion of counsel. Once again, I have no concern if Botsman has this. It amply explains and supports the reasons for approval of the settlement.

3. I don't believe there are any references in Tony Zita's affidavits of 19 or 24 January to "the evidence filed by Mr Bolitho relative to the evidence filed by Banksia". In many ways I would be happy for Botsman to have access to the documents because it makes it less probable that Pitman was denied access to them in January. I am concerned that Botsman is painting us as non-compliant with the orders to make documents available to debenture holders in advance of the settlement approval hearing in January."

896 Mark Elliott did not share O'Bryan's perspective. Copying in Alex Elliott, Mark Elliott replied later that day:

I thought that our principal objection was that if we lost the appeal and the case goes on that we could be disadvantaged by disclosure of material eg that the SPR's have a shit case (and that we told the Court that fact) and that items in the Costs report are sensitive vis a vis all parties

I DO really care about giving access to these documents to anyone, particularly the Botsman clan.

The authors in each instance believed that the documents would be kept confidential (as ordered) and justice demands that that remain the position. We didn't object to providing him with the deed of settlement in our other case as he had already received it from the SPR's (if not before from Pitman)

No valid argument has been given as to why WB needs the Costs report. What we spent v's what the SPR's spent on different cases is no indication of anything. If their case has no merit than every $ spent was wasted.

How can the Pitman evidence be admitted for consideration in a submission without any supporting affidavit? Who is the author of it??

No grounds at all are given for why the 2nd Counsel opinion should be provided?

Where is the evidence that the WB signed objection was even sent in time to the Court?

897 The next day, on 9 May 2018, Mr Bolitho filed a notice of objection to competency in respect of Mrs Botsman's interlocutory applications, including the application for production of the confidential documents. O'Bryan emailed Symons and counsel in relation to the confidential documents application. O'Bryan also separately forwarded his email to Mark Elliot. O'Bryan wrote (emphasis added):

It seems to me that the reasons why we should do a deal with Botsman and give him the documents he wants, provided he gives a reliable undertaking, are:

1. Portfolio Law did not cover themselves in glory in facilitating inspection by Pitman in January. Despite the absence of any admissible evidence about what actually happened, Pitman has repeatedly alleged in correspondence that access was denied. [Portfolio denies this, but mud sticks]

2. It looks bad and defensive for us to keep Trimbos' report under wraps. There is no need to do so. It ought to have been made available to all comers in January. All the supporting evidence for the work done is in there and Trimbos has given an independent expert opinion, supported by good reasons, that it is reasonable in both volume and value. $5M for a 5.5 year case valued at $220M, with (originally) 10 active and separately

represented defendants, is very good value, when Clayton Utz spent $13M for Trust Co alone. Disclosing the report will also assist the funder's cause for the same reasons.

3. Getting Trimbos' report offers Botsman no forensic advantage because he has nothing else against which he can compare our work. The liquidators didn't need to justify their costs to get their settlement approved, so no-one knows on what they have spent the debentureholders' money. Botsman won't be able to use the Trimbos report to support his thesis that the liquidators did all the so-called 'heavy lifting' or that there was duplication or waste in the work we did.

4. Getting our supplementary submissions won't assist Botsman either, because they simply address his & Pitman's objections and contradict them, mainly by cross-reference to our original submissions/opinion. [Philip, if you need to look at any of this stuff, Michael can show it to you]

5. I think category (c) of Botsman's request is empty anyway.

We need to show the VSCA that we have nothing to hide and that our only concerns are that Botsman is unreliable (proof of that was his immediate breach in the last round of the undertaking he gave in respect of Lindholm's conf. affidavit).

Counsel replied:

I completely agree Norman. Mark called me. He may resist this approach in our conference tomorrow. But our job is to persuade. I told him you don't get a guard dog and bark yourself.

Mark Elliott replied later that evening:

I think that we should wait and see how MS's draft submissions in opposition shape up tomorrow. Let's discuss.

898 On 17 May 2018, the Court of Appeal ordered that Mr Bolitho disclose the Third Trimbos Report to Mrs Botsman. As AFP tendered counsel's first and second opinions in the AFP injunction proceeding they were in Mrs Botsman's possession.

899 On 29 May 2018 after his review of the opinions, Mr Botsman identified several concerns in an email to Zita:

Your counsel were the principal advocates for the funder receiving the funding commission of $14.1 m and the order for repayment of legal costs in the amount of $5.225 million. This was so notwithstanding that the funder appeared and was represented on the appeal.

The interests of Mr Bolitho and in each of the group members (both funded and unfunded) lay in the funder receiving as little by way of funding commission and recovery of legal fees as possible...

...

There was an inherent conflict between the competing interests of: (a) Mr Bolitho and group members; and (b) the funder. Nevertheless, your firm and counsel appear to have supported the position of the funder in the proceedings before Croft J and continue to do so on appeal.

...

Would you please explain on what basis the approach taken by the Applicant at the approval hearing and on appeal is considered by your firm and your counsel to be appropriate and consistent with their obligation, acknowledged by Mr Bolitho to Ferguson JA, to act in the best interests of the Applicant and group members?

900 The identification to Zita of the conflict issues that should have been obvious to him for over three years was explicit. Zita dealt with that email in the same way he dealt with all other emails. He deferred to Mark

Elliott, O'Bryan and Symons by forwarding the email to them. O'Bryan prepared a reply, to which Mark Elliott and Symons agreed.

901 The next day, Zita replied to Mr Botsman using the response drafted for him. He did not reflect on whether it was appropriate and did not exercise any independent judgment:

We are instructed not to respond to any communications from you concerning any of your client's grounds of appeal.

Accordingly, we will not be responding to your email below (or any similar email which you may send).

Our silence in this regard should not be taken by your client as an assent to any of the propositions in your email.

K.2. New strategy: Appealing to the SPRs

902 On 14 May 2018, Mark Elliott emailed Mr Lindholm in relation to evidence filed by Mrs Botsman in the AFP injunction proceeding.

As we discussed last week, AFPL is chasing Wendy Botsman for breaching the LFA she signed in March 2015 and we go to Court on 24 May for the trial

I fully expect to own a holiday house in Magill SA in due course, that being the current home of Wendy Botsman

The attached evidence is what she filed on Friday in the case

It comprises a self-explanatory witness statement from dopey old Keith Pitman who has clearly lost his mind

Further, it includes your Affidavit (15/02/2018) and the written case of BSL et al filed in the Appeal proceedings

I have no idea what relevance this material/the SDS could have to this case (or to the Appeal) but I have given up trying to understand the Botsman clan, Redwood or Pitman.

Do you wish to respond, be heard on or otherwise object to the use of your material in this way?

903 On 15 May 2018, Mr Lindholm replied:

It's looking like a circus with these guys....

I'm catching up with Newman later today to discuss things generally - is there anything you or Norman think we can / should do to help out?

Happy to discuss.

904 Mark Elliott forwarded Mr Lindholm's offer to O'Bryan, and wrote:

Is there anything specifically we should ask for?

905 O'Bryan replied to Mark Elliott (emphasis added):

Yes.

On the Mrs Botsman appeal, one of Botsman's supposedly big points (according to him) is that Maddocks did all the work on the two cases and we did none and therefore our legal costs are too high and the funder deserves nothing.

It would help a lot if they would confirm, in court and outside (i.e. in Botsman's ear), that all the work done on the expert evidence for trial (which is the bulk of all legal work done) was shared (i.e. Michael & I contributed

fully to all briefings to experts, settling instructions and questions, reviewing reports, finalising the evidence & reply evidence etc.).

JL paid for most of it, but that was only because he had got $10M of debentureholders' money from Black J and it made perfect sense to spend that money first, rather than AFP's money, since AFP would simply ask for a much larger lit. fund. fee if it had had to spend those additional $millions.

I reckon Botsman has the idea that Maddocks did all the work from an inside source. I want JL to give clear instructions to his legal team not to support this nonsense.

Secondly, on AFP's case, it would help a lot if JL made it absolutely clear to Botsman that he does not intend to give evidence in the case and that his Feb. affidavit was filed without his permission and is now out of date because the settlement scheme issue has now been resolved (or nearly so). Even better if he would put that on oath & allow AFP to file that evidence in its case.

906 On 17 May 2018, Symons circulated to O'Bryan, Mark Elliott and Alex Elliott a proposed letter. The subject of the letter was the effect of Mrs Botsman's amendment application on the Settlement Deed, and was intended to be sent by AFP to Maddocks and Clayton Utz. Symons' draft letter concluded:

Any variation to the distribution of the Settlement Sum agreed pursuant to the Deed, including because the legal fees recoverable under the deed are not payable or because the parties' costs are to be paid from the funding commission or the Settlement Sum, will trigger the operation of cl 2.2 as the conditions precedent set out in cll 2.1.3 and/or 2.1.4 will not be satisfied.[95]

907 On 18 May 2018, Mark Elliott replied to all with his comments on Symons' letter. He wanted the last paragraph to be more emphatic. Later that morning, Symons circulated a final draft that substantially adopted Mark Elliott's suggestion. Mark Elliott signed and sent the letter on behalf of AFP to Maddocks and Clayton Utz shortly after midday on 18 May 2018. He also copied the letter to Mr Lindholm. In the sent version, the final paragraph stated:

It follows from the above that, if the Court of Appeal does not confirm the Approval Orders in their entirety or makes the costs orders sought by the applicant, it is likely that the Deed will be at an end pursuant to cl. 2.2 and there will be no occasion for the further negotiation of settlement terms pursuant to cl 2.4.

Submissions on the appeal

908 On 19 April 2018, Symons drafted submissions in opposition to the appeal, which he sent to O'Bryan, Mark Elliott and Alex Elliott. O'Bryan settled those submissions.

909 Appeal ground 5 was:

Having found: (a) a high degree of interrelationship between the Bolitho Proceeding and the Banksia Proceeding (RFJ[34]-[36]); and (b) that the legal and insolvency practitioners prosecuting the Banksia Proceeding shouldered most of the practical, evidentiary and financial burden of the conduct of the proceedings (RFJ[22d]), it was an error to approve the commission of the funder and legal costs and disbursements of the Bolitho Proceeding (amounting to $17.55 million):

a. Without having proper regard to the relative contributions to the settlement of the Banksia and Bolitho proceedings;

b. On the assumption that the entire Settlement Sum was attributable to the Bolitho proceeding;

c. Without regard to the formula employed by Robson J in the partial settlement in Re Banksia Securities Limited [2017] VSC 148 at [104]; and

d. In circumstances where no common fund order had been made.

910 Bolitho's written case stated:

As concerns ground 5, the assertion concerning the Special Purpose Receivers (SPRs) shouldering most of 'the practical, evidentiary and financial burden of the conduct of the proceedings' is identified in the reasons for judgment at [22] as a submission made by the SPRs, not as a finding; and (ii) all of the matters in Ground 5 were the subject of the parties' submissions below. The judge did not act upon a wrong principle, nor did he take account of extraneous or irrelevant matters, mistake the facts or fail to take into account a material consideration. The settlement approval is not unreasonable or plainly unjust. On settled principles, the Court ought not disturb the exercise of a trial judge's discretion in these circumstances: see [21]-[31] below.

911 Other misleading features of the written case included the following and these misleading features were not in the nature of a client's instructions honestly accepted but ultimately not proved. O'Bryan and Symons knew from their personal involvement that the statements were false and intended that the Court of Appeal be misled to protect their ill-gotten spoils.

(a) At para 2, 'Bolitho' asserted that:

> no substantial injustice will be done if the decision stands' and 'debenture holders would be worse off if the appeal was allowed, because the only recourse would be a full trial against Trust Co which would exhaust Trust Co's limited assets.

(b) At para 28:

> At the core of Ground 5 is the erroneous assertion that the primary judge found that 'the legal and insolvency practitioners prosecuting the Banksia Proceeding shouldered most the practical, evidentiary and financial burden of the conduct of the proceedings'. This 'finding' is said to be recorded at [22(d)] of the Reasons. The introductory words to [22], however, record that the matters set out in [22] were not findings, but the SPRs' submissions.

(c) At para 29:

> The Applicant's assertion is therefore wrong. This supposed 'finding' appears to underpin the allegation of error in approving the payment of commission to the funder and the payment of legal costs and disbursements, on the asserted basis that there would be a logical fallacy in, using Ground 5(b) as an example, assuming 'that the entire Settlement Sum was attributable to the Bolitho proceeding' if the SPRs had done all the work and the First Respondent's lawyers and litigation funder had done none. Grounds 5(a) and 5(c) operate similarly, while Ground 5(d) suggests error in approving the payment of the commission to the funder and of legal costs where no common fund order had been made. As the judge noted, the terms of settlement comprehensively addressed the distribution of the settlement sum, which was at the heart of the approval application.

(d) At para 31:

> The Applicant has identified no basis upon which the exercise of discretion below has miscarried. The Court may be fortified in this conclusion by the matters addressed in the Bolitho counsel opinion

and the SPR counsel opinion. The application for leave to appeal should be dismissed.

Disclosure of documents

912 On 21 May 2018, Maddocks wrote to Zita requesting production of the Third Trimbos Report to the SPR on the same basis as ordered by the Court of Appeal to Trust Co. O'Bryan emailed Zita and the Bolitho class action email account (copying Symons and Mark Elliott), supporting Maddocks' request, out of self-interest. Mark Elliott disagreed. Symons suggested a middle ground, but O'Bryan remained firm:

I don't see how denying the SPR access to this report can possibly advance our interests on the appeal.

As did Mark Elliott:

Have you read their submissions filed at 3.43 pm today?

913 On 25 May 2018, Symons circulated a draft response to the request from Maddocks for the release of the Third Trimbos Report to O'Bryan and Zita (copying Mark Elliott and Alex Elliott). The response refused the request on the basis of the contractual obligations assumed by the SPR under the Settlement Deed. From my findings discussed earlier,[96] I am satisfied that Mark Elliott, O'Bryan, and Symons perceived disclosure of the Trimbos report to the SPR, who would have readily spotted its 'deficiencies', as detrimental to concealing their conduct. Shortly after, O'Bryan circulated his agreement to Symons' proposed response.

Lead up to the hearing

914 As the hearing of the appeal approached, Mark Elliott, O'Bryan and Symons became increasingly desperate about maintaining their control of the narrative being presented to the court.

915 On 27 May 2018, Mark Elliott proposed a return to the Botsman intimidation strategy in an email to Symons, copied to Alex Elliott and Zita, and blind copied to Pina Elliott. Mark Elliott wrote:

We need an affidavit from TZ on why CB should be liable for the costs of the Appeal when he loses

I want to show that he is the moving party

Exhibit the Calderbank letter that was sent to WB

Exhibit our letter to him re costs being paid by him

Exhibit property searches and ASIC searches on Him and his wife Rachel-TZ to do please asap

Exhibit his CV and that of Withers and Redwood to show that they all went to University and NYC together and share Banco Chambers

I want to exhibit all Google articles on Rachel Botsman to show her net wealth ($19M) and to compare WB claim to size of distribution to all debenture holders

I want to exhibit transcript reference to when Botsman/Withers(?) told the CoA that he was pro bono but that if they won they would claim costs

I want to exhibit reference to skiing in Davos-ie why they couldn't attend the 30/01/2018 hearing

What else??

Lets discuss

916 On 28 May 2018, Symons raised with Mark Elliott his concern about a potential discrepancy in the AFP narrative, in relation to the additional value of the foregone Trust Co remuneration claim. It appears that no further discussion was entertained on this issue at this stage until after the first hearing date in the appeal.

917 On 7 June 2018, the day before the first day of hearing in the appeal, Mr Redwood circulated an email to all counsel involved in the proceeding, attaching a document identifying disclosures that he intended to make known to the Court of Appeal pursuant to their professional obligations to correct any imbalances of information of which they were aware:

In preparing for the appeal it has come to our attention that whilst the exhibit to the Lindholm affidavit at CB 507-508 is accurate in setting out the evidence of the plaintiffs when read with para 13 of the affidavit it could convey the impression that Banksia "filed" all of that material. I am therefore required to correct it.

The attachment otherwise includes an additional column that merely describes the length of the relevant statement/report; matters known to the judge hearing the approval applications as the trial judge but not apparent to the Court of Appeal.

918 O'Bryan replied privately to Mr Redwood:

Dear Jonathon,

Please ensure the court understands that we worked together and co-operatively on much of this evidence, especially the experts.

This assertion, as Mr Redwood well knew, was false.

K.3. Appeal hearing and ensuing events

919 The hearing in the appeal commenced on 8 June 2018 before Tate, Whelan and Niall JJA.

920 O'Bryan and Symons appeared on behalf of Mr Bolitho. Mark Elliott and Alex Elliott attended the hearing. By this stage, Alex Elliott was deeply involved in the proceeding, having worked on the AFP injunction proceeding since April 2018. From his research, and from reading group emails, Alex Elliott was aware of both the legal issues in the submissions and the strategic discussions taking place behind the scenes between O'Bryan, Symons, Mark Elliott and Zita. Alex Elliott attended the hearing to take notes and to report back to Mark Elliott. Alex Elliott gave evidence that the purpose of his note-taking was that it was 'an interesting application' concerning 'very interesting and quite novel points'. I did not accept that evidence as truthful.

921 The Court of Appeal first heard from Mr Withers. While it is not necessary to set out those submissions, their importance as a turning point in this entire matter did not come to light until the remitter and cannot be understated. If not for the courageous perseverance of Mrs Botsman, Mr Botsman and Mr Withers bringing legitimate concerns to the Court of Appeal, it is altogether possible that Mark Elliott, O'Bryan and Symons would have succeeded in violating their trusted and privileged position with the court as its officers to achieve illegitimate personal gain at the expense of the debenture holders.

922 The Court of Appeal readily identified the potential conflict of interest festering in a confidentiality regime and the absence of a contradictor.[97]

Trimbos's evidence

923 During Mr Withers' submissions, the following exchange occurred between the bench and O'Bryan about the independence of Trimbos, and his other engagements by AFP in other proceedings:

TATE JA: But outside of the Banksia proceedings and their totality, are you prepared to accept that Trimbos has acted as, as he describes himself, an independent expert?

O'BRYAN: In one other case only, one other case only.

WHELAN JA: So he has not acted for the funder in any other proceedings?

O'BRYAN: He has given opinions in respect of security for costs claimed by respondents only.

O'Bryan agreed to seek more precise instructions about the number of times Trimbos had provided opinions to AFP.

924 Following the lunch adjournment, Mr Withers reported an agreed position about AFP's involvement with Trimbos. Mr Withers stated that Mark Elliott and Trimbos had met in 2014, and that Mark Elliott had retained Trimbos through his funding entities in five separate proceedings: two in relation to settlement approval and three in relation to security for costs.

925 O'Bryan submitted that Mr Withers' contentions about the complexity of the settlement arrangement were 'greatly exaggerated'. The Third Trimbos Report was confidential because it was a road map for every step taken by Mr Bolitho in the context of the litigation. The SPR was justifiably excluded from accessing the Third Trimbos Report and counsel's first and second opinions because:

it would tell them things about our conduct of [the Bolitho] case that it may not be desirable for [the SPRs] to know

926 O'Bryan intentionally depicted the Third Trimbos Report as an accurate depiction of work undertaken by counsel and Zita. O'Bryan intended the Court of Appeal to rely on the Trimbos report as such and to infer that it would not be in the interests of the group members for the SPR to become aware of all aspects of the conduct of the Bolitho case because the parties had different goals in different proceedings. He submitted that this case had:

Particular aspects of confidentiality about it because of the need for [Bolitho] to compare and contrast the legal and factual substrata of the class action claim as compared to the special purpose receivers claim **for the purposes of explaining to a judge why the particular legal costs and funding fees were reasonable** in the case which we were bringing, and in particular to describe the comparison that should be drawn between amounts of funding commissions at the various percentage rates that might be applied to the $64 million settlement sum.

927 O'Bryan represented to the Court of Appeal that counsel's first and second opinions were reasonable explanations of reasonable costs incurred by the Bolitho legal team in a proceeding separate to, although overlapping in some respects with, the Banksia proceeding, and that the confidentiality imposed on these documents was reasonable to protect the interests of the group members. This representation was false and misleading, carrying a tendency to induce error. As will appear, O'Bryan and Symons intended that consequence. As did Mark and Alex Elliott, who were in court effectively as the instructing solicitor because this submission was not made in Mr Bolitho's interests.

928 The purpose of the confidentiality, as earlier explained,[98] was exclusively to maintain secrecy preventing the other parties, particularly the SPR, from identifying the discrepancies between what O'Bryan and Symons had told Croft J and had instructed Trimbos to accept, and the true facts known to the SPR that the relative work contributions of the two legal teams grossly favoured the SPR. This is analysed later in these reasons.

929 O'Bryan contended there had been no procedural unfairness in the course of the approval decision. It is illustrative to quote, from the transcript of the hearing, an exchange between Tate and Whelan JJA, and O'Bryan, when their Honours asked O'Bryan whether Croft J dealt with the possibility of apportionment of the settlement sum between the two proceedings and the consequences for AFP's commission claim. This demonstrated that O'Bryan was attempting to mislead the Court of Appeal:

O'BRYAN: He does not say explicitly, but it must follow from his Honour's reasoning, we submit, that his Honour has reached the conclusion that there is no sensible way in which the $64 million can be divided.

TATE JA: But he does not say that, does he, anywhere?

O'BRYAN: No.

TATE JA: And he does not say it even implicitly anywhere, does he? He recognises that they are overlapping proceedings. He notes the argument that it is the special, the SPRs and their legal team who have done the burden of the work, but at no point does he actually address that point as to whether it would have been appropriate to apportion the $64 million sum.

O'BRYAN: He does not. Could I just go back one step. He does not recognise that they have done the bulk of the work, your Honour.

...

O'BRYAN: He recognises that submission which we were unaware of. Had we been aware of it things might have been different, but in any event that was the submission that they made.

WHELAN JA: There is no doubt that they compiled most of the evidence.

O'BRYAN: Compiled in a sense that their name appears on the cover of the file.

WHELAN JA: I have read the file, I have read the fee notes. There is no doubt that they compiled most of the evidence.

O'BRYAN: I have not read their fee notes, your Honours.

WHELAN JA: You seem the spend a lot of time reading their witness statements.

O'BRYAN: No. We spent a lot of time in preparation of their witness statements, your Honours. Mr Redwood will confirm – he will not be able to confirm the number of hours, but we jointly were involved in the preparation in particular of the expert evidence.

930 During his cross-examination, Alex Elliott was taken to this exchange between Tate and Wheelan JJA and O'Bryan concerning apportionment of the settlement sum. In relation to Whelan JA's observation that there was no doubt the SPRs compiled most of the evidence, and O'Bryan's reply that the preparation was a joint exercise, Alex Elliott stated that he did not know whether O'Bryan's comment was truthful. I am satisfied that he knew that it was not truthful. He agreed that whether the claimed legal costs were excessive was one of the issues that arose in the hearing, and that the exchange between their Honours and O'Bryan as to apportionment would have an impact upon the question of the funding commission.

931 I find that Mark Elliott, Alex Elliott, O'Bryan and Symons all knew that the Court of Appeal had read the Third Trimbos Report and looked at the invoices and fee slips attached to the report. They were aware that the Court of Appeal was scrutinising the contributions of the respective legal teams, and the veracity of Mr Bolitho's claims to legal costs.

932 Alex Elliott accepted that one issue that arose was whether the claimed legal costs were excessive in view of the work actually performed by the Bolitho team. Cross-examined, the following exchange occurred.

So having been raised in the appeal, did you stop to wonder about the quantum of the legal fees charged by O'Bryan, Symons and Zita?---No.

Did it not occur to you at that point to think, 'I've never actually looked at their invoices and fee slips'?---No.

Did it not occur to you to think, 'Oh God, I don't know if dad's even looked at their invoices and fee slips'?---No.

Had you seen any fee slips from these three lawyers in this matter?---Definitely hadn't seen Norman's. I don't think I'd seen Michael's either and I think Tony might have sent his to me but - - -

But by this time had you not seen some fee slips that were appended to Mr Trimbos's affidavit?---I don't recall seeing the fee slips, no.

You don't recall at this stage seeing any fee slips appended to Mr Trimbos's report?---I don't recall going through them, no.

SPRs' submissions

933 It is necessary in order to understand what followed to set out the substance of the SPR's submission put by Mr Redwood to the Court of Appeal on 8 June 2018. Addressing the issue of apportionment, he submitted that:

There was no apportionment. Apportionment could have been possible, but would have required my client and Mr O'Bryan's client to agree on what that apportionment was. And I think your Honours have probably heard enough and seen enough to indicate that there might have been a fair degree of debate between us as to what they would be prepared to attribute to our claims versus theirs.

Mr Redwood added:

The need for apportionment does arise because they are wanting a funding commission, and the funding commission has to be referrable to something. So, we do say that if the proposition is – and we do not know because we have not seen, ourselves, the reasoning. But if the proposition is that at least an integer or the key integer of the funding commission is 64 million – that is, the entire settlement sum – then it would have to be justified on some basis.

934 Addressing the procedure at the approval hearing, Mr Redwood stated:

As we apprehended the [Botsman] objection, it raised, in particular, three key issues as to the denominator for apportionment, the relative contribution of the parties to the settlement sum on the proceedings, and the question of whether an integer in the calculation ought to have been a percentage of debenture holders who signed a funding agreement, i.e. 57 per cent, or a hundred per cent.

...

It is difficult to conclude the judge gave adequate consideration to those matters.

935 Mr Redwood submitted that the confidentiality imposed on counsel's opinions with respect to the respective contributions of the parties to the settlement sum was unfortunate:

I think Niall JA asked earlier about why we did not share submissions. I think I can certainly see why there would have been virtue in it. I think there obviously is some diversions of interest.

936 Mr Redwood submitted that confidentiality imposed on the Third Trimbos Report was unwarranted:

[T]here could not possibly, to my mind, be anything confidential. We are on the same team working together. I cannot presently conceive of anything that could be confidential as against us.

...

I have to concede it would have been preferable if we had have had access to [the Third Trimbos Report] at the settlement approval, you know, and we were unconstrained to make submissions. In a difficult situation, the best we could do was to emphasise ... that it needed the careful scrutiny of the court.

...

It was not our application, we did not seek confidentiality – they made the application for confidentiality. We did not oppose it. The confidentiality over the costs report went too far on principle. The [Trimbos] affidavit was close to worthless to a debenture holder without the report, and it was difficult to reconcile with the notice given to debenture holders.

937 In relation to the need for a contradictor, Mr Redwood submitted that it would have been better had a contradictor been appointed, as with the Partial Settlement. Mr Redwood submitted that the relevant test in relation to the appointment of a contradictor was whether:

the interests of debenture holders would have been so plainly endangered without a contradictor that no judge of Croft J's circumstances could have reasonably concluded that a contradictor was not necessary to protect their interests.

Any assessment of whether that high bar has been established would be informed by ... whatever the Bolitho camp did or did not do, and we do not know because we have not seen, obviously, the submissions, but on our side, we were acutely conscious of our duties of candour to the court in the absence of a contradictor and we made a concerted effort in relation to the fairness and reasonableness of the settlement sum to identify competing considerations.

938 Mr Redwood submitted that cl 3.10 of the Settlement Deed inhibited the SPRs:

3.10, that kind of provision places counsel in a difficult position. It does have an inhibiting or chilling effect. At the very least, as we have said, we strive to put all factual and legal material before your Honours but it does on one view inhibit a candid opinion on the ultimate question, for example; is the funding commission fair and reasonable? If that is the expectation of the courts and of the regime, that counsel be in a position to express a view on that matter, then 3.10 is problematic.

...

As I stand here now, my submission would be different if that provision were not there, in the sense that I would feel obligated to give my candid opinion on the fairness and reasonableness of the funding commission.

939 Mr Redwood submitted that cl 2.4 of the Settlement Deed:

[D]oes have the problematic effect of placing the Court having to make a binary choice. As I have indicated, the combination of the two provisions, 2.4 and [3.10] is problematic.

...

Now it must be said on any proper construction of the clause, the greater the zone of discretion reserved at the end of the day to the funder, the more likely that good faith carve out would be inadequate to address the concern of 2.4 without the carve out because we would end up in the same world.

940 Alex Elliott was not in court to hear Mr Redwood's submissions, as he left part-way through the hearing for the commencement of the Victorian ski season. However, he knew that the submissions had troubled his father and O'Bryan and he recalled that Mark Elliott thought that the SPRs had breached their contractual obligation to support the commission and the Settlement Deed.

941 The further hearing of the appeal was adjourned to 19 June 2021.

Campaign against Jonathon Redwood

942 Mr Newman was not present in the Court of Appeal for Mr Redwood's submissions, but stated that he had telephone discussions with Mr Lindholm, Mr Kingston and Mr Gashi of Maddocks, who all conveyed to him that Mark Elliott had complained about them. Alex Elliott confirmed that Mark Elliott was troubled by Mr

Redwood's submissions and recalled him 'being upset'.

943 On the evening of 8 June 2018, following the hearing, O'Bryan sent a text message to Mr Newman:

Why have you decided to blow up the settlement?

944 Later that evening, Mark Elliott departed for an overseas trip. Prior to his departure, he emailed Mr Lindholm and copied O'Bryan:

John

Thanks for the chat and your confirmation that Redwood went rogue and acted against your instructions

We now need to fix the mess by:

1. Sacking Redwood

2. You appointing a serious Senior Counsel to show and tell the Cof A that you support the deal,disapprove of what JR did and to declare that his personal opinion is just that

3. Agreeing between ourselves what our submissions will say next week about Court powers to approve/change the deal.

4. Disavow the Court of any notion that they can rejig the deal as they see fit

5. File an Affidavit by you supporting the deal ,the funders fee and the implied apportionment of the settlement sum

Both Bolitho and AFPL cannot standby and watch the SPR's through their counsel breach the deed and risk the Court deciding the terms of a new deal and imposing it on us against our will We will act to avoid that if the above steps are either not taken or prove unsuccessful.

Please have DN confer with Norm on how to fix this mess

Talk soon

945 On 9 June 2018, Mr Lindholm replied to Mark Elliott (copying O'Bryan and Mr Newman).

I had a good chat with Dave [Newman] last night along the lines you've outlined below.

Let's catch up Tuesday am if you're around.

946 Mark Elliott replied to Mr Lindholm privately:

I think that you also need to change your submissions regarding S33ZC and oppose Botsman appealing at all. It may already be too late to save the Croft approval the way we are currently approaching it. Redwood did not do so previously (no doubt as part of the Redwood/Withers/Botsman conspiracy) Can you please discuss this idea with DN [Mr Newman]?

Email is best way to contact me next week

947 Mark Elliott later forwarded his email exchange with Mr Lindholm to Symons, who forwarded it to O'Bryan, adding:

I assume you got this?

I have no idea whether it means he will help or not

948 Symons was complicit in the campaign of intimidation against Mr Redwood. On 12 June 2018, O'Bryan and Symons discussed holding back the first opinion if the SPRs continued to retain Mr Redwood. In the

context of a discussion about whether to provide Mr Botsman with the first and second opinions, Symons said to O'Bryan:

If Lindholm puts on an affidavit which ascribes most of the value to the Bolitho claim, I would simply give the opinions to Botsman subject to a confidentiality undertaking. If that becomes common ground, I don't see that there's anything particularly prejudicial in Botsman having them. If Lindholm doesn't do so and it turns out that Redwood will really be retained, then I would continue to oppose.

Alex Elliott's 'my thoughts' email

949 On 12 June 2018, Alex Elliott sent Mark Elliott a detailed email, with the subject 'Botsman appeal submissions', summarising his analysis of the hearing and the Mrs Botsman's submission for his father's consideration while overseas. Reading between the lines, Alex Elliott, still apparently a 'personal assistant' rather than a solicitor, revealed that he had been on top of the detail of AFP's position since the Trust Co Settlement was negotiated. Alex Elliott wrote (emphasis in original):

My thoughts:

1. Apportionment seems very necessary and unavoidable;

2. What happens if the SPRs and Trust Co submit to the Court that it has the power to remit the funding commission and legal costs for reapproval– **how do we retain control of the funding commission so that we do not end up with $3.2M?** Insist on apportionment? What if SPRs do not want to apportion?

3. The funding commission needs to be directly referable to the Bolitho proceeding (ie 25% of $50m) otherwise the funding commission will be attacked as unreasonable due to the lack of evidence filed by Bolitho, SRPs shouldering the burden, special purpose vehicle etc;

4. If the Court accepts our submission that they do not have the power under 33ZF and 33V to remake the Deed or remit certain clauses, then the Court will likely set aside the approval orders, having the effect of terminating the Deed:

(a) Is terminating the Deed a better outcome than a $3.2M funding commission?

(b) Will it force the SRPs to apportion the settlement sum more favourably to Bolitho if they refuse to apportion favourably now?

(c) Will Trust Co still be waiting to settle on similar terms? Maybe not

5. Does having a clause to 'negotiate in good faith the funding commission' alleviate the suggestion that the Court is being held at ransom?

6. What is the denominator? $64M, $68M, $70M

Key take-aways from Botsman's appeal submission:

1. No evidence was filed on how the funding commission was derived

2. No evidence was filed explaining why the parties did not apportion the settlement sum

3. The funding commission is inconsistent with amount of evidence filed by the SPRs

4. Independence of Peter Trimbos

5. No instructions to Peter Trimbos regarding the parallel proceedings and duplication of work

6. Legal costs and disbursements should be $1M.

7. Legal costs should be referred to a Court Referee or Associate

8. Court should set aside approval order unless it has the power to alter funding commission and legal fees

9. The Court cannot be held to ransom by the CPs of the Deed

10. Group members should not be disadvantaged by a failure to apportion the settlement sum between the parties

11. Funding fee should be revised to $3,283,000

12. The Court has the power under 33ZF and 33V to alter the funding commission

13. The Court must strive to interpret the Deed so far as possible in a way to avoid any provision being found to be void, invalid or unenforceable

950 Alex Elliott described the email as a summary of the live issues discussed during the Court of Appeal hearing the previous Friday. He agreed that AFP was not a party in the proceeding at this stage, but he knew that Mark Elliott would be in communication with O'Bryan and Symons about the appeal, and in writing this email he was 'just trying to show an interest'. This evidence was a reconstruction, as Alex Elliott sought to be seen in a more favourable light. I reject that he was merely trying to show an interest.

951 During cross-examination, Alex Elliott did not agree that this email was his analysis of the issues in the appeal. When his cross-examiner suggested that he was reflecting on Mrs Botsman's submissions and what had been said from the bench, and that he was giving Mark Elliott his own analysis and account of where he saw things sitting, Alex Elliott responded:

It wasn't through my lens. It was just a regurgitation of what was said that day.

952 Alex Elliott did not agree that he was opining what he thought the court was likely to do, or where he thought the appeal was going. Alex Elliott stated:

It was a roll up of the day. I sat next to [Mark Elliott] throughout the day. These were just issues that fell out of the day.

...

I just didn't really look at it as my account.

When asked why he had headed the document 'My thoughts', Alex Elliott stated:

I'm not sure.

When asked whether he was conveying his thoughts as a lawyer in the document, Alex Elliott stated:

I just never looked at it that way. I honestly didn't look at it as me writing as a lawyer. I was writing as someone that went to court with dad and was just summarising the day. I don't – I never like considered myself, I guess, as working as a lawyer when I did this document.

953 Alex Elliott's defence was that he was an innocent bystander, just assisting his father. I am satisfied both from close analysis of his evidence overall and from observation of his demeanour in the witness box that he was reconstructing to deliberately downplay his role. I do not accept this explanation. His failure to accept that he was acting as a lawyer was a false denial as became clear on analysis, in the context of his answers in cross-examination, of the 'My thoughts' document, prepared at his father's request, summarising the main aspects of the day's hearing in the Court of Appeal.

954 I find that Alex Elliott attended the hearing in the Court of Appeal and prepared the 'My thoughts' document in his capacity as a junior solicitor on the Banksia matter, and a solicitor acting for AFP. Further, I found the document revealing of the true nature of the role, as I have described it, actively being played by

Alex Elliott from the point when the Trust Co Settlement had reached agreement in principle.

955 The Contradictor submitted, and I find it a matter of concern for the court, that Alex Elliott failed to acknowledge his role and responsibility as a lawyer. Hiding behind the descriptor 'personal assistant' was discreditable. His demeanour showed defiance and disregard for the processes of the law, and a complete lack of self-awareness of the candour expected of him.

956 During cross-examination about 'My thoughts', Alex Elliott disputed the suggestion that points 4 and 5 under the 'key takeaways' heading were drawing attention to the independence of Mr Trimbos and the integrity of the Third Trimbos Report as 'key' points in the appeal.

957 Alex Elliott well knew that AFP's legal costs and funding commission were being closely scrutinised. He had long understood the interdependence of the two issues and at the hearing he witnessed the exchange between Whelan JA and O'Bryan. I find that he did identify the integrity of the Third Trimbos Report as a 'key' factor and he agreed that he did not reflect upon the quantum of legal fees charged by O'Bryan, Symons and Zita. He agreed that it did not occur to him that he had never actually looked at their invoices or fee slips, or that he did not know whether his father had ever looked at them either. Alex Elliott personally delivered O'Bryan's invoices and fee slips to Trimbos on or around 13 December 2017, just a few days after they were produced by O'Bryan on or around 11 December 2017. I am satisfied that Alex Elliott knew his father had, at best, a limited opportunity to look at them before they were handed over, evidently without being copied.

958 When his cross-examiner took Alex Elliott to point three of 'My thoughts', he denied that he knew at that stage that the work product of the Bolitho legal team relative to the Banksia legal team was in doubt. He stated that it was his understanding that the Bolitho legal team had a lot of involvement in that evidence. I do not accept this inconsistent explanation that he did not recall that the Court of Appeal was concerned about work product issues.

959 Cross-examined about point five under 'My thoughts' and point nine under 'Key take-aways', Alex Elliott agreed that his references to the court 'being held at ransom' was a reference to the conditions precedent in the Settlement Deed and the issue of whether the settlement could only be fully approved or not approved at all. He conceded that he knew that the Court of Appeal was concerned that group members should not be disadvantaged by a failure to apportion the settlement sum. Yet, Alex Elliott denied that he and his father were concerned at the prospect that AFP's funding commission could drop from $12.8 million plus GST to $3.2 million, despite the reference to this in point two under 'My thoughts' being emphasised (bolded and underlined). When asked why else it would be bolded and underlined other than for emphasis, Alex Elliott claimed:

It's an interesting question.

960 I pause to observe that Alex Elliott gave this response on several occasions. I am satisfied that he was covering his 'professional' interest in the question as an active member of the AFP team with the suggestion of an 'academic' interest. He was dissembling.

961 While pausing, I also note a troubling aspect of Alex Elliott's email to Mark Elliott, that is echoed in Mark Elliott's conduct during the appeal. Quite plainly, issues about the integrity, honesty, transparency and fairness of the conduct of counsel and solicitors for Mr Bolitho, and Mark Elliott and Alex Elliott (as funders) before and during the settlement approval, were evident from the nature of the questions Alex Elliott identified as raised in the appeal, the tense exchange between O'Bryan and the bench, the revelations of Mr Redwood during the hearing, and in Mark Elliott's cross-examination before Robson J in the costs indemnity hearing on 7 June 2018. In Alex Elliott's email, the possibility of a reduction in the funding commission appeared to be his

greatest concern.

962 It is extraordinary that in these circumstances, Mark Elliott and the Lawyer Parties continued aggressively to defend the appeal, seek leave to appeal Robson J's costs finding, and later resist the remitter. They even continued with their misguided intimidation tactics against, among others, the Contradictor. They showed no apparent concern for their professional reputations and standing or possible disciplinary proceedings. They attempted simply to settle with Mrs Botsman and take a small cut on funding commission and costs. They doggedly pursued their financial interests in defending the settlement approval, necessitating the remitter and the consequences which flowed from it for them. There were many forks in the road at which these legal practitioners could have sought to protect their professional reputations. Each time, they chose the wrong option.

Instruction to draw cheques

963 After receiving Mark Elliott's proposal about how to 'fix this mess', O'Bryan replied on 10 June 2018 with his own proposal:

Having regard to what Whelan said on Friday about our bills & legal costs, I think it is vitally important that AFP pays [Symons] & [Zita] in respect of the accounts that Trimbos has opined on, so that I can confirm to the court when asked (which I now think highly probable) that they have been paid.

If I am asked on 19/6, I will need to be able to answer yes very quickly, since MS & TZ will be in court.

Let me know if this causes any problem.

964 The following morning, Mark Elliott forwarded O'Bryan's email to Alex Elliott, adding:

Alex I think we should draw cheques to MS and PL

Use old BSL cheque book

Date cheques 1 August 2018

Use Trimbos report to get $ amounts correct

Put in envelopes marked 'do not open until you talk to MEE'.Give to each of TZ and MS before 19 June

Let's discuss.

Connection between legal costs and commission

965 Later that day, Alex Elliott sent Mark Elliott a table of figures obtained from the Third Trimbos Report as instructed:

See the past/future costs of PL and MS

	Past Costs	**Future Costs**
Portfolio Law	$377,795.00 (Inc GST) 1 Aug 16 – 8 Dec 17	$354,046 (Inc GST) anticipated costs of PL in completing the distribution of settlement funds should the Court grant approval
Michael Symons	$608,031 (Inc GST) 1 July 2016 – 8 Dec 17	$110,000 (Inc GST) Anticipated costs in obtaining approval of t final settlement

966 Alex Elliott sent a second email to Mark Elliott that day, with the subject line 'alternative funding commissions'. In the body of the email, Alex Elliott set out a table at Mark Elliott's request of calculations identifying different variations of the total value of the settlement, Bolitho 'denominator', funding commission percentage, and the resultant calculation of the AFP Funding Commission:

16.5% (Robson J "Equalisation"%)

20% (discount Common Fund %)

25% (Common Fund % advertised to group members)

30% (LFA %)

Total Denominator	**Bolitho Denominator**	**Funding Commission %**	**Total Commissior**
$64M	$64M	16.50%	$10.56M
$64M	$32M (50/50)	20%	$6.4M
		25%	$8M
		30%	$9.6M
$64M	$38.4M (60/40)	20%	$7.68M
		25%	$9.6M
		30%	$11.52M
$64M	$44.8M (70/30)	20%	$8.96M
		25%	$11.2M
		30%	$13.44M
$64M	$48M (75/25)	20%	$9.6M
		25%	$12M
		30%	$14.4M
$68M	$68M	16.50%	$11.22M
$68M	$34 (50/50)	20%	$6.8M
		25%	$8.5M
		30%	$10.2M
$68M	$40.8M (60/40)	20%	$8.16M
		25%	$10.2M
		30%	$12.2M
$68M	$47.6M (70/30)	20%	$9.52M

		25%	$11.9M
		30%	$14.28M
$68M	$51M (75/25)	20%	$10.2M
		25%	$12.75M
		30%	$15.3M
$75M	$75M	16.50%	$12.375M
$75M	$37.5M (50/50)	20%	$7.5M
		25%	$9.375M
		30%	$11.25M
$75M	$45M (60/40)	20%	$9M
		25%	$11.25M
		30%	$13.5M
$75M	$52.5M (70/30)	20%	$10.5M
		25%	$13.125M
		30%	$15.75M
$75M	$56.25 (75/25)	20%	$11.25M
		25%	$14.06M
		30%	$16.875M

967 Alex Elliott claimed that at the time he did not think that O'Bryan's email of 10 June 2018 about paying Zita and Symons was expressing concerns to Mark Elliott about the questions that Whelan JA had been asking O'Bryan at the hearing. O'Bryan had:

Asked my father to do something. He was a 30 year QC, his father was a judge, his grandfather's a judge. I didn't expect that he would be putting me in a position to mislead the Court of Appeal.

968 Alex Elliott added:

It didn't come across to me as something that was wrong. It was just Norman saying to dad, 'We need these things done before the 19th' and then dad asking me to do it. Whether things had been paid or not wasn't an issue.

...

I didn't think it was an issue at all.

...

I never thought that costs paid really had any connection to the commission. It's just not something that ever crossed my mind.

969 This evidence was untruthful. Alex Elliott was not 'naïve' (as he claimed) to the connection between claimed legal costs and the funding commission.

970 Alex Elliott's detailed work emailed to Mark Elliott to assuage his concerns, showed that Alex Elliott understood that the higher the 'denominator', the better AFP's prospect was of retaining an acceptable return. Alex Elliott knew that the 'Bolitho denominator' was an expression of the apportionment issue, which he knew was a 'critical element of the appeal'. He agreed that he recalled the exchange between Whelan JA and O'Bryan in relation to the claimed legal costs, and in his 'My thoughts' email he brought attention to the links between the respective work contributions of the legal teams, the costs claimed in the Third Trimbos Report, and the impact on the funding commission. He was also alive to the principles of *Money Max* which placed relevance on costs expended in calculating acceptable commission.

Significance of the cheques

971 Alex Elliott agreed that Mark Elliott's instruction to draw the cheques was connected with O'Bryan's email, but claimed he did not notice or place any significance on the various suspicious features of this request:

> (a) Mark Elliott's signature: In cross-examination, Alex Elliott recalled reading the email chain starting with O'Bryan's email of 10 June 2018 and containing his father's instruction. He agreed that the reference to Mark Elliott's phrase 'let's discuss' referred to a phone discussion at some point after he received the email. Alex Elliott could not recall the content of this phone call, apart from the fact that Mark Elliott instructed him to sign the cheques in Mark Elliott's name, that is, to apply a version of his father's signature. Alex Elliott disagreed with the cross-examiner's suggestion that his father's request to write two cheques for nearly one million dollars and sign them in his father's name was the job of a 'right hand man'. Initially, Alex Elliott denied thinking the request to sign cheques in his father's name was unusual, but, somewhat inconsistently, he also agreed that this was not something he had ever done or been asked to do before. Alex Elliott also agreed that he had never drawn a cheque on behalf of AFP before either.
>
> (b) Forward-dating: He said he could not recall why he was instructed to forward-date the cheques. He claimed that he did not realise from this, and the instruction to 'put [the cheques] in envelopes marked "do not open until you talk to [Mark Elliott]"' that Mark Elliott did not want to run the risk of Symons and Portfolio Law presenting their cheques. Alex Elliott stated that he 'didn't put two and two together' that if they had been given a forward-dated cheque then in fact they would not have been able to cash it and have been 'paid', as O'Bryan's email stated he would need to be able to tell the Court of Appeal on 19 June 2018.
>
> (c) Old BSL cheque book: He also said he 'didn't put two and two together at that point' that he had been asked to use an old, non-current cheque book, despite Mark Elliott's email itself describing the cheque book as 'old'. He said the request to use the 'old BSL cheque book'... 'didn't seem like a big deal at the time'.

972 Alex Elliott maintained that he did not understand at that time the significance of the fact that Croft J and the Court of Appeal had been told that AFP had actually paid the legal costs for which it was seeking reimbursement. This evidence was untruthful.

973 Alex Elliott personally observed the Court of Appeal's scrutiny of the legal costs claim. He read the emails from Mark Elliott, including Mark Elliott's list of demands of Mr Lindholm in response to Mr Redwood's

submissions. He read O'Bryan's concerns about wanting to confirm in the presence of Symons and Zita that AFP had paid their fees. Alex Elliott was directly instructed by his father to prepare post-dated cheques for the exact amounts AFP was claiming to have paid, with instructions to ensure that those cheques could not be cashed. His responses were incredible, because he was lying.

Carrying out the instructions

974 On 13 June 2018, O'Bryan emailed Mark Elliott with the subject line 'Rob Crow called this morning & I have filled him in on where we are at and what is likely to happen'. In the body of the email, O'Bryan wrote:

is the costs question squared away?

Mark Elliott replied, copying Alex Elliott:

It will be by Tuesday.

975 I pause to observe that it was clear that O'Bryan was very concerned to ensure that the cheques were delivered to Symons and Portfolio Law before 19 June 2018 and that Mark Elliott agreed with the strategy that would allow O'Bryan to address questions he might be asked in the Court of Appeal without concern about being contradicted.

976 That evening, Alex Elliott replied privately to Mark Elliott:

Give me a call when you can, not urgent.

Despite stating that he didn't think much of Mark Elliott's cheque request, didn't think it unusual, and that he didn't think these senior lawyers would ever ask him to assist in misleading the court, Alex Elliott told his cross-examiner that he did not like the idea of signing the cheques and that he felt uneasy about it. Alex Elliott stated that his request for his father to call him on 13 June 2018 may have been about the cheques.

977 Alex Elliott wrote a cheque to Zita for $377,795 and dated it 1 July 2018. Alex Elliott wrote a second cheque to Symons for $608,031 and also dated it 1 July 2018. He signed both cheques with Mark Elliott's signature. It is not clear why he did not date the cheques 1 August 2018 as per his father's initial email. This date may have been revised during one of their phone calls after the email.

978 Throughout his cross-examination, Alex Elliott maintained that he had no idea that there was anything untoward with his father's instructions, because if O'Bryan's perceived standing in the legal profession.

979 In re-examination, following eight days of evidence, and after consulting with his counsel, Alex Elliott conceded that the direction from Mark Elliott to draw the cheques to make sham payments to Symons and Zita was for the purpose of deceiving or misleading the Court of Appeal, and that, had he looked at things critically, he had had enough information available to him at the time to identify that deception. As refreshing as this admission seemed, as to his attempt to qualify the context of his earlier false denials, I do not accept that Alex Elliott was telling the truth when he said that he only later came to this realisation.

980 I am satisfied that Alex Elliott identified when he drew the cheques that he was being asked to set up an opportunity for O'Bryan's proposed deception of the Court of Appeal and that he knew and understood that he was complicit the purpose of the activities at that time. His understanding was not just based on the email exchange Mark Elliott had sent him but also he had witnessed first-hand the exchange between Whelan JA and O'Bryan in court.

981 Early on the morning of 14 June 2018, Mark Elliott emailed Alex Elliott with the subject line 'costs', and wrote:

Don’t worry about cheques for PL and MS

We are terminating

Talk later

Alex Elliott replied:

No worries

982 Alex Elliott could not recall what he did with the cheques, and was not able to remember whether he delivered them to Symons and Zita. I am satisfied that they were delivered but cannot say when or by whom. The emails privately exchanged between Mark Elliott and Alex Elliott show that Alex Elliott knew he had been asked to make sham payments to Symons and Zita. Alex Elliott understood that Mark Elliott withdrew the instruction once a decision was made to terminate the Settlement Deed, as the cheques were no longer needed as part of the strategy to mislead the Court of Appeal.

983 However, two observations remain. First, the cheques were delivered but not cashed as proposed. Second, Whelan JA never asked ‘the question’, but it became relevant after the Court of Appeal remitted the issue of approval of the costs to me. In December 2018, the Contradictor circulated the first iteration of the list of issues. Issue 5(b)(v) was:

Has AFP paid the Legal Costs in respect of which it claims reimbursement, and if so, when?

984 When cross-examined, Zita had no actual recollection of when he received his cheque. His belief was that he received the cheque around the time it was banked, on 21 January 2019, based on the fact that it was Portfolio Law’s usual practice to bank cheques within a few days of receiving them. There was no corroborating evidence of this usual practice, rather there was evidence that Zita would place cheques in his safe, which is not inconsistent with a finding that the cheque was banked on 21 January 2019, shortly after the commencement of the remitter, when ‘the question’ was asked.

985 On any view, AFP’s payment of Symons and Zita was not a payment in the ordinary course. Zita knew he received a post-dated cheque, when AFP had not received the settlement funds, in an envelope stating ‘Do not open until you talk to [Mark Elliott]’. He appeared to follow that instruction.

986 Symons stated that he received his cheque from Mark Elliott on ‘about’ 1 July 2018, with instructions not to cash it until he was told otherwise. Remarkably, Symons also banked his cheque on 21 January 2019.

987 Towards the end of June 2018, Mark Elliott became increasingly concerned about AFP’s solvency. He sought a loan from one of AFP’s shareholders, Mr Crothers:

Thanks for meeting with me this morning and for the ongoing advice

As discussed, AFP has some short term (3-4 months) cashflow issues that need some rather urgent attention

Further, it is advisable that the 30 June accounts (which become public in October), show some margin of cash at bank when accessed and considered by our adversaries.

Ideally, we need $1M put into the bank account by 30 Jun (tomorrow if possible to meet the balance date with comfort) and access to up to a further $1M over the next 3-4 months

We have $400-$500k of bills we can/should pay by 30 June. The balance can come if/when required next FY ...

988 Mr Crothers instructed a Mr Chau-Kwan to arrange for payment of $1 million to be deposited into AFP's bank account.

989 I cannot draw any inference that this loan was also intended to cover the cheques for Symons and Portfolio Law. However it is clear that AFP was under financial pressure at this time and O'Bryan's request to issue these payments would have placed AFP under unexpected financial strain, which may explain the post-dated cheques. In addition, Mark Elliott evidently was conscious of keeping up the appearance that AFP was capable of paying the costs of the litigation.

K.4. The proposal to terminate the Settlement Deed
Alex Elliott's research

990 On 13 June 2018, Mark Elliott instructed Alex Elliott to research the court's power to alter the conditions precedent in the Settlement Deed. The Court of Appeal had requested the parties file submissions on the source of the court's power to approve the settlement.

991 Late in the day, Alex Elliott emailed Mark Elliott his analysis of Murphy J's comments in *Caason Investments Pty Ltd v Cao (No 2)* ('***Caason***').[99] Alex Elliott wrote (emphasis in original):

There is a big difference between seeking Court approval of a proposed settlement and the Court exercising its powers under 33ZF and 33V to deduct the funding commission under the proposed distribution scheme (Earglow case etc) **and** the power of a Court to alter a condition precedent to the Settlement Deed (Caason)

Murphy J in Caason did not refer to any Court powers to alter the condition precedent of a common fund in the settlement deed. Rather, he said:

1. "I would be strongly inclined to refuse to approve a settlement which included such a clause (CP of a common fund)";

2. "the Common Fund Condition Precedent is inconsistent with the overarching purpose in s 37M of the Act";

3. "I would decline to hear the settlement approval application if it was open to the applicants to walk away from the settlement in the event it was approved but without a common fund order."

4. "The use of such a condition precedent in the settlement of class action proceedings should be **strongly discouraged**."

If the COA does not have the power to sever/alter a clause in the Settlement Deed, what do they do? If it gets sent back for re-approval, with the current CPs in the Deed, any primary judge will have to refuse approval (on Caason analysis) ..... The risk to group members appears too great!

992 Cross-examined about this email, Alex Elliott disagreed that, from the perspective of AFP, Murphy J's reasoning was alarming. Alex Elliott stated:

I'm not sure I was looking at it as a problem. It was more just an interesting situation.

Alex Elliott agreed that he was following up with his father about what another judge had said regarding issues currently alive before the Court of Appeal. He did not recall his father doing anything in particular with the email.

Termination strategy

993 On 14 June 2018, Mark Elliott emailed Alex Elliott, Zita, Symons and the general class action email:

All

I think it's time we try and double cross the SPR'S

We should approach Trustco and offer to settle for $50M + costs

We should close the class and bind all class members to the deal-no one can appeal the deal as the Notice will advise them that under the LFA they are not allowed.

If Trustco want the Undertakings from me and Norm we can provide them at no extra charge.

If Trustco insist that the SPR'S also settle (they may not given recent Yates J decision) we give them 7 days to obtain a separate agreement or else we go to trial

JL will agree to settle

He can go and get his own approval separate to us.

He cannot/will not fight the case

He gets all his costs back

Irrespective of Trustco response the Deed is dead

Only question is do we pull the Deed before 22 June or wait for Court to overturn Croft? Via Redwood the SPR'S have breached the Deed

MS-please draft a show cause letter to be sent tomorrow and give them till Monday to reply if we are all in agreement.

I say pull now if Norm says we will lose and avoid the precedent

Comments please.

O'Bryan agreed with Mark Elliott's strategy and provided directions and advice for AFP to send a letter stating that:

Redwood's submission on Friday constitute a breach of the obligation to support the deed (both express and implied terms)

...

AFP remains willing to settle, but only on a basis that reflects the terms earlier agreed; otherwise Bolitho will go to trial as soon as possible.

994 During cross-examination, Alex Elliott agreed that he knew that the strategy was to terminate the Settlement Deed. He was 'not sure' whether it was a worse settlement for group members, nor was he sure about what his father meant by his comment that AFP/Bolitho 'double cross the SPRs'. He accepted that the 'we' used with reference to approaching Trust Co did not include the SPRs. Alex Elliott did not think the correspondence was untoward, and as to whether it was in the interests of group members he stated:

I never really looked at the interests of, I guess, the class members in that respect. Like it was in the interests of AFPL's class members, like they'd get more money if it was, the class was closed, and it was up to, I guess, Tony, Michael and Norman to work out everyone else.

995 On 14 June 2018, Symons drafted a letter from AFP to Mr Lindholm in the terms that O'Bryan had suggested earlier that day. O'Bryan settled the letter and circulated it to Mark Elliott and Alex Elliott.

996 Alex Elliott agreed that he knew that O'Bryan and Symons, who were counsel for the entire class, had the job of drafting the letter to terminate the Settlement Deed. He was also aware that AFP had previously sought a common fund order before Croft J on the basis that it had brought the proceeding on behalf of all 16,000 debenture holders and for their benefit.

997 I am satisfied that Alex Elliott reviewed the Funding Agreement, including the conflict provisions, during his work on the AFP injunction proceeding, which had included providing a witness statement. Despite that, Alex Elliott stated that he could not recall being familiar with specific provisions of the Funding Agreement, and that:

Actually thinking about the consequence of that clause with Michael and Norman and them drafting letters about terminations of settlement deeds is not something I recall triggering in my mind as a breach of the LFA.

998 Alex Elliott said that he did not think about the ethical position of O'Bryan or Symons in assisting AFP to terminate the Deed, and that it never crossed his mind that this might be a conflict. This statement was not truthful, as his conduct showed.

Alex Elliott's concerns

999 After he saw the draft termination letter to Mr Lindholm, Alex Elliott emailed Mark Elliott:

Are you convinced on this letter? I do not have a good feeling about it at all

Mark Elliott sought an explanation. Alex Elliott responded, signing off with his Elliott Legal signature block:

1. It draws a clear line in the sand between SPRs and AFPL

2. AFPL is representing 5,600 group members interests pursuant to the LFA- it is not acting in their interests by terminating the Deed? I have concerns about AFPLs control/self interest and how that may be exploited by Botsman and Co

3. The Courts reaction to terminating the Deed will not be favourable.

4. What if TC do not want to deal anymore.

Mark Elliott replied:

If we terminate, all 4 may apply. Send the letter. We will see how they respond and then decide whether to terminate- OK?

Alex Elliott replied:

Hmmm only to JL? Not to TC or maddocks?

1000 Alex Elliott attempted to down play the use of his Elliott Legal signature block. He said that he used only one email account for both personal and professional emails. Alex Elliott described his role as:

Just an interested son in what his father was doing. I don't - I've never really thought about the hat I was wearing, you know, I was just trying to help dad, just give some thoughts to dad so that he could think about them.

1001 Cross-examined about expressing such views to his father, Alex Elliott stated that he did not look at termination as an 'ethical problem' but as a commercial one because the settlement was 'really good' and did not need to be terminated. He recalled being concerned that Mark Elliott needed to be able to secure a better deal. Despite denying any ethical concern, Alex Elliott also stated about his email that:

It seemed a little bit unusual that the funder could, I guess, blow up the deal on behalf of , you know, two proceedings and 16,000 debenture holders and I was just saying to dad, you know, that just doesn't really sit that well, you know, have a think about that.

1002 Alex Elliott was questioning Mark Elliott's judgment and he accepted that, although he qualified that acceptance by saying this was atypical. He claimed that Mark Elliott did not respond positively to contrary

views being put to him. I am unable to assess this claim. The evidence showed that Alex Elliott could, when he chose to do so, question his father's professional/commercial judgment. In this instance, he did so because he identified the material facts of fiduciary breach, namely that AFP's interests were being pressed to the detriment of the interests of group members.

1003 In making the 'line in the sand' point in his email, Alex Elliott was concerned that AFP and the SPRs were going from working together to working separately, in a context where he understood that AFP represented group members who were debenture holders represented by the SPRs. Alex Elliott was concerned about AFP's attack on the SPRs and was advising against that course. Alex Elliott ultimately chose not to press his concerns about the conflict between the interests of AFP and the group members. He demurred to his father's views.

1004 I am satisfied, rejecting his denial, that Alex Elliott perceived an ethical problem about the termination of the Settlement Deed, consistent with his initial statement that he 'did not have a good feeling' about the letter. His evidence in another context was that he had examined the conflict provisions in the Funding Agreement only two months earlier. Given he had identified the clear conflict between the interests of AFP and those of the group members, I am satisfied that Alex Elliott made a choice. He chose to ignore the conflict and allow his father's views to continue to prevail.

1005 That afternoon, Alex Elliott obtained a final version of the proposed termination letter and prepared the letter in a form to be sent to Mr Lindholm. It was possible that he then emailed the letter as Mark Elliott was away. AFP sent the letter that day to Mr Lindholm, copying Maddocks and Clayton Utz. AFP wrote, amongst other things (emphasis added):

As a result of the submissions made by counsel for the Special Purpose Receivers referred to above, Australian Funding Partners Limited has reluctantly concluded that the application for leave to appeal and appeal must succeed, with the consequence that Approval Orders will not be made or confirmed, as required by cll 2.1.3 and 2.1.4 of the Deed.

The making of submissions contrary to the express and implied obligations arising under the Deed constitutes a breach of the Deed by the Special Purpose Receivers. Australian Funding Partners Limited is giving consideration to whether it should act to terminate the Deed and commence proceedings against the Special Purpose Receivers to recover its loss caused by the Special Purpose Receivers' failure to comply with the express and implied obligations to support the Deed.

1006 Zita also knew of this latest strategy. After AFP sent the letter to Mr Lindholm, Zita sent an SMS to Mark Elliott, confirming his complicity on the side of AFP in the conflict:

Good letter. We need to put pressure on these guys!

1007 Zita conceded that he 'probably' knew that the letter was going to be sent before he was copied to it on 14 June 2018. He also conceded that he did not inform Mr Bolitho of AFP's threat to terminate the Settlement Deed or consult him about it.

Submissions on court's power to vary settlement

1008 On 14 June 2018, Symons drafted the submissions in reply on the issue of the court's power to approve the settlement with varied terms. Symons circulated the draft submissions to Mark Elliott and O'Bryan and they replied with their comments.

Mark Elliott:

Please respond to my issue on ii) in last sentence

It would suit us to get approval subject only to remittance on funders fee?

O'Bryan:

That is not inconsistent with there being no power to approve and force you to renegotiate. That's all the last sentence says.

O'Bryan settled the submissions and circulated the final version the following morning.

1009 On 15 June 2018, O'Bryan emailed Zita asking whether he had 'our reply submissions ready to file by 4pm'. Mark Elliott forwarded the email to Alex Elliott, and wrote:

What do you think of them? Can you read the transcript and tell me when SPR'S must file theirs?

Alex Elliott replied and provided the answer from the transcript. He also wrote:

I thought they were compelling that there is no power to vary terms of the Deed.

1010 Alex Elliott was cross-examined regarding these emails:

COUNSEL: And your father wants your opinion, does he not? Do you see the email above that?---I don't think he wanted my opinion. I think he was just trying to involve me.

What do you mean you don't think he wants your opinion? He's asking you what you think of them?---I had no influence over them - - -

What's he asking you about?---Just said, 'What do you think of them. Like they're good, aren't they?' He's not asking me for an opinion, the submissions are ready to be filed. I didn't have any consultation over the submissions.

He's expecting you to have read the submissions, is he not?---Sure.

He's expecting you, when he asks that question, to give him your opinion about what you thought of them?---He's just asking me - - -

You're not seriously doubting what I put to you then, are you, Mr Elliott?---Can you repeat the question, please?

1011 Zita was not familiar with *Caason*, albeit he claimed he was aware that it concerned group proceedings. He had not read the decision and was not familiar with the principles. He was not asked to undertake any legal analysis about whether it was reasonable or unreasonable to make a settlement conditional on approving a funding commission. More generally, Zita agreed that he never did any research or analysis of that kind in the proceeding. Rather, he 'left it to counsel'. Similarly, he never wrote a memorandum of advice.

1012 Later that afternoon, on 15 June 2018, Zita filed the submissions on behalf of Mr Bolitho.

Apportionment and the Trust Co remuneration claim

1013 On or around 16 June 2018, Symons, on Mark Elliott's request, discussed with counsel for Trust Co, Mr Liondas, its position on its reimbursement claim, settlement generally, and the issue of the court's power to approve settlement on varied terms.

1014 On 17 June 2018, Symons emailed Mark Elliott to summarise Trust Co's position on the three issues. Symons wrote:

1. $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;
2. Trust Co continues to support the settlement;

100. In answering the questions put by the Court, they are likely to see a distinction between the Court's power and the consequences under the deed. I don't regard this as being particularly different from our position. Essentially, the Court might have power to "approve" or say that it is happy with a funding commission which differs from that contemplated by the Deed, but that would have consequences for the operation of the Deed.

In addition, he wondered how helpful the letter sent last Thursday would be when resolving the situation requires Bolitho/SPRs to work together and didn't think that Redwood's submissions had gone so far as the letter made out.

Symons explained to Mark Elliott and O'Bryan that the $3.96 million figure came from Trust Co's original demand to Banksia and was recorded in a Court of Appeal decision as well as in Trust Co's defence in the Banksia proceeding.[100]

1015 Mark Elliott replied:

What an idiot!

Forwarding Symons' email to Alex Elliott, Mark Elliott noted that the discussion with Mr Liondas was of no real use.

1016 In a further exchange of emails Alex Elliott and Mark Elliott reviewed the potential outcomes of Mrs Botsman's appeal and AFP's strategy for securing its financial interests in the funding commission in those scenarios:

Mark Elliott:

I think Liondas is right

I hope the Court says they would "approve" a $ amount. I think we all agree that they can't impose a deal on me but an indication would assist in discussions. If it's $10M plus it's maybe ok

Otherwise we terminate as no point taking same deal to a new Judge. We need new deal with correct apportionment between cases and that means new Deed

Alex Elliott:

I agree, I do not think it's possible to impose a new deal on AFPL.

Therefore, unless the COA approve the settlement now, the CPs of the deed make it pointless to remit it back to first instance if the $12.8m is unlikely to be approved

The COA does not have enough information to order a separate amount/hope you waive your express contractual right to $12.8m and accept say $10m+

Mark Elliott:

So, if they allow the Appeal-what next?

They will remit

We will say no point unless JL files an affidavit agreeing it's all mine at 20% commission

He will not want to do

If he does, we remit and get $

If he does not....

We terminate on grounds that it will not get approval

We do separate deals and get result?

Alex Elliott:

Yes, that's how I see it playing out.

Unless the COA somehow find they can isolate funding commission under 33zf, then it gets remitted on that point alone with additional evidence. Afpl end up with 25% of 32m! (I find this an unlikely scenario for what it's worth)

Mark Elliott:

No chance

No evidence of $32M

They may isolate funding as they worry about cp's

Remit on that Q alone

Then below applies...

Ie we get JL to file affidavit or else we terminate on grounds that it will never get approved etc and we don't accept non apportionment as it's an issue

Same result

Alex Elliott:

I know, just need to be careful from Normans submission to the court that apportionment wasn't possible.

1017 When it was put to Alex Elliott that his last comment was a reference to what he heard O'Bryan submit in the Court of Appeal on 8 June 2018, that 'his Honour reached the conclusion that there was no sensible way in which the $64M could be divided', he was not sure if he was referring to 'that passage, but it was along those lines'. Alex Elliott clarified about this email discussion that the issue of apportionment was discussed when Mark Elliott returned from overseas as it had become such a critical element of the appeal.

1018 Alex Elliott acknowledged that the sum Trust Co itself evidently thought the claim was worth was very different to the values that had been relied upon by AFP and the plaintiff. He knew that O'Bryan and Symons had submitted to Croft J that Trust Co's remuneration claim had a value of up to $11 million, which made the total settlement value $75 million. Alex Elliott said he had read 'parts' of counsel's first opinion. He also acknowledged drafting the script that Zita used when dealing with enquiries about the settlement with debenture holders, and that the script valued the Trust Co remuneration claim at $3.96 million up to February 2014, plus at least $1 million more for the intervening period. Alex Elliott had prepared the detailed table set out above identifying the different apportionment values with each different total settlement sum, and the resulting funding commissions.

1019 Alex Elliott did not think it was important to go back to Croft J and rectify what the court had been told the settlement was worth because 'what [O'Bryan] and [Symons] opined upon in their settlement opinion was a matter for them ... [he] didn't know whether it was right or wrong'. Despite demonstrating a sophisticated understanding of the Trust Co Remuneration Claim in the context of the specific facts and circumstances, when asked why he did not raise the disparity with his father, O'Bryan, or Symons at the time, Alex Elliott stated:

I'm a first year lawyer. Are you telling me I'm supposed to go to Norman O'Bryan and say, 'Norman, your figures and how you calculate a trustee remuneration is wrong', when I don't have any of the facts? I haven't been involved in the case since its commencement. It's not my position to do so... If that's what they thought the figure was, that's the figure.

Abandonment of termination strategy

1020 On 17 June 2018, Symons emailed O'Bryan and Mark Elliott to notify them of 'a further and likely more serious concern about terminating the deed'. Symons referred to the conflict clauses in the Funding Agreement and wrote:

I am concerned that having decided that the proposed Settlement is fair and reasonable, it's not possible for AFPL to unilaterally terminate without breaching the funding agreement.

Mark Elliott replied:

See if you can find any more reasons!

O'Bryan replied to provide advice that the SPRs' submissions at the hearing on 8 June 2018 amounted to a breach of the Settlement Deed and was sufficient to entitle AFP to terminate.

1021 Mark Elliott forwarded O'Bryan's advice to Symons, and copied in Alex Elliott. Mark Elliott wrote:

Told you so!

Please Draft a letter for AFP to send to the SPR's referring to our letter last week, recording absence of a reply and advising intention to terminate for breaches of Deed

Breach is for cl3.10 and any other provision?

Refer in detail to Redwood submissions on 8 June

Explain significance of clause to Bolitho and AFP

Symons replied, copying O'Bryan:

I also think that as counsel for Bolitho, I am in a difficult position in writing a letter which gives notice of immediate termination because (for the reasons outlined in my email yesterday afternoon) because until the Court has actually set aside the settlement approval I do not expect that Bolitho's/group members' interests and AFPL's interests are aligned in respect of termination.

If AFPL wants to take that step now, I think it would need to engage somebody else (Minters/ABL?) to assist.

1022 Meanwhile, Symons consulted O'Bryan privately:

I don't know if I am being overly sensitive, but I think that this puts me in a difficult position in assisting with drafting a letter by which [AFP]would give notice of termination of the Deed as (i) the interests of group members now appear to me to be necessarily different to those of [AFP]; (ii) once counsel have formed an opinion that the settlement is fair and reasonable, there are obligations imposed on [AFP]to support the settlement; and (iii) nothing seems to have changed which would permit a reconsideration by counsel of whether the terms of settlement are fair and reasonable.

The only way I can see that it might be ok is if Laurie Bolitho were first to instruct that cl 16.1 would be breached (i.e., [AFP] would be likely to be deprived of the benefit under the [Funding Agreement]) if the Deed were not terminated, but Laurie would presumably need to be independently advised about that before giving any instruction.

What do you think?

O'Bryan replied:

I understand, M.

Let me ponder it further overnight.

1023 The next morning, on 18 June 2018, O'Bryan advised Symons:

Dear M, my responses to your questions below.

(i) the interests of group members now appear to me to be necessarily different to those of AFPL:

DISAGREE (to some extent – group members are always in theory better off if they can reduce the funding commission, but it's not so simple as that, having regard to the symbiotic relationship between the funder and the group in any class action, especially in settlement negotiations). Group members have an interest in the settlement as a whole being approved (they want their money now), which necessarily includes recognising and respecting AFP's rights/interests in its funder's fee under the deed. In other words, group members can't have their cake & eat it too. They are inextricably bound up together with their funder – that's the reason why AFP is a party to the settlement deed. Further, Botsman represents only one group member – it appears the other 15,600+ are happy. Why should they be assumed to support Botsman's point of view?

(ii) once counsel have formed an opinion that the settlement is fair and reasonable, there are obligations imposed on AFPL to support the settlement:

AGREED, assuming the settlement in the terms agreed is approved; not otherwise. If AFP had been faced with Botsman's objections in the course of settlement discussions and Botsman had status as a party, there would have been no settlement. So the settlement necessarily incorporates the funder's fee without the Botsman objection and we have opined it is fair and reasonable to all parties, including AFP. It would be very odd to conclude that it still remained fair and reasonable to all parties despite the fact that AFP's fee had been reduced to say $3m or whatever Botsman arbitrarily chooses as his preferred funding fee now. It would make a nonsense of our joint opinion because we would be saying that it was fair & reasonable despite the fact that the group members would lose their funding – very odd indeed.

(iii) nothing seems to have changed which would permit a reconsideration by counsel of whether the terms of settlement are fair and reasonable:

AGREED, if nothing has in fact changed, but that is not our case because Botsman is fundamentally altering the terms of settlement (see (ii) above) and so it is essential that we reconsider it. On the basis of our earlier joint opinion, it is no longer fair & reasonable because it will fall over for legal reasons (see (i) above) and then the group members may get nothing. That means (in my view) that it is no longer fair & reasonable.

The only way I can see that it might be ok is if Laurie Bolitho were first to instruct that cl 16.1 would be breached (i.e., AFPL would be likely to be deprived of the benefit under the LFA) if the Deed were not terminated, but Laurie would presumably need to be independently advised about that before giving any instruction:

DISAGREE, for the reasons given above.

1024 Symons emphasised his concern to Mark Elliott and O'Bryan later that morning that 'it would be unwise to give any indication of seeking to terminate in advance of tomorrow's hearing'. Symons outlined a number of reasons why 'any immediate termination would introduce a risk for AFP'. In particular, Symons commented that:

the Court may view the situation as indicating AFPL's own intention not to be bound by the deed. If that were the case, it would undo AFPL's argument that it has a contractual right to the funder's fee under the Deed and

would give the Court the very power which Bolitho and AFPL say that the Court doesn't have (i.e., to fix the funder's fee).

1025 On 18 June 2018, Maddocks and Clayton Utz separately wrote to Mark Elliott on behalf of the SPRs and Trust Co respectively in response to AFP's termination correspondence. Both letters stated that the SPRs and Trust Co would regard any purported termination of the Settlement Deed by AFP as a repudiation of the Deed and that they would take steps to protect their clients' interests.

1026 Clayton Utz stated:

Further, Trust Co considers that the labelling of your letter as being 'without prejudice', and the attempt thereby to cloak your letter with without prejudice privilege, is both inappropriate and ineffective. The letter does not contain any genuine offer by AFPL to compromise the dispute AFPL has created, and nor is it a genuine attempt by AFPL to engage in communications to settle that dispute. Accordingly, should AFPL purport to terminate the Deed, Trust Co will rely on your letter and this response (which, for the avoidance of doubt, is sent on an open basis) in any proceedings arising out of any wrongful termination of the Deed by your client. Trust Co also reserves its rights to bring your letter to the attention of the Court at the resumed hearing on 19 June 2018 if it considers that to be necessary.

Finally, Trust Co reminds you that it is in the interests of the debenture holders, the funder and each of the respondents to work together constructively in the context of the Court of Appeal proceeding to retain the settlement approved by Croft J, or if that is not possible, to reach a result that preserves as much of that settlement as possible (whether by order of the Court or in a renegotiation between the parties). Notwithstanding Trust Co's ongoing support for the settlement that has been reached, if the Deed comes to an end for any reason, then the parties should not assume that Trust Co will be prepared to settle the proceeding for an amount of $64 million in any future negotiation (and should appreciate the potential for that amount to be eroded, given that Trust Co continues to be forced to incur costs in relation to the Banksia proceedings, which costs would inevitably increase sharply if issues such as those raised by your letter are escalated). Among other things, we have of course also closely studied the recent decision in *Oztech Pty Ltd v Public Trustee of Queensland (No 15)* [2018] FCA 819 to which you refer, which decision clearly illustrates the difficulties that *all* plaintiffs in the proceedings against Trust Co will face, particularly in relation to establishing liability and causation.

1027 AFP took no further action to terminate the Settlement Deed following receipt of the correspondence from Maddocks and Clayton Utz.

1028 Before the parties returned to the Court of Appeal the following day, Alex Elliott emailed Mark Elliott concise summaries of the submissions filed that day by the SPRs and Trust Co in the appeal. Alex Elliott accepted that he was bringing Mark Elliott up to date with the position of the SPRs and Trust Co.

K.5. AFP as a party in the appeal

1029 On 19 June 2018, the parties appeared in the Court of Appeal on the second day of the hearing. Alex Elliott attended. On 20 June 2018, Alex Elliott sent two emails to report on the hearing to his father, who was still overseas. He gave evidence that Mark Elliott had asked him to provide summaries in his absence but objected to the emails being described as his 'analysis'. Alex Elliott stated:

I think it is what was submitted by Norman.

When it was put to Alex Elliott in cross-examination that he was listening to the submissions and following the argument, he accepted that he was there.

The Sunday night meeting

1030 Mark Elliott, who had been overseas through most of June, returned on 22 June 2018. On Sunday 24 June 2018, Mark Elliott, Alex Elliott, O'Bryan, Symons and Zita attended a meeting at the Elliott family home to discuss the appeal and AFP's strategy should it be joined as a party to the appeal.

1031 When Zita was asked about Alex Elliott's involvement in the meeting, his first response was that he was 'pouring the wines', before clarifying that he was not an active participant. When it was put to Zita that Alex Elliott was there as part of the Bolitho legal team, he initially replied that Alex was there 'helping his father' to keep on top of things and that he was in the meeting 'with the team', before conceding that they were all there as part of the Bolitho legal team. Further, he said that Mark Elliott frequently brought Alex Elliott along with him to court hearings in connection with the Banksia litigation. Throughout his evidence, Zita sought to avoid the post-box label by downplaying Alex Elliott's role and exaggerating his own role. This was an example.

1032 Zita made no note about the meeting. By contrast, Alex Elliott took notes during the meeting and sent his father a concise summary by email the next morning:

Brief note from last night:

1. Should MEE ask JL on position re: joinder?

2. Should AFPL run the privity of contract argument?

3. CB should have joined AFPL when he filed amended LTA application

4. AFPL cannot be expected to shoot a moving party – are submissions closed?

5. Possible QCs: Archibald, Huntly, Caleo

6. Engage ABL

7. Write to HSF requesting copy of the settlement deed in TWE?

1033 On 18 July 2018, the Court of Appeal joined AFP as a party to the appeal of its own motion. AFP retained ABL as its solicitors in the appeal and Mr Loxley as counsel. O'Bryan and Symons continued to act for and assist AFP, even after it was joined as a separate party, and in circumstances where Mark Elliott and Alex Elliott knew (and were advised by ABL) that there was a conflict between the interests of AFP and the interests of Mr Bolitho and the group members.

AFP develops its arguments in the appeal

1034 On 18 July 2018, Alex Elliott resent to Mark Elliott the email setting out a range of different values for the funding commission. Mark Elliott replied the next day and copied in Symons:

Its very simple for me:

$64M +$4M +5M x 70% x25%=$12.775M but say $12.8M plus GST

We need to get this into our submissions!!

Alex Elliott said that his father often discussed with him 70% as the apportionment figure to be applied to the Bolitho proceeding.

1035 On 19 July 2018, Mark Elliott instructed ABL (copied to Alex Elliott) that:

We will develop this argument further and provide draft submissions for your consideration mid next week. Nothing further required from either Counsel in the interim.

1036 During cross-examination, Alex Elliott agreed that he was involved in instructing ABL with his father, and that Mark Elliott's choice of words in the email could imply that Alex Elliott would be involved in the process of

drafting submissions. Alex Elliott did not recall working on any draft submissions and suggested that Mark Elliott was referring to O'Bryan or Symons. This suggestion was nonsensical. Mark Elliott would not have intended ABL to think that O'Bryan and Symons were drafting AFP's submissions.

1037 On 24 July 2018, Alex Elliott emailed Mark Elliott a list of '[i]mportant definitions and clauses in the Deed' relevant when interpreting the Approval Orders. He said that an issue arose in the Court of Appeal that 'the interpretation of certain clauses in the settlement deed may or may not have an effect on whether ... an application was made by the funder', and that Mark Elliott asked him to go through the Settlement Deed and see how it interacted with the approval application (emphasis in original):

13. Sub heading in the Deed**: Evidence in support of the Settlement Approval Applications**

1. Under this subheading "3.9 BSLLP 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 incurred by BSL 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 consultants affidavit as a confidential exhibit (does this indicate that the legal costs were a part of the Settlement Approval Applications, which is defined as the Bolitho Approval Application?)

14. 3.10: "BSLLP's application' ie BSLLPs **claim** for 12.8m

Alex Elliott agreed that he added the underlining. He was unsure why he had used bolded text in paragraph 13, although he was perhaps creating a link with paragraph 14 below. He denied that there was an issue in his mind at the time about the difference between costs incurred and costs claimed. In relation to his role in compiling this email, Alex Elliott prepared the list for Mark Elliott looking through the lens of AFP.

1038 Zita agreed that the email contained analysis of important definitions and clauses in the Settlement Deed concerning questions of construction that arose in the Court of Appeal. He was not asked to undertake analysis of that kind, nor did Alex Elliott discuss the points with him. Moreover, he was excluded from the earlier email chain between Symons, Mark Elliott and O'Bryan, to which Alex Elliott was copied, concerning a draft letter on the issue of rectification.

Conflict of interest

1039 On 27 July 2018, ABL emailed Mark Elliott (copied to Alex Elliott). The email stated (emphasis added):

I also now appreciate that our side is considering and planning for a possible special leave application. If that becomes necessary, depending upon the outcome, there may be a real question mark as to whether Bolitho can bring that special leave application.

If the Court of Appeal keeps the settlement intact, but forces AFPL to seek approval in relation to its commission and costs, **it may expose a conflict if Bolitho was to seek special leave**.

1040 Putting to one side the curious use of the expression 'our side' by the author, Alex Elliott did not recall discussing the email with his father, but did recall discussions about rectification of the Settlement Deed. He agreed that the conflict that was being referred to in the email was that it was not in the interests of Mr Bolitho and the group members to appeal from the Court of Appeal decision. He did not recall thinking at the time whether it was in the interests of Mr Bolitho and the group members to have a settlement that was not conditional upon the resolution of the commission issues. He agreed that there was a feeling in his father's 'camp' that Mrs Botsman was going to have a measure of success. Further, he remembered thinking at the time that the settlement was a good deal for everyone involved.

Continued involvement of O'Bryan and Symons

1041 On 1 August 2018, AFP wrote to Trust Co, the SPRs and Portfolio Law requesting that the other parties to the Settlement Deed confirm agreement on the definition of the 'Bolitho Approval Application'. Shortly after, Mark Elliott emailed O'Bryan and Symons (copied to Alex Elliott) attaching AFP's letter, as well as the two letters received from Maddocks and Clayton Utz on 18 June 2018. He said:

We need to respond to this in our submissions especially point about there being no [AFP] application

See attached reply from Trustco to our last letter-we need to respond to it in our submissions as well and in particular, can we use para 4 in general overview to Court????

Lets discuss

1042 On 2 August 2018, Mark Elliott emailed Symons (copied to Alex Elliott) a list of issues to discuss concerning the Court of Appeal proceeding and arguments which could be advanced. Alex Elliott claimed that the list of issues was sent to Symons, rather than Mr Loxley who was acting for AFP, because Mark Elliott often consulted Symons on many things. According to Zita, no one asked for his views on the matters listed in the email.

1043 On 16 August 2018, after ABL filed AFP's submissions, O'Bryan emailed Zita:

Please write to AFPL to confirm that Mr Bolitho agrees with their letter dated (please remind me of the date).

Mark Elliott replied to O'Bryan and Zita:

1 August 2018.

Alex Elliott's involvement in AFP submissions

1044 Alex Elliott agreed that Mark Elliott copied him into, and forwarded him correspondence, to keep him 'in the loop on the general position'. He recalled conversations with his father about the approach of the Court of Appeal if it could not approve the entire settlement.

1045 On 7 August 2018, Alex Elliott emailed Mark Elliott a draft memorandum to Mr Loxley, providing a Dropbox link to relevant documents and setting out the background to the Bolitho proceeding and Mrs Botsman's appeal. Alex Elliott collated the material and drafted the summary of events. He accepted that by that stage he had a 'reasonable understanding of the proceedings'. In contrast, Zita never at any point drafted a brief to any of the counsel retained in the Bolitho proceeding or sent them a summary of issues arising in the case.

1046 Later that day, Mark Elliott instructed Alex Elliott:

Do me 3 lists please:

1. List of procedural issues that Botsman/Pitman complain of that they say we're unfair

2. Our response to each issue

3. Reasons why we should get greater % of $64M.

1047 Alex Elliott responded later that day:

1. <u>Procedural fairness</u>

A. Denial of PF in respect of the Pitman and Botsman objections

B. Failure of CJ to properly consider the objections

100. Pitman was prevented from inspecting evidence in support of settlement, in particular the Trimbos Report

4. Both objectors were not given access to material information about the settlement

E. CJ declined to appoint contradictor

6. CJ erred in allowing virtually all evidence and submissions in support to be given on a confidential basis (contrary to the approach by Robson J in partial settlement)
7. CJ failed to take into account Pitmans correspondence, as CJ stated that the Costs Report had been made available for inspection by GMs
8. CJ failed to read or consider paragraph 6 of the Botsman objection – CJ had already reached a conclusion as to the reasonableness of AFPLs commission
9. CJ overlooked both versions of the Botsman objection, and the apportionment of the commission between the two proceedings

2. <u>Our response</u>

A. We would say that's incorrect for all the reasons below

2. Paragraph [17] First Respondents submissions; [8] Trust Co Amended written case

C. Paragraph [18] First Respondents submissions

D. Paragraph [19] First Respondents submissions

E. Paragraph [20] First Respondents submissions

6. Incorrect, a substantially similar approach was adopted in the Robson J Approval Hearing – the 8 July 16 PT Costs Report was not confidential but the 18 August 16 Supplementary Costs Report was confidential

a. Paragraph 6- Trust Co's amended written case

7. CJ took Pitmans correspondence into account

a. - CJ was aware that the costs affidavit was available for inspection

b. CJ was aware that the costs exhibit was confidential – see 4 December 2017 summons #para 6(d)

H. Repeat Paragraph [17] First Respondents submissions

I. Repeat Paragraph [17] First Respondents submissions

3. <u>Reasons for favourable apportionment</u>

1. Quality of the claims made in the class action compared to the claims made in the SPR's proceeding: See Counsel Opinion at: paras[146]-[164]
2. Claim size (including the accumulated interest) of the class action comparted to the SPR proceeding

100. The number of funded GMs who had signed LFA's

D. Value of the undertaking provided by Mark Elliott a.k.a AFP

1048 Alex Elliott prepared the first and second lists by reference to the filed submissions. He stated that the arguments he listed for why AFP should receive a favourable apportionment were 'commonly discussed

reasons between, I guess, Dad and I and others that I've just outlined there'. Alex Elliott stated that the purpose of the email was assisting Mark Elliott to brief counsel for AFP. Zita was never asked by Mark Elliott to undertake analysis in connection with the listed matters, nor was he asked to undertake an analysis of any legal issues that had arisen in the Bolitho proceeding.

1049 On 9 August 2018, Mark Elliott emailed Mr Loxley ahead of a conference and attached two files, named 'AFPL Submissions' and 'Letter to Parties re Deed of Settlement and Release – 1 August 2018'.

AFP's submissions

1050 AFP filed written submissions in the appeal on 16 August 2018, but made no oral submission. AFP submitted that:

> (a) Croft J's discretion to approve the Settlement Deed, including the distribution to AFP, was properly exercised;
>
> (b) the correct value of the settlement in respect of calculating the funding commission was the sum of the 'cash component plus the benefit of the release and discharge granted by Trust Co which was submitted to hold a value to the debenture holders in the order of $11.16 million' (emphasis in original); and
>
> (c) AFP's risk as funder of the group proceeding was 'significant', and included 'substantial adverse costs exposure', which AFP submitted comprised of AFP having:

(a) paid or agreed to pay security for costs against all defendants, with the quantum of that possible liability likely to exceed $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.

1051 AFP did not in its submissions correct any of the previous misrepresentations made to the court in relation to conflict between the interests of the debenture holders/group members, and the interests of AFP, O'Bryan, Symons and Zita. AFP admitted in the remitter that its submission was incorrect and misleading in respect of:

> (a) the Lawyer Parties' fee arrangements which appeared to magnify the funding risk assumed by AFP;
>
> (b) the terms of the settlement, which were negotiated in AFP's interest but not in the interests of the debenture holders/group members;
>
> (c) the direct financial interest of O'Bryan, Symons and Zita in the payments sought by AFP in respect of legal costs, because AFP had not paid these costs;
>
> (d) the claim for legal costs from what was effectively a common fund order;
>
> (e) the treatment by AFP of the whole of the settlement sum as being referable to the Bolitho proceeding in order to increase the 'denominator' for the funding commission, despite the

significant contribution of the Banksia proceeding and the payment of the Banksia proceeding costs by the debenture holders; and

(f) the proportionality of AFP's legal costs and disbursements, commission, and scheme administration costs, in respect of the contribution actually made by AFP to the Bolitho proceeding.

O'Bryan and Symons' submissions 'in reply'

1052 On 29 August 2018, Symons drafted submissions on behalf of Mr Bolitho 'in reply' to AFP and sent them to O'Bryan. O'Bryan revised the 'reply' submissions and circulated his edits to Symons, copying Mark Elliott and Alex Elliott.

Mark Elliott replied:

Looks good

Cheers

O'Bryan replied:

Let's file lads

1053 On 30 August 2018, Mr Bolitho's submissions 'in reply' to AFP, were filed and contended that:

AFPL incurred legal costs and disbursements of approximately $7.8 million in respect of the proceeding as a whole

...

AFPL's "Funder's Invested Capital" is approximately $9.3 million. Taking account of the staging of agreed security for costs, the "Funder's Invested Capital" is approximately $8.6 million.

O'Bryan and Symons also submitted that:

Mr Bolitho agrees with AFPL's submission at [21] concerning the construction of "Approval Orders". It does not appear on ordinary principles that any alternative construction is available.

1054 Alex Elliott did not sit at the bar table with Mr Loxley or otherwise instruct him in the subsequent attendance at the Court of Appeal. In describing his role at the Court of Appeal, Alex Elliott stated:

I was sitting there I think just to help dad, just to fill him in when he was away. I never really saw myself sitting there as a solicitor trying to I guess provide services or anything. I was just sitting there to help dad and keep across where I guess things were at generally with, you know, what he was involved in.

K.6. The judgment on appeal

1055 The Court of Appeal handed down judgment on 1 November 2018.[101] The Court of Appeal found that:

(a) it was appropriate for it to exercise oversight over litigation funding charges and to ensure that the plaintiff's legal costs were reasonable in all the circumstances;[102]

(b) the effect of the confidentiality regime meant that the Banksia legal team and the SPRs could not assist the court in any meaningful way in assessing the reasonableness of costs and disbursements, that it prevented scrutiny of the costs, and that there was no proper basis for such confidentiality;[103]

(c) any assessment would have to have regard to overlap between the two proceedings and

that Mr Trimbos's report did not address this issue;[104]

(d) the original court's finding that the funder's commission was fair and reasonable could not stand;[105] and

(e) many of the problems experienced by the court below could have been avoided had a contradictor been appointed.[106]

1056 The Court concluded that it was open to it to approve the settlement sum, but remit the question of the funder's commission and legal costs to the Trial Division under s 33V(1) of the *Supreme Court Act*. Although it found it could do so even on the terms of the Settlement Deed itself, it would have reached the same conclusion if the deed expressly precluded this course, as the *Supreme Court Act* gave the court the power to approve settlement of claims against a defendant without, at the same time, approving the distribution of any money paid under the settlement.[107]

50. **THE REMITTER**

L.1. Early events

1057 The Court of Appeal remitted AFP's applications in November 2018. AFP was represented by ABL, who was initially instructed by Mark Elliott assisted by Alex Elliott. The Lawyer Parties continued to represent Mr Bolitho.

1058 On 21 December 2018, the Contradictor submitted the first iteration of the list of issues arising for determination in the remitter. These included:

(a) whether the legal costs and disbursements AFP sought to recover were supported by valid and enforceable costs agreements and disclosure statements; and

(b) in respect of AFP's application for a funding commission:

(i) whether there were risks and expenses to which AFP was exposed in the Bolitho proceeding, pursuant to the Funding Agreement;

(ii) what financing obligations AFP undertook and performed in relation to those proceedings; and

(iii) whether (and if so, when) AFP paid the legal costs it claimed for reimbursement.

1059 I directed that the list of issues sought by the court, pursuant to s 48 (2)(e) of the *Civil Procedure Act,* be developed collaboratively. The conflict of interest between acting for Mr Bolitho and being paid legal fees was stark. The first iteration of the list made plain to AFP, Mr Bolitho and the Bolitho legal team from the outset that the fees charged by the Lawyer Parties were contentious, yet it would be some time before the Lawyer Parties ceased to act in the remitter, only after a ruling from the Victorian Bar Ethics Committee compelled them to withdraw.

1060 The reasonable inference arising from the Lawyer Parties' delay until rulings were obtained from the Victorian Bar Ethics Committee was that Mark Elliott required, or they themselves considered it necessary, that they retain their briefs until required to relinquish them. My earlier findings provide the probable explanation for the unwillingness of the Lawyer Parties to immediately step aside and relinquish control of the

remitter and why Mark Elliott would require them to continue to act for Mr Bolitho. The earlier findings also illustrate why the legal representatives who then commenced to act for them, needed to exercise extreme care in the proper discharge of their obligations to the court. Whether they did so was an enquiry beyond the scope of the remitter.

1061 During the 18 month period between the commencement of the remitter, and the trial, which began on 27 July 2020, Mark Elliott/AFP, O'Bryan and Symons resisted the Contradictor's inquiries into the nature and extent of their conduct, which resulted in numerous interlocutory contests, attempts to avoid discovery and intimidation of the Contradictor and SPRs prior to the trial. The consequence was considerable delay and expense for debenture holders still awaiting resolution of their claims.

Response to Contradictor's initial requests

1062 As Mark Elliott and O'Bryan immediately appreciated, the Contradictor knew nothing of the circumstances of the Bolitho proceeding, and was dependent on information from other sources. Discovery was particularly relevant, but the process was manipulated to delay the Contradictor and obfuscate the investigation.

1063 The first substantive directions hearing in the remitter was on 1 February 2019. Prior to that hearing, the Contradictor circulated proposed orders, including discovery categories sought from AFP. Mark Elliott, O'Bryan and Symons met on 30 January 2019 in O'Bryan's chambers to discuss the orders. Prior to that meeting, O'Bryan circulated a version of the proposed orders to Mark Elliott and Symons with his comments. O'Bryan's comments were revealing:

(b) documents evidencing or recording case budgets prepared by, for, or on behalf of Mr Bolitho; WHAT DOES THE EXPRESSION 'CASE BUDGETS' MEAN? IT IS NOT A TERM OF ART.

(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; WHAT IS THE RELEVANCE OF ANY SUCH COMMUNICATIONS (ASSUMING ANY EXIST)?

(d) documents evidencing or recording the dates on which Mr O'Bryan AM QC and Mr Symons issued the invoices attached to the report of Peter Trimbos dated 4 January 2018 (Counsel Invoices) to Portfolio Law; THE BILLS ARE ALL DATED.

Had O'Bryan overlooked that he knew AFP sought a finding commission on false premises about the level of financial support it provided in the proceeding, or that he had fraudulently backdated his invoices? Did he expect the Contradictor — and the court — to accept some limited disclosure of documents to be accepted at face value?

1064 On 31 January 2019, Mark Elliott issued a series of directives to O'Bryan, Symons and Zita (copying Max Elliott and Mr Mengolian):

TZ to send Contradictor (+junior) invoices to Associate today marked FYI. MS to draft email

ABL will distribute our draft of the procedural orders-very close to the Contradictors version

The SPR's have gone bush

All agreed??

O'Bryan replied, agreeing. There is no record on any reaction from O'Bryan, Symons, and Zita, as legal representatives of Mr Bolitho, or for that matter from ABL, to this directive from AFP.

1065 Later that afternoon, Zita emailed to the court the invoices of senior and junior counsel for the Contradictor that had been rendered to 14 December 2018.

1066 When cross-examined, Zita conceded that Mark Elliott had told him that his motive for sending the Contradictor's fee slips to the court was to close down the Contradictor's enquiries. Zita stated that he 'unfortunately' agreed to carry out the instruction. He described having sent the email as 'an absolute error of judgment' and one that he regretted.

1067 On 1 February 2019, I gave directions for trial preparation, including that AFP and Mr Bolitho make discovery of:

> (a) any costs agreements with O'Bryan or Symons or cost disclosure statements issued by them;
>
> (b) case budgets for Mr Bolitho;
>
> (c) all communications between O'Bryan or Symons and AFP or the solicitors for Mr Bolitho relating to costs incurred or expected to be incurred by counsel in the Bolitho proceeding;
>
> (d) documents evidencing or recording the dates on which O'Bryan and Symons issued their invoices to Zita;
>
> (e) documents evidencing or recording the dates on which the invoices were paid; and
>
> (f) documents evidencing or recording AFP's capacity to obtain funds, such as communications with lenders relating to AFP's lending capacity or communications with shareholders relating to the capacity and willingness of shareholders to provide further funds to AFP to meet a costs order exceeding AFP's net assets.

1068 I further ordered that:

> (a) the SPRs' trial counsel file and serve a confidential opinion in response to the opinions filed by O'Bryan and Symons in the approval application; and
>
> (b) the SPRs make discovery of several categories of documents relevant to the underlying litigation against Trust Co, particularly regarding their cooperation with the Bolitho legal team.

1069 On 8 February 2019, Mark Elliott emailed O'Bryan and Symons (copying Alex Elliott) requesting copies of their cost agreements. On 9 February 2019, O'Bryan emailed Mark Elliott (copying Alex Elliott, Symons and Zita):

We are going to have very little to discover next week.

We will be criticised for that (especially by PJ [Peter Jopling] & JC [Jennifer Collins]), but our response will be that we do not operate like HSF, Aliens, KWM, Clutz etc. and the counsel they ordinarily hire — all of whom know how to spend the maximum time and money on behalf of their well-heeled clients until they are fully fed from the trough of available insurance money.

We are a lean, mean, fighting machine.

We don't waste time or money on useless written advices, "trial plans" etc.

Most, if not all, of our important communications are verbal — over the phone or face to face (never by SMS or any other message service, mention of which will only provoke a demand to produce such rubbish).

Mark Elliott responded:

There are 2 lever arch folders that are full

Its alright except for no plans and budgets

Wait and see response

1070 On 13 February 2019, AFP made discovery, remarkably in the form of a joint list on behalf of itself and Mr Bolitho, of documents purportedly falling within the ordered categories, which Zita confirmed was a 'complete list of Mr Bolitho's discoverable documents and consistent with his discovery obligations'. The discovery included 245 documents, the vast majority of which were copies of the invoices annexed to the Third Trimbos Report. Limited communications between members of the Bolitho legal team were discovered, and no documents under the case budget or litigation funding risks categories were produced.

1071 On 18 February 2019, the Contradictor requested Portfolio Law and AFP produce the covering emails to which counsels' costs agreements and disclosure statements were attached when sent to them. On 21 February 2019, the Contradictor further requested that AFP answer a series of questions regarding obligations it owed under the Funding Agreement. After receiving that request, O'Bryan sent Symons and Zita the following response, able on this occasion to distinguish between different interests:

My personal responses to these questions/demands (which I note are all directed to AFPL and not Portfolio Law) are as follows.

You & Michael may well have different/additional points you wish to make and so you should discuss these Mark.

Questions arising out of discovery

Did AFPL require Mark Elliott, Portfolio Law, Mr O'Bryan and/or Mr Symons to provide a budget for all estimated costs and expenses up to the conclusion of the trial in the Bolitho Proceeding?

Yes. The budgeted costs were a product of the work plan to conduct the class action. The work plan and the budgeted costs to conduct the class action were discussed with Portfolio Law and counsel at least monthly and often more regularly throughout the course of the class action from 2012-2017. AFPL was in contact with Portfolio Law and the counsel for Mr Bolitho at least 2 – 3 times every week during the course of the class action and the work plan, work completed and the budgeted costs incurred and to be incurred to conduct the class action were discussed regularly.

...

Did AFPL monitor costs and budgets in connection with the Bolitho Proceeding? For instance, did AFPL seek an updated budget for all estimated costs and expenses up to the conclusion of the trial after the court made orders for trial, and/or when the parties agreed the trial framework? If so, please produce the communications or documents which evidence or record AFPL monitoring costs and budgets as required by paragraphs 11(b) and (c) of the Orders. If not, please explain why not.

Yes. See the answer to question 3 above.

These assertions were false, as my earlier findings in section H demonstrate.

1072 AFP refused to comply with the Contradictor's requests contending they were neither relevant nor probative. On 22 February 2019, ABL, on its behalf, stated:

The Contradictor's costs of reviewing the information and documents is, in our client's view, unjustified in circumstances where the material has no obvious probative value. Furthermore, in our client's view, it is not in debenture holders' interests for our client and the Contradictor to continue to incur substantial costs on peripheral issues. Finally, and for the same reasons, our client does not agree to continue to be interrogated on peripheral issues.

AFP specifically rejected the request for covering emails on the basis that those documents were irrelevant, alternatively that the cost of producing them would be disproportionate to their probative value. AFP's refusal essentially amounted to a contention that the dates on those costs documents ought to be accepted at face value.

1073 The Contradictor pressed the requests by further application. On 1 March 2019, I ordered AFP/Mr Bolitho to produce the covering emails, together with further categories relating to communications with Trimbos, fee quotes/case budgets and AFP's financial position. I further ordered that Mr Bolitho and the SPRs each make discovery of all correspondence between them in respect of AFP's claim for legal costs and funding commission from the Trust Co Settlement.

1074 On 8 March 2019, AFP responded, discovering the emails that O'Bryan and Symons had each sent Trimbos in December 2017 attaching their costs agreements. The Contradictor sought an explanation as to why no earlier documents had been produced. Consistently with my earlier findings, the truthful response to this query would have been to confirm that no earlier documents existed. Instead, Zita sent a carefully worded response, drafted by Symons, stating that:

> (a) all responsive documents had been produced;
>
> (b) as AFP and Portfolio Law were each a 'commercial or government client', a cost agreement wasn't necessary and were irrelevant to the remitter; and
>
> (c) the rates charged by counsel had been discussed and agreed with Mark Elliott, and 'the cost agreement and disclosure documents which have been produced reflect those agreements'.

Zita's email also included the following statement, apparently as an explanation:

Neither O'Bryan nor Symons considers that he entered into a 'deferred fee arrangement' with either Portfolio Law or AFPL. Neither of them acted on a contingent or conditional fee basis. Following the partial settlement, O'Bryan and Symons were requested to continue to keep detailed records of all work performed on the class action but not to render invoices until the matter with Trustco finally settled, which was anticipated to occur in the near future. O'Bryan and Symons agreed to this and acted accordingly.

1075 On 19 March 2019, in response to the Contradictor's express request to confirm when the cost agreements were created, Zita replied (drafted by counsel):

[O'Bryan] and [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. The costs agreements are consistent with my understanding of the arrangements which had been discussed with this firm from time to time by both counsel and the funder.

...

I knew throughout the course of the proceedings what legal work was being done and was proposed to be done by my firm and by counsel and therefore had a full understanding of the costs which had been and were proposed to be incurred by the litigation funder to conduct the class action... I also discussed the work being

performed and the anticipated costs with the litigation funder regularly. I was aware of all of the work product of Mr Bolitho's legal team and I understood the likely costs of running the proceeding. The costs actually incurred were consistent with my expectations from time to time.

1076 I am comfortably satisfied that Zita knew this letter was, at the very least, misleading and, more significantly, at the time AFP made discovery in response to the 1 February and 1 March 2019 orders, Mark Elliott/AFP knew that it was misleading. Mark Elliott knew precisely what cost agreements AFP had received and when. He was the architect of the fraudulent scheme and knew that the documentation underpinning counsel's fee arrangements did not exist. Mark Elliott had every reason to apprehend that, unless delayed until the last possible moment, the Contradictor would become aware that documents founding AFP's claim for costs had been backdated, which would lead to more requests for information and risk unravelling their entire deception.

Fourth Trimbos Report

1077 On 1 February 2019, I directed that AFP file and serve any further expert evidence on which it intended to rely in the remitter by 1 March 2019.

1078 On 15 February 2019, ABL instructed Trimbos to prepare a further report opining on essentially the same issues that were the subject of the Third Trimbos Report. For his further report, he was instructed to assume that all costs incurred by AFP had been paid, other than invoices issued by:

(a) Symons and Zita for work performed in December 2017 and January 2018; and

(b) O'Bryan since the Partial Settlement for the period 1 July 2016 to 31 January 2018.

1079 On 12 March 2019, AFP filed the Fourth Trimbos Report on the costs in the Bolitho proceeding. In this report, Trimbos reiterated, in substance, his earlier expressed opinions, save that this report exhibited, without comment, a substitute set of O'Bryan's invoices, which were not stamped as 'PAID', consistently with the assumption he was to make.

1080 Asked in cross-examination whether he was concerned at the time of receiving these instructions that he might have misled the court in the Third Trimbos Report by exhibiting O'Bryan's invoices stamped as 'PAID', Trimbos answered: 'I suppose I was'. Trimbos sought to justify his conduct by suggesting that 'it was clear at this time that, and the court was aware that, O'Bryan's fees weren't paid', pointing to an oblique reference buried in his letter of instructions and annexed some 19 pages into his report. When pressed by his cross-examiner:

Do you now think that you as an independent costs consultant retained as an expert should have brought this matter to the court's attention?---Well, I clearly say in my report that these fees haven't been paid.

Brought to the court's attention the disparity between what you had said in your 4 January report of 2018 and what you are saying in your report of 12 March 2019?---I mean, I suppose I've included it in my report. I mean, isn't this bringing it to the court's attention?

You don't say, 'Contrary to what I was instructed last time around when I prepared my report in 2018 where I was told O'Bryan's fees had been paid and I was given a whole lot of fee slips that had been paid, the factual circumstances have changed and I've now been given fee slips of O'Bryan that tell me he hasn't been paid'?---No, I don't say that. Clearly I don't say that, no.

And that's the sort of thing you would want to flag, isn't it?---I assumed that once again - - -

If you're an independent expert isn't that the sort of thing you would want to flag?---I'm dealing with the quantum of fees.

1081 This deliberately evasive response was unacceptable as was Trimbos's conduct. This was no trifling matter. It was incumbent on Trimbos, as an expert witness professing to honour the Expert Code of Conduct, to clearly identify material changes in the assumptions underlying his opinions. Trimbos took no steps to directly advert to that fact in his report, or to highlight the change in his previous instructions or the distinction between the set of invoices stamped as 'PAID' annexed to the Third Trimbos Report and the new set which were not stamped as 'PAID' annexed to the Fourth Trimbos Report.

The allegations of disentitling conduct

1082 On 27 March 2019, the Contradictor filed a Revised List of Issues, which added the following issue for determination on the remitter:

Has there been any conduct by AFP/Mark Elliott, O'Bryan, Symons and/or Zita/Portfolio Law in respect of the applications brought by Mr Bolitho and AFP for payment to AFP of:

(a) legal costs and disbursements; and/or

(b) funding commission,

by reason of which the court should exercise its discretion under section 33ZF of the *Supreme Court Act 1986* (Vic) to reduce or disallow AFPL's claims for those payments so that justice is done in the proceeding?

1083 The Contradictor gave notice that directions would be sought that Mark Elliott and the Lawyer Parties provide affidavits addressing various questions formulated by the Contradictor, directed at explaining identified factual inconsistencies. Presumably because the affidavits required counsel to provide evidence, rulings were sought as O'Bryan and Symons thought they could no longer delay returning their briefs as counsel in the Bolitho proceeding; O'Bryan did so prior to the directions hearing and appeared as a formality, while Symons returned his brief in days following.

1084 At a directions hearing on 29 March 2019, the Contradictor identified that the disentitling conduct (at that time) was directed at inconsistencies in the limited documentation that had been discovered to date, including:

> (a) O'Bryan having not been paid his fees, despite the appearance of 'PAID' stamps on his invoices and the representation made to Trimbos that O'Bryan's fees had been 'duly paid' by AFP, together with AFP having sought a 'reimbursement' of its legal costs on the approval application;
>
> (b) the appearance on the face of counsel's invoices that they had been issued monthly, despite the explanation given by Zita in March 2019 that AFP had requested that the Lawyer Parties not render invoices until the claim against Trust Co had settled;
>
> (c) the backdating of counsel's cost agreements; and
>
> (d) O'Bryan's fee slips recording time charged that was inconsistent with publicly available information regarding his involvement in other matters.

I gave directions, by consent, for the affidavits sought about these matters ('**affidavit order**'). O'Bryan and Symons continued to consult with Mark Elliott and Alex Elliott about the strategic course of the remitter.

1085 On 2 April 2019, Corrs wrote directly to O'Bryan, drawing his attention to the order that required him to make an affidavit in the remitter, adding:

There is an additional issue in this application which it is now necessary to raise directly with you. It concerns the terms upon which you were retained to act in this matter, and in particular, whether you were retained to act on a deferred fee basis, or a contingent fee basis.

The Contradictor understands that you have acted in a number of matters since 2012 in which you have been engaged by or on behalf of Mr Mark Elliott or entities associated with him. In this regard, we note that ... your confidential opinion filed with the court on 19 January 2018 states ... 'the solicitors and counsel engaged by the plaintiff have been engaged on their usual terms'.

It would assist the Contradictor to have a full understanding of the 'usual terms' referred to...

O'Bryan then retained MinterEllison to act on his behalf.

Alex Elliott's role

1086 On 2 April 2019, the SPRs made discovery in response to the order of 1 March 2019. Relevantly, that discovery included the voluminous email correspondence exchanged between the Bolitho legal team and the Banksia legal team in November 2017 regarding the form of the Settlement Deed.

1087 On 3 April 2019, Corrs wrote to ABL raising several questions in relation to that correspondence. The Contradictor stated that the conduct of the Lawyer Parties in the settlement — namely, assisting to procure a settlement containing terms that were adverse to the interests of Mr Bolitho and group members — would be included in the particulars of disentitling conduct. The Contradictor further observed that Alex Elliott was a recipient of several emails and sought all documents and information held by him that recorded his involvement and role in the litigation.

1088 On 5 April 2019, Corrs wrote to ABL, Portfolio Law and MinterEllison summarising several references to communications between the Lawyer Parties, Alex Elliott and Trimbos in December 2017 and January 2018 that appeared in the fee slips of counsel exhibited to the Fourth Trimbos Report, and sought discovery of those communications. The Contradictor also identified various references to work undertaken by and conferences with Alex Elliott from the fee slips of counsel issued throughout the Bolitho proceeding. It asked, in light of those references and the Bolitho No 4 decision, for full details of the respective roles of Alex Elliott and Elliott Legal in the Bolitho proceeding.

1089 In cross-examination, Alex Elliott conceded that he would have printed off both letters for his father at the time. He said it was likely he read the 3 April letter, but did not concede that he understood that the negotiation of the Settlement Deed was an issue in the remitter, or that the Contradictor was interested in his own role in connection with the litigation. Alex Elliott could not recall any discussion with his father about how the two of them were going to approach the request for documents.

1090 Alex Elliott could not recollect reading the 5 April letter but maintained that, at the time, he had no concerns about any interest in his conduct in the remitter, and that he did not discuss the matter with his father. He could not recall there 'ever being an issue' as to his role in the litigation. It did not cross his mind to consider the Bolitho No 4 decision and the role of Elliott Legal. Alex Elliott claimed he relied on his father as to how to deal with the 5 April 2019 letter and so he 'didn't really think about it too much'.

1091 The Contradictor submitted, and I agree, that Alex Elliott's evidence about these letters must be rejected:

> (a) The documentary evidence reveals that Alex Elliott was assisting his father with the remitter, including responding to the initial orders for discovery and progressing AFP's special leave application. He knew that the Contradictor had alleged serious misconduct that was becoming the focus of the remitter, including that there had been impropriety in the settlement

negotiations.

(b) By his own admission, Alex Elliott from mid-2018 had become 'more interested and more actively involved in what was happening' in connection with the appeal. That timing was understandable: Mrs Botsman's appeal threatened AFP's claim for nearly $13 million in funding commission, the majority of which Alex Elliott's family was entitled to. As earlier noted, during the appeal, he raised with his father substantially the same conflict issues as were being alleged by the Contradictor.[108] It was a step too far to ask the court to believe that he was ignorant and unconcerned by the line of inquiry that was developing. Again, Alex Elliott was dissembling.

(c) It is implausible that any legal practitioner would have read the Contradictor's letters and not have immediately understood, and been deeply troubled by, the prospect of being drawn into the serious allegations made by the Contradictor. His evidence that such issues did not cross his mind or cause him to reflect was dissembling and I reject that explanation.

1092 I am satisfied Alex Elliott knew in April 2019 not only that the Contradictor had alleged disentitling conduct in the negotiation of the Settlement Deed, but also that his own conduct had caught the Contradictor's attention.

1093 On 5 April 2019, Symons drafted a letter intended to be sent by ABL to Corrs in response to the 3 April 2019 letter. He sent it to Mark Elliott (copied to O'Bryan). The draft stated:

[W]e are instructed that Mr Alexander Elliott was at relevant times a law graduate. Mr Alexander Elliott was copied to emails for education purposes and did not originate any relevant documents. Mr Alexander Elliott does not hold any documents relevant to the request ... which have not already been produced...

1094 On 12 April 2019, ABL replied to Corrs, minimising Alex Elliott's role to a greater extent, compared to the draft prepared by Symons, by stating:

[W]e are instructed that the involvement of Mr Alexander Elliott in the Banksia proceedings was in the capacity of a personal assistant to Mr Mark Elliott in Mr Mark Elliott's capacity as a director of our client. Mr Alexander Elliott attended a small number of conferences with Counsel, undertook a number of administrative tasks and errands and was often automatically copied to emails. Mr Alexander Elliott did not create or author any material documents and he does not hold any documents relevant to the request ... which have not already been produced.

1095 Alex Elliott received the final version of the letter and at least two drafts before it was sent, although he could not remember the reference to 'law graduate' appearing in the earlier draft. He stated that he did not give the instructions that he held no documents, nor did he look at his own documents to satisfy himself there was a proper basis for the statement set out in the letter. He said that those instructions must have been given by his father, although he did not speak to Mark Elliott about whether he held any documents.

1096 Once taken in cross-examination to various examples of emails exchanged within the Bolitho legal team during the Trust Co Settlement negotiations, Alex Elliott conceded that documents falling within the scope of the Contradictor's requests and the extant discovery orders had not been produced by AFP at the time the letter was sent, despite being readily accessible from his computer. However, he refused to accept that there was any need for him to apply his own independent mind to issues of discovery, even though his conduct was the focus of the Contradictor's express inquiries.

1097 I am satisfied that Alex Elliott knew of, and acquiesced in, the instructions to ABL and find that he was

complicit in making false statements to the Contradictor regarding AFP's compliance with its discovery obligations and the further request for documents.

L.2. Resisting the Contradictor: Intimidation, collusion and fabricated evidence
Mark Elliott's affidavits

1098 On 23 April 2019, AFP filed an affidavit of Mark Elliott (made that day) in response to the affidavit order. Mark Elliott did not answer each of the matters upon which he was ordered to explain, relevantly stating:

Why was a summons issued in this court on 7 December 2017 seeking payment out of the settlement to AFPL for "reimbursement" of legal costs?

On 4 December 2017, Michael Symons, junior counsel acting for Mr Bolitho, emailed a draft summons, and material relating to the orders sought in the draft summons, to AFP, [O'Bryan] and [Zita]... I understood that the form of the summons was not materially different to the summons previously agreed to by the parties in respect of the partial settlement approved by this Court in August 2016.

I do not recall providing any comments on the draft summons prior to it being finalized and filed in this Court. I was content with Mr Bolitho, on behalf of AFP, seeking reimbursement for certain legal costs and disbursements incurred by AFPL ... notwithstanding that some of those legal costs and disbursements were unpaid as at the date of the summons as AFPL had nevertheless incurred financial liabilities to third parties for which it was legally liable to discharge.

Precisely what discussions occurred at relevant times between AFPL and Mr Bolitho's representatives about the costs incurred and to be incurred in the proceeding, and the terms upon which Mr Bolitho's representatives were asked to act, and the terms upon which Mr Bolitho's representatives agreed to act?

...

After the approval of the partial settlement in August 2016, [O'Bryan], [Symons] and [Zita] agreed to keep contemporaneous records of time spent ... and detailed descriptions of work performed by each of them, in the conduct of the Bolitho Proceeding, and to defer the issue of their invoices seeking payment for their work for an unspecified period.

The commercial advantage, of the deferral of fees, to AFPL, who at all relevant times was conducting multiple class actions, is that its working capital requirements were reduced ... At no time has AFPL had a contingent or conditional fee arrangement with any of Mr Bolitho's legal representatives in the Bolitho Proceeding.

1099 I pause to note that Mark Elliott has contradicted the representation that Zita made to the Contradictor (above at [1075]) that expressly stated counsel did not regard themselves as having a deferred fee arrangement with Zita/AFP.

1100 On 9 May 2019, in response to the Contradictor's complaint about the adequacy of this affidavit, AFP filed a second affidavit of Mark Elliott, in which he expressly disclaimed any knowledge of:

> (a) the processed dates on counsel's invoices or, in the case of O'Bryan's fee slips, the 'PAID' stamps;
>
> (b) O'Bryan having informed Trimbos that fees had been 'duly paid' by AFP; or
>
> (c) the backdating of counsel's cost agreements.

1101 The false statements in these two affidavits were deliberately made, which is clear from my earlier expressed findings. Mark Elliott's intention was to mislead the Contradictor.

Threats of personal costs orders

1102 On 26 April 2019, Symons' then-solicitors, King & Collins, under the hand of principal Alex King, wrote to Corrs stating:

We refer to the Proceeding to which our client, Michael Symons, is not a party.

Putting to one side, for present purposes, whether the allegations made in respect of Mr Symons are properly within the ambit and scope of an amicus to make, we note that the allegations will require Mr Symons to spend considerable time and resources considering those allegations and taking the necessary steps to properly defend himself against any allegations of impropriety.

It further stated that to the extent that the allegations made by the Contradictor were found to be beyond its remit, were manifestly hopeless, lacked a proper basis, or were not proven:

[O]ur client may, in due course, seek an order from the Court in the Proceeding that your client pay some or all of our client's costs incurred in relation to the Proceeding including on actual indemnity basis ... alternatively an indemnity basis.

After setting out the hourly rates of Mr King, a second lawyer and counsel then briefed, the letter concluded:

In light of the above, please confirm the funding sources available to the Contradictor to meet any adverse costs order in either of the scenarios above, including in the event that an outcome of the present special leave application (and any consequent appeal to the High Court) is that the settlement is ultimately not approved *in toto*.

1103 On 24 May 2019, AFP's solicitors, ABL, under the hand of principal Mr Mengolian, also wrote to the Contradictor and its solicitors. In a similar vein, although perhaps more carefully worded, ABL wrote that:

[I]t may ultimately be appropriate for orders to be sought for the Contradictors and solicitors instructing to pay the costs themselves rather than visit them on group members.

If necessary, our client will rely upon this letter on the question of costs, including, if appropriate, against the Contradictors and solicitors instructing.

1104 This correspondence was in practical terms intended to dissuade the Contradictor from proceeding with the remitter in a direction thought undesirable by Symons and by AFP. It could be thought intimidating in its tone, particularly through the implication that a substantial costs liability might be visited on the Contradictor and instructing solicitors personally. The correspondence followed the first iteration of the Revised List of Issues containing the disentitling conduct allegations and were hollow threats. No basis for contending that an application of the kind contemplated might be necessary was identified. As events transpired, no defence was offered to the disentitling conduct allegations, and no basis for issuing a threat of personal liability for costs ever became evident.

1105 It ought to have been apparent to a competent solicitor that, notwithstanding a client's instructions, such notice should not have been given. If a person not a party to the proceeding, as Symons then was, or AFP, wished to raise a concern about the conduct of a court-appointed contradictor, those concerns ought to have been raised with the court, which was always available for case management, and whose function it was to provide direction to the Contradictor about the expected role.

O'Bryan's collusion

Trimbos

1106 On 29 March 2019, the same day as the affidavit order, O'Bryan emailed Trimbos a copy of the questions he had been ordered to answer:

Unfortunately I have now become a witness in the Banksia class action costs dispute - see order 4 attached.

Could you please call when it is convenient to discuss some aspects of the costs information & reports?

I have various notes of our discussions in 2016-17, but my memory of all the events is not as reliable as I would wish!

Trimbos and O'Bryan spoke that day.

1107 On 1 April 2019, O'Bryan emailed Trimbos a copy of his draft affidavit. The email stated:

Apropos of our discussion last week, can you let me know if I have misunderstood anything in what I have written in the attached document.

Many thanks for your assistance, as always. I read those cases to which you referred me over the weekend, which were very helpful in clarifying the legal points.

1108 In his affidavit made after being joined to the remitter, Trimbos stated that:

(a) he could not recall if he read the orders attached to O'Bryan's email;

(b) he did not want to be involved in the issues that were the subject of the remitter and felt uncomfortable that O'Bryan had contacted him, but offered to talk to him as a courtesy;

(c) he only had a vague recollection of what was said, which included that O'Bryan was concerned about his cost agreements and wanted to find copies. In response, Trimbos told him he had sent them in November or December 2017 and that he should check his email from around that time;

(d) it was possible that he referred O'Bryan to some cases, but he could not recall what they were, or why he had referred to them; and

(e) he did not read the draft affidavit O'Bryan sent him the following week, as he did not want to engage with him. He did not respond to the email, and O'Bryan did not follow him up.

1109 When cross-examined, Trimbos evasively claimed a limited recollection of his conversation with O'Bryan:

COUNSEL: You do remember him having a conversation with you about that, don't you?---I don't recall discussing those matters specifically.

Oh, really? Really, Mr Trimbos? ... So Mr O'Bryan is saying, 'Apropos the discussion we had (where I ran everything past you in relation to the matters the judge wants me to answer) [can you let me know if] if I have misunderstood anything' — meaning, 'if I had misunderstood any of the conversation you and I had had,' that's what it's implying, is it not?---It is implying that, yes.

And it's saying, 'Have a look at this attached document and tell me where I've got it wrong'; correct?---That's what it's saying, yes.

Do you think that's the sort of thing an expert costs consultant who's retained to be an expert should be doing in a court case?---No.

No. It's totally wrong, isn't it?---Yes.

He was trying to stitch you up, wasn't he, to make certain his version of events matched up with yours?---That's right.

It's egregious conduct, isn't it?---I - - -

It's egregious conduct, Trimbos?---Yes.

1110 I am satisfied that Trimbos provided some advice or guidance to O'Bryan, including referring him to relevant authorities concerning recovery of legal costs. Trimbos's apparent memory loss was convenient and reflected poorly on his credibility. It is probable that Trimbos did recall a conversation that occurred less than eighteen months earlier about serious matters, such as responding to orders of this court, particularly in circumstances where the matters raised for disclosure went directly to the integrity of his previous reports, and led to a subsequent report being in which he recanted his earlier opinions. Trimbos was also aware of the appeal and of the remitted questions and had only recently prepared and filed his fourth report that confirmed his opinions expressed in his third report. Trimbos was feigning memory loss to distance himself from O'Bryan.

1111 I do not accept Trimbos's assertion that he did not read the draft affidavit attached to O'Bryan's email. Had he done so for reasons of propriety or ethics, as he inferred in evidence, some documentary trail might be expected. Trimbos produced no file note recording that he did not read the affidavit, nor any email to O'Bryan conveying that he thought it was inappropriate for him to receive it, let alone read it. He did not advise the court, either prior to, or in, his final report, that O'Bryan had forwarded this material to him with an invitation to respond to it, yet it raised issues that were ultimately a material basis for his recanted opinion.

1112 Further, while Trimbos may well have wanted to distance himself from the events of the remitter, he was interested in monitoring its progress. In cross-examination, he admitted to searching the court file to obtain a copy of pre-trial orders I made in November 2019, so he could know when it was set down for trial. I am satisfied that he would have read both the questions that were ordered to be answered by counsel, and O'Bryan's draft affidavit, as a means of understanding what issues were being raised by the Contradictor in relation to the claims for legal costs.

1113 Turning to the draft affidavit itself, O'Bryan first addressed the issue of his invoices being stamped 'PAID':

(c) Why were invoices stamped as "PAID" when they had not been paid? Who stamped them as "PAID"?

5. All of my fee invoices prepared during the class action were stamped as 'paid' following their creation by my secretary on my instruction, in order to make it clear that, as between me and the solicitors, Portfolio Law (to whom they were addressed and sent), they were to be treated as paid and as not creating any liability for payment by either Portfolio Law or their client, Mr Bolitho.

O'Bryan's proposed explanation was false. O'Bryan never provided the invoices to Portfolio Law. He sent them straight to AFP and Trimbos. O'Bryan's true motivation for deciding to apply the 'PAID' stamp to his invoices has already been analysed.

1114 Next, O'Bryan proffered the following purported explanation for his email to Trimbos on 20 December 2017 attaching his backdated fee agreement:

(e) Why did senior counsel for Mr Bolitho inform the expert witness Mr Trimbos that fees had been duly paid, when they had not been paid?

7. My email to Mr Trimbos dated 20 December 2017 was sent in response to a question that Mr Trimbos had asked me during the course of a discussion about my fee arrangements, namely whether I or any other member of the class action legal team was acting on a contingent or other conditional fee basis. The email confirmed the due payment of my invoices, following the entry into of the most recent (May 2016) fee agreement, as had occurred.

In the course of this discussion, Mr Trimbos informed me that it was irrelevant to his costs report whether counsels' fees (or any other legal costs or disbursements) had been paid; the relevant question for him was whether they had been properly and reasonably incurred and the client or the funder was unconditionally liable for them.

I told Mr Trimbos that I considered my fees had been properly and reasonably incurred, that the funder (as opposed to the solicitors or client) was unconditionally liable for their payment and that I was confident, based on my previous experience, that all amounts then outstanding would be paid.

(f) Why were fee agreements created in December 2017 after Mr Trimbos asked for them, and why were they provided to Mr Trimbos?

8. I was informed that Mr Trimbos required for the purpose of his costs report a written record of the costs arrangements that had been entered into between counsel, Portfolio Law and the litigation funder.

In the course of my discussion with Mr Trimbos, I told him that, following the introduction of the Legal Profession Uniform Law and the abolition of the previous requirement for written costs disclosures and agreements as between barristers and solicitors or litigation funders, no written fee agreements had been created as between me, Portfolio Law and/or the funder.

My fee agreement was prepared to satisfy Mr Trimbos' request for a written record of what had been agreed between me, Portfolio Law and the litigation funder in May 2016.

1115 As my earlier findings reveal, these explanations were false. O'Bryan's email to Trimbos on 20 December 2017 cannot be reconciled with any oral conversation alleged to have occurred at that time, in which O'Bryan might have told Trimbos that he had no fee agreement, or in which Trimbos could have told O'Bryan that it was irrelevant whether or not fees had been paid. There was no evidence of any such alleged conversation. Trimbos confirmed in his evidence that he believed the fee agreement sent to him by O'Bryan was authentic, and that he relied on it.

1116 Finally, O'Bryan's draft affidavit also asserted:

My fee invoices in respect of the post-1 July 2016 period were prepared, in accordance with the arrangements which had been made between me, the instructing solicitors and the funder, by reference to my detailed monthly work summaries and so as to specify a total sum due each month, by reference to the monthly intervals of the work summaries which were prepared throughout the course of the proceeding. Because the work summaries were prepared at monthly intervals and the funder's liability accrued monthly, I considered it appropriate to prepare invoices corresponding with each monthly summary.

1117 There was no truth in this explanation. I have dealt with how O'Bryan's fee documentation came to be created. No work summaries were created, let alone any contemporaneous records quantifying O'Bryan's fees.

1118 I am comfortably satisfied that this communication and correspondence with Trimbos was an egregious attempt by O'Bryan to narrate or influence the explanation Trimbos would give, so that it would align with O'Bryan's knowingly false account. There was no other plausible explanation proffered for this contact. Trimbos appeared to recognise immediately that it was improper, and agreed with his cross-examiner that O'Bryan sending him the material was an attempt to collude with him.

1119 O'Bryan's presentation to Trimbos of a false explanation in the draft affidavit fortifies the inference that I drew earlier, by reference to other evidence, that O'Bryan deceived Trimbos to conceal the fact that he was acting on a contingent or other conditional fee basis.

Zita

1120 A further example of attempted collusion occurred in late April or early May 2019 when, after they were both ordered to file affidavits, Zita attended a conference with O'Bryan at his chambers. During that conference, O'Bryan provided Zita with a document titled 'Responses to Contradictors' Revised List of Issues dated 16 April 2019', which was copied onto a USB. The response document set out a lengthy rejoinder to the Contradictor's allegations then made in the Revised List of Issues, many of which were contained in his draft affidavit provided to Trimbos around the same time.

1121 Relevantly, in respect of his claim for fees, O'Bryan pithily summarised the Contradictor's allegations as being that 'I did not do any/sufficient work to justify my fees for the 19 month period in question', before claiming:

... over the period in question we closely analysed the pleadings and particulars, drew up trial issues papers on facts and law, researched the applicable law and prepared submissions about all important legal principles, studied the documentary record carefully (which was voluminous, drawn from more than 100 volumes of discovered documents, transcripts of Corporations Act examinations and other sources), selected the relevant documents for trial and prepared the index for the court book, identified the documents for tender in Mr Bolitho's case in chief, prepared the opening submissions for trial (with all relevant documentary evidence intended for tender in opening), selected the documents which were proposed to be used in cross-examination and prepared the topics and the lines of questions for cross-examination.

... I worked on the trial preparation for the class action throughout that period, on nearly every day (including weekends and holidays) for at least some hours. I did not work in this case, and I have never worked at any time in my career as a lawyer, on an illegal contingent fee basis. Nor did I work on a no win/no fee basis in this case.

1122 These claims were false. As earlier recounted:

> (a) neither O'Bryan nor Symons undertook substantial work on the court book, which was largely prepared by the Banksia legal team. To the extent that the Bolitho legal team undertook any material work, it was performed by Ms Jacobson and Ms Koh; and
>
> (b) O'Bryan did not commence trial preparation until about September 2017, and even then performed little work, preferring to wait and see whether there would be a resolution at the mediation in November 2017. The suggestion that O'Bryan worked 'nearly every day (including weekends and holidays)' during this period was untruthful.

1123 Further, in explaining his statement to Trimbos that his fees had been 'duly paid', O'Bryan responded:

My email to Mr Trimbos dated 20 December 2017 was sent in response to a question that Mr Trimbos had asked me during the course of our discussion about my fee arrangements with Portfolio Law and the litigation funder. Mr Trimbos enquired whether I or any other member of the class action legal team was acting on a no win/no fee or any other conditional fee basis. My email confirmed the due payment of my invoices, following the entry into of my most recent (May 2016) fee agreement, as had occurred.

No question of that kind appeared in Trimbos's preceding email, nor do I accept that such a question was asked in a separate conversation, for reasons already explained.

1124 In each of these examples, O'Bryan demonstrated a repeated pattern of conduct, where he attempted to collude with other prospective witnesses to ensure that they adopted a consistent approach in the remitter. In addition to Trimbos, he had sought to do the same with Mark Elliott, Symons and Zita, by sending them emails containing his thoughts on how they should respond to the Contradictor's enquiries.

1125 The Contradictor submitted that O'Bryan's conduct ought to be the subject of the strongest rebuke by the

court. I agree. Such conduct is inimical to the proper administration of justice. That senior counsel, when ordered by the court to file an affidavit deposing to his conduct, should seek to influence the evidence of another witness to corroborate his own false account defies belief. It was a measure of the desperation that was becoming evident in the conduct of Mark Elliott and the Lawyer Parties by this point in the remitter.

1126 Absent an exculpatory explanation (and O'Bryan declined to give any to the court), these incidents demonstrate, without more (although there is more), that O'Bryan is not a fit and proper person to remain on the Roll.

Attempts to limit scope of the remitter

1127 On 11 April 2019, the Contradictor served a subpoena on O'Bryan, seeking production of several categories of documents relating to his involvement in other group proceedings funded by AFP or in which Mark Elliott was the instructing solicitor, including cost agreements, fee slips and email correspondence.

1128 On 16 April 2019, the Contradictor filed and served an updated Revised List of Issues, which detailed, for the first time, substantial particulars of the allegations of disentitling conduct by Mark Elliott/AFP, O'Bryan, Symons and Zita. At this point, the Contradictor's direct focus in the remitter had turned to the conduct of AFP and the Lawyer Parties. In response, they sought to defeat or constrain the scope of the Contradictor's enquiries in the remitter.

1129 Between 16 April 2019 and 2 May 2019, the Lawyer Parties each filed a summons, seeking orders that:

(a) challenged the scope of the Contradictor's powers in the remitter;

(b) set aside the order that they each make an affidavit in the remitter;

(c) struck out the Revised List of Issues dated 16 April 2019 and removed it from the court file; and

(d) set aside the subpoena to O'Bryan.

1130 Mark Elliott displayed a similar attitude. On 14 May 2019, Corrs wrote to ABL providing further and better particulars of the allegations of disentitling conduct made in the Revised List of Issues, and stated that, in relation to a number of matters, further particulars would be provided following further discovery.

1131 On 24 May 2019, ABL responded:

The [Revised List of Issues] include serious allegations that our client, our client's managing director Mr Elliott, and Mr Bolitho's solicitors and counsel, engaged in conduct giving rise to breaches of their respective duties and obligations to Mr Bolitho, other group members and the Court....

Given the Contradictors have not provided [all of the particulars sought], our client is proceeding on the basis that the Contradictors cannot provide the particulars sought. In those circumstances, the Contentions ought to be immediately withdrawn...

Our client will resist any further discovery in relation to allegations of fraud and breach of trust, which are incomplete and improperly based, and should never have been made by the Contradictors.

1132 ABL's letter invited the Contradictor to withdraw the Revised List of Issues, boldly asserting that AFP will 'not submit to further interrogation by the Contradictor in circumstances where there are live issues about the power and role of the Contradictor'. Those live issues were being agitated by the Lawyer Parties, not AFP. The Lawyer Parties' summonses were heard on 29- and 30 May 2019. In September 2019, save that I set

aside the subpoena, I dismissed these applications, concluding that the Contradictor's allegations of disentitling conduct were not fanciful and were adequately particularised.[109] I further noted that it may be necessary for the Lawyer Parties to be joined to the remitter to address them.

1133 On 15 November 2019, I ordered that AFP be joined to the remitter as the second plaintiff and that O'Bryan, Symons and Zita be joined as second to fourth defendants respectively.

1134 On 20 November 2019, the Contradictor issued and served a subpoena on Trimbos, requiring him to produce documents regarding the preparation of his reports filed in the Bolitho proceeding and the remitter, including all communications between himself, Mark Elliott, Alex Elliott and the Lawyer Parties.

L.3. Prior to trial

Discovery by AFP and Lawyer Parties

1135 On 20 December 2019, I made orders requiring AFP and the Lawyer Parties to make discovery, including communications involving Mark Elliott and Alex Elliott, of various categories, including:

> (a) documents relating to the Trust Co Settlement, the costs and disbursements to be recovered from that settlement, and the Third Trimbos Report, which the Contradictor had been seeking in correspondence since April 2019; and
>
> (b) documents relating to Mrs Botsman's appeal.

1136 The Lawyer Parties made discovery by early 2020, including documents that would have been responsive to the early 2019 discovery orders directed to AFP, but were not discovered, including, for example, an email from Mark Elliott to O'Bryan on 4 December 2017 reminding O'Bryan to charge a $200,000 cancellation fee.

1137 In mid-January 2020, Mark Elliott began some form of review of his emails possibly to identify documents responsive to the 19 December 2019 order. In late January 2020, Alex Elliott began reviewing the documents produced by Trimbos in response to the Contradictor's subpoena. He forwarded documents that might be privileged to ABL.

Deliberate destruction of documents

The 'document destruction practice'

1138 On 10 February 2020, Mark Elliott and Alex Elliott met with ABL, and Mark Elliott instructed ABL that AFP had limited documents to discover because he had deleted most of its emails.

1139 On 11 February 2020, ABL wrote to Corrs making discovery in compliance with the 20 December 2019 order. On instructions from AFP, the letter then explained what I will refer to as Mark Elliott's purported '**document destruction practice**':

> Our client expects that the number of documents that have been, or will be, enumerated in the lists of discoverable documents filed by [the Lawyer Parties] will be significantly greater than the number of documents in our client's List... as a result of the following matters...
>
> Mr Elliott has a long standing and invariable practice (which he observed at all relevant times during this proceeding) [when reviewing an email on his computer or Blackberry] of doing the following:
>
> (i) immediately delete the email once he has read it;
>
> (ii) read it, respond to it and then immediately delete it; or

(iii) if the email is, in his view significant or important, requires actioning at a later time or is otherwise worth retaining in his view, he will move it to a sub-folder relating to the relevant proceeding. Mr Elliott estimates that of the emails that he receives, he would maintain approximately 10-20% of the emails by moving them into sub-folders instead of deleting;

At the end of each day, but occasionally at the end of a week or at the end of a month, Mr Elliott will delete all emails in his inbox... Mr Mark Elliott expects and relies on [other practitioners he retains] to keep copies of all emails and other documents they exchange...

Mr Elliott deletes all items in his 'deleted items' sub-folder from time to time, usually within a month of first receiving the email. [Those deleted emails] are then [archived] for 7 days after which time they are permanently deleted and no back-up copies are maintained on any hard drive.

Mr Mark Elliott observes the practice outlined above for the purposes of efficient document management, to assist him to efficiently and quickly respond to emails and keep track of what emails he needs to respond to, and cyber security...

1140 AFP discovery enclosed with ABL's letter included 197 documents, of which only six were emails exchanged between Mark Elliott and Alex Elliott.

1141 On 12 February 2020, Corrs responded to ABL's letter, stating:

The Contradictor considers that AFPL should verify its discovery by affidavit to be sworn by Mr Elliott. Please confirm whether AFPL agrees to do so. The Contradictor will otherwise seek orders at the hearing on 17 February 2020 requiring AFPL to provide an affidavit verifying its discovery.

1142 On 14 February 2020, ABL notified the court and the parties that:

There has been a tragedy in the family from those whom we take instructions. Our client's managing director Mark Elliott passed away yesterday.

While our instructors' family is grieving, we are unable to obtain instructions ... We respectfully request that Monday's hearing be adjourned for a period of 14 days to allow our client and our instructors' family to order their affairs.

1143 The hearing for 17 February 2020 was adjourned to 6 March 2020, when I ordered that ABL secure all electronic devices used by Mark Elliott and for those devices to be examined by forensic IT experts for the purposes of discovery. I also ordered ABL to use its best endeavours to search for the Blackberry mobile device they identified in the 11 February 2020 email to Corrs. On 25 March 2020, I made further orders, following the recovery of Mark Elliott's Blackberry mobile device. These orders were limited to Mark Elliott's email accounts.

1144 On 20 April 2020, after the devices were retrieved and forensically examined, I ordered that AFP make discovery of any recovered documents, and serve a report from the forensic IT experts as to whether any deleted items were recoverable from the devices, and if so, any information about when data was deleted from the devices.

1145 After his father's death, Alex Elliott was the only person with knowledge of AFP's day-to-day running of the Banksia litigation. He stated that following Mark Elliott's death, and in the context of the instructions regarding his father's practice of deleting emails, ABL had requested that Alex Elliott search his computer for specific documents on occasion. At no other stage did Alex Elliott revisit the discovery that AFP had provided or undertake any searches to ensure that all relevant documents on his own computer had been discovered.

1146 I am satisfied, for the reasons that follow, that the document destruction practice described by ABL, on

instructions from Mark Elliott, was a fiction. I am comfortably satisfied to the requisite standard that, between March 2019 and February 2020, Mark Elliott deliberately, and dishonestly, destroyed targeted documents in his possession, custody and power to prevent them from being discovered to the Contradictor and used as evidence in the remitter.

1147 First, despite the document destruction practice apparently being 'long standing and invariable', the evidence demonstrated a number of instances where it was possible to access Mark Elliott's previous emails that would have been unrecoverable, had the practice occurred consistently. I note two examples.[110]

1148 On 8 February 2019, following my first order requiring that AFP make discovery, Mark Elliott had the following email exchange with counsel (copied to Alex Elliott) seeking copies of their cost agreements:

I need some urgent help on this please

I don't have any costs agreements or invoices from you for the January 2018 costs report by Trimbos ie for period 1/7/2016-31/1/2018

I think that you sent them all to Trimbos directly

Can you please provide asap

Need them all by Monday am

MS-found all of your emails and have a good history for you

1149 When O'Bryan forwarded Mark Elliott his email to Trimbos on 20 December 2017 attaching his cost agreement, the two had the following exchange:

Mark Elliott:

Got that/those

What about when your fees went up to $1250?

See the emails

O'Bryan:

I didn't prepare a new fee agreement when I increased my rate to $1250/hr; $12500/day.

I discussed it with you & Tony & it was agreed verbally.

There is no legal requirement to sign a new agreement in these circumstances.

Mark Elliott:

Yes I recall

These exchanges revealed that Mark Elliott had retained copies of O'Bryan and Symons' emails from more than 14 months earlier. He stated that he had a 'good history' of Symons' cost agreements, and had told O'Bryan to 'see the emails' regarding whether there were multiple costs agreements (a reference to the communications they had shared in November 2018 when O'Bryan increased his hourly rates to meet his fee target).

1150 On 5 March 2020, following settlement of the Murray Goulburn proceeding, Alex Elliott met with John White, the expert costs consultant appointed by the Federal Court of Australia to assess Elliott Legal's claim for costs in that matter. He provided Mr White with 'quite a complete file' of more than 11,000 documents relating to that matter from his computer and his father's computer, including email correspondence

maintained by Mark Elliott. Alex Elliott did not mention the document destruction practice to Mr White, and there was no evidence that documents had been deleted. Alex Elliott could not explain the discrepancy between the different matters.

1151 Secondly, Alex Elliott stated that the first time he had ever heard about his father's alleged 'long standing' practice of routinely deleting most of his emails was around the time ABL notified Corrs about it in February 2020, despite having worked closely with his father continuously for four years.

1152 Thirdly, Mark Elliott had the opportunity to, and did, delete inculpatory documents from Alex Elliott's computer. Alex Elliott explained that while his computer was in his office and mostly only used by him, the passwords for each device in the office were kept on pieces of paper at the base of the screen. He also stated that Mark Elliott was 'across all the passwords' and had access to Alex Elliott's email account on his own computer for a period of time. Alex Elliott agreed that his father could have deleted emails from his email account.

1153 In an affidavit that he proffered at the conclusion of his examination in chief, Alex Elliott stated:

Prior to my father's death on 13 February 2020, my father told me that he undertook all of the searches in response to discovery orders, including undertaking any searches of my computer. None of those searches were done in my presence ...

1154 When cross-examined, Alex Elliott recalled that the conversation with his father about discovery occurred a few days before his death. However, he gave a different account about the search of his computer. He stated that, at the time, he moved away from his computer so that Mark Elliott could 'take the driver's seat' and search his device, explaining that there was only one seat in his office, and he offered it to his father. Alex Elliott claimed that he had no idea what searches his father had undertaken.

1155 The timing should be noted. The document destruction practice was revealed by ABL's letter approximately one week after the incident in which Mark Elliott sat at Alex Elliott's computer, and two days prior to Mark Elliott's death. If Mark Elliott had not already deleted relevant emails from Alex Elliott's computer in April or May 2019, it is probable that February 2020 was the occasion when he did so, when Alex Elliott was present observing his father's conduct, about which he had 'no idea'.

1156 I am comfortably satisfied that Alex Elliott was aware of and acquiesced in his father's destruction of documents, and reject his evidence to the contrary. In order for the court to accept Alex Elliott's evidence that he was not dishonest, as he believed his father had acted appropriately in respect of AFP's discovery obligations, the court must necessarily believe that he placed blind faith in his father's integrity and was completely ignorant to the possibility that he might engage in wrongdoing.

1157 Alex Elliott's narrative cannot be reconciled with the following matters:

(a) Alex Elliott had internally questioned the morality of his father's conduct from as early as 2018. He admitted to feeling 'uneasy' about Mark Elliott's instruction to sign cheques to Symons and Zita, and challenged his decision to send the termination letter to the SPRs. Document destruction is unambiguously wrong;

(b) By March 2019, the Contradictor had made very serious allegations of impropriety against Mark Elliott. Alex Elliott was aware of the nature of those allegations and their implications from that time;

(c) By the time that Alex Elliott gave evidence, the Contradictor had opened its case against all parties, including Alex Elliott, to the court and laid out the documentary trail that is set out in these reasons. Alex Elliott was provided with the full trial record at the time of his joinder. He was able to assess the extent to which his narrative was confronted by uncontested fact, including, had he sought it, advice from his own competent and experienced legal team; and

(d) there was no reason not to accept Alex Elliott's evidence that he 'idolised' his father, but, that taken into account, it was not plausible that Alex Elliott could have blindly trusted his father when he knew of the significant personal stake Mark Elliott (and he, by familial relation) had in the litigation. He knew, too, that his father had actively resisted any process that might have revealed his improper conduct, since, at least to Alex Elliott's knowledge, the Trust Co Settlement. In this context, it bears mentioning that Alex Elliott described Mark Elliott's style as 'don't give anyone anything unless they, you know, claw it from you' and that '[h]e just wasn't going to give anyone a leg up if they didn't, you know, absolutely try really hard to get it'.

1158 The document ID in the footer of the letter from ABL to Corrs on 11 February 2020 (ABL/77-2991v5) suggested that there were five versions created before it was finalised. Under cross-examination, Alex Elliott initially denied that he saw a copy of the letter before it was sent. However, during his evidence, his solicitors were served with a notice to produce all emails attaching the letter and any prior drafts of it. Over objection, the Contradictor called for production in response to the notice and, when cross-examination resumed, Alex Elliott later gave different evidence. He said his father had 'sent a draft I think to ABL that they'd used or assisted with this letter' and that he 'saw an ABL draft'.

1159 The documentary evidence as a whole carried no suggestion at all that Mark Elliott sought to limit Alex Elliott's exposure to his conduct. To the contrary, I am satisfied, rejecting Alex Elliott's 'personal assistant' narrative, that Mark Elliott drew Alex Elliott into actively participating in the 'family business'. In such circumstances, it was not logical for Mark Elliott to exclude Alex Elliott from his practice of document destruction.

1160 I am comfortably satisfied that that the most probable inference is that Mark Elliott did not conceal from his son that he planned to destroy (or had destroyed) emails exchanged between the two of them in connection with the Bolitho proceeding. Despite his denials, which I reject, it would have been obvious to Alex Elliott that their private emails were missing from the discovery. Mark Elliott would have perceived a risk that Alex Elliott might give information to ABL that would likely invite scrutiny about the deletion of the emails. The most probable inference was that Mark Elliott informed his son of what he had done or planned to do, to ensure that he was 'on board' and/or that he deleted documents in Alex Elliott's presence.

1161 I was persuaded that Alex Elliott knew that his father's deliberate destruction of documents was confined to the Bolitho proceeding and was introduced to thwart the ongoing requests of the Contradictor. A question arises as to whether any person, and the inquiry would not be limited to Mark Elliott, engaged in conduct in contravention of s 254 of the *Crimes Act 1958* (Vic).[111] That question is beyond the scope of the remitter.

Salvaging destroyed documents

1162 My findings in respect of Alex Elliott's knowledge of and acquiescence in Mark Elliott's targeted document destruction are supported by the recovery of the Banksia Expenses Spreadsheet, at the behest of the Contradictor.

1163 On 21 April 2020, Corrs wrote to ABL noting that Forensic IT, the consultants nominated to conduct the

search of Mark Elliott's devices, retrieved 33,498 emails. The Contradictor sought further information from ABL about the emails on the devices and concluded:

[W]e note that, from the Contradictor's review of documents recently discovered by the parties, it appears that Alex Elliott was copied to most emails that were sent between AFPL and the Lawyer Parties. You have advised that Alex Elliott acted as an assistant to Mark Elliott in his capacity as director of AFPL. Would you please confirm that, in complying with its discovery obligations in this proceeding, AFPL has secured all of the documents and communications of Alex Elliot (and has not limited itself to the documents and communications of Mark Elliott).

1164 On 22 April 2020, ABL responded, stating that:

Mr Elliott, on behalf of our client, arranged for Mr Alex Elliott's emails to be reviewed for the purposes of discovery. Further, we advise that our client has arranged for Mr Alex Elliott's emails to be searched for the 'Banksia expenses' spreadsheets sought by the contradictor.

1165 Alex Elliott stated on affidavit:

As far as I was aware, AFPL and ABL had arranged for all of my emails to be searched and that any of my emails that were discoverable had been discovered through that process.

1166 On 24 April 2020, I ordered AFP to discover all versions of the Banksia Expenses Spreadsheet, and all communications between Mark Elliott, Alex Elliott, Max Elliott, O'Bryan and Symons about the spreadsheet and the costs it recorded. The order expressly required discovery of the email sent by Mark Elliott to O'Bryan and Symons (copying Alex Elliott) on 21 November 2017 at 4:07pm that attached the Banksia Expenses Spreadsheet.[112]

1167 On 13 May 2020, AFP made discovery in accordance with this order, which included an email sent by Max Elliott to Alex Elliott and Mark Elliott on 21 November at 4:05pm, attaching the Banksia Expenses Spreadsheet. A copy of the 4:07pm email was not discovered. It was accepted that the Banksia Expenses Spreadsheet attached to the 4:05pm email was almost certainly attached to Mark Elliott's email to O'Bryan and Symons two minutes later.

1168 When cross-examined, Alex Elliott stated that:

> (a) in relation to the 24 April 2020 discovery order, ABL asked him to conduct specific searches for documentation, such as the Banksia Expenses Spreadsheet and other financial information, which he did in April and early May 2020;
>
> (b) during these searches, he located the 4:05pm email on a 'work computer we had at home', which was likely used interchangeably by Alex, Max and Mark Elliott;
>
> (c) when shown a subsequent reply to the 4:07pm email, he agreed that none of the recipients, including himself, had been able to produce the original 4:07pm email with the Banksia Expenses Spreadsheet attached; and
>
> (d) the email should have been on his computer, but he was not able to explain why it was not found there. He did not recall deleting the 4:07pm email but expected that was what had happened.

1169 I am satisfied to the requisite standard that the 4:07pm email was deleted by each person who received it, as they each believed it was an incriminating document that revealed how the division of the spoils occurred and the process by which the fees had been quantified. The probable inference is that the email was

found on the home computer on Max Elliott's email account. Mark Elliott did not destroy that document, because the Contradictor never sought documents held by Max Elliott.

AFP and O'Bryan's challenges to document inspection

1170 In March 2020, I referred three disputes to Daly AsJ for determination:

> (a) O'Bryan's claim for privilege over the response document he prepared to the questions posed to him by the Contradictor, which he provided to Zita;
>
> (b) O'Bryan's objection to the inspection of the draft affidavit he prepared in response to the court's order, to explain the circumstances of the fee arrangements, which he gave to Trimbos, on the basis that they fell outside the scope of the subpoena issued to Trimbos by the Contradictor; and
>
> (c) AFP's claim for privilege over a large number of communications between Mark Elliott or Alex Elliott and O'Bryan/Symons/Zita between March 2018 and April 2018, concerning Mrs Botsman's appeal, AFP's injunction proceeding against Mrs Botsman, and the remitter.

1171 In *Bolitho v Banksia Securities Ltd (No 8)*,[113] her Honour concluded that:

> (a) O'Bryan's response document was properly subject to a claim for privilege, but O'Bryan had waived that privilege;
>
> (b) O'Bryan's draft affidavit provided to Trimbos fell within the scope of the subpoena and ought be made available for inspection; and
>
> (c) save for four documents in relation to the injunction application, AFP's claim for privilege was properly made.

1172 The release of O'Bryan's response document and draft affidavit, discussed earlier, created obstacles for O'Bryan's defence, as each demonstrated that O'Bryan had not only considered giving the court false explanations for his conduct, but also sought to ensure that the evidence of other witnesses would corroborate his own account. They were also inconsistent with the version contained in his sworn affidavits filed, but not ultimately relied on by him, in the remitter.

The Lawyer Parties' affidavits

1173 O'Bryan and Symons each filed their affidavits in response to the Revised List of Issues on 7 April and 20 May 2020, respectively.

1174 On 30 April 2020, Zita filed an affidavit in which he made some concessions. However, he maintained his defence to the majority of the allegations against him and continued to assert that he acted independently and in the best interests of his client.

1175 On 20 May 2020, in response to the 24 April 2020 discovery order, O'Bryan made an affidavit discovering 46 hard copy folders that he asserted constituted his work product in the period from 1 June 2016 to 30 January 2018. This was the first reference to these folders.

1176 The Contradictor contended that the 46 folders largely contained documents and work product from prior to the Partial Settlement and was not relevant to O'Bryan's fees that were the subject of the remitter. As O'Bryan capitulated and abandoned his defence, so much was accepted. It provided a further example of the

oppositional, denialist stance he adopted in the remitter, requiring the Contradictor to invest considerable time and effort, at great expense to debenture holders, to assess the utility of the discovered material to the issues. As O'Bryan must have known, there was none.

1177 On 22 July 2020, Zita filed an further affidavit in which he rejected the suggestions that:

> (a) he had agreed with Mark Elliott to defer issuing invoices seeking payment for an unspecified period; and
>
> (b) he had discussed and agreed to a work plan with O'Bryan. Instead, he stated that O'Bryan's work was self-directed and he was not privy to all the trial preparation work that was being undertaken by counsel.

Fifth Trimbos Report

1178 On 2 June 2020, ABL instructed Trimbos to prepare the '**Fifth Trimbos Report**', in which he was instructed to opine on whether and how the opinion that he expressed in the Fourth Trimbos Report would be altered if each of the factual allegations made in the Revised List of Issues against AFP and the Lawyer Parties and/or the evidence filed by the Lawyer Parties were proved.

1179 Trimbos was provided with a copy of the Revised List of Issues, about which he stated:

I was shocked and dumbfounded ... I could not believe what I was reading. I had worked with these legal practitioners on other matters. I could not and still cannot make sense of their conduct. They came across as ethical practitioners to me. I never thought there was an untoward scheme going on and that they misled me as well as the Court.

1180 On 29 June 2020, AFP filed the Fifth Trimbos Report.

1181 Trimbos stated that:

> (a) his opinion that the Lawyer Parties' fees were fair and reasonable was based on his understanding that their time records were accurate and had been made contemporaneously;
>
> (b) assuming the Contradictor's allegations were made good, his opinion was that a very significant reduction would need to be made to the time and fees allowed for various tasks undertaken by the Lawyer Parties; and
>
> (c) if the time records could not be relied on, the sampling process previously undertaken would be inappropriate. Instead, the work product for each task would need to be reviewed to determine a reasonable amount of time to allow, in a process similar to a taxation or assessment.

1182 Many months prior to filing the Fifth Trimbos Report, on about 27 September 2019, Trimbos read an article in The Age concerning the allegations made in the remitter that O'Bryan had fabricated his fees. This caused him to read *Bolitho No 6*. He reasoned that, at that stage, they were only allegations, and did not contact anybody involved in the proceeding, as he thought it inappropriate to do so as an expert witness.

Late discovery

1183 On 30 June 2020, I ordered AFP to discover documents in specified categories, including copies of its bank statements and all communications with its auditor relating to O'Bryan's fees.

1184 On 8 July 2020, AFP made discovery of the emails noted earlier in these reasons between Mark Elliott and CFMC that included references to O'Bryan and Symons being retained on 'no win no fee' agreements, and a copy of O'Bryan's letter confirming that arrangement. That evening, Corrs wrote to ABL stating:

Please provide us with a copy of the 'no win no fee' agreement for Symons referred to in the attached email and any communications with Symons relating to same. These documents are within the scope of the 1 February 2019 discovery orders and, in any event, are critical to the issues in the remitter.

ABL responded:

[W]e understand that the no win no fee agreements referred to in the attached document relate to proceedings other than the Banksia class action. As such, those documents were not, and are not, discoverable pursuant to the 1 February 2019 orders as asserted in your email below... Please note that this does not mean we expect to receive instructions not to provide copies of the agreements to you.

1185 On 10 July 2020, AFP discovered Symons' no win no fee letter. In the covering letter, ABL stated:

In relation to our statement that we understood the 'no win no fee' agreements related to matters other than the Banksia class action, this understanding was based on our review of discovered documents evidencing payments made to O'Bryan and Symons in the Banksia class action ... and an email dated 14 February 2019 from Mark Elliott to our client's accountant ...

Corrs replied:

It is disappointing that AFP did not discover these critical documents in relation to the no win no fee arrangements with O'Bryan and Symons until two weeks prior to trial. The Contradictor has spent time preparing the case in relation to the no win no fee issue, much of which could have been avoided by production of the primary evidence that O'Bryan and Symons acted on a no win no fee basis in all cases in which AFP acted as litigation funder.

1186 The Contradictor was rightly critical of AFP's conduct. These documents should have been discovered in response to my 1 February 2019 discovery order, which explicitly called for any cost agreements entered into with O'Bryan or Symons and any communications they issued relating to their costs.

1187 In this exchange, ABL suggested that the delay in discovery resulted from their understanding that the no win no fee agreements did not relate to the Bolitho proceeding, and were thus not discoverable. ABL referred to two documents that it asserted provided a basis for this understanding. This understanding was incorrect. In particular, the email dated 14 February 2019 from Mark Elliott to the accountant did not give ABL a proper basis for the assertion that no win no fee agreements were not discoverable pursuant to the 1 February 2019 order. The documents that ABL stated that it reviewed inferred that counsel were retained on a no win no fee arrangement in the Bolitho proceeding and two other group proceedings. If left in any doubt, ABL should have sought clarification from AFP/Mark Elliott to ascertain whether the documents were discoverable,[114] particularly after further documents concerning counsel's fee arrangements were discovered.

1188 An example is illustrative, but this is just one example. From AFP's bank statements discovered pursuant to the 30 June 2020 order, the Contradictor identified that Symons was engaged on a quarterly retainer. On about 13 July 2020, two weeks prior to trial, AFP and Symons each discovered emails exchanged between Symons and Mark Elliott in February and March 2018, which provided further evidence of the contingency fee arrangement in the Bolitho proceeding, which have been discussed.

1189 No explanation was proffered, and none is apparent, for the failure of AFP and Symons to promptly discover correspondence concerning Symons' retainer as documents falling into discovery category 'relating to the costs incurred ... or expected to be incurred by counsel in conducting the Bolitho proceeding' ordered

on 1 February 2019, when the correspondence expressly referred to Symons' fee arrangement in this proceeding. For the preceding eighteen months, AFP and Symons had forcefully contended for a proposition that was ultimately abandoned, never established, that there was no proper basis for the Contradictor's allegations. Given their conduct generally in the proceeding, it was probable that this dilatory discovery was intentional, and documents have been withheld causing substantial expense, and possibly significant financial detriment, to innocent parties. Presently I have no evidence as to whether the capacity of any defendant to meet the judgment to be entered against them has deteriorated over this time as a result of their obstructive conduct in the remitter.

1190 Throughout the consideration of the proper discharge of discovery obligations, I have no explanation about how the legal representatives for AFP, O'Bryan, Symons and Alex Elliott discharged their duty to the court to ensure that their client made proper discovery. I readily accept that those representatives were not invited to offer any explanation or otherwise to persuade the court that they complied with their own obligations under the *Civil Procedure Act*. I am not in a position to make findings.

1191 On the other hand, there is an elephant in the room. What is clear is that there was serious dishonest conduct that was ultimately not defended. Probative documents, readily identifiable by reference to the Revised List of Issues, were not discovered when they ought to have been. A practice of document destruction emerged. What is also possible is that scarce financial resources, that ought to be available to compensate the debenture holders may have been used to pay lawyers, who may have advised their clients that their claims/defences were untenable and ought to be abandoned at a much later point in time than is acceptable to the court in the context of the proper administration of justice.

1192 These very serious matters, of great concern to the court, remain unexplained, but the issues raised are too complex to admit any inappropriate speculation.

AFP's admissions

1193 On 14 July 2020, AFP filed a document containing extensive admissions about its conduct and that of the Lawyer Parties. AFP admitted, *inter alia*, that:

> (a) the Lawyer Parties 'did not disclose to Mr Bolitho or group members their costs or the basis upon which they would charge their fees';
>
> (b) the Lawyer Parties 'did not adhere to their costs agreements or disclosure documents';
>
> (c) the fee arrangements of the Lawyer Parties were 'inconsistent with the obligations under the Funding Agreement'; and
>
> (d) AFP, assisted by O'Bryan and Symons, had supplied the information for the Third Trimbos Report, 'some of which was false or misleading'.

1194 Notwithstanding those admissions, AFP continued to maintain its claim for legal costs of at least $1.3 million and for commission in the sum of nearly $7 million.

L.4. The trial of the remitter

1195 On 27 July 2020, the trial of the remitter commenced. During the first sitting week, AFP and the SPR each opened their respective cases, and the Contradictor completed two and a half days of its opening.

1196 I then stated:

The only other matter that I wanted to raise was that, having listened to the opening that I have heard so far — and of course it remains to be seen whether any of the allegations that are made by counsel in opening are ultimately established at the end of the day — but I thought I would just let the parties know that, in the event that these allegations are established, one thing that has troubled me in listening to all of this is the question of whether certain parties are fit and proper persons to remain on the roll of practitioners in this court.

I have certain powers in relation to that question, both under the court's inherent jurisdiction and under s 23 of the *Legal Profession Uniform Law*. I will, if I remain troubled by this, be inviting the parties to make submissions as to both procedure and substance on that issue at a later point in time. I thought it was only fair to let you all know the tentative way in which I'm thinking so that you can take it into account. Plainly I will ensure that to the extent that that might be advanced in any way it will be on the basis of assistance from the parties in making submissions as I have just stated.

Counsel's capitulations

1197 On 3 August 2020, after the Contradictor's opening had concluded, O'Bryan's counsel informed the court of the following:

First, Mr O'Bryan will not maintain any further defence of the allegations that have been made against him in this proceeding by the Contradictor in the revised list of issues dated 21 July 2020 and its particulars. In those circumstances. Mr O'Bryan would not be entitled to, and he will not, contend against the court making findings in respect of him in accordance with those allegations.

Secondly, your Honour, Mr O'Bryan consents to the entry of judgment against him (a) for money liability under section 29 of the Civil Procedure Act in such amount as the court determines on the evidence before it and (b) otherwise on the terms as the court sees fit.

Thirdly, your Honour, Mr O'Bryan will not oppose this honourable court removing his name from the Supreme Court roll. He accepts that this should occur.

Fourthly, Mr O'Bryan will not seek payment of any of his unpaid fees in this matter. He abandons any right to such payment.

Your Honour, we are instructed to record that in taking this course Mr O'Bryan seeks to convey and give some measure of effect to his contrition and his very deep regret at his actions and to do what he is now able to do to assist in these proceedings being brought to conclusion.

Consistently with the foregoing, (a) there will be no cross-examination of any witness on behalf of Mr O'Bryan; (b) Mr O'Bryan's affidavits will not be read and he will not be giving evidence; and (c) no submissions will be made on Mr O'Bryan's behalf in closing.

1198 On 13 August 2020, after filing a number of affidavits in his defence, and after cross-examination of Mr Newman and Mr Kingston, Symons, through his counsel, also capitulated:

Mr Symons deeply regrets the circumstances that have given rise to the remitter and the allegations in the revised list of issues.

He conveys that he no longer contests the allegations contained in the revised list of issues dated 21 July 2020, and the making of findings and granting of compensation the court considers available to it in accordance with those allegations.

For clarity, Mr Symons consents to the entry of judgment against him for monetary liability under s 29 of the Civil Procedure Act in such amount as the court determines is appropriate having regard to the evidence and/or otherwise on the terms the court sees fit.

Further, Mr Symons consents to his name being removed from the Supreme Court roll, and he asks the court to act of its own motion in doing so. Finally, Mr Symons abandons any claim for his unpaid fees in the matter.

As a consequence, Mr Symons' affidavits will not be read and he will not give evidence. He will not seek to cross-examine Mr Trimbos or any other witness, nor make any submissions in closing.

Symons' capitulation was substantially the same as O'Bryan's, save that instead of expressing contrition, he stated that he 'deeply regret[ted]' the circumstances that had given rise to the remitter. He also asked the court to act 'of its own motion' and remove his name from the Roll. I have disregarded Symons' cross-examination of both witnesses prior to his capitulation.

1199 For convenience, I will refer to each of O'Bryan and Symons' statements as a '**capitulation statement**'.

1200 Symons, through his counsel, had earlier, in May 2019, submitted that he 'recognises his duty to the court and seeks to ensure that the court is in possession of all the assistance reasonably required for the conduct of the remitter'. I do not accept either of these assertions. He did not provide the court with a frank explanation of the events in issue in the remitter, nor did he ever offer the court or debenture holders an apology.

1201 Neither O'Bryan nor Symons ever proffered an explanation for their conduct in the Bolitho proceeding, as it is documented in these reasons. Neither entered the witness box on their own behalf, although O'Bryan gave some evidence that I will come to in due course. There was no suggestion by their counsel that they were present in the virtual courtroom when their capitulation statements were made to the court.

1202 At this point in the trial, much of the very substantial expense of the remitter had been incurred by the debenture holders. The court cannot assess why these decisions were not made until this time.

1203 On 13 August 2020, following O'Bryan and Symons' capitulation statements, counsel for AFP stated:

In light of the events that have occurred we are instructed that AFPL will not pursue its application for commission and will pursue its application for costs only in the amounts not disputed by the Contradictor.

The consequences of this concession are dealt with in section Q of these reasons.

Evidence from Trimbos and Zita

1204 From 13 August 2020, Trimbos and Zita gave evidence. On 17 August 2020, during cross-examination, Zita publicly apologised to Mrs Botsman and Mr Botsman for his role in sending intimidating correspondence to them. However, he still maintained his defence to the allegations made against him and Portfolio Law.

Joinder of Alex Elliott and Trimbos

1205 On 18 August 2020, the SPR filed a summons seeking an order for indemnification of costs incidental to the remitter by certain non-parties including, among others, Alex Elliott.

1206 On 19 August 2020, at a directions hearing on this summons, the SPR sought limited discovery from Alex Elliott regarding his possible financial interest in the outcome of the remitter, through Elliott family trusts. Alex Elliott objected to the discovery. During argument, I said that both Alex Elliott and Trimbos appeared to have a case to answer on the issues in the remitter that they may have engaged in conduct in breach of overarching obligations under the *Civil Procedure Act*, and that it was desirable to consider the extent to which each of them might be liable to pay compensation.

1207 On 20 August 2020, Alex Elliott and Trimbos were formally joined to the remitter as defendants.[115] The

Contradictor subsequently updated the Revised List of Issues to give notice of the allegations to be considered in respect of each of them.

Alex Elliott's conduct post-joinder

1208 Each of AFP, Zita and Trimbos submitted that Alex Elliott should bear the costs of the remitter from the time of his joinder, because he adopted, unreasonably, a defiant stance through an evasive and non-compliant approach to discovery, as well as by pursuing numerous interlocutory battles. Although I was not persuaded that Alex Elliott should bear those costs to deal with these and, other, submissions, it is necessary to review Alex Elliott's conduct after he was joined as a party to the remitter.

1209 On 27 August 2020, Alex Elliott applied for an order that I recuse myself from the hearing on the basis of apprehended bias. On 2 September 2020, I heard the application and dismissed it on 7 September 2020.[116]

1210 On 8 September 2020, the Contradictor proposed orders, including for discovery by Alex Elliott. Alex Elliott filed a summons seeking a stay of the proceeding pending the hearing and determination of an application for leave to appeal against the dismissal of his application for recusal.

1211 On 9 September 2020, during a directions hearing, Alex Elliott applied to stay the proceeding pending his application for leave to appeal. In the context of resisting discovery sought by the Contradictor in correspondence but not yet pressed by order, the following exchange occurred:

MR KOZMINSKY: [W]hen one writes to an instructing solicitor and says make discovery to the extent it has not already been discovered, that involves the following. First, one has to get all the documents from their client and then they must cross-reference it to what's been discovered. That is the only way one could check independently.

If what Mr Jopling is asking for is for my instructor to pick up the phone and call Mr Horgan's instructor and say, 'Did you make discovery,' well, yes, that's not a particularly difficult task ...

But the task involved is to get all the documents from our client, identify what is discoverable and then cross-check against what has been discovered to see what has and has not been discovered. That's the process, your Honour, and it will take time.

HIS HONOUR: Well, I didn't understand him to be making the submission in those terms, and reframing what he said is not going to help me.

MR KOZMINSKY: But the task involved is to get all the documents from our client, identify what is discoverable and then cross-check it against what has been discovered to see what has and has not been discovered. That's the process, your Honour, and it will take time.

HIS HONOUR: Yes, thank you.

1212 When cross-examined, Alex Elliott initially could not recall being told about this discussion in court nor giving instructions to his solicitors or counsel on the work involved in discovery, but then conceded he 'may have' told his solicitor that it was going to take a lot of time and eventually conceded that he did recall being told about the 'concept' of what his counsel submitted in court.

1213 I dismissed Alex Elliott's stay application,[117] and further directed that he file an affidavit deposing to a full and frank explanation of the circumstances pertaining to his involvement in the application before Croft J for approval of the settlement, Mrs Botsman's appeal against the approval, and the subsequent remitter.

1214 On 16 September 2020, by consent, I ordered Alex Elliott to discover documents in ten categories

directed at his communications concerning counsel's fees, Trimbos's reports, Mrs Botsman's appeal and the remitter. The order was qualified to remove the obligation to discover any document that had been discovered previously by AFP. The following categories were relevant to later developments:

(a) all documents within the scope of the court's discovery orders dated 1 February 2019, 1 March 2019, 20 December 2019, 24 April 2020 and 30 June 2020;

...

(i) all documents which record or evidence communications between Alex Elliott and any officer or agent of AFP (including its legal representatives) in relation to the admissions to be made by AFP in response to allegations made in the various 3 iterations of the Contradictor's Revised List of Issues filed in the proceeding, from 1 June 2020 to 14 July 2020; and

(j) all documents which record or evidence communications between Alex Elliott and any officer or agent of AFP in relation to the trial of this proceeding, from 27 July 2020 to 20 August 2020.

1215 On 21 September 2020, Trimbos filed an affidavit setting out his conduct with respect to the Bolitho proceeding and the remitter, and provided context to his five reports. Trimbos's affidavit was tendered, without objection, following his death.

1216 On 1 October 2020, Alex Elliott produced a list of 146 documents to ABL in response to the 16 September 2020 discovery orders.

1217 On 2 October 2020, the Court of Appeal dismissed Alex Elliott's application for a stay of the proceedings and his application for leave to appeal the recusal decision.[118] The Court set aside the order compelling Alex Elliott to file a full and frank affidavit of his involvement in the Bolitho proceeding, on the basis that it would not allow Alex Elliott to claim the privilege against self-incrimination if desired.[119] The Court of Appeal noted that Alex Elliott remained subject to a practitioner's obligation of candour.[120]

1218 Alex Elliott then declined to substantively identify his position on any of the allegations made against him, by filing an affidavit or outlining his evidence, until after the Contradictor opened the case against him. I granted his application that his evidence be given orally and in person over several days.

1219 That evening, in response to a separate discovery request the Contradictor made of AFP that week, ABL wrote to Corrs stating:

We will seek instructions to provide the discovery sought in your letter by the end of next week, and will let you know once we receive those instructions.

In relation to the production of our client's discovered documents, we note that paragraph 121 of the Court of Appeal's reasons delivered today indicates that it is intended to offer Mr Alex Elliott an opportunity to claim the privilege against self-incrimination in connection with the discovery process. As such, it may be that Mr Elliott is entitled to, and will seek, an opportunity to review our client's discovery before it is produced to the contradictor.

We have copied Mr Elliott's solicitors to this email so that they can seek instructions about this matter.

1220 I make two observations about this email:

> (a) There was no basis for ABL to contend that Alex Elliott may have had a right to object to AFP's discovery. The privilege against self-incrimination is a personal right and does not provide a basis to object to discovery being made by a third party.[121] The Court of Appeal's reasons

made no reference to the asserted entitlement.

(b) Why ABL thought it appropriate to raise this issue was unclear. Its client was AFP, who had no care for any claim for privilege against self-incrimination that might be made by Alex Elliott. It is difficult to imagine how AFP's interests in minimising costs by ensuring the prompt determination of the remitter were served by its advisors raising this theoretical roadblock.

1221 Alex Elliott did not make discovery as required by the 16 September 2020 order, causing Corrs to request of Alex Elliott's solicitors, Garland Hawthorn Brahe ('**GHB**'), production of his list of documents. On 7 October 2020, after failing to respond to those requests, GHB raised, for the first time, and despite having consented to the 16 September 2020 order, an objection to giving discovery in respect of those orders, including producing the list of documents Alex Elliott had already provided to ABL, on the basis of an entitlement to the privileges against self-incrimination and exposure to a penalty.

1222 On 8 October 2020, the Contradictor served a subpoena on Elliott Legal seeking the production of the same categories of documents as specified in the discovery order of 16 September 2020. There were lengthy delays in complying with that subpoena.

1223 On 12 October 2020, Alex Elliott filed an application that he be excused from production of discovery categories (i) and (j) of the 16 September 2020 order on the basis of an entitlement to the privileges earlier referred to. Daly AsJ heard the application on 15 October 2020.

1224 On 21 October 2020, at a case management conference, I ordered that:

(a) by 22 October 2020, Elliott Legal comply with the subpoena by making production of the documents to the Prothonotary and AFP's solicitors; and

(b) by 26 October 2020, AFP notify the Contradictor of any documents over which it made a claim for privilege.

1225 That evening, GHB (who also acted for Elliott Legal) wrote to Corrs seeking to clarify the scope of the subpoena:

[Elliott Legal's] response to the subpoena to date has been predicated on its natural reading of the subpoena, including communicating with Mr Brendan McCreesh, the IT expert previously retained in the proceeding, and with Arnold Bloch Leibler regarding efficient methods of access to and review of responsive documents.

1226 On 26 October 2020, AFP informed the Contradictor that it objected to inspection of all of the documents produced on subpoena by Elliott Legal on the basis of a claim for client legal privilege. AFP produced a list of those documents, comprising of 196 documents, most of which were email communications involving a combination of AFP's directors, Alex Elliott and ABL. It was accepted that the documents produced by Elliott Legal on subpoena were the same documents that were the subject of Alex Elliott's application before Daly AsJ.

1227 On 27 October 2020, the Revised List of Issues was further revised, for the final time. The revisions added particulars of disentitling conduct and breach by Alex Elliott and Trimbos of their overarching obligations under the *Civil Procedure Act*.

1228 On the same day, Daly AsJ dismissed Alex Elliott's application to be excused from compliance with the 16 September 2020 discovery order.[122] Her Honour noted that Alex Elliott had failed to appeal the order when he appealed my recusal decision, despite having filed an amended notice of appeal on 18 September

2020 that squarely raised issues about privilege against self-incrimination and penalty privilege, the very arguments he was seeking to advance in the excusal from discovery application. Alex Elliott's reasons for that failure were dismissed as unpersuasive.

1229 Daly AsJ observed:

A further explanation proffered on behalf of Alex Elliott is that his legal team were endeavouring to be helpful and cooperative in agreeing to orders for discovery on 16 September 2020. Again, such an explanation carries with it the implication that Alex Elliott always intended to take an *in limine* objection to giving discovery, but did not do so at the time so as not to be perceived to be unhelpful and uncooperative. Again, such an explanation is not supported by the chronology of events, but if indeed Alex Elliott's objectives were to facilitate the expeditious and efficient conduct of the remitter proceeding, then those objectives have not been achieved. If the objection had been taken at that point (on 15 September 2020), the argument could have been had on that day, or shortly thereafter, and if the outcome of the argument had been decided adversely to Alex Elliott, the issue could have been dealt with by the Court of Appeal in the hearing on 23 September 2020, and in its reasons of 2 October 2020. Now that the point has been taken late, more time and money has been spent, the trial has been delayed further, and may well be delayed further by further interlocutory appeals.[123]

1230 At Alex Elliott's request, Daly AsJ stayed the order requiring him to provide his list of documents until 4:00pm on 30 October 2020, to permit him to consider an appeal. Alex Elliott did not appeal the order.

1231 On 30 October 2020, the Contradictor opened its case against Alex Elliott. At 5:00pm, Alex Elliott delivered his list of documents, resulting in the Contradictor only receiving it after commencing to open their case against him.

Alex Elliott's case

The proper scope of the Contradictor's allegations

1232 Before turning to the final stage of evidence in the remitter, in final submissions, Alex Elliott strongly submitted that the allegation that he was knowingly complicit in Mark Elliott's targeted destruction of documents was not an issue raised in the Revised List of Issues, and should not be the subject of findings in the remitter.

1233 While it is true that the Revised List of Issues did not expressly make that allegation, it catalogued the specific ways in which Alex Elliott was complicit in AFP's conduct, including express allegations that Alex Elliott contravened the overarching obligations to act honestly.[124] The manner in which the specific issue of complicity in document destruction developed at trial was a consequence of the manner in which Alex Elliott conducted his defence. I permitted Alex Elliott to decline to disclose what evidence he would give or how he would otherwise answer the case the Contradictor put against him until the Contradictor closed its case. The time to object that an allegation of knowingly complicity in Mark Elliott's targeted destruction of documents could not be fairly pursued was when the Contradictor closed its case.

1234 Apart from incorrectly suggesting in his final submission that document destruction was not alleged against Alex Elliott by the Contradictor in opening, he also asserted that it was never put to him in cross-examination. I reject both contentions and will come to the second of them shortly.

1235 Alex Elliott's failings in relation to discovery, both on behalf of AFP and on his own account, were clearly raised. Alex Elliott was put on notice that the Contradictor sought an explanation of AFP's document destruction in opening. After taking the court to conferrals between ABL and Alex Elliott in the days leading up

to the 11 February 2020 letter that outlined the document destruction practice, and the absence of any explanation from Alex Elliott about his father's knowledge of those matters in AFP's subsequent affidavits of discovery, the Contradictor stated:

We look forward to him providing this court with his understanding about what happened in relation to document destruction.

1236 I was left in no doubt, and neither was Alex Elliott, that the Contradictor specifically opened the case on the basis that the court would be asked to infer that AFP and its agents did not believe in the veracity of the account provided by Mark Elliott, through his solicitors, with respect to his purported practice of routinely deleting emails. Alex Elliott heard what the case against him was from a comprehensive opening from the Contradictor before he responded in any way. Further, given that Alex Elliott's position in final submissions was that he was 'an agent' of AFP, he was in no doubt that his complicity in the targeted destruction of documents was an issue on which his candid explanation was being sought. The Contradictor's allegation that Alex Elliott either acquiesced in, or at the very least knew about, the deliberate destruction of evidence by Mark Elliott by no later than February 2020, was a topic that was thoroughly explored during his case.

1237 Alex Elliott also submitted that in four days of cross-examination at no point did the Contradictor put to him that he was knowingly complicit in a fraud. These submissions were misconceived. It is pertinent to quote from Alex Elliott's cross-examination:

COUNSEL: AFPL had never before this letter told the Contradictor about a document destruction practice that your father had, had they?---Not that I was aware of, no...

AFPL had made discovery on previous occasions, had it not?---Yes.

And do you know why we hadn't been informed of the practice on those previous occasions?---No...

And did your father say to you, 'Given that we've only got 197 documents to discover, we're going to have to come up with a story to tell the Contradictor why we haven't got nearly as many documents as O'Bryan and Symons'?---No, he didn't describe it that way.

How did he describe it?---I can't recall him describing it that way...

Did you and your father have a conversation where your father said to you, 'I'm concerned about the discovery that O'Bryan and Symons are making which is going to make our discovery look odd'? ... Or something like that?---No, I don't recall that conversation.

Odd because the number of documents you were going to discover were substantially less than the number of documents O'Bryan and Symons were going to discover?---I just don't recall that conversation...

I asked you how do you explain the discrepancy between the volume of documents you were able to provide in Murray Goulburn to Mr White and the small number of documents AFP was able to provide in February of this year, and you said, 'I can't explain that'. I said would you think it's explainable by the fact that your father had a document destruction practice?---It's a reason why there wasn't as many documents discovered, yeah.

And I put it to you that that document destruction practice only existed in the Banksia matter?---I don't know.

Have you searched the other files that your father maintained to see whether this document destruction practice was carried through into those other files?---I'm not - no.

Thank you. I put it to you that your father told you he was going to destroy his emails in this case because he wanted to put an end to the requests we were making for discovery?

Alex Elliott's counsel took objection at this point but the objection taken was not the argument put in final submissions; that the cross-examination went to an issue that was irrelevant having regard to the Revised List

of Issues. Rather the objection was that the Contradictor could not put what Mark Elliott said to Alex Elliott. In the course of debating the objection, the Contradictor said:

The problem, as I've said all along, is I don't have a client in the normal puttage sense. I can only gather what I can gather from the documents I'm given and try and piece together what in fact happened. What we're confronted with on 11 February is a document destruction practice and then, what it seems to us, appears in the Webster case is that that practice isn't followed through to that case and there are a vast number of documents available. So I'm trying to explore with the witness ...

1238 As I noted earlier there was sufficient notice of the issue before Alex Elliott opened his case, and in cross-examination the Contradictor was giving him the opportunity to address the issue until his counsel objected.[125] Further, this issue unfolded in the context of Alex Elliott's inexcusable failure to provide discovery when ordered to do so, which is a form of suppression of evidence. Alex Elliott admitted that he never properly searched for documents, and I was satisfied that Alex Elliott well understood what needed to be done. I also reject the assertion that this failure was explicable by reference to health considerations.

1239 That being the case, closing submissions was not the time to complain that there was procedural unfairness in this issue being considered by the court. In a proceeding of this sort, the response would not have been to amend the Revised List of Issues. Rather, it would have been to understand how Alex Elliott asserted prejudice by that issue being explored, and what steps (whether by way of adjournment, further particulars, or some other process) might properly alleviate any identified prejudice. Not having distinctly taken the point during evidence, Alex Elliott relied on the Revised List of Issues in final submissions, but by that time the evidence was admitted and capable of supporting findings in the judgment.

Failure to make proper discovery

1240 Turning back to the chronology, on the evening of 24 November 2020, the day before his case was due to commence, Alex Elliott discovered and produced a tranche of late discovery, which included a number of highly significant documents, including internal emails between him and his father in 2018 in the context of Mrs Botsman's appeal. These documents had not previously been discovered by any party. On the resumption of the trial the next day, Alex Elliott conceded, through his counsel, that he had not properly undertaken searches in accordance with the 16 September 2020 discovery order. I stood the trial down to allow the further discovery to be considered, and for further searches to occur.

1241 The Contradictor pressed Alex Elliott to provide an affidavit identifying the matters contemplated in r 29.04(1)(c) of the Rules, including what steps he undertook (prior to and since his joinder) to ensure that AFP provided proper discovery, distinguishing those documents which are in his possession from those no longer in his possession, and to explain when he parted with those documents and his belief as to what became of them. He refused, by his solicitors, to provide any such affidavit.

1242 The following day, I was informed that Alex Elliott produced further discovery late the previous evening, and I adjourned the proceeding until later that afternoon.

1243 When trial resumed, Alex Elliott informed the court that he had made efforts at some parts of the discovery order against him, but had not searched for 'all documents within the scope of the court's earlier discovery orders' as required by the 16 September 2020 discovery order.

1244 On 3 December 2020, just prior to completing his evidence in chief, Alex Elliott unexpectedly proffered an affidavit purporting to explain his approach to discovery. This was surprising, given he had refused to file any affidavit of discovery when pressed to do so by the Contradictor in the preceding days. Alex Elliott claimed that he was not consulted about the Contradictor's request for an affidavit of discovery and did not

provide instructions for the letter refusing the request. In the absence of confirmation from his solicitor that he acted without instructions, I reject this evidence. It was untruthful.

1245 Alex Elliott stated in his affidavit that:

> (a) prior to his death, his father had undertaken all searches in relation to the discovery orders, including on his computer. Because he was an experienced lawyer, and was being assisted by ABL, he thought that the search of his computer and email account was comprehensive and done correctly.
>
> (b) his approach to the 16 September 2020 orders was that discovery had already been made in the proceeding, including searches of his accounts, together with the discovery made by the other Lawyer Parties, which meant that there would not be any further documents to be found in six of the categories ordered;
>
> (c) he did not undertake searches of these categories at all, because he understood the inclusion in the order of the words 'to the extent that it had not already been discovered' to mean that those categories were qualified entirely; and
>
> (d) after realising that there 'may be some additional emails' which he recalled that had not been discovered, he conducted searches of his emails, and that he continued searching for the categories he had previously ignored, save for category (a).

1246 The affidavit was provided to the Contradictor at 1:00 pm on 3 December 2020, immediately before Alex Elliott's cross-examination was due to commence. This caused another adjournment of the trial.

1247 In cross-examination about his involvement in discovery, Alex Elliott stated that:

> (a) in respect of his decision not to review categories that had been previously ordered to be discovered by AFP, he thought he had 'a reasonable expectation that they'd been produced' and that's what he 'ran with at the time';
>
> (b) at the time of conducting the searches for discovery, his concentration was adversely affected because he felt 'greatly saddened' by the death of Trimbos, 'particularly given that Mr Trimbos had been added as a party at the same time as me';
>
> (c) he did not know on 21 April 2020 that the Contradictor had sought confirmation from ABL that AFP had secured all of his documents and communications for the purposes of discovery, nor could he recall ABL drawing that request to his attention in preparing a response;
>
> (d) when asked whether he read ABL's reply to Corrs on 22 April 2020, Alex Elliott stated that he could not recall seeing it, but conceded that he may have read the letter before and as it was sent, because ABL's usual practice was to copy him into drafts and final versions of letters;
>
> (e) he recalled the reference to '30,000-odd documents' that Forensic IT extracted from Mark Elliott's devices, as this was why he did not think it necessary to do a wholesale review of what was on his computer:
>
> > I just recall thinking at the time that Forensic IT had recovered 30 or 40,000 documents and all the other Lawyer Parties were subject to

> the same discovery and I expected that everything would be, I guess, captured.

(f) he was aware that the Forensic IT searches were only conducted on his father's computers and accounts, which did not include his personal computer;

(g) he did not realise in late April 2020 that Forensic IT could not recover any documents that had been permanently deleted by Mark Elliott;

(h) he agreed that he was the only person at AFP/Elliott Legal with knowledge about what was on his computer, and that any email communications between him and his father on his computer that could not be recovered from any other devices would have been relevant and discoverable;

(i) despite not knowing what searches his father had undertaken of his computer, he was not prompted by the 21 and 22 April 2020 letters, or any of my orders for discovery that followed, to go back and check himself from his computer whether his father's searches had been comprehensive; and

(j) although he never provided his computer to ABL for them to undertake their own searches of his emails, he said that he had formed and maintained the view that all his emails had been discovered because of ABL 'putting, I guess, their – I don't know, their services over it, over the documents and deciding what's relevant and what's not relevant'.

1248 For reasons that I will now explain, I reject Alex Elliott's evidence that he believed his father had undertaken thorough and complete searches of his computer, such that he did not have to separately review it for the discovery he was subsequently ordered to make. It was not, in the circumstances revealed on the whole of the evidence, a credible proposition. Neither was Alex Elliott a credible witness, having regard to his demeanour and cross-referencing to contemporaneous documents that had not been destroyed by others.

1249 First, Alex Elliott's explanation of his failure to independently search his devices for relevant documents was unsatisfactory. His contention that he trusted his father, together with ABL, to appropriately discharge AFP's discovery obligations sits implausibly with his evidence that he only became aware of Mark Elliott's 'long standing and invariable practice' of destroying his emails shortly before his death. Further, his evidence about becoming aware of this practice and allowing his father to take control of his computer in February 2020 was evasive and the subject of two different accounts of what had occurred, neither of which were credible. His evidence was disingenuous, and invoking the death of Trimbos was irrelevant to his approach to discovery.

1250 Second, I do not accept Alex Elliott's evidence that he thought all relevant documents were recovered from Mark Elliott's devices by Forensic IT or had been already discovered by the Lawyer Parties, because:

(a) the most probable inference was that ABL informed Alex Elliott of the results of the Forensic IT process, given the timing of the court's orders in that regard, and Alex Elliott's interest and ongoing role in the litigation following his father's death;

(b) if Forensic IT had been able to recover deleted documents from Mark Elliott's devices, it would have been unnecessary for Alex Elliott to search for such documents. As earlier found, Alex Elliott needed to search through multiple computers to find communications with his father relating to the Banksia Expenses Spreadsheet, because those communications had not been

recovered from his father's email account by Forensic IT;

(c) the fact that Forensic IT had identified more than 30,000 documents on Mark Elliott's devices did not support the thesis that it had recovered deleted items. Rather, it supported a thesis that Mark Elliott had only destroyed documents relating the Bolitho proceeding, which Corrs expressly posited in its 21 April 2020 letter;

(d) the fact that GHB conferred with ABL and Forensic IT in October 2020 about discovery and the extraction of emails from Alex Elliott's devices underscores the improbability that Alex Elliott, when giving evidence, had any misconception about what Forensic IT had been able to recover from Mark Elliott's devices; and

(e) Alex Elliott knew that private emails exchanged only between himself and his father would not be discovered by the Lawyer Parties.

1251 Third, as a practising solicitor, Alex Elliott could not credibly conclude that an order requiring him to make discovery could be ignored, simply because a different person had been ordered to produce the same category of documents some nine months earlier. It was clear on the face of the order that the Contradictor was pressing the issue of discovery of his emails. No legal practitioner in Alex Elliott's position could reasonably think it sufficient to rely upon an unverified belief in the adequacy of his father's searches undertaken a short time before his death in a case primarily concerned with his father's serious misconduct.

1252 Finally, the most probable inference, as I earlier concluded, is that Alex Elliott knew his father had deleted all the relevant emails relating to the Bolitho proceeding from both of their computers. I can readily infer that both AFP's solicitors and Alex Elliott's solicitors were supervising the discovery process, as the court would ordinarily expect. There was no evidence to the contrary, and, in any event Alex Elliott is a solicitor. The fact that Alex Elliott never properly searched for documents is consistent with a definitive belief that all such documents had been erased. If Alex Elliott did not know that his father had deleted documents from his computer, or was uncertain as to what his father had or had not deleted, it is probable that he would have reviewed his own emails against the discovery orders.

1253 The Contradictor submitted that Alex Elliott's explanations as to why he did not revisit the documents on his computer were weak, and were given as part of his defence that he was just a personal assistant, a bystander, to maintain plausible deniability about the damaging facts of which he was well aware. I am satisfied that by February 2020, the Lawyer Parties had discovered documents evidencing the very serious misconduct alleged by the Contradictor. AFP had not discovered its own copies because Mark Elliott had destroyed them. Alex Elliott did not believe his father's searches of his computer were properly done, as he asserted in his evidence. He did not revisit the documents on his computer, because he knew or believed that Mark Elliott had deleted the documents.

1254 Alex Elliott had reason to ignore previous discovery orders, particularly about the documents on his computer. He hoped to avoid having to disclose to ABL what he knew about the deletion of emails from his own computer and email account, and he wanted to avoid having to discover any relevant emails that might remain on his computer, which might draw greater attention to him and his role.

1255 Alex Elliott's approach to discovery in this proceeding, both as a litigant and as an officer of the court, cannot be accepted. To this day, he has never searched for the category (a) documents or explained his failure to do so, and has not disclosed the matters required to be addressed by r 29.04(1)(c).

1256 I have already found that Alex Elliott's asserted belief, at or shortly before the time of his father's death, that he and his father had approached discovery comprehensively and correctly was implausible. I am further satisfied that Alex Elliott's conduct in the remitter — maintaining this asserted belief during the period following his father's death and throughout the trial — was inconsistent with his evidence.

1257 Additionally, on the basis of the findings I have already made, and having regard to all of the circumstances, I am also satisfied that Alex Elliott's late discovery of 2018 emails revealing his role in Mrs Botsman's appeal gave rise to a reasonable inference that Alex Elliott was involved, in a similar professional legal capacity, at least as early as the Trust Co Settlement, the instructions for Third Trimbos Report, and the preparation for the first approval application.

Evidence from O'Bryan

1258 On 2 November 2020, Alex Elliott's counsel described his defence to be:

[G]iven the people whom he was being mentored by, given his youth and inexperience, given his relationships with his father, a fierce litigator on the evidence presented in this court, and Mr Norman O'Bryan, who until recently was a very highly regarded leader of this Bar ... he may not have understood ... that there was something wrong going on.

1259 On 18 November 2020, Alex Elliott gave notice to the Contradictor he would tender the affidavits of O'Bryan dated 7 April and 16 June 2020, both of which O'Bryan had abandoned, and the affidavits of Symons dated 20 May, 7 July and 26 July 2020, which Symons had likewise resiled from. Alex Elliott also stated his intention to call O'Bryan, whom he had subpoenaed.

1260 I refused the tender of the O'Bryan and Symons affidavits. I directed Alex Elliott to notify the parties and the Contradictor of the topics on which he sought to examine O'Bryan, and the identity and sequence of his witnesses. In response, Alex Elliott proffered a brief and unhelpful list of bullet points in pretended compliance with my direction. It appeared that much of the evidence that Alex Elliott sought to lead could substantially reopen the case that O'Bryan had conceded. O'Bryan, although answering a subpoena, was not an unwilling witness. Senior counsel for Alex Elliott conferred with him on 5 November 2020, prior to serving the subpoena. O'Bryan was a close friend of Mark Elliott.

1261 On 27 November 2020, I ruled that limited evidence could be led from O'Bryan in support of Alex Elliott's defence, and confined the use that could be made of that evidence.[126] I limited the issues on which O'Bryan might give evidence by excluding all evidence relevant to any issue affecting O'Bryan in the Revised List of Issues that he had elected not to contest. I directed that any of O'Bryan's evidence relevant to any issue affecting him in his capacity as the second defendant, that was part of the excluded evidence, would not be admitted. In effect, only O'Bryan's evidence that was relevant to the allegations against Alex Elliott in the Revised List of Issues, and cross-examination as to credit, would be admissible.

1262 O'Bryan recalled that Alex Elliott attended numerous conferences in his chambers, which he said were recorded in his monthly fee summaries. Cross-examined, he agreed that the subject matter of those conferences as set out in his fee summaries related to legal issues, contrary to Alex Elliott's case that he was not a member of the 'legal team'.

1263 When the trial resumed the following day, I suggested to Alex Elliott's senior counsel that O'Bryan's fee summaries might not be reliable (as I have found to be the case). Counsel embraced this suggestion. There seemed little point in calling O'Bryan, a witness whose credibility was profoundly destroyed by his conduct that he declined to explain. So much was plain by this stage of the proceeding. In the end, I struggled to see any sound forensic purpose in this exercise, which caused significant delay and cost for all parties.

1264 That said, and possibly contrary to Alex Elliott's forensic strategy, I am satisfied that Alex Elliott did attend conferences in O'Bryan's chambers and did participate at some level in discussing legal issues. Alex Elliott had an independent recollection of some conferences and confirmed that it was his 'usual practice' to have a conference at Dawson Chambers before and/or after all directions hearings in the matter.

Alex Elliott's evidence

1265 At trial, Alex Elliott denied acting in a professional legal capacity in connection with the Banksia litigation. He adopted the description of his role advanced in correspondence from ABL in April 2019, which asserted that he acted as a 'personal assistant' to AFP. He recalled the phrase 'personal assistant' being used and regarded it as 'a proper description'. He sought to characterise his role as 'administrative' and as an 'errand boy'. It was his case that he did not provide any substantive legal input in connection with the litigation. For reasons I have already expressed, I rejected this evidence.

1266 As the Contradictor submitted, Alex Elliott's evasiveness was illustrated by his inability to recall events in issue that had occurred quite recently and in which he was actively involved. For instance:

(a) he was firm in his recollection that he left the Court of Appeal on 8 June 2018 before Mr Redwood's submissions — presumably thinking it helpful to his case that he was not in court for those submissions — yet he claimed he could not recall other events in that period, including his conversations with his father about his unusual request to draw cheques. I am satisfied that he was troubled by the cheque incident, having described it making him feel 'uneasy' and recalled it in detail;

(b) when asked about two conferences documented in O'Bryan's fee slips which stated that Alex Elliott attended along with Mr Redwood and Mr Kingston, Alex Elliott stated he did not have any recollection. Alex Elliott could not recall all of those conferences when giving evidence, leading to a submission that Alex Elliott was suffering from concentration difficulties, and seeking an adjournment of the trial. Alex Elliott appeared to take this lead and responded: 'I'm quite clouded at the moment ... I'm sort of struggling to concentrate'. Alex Elliott stated that he had never met Mr Redwood and did not believe he had ever met Mr Kingston, but some of the conferences recorded in the fee slips involved their attendance;

(c) he was evasive when asked about his knowledge of O'Bryan's fee arrangements, offering oblique responses such as 'I'd never really discussed it with dad', 'I just didn't deal with that side of the business', which avoided the question. I reject this denial. I set out earlier the process, including the use of the spreadsheet, in which Alex Elliott was involved;

(d) he initially denied in cross-examination that he saw a letter dated 11 February 2020 from ABL to Corrs (describing the document destruction practice) before it was sent, but later gave different evidence, as discussed earlier, after draft versions of the letter were provided to the Contradictor in response to a notice to produce;

(e) he refused to make obvious concessions, even in the face of incontrovertible documentary evidence. For example:

(i) he refused to concede that an email which he sent to his father entitled 'my thoughts' was in fact an email setting out his thoughts; and

(ii) he denied that independently searching for and locating an authority relating to

a decision in a recent security for costs application before the Court of Appeal, in the period leading up to Mrs Botsman's appeal hearing, constituted 'legal research'; and

(iii) he refused to concede that his father valued his opinion, despite being shown an email sent to him by Mark Elliott attaching counsel's submissions with the question 'What do you think of them?'; and

(f) the metamorphosis of Alex Elliott from a 'personal assistant' into a solicitor in early 2018 is artificial, implausible, and inconsistent with objective facts, because it was a false construct in the first instance. Even on his own case, the work he performed was legal work.

1267 Only in re-examination, following eight days of his evidence, and after being afforded the opportunity to consult with his senior counsel before re-examination commenced, did Alex Elliott accept that the request from his father to issue sham cheques to counsel amounted to a deception or misleading of the court. However, his concession was half-hearted and failed to properly appreciate the gravity of the conduct that he had been involved in:

COUNSEL: Do you now accept that what was being suggested here involved a deception or misleading of the court?---Yes, I do.

Do you accept that in June 2018 if you had looked at things critically, that you had enough information available to you to identify or at least have a query about whether there was a deception occurring?---Yes. Yes, I do.

Can I ask you how you feel now about having been drawn into that deception?---I don't know. I don't know.

The final question I want to ask you, Alex, is if you had at that time, or at any other time thereafter, put two and two together and identified or at least had concerns that there was deception and misleading conduct occurring, what could you or would you have done?---It's a really hard question.

HIS HONOUR: Think about it. There's two different questions I think. What could you have done and then you can answer what would you have done.

COUNSEL: Thank you, Your Honour?---I'm not sure I could have done anything or influenced the outcome. I should, I would have gone and probably sought advice from a lawyer who was a family friend of mine and asked what I'm supposed to do, you know, should I remove myself from the situation, you know, should I try and do something else? But it's an incredibly difficult situation to be in and I would have had to have sought advice on it I think, Your Honour, as to what I could actually do.

1268 This was, considered in isolation, a good answer. Seeking the counsel of a senior practitioner for advice about responding to an ethical problem is an appropriate response. However, he only gave that response to the court at the death knock after months of denial of fault and vigorous contest of each and every issue, as is described throughout these reasons, which conduct was inconsistent with any degree of insight on his part. This context persuaded me that Alex Elliott saw the light shortly prior to his re-examination and after his attempts at exculpation had failed. Evidently, he did not actually seek such guidance at the time.

1269 Apart from the mentoring proposal, as the Contradictor submitted, this rest of the answer was disturbing. It can never be a hard question for a legal practitioner to answer what they would have done if they had identified a deception perpetrated, or to be perpetrated, on the court. No legal practitioner should ever involve themselves in attempting to deceive the court. There are no complexities to that proposition. The duty to further the administration of justice is paramount. A duty or obligation to a co-offender, whether family or otherwise, is not.

1270 Alex Elliott's concession that he could have acted differently, made at the invitation of his counsel during re-examination, confirmed the view that I had already formed that much of his evidence was dissembling, reconstructive and infected with a glaze of apparent memory loss that provided cover to which he conveniently, and regularly, retreated. There were many things that Alex Elliott could have done differently but he chose to be part of the team. He was complicit. His duty to the court required that he did not assist in the dishonourable and improper conduct of his father, O'Bryan and Symons. The incident with the cheques is a clear example that demonstrates to my satisfaction that Alex Elliott had identified that a deception was being perpetrated upon the court. The fact that he made no apology for his conduct was significant.

13. THE DEFENDANTS' CONTENTIONS

1271 As well as oral submissions, the court received more than 1,000 pages of submissions from the Contradictor and the parties, other than O'Bryan and Symons.

1272 It is not necessary to burden these reasons with a precis of the submissions made by the Contradictor or the SPR. Where relevant, I identify their various submissions in context throughout these reasons. Likewise, as recorded elsewhere, AFP amended its claim substantially as the remitter progressed and addressed its final submissions to the limited issues of appropriate orders as to compensation and costs. Its submissions are noted in section Q.

1273 The remaining defendants, Zita, Trimbos and Alex Elliott, having given evidence contested that findings of breaches of the paramount duty, overarching obligations and fiduciary duties should be made against them. I will now set out a brief precis of each of their submissions, which have otherwise been identified in greater detail in context.

M.1. Zita

1274 Zita contended that on a proper analysis of the facts in respect of each material allegation of contravening conduct (which he addressed in detail in his final submissions), he was either not in contravention of the overarching obligations, or did not make any material contribution to the losses claimed. Zita may have been careless, but he was not dishonest, and must be judged by reference to the facts which Zita knew or ought reasonably to have known. In many instances, Zita submitted that he did not engage with the relevant conduct in any meaningful way. He could not be held accountable for any loss, or alternatively, for the whole of it.

1275 Allegations of breach of the paramount duty were generally met with the submission that the Contradictor had not identified conduct that was contrary to furthering the administration of justice. Zita's failures, he claimed, did not rise so high as to breach the paramount duty.

1276 In respect of the allegations of breach of the overarching obligation to act honestly, particularly in respect of his conduct concerning the proposed settlement distribution scheme, Zita generally submitted that the allegations were too broad and insufficiently particularised to be relied on when making findings of fraud or dishonesty. It was not open to find that Zita was wilfully blind or dishonest.[127] In other instances, Zita was himself deceived by Mark Elliott, O'Bryan and Symons. In respect of Trimbos, Zita contended that he did no more than carelessly file a misleading report, without appreciating that to be the case.

1277 Zita contended that it was not alleged that he had engaged in significant breaches of fiduciary duty. Zita admitted he ought to have appreciated there was a conflict of interest between AFP and the group members, but maintained that his failure to appreciate and appropriately address conflicts was in error, and was mitigated in the circumstances.

1278 Zita submitted that he did not contravene the overarching obligations or paramount duty. Even if there was such a finding, an order pursuant to s 29 of the *Civil Procedure Act* does not follow automatically. The court has a discretion as to whether to make such an order. If Zita were found to have contravened the overarching obligations or paramount duty, the court ought not exercise its discretion against him. The submission that I exercise my discretion in favour of Zita, in general, turned on Zita's reliance on others, such as counsel, Mr Crow and Trimbos, and the relatively small role Zita played in any particular contravention, when compared to the culpability of the other contraveners.

1279 While the overarching obligations are likely non-delegable, Zita claimed that O'Bryan and Symons' advice and direction to him was a relevant factor when considering whether an obligation had been breached. If breached, it was also a relevant discretionary consideration when determining whether to make any order and, if so, in what form.

1280 Further considerations Zita contended to be relevant in the court's exercise of discretion included:

> (a) the financial impact of any orders on the practice of Portfolio Law;
>
> (b) the likely reputational damage that has been suffered as a consequence of the remitter; and
>
> (c) the probable intervention by, and prospect of direct sanctions from, professional regulatory bodies;

although I pause to note these considerations were neither the subject of evidence nor of specific submission.

1281 To the extent that he is found to have breached overarching obligations, Zita contended that his conduct did not cause the loss for which the Contradictor sought compensation. If Zita had acted entirely properly and in compliance with his overarching obligations, it is likely that the debenture holders would still be in the same position because of the conduct of the other Lawyer Parties, some of whose conduct was dishonest.

1282 The Contradictor, Zita said, was in the position of a plaintiff making a claim for loss and damage and must prove that claim. Zita submitted that the assessment of any compensation to be awarded should not include interest calculated at the penalty interest rate. Further, it should take account of a counterfactual that included:

> (a) the reasonable costs and commission that debenture holders would have incurred, absent contravening conduct; and
>
> (b) the fact that Mrs Botsman would have appealed the approval of the Trust Co Settlement in any event.

1283 Zita also submitted that the court must apportion loss and damage between the defendants, pursuant to the proportionate liability regime under pt IVAA of the *Wrongs Act 1958* (Vic) or otherwise in the court's discretion.

1284 Finally, as to costs, Zita submitted that:

> (a) the court should limit his liability for the costs of the remitter to only those costs occasioned by his conduct, and not impose liability for costs caused by the conduct of other contraveners; and

(b) the costs of the Contradictor and the SPR should be assessed by the Costs Court.

M.2. Alex Elliott

1285 Alex Elliott contended that he was not subject to the overarching obligations by force of s 10 of the *Civil Procedure Act*. He was not an employee of AFP. He never acted as an in-house solicitor for AFP or as a solicitor for Mr Bolitho and group members. He was merely 'a person who happened to be a solicitor', but his work in connection with the Bolitho proceeding was not legal work.

1286 Alex Elliott submitted that the court should be slow to find that the duty not to mislead or deceive had been contravened, absent evidence of any intention to do so. Although the statutory language applies an objective test that does not require proof of intention or knowledge, it is derived from the analogous provision in consumer protection legislation that is not construed as strict liability. A person is unlikely to have engaged in misleading or deceptive conduct where they merely pass on the impugned information, but they were not its source and they expressly or impliedly disclaimed any belief in its truth or falsity (they are a mere conduit).[128] Further, the requisite standard of proof meant that inaccurate statements capable of being attributed to mistake or exaggeration for the purpose of emphasising a point to the court, rather than intentionally misleading it, would fall into the same category.[129]

1287 Alex Elliott next contended that he had no power or right to approach the court to correct any deception, or to give instructions to counsel to do so. Nothing he did, or could have done, influenced the outcome. A legal practitioner cannot contravene an overarching obligation by some conduct or omission if there was no alternative course available in the circumstances. Further, the Contradictor did not identify what Alex Elliott should have done. While no lawyer should be an active, knowing and willing participant in practicing deception on a court, there is a mental element to the requirement to correct any misleading statement.

1288 Criticism of Alex Elliott's discovery in the remitter overlooked the extensive discovery made by AFP before his joinder. ABL, a first-class law firm, managed AFP's discovery with Mark Elliott prior to his death, and then with the directors of AFP. However, Alex Elliott accepted that his late discovery established that his earlier searches were inadequate, and that he caused wasted legal costs in this case that will fall at his feet.

1289 The Contradictor's failure to plead the claim that Alex Elliott was knowingly complicit in a criminal document destruction practice, or to put this to him, meant, he submitted, that the Contradictor should not be permitted to maintain these allegations, and the court should refrain from making any finding in respect of them.

1290 Alex Elliott contended he did not make any material contribution to many particular aspects of the losses claimed, and there was no evidence of any concrete step that he could have taken that would have prevented or reduced any loss suffered by the debenture holders. Any loss to debenture holders was far more connected to the failures of others to correct misleading statements made to the court, rather than to Alex Elliott's conduct. His degree of responsibility should be found to be extremely low. Accordingly, he submitted that he cannot be held accountable for that loss.

1291 As the nature of an order under s 29 of the *Civil Procedure Act* was compensatory in nature, debenture holders ought only to be awarded penalty interest in the remitter if they had such an entitlement in the primary group proceeding. As the Bolitho proceeding was compromised by the Trust Co Settlement, no such entitlement arose. The claim that debenture holders have suffered a loss by reason of being kept out of their money was therefore a '*Hungerfords* claim'[130] for interest, which was not proved.

1292 Liability is apportionable under the *Wrongs Act*. Even if liability is not apportionable, s 29(1) of the *Civil Procedure Act* empowers the court to make such orders as are appropriate, in the interests of the administration of justice. This extends to crafting an order that appropriately limits Alex Elliott's liability to reflect his peripheral contribution to any loss suffered by debenture holders.

1293 Finally, Alex Elliott submitted that the claim for legal costs should be dealt with in the usual jurisdiction to make orders as to costs, rather than s 29 of the *Civil Procedure Act*.

M.3. Trimbos

1294 Trimbos contended that he was a victim, deliberately misled by the fraudulent design of AFP, O'Bryan and Symons. He was not part of their criminal enterprise, nor was he a scoundrel or a rogue. He was an honest professional, and his name and reputation should not be sullied by unjustified aspersions.

1295 The primary defence relied on was that the proceeding abated upon Trimbos's death because there was no surviving cause of action against him. An order under s 29 of the *Civil Procedure Act* is not a cause of action, such that there was never a cause of action against Trimbos in the remitter. Alternatively, if that submission failed, he contended that the Contradictor did not prove that he contravened the paramount duty or the overarching obligation not to mislead or deceive by his conduct in the Bolitho proceeding.

1296 Trimbos maintained that there is a relevant conceptual distinction between conduct which is 'misleading or deceptive' and conduct which is 'likely to mislead or deceive'. In the absence of expert evidence opining on the process adopted by Trimbos in preparing his opinion, an adverse inference should be drawn against the Contradictor that no evidence demonstrated that his opinions were likely to mislead or deceive.

1297 The fraud of AFP and the Lawyer Parties unravelled the instructions to Trimbos regarding the Third Trimbos Report. It unravelled Trimbos's opinions and it unravelled the reliance by Croft J. Croft J did not rely on the Third Trimbos Report or was not misled by it, but rather the court was misled by the fraudulent assumed facts and documents.

1298 Trimbos submitted that the best evidence of whether the court was misled or deceived by the Third Trimbos Report would have been evidence from Croft J. Although the judge was not a compellable witness, Trimbos contended that his Honour was competent to give evidence in the remitter. In the absence of evidence from Croft J that his Honour relied on the opinions and was misled, Trimbos submitted that an adverse inference should be drawn against the Contradictor that there was no such reliance.

1299 For similar reasons, Trimbos contended that the allegation his conduct had continued to mislead or deceive until the Fifth Trimbos Report was filed had not been proved, and did not cause any loss.

1300 Alternatively if the court were to find that Trimbos contravened the *Civil Procedure Act*, Trimbos submitted that:

> (a) he did not materially contribute to any wasted legal costs, other costs or expenses, or any financial or other loss, as he was deliberately misled and had no control over the distribution of whatever amount of the settlement sum remained; and
>
> (b) the court should not, in the exercise its discretion, make any orders against Trimbos, as it would not be appropriate, in the interests of justice, having regard to the circumstances of the proceeding (including the conduct of the remitter) and the conduct of the other contraveners and when compared to Trimbos's own involvement.

1301 As to matters of the calculation of compensation:

> (a) the Contradictor was required, and failed, to prove the loss of each individual group member to succeed on a claim for penalty interest; and
>
> (b) the counterfactual must assume that absent contravening conduct, Mrs Botsman would have nonetheless appealed the approval decision.

1302 Finally, Trimbos submitted that the proportionate liability regime set out in Part IVAA of the *Wrongs Act* is not applicable. However, the court should apportion responsibility between contravening parties pursuant to s 29 of the *Civil Procedure Act* 'according to the principles applied to apportion responsibility for contributory fault in tort'.

14. LEGAL ISSUES REQUIRING RESOLUTION

N.1. Civil Procedure Act

Application

1303 Section 10 of the *Civil Procedure Act* provides that:

(1) The overarching obligations apply to—

(a) any person who is a party;

(b) any legal practitioner[131] or other representative acting for or on behalf of a party;

(c) any law practice[132] acting for or on behalf of a party;

(d) any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—

(i) an insurer;

(ii) a provider of funding or financial support, including any litigation funder.

(2) Subject to subsection (3), the overarching obligations do not apply to any witness in a civil proceeding.

(3) The overarching obligations (other than the overarching obligations specified in sections 18, 19, 22 and 26) apply to any expert witness in a civil proceeding.

1304 The Contradictor submitted that each of AFP, O'Bryan, Symons, Zita, Alex Elliott and Trimbos were subject to the overarching obligations imposed by the *Civil Procedure Act*. Leaving Alex Elliott to one side, this submission was not contested. O'Bryan, Symons, Zita and Portfolio Law were legal practitioners (and law practices) acting for or on behalf of a party, Mr Bolitho. Trimbos was an expert witness. AFP provided, or ostensibly provided, financial assistance to the plaintiff. Additionally, AFP by Mark Elliott exercised direct control and influence over the conduct of the civil proceeding and over the conduct of the plaintiff, Mr Bolitho, in respect of that civil proceeding.

1305 Alex Elliott's contentions are considered later in section O.1.

1306 Section 11 applies the overarching obligations to any aspect of a civil proceeding in a court:

The overarching obligations apply in respect of the conduct of any aspect of a civil proceeding in a court, including, but not limited to—

(a) any interlocutory application or interlocutory proceeding;

(b) any appeal from an order or a judgment in a civil proceeding;

(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

1307 Sections 12 and 13 establish the primacy of the overarching obligations:

12 Overarching obligations prevail over certain other obligations and duties

Subject to the paramount duty, the overarching obligations prevail over any legal obligation, contractual obligation or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.

13 Overarching obligations and legal practitioners

(1) The overarching obligations do not override any duty or obligation of a legal practitioner to a client, whether arising under the common law or by or under any statute or otherwise, to the extent that those duties and obligations and the overarching obligations can operate consistently.

(2) Despite subsection (1), a legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must comply with the overarching obligations despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.

The paramount duty

1308 Section 16 of the *Civil Procedure Act* provides:

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

(a) any interlocutory application or interlocutory proceeding;

(b) any appeal from an order or a judgment in a civil proceeding;

(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

1309 The concept of a lawyer owing a paramount duty to the court as one of its officers has existed for 800 years. The common law tradition of setting ethical standards for lawyers emerged simultaneously with the legal profession in the thirteenth century.[133] An early example of statutory regulation of the legal profession is Chapter 29 of the *Statute of Westminster the First 1275* (Imp) (3 Edw I), in which 'deceit or collusion' by lawyers was forbidden.[134] Prior to the nineteenth century, the legal profession in England was mostly regulated by the lawyer's oath — a 'condensed code of legal ethics'[135] — by which lawyers were required to swear that they would 'not themselves, or by means of others, suborn witnesses, or instruct the parties to give false evidence, or to suppress the truth'.[136]

1310 The legal profession has long required the highest standards of integrity.[137] A detailed historical survey published by legal scholar, Professor Carol Rice Andrews of the University of Alabama Law School, concluded that the basic elements of medieval regulation — fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service — continue to be the central principles of modern legal ethics.[138] The historical persistence of these foundational concepts informs the traditional role of lawyers as litigators, and their central relationship with courts. It demonstrates that society has always been concerned about abuse of that role, and the implications of any abuse for the proper functioning of the administration of justice. The lesson of history is that litigation abuse, real or perceived, will always be a focal point of standards of conduct for lawyers.

1311 An enduring theme over the centuries has been concern about the lawyer's relationship with their client. Issues of loyalty, competence, confidentiality and fees were sources of client discontent and regulation in medieval times, and have remained so ever since. Another long standing attribute emphasising that lawyers are essential in the administration of justice is the common element of public service, which is expressed in the ethical requirement to provide services pro bono: voluntarily and without payment for the public good.

1312 In 1866, the United States Supreme Court stated in *Ex parte Garland*[139] that a legal practitioner was, by their oath of office, an officer of the court, with all the rights and responsibilities which the character of the office gives and imposes, and is neither a servant of their client nor a servant of the court. The Court observed that the office of attorney was not like an office created by Congress. As an officer of the court, an attorney held office during good behaviour and could only be deprived of it for misconduct ascertained and declared by the judgment of the court, after an opportunity to be heard had been afforded.[140] The admission or exclusion of an attorney was an exercise of judicial power.[141]

1313 Stepping forward to present times, in *NSW Bar Association v Cummins*, Spigelman CJ observed:

Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the State regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the higher standards of integrity.

There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.[142]

1314 In *Ziems v The Prothonotary of the Supreme Court of NSW*, Kitto J said:

It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.[143]

1315 The observations of Moffitt P in *Re B* have a particular resonance. The President observed:

It is to misconceive the duty of a barrister to relate it to some subservience to judges or the court, as if to an elite class. The duty is of a different nature. The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in a manner which will uphold the law and further its pure administration. By reason of the privilege which the law attaches to communications between barristers and client in relation to litigation, a barrister, by being a barrister, is in the unique situation that he does much of his work in secret protected by his client's privilege. However his duty to his client is tempered and indeed overridden by his public duty to uphold the law and neither break the law himself nor

participate or encourage its breach and in other well-known ways to conduct himself in a manner which will serve the proper and fair administration of the law.

Because of privileged secrecy, departure from his duty may not be discoverable and if suspected may be incapable of proof. The proper performance of his duty and hence the pure administration of the law depends on his being able to be trusted unsupervised to do what is right. For this reason to admit a person in whom the court lacks confidence on the basis that he can be supervised and disbarred if he falls out of line involves a misconception. Once admitted he can only be disbarred for cause shown. A barrister has a privilege in his own right concerning what he publicly says in court. What he says if the subject of a fair report can be published to the world. To a considerable degree the proper exercise of this privilege depends on trust, because a discernment of whether it has been exceeded often will not be discoverable because it will depend on the privileged and secret communication with his client ...

It is of the utmost importance that this Court have available a Bar on which it can rely to perform its duty, so the Court can order its procedures and give its decisions in the confidence that the barristers appearing before it, will not mislead it, will conduct themselves in accordance with the law and discharge their duty even when not subject to scrutiny. Being a member of the Bar of relatively small size of specialists in full time pursuit of advocacy and having the examples of others doing likewise facilitates the comprehension of the concepts, at times subtle, of what his duty comprises. The importance of having a Bar in which the court can place its trust has often been acknowledged. At times it has played a critical role in enabling a judge to meet a problem otherwise impossible of a satisfactory solution. Thus judges here and in England have been able to do so because between the court and parties there is interposed an experienced Bar that can be trusted.[144]

1316 In *Giannarelli v Wraith*,[145] Mason CJ stated that when considering the advocate's immunity from suit, the peculiar feature of counsel's responsibility was that they owe a duty to the court as well as to their client. Their duty to their client was subject to their overriding duty to the court. In the performance of that overriding duty, there was a strong element of public interest.[146] In the same context, and expanding on the role of an advocate in the public interest in the administration of justice, the plurality in *D'Orta-Ekenaike v Victoria Legal Aid* noted that judicial power was exercised as an element of the governance of society, with wider aims than those of the parties to a particular controversy.[147] The community at large has a vital interest in the quelling of controversy and in the finality of that process.[148]

1317 Lawyers have duties arising from various sources. I am presently concerned with the duties that are described as owed to the court. Such duties are properly understood as owed to the community as a whole. As a society, we have a vital collective interest in the proper administration of justice. As is made clear in the speeches in *Myers v Elman* ('***Myers***'), the court has from time immemorial exercised an inherent jurisdiction to enforce the 'duty to the court'.[149] The court's fundamental role is to protect and maintain the integrity of the administration of justice and, to this end, can enforce appropriate behaviour by lawyers.

1318 The *Civil Procedure Act* was enacted in the context of these existing principles, developed over centuries, to clarify and restate the lawyer's duty to, and relationship with, the court.[150] However, the Act does not merely reaffirm the existing inherent powers of the court. It provides a powerful indication of Parliament's will that the values identified in the legislation must be honoured in the way that cases are managed and tried in the courts, and in the balances to be struck in the litigation process.[151] Parties to a civil proceeding are under a strict, positive duty to ensure that they comply with each of the overarching obligations and the court is obliged to enforce these duties.[152]

1319 Common law principles provide guidance as to the nature and content of the paramount duty. I am indebted to Ipp J, writing extra judicially in the Law Quarterly Review, for his scholarly and comprehensive

analysis of the modern state of the law.[153] Ipp J identified the unifying force of these principles as the requirement that lawyers act with honesty, fairness, expedition, efficiency and restraint, in order to properly serve and protect the justice system.[154] His Honour's exegesis that, with due respect, I accept as comprehensive and accurate, is that at common law, a lawyer's paramount duty encompasses all of the following:

> (a) A lawyer must be candid with the court and not mislead the court in any way.[155]
>
> (b) A lawyer must not corrupt the administration of justice, which requires them to conduct cases with due propriety and not to further any dishonest conduct on the part of the client. A lawyer must not assert a case they know is false, connive at or attempt to substantiate a fraud, or assist in any way in dishonourable or improper conduct.[156] If a client insists on a lawyer conducting the case improperly, the lawyer must withdraw.[157]
>
> (c) If a lawyer discovers that a witness intends or is likely to give false testimony, they are duty bound not to present that individual as a credible witness. A lawyer must not produce a witness statement which they know to be false, or where they know that the witness does not believe it to be true in all respects. If the lawyer is put on inquiry as to the truth of the facts stated in the statement, they should, where practicable, check whether those facts are true. If a lawyer discovers that a witness statement they have served is incorrect, they must inform the other parties immediately.[158]
>
> (d) It is a breach of duty for a lawyer to have a conflict of interest in representing a client, not only in respect of the fiduciary relationship with the client, but also to the court. The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties. The integrity of the justice system and the concomitant preservation of public confidence in the administration of justice are both dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind.[159]
>
> (e) A lawyer must exercise their judgment in the presentation of cases. They must advance only those points that are reasonably arguable.[160] Mere mistake or error of judgment is not a breach of duty to the court, but misconduct, default or negligence of a serious nature may be a breach of that duty, and sufficient to justify an appropriate order.[161]
>
> (f) A solicitor cannot escape liability for lack of diligence on the ground that counsel has been briefed. Although, in general, a solicitor is entitled to rely on the advice of counsel properly instructed, they are not entitled to follow such advice blindly, and must apply their own professional mind to the issue. The solicitor is expected to be experienced in their particular legal fields, and the briefing of counsel does not operate so as to give automatic immunity.[162]

1320 Significantly, the *Civil Procedure Act* extends the reach of the paramount duty to other participants in civil proceedings, including parties, litigation funders, expert witnesses, and others who exercise influence over the conduct of litigation.[163] The principles just set out apply, where relevant, to such persons.

1321 The overarching obligations imposed by the *Civil Procedure Act* are non-delegable.[164]

1322 The core functions of the paramount duty find further and particular expression in the overarching obligations, but before turning to those provisions, I note a decision of the New South Wales Court of Appeal

that resonates with the present circumstances, albeit based on the common law. In *Law Society of New South Wales v Foreman*, Kirby P described a solicitor's conduct in these terms:

[T]he solicitor's deception was compounded. It came to involve employees of the solicitor's firm. It was extended to her partners. It roped in counsel appearing for the firm and other advisers. Most seriously, by a second re-writing of the time sheets, to be produced on discovery in what was by then a litigated contest between the firm and Ms Weiss (as Mrs Avidan had again become), the deception was extended to Ms Weiss and her new legal representatives. Most importantly of all, it was extended, uncorrected, to the Family Court of Australia by the action of the solicitor in permitting, indeed facilitating, the production to that court of a further copy of the re-written time sheet. This pretended to be genuine. It was produced at considerable pains to make it appear genuine. It was put forward to practitioners, opponents and the Family Court as genuine. The solicitor knew that it was false.[165]

1323 Mahoney JA described the effect of this conduct:

[The practitioner] had ... further falsified the affidavit of discovery which she had sworn and had to that extent defeated the purpose of it; she had falsified the records of the firm in that she had created time sheets to show that a notation had been made (of delivery of the costs agreement form) on a date 7 September 1989, when it had not been made on that date; she allowed falsified documents to be produced to the Family Law Court on subpoena and, indeed, contemplated that they would be; and she allowed the costs proceedings before that court to proceed upon a basis which she knew to be false, viz, that on 7 September 1989 a time sheet had been prepared which recorded that a costs agreement form had been given to Mrs Avidan. She did these things, I infer, knowing the significance of them. She confessed to them only when she was found out. [166]

1324 Mahoney JA concluded that the solicitor's conduct was 'most serious in itself ... a contempt of court, an interference with the course of justice, and perhaps more'.[167] His Honour continued:

It was the more serious because of the way it was done and because of those to whom it was directed. I have described the elaborate and calculated way in which it was done. In doing it she deceived those who — in one sense or another — should have been able to trust her. What she did was directed to deceiving the Court; indeed, this was the purpose of it. In this she disregarded the first and primary obligation of a solicitor practising before the courts. A practitioner must not merely not deceive the court before which she practises; she must be fully frank in what she does before it. This obligation takes precedence over the practitioner's duty to her client, to other practitioners and to herself: *Meek v Fleming* [1961] 2 QB 366 at 382, 383. The justice system will not work if a practitioner is, for her own purposes, free to put to the court that which she knows to be false.

... As I have indicated, the administration of justice can proceed only on the basis that practitioners can, within appropriate limits, place reliance upon the honesty of the practitioners with whom they deal; at least, they are not expected to act on the assumption that the documents which practitioners prepare and put before them are falsified. [168]

The obligation to act honestly

1325 Section 17 of the *Civil Procedure Act* provides:

A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.

1326 Dishonesty is an ordinary concept, not a term of art.[169] What must be established is that the person subjectively intended to do the acts which are said to be objectively dishonest by the ordinary standards of reasonable and honest people. It is an enquiry into the mental state of the person whose conduct is in issue.

[170]

1327 In most cases, the question is whether some positive act was dishonest; an inquiry about whether that act was done with knowledge or belief of some specific thing, or with some specific intent. If the question is whether a failure to act was dishonest, it is usually answered by considering whether that failure was motivated by a desire to conceal the truth, or to obtain an advantage to which the person concerned knew they were not entitled.[171]

1328 A conclusion that something is said dishonestly cannot be reached if the person whose conduct is in issue believes in the truth of the statement.[172] There is little, if any, difference between failing to act honestly and engaging in conduct that knowingly misleads or deceives. A person is deceitful if they know or believe that what they say is false.[173] However, it is not necessary that the person making the false statement understood it to be dishonest by that standard. In *McCarthy v St Paul International Insurance Co*, Kiefel J said:

[I]t is incongruous to ask whether a person accused of dishonesty appreciated that to be the case. Ordinary honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question, or the intention with which it was done. They do not enquire whether the accused must have realised the act was dishonest. The ordinary person would consider it to be dishonest to assert as true something which is known to be false.[174]

1329 Dishonesty encompasses recklessness, which is a statement made not caring whether it be true or false; without an honest belief as to its truth; or an indifference to, or disregard of, whether a statement be true or false.[175] A dishonest state of mind may be inferred from wilful blindness or from dishonest or deliberate ignorance.[176] Wilful blindness, the deliberate shutting of one's eyes to what is going on, is equivalent to knowledge.[177] In *Pereira v Director of Public Prosecutions*, in dealing with knowledge proved by inference from surrounding circumstances, the High Court said:

[A] combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter.[178]

1330 Where, in a civil case, knowledge is to be inferred from the surrounding circumstances, it must be the most probable inference available.[179]

The obligation not to mislead or deceive

1331 Section 21 of the *Civil Procedure Act* provides:

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

(a) misleading or deceptive; or

(b) likely to mislead or deceive.

1332 In *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8),* I analysed the obligation in s 21 and need not repeat that analysis.[180] The interpretation of the duty is informed by jurisprudence on s 18 of the *Australian Consumer Law*, a cognate provision in the context of conduct in trade or commerce.[181] As with each of the overarching obligations, s 21 establishes a norm of conduct, like s 18.

1333 An intention to mislead or deceive is irrelevant for the purposes of s 21.[182] The issue is whether, tested objectively, the conduct induces or is capable of inducing error. Considering its application begins by

identifying the conduct that is said to meet the statutory description of 'misleading or deceptive or... likely to mislead or deceive'. The first question is always 'What did the alleged contravener do (or not do)?'[183]

1334 Contrary to Trimbos's submission, there is no relevant conceptual distinction between conduct which is 'misleading or deceptive' and conduct which is 'likely to mislead or deceive'. The latter phrase only serves to clarify that it is unnecessary to prove that the conduct in question actually deceived or misled anybody.[184] The court determines the question objectively on the basis of the conduct, rather than its consequences.[185] Trimbos's submission that the Contradictor ought to have called evidence from Croft J as to whether he was misled or deceived was therefore misconceived. Further, it is settled law that judges cannot be compelled to answer as to the manner in which they have exercised their judicial powers.[186] Objectively assessed, the significance of Trimbos's opinions is clearly explained by the judges' reasons for judgment.

1335 Alex Elliott submitted that the requirement that a contravener 'engage in conduct' is not met where that person is a mere conduit.[187] However, his submission did not identify any particular instance where he was a 'mere conduit'. He did not identify which of the Contradictor's allegations of his breach of this obligation involved no more than passing on information. If it be assumed that the submission was directed to Alex Elliott being no more than a 'personal assistant' to Mark Elliott, it is misconceived, as the statutory obligation to the court is personal and non-delegable.[188]

1336 Alex Elliott further submitted that this overarching obligation was particularised on the basis of his failure to act, or his silence. Whether that is a correct characterisation of the Contradictor's allegations is dealt with through these reasons. Conceptually, conduct of that sort is assessed against the statutory standard as a circumstance like any other. In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*, French CJ and Kiefel J said:

In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52.[189]

1337 Having regard to the context and purpose of the *Civil Procedure Act*, it is erroneous to contend that a legal practitioner who was a member of a team acting for a party in a civil proceeding, can sit in silence and watch other practitioners in that team further the objectives of the team (or, for that matter, the client) in the litigation in breach of an overarching obligation. The determination of whether a person 'engaged' in conduct if that person was not the actor but, rather, failed to act, requires a careful analysis of the circumstances of the actions of others and the inaction of the person, including the context in which the obligation to the court arises. Knowledge of the nature of the acts of another or of their probable consequences will be relevant as will issues of mutual intention or interest between the person and the actor. The context of the obligation to the court may preclude the option of inaction. To stand by may be to engage complicitly in the relevant conduct. Persons entitled to sign the Roll must first satisfy the court that they have been trained in, and understand, their ethical obligations, including their duties to the court. The exercise of independent judgment, particularly in the discharge of a duty to the court, is expected of every practitioner.

The obligation to ensure reasonable and proportionate legal costs

1338 Section 24 of the *Civil Procedure Act* provides:

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

(a) the complexity or importance of the issues in dispute; and

(b) the amount in dispute.

1339 The Court of Appeal considered this obligation in *Yara Australia Pty Ltd v Oswal*.[190] Section 24 imposes a positive obligation to take steps to ensure that costs are not excessive.[191] The test to be applied is flexible, requiring that the costs expended be weighed against the complexity and importance of the issues and the amount in dispute. Parties and their legal representatives are each obliged to comply with the overarching obligation.[192] Each practitioner, whether a barrister or solicitor, must ensure that having regard to the issues, the extent and level of representation proposed is reasonable and proportionate. The overarching obligation overrides the practitioner's duty to their client if there be inconsistency.

1340 Each of Zita and Alex Elliott submitted that this obligation ought to be construed so as not to require a solicitor or a funder to monitor the costs sought to be charged by others, including counsel, to their client. Zita contended that this obligation did not extend to require that others complied with the terms of cost agreements, or that the costs of others were assessed by reference to work undertaken and recorded in contemporaneous documents, or that they ought to review the costs charged to ensure they were made honestly and accurately. Similarly, Alex Elliott contended that:

It would be inconsistent with the duty to ensure that costs are reasonable and proportionate for Alex Elliott to have independently checked and verified the factual foundations of Mr Trimbos's work.

1341 I reject these submissions, which seek to constrict the clear text of the section. Consistently with the objectives of the *Civil Procedure Act*, s 24 is clearly capable of embracing an obligation on a solicitor to scrutinise disbursements sought to be charged to their client. Any person referred to in s 10 (whether they be a litigant, a lawyer, a litigation funder, or an insurer) must use reasonable endeavours to avoid excessive legal costs being incurred in the civil proceeding(s) to which the overarching obligations apply to them. Zita's submission that any responsibility extending beyond the monitoring of counsel's fees fell within a solicitor's existing duty of care to their client, rather than the overarching obligation, was contrary to the express text of the section (and to its historical foundations).

1342 It is neither excessive nor disproportionate for solicitors and litigation funders to take reasonable endeavours to scrutinise the costs they seek to recover from a common fund where those costs are against the interests of group members and intended to maximise their individual returns. The Contradictor's case was not that the use of reasonable endeavours required a solicitor to independently check and verify the factual foundations of the work of an expert. Identifying what reasonable endeavours were required, and whether they were undertaken, is a fact-sensitive inquiry.

The obligation to have a proper basis

1343 Section 18 of the *Civil Procedure Act* provides:

A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

...

(d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.

1344 'Claim' refers to a cause of action, or the assertion of a right that entitled the asserting party to relief from the court.[193] Section 18 applies equally to claims for interlocutory relief.[194] An assessment of whether a proper basis exists must be made at the time of advancing or responding to a claim, whether it be by filed document or in the course of an oral application.

1345 Where a solicitor has retained counsel such that the barrister assumes conduct of matters ordinarily managed by the solicitor, the solicitor authorises the barrister to perform all necessary steps. In doing so, the solicitor places the barrister in the position of acquiring firsthand knowledge of relevant facts, and is to be fixed with that knowledge acquired by the barrister.[195] It will follow that the solicitor who acquiesces in the entire conduct of the proceeding being undertaken by the barrister must be fixed with the knowledge, or assessment, of the barrister as to whether the claim has a proper basis.

The obligation to only take necessary steps

1346 Section 19 of the *Civil Procedure Act* provides:

For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

1347 This section has received little judicial attention.

1348 The Contradictor's allegations of breach of this overarching obligation were limited to the conduct in relation to Mrs Botsman's appeal, and directed attention at whether solicitors' correspondence can be a 'step', and to the requirement of reasonably believing in the 'necessity' of the 'step'.

1349 In respect of Zita, the conduct said to be in breach of this obligation consisted of sending a letter to Mrs Botsman and making an application for security for costs. Zita denied that the former could be considered a 'step' in the proceeding. In respect of the latter, Zita submitted that the court should find that he reasonably believed the application was necessary to facilitate the resolution or determination of the proceeding.

1350 In *Naumovski v Ugrinovski,*[196] the question of whether the obligation only to take reasonable steps had been breached was considered in the context of subpoenas. In that proceeding, there seemed no dispute that issuing a subpoena was taking a step in the proceeding.

1351 The requirement 'reasonably believed' is not directed to what a reasonable person would have believed, but whether, objectively assessed by reference to the circumstances in which the step was taken, it was open for a person in the position of the contravener to believe that the step was necessary to facilitate the resolution or determination of the proceeding.

1352 The expression 'any step in connection with any claim or response to any claim in a civil proceeding' is not to be given a narrow interpretation. It includes conduct such as sending correspondence. I can see no justification in the text, context or purpose of the Act, including by reference to relevant extrinsic materials,[197] for concluding that the concept of a 'step' is to be confined to the filing of formal process as required by the Rules. One objective of the *Civil Procedure Act* is to change litigation culture, in particular, to avoid unnecessary delay and cost in civil litigation occasioned by a party taking steps for tactical reasons or to oppress another party in a manner that fails to focus on the real issues in dispute in the proceeding.[198] That objective is facilitated by a broad view of what constitutes a 'step'.

1353 It cannot be gainsaid that correspondence or communications between parties, whether by the legal representatives or otherwise, is an essential component of the conduct of civil litigation. The scope of the obligation, and its effectiveness in advancing the purposes of the Act, would be unduly constrained by the construction that the defendants contended for.

1354 Further, 'step' must be given a consistent meaning in its use throughout the Act. The use of that term in relation to case management in Part 4.2, or the now-repealed Chapter 3 (which expressly referred to the exchange of correspondence as a 'step'), is consistent with the conclusion that Parliament envisaged that a broad range of acts could constitute taking a 'step' in the proceeding, including correspondence between parties.

1355 As the Contradictor correctly submitted, correspondence can plainly be influential in the conduct of a proceeding by legal practitioners. Correspondence that threatens to seek costs against a party or practitioner personally without a proper basis,[199] or inappropriately pursues tactical or strategic objectives that are collateral, extraneous or ulterior to the resolution or determination of the proceeding, are inappropriate steps in breach of the obligation.

N.2. Fiduciary duty

1356 The Contradictor submitted that conduct in breach of a lawyer's fiduciary duties, and action by a litigation funder that procures those breaches, can, in appropriate circumstances, breach the paramount duty.[200] The integrity of the justice system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice,[201] and it is why the duty to the court is the paramount loyalty.

1357 An issue of some complexity is whether the Lawyer Parties owed such duties in the present matter. In group proceedings commenced under Part 4A of the *Supreme Court Act* (or similar legislation in other jurisdictions), the lead/representative plaintiff owes fiduciary duties to group members.[202]

1358 In *Liverpool City Council v McGraw-Hill Financial Inc*, Lee J described the representative plaintiff's duty (in the context of court approval of a settlement) as a 'fiduciary duty not to act contrary to the interests of group members'.[203] Undoubtedly, the legal representatives acting for a lead plaintiff also owe obligations to group members, but how far those obligations extend is not settled.[204] At a minimum, they at least have a duty, which may or may not be fiduciary, to act in the interests of group members. Fiduciary obligations may arise when group members directly agree to retain a lawyer to act in the proceeding (e.g. by signing a retainer or a funding agreement).[205]

1359 In *Kelly v Willmott Forests Ltd (in liq) (No 4),* Murphy J stated:

The scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members. The applicant's lawyers owe fiduciary duties to class members who are their clients and they also owe duties to class members who are not their clients. These duties may or may not be fiduciary in nature, but the applicant's lawyers at least have a duty to act in the class members' interests.

...

Some authorities provide that the applicant's lawyers owe fiduciary duties to class members who are not clients, although the decisions tend to assume this rather than analyse the issue. Associate Professor Legg argues that, by reference to the established criteria, a fiduciary relationship exists between an applicant's lawyers and class members. Other authorities describe the applicant lawyer's duty as being to conduct the

representative proceeding on behalf of the applicant in a way that is consistent with the interests of class members including those who are not clients.[206]

1360 A fiduciary undertakes or agrees to exercise a power or discretion on behalf of another person that will affect their interests in 'a legal or practical sense'.[207] The fiduciary has a unique opportunity to exercise this power or discretion to the detriment of the other person who is vulnerable to abuse by that fiduciary. As such, a fiduciary relationship is characterised by trust and confidence.

1361 The Contradictor submitted that lawyers acting for a lead plaintiff in a group proceeding owe fiduciary duties to all other group members. Those lawyers have power to affect the interests of group members, who are vulnerable because their rights are often dealt with in a group proceeding without their knowledge. The submission was that a group proceeding is a paradigm case for fiduciary duties to arise.[208]

1362 In the context of the conduct of a group proceeding, as here, from the point at which an in-principle settlement is being negotiated to compromise the entire claim that will require court approval under s 33V of the *Supreme Court Act*, and thereafter, the lawyers will owe fiduciary obligations to all group members. It is unnecessary on the issues in the remitter to determine whether fiduciary obligations towards all group members arise from an earlier point in time. When identifying the existence and scope of fiduciary obligations in a relationship, the court must examine the particular circumstances, especially the course of dealings between the parties.[209]

1363 Part of the difficulty with the issue of whether fiduciary obligations were owed to group members has been whether group members have a sufficient identity of interest to enliven a fiduciary relationship. The group proceeding regime permits access to justice for persons with varying degrees of interest in the conduct of a wrongdoer. While a group proceeding commonly conclusively determines the rights of the lead plaintiff, for group members all that is determined are the questions that are common to the interests of all group members. The legal interests of a group member and the lead plaintiff only align to the extent that each has an interest in the resolution of those common questions.[210] Group members are not privies in interest of the lead plaintiff for all purposes. Their rights and interests are only determined after their individual claim has been determined, usually following the trial of the common questions.[211]

1364 Different considerations apply once an in-principle settlement of the rights and interests of all group members is being negotiated or has been reached. Generally, the (proposed or agreed) compromise is not limited to the common questions, but extends to the resolution of each group members' individual claim. Individual group members' interests in the claims made in the proceeding against the settling defendant will, once the settlement is approved by the court, be extinguished. At this point, the critical feature of a fiduciary relationship identified by Mason J in *Hospital Products v United States Surgical Corporation* — that the fiduciary undertakes or agrees to act for, or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense — is clearly present.[212]

1365 The duties owed by the Lawyer Parties to group members, beyond Mr Bolitho and any others who may have formally retained them, are properly regarded as proscriptive.[213] In *Breen v Williams*, Gaudron and McHugh JJ said:

The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that '[n]o man can serve two masters'. Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve. In *Bray v Ford*, Lord Herschell said:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.[214]

1366 Fiduciary duties are obligations of 'absolute and disinterested loyalty'.[215] A fiduciary must not obtain any unauthorised benefit from the relationship (the profit rule), nor permit any conflict to arise between their loyalty to their principal and their own personal interests or duties owed to others (the conflict rule). It was in this sense, as is analysed elsewhere in these reasons, that there was the potential for, and actual, conflict between duties owed to the group members by the Lawyer Parties. This conflict arose because the Lawyer Parties preferred their personal interests as they sought to profit through receiving unauthorised benefits from the settlement sum, particularly as they did so by seeking a common fund order.

Knowingly assisting a breach of fiduciary duty

1367 The relevant principles for the liability of a third party for breach of fiduciary duty by another were recently stated by Gageler J in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd.*[216] Knowing participation in a dishonest and fraudulent breach of fiduciary duty includes knowingly assisting in the execution of a 'dishonest and fraudulent design' on the part of the fiduciary that is in breach of fiduciary duty.[217] The requisite element of dishonesty and fraud on the part of the fiduciary is met where the conduct which constitutes the breach transgresses ordinary standards of honest behaviour.[218] The requisite element of knowledge on the part of the participant is met where the participant has knowledge of circumstances which would indicate the fact of the dishonesty on the part of the fiduciary to an honest and reasonable person.[219]

1368 Conduct which transgresses ordinary standards of honest behaviour is conduct which no honest person in the circumstances would undertake.[220] It is not necessary to demonstrate that the person thought about what those standards were.[221] In some circumstances, 'a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards'.[222]

N.3. Agency

1369 The applicable principle for present purposes, of an agent's duty of fidelity, was stated by Lord Alverstone CJ in *Andrews v Ramsay & Co*, which has since been followed, and not doubted:

> A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission.[223]

1370 Citing that decision with approval, the English Court of Appeal in *Imageview Management Ltd v Jack* noted that, in the ordinary case, once an agent has been shown to be guilty of some breach of fiduciary duty, such as a conflict of interest, 'the right to remuneration goes'.[224]

1371 More recently, in *Premium Real Estate Ltd v Stevens*, the Supreme Court of New Zealand, following this line of cases, and dealing with a breach of the fiduciary duty of loyalty, noted that the remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction.[225] There is no inconsistency in awarding the principal both damages and the refund of the commission.[226] The agent has no right to be paid or to retain any commission and must also compensate the principal for any loss which the agent has caused,[227] operating as a deterrent to betrayal by the agent.[228]

N.4. Entitlement to costs by a negligent solicitor

1372 A solicitor is generally not entitled to costs for work that is useless.[229] In its inherent jurisdiction, the court may make a 'wasted costs' order and disallow costs that have been incurred improperly, or without reasonable cause.[230] That encompasses expenditure incurred through a solicitor's negligence or ignorance, [231] or costs wasted by undue delay or other misconduct or default on the part of the solicitor.[232]

1373 The primary object of disallowing wasted costs is not punitive or disciplinary but compensatory, enabling reimbursement of a party's costs incurred because of the default of the solicitor.[233] In so doing, it protects the client who has suffered loss, indemnifies the injured party, and where applicable, shields solicitors from the negligence or incompetence of counsel.

1374 The words 'reasonable competence and expedition' require proof of a failure to act with the standard of competence expected of ordinary members of the legal profession. It is a lower threshold than gross negligence or dereliction of duty.[234] Put another way, it means to act 'in a way no reasonably well-informed and competent ordinary member of the profession would have done'.[235] In certain circumstances, the standard may be assessed by reference to any special qualifications, experience, or attributes possessed by the legal practitioner, such as a speciality area of practice or in a field of law.[236]

1375 A negligent solicitor may nonetheless recover any costs that are severable, untainted by negligence, and relate to matters distinct from those on which the solicitor has been found negligent.[237] If they seek to recover fees in respect of the very proceedings in which they have been found negligent, the onus falls on them to show that, despite the negligence, some real advantage has accrued to the client from those services, or some of them, which would render it unjust for the client to escape liability for those fees or part of those fees.[238]

1376 As the Contradictor correctly submitted, these principles apply to AFP's claim for the court's approval to recover Portfolio Law's costs from the settlement fund, particularly having regard to the concessions and admissions by AFP and Zita about Zita's carelessness and failure to exercise independent judgment. The Contradictor further submitted that by his conduct, Zita abrogated his duties to the court and to his client. The court relies upon the solicitor on the record for a party. Pertinently to the position of Zita, in *Wentworth v Rogers*, the NSW Court of Appeal said:

Mr Russo [a solicitor] lent himself to a situation in which he allowed himself to be controlled by his client. It is one thing to take instructions but it is another thing to allow the client to have complete control of the litigation in the way that Ms Wentworth had control of this litigation. We do not mean to be unkind but the objective facts of the matter are open to the inference that Mr Russo acted as Ms Wentworth's lackey. He did her bidding and allowed her to conduct the various applications which were before the Court in whatever way she chose. He had no control over her and, if what she was doing would have amounted to misconduct by a practitioner, he must bear responsibility for what she did.[239]

1377 Zita relinquished his responsibilities as solicitor on the record in favour of Mark Elliott/AFP by acquiescing in the control of his functions by or at the direction of Mark Elliott. Zita must bear responsibility for

the way in which AFP conducted the proceedings. This, in turn, informs the assessment of AFP's claim to recover Zita's fees.

N.5. The duty to the court in relation to discovery

1378 A solicitor has a duty to the court to ensure that their client makes proper discovery. In *Guss v Law Institute of Victoria Ltd*, a case concerning a solicitor's deliberate failure to discover a relevant document, Maxwell P said:

It is difficult to overstate the importance to the administration of justice of the paramount duty of a legal practitioner not to mislead the court. Where there is any conflict, or risk of conflict, between that duty and what the practitioner perceives to be his/her duty to the client, the duty to the court must always prevail. Nowhere is the risk of conflict more likely to arise than in relation to the obligation to make discovery. Discovery is, of course, the obligation of the client, but the client inevitably depends upon the advice of the legal practitioner as to what is, and what is not, discoverable and as to the availability of any claim for privilege. As Giles AJA said in *Law Society of New South Wales v Foreman*:

> It is of the greatest importance in the conduct of the profession of a solicitor, and never more so than in relation to litigation where the court relies upon the solicitor in matters such as discovery of documents, that other legal practitioners should be able to accept without question the honesty of their colleagues and the court should be able to accept without question the honesty of its officers.[240]

1379 In discharge of their duty to the court, a solicitor must advise their client what documents are material and must therefore be disclosed to the other parties. The obligation is a heavy one.[241] In *Myers*, Lord Wright stated:

An order for discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.[242]

1380 A solicitor is obliged to appraise the case and form an opinion as to what documents are probably in existence and actively seek confirmation of that fact from the client.[243] A party and their solicitor are not entitled to rely on their unrefreshed recollection of the existence and whereabouts of relevant documents.[244] Both are required to undertake appropriate searches and make appropriate inquires for documents that would assist the case for the party as well as for those that would not.[245]

1381 The solicitor also has a duty to advise the client not to lose or destroy relevant documents that might need to be disclosed. It is pertinent to restate the practice direction published by Megarry J in 1968 in *Rockwell Machine Tool Co Ltd v FP Barrus (Concessionaires) Ltd)*. His Honour concluded:

Accordingly, it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.[246]

1382 Discovery obligations are restated by s 26 of the *Civil Procedure Act*, which provides:

(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—

(a) of which the person is aware; and

(b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.

(2) Disclosure under subsection (1) must occur at—

(a) the earliest reasonable time after the person becomes aware of the existence of the document; or

(b) such other time as a court may direct.

...

(4) The overarching obligation imposed by this section—

(a) is an ongoing obligation for the duration of the civil proceeding; and

(b) does not limit or affect a party's obligations in relation to discovery.

1383 This obligation is directed to emphasising that the timely disclosure of material documents, is necessary to facilitate the resolution of disputes and the narrowing of issues in a proceeding, in order to reduce costs and delay. It supplements other obligations to make discovery or other disclosure. It is an obligation to disclose 'the existence of all documents' of which the person is aware, and which the person considers, or ought reasonably consider, critical to the resolution of the dispute. This ongoing obligation emphasises, beyond a party's obligation to other parties in the proceeding, the importance of documentary disclosure as a component of duties owed to the court, and to the administration of justice.

N.6. Standard of proof

1384 Serious allegations require clear and cogent proof.[247] The governing principle is expressed in s 140 of the *Evidence Act*. The parties also cited *Briginshaw v Briginshaw*.[248] The High Court stated that the tribunal of fact must feel an actual persuasion of the occurrence or existence of any fact before it can be found, reaching a state of reasonable satisfaction about the matters it must take into account, as specified in s 140(2). As Dixon J observed in that case:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. [249]

1385 The applicable standard of proof is on the balance of probabilities. While the standard does not alter, the strength of the evidence necessary to establish a fact can vary according to the nature of what is sought to be proved,[250] and the circumstances in which it is sought to be proved.[251] Such statements reflect the perception that members of the community do not ordinarily engage in serious misconduct.[252] A feeling of actual persuasion or a state of actual satisfaction is not reached by mere mechanical comparison of probabilities. The concept of 'actual persuasion' should be understood as equivalent to the state of 'satisfaction', of the occurrence or existence of the fact in issue.[253]

N.7. Inferences

1386 Having regard to the manner in which AFP, O'Bryan, Symons and Alex Elliott conducted their cases, the following principles are relevant:

(a) Under certain conditions,[254] an unexplained failure by a party to call a witness will permit a tribunal of fact to draw one or both of the inferences established in *Jones v Dunkel*, that:

(i) the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness; and/or

(ii) if the uncalled witness appears to be in a position to cast light on whether an adverse inference, already available against the party who failed to call the witness, should properly be drawn, that inference may be drawn with greater confidence.[255]

(b) In circumstances where it is within a party's power to deny or explain facts and they fail to do so, this failure 'gives a colour to the other evidence against him'.[256] The more unique the party's position in this respect, the stronger the inference against them, such that 'when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box, a court is entitled to be bold.'[257]

(c) Where a party claims the privilege against self-incrimination in a civil matter, their failure to explain evidence raised against them, in certain circumstances, can be used to, at least, the same extent that the failure of an accused to give an explanation in a criminal trial can be used. The court may have regard to the party's election not to provide any form of alternative 'explanation or answer', as the party might be expected to have available if the truth were consistent with innocence, in considering whether to draw inferences from the material presented before it.[258]

(d) Lies may amount to an admission by conduct.[259] In a civil case, a lie may be used as evidence in that way if that is the more probable inference to be drawn.[260]

1387 In *Amalgamated Television Services Pty Ltd v Marsden*, the New South Wales Court of Appeal endorsed the following statement of principle, which warrants careful application to the conduct Mark Elliott, O'Bryan, and Symons, and their principal, AFP:

[T]he conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieved in his own case, may be proved and used as evidence against him.

The principle is well stated by Sir Alfred Wills, until lately Wills J, in his edition of his father's work upon circumstantial evidence, '[a]mongst the most forcible of presumptive indications may be more than all attempts to pollute or distort the current of truth and justice or to prevent a fair and impartial trial, by endeavours to intimidate, suborn, bribe, or otherwise tamper with the prosecutor, or the witnesses, or the officers or ministers of justice, the concealment, suppression, destruction, or alteration of any article of real evidence; any of which acts clearly brought home to the prisoner or his agents, are of a more prejudicial effect as denoting on his part a consciousness of guilt, and a desire to evade the pressure of facts tending to establish it'.[261]

The duty of candour

1388 As noted earlier, the *Civil Procedure Act* imposes strict positive obligations on the participants in a civil proceeding, relevantly parties, lawyers and litigation funders. Those duties may intersect with the existing duty of candour owed by legal practitioners.[262]

1389 Where a prima facie case is established that a person, who is subject to the duty of candour, may have contravened an overarching obligation, and that person fails to give evidence, the court may more readily draw an unfavourable inference. If a legal practitioner invites the court to accept an explanation for their conduct, the explanation cannot be put by submission. They have an obligation to meet the situation by explanation on oath and should enter the witness box at the hearing.[263]

1390 The paramount duty requires that a legal practitioner provide a full and frank explanation to the court for apparent irregularities in the course of a proceeding in discharge of the overarching obligations, particularly if an innocent explanation exists. That is so irrespective of the possibility that the court might consider it appropriate in the interests of justice to order that the person pay costs or expenses or that the person compensate any person for financial loss. If a legal practitioner declines to give their account on oath of the matters raised against them, they cannot complain if the court finds against them that the alleged facts are substantially true.[264]

1391 The duty of candour is part of the evidentiary matrix that informs the court's fact-finding exercise. However, as the Court of Appeal has cautioned, the scope of this obligation requires more detailed attention as to its application in particular circumstances.[265] While there may be competing interests important to the proper administration of justice (such as an entitlement to the privilege against self-incrimination), considerations of strategy or tactics personal to the practitioner and extraneous to the interests of justice will not likely be sufficient explanations to avoid adverse inferences being drawn.[266] Moreover, if the legal practitioner seeks sanctuary outside the courtroom or in the well of the court, and does not explain why they have failed to take the witness stand, this will usually attract an adverse inference. However, these considerations did not arise. Although neither O'Bryan nor Symons entered the witness box,[267] their capitulation statements were unambiguous in what inferences ought to be drawn about their conduct.

Deliberate destruction of documents

1392 The principle is well settled. In *Allen v Tobias*, the High Court considered whether the trial judge was correct in holding, against the defendant, that a document had been executed, when the defendant had destroyed the three copies of it. The High Court considered the presumption of fact against the defendant to be a proper application of the principle *omnia praesumuntur contra spoliatorem*.[268] That principle had been best explained in *The Ophelia* by the Privy Council in these terms:

If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.[269]

1393 In *Katsilis v Broken Hill Pty Co Ltd*, Barwick CJ, dissenting in the result, said:

Ordinarily, though a case is normally better tried on the evidence which is produced than on that which is not, it can properly be said that the failure of a party to give or produce evidence which in the circumstances of the case that party in its own interest would be expected to give or produce, warrants the conclusion that, if given or produced, the evidence would not support that party's case. Indeed, in some circumstances it might be

inferred that it would support the opponent's case; but, if so, it must depend very much on the circumstances. But, in any case, the inference would depend upon some element of conscious repression or withholding of the evidence. The warrant for the inference must depend upon the deliberation with which the evidence is withheld and the appreciation or likely appreciation of the party of its significance in the case.[270]

1394 Although the inquiry is fact sensitive, deliberate destruction of documents can be evidence of a consciousness of guilt.[271]

N.8. Removal of name from Roll

1395 The court may, in its inherent jurisdiction and on its own motion, remove the name and details of a person from the Roll.[272] Before ordering that a person be removed from the Roll, the court must be satisfied that at the time of hearing, they are not a fit and proper person to be a legal practitioner and are likely to remain so for the indefinite future.[273]

1396 Removal of a practitioner from the Roll is not a punitive measure. It operates to protect the public from misconduct by practitioners and to promote community confidence in the proper administration of justice.[274]

1397 Warren CJ held in *Legal Services Board v McGrath*, that striking off is an appropriate sanction:

[W]here a practitioner's conduct shows 'a defect of character incompatible with membership of a self-respecting profession' or where a conviction carries 'such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails.'[275]

1398 In order for a person to be 'fit and proper' to become, or remain, a legal practitioner, they must be honest, independent, able to judge what ethical conduct is required of them, and then be capable of diligently discharging the responsibilities of their office.[276] A legal practitioner must be 'possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails.'[277]

1399 Whether a practitioner fails to meet these criteria is a fact-sensitive inquiry.[278] In making this evaluation, the court is required to do more than just consider the practitioner's historical actions.[279] It must also inquire into whether the practitioner has insight into, and fully appreciates, the gravity of his wrongdoing and has demonstrated effective rehabilitation.[280] The court must also consider the connection of the conduct to the practitioner's fitness, which is to say, to what extent the conduct is simply inconsistent with the privileges associated with further practice.[281]

1400 A practitioner will be found unfit to remain on the Roll if:

[T]hey pose a direct risk to the public, to the legal fraternity, to the courts, to the system of professional co-operation and trust on which they both depend, and to the administration of justice ...[282]

1401 As Forbes J recently observed in *Victorian Legal Services Board v Gobbo*:

Reliance by a court on the integrity of those who are its officers is ... fundamental to the proper administration of justice. Repeated breaches in a number of proceedings over such a period of time as is demonstrated by the agreed facts is incapable of being overcome.[283]

1402 A case with striking similarities to the circumstances in the remitter, *New South Wales Bar Association v Evatt* ('***Evatt***'),[284] involved a practitioner from an established legal family in New South Wales. The High Court considered an ongoing scheme between the barrister and two solicitors, who had worked together on a

number of cases. The barrister was found to have knowingly assisted in and facilitated the solicitors' overcharging, and had shared in their ill-gotten proceeds. The court found that the barrister managed the litigation and, in the course of doing so, 'prefer[red] the solicitors' greed to the clients' interests.'[285]

1403 A critical feature of the misconduct was the barrister's advice to clients to accept settlement sums from which grossly excessive fees, rendered by the solicitor and barrister, were deducted. Further, the barrister obtained his clients' authority to settle without telling them that the solicitors would be paid party and party costs in addition to the deduction from the settlement sum for legal costs. The High Court found that not only had the barrister assisted the solicitors in 'grave malpractice', but did so 'knowing that their malpractice would provide the source of part of his own excessive fees.'[286]

1404 The High Court concluded that this misconduct 'demonstrated the unfitness of the respondent to be a barrister, and compelled the conclusion that he should be disbarred.'[287] This was because the facts disclosed a systematic practice and not 'some isolated or passing departure from proper professional standards amounting to something less than proved unfitness.' While the court at first instance had ordered that his ability to practice be suspended, rather than being struck off, because 'mercy might be shown towards a young man who had not understood the error of his ways,' the High Court disbarred the barrister. The court clarified that its disciplinary jurisdiction was entirely protective and, accordingly:

[the barrister's] failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice, the client must depend upon the standards as well as the skill of his professional adviser.[288]

1405 The former barrister later attempted to restore his name to the roll of barristers,[289] relying on the fact that the situation in the profession at the time was unique, in that the settlement rate of actions against the Government Insurance Office was high, the settlement sums were liberal, and the verdict was the sole source of fees, costs, charges and expenses. The calculation of such fees was an integral part of last-minute settlements. He claimed that while the impugned practices were notorious in the profession, there had been no challenge to it by professional associations, and that his participation in the scheme constituted only a small part of his otherwise substantial practice.[290]

1406 The former barrister also attempted to rely on the fact that he was now remorseful and fully understood the gravity of his actions. He claimed that his professional downfall had been caused by:

[B]eing too obliging to solicitors and undertaking too many of their duties, ambition to succeed too quickly in emulation of his family, overwork affecting his judgment, lack of financial common sense, a transient personal defect, that he was a ready victim for persons without financial scruples, that he was too anxious to please, had difficulty in resisting demands made by strong personalities and was somewhat of an unwitting dupe, that his early great success and youth led to lack of humility and presumptuousness together with rashness of manner.[291]

1407 The Court of Appeal rejected this reasoning. It referred to a class of fundamental ethical rules, including those that the former barrister had breached, which were not of the type that needed to be reduced to writing and taught, relying on the following observation by the High Court in *Clyne v New South Wales Bar Association*:

[T]hey rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of 'does not' than of 'must not'. A barrister does not lie to a judge who relies on him for information ...[292]

The Court of Appeal continued:

It is obvious that the High Court regarded ... [the barrister's] misconduct as gross and serious and as capable of being dealt with only by disbarment ...

For he, as counsel, was required to keep steadily before him the duty of doing all he legitimately could in the true interests of his client ... It was the true interests of his client he was required to safeguard or consult and that is a more extensive duty than to use his best exertions in the conflict in the arena. After all, he was his client's counsel and the name signifies a good deal more than a forensic gladiator. As counsel, he must keep steadily before him the necessity of gaining and keeping the confidence of the court. He should feel that the judges can rely upon him without misgiving as one who will competently ascertain and present for judicial examination his client's affairs, even in the realm of settlement of litigation, especially in the cases involving widows and children, intelligently, definitely and with candour. The latter rests on simple moral grounds.[293]

1408 The facts of the present case appear more egregious than the facts in *Evatt*.

15. **FINDINGS**

O.1. Applicability of the *Civil Procedure Act*
AFP, the Lawyer Parties and Trimbos

1409 I find that the *Civil Procedure Act* plainly applied to each of AFP, the Lawyer Parties and Trimbos by virtue of s 10. Each of whom were accordingly subject to relevant overarching obligations.

Alex Elliott

Contradictor's submission

1410 The Contradictor submitted that Alex Elliott was subject to the overarching obligations, as he was:

> (a) a legal practitioner or other representative acting for or on behalf of a party (Mr Bolitho and group members);
>
> (b) a person providing assistance to any party, insofar as he exercised control and/or influence over the conduct of the Bolitho proceeding, or the conduct of Mr Bolitho in respect of that proceeding; and/or
>
> (c) a legal practitioner or other representative acting for or on behalf of AFP, which was joined to the Bolitho proceeding during the appeal on 18 July 2018.

1411 For the reasons that follow, Alex Elliott was subject to the overarching obligations on the second and third bases advocated by the Contradictor, but not the first basis. My factual findings relevant to these matters are distributed through these reasons, making it convenient to provide a summary assessment at this point.

Alex Elliott's submission

1412 Alex Elliott submitted that he was never a person to whom the overarching obligations applied because he had never acted as an in-house solicitor for AFP or as a solicitor for Mr Bolitho and group members. I can accept the second limb of this submission but not the first limb. Conceding that he regularly assisted AFP and its managing director, Mark Elliott, Alex Elliott submitted that the court should find he was not formally employed by AFP at all relevant times and was no more than its agent. His contention was that, in that capacity, he was not a person to whom the overarching obligations applied.

1413 Alex Elliott claimed that he had no 'substantive' involvement in the Bolitho litigation, and that his role was purely administrative. For example, he said in evidence:

It was mainly administrative sort of things, I was just sort of following him around to meetings and attending court with him and a few other sort of things here and there...

Dad was just trying to give me exposure...

He was just trying to show me how things got done...

I never really saw myself sitting there as a solicitor trying to I guess provide services or anything...

I always looked at it as just sort of helping dad and just doing whatever he wanted in his direction...

I never saw myself as the solicitor, I was just helping dad...

1414 Elliott Legal was solicitor on the record in the Murray Goulburn proceeding. Alex Elliott claimed his roles were distinguishable:

Well I wasn't solicitor in Banksia so I didn't do any of those solicitor type things of, I guess filing affidavits or instructing counsel or anything like that. I did a lot more work in Murray Goulburn in respect of, I just guess reviewing and considering documents, researching, you know, attending to the client, going to court, instructing, that sort of stuff.

1415 I reject the first contention. I accept that Alex Elliott had a different role in respect of the Bolitho proceeding that Elliott Legal did in the Murray Goulburn proceeding. Portfolio Law was the solicitor on the record in the Bolitho proceeding. All that follows from that fact is that Alex Elliott was not a legal practitioner acting for or on behalf of a party, Mr Bolitho.

1416 I accept Alex Elliott's submission that he was not a legal practitioner within the meaning of the *Civil Procedure Act* prior to 11 May 2017, the date from which he first held a practising certificate. Consequently, I accept that it is unnecessary to examine any of Alex Elliott's conduct prior to that date in connection with this issue. The relevant period for the enquiry into whether Alex Elliott is subject to the provisions of the Act in connection with the Bolitho proceeding begins with the in-principle agreement for the Trust Co Settlement, in November 2017. That is not to say that Alex Elliott's earlier conduct is not relevant to understanding his role in the Bolitho legal team from this time.

1417 By 18 July 2018, when AFP was joined as a party to the appeal, Alex Elliott was subject to the provisions of the *Civil Procedure Act* as 'a legal practitioner or other representative acting for or on behalf' of AFP, a party to the proceeding.

1418 Alex Elliott submitted that AFP was not joined as a party to the proceeding until 22 November 2018, being the date on which I ordered in the remitter that it be joined as a party to the ongoing trial proceeding. At the conclusion of the appeal, it was AFP's application for commission and legal costs and disbursements that was remitted. AFP had not, of course, been a party to the Bolitho proceeding and was only then formally joined into the remitter to prosecute its remitted claim, Mr Bolitho having secured court approval for the settlement.

1419 The later date of joinder to the remitter is inconsequential. The material event was AFP being joined as a party to the appeal. AFP became a party to a relevant civil proceeding (the appeal) from the time that it was first joined. Sub-section 11(b) of the *Civil Procedure Act* makes it clear that the overarching obligations apply in respect of any aspect of a civil proceeding, including — expressly — any appeal from an order or a judgment in a civil proceeding.

1420 Alex Elliott's submission that Mrs Botsman's appeal was a separate and distinct civil proceeding from the trial proceeding that was remitted, for the purpose of determining the application of the Act, was misconceived

and must be rejected. Moreover, as the SPR correctly submitted, to contend as Alex Elliott did, that AFP did not become a party to a civil proceeding until it was joined into the remitter would be to permit form to triumph over substance.

1421 I find that Alex Elliott was a legal practitioner or other representative acting for or on behalf of AFP in a civil proceeding from 18 July 2018.

1422 The question that remains is whether Alex Elliott was, by s 10, subject to the obligations of the *Civil Procedure Act* in the eight months between November 2017 and July 2018. In this contentious period, the principal activity was documenting the Lawyer Parties' fee claims, briefing Trimbos, the approval of the Trust Co Settlement and the early stages of AFP's reaction to Mrs Botsman's appeal.

The evidence

1423 I was persuaded on the evidence that Alex Elliott, in connection with the Bolitho proceeding:

(a) filed documents;

(b) regularly attended court;

(c) was included in almost all emails as if he were another solicitor acting on the matter, which his father expected him to, and he did, read;

(d) assisted with the establishment of the Bolitho class action email account and the general class action email account (the latter of which he had access to);

(e) had a general practice of printing most correspondence that was sent to the Bolitho class action email account (via the general class action email account) for discussion with his father;

(f) reviewed and considered documents, such as the Settlement Deed, the Third Trimbos Report, in both draft and final form, and counsel's first opinion;

(g) was involved in instructing Trimbos to prepare the Third Trimbos Report, including collating and delivering to him the folder of the Lawyer Parties' invoices;

(h) researched issues arising in connection with the approval of the Trust Co Settlement and the subsequent appeal, either as directed by his father or on his own initiative. For example, he understood the difference between a funding equalisation order and a common fund order, and was across the *Money Max*[294] principles;

(i) critically analysed legal issues, expressed his own independent ideas, and discussed his father's views on legal issues;

(j) attended significant strategy meetings, including the Wrap-Up Meeting;

(k) attended conferences in counsel's chambers;

(l) created the script for Zita to follow when speaking with group members regarding the Trust Co Settlement;

(m) received and handled enquiries from group members diverted to him by Zita; and,

(n) described himself as an employee of AFP when he gave evidence in AFP's injunction proceeding against Mrs Botsman in 2018, because he was an employee and remained so, in the sense that he was describing, until sometime after Mark Elliott's death.

1424 Alex Elliott's role in the litigation could be contrasted with the role of Zita, who as the solicitor on the record only discharged a post-box role. Comparatively, Zita lacked a 'substantive' involvement in the Bolitho litigation, and played a role that was purely administrative, to borrow the terms Alex Elliott used about himself. But that does not alter the fact that Zita was the solicitor on the record for the plaintiff and the legal practitioner for or on behalf of a party, Mr Bolitho (and group members).

1425 The analysis of what Alex Elliott actually did was not always observed with clarity. On the one hand was the issue of whether Alex Elliott was doing solicitor's work, or was a personal administrative assistant; on the other hand was the issue of whether he worked for AFP/Elliott Legal or Mr Bolitho (and the group members). I find that Alex Elliott was doing solicitor's work and that he represented AFP/Elliott Legal. It is appropriate to say more about what Alex Elliott was expected to achieve for AFP/Elliott Legal when doing solicitor's work.

1426 In this context, Mark Elliott's objective in retaining Zita for a post-box function while formally the solicitor on the record for the plaintiff was to disguise who was the controlling decision maker in the litigation. I am satisfied that Mark Elliott trusted Alex Elliott and, subject to recognising that he was relatively inexperienced, involved him appropriately in assisting with the solicitor's work that needed doing, apart from engrossing correspondence, which was Zita's specialist role. Mark Elliott did so for the purpose of exercising more fully that control and influence over the conduct of the Bolitho proceeding.

1427 That said, Alex Elliott was always working for AFP/Elliott Legal. There is a distinction between undertaking tasks as the legal representative of a party, and undertaking tasks as part of the funder's illegitimate process of controlling the legal conduct of the Bolitho proceeding. Each of the respects in which I have found that Alex Elliott carried out solicitor's work is consistent with this process of AFP/Mark Elliott exercising control of the conduct of the proceeding.

Right hand man

1428 Throughout the trial the analogy of a 'right hand man' was employed; it became a 'buzz phrase' during the trial. I am satisfied that Alex Elliott provided support and assistance to both AFP and Elliott Legal as a solicitor working at his father's direction. In that way, although Alex Elliott provided some support and assistance to Mr Bolitho, it was, importantly, as a delegate of Mark Elliott, that he assisted in exercising control or influence over the conduct of the Bolitho proceeding or of Mr Bolitho and group members in respect of that proceeding.

1429 It was Zita who in evidence described Alex Elliott was his father's 'right hand man'. I accept that Zita's characterisation was based on his direct assessment of interactions between Mark and Alex Elliott over a number of years. There was no reason not to accept Zita's evidence in this respect.

1430 A compelling example of Alex Elliott's trusted role was his dealing with his father when he decided to terminate the Settlement Deed during the hearing of the appeal.[295] In this exchange, Alex Elliott exercised control or influence over the conduct of the Bolitho proceeding, and exercised an active role in seeking to influence the conduct of AFP, who was effectively dealing with the rights of Mr Bolitho and group members in the proceeding, in connection with the Settlement Deed.

1431 I have explained Alex Elliott's participation in preparing cheques and delivering them to Zita and Symons to assist, as he well knew, Mark Elliott and O'Bryan to mislead the Court of Appeal.[296] The Contradictor submitted, and I agree, that playing an active but covert role of that sort well qualified Alex Elliott to be described as his father's right hand man.

1432 There was uncontested evidence that Alex Elliott appeared to attend most meetings with his father and actively assisted his father in connection with the Bolitho proceeding, including conferences with counsel. Correspondence from Corrs early in the remitter raised the issue of Alex Elliott's role in conferences.[297]

1433 Alex Elliott recalled a discussion in February 2017 at the chambers of O'Bryan and Symons, but not the specific conference referred to. He attended most meetings that Mark Elliott went to, describing it as the 'usual practice' of what he did. As to conferences in 2017, after directions hearings he described his role as follows:

I would have gone up to chambers with dad and we would have sat in the conference room and there would have been a discussion about what took place at that directions hearing and what orders were made and what I guess procedural steps needed to be undertaken afterwards. I would have typically sat there. I may have had a copy of any I guess orders and, yeah, I didn't really have a huge amount to contribute.

1434 Alex Elliott claimed that O'Bryan, Mark Elliott, Symons and Zita had 'the running' of the meetings, and while he may have had a copy of orders and taken notes, such notes were for his benefit only. He denied that he was ever allocated any jobs or tasks while he was there:

I only ever really undertook, you know, very certain and minor tasks like getting that notice to group members out or I guess liaising with group members in any settlement approval or something like that. I never took on anything to do with the prosecution of the matter in that period of time, no. That was really something between sort of [Zita] and [Symons] and [O'Bryan] about anything that needed to be done in the case at that time.

1435 I accept Alex Elliott's description of himself prior to the Trust Co Settlement as no more than an observer and an errand boy. That was because in the period up to the Partial Settlement he was inexperienced. Following the Partial Settlement, the epicentre of industriousness was not in the Bolitho legal team. On the plaintiff's side not much was happening in the Banksia proceeding. Trust Co put on its evidence and the Banksia legal team prepared the reply evidence and expert evidence. At some point not far out from the November 2017 mediation, some trial preparation work started.

1436 Alex Elliott was actively working as a solicitor on other litigation in which AFP was funder, or Elliott Legal was solicitor, for the plaintiff from late 2016 into 2017. By the Bolitho proceeding mediation in November 2017, the descriptor 'errand boy' was historical. Alex Elliott was a solicitor and the only solicitor assisting his father internally at AFP/Elliott Legal, a natural position to be seen as a right hand man.

1437 I am satisfied that, in his evidence, Alex Elliott reconstructed his role, by reference to these historical labels, expressly to minimise his role in his father's conduct in controlling the Bolitho litigation. The contemporaneous documents, in particular, place Alex Elliott in an active role as an AFP/Elliott Legal solicitor from the time of the Trust Co Settlement, and the purpose of that active role was to assist Mark Elliott to control the Bolitho litigation.

Conclusion

1438 For these reasons, I find that Alex Elliott was subject to the paramount duty and the overarching obligations under the *Civil Procedure Act*, as he was:

(a) a person providing assistance to a party, insofar as he exercised control and influence over the conduct of the Bolitho proceeding or the conduct of Mr Bolitho in respect of that proceeding; and/or

(b) a legal practitioner or other representative acting for or on behalf of AFP, which was joined to the Bolitho proceeding on 18 July 2018.

1439 By reference to findings of fact set out elsewhere, the date upon which Alex Elliott first became subject to the overarching obligations was at least at or about the time that the Trust Co Settlement was agreed at mediation. It is not necessary to consider whether he was subject to overarching obligations at any earlier point in time.

O.2. AFP's vicarious liability

1440 AFP admitted that:

(a) the Lawyer Parties advanced the interests of AFP and their own interests in connection with the matters in issue on this remitter;

(b) AFP expressly or impliedly consented to the Lawyer Parties acting to advance its interests in respect of the application for commission and costs;

(c) O'Bryan and Symons acted for AFP in recovering the costs and commission it claimed from the Trust Co Settlement; and

(d) O'Bryan and Symons acted as agents for AFP.

1441 O'Bryan and Symons offered no defence to the allegations set out in the revised list of issues as at 21 July 2020, and did not contest findings being made against them on the basis of those allegations.

1442 AFP is vicariously liable for their conduct.

1443 From this point, for convenience I refer to AFP, O'Bryan, Symons, Zita/Portfolio Law, Alex Elliott and Trimbos together (or some combination of these parties, as the context indicates), as the '**Contraveners**'.

O.3. Contraventions in respect of the Bolitho No 4 decision

1444 By their conduct in allowing O'Bryan to maintain his dual interests of funder and legal representative, AFP, O'Bryan and Symons circumvented the Bolitho No 4 decision. By their conduct in allowing Mark Elliott/AFP to maintain their dual interests of funder and legal representative, AFP, O'Bryan, Symons, Zita and Alex Elliott circumvented the Bolitho No 4 decision. In doing so, they contravened:

(a) the paramount duty; and

(b) the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive.

1445 In section D of these reasons, I found that:

(a) in breach of the Bolitho No 4 decision, Mark Elliott and O'Bryan continued to act as solicitor and counsel respectively, and O'Bryan continued to maintain a financial interest in AFP;

(b) Zita replaced Mark Elliott as solicitor on the record for Mr Bolitho. The arrangement disguised that Mark Elliott continued to run and control the litigation;

(c) AFP admitted documents that represented that a consideration of $500,000 was agreed. I was not persuaded that the consideration was ever paid;

(d) the share transfer was a paper transaction that was never intended to effect a change in the beneficial ownership of AFP. In substance, O'Bryan maintained a financial stake in AFP and, consequently, in the outcome in the Bolitho proceeding, albeit with legal title now held not by Noysue but by Regent Support, but with no change in beneficial ownership;

(e) in an egregious breach of the trust that characterises communications between counsel about the conduct of civil litigation, Mr Godfrey's counsel and his instructing solicitors were deceived before the court hearing. Consequentially, the court did not make different orders as would have resulted had it not been misled;

(f) Mark Elliott, O'Bryan and Symons induced the court on a false premise to accept that there was no need for formal orders precluding Mark Elliott and O'Bryan from acting for Mr Bolitho whilst holding an interest in AFP; and

(g) what occurred before Ferguson JA at the directions hearing on 15 December 2014, was a typical example of how judges rely on counsel to assist them in expeditiously effecting the due administration of justice, and the trust that the court places in counsel in doing so.

1446 O'Bryan and Symons offer no defence to these allegations and did not contest findings being made against them. It should be borne in mind that they offered no defence to any allegation that is the subject of findings in this section. AFP (or Alex Elliott in respect of financial dealings involving Elliott family entities) did not call any evidence to explain either the use of Zita as a post-box or the circumstances of the apparent divestment of the beneficial interest in AFP. I noted earlier that O'Bryan did seek leave to reopen his case, which was refused.

1447 Mark Elliott, O'Bryan and Symons failed to act with honesty and integrity by deceiving the court, resulting in a corruption of the proper administration of justice. Such conduct was conduct in breach of the paramount duty. As the litigation progressed, they seemed emboldened by their 'achievement' in deceiving the court, to the detriment of the debenture holders.

O'Bryan maintaining a financial interest in AFP

1448 I am satisfied that, on the basis of my findings, the conduct of AFP, O'Bryan and Symons, between publication of the Bolitho No 4 decision and the directions hearing on 15 December 2014, engaged in conduct that induced error on the part of Mr Godfrey's lawyers and consequently the court. Each was induced to understand that the conflicts of interest identified in the ruling had been addressed. In fact, they were deceived. AFP, O'Bryan and Symons were active participants in breaching the overarching obligation not to mislead or deceive. Mark Elliott and O'Bryan both continued acting as solicitor and counsel in the proceeding respectively, while at the same time maintaining their financial interest in the litigation (in the case of O'Bryan, above the fees he was properly entitled to charge).

1449 I was not persuaded that Zita breached the overarching obligation not to mislead or deceive by failing to properly satisfy himself as to the truth of the representations made in submissions to the court and in correspondence between solicitors. Zita acted on the instructions from AFP and O'Bryan. Either Zita or Mr Mizzi expressly amended the draft letter O'Bryan prepared for him to clarify that Portfolio Law had been 'instructed' that Noysue had divested its interest in AFP, rather than expressing it as a matter of fact. I accept

Zita's submission that by doing so, the letter impliedly disclaimed Portfolio Law from any belief in the truth or falsity of the contents.[298]

1450 Zita asked O'Bryan for a copy of the share transfer form, but O'Bryan did not produce it, and Zita did not follow up this request. Had Zita asked for the document in order to satisfy himself of the truth of his instructions, it might be said that his failure to follow through with the request might contravene the overarching obligation. However, he merely passed on a request from Mr Godfrey's solicitors that the transfer form be provided.

Zita's role as post-box solicitor

Mark Elliott/AFP, O'Bryan and Symons' conduct

1451 By their involvement in the arrangement by which Zita acted as a post-box solicitor, each of Mark Elliott/AFP, O'Bryan, Symons, Zita and Alex Elliott all breached the paramount duty.

1452 I find that Mark Elliott/AFP arranged for Mr Bolitho and group members to be represented by Portfolio Law as solicitor on the record expressly for the purpose of retaining personal control of the position of solicitor on the record for the representative plaintiff. It was necessary to maintain this charade to create the appearance of compliance with the Bolitho No 4 decision and to conceal the misleading nature of the representations made to the other parties in the proceedings.

1453 As Mark Elliott/AFP, O'Bryan, Symons and Zita each intended, Zita only superficially represented the interests of Mr Bolitho, and not in a manner independently of AFP when their interests were in conflict, by permitting Mark Elliott/AFP and O'Bryan to control the position of solicitor on the record for the plaintiff despite the Bolitho No 4 decision. Symons, Zita, and, later, Alex Elliott were complicit in this strategy, enabling and advancing its implementation in practice. They intended to avoid the transparency that would come with an independent solicitor, which would have compromised their control over the case and their opportunity to seek excessive and undeserved 'spoils' for themselves at the expense of the debenture holders.

1454 I am comfortably satisfied that the conduct of AFP, Mark Elliott, O'Bryan and Symons in manipulating Zita to act as a 'post box' was conduct that breached the paramount duty. It was conduct that corrupted the administration of justice. It was both indefensible and undefended.

1455 That this deception was prejudicial to the proper administration of justice is beyond doubt. It was corrupting and dishonourable. For AFP, Mark Elliott, O'Bryan and Symons it was deceptive conduct. For Zita and Alex Elliott it was misleading. There was a want of candour towards other litigants and their practitioners and towards the court. It was conduct that set up the opportunity for AFP, Mark Elliott, O'Bryan and Symons to dishonestly obtain a financial advantage from the settlement sum to which they were not lawfully entitled to the detriment of defenceless debenture holders.

1456 I need to say more about the conduct of Zita and Alex Elliott, as they contested the findings for which the Contradictor contended.

Zita's conduct

1457 When cross-examined, Zita's attention was drawn to passages of the Bolitho No 4 decision that revealed the court's concern that Mr Bolitho and group members should have the benefit of independent, objective advice in connection with any settlement, and that it would be inappropriate for Mark Elliott to provide such advice, having regard to his interest as funder. Zita agreed that Mr Bolitho and group members expected him to bring an independent and objective mind to bear in the proceeding, and that he was charged with the

responsibility of safeguarding their interests.

1458 Despite acknowledging that to be the case, Zita conceded that he could not point to a single instance, in the course of the whole proceeding, where he stood up to Mark Elliott in the interests of debenture holders, or told him that he wouldn't comply with his instructions when they involved advancing the interests of AFP. I reject Zita's bare and unsupported suggestion in evidence that he might have done so. He was attempting to find refuge from the searching examination of his professional character and his unprofessional conduct. The contemporaneous documentary evidence supported my findings that Zita's invariable practice was to do as he was told by Mark Elliott, O'Bryan and Symons.

1459 Zita offered a number of defensive explanations for his conduct, including that:

(a) he relied on counsel;

(b) Mark Elliott was empowered by the Funding Agreement to have significant input into the litigation strategy, that agreement gave him a contractual right to give instructions and to provide management services;

(c) he may have lacked experience in group proceedings, but had significant experience in commercial litigation;

(d) the group email accounts were merely a convenience;

(e) Mr Crow provided independent advice Mr Bolitho;

(f) he did substantial work in the proceeding;

(g) there was a collaborative decision-making process controlled, as is usual in litigation, by counsel;

(h) it was common practice for counsel to draft correspondence; and

(i) insofar as he participated in an improper arrangement orchestrated by Mark Elliott and O'Bryan, he did so unwittingly.

1460 The Contradictor submitted, and I agree, that these explanations cannot be accepted. When I consider collectively all of my findings on the evidence in this remitter, I am positively persuaded that Portfolio Law was not expected to, and did not, discharge the function of an independent and competent firm of solicitors. It maintained a charade that induced third parties, ranging from Mr Bolitho and the group members, to the other parties and their legal practitioners, and the court itself, to believe that Portfolio Law was just that.

1461 My findings set out that Zita did what was asked of him, not by his client, but by the funder and counsel, blindly and without any inquiry. I cannot be persuaded to accept Zita's position that he was not aware of any conflict between the interests of Mark Elliott/AFP and the interests of group members in connection with the Trust Co Settlement. On evaluation of his evidence, I am satisfied that, at best, Zita was ignorantly blind to the misconduct of Mark Elliott, O'Bryan and Symons.

1462 It was not to the point that the conduct of others may be thought more egregious. Zita, by his acquiescence in Mark Elliott's scheme, did not discharge his duty to the court. His conduct was misleading. He failed to comply with his duty to further the administration of justice. In being complicit in the charade of an

independent solicitor for the lead plaintiff, he corrupted the administration of justice.

1463 The use of a 'post-box' solicitor to enable a conflicted person to remain secretly in control of litigation constitutes a plain breach of the paramount duty owed by all involved to the court and warrants strong condemnation. In *Incorporated Law Institute of New South Wales v Meagher* ('***Meagher***'),[299] Meagher sought readmission to practice after being struck off the roll of solicitors. There was evidence that Meagher had been involved in corrupt dealings with one Willis, both of them being members of the Legislative Assembly. This involved them as 'land agents', accepting bribes from third parties to procure favourable leases from the Minister for Lands. Meagher 'lent his name to be used by Willis exactly as the latter pleased, and signed anything that Willis put before him'.[300] In some instances, Willis asked Meagher to sign his name to a lease application in order to 'deceive future possible clients by making it appear' that Willis was not acting in the transaction, and Meagher abetted Willis in this attempt to deceive.[301]

1464 Griffiths CJ described Meagher's conduct in these terms:

In my opinion the word "reprehensible" is not adequate to describe the conduct of a man who deliberately lends his name for the purpose of putting the man to whom it is lent in a position to deceive intending clients. According to Meagher's version of the facts, Willis, who had received a fee of £1000 for services of some extraordinary and unexplained nature to be rendered desired to be in a position to obtain further fees from other persons who would employ him to take action in conflict with the interests of his client, and Meagher assented. This explanation is cynically offered to the court, not as accounting for an error into which he fell many years ago, and of which he has now repented, but as a vindication of his action as he now regards it. This, to my mind, is the worst feature of the matter, for it shows the respondent's notion of the moral obligations of a practitioner of the class to which Willis and he belonged in 1903, and which he obviously regards as equally applicable to the honourable obligations of a solicitor.[302]

1465 Meagher had signed a letter asking the Minister for Lands to accept security from a person whom he had never met and about whom Meagher had made no enquiries. Griffiths CJ said:

Without the bonds this transaction could not have been carried through. It is plain that the letter of 24th July was written that it might be acted upon as a personal assurance by Meagher, a member of the Legislature, that Scott was a proper person to be accepted as surety. It is equally manifest that he did not know whether what he said about him was true or false, and in my opinion it is equally clear that he did not care whether it was true or not... In any view of the facts the frequent dating of his letters from that office leads to only one conclusion — that he was in these transactions a tool of Willis, to whom he lent his name, and his signature when desired, to carry out Willis' projects, of whatever nature. The explanation that he was a simple innocent person who unwittingly allowed himself to be made use of as an instrument of fraud cannot be accepted.[303]

1466 Meagher's application for restoration to the roll of solicitors failed. Higgins J said:

If it be said that the respondent's admissions are a sign of frankness, I must say they are to me a sign of moral atrophy. The respondent seems to be unconscious of anything wrong or dangerous in such transactions; and how then can it be said, in the words of the Charter of Justice, that he — this "dummy" of Willis — is a "fit and proper" person to be a solicitor, stamped by the court with its approval, put by the court into a position of privilege, held out as being worthy of the confidence of clients, and fitted to assist in the administration of justice? [304]

Isaacs J said:

The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or

reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the court — a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future.[305]

1467 To borrow from Higgins J, Zita was the 'dummy' of AFP/Mark Elliott, O'Bryan and Symons. He lent his name to be used by them, exactly as they pleased, as he sent everything that they put before him. His evidence demonstrated the same kind of moral atrophy Griffiths CJ described about Meagher. No self-respecting solicitor mindful of his paramount duty to the court and his duties to his clients would have allowed himself to be controlled by Mark Elliott, AFP, O'Bryan and Symons as Zita so obviously was. I strongly condemn his abrogation of his duty to the court and to his clients.

1468 For similar reasons, Zita did not meet the standard of conduct mandated by s 21 of the *Civil Procedure Act*. The Bolitho No 4 decision made explicit the court's expectations of independence between the solicitor for the lead plaintiff and the funder of the proceeding. Zita was aware of that ruling and of precisely why Mark Elliott could no longer act and offered the retainer to Zita. Zita maintained the appearance of an independent solicitor throughout the proceeding when he was not. His conduct was capable of inducing error and was likely to mislead or deceive.

Alex Elliott's conduct

1469 Alex Elliott claimed he did not read the Bolitho No 4 decision, however he admitted that he was aware of it. He asserted that he only knew that the court had ruled that Mark Elliott could not act as the solicitor in the Bolitho proceeding while having a significant financial interest in AFP. I did not accept his denial as credible, having regard to his demeanour as a witness and his interest in other relevant group proceeding cases, as noted elsewhere. His concession sufficiently covered his knowledge of the prohibition on his father and Elliott Legal. He knew they had contravened that prohibition, but, in any event, it is probable that he also read and understood the Bolitho No 4 decision, and I so find.

1470 Throughout the trial there was a contest as to whether Alex Elliott was his father's 'personal assistant' or his 'right hand man'. While labels are convenient, they are of dubious utility, merely identifying, in a summary way, Alex Elliott's position on a sliding scale between minimum knowledge and responsibility, as he contended, and full and active participation in Mark Elliott's dealings, as the Contradictor contended. I am satisfied that, by mid-2017, once he held a practising certificate and was a solicitor employed by Elliott Legal working under the direction of his father, Alex Elliott became aware that Mark Elliott was, in substance, controlling the solicitor for the plaintiff in the Bolitho proceeding to prioritise the interests of AFP by the manner in which he exercised control over all that Zita did. As the employed solicitor, Alex Elliott worked as directed by Mark Elliott in maintaining or managing that control.

1471 Because of his role in creating the Portfolio Law email accounts and his active participation in their use, I have no doubt that he knew how Mark Elliott actively controlled Zita and how he wanted the Bolitho proceeding run. Increasingly, Alex Elliott became more active in the role of controlling the litigation for the ultimate benefit of Mark Elliott/AFP, O'Bryan and Symons, in conflict with the interests of Mr Bolitho and group members. As his work load increased, so did his knowledge of what his father was seeking to achieve.

1472 His active role as a solicitor was evident in other group proceedings in which Elliott Legal were the solicitors on record for the lead plaintiff. Alex Elliott's distinction between his work on those matters, being that

of a solicitor, while his work on the Bolitho proceeding was that of a 'personal assistant' was nonsensical and an artifice. I am satisfied that Alex Elliott deliberately downplayed his role by adopting this description because he well understood the implications of the Bolitho No 4 decision.

1473 If not before, by the time the Trust Co Settlement was negotiated, I am satisfied that Alex Elliott's role, whether acting at the direction of his father or otherwise, was one of active participation, assisting in the management of what the NSW Court of Appeal described in *Meagher* as a 'dummy' solicitor, concealing that the real substantive legal input into the litigation behind the scenes was in the hands of lawyers with a personal financial interest in the result. From that time, his conduct amounted to a breach of the paramount duty and the overarching obligation not to mislead and deceive.

O.4. Contraventions in respect of the Trust Co Settlement

1474 I find that, by their conduct in negotiating the Settlement Deed that documented the Trust Co Settlement:

(a) AFP contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and

(b) AFP, O'Bryan, Symons and Zita contravened the paramount duty.

1475 I am satisfied that:

(a) Mark Elliott controlled the settlement negotiations;

(b) neither he nor the Lawyer Parties sought instructions from Mr Bolitho about the position adopted on his behalf in the settlement discussions, nor did they advise him that the Adverse Settlement Terms were unreasonable;

(c) Symons drafted and O'Bryan settled the Adverse Settlement Terms, which raised conflicts between the interests of AFP and the Lawyer Parties and Mr Bolitho and the group members;

(d) neither AFP nor the Lawyer Parties informed Mr Bolitho (or Mr Crow) of the conflicts between their own interests and their duties, including by triggering cll 13.3 or 13.5 of the Funding Agreement, which provided the procedure for such conflicts during settlement negotiations; and

(e) Mark Elliott and O'Bryan procured Mr Bolitho's agreement to the Adverse Settlement Terms by significantly misrepresenting the net return that group members could expect.

1476 I rejected Alex Elliott's evidence that he had not reviewed the various iterations of the Settlement Deed or that he knew that the Adverse Settlement Terms were being demanded.[306] I am satisfied he was complicit in AFP's conduct and understood the material facts that gave rise to the conflict between AFP and the group members.

1477 Zita had limited, if any, involvement in the settlement negotiations, and eschewed his responsibility in favour of those that controlled him: AFP/Mark Elliott, O'Bryan and Symons. Whatever limited role Zita might have performed in settlement negotiations at the direction of Mark Elliott was given to and discharged by Elliott Legal/Alex Elliott.

Misleading or deceptive conduct

1478 I will come later to my reasons for being satisfied that there was no proper basis for AFP and the Lawyer Parties to claim payments of $12.8 million (plus GST) in respect of commission and $4.75 million (plus GST)

in respect of legal costs.

1479 Mr Bolitho's instructions to accept the offer and the SPRs' agreement to support the approval of the settlement, including those sums being paid to AFP, were induced by misleading or deceptive conduct.

1480 First, I accept the Contradictor's submission that AFP and the Lawyer Parties acted contrary to Mr Bolitho's instructions in respect of the demands they made for costs and commission. Mr Crow informed Mark Elliott that Mr Bolitho's instructions were to settle on the basis that the settlement represented a return of not less than 10 cents in the dollar, or about $65 million (plus any amounts for legal costs and commission).

1481 Mark Elliott falsely represented to Mr Crow that the settlement would achieve that return, by stating that the 'headline figure' of the settlement was about $85 million, based on a fanciful valuation of $21 million of the released remuneration claims of Trust Co against Banksia.[307] Instead, had the fraudulent scheme succeeded, the proposed cash return to group members was just $44.695 million, while $19.305 million would be deducted on account of funding commission and legal costs. AFP presented the Settlement Deed to Mr Bolitho for signature, while failing to meet his express instructions that a settlement return not less than 10 cents in the dollar to group members. To do so was misleading.

1482 Second, I am satisfied that AFP procured the SPRs' agreement to those sums by deceiving Mr Lindholm as to material facts. I accepted Mr Lindholm's unchallenged evidence regarding his meeting with Mark Elliott on 10 November 2017 after the in-principle settlement was reached, including that Mark Elliott made it clear that AFP's commission was a 'take it or leave it' figure, and that he was unaware of the irregularities with Lawyer Parties' fee arrangements.[308]

1483 AFP chose not to rebut Mr Lindholm's evidence. I find that in procuring the SPRs' agreement to the Adverse Settlement Terms, AFP intentionally withheld material information from Mr Lindholm and, in doing so, misled and deceived him. The material information that AFP knew in November 2017[309] would have persuaded Mr Lindholm, were he aware of it, to oppose the costs and commission being sought.

1484 Third, the Lawyer Parties' costs were false.[310] They failed to prove that they did any significant work on the Bolitho proceeding in the relevant period. The overwhelming bulk of the trial preparation work was done by the Banksia legal team.

1485 Fourth, the falsified and exorbitant costs claim was intended by AFP, Mark Elliott and O'Bryan to justify the commission that AFP sought. Mark Elliott's demands in respect of costs and commission added up to approximately 30% of the total settlement sum paid in respect of both proceedings. Mark Elliott and O'Bryan may have believed they were entitled to that percentage by virtue of the Funding Agreement, but objectively assessed, the claim was based on misconceptions or deceptions.

1486 Fifth, AFP sought its commission on the whole of the settlement sum, when part of the settlement sum was properly referable to the Banksia proceeding. AFP sought, and received, a common fund order. Mr Lindholm was alive to this issue, but made a commercial decision in the face of Mark Elliott's 'take it or leave it' negotiating stance. Each of Mark Elliott, O'Bryan, Symons and Alex Elliott knew that the settlement sum was being paid to secure the compromise of the two proceedings but that part of the settlement sum, as had occurred in the Partial Settlement, was referable to the claims in the Banksia proceeding. They each knew that AFP had neither a contractual nor any other basis to claim a right to a commission on the whole settlement.

Paramount duty

Failure to properly advise Mr Bolitho and group members

1487 Mark Elliott conducted the negotiations and discussions with respect to the settlement. O'Bryan and Symons assisted and, in so doing, abused their privileged position as counsel for the plaintiff and group members to advance the interests of AFP and their own personal interests in receiving the substantial claims for costs and commission.

1488 Zita invited the court to find that he acted appropriately by delegating all responsibility for drafting of the Settlement Deed to counsel and Mark Elliott. I cannot accept this invitation. The term 'delegated' is inapposite. Delegation is done by persons in control, with responsibility. Zita could not be so described. Mark Elliott, O'Bryan and, to a much lesser extent, Symons delegated to others. Mark Elliott intended to, and did, exercise full control to ensure that his personal interests and those of AFP, O'Bryan and Symons were foremost, prevailing whenever there was any conflict.

1489 Zita acted as instructed, never exercising independent judgment and never focussing on interests other than those of AFP/Mark Elliott and the Lawyer Parties. In the resolution of the terms of the Settlement Deed, he was shut out. Despite the fact that he had no input into the discussion of the proposed amendments, 'alarm bells' did not go off for him about the issues raised in the Bolitho No 4 decision, which he had read or from correspondence from the SPR he read earlier in the proceeding.[311] Of course, if Zita were in a position to 'delegate' his responsibilities in the settlement process, he could hardly delegate to Mark Elliott, whose interest in the settlement was adverse to the interests of his client and the group members.

1490 Zita was not involved in the negotiations. Zita did not appreciate that Mark Elliott was actively excluding him or diverting responsibility away from him because he was content for O'Bryan, Symons and Alex Elliott to do as he directed in those negotiations. Zita accepted, when cross-examined, that he abrogated his responsibilities as solicitor for the class. The evidence has comfortably persuaded me that Zita understood that Portfolio Law's true role was to enable Mark Elliott to continue controlling the litigation, especially the settlement negotiations. Accordingly it was inimical to AFP for Zita to properly and independently represent Mr Bolitho and the group members. He never attempted to do so, even though he knew what the court had ruled in the Bolitho No 4 decision.

1491 I am satisfied, having regard to his evidence earlier referred to,[312] that Zita did not give the Settlement Deed sufficient attention to properly understand its implications for Mr Bolitho and group members. He did not discuss the terms proposed with Mr Bolitho, Mark Elliott, O'Bryan or Symons, and had no appreciation of the differences between the positions of the SPRs and AFP. He treated the entire settlement process as though it were none of his business.

1492 I rejected Zita's contention that Zita considered whether the terms sought by AFP were in the interests of Mr Bolitho and group members. As I have explained elsewhere, his belief that a net $44 million (approximately) was a good settlement for group members is no answer. It is plain from the totality of the documentary evidence and Zita's own evidence that he applied no independent judgment about the terms of the Settlement Deed. The Contradictor submitted that it was farcical to contend otherwise. I agree.

1493 Zita's claim that it was Mr Crow's responsibility to advise Mr Bolitho about the settlement terms[313] was a self-serving attempt to avoid facing the reality that, as I find, he abandoned his client and the group members, and entirely served AFP/Mark Elliott's interests, instructions and directions. I reject Zita's suggestion that he believed that he had no obligation to advise the plaintiff about the settlement. Zita breached his paramount duty by the adoption of a post-box role that contributed to enabling Mark Elliott to achieve the settlement on those terms.

Failure to trigger the processes in the Funding Agreement

1494 I am satisfied that Zita's failure to identify and properly manage the conflict of interest between AFP and Mr Bolitho/group members, clearly present at the time of the Trust Co Settlement, was a consequence of his principal breach of the paramount duty. By knowingly acquiescing in the post-box role demanded of him, Zita breached his duties.

1495 Although I accept that Alex Elliott was a junior solicitor in the Bolitho legal team, his interests were aligned with those of his father and AFP, not with Mr Bolitho and group members. A practising solicitor should be capable of identifying conflicts of interest, and Alex Elliott later showed that that he could. This was a glaring conflict of the kind that was explicitly recognised in the Funding Agreement and AFP's Conflicts Management Policy.

1496 Despite his denial, I was satisfied that Alex Elliott appreciated the material facts that gave rise to the conflict. As I have found, he knew the extent of the claims being made against the settlement sum by AFP and was familiar with the terms of the Funding Agreement. However, Alex Elliott's alignment with Elliott Legal and AFP distinguished his position from that of Zita.

1497 The Contradictor submitted that, having regard to the fact that the Bolitho proceeding concerned the rights of 16,000 group members, the court should find that Alex Elliott breached his paramount duty by failing to identify and properly manage this conflict. I am not persuaded to accept this submission. Alex Elliott was not the solicitor for Mr Bolitho. He contributed to the source of the conflict that the Lawyer Parties were obliged to manage. That said, that Alex Elliott knew these matters by the time the Settlement Deed was signed would later become significant.

1498 By these contraventions in respect of the Settlement Deed, AFP, O'Bryan, Symons and Zita contravened the paramount duty. AFP and O'Bryan, having deceptively circumvented the Bolitho No 4 decision, corrupted the administration of justice by exploiting the conflict of interest between AFP and the group members in the ways predicted by the court in that ruling. Symons and Zita were complicit in that conduct.

1499 Mark Elliott, as O'Bryan and Symons well knew, was not candid with either Mr Bolitho or Mr Crow in securing instructions to settle, or with Mr Lindholm in securing relevant concessions from the SPRs that were integral to the fraudulent scheme. For O'Bryan and Symons, it was Mark Elliott's job to achieve this, and they agreed with and supported him in his deception of each of Mr Bolitho/Mr Crow and Mr Lindholm. They were complicit in Mark Elliott's breach of his paramount duty as if they had conducted the negotiations themselves.

1500 The administration of justice is corrupted if a lawyer is not candid with an opponent in dispute resolution by engaging in deceptive and misleading conduct. Settlement is a foundational process in civil litigation and is critical to the proper administration of justice. The administration of justice is equally corrupted if a lawyer is not candid with their client in obtaining instructions for settlement by deception and misleading conduct.

O.5. Contraventions in respect of the Lawyer Parties' fee arrangements

1501 I am persuaded to the requisite standard, and find, that by their conduct in connection with entering into and documenting arrangements in relation to the Lawyer Parties' fees, and in failing to ensure that fees claimed from the Trust Co Settlement sum were properly incurred:

(a) AFP, O'Bryan, Symons and Zita contravened the paramount duty;

(b) AFP, O'Bryan and Symons contravened the overarching obligation to act honestly;

(c) AFP, O'Bryan, Symons and Zita contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and

(d) AFP, O'Bryan, Symons and Zita contravened the overarching obligation to ensure that costs were reasonable and proportionate.

In this section of the reasons, I will refer to these contraventions as the 'fee arrangement contraventions'.[314]

1502 Further, I am satisfied that by their conduct in connection with seeking to recover from group members, for O'Bryan and Symons, fees that exceeded a fair and reasonable amount:

(a) AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the paramount duty;

(b) AFP, O'Bryan, Symons and Alex Elliott contravened the overarching obligation to act honestly;

(c) AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and

(d) AFP, O'Bryan, Symons, Zita and Alex Elliott 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.

In this section of the reasons, I will refer to this category of contraventions as the 'overcharging contraventions'.[315]

1503 My earlier findings demonstrated that the conduct in respect of the fees arrangement contraventions involved the following elements.

1504 O'Bryan and Symons:

(a) did not keep contemporaneous records of the time spent or the work done, nor did they issue regular accounts;

(b) agreed with AFP not to issue regular interim invoices or interim statements of the costs they had incurred, to enable a clean documentary trail to be created after the Settlement Deed was signed that disguised the unlawful contingency fee arrangement;

(c) manipulated their invoices to charge fees in a sum predetermined by AFP/Mark Elliott following the Trust Co Settlement, which was unrelated to the time spent or the work done;

(d) generated their invoices in a way to make it appear, falsely, as if they had been issued to Portfolio Law monthly throughout the litigation, and were due for payment a month after issue; and

(e) were each aware of what the other was doing, and agreed with or acquiesced in the conduct of the other, as joint participants in the fraudulent scheme.[316]

1505 Zita:

(a) was engaged on a no win no fee basis, contrary to the terms of his costs agreement;

(b) did not keep contemporaneous records of time spent or work performed, nor issue regular accounts; and

(c) created the Portfolio Law Spreadsheet in an attempt to demonstrate that he had performed valuable work on the matter.[317]

1506 AFP/Mark Elliott and the Lawyer Parties relied on those contrived documents intending to mislead Trimbos into opining in the Third Trimbos Report that their fees were fair and reasonable,[318] on which they intended to rely when obtaining court approval for the Trust Co Settlement.

1507 There was no scrutiny or monitoring of the Lawyer Parties' fees. Zita conceded that, contrary to the Portfolio Law costs agreement, he never discussed counsel fees or the terms of counsel's retainer with Mr Bolitho.[319] Fees and retainers were controlled by Mark Elliott.

1508 The Lawyer Parties' fee arrangements were implemented at AFP/Mark Elliott's direction, without any discussion with or notice to Mr Bolitho. AFP did not pay their invoiced fees (save for some relatively insignificant payments), because payments could only be made out of the settlement sum once received. AFP did not, probably could not, finance them in any other way.[320] Even when circumstances changed and AFP purported to pay Symons and Zita,[321] the payments were not made in the ordinary course of business.

1509 Alex Elliott:

(a) attended the Wrap-Up Meeting to discuss and plan how to justify the $4.75 million (plus GST) that Mark Elliott demanded from Mr Lindholm;

(b) assisted with preparation of the Banksia Expenses Spreadsheet prior to any underlying documentation from the Lawyer Parties being received;

(c) received various documents from O'Bryan quantifying his fees at different amounts; and

(d) received the Lawyer Parties' fee documentation, each of which fell in close proximity to their respective fee targets.[322]

1510 The Contradictor's allegations against Alex Elliott only concerned the overcharging contraventions.

Dishonesty

1511 By the ordinary standards of reasonable and honest people, what each of AFP/Mark Elliott, O'Bryan, Symons and Alex Elliott were seeking to achieve was dishonest, an intention that infected what they did. I am satisfied to the requisite standard that their specific intention was not to document what the Lawyer Parties were entitled to, but rather to justify a substantial benefit for AFP and, in the case of counsel, an amount for their own financial benefit. There was no evidence that any of them believed the Lawyer Parties were entitled to calculate and invoice fees in this manner.

1512 Tellingly, Alex Elliott admitted that he did not scrutinise the Lawyer Parties' fee documentation prior to the approval hearing. After issues arose in the appeal as to whether those fees were excessive, he did not revisit the fee slips or consider their quantum, nor had he done so at the time of giving evidence in the remitter. I am comfortably satisfied from these concessions that Alex Elliott knowingly assisted AFP to advance a dishonest

claim for fees that were not fair or reasonable. No solicitor acting honestly would have failed to turn their mind to the veracity of the Lawyer Parties' fee documents in the circumstances Alex Elliott was in. He had no need to consider the truth of the claims, as he positively knew they were false.

Misleading or deceptive conduct

1513 I pause to note that the Contradictor made no allegation of dishonest overcharging against Zita. Rather, the Contradictor contended, and Zita conceded, that his bills were based on guesswork, which was wholly unreliable, and for which debenture holders should not be asked to pay. That concession is sufficient to support findings that Zita breached the overarching obligations not to mislead or deceive.

1514 It was deceptive for Zita to proffer to Mr Bolitho, Trimbos, and the court, documentation that did not reflect Portfolio Law's actual entitlement to fees or the role that Zita performed in the litigation. The costs agreement did not permit Zita's no win no fee arrangement or charges for the 'work' that was actually performed. Zita sat in silence and said nothing to the court in the approval hearing and thereafter.

Unreasonable and disproportionate costs

1515 I am satisfied that the conduct of AFP/Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott in connection with the claim for $4.75 million (plus GST) demonstrated that they failed to use reasonable endeavours to ensure that legal costs were reasonable and proportionate.

1516 No other conclusion is open from the manner in which the Lawyer Parties' fees claims came into existence as earlier set out. They were not costs that were consistent with their costs agreements or costs disclosures, but amounts that Mark Elliott directed, after the spoils had been divided. No contemporaneous records were kept. No evidence of work product justifying the amounts was available. In the case of O'Bryan and Symons, they were proven to be total fiction. It was impossible, in the light of these findings, for the Lawyer Parties to contend that the fees invoiced were reasonable and proportionate.

1517 Zita contended that he could not be accused of failing to ensure that his legal costs were reasonable and proportionate in circumstances where no allegation of overcharging was advanced against him. That submission misconceived the true position. It did not follow from the fact that no such allegation was made that Zita's fees were reasonable and properly incurred.

1518 First, the overarching obligation does not solely apply to Zita in respect of his own legal costs.[323] Zita acquiesced in O'Bryan and Symons' overcharging.[324] He breached his contractual obligations to Mr Bolitho and failed to protect the interests of group members. His willingness to act as the dummy of Mark Elliott, O'Bryan and Symons could not, on any view, amount to a reasonable endeavour contemplated by the overarching obligation.

1519 Second, the conclusion that Zita contravened the overarching obligation to ensure that the legal costs were reasonable and proportionate, and that his fees were neither reasonable nor properly incurred, must follow, *a fortiori*, in light of his own concessions in cross-examination.[325] The costs of a solicitor are not reasonable or proportionate where they cannot identify a single example of applying independent thought or exercise of judgment over the course of the entire retainer. Zita acknowledged that group members should not pay for his costs, in light of how the invoices had been prepared.

Paramount duty

1520 AFP, O'Bryan, Symons and Alex Elliott intended to obtain and divide the spoils that Mark Elliott negotiated from the Trust Co Settlement under the guise of a 'reimbursement' of legal costs. Each of them joined in concealing the true arrangements with respect to fees, knowing and intending that fabricated (or, in

the case of Alex Elliott, grossly inflated) fee slips by counsel would be relied upon by Trimbos and, directly or indirectly, the court. They did so with dishonest intention.

1521 Their conduct was truly egregious and corrupted the proper administration of justice. This form of deceit and collusion has been proscribed as inimical to the proper administration of justice since advocates first appeared in courts. It was conduct that directly undermined the confidence that the judiciary must place in legal practitioners to conduct themselves in accordance with the law and discharge their duty even when not subject to scrutiny.

1522 AFP, O'Bryan, Symons and Alex Elliott breached their paramount duty because they were not candid with the court. They misled the court by intentionally deceiving it about the fee arrangements, and into proceeding to judgment on the assumption that it had the assistance of independent legal representation for the litigating parties, lawyers acting with perfect good faith, untainted by divided loyalties of any kind.

1523 Zita, likewise, knew that if the court approved the settlement and the claimed costs, he would be paid money that exceeded any proper entitlement. He knew, as did the other Contraveners, that the legal costs would be deducted from a settlement sum destined for distribution to a large number of beneficiaries, for whom the court exercised a protective jurisdiction in the approval application. The financial advantage that they sought would have come as a loss suffered by many victims.

1524 Legal practitioners owe fiduciary duties, both in respect of making a costs agreement, and in carrying out a costs agreement already made.[326] In the context of a group proceeding, where costs were sought to be recovered from funds accepted for the benefit of the whole class, this conduct amounted to a breach of the paramount duty and the relevant obligations by AFP and each of the Lawyer Parties not to overcharge.

1525 Zita mischaracterised the Contradictor's case against him in respect of his fee arrangements, as being based on breach of the Portfolio Law costs agreement. Of itself, a mere technical breach of a costs agreement is unlikely to give rise to a contravention of an overarching obligation. The gravamen of the case that Zita had to meet was far more serious.

1526 Zita conceded he had an obligation to monitor the terms of counsel's engagement and counsel's fees. That concession was proper. Zita was the solicitor on the record. He had a strict, positive obligation to ensure that the legal costs were properly incurred, reasonable and proportionate. He did nothing to discharge that obligation.[3]

1527 I reject Zita's submission that his conduct fell short of a breach of the overarching obligation to further the administration of justice. Zita breached his paramount duty. He failed to inform Mr Bolitho, Trimbos, and the court of the real position with respect to Portfolio Law's fee claim and billing arrangements. He failed to provide any oversight in respect of counsel's fees, thereby enabling their contraventions. In doing nothing to correct the misleading conduct of others, Zita preferred the interests of AFP/Mark Elliott, O'Bryan and Symons to the interests of Mr Bolitho/group members and to his duty to the court.

1528 As the solicitor on the record, Zita proffered to the court a claim for legal costs and disbursements totalling millions of dollars, yet had no knowledge of what work had been undertaken. This claim was supported by expert opinion based on fabricated invoices addressed to Zita and made to appear as if they had been issued monthly. Zita filed this opinion having never received these invoices. Zita could, and ought to, have readily identified these irregularities. Group members were entitled to expect better from the solicitor engaged on their behalf to conduct the litigation.

1529 Zita's abrogation of his duties to his client was a direct consequence of his subservience to Mark Elliott, and his willingness to cede all control of the litigation to AFP and the Lawyer Parties. It is irrelevant whether Zita would have discovered the fraud had he fulfilled his obligations. The point is, he did not fulfil those obligations and that, in and of itself, was a breach of his duty to the court.

1530 I have already noted that the undisclosed assumption of a post-box role by the solicitor on the record misled the court.[3] That the court was unaware that one of the usual and expected checks and balances in respect of costs and disbursements had been disengaged was also corrupting of the proper administration of justice.

O.6. Contraventions in respect of misleading Trimbos

1531 I find that, by their conduct in connection with the Third Trimbos Report:

(a) AFP, Alex Elliott, O'Bryan and Symons contravened the overarching obligation to act honestly;

(b) AFP, Alex Elliott, O'Bryan, Symons and Zita contravened the overarching obligation not to mislead or deceive;

(c) AFP, Alex Elliott, O'Bryan, Symons and Zita contravened the paramount duty.

1532 AFP made very extensive admissions, admitting the contraventions alleged against it and the Lawyer Parties (including the allegations of dishonesty), and most of the underlying alleged facts. O'Bryan and Symons offered no defence to these allegations.

1533 Zita and Alex Elliott largely adopted AFP's admissions, save that Zita denied that he contravened the overarching obligations or paramount duty, and Alex Elliott denied any complicity in the alleged misconduct. They both admitted the Third Trimbos Report was misleading and that AFP, O'Bryan and Symons each contravened the obligation to act honestly.

1534 On my assessment of the whole of the evidence, I find that:

(a) by procuring and relying on the Third Trimbos Report, each of AFP, O'Bryan, Symons and Alex Elliott contravened the overarching obligation to act honestly;

(b) by providing information to Trimbos that was false, each of AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the overarching obligation to not mislead or deceive;

(c) the conduct of AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the paramount duty by causing conduct inimical to the proper administration of justice, including:

(i) an expert witness's misleading report was used to induce the court into error by approving excessive claims for legal costs and funding commission in a manner that compromised the proper administration of justice;

(ii) misleading the court about the fee arrangements when each of them was duty bound not to produce Trimbos as a credible witness;

(iii) an abuse of the practices and procedures of the court established in connection with the settlement of group proceedings, in which the court relies on legal practitioners seeking approval of a settlement putting before it, often on a

confidential basis, all matters relevant to its function, having particular regard to the court's protective role; and

(iv) undermining the court's trust and confidence in the honesty and candour of the solicitors and counsel appearing before it.

AFP, O'Bryan and Symons

1535 I am satisfied to the applicable standard that:

(a) Mark Elliott and O'Bryan consciously and deliberately decided to mislead Trimbos by instructing him in the way that was most favourable to AFP. In addition to omissions concerning the Banksia proceeding and the length of the trial, they falsely asserted that AFP had actually paid the costs it sought to recover, as they had done in respect of the Partial Settlement. In addition to the obvious benefit of that claim being approved, they each understood that to justify the funding commission sought, it was necessary that it appear that AFP had invested in the proceeding by paying legal expenses;

(b) Symons was aware that the instructions to Trimbos were false, as:

(i) he knew his own fees had not been invoiced, let alone paid;

(ii) having received drafts of O'Bryan's fee memoranda shortly after the in-principle settlement, Symons knew that O'Bryan's fees had not been invoiced, let alone paid; and

(iii) the evidence demonstrated that Symons did not simply adopt a passive role in the fraudulent scheme perpetrated by Mark Elliott and O'Bryan. He was part of their inner circle and knew that success depended on favourable evidence from Trimbos;

(c) to ensure court approval of the settlement, these false statements were communicated to Trimbos, whom they intended would accept them as true and would, as he did, opine on the false basis that AFP had actually paid the costs it sought to recover.

Zita

1536 Despite admitting that the Third Trimbos Report was misleading, Zita denied that he contravened the paramount duty and overarching obligations. He contended that he was not involved in the briefing of Trimbos, did not draft the letter of instruction and did not provide the misleading costs agreements and invoices of counsel that founded the misleading representations in Trimbos's report. He did not convey to Trimbos, or the court, that the Portfolio Law Spreadsheet was a contemporaneous record (or based on contemporaneous records).

1537 I reject this submission. First, Zita's positive conduct in providing the Portfolio Law Spreadsheet to Trimbos did mislead him. Zita's conduct induced Trimbos to assume that the Portfolio Law Spreadsheet was based on contemporaneous records. So much was made plain by the Fifth Trimbos Report:

My Portfolio Law fees opinion was also based on my understanding that Portfolio Law maintained contemporaneous records of the time spent on the matter.

If, as alleged Portfolio Law did not maintain proper time records then ... the sampling approach I undertook to evaluate the reasonableness of the time spent by Portfolio Law on the matter will not be appropriate and each

item of work undertaken will need to be considered. This is likely to result in a reduction to the time to be allowed for the various tasks undertaken and a corresponding reduction to my Portfolio Law fees opinion.

1538 Putting to one side whether there was a reasonable basis for Trimbos to make that assumption, addressed elsewhere, I am satisfied that Trimbos believed that Portfolio Law maintained time records during the Bolitho proceeding, and that he relied on this material in preparing his report.

1539 Further, even if Trimbos had not relied on the Portfolio Law Spreadsheet as constituting a contemporaneous record of Portfolio Law's time spent on the matter, Zita intended for it to convey that Portfolio Law had performed valuable work in accordance with the terms of its costs agreement. For the reasons set out in section H.5, that was not the case. He did not perform any work capable of being ascribed a monetary value. To represent that he did was misleading.

1540 Second, the fact that Zita acquiesced and allowed AFP/Mark Elliott, Alex Elliott, O'Bryan and Symons to brief Trimbos on his behalf does not enable him to contend that he did not engage in the contravening conduct. On analysis of the relevant circumstances of his participation, particularly his presentation of the Third Trimbos Report to the court on behalf of Mr Bolitho, I am satisfied that Zita placed those who truly briefed Trimbos in the position of acquiring firsthand knowledge of relevant facts in respect of a task that was made to appear to be his, and is to be fixed with the knowledge acquired by AFP/Mark Elliott, Alex Elliott, O'Bryan and Symons, and accordingly is complicit in their conduct.[327]

Alex Elliott

1541 Despite his refusal to concede any responsibility for misleading Trimbos and the court, I am satisfied that Alex Elliott was complicit in the contravening conduct of AFP and Mark Elliott and himself engaged in conduct that misled Trimbos and the court.

1542 As an employee of AFP or employee solicitor of Elliott Legal, he assembled and delivered the brief to Trimbos. I reject Alex Elliott's contention that he did not understand that the information he conveyed to Trimbos was misleading. He well knew that the invoices of the Lawyer Parties had been issued after the Settlement Deed was signed, and had not been paid. Alex Elliott was managing the Banksia Expenses Spreadsheet and Mark Elliott copied him into the emails chasing invoices and involved him in correspondence with AFP's auditor for that purpose.

1543 When Alex Elliott saw the Trimbos instruction letter on 24 November 2017, he knew that neither Portfolio Law nor O'Bryan had issued any invoices and that Symons had not invoiced for the amount asserted in the instructions. Consistently with his failure to question his father, and instead to support his approach to instructing Trimbos that Symons' and Zita's costs had been paid, and contrary to his knowledge, it later became plain that neither Mark nor Alex Elliott ever believed those costs had been paid when he was asked to issue cheques to pay these invoices during the appeal.

1544 In this context, I reject Alex Elliott's attempt to characterise himself as a personal assistant who read nothing, and who unknowingly and in an unquestioning manner did as he was told, without applying any critical thought to the tasks he was asked to perform. The documents in evidence showed that characterisation to be false and the content and demeanour of his evidence in the witness box corroborated that conclusion. His demeanour in the witness box did not persuade me that he was not an astute and engaged solicitor at all relevant times, as appears a probable and reasonable inference from the documents tendered in the remitter. I am satisfied that Alex Elliott paid close attention to the content of emails and letters sent to him. He knew that Mark Elliott was misleading Trimbos.

O.7. Contraventions by Trimbos as an expert witness

1545 I am satisfied that:

(a) Trimbos's conduct in making the representations expressed in the Third Trimbos Report contravened the overarching obligation not to mislead or deceive;

(b) Trimbos maintained those representations, and continued to contravene the overarching obligation not to mislead or deceive, until he issued the Fifth Trimbos Report and recanted them;

(c) Trimbos contravened the paramount duty by:

(i) failing to give primacy to his duty to the court as an independent expert by preferring the interests of AFP/Mark Elliott and the Lawyer Parties;

(ii) misleading the court by his express representation in the Third Trimbos Report that he had complied with the Expert Code of Conduct; and

(iii) failing to comply with his duty to provide forthwith a supplementary report after changing his opinions on material matters expressed in the Third Trimbos Report, despite being aware of issues in this remitter materially affecting his reports.

1546 Trimbos appears not to have considered himself bound by the Expert Witness Code of Conduct, or, if he did, not to have actually considered it. He was not independent of AFP. He also provided informal advice that affected his apparently independent retainer. He accepted, without criticism, the veracity and accuracy of the material and assumptions he was briefed with. He failed to apply an objective process of independent assessment.

1547 Trimbos did not make all the inquiries that were desirable and appropriate for an expert to have made, and to express all the necessary qualifications to his opinions, particularly as an expert representing that he has complied with the Expert Code of Conduct. By the representations Trimbos made, he induced the court to accept his evidence. In doing so, the court was misled.

1548 The Contradictor submitted, and I agree, that the Fifth Trimbos Report did not confront the reality that Trimbos had, by his third report, misled the court, particularly about O'Bryan's fees. Trimbos knew this was a significant matter. It needed to be directly drawn to the court's attention to avoid corrupting the proper administration of justice. Trimbos did not address the issue in a manner consistent with his paramount duty to the court as an expert witness.

1549 When O'Bryan emailed Trimbos a copy of the affidavit order, he could not, from that moment forward, have doubted that grave issues had arisen with respect to the information that AFP and the Lawyer Parties provided to him, and the manner in which they had deployed the Third Trimbos Report before the court. Trimbos did not then revisit the opinions he had expressed in any of his reports.

1550 Critically, when briefed to prepare the Fourth Trimbos Report, Trimbos was instructed with a different set of O'Bryan's invoices, together with the amended assumption, contrary to his previous instructions, that O'Bryan had not been paid his fees that were the subject of the Third Trimbos Report.

1551 These matters ought to have caused Trimbos to make further inquiries concerning the reasonableness of those fees and apply a process that properly scrutinised them, which would have quickly exposed their illegitimacy. Alternatively, he ought to have directly identified the changed circumstances in his Fourth Trimbos

Report, and disclosed that, consistent with 'tradition', he accepted counsel's fee documentation as truth, such that he did not consider it necessary to question why his instructions had changed. He failed to do so.

1552 By contravening the paramount duty and the overarching obligation not to mislead the court when he prepared the Third Trimbos Report, Trimbos materially contributed to the impugned approval of the Trust Co Settlement and to the loss suffered by debenture holders, an issue to which I will soon return. The Fifth Trimbos Report was served on 29 June 2020. It precipitated AFP's extensive admissions served two weeks later, on 14 July 2020. AFP had little choice but to make admissions in circumstances where its own expert had recanted his earlier opinions. Had Trimbos discharged his paramount duty to the court and his duties under the Expert Code of Conduct from around February 2019 when, at the very latest, he was put on inquiry about the integrity of the instructions provided to him for his reports, it is unlikely that AFP could have continued to aggressively pursue its claims in the remitter, or resist those of the Contradictor and losses may have been capped.

O.8. Contraventions in respect of the application for settlement approval
Summons and notice to group members

1553 I find that, by their conduct in connection with preparing and issuing a summons and notice to group members that stated that AFP was seeking 'reimbursement' of legal costs when AFP had not in fact paid substantially all of those legal costs for which it claimed 'reimbursement':

(a) AFP, O'Bryan and Symons contravened the overarching obligation to act honestly;

(b) AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the overarching obligation not to mislead or deceive; and

(c) AFP, O'Bryan, Symons, Zita, and Alex Elliott contravened the overarching obligation to only make claims that have a proper basis.

Dishonesty

1554 The use of the term 'reimbursement' by AFP/Mark Elliott, O'Bryan and Symons was intentional. It was not merely a misleading representation. By the ordinary standards of reasonable and honest people, the deception practiced by AFP/Mark Elliott, O'Bryan and Symons on the court, Mr Bolitho/group members and other parties in communicating that the representation was true, was dishonest. I am satisfied to the requisite standard, having regard to the nature of the findings, that they were each motivated by an intention to conceal the fraudulent scheme and to falsely establish a basis for AFP to receive amounts that were well beyond any proper entitlement.

1555 The Contradictor made no allegation of dishonesty against Alex Elliott in connection with the summons or notice, and I make no finding about his state of mind.

Misleading or deceptive conduct

1556 The use of the term 'reimbursement' in reference to the costs was misleading because the ordinary meaning of the word 'reimbursement' is pay back, refund, or repay.

1557 I am satisfied that each of Symons, O'Bryan, Mark Elliott and Alex Elliott intended for group members and the court to wrongly assume the fact that AFP had incurred and paid $4.75 million (plus GST) in legal costs and disbursements. So much was clear from the use of the Third Trimbos Report in the approval application and from what was said by O'Bryan and Symons in their opinions. They knew that approval of the funding commission claimed was dependent on the investment that AFP had made in the expenses of the

litigation.

1558 The representation was false.[328] Mark Elliott and Alex Elliott knew what AFP had, and had not, paid. O'Bryan and Symons each knew that their own fees had not been paid.

1559 Alex Elliott was involved in the preparation of the notice.[329] Although he initially denied reviewing the summons, when cross-examined he conceded that he reviewed the draft before it was filed.

1560 Zita argued that the Contradictor failed to prove that he knew that the representation was false, but that submission fails as a matter of law.[330] It is not to the point that Zita did not know or consider that counsel were engaged on an illegal contingency basis. He was never privy to their fee arrangements because he took no interest. That issue was beyond the remit of his retainer with Mark Elliott.

1561 Zita engaged in misleading conduct because of his acquiescent, obsequious relationship with Mark Elliott that I have already described.[331] Zita's evidence confirmed as much. Zita:

(a) read the summons and the notice to group members, but not in any detail;

(b) did not identify any issue arising from the use of the word 'reimbursement';

(c) could not say whether counsel's fees had been reasonably incurred or paid, having made no enquiries; and

(d) knew that Portfolio Law had not been paid at the time the summons was filed and notice was approved by the court.

1562 While he didn't think, Zita did issue and serve the summons and communicate the message from the script to group members. He engaged in conduct that was misleading because it led the recipients of his communications into the error of believing a false representation was true.

No proper basis

1563 Zita submitted that he did not breach the proper basis obligation for two reasons:

(a) He was entitled to rely on the truthfulness of AFP's instructions and the competence of counsel. Zita submitted that he reasonably understood that AFP was obliged to pay legal fees but he did not, and could not, know of the illegal contingency arrangement because it was concealed from him. Accordingly, Zita reasonably considered there to be a proper basis to claim those legal fees.

(b) A party can obtain a taxed order for costs without having paid them; it is sufficient that the costs have been incurred.[332] Zita contended that, in the context of a claim for costs, the word 'reimbursement' can, as a matter of ordinary language, also encompass costs liability incurred, but not paid.

1564 Neither submission was sufficient to establish that there was a proper basis to assert that AFP sought a 'reimbursement'. The word does not mean 'incurred a liability' to third parties, particularly to lay people unfamiliar with the processes of the Costs Court. The assessment is objective, not subjective. Zita's reliance on a subjective belief of a proper basis is rejected.

1565 Alex Elliott also submitted that he did not breach the proper basis obligation because he was entitled to

rely on the truthfulness of AFP's instructions and to rely on the competence of counsel. He put his position in response to a question in cross-examination:

It's a difficult question. I mean at the time I'm being guided by, you know, incredibly superior people and I have an anticipation and expect that everything is being run in accordance with how it should be run. Looking back now I can see, you know, there are issues and it's a really difficult, difficult position to be in. I'm not really sure what I'm supposed to do.

1566 Alex Elliott claimed that he was entitled to rely on other members of the legal team having assessed that there was a proper basis for the terminology used in the summons and the notice, and to expect a junior solicitor who files a summons to independently verify the truth of every representation it made would impose unreasonable and unrealistic standards on them.

1567 I reject this submission. First, it was divorced from the facts as I found them. This case did not concern the extent to which a junior solicitor must make enquiries. Alex Elliott knew the facts. He did not need to independently 'verify the truth of every representation made' in the summons and the notice. He knew the representation was false. Second, the lawyer's duty to the court is non-delegable.[333] To say that Alex Elliott was entitled to assume that Mark Elliott, O'Bryan and Symons were satisfied that there was a proper basis for the representation is misconceived.

1568 This submission was consistent with Alex Elliott's broader defence that, as a junior lawyer, it was not his responsibility to point out egregious errors and falsehoods of which he became aware, or to question the senior lawyers who were on the legal team. This completely undermined his role as a member of that legal team, and his duties to the court. It would seem that he reserved to himself an ability to come and go as he pleased, to change his spots when it suited.

1569 At its base, his case appears to be that he should be permitted by this court to engage in the wrongs alleged because he was a junior lawyer; overborne as to his duties to the court by his father and the Lawyer Parties, whose conduct he admired.[334] There is no authority to be found for this exception, either in the text, context and purpose of the *Civil Procedure Act*, or in the cases cited to me. Alex Elliott's submission that there was nothing that he as a junior lawyer could have done is addressed later in section P. The steps that Alex Elliott could have taken began with recognising, from what he already knew, that there was no proper basis for using the terminology 'reimbursement'.

Counsel's opinions

1570 I find that:

> (a) AFP, O'Bryan, Symons and Alex Elliott misled the court in connection with counsel's first opinion (and did so in circumstances where they knew the opinion was deficient);
>
> (b) AFP, O'Bryan and Symons misled the court in connection with counsel's second opinion (and did so in circumstances where they knew the opinion was deficient); and
>
> (c) AFP, O'Bryan, Symons and Alex Elliott thereby contravened the paramount duty, the overarching obligation to act honestly, and the overarching obligation not to mislead or deceive.

1571 Against Alex Elliott, the Contradictor pressed that Alex Elliott knew that counsel's first opinion was deficient in relation to the statements it made about funding risk and the Trust Co remuneration claim, but did not otherwise press allegations of dishonesty again him in respect of counsel's first or second opinion (in

circumstances where his evidence was he was away overseas when the latter was drafted and did not read it). I have made my findings in respect of Alex Elliott's conduct on that basis.

Role of O'Bryan, Symons and AFP

1572 In a case that settles prior to trial, with some similarity to an *ex parte* hearing, the court knows far less about the issues in the case than the legal representatives acting for the parties. It was well understood in 2017 that in an application for approval of a settlement and of deductions to be permitted from the settlement sum, the court discharges a protective role in relation to group members' interests, in respect of both the settlement itself and any deductions from that sum.[335]

1573 This protective role is necessary because the rights of many, namely the group members other than the lead plaintiff who are not before the court, may be determined.[336] The court when exercising its jurisdiction pursuant to s 33V on behalf of those group members relied heavily on Mr Bolitho, the Lawyer Parties, and AFP to act with absolute integrity, transparency and honesty. That reliance extended to the litigation funder by reason of s 10 of the *Civil Procedure Act,* as discussed elsewhere in these reasons.

1574 A practice has developed of requiring trial counsel for the lead plaintiff to provide a confidential opinion for the assistance of the court. What the court expected, and the unrepresented group members deserved, was counsel providing the court with a balanced view of the matter in their opinion: drawing attention to the relevant considerations, both favourable and unfavourable. It is obvious that, on such an application, the court expects solicitors and counsel acting for the class to be mindful of their duties and obligations not only to their clients, but also to the court.[337] There is a heavy burden on solicitors and counsel seeking approval of the settlement to make full disclosure to the court of all matters relevant to the court's consideration of the matter.[338]

1575 Particularly where no contradictor is appointed by the court, a settlement approval application is akin to an *ex parte* application. Persons whose rights may be affected are absent. Counsel are expected to be candid and frank in their opinion.[339] That is one reason why such opinions are kept confidential. Counsel are under an obligation to bring to the court's attention all facts and issues which might bear upon the order to be made.[340]

1576 O'Bryan and Symons well understood these matters. In the first opinion, they said:

A confidential and privileged opinion from the counsel acting for the class action plaintiff as to whether a proposed settlement is fair, proper and appropriate, and likely to be in the interest of the group members as a whole, has become a standard step in class action settlement approval processes in recent years.

1577 They included a footnote which referred to various authorities including *Lopez v Star World Enterprises Pty Ltd*, in which Finkelstein J stated:

[T]he task of the court in considering an application under s 33V is indeed an onerous one especially where the application is not opposed. It is a task in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter. In this regard there would be few cases where the court can properly exercise its power under s 33V without evidence from the solicitor supported by counsel that the proposed compromise is in the interests of the group members. I appreciate that, on occasion, this will place the solicitor and counsel in a difficult position. The interests of their client will not always be coincident with the interests of the members of the group. But, in my view, that is no more than a necessary consequence of their client instituting a representative action.[341]

1578 O'Bryan and Symons knew that 'a necessary consequence' of accepting a brief to act in a group proceeding was that they became subject to onerous duties as counsel for group members, whereby the court was entitled to 'rely heavily' on them to 'put before it all matters relevant to the court's consideration of the matter'. They also knew that the court did rely on such opinions. Their footnote also referred to *Downie v Spiral Foods Pty Ltd*, where J Forrest J said:

It is to be remembered that in reaching this opinion, counsel owed a duty not only to the plaintiff but also to the group members as well as the court. I am therefore fortified in my conclusion that the settlement is fair and reasonable by the opinion of counsel experienced in this area and very familiar with the issues in the case.[342]

1579 I am satisfied that O'Bryan and Symons expected that the court would place weight on their opinions in the belief that they were provided in the discharge of their duties both to the court and to all group members, well understanding that such duties were paramount, taking precedence, in particular, over their duties to AFP and their own self-interest, and, in the particular circumstances of this proceeding, well aware of the explicit warning given in the Bolitho No 4 decision.

1580 Regrettably, this expectation provided an opportunity to exploit the court's trust, to corrupt the proper administration of justice, and gain for themselves the unjustified division of the spoils at the expense of the debenture holders. This was achieved through a fraudulent claim for legal costs and disbursements, a fraudulent claim that AFP had financed the litigation and was entitled to a contractually assessed commission calculated by reference to the total settlement sum achieved in both proceedings.

Failure to provide a frank, independent and objective opinion

1581 It is not evident why a litigation funder should have input into the opinions drafted by counsel to assist the court. This is a duty that falls classically within the quotation from Lord Langdale with which I commenced these reasons. The court seeks counsel's independent opinion — their assistance in the proper administration of justice — because it is exercising a protective jurisdiction. The fact that O'Bryan and Symons provided AFP with drafts of both opinions before they were finalised was evidence of the partisan and conflicted approach of O'Bryan and Symons to their opinions. It was misleading for O'Bryan and Symons not to disclose that the opinions provided to the court had been reviewed (settled) by the funder.

1582 Given the reasons why the opinions were being taken into account and the expressed judicial concern that led to the practice, it was vital for the court to be informed that the opinions were something other than the independent confidential opinion of counsel. In any circumstance where the court has not been informed that others beyond counsel who have signed the opinion have contributed in any way, the court is being misled about the nature of the opinion. This is not to say that the opinion could not state that the solicitor for the plaintiff materially contributed to what is, for example, a joint opinion, if that be the case. A court may be assisted by such disclosure. If it is not alerted to the participation of others in the substantive drafting of the opinion, it assumes such participation has not occurred. This is relevant because motivation and commitment to the paramount duty cannot be discerned in the opinion if other partisan parties have contributed to its conclusions. It affects the weight the court can place on it. Absent express acknowledgement, the court is entitled to assume that an opinion is the independent product of its signatories alone.

1583 O'Bryan and Symons did not discharge this duty to further the proper administration of justice, which was their paramount obligation.

1584 O'Bryan and Symons did not act in the interests of all group members: their opinions were prepared to advance the interests of AFP and themselves, at the expense of their own clients. In reality, O'Bryan and Symons saw AFP as their primary client. They acted to serve the interests of AFP and their own interests,

each of whom sought personal gain to which they were not entitled. When conflict arose, as it did at the time of settlement, they sacrificed the interests of Mr Bolitho and group members and their duties to the court and pursued the interests of AFP, and in turn, themselves. This outcome was foretold in the Bolitho No 4 decision. AFP was separately represented by Mr Loxley of counsel, whose conduct is not impugned in any way in this remitter. It is telling about the content of the opinions that Mr Loxley simply adopted what O'Bryan and Symons said in their opinions in support of his submission that the funding fee should be approved.

Dishonesty

1585 AFP admitted that the opinions were misleading. I have set out my findings about the misleading nature of statements found in the opinions under a series of headings.[343] In each relevant respect, AFP/Mark Elliott, O'Bryan and Symons knew the true position and therefore that the opinions were deficient.

1586 Their failure to observe their paramount duty and their misleading statements were motivated by their desire to conceal the true facts from the court. They did not believe those statement to be true and the truth was concealed in order to gain an advantage for themselves and AFP to the detriment of their clients. By the ordinary standards of reasonable and honest people, their conduct in respect of the opinions was dishonest.

Alex Elliott

1587 I have found that Mark Elliott and Alex Elliott reviewed counsel's first opinion together for the purposes of approving its substantive content, insofar as it related to the interests of AFP.[344] This in not to impose all responsibility for the opinion on Alex Elliott. I accept that he was a minor player but nonetheless complicit in the process of producing that opinion and placing it before the court in his role for AFP. In that sense his contribution to the contraventions was not immaterial.

1588 Alex Elliott admitted that the opinions were misleading, but denied that he knew them to be so. In respect of the contravention of the obligation not to mislead, knowledge is irrelevant.

1589 However, the Contradictor went further and contended that Alex Elliott was dishonest. The case against him in this respect was limited to the statements the first opinion made about funding risk and the statements it made about the Trust Co remuneration claim.

1590 As a practising solicitor, Alex Elliott knew that it was the duty of AFP and the Lawyer Parties to provide the court with accurate information. He agreed that he knew that counsel's opinions would be relied on by the court when approving the settlement.

1591 In light of my other findings as to Alex Elliott's knowledge about the matters with which it dealt, he knew the opinion was deficient. He understood and agreed with the strategy of the Bolitho legal team to do what was necessary to obtain court approval for the settlement. Approval generated a substantial return for AFP in the form of a funding commission to which it was not properly entitled. So motivated, he didn't care to stand in the way of winning and distributing the spoils.

1592 I rejected his evidence that he did not review counsel's first opinion.[345] As he did so, Alex Elliott knew that AFP was seeking a substantial funding commission and a common fund order, and that the quantum of the settlement and the risk taken on by the litigation funder were relevant to the court's assessment of that claim. In that context, Alex Elliott knew that the statements in counsel's first opinion about 'legal costs expended and to be expended' were misleading. He knew that AFP had not financed the legal costs and that its commission claim was correspondingly inflated and misleading.[346]

1593 I am comfortably satisfied to the requisite standard that Alex Elliott failed to act to discharge his

paramount duty to the court to ensure that it was not misled because he intended that the funding commission be approved knowing that it was in a sum in excess of AFP's proper entitlement being paid to a company that would financially benefit him and/or his family. By feigning indifference to the misleading statements being presented by counsel's first opinion, he was dishonest, by the ordinary standards of honest people.

Settlement distribution scheme

1594 I am comfortably persuaded that, by their conduct in connection with seeking excessive fees for AFP and Portfolio Law to administer the settlement distribution scheme:

(a) each of AFP, O'Bryan and Symons contravened the overarching obligation to act honestly;

(b) each of AFP, O'Bryan, Symons and Zita contravened the overarching obligation not to mislead or deceive; and

(c) each of AFP, O'Bryan, Symons and Zita contravened the paramount duty.

1595 I make no findings against Alex Elliott in connection with the settlement distribution scheme. While the Revised List of Issues alleged that Alex Elliott contravened each of the above duties, the Contradictor did not press any allegation of dishonesty or breach of the paramount duty against Alex Elliott in relation to the settlement distribution scheme in submissions. As to the remaining allegations of contravention in connection with the settlement distribution scheme, I was not satisfied that Alex Elliott contravened either the paramount duty or the overarching obligation not to mislead.

Unreasonable and disproportionate costs

1596 The Contradictor submitted that having regard to the fact that the SPRs could distribute the settlement proceeds more efficiently, cheaply and competently than Zita could, the court should find that each of AFP, O'Bryan, Symons and Zita contravened the overarching obligation to ensure that legal costs were reasonable and proportionate in connection with their conduct in advancing the scheme.

1597 Zita contended that he did not breach the overarching obligation. The scheme was a proposal only, and was never approved by the court. Accordingly, the costs that the Contradictor alleged to be unreasonable and disproportionate were never incurred.

1598 I accept Zita's submission. The overarching obligation was not contravened by seeking that unreasonable and disproportionate settlement distribution costs be approved by the court. Costs must be incurred. Although AFP, O'Bryan, Symons and Zita knew that the costs sought through the scheme were excessive and there was no proper basis for them being sought, unlike the costs of the Lawyer Parties, they were not put to the court on the basis that they had been incurred and paid.

1599 I was not persuaded that AFP, O'Bryan, Symons and Zita contravened the overarching obligation to use reasonable endeavours to ensure that legal costs and other costs incurred were reasonable and proportionate, as contended for by the Contradictor.

Dishonesty

1600 I am comfortably satisfied that, in promoting the settlement distribution scheme, AFP, O'Bryan and Symons contravened the overarching obligation to act honestly, in that:

(a) they had no honest and reasonable basis for seeking the costs of the scheme; and

(b) they advanced the settlement distribution scheme for the purposes of obtaining for themselves and/or each other excessive costs.

1601 However, I was not persuaded that Zita also contravened the overarching obligation to act honestly.

1602 Zita submitted that he could not have acted dishonestly when he did not read the scheme before the approval hearing. The Contradictor submitted that dishonesty encompasses recklessness; that is, a statement made not caring whether it be true or false, or without an honest belief as to its truth; an indifference to, or disregard of, whether a statement be true or false.

1603 The Contradictor compared Zita with the respondent in *Meagher*,[347] submitting that the observations of Griffiths CJ were apt. Zita lent his name to be used by Mark Elliott exactly as the latter pleased, and signed, endorsed, or adopted anything that Mark Elliott put before him, not caring whether there was a proper basis for what he thereby endorsed.

1604 The Contradictor submitted the evidence demonstrated that Zita was indifferent to the content and terms of the settlement distribution scheme and the costs to be charged for its administration. I was not persuaded to the requisite standard that Zita's indifference was such that he was dishonest.[348] Zita was offering to help, from a position of ignorance, believing that there might be some opportunity to participate for the benefit of group members beyond his customary post-box function. I find this to be the case even though Zita conceded that, in relation to the settlement distribution scheme, he did whatever Mark Elliott told him to do.

1605 Different considerations leave me comfortably persuaded that AFP/Mark Elliott, O'Bryan and Symons advanced the settlement distribution scheme for the purposes of obtaining for themselves and each other the opportunity to share in excessive scheme administration costs. Mark Elliott saw the opportunity for additional costs to be unreasonably taken from the pockets of debenture holders.[349] My earlier findings of fact show that O'Bryan and Symons were complicit in that intention.

1606 They well knew that the SPRs were qualified, experienced and court supervised in the role of efficiently distributing funds to creditors in insolvency. O'Bryan and Symons knew that the most cost effective and efficient distribution of funds was in the interests of group members and would be achieved through an SPR-administered distribution scheme. Mark Elliott, O'Bryan and Symons positively advocated for the settlement distribution scheme, knowing that it was not in the best interests of group members and intending that excess and unwarranted fees could be earned at their expense. Such conduct is objectively dishonest by the ordinary standards of reasonable and honest people.

Misleading or deceptive conduct

1607 In respect of the settlement distribution scheme, I find that AFP, O'Bryan, Symons and Zita contravened the overarching obligation not to engage in conduct that was misleading or deceptive, or likely to mislead or deceive.

1608 They represented, contrary to the facts, that:

(a) Zita would act as scheme administrator, when in fact AFP/Mark Elliott would control the process and its cost to group members;

(b) the costs of the settlement distribution scheme were reasonable, despite being on notice as to the lower costs that the SPRs would incur, and that their own costs were unreasonable and excessive; and

(c) they did not inform the court that, in respect of the Partial Settlement, and at AFP's direction, Zita had breached the terms of the trust for the security of the settlement proceeds by transferring the settlement sum to AFP, a material fact for the court to assess whether it was appropriate to prefer Zita to the SPRs as scheme administrator.

Paramount duty

1609 The above findings persuade me that each of AFP, O'Bryan, Symons and Zita contravened the paramount duty. I was not persuaded that any of them acted to further the administration of justice.

Resisting the appointment of a contradictor

1610 I am satisfied that O'Bryan and Symons contravened the overarching obligation not to mislead or deceive by their conduct in submitting to the court on the settlement approval application that there was no conflict of interest and that the appointment of a contradictor was unwarranted.[350]

1611 Although not expressly alleged by the Contradictor, it is clear from my findings that the submission made by O'Bryan and Symons was part of their overall strategy to preserve the windfall they expected to receive from the approval of the Bolitho settlement, and to protect them from the court detecting any wrong doing on their part. Submitting there was no need for a contradictor properly constituted part of the process by which they corrupted the administration of justice by concealing from the court matters that forced the court into error.

O.9. Contraventions in respect of the appeal from approval of settlement

1612 I am satisfied to the requisite standard that, by their conduct in connection with Mrs Botsman's appeal:

(a) AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the paramount duty;

(b) AFP, O'Bryan, Symons and Alex Elliott contravened the overarching obligation not to mislead or deceive; and

(c) AFP, O'Bryan, Symons, Zita and Alex Elliott contravened the overarching obligation to only take steps that are reasonably necessary to facilitate the resolution or determination of the proceeding.

Contravening conduct

1613 AFP/Mark Elliott, O'Bryan, Symons and Alex Elliott directly engaged in the contravening conduct, while Zita and, in some cases, Alex Elliott, assisted in or encouraged, and were complicit in, the contravening conduct.

1614 First, they attempted to intimidate, improperly pressure, or dissuade Mrs Botsman from pursuing her appeal by developing and implementing a strategy that involved:

(a) sending intimidating correspondence to Mrs Botsman personally, which requested detailed and personal information about her financial situation, threatened to seek security for costs in an excessive and crushing quantum that she would be unable to finance, alleged that she was not acting in the best interests of the group members by seeking an appeal, and challenged whether she was properly represented by her son;[351]

(b) continuing to directly correspond with Mrs Botsman, even after being informed that Mr Botsman would, and properly could, receive and deal with all communications on behalf of his

mother;[352]

(c) commencing, using separate legal representatives in, a proceeding against Mrs Botsman to restrain her from proceeding with her appeal based on the terms of the Funding Agreement, while retaining control over all proceedings;[353]

(d) applying (unsuccessfully) to the Court of Appeal for Mrs Botsman to provide security for costs to Mr Bolitho;[354] and

(e) separately threatening to seek personal costs orders against Mr Botsman, her legal representative.[355]

1615 Second, they misled (or intended to mislead) the Court of Appeal by:

(a) attempting to maintain confidentiality over key documents, including the Third Trimbos Report and the second opinion, from Mrs Botsman and from the SPRs;[356]

(b) submitting:

(i) that the SPRs had not shouldered most of the practical, evidentiary and financial burden of the conduct of the Bolitho proceeding;

(ii) a misleading apportionment of the settlement sum between the Bolitho proceeding and the Banksia proceeding;

(iii) an inflated value to the Trust Co remuneration claim;

(iv) that the Third Trimbos Report accurately depicted the legal work undertaken;

(v) that there was no procedural unfairness before the primary judge;[357]

(c) issuing the sham cheques to Symons and Zita.[358]

1616 Third, they attempted to dissuade the SPRs, by reference to what AFP perceived as a contractual obligation under the Settlement Deed from making submissions to assist the Court of Appeal and, rather, to support AFP's claim to its ill-gotten spoils. Such conduct included:

(a) pursuing, but ultimately abandoning, a strategy to intimidate the SPRs by threatening to terminate the Settlement Deed and sue them for damages in order to secure their cooperation;[359] and

(b) pursuing and ultimately abandoning, a strategy to terminate the deed in order to 'double cross' the SPRs through direct negotiations with Trust Co; and attempting to remove Mr Redwood as counsel for the SPRs by seeking to persuade Mr Lindholm to replace him with counsel who would strictly comply with the contractual obligation to support the settlement and would not put a submission that did not support the contentions of AFP and Mr Bolitho.[360]

1617 Finally, once AFP was joined as a party to the appeal and separately represented, they failed to correct any of the previous misrepresentations made to the court in relation to conflict between the interests of group members, and the interests of AFP and the Lawyer Parties. O'Bryan and Symons, as Mark Elliott and Alex

Elliott well knew, continued to advise and assist AFP.[361]

1618 Although AFP admitted many of these matters, it resisted the Contradictor's contention that it had misled the Court of Appeal by claiming that:

(a) the primary judge's discretion to approve the distribution to AFP was properly exercised;

(b) 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; and

(c) the primary judge had recognised that AFP assumed significant risks in funding the proceeding, including substantial adverse costs exposure, security for costs in excess of $1.5 million, and legal costs and disbursements of approximately $7.8 million.

1619 I have rejected these claims.[362] I am satisfied that the primary judge was misled and did not reach a proper conclusion on the deductions sought by AFP. In pressing those matters on appeal, it further sought to mislead the Court of Appeal.

1620 Under cross-examination, Zita conceded that he regretted sending the correspondence to Mrs Botsman attempting to prevent or dissuade her from pursuing her appeal.[363] At the time of the conduct, however, Zita actually encouraged it. His duty to the court demanded that he first advise his client that the contentions in the letter were improper, and if AFP nonetheless insisted it be sent, to withdraw. Instead, he noted the content of the letter to Mrs Botsman and Mr Botsman and said:

Good letter. We need to put pressure on these guys.

1621 Zita conceded that he obediently did as he was told without ever questioning O'Bryan and Mark Elliott, and admitted that, if he had exercised his own independent judgment, he 'wouldn't have adopted that strategy'. I am not persuaded that I should accept his denials in respect of any of this conduct.

1622 Alex Elliott adopted AFP's admissions to the allegations made against it and the Lawyer Parties prior to opening his case. In relation to allegations made specifically against him, Alex Elliott admitted that:

(a) he knew the Court of Appeal had been provided with the Third Trimbos Report;[364]

(b) he drew the sham cheques to Symons and Zita, as directed by Mark Elliott;[365]

(c) he knew of the submissions that were made to the Court of Appeal by AFP and by O'Bryan;[366] and

(d) he did not correct any of this misleading information.

1623 Although he otherwise denied the allegations against him, I have found that his conduct extended beyond what he was prepared to admit and, when earlier noting Alex Elliott's evidence, expressed my findings about the quality and credibility of that evidence as well as my findings as to his conduct.

Findings in respect of contraventions

Paramount duty

1624 The Contradictor submitted, and I agree, that there was a gross breach of the paramount duty when the Lawyer Parties waged a campaign of intimidation against their own client, Mrs Botsman, in order to protect

the interests of AFP and their own interests. Mrs Botsman was their client because she signed the Funding Agreement in which she agreed to retain 'the Lawyers', being Portfolio Law, with O'Bryan and Symons as counsel.

1625 Beyond their fees, O'Bryan was financially interested in AFP, as earlier discussed. Symons was engaged by AFP under a retainer at a fee of $800,000 per year, which he did not reveal to his client. What occurred was conduct that undermined, rather than promoted, the administration of justice, because it had the tendency to bring the administration of justice into disrepute.

1626 The contravening conduct was carried out in pursuit of two purposes, both of which were improper:

> (a) to avoid or minimise the prospect that earlier conduct prior to the institution of the appeal would be discovered by the Court of Appeal; and
>
> (b) to ensure that the approval of AFP's claims would not be set aside or varied and deny the Bolitho legal team their ill-gotten spoils.

1627 It breached the paramount duty in three important respects.

1628 First, it attempted to corrupt the due administration of justice, as AFP/Mark Elliott, O'Bryan, Symons and Alex Elliott did not act with due integrity and propriety. They dishonestly attempted to conceal their earlier improper conduct. They were conniving at, or attempting to, defraud debenture holders. In this endeavour, they were not candid with the Court of Appeal, rather they intended to mislead and deceive it.

1629 In respect of the improper conduct where I have not found Alex Elliott to be directly implicated, he, like Zita, was aware of it occurring. Zita and Alex Elliott each had no option but to object to, or otherwise to withdraw or distance themselves from, and mark their condemnation of, the conduct. Failing to do so, and supporting or encouraging the conduct by their continued participation in the Bolitho legal team, rendered them complicit in the conduct of the principal Contraveners.

1630 The integrity of the proper administration of justice is not solely the responsibility of judges, far from it. It is the responsibility of every person to whom the overarching obligations under the *Civil Procedure Act* apply. Judges are not privy to the private communications of legal teams, which are usually privileged. They necessarily rely on officers of the court to protect the integrity of the system.

1631 Secondly, from the moment Mrs Botsman commenced her appeal, there was conflict between the interests of AFP/Mark Elliott/Alex Elliott and the duties owed by the Lawyer Parties. For present purposes, the relevance of this conflict lay not in the existence of a fiduciary relationship with a litigant,[367] but in the duty owed to the court. This duty developed at common law from the court's concern that it should have the assistance of independent legal representation for the litigating parties. Under the *Civil Procedure Act,* the paramount duty is owed by a wider group of participants in litigation, as defined by s 10 of the Act. It is central to the preservation of public confidence in the administration of justice that the integrity of the adversarial system is maintained. Its integrity depends on participants in litigation acting with perfect good faith, untainted by divided loyalties of any kind.

1632 Thirdly, O'Bryan and Symons did not, as they were obliged to, exercise judgment in the presentation of cases to the Court of Appeal. They did not advance points that were reasonably arguable. Their contentions were not erroneous, mistaken or advanced by error of judgment. Their conduct was intentional, their contentions were deliberately misleading. It was not, and could never be, a proper exercise of judgment to devise and implement a strategy to conceal their earlier contraventions by further contraventions in the

systemic process to uncover and rectify such error.

1633 In respect of the conduct of Zita and of Alex Elliott when they were not actively participating in the particular conduct of Mark Elliott, O'Bryan and Symons, the obligations (including the paramount duty) imposed by the *Civil Procedure Act* are non-delegable. Those obligations are personally owed to the court. Although, speaking generally, a solicitor may be able to defer to properly instructed counsel and act on behalf of a client in accordance with advice counsel has provided to the client (or the solicitor),[368] a solicitor cannot escape liability for contravention of the *Civil Procedure Act,* for lack of diligence in discharging the duties owed to the court, on the ground that counsel has been briefed. Each of Alex Elliott and Zita strongly contended to the contrary.

1634 Those contentions were misconceived. They find no support in the text, context or purpose of the *Civil Procedure Act*.

1635 The most egregious example of conduct intended to mislead the Court of Appeal or otherwise breach the overarching obligations, amongst many, was in respect of the cheques. This breach implicated O'Bryan, Mark Elliott and Alex Elliott, who each intended to deceive the Court of Appeal into accepting a false submission that O'Bryan would make to it, consistent with the false assumption propounded by the Third Trimbos Report, that O'Bryan, Symons and Zita had been paid.

1636 I pause to note that O'Bryan, whom AFP had not paid for the invoices issued in December 2017, did not consider it 'vitally important' that his fees be paid,[369] only those of Symons and Zita. Had Whelan JA asked the question, O'Bryan would without hesitation have lied about his fees, confident that he controlled disclosure of his own circumstances. Their intention was to corrupt the administration of justice.

1637 O'Bryan proposed to make this misrepresentation that Symons and Zita had been paid, as counsel for Mr Bolitho, in order to advance conflicting personal interests of himself, Mark Elliott, AFP and its shareholders, as well as Symons and Zita. Each of O'Bryan, Mark Elliott and Alex Elliott knew that representation, if ultimately made, would be false. They were conniving to protect the spoils that they intended to divide between themselves. It is irrelevant that the representation was never actually made to the court. This was merely an accident of circumstance as the question was never asked of O'Bryan.

Misleading or deceptive conduct

1638 I find that counsel's submissions to the Court of Appeal were misleading, and that O'Bryan and Symons intended to deceive the court. O'Bryan and Symons each knew that their fee slips attached to the Third Trimbos Report were contrived, and did not reflect the work they had undertaken. I will explain the basis for my findings that they had hardly worked on the matter, and the overwhelming bulk of the trial preparation was done by the Banksia legal team.[370]

1639 Alex Elliott's evidence that he did not revisit the invoices and fee slips to examine whether there might be any substance in concern expressed by Whelan JA[371] is consistent with either knowledge that the invoices and fee slips were contrived or a wilful blindness to the want of integrity of the Third Trimbos Report. His evidence was, at worst, dishonest and, at best, discreditable reconstruction. Bearing in mind that he was given the job of compiling the briefing folder of invoices and fee slips to instruct Trimbos, his statements cannot be credibly reconciled.

1640 O'Bryan's submission to the Court of Appeal was intended to convey that the first opinion, second opinion and Third Trimbos Report, which needed to remain confidential before the primary judge, reliably explained why the claimed 'legal costs and funding fees were reasonable'. In reality, the regime of secrecy

arose because the opinions were deliberately misleading and Mark Elliott did not want them to be subjected to scrutiny and criticism, particularly by Mr Redwood, who was aware of the true facts as to the relative work contributions of the two legal teams, and was unaware of what O'Bryan and Symons had stated to Croft J about that issue.

1641 A further example is seen in the response to appeal ground 5.[372] My earlier findings demonstrated that O'Bryan and Symons knew that the issues raised around the Banksia proceeding and which legal team had shouldered the burden were not the subject of proper submissions before the primary judge. AFP/Mark Elliott, O'Bryan and Symons successfully silenced the SPRs by contractual restraint, opposed the appointment of a contradictor, arranged for key documents to be confidential and not open to scrutiny by either the SPRs or group members. Their submission on ground 5 was misleading at best.

1642 I am satisfied that, for O'Bryan and Symons, it was knowingly deceptive. They intended to deceive the Court of Appeal to proceed on the erroneous basis that the SPRs had not shouldered most of the practical, evidentiary and financial burden of the conduct of the Bolitho proceeding. O'Bryan and Symons knew, as a fact, that they had done so and that the primary judge was induced by their conduct to adopt a mistaken view of these matters.

1643 Alex Elliott's evidence that he did not appreciate that there was anything untoward about the request to draw the cheques to Symons and Portfolio Law was false. I also find that Alex Elliott was obliged, and had the capacity, to investigate the discrepancies regarding the value of the Trust Co remuneration claim. He was aware of three inconsistent values being accorded to that claim. In the circumstances, his claim that he did not think it was important to go back to Croft J and rectify what the court was told about the Trust Co remuneration claim, was tantamount to misleading the court.

1644 I pause here to address a submission put for Alex Elliott. Once a solicitor, no matter of what seniority or lack of it, becomes aware of the discrepancies of the kind exposed in relation to the Trust Co remuneration claim, it is inconsistent with the paramount duty to the court and the overarching obligation not to mislead or deceive, to do nothing about it. The paramount duty requires integrity from a lawyer, and it is inconsistent with integrity for a solicitor to continue to permit a court to be significantly misled.

1645 Youth is no impediment to a legal practitioner's duty to never mislead the court. A lawyer who has been admitted to the Roll has been found to be a fit and proper person. The court cannot countenance the notion that a first year lawyer be excused from the foundational duty to the proper administration of justice. The court and the public are entitled to expect that all legal practitioners, regardless of age and experience, will act with integrity.

Taking steps unnecessary to resolve a dispute

1646 As set out above, AFP/Mark Elliott, O'Bryan, Symons, Zita and Alex Elliott pursued a strategy of intimidation against the SPRs and their counsel. Their conduct was not only a breach of the paramount duty, but also the overarching obligation to only take steps reasonably necessary to resolve a dispute.

1647 For reasons explained earlier,[373] I do not accept Zita's submission that his post-box role was not 'taking a step'. It follows from my finding of an ulterior purpose that the steps taken in the proceeding in furtherance of that ulterior purpose were not reasonably necessary to facilitate the resolution or determination of the appeal.

O.10. Contraventions in respect of the remitter
AFP and Alex Elliott

1648 On the basis of my findings set out above, by their conduct in resisting the Contradictor's investigation of the facts relevant on the remitter, including in respect of discovery, I am satisfied to the requisite standard that AFP and Alex Elliott 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.

1649 The Contradictor did not allege that AFP and Alex Elliott contravened the overarching obligation to act honestly, and for that reason alone, I make no finding of that particular contravention, despite being comfortably satisfied, as I will explain, that such finding is properly open on the evidence. The absence of a finding in respect of this particular contravention leaves the relief that I will order unaffected. Further, as earlier explained, I am satisfied that Alex Elliott well understood that the Contradictor alleged against him that he was dishonest, complicit in Mark Elliott's wrongdoings.

1650 I am satisfied that when AFP discovered the costs agreements of counsel in response to the 1 February 2019 order, Mark Elliott knew that they were misleading documents. In discovering them without any explanation or qualification as to the timing and circumstances of their creation, the conduct of AFP was deceptive and improper. AFP sought to maintain the deception by resisting orders for further discovery to reveal when they were created.

1651 I also refer to my previous findings in relation to Mark Elliott's targeted document destruction. Plainly, Mark Elliott's conduct was, objectively assessed, dishonest. His intention was to conceal his wrongdoing. To frame it as a 'longstanding and invariable practice' of 'efficient document management' was a shallow pretence to excuse the disparity of discovery in comparison to the Lawyer Parties and evade further investigation, at the expense of the debenture holders.

1652 Alex Elliott assisted AFP in providing discovery in response to the February and March 2019 discovery orders. I am satisfied that he did so in his capacity as a solicitor, but it matters not what hat he wore when he did. Alex Elliott was subject to the paramount duty and overarching obligations as a solicitor acting for or on behalf of AFP.

1653 The solicitor's duty to the court requires them to advise their client as to what documents are material and must therefore be disclosed. The obligation is a heavy one.[374] A solicitor must probe their client, and ensure that accurate and complete discovery is provided, or else withdraw from the case.[375] By his own concession, Alex Elliott initially left everything to his father, and to AFP's solicitor, and exercised no independent judgment in relation to discovery.

1654 Alex Elliott was a practising solicitor in 2019. He was involved in providing instructions to ABL, who acted on them in their dealings with the Contradictor. It is inexcusable for a practising solicitor to turn a blind eye to the adequacy of their discovery (or that of an entity for which they are giving instructions) or the veracity of the representations they convey to their opponents in litigation.

1655 I am comfortably satisfied that the reasonable and probable inference open on all of the evidence is that Mark Elliott expressly informed Alex Elliott what documents he planned to destroy or had destroyed or that they had an understanding about the specific documents that had been destroyed. I am satisfied that Alex Elliott's conduct from February 2020 in connection with discovery comfortably supported the probable inference that Alex Elliott knew of, and was complicit in, the targeted document destruction that I have

described.

1656 Alex Elliott's complicity in Mark Elliott's concealment, suppression, and destruction of evidence permits me to more readily infer that he was conscious of the improprieties in Mark Elliott's conduct at least from the time of the approval application. Alex Elliott sought to evade the pressure of facts tending to establish that he was an active participant in the Bolitho legal team from that time; and that he was aware of and supported the AFP strategy, to seek a substantial funding commission that far exceeded its legitimate entitlement, and from which he personally stood to gain as a beneficiary of family trusts which would have benefited from the commission.

1657 If the internal emails between Mark Elliott and Alex Elliott in the period since the Trust Co Settlement would have provided support for the thesis that Alex Elliott acted in an administrative, non-legal capacity or that he otherwise had little to no involvement with the events in issue in this remitter, he lacked the corroboration that might reasonably be expected to have been discovered. The suppression and destruction of those emails and attached documents by AFP, Mark Elliott, and Alex Elliott supported the strong presumption that if those emails had been produced they would have told against them.

1658 Alex Elliott's conduct during the remitter to continue tactics of resistance, denial, and evasion of responsibility by virtue of asserted ignorance and inexperience, in light of the probability that he was complicit in the destruction of evidence, bears significantly on his accountability to the court, and the extent to which his observance of his obligations was lacking.

1659 Notwithstanding that I make no finding of breach of the overarching obligation to act honestly, my findings comfortably satisfy me to the requisite standard that Alex Elliott's conduct in avoiding the proper discharge of his discovery obligations was objectively dishonest by the ordinary standards of reasonable and honest people. He intended to conceal his complicity, in the manner set out in my findings, in the dishonest conduct of his father. This conduct sought to camouflage from the Contradictor and the court the wrongdoing engaged in to obtain court approval for the deduction from the settlement sum of the costs and funding commission in breach of the paramount duty and the overarching obligations.

O'Bryan and Symons

1660 Although not alleged by the Contradictor, and again, notwithstanding that I will make no finding of breach of these overarching obligations, I am comfortably satisfied to the requisite standard on the evidence relied on in the remitter that O'Bryan and Symons' conduct would contravene:

(a) the overarching obligation to act honestly;

(b) the overarching obligation not to mislead or deceive;

(c) the overarching obligation to ensure that legal costs are reasonable and proportionate; and

(d) the paramount duty,

by their conduct in connection with:

(e) facilitating and/or acquiescing to Mr Bolitho's provision of their costs agreements to the Contradictor 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;

(f) continuing to act on behalf of Mr Bolitho when serious allegations, which they knew to be true and well-founded, were made against them;

(g) resisting the Contradictor's efforts at ascertaining when their costs agreements had been created and served on AFP; and

(h) in relation to O'Bryan only, attempting to collude with witnesses to mislead the court.

1661 O'Bryan and Symons did not offer any explanation for the conduct alleged against them or why they held out until the very end, at such expense to the 16,000 debenture holders who were their former clients. Neither relinquished their briefs until the Contradictor sought orders that they make affidavits to address their involvement in the Bolitho proceeding, causing them to each seek rulings from the Victorian Bar Ethics Committee.

1662 I am satisfied that, by the abandonment of their defences and consenting to the findings to be made against them, both O'Bryan and Symons knew throughout the remitter, despite their participation in various attempts to obstruct the Contradictor, that the evidence against them was overwhelming. Until then, however, they put their former clients, the debenture holders, to the expense of proving their involvement in the dishonest scheme, holding on to the faint glimmer of hope that their fraudulent conduct would not be exposed. Significant unnecessary time and effort was expended during the remitter by the Contradictor to address challenges to the legitimacy of its inquiry, when counsel knew full well that it would uncover their misconduct if not misdirected or interrupted.

1663 Further, given that Symons was well aware of his impropriety from the outset of the remitter, it was both inappropriate and reprehensible for him to have instructed his solicitors to threaten personal costs orders against the Contradictor, an officer appointed by the court.

1664 As these allegations were not alleged in the Revised List of Issues on which O'Bryan and Symons stated that their capitulation was based, I do not propose to, and have not, taken these findings into account in the overall conclusions I have reached concerning their conduct.

O.11. Contraventions in respect of fiduciary duty

1665 By the conduct that I have found to be in contravention of the *Civil Procedure Act*, each of AFP, O'Bryan, Symons and Zita contravened the paramount duty by:

(a) failing in their obligations to manage and avoid conflicts of interest; and

(b) pursuing their own interests, and the interests of each other, in seeking to secure payments that exceeded fair and reasonable legal costs and funding commission, to the detriment of the interests of group members.

1666 The Contradictor submitted that such contraventions arose primarily by reason of breaches of fiduciary duties owed by the Contraveners to group members, or, alternatively, in the case of AFP, by providing knowing assistance to dishonest and fraudulent conduct of a fiduciary that was in breach of their duty.

The Lawyer Parties

1667 I have concluded that the Lawyer Parties owed fiduciary duties, not just to Mr Bolitho and any group members that had signed the Funding Agreement, but to all group members from when the in-principle settlement with Trust Co was agreed.[376] From that time, the Lawyer Parties pursued AFP's interests and their own interests at the expense of the interests of Mr Bolitho and group members, in clear breach of their

fiduciary obligations, all under the direction and control of Mark Elliott. The fiduciary obligations were to not make a profit at the expense of their beneficiaries and not to put themselves in a position where interest and duty conflict.

1668 More generally, the duties owed by the Lawyer Parties to Mr Bolitho and group members were defined by their retainers. In the context of the Funding Agreement, I find that:

(a) The Lawyer Parties owed duties to Mr Bolitho and signed-up group members to:

(i) provide budgets for all estimated costs and expenses up to the conclusion of the trial in the Bolitho proceeding;

(ii) bring to the attention of AFP, Mr Bolitho and group members conflicts of interest which arose during the course of the Bolitho proceeding; and

(iii) inform Mr Bolitho and group members of their rights when conflicts of interest arose during the course of the Bolitho proceeding;

(b) the Lawyer Parties owed duties to advise Mr Bolitho and signed-up group members in relation to these matters, including in the context of any settlement of the claims in the Bolitho proceeding, in a manner that was consistent with their:

(iv) duties of skill, diligence and competence;

(v) fiduciary duties, including the duty to avoid conflicts of interest;

(vi) duties to promote and protect their best interests, without regard to their own interests or the interests of any other person; and

(vii) paramount duty to the court.

1669 I accept as correct the Contradictor's submission that the Funding Agreement and accompanying Conflicts Management Policy and Disclosure Statement were critical components of the Lawyer Parties' retainer agreements.

1670 I find that, on the totality of the evidence, reinforced by the admissions and concessions made by the parties, the Lawyer Parties all knew that their client was Mr Bolitho, but saw AFP as their real client. When situations of conflict arose, the Lawyer Parties chose to advance the interests of AFP in preference to those of Mr Bolitho and the group members. The Lawyer Parties permitted their own financial and commercial interests, including their commercial relationship with AFP, to subvert their fiduciary obligations to their clients.

1671 So much was clearly demonstrated by stepping back and observing the totality of the contravening conduct, as I have explained it. What follows are some examples of how the Lawyer Parties' conduct manifested a breach of their fiduciary duty.

1672 Contrary to the ruling in the Bolitho No 4 decision, I am satisfied that O'Bryan had an arrangement or understanding with Mark Elliott that enabled his family to continue to maintain a financial interest in AFP or its litigation funding enterprise. I am satisfied that this arrangement or understanding gave O'Bryan a relevant ongoing financial interest in the litigation, over and above the legal fees that he was properly entitled to charge.

1673 Following the in-principle settlement, AFP, O'Bryan and Symons drafted and procured the Adverse Settlement Terms, adverse to the interests of Mr Bolitho and group members. Critically, they included provisions that would make the whole settlement conditional on the approval of payments to AFP in respect of costs and commission, and they required the SPR to support the application for approval of those payments to AFP. There were further terms for confidentiality to disguise or manage the potential for conflict with the duties the SPRs owed to the debenture holders.

1674 The Lawyer Parties chose to retain a concealed profit at the expense of their beneficiaries, the group members.

1675 The payments referred to in the Settlement Deed were the product of the Lawyer Parties' impermissible and irregular fee arrangements with AFP: not to quantify and bill their fees throughout the matter, but only when the matter settled and the division of the spoils that had been undertaken. AFP's interests were served by limiting the funding costs of the litigation, reducing its exposure to financial risk and maximising its returns, while appearing as if it were entitled to a funding commission on the usual full financing basis.

1676 The Lawyer Parties then worked, and reworked their fee claims to make up the agreed costs claim and generated documentation to support those claims. This process would have seen the Lawyer Parties retain a disguised profit to the detriment of group members and was in direct conflict with the interests of group members in securing a fair and just entitlement from the agreed settlement sum. The interests of group members required, first, that the legal fees were quantified according to law and the terms of their costs agreements, and were reasonably incurred and reasonable in amount. Second, that the quantification of legal fees would not assist AFP to improperly assert an inflated entitlement to a funding commission and that the sum deducted from the settlement for the funding commission would be fair and just.

1677 The Lawyer Parties were each involved, to varying degrees, in deceiving the court on the approval application:

> (a) First, in misleading Trimbos and procuring his misleading report that supported their claim for fees. That conduct subverted the interests of their clients in ensuring the fees were properly scrutinised. It was in the interests of group members that the reasonableness of those fees be assessed on the correct basis and with all necessary information, but the Lawyer Parties acted to ensure that a court saw their improper and excessive claims as respectable and legitimate to secure its approval. This clear conflict was exploited, with the encouragement of AFP, to the detriment of group members.
>
> (b) Second, by O'Bryan and Symons advocating for their own interests, and those of Zita and AFP in the opinions filed in support of approval, which included support for AFP's illegitimate claim for funding commission, contrary to the interests of the group members. They willingly provided their opinions to Mark Elliott for review by Mark Elliott (and, in the case of the first opinion, to Alex Elliott) because AFP expected, or demanded, that Mark Elliott approve their content to ensure that AFP's interests were prioritised. The subservience of counsel by this conduct, inimical to the independence of barristers, was explicable only by recognising that AFP was the real client whose interests were preferred, as AFP and the Lawyer Parties took illegitimate profit from the settlement sum.

1678 Symons' entry into a formal retainer agreement with AFP in March 2018, on terms earlier set out,[377] was not disclosed to Mr Bolitho or group members. By this retainer, Symons assumed a duty to AFP which was in direct conflict with his duties to the group members in various group proceedings, including the Bolitho proceeding. Rather than assisting him, his attempt to pay lip service to the ethical issues caused by the

retainer in his email correspondence with Mark Elliott, demonstrates that he was alive to the conflict, yet continued to act against the interests of group members.

1679 Mark Elliott encouraged Symons, and he accepted, to pursue the interests of AFP at the expense of his clients. The retainer was already a significant sum for a fourth year barrister, but the 'TBA % share' and 'bonus points' enabled Symons to obtain undisclosed financial benefits, fraudulently disguised as legitimate fees. Symons' compromise of his independence, fundamental to the office of counsel, was conduct that corrupted the proper administration of justice. These reasons document that Symons was always eager to advance AFP's interests at the expense of the group members, and this is a factor in my assessment that his conduct, at least from the time of the Trust Co Settlement, was dishonest and driven by greed.

1680 When Mrs Botsman filed her appeal, O'Bryan and Symons' advised AFP to commence, and AFP did commence, a proceeding for an injunction, damages and costs, advancing their own interests, rather than those of group members. Their action was calculated to damage the interests of Mrs Botsman, who, as Mark Elliott put it, was an 'old lady doing it for the class'. Importantly, Mrs Botsman was not just a group member, she was one who had signed the Funding Agreement.

1681 In the appeal, the Lawyer Parties advanced the proposition — with the knowledge and approval of AFP — that the whole settlement would cease to have any effect if the payments to AFP were not approved. That was in direct conflict with the interests of Mr Bolitho and group members. Further, AFP/Mark Elliott's campaign directed at the SPRs and their junior counsel following the first day of hearing in the appeal, which the Lawyer Parties supported, was correctly characterised by the Contradictor as disgraceful intimidation. AFP and the Lawyer Parties expressly sought to ensure that the SPRs adopted a different position, one supporting AFP's claims for costs and commission, contrary to the interests of debenture holders.

1682 Each of these conflicts should have, but did not, trigger the procedures under the Funding Agreement, drafted by Mark Elliott and settled by O'Bryan. The Lawyer Parties did not activate conflict management processes on behalf of Mr Bolitho, as that would have adversely affected their personal interests and the interests of AFP, on which they appeared totally focussed. There was no evidence that the conflict management provisions in the Funding Agreement ever came to mind.

1683 Zita abrogated his duty as solicitor for Mr Bolitho. Not only did he directly engage in breaches of fiduciary duty, but he also knowingly allowed (and even facilitated) breach by others, such as O'Bryan and Symons, of their fiduciary duties, by continuing to acquiesce in Mark Elliott controlling how he acted as solicitor for group members, and concealing this fact of control from the court by remaining as the solicitor of record, as he had since the Bolitho No 4 decision.

AFP

As agent for group members

1684 AFP acted as agent for the group members that had executed the Funding Agreement. AFP's claim against Mrs Botsman for injunctive relief was brought on that express premise.

Controlling the solicitor for Mr Bolitho and group members

1685 AFP, through Mark Elliott, controlled and dominated the performance by Zita of his role as the solicitor for the plaintiff in the Bolitho proceeding. By assuming control of the relationship that carried fiduciary obligations to all group members as I described earlier in this section, these fiduciary obligations were, as a consequence, imposed on AFP. The fact that Mark Elliott's role was not the subject of a formal retainer and was disguised by Zita appearing as the 'dummy' solicitor was irrelevant, for as stated in *Beach Petroleum NL v Abbott Tout Russell Kennedy*:

It is well-established that a person may take upon herself or himself the role of a fiduciary by a less formal arrangement than contract or by self-appointment... [W]hether the relationship derives from retainer, a less formal arrangement or self-appointment, it must be examined to see what duties are thereby imposed on the fiduciary and the scope and ambit of those duties.[378]

1686 The scope and ambit of the fiduciary duties assumed by AFP by it exercising control of the relationship between solicitor and group members, from the time it commenced to negotiate a settlement of the claims in the Bolitho proceeding, have just been described. They were the duties that arose from the relationship between the Lawyer Parties and group members.

1687 AFP breached these fiduciary duties, by acting against the interests of group members to further its own interests in the conduct of the Bolitho proceeding, in a number of respects that have been examined in these reasons and do not need to be repeated.

Accessorial liability for breaches of paramount duty

1688 The Contradictor submitted, alternatively, that AFP's role in the Lawyer Parties' breaches of their fiduciary duties gave rise to a liability in its own right, through the analogous application of the 'second limb' (accessorial liability) of *Barnes v Addy.*[379] In view of my findings, it is not strictly necessary to consider this further alternative ground, but out of deference to counsel's argument, I will briefly state my reasons for agreeing with the submission.

1689 The proposition advanced, which I accept, was that if a breach of fiduciary duty by a legal practitioner constituted a breach of the paramount duty, a litigation funder's knowing assistance in that breach will constitute a breach of the paramount duty. This is analogous, conceptually, to a third party knowingly procuring or assisting in a fiduciary's breach of their duties as recognised in equity.

1690 Equitable principles illuminate the core of the paramount duty to the court. The proper administration of justice demands that those who owe the paramount duty to the court must not have competing loyalties. The court relies on its officers discharging their fiduciary obligations to their clients, as the proper administration of justice cannot be advanced if the court is deceived as to the loyalties of the representatives of the litigants. I need not repeat what I set out elsewhere in these reasons as to how equitable principle informs the proper understanding of the scope of the paramount duty.

1691 Establishing equitable fraud 'does not require that an actual intention to cheat must always be proved'.[380] Equitable dishonesty in the *Barnes v Addy* sense is broader than fraud or dishonesty at common law. The Lawyer Parties' breaches of fiduciary duty transgressed ordinary standards of honest behaviour. So too did the role played by Mark Elliott in the breaches by the Lawyer Parties. Their conduct comfortably cleared the standard for equitable dishonesty.

1692 My findings catalogue numerous instances of dishonest conduct by counsel. No honest legal practitioner would conduct themselves in the way that O'Bryan and Symons did. The plain inference from the totality of the evidence is that they intended to deceive Mr Bolitho, the group members, the SPRs, Trimbos, the court, and the Contradictor on this remitter, to secure large financial rewards for themselves, each other, and AFP, at the expense of the group members and to then keep their nefarious conduct concealed in order to enjoy those spoils.

1693 The conduct of Zita fell short of ordinary standards of honest behaviour and comfortably met the standard of equitable fraud. In particular, no honest solicitor would:

(a) permit themselves to be used as a 'post-box', or abrogate to others their duties to their client behind such a façade, particularly in the context where Zita knew that he had been appointed to act following the Bolitho No 4 decision;

(b) allow a litigation funder to demand unreasonable conditions from the settlement of group members' claims for its own benefit under threat of damaging the opportunity of group members to compromise the proceeding;

(c) enter into a fee arrangement that involved maintaining no contemporaneous time records and reconstructing bills to support a claim for fees arbitrarily determined by the litigation funder, rather than by reference to work actually performed;

(d) file an expert report purporting to support a claim for substantial legal costs without reading the report or examining counsel's invoices;

(e) promote a settlement distribution scheme that they had not read, did not understand, and could not competently undertake, and which sought to impose fees on group members that they had not scrutinised; and

(f) encourage and support a litigation funder's campaign of intimidation against a group member (and client) to prevent her from raising legitimate concerns about claims for costs and funding commission which they knew they had not themselves assessed.

1694 AFP knowingly procured or assisted the Lawyer Parties' dishonest conduct and breaches of fiduciary duty. In doing so it was also, itself, dishonest. AFP admitted to its own dishonesty through the conduct of Mark Elliott, O'Bryan and Symons, who all acted as, or for, AFP. This characterisation of their conduct is overwhelmingly demonstrated by my findings. I emphasise that:

(a) Mark Elliott and O'Bryan were the masterminds of the dishonest and fraudulent scheme;

(b) AFP admitted that the Lawyer Parties advanced its interests and did so as its agents;

(c) AFP admitted that it expressly or impliedly consented to the Lawyer Parties acting to advance the interests of AFP in the application for commission and legal costs; and

(d) AFP admitted that there were numerous actual or potential conflicts between the interests of group members and the interests of AFP/the Lawyer Parties and, despite these conflicts, it failed to manage them by complying with the terms of the Funding Agreement, conflicts management policy and disclosure statement.

1695 I am comfortably satisfied that AFP and Mark Elliott facilitated, assisted and/or procured the significant breaches of fiduciary duty by the Lawyer Parties. In doing so, AFP breached the paramount duty, not simply by direct reference to the conduct of Mark Elliott, Alex Elliott and its agents, but also by reference to its conduct in knowingly facilitating, procuring or assisting in the Lawyer Parties' breach of their fiduciary obligations.

Alex Elliott

1696 Alex Elliott, understanding the implications of the Bolitho No 4 decision, assumed an adumbral role of assisting AFP in the conduct of the Bolitho proceeding and AFP's business in respect of it, when it was readily apparent to him that Zita acted as no more than a post-box solicitor and that AFP exercised control as the real

solicitor.

1697 The Contradictor submitted that, on the basis of his role, I should find that Alex Elliott assumed the fiduciary obligations of a solicitor to group members, which he breached by assisting his father to achieve AFP's commercial ends at the expense of group members' interests. It submitted that the findings in respect of Zita's conduct transgressing ordinary standards of honest behaviour applied to Alex Elliott with equal force. In addition, Alex Elliott actively assisted in conduct intended to perpetrate a deception on the Court of Appeal when he drew sham cheques.

1698 I was not persuaded to accept this submission. At no stage was Alex Elliott in a fiduciary relationship with group members because there was not a solicitor/client relationship between Alex Elliott and Mr Bolitho. It was not Alex Elliott who assumed control of the relationship that gave rise to fiduciary obligations between Zita and the group members. It was AFP, through its directing mind and will, Mark Elliott, that exercised that control. My findings that Alex Elliott assisted in some aspects of managing the conduct of the Bolitho proceeding for AFP and at the direction of Mark Elliott do not permit the conclusion that he was controlling the relationship that engendered fiduciary obligations on AFP's part towards group members.

1699 I was satisfied that Alex Elliott assumed some solicitor's duties in relation to the Bolitho proceeding, but he did so by directly acting for AFP, or as Elliott Legal acting for AFP. Had it been an issue in the remitter, it may be that Mark Elliott's puppet-mastery of Zita would have comfortably supported a conclusion that Mark Elliott did personally owe group members the fiduciary obligations that Zita owed.

O.12. The Roll

1700 I foreshadowed to the parties during the hearing of the remitter that if the facts as opened by the Contradictor were proved, the court may consider whether certain parties were fit and proper persons to remain on the Roll.

Removal of O'Bryan and Symons

1701 As these reasons record, O'Bryan and Symons engaged in conduct that must reasonably be regarded as disgraceful or dishonourable by professional colleagues who are of good repute and competency.[381] I have found that they corrupted the administration of justice and have been dishonest for reasons of personal greed.

1702 As the SPR pithily lamented in his closing submissions:

[The misconduct uncovered by the remitter] has debased the administration of justice, abused the **representative proceeding** regime, betrayed the solemn trust that the Court places in its officers, and brought the justice system into disrepute.

1703 There is no evidence of any extant investigation or action by the Victorian Legal Services Commissioner concerning these practitioners. However, as Forbes J recently noted:

[N]o benefit is derived from undertaking such proceedings at the Victorian Civil and Administrative Tribunal. Given the extraordinary circumstances that underpin this application and the characterisation by [this] Court of the conduct, no benefit would be gained from such a course and no different outcome likely.[382]

1704 Counsel's conduct involved breaches of their paramount duty and their overarching obligations under the *Civil Procedure Act*, including serious conflicts of interest and breach of their fiduciary duties to their clients. I am satisfied that they were derelict in their duty to the court, and that each of them is not a fit and proper person to remain on the Roll. That is likely to remain so for the indefinite future.

1705 No clearer case of professional misconduct warranting removal from the Roll can be imagined. However,

as O'Bryan and Symons have each agreed to their names being removed (or 'struck off') the Roll by their respective capitulation statements, it is unnecessary to revisit the findings I have set out in great detail above in this context. I will make that order in respect of each of them.

Zita and Alex Elliott to show cause

1706 I am also of the view that, having regard to the findings I have made, Zita and Alex Elliott must each show cause as to whether they are a fit and proper person to remain on the Roll.

1707 I will hear from these parties and give appropriate directions for that to occur at a later time.

16. **CAUSATION**

P.1. Materially contributed to by

1708 Section 29(1) of the *Civil Procedure Act* empowers the court to order that the person found to have contravened an overarching obligation compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation. The statutory test for causation is found in the words 'materially contributed to by'.

1709 In *Lewis v Australian Capital Territory* ('***Lewis***'),[383] Edelman J observed:

Causation is a concept that establishes a link between a physical event and physical outcome. Where a claim is brought for compensation for loss, the causal question asks whether the defendant's wrongful act was necessary for the loss: "did the defendant's act make a difference" to that outcome? That question is posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act ...

Causation of loss, in this strict sense, is not always required for a defendant to be responsible for losses arising from a wrongful act. In exceptional cases, a defendant can be held responsible for a loss if their actions materially contributed to the loss which would have occurred in any event ... In order to include these exceptional cases within the test for the required link this court has sometimes described the link required for the imposition of responsibility as requiring the act to have "caused or materially contributed" to the loss.[384]

Although Edelman J was writing in the context of the tort of false imprisonment, his Honour's observations are pertinent in the present statutory context.

1710 In *Henville v Walker*,[385] Gleeson CJ observed in the context of the *Trade Practices Act 1974* (Cth), which observations also provide helpful guidance in the present statutory context, that s 82 is the statutory source of the entitlement to damages. Noting the express textual guidance offered by the legislature, the Chief Justice said that the principles of common law, relevant to assessing damages in contract or tort, while not directly in point, provided useful guidance. They were not controlling, but represented an accumulation of valuable insight and experience which may well be useful in applying the Act. The Chief Justice's identification of the role of common law principle in the application of the statutory standard applies equally when considering the statutory test for causation under s 29 of the *Civil Procedure Act*.

1711 Causation principles in deceit, misleading conduct and equitable compensation for breach of fiduciary duty provide helpful guidance with the statutory text of s 29. A number of specific principles found in the cases relating to assessing causation in such causes of action are analogous, and, to the extent that they are consistent with the text, context and purpose of s 29, useful in resolving the questions before the court.

1712 It is also pertinent, having regard to the issues on the remitter, to recall what was said by the High Court in *I & L Securities Pty Ltd v HWT Valuers (Brisbane) Pty Ltd* ('***I & L Securities***').[386] In that case, the court looked at the issue of concurrent causes of loss in the context of s 82 of the *Trade Practices Act* where the

textual relationship between the contravening conduct and the loss, one of legal responsibility, is only expressed in the word 'by'.

1713 Gleeson CJ observed:

When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case.[387]

1714 Applied in the present context, the attribution of legal responsibility for the financial loss is done to give effect to the discernible purposes of the *Civil Procedure Act.* The correct question is not whether the contravening conduct was necessary for the loss (but for the conduct, it would not have occurred). It is whether the contravention materially contributed to the loss.

1715 In *I & L Securities,* two concurrent factors resulted in the transaction that caused the loss: the respondent's misleading conduct in preparing a valuation, and the appellant's carelessness in deciding to do business with the borrower. It was argued that the appellant's carelessness reduced the extent of the respondent's responsibility for the loss suffered on the transaction. Gleeson CJ rejected this argument, stating:

The relevant purpose of the statute was to proscribe misleading and deceptive conduct in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an award of damages, to a victim of such conduct. The measure of damages stipulated was the loss or damage of which the conduct was a cause. It was not limited to loss or damage of which such conduct was the sole cause. In most business transactions resulting in financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under s 82 were restricted to loss of which the contravening conduct was the sole cause.[388]

1716 The Chief Justice concluded that, as a matter of principle in the application of s 82 of the *Trade Practices Act*, a failure by a lender is not to be treated as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. In this context of the relationship between a valuer and a prospective lender, his Honour found that the statutory regime of conduct in the *Trade Practices Act* gave rise to a legal responsibility that extended to the whole of the loss of which the contravening conduct was a direct cause.[389]

1717 The observations of the Chief Justice apply to the *Civil Procedure Act* because one of its purposes in prescribing the overarching obligations is to provide for compensation for financial loss, suffered by any person, that was materially contributed to by a contravention affecting the proper administration of justice. It is not restricted to loss of which the contravention was the sole cause. In *I & L Securities,* Gaudron, Gummow and Hayne JJ stated:

If the valuation had not been misleading, there would have been no loan. Likewise, if the lender had made adequate inquiries, there would have been no loan. But to show that, if *either* of the two events had not occurred, a loss which has been suffered would not have been suffered, does *not* demonstrate that one rather than the other was *the* cause of the loss, any more than it demonstrates that neither was *a* cause of that loss. But the fact is that both did happen and both contributed to the decision to make the loan.[390]

1718 Their Honours observed:

As was recognised in *Henville v Walker*, there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further, it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being "independent" of the contravention.[391]

1719 Relevantly to the present circumstances, their Honours questioned whether there was a basis to assign greater causative significance to a deliberate act or a careless act when each played a part in the history of events, including that there was no reason why the Act should be understood as requiring or permitting inquiry of that kind.

The Act creates certain norms of behaviour. It prescribes what constitutes a contravention of those norms. There is nothing in the terms in which those norms are prescribed, or in the terms in which remedies for contravention are provided, that warrants injecting into the inquiry some a priori assumption about distributing responsibility for loss or damage suffered between those who have contravened the Act and those who have not.[392]

1720 The text, context and purpose of the *Civil Procedure Act* admit the same observations. A contravention will cause financial loss if it materially contributed to the loss. Rarely will responsibility for loss be attributed to particular causative events; no inquiry is warranted by the Act into the causal potency or comparative culpability of the contraventions of each wrongdoer separately. This point is made clear, later in these reasons, in my analysis and rejection of the submission that a claim for compensation is subject to a proportionate judgment by reason of Part IVAA of the *Wrongs Act*. While that inquiry is not relevant to causation, some contraveners submitted that such an inquiry may be required by the interests of justice in fashioning appropriate relief or by reason of the wide ambit of s 29 of the *Civil Procedure Act.* I will explain why these contentions are misconceived later in section R.2.

1721 In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,[393] French CJ, Hayne and Kiefel JJ drew attention to the basic proposition that the proper identification of the damage should usually point the way to the acts or omissions that were its cause, identified by a common sense inquiry into the facts of the particular case. Their Honours stated:

The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.[394]

1722 The factual inquiry is whether as a matter of common sense, in the circumstances described in these reasons, the contravention of an overarching obligation by any of the Contraveners played some material part in contributing to that financial loss. Here, the damage has been the cost of delay, which commenced soon after the settlement approval hearing, and continued through the appeal process and this remitter proceeding. The debenture holders will continue to suffer delay costs until judgments are executed and recoveries completed enabling further distributions. This damage would be mitigated, and time would cease to accrue on this delay, by a payment from a Contravener to the SPR. That has not occurred.

P.2. Other guiding principles

1723 In *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG*,[395] by reference to a significant line of authority, the Court of Appeal identified a number of principles governing the issues of causation and loss under s 82 of the *Trade Practices Act*.[396] These principles are helpful in responding to the submissions put by the Contraveners. From the principles identified by the Court of Appeal, principles numbered (4) to (13) apply in respect of causation.[397] What follows is limited to those causation principles.

1724 Transposing the causation principles to the present circumstances, by analogy, the following principles are applicable to s 29 of the *Civil Procedure Act*. When considering the causation principles in the context of s 29, an important distinction must be borne in mind. The duty or obligation, analogous with the conduct or transaction referred to in the context of consumer law, is not owed to a plaintiff but to the court. In respect of s 29, the causation principles are:

> (a) Section 29 requires identification of a causal link between loss or damage and conduct done in contravention of the Act;[398] the question of causation is relative to the purpose of Parts 2.3 and 2.4, applied to the circumstances of a particular case.[399]
>
> (b) Determining the question of causation will often involve considering the detrimental effect on the administration of justice as a result of the consequences that followed on the contravening conduct, compared with what would have been had the contravening conduct not taken place. This entitles the injured party to all the consequential loss directly flowing from the court's inducement by that conduct, at least if the loss is foreseeable.[400]
>
> (c) Analysing the question of causation only by reference to what is, in essence, a 'but for' test has been found wanting in other contexts and it should not be treated as an exclusive test of causation under s 29 either;[401] especially where there is more than one cause of the loss (as discussed earlier).[402]
>
> (d) It is relevant to ask what the injured parties and the court would have done had they not relied on the contravening conduct.[403]
>
> (e) There are cases where if the contravening conduct which misled the injured parties and the court had not occurred, they would not have embarked upon the application or proceeding at all or the court would not have granted any relief;[404] and there are cases where if the injured parties and the court had not been misled they would still have embarked upon the application or proceeding or granted relief, but would have done so by a different application or proceeding or granted alternative relief.[405]
>
> (f) An injured party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted.[406]
>
> (g) A court should not engage in speculation about multiple possibilities of past hypotheticals to which no specific evidence was directed.[407]
>
> (h) Once the causal connection is established, there is nothing in s 29 which suggests that the amount that may be awarded as compensation under that section should be limited by drawing some analogy with the law of contract, tort or equitable remedies.[408]

(i) If the defendant's breach has 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach, without more, would not have brought about the damage (as discussed earlier).[409]

(j) In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage, but such cases are exceptional.[410]

1725 In the context of Trimbos's submissions on causation, the observations of the Full Court of the Federal Court in *Como Investments Pty Ltd (in liq) v Yenald Nominees Pty Ltd* are relevant, (reading 'expert opinion' for 'a representation'). The court stated:

Where a representation is relevant to the decision in question, and in its nature persuasive to induce the making of that decision, it accords with legal notions of causation to hold that it has a causative effect. And where a respondent, who may be taken to know his own business, has thought it was in his interests to misrepresent the situation in a particular respect, the Court may infer that the misrepresentation was persuasive. These inferences arise from the making of the representation followed by the respondent doing the thing it was calculated to induce him to do. All this is a matter of common sense. It has also been stated in the authorities.[411]

1726 Causation of loss in equitable compensation for breach of fiduciary duty developed in the context of traditional trusts where the only way in which a beneficiaries' rights were fully protected was by restoration of the trust fund. The basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach, or compensation for such loss.[412] If specific restitution of trust property is not possible the liability of the trustee is to pay sufficient compensation to restore the trust estate to what it would have been had the breach not been committed. A trustee is liable to make good a loss to the trust estate if, but for the breach, such loss would not have occurred. That is so, even where the immediate cause of the loss is the dishonesty or failure of a third party.[413]

1727 Equity's insistence that the trustee be held to the obligation to perform the trust is strongly manifest where loss is occasioned by breach arising from conflict between duty and interest. The same insistence is present in equity's treatment of disloyalty by a non-trustee fiduciary.[414]

1728 With causation in equitable compensation, the onus readily shifts to the fiduciary. For example, if a fiduciary asserted that a breach of fiduciary duty caused no damage for the reason that the principal would, if asked, have authorised the variation which constituted the breach of duty, then there is at least an evidentiary onus on the fiduciary to make good that proposition. The onus will shift to the fiduciary once the claimant establishes a causal link between the conduct and the claimed loss.

1729 Once the causal link is established, equity does not enquire as to the whether the loss was also caused by other acts or omissions. In many cases only a minimum of evidence is necessary to discharge the evidentiary burden of causation because 'it has been said that "[e]quity must strive to repair the breach of fiduciary duty lest the fiduciary in default could be exonerated too easily...[and] the courts [be] seen to wink at wrong-doing"'.[415]

1730 In *Premium Real Estate Ltd v Stevens*,[416] the Supreme Court of New Zealand endorsed what Tipping J said in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*:

[O]nce the plaintiff has shown a loss arising out of a transaction to which a breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, i.e. without any breach on the fiduciary's part ... policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.[417]

1731 These principles resonate conceptually with the text, context and purpose of the power to award compensation under s 29(1)(c) of the *Civil Procedure Act*. They are helpful in identifying the proper approach to causation required by the statutory test.

P.3. Causation findings

1732 Having regard to these principles it is clear on my findings that the contraventions of AFP, O'Bryan and Symons materially contributed to the financial loss suffered by the debenture holders and that no reason to conclude otherwise was established. I am satisfied that the same conclusions are warranted in respect of the contraventions by Trimbos. In each case it is plain that if a counterfactual is postulated in which the only hypothetical alteration to the circumstances is to remove from consideration the contravening conduct of the particular Contravener, the financial loss that I have found would not have been sustained by the debenture holders. That is so because if any of the Contraveners had properly discharged their duty to the court, the other Contraveners would not have been able to conceal their respective contraventions.

1733 I am satisfied that a like counterfactual applied to the claims against Zita and Alex Elliott, and this leads to the same conclusion. I find that the contraventions of Zita and Alex Elliott materially contributed to the financial loss suffered by the debenture holders.

1734 It is a purpose of the paramount duty and the overarching obligations to protect the functional operation of the courts from all risk to the integrity of the administration of justice. That is why the provisions of the *Civil Procedure Act* restate or make explicit in the form of the paramount duty and the overarching obligations foundational operational principles for the adversarial system of law that serves our society.

1735 In summary, debenture holders were entitled to a settlement of $64 million to be distributed to them following the expiry of the appeal period after the court granted approval of the Trust Co Settlement. Because AFP claimed costs and commission that were not simply excessive but fabricated, the contravening conduct of all Contraveners impeded, in various ways, the distribution of those funds to debenture holders. I am satisfied that from the documentation of the settlement, when the Adverse Settlement Terms were improperly included in the Settlement Deed through to and including the trial of the remitter, the contravening conduct of each of the Contraveners materially contributed, in the sense discussed above, to the delay in that distribution and accordingly to the loss claimed. Each of the Contraveners was part of a fraudulent scheme, namely AFP's business model. That conclusion, in the context of causation, involves no comparative assessment of culpability. I accept that the roles of Zita or Trimbos as an integral part of the scheme were distinct from those of Mark Elliott or O'Bryan but that is not to the point. Each of the Contraveners, as a material contributor to its cause, was responsible for the delay in the distribution to debenture holders of the settlement proceeds and that delay was a single continuing loss.[418]

P.4. Further specific contentions

1736 Zita and Alex Elliott put particular submissions in respect of causation that I will now consider.

Zita

1737 Turning first to Zita, in general terms, this Contravener's submissions did not properly identify the damage to which his conduct played some part. Rather, in his submissions he broke down the conduct into constituent parts for analysis. Zita's analysis of his conduct could not be related to an identifiable constituent part of the loss. The submission appealed to distributive responsibility and emphasised the conduct of Mark Elliott, O'Bryan and Symons. Zita submitted this analysis supported a contention that it was those Contraveners and not Zita Law who caused the loss.

1738 Zita's submission is misconceived because it fails to recognise that the loss caused by his contravention was the whole loss suffered by debenture holders; this was the causative impact of his contraventions of the overarching obligation, particularly those that flowed from his role as a post-box. As long as a contravention materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.[419] This was not addressed by Zita's contention that no specific loss or damage is alleged by the Contradictor to have been materially contributed to by a specific contravention.

1739 My findings of fact supported the conclusion that Zita abrogated his duties from the outset of his retainer. By accepting the post-box role, the prospect of AFP, O'Bryan and Symons' fraudulent scheme being exposed by a competent instructing solicitor was neutralised. That abrogation of responsibility, in breach of fiduciary duty owed by Zita to group members and in breach of the overarching obligations, by discharging his retainer in that fashion, permitted and facilitated the contravening acts of AFP, O'Bryan and Symons. In that way, a direct link existed between the contravening conduct and the loss.[420] It was no answer to say that AFP, O'Bryan and Symons would have acted fraudulently irrespective of Zita's conduct. A competent solicitor acting properly in the discharge of his retainer on behalf of the plaintiff and faithfully observing the overarching obligations under the *Civil Procedure Act* would not have permitted Mark Elliott, O'Bryan and Symons to attempt to appropriate from the debenture holders funds to which they were not lawfully entitled.

1740 The detrimental effect on the administration of justice of Zita contravening overarching obligations by that abdication of responsibility, enabling the more serious contraventions by AFP and the other Lawyer Parties, was substantial. It is inconceivable that if Zita had filed an affidavit on the settlement approval application explaining their role in the proceeding in the terms described in these reasons, that the court would have approved the settlement as it did. Zita did not persuade me that in that counterfactual, the court would not have appointed a contradictor or would have approved the settlement and the distribution of it in the terms that it did.

1741 AFP, O'Bryan and Symons intended that the court be misled on the settlement approval application. That is why Zita was constrained into the post-box role that he accepted, why the SPRs were constrained by the Adverse Settlement Terms and why Trimbos was deceived by the instructions that he blindly accepted when expressing his costing opinions to the court. Zita did not persuade me that with assistance from a contradictor, the court would nonetheless have made no inquiry into the claims for costs and commission, focussing on the work of Trimbos as well as the opinions of O'Bryan and Symons, and that the outcome for debenture holders would not have been any different from what actually eventuated.

1742 This material contribution to the financial loss suffered by debenture holders is sufficient, by reference to the principles I have set out, to enable the debenture holders to recover all the consequential loss directly flowing from the court's inducement, by that conduct, to act in error when approving the settlement. The loss that flowed directly from the erroneous approval of the costs and commission as claimed by AFP, was the loss suffered by debenture holders in the form of delay damages and costs, as assessed elsewhere in these reasons.

1743 That loss was plainly foreseeable. Even from their perspective as Contraveners, Mark Elliott/AFP, Alex Elliott, O'Bryan and Symons acknowledged the possible consequences of the appeal and foresaw that any basis to challenge the settlement approval would detrimentally affect their anticipated 'division of the spoils'.

1744 Contraventions by AFP, the other Lawyer Parties, Trimbos and Alex Elliott, might be thought to have played an even more significant role in causing that loss. That was the submission Zita advanced. It was misconceived, because the *Civil Procedure Act* neither requires nor permits inquiry or comparison to assign greater causative significance to a deliberate act or a careless act when each played a part in the history of events. As a matter of principle, this further conduct by others is irrelevant when assessing the causal effect of Zita's conduct. The proper focus is on Zita's conduct and the proper question is whether his contributions materially contributed to the loss.

1745 I am persuaded that the contraventions found proved against Zita materially contributed to that loss and are properly regarded as a cause of the loss, despite other factors or conditions being present.

1746 This conclusion is consistent with the common law position. In *Myers*,[421] the critical question was whether a solicitor could be ordered to pay to the plaintiff the costs of an action because the solicitor had delivered defences which he must have known or suspected to be false, and had prepared and permitted his clients to make affidavits of documents which were inadequate and false. The House of Lords recognised that a solicitor's duty to the administration of justice and the wasted costs jurisdiction relevantly focused attention on the solicitor's misconduct in the way in which the work entrusted to his firm was carried on.[422]

1747 Lord Atkin's words resonate generally in respect of the issues on this remitter:

> From time immemorial, Judges have exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the court itself. Rules are disobeyed, false statements are made to the court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they be carrying on the profession alone or as a firm.
>
> ...
>
> It seems to me quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which the court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The court is not concerning itself with a breach of duty to the other litigant, but with a breach of duty to itself.[423]

1748 The misconception in Zita's submission can be illustrated by reference to his contention that even if properly advised by Zita, Mr Bolitho would have entered into the Settlement Deed, with the Adverse Settlement Terms, in any event. This submission offends the principle that it is not open to a defaulting fiduciary to contend that, absent breach, the beneficiary would not have acted any differently. The Adverse Settlement Terms were integral to the dishonest scheme to charge the excessive fees promoted by Mark Elliott, O'Bryan and Symons. The evidence does not show that those parties advised Mr Bolitho in relation to the terms of the Settlement Deed. That was Mr Crow's job, a separation of function that enabled the critical facts to be withheld from Mr Bolitho. Zita's contraventions materially contributed to that Deed, its approval, the need to set the approval aside, and the enquiry on the remitter.

1749 Zita also submitted that his culpability was diminished because the SPRs agreed to the Adverse Settlement Terms. As I have explained, as a matter of principle, causation is not assessed by reference to the comparative culpability of others or causal potency. That is so even where Mark Elliott, O'Bryan and Symons

were deliberately concealing a fraud. Zita's breach of duty facilitated that concealment enabling Mark Elliott to ensure that the Adverse Settlement Terms were included in the settlement and that the SPRs were incapacitated from discovering the fraud. In any event, the evidence was that the SPRs resisted the Adverse Settlement Terms, and sought other conventional and appropriate terms. It was Mark Elliott who insistently demanded their inclusion.

Alex Elliott

1750 Alex Elliott's primary submission was to similar effect. He did not make any material contribution to any financial loss suffered by debenture holders. He submitted that the court must so find because he was not in a position to effect the course of events and did not have any realistic basis to detect, let alone reveal, the deception that was at play. Further, he had no realistic prospect of altering the positions that were taken by AFP, Mark Elliott, O'Bryan, Symons, Zita or Trimbos. In other words, nothing that Alex Elliott could have done, or refrained from doing, was realistically capable of making any difference to what in fact occurred.

1751 This submission is misconceived. It is not supported by the analysis of principle that I have set out. In particular, it cannot sit with what Gaudron, Gummow and Hayne JJ said in *I & L Securities*.[424] In essence, Alex Elliott submitted that any finding of a contravention against him, was a finding of conduct that was not necessary for the occurrence of the loss. Analysing the question of causation only by reference to the 'but for' test as an exclusive test of causation under s 29 is not the correct approach, especially where there is more than one cause of the loss. Material contribution to loss is not assessed by whether the course of events would necessarily have altered absent the postulated contravention. The assessment is directed to the consequences of what Alex Elliott actually did. Plainly there was action that Alex Elliott could have taken to not contravene his obligations. He could have refused his father's instructions. He could have withdrawn from the matter. He could have sought mentoring. He could have sought an ethical ruling. He could have 'blown the whistle'. His conduct, including his failure to act on what he knew, made a material contribution to the loss suffered by debenture holders, notwithstanding that the conduct of others, over which he may not have exerted control, made the loss seem inevitable. It is speculative to contend that the outcome would have been unchanged, absent all of Alex Elliott's contravening conduct.

1752 The Contradictor submitted the following reasons to reject Alex Elliott's submission:

> (a) Alex Elliott showed a fundamental lack of insight into his duties as a legal practitioner, both in relation to clients and in relation to the court. He sought to be excused from liability by virtue of his youth, his diffidence to the wisdom and experience of his father and his admiration for O'Bryan, which should not be entertained;
>
> (b) Alex Elliott's submissions also failed to grapple with the nature of the loss that was caused. As Zita did, Alex Elliott contended that, in the absence of evidence that a particular contravention by him contributed to an identifiable or specific loss, I should not be satisfied that the debenture holders' financial loss was materially contributed to by a contravention of an overarching obligation by Alex Elliott. This should be rejected;
>
> (c) Alex Elliott desired that I accept that he was incapable of raising matters with his father, O'Bryan or Symons regarding the discrepancies in the information presented to the court in counsel's first opinion. However, that opinion had been provided to Mark and Alex Elliott for feedback with express instructions to 'check all the facts and figures'. Alex Elliott's omissions materially contributed to the misleading nature of both Trimbos's opinion and counsel's first opinion. Alex Elliott knew that the Lawyer Parties did not begin trial preparation work until the

second half of 2017. He was in a position to identify and correct erroneous instructions to Trimbos at the time, and failed to do so.

1753 For reasons expressed earlier, I accept the Contradictor's first submission (a). Alex Elliott's lack of wisdom and experience, and his reverence for his father and O'Bryan, are not relevant to the assessment of material contribution under s 29 of the *Civil Procedure Act*.

1754 I also accept the second submission (b), that Alex Elliott's analysis of material contribution misconceived the loss and the Contradictor did not need to identify one specific instance of conduct and show how it directly caused specific loss by application of a but for test. Alex Elliott's submission that causation cannot be shown when the Contradictor has not provided particulars of what it is alleged that Alex Elliott should have done differently in each instance of contravening conduct was, by reference to the principles set out above, misconceived.

1755 In any event as I just noted, there are various examples of the different choices Alex Elliott could have made. Alex Elliott himself belatedly recognised in re-examination that he could have responded differently to the request that he prepare the cheques O'Bryan required by seeking mentoring from a senior practitioner. What Alex Elliott should have done differently was not contravene the overarching obligations.

1756 Examples where Alex Elliott's conduct materially contributed to the loss include his conduct in preparing the script, the Banksia Expenses Spreadsheet, in collating the invoices for Trimbos and delivering them to him, his enthusiastic research in the early stages of Mrs Botsman's appeal on the issue of requiring her to post security for costs can also be noted, his work on the appeal at the time of the hearing and in particular, his acts of assistance to his father and to AFP during the later stages of the appeal, particularly drawing the sham cheques for Symons and Zita and assisting in the preparation of the letter to the SPRs threatening to terminate the settlement, his involvement in Mark Elliott's document destruction practice, and his attitude to discovery and compliance with court directions.

1757 I also accept the third submission (c). It is not to the point that Mark Elliott, O'Bryan and Symons may well have brushed aside any effort that Alex Elliott made to intervene to discharge his obligations to the court, or to confront their failure to discharge their obligations. For one thing, what Alex Elliott might have done is not limited to those options. For another, it is not to the point to speculate what might have happened to the innocent party when speculating about different behaviour by a contravener. As a matter of principle, material contribution to loss is not assessed by whether the course of events would necessarily have altered absent the postulated contravention. The assessment is directed to the consequences of what Alex Elliott actually did. He did not persuade me that he made any significant effort to avoid being, himself, in contravention of an overarching obligation. Alex Elliott elected to continue to assist AFP after he recognised his father's commitment to AFP's personal interests in settlement of the proceeding, on improperly negotiated and approved terms, quite disadvantageous to the group members, as set out above.

1758 Alex Elliott materially contributed to the loss through what he failed to do. Alex Elliott conceded that he had an understanding of the work that had been done by the Bolitho legal team and that would have enabled him to undertake some scrutiny of counsel's fees. I reject his contention that he was incapable of undertaking that task because he was 'freshly minted'. Spotting the misconception would not have taken a great deal of scrutiny. Alex Elliott understood that Trimbos would rely on the integrity of the invoices and fee slips that he had collated and provided to him. I cannot accept his contention that nothing he could have done would make any difference to the outcome of the settlement approval.

1759 The answer to Alex Elliott's contention that there was nothing he could do is that the steps that a person

in Alex Elliott's position ought to have taken were defined by his paramount duty. It is not the causal question that I just addressed. The paramount duty is not to be construed by reference to whether a practitioner's conduct materially contributed to loss suffered by any person. That question arises, but not in this context. The relevant question is whether there was any step that he ought to have taken to further the administration of justice. It is speculative whether the course of these proceedings may have been different if he had, because the dominant players Mark Elliott and O'Bryan went to extraordinary lengths to save their nefarious scheme.

1760 I was persuaded that Alex Elliott was capable of raising concerns with his father and did so at various times. While Mark Elliott may have been difficult for others, such as Zita, to effectively and responsibly deal with, I am satisfied that Mark Elliott valued his son's opinion. In any event, as I have noted, as a solicitor Alex Elliott was not entitled to sit on the side lines as a supportive observer.

1761 I am persuaded that the contraventions found proved against Alex Elliott materially contributed to the loss suffered by debenture holders that is analysed elsewhere in these reasons and are properly regarded as a cause of the loss, despite other factors or conditions being present.

17. COMPENSATION

Q.1. The claim

1762 The Contradictor, supported by the SPR, sought compensation for the loss of use of the settlement funds through delay in their distribution, the costs of certain past applications, and full indemnity costs in respect of the remitter proceeding.

1763 The compensation claim was put on the basis that debenture holders have been held out of their funds by the misconduct of the Contraveners, and have funded significant costs in the dispute with AFP and the Lawyer Parties over their claims for costs and commission.

1764 The Contradictor and the SPR submitted that I should order that:

> (a) the Contraveners compensate the SPR (for the benefit of debenture holders) for financial loss, in the form of delay damages to which one or more contraventions by each of the Contraveners materially contributed, pursuant to s 29(1)(c) of the *Civil Procedure Act*;
>
> (b) apart from an agreed sum for certain costs that were not disputed ($234,375), the fees, costs, and expenses to which the Contraveners might otherwise be entitled in the proceeding be disallowed in whole or in part, pursuant to s 29(1)(a); and
>
> (c) the Contraveners pay the SPR (for the benefit of debenture holders) all of the legal costs or other costs or expenses of it and the Contradictor arising from contraventions of overarching obligations, which the SPR submitted included the costs noted below.[425]

1765 The Contradictor also submitted that I might further order that:

> (a) the Contraveners indemnify parties in whole or in part in respect of costs ordered by the court to be paid by them; and
>
> (b) the conduct of one or more of the Contraveners be referred to a disciplinary body.

1766 The Contradictor's claim for compensation was put as follows:

	A	Settlement Sum	$64,000,0
less	B	AFP's remaining undisputed costs	$234,3
less	C	AFP's fair and reasonable entitlement to costs in the proceeding	$
less	D	AFP's fair and reasonable commission	$
equals	E	Principal available for distribution on 21 March 2018	$63,765,6
less	F	Distribution made on 13 June 2019	$42,000,0
equals	G	Principal available for distribution on 13 June 2019	$21,765,6
	H	**Interest on $63,765,624 at 10% per annum from 21 March 2018 to 13 June 2019**	**$7,861,5**
	I	**Interest on $21,765,624 at 10% per annum from 14 June 2019 to 26 February 2021**	**$3,715,0**
	J	**TOTAL INTEREST CLAIM**	**$11,576,5**

1767 The SPR contended for a slightly different calculation that led to a total of $11,627,945; the difference being that the SPR gave no allowance for item B.

1768 AFP submitted that the loss sustained by group members was the loss of an opportunity to recover more and sooner, and must be calculated with precision. AFP contended for a four step process to evaluate the proper counterfactual.

1769 AFP assessed the loss as follows:

	A	Settlement Sum	$64,000,0
less	B	AFP's remaining undisputed costs	$234,3
less	C	AFP's fair and reasonable entitlement to costs in the proceeding, comprising: O'Bryan: $1,049,300 Symons: $200,000 Mr Crow: $28,604 Zita/Portfolio Law: $Nil[426]	$1,277,9
less	D	AFP's fair and reasonable commission	$6,969,6
equals	E	Principal available for distribution on 29 November 2018	$55,518,1
less	F	Distribution made on 13 June 2019	$42,000,0
equals	G	Principal available for distribution on 13 June 2019	$13,518,1
	H.1	**Interest on $55,518,121 at 5% per annum from 30 November 2018 to 16 May 2019**	**$1,277,0**
	H.2	**Interest on $55,518,121 at 10% per annum from 17 May 2019 to 13 June 2019**	**$425,8**
	I.1	**Interest on $13,518,121 at 10% per annum from 14 June 2019 to 14 July 2020**	**$1,470,3**
	I.2	**Interest on $13,518,121 at 5% per annum from 15 July 2020 to 26 February 2021**	**$420,3**

less	J	Interest earned on funds retained by the SPR as at 10 March 2021	$207,9
	K	**TOTAL INTEREST CLAIM**	**$3,594,2**

1770 AFP contended that interest should not be awarded at the penalty interest rate for the whole of the period to final judgment, having regard to certain events that took place during the remitter. These submissions are considered later in this section. AFP also submitted that interest earned on the settlement sum in Maddocks' trust account, funds retained by the SPR as at 10 March 2021, must be brought to account.

1771 Pausing to deal with that latter submission, I accept that, conceptually, there is merit in the notion that additional interest earned on the settlement sum should be brought to account. However, this proposition was not explored with Mr Lindholm in evidence. Clearly, the submission was developed late in the proceeding and was based on information drawn from an affidavit of Mr Kingston sworn 10 March 2021, filed in support of an application for approval of a further distribution to debenture holders. Consequently, AFP failed to establish whether the debenture holders are entitled to any, and if so what part, of the accrued interest since the interest income forms part of the receipts of the special purpose receivership and may be subject to legitimate deductions.[427] I am not prepared to speculate against the interests of the debenture holders.

1772 A number of integers in these calculations were in issue between the parties:

(a) What deductions ought reasonably be allowed from the settlement sum prior to distribution?

(b) When would the distribution have been paid?

(c) What is the appropriate interest rate to allow?

(d) Was the loss being compensated a lost opportunity?

1773 The Contradictor and the SPR also claimed costs, namely:

(a) the SPR's costs of the approval hearing before Croft J;

(b) the SPR's costs of the appeal to the Court of Appeal;

(c) the SPR's costs of the application for special leave to appeal to the High Court; and

(d) the Contradictor and SPR's costs of the remitter, to be assessed on an indemnity basis.

1774 The SPR assessed that the total legal costs of the remitter currently borne by debenture holders significantly exceed $10 million. As at 31 December 2020, the Contradictor and the SPR had incurred approximately $7 million and $3 million in costs, respectively.

Q.2. Principles for quantification of compensation

1775 How the court ought to approach assessment of compensation is predominately a matter of statutory construction.

1776 Earlier,[428] I cited *Henville v Walker,*[429] where Gleeson CJ observed that common law principles may provide useful guidance, an accumulation of valuable insight and experience, which may well be useful in applying the *Civil Procedure Act* in the context of assessing compensation under s 29.

1777 I start with the statutory text.

1778 Section 29(1) of the *Civil Procedure Act* provides:

If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to:

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

(b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including:

(i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or

(ii) an order for no interest or reduced interest;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

1779 As discussed in section P, s 29 gives express guidance in respect of causation with the expression 'materially contributed to by the contravention' in relation to compensation for financial or other loss. A wider or more generous causation test applies in relation to legal costs, with the statutory language being 'arising from the contravention'.

1780 I am satisfied on the balance of probabilities, as stated above, that each of the Contraveners contravened an overarching obligation. Accordingly, the jurisdiction under s 29 is enlivened, and I may make any order I consider appropriate in the interests of justice.

1781 It is necessary to consider the nature of the court's power under this section.

1782 AFP submitted that s 29 ought to be read solely on the basis of the compensatory principle, and that damages could not be ordered punitively. It contended that so much was clear by the wording of s 29(1)(c), which allowed the court to 'compensate... for any financial loss or other loss'.

1783 The Contradictor contended that the court is armed with both compensatory and disciplinary powers,[430] and, in a practical sense, the disciplinary function may not always be disentangled from the compensatory function. The Contradictor argued that the court's power to make an order under s 29 was analogous to exemplary damages; the court may exercise its powers to demonstrate its disapproval of contravening conduct and to act as a deterrent to the defendant and others from engaging in similar behaviour.[431] Questions of whether to grant further orders of a punitive nature do not arise where the compensatory order has a sufficiently appropriate impact. Exemplary damages should only be considered after assessment of the finalised compensatory damages if the court takes the view that the quantum of compensatory damages is inadequate for the court to express its condemnation of the conduct. In this case, I was not persuaded that exemplary damages should be awarded.

1784 The plain text of the section draws attention to the compensatory principle, particularly when the court moves under s 29(1)(c). I accept that the statute is expressly contemplating the principles of general law that give colour and content to the compensatory principle that is engaged.

1785 Useful guidance, as Gleeson CJ put it, can be drawn from other cases. Although the Chief Justice referred to assistance being derived from common law principles, that comparison naturally arose in that case from the analogy between consumer law and the common law of tort and contract. Having regard to the context and purpose of s 29 of the *Civil Procedure Act,* equitable principles are a better source of guidance when selecting a measure of compensation that conforms to both the remedial purpose of the statute and to the justice and equity of the case. The principles of general law to be contemplated when assessing compensation extend to the principles of equitable compensation.

1786 The purpose of the *Civil Procedure Act* was, in part, to effect change in the culture surrounding the conduct of litigation. Its strong focus is on the duties owed to the proper administration of justice, particularly by means of the overarching purpose in the conduct of civil litigation, the paramount duty to the court, and the overarching obligations owed by those subject to regulation by the Act.[432] Notably, and notwithstanding that a legal practitioner's duty to a client may be fiduciary, the *Civil Procedure Act* provides that a legal practitioner is not required to comply with any instruction or wish of a client that is inconsistent with an overarching obligation,[433] and must not cause the client to contravene an overarching obligation.[434] To the extent that there is an inconsistency between a legal practitioner's duty to a client and an overarching obligation, the latter prevails.

1787 The provisions of Part 2.4 of the *Civil Procedure Act* are intended to expressly identify how all those involved in the conduct of litigation — parties, practitioners, experts and financiers — are accountable to the court for the just, efficient, timely and cost effective resolution of disputes.[435] Such duties are, conceptually, sufficiently analogous with the duties and standards expected of fiduciaries towards their beneficiaries and render apposite how equity applies the compensatory principle. Although the compensatory principle is universal, there are differences in the manner of its application between the common law and equity.

1788 The High Court recently considered the compensatory principle at common law in *Lewis*, a proceeding concerning the intentional tort of false imprisonment. Gageler J restated the well-understood principle:

The compensatory principle entitles the victim of a tort to no less and no more than "a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the ... tort had not been committed".[436]

1789 Gageler J described the correct approach to a loss counterfactual. The requisite inquiry will be fact-specific and inferential, and requires the court to examine the position that the plaintiff would have been in, had the defendant and all those who had a lawful capacity to contribute to the wrongdoing, conducted themselves strictly in accordance with the law. His Honour said:

Notwithstanding the inherently hypothetical nature of that counterfactual inquiry, the inquiry necessarily proceeds by drawing inferences from known facts to find the counterfactual position on the balance of probabilities.

...

The policy of the common law therefore demands that counterfactual analysis in a case of wrongful imprisonment be undertaken on the assumption that everyone who had lawful capacity to contribute to deprivation of the plaintiff's liberty acted in strict performance of their legal duties and acted or refrained from

acting in strict compliance with the conditions expressly or impliedly imposed on the exercise of their legal powers.[437]

1790 Edelman J's analysis in *Lewis* is also instructive:

As explained above, the test for causation of loss asks whether the wrongful act was necessary for the loss. The "but for" or counterfactual approach "directs us to change one thing at a time and see if the outcome changes". The change is the removal of the wrongful act. If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The counterfactual approach thus involves a hypothetical question where no other fact or circumstance is changed other than those which constituted the wrongful act.[438]

1791 In *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* ('***Pearce***'), Warren CJ considered the principles of assessment of equitable compensation, noting that the measure of equitable compensation is the sum that would restore the plaintiff to the position he or she would have been in had the breach of equitable obligation not occurred.[439] Conceptually then, what the High Court said in *Lewis* about counterfactuals in the context of a tort remains apposite in this context. The Chief Justice observed that equitable compensation is not assessed with respect to the foreseeable value at the time of breach; rather, damages will be assessed at the trial date having regard to what actually happened. Her Honour noted Lord Browne-Wilkinson's observations in *Target Holdings Ltd v Redferns*:

Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests. To make good a loss in fact suffered by the beneficiaries and which, using hindsight and common-sense, can be seen to have been caused by the breach.[440]

Where the court is protecting the proper administration of justice, this approach is apposite.

1792 The Chief Justice also held that the court is entitled, with the full benefit of hindsight, not to speculate against the interests of the plaintiff. This principle applies in assessing three variables in the counterfactual in this case: the hypothetical quantum of both the legal costs and the funding commission, and the reasonable period between court approval of the settlement and distribution of the settlement sum to debenture holders.

Q.3. The counterfactual analysis

Identifying the appropriate parameters of the inquiry

1793 On the Contradictor's primary counterfactual, had there been no contraventions of the paramount duty and the overarching obligations:

> (a) Mr Bolitho would have been represented by independent lawyers since the Bolitho No 4 decision, who would have acted in his interests and in the interests of other group members, and would have operated as an effective check on the ability of AFP to advance its own interests, to the detriment of Mr Bolitho and other group members;
>
> (b) the Settlement Deed would not have contained the terms that were adverse to the interests of group members, including that the settlement was conditional upon approval of payments to AFP;
>
> (c) the true position about the quantum and payment of costs that had been incurred would have been disclosed to Mr Bolitho, the SPRs, Trimbos and the court;
>
> (d) the SPRs would not have agreed to support AFP's claims for costs and commission;
>
> (e) the court would have approved reasonable costs and funding commission in a significantly

lower sum than claimed by AFP;

(f) a Contradictor would have been appointed to review the settlement and the claim for costs and commission;

(g) the Contradictor would have likely concluded that the settlement sum itself was fair and reasonable;

(h) there would have been no appeal from the approval of the Trust Co Settlement;

(i) debenture holders would have received their proper entitlement upon expiration of the appeal period following the settlement approval in about March 2018; and

(j) the costs of the settlement approval application, the appeal, the special leave application and the remitter would not have been incurred.

1794 The SPR observed that the Contradictor's counterfactual was straightforward. Had the Contraveners properly discharged their statutory and fiduciary duties, the true facts would have come to light. Armed with true and complete information, the SPR, Trimbos (assuming that he too properly discharged his duties), a contradictor and the court, in whatever combination, would have ensured that AFP and the Lawyer Parties were awarded no more than their proper entitlement from the settlement sum by the court on the approval application. The Contradictor's case was, it was contended, an 'all or nothing' approach. On the balance of probabilities, a greater proportion of the $64 million settlement sum would have been distributed to debenture holders at an earlier time had there been no contravening conduct.

1795 Zita submitted that, in order to avoid awarding an inappropriate windfall to debenture holders, compensation should be assessed taking into account allowances for reasonable legal costs and disbursements for prosecuting the proceeding and for a funding commission. These costs, including seeking approval of the settlement, obtaining a report from an expert costs consultant, and commission should therefore be deducted from the settlement sum in the counterfactual.

1796 AFP characterised the relevant loss as a lost opportunity for debenture holders to recover more and sooner. It submitted such loss was to be calculated by reference to a counterfactual answered by this question: What position would debenture holders have been in if the contraventions of overarching obligations had not been committed?

1797 I can mostly accept this submission, but characterisation of the loss as a lost opportunity introduces confusing notions into the principles for assessment of compensation for contravention of a statutory duty. In common parlance, it might be said that debenture holders lost an opportunity to be paid more earlier, but they did not lose an opportunity to receive a distribution. Rather, they were held out by contravening conduct from timely receipt of their just entitlement. What they were denied was an entitlement that had accrued, which was neither a future, nor a hypothetical past, event. It cannot be equated to an opportunity to be fully realised in the future or in hypothetical circumstances.

1798 In the counterfactual proposed by the Contradictor and adopted by the SPR, all that changes is the assumption of no contraventions of the *Civil Procedure Act* or other breaches of duty. All other facts governing assessment remain the same. This approach accords with authority. Self-evidently, the counterfactual is not what actually happened. Determining the appropriate counterfactual consequences requires a hypothetical inquiry into past facts, involving an assessment of what inferences could be properly drawn from proven facts.

1799 This approach demonstrates why describing the claim as a lost chance or opportunity is misconceived. There is no alternative transaction, nor any diversion from a contingent commercial opportunity. What was diverted from debenture holders was their just entitlement in the subject transaction: the approved settlement of their claims and the timely distribution of their share of the proceeds. There was no legal right in the nature of a loss of opportunity to be recognised and protected for the benefit of debenture holders. That concept is inapt as a practical solution to evidential uncertainties.

1800 AFP developed its submission by contending that the value of this lost opportunity is hypothetically assessed by a four point process, by which the fact specific and inferential inquiry should proceed:

> (a) How much commission and costs would AFP have obtained absent the disentitling conduct?
>
> (b) When would the net settlement sum (less AFP's costs and commission) have been distributed?
>
> (c) By comparison with the payments actually distributed, to what extent were group members underpaid, and for how long were they kept out of their money?
>
> (d) Should that loss have been reduced, having regard to the want of certainty in the counterfactual?

1801 The first three steps are consistent with *Lewis* and I accepted them. The first step is also consistent with the SPR's submission that in the counterfactual, AFP and the Lawyer Parties were awarded no more than their proper entitlement from the settlement sum in the approval application. This first enquiry provides the basis for inferential findings to answer the second and third steps. These steps further accord with Zita's submission that proper costs and commission should be deducted from the settlement sum. However, the final step would permit a discount for vicissitudes that render the final return uncertain. It is this fourth step that must be carefully analysed.

1802 AFP's fourth step— reduction for want of certainty — differs from the first three stages, as it is not limited to a binary change, as described in *Lewis*, in the assumptions on which the counterfactual is founded. It introduces the notion that the inquiry ought not simply draw inferences from known facts to find the hypothetical counterfactual position on the balance of probabilities. Instead, it transposes what AFP identified as uncertainty in drawing inferences as to past facts into uncertainty about the ultimate counterfactual outcome.

1803 This is incorrect. Although the counterfactual outcome is assessed in a hypothetical sense, there were not future uncertainties or vicissitudes as would be present in the assessment of a lost commercial opportunity. The counterfactual event was clear. If all the obligations were observed, the debenture holders would have received the settlement sum minus reasonable costs/commission sooner. The inferential findings on the balance of probabilities are about past events, such as what was the fair and reasonable commission at the relevant time and when would distribution have been made. These inferences pertain to the first three steps AFP identified. As Gageler J identified in *Lewis* as the proper approach, the focus is on what would have happened, in the context of fact finding by inference from proven past facts.

1804 It is convenient to bear in mind what was explained by the High Court in *Malec v JC Hutton Pty Ltd*:

> When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its

approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high - 99.9 per cent - or very low - 0.1 per cent. But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so high as to be practically certain - say over 99 per cent - the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place.[441]

1805 To the extent that any events necessary to establish the counterfactual are in the category of past hypothetical fact, it will be necessary to assess and to take into account the degree of probability that it would have occurred.

1806 Item A (the settlement sum) and Item B (undisputed costs incurred by AFP) are not in dispute. Items C (AFP's fair and reasonable entitlement to costs in the proceeding) and D (AFP's fair and reasonable commission) are in contention. That dispute affects Item G (the quantum of the principal available for distribution).

1807 Two further facts that supported the Contradictor's claim were in dispute:

> (a) whether distribution would have been made by 21 March 2018 (or 21 April 2018), as assumed by the Contradictor in Item E, or at some later date after the appeal was determined, as the Contraveners submitted; and
>
> (b) whether the claim for interest should be subject to the penalty interest rate of 10%, as submitted by the Contradictor, or some lesser figure, as was contended by the Contraveners.

Legal costs

1808 I accept, as Zita and AFP contended, that in determining the quantum of the settlement sum available for distribution to debenture holders in the counterfactual, an allowance must be made for the reasonable legal costs and funding commission. It cannot be supposed that, absent the contravening conduct and breach of other duties as alleged, debenture holders could have achieved the Trust Co Settlement without solicitors, counsel and, most likely, a litigation funder, to prosecute the litigation on their behalf.

1809 Zita submitted that the Contradictor bore the onus of establishing the quantum of the net loss suffered by debenture holders, and had failed to satisfy the evidentiary onus to demonstrate the reasonable costs and commission recoverable on the counterfactual. Having adopted this position, Zita made no further submission directed either to identifying the proper allowance for the legal costs of the Bolitho proceeding or the appropriate funding commission.

1810 I do not accept that it was incumbent on the Contradictor to place evidence before the court of what reasonable amounts in costs and commission ought to be included in the counterfactual, or that in the absence of such evidence it is not possible to identify an appropriate allowance in the counterfactual for those items, in order to avoid overcompensating debenture holders.

1811 What is necessary is to identify the net settlement sum that would have been dispersed to debenture holders, and when that distribution would have been made. Those integers are to be calculated by reference to the evidence where no other fact or circumstance is changed, other than those which constitute the contraventions alleged by the Contradictor and found to have been proved. If that counterfactual position is able to be identified, by proper inference, from the facts proved in the proceeding, a proper interpretation of s 29 requires that the onus shifts to the Contraveners to demonstrate that all or part of that loss would have been suffered even if they had not breached the relevant statutory duty.[442]

1812 There is evidence, that I will come to shortly, on which I can assess the appropriate apportionment of the settlement sum between the Bolitho proceeding and the Banksia proceeding. There is also evidence from which I can reasonably infer the fair and reasonable sum that might have been allowed for legal costs and disbursements and for a funding commission. Such inferences are the necessary facts to determine the proper deductions from the settlement sum in the counterfactual.

1813 Before looking at the evidence that determined a proper apportionment, I will first identify the evidence as to the legal costs incurred in the Bolitho proceeding. There are three possible bases from which to estimate an allowance for legal costs, absent contravening conduct, in the counterfactual.

1814 The first basis is the modified claim now advanced by AFP, set out above, that totals, as a maximum figure, $1,914,088. This claim includes the costs paid by AFP to Zita in full, and claims counsel's fees by speculative assessment that lacks any proper basis.

1815 A second approach is to determine what inferences are reasonably open from the evidence of Trimbos. However, it would be necessary to assess whether if I assume away contravening conduct on his part I could identify or rely on any conclusion that may be drawn from his reports.

1816 The third approach is to look at the costs incurred by the SPR in the Banksia proceeding as a comparator for a hypothetical reasonable amount of legal costs in the Bolitho proceeding, taking into account the division of labour. This approach would require assessment by reference to the costs actually incurred by the SPR, adjusted by an assessment of the proportion of the total legal costs that would reasonably be incurred, by a legal team that did not breach any duty as alleged, in completing legal work not done by the Banksia legal team in preparing both proceedings for trial. From these integers, an assessment can be made of the probable inference open to be drawn as to the reasonable costs in the counterfactual. Relevantly, the decision by Mark Elliott and O'Bryan to leave the bulk of the trial preparation work to the SPR, to be performed by his legal team and at his expense, is not a circumstance that must alter in the hypothetical.

AFP's claim

1817 The costs that AFP submitted be properly allowed from the settlement sum on the counterfactual were the following:

(a) the undisputed expenses totalling $234,375.71;

(b) costs paid to Mr Crow in the sum of $28,604.60 for the period 27 May 2016 to 31 December

2018; and

(c) an unidentified portion of the amount paid to Zita. Although Portfolio Law was paid $401,808, AFP acknowledged that Zita faced allegations of contravening conduct and that this amount should be significantly reduced, as Trimbos opined in the Fifth Trimbos Report.

1818 AFP also submitted, remarkably, that notwithstanding the allegations made by the Contradictor that went undefended by counsel on the remitter, O'Bryan and Symons 'did engage in work', and a proper allowance for that involvement should be incorporated into the counterfactual. In respect of O'Bryan, AFP contended for the total of the 'first version'[443] of invoices he prepared, being $1,049,300, to be included in AFP's reasonable costs of the proceeding. A fair and reasonable allowance for Symons' fees would, it submitted, be $200,000; calculated by comparing 'the available documentary evidence of work undertaken' with Symons' fee slips that were in evidence.

1819 The Contradictor submitted that no allowance should be made for any costs for O'Bryan, Symons or Zita. O'Bryan and Symons were retained on illegal contingency fee arrangements, and accordingly could never recover their fees.[444] Zita was a post-box solicitor, who exercised no independent judgment in the interest of group members, and instead functioned as a front for Mark Elliott to continue to control the litigation, contrary to the Bolitho No 4 decision.

1820 Save for the undisputed expenses totalling $234,375.71, recovery of which will be permitted by set off, AFP's claim must be rejected for the following reasons.

1821 First, there is no proper basis to charge Mr Crow's costs to the debenture holders and these costs are irrelevant in the final analysis. AFP submitted that there was no suggestion that those fees were not actually incurred, and there was no basis to find that they were not reasonably incurred. Under cross-examination, Mr Crow was an honest witness and a practitioner who assisted Mr Bolitho in discharging his functions as lead plaintiff.

1822 AFP's submissions – that it was no reason to deny Mr Crow's costs because the Lawyer Parties did not provide legal services to group members - did not address the antecedent issue and was misconceived. Mr Crow was engaged by Mark Elliott and paid by him for AFP's purposes. The group members had no need for the lead plaintiff to be independently advised, that was AFP's need.

1823 Mr Crow was initially approached by Mark Elliott and O'Bryan in 2012. Mark Elliott arranged for his engagement as an 'independent lawyer' for Mr Bolitho. Mark Elliott entered into a 'Deed of Indemnity of Representative Plaintiff' with Mr Bolitho on 24 December 2012, in which Mark Elliott indemnified Mr Bolitho for all costs and liabilities in connection with the Bolitho proceeding, including Mr Crow's professional fees and any adverse costs order made in the proceeding. In turn, Mr Bolitho was obliged to accept and act promptly on all advice given by Mark Elliott and counsel, and not to consult any other legal practitioners in respect of the proceeding. Mr Crow was paid by Mark Elliott and is not out of pocket.

1824 Mr Crow deposed that when initially engaged, one of his roles as an independent lawyer was to advise Mr Bolitho in relation to the potential for a conflict of interest should his lawyers in the proceeding (then Mark Elliott and/or Elliott Legal) also have an involvement in the funding entity, as ultimately became the case. I have no reason to make any finding adverse to Mr Crow on the evidence on the remitter. Unlike the Lawyer Parties, he appears to have discharged his retainer to provide advice to Mr Bolitho competently and with due regard to his duties to the court.

1825 However, absent the contravening conduct, his involvement was unnecessary and the associated costs are not those that would be reasonably incurred in the counterfactual. Following the Bolitho No 4 decision and the court's conclusion that Mr Bolitho be represented by a solicitor and counsel who were independent of the litigation funder, the subsequent engagement of Zita ought to have rendered Mr Crow's role nugatory. However, because it was never any part of Zita's function to act other than as a mouthpiece and post-box for AFP, Mr Crow continued to provide advice to Mr Bolitho that was independent of AFP. Absent contravening conduct, this arrangement would be unnecessary and Mr Crow's costs were not properly an expense to be included in the counterfactual.

1826 Second, in the light of my findings that he acted as a post-box for AFP and the other Lawyer Parties, Zita's fees cannot be regarded as costs that might have been reasonably incurred in the counterfactual. AFP/Mark Elliott intended that Zita provide them with camouflage so that they could flout the Bolitho No 4 decision. Zita rendered services to AFP for its benefit. AFP conceded in final submissions that Zita's costs should be significantly reduced, as opined in the Fifth Trimbos Report, and that AFP would only be entitled to recover the difference. However, it is irrelevant to examine the reasonableness of expenses paid by AFP for its own purposes.

1827 As stated earlier in these reasons, no monetary value can properly be ascribed to Zita's discharge of the function of solicitor for the plaintiff in the Bolitho proceeding, given his abject failure to properly protect the interests of group members. Accordingly, Portfolio Law's costs provide no basis for any inference as to the reasonable costs of a solicitor for the plaintiff in the Bolitho proceeding. AFP has not persuaded me that Zita made any meaningful contribution to trial preparation in the Bolitho proceeding. The fact that AFP did not make any attempt in final submissions to quantify an appropriate deduction from Zita's fees is illustrative of the futility in its contention.

1828 While it is correct that in the counterfactual the plaintiff's solicitor would perform a legitimate and independent role that would necessarily have incurred legal costs, I cannot infer the reasonable quantum of such costs from what Zita charged, even as assessed by Trimbos. The two roles bore no relation.

1829 Third, all that AFP proffered in respect of counsel's fees on trial preparation was the following submission:

While O'Bryan has not sought to maintain any further defence of this proceeding, it is clear from the SPRs that he did engage in work. An appropriate figure is the first draft of his fees prepared by Mr O'Bryan before any inflation, which was $1,049,300.

[An] allowance of $200,000 would be made for Mr Symons's fees.

1830 The claim in respect of O'Bryan's fees was based on concessions made by the SPR that O'Bryan did some trial preparation work. I accept that the SPR made this concession during the trial of the remitter, and also in the confidential opinion of his counsel.

1831 As to the quantum of those fees, AFP contended that, in respect of an appropriate figure for O'Bryan, I adopt the 'first version' of fee slips prepared before he subsequently inflated his fee claim, as earlier discussed. I reject this submission. It carried an imbedded assumption that the fee slips as initially drafted represented a proper and accurate record of work performed and the charge to be made for it. AFP never proved that fact and O'Bryan likewise adduced no evidence of the correctness of those initial fees. For reasons that are obvious in light of the findings earlier made,[445] I am not prepared to infer that to be the case.

1832 The allowance for Symons' fees was based on a spreadsheet prepared by AFP that was neither put to nor accepted by a witness, but put to me in final submissions. By reference to Symons' fee slips, which purported to justify billings of $709,726 (inclusive of GST), AFP has extracted approximately 1,000 hours of attendances, conferences and appearances, equating to fees of approximately $280,000. AFP submitted that by comparison against 'available documentary evidence of work undertaken' which was set out in the spreadsheet, a reasonable allowance of $200,000 could be estimated.

1833 I reject this submission for two reasons. First, it is based on documents prepared by Symons (including, critically, his contrived fee slips), in circumstances that I do not accept as reliable.[446] Second, even if it be accepted that Symons did perform some work, AFP did not adduce a proper assessment based on credible evidence of the value of that work.

1834 For these reasons, I gain no assistance from the costs claim made by AFP in assessing the quantum of reasonable costs that would have been incurred in the counterfactual.

Trimbos's assessment

1835 The second method of assessment identified was to look at the opinion expressed by Trimbos. The proper conclusion to be drawn was that Trimbos's expert opinion, as expressed in the Third Trimbos Report, was inadmissible.[447] That conclusion is fortified by the Fifth Trimbos Report. I can draw no assistance from his reports in assessing the counterfactual.

Comparison with costs of Banksia legal team

1836 The third approach involved an assessment of the work that was actually undertaken by the Bolitho legal team in the Bolitho proceeding which would be valued by comparison with the costs incurred by debenture holders for the work actually undertaken by the Banksia legal team in both proceedings.

1837 Mr Newman deposed that from the SPR's appointment to December 2017, the SPR incurred legal costs and disbursements of $8,682,155.74 (excluding GST) in respect of the Banksia proceedings, comprising:

(a) the SPR's costs of $683,305.14;

(b) Maddocks's fees of $3,559,671.50;

(c) counsel's fees of $2,343,653.83;

(d) expert fees of $1,685,184.73; and

(e) other disbursements of $410,340.54.

1838 Mr Newman estimated that the SPR's legal costs and disbursements in this period included approximately $600,000 (exclusive of GST) in costs associated with prosecuting Banksia's claim against Insurance House between June 2015 and March 2019. He further stated that those claims were largely in abeyance from December 2017, as a result of the Trust Co Settlement, the appeal and the remitter.

1839 Further, the assessment of Mr David Hayes, one of the Receivers, was that its expenditure on legal costs and disbursements relating to the Banksia proceedings until the appointment of the SPRs was $4 million (exclusive of GST).

1840 The administration of the special purpose receivership is subject to court supervision, and these costs

are unchallenged in that or any other context.

1841 Rounded out, I find that the total costs of the SPR legal team from the investigation and prosecution of the Banksia proceedings, to the point of the application for approval of the Trust Co Settlement, was $12.082 million.

1842 Next, I am satisfied that this expenditure represented approximately 90% of the total reasonable legal costs and disbursements for the Bolitho proceeding and the Banksia proceeding together. For reasons I will identify when discussing the SPRs' counsels' opinions, I find that the Bolitho legal team stood by and permitted the SPR to carry the burden of preparing both proceedings for trial. This was Mark Elliott's intention, expressly stated in private email communications, and never contradicted. The Banksia legal team would do the bulk of the trial preparation work, rendering it unnecessary for AFP to fund solicitors, counsel, experts and general disbursements, which — conveniently for AFP — could be funded by group members out of the funds that they were otherwise entitled to as debenture holders.

1843 Mark Elliott's attitude was reflected in the SPR's evidence about the work performed by each of the legal teams. Drawing on the affidavits of Mr Lindholm, Mr Newman and Mr Kingston, and the SPR's counsels' opinion, none of which was challenged and which I accept as credible and reasonable evidence, that is what occurred. In respect of the work undertaken to prepare both proceedings for trial, I assess the relative percentage contributions of the Bolitho legal team at 10%, and the Banksia legal team at 90%.

1844 Although the SPR's costs and disbursements were not assessed by an independent costs consultant, they were subject to court approval, having regard to the position of the SPR as a court-appointed receiver. [448] Moreover, as the SPR's evidence and the counsels' opinion of his made clear, the Banksia legal team effectively prepared both the Bolitho and the Banksia proceedings for trial.

1845 Accepting the costs of the Banksia legal team at approximately $12 million to have been reasonably incurred and reasonable in amount, and applying the percentage contribution by each legal team, I assess the total reasonable legal costs and disbursements for both proceedings to be approximately $13.34 million. From this assessment, the hypothetical reasonable costs incurred by the Bolitho legal team, absent contravening conduct but otherwise permitting the Banksia legal team to perform the bulk of the work, was approximately $1.34 million.

1846 The above calculations identify the approximated legal costs for the claims prosecuted in both Bolitho and Banksia proceedings being the claims settled in both the Partial Settlement and in the Trust Co Settlement. Accordingly, the Bolitho legal team's costs approved on the Partial Settlement and paid to AFP must be brought to account.

1847 I set out earlier that the court approved, on the Partial Settlement, $2.55 million for reimbursement to AFP of legal costs and disbursements. The court's assessment of legal fees was based on Trimbos's evidence about which the judge observed:

The amicus curiae submitted that looking at the question in the broad, and taking into account the need to strike an appropriate balance between the level of information available on the one hand, and the costs associated with producing additional information, it was difficult for him to submit that the legal costs were unreasonable.[449]

1848 Mr Bolitho presented the Partial Settlement to the court on the basis that only 75% of the total costs incurred were sought to be deducted from the settlement sum, as they related to the claims of the defendants who were parties to the compromise, but that is irrelevant for present purposes.

1849 Using hindsight and common sense, and not speculating against the interests of debenture holders, once the $2.55 million in legal costs and disbursements already recovered from the Partial Settlement is set off against my finding of total legal costs of $1.34 million for Mr Bolitho's reasonable costs of prosecuting both proceedings in toto, I am not persuaded to make an allowance for any further costs and disbursements in the counterfactual on this method of assessment. I note that there is a considerable margin for error and my assessment of the contribution made by the Bolitho legal team could be doubled before it could be said on the counterfactual that an entitlement to reimbursement from the Trust Co Settlement was identifiable. This conclusion is not inconsistent with doubts expressed by the court at the time of the Partial Settlement, bearing in mind that the contradictor on that application, although suspicious, was considerably less well informed.

Apportionment of the settlement sum

1850 As earlier stated, no submission was made on the approval application before Croft J contending how the settlement sum ought to be apportioned between the proceedings. In this and other contexts it will be useful to make findings about how the settlement sum ought to be apportioned between the two proceedings, including for comparison of the legal work done in respect of each of the proceedings from inception to settlement.

1851 AFP submitted that the settlement sum would have been apportioned on the basis that 66% be attributable to the Bolitho proceeding, principally because it was consistent with:

(a) the opinions of O'Bryan and Symons as trial counsel for Mr Bolitho and of the SPR's trial counsel that the Bolitho proceeding had better prospects of success;

(b) the apportionment adopted in the Partial Settlement; and

(c) material contemporaneous with the settlement in November 2017.

1852 I reject this submission. For the following reasons, I find that $16 million was a fair and reasonable apportionment of the settlement sum attributable to the Bolitho proceeding.

Determining the apportionment

1853 The parties themselves did not expressly provide in the Settlement Deed for an apportionment of the settlement sum between the two proceedings. The Court of Appeal suggested, in passing, that the relative prospects of each proceeding might suit the purpose of apportioning the settlement sum between the two proceedings to determine an appropriate denominator when assessing a funding commission.[450] What the Court of Appeal identified was that it was necessary to factor in, as an essential ingredient of this inquiry, the existence, nature and interrelationship of the two proceedings. Put another way, they found it necessary to determine to what extent the settlement sum payable under the Deed was referrable to the Bolitho proceeding as the funding commission ought to be assessed by reference to that amount.

1854 This inquiry is factual. The interrelationship between the two proceedings could be assessed by reference to more than their respective prospects of success. Other considerations include the overlap in the evidence required to prove each proceeding and the work undertaken to prepare each proceeding for trial. In order to identify a rational basis for an apportionment, all relevant circumstances must be considered and weighed.

1855 Notwithstanding that counsel's confidential opinions opined on the relative strengths of the proceedings and left the court with different perspectives on the relevant contribution that each made to the achievement of the settlement, Croft J did not make any specific findings or otherwise address these issues, because of

the manner in which the approval application was presented to the court.

1856 Any assessment of the appropriateness of AFP's commission claim needed to take into account the contribution of the Banksia proceeding to achieving that settlement. However, confidentiality considerations — seemingly more assumed than real — prevented each party from addressing the other side's submission. Together with the contractual obligation, imposed on the SPR by AFP, to support approval of the settlement as documented and presented, the court was denied an analysis of the competing views. As a result, the relevant considerations remained unexposed to both Croft J and the Court of Appeal.

1857 Initially, on 1 February 2019, before becoming aware of the allegations of contravening conduct that would later emerge, I ordered that the SPRs and their solicitor, Mr Newman, file affidavits addressing:

> (a) a procedural chronology of each of the proceedings;
>
> (b) any arrangement between the plaintiffs in each of the proceedings for dividing up the work necessary for the trial of each proceeding; and
>
> (c) a chronological account and descriptions of the categories of work that were performed by the SPRs and their lawyers for the proceedings.

1858 I also ordered that the SPRs file a confidential opinion from trial counsel responding to the confidential opinions prepared by O'Bryan and Symons and placed before the court on the Trust Co Settlement approval application. The further opinions addressed the relative prospects of each of the claims and other matters and I will come to them shortly. Further directions provided an opportunity for responsive opinions from O'Bryan and Symons.

1859 Two particular aspects of the two proceedings required comparative analysis in order to apportion the settlement sum. The first was the work done to prepare the two proceedings for trial and the incidence of the costs of doing so. The second related to the merits of the claims made in the proceedings, but framing the question a little differently: precisely what persuaded Trust Co to settle jointly both proceedings?

Contributions to trial preparation

1860 Initially, the SPRs had no access to funds from the receivership to finance the Banksia proceedings. In 2016 the SPR Litigation Fund was established.[451] All of the legal work in preparation of the Banksia proceeding for trial was financed, by debenture holders, from this fund.

1861 The SPRs' chronology of the proceeding, consolidated to cover the period from 25 October 2012 to 17 December 2018, was verified by Mr Newman and Mr Kingston and supported by their counsel's opinion. In addition, Mr Lindholm and Mr Newman who were each cross-examined on their affidavits were not challenged on the details presented in the consolidated chronology.

1862 Thus, on the remitter, the SPRs placed considerable evidence before the court of the legal costs and disbursements incurred in preparing the Banksia proceeding for trial, and in particular, the work undertaken to place the parties in the position of being able to resolve the claim against Trust Co at mediation.

1863 I am satisfied that the SPRs' legal team always sought to work with the Bolitho legal team to prosecute the claims against Trust Co and the other defendants cooperatively, minimising duplicated costs to achieve the best commercial outcome for debenture holders.[452] The Banksia legal team kept the Bolitho legal team informed of the details of the evidence that it had prepared. Mr Newman's chronology of the conduct of the

Banksia proceeding after the SPRs' appointment included details of the legal costs incurred by the SPRs.

1864 A brief description of the legal work involved will assist. Prior to 2015, claims against Trust Co were solely made in the Bolitho proceeding; the Receivers' focus was directed at other potential wrongdoers.[453] In the early stages of the Bolitho proceeding, objections were taken to the plaintiff's pleading, and at least three versions of the statement of claim were rejected.[454] Ultimately, on 29 January 2016, Mr Bolitho filed a fourth further amended statement of claim, which was the seventh version of the statement of claim. During part of this period, while the Bolitho legal team was seeking to set up its pleadings, the Receivers completed public examinations and compiled the Receivers' Court Book, later produced to the parties to the proceedings.

1865 Mr Newman noted that the SPRs were aware that in four separate group proceedings in which interests associated with Mark Elliott financed or represented the plaintiff, the plaintiff had been unable to articulate a tenable cause of action. The Banksia legal team concluded that there was a risk the Bolitho proceeding might suffer a similar fate and be dismissed or Mr Bolitho's pleadings struck out. There was also ongoing uncertainty about possible further challenges to those pleadings, and whether Mr Bolitho's claims against Trust Co were properly pleaded.

1866 These concerns significantly influenced the strategy adopted by the SPRs. In 2014, the SPRs conducted further public examinations of 10 current and former directors and officers of Trust Co across seven days of hearing, uncovering critical documents and information of potential claims available against Trust Co. Prior to that time, these issues had not been investigated. The SPRs' inquiries ultimately led them to commence the SPRs' Banksia proceeding on 27 March 2015, together with the McKenzie proceeding. There was cross-fertilisation of the SPRs' efforts with the Bolitho proceeding, most evident when the Bolitho legal team incorporated claims against Trust Co that were similar to the statutory conflict claim made by Banksia for alleged contraventions of provisions of Chapter 2L of the *Corporations Act*.[455]

1867 When commencing both the Banksia proceeding and the McKenzie proceeding, the SPRs were primarily seeking, on behalf of debenture holders, to ensure that, as they submitted:

> (a) reasonably arguable claims that were available were made before they potentially became statute barred, particularly in circumstances where there was a real possibility that the Bolitho proceeding would be summarily dismissed or permanently stayed;
>
> (b) the claims against Trust Co were being fully prosecuted for the benefit of all debenture holders, including the statutory conflict allegations that were not then alleged in the Bolitho proceeding; and
>
> (c) debenture holders were 'insured' against the risk that the Bolitho proceeding would be struck out or permanently stayed.

1868 The pleadings in the Banksia proceeding were substantively amended twice after it was commenced. The first occasion was following the Partial Settlement and consequent upon it. At that time, new counsel retained by the SPRs also saw the need to reformulate the claim to address various criticism made of the existing pleading by Trust Co. Those amendments were vigorously contested. Further amendments were made in July 2017, following the provision of Trust Co's evidence. At that time, a detailed forensic review was undertaken and, in the judgment of the SPRs' counsel, it was appropriate for a further amendment to be made to the pleadings. This further amendment was also vigorously resisted, but permitted by the court.

1869 Mr Newman deposed, and I accept, that the SPRs' legal team undertook the vast majority of

interlocutory steps to get both the Bolitho proceeding and the Banksia proceedings ready for trial, which included:

(a) extensive discovery, including engaging in numerous and protracted disputes with Trust Co concerning the provision of documents;

(b) preparing the index for the court book for the combined trial of the proceedings;

(c) preparing position papers for directions hearings; and

(d) instructing and conferring with expert witnesses, leading to the production of the expert evidence to be relied on in all three proceedings.

1870 There were three phases of evidentiary preparation, the first of which occurred in the second half of 2015. Trial preparation had been ordered by Judd J in July 2015. The Banksia legal team filed its evidence in December 2015, shortly before the Partial Settlement was agreed in-principle. Apart from a small portion of this evidence that related to the claim against Insurance House, the evidence was directed to all defendants against whom claims were made in both proceedings. Most of the evidence was interrelated, especially as causation, loss and damage issues were substantially similar in respect of all defendants.

1871 The SPRs prepared and filed the overwhelming majority of the lay and expert evidence to be relied on in both proceedings. In the first tranche of evidence, they filed 26 witness outlines, 10 witness statements and five experts reports. The preparation of this evidence involved a very substantial amount of work by the Banksia legal team during the period from August to December 2015.

1872 A second phase of substantial evidentiary preparation followed in the period from September to December 2016. The Banksia legal team identified and prepared several expert reports, evidence of particular significance for placing the claims against Trust Co on a much stronger forensic footing and contributed to the prospect of inducing a favourable settlement. During this period, a further seven witness outlines, two witness statements and three experts reports were coordinated, prepared and filed.

1873 At the end of 2016, both proceedings were set down for a joint trial of approximately 40 – 45 sitting days from February to July 2018.

1874 The third and most significant phase of trial preparation occurred from July until November 2017, in response to the voluminous evidence filed by Trust Co in June and July 2017. Assembling the reply evidence principally involving the SPRs' solicitors and Mr Redwood. Trust Co filed one witness outline, 13 witness statements and 11 experts reports. In reply, the SPRs filed one witness outline, five witness statements and eight experts reports in reply. As part of this exercise, the SPRs issued further summonses for public examination, requiring the production of a substantial number of documents and the public examination of one further witness.

1875 The SPRs' trial counsel opined that an enormous responsive effort was required to coordinate and assemble the reply evidence, which in their opinion was of critical importance to both proceedings.

1876 In contrast, the Bolitho legal team made a minimal contribution to the evidentiary preparation activity. O'Bryan responded with comments and suggestions on drafts prepared by the Banksia legal team. This included cooperation in particular on the witness outlines of Trust Co's officers, the two reports by the trustee expert, Mr Clynton Hardy, the first report of the director expert, Mr John Story AO, and the first and third reports of the due diligence expert, Mr Jeffrey Hall. Banksia's legal team was involved in the preparation of

each of those reports. Beyond that material, on the evidence, the Bolitho legal team had done very little, if anything, in terms of trial preparation before September 2017, confirmed by the following email exchange between Mr Redwood and O'Bryan (copied to Symons and Zita) on 9 September 2017:

Mr Redwood:

Let's talk on Monday but we really need your side to start assisting us in putting some real pressure on Trust Co.

We are happy to take the lead but we have a hell of lot happening at our end in terms of reply evidence and need more help from the your side which is always very valuable.

They are being typically difficult and unreasonable regarding discovery and now on reply evidence.

We also need to discuss proposed mediators and timing (and the point?) of mediation before openings.

Another thing we need from your side within the next few weeks is a list of all the documents you propose to rely on trial for the purposes of the Court Book.

We also thought your side could start having a crack at objections to Trust Co evidence (lay and expert) while we are dealing with all of the reply evidence?

O'Bryan:

Agreed on all points, JR.

Let's discuss early this week.

1877 I am satisfied that the SPRs worked diligently to avoid duplication in preparing various proceedings. A cooperation protocol was negotiated between the SPRs and the Receivers in relation to the preparation of evidence in the Banksia proceeding. The SPRs were not able to reveal documents relating to the preparation of evidence in the Bolitho proceeding and Banksia proceeding because of an objection by AFP that the documents may be subject to claims of joint privilege. Subject to those restraints, the court received the following information.

1878 In August 2015, the Banksia legal team sought to discuss preparation for the joint trial with the Bolitho legal team, which was then listed to commence on 26 April 2016. O'Bryan responded with a summary of issues for discussion. Soon after a meeting occurred, tasks were recorded and allocated amongst the respective teams. In September 2015, the Banksia legal team created a proposed work division plan, which led to the development of the trial evidence plan in conjunction with the Receivers. That plan continued to be amended and updated over time.

1879 Such cooperation as was offered occurred between counsel. Mr Redwood regularly updated and informed O'Bryan about the evidence being coordinated and prepared by the SPRs' legal team. They discussed various forensic and strategic matters from time to time, including trial preparation and the proposed division of responsibility for cross-examination of witnesses.

1880 Mr Newman could not recall any meetings between the legal teams in relation to the second and third tranches of evidence filed by the SPRs. However, and significantly, Mr Newman understood that Mr Bolitho intended rely on all of the evidence coordinated, prepared and filed by the SPRs in the Banksia proceeding. This understanding was confirmed on numerous occasions. One example was a letter from Zita on 31 August 2016, which stated that Mr Bolitho would be 'relying on all evidence' prepared for use in the Banksia proceeding. This letter was in fact prepared by O'Bryan. In September 2017, in a position paper filed for a directions hearing, Mr Bolitho confirmed that he would be relying on parts of the SPRs' reply evidence.

Merits of each proceeding

1881 The SPRs' trial counsel had expressed views in advices and submissions that the Banksia proceeding had reasonable prospects of success (slightly better than even), while the Bolitho proceeding enjoyed somewhat better prospects of success if conducted through to trial. Viewed in combination, there were good prospects (better than 60%) that either the Banksia proceeding or the Bolitho proceeding would prevail at trial, if the SPRs continued to conduct the litigation. It is important to note this final qualification.

1882 The opinion filed in the remitter and signed by the SPRs' trial counsel, Mr Dick, Mr Redwood and Ms Binden, accepted that its function was not limited to responding to the opinions of Mr Bolitho's counsel filed on the approval application.

1883 Counsel expressed the following conclusion:

In light of our legal assessment of prospects, we consider that a reasonable range for any apportionment (similar to the exercise performed for the Partial Settlement for the purposes of determining a denominator for the funding commission) of the settlement sum would be to attribute between 35% to 50% to Banksia's claims compromised by the Settlement Deed. The issue of any apportionment of the two claims based on their relative prospects would arguably only deal with one aspect of the importance of the SPR Proceeding, and the interplay between the SPR Proceeding and the Bolitho Proceeding of possible relevance to the funding commission and legal costs. The other two aspects of intersection and potential relevance alluded to before the Court of Appeal (and reflected in the draft opt-out notice) would be:

(a) the relevance of the evidence prepared, filed and paid for by the SPRs and relied on, directly or indirectly, by the Bolitho Proceeding; and

(b) as the Court of Appeal observed (at [308]), the appropriateness of a common fund order for 100% of the amount apportioned to the Bolitho Proceeding from the settlement sum where debenture-holders had, at least in part, "financed" the Bolitho claims through the evidence prepared, filed and paid for by the SPRs (out of assets held for the benefit of debenture holders).

1884 Counsel noted that, notwithstanding pragmatic and commercial reasons explaining the SPRs' support for the payments sought by AFP, they recognised they had been ordered to express an opinion that candidly, frankly and independently addressed the legal matters identified by the Court of Appeal as of possible relevance to the court's independent assessment of the funding commission and reasonableness of the costs incurred, without specifically expressing their own opinion on that question.

1885 Because O'Bryan and Symons capitulated and AFP substantially abandoned its claim at trial, no issue was taken with any of the views expressed in this opinion. Notwithstanding, I have carefully considered the opinion of the SPRs' counsel and find it to be carefully and appropriately reasoned. I accept its expressed conclusions.

1886 I will highlight a number of preliminary aspects of their opinion:

> (a) The settlement of $64 million from Trust Co, which exhausted its available assets, was the product of the combined forensic, legal and strategic advantages that came from the prosecution of the two proceedings with two sets of claims. It would be artificial to fixate on either the claims in the Bolitho proceeding or those in the Banksia proceeding in isolation;
>
> (b) Counsel did not intend to minimise, as they carefully put it, 'such cooperation and assistance as was afforded by counsel for Mr Bolitho, in particular Mr O'Bryan, in relation to the proceedings'. That said, it was plainly necessary that such complex commercial multi-party

litigation needed to be prepared and run by an established and experienced commercial law firm. In doing so, the Banksia legal team enjoyed considerable advantages through the public examinations conducted by the Receivers and the SPRs;

(c) Having regard to the history of procedural challenges, it could not be said that either proceeding, but particularly the Banksia proceeding, lacked real prospects of success. When it agreed to compromise the litigation, Trust Co faced arguable claims in each proceeding and enormous financial and reputational risks if they lost. The viability and strength of Banksia's pleaded claims against Trust Co had been assessed by two teams of barristers (the Receivers and the SPRs') and were vigorously challenged throughout by Trust Co;

(d) The Banksia proceeding was funded by the SPR Litigation Fund, an allocation of approximately $20 million of debenture holders' funds from the Receiver. Save for group members who opted out, membership in the Bolitho proceeding corresponded with those debenture holders entitled to the proceeds of the Banksia proceeding;

(e) The SPRs' overriding concern, consistent with their statutory duties, was to ensure that debenture holders prevailed at trial against Trust Co and maximised their recovery. The claims made in the Bolitho proceeding were fully supported by the SPRs as an independent and alternative source of recovery, maximising the overall prospects of success for debenture holders;

(f) There was no truth in the suggestion made by the Bolitho legal team that legal costs expended by the SPRs in advancing claims against Trust Co had resulted in duplication of litigation costs, using funds which might otherwise have been returned to debenture holders. Mr Bolitho had not opposed the applications in relation to the SPR Litigation Fund, but rather had supported them. Mr Bolitho relied on evidence filed, and paid for, by the SPRs in support of his claim, and his statement of claim directly relied on and referred to evidence and public examinations commissioned by the Receivers and the SPRs;

(g) The pragmatic and commercial reasons for the SPRs to support the payments sought by AFP from the Trust Co Settlement do not bolster the conclusion, expressed by counsel for Mr Bolitho, that the SPRs negatively viewed the prospects of success in the Banksia proceeding, particularly as it was in the interests of all debenture holders (the group members) for the funding commission to be lower than the sum claimed; and

(h) Finally, the criticism made by the Bolitho legal team that there was unnecessary delay in commencing the Banksia proceeding because the Receivers were conflicted, resulting in the loss of three years of interest, was unfounded. In contrast to the rapid commencement of the Bolitho proceeding less than three months after Banksia's collapse, the Receivers and SPRs conducted very thorough, factual and legal examinations and analysis; work that was ultimately relied on by the Bolitho legal team. An early settlement to the claims was also attempted to be achieved through mediation. During that time, the Bolitho legal team did not make significant progress either in achieving clarity in the statement of its claim or in undertaking investigation, analysis and preparation for its proof at trial. In any event, the claimed advantage that interest commenced to run on Mr Bolitho's claim from a much earlier time was misconceived. Interest for the purposes of the SPRs' claim accrued under Banksia's trust deed from the date of its entry into external administration.

1887 Counsel for the SPRs noted that the Court of Appeal accepted that the settlement sum was proper, having exhausted the assets available to Trust Co. The Court of Appeal did not identify any issue that possibly viable claims against Trust Co's immediate parent company, Trust Company Ltd, were unfairly or unreasonably released by the Settlement Deed. However, in their opinion filed in the remitter, the SPRs' counsel did not reject the suggestion raised by Mrs Botsman in the appeal that the settlement did release such claims, which may have had commercial recoverability of significantly more than $64 million. Counsel conceded that it might be said that Banksia's available and compromised claims against Trust Co were more valuable than those of Mr Bolitho. Ultimately, I consider there is no merit in exploring this proposition, or that the total value of the settlement is other than $64 million.

1888 Counsel for the SPRs confirmed that the evidence filed in both proceedings by the SPRs' legal team was voluminous and complex, running into thousands of pages. Trust Co filed evidence in opposition that was of a similar volume.

1889 The lay evidence was prepared solely by the Banksia legal team. The Bolitho legal team acknowledged that the lay witnesses were of 'mutual relevance' to both plaintiffs' claims. The SPRs' counsel explained in some detail the degree of preparation that was required and the significance of the witness statements that were ultimately filed and served, but it is not necessary to traverse these matters, as they were not put in issue. I am satisfied that the Bolitho legal team agreed that subject to O'Bryan being invited to provide comments on advanced drafts of witness outlines prepared by Mr Redwood, the preparation of this evidence by the SPRs' legal team was appropriate. In contrast, the Bolitho legal team only filed a short witness statement from Mr Bolitho that was of no relevance to the Banksia proceeding, of marginal relevance in the Bolitho proceeding, and carried little strategic impact.

1890 Counsel expressed the following conclusion, which I accept:

Overall, we are comfortably satisfied that all of the lay evidence was appropriately prepared as relevant to the issues in dispute in both proceedings and that it was, perhaps with the odd minor exception noted above, of mutual relevance to the Bolitho claims and Banksia claims and to the mutual forensic and strategic benefit of both sets of claims.

1891 In their written opinion, counsel provided significant detail about the expert evidence filed in the proceedings. They opined, and I accept, that all of the expert reports were relevant (either directly or indirectly) to the claims against Trust Co and the defences and cross-claims by both Banksia and Mr Bolitho in the proceedings, save for a small percentage (less than 10%) that related to Banksia's claims against Insurance House. All of the experts were informed that their reports would be relied on in the Bolitho proceeding, as the Bolitho legal team intended.

1892 Counsel have considered a number of these expert reports individually and at some length, and concluded that the opinion expressed in them provided significant support to the claims in the proceedings. It is unnecessary to set out in these reasons the detail provided in the written opinion in support of these conclusions. Counsel opined that it would be simplistic to view any of the expert evidence in isolation, as it was part of a carefully developed case theory and supporting evidence matrix, including the lay evidence against Trust Co, that the Banksia legal team intended to achieve the best outcome for debenture holders in the trial of both proceedings.

1893 A further area of significant contribution was the quasi-expert evidence filed by the Receivers, which reported on their examination of Banksia's affairs and the causes of its failure, and provided a forensic financial examination of those matters and of the realisation of Banksia's loan book. The Bolitho legal team were not involved in preparing any of this evidence but encouraged its preparation, appreciating its relevance

to the Bolitho proceeding.

1894 All parties agreed that the proceedings were heavily documentary. Substantially all of the documents discovered by all defendants, including Trust Co and Banksia itself, emerged from the documents obtained by the Receivers and the SPRs through the conduct of public examinations, which involved investigations and legal work funded by debenture holders from the assets held in the receivership. Further, the burden of establishing a court book for trial, dealing with privilege claims, and generally coordinating the document management for both proceedings rested with the Banksia legal team.

1895 Addressing the issue of cooperation between counsel for each legal team, counsel for the SPRs opined:

There is a body of evidence which has been discovered that reveals the SPRs and their legal team were responsible for the vast bulk of the work necessary to source, coordinate and prepare the evidence filed for the proceedings and also which reveals the degree of cooperation and involvement of Mr Bolitho's legal team, especially Mr O'Bryan, in that large undertaking.

Although counsel generously acknowledged O'Bryan's contribution, the assessment made by Mr Newman and the documents tendered by the Contradictor that were analysed earlier in these reasons lead inevitably to the conclusion that the degree of that involvement was quite modest.

1896 Notwithstanding the claims of a cooperative approach made by O'Bryan and Symons in the opinion provided to Croft J, which implied a far greater contribution from the Bolitho legal team than actually occurred, counsel opined that it was incontrovertible that substantially all of the expert evidence was commissioned, prepared and paid for by the SPRs. An assessment of disbursements incurred for expert fees in both proceedings shows that the SPRs paid approximately $1.9 million, while AFP paid approximately $25,000: approximately 1% of the total expenditure.

1897 Counsel's conclusions about the relative merits and the interrelationship of the claims in both proceedings were supported by the fact that the settlement sum represented a payment by Trust Co of all of its remaining assets, particularly the balance of its limits from responsive insurance policies (from which its defence costs were also drawn). As counsel opined, it is inherently improbable that Trust Co would have settled on such terms, unless it and its insurers regarded the claims they faced at trial, as prepared and presented, as not enjoying good prospects of success.

1898 In this context, it was the combination of the claims that Trust Co faced that is significant. Importantly, counsel submitted that any comparative analysis should appropriately focus on the relative strengths of the claims made against Trust Co, rather than their relative weaknesses. Driven by their desire to advance the interests of AFP instead of the interests of the debenture holders, O'Bryan and Symons focused their opinion on relative weaknesses and difficulties.

1899 Ultimately, the debate evident in the pages of the various opinions of counsel was not developed on the remitter and it is, again, unnecessary that I set out the opposing positions and reach a concluded view, because the issue did not remain in contest. That said, the following observation made by counsel for the SPRs is significant:

Broadly speaking, our general assessment of the claims made by group members and the claims made by Banksia in the previous SPRs' opinions was that on issues of duty and breach the Bolitho proceeding enjoyed clear and significant advantages by reason of legal risks associated with the SPRs proceeding but that on matters of factual causation and determination of the quantum of loss, the SPRs proceeding was demonstrably superior to the Bolitho proceeding. The disadvantages of each tended to be minimised, if not eliminated, when assessed in combination and by reason of the fact that the two claims were being run

together in a single trial with evidence in one proceeding being evidence in the other proceeding. The conundrum this created for Trust Co was whatever weaknesses or risks were present (i) in relation to Banksia's case on certain threshold legal points and (ii) in relation to Bolitho's case on causation and loss, assessed individually, the combination of the two claims was such that those individual weaknesses would be unlikely to defeat both of the claims.

Conclusion

1900 In their opinion filed in the remitter, O'Bryan and Symons characterised Mr Bolitho's claims as 'very strong' and Banksia's claims as 'very weak' or 'tenuous', and opined that 80% of the settlement sum should be apportioned to the claims in the Bolitho proceeding, and 20% to the claims in the Banksia proceeding.

1901 On the other hand, in a more measured consideration of the issue, the SPRs' counsel suggested that a fair assessment of the relative prospects only arose from analysis of the combined benefits of the two claims. They opined that a reasonable range for apportionment would be to attribute between 35–50% of the settlement sum to the claims made in the Banksia proceeding, and identified some legal factors that would support apportionment at either end of the range nominated.

1902 I earlier concluded that the SPRs prepared, filed and paid for approximately 90% of the evidence in both proceedings. Overwhelmingly, the SPRs financed the work that resulted in the settlement out of the assets held for the benefit of debenture holders. Further, the inference is open that neither Mark Elliott nor O'Bryan were prepared to invest substantial effort in preparing the Bolitho proceeding for trial, because that work was being undertaken by the Banksia legal team. Their focus was on the mediation with Trust Co in November 2017, which they intended to approach with Mark Elliott's hardball 'force of personality' negotiating style, which was obviously employed, and for which they were notorious. Mark Elliott and O'Bryan were content to defer a decision as to what further work was needed if, despite their best efforts, the mediation ultimately failed.

1903 In all of the circumstance, I am not persuaded that any simple empirical analysis of the costs and effort of trial preparation is available to precisely identify a fair apportionment of the settlement sum. Neither does an assessment of the relative strengths of the two proceedings alone provide a rational basis for an apportionment, for the reasons I have outlined. A determined defendant and its insurer (underwriting a defence costs inclusive policy) each have 'skin in the game' and can be difficult to persuade to settle a proceeding if unconvinced that a plaintiff's claims have been properly prepared for trial and are capable of being proved to the satisfaction of the court. This is so even if they have assessed that the claims may have significant legal merit.

1904 The preferable basis for an apportionment of the settlement sum when a proceeding is compromised rather than tried must be an evaluation of the factors that persuaded the defendant to settle, as it did. There was no evidence as to what motivated Trust Co (or, for that matter, its insurer) to settle.

1905 On my analysis of the merits of the two proceedings as an isolated consideration, a 50/50 split of the settlement proceeds between the two proceedings may have been warranted. But looking simply at the relative strengths of the two proceedings fails to take account of all relevant considerations. It is improbable that an assessment of the relative merits of claims and defences drove the decision of Trust Co and its advisers to offer up its remaining assets, particularly given the fact that the Banksia legal team prepared and financed approximately 90% of the joint preparation of both proceedings for trial. That factor is such that an equal allocation of the settlement sum to both proceedings would be neither fair nor reasonable to the debenture holders/group members.

1906 Because an empirical basis for an assessment of a fair and reasonable apportionment of the settlement

sum has not emerged from the evidence on the remitter, an evaluative judgment is required.

1907 I am persuaded by the SPRs' submission that the critical feature likely to have influenced Trust Co to settle as it did was the combined force of the two proceedings brought against it. It is probable that Trust Co, having aggressively conducted its defence throughout the interlocutory stages, was persuaded to settle on the basis of paying out the remaining balance of its insurance policy limit, by the effort of the Banksia legal team in preparation of the evidence (lay and expert) for the joint trial of both proceedings. Once that consideration is factored in, the range proffered by the SPRs' counsel is neither justifiable nor adequate. It fails to take proper account of the substantial contributing factor to the combined force of the two proceedings that was the investment by the SPR in the preparation of both proceedings for trial.

1908 Taking into account all of the matters to which I have referred, and declining to make assumptions against the interests of innocent parties, I have concluded that the settlement sum should be apportioned such that 75% (or $48 million) is referable to the Banksia proceeding and 25% (or $16 million) is referable to the Bolitho proceeding.

1909 I would add that in making this apportionment, I am mindful that its relevance extends no further than setting the denominator in the counterfactual for quantifying a reasonable funding commission, for a funder in the hypothetical circumstances of having funded a proceeding that settled for $16 million, absent contravening (disentitling) conduct. I will turn next to this issue.

Funding commission

Submissions

1910 AFP contended that the commission rate adopted in the counterfactual ought to be determined by reference to the rate specified in the Funding Agreement. It submitted that it would have been awarded a funding commission of 30% from debenture holders who were a party to the Funding Agreement.

1911 AFP's claim for the funding commission, prior to its capitulation, was contractually based. Its case on the remitter was opened on the basis that 55% by value of group members had signed the Funding Agreement. It appears to have been assumed, or not contested, throughout the proceeding that a majority of group members had done so.

1912 In closing, AFP asserted the court should proceed on the basis that 55% of debenture holders (by value) had entered into the Funding Agreement, despite accepting that it did not adduce admissible evidence of this fact. It submitted that such a figure was used to calculate AFP's commission from the Partial Settlement, and no misconduct has been alleged in respect of the use of that figure at that time.

1913 I reject AFP's submission. First, the Funding Agreement does not provide for commission at a fixed rate of 30%, but rather links the commission rate to the degree of financing being provided by AFP, to both a 'financing criterion' and a 'performance criterion'. Clause 12 of the Funding Agreement stated that AFP was entitled to recover from the resolution sum:

a further amount, as Consideration for the financing of the Case and performance by [AFP] of its various obligations under this [Agreement], being a maximum of 30% of that Resolution Sum.

If the counterfactual analysis were to proceed on the basis of the Funding Agreement, assuming that it was valid and enforceable, there could be no entitlement to commission at the maximum rate, given how little financing AFP actually provided (the financing criterion) and its failure to comply with other material provisions of the Funding Agreement (the performance criterion).

1914 Secondly, there is simply no evidence upon which to find what percentage of debenture holders (by value) had entered into the Funding Agreement. In the remitter, AFP failed to prove how many group members had signed up. The fact was squarely raised when the specific issue of the reasonableness of the funding commission was to be determined. The evidence only identified Mr Bolitho, Mrs Botsman and Mr Crow, and a few others apparent on the face of some documents, as signed-up group members.

1915 Despite announcing that it would call evidence from Mr Ben Horne to establish, as a fact, that 55% of debenture holders by value had entered into the Funding Agreements, his evidence, which related to the compilation of a spreadsheet sought to be admitted as a summary document,[456] was never led. I infer that his evidence would not have assisted AFP. I cannot make any relevant finding as to the number or percentage of debenture holders who signed the Funding Agreement. Further, there was no evidence, and I so find, that neither O'Bryan, Symons nor Zita ever satisfied themselves as to what proportion of group members had signed the Funding Agreement, despite this being a critical integer affecting the funding commission and the rights of all debenture holders in whose interests they were to act.

1916 AFP knew the fact was contested as prior to trial it sought, but did not receive, an admission from the Contradictor. AFP did not then prove a fact in issue. It was not open to AFP to baldly submit that the fact was accepted by a court when approving the funding commission on the Partial Settlement.

1917 The Contradictor submitted that beyond AFP's inability to prove the extent of signed funding agreements with group members, it abandoned its claim for commission during the trial. Accordingly, no allowance should be made in the assessment of damages due to group members for any funding commission that AFP might have recovered in the absence of misconduct. I do not accept this submission either. Although that is what actually occurred, my present task is assessing the counterfactual. I am satisfied that the court, on the counterfactual settlement approval application, could and would have determined AFP's claim for a funding commission as a funder who had not contravened the *Civil Procedure Act*. My task is to identify from the facts proved before me, the proper inferences as to what an appropriate funding commission is, absent contravening conduct.

Common fund orders

1918 For the purposes of the counterfactual, I accept that, as actually occurred, Mr Bolitho would have sought a common fund order. Properly advised, Mr Bolitho would have determined that a common fund order was in the best interests of group members, as it would have spread the legal costs and disbursements and the funding commission across the entire group, rather than those group members who had signed a Funding Agreement. That concession brings into play different parameters to those defined by a contractual solution based on a funding agreement, although the Funding Agreement remained relevant.

1919 Although much has been said about the court's power to make common fund orders in recent times,[457] in early 2018, when the settlement approval application was heard and determined, *Money Max* stated the applicable law. In *Money Max*, the Full Court of the Federal Court identified a number of relevant considerations, which relevantly included:

> (a) a comparison of the funding commission with funding commissions in other group proceedings, and/or what is available or common in the market;
>
> (b) the litigation risks of providing funding in the proceeding;
>
> (c) the quantum of adverse costs exposure that the funder assumed;

(d) the legal costs expended and to be expended, and the security for costs provided, by the funder; and

(e) the amount of any settlement or judgment. This, it said, was of particular significance when a very large or very small settlement or judgment is obtained, and that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder.[458]

1920 Since *Money Max*, the practice that has developed is that a court will usually determine the funding commission by identifying an appropriate percentage of the settlement sum to be paid to the litigation funder, having regard to the relevant considerations identified above. What percentage is set is presumed, or assessed, as a fair and reasonable deduction from the entitlement of each group member that represents an appropriate return to the funder. However, that is not to say that common fund orders must always tie the rate of return by a funder to the value of the settlement sum. Other models of identifying the appropriate commission have been adopted, including identifying the reasonable return on the capital expended by the litigation funder.[459]

1921 The court must take into account all relevant factors in approving a funding commission to ensure that it is fair and reasonable and in the interests of group members. So much was made clear by the Full Court in *Money Max*:

We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.[460]

1922 The Court of Appeal, in adopting the Full Court's comments in *Money Max*, made this observation in Mrs Botsman's appeal:

It is no doubt difficult for a court to determine what might be an appropriate return on capital or appropriate reward for the risks associated with underwriting a legal proceeding that would otherwise not be brought without the support of the funder. Nevertheless, as the analysis in *Money Max* makes clear, the determination of whether a claimed payment is fair and reasonable is readily amenable to judicial determination. There is no reason in principle why the court should be precluded from determining an appropriate payment having regard to all of the relevant circumstances.[461]

1923 Prior to trial, when AFP's commission entitlement was a primary issue on the remitter and the possibility of a counterfactual had not arisen, the court was in a different position on this issue than is common on a s 33V application. Uncommonly, the Contradictor and AFP each engaged experts to opine on that issue. Because AFP abandoned its claim to commission, it is not necessary to undertake a thorough analysis of this evidence as it related to AFP specifically. However, the evidence remains relevant and of assistance to the court when determining a hypothetical funding commission in the counterfactual.

Expert evidence on appropriate rate of return for litigation funding

Mr Greg Houston

1924 AFP adduced expert evidence from an economist, Mr Greg Houston. Mr Houston is a founding partner of consulting firm HoustonKemp and has 25 years' experience, including as a consulting economist and working for a financial institution and within government. Although Mr Houston was an experienced expert witness in the field of economics, his experience was predominantly in the fields of shareholder litigation (particularly claims for misleading and deceptive conduct in relation to disclosures by publicly listed

companies); mergers and acquisitions; competition, valuation/contract analysis; and institutional/regulatory reform.

1925 I found Mr Houston's approach, as an economist, to investment methodology for litigation funding and to the issues on which he was asked by his instructor to opine, unattractive. I have concluded that his evidence, as presented at trial, was inadmissible as irrelevant to the issue of AFP's claim for a funding commission, prior to it being abandoned. Further, and for similar reasons, it provided no assistance in determining what a fair and reasonable commission would be in the context of the counterfactual.

1926 Further, at the close of evidence facts had not been proved that were sufficiently similar to the assumptions made by Mr Houston to render his opinion of any value on any issue. I was not persuaded that Mr Houston's opinions were wholly or substantially based on the application, by an acceptable path of reasoning, of identified specialist knowledge to the assumptions he was instructed to make. In other words, he failed to reason from those assumptions to the opinion that he expressed so as to reveal his opinion to be based upon relevant specialised knowledge. In places, his reasoning was that of a lawyer, not an economist. That is a field of expert opinion that courts rarely accept.

1927 I will now set out my reasoning for concluding that:

> (a) because AFP either abandoned or failed to establish the assumptions on which Mr Houston's opinions were based, his evidence was irrelevant and, as such, inadmissible pursuant to s 56(2) of the *Evidence Act 2008*.
>
> (b) Mr Houston's opinions were also inadmissible pursuant to s 76 of the Act, because I was not persuaded that the exception under s 79 of the Act was applicable.

1928 The difficulty with Mr Houston's evidence first began with his instructions. AFP asked Mr Houston to identify the quantum of a funding commission that would reflect the amount or rate commonly achieved in the 'litigation funding market', as well as that sought and achieved by private equity and/or venture capital firms.

1929 Mr Houston did not identify the 'litigation funding market' on the basis of his expertise as an economist. Although one might have thought it was a matter better left for him to independently identify with his specialised knowledge as an expert economist, Mr Houston was instructed by AFP to examine a 'market' based on a dataset reproduced by the Australian Law Reform Commission for group proceedings involving litigation funding between 1997 and 2018,[462] 13 further decisions of various courts concerning approval of a funding commission in a group proceeding (class action),[463] and an academic journal article,[464] and was briefed with these materials. Mr Houston uncritically accepted this assumption as appropriate and proceeded on the basis that a litigation funding market was identifiable from a selection of decisions of courts, made by the funder's solicitor, on the approval of settlements under s 33V of the *Supreme Court Act*[465] discussing or approving commissions payable to litigation funders on a common fund basis.

1930 In so doing, Mr Houston appeared to be acting as an advocate for AFP, was conducting an analysis based on legal reasoning, not economic theory, and did not explain why it was, by the application of the criteria under s 79 of the Act, that his instructing solicitors had correctly identified a litigation funding market. Mr Houston's report and supplementary report, together with his evidence during the expert conclave, failed to identify a path of reasoning from his training, qualifications and experience as an economist to a methodology that enabled the assessment of a fair and reasonable funding commission. Mr Houston did not demonstrate that he drew on properly based specialised knowledge when identifying a litigation funding market.

1931 Second, Mr Houston's instructions directed or invited him to assume that:

(a) the settlement value was in a range of $68 – $75 million, comprising a payment of $64 million and the remainder value attributable to a release for professional fees;

(b) the settlement was a joint compromise of two proceedings;

(c) the settlement value was assessed at the time of settlement as being 80% attributable to the Bolitho proceeding and 20% attributable to the Banksia proceeding;

(d) at an earlier time (the Partial Settlement), the settlement value had been assessed as two thirds attributable to the Bolitho proceeding and one third attributable to the Banksia proceeding;

(e) Mark Elliott and/or AFP at all times provided a full indemnity to Mr Bolitho in respect of the costs and adverse costs of the conduct of the Bolitho proceeding;

(f) AFP had paid, or was liable to pay, $7.85 million (including GST) for costs incurred by Mr Bolitho in the conduct of the Bolitho proceeding;

(g) AFP had paid, or had accepted an obligation to give, security for costs in the sum of approximately $1.5 million; and

(h) AFP had been subject to an adverse costs risk for a sum in excess of $15 million.

1932 Pausing here, these assumptions, with some exceptions, were not established in evidence by AFP. Relevantly, the facts found are that:

(a) AFP received a commission from the settlement sum in the Partial Settlement that was paid by defendants other than Trust Co, in respect of different claims;

(b) the $1.5 million in security for the costs that AFP was ordered to provide included amounts in respect of those other defendants. In respect of Trust Co, AFP was ordered to provide security by tranches in the total sum of $1.29 million. However, by the time of the Trust Co Settlement, it had only paid $570,000: $90,000 in approximately January 2015 and $480,000 in October 2017. The remaining tranche of $720,000 fell due for payment after the Trust Co Settlement was reached, although I accept that it was an obligation requiring a funder to make a provision, although there was no evidence that AFP entered into any financial commitment to do so;

(c) the adverse costs risk actually taken on by AFP was a fraction of the $15 million it contended. [466] Further, Mr Houston was provided with no instructions about, nor did he make any inquiries regarding, the extent to which that risk was actually real, given AFP's precarious financial position;

(d) the settlement value was $64 million. No evidentiary basis for accepting this assumed range of $68 – $75 million was ever established. The non-cash component of this range includes some of Mark Elliott's 'benefits' that he directed be included in the settlement deed to 'gross up' the settlement sum, as earlier discussed;[467] and

(e) Mr Houston's instruction to assume that the proportion of the settlement value attributable to

the Bolitho proceeding was either 66.66% or 80% was also not established. I have found that the proper apportionment between the Bolitho proceeding and the Banksia proceeding was 25% and 75% respectively.[468]

1933 Accepting AFP's claimed commission of $12.8 million (plus GST) as it then was, Mr Houston calculated a funding commission rate proportion of the gross settlement value to be in a range of 21 – 30%, which he identified from the litigation funding market.

1934 Third, his report set out:

The essential features of the 'common fund' approach to financing representative litigation and its distinction from two principal alternatives, being the equalisation fund and contribution fund arrangements.

Mr Houston's summary was flawed in that it invented a 'contribution fund' type of order, which does not appear to have ever been recognised judicially, but rather is a descriptor drawn from academic writings.[469] Mr Houston explained it was appropriate to assume that a common fund order would have been made by the court on the settlement approval application. Putting to one side that this assumption is appropriate, the opinion of an economist as to what order a court might appropriately make is inadmissible because it is expressed from outside his expertise.

1935 Fourth, Mr Houston proceeded to conduct an 'assessment' of comparative funding commission rates to opine on whether AFP's funding commission was reasonable, using two different measures of commission calculation:

(a) Mr Houston considered comparative funding commissions calculated as a percentage of the settlement sum. He stated that, by reference to the materials on which he was asked to determine a litigation funding market, commissions as a gross percentage of the settlement value ranged from between 8 – 62%, with a median of 29%; leading him to opine that the commission sought by AFP fell within the range of historical funding commissions. In this context, Mr Houston's reasoning seemed to adopt his instructor's self-serving assumption that settlement approval decisions in earlier court decisions are evidence of the 'market' for funding commissions.

(b) However, such a large spread on such a small sample rather suggests that no conclusion is open about the significance of the median figure, particularly given that the dataset included an array of differing variables, including settlement value, amount of funding commission as percentage of settlement value, and whether the basis for litigation funding was contractual or by court order.

(c) Mr Houston's evidence did not identify a methodology for calculating a fair and reasonable return by this measure that might provide assistance in the counterfactual. As I have determined that the proportion of the settlement sum attributable to the Bolitho proceeding is $16 million, the range of reasonable funding commissions referrable to the historical data identified by Mr Houston would be $1.28 million to $9.92 million, with a median of $4.64 million. The methodology he adopted rendered a range and median so broad that it lacked any probative value in determining, in the circumstances of the Bolitho proceeding, where in that range a fair and reasonable funding commission lay.

(d) Had AFP intended to advance its claim solely by comparing it to funding commissions ordered in other group proceedings, it is unclear why Mr Houston's engagement was thought necessary. That comparative assessment involved no more than calculating basic values (such

as range and median) from a dataset of denominators extracted from court decisions, a task that falls well within the capability of a lay person, and can be performed without expert assistance.

1936 Mr Houston then 'tested' this conclusion by reference to 'the cost of the litigation' by looking at a 'return on investment' methodology that was independent of the timing of the cashflows in respect of the investment:

(a) He assumed that AFP paid or was liable to pay legal costs and disbursements in the Bolitho proceeding of approximately $7.85 million, was exposed to the risk of an adverse costs order of as much as $15 million, and funded the payment of $1.5 million in security for costs. His calculation ignored AFP's capacity to pay that contingent exposure to an adverse costs order. Mr Houston added the funding commission from the Partial Settlement of $858,000, to the commission claimed in respect of the Trust Co Settlement, and produced a total funding commission of $13.7 million, reflecting a return on investment multiple of 1.46. This calculation was nonsensical.

(b) Mr Houston referred to two common fund orders that included a return on investment based on the cost expended by the litigation funder,[470] where the Federal Court had allowed higher multipliers (2.2, 2.8 and 3.0) and to returns reported by publicly-listed litigation funders using the same methodology (1.47 and 1.38). Mr Houston also relied on an academic survey[471] to contend that in the period spanning 2000 to 2008, private equity firms earned an average investment multiple of 1.07.

(c) A further reason to reject this analysis was that the calculation was conceptually flawed. The multipliers from each of the Federal Court cases cited by Mr Houston were not used by the court to approve a commission amount following a settlement, but were instead considered in the context of a multiplicity dispute and a common fund order made during the proceeding. In that sense, those multipliers were nothing more than hypothetical rates that remained subject to court approval once the costs denominator was known.

(d) Drawing from these examples, Mr Houston opined that the return on investment claimed by AFP prior to trial was less than had been recently allowed in the Federal Court and consistent with returns achieved by other litigation funders and private equity investors.

(e) Leaving these criticisms to one side, when applied to the capital notionally invested by AFP (according to my earlier findings) of $2.663 million, Mr Houston's methodology would predict in the counterfactual that a reasonable funding commission would lie in the range of $2.81 million to $7.89 million. Such a broad range demonstrated that Mr Houston's methodology lacked probative value.

1937 Based on the application of both of the measures he referred to, Mr Houston concluded that AFP's proposed funding commission would fall within the range of similar funding commission regarded by the courts as reasonable. For the reasons just stated, I reject it.

1938 Mr Houston's evidence is of no assistance in determining the funding commission in the counterfactual.

Mr Sean McGing

1939 The Contradictor called Mr Sean McGing, an actuary and managing director of McGing Advisory & Actuarial, whose extensive professional experience has involved the measurement and management of risk and uncertainty affecting items on both sides of a balance sheet. I consider that Mr McGing brought a

significantly more appropriate character of training, qualifications and experience than Mr Houston to the question of determining a reasonable rate of return to a litigation funder. As the Contradictor correctly submitted, Mr McGing's methodology related to the financing criterion and the performance criterion on which AFP based its contractual entitlement to a commission.

1940 Notably, Mr McGing's calculations, assumptions and opinions in the content of his report were peer reviewed by another actuary, Mr Neekhil Shah, who certified that Mr McGing's report was of a high standard (meeting the purpose for which it was intended) and that Mr McGing was appropriately qualified to complete that report. Mr Shah stated that he would be comfortable to issue the advice contained in Mr McGing's report under his own name without any material changes.

1941 Mr McGing applied principles generally accepted in the fields of investments and insurance, stating that it is essential to analyse business prospects by valuing or discounting risky future cashflows and applying pricing expertise to create a fair and reasonable valuation. A prudent investor seeks the return of the capital invested together with a fair and reasonable return for its use. The relevant factors underpinning the level of return include whether the capital is invested, held (notionally or physically) for amounts potentially at risk, or is depleted to cover costs and expenses specifically attributable to the investment. It also requires assessment of the time horizon over which the capital is invested or is subject to risk, as well as the level of the risk undertaken over that period. The potential rate of return grows with an increase in risk, and the investor makes an assessment about the suitability or desirability of a particular investment at the time it is entered into, notwithstanding that subsequent events will determine the actual investment returns.

1942 Also relevant in litigation funding investments is the concept of insurance, by which an entity pays a premium to an insurer to take the risk of a particular loss. The insurer determines a premium based upon a calculation of the risk of return, the 'expected' amount of any return, the insurer's expenses and its reasonable profit. Again, the higher the level of risk, the greater the premium, assessed prospectively at the time an insurance contract is made. Subsequent events will determine the actual level of any insurance payout.

1943 Mr McGing stated that the application of investment and insurance principles is a fundamentally sound approach, and the clearest and fairest way to determine a fair and reasonable return for a litigation funder. To the extent that funding is provided, or expenses are paid, the position of a litigation funder is almost identical to that of an investor requiring a return on their capital in the manner I have described. A litigation funder may also accept contingent obligations that require it to notionally insure against amounts at risk of becoming payable. In this respect a litigation funder's position is almost identical to that of an insurer providing insurance coverage against potential future losses.

1944 Mr McGing made a number of pertinent observations about the relationship between expected return and risk. Risk is the level of uncertainty of outcome. The core principle is that the greater the risk the capital is subject to, the greater the return required by an investor over the time horizon. The core risks are:

(a) partial or complete loss of capital;

(b) disappointed expectations as to the income or capital growth actually received;

(c) variability in anticipated timing; and

(d) calls upon capital held (or notionally held) to meet the risk of payment by the investor to a third party.

1945 Risk may be mitigated (for example, by insurance), or capped (for example, by contractual or balance sheet limitations). It is only the actual risk to the capital that is evaluated.

1946 An investor decides to invest capital based on their risk appetite, which is determined by their investment objectives. A risk-free rate of return is the theoretical rate of return investors should receive on an investment with zero risk. In practice, the return on government bonds is used as a proxy.

1947 A risk premium is the expected return on investment in excess of the risk-free rate of return. Investments with greater volatility of returns indicate risk and require higher risk premiums. The risk premium has two components:

> (a) a pure risk premium, arising from the uncertainty of the future level of a project's profits after expenses, and the risk of failure or loss of value of such projects; and
>
> (b) the illiquidity premium, arising from the lack or inability to sell the investment or withdraw capital invested from a project at the time of ones choosing.

1948 In Australian listed and liquid markets (including shares, bonds and cash), investors note that returns historically fall in the range of 4 – 9% per annum. Private equity investments, on the other hand, involves greater risk through higher uncertainty, longer investment time horizons and illiquidity. Investors therefore reasonably expect an additional rate of return beyond that for listed and liquid investments — in the order of 5 – 15% per annum — to reflect these factors. Finally, venture capital investments are projects in which risk is generally higher than for private equity, meaning that investors in such projects seek an additional rate of return beyond that for private equity investments.

1949 Mr McGing identified the tools used by investors in decision making. The most commonly used measure of investment performance in financial markets is the internal rate of return ('**IRR**'): the average compound annual rate of return on an investment, allowing for all cashflows invested and received by the investor, and the exact timing of those cashflows. IRR is considered a useful measure to compare the performance of different investments when capital is at risk for periods of at least a year, and works best in reflecting capital at risk and returns over several years.

1950 Return on invested capital, or return on investment ('**ROI**'), is a simpler measure. The calculation is:

1951 The reasonable return for some financial obligations often assumed by a litigation funder (for example, a contingent liability to pay an adverse costs order) can be assessed by reference to insurance principles, where a litigation funder is thought of as an insurer.

1952 An insurer (or litigation funder) determines their best estimate of the probability of the required payout occurring, less any mitigating elements adopted to reduce the size of any payout, such as limiting cover to a maximum amount, requiring an excess to be paid and obtaining its own insurance from a reinsurer. The smaller an insurer (or the more limited the pool of risks being insured), the less statistical variability of losses can be absorbed, meaning a higher relative uncertainty. An insurance premium rises with an increase in the uncertainty of probability.

1953 Once the best estimate of loss is established, a risk and profit margin will be applied. Principles of prudence will also be adopted to recognise inherent variability and to provide a level of profit. Mr McGing opined that based upon his knowledge and understanding of the Australian insurance market, a reasonable

combined insurance risk and profit margin would add approximately 15% to the best estimate of loss, plus a further margin of 10% for the added uncertainty for a small entity. For a small litigation funder like AFP, a total risk and profit margin of 25% would be reasonable.

1954 The appropriate return for an insurer (or funder) to accept the risk, taking into account the best estimate of loss and risk and profit margin, was characterised by Mr McGing as the notional insurance premium.

1955 Mr McGing set out in the following table his assessment of the specialist risk factors in litigation funding and their effect on the notional insurance premium.

No.	Risk/risk mitigation factor	Description	Impact on notional insurance premium
1a	Capital loss of lawyer costs/fees and litigation funder's expenses for running the case	Probability of litigation funder making a loss in relation to lawyer costs/fees and in relation to its expenses for running the case.	There must be an expected return on capital reflecting the probability of loss of capital. For example, if there is an 80% chance of success of winning the case, there is a 20% chance that the litigation funder will have a capital loss. This is before loss reduction/risk mitigation. In this example, a best estimate return requires $100 for every $80 invested. This calculates to a return of $20, or 25% of the $80. That is a 25% return to compensate for the expectation of failure PLUS a retu of capital actually invested.
1b	Adverse costs and related security payment loss	Probability of litigation funder making a loss as a result of adverse costs being awarded.	Almost all cases brought to date have settled prior to court judgement, and adverse costs have not been awarded. Risk exists and is dependent on whether the case goe to trial and fails, resulting in adverse costs being awarded, including the risk that the other side's costs are higher or lower than the security held for adverse costs. Risk is reduced if "after the event" insurance is taken out but that comes at a cost (the insurance premium), that the insurance provider deems commensurate witl the risk and related insurer profitability and administration. If no insurance, security capital is required to be paid into trust, until case completion, ar if the case fails, adverse costs are expected to be awarded, resulting in none or some of the security payment being returned. A further payment of adverse costs may also be required.
2	Lawyer cost/fee arrangements	Determined on capital requirement for the funder to pay lawyers for preparing and	**Fees for service and deferred fee** – Risk of paymen to the litigation funder only upon failure of the case wi legal costs not being awarded. Consideration of the probability of legal costs being paid by the litigation

		arguing the case. There should be sufficient documentation at the outset and en-route to determine the bona-fide lawyer cost/fee arrangement.	funder and the level of the legal costs by the litigation funder and not by any other party. **No win no fee** – no risk to funder. The risk is effective transferred to the lawyer and the lawyer would likely have risk factors applying in its fee/cost basis. There i no capital invested or capital amount at risk for any tir by the funder so a fair and reasonable return on this component would be nil.
3	Funding agreement	Contractual arrangements for funder accepted by plaintiff and members of action.	Can limit risk for funder. May or may not allow funder withdraw from case and reduce or eliminate potential future plaintiff lawyer or adverse costs. Any limitation of risk would result in a reduction in the probability of loss and flow through to a lower notiona insurance premium.
4	Parallel proceedings	Other proceedings related to the case, where other funders have sourced information relevant to the case that reduced the work volume and /or increased the chance of success.	Risk sharing across the funder and other funding parties to parallel proceedings related to the case can mitigate the risk to the funder's actual and notional capital. Costs will also be decreased as the funder can leverage the work completed by other funding parties. Any reduction in risk due to parallel proceedings shou reduce the notional insurance premium.
5	Funder's strength of covenant	To what extent the litigation funder is demonstrably: 1. willing; and 2. able, to meet payment obligations.	**Willingness:** For example, the extent that in failure, th litigation funder may negotiate and reduce its losses. **Ability:** For example, has the funder sufficient assets be able to meet any adverse costs and legal fees arising from their current and future cases? If the funder's net assets are not sufficient to meet adverse costs and/or deferred legal fees, then the amount at risk (potential loss) is reduced and limited t the net assets of the funder.

1956 A litigation funder will also determine how much capital will be invested (at risk) and when such funds are likely to be committed or recovered, as Mr McGing's next table identified.

No.	Capital item	Purpose	Timing	Effect on investment return
1	Security for adverse costs	Court capital lodgement requirement to meet adverse costs if case fails. The costs awarded against the litigation funder may be more or less than the	Can be in instalments. Can be required early in the piece. If litigation funder has a successful outcome, the security is	Can be a major tie up o capital, requiring a reasonable rate of retur

		security requirement. Can be insured, in which case the insurance premium is a fixed non-refundable cost.	returned on case completion.	
2	Litigation funder's expenses for running this case	The reasonable proportionate share of overhead fixed costs applicable to this case out of all the cases being considered. Eg, if 5 cases, then approx. 20% of funder's overhead costs. Non-lawyer costs and disbursements specific to the case as well as the project management of case.	From pre-case start, at intervals through case progression, to completion.	Amount depends on the case and can be justifie The later the payment costs, the lesser the dollar return expected o required for a reasonab rate of return.
3.1	Lawyer costs/fees – on fees for service basis	Legal arguments supporting case	At intervals through case progression. Volume can be greater later in case as intensity increases.	The later the payment costs, the lesser the dollar return expected o required for a reasonab rate of return.
3.2	Lawyer costs/fees – on deferred fees basis	Legal arguments supporting case	Consider timing of notional capital for amount at risk.	Consideration of return on notional capital. Notional capital is effectively invested en-route to meet the legal costs on the proportion cases that fail at case completion.
3.3	Lawyer costs/fees – on contingent fees (= no win, no fees) basis	Legal arguments supporting case	No capital invested. No capital at risk.	No investment return as no capital invested.

1957 As noted, a litigation funder must identify an investment return commensurate with the risk taken of exposure to a loss (or potential loss) beyond the capital invested. That risk might be insured against, in which case the insurance premium is effectively a reduction in capital or a negative cashflow, reducing the return on capital. Alternatively, if self-insuring, the investor puts its notional capital at risk, equivalent to that insurance premium, and should allow for an appropriate investment return accordingly.

1958 In this respect, Mr McGing drew attention to the following risk considerations for a litigation funder:

(a) no settlement can be reached and the plaintiffs' claims fail at trial;

(b) the litigation funder is required to pay legal costs and disbursements;

(c) a proportion of legal costs and disbursements may not be paid by any other party but remain the obligation of the litigation funder;

(d) contractual arrangements entered into by the litigation funder;

(e) opportunities to negotiate the extent of adverse claims against the litigation funder; and

(f) the demonstrated financial willingness and ability of the litigation funder to make payments.

A prudent investment decision by a litigation funder must make an allowance for the combination and interaction of these factors.

1959 Having regard to the evidence with which he was briefed concerning risk and the applicable time horizon, Mr McGing assessed the notional insurance premium to be in the range of 16 – 26% of capital at risk for legal fees and disbursements and 5 – 15% of capital at risk for adverse costs and related security.

1960 By assessment of each of the risk and timing factors affecting the capital invested by AFP, including the notional capital required for the notional insurance premium for any potential amounts at risk that were not the subject of direct physical investment of capital, Mr McGing opined that a reasonable internal rate of return target for AFP in respect of this litigation was 25%. This target was calculated by:

(a) rounding up to 10% the return that a prudent investor might expect from listed equity investments;

(b) adding a further margin of 10% over that rate as compensation for greater uncertainty, variability of returns, lower capital base and less market power because AFP will be taking on a greater risk to its capital similar to that assumed by a smaller business private equity investor; and

(c) adding a further 5% margin, in recognition that AFP was investing as a specialist litigation funder with uncertainty around the duration that its capital would be tied up, heightening illiquidity risk.

1961 Drawing on the foregoing, Mr McGing proffered the following investment return calculations for the relevant capital items:

(a) Adverse costs and related security: 9 – 14% of capital at risk.

(b) Litigation funder's expenses: 41 – 65% of capital at risk.

(c) Lawyer costs/fees: 7 – 17% of capital at risk.

1962 Allowance should also be made for the return of capital expected by an investor on successful completion of the project. The security for costs is assumed to be returned to AFP. The litigation funder's expenses are not awarded and must be treated as a capital depletion to be added to the return required by AFP. Likewise, legal costs and disbursements are expenditure that should be added to the return required by AFP. Mr McGing calculated the reasonable returns that an investor might expect on the assumptions he was

asked to make about the expenditure and contingent liabilities assumed by AFP. On my findings, those assumptions (and resulting calculations) do not identify a proper funding fee in the counterfactual.

1963 Mr McGing concluded that the approach of fixing a percentage of a settlement amount was inappropriate for determining a reasonable rate of return for a litigation funder. Such an approach was inconsistent with investment and insurance principles of assessing risk versus return on capital invested and amount at risk, as the amount of return targeted is unknown at the time the investment decision is made, and not directly related to the capital required or at risk.

1964 Mr McGing did not disagree with Mr Houston's opinion that the proposed funding commission, as a percentage of settlement value, fell within the range of previous settlements, or that the ROI was similar to those obtained in previous settlements and by other litigation funders and private equity firms. That said, he did not accept that Mr Houston identified the correct methodology, for the reasons set out above. Mr McGing accepted that calculation of both ROI and IRR were both estimates of future transactions uncertain as to both timing and amount. An ex-ante assessment is a primary driver of reasonable return expectations because it is that assessment that drives the key initial investment decision. As the matter proceeded, expectations of returns could be updated by reference to completed transactions.

Conclusion

1965 Mr McGing's methodology must be preferred. In the context of this remitter, particularly with the benefit of Mr McGing's analysis, it cannot be regarded as fair to group members and therefore reasonable, to determine a funding commission solely by reference to funding commissions awarded in other cases, or by reference to a percentage of an ultimate settlement sum agreed to by some but not all members. Aside from being inconsistent with the multifactorial approach adopted by courts post–*Money Max*, Mr Houston's methodology was disconnected both from the actual scope of the funding obligation and the decision to invest in the litigation. Further, in *Money Max* the issues were different as was the evidence before the court and nothing the Full Court said in its reasons precludes an analysis by reference to Mr McGing's methodology.

1966 It is fundamental that the assessment by a court of a fair and reasonable return for a litigation funder more naturally emerges from the inputs specific to the litigation funder — primarily the level of funding, and promise of funding, that it provides and the period of exposure to risk — than a denominator applied to the settlement or judgment sum. A necessary consequence of accepting this relationship between the court's role in the proper administration of justice, when assessing what is fair and reasonable, and a fair commercial return for a funder, is that real difficulties are presented for the proper administration of justice by the ex-ante assessment of a percentage of an unknown sum to be received at an undetermined future time.[472] The settlement sum, gross or net of costs, is uncertain until case completion, and can vary enormously. This can result in extremely wide and potentially excessive and inequitable returns on what the litigation funder actually invested or put at risk. The litigation funder and the lead plaintiff owe an overarching obligation under s 24 of the *Civil Procedure Act* to ensure that legal costs and all other costs incurred in connection with a group proceeding are reasonable and proportionate. However, that conundrum has not arisen on the remitter and I say no more. It can be properly considered when it does arise.

1967 Drawing from the available evidence, I consider that the application of investment and insurance principles is a fundamentally sound approach to determine a fair and reasonable return for a litigation funder on the counterfactual.

1968 In his evidence, Mr McGing analysed each of the capital items, on the basis of assumptions he was asked to make by the Contradictor, in order to determine a reasonable rate of return for AFP in the Bolitho proceeding. Given AFP abandoned its claim, it is unnecessary to examine that particular calculation.

1969 However, with some adjustment, Mr McGing's methodology can be applied to determine the funding commission applicable on the counterfactual. For these calculations, the relevant time period commences when AFP entered into the Funding Agreement with Mr Bolitho (13 March 2014) and ended on the date of the approval of the Trust Co Settlement (30 January 2018).

1970 The other relevant inputs are:

> **(a) Security for costs**: $1.29 million, comprising $90,000 paid on 19 December 2014, $480,000 paid on 9 October 2017, and $720,000 to be paid by 31 January 2018. Although the Trust Co Settlement meant that final tranche was never provided, it was necessarily a contingent liability and it was appropriate to recognise it as provisioned from the same date as the second tranche was paid, as opined by Mr McGing.
>
> **(b) Lawyer costs/fees**: $1.314 million (as reasoned earlier), paid on a time horizon of 30% to December 2015, 20% to December 2016 and 50% to February 2018.[473]
>
> **(c) Litigation funder's expenses**: For the purposes of the counterfactual, I can make no allowance for this item without some evidence. I would not allow the costs paid to Mr Crow as, absent contravening conduct, they would not have been incurred.
>
> **(d) Risk of adverse costs order**: The settlement sum represented the balance remaining from Trust Co's available insurance cover, after deduction of defence costs. It may therefore be inferred that the defence costs to the point of settlement were approximately $11 million. An estimate of $15 million had been made.

1971 A little more needs to be said about the risk of an adverse costs order. On one view, the contingent exposure to party/party costs at the conclusion of the trial might be assessed in the sum of $15 million for the purposes of the counterfactual calculation. There are two reasons that militate against this approach and neither is assumed away in the counterfactual. First, there was no evidence that AFP made any provision in respect of the risk of adverse costs. Second, its capital would have been at risk with insolvency a certain outcome, absent external support through director or shareholder loan accounts. There was no evidence that support of that sort was available.

1972 Mr McGing proposed in that case that the capital at risk should be framed on what assets AFP had available. The evidence of Mr Samuel was that AFP's balance sheet surplus was $1,187,630 as at 30 June 2018. Mr McGing's opinion using the notional insurance premium approach, was that adverse costs and related security would be 10% capital at risk.

1973 The following table shows the calculation of a fair and reasonable funding commission in the circumstances of the counterfactual, based on Mr McGing's methodology and my findings set out above. The calculation is assessed with hindsight, but where possible, as on this counterfactual, that is appropriate. I find that absent contravening conduct, the fair and reasonable funding commission that would have been allowed to AFP was $402,763 (in addition to the commission allowed by the approval of the Partial Settlement). The modest figure follows from the fact that very limited capital was provisioned, expended or invested by AFP in the Bolitho proceeding.

Item and scenario	Capital at risk	Investment return range	Investment return range ($)	Fair and reasonab funding commission ($)

		(%)		
Security for costs	$1,290,000	14-29% (mid: 22%)	$181,000 – $374,000	$284,000
Adverse costs	$1,187,630	5-15% (mid: 10%)	$59,382 - $178,145	$118,763
Litigation funder's expenses	$Nil	157-191% (mid: 174%)	$Nil	$Nil
Lawyer costs/fees	$Nil	23-43% (mid: 32%)	$Nil	$Nil
TOTAL			$240,382 – $552,145	$402,763

Timing

1974 A further variable to be incorporated into the counterfactual is the date that group members would have received their distribution following approval of the Trust Co Settlement, absent disentitling conduct.

1975 AFP submitted that the date on which the hypothetical distribution ought to be found to have occurred was 29 November 2018, being 28 days after the delivery of judgment by the Court of Appeal. It submitted that a distribution would not have been made soon after the approval by Croft J on 30 January 2018, because on the counterfactual, Mrs Botsman would have sought leave to appeal in any event, because her grounds of appeal extended to the fairness and reasonableness of the total settlement sum.[474]

1976 Zita made similar submissions, save that he calculated the date of distribution as 1 January 2019.

1977 The Contradictor and the SPR submitted that, absent disentitling conduct, there would have been no appeal from the settlement approval order and debenture holders would have received their proper entitlement to the settlement proceeds following the expiry of the appeal period on 21 March 2018.

1978 It may be accepted that the fairness and reasonableness of the total settlement sum had nothing to do with any disentitling conduct. The question is whether the application for leave to appeal was inevitable.

1979 Absent disentitling conduct, I am satisfied that Mrs Botsman would not have appealed the settlement approval order, for two reasons.

1980 First, it is evident that the primary concern of Mrs Botsman and Mr Pitman was what they perceived to be the unjust enrichment of AFP/Mark Elliott and the Lawyer Parties at their expense. So much is made plain by the letter that Mr Pitman sent the court prior to the settlement approval hearing (emphasis added):

I wish to inform the Court that around 80% of the investors in the Banksia collapse were 55 plus years of age with most in their 70's and 80's. For some it was their life savings with many being advised by legal firms and

professional financial advisors to invest in Banksia. The collapse had devastating psychological effects on many of these investors, **and to see one individual substantially profit from their misfortune beggars belief**.

1981 Similarly, Mrs Botsman's notice of objection (prepared by Mr Botsman) stated (emphasis added):

The claim by the Plaintiff and the claim brought on behalf of Banksia are said to be worth at least $170 million. The proposed settlement sum of $64 million (Settlement Sum) represents 38% of the amount claimed. **In terms of the $44.62 million available to debenture holders the percentage is 26%.** This low percentage is at odds with my understanding of the case which is that Banksia has strong claims against Trust Company.

In terms of the proposed distribution, the payment of $17.6 million to the Plaintiff's lawyers is extravagant ... the fee of $4.75 million to the Plaintiff's lawyers is extravagant.

How can the special purpose receiver justify a settlement that involves such a meagre return to debenture holders ($44.62 million representing 26% of the claimed sum) and such a spectacular return to the Plaintiff's lawyer ($17.6 million) where the Plaintiff has had its claims struck out and the vast bulk of the valuable legal work has been undertaken by the lawyers for the special purpose receiver.

1982 On the hypothetical settlement in the counterfactual, debenture holders would have received substantially more of the settlement sum, because AFP's entitlement would be substantially reduced. Absent the contravening conduct, group members would not have been prevented from accessing copies of the Settlement Deed or evidence filed in support of AFP's claim for reasonably incurred legal fees and disbursements, nor would Mr Pitman have been subject to repeated requests from the Lawyer Parties to withdraw his objection.

1983 In light of the substantially greater proportion of the settlement sum payable to group members, together with the settlement documents being promptly made available for inspection, I consider it improbable that either Mrs Botsman or Mr Pitman would have filed, or pressed, an appeal from the approval order. What ultimately occurred on the appeal — when Mrs Botsman pressed, and lost, appeal grounds related to the sufficiency of the settlement sum — was likely influenced by other factors occurring in the intervening period, as discussed above, particularly the bullying and intimidating conduct of AFP supported by the Lawyer Parties, and does not support the inference that she would, in any event, have pursued an appeal.

1984 Having objected to the approval, Mrs Botsman and Mr Pitman jointly submitted to Croft J on 30 January 2018 that they would withdraw their objection if a contradictor was appointed and considered the settlement to be fair and reasonable to debenture holders. Although Mr Pitman made that representation in court, I am satisfied, having regard to Mrs Botsman's concerns at the time, that this statement represented her probable intention. Mr Pitman's unchallenged evidence was that he spoke with Mr Botsman on the morning of the settlement approval hearing, who explained that if Croft J appointed a contradictor, it would ensure that the settlement was properly reviewed. It is probable that in the counterfactual, with no contravening conduct, these concerns about proper independent review by a contradictor would not have arisen. The reasons that persuaded the Court of Appeal that a contradictor was needed would have been absent. In particular, the SPR would have been well placed to assure debenture holders that there was no further money available and the proposed deductions from the settlement sum for costs and a funding fee would be substantially less.

1985 Mrs Botsman's concern regarding adequacy of the settlement sum appeared to arise from a reference in the notice to 'support' from 'related entities', which suggested some support from, or independent liability of, Perpetual existed or might be pursued. That was misconceived. Mr Pitman appeared to accept Croft J's assurance that he was satisfied that there were no further assets available beyond the insurance policy.

1986 In the different scenario of the counterfactual, it was probable that Mrs Botsman and her son would also

have accepted the reasoning about the adequacy of the $64 million settlement sum that was accepted by the SPRs, Croft J and the Court of Appeal.

1987 Once on the counterfactual, no fault would have been found with the settlement sum itself, the notion that Mr Bolitho (or, for that matter, the SPR) should have rejected the Trust Co Settlement in order to join its parent company as a party to the proceeding at that stage would also not have found favour, for the reasons that were later articulated by the Court of Appeal.[475] With the benefit of transparency, proper assistance to the court from its officers, and independent advice to debenture holders from the SPR, the court would have approved the settlement and the deductions for costs and commission in a fair and reasonable amount, and Mrs Botsman and Mr Pitman would have been satisfied by the independent scrutiny. There would have been no appeal.

1988 Allowing for the expiry of the period in which to appeal as provided for by the Settlement Deed, and for a period of one month for the distribution to be effected, I find that the distribution would have been made by 21 April 2018. It is from that date that the calculation of interest commences.

Applicable interest rate

1989 The Contradictor and the SPR each submitted that interest on the loss and damage suffered by group members should be calculated at the applicable penalty interest rate under the *Penalty Interest Rates Act 1983* (Vic).

1990 AFP submitted that penalty interest should not be imposed prior to 17 May 2019, being the date that the High Court refused AFP's special leave to appeal the decision of the Court of Appeal. It is not necessary to deal with this submission, as I have found that in the counterfactual there was no appeal to the Court of Appeal. Secondly, AFP contended that penalty interest ought not be imposed from 14 July 2020, when it filed its notice of admissions. AFP submitted that it had appropriately confined its claim from that point and did not participate in any further interlocutory applications that had the effect of delaying the final resolution of the remitter. Similarly, AFP submitted that it should not pay penalty interest for the period following the joinder of Trimbos and Alex Elliott, as AFP did not cause the delay occasioned by their addition as parties to the remitter.

1991 Zita submitted that debenture holders would be overcompensated by assessing interest at the penalty interest rate. Alternatively, if a penalty interest rate were adopted, that rate should not apply until after Zita was joined as a party to the remitter proceeding on 15 November 2019. If there was no claim on foot against him, it could not be said that he had kept the debenture holders out of their money or deprived them of its use.[476]

1992 It may be accepted that, ordinarily, the purpose of an award of interest up to the date of judgment is to compensate a plaintiff for an injury sustained: being denied access to the judgment sum to which they were ultimately entitled to from the commencement of a proceeding.[477] Thus, the general compensatory principle is engaged, and an award of interest should do no more than assist in the restoration of a plaintiff to the position in which they would have been but for the defendants' wrongful conduct.

1993 Zita submitted that:

> (a) because the penalty interest rate is significantly above a reasonable rate of return otherwise commercially obtainable, debenture holders would be overcompensated;
>
> (b) the Contraveners have not had the benefit of the funds for their own purposes;

(c) penalty interest would impose a further and unnecessary penalty on the Contraveners, when the objective of the jurisdiction under s 29 of the *Civil Procedure Act* is primarily compensatory, rather than punitive, and penalty interest would have a far more significant disciplinary impact on the Contraveners than would otherwise arise; and

(d) the Contraveners have not had the opportunity to resolve the proceeding or otherwise mitigate the damage caused by delay in the distribution of remaining funds.

1994 Zita submitted that interest should be calculated at a rate as determined by the Reserve Bank of Australia, or alternatively at the rate of 5% per annum. That rate was, it submitted, adequate to compensate a plaintiff for a defendant's oppressive conduct in withholding profits from the plaintiffs.[478]

1995 Section 60 of the *Supreme Court Act*, applicable in any proceeding for the recovery of debt or damages, refers to interest 'at such rate not exceeding the rate for the time being fixed' under the *Penalty Interest Rates Act*, and provides for such interest to be calculated from the commencement of the proceeding to the date of judgment.

1996 Section 29 of the *Civil Procedure Act* provides that an order for compensation may include an order for penalty interest at the applicable rate in respect of any delay in the payment of any amount claimed, or an order for 'no interest or reduced interest'.

1997 In the present circumstances, the date upon which the Lawyer Parties were joined to the proceeding is of no particular relevance. It is mistaken to submit that the award of interest in this proceeding is to be determined by reference to ss 58 or 60 of the *Supreme Court Act*. Section 29(1)(c) of the *Civil Procedure Act* provides that the court may make any order it considers appropriate, in the interests of justice, to compensate any person for any financial or other loss materially contributed to by the contravention of the overarching obligations, including:

(i) an order for penalty interest in accordance with the penalty interest rate applicable in respect of any delay in the payment of an amount claimed in the civil proceeding;

1998 The claim before the court is precisely that. The statute expressly envisages the application of the penalty interest rate. From this perspective, Zita's reliance on the decision in *Amcor Ltd v Barnes (No 2)*[479] is misplaced and I was not persuaded by any of the arguments he advanced that a lesser rate ought to be adopted.

1999 Having regard to the statutory text, the period of exposure of any particular Contravener to claims against them in the proceeding is not relevant. I must have regard to the delay in the payment of an amount to be awarded as compensation for financial loss suffered as a result of the breach of an overarching obligation to the court. The contention that a party could not ameliorate its exposure to penalty interest except when it was relevantly a party to the proceeding is misconceived. The contravening conduct that materially contributed to the financial loss being compensated occurred in the principal action, the group proceeding. That was a civil proceeding to which the Contraveners had a connection in the sense defined in s 10 of the *Civil Procedure Act*.

2000 There was no evidence of any attempt to ameliorate the consequences of contravening conduct until the commencement of the trial, when some admissions were made. However, I do not consider that any mitigatory conduct in the remitter, on the part of any party, went far enough to warrant a conclusion that interest should cease to run against that particular party. What might have been relevant would have been

any payment to the SPR that accompanied such mitigatory conduct, but there was none. It was irrelevant that the Lawyer Parties did not have the use of the funds, since by engaging in contravening conduct, they prevented, in substance, the timely distribution of those amounts to debenture holders and it was they who suffered the loss of use of the funds.

2001 In *Amcor Ltd v Barnes (No 2)*,[480] Sloss J surveyed the authorities in respect of ss 58 and 60 of the *Supreme Court Act*. A number of the conclusions that her Honour drew from those authorities are apposite in the context of s 29 of the *Civil Procedure Act*:

> (a) as a matter of practice, the penalty rate is the starting point, benchmark or usual rate of interest to be awarded;
>
> (b) the rate fixed pursuant to the *Penalty Interest Rates Act* contains a penalty component, and there may be good reasons not to award the total amount of the penalty component; and
>
> (c) the *Penalty Interest Rates Act* reflects a policy position that interest otherwise payable pursuant to statutory provisions should, where appropriate, do more than merely place the plaintiff in a position formerly held before the relevant claim was made.[481]

2002 In the present circumstances, I see no reason to deprive debenture holders of interest calculated at the penalty interest rate. The discretion as to the rate to be applied is to be exercised having regard to the particular circumstances in question. Relevantly, the reference in s 29 to penalty interest enlivens the broader purpose recognised in the *Civil Procedure Act* of ensuring that persons who, by contravention of overarching obligations, delay the payment of an amount claimed in a civil proceeding may wrongfully obtain a profit or other advantage. Other advantage can include deferral of the day of reckoning with the court for breach of obligations owed to it bringing unidentifiable personal benefit to the contraveners including depleting or secreting assets.

2003 The *Civil Procedure Act* plainly seeks to deter delay in litigation by contravening conduct and encouraging those who have breached overarching obligations to make realistic assessments of their liability and take bona fide steps to narrow the issues in dispute, so as to resolve the question of whether and what orders should be made under s 29.[482] In the present circumstances, the consequences of delay for individual debenture holders are not apparent, save that, as earlier described, there are a great number of them, and many are elderly. It is reasonable to infer that the consequences are significant.

2004 The Contradictor made a number of pertinent submissions relevant to the exercise of this discretion. First, AFP, O'Bryan and Symons maintained denials of wrongdoing, in the face of incontrovertible evidence, for a substantial period of the remitter. As discussed above, AFP, O'Bryan and Symons did not promptly discharge their obligation to make discovery, forcing the Contradictor — at considerable expense — to extract documents from them. O'Bryan and Symons failed to discharge their duty of candour to the court. Further, they actively continued, at least to the point of Mark Elliott's demise, the course of conduct that commenced when Mrs Botsman stated her intention to appeal the settlement approval, of taking aggressive steps to conceal the contraventions of their obligations that are documented in this judgment.

2005 In consequence, debenture holders were subjected to substantial delay and expense, requiring that further distributions to them be postponed while funds to which they were primarily entitled were applied (and put at risk),[483] initially, in defence of an unjustifiable claim to costs and commission, and thereafter to establish their entitlement to compensation. It was only after that substantial delay and expense that admissions were made shortly prior to the start of the trial of the remitter, which the Lawyer Parties

themselves anticipated would be four weeks. Then, O'Bryan and Symons abandoned their defences and consented to judgment, and AFP substantially abandoned its claims on the remitter. The appropriate time for a frank assessment of the need for admissions, candour and contrition was much earlier when Mrs Botsman commenced her challenge to the settlement approval or, at the latest, when the Court of Appeal ordered this remitter.

2006 Zita did not made appropriate concessions and admissions until 18 months after the commencement of the remitter, after having joined with the strategy of AFP, O'Bryan and Symons to stymie the remitter. Further, as these reason show, the concessions made fell well short of my findings.

2007 Trimbos did nothing to correct the misleading statements in the expert reports that he had prepared for AFP until the eve of the trial, when he provided his fifth report that recanted his earlier opinions. He accepted that AFP's claim to legal costs of more than $5 million from the settlement sum was dependent upon his expert opinion. I am not persuaded by reference to his conduct, as I have found it, that interest should be assessed at a lesser rate.

2008 The Contradictor also submitted that the combative and recalcitrant stance adopted by Alex Elliott in the remitter resulted in needless expense and delay. His want of concern for the interests of debenture holders, adversely affected by the conduct of AFP and the Lawyer Parties, in which he played a not insignificant role, provided no basis to apply an interest rate below the penalty interest rate.

2009 The SPR further contended that it was appropriate to draw an analogy with awards of interest in equity in cases of misconduct or 'gross misappropriation'.[484] Further, equity would award compounding interest where a defendant has been guilty of fraud or serious misconduct.[485]

2010 The analogous application of equitable principle must be approached with care. On the one hand, the standard rate usually applied for interest upon judgments may be appropriate in respect of late performance of equitable (or statutory) obligations to transfer money.[486] For equity's purpose, awarding interest is not to punish a defaulting fiduciary, but to restore to the innocent party the benefit derived by the defaulting fiduciary from their use of the property. That is not this case. Further, a compound interest is usually awarded in order to ensure that no profit remains in the hands of the defaulting fiduciary. Again, that is not necessary here.

2011 I will order that simple interest be calculated at the penalty interest rate, currently 10%.

Q.4. Conclusions on quantum of compensation

2012 On the basis of these findings, I assess the compensation recoverable by debenture holders pursuant to s 29 of the *Civil Procedure Act* to be calculated as follows:

	A	Settlement Sum	$64,000,0
less	B	AFP's remaining undisputed costs	$234,3
less	C	AFP's fair and reasonable entitlement to costs in the proceeding	
less	D	AFP's fair and reasonable commission	$402,7
equals	E	Principal available for distribution on 21 April 2018	$63,362,8
less	F	Distribution made on 13 June 2019	$42,000,0
equals	G	Principal available for distribution on 13 June 2019	$21,362,8
less	H	Distribution made on 10 May 2021	$13,000,0

equals	I	Principal available for distribution on 10 May 2021	$8,362,8
	J	**Interest on $63,362,862 at 10% per annum from 21 April 2018 to 13 June 2019 (419 days)**	**$7,273,7**
	K	**Interest on $21,362,862 @ 10% per annum from 14 June 2019 to 10 May 2021 (697 days)**	**$4,073,5**
	L	**Interest on $8,362,862 at 10% per annum from 11 May 2021 to 11 October 2021 (154 days)**	**$352,8**
	M	**TOTAL INTEREST CLAIM**	**$11,700,1**

Q.5. Costs

Applications and submissions

2013 The SPR sought to recover, pursuant to s 29 of the *Civil Procedure Act*, the following amounts, estimated at approximately $820,000:

> (a) the costs ordered by Croft J on the approval application on 30 January 2018, in respect of the Banksia proceeding, that the SPRs' costs of the proceeding (including the costs of the approval application) be costs in the special purpose receivership. These approval costs were estimated to amount to approximately $100,000 (including GST);
>
> (b) the SPRs' remuneration approved and ordered by Black J on 21 February 2019 for the period 1 October 2017 to 31 August 2018, fixed in the sum of $387,852 (plus GST). This period included the approval application before Croft J and, with the assistance of a contradictor, Black J examined the conduct of the SPRs in respect of that application when approving the claim;[487]
>
> (c) the costs ordered by the Court of Appeal on 1 November 2018, that the SPRs' costs of the appeal be costs in the special purpose receivership of Banksia. These appeal costs were estimated to amount to approximately $560,000 (including GST); and
>
> (d) the costs ordered by the High Court of Australia on 17 May 2019, that AFP pay the SPRs' costs of the application for special leave to appeal, estimated at $160,000 (including GST).

2014 Neither the approval costs nor the appeal costs were the subject of *inter partes* costs orders. In substance, the respective courts directed or confirmed that the SPRs' costs be recovered from the SPR Litigation Fund, effectively depleting the funds available for distribution to debenture holders.

2015 The SPRs also sought to recover their costs in the remitter, as well as those of the Contradictor. The SPR's costs in the remitter have been paid out of the SPR Litigation Fund, while the Contradictor's costs have been paid from the settlement sum.

2016 AFP submitted that the remitter costs should not be payable as compensation as a matter of principle. Each of the Contradictor and the SPR are (or should be) regarded as parties to the proceeding and entitled to costs if successful, in the usual way. Any difference between the quantum of those costs orders and the expenditure actually incurred cannot be recovered as damages.[488] Likewise, the approval costs cannot be recovered as damages, and if there be recovery at all, such recovery must be pursuant to a costs order.

2017 AFP further submitted that the special leave costs are also not recoverable as damages in the remitter. Costs incurred by one party in a proceeding are not recoverable against a person who was also a party to that

proceeding, in separate litigation.[489]

2018 Zita submitted that he can only be ordered, pursuant to s 29 of the *Civil Procedure Act*, to pay legal costs or other costs or expenses arising from his contravention of an overarching obligation, and that the costs in the proceeding ought not be assessed globally against all the relevant parties.

2019 Zita submitted:

(a) he played no role in the application for special leave;

(b) unlike the position in respect of AFP, O'Bryan, Symons and Alex Elliott, the Contradictor made no complaint about his cooperation or compliance in the discovery process;

(c) he took no part in interlocutory disputes likely to have resulted in significant costs being incurred by the Contradictor and the SPR, and in which costs were reserved, namely:

(i) the interlocutory dispute resisting inspection on the grounds of privilege;[490] and

(ii) AFP's application to keep certain documents confidential;[491]

(d) Zita should not bear any responsibility for the remitter costs incurred following the addition of Trimbos and Alex Elliott as parties, because they were caused by the court's late joinder of its own motion, and were exacerbated or inflated by the delay caused by Alex Elliott's forensic choices;

(e) he behaved reasonably to avoid incurring unnecessary costs and should not be visited with the remitter costs caused by reason of the unreasonable behaviour of other Contraveners;

(f) because assessment of the remitter costs by issue or individual events and applications would likely be complex and costly, it would be in the interests of justice for the court, in the exercise of its discretion, to apportion those costs, and a share of less than 10% for Zita would be appropriate; and

(g) having regard to the significant sums being claimed, and the prospect that Zita could successfully contend that certain costs were in an unreasonable amount or were unreasonably incurred, the court could not quantify the costs as part of its judgment, and should refer assessment to the Costs Court. Trimbos also supported this submission.

2020 Alex Elliott submitted that the court should determine legal costs by exercising the usual jurisdiction, namely s 24 of the *Supreme Court Act*, rather than pursuant to s 29 of the *Civil Procedure Act*. He submitted this course should be favoured because there was an extant application for non-parties to pay legal costs, and it would be most efficient for all questions of costs to be heard and determined together at a later time.

Consideration

Previous costs orders

2021 I refuse the SPR's applications to recover the approval costs and the special leave costs from the Contraveners.

2022 It is not necessary to make any order in respect of the special leave costs, which the High Court has ordered are to be paid by AFP. Those costs relate to a distinct issue between AFP and the SPRs and do not concern the remaining Contraveners. AFP remains liable to pay those costs under a court order that may be enforced in the usual way.

2023 Absent contravening conduct, the application to approve the Trust Co Settlement would still have been necessary. The contravening conduct did not affect the decision of Trust Co to settle on the terms that it did. Any settlement of the Bolitho proceeding required court approval pursuant to s 33V of the *Supreme Court Act* and, as the Court of Appeal confirmed, the settlement was properly approved, save for the remitted issues. The SPRs would have participated in that process, and costs to the account of the debenture holders would necessarily have been incurred, possibly greater than the amount that was actually incurred, because the SPRs' participation before Croft J would not have been constrained by the terms of the settlement agreement.

2024 However, the SPR is entitled to recover the appeal costs. Although I accept the general rule, identified and relied on by the Contraveners, that the costs of a proceeding are not recoverable as damages in the same or a subsequent proceeding,[492] the principle admits exceptions.[493] As Devlin LJ concluded in *Berry v British Transport Commission* ('***Berry***'):

I find it difficult to see why the law should not now recognise one standard of costs as between litigants and another when those costs form a legitimate item of damage in a separate cause of action applying from a different and additional wrong.[494]

Further, Devlin LJ considered that the damages recoverable against such third parties may not be limited to assessment on a standard basis. His Honour remarked:

The stringent standards that prevail in the taxation of party and party costs can be justified on the same sort of ground... it helps to keep down extravagance in litigation and then is a benefit to all those who have to resort to the law. But the last person who ought to be able to share in that benefit is the man who ex hypothesi is abusing the legal process for his own malicious ends. In cases of malicious process [the general] rule... has not always been applied.[495]

2025 There are two reasons why it is appropriate to order that the Contraveners pay the appeal costs within the confines of the principle identified in *Berry*.

2026 First, it is of no consequence that recovery of the appeal costs is sought in the remitter. But for the contravening conduct, there would not have been an appeal. Further, the Contradictor's exposure of the contravening conduct effectively reconstituted the nature of the remitter such that, although not as a matter of form but as a matter of substance, it appeared to be a separate proceeding from both the Bolitho proceeding and the appeal from the settlement approval, in the sense that Devlin LJ's observations in *Berry* ought be properly understood and for the purposes of application of the *Berry* principle.

2027 Alternatively, I accept, as the SPR submits, that if the common law principle is confined to the proposition that costs can only be recovered in a separate proceeding, and the remitter is not to be regarded as a separate proceeding, a further exception should be recognised to take account of the current circumstances. That is particularly so, having regard to the nature of the contraventions of the *Civil Procedure Act* that have been established against the Contraveners.

2028 Secondly, the express terms of s 29 of the *Civil Procedure Act* provide a statutory basis for ordering that the SPR recover the appeal costs from the Contraveners. In making any order that the court considers appropriate, in the interests of justice, against a person who contravened an overarching obligation, the court may order that the person pay some or all of the legal costs or other costs or expenses of any person arising

from the contravention.[496] There are two pre-conditions for the exercise of that power. I must be satisfied that, on the balance of probabilities:

(a) a person has contravened an overarching obligation; and

(b) the appeal costs arise from the contravention.

2029 For reasons earlier expressed, I am satisfied that each of these pre-conditions are satisfied. The power is enlivened, and it is appropriate that the Contraveners pay the appeal costs. In this context, I refer back to my findings in respect of contravening conduct by all of the Contraveners infecting both the settlement approval process and the appeal, including the interlocutory proceedings against Mrs Botsman.

Remitter costs

2030 I am satisfied that it is both proper and appropriate to order that the Contraveners pay the remitter costs. Some of the Contraveners sought, in final submissions, to reserve the question of the costs of the remitter for further submissions after they took the opportunity to consider these reasons, notwithstanding that I made it clear that all issues, including costs, should be addressed at that time. I will not take that course. It is appropriate to deal with the remitter costs as part of these findings.[497]

2031 First, I am satisfied the remitter costs are costs arising from the contraventions of the overarching obligations by each of the Contraveners, as earlier reasoned. The statutory power to order that costs or expenses be paid by a Contravener requires that such costs and expenses arise from the contraventions. The words denote a causal connection, and encompass a more remote consequence than, for example, the phrase ‘caused by’. The section does not require that the contravention be the sole, or even proximate, cause of the costs. The wide causality test is more easily satisfied than ‘materially contributed to’. As I have earlier reasoned,[498] each of the Contraveners materially contributed to the loss and damage suffered by debenture holders. I am satisfied that it is appropriate in the interests of justice to order that all of the Contraveners pay the remitter costs.

2032 AFP, Zita and Alex Elliott each suggested they were exposed to duplicated costs in the remitter by reason of the involvement of both the SPR and the Contradictor. I reject that submission.

2033 It is pertinent to note that no party applied to the court for directions on the question of any costs duplication that might be occasioned by the participation of both the SPR and the Contradictor. When the precise role of the Contradictor was addressed in *Bolitho No 6*,[499] it became clear to the court that the SPRs were actively concerned to avoid duplicated costs, and to properly understand the role that would be expected of them in the remitter and, in that context, they put submissions to the court.

2034 I am satisfied that the SPR’s role and the degree of his participation in the remitter has been reasonable and proportionate. The SPR’s legal representatives have conducted themselves appropriately, and their participation has not resulted in or encouraged unnecessary duplication of costs. Any assessment of the remitter costs is to proceed on this basis.

2035 As set out above, the Trust Co Settlement Deed constrained the SPRs and their legal representatives from actively testing and expressly contradicting AFP’s claims from the settlement sum. These restrictions were considered necessary for AFP, the Lawyer Parties and Alex Elliott to achieve their improper purpose.

2036 Such conduct is to be strongly discouraged. In my view, the court should be reluctant to consider approval of a settlement in a group proceeding when relevant parties are subject to a contractual gag, and

unable to frankly and candidly assist the court, acting in its protective jurisdiction, to determine whether to approve the compromise.[500] Absent any restrictions under the Settlement Deed, the SPRs, as a party to the Bolitho proceeding, would have been free — and obliged, in accordance with their statutory duties to debenture holders, as well as their duties to the court — to actively scrutinise the payments that AFP sought. The Court of Appeal held that on the settlement approval application, a contradictor with access to all confidential material and uninhibited by any such contractual restriction, ought to have been appointed to fulfil the critical role of actively testing and contradicting Mr Bolitho's position.

2037 The issues initially raised on the remitter — what deduction from the settlement sum should be permitted as fair and reasonable for the plaintiff's legal costs and the funding commission — required significant input from the SPRs in relation to the factual and legal matters underpinning those questions. Recalling that the Banksia proceeding was jointly settled with the Bolitho proceeding, the SPRs were uniquely placed to assist the court on the remitter. At my direction, the SPRs filed affidavits, produced confidential opinions of counsel, filed written submissions and provided discovery. No parties suggested that any of this work was not relevant, or probative, to the issues arising on the remitter.

2038 On the other hand, the Contradictor was appointed for a distinct and separate purpose: to represent the interests of group members on the assessment of the remitted issues. The Contradictor was entirely dependent upon the flow of information from other sources in performing this role. I am satisfied that the SPR's participation was critical in ensuring that the information obtained by the Contradictor was accurate, complete, and in its proper context. It is important to bear in mind, as documented above, that Mark Elliott, AFP, O'Bryan, Symons and Alex Elliott did not cooperate with the Contradictor on discovery or by providing responsive affidavits.

2039 The SPR could not reasonably be expected to have anticipated the course that the remitter would take. As evidence of contraventions of the *Civil Procedure Act* emerged, the role of the Contradictor significantly expanded. Correspondingly, the role of the SPR in the remitter also expanded. Emergence of these new and very serious allegations had two consequences. First, the costs and expenses incurred by the SPR on the remitter increased significantly. These costs were funded from the SPR Litigation Fund, in respect of which the SPR owed legal and statutory duties to debenture holders, and, as officers of the court, were subject to supervision by both this court and the Supreme Court of New South Wales. Discharging these duties required an active role for the SPR.

2040 Secondly, the SPR necessarily gave careful consideration to restitution of the SPR Litigation Fund by seeking recovery of any compensation and costs that might ultimately be ordered in the debenture holders' favour from all possible sources. In this context, the SPR has filed a summons, which remains extant, seeking costs orders against a number of non-parties, discussed earlier in these reasons.[501]

2041 It is unsurprising that the positions adopted by the Contradictor and the SPR on a variety of issues have overlapped to a significant degree. They each represent, from different perspectives, the interests of approximately 16,000 group members/debenture holders, in addition to the broader public interest in ensuring the proper administration of justice. I am satisfied that the SPR remained focused on his central role as an officer of the court, as a liquidator and a special purpose receiver of assets for the benefit of debenture holders.

2042 Further, I monitored the conduct and performance of each of the SPR and the Contradictor to ensure that the best interests of debenture holders were protected. Black J (of the Supreme Court of New South Wales) has exercised similar supervisory jurisdiction and has made specific observations about the work undertaken by, and the conduct of, the SPR, in the context of approval of fees. On at least one occasion,

Black J was assisted by a contradictor when approving fees incurred in the remitter. From my perspective, I would add, with the greatest respect, that I agree with Black J's assessment of the SPR's approach to his role in the remitter.[502]

2043 Proportionality and avoidance of duplication is also evident from the estimated quantum of costs incurred by the SPR to date, which is approximately half of the costs incurred by the Contradictor. I have observed that throughout the remitter, the SPR has selected from his legal team only those who are appropriate to deal with the issues then before the court.

2044 That being said, I find it deeply regrettable that more than $10 million in legal costs has been necessarily expended from debenture holders' funds for the Contradictor and the SPR. When I was first allocated the remitter my expectation of the work that might be involved was substantially less than that.

2045 The substantial costs incurred is a consequence, all too commonly observed in civil litigation, of parties having to respond to the attitude and approach adopted by the losing party. In seeking to camouflage and suppress the evidence of their wrongdoing by refusing to cooperate or comply with rules and court directions, the conduct of AFP, Mark Elliott, O'Bryan, Symons and Alex Elliott in the remitter has been pugnacious. The belated concessions and admissions by each of the Contraveners have been characterised by a recognition that continuation of their disruptive conduct could well exacerbate adverse consequences. A real sense remains that the Contraveners might have already dissipated their assets in the cost of their defence, to the detriment of debenture holders.

2046 The usual order is that costs are awarded to the successful party and assessed on a standard basis, unless there is some special or unusual feature justifying a departure from that rule. This principle is well established and is explained in the cases frequently cited in this jurisdiction when the question of an assessment on an indemnity basis arises.[503]

2047 When that question arose in the context of breaches of overarching obligations under the *Civil Procedure Act*, the Court of Appeal in *Yara Australia Pty Ltd v Oswal* observed:

The breach of the overarching obligation under the Act is a matter that may be taken into account in making an order for costs. There will be cases where a breach of an obligation under the Act may support an order for indemnity costs. The breach may well reflect an already well recognised basis for the making of such a costs order. We do not need to consider whether there may be contraventions which give rise to any new basis for the making of such orders.[504]

2048 It is appropriate to order that costs be assessed on an indemnity basis where the party paying costs has engaged in unmeritorious or deliberately improper conduct that would warrant the court both showing its disapproval and, at the same time, preventing the winning party from being left out of pocket.[505] Late discovery of documents without proper explanation may also amount to misconduct in litigation that justifies indemnity costs.[506]

2049 The SPR submitted that the remitter costs should be assessed on an indemnity basis for three reasons:

(a) the fact and nature of the contraventions themselves;

(b) as the remitter has been funded from debenture holders' funds, it would visit a substantial injustice upon them if they were left out of pocket for the cost of an inquiry that has uncovered substantial wrongdoing; and

(c) various aspects of the conduct of the parties in the remitter.

2050 The Contradictor submitted succinctly:

A clearer case for indemnity costs could scarcely be imagined. AFP, the Lawyer Parties and Alex Elliott strenuously fought the Contradictors all throughout the remitter. Mr Zita/Portfolio Law made concessions in April 2020, but that was after the remitter had been on foot for 18 months. AFP, Mr O'Bryan and Mr Symons held their positions until the trial, and Alex Elliott, once joined, made no concessions until the very weak concession he made in re-examination following eight days of oral evidence. Mark Elliott, Mr O'Bryan and Mr Symons produced a range of different sworn and unsworn versions of events and, in the end, none of them chose to reveal the truth to the Court. Mr O'Bryan and Mr Symons abandoned their affidavits and capitulated on the eve of their cross-examination, only once millions of dollars had been expended in proving the case against them.

2051 On considering the basis for assessment of the remitter costs, I accept that, as the SPR submitted, the contraventions are the direct, sole and proximate cause of not simply the fact they were incurred, but also of the extent of the expenditure. Had any of the Contraveners properly discharged the overarching obligations they contravened, the dishonest and fraudulent scheme uncovered by the Contradictor would never have been devised, and the need for such a wide ranging and expensive enquiry would have been avoided. I am satisfied that, but for this remitter, the contravening conduct would never have been uncovered. For that reason alone, the cost of enquiring into, discovering and prosecuting the contravening conduct must be repaid in the manner that most completely compensates those who have funded it. Many instances of gross dereliction of duty by all of the Contraveners — but particularly by O'Bryan and Symons, for whose conduct AFP accepts responsibility — have been detailed in these reasons. Further, the continuing conduct in the remitter, particularly by AFP up to the trial, and by O'Bryan and Symons until their belated capitulation, exacerbated the extent and cost of the work that was required.

2052 As both the SPR and the Contradictor submitted, it is difficult to conceive of a clearer case warranting an order for payment of costs on an indemnity basis. I will so order.

18. DEFENCES

R.1. Abatement of claims against Trimbos following death

2053 To recap, on 20 August 2020, the court joined Trimbos to the proceeding, on its own motion, as the sixth defendant.[507] Subsequently, the Contradictor served on Trimbos particulars of the allegations being made, and the relief being sought, against him. He made and filed an affidavit in response to those particulars on 21 September 2020.

Submissions

2054 The gravamen of Trimbos's submission was that the court's jurisdiction and power to make an order against him under s 29 of the *Civil Procedure Act* terminated upon his death and did not transmit to his estate. Consequently, the Contradictor's claim against him had abated and the appointment of the representative was pointless. Trimbos submitted that no cause of action was created by the statute, as its terms did not give rise to any statutory legal right capable of being be sued on. He submitted that the contravention of an overarching obligation in a civil proceeding gave rise to a possible sanction only within that civil proceeding, or at least prior to its finalisation. The *Civil Procedure Act* did not bestow legal rights on any person or party or give rise to a right to relief. Thus, no proceeding could be commenced by any person based upon a contravention of the Act.

2055 Trimbos submitted that a number of factors told against the existence of a cause of action. He was not

joined to the proceeding by any party, rather by the court acting on its own motion. No party to the proceeding sought any remedy or relief from him; the Contradictor, the only claimant against him, was not itself a party. Trimbos was joined so that the court might investigate potential breaches of the overarching obligations, particularly the obligation under s 21 of the *Civil Procedure Act*, which is owed to the court, and not to any party. The overarching obligations create no basis for redress outside the proceeding in which the contraventions by Trimbos were alleged to have occurred.

2056 Trimbos next contended that because the *Civil Procedure Act* did not create a cause of action against him, the Contradictor's claims against him were not transmitted to his estate and instead abated on his death. Section 29(1) of the *Administration and Probate Act 1958* (Vic) states:

Subject to the provisions of this section, on the death of any person, all causes of action subsisting against or vested in him shall survive against or (as the case may be) for the benefit of his estate.[508]

2057 Consequently, even if Trimbos was found to have breached an overarching obligation causing financial loss to debenture holders, any responsibility for such financial loss ceased on his death and his estate could not be pursued for compensation. Accordingly, the proceeding insofar as it related to Trimbos had abated and must be dismissed.

2058 Trimbos contended that s 29(1) of the *Administration and Probate Act* neither contemplated nor intended that a civil proceeding could continue against the estate of a deceased person where the foundation for the joinder of the deceased person was not a claim or cause of action brought by a plaintiff in a civil proceeding for a remedy or relief. The potential breach of a statutory obligation owed to the court by the deceased during the course of a civil proceeding, to which he was not previously a party, was not a cause of action. The operative effect of s 29(1) of the *Administration and Probate Act* is not to create a fresh cause of action in favour (or against) the deceased estate. All that the section did was replace the operation of the common law principle *actio personalis moritur cum persona* (a personal right of action dies with the person)[509] where there was a cause of action against a deceased person.

2059 The SPR submitted that Trimbos's contention was fundamentally misconceived, as it presumed that s 29 of the *Administration and Probate Act* was the applicable law. The correct position, the SPR contended, was that:

> (a) Trimbos was correct in his contention that the court's power to make orders under s 29 of the *Civil Procedure Act* against a person who had contravened an overarching obligation is not, properly understood, a cause of action;
>
> (b) section 29 of the *Administration and Probate Act* is not a code in relation to the survival of claims against a deceased estate. Where a statutory power or right does not have the character of a cause of action, the survivability of the claim is to be ascertained by reference to the intention of the legislation conferring the power; and
>
> (c) on its proper construction, the legislature plainly intended that the court's power to make orders under s 29 of the *Civil Procedure Act* would survive the death of a contravener and transmit the responsibility for financial sanctions or compensation orders to their estate. The contrary result would make a mockery of the object and purpose of s 29 of the Act.

2060 The SPR's contentions must be accepted as correct.

Characterisation as a cause of action

2061 Although the parties were in agreement that the claim Trimbos faced was not properly described as a cause of action, I will set out my reasoning for accepting that to be so. In *Port of Melbourne Authority v Anshun Pty Ltd (No 2)*, Brennan J observed:

There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment ... sometimes to mean a right which has been infringed ... and sometimes to mean the substance of an action as distinct from its form ... Imprecision in the meaning of cause of action tends to uncertainty in defining the ambit of the rule that a judgment bars subsequent proceedings between the same parties on the same cause of action.[510]

2062 In the context of s 29 of the *Administration and Probate Act*, the phrase appears to refer to the existence of facts which demonstrate that a right has been infringed, resulting in a legally recognised entitlement to sue. In *Letang v Cooper*, Diplock LJ referred to a cause of action as:

Simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.[511]

2063 In *Sugden v Sugden* ('***Sugden***'), [512] the English Court of Appeal considered the survival against a deceased person's estate of rights enforceable by action that were not actions at law or in equity, strictly, so called. The question, which arose in the context of the English equivalent to s 29 of the *Administration and Probate Act*,[513] was whether claims to spousal maintenance sought by a widow survived her husband's death. Denning LJ considered that the phrase 'causes of action' in the legislation meant rights that could be enforced, or liabilities that might be redressed, by legal proceedings in the Queen's Court. This concept could extend to rights enforceable by proceedings in the Divorce Court, provided that they really were rights and not 'mere hopes or contingencies'.[514]

2064 Denning LJ added that the defining characteristic for whether a cause of action survived was the presence of an enforceable right at the time of death. In the absence of any enforceable right, such as a hope or contingency that a court may make a beneficial order, the legislative provision had no application.

2065 Sugden was followed in Australia at first instance, but on appeal, the Full Court rejected the relevance of common law rules to determining whether a cause of action survived.[515] I will come shortly to that decision.

2066 Turning specifically to s 29 of the *Administration and Probate Act*, a number of characteristics indicate that a cause of action, as that phrase is understood in that context, is not an appropriate characterisation of the claim against Trimbos under s 29(1) of the *Civil Procedure Act*. Those characteristics are:

> (a) the court must be satisfied that a person has contravened an overarching obligation and, if so, the court has a discretion to make any order it considers appropriate in the interests of justice;
>
> (b) an order can be made on the court's own motion, or on the application of any party to a civil proceeding or any other person who has a sufficient interest in the proceeding;
>
> (c) the pre-condition that the court must be satisfied that a person has contravened an overarching obligation refers to those set out in Part 2.3 of the *Civil Procedure Act*, which are not expressed to be owed to any particular person or party, but are manifestations of the paramount duty owed to the court; and

(d) the application must be made in the court in which the relevant proceeding is being heard and before the finalisation of the proceeding.[516]

2067 The powers under s 29 must be exercised in furtherance of, and to give effect to, the purposes of the *Civil Procedure Act*, particularly the overarching purpose of facilitating the just, efficient, timely and cost effective resolution of the real issues in dispute.[517] It is significant that the range of considerations applicable to the question of whether any, and if so what, order should be made under s 29 extend well beyond the private interests of the particular parties before the court. Those considerations include more fundamental issues, including public interest in the administration of justice, and control of the culture and conduct of litigation through enforcement of obligations owed by its participants, particularly the court's officers. Further, although the jurisdiction is predominantly compensatory, some relevant considerations for its exercise have a punitive or deterrent quality.[518]

2068 It follows that no matter how the jurisdiction is engaged, no person has a right to any relief but rather, in the common law language of *Sugden*, a mere hope or expectancy that the court might, in furtherance of the overarching purpose, make an order in their favour. This conclusion is not simply founded on the discretionary nature of an order under s 29. The section is not primarily concerned with the vindication of any private right or interest of a litigant or other sufficiently interested person. It is not the fact that loss has been suffered that engages the jurisdiction. It is enlivened by a finding that a person has breached obligations owed to the court. The fact that a person claims to have suffered loss is incidental. Notwithstanding that the orders the court might make include awarding compensation or ordering the payment of costs, the exercise of the power under the section is inextricably bound up with broader considerations of public policy in the ways that I have noted.

2069 The fact that the court has acted on its own motion in order to discharge its duty to proactively enforce the provisions of the *Civil Procedure Act*, and exercise power under s 29, is incompatible with the notion of a cause of action. That is what occurred here. Conceptually, a claim maintained by a party to a proceeding who had suffered financial loss and seeks that the court make compensatory orders under s 29 would be no different, namely, it is not a cause of action. Engaging the court's jurisdiction under s 29 of the *Civil Procedure Act* cannot comfortably fall within the notion of a cause of action as it has been identified in the authorities.

2070 For these reasons, I accept the submissions of both Trimbos and the SPR that s 29 of the *Administration and Probate Act* is not engaged and the claim in this remitter against Trimbos is not transferred to his estate by reason of that provision. That said, there is a more persuasive reason for rejecting Trimbos's contentions.

Statutory construction and survivability of claims

2071 The SPR correctly submitted that the question of whether the power to make orders under s 29 of the *Civil Procedure Act* is a liability that survives the death of a contravener and transfers to their estate is to be determined by consideration of the text, context and purposes of the section. That analysis supports the SPR's submission that the court retains the jurisdiction and power to order compensation for financial loss, or the payment of costs, against the estate of a contravener who has died.

2072 Similar questions arose in a different context in *Stephenson v Human Rights & Equal Opportunity Commission*.[519] In that proceeding, the issue was whether a complaint under the *Sex Discrimination Act 1984* (Cth) survived the death of the complainant. Wilcox J, delivering the judgment of the Full Court (with the other members agreeing) first rejected the proposition that common law rules were relevant, on the ground that they were evolved by judges as necessary ancillaries to substantive common law principles, also evolved

by judges, and were meaningful only in relation to the common law actions to which they applied. His Honour then stated:

Where a right of action is created by statute, guidance must be sought in the statute itself; a Parliament that creates a cause of action may ordain as it pleases in relation to the cause of action's survival on death of a party. And the same principle applies in relation to a statutory entitlement that falls short of constituting a "cause of action", as lawyers use that term, or a statutory proceeding.[520]

Wilcox J added that if the common law rules were irrelevant, it followed that an analogous statutory provision to s 29 of the *Administration and Probate Act* was also irrelevant.[521]

2073 The critical question was what inference as to Parliament's intention in respect of survivorship best accorded with the scope and purpose of the Act, as disclosed by its text. Wilcox J observed that the objects of the *Sex Discrimination Act* were societal. It was directed towards the elimination of discrimination, and an inquiry into a complaint may assist that purpose, notwithstanding the death of the complainant and whether or not it would lead to a determination providing a personal remedy.

2074 Following careful analysis of the terms of the *Sex Discrimination Act* in attempting to objectively determine the unknowable subjective views of the Parliament, Wilcox J concluded that imputing to the Parliament an intention that if a complainant died, the complaint should also die, would unduly and unnecessarily frustrate the realisation of the object that the Act set out to achieve. His Honour added:

However, it is, perhaps, a useful check on the cogency of the objective reasoning to stand back for a moment and ask whether the result is so out of line with general community opinion that it would have been rejected by Parliament, if the issue had arisen in debate. Considering the matter in this way, and only as a check on what has gone before, I do not think it is. Although the common law rule that applied to most actions was that the cause of action died with a party, that position has been statutorily reversed in modern times in most common law jurisdictions, including in Australia. The reasons that have caused so many legislatures to provide an opposite rule, that most actions survive the death of a party, are reasons that apply equally to a complaint under the Sex Discrimination Act.[522]

2075 The purposes of the *Civil Procedure Act*, as the SPR correctly contended, can be described as societal objects. In *Rozenblit v Vainer*,[523] Gordon and Edelman JJ described the *Civil Procedure Act* as effecting a 'culture shift' and recognised that the 'primary consideration of the courts is to safeguard the administration of justice'.[524] Their Honours also earlier observed:

The overarching purpose of the [*Civil Procedure Act*], and the obligation for a court to give effect to and further that overarching purpose, reinforce that the power exists to enable a court to protect itself from abuse of its processes in order to safeguard the administration of justice, and that that purpose may "transcend the interest of any particular party to the litigation".[525]

2076 The plenary power under s 29 of the *Civil Procedure Act* is integral to the statutory regime, and the width of the text of the section empowers the court to achieve that objective.

2077 It is not possible to identify in the text, context or purposes of the *Civil Procedure Act* an intention that the exercise of the jurisdiction it confers not survive the death of a contravener. A number of considerations support this conclusion. The first concerns the harm caused by the contraventions. I have found that debenture holders have been victims of most egregious breaches of duties owed to the court, and that they have consequently suffered considerable loss. Further, a number of the Contraveners have engaged in conduct that prolonged the remitter. It would be entirely incongruous with the purposes of the Act if, by reason of the unfortunate death of a contravener during the course of the proceedings, the court did not have jurisdiction to make an order it thought appropriate, in the interests of justice, including the award of

compensation for financial losses.

2078 The second consideration is the contravening conduct in question. Although neither the SPR nor the Contradictor contended that Trimbos's moral culpability was comparable with that of some of the other Contraveners, his contravention of the obligation not to mislead the court materially contributed to the approval of payments of nearly $20 million to AFP in the approval application. The confidence placed by the court and the SPR in the proper performance by Trimbos of his duties as an independent expert was misplaced.

2079 Thirdly, many participants in civil proceedings who are subject to the overarching obligations under the *Civil Procedure Act* are obliged by statutory schemes to hold professional indemnity insurance.[526] The *Civil Procedure Act* was enacted in that context. Compulsory professional indemnity insurance exists to protect the public from harm resulting from dealings with such professionals in breach of professional standards. It is entirely consistent with the purposes of the Act that the beneficiaries of a compensation order have the opportunity to access a responsive policy of insurance, notwithstanding that the insured contravener who caused the financial loss has died.

2080 The final consideration arises in the broader context of the proper administration of justice and the purpose of the *Civil Procedure Act* to effect a change to the culture of civil litigation. This purpose is (at least in part) implemented through s 29, and the mischief that the statute intended to address is relevant in construing the statutory language. From this perspective, no justification can be identified for reading down s 29 in a way that would prevent the court from making orders for the payment of compensation against the estate of a deceased contravener when such powers are fundamentally being exercised to promote the administration of justice, uphold professional standards and ensure that fundamental duties owed to the court are observed.

2081 For these reasons, I conclude that Parliament intended that the exercise of the jurisdiction and powers under the *Civil Procedure Act* against a contravener of the overarching obligations does not abate upon the death of that contravener.

2082 The SPR has flagged an intention, if necessary, to seek enforcement of the compensation orders that I propose to make directly against Trimbos's professional indemnity insurer under s 51 of the *Insurance Contracts Act 1984* (Cth). If that claim matures into a dispute, it will be a matter for another day.

R.2. Proportionate liability and apportionment

2083 AFP, Zita and Alex Elliott each submitted that any judgment for compensation pursuant to s 29 of the *Civil Procedure Act* was limited to their proportionate responsibility for the assessed loss, by reason of the application of Part IVAA of the *Wrongs Act*. Those parties also alleged that Trimbos was a concurrent wrongdoer, and Alex Elliott further alleged that his father was a concurrent wrongdoer up until the day of his death. The arguments in favour of a proportionate judgment were most extensively developed by Zita and Alex Elliott.

2084 The Contradictor, the SPR and Trimbos contended that Part IVAA was inapplicable in the present proceeding. I agree, for the following reasons.

2085 Zita submitted that a claim not arising in negligence may nonetheless arise from 'a failure to take reasonable care', and thus be subject to the provisions of Part IVAA. The submission was founded on *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* ('***Dartberg***')[527] and *Reinhold v NSW Lotteries Corp (No 2)* ('***Reinhold***').[528] Zita contended that the 'factual approach' (by which a claim can be found to be

an apportionable claim, notwithstanding that a failure to take reasonable care was not in the strict sense legally in issue) would apply if the findings ultimately made at trial permit the conclusion that the statutory conditions compelling the court to apportion the judgment between concurrent wrongdoers were engaged.

2086 While acknowledging that the Contradictor's claims of contravention of various overarching obligations and the paramount duty in the *Civil Procedure Act* were not framed as allegations of negligence or a failure to take reasonable care in a strict sense, Zita submitted that those obligations prescribed the normal conduct expected of litigants and legal practitioners. If, as was the case here, the person owing those obligations had contravened them, causing economic loss through carelessness (as opposed to intentional or dishonest contravention), there was no principled reason to conclude that the proportionate liability regime under Part IVAA was inapplicable.

2087 Zita further submitted that:

> (a) the claim against him for compensation arose from his failure to take reasonable care and, accordingly, was an apportionable claim; and
>
> (b) the conduct of each of the other Contraveners had materially contributed to the compensation sought and they were therefore concurrent wrongdoers, within the meaning of s 24AH, as persons whose acts or omissions caused, independently of each other or jointly, the loss or damage.

2088 Alex Elliott also submitted that the claim for compensation, defined as 'damages' by reference to the definition in s 24AF(1)(a), arose from a failure to take reasonable care. Part IVAA did not confine the expression 'reasonable care' to its use in the law of negligence as the words 'whether in tort, in contract, under statute or otherwise' made clear. A failure to take reasonable care must be understood broadly as a failure to comply with some duty or obligation. It does not of itself have to be, specifically, a duty or obligation to take reasonable care, provided the failure to comply was due to a failure to take reasonable care, as determined by reference to findings of fact, rather than the pleaded or alleged character or content of the duty said to have been breached.

2089 These submissions must be rejected for two reasons.

2090 First, since I reserved my decision, the Court of Appeal delivered judgment in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* ('***Tanah Merah***').[529] In this proceeding, a builder had been found liable for breach of contractual warranties concerning the suitability of materials, compliance with the law, and fitness for purpose, and was therefore primarily liable to pay damages to the owner. Another group of respondents (the consultants) were found to have breached consultancy agreements with the builder by failing to exercise due care and skill in the provision of their services. The consultants were found to be concurrent wrongdoers and the Tribunal apportioned the damages payable by the builder, pursuant to Part IVAA, when entering judgment.[530]

2091 Acknowledging that to meet the statutory description of an apportionable claim, a claim must be one sustained by findings of fact and not simply raised by pleadings, the Court of Appeal held that, on its plain meaning, Part IVAA did not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. It is the claim itself that must arise from a failure to take reasonable care.[531] This conclusion was consistent with the reasoning of the High Court in *Hunt & Hunt v Mitchel Morgan Nominees Pty Ltd*.[532] The Court of Appeal also cited, with approval, the observations of MacFarlan JA in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2),*[533] who concluded that the natural meaning of the words used

indicated that a failure to take reasonable care must be a part of, and therefore an element of, the plaintiff's successful cause of action.[534]

2092 The Court of Appeal concluded that, having considered the statutory text in context and having had regard to its purpose, the terms in which a claim is framed against the concurrent wrongdoer are an essential determinant of whether it can be said to arise from a failure to take reasonable care.[535] The court considered the passage in *Dartberg* that was relied on by the Contraveners in the present case,[536] to be *obiter dictum*, noting that acceptance of the correctness of that passage would have anomalous consequences.[537] The court made the same observation about aspects of the earlier decision in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd*.[538] That decision, the court explained, is not authority for the proposition that a claim that does not itself arise from a failure to take reasonable care can be transformed into an apportionable claim by a defendant establishing that the circumstances upon which the plaintiff relies, arose out of a failure to take reasonable care.[539] The court concluded that nothing in Part IVAA suggested that such a construction was open.[540]

2093 In the light of the court's decision in *Tanah Merah*, the contention by Zita and Alex Elliott that the 'factual approach' renders Part IVAA applicable was misconceived.

2094 Secondly, the SPR contended that Part IVAA was not intended to, and did not, apply to the exercise of the court's power under s 29 of the *Civil Procedure Act*, because a proceeding under s 29 is not 'a claim for economic loss' within the meaning of Part IVAA. The Contradictor's allegations did not arise from any failure to take reasonable care, but rather breaches of overarching obligations owed to the court. The statutory relationship - between the economic loss claim and the need for it to arise from a failure to take reasonable care - limits the types of claims for economic loss to which Part IVAA is directed. Section 29, by reference to its context and purpose, is a self-contained and exhaustive statutory regime that was not intended to be limited by the concepts of apportionable claims and proportionate liability identified in the *Wrongs Act*.

2095 Trimbos contended that although the court might, in substance, apportion responsibility in a manner that assessed the obligation of individual Contraveners to pay compensation, a matter to which I will return, Part IVAA was not applicable. Trimbos submitted that s 29 neither provided for, nor created, a cause of action, and did not give rise to a statutory legal right. Rather, the court was empowered, at its discretion, to order compensation for contraventions of overarching obligations owed to it, having regard to the interests of justice. Thus, the contravention of an overarching obligation involves a breach of duty owed to the court, and as such does not 'arise from a failure to take reasonable care'.

2096 The Contradictor submitted that none of the claims made against the Contraveners was a claim for economic loss in an action for damages arising from the failure to take reasonable care, and Part IVAA therefore had no application. The Contradictor contended that the *Civil Procedure Act* is a statutory regime regulating the conduct of participants in civil proceedings, and that the principal duties that informed the claims brought by the Contradictor were not duties of care, but duties to the court. The liability of the Contraveners arose not from negligence, but from misconduct.

2097 The Contradictor further submitted that each of the Contraveners was involved in a deception on the court, in gross dereliction of their duties to the court and the interests of debenture holders. Each of the Contraveners had an integral role in a fraudulent scheme which comprised AFP's business model. So much was plain in the uncontested allegations against O'Bryan and Symons, for which AFP must, and did, accept responsibility.

2098 It was not open to Zita to say that he was 'a simple innocent person who unwittingly allowed himself to be made use of as an instrument of fraud'.[541] Zita lent his name and that of his firm to be used by Mark Elliott, O'Bryan and Symons exactly as they pleased. He signed, sent or filed anything that they put before him, without any regard for whether there was a proper basis for what it contained. He consciously allowed himself to be used as a post-box solicitor, abrogating all his duties and responsibilities to his clients and the court to the cabal of lawyers whose directions and bidding he, without questioning, acceded to.

2099 I would add, perhaps superfluously, that the evidence before the court demonstrated that the losses suffered by debenture holders were occasioned by the Contraveners, acting in contumelious disregard of their professional duties, and in pursuit of their own interests and the interests of each other, in seeking to secure payments that grossly exceeded their proper entitlement to legal costs and funding commission. It is these Contraveners who contend for a proportionate judgment. Such conduct bore no resemblance to what the law would describe as a failure to take reasonable care.

2100 An enquiry conducted by the court of its own motion to consider breaches of the obligation imposed on litigants, legal practitioners, litigation funders and expert witnesses, directed to enforcing the paramount duty owed by them to the court to further the administration of justice in relation to any civil proceeding, is quite distinct from the kind of claim for economic loss arising from the failure to take reasonable care, to which Part IVAA is directed. The power to award compensation under s 29 of the *Civil Procedure Act* is conferred on the court to be exercised in its discretion, as part of its role in safeguarding the administration of justice and facilitating the just, efficient, timely and cost effective resolution of the real issues in dispute in the civil proceeding. The broad powers granted to the court to make any order that is considered appropriate, in the interests of justice, having regard to the context and purpose of the Act as a whole, demonstrates that they are to be directed to the maintenance of the proper administration of justice.

2101 In contrast, the object and purpose of Part IVAA are quite different. Its enactment abrogated the common law solidary liability rule.[542] Any analysis of the history of the intrusion of proportionate liability upon this settled common law principle demonstrates that its focus was plainly insurable claims for economic loss arising from the failure to take reasonable care, although possibly extending beyond the law of negligence.[543] There is nothing in the history, scope, purpose or text of Part IVAA that provides that it ought to extend to the exercise of the court's power to make orders under s 29 of the *Civil Procedure Act*. It is necessarily limited to causes of action in which a claimant seeks to redress a private right to damages or compensation arising from the failure of another person to take reasonable care.

2102 The SPR submitted, and I agree, that if s 29 is to be construed as limited in some way by the proportionate liability regime in Part IVAA, unsatisfactory consequences would follow. As I have already noted, a good example of such a consequence could be the limitation of the liability of Zita for the whole of the loss suffered by the debenture holders who were his clients.

2103 Section 29 brings into play notions that are broader than compensation for economic loss. As the SPR submitted, considerations that may become appropriate, in the interests of justice, when determining the relief to be granted pursuant to the section, include the practical effect of a significant compensation order as a sanction for a contravention, the importance of deterrence, or the need to reinforce the duties and responsibilities of persons subject to the *Civil Procedure Act* when managing the claims of thousands of vulnerable and remote beneficiaries of a civil proceeding. Further, as is now well established in the authorities,[544] contemporary legislation, of which the *Civil Procedure Act* is an example, seeks to change the culture of litigation.[545] If it be part of the culture that substantial funds generated for beneficiaries (such as group members, creditors in insolvency, or beneficiaries of estates) can be diminished by the conduct of those

exercising effective control, generating reward beyond their strict entitlements, as occurred in this proceeding, changes are necessary.

2104 Even if it be assumed that a rational, economic case for the continuance of proportionate liability beyond the private interests of insurers can be made out, none of the possible justifications for that regime could be reasoned as applicable in the context of the *Civil Procedure Act*.

2105 In *Cassegrain v Cassegrain,*[546] the New South Wales Court of Appeal was concerned with the question of whether a claim for equitable compensation for knowing receipt of property transferred in breach of fiduciary duty was an apportionable claim. Basten JA considered that the conduct that was the basis for the claim for compensation involved neither strict liability nor negligence, but a higher level of moral responsibility.[547] Basten JA observed:

[T]he question is useful because the answer illustrates the distinction between strict liability, a failure to exercise reasonable care and intentional misconduct. In broad terms, strict liability does not depend upon advertence by the tortfeasor to the consequences of his or her action. An intentional tort, on the other hand, clearly does. One can articulate an intentional tort, such as trespass to the person, in terms of a duty to avoid certain conduct, but the "duty", so formulated, is to avoid deliberately assaulting another person without his or her consent; it is not a duty to take reasonable care not to assault a person without consent. On the other hand, the tort of negligence is always expressed in terms of a duty to take reasonable care. It is wrong to describe an element of negligent driving as an obligation not to run down a pedestrian or an obligation to ensure that pedestrians are not run down; the correct formulation is a duty to take reasonable care to avoid running down a pedestrian.

In this sense, the phrase "failure to take reasonable care" does envisage a duty expressed in negative terms but, more importantly, in terms which are inapt with respect to an intentional tort. Similar reasoning applies to the liability based on receipt of property transferred in breach of a fiduciary duty. The duty of a person dealing with fiduciaries is not to take reasonable steps to avoid becoming party to their breach of duty, but rather not knowingly to receive the property of the company with knowledge of circumstances which would allow an honest and reasonable person to recognise that an impropriety had been committed.[548]

2106 Similar reasoning applies to liability for breaches of overarching obligations under the *Civil Procedure Act.* The contravening conduct found proved against the Contraveners relates to duties that are expressed in positive terms and impose strict liability on those who breach them. It does not relate to duties to exercise reasonable care to avoid becoming a party to their breach. As the SPR correctly submitted, none of the overarching obligations, either expressly or impliedly, impose an obligation to take reasonable care by reference to a normative, objective standard. Simply because situations might be imagined where a person breached an overarching obligation because they failed to take reasonable care to observe the duty cannot mean that liability for that contravention arises from a failure to take reasonable care. It arises from the breach of a positive statutory duty.

2107 It is apt to adopt Basten JA's phrase 'a higher level of moral responsibility' when identifying the basis for breaches of overarching obligations, rather than the notion of claims arising from a failure to take reasonable care. This is particularly so in the circumstances of this remitter, where the Contradictor has, in large part, proved allegations involving intentional wrongful conduct, certainly by the major contraveners. It is not in the interests of justice that the risk of insolvency of a Contravener declared proportionately liable should be borne by the debenture holders who were vulnerable to contravening conduct at the hands of the Contraveners. That is so whether the Contravener's conduct was attempting to appropriate funds to which debenture holders were properly entitled, or failing to protect debenture holders from that conduct. Collectively, this conduct led to debenture holders suffering very significant and continuing losses. They would not be in this position had

any of the Contraveners complied with their duties to the court.

2108 For these reasons, the defences advanced by some of the Contraveners that they were entitled to a proportionate judgment, having regard to their responsibility for the loss suffered by debenture holders, are misconceived and are rejected.

2109 As noted in section P of these reasons, in the context of the *Civil Procedure Act* as a whole and having regard to its purpose, s 29 does not require responsibility for loss be distributed to particular causative events or that, when considering causation, inquiry is warranted into the causal potency or comparative culpability of the contraventions of each wrongdoer separately. The submissions, particularly from Zita and Alex Elliott, hinted at apportioned responsibility on an alternative basis to Part IVAA, by reference to the width of the plenary power in s 29. I describe the submissions as 'hinted at' purposefully, because as I will now explain, the concepts that underlie the assessment of the limits of the plenary power in s 29 in this context are complex, somewhat uncertain, and were not developed appropriately by counsel to enable the court to rule on the submission. Ultimately, I suspect, the contention is misconceived but that conclusion must await an appropriate case.

2110 The submission was that s 29 is in the widest possible terms, which empowers the court to do whatever is appropriate, in the interests of justice, to achieve the purposes of the Act. In the exercise of this wide power, what the court might consider to be appropriate, in the interests of justice, could encompass recognising whether in the circumstances, as between multiple or concurrent wrongdoers, it may be inappropriate, in the interests of justice, for one Contravener to bear a greater share of the financial loss than another.

2111 Clearly, this question is of interest to contraveners and any insurer standing behind them.

2112 It must be borne in mind that the primary context in which the section is to be construed is the context and purpose of the Act. What might be appropriate in the interests of justice is understood in the context of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute between litigants. More particularly, that context in this remitter has focussed on the overarching obligations to be observed by participants in civil proceedings, to maintain standards of conduct in litigation that achieve the proper administration of justice. The contraventions of those overarching obligations materially contributed to persons sustaining financial or other loss. The primary focus of whether exercise of the powers under s 29 of the Act, particularly by compensating those persons for any financial or other loss, is whether any particular order will serve the enforcement of the proper administration of justice and the achievement of the overarching purpose.

2113 As I noted in *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd (No 9),*[549] considering the scope of compensatory orders against individual Contraveners in respect of a loss does not create any general rule that liability is proportionate rather than solidary. Rather, what was reflected was the court's consideration of what was appropriate in the interests of justice.[550]

2114 The decision is distinguishable from this remitter because the financial loss suffered by the plaintiff took the form of wasted costs: the costs of the appeal, the wasted costs in the jury trial and the costs of the application under the *Civil Procedure Act*. After the Court of Appeal had made orders against two of the three contraveners (the barrister and the solicitor), a third contravener, the expert witness, was before the court. In that proceeding, no party, including the plaintiff, sought an order that all of the contraveners be jointly liable for the whole of the plaintiff's loss with contribution rights in case any one of them paid an inequitable share of the judgment.[551] The application proceeded on the presumption accepted by all parties that responsibility should be apportioned. No such presumption applied in this case.

2115 As noted in section Q of these reasons, equitable concepts can be helpful in identifying the proper doctrinal approach to this question. Bearing that earlier analysis in mind, it is not appropriate, in the interests of justice, that the risks that any Contravener may be insolvent or otherwise able to frustrate execution of a judgment, be borne by the debenture holders. The possibility of that consequence would necessarily follow were I to apportion responsibility by some broad order shaped at the request of the Contraveners by reference to the widely expressed terms of the section, but without careful analysis of an identified underlying doctrine that related the order to the proper administration of justice. It has long been recognised that courts fashion remedies to compensate the victims of wrongdoing, and making good the loss suffered by debenture holders is not achieved by focussing on issues of comparative responsibility between contraveners through a vague notion of fairness.

2116 A plaintiff is entitled to execute the judgment of the court against any contravener. At common law, it is the plaintiff, not other contributing wrongdoers, who is protected from suffering loss through an inability to execute the judgment of the court against a defendant. Until the legislature, in its wisdom, saw fit to intervene to adjust perceived economic inefficiencies in the operation of solidary liability, that principle has been foundational in the proper administration of justice. The law looks to the interests of the plaintiff, not the defendant, when fashioning remedies. This principle is so ingrained that claims by defendants to alternate remedies, in the interests of justice, have only been possible through statutory intervention.

2117 Outside the statutory scheme under Part IV of the *Wrongs Act*, a possible doctrinal basis for contribution orders pursuant to s 29 could be contribution in equity,[552] or invocation of the principles of unjust enrichment.

2118 The question that might have been raised on the remitter was whether a contravener whose offending conduct materially contributed to the loss suffered by the debenture holders and who had paid (or, perhaps, would pay) the judgment could demonstrate that it was not appropriate, in the interests of justice, for their satisfaction of the judgment to substantively discharge the liability of other contraveners. Those claims might have been, more specifically, that it would be equitable as between contraveners for contribution orders to be made that, in the event a contravener satisfied the judgment, an entitlement to contribution could be exercised against other contraveners, so as to adjust the respective contribution of any contravener who becomes obliged to, and does, pay a greater share of the compensation ordered. Thus, such an order could, or should, be made under the wide plenary power found in s 29 of the Act.

2119 Such claims, had they been properly articulated, would raise issues of some complexity. It was curious during the interlocutory stages of the remitter that the Contraveners did not actively participate in defining the issues to be resolved. The development of the list of issues was almost completely left to the Contradictor. This question might have been incorporated by one of the defendants, just as it was for them to contend for a proportionate judgment as a defence to the claims against them, but the latter was all that the defendants placed in issue. While statutory contribution pursuant to Part IV of the *Wrongs Act* would be inapposite for such a claim, whether the principles of equitable contribution or unjust enrichment could be invoked is not a question susceptible to a casual response. As Zita and Alex Elliott have not paid the judgment and may never satisfy it, such claims would face complex, probably insurmountable, hurdles. In any event, no claims of this sort were before the court. In the absence of specific claims and of argument addressing them, and with the doctrinal basis for such claims not settled, I can say no more.

2120 No basis has been established for any form of proportionate judgment, apportionment/contribution orders, or other order adjusting or declaring the respective responsibilities of the contraveners on the ground that it is appropriate, in the interests of justice, to do so. The principles of solidary liability best effect the

statutory purpose. A contravener who satisfies the judgment may, following on from that conduct, be entitled to some relief against co-contraveners, a question to be answered when necessary to do so.

19. FURTHER INVESTIGATION

2121 I will direct that the Prothonotary provide the Director of Public Prosecutions with these reasons, the Revised List of Issues and the transcript, exhibits, and written closing submissions from the trial for any further investigation and/or action thought appropriate.

20. CONCLUSION

2122 It is important to appreciate the wider context of these contraventions. I have set out my findings and my reasons in extensive detail to shine light on the egregious conduct that betrayed the solemn trust fundamental to the civil justice system. What Wendy Botsman's courage, and the tenacity and application of the Contradictor, exposed has, unmistakably, undermined public confidence in the due administration of justice.

2123 In the community, persistently held notions such as 'the cost of lawyers restricts access to justice for litigants' and 'lawyers charge excessive fees' are widely accepted and thought warranted. They do not need to be reinforced. But that is what has occurred here. That is what motivated Mrs Botsman and Mr Pitman. The falsified claim for costs that they identified ultimately failed. The civil justice system protected the litigants, but not without some damage in the public eye to its integrity. It is infinitely more difficult to regain the community's trust than it is to condemn, in the strongest possible terms, the appalling conduct I have documented.

2124 Some of the worst features of litigation culture contemplated by the legislature when enacting the *Civil Procedure Act* remain on display. Three matters warrant particular mention; expert evidence, the discovery process, hoary old chestnuts each of them, and the paramount duty.

2125 Experts, like advocates, enjoy a position of particular privilege.[553] Manipulation of expert evidence has long been endemic in civil litigation and remains a concern to courts. In the heat of litigation, the persuasiveness of expert opinion as advocacy is as beguiling, for litigant and legal practitioner alike, as the siren's song was for Ulysses. But like the sweeter music of Orpheus, the duty to the administration of justice must always prevail.

2126 It must again be said that it misconceives an expert's duty if it be solely defined by a retainer for a party in litigation, as a commitment to advance only the interests of that party. The duty is of a different, wider nature, owed to the community through the paramount interest in the administration of justice. The overarching obligations in the *Civil Procedure Act* now sit with the Expert Code of Conduct to remind the expert of their paramount duty to the administration of justice and of the new ways in which it is enforceable.

2127 The proper discharge of discovery obligations by parties and practitioners has long been recognised as fundamental to the goal of a just, efficient, timely and cost-effective quelling of disputes. This remitter has been a textbook example of the consequences of non, or poor, compliance with discovery obligations. The disdain by which some participants in this matter have treated those obligations is likely to be detrimental, certainly for debenture holders, and possibly others. Presumably, that is one reason why the SPR presses for non-party costs orders.

2128 I am left in no doubt that the deficiencies in discovery identified throughout these reasons are blatant examples of unacceptable litigation culture. While the conduct of AFP and Alex Elliott in relation to discovery throughout the remitter was inexcusable, I am troubled that at no point in the proceeding did the court receive

any explanation for why, when Mark Elliott's document destruction practice was revealed, earlier searches were not performed again on other computers, including those owned by AFP and Mark Elliott, where destroyed emails were readily discoverable. When I reflect on the egregious non-compliance by AFP and Alex Elliott with court orders and the principles of discovery exposed in my reasons, there is an unanswered question: How could that conduct have gone unnoticed by their legal representatives, particularly in the context of s 13 of the *Civil Procedure Act*?

2129 Whether the legal representatives for some of the parties in this matter appropriately discharged their obligations to the court was beyond the scope of the remitter. I make no finding, although an explanation might have enabled me to affirmatively state that no adverse finding of that sort was warranted.

2130 Likewise, I found it extraordinary that after protracted and combative interlocutory steps, AFP made very substantial admissions a fortnight prior to trial. It was no answer to say that they became necessary once Trimbos resiled from the Fourth Trimbos Report, or when O'Bryan and Symons capitulated. Absent a compelling alternative explanation, there is a strong inference open that O'Bryan and Symons continued to associate with Mark Elliott; strategising a defence of the remitter until his death. Thereafter, Alex Elliott was actively involved in AFP's affairs, at least as a consultant to the directors. It would be naïve to think that the Contraveners were unaware of each other's position before the court was informed.

2131 There was no evidence that AFP, through Mark Elliott, Alex Elliott, or its agents, the Lawyer Parties, could ever demonstrate a proper basis at any point in the remitter to contend that there was a good defence to the central thrust of the Contradictor's allegations of disentitling conduct against the principal Contraveners, AFP/Mark Elliott, O'Bryan and Symons. At the conclusion of this trial, and with the full benefit of hindsight, the proposition is undeniable.

2132 Again, in the context of the probable detriment to debenture holders, in that they may not fully recover the judgment they will have, and assuming the lawyers acting for those Contraveners were all paid, the detriment following on from possible further contraventions may be unfairly distributed. The absence of any explanation of whether independent forensic judgment was exercised appropriately is noted.

2133 Finally, I consider that it needs to be understood that subject to engagement in particular circumstances, the duties to the proper administration of justice set out in Part 2.3 of the *Civil Procedure Act* are not attenuated by age, inexperience or other personal characteristics, or by competing duties or obligations, as Part 2.2 of the Act demonstrates. The obligations follow on becoming a person to whom the overarching obligations apply, in the sense now defined by s 10 of the Act. This is a wider category than that of being an officer of the court.

2134 It is implicit in being a fit and proper person to be a legal practitioner recognised on the Roll, or in being a litigation funder or expert witness who chooses to participate in litigation in the court, that the overarching obligations apply and will be honoured. While advocates and experts are immune from suit at common law, they are not immune from a compensation order under s 29.

2135 The maintenance and restoration of public faith and confidence in the administration of justice is not just the responsibility the courts.

2136 First and foremost, there should be no doubt that conduct of legal practitioners, litigation funders, and experts that fractures that trust is significantly detrimental to the administration of justice. In Shakespeare's *Henry VI, Part III*, Queen Elizabeth pithily explained the detriment:

For trust not him that hath once broken faith[554]

2137 Repairing fractured trust is no easy matter, and involves more than time. It requires new attitudes from all participants in civil litigation, and begins with acknowledging why that is so. It is well that readers of these reasons see the detail that often never emerges, perhaps because of the cloak of legal professional privilege or a want of investigative resources, or because concerted efforts to avoid the cleansing effect of transparency succeed in obscuring bad behaviour in litigation.

2138 A good start will be a renewed and invigorated resolve to change litigation culture by a commitment from every person identifiable by reference to s 10 of the *Civil Procedure Act* to the purposes stated in s 1 of the Act.

2139 There was considerable public interest in the trial. Daily, thousands observed the live streamed trial hearings. It was reported extensively in the media, drawing comment in the legislature, including in a parliamentary inquiry. Care should be exercised in identifying the lessons to be learned for the future. A bad apple is not the harbinger of a diseased orchard. From my 'ringside' perspective, I saw no reason to be concerned about the efficacy or regulation of group proceedings or litigation funding as pathways for access to justice, or about the capacity of the legal system to properly self-regulate.

2140 This judgment also records the restorative capacity of the civil justice system to protect fundamental values, to protect its integrity through the commitment of the judiciary and the profession to preserve, maintain and nourish the common law's absolute commitment to the proper administration of justice. Ultimately, despite the best efforts of the Contraveners, the spoils were never divided.

2141 The public duty, developed in the common law, to always engender and protect the proper administration of justice remains as deeply rooted in the legal profession as it is in the judges. It was discharged by many, in different ways, throughout the course of this proceeding. For the integrity and commitment of the overwhelming majority, I express the court's gratitude.

21. FORM OF JUDGMENT

2142 The judgment of the court will be as follows:

1. The application by the second plaintiff, pursuant to cl 3.10 of the Deed of Settlement and Release executed by Mr Laurence Bolitho, Banksia Securities Ltd (in liq) (recs and mgrs apptd) and The Trust Company (Nominees) Ltd on 4 December 2017, for payment of:

(a) $12.8 million (plus GST) by way of a funder's commission from the funds available upon the payment of the settlement sum; and

(b) legal costs and disbursements incurred by the funder in the conduct of the group proceeding in the sum of $4.75 million (plus GST),

is dismissed.

2. The second plaintiff and the second to sixth defendants pay to the first defendant, in his capacity as special purpose receiver of the rights and entitlements of debenture holders in Banksia Securities Ltd:

(a) compensation of $11,700,128;

(b) the first defendant's costs of and incidental to Supreme Court proceeding number S APCI 2018 0037, which the Court of Appeal ordered be costs in the receivership of the first defendant, and the costs of and incidental to the remitter, to be assessed on an indemnity basis; and

(c) the Contradictor's costs of and incidental to the remitter, to be assessed on an indemnity basis.

3. The second plaintiff is entitled to set off the sum of $234,375 against any sum payable under paragraph 2.

4. The names and other particulars of the second defendant and the third defendant be removed from the roll of persons admitted to the legal profession kept by the court.

5. The fourth defendant and the fifth defendant shall each show cause, on a date to be fixed, whether, in the context of the findings expressed in these reasons, he is a fit and proper person to remain on the roll of persons admitted to the legal profession kept by this court.

6. The first defendant's application (by summons filed 18 August 2020) for costs orders against non-parties is adjourned to a date to be fixed.

7. The Prothonotary is directed to provide copies of the following documents to the Director of Public Prosecutions:

(a) the Revised List of Issues filed 27 October 2020;

(b) the exhibits tendered at the trial of the remitter;

(c) the transcript from all hearings in the remitter since 27 July 2020, including the trial, case management hearings and applications;

(d) the outlines of closing submissions relied on by each party; and

(d) these reasons.

ANNEXURE – INDEX OF DEFINED TERMS

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Banksia proceedings	**[48]**

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SCHEDULE OF PARTIES

S CI 2012 07185

BETWEEN:

LAURENCE JOHN BOLITHO First Plain

AUSTRALIAN FUNDING PARTNERS PTY LTD	Second Plain
- and -	
JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE RECEIVER OF BANKSIA SECURITIES LIMITED) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)	First Defenda
NORMAN O'BRYAN SC	Second Defenda
MICHAEL SYMONS	Third Defenda
ANTHONY ZITA AND PORTFOLIO LAW PTY LTD	Fourth Defenda
ALEXANDER CHRISTOPHER ELLIOTT	Fifth Defenda
KATERINA PEIROS, AS THE REPRESENTATIVE OF THE ESTATE OF PETER TRIMBOS	Sixth Defenda

[1] *Hutchinson v Stephens* [1837] EngR 885; (1837) 1 Keen 659; 48 ER 461, 464.

[2] Emphasis added.

[3] Referred to throughout these reasons as AFP, it has had several name changes, being previously named International Litigation Partners Ltd (or ILP), BSL Litigation Partners Ltd (or BSLLP) and Australian Funding Partners Ltd (or AFPL).

[4] During the course of the remitter, Mr Peter Damien McCluskey retired and Mr John Ross Lindholm continued as the sole SPR, hence the varying references throughout these reasons.

[5] *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd) (No 2)* [2015] NSWSC 1449. See also the decision of Black J in *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2015] NSWSC 1378, where his Honour explained that the reason for appointing the liquidators as the SPR, rather than the Receivers, related to

concerns that a commercial conflict may exist if the latter were to pursue claims against Trust Co, given they had been appointed as receivers of Banksia by Trust Co.

[6] *Re Banksia Securities Ltd* [2017] VSC 148 (‘**Partial Settlement Reasons**’).

[7] *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd) (No 2)* [2018] VSC 47 (‘**Trust Co Settlement Reasons**’).

[8] *Corporation Regulations 2001* (Cth) sub-reg 5C.11.01(b), as amended by the *Corporations Amendment Regulation 2012 (No 6)* (Cth). As a result of the enactment of the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth), this exemption was repealed from 24 July 2020.

[9] Although this is what the correspondence stated, it was not correct. The ‘Resolution Sum’ from which the funding fee and costs recovery would be made from was defined as the entire settlement amount.

[10] *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2016] NSWSC 357.

[11] *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2018] NSWSC 228.

[12] *Botsman v Bolitho (No 1)* [2018] VSCA 278; (2018) 57 VR 68 (‘**Botsman Appeal Reasons**’).

[13] Noted in *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653, [10] (‘***Bolitho No 6***’).

[14] Ibid.

[15] *Bolitho v Banksia Securities Ltd (in liq) (recs and mgrs apptd) (No 5)* (2019) 60 VR 486 (‘***Bolitho No 5***’).

[16] *Bolitho No 6* [2019] VSC 653, [43], [241], [243].

[17] See [1197]–[1199].

[18] [2020] VSC 524 (‘***Bolitho No 10***’).

[19] Mr Pitman made an affidavit (which was tendered by the Contradictor), but was not required for cross-examination.

[20] See [1169]–[1138].

[21] O’Bryan resigned as a member of the Order of Australia on 10 August 2020: Commonwealth, *Gazette*, No C2020G00665, 14 August 2020.

[22] See [1094].

[23] *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582, [67] (‘***Bolitho No 4***’).

[24] Ibid [16], citing *Kallinicos v Hunt* [2005] NSWSC 1181; (2005) 64 NSWLR 561.

[25] Ibid [48]–[57], [62].

[26] *Legal Profession Act 2004* (Vic) s 3.4.29(1) (now repealed). A similar prohibition has applied from 1 July 2015 with the introduction of the *Legal Profession Uniform Law* (Vic) s 183. From 1 July 2020, *Supreme Court Act 1986* (Vic) s 33ZDA commenced operation, which provides that a group costs order, calculated as a percentage of the amount of any award or settlement, may be made in a group proceeding, despite the statutory prohibition of contingency fees under the *Legal Profession Uniform Law* (Vic).

[27] *Bolitho No 4* [2014] VSC 582, [58], [62].

[28] Since renamed to MCM (Mt Buller) Developments Pty Ltd.

[29] See [1197].

[30] *Bolitho v Banksia Securities Ltd (No 17)* [2021] VSC 132.

[31] See [141]ff.

[32] See section Q.3.

[33] See [49].

[34] See section B.4.

[35] Partial Settlement Reasons, [10]–[12].

[36] See [716]–[719].

[37] See [759]–[766].

[38] See [290].

[39] [2016] FCAFC 148; (2016) 245 FCR 191 (‘***Money Max***’).

[40] *Legal Profession Uniform Law* (Vic) s 174 requires a ‘law practice’ (including a solicitor and/or a barrister) to (a) provide the client with information disclosing the basis on which legal costs will be calculated and an estimate of the total legal costs; and (b) provide the client with information disclosing any significant change to a previous disclosure concerning the legal costs that will be payable by the client as soon as practicable.

[41] See [964]–[986].

[42] See [467].

[43] See [552]–[554].

[44] See [1138]–[1170].

[45] Invoice total divided by hourly rate ($990 including GST).

[46] Invoice total divided by hourly rate ($1,100 including GST).

[47] See section I.1.

[48] Invoice total divided by hourly rate ($1,100 (plus GST) and, from 1 July 2017, $1,250 (plus GST)).

[49] See [1139]ff.

[50] See section I.2.

[51] Invoice total divided by hourly rate ($1,100 (plus GST) and, from 1 July 2017, $1,250 (plus GST)).

[52] See section O.11.

[53] Ms Jacobson’s involvement in the Bolitho proceeding was not subject to any criticism by the Contradictor. Nothing in the course of the remitter suggested to me that she performed her role as counsel for Mr Bolitho and group members other than ethically and to the usual standard of care, skill and diligence expected of counsel.

[54] See [400].

[55] *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* (2017) ALR 494. The decision notes ([30]) that the trial was heard in Sydney.

[56] *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187; (2017) 53 VR 709.

[57] See [327]–328].

[58] Ibid 209 [80].

[59] See [1338]ff.

[60] See [376].

[61] See [383].

[62] Partial Settlement Reasons, [70]–[74].

[63] In addition to the First and Second Trimbos Reports, Trimbos was also retained as an expert in the Downer proceeding, the Myer proceeding and group proceedings against Treasury Wine Estates Ltd, Worley Parsons Ltd and Leighton Holdings Ltd (all Mark Elliott proceedings).

[64] [2004] FCA 1406, [61].

[65] *Legal Profession Uniform Law* (Vic) s 172.

[66] See [1178].

[67] See section H.

[68] This assumption is consistent with the use of the settlement distribution scheme to obtain further spoils at the expense of group members.

[69] See [62].

[70] *Bolitho No 5* (2019) 60 VR 486.

[71] See [273].

[72] See [1013].

[73] See [270].

[74] *Perazzoli v Westpac Banking Corporation Ltd* [2017] FCAFC 204, [174]–[188]; *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2)* [2009] FCA 449; (2009) 180 FCR 1.

[75] Trust Co Settlement Reasons, [71].

[76] Ibid [82].

[77] Ibid [71].

[78] Ibid [92].

[79] Ibid [61].

[80] Botsman Appeal Reasons, 134–6 [323]–[336].

[81] Clause 6 of the Funding Agreement sets out the obligations of the signatories. Clause 7.2 requires that a signatory ratify any act or exercise of power by AFP done in good faith. Clause 16 requires a signatory not to undertake any action likely to deprive any other party of the benefit for which that party entered into the Funding Agreement.

[82] See [36].

[83] *Australian Funding Partners Ltd v Botsman (No 3)* [2018] VSC 507, [18]–[21] ('***AFP v Botsman (Costs)***').

[84] Mrs Botsman was not in court, as the trial was conducted remotely due to COVID restrictions. It is not known whether she watched the livestream broadcast or was otherwise aware of the apology.

[85] *Australian Funding Partners Ltd v Botsman* [2018] VSC 303.

[86] *AFP v Botsman (Costs)* [2018] VSC 507, [51]–[55].

[87] See ibid [21], noting the judge's observations about Mark Elliott.

[88] *Australian Funding Partners Ltd v Botsman* [2019] VSCA 1, [5].

[89] See section I.4.

[90] [2015] VSC 735.

[91] [1992] HCA 28; (1992) 174 CLR 178.

[92] *Gdanski v Palms Court Management Pty Ltd* [2017] VSCA 348.

[93] Botsman Appeal Reasons, 149 [3]–[4].

[94] Botsman Appeal Reasons.

[95] Cl 2.2 provides:

In the event that any of the conditions in clause 2.1 are not met:

2.2.1 this Deed, save for 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;

2.2.2 no party shall rely upon any term of this Deed, save for this clause 2 and clause 13, for any purpose whatsoever in the Proceedings; and

2.2.3 each party shall bear its own costs and disbursements incurred in connection with this Deed.

[96] See [298]ff.

[97] *Botsman Appeal Reasons*, 135–6 [332]–[336].

[98] See [298]ff.

[99] [2018] FCA 527 ('***Caason***').

[100] *The Trust Co (Nominees) Ltd v Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2016] VSCA 324, [7].

[101] Botsman Appeal Reasons.

[102] Ibid 114–15 [217], [220].

[103] Ibid 123 [261].

[104] Ibid 123 [259].

[105] Ibid 134 [321].

[106] Ibid 134 [323].

[107] Ibid 138–9 [348]–[354].

[108] See [999].

[109] *Bolitho No 6* [2019] VSC 653.

[110] A cursory review of the Online Review Book (the trial exhibit) revealed others: on 21 January 2019, Mark Elliott forwarded Symons an email sent to him by Alex Elliott on 11 June 2018; on 10 January 2018, Mark Elliott forwarded Symons an email he sent to a group member on 1 May 2014; on 8 January 2018, Mark Elliott forwarded Symons an email sent to him by Mr Ben Horne on 10 April 2015.

[111] A person who—

(a) knows that a document or other thing of any kind is, or is reasonably likely to be, required in evidence in a legal proceeding; and

(b) either—

(i) destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or

(ii) expressly, tacitly or impliedly authorises or permits another person to destroy or conceal it or render it illegible, undecipherable or incapable of identification and that other person does so; and

(c) acts as described in paragraph (b) with the intention of preventing it from being used in evidence in a legal proceeding—

is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum) or a level 6 fine or both.

[112] The Contradictor having become aware of its existence from subsequent emails to that chain discovered by O'Bryan and Symons.

[113] [2020] VSC 174 ('***Bolitho No 8***').

[114] See *Guss v Law Institute of Victoria Ltd* [2006] VSCA 88 ('***Guss***').

[115] *Bolitho No 10* [2020] VSC 524.

[116] *Bolitho v Banksia Securities Ltd (No 11)* [2020] VSC 567.

[117] *Bolitho v Banksia Securities Ltd (No 12)* [2020] VSC 591.

[118] *Elliott v Lindholm* (2020) 62 VR 307 ('**Recusal Appeal Reasons**').

[119] I was surprised by the notion that the deponent could not have claimed privilege in such an affidavit in the like way as is done in a discovery affidavit, or made a further application on appropriate evidence to limit or vary the order in particular respects.

[120] Ibid 333 [113].

[121] *The Queen v The Herald & Weekly Times Pty Ltd (Ruling No 1)* [2020] VSC 616, [21], [33], citing *Rochfort v Trade Practices Commission* [1982] HCA 66; (1982) 153 CLR 134, 145, 147; *R v Ronen* [2004] NSWCCA 67; (2004) 62 NSWLR 707, 726–7 [99].

[122] *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703.

[123] Ibid [91].

[124] Alex Elliott was joined into the proceeding partly on the basis of an affidavit sworn by Mr Newman that sets out grounds for a belief that Alex Elliott, as an officer of AFP, knowingly participated in and assisted with the conduct alleged by the Contradictor in the remitter, including the fraudulent scheme to enrich AFP and the Lawyer Parties at the expense of debenture holders: *Bolitho v Banksia Securities Ltd (No 10)* [2020] VSC 524, [16]–[20].

[125] Cf *New South Wales Police Force v Winter* [2011] NSWCA 330, [82]–[86].

[126] *Bolitho v Banksia Securities Ltd (No 16)* [2021] VSC 9.

[127] *Kaur v Minister for Immigration and Border Protection* [2019] FCAFC 53; (2019) 269 FCR 464.

[128] *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661, 666 (‘***Yorke***’).

[129] *Giles v Jeffrey* [2016] VSCA 314, [188] (‘***Giles***’).

[130] *Hungerfords v Walker* [1989] HCA 8; (1989) 171 CLR 125.

[131] Meaning a person admitted to the Australian legal profession who holds a current practising certificate. See *Civil Procedure Act 2010* (Vic) s 3 and *Interpretation of Legislation Act 1984* (Vic) s 38, which adopts the meaning of ‘Australian legal practitioner’ that is used in the *Legal Profession Uniform Law* (Vic) as the default definition for that term in all Victorian legislation, unless expressly defined by the instrument.

[132] Which relevantly includes a sole practitioner, a law firm, or an incorporated legal practice: *Civil Procedure Act 2010* (Vic) s 3; *Interpretation of Legislation Act 1984* (Vic) s 38; *Legal Profession Uniform Law* (Vic).

[133] Carol Rice Andrews, ‘Standards of Conduct for Lawyers: An 800-Year Evolution’ (2004) 57(4) *SMU Law Review* 1385, 1390, 1394–5.

[134] Josiah Henry Benton, *The lawyer’s official oath and office* (The Boston Book Company, 1909) 10.

[135] Ibid 9.

[136] Ibid 15, quoting from an oath for advocates decreed in 1237 in England.

[137] *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279, 284 [19] (‘***Cummins***’).

[138] Andrews (n 133).

[139] 71 US [1866] USSC 33; (4 Wall) 333, 378 (1867).

[140] Ibid.

[141] Ibid 379.

[142] *Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279, 284 [19]–[20].

[143] [1957] HCA 46; (1957) 97 CLR 279, 298 (‘***Ziems***’). See also *Re Davis* [1947] HCA 53; (1947) 75 CLR 409, 420; *In re Foster* [1950] NSWStRp 2; (1950) 50 SR (NSW) 149, 151–2; *Re Gruzman* (1968) 70 SR (NSW) 316, 323; *NSW Bar Association v Thomas (No 2)* (1989) 18 NSWLR 193, 204–5.

[144] [1981] 2 NSWLR 372, 381–3.

[145] (1988) 165 CLR 543.

[146] Ibid 555.

[147] [2005] HCA 12; (2005) 223 CLR 1, 16 [32] (‘***D’orta-Ekenaike***’).

[148] Ibid 16 [32], 39–40 [106]–[107].

[149] [1940] AC 282, 302 (‘***Myers***’).

[150] Victorian Law Reform Commission, *Civil Justice Review Report* (2008) 14, Chapter 3, particularly 154–6, 162–5, 182–90.

[151] *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337; (2013) 41 VR 302, 311 [26] (‘***Yara***’); *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)* [2014] VSC 400; (2014) 48 VR 1, 36 [92] (‘***Dura***’).

[152] *Dura* [2014] VSC 400; (2014) 48 VR 1, 36 [92].

[153] DA Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63.

[154] Ibid 106.

[155] Ibid 105.

[156] Ibid 104.

[157] Ibid 105.

[158] Ibid 92.

[159] Ibid 93, 104, citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; *Black v Taylor* [1993] 3 NZLR 403; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Keys v Boulter* [1971] 1 QB 300, 306, 309; *Everingham v Ontario* [1992] 8 OR (3d) 121.

[160] Ipp, 104 (n 153).

[161] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8)* [2014] VSC 567, [166] (‘***Hudspeth No 8***’); Ipp, 95 (n 153), citing *Ridehalgh v Horsefield* [1994] Ch 205 (‘***Ridehalgh***’); *Myers* [1940] AC 282; *Cassidy v Murray* [1995] FamCA 91; (1995) 124 FLR 267.

[162] Ipp, 95 (n 153), citing *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48 (‘***Davy-Chiesman***’).

[163] *Civil Procedure Act 2010* (Vic), s 10.

[164] *Dura* [2014] VSC 400; (2014) 48 VR 1, 49 [131]–[132]. See also *Myers* [1940] AC 282, 302; *D’Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1, 41 [111]–[113].

[165] (1994) 34 NSWLR 408, 411 (‘***Foreman***’).

[166] Ibid 432–3.

[167] Ibid 447.

[168] Ibid 447.

[169] *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; (2007) 157 FCR 402, 415 [34] (‘***McCarthy***’), citing *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493, 503–4 [15], [18] (‘***Peters***’); *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579, 596 [55] (‘***McCann***’); *Comino v Manettas* (1993) 7 ANZ Ins Cas 61–162, 77,869; *Harle v Legal Practitioners Liability Committee* (2004) 13 ANZ Ins Cas 61–605, 77,302.

[170] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [173] (‘***Farah***’); *SAJ v R* [2012] VSCA 243, [6], [56]–[57]; *McCarthy* [2007] FCAFC 28; (2007) 157 FCR 402, 415 [34]; *McCann* [2000] HCA 65; (2000) 203 CLR 579, 596 [55].

[171] *McCann* [2000] HCA 65; (2000) 203 CLR 579, 596 [55], citing *Peters* [1998] HCA 7; (1998) 192 CLR 493, 503 [16].

[172] Ibid.

[173] *Hudspeth No 8* [2014] VSC 567, [192]; *McCarthy* [2007] FCAFC 28; (2007) 157 FCR 402, 415 [34], citing *Derry v Peek* (1889) 14 App Cas 337, 343, 351, 374 (‘***Derry***’).

[174] *McCarthy* [2007] FCAFC 28; (2007) 157 FCR 402, 415 [34], citing *Peters* [1998] HCA 7; (1998) 192 CLR 493, 503 [15].

[175] *Derry* (1889) 14 App Cas 337, 368, 371–2, 374, 376; *R v Staines* (1974) 60 Cr App R 160.

[176] *Australian Securities and Investment Commission v Rent 2 Own Cars Australia Pty Ltd* (2020) 147 ACSR 598, 670 [372], citing *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537, 541 [11].

[177] *Giorgianni v R* [1985] HCA 29; (1985) 156 CLR 473, 482.

[178] (1988) 82 ALR 217, 220.

[179] *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 [88], [375] (‘***Amalgamated Television Services***’). Cf the standard of proof required in a criminal case of being the only rational inference available: see ibid 220.

[180] *Hudspeth No 8* [2014] VSC 567, [176]–[194].

[181] See *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216, 228; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191, 199 (‘***Parkdale***’); *Yorke* [1985] HCA 65; (1985) 158 CLR 661, 666; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357, 368 [15] (‘***Miller***’); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 443–4 [9] (‘***Google Inc***’).

[182] *Hudspeth No 8* [2014] VSC 567, [190]; *Brown v Guss (No 2)* [2015] VSC 57, [126]. This is consistent with the position in the common law for actions of deceit that if the fraud be proved the intention is immaterial, see *Derry* (1889) 14 App Cas 337, 374.

[183] *Hudspeth No 8* [2014] VSC 567, [195], quoting *Google Inc* (2013) 249 CLR 435, 465 [89].

[184] *Parkdale* [1982] HCA 44; (1982) 149 CLR 191, 198–9, citing with approval *McWilliam’s Wines Pty Ltd v McDonald’s System of Australia Pty Ltd* [1980] FCA 159; (1980) 49 FLR 455, 461, 476–7.

[185] Ibid 198.

[186] *Knowles' Trial* (1692) 12 Howells' State Trials 1167; *Hennessy v Broken Hill Pty Co Ltd* [1926] HCA 32; (1926) 38 CLR 342, 349; *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698, 700–1 [13]–[16].

[187] *Yorke* [1985] HCA 65; (1985) 158 CLR 661, 666.

[188] See [1320].

[189] *Miller* [2010] HCA 31; (2010) 241 CLR 357, 369–70 [20] (citations omitted).

[190] *Yara* [2013] VSCA 337; (2013) 41 VR 302.

[191] Ibid 307 [12].

[192] Ibid 307 [14].

[193] *Dura* [2014] VSC 400; (2014) 48 VR 1, 34 [88].

[194] Ibid.

[195] *Hudspeth No 8* [2014] VSC 567, [226], citing *Sargent v ASL Developments Ltd* [1974] HCA 40; (1974) 131 CLR 634, 648–9, 658–9.

[196] [2015] VSC 49.

[197] Explanatory Memorandum, Civil Procedure Bill 2010 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2607 (Rob Hulls, Attorney-General).

[198] Ibid. The Attorney-General stated that the reforms were intended to affirm pre-existing judicial statements calling for lawyers to 'focus on resolving disputes, rather than attempting to win at all costs'.

[199] See, eg, *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1968] 2 All ER 1233, 1236.

[200] See discussion at [1319(d)] and authorities cited therein.

[201] Ibid.

[202] *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507, 524 [40]; *Dyczynski v Gibson* (2020) 280 FCR 583, [209] ('***Dyczynski***').

[203] [2018] FCA 1289, [69]. See also *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 [33], [40] ('***McKenzie***').

[204] *Dyczynski* (2020) 280 FCR 583, 635–6 [209].

[205] *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719, [36]; *Dyczynski* (2020) 280 FCR 583, 634–5 [208].

[206] *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323; (2016) 335 ALR 439, 486 [220], 508 [308] (citations omitted) ('***Willmott Forests***').

[207] *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, 96–7, 142 ('***Hospital Products***').

[208] Ibid; *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1, 200–1; *Breen v Williams* (1996) 186 CLR 71, 133–4 ('***Breen***'). See also Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in

Australian Class Actions: Conflicts between Duties' [2014] UNSWLawJl 33; (2014) 37 *University of New South Wales Law Journal* 914; Michael Legg, 'Class Action Settlements in Australia — the Need for Greater Scrutiny' [2014] MelbULawRw 23; (2014) 38(2) *Melbourne University Law Review* 590, 596.

[209] *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384, 408 ('***Birtchnell***').

[210] *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] FCA 44; (2016) 259 CLR 212, 249–50 [122], 254 [141].

[211] Ibid 254 [142].

[212] *Hospital Products* [1984] HCA 64; (1984) 156 CLR 41, 96–7.

[213] *Breen* (1996) 186 CLR 71, 113, 137–8; *Pilmer v Duke Group Ltd (In liq)* [2001] HCA 31; (2001) 207 CLR 165, 197–8 [74]; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43; (2018) 265 CLR 1, 29–30 [67] ('***Ancient Order of Foresters***').

[214] *Breen* (1996) 186 CLR 71, 108 (citations omitted).

[215] *Ancient Order of Foresters* [2018] HCA 43; (2018) 265 CLR 1, 31 [70]–[71], quoting *Hospital Products* [1984] HCA 64; (1984) 156 CLR 41, 104. See also *Phelan v Middle States Oil Corporation* [1955] USCA2 324; (1955) 220 F 2d 593, 602; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, 344–5 [174] ('***Grimaldi***').

[216] *Ancient Order of Foresters* [2018] HCA 43; (2018) 265 CLR 1, 31 [70]–[71] (citations omitted).

[217] *Farah* (2007) 230 CLR 89, 140 [111], 159 [160], quoting *Barnes v Addy* [1874] UKLawRpCh 20; (1874) LR 9 Ch App 244, 251–2.

[218] *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266; (2014) 87 NSWLR 609, 636 [124] ('***Hasler***').

[219] *Farah* (2007) 230 CLR 89, 163–4 [177]; *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373, 412.

[220] *Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4; (2021) 387 ALR 48, 79 [114].

[221] *Hasler* [2014] NSWCA 266; (2014) 87 NSWLR 609, 636 [124].

[222] *Farah* (2007) 230 CLR 89, 163 [173].

[223] [1903] UKLawRpKQB 149; [1903] 2 KB 635, 638.

[224] [2009] EWCA Civ 63; [2009] 2 All ER 666, [43]–[44] ('***Imageview***').

[225] [2009] NZSC 15; [2009] 2 NZLR 384, 416 [90] ('***Premium Real Estate***').

[226] Ibid.

[227] Ibid.

[228] *Imageview* [2009] EWCA Civ 63; [2009] 2 All ER 666, [50].

[229] *Re Windeyer, Fawl & Co; Ex parte Foley* [1930] NSWStRp 87; (1930) 31 SR (NSW) 145, 149.

[230] Codified by *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.23.

[231] *Ryan v Hansen* [2000] NSWSC 354; (2000) 49 NSWLR 184, 199 [71] ('***Ryan***'), citing *Re Massey and Carey* [1884] UKLawRpCh 72; (1884) 26 Ch D 459, 464.

[232] Ibid, citing *Legal Profession Act 1987* (NSW) s 208P(a) (now repealed). These words no longer appear in the Victorian rule, which was broadened in 2000, see *Supreme Court (Chapter 1 Amendment No. 12) Rules 2000* (Vic).

[233] *Yara* [2013] VSCA 337; (2013) 41 VR 302, 309 [18], citing *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* [1998] FCA 806; (1998) 156 ALR 169, 229.

[234] *Dura* [2014] VSC 400; (2014) 48 VR 1, 20–1 [53]–[54], citing *Ridehalgh* [1994] Ch 205, 232.

[235] Ibid 22 [57].

[236] Ibid.

[237] *Cachia v Isaacs* (1985) 3 NSWLR 366, 371; *Ryan* [2000] NSWSC 354; (2000) 49 NSWLR 184, 199 [71];

[238] Ibid.

[239] *Wentworth v Rogers* [1999] NSWCA 403, [46].

[240] *Guss* [2006] VSCA 88, [39]–[40], quoting *Foreman* (1994) 34 NSWLR 408, 471–2.

[241] *Rockwell Machine Tool Co Ltd v FP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693, 694 ('***Rockwell***'); *E I Du Pont De Nemours & Co v Commissioner of Patents* (1987) 16 FCR 423, 425–6 ('***E I Du Pont De Nemours***').

[242] *Myers* [1940] AC 282, 322.

[243] *Ferguson v Mackaness Produce Pty Ltd* [1970] 2 NSWR 66, 68–9.

[244] *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2008] NSWCA 216, [41].

[245] Ibid; See also *Woods v Martins Bank Ltd* [1959] 1 QB 55, 60.

[246] *Rockwell* [1968] 1 WLR 693, 694.

[247] *Evidence Act 2008* (Vic) s 140.

[248] (1938) 60 CLR 336. Cf *Granada Tavern v Smith* [2008] FCA 646; (2008) 173 IR 328, [90].

[249] Ibid 361–2.

[250] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170, 170–1 ('***Neat Holdings***'); *Giles* [2016] VSCA 314, [121].

[251] *Qantas Airways Ltd v Gama* [2008] FCAFC 69; (2008) 167 FCR 537, 576–7 [139]; *Employment Advocate v Williamson* [2001] FCA 1164; (2001) 111 FCR 20, 41 [66]–[67].

[252] *Neat Holdings* [1992] HCA 66; (1992) 67 ALJR 170, 170–1.

[253] *Nom v Director of Public Prosecutions* [2012] VSCA 198; (2012) 38 VR 618, 655–6 [123]–[124].

[254] To enliven a *Jones v Dunkel* inference, there are two characteristics of the uncalled witness which must be present. First, the witness would be expected to be available to one party (the party which failed to call the

witness) rather than the other. Second, there is a reasonable expectation that their evidence would elucidate a matter of relevance: *Payne v Parker* [1976] NSWLR 191, 201.

[255] *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, 308, 312, 320–1; *Manly Council v Byrne* [2004] NSWCA 123, [51], [54]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; (2009) 264 ALR 201, 225 [102].

[256] *Boyle v Wiseman* [1855] EngR 110; (1855) 156 ER 598, 600.

[257] *Insurance Commissioner v Joyce* [1948] HCA 17; (1948) 77 CLR 39, 49.

[258] *Council of the NSW Bar Association v Power* [2008] NSWCA 135; (2008) 71 NSWLR 451, 463–7 [20]–[28], citing *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50, 72–4 [60]–[68]. See also *Re Veron; Ex parte Law Society of New South Wales* [1966] 1 NSWR 511 ('***Re Veron***'); *Coe v NSW Bar Association* [2000] NSWCA 13 ('***Coe***'); *NSW Bar Association v Meakes* [2006] NSWCA 340, [70]–[78] ('***Meakes***').

[259] *Amalgamated Television Services* [2002] NSWCA 419, [82].

[260] Ibid [88].

[261] Ibid [81], quoting *R v Watt* (1905) 20 Cox CC 852, 853; William Wills and Sir Alfred Wills, *An essay on the principles of circumstantial evidence* (Butterworth & Co, 5th ed, 1902).

[262] Recusal Appeal Reasons, 333–4 [115].

[263] *Meakes* [2006] NSWCA 340, [70], quoting *Coe* [2000] NSWCA 13, [21].

[264] *Re Veron* [1966] 1 NSWR 511, 515.

[265] Recusal Appeal Reasons, 334–5 [118], citing *Health Care Complaints Commission v Wingate* [2007] NSWCA 326; (2007) 70 NSWLR 323, 333–4 [43]–[45].

[266] *Re Veron* [1966] 1 NSWR 511, 515.

[267] Leaving aside the limited evidence that O'Bryan gave in support of Alex Elliott under cover of a certificate under s 128 of the *Evidence Act 2008* (Vic).

[268] [1958] HCA 13; (1958) 98 CLR 367, 375.

[269] (1916) 2 AC 206, 229–30.

[270] (1977) 52 ALJR 189, 197.

[271] *Re El-Debel (a bankrupt)* [2020] FCA 1031, [130].

[272] *Victorian Legal Services Commissioner v Horak* [2016] VSC 780, [5].

[273] Ibid [57]; *Legal Services Board v McGrath* [2010] VSC 266; (2010) 29 VR 325, 329 [11] ('***McGrath***'); *Southern Law Society v Westbrook* [1910] HCA 31; (1910) 10 CLR 609, 612.

[274] *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [7] ('***Gobbo***').

[275] (2010) 28 VR 325, 329 [10], quoting *Ziems* [1957] HCA 46; (1957) 97 CLR 279, 298.

[276] *Hughes & Vale Pty Ltd v NSW (No 2)* [1955] HCA 28; (1955) 93 CLR 127, 156.

[277] *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70, 76.

[278] *Gobbo* [2020] VSC 692, [9].

[279] Ibid [10].

[280] *A Solicitor v Law Society (NSW)* [2004] HCA 1; (2004) 216 CLR 253, 275 [37].

[281] Ibid 273–4 [33]–[34].

[282] *McGrath* [2010] VSC 266; (2010) 29 VR 325, 329 [11].

[283] *Gobbo* [2020] VSC 692, [49]. See also *Legal Services Board v Williams* [2009] VSC 561, [10].

[284] [1968] HCA 20; (1968) 117 CLR 177, 179.

[285] Ibid 180.

[286] Ibid 182.

[287] Ibid 183.

[288] Ibid 183–4.

[289] *Ex parte Evatt; Re New South Wales Bar Association* (1969) 71 SR (NSW) 153 (‘***Evatt***’).

[290] Ibid 153–4.

[291] Ibid 158.

[292] *Evatt* (1969) 71 SR (NSW) 153, 159, quoting *Clyne v New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186, 199–200.

[293] Ibid 159.

[294] *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191.

[295] See section K.4.

[296] See [963].

[297] See [1086]. On this point, O’Bryan gave general evidence as to the context in which the listed conferences arose: see [1262].

[298] *Yorke* [1985] HCA 65; (1985) 158 CLR 661, 666.

[299] [1909] HCA 87; (1909) 9 CLR 655 (‘***Meagher***’).

[300] Ibid 669.

[301] Ibid 672.

[302] Ibid 673.

[303] Ibid 675.

[304] Ibid 691.

[305] Ibid 681.

[306] See [323]–[325].

[307] See [264]–[268].

[308] See [256]–[260].

[309] See [259].

[310] See section H.

[311] See section F.

[312] See [306]ff.

[313] See [315]–[316].

[314] Being those contraventions relating to the conduct described in sections 332–H.5.

[315] Being those contraventions relating to the conduct described in sections H.6–H.8.

[316] See section H.2; [398]–[443] (in respect of O'Bryan), [444]–[458] (in respect of Symons).

[317] See section H.3; [459]–[481].

[318] See section I.

[319] See [526].

[320] See [987]–[989].

[321] See [963]–[986].

[322] See [391]–[396], [573]–[596].

[323] See [1338]–[1342].

[324] See section H.8.

[325] See [471]–[480].

[326] *Foreman* (1994) 34 NSWLR 408, 435.

[327] See [1345].

[328] See section H.

[329] See [674].

[330] See [1331]–[1337].

[331] See section E.

[332] Citing *Cachia v Hanes* (1994) 179 CLR 403.

[333] *Myers* [1940] AC 282.

[334] See [1268].

[335] See, eg, *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [7]–[8].

[336] Ibid; Botsman Appeal Reasons, 130 [300].

[337] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [150] (‘***Downie***’); *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [15]–[16] (‘***Lopez***’).

[338] *Lopez* [1999] FCA 104, [15]–[16]; *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625, [3] (‘***Pathway Investments***’).

[339] *Murillo v SKM Services Pty Ltd* [2019] VSC 663, [33]; *Lopez* [1999] FCA 104, [15]–[16]; *Pathway Investments* [2012] VSC 625, [3]; *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 2)* [2019] NSWSC 640, [62]; *Willmott Forests* [2016] FCA 323; (2016) 335 ALR 439, 504 [287].

[340] *Lopez* [1999] FCA 104, [15]–[16]; *Pathway Investments* [2012] VSC 625, [3]; *McKenzie* [2019] FCA 10, [26].

[341] *Lopez* [1999] FCA 104, [16].

[342] *Downie* [2015] VSC 190, [150].

[343] See section J.4 and J.6.

[344] See [724]–[731].

[345] See [727]–[731].

[346] See [590]–[595], [759]–[763].

[347] See [1463]ff.

[348] See [1325]-–[1330].

[349] See [711]–[712].

[350] See [804].

[351] See [838].

[352] See [842]–[845]

[353] See [850]–[854].

[354] See [873]–[878], [888]–[891].

[355] See [879]–[887].

[356] See [894]-–[898], [912]–[913].

[357] See section K.3.

[358] See [963]–[986].

[359] See section K.4.

[360] See [942]–[948].

[361] See section K.5.

[362] See section J.

[363] See [845].

[364] See [957].

[365] See [963]–[986].

[366] See section K.3.

[367] An issue discussed in section N.2.

[368] Although a solicitor is expected to be experienced in particular legal fields and briefing counsel does not necessarily operate to give automatic immunity: *Davy-Chiesman* [1984] Fam 48, 63–4.

[369] See [963].

[370] See section Q.3.

[371] See [929]–[932].

[372] See [909]ff.

[373] See [1346]ff.

[374] *Rockwell* [1968] 1 WLR 693, 694; *E I Du Pont De Nemours* (1987) 16 FCR 423, 425–6.

[375] *Myers* [1940] AC 282, 322.

[376] See section N.2.

[377] See [356]ff.

[378] [1999] NSWCA 408; (1999) 48 NSWLR 1, 46. See also *Birtchnell* [1929] HCA 24; (1929) 42 CLR 384, 408.

[379] [1874] UKLawRpCh 20; (1873-74) LR 9 Ch App 244.

[380] *Polyaire Pty Ltd v K-Aire Pty Ltd* [2005] HCA 32; (2005) 216 ALR 205, [35]; *Nadinic v Drinkwater* [2017] NSWCA 114, [22].

[381] *Re A Solicitor* [1960] VicRp 96; [1960] VR 617, 620, citing *Allinson v General Council of Medical Education and Registration* [1894] UKLawRpKQB 36; [1894] 1 QB 750, 763–7.

[382] *Gobbo* [2020] VSC 692, [50].

[383] [2020] HCA 26; (2020) 94 ALJR 740 (‘***Lewis***’).

[384] Ibid 775 [151]–[152] (citations omitted).

[385] [2001] HCA 52; (2001) 206 CLR 459, 470 [18].

[386] [2002] HCA 41; (2002) 210 CLR 109 (‘***I & L Securities***’).

[387] Ibid 119 [26].

[388] Ibid 122 [33].

[389] Ibid.

[390] Ibid 129 [58].

[391] Ibid 130 [62] (citations omitted).

[392] Ibid 129 [60].

[393] [2013] HCA 10; (2013) 247 CLR 613 (‘***Hunt & Hunt***’).

[394] Ibid [45] (citations omitted).

[395] [2014] VSCA 338.

[396] Ibid [540] 192–5.

[397] Ibid.

[398] *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; (1998) 196 CLR 494, 512–13 [41]–[42] (‘***Marks***’).

[399] *Travel Compensation Fund v Tambree* [2005] HCA 69; (2005) 224 CLR 627, 639 [30] (‘***Tambree***’).

[400] *Gates v City Mutual Life Assurance Society* (1986) 160 CLR 1, 14–15 (‘***Gates***’).

[401] *Marks* [1998] HCA 69; (1998) 196 CLR 494, 512 [41]–[42]; *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, 533; *Chappel v Hart* (1998) 195 CLR 232, 255–6 [62]; *Tambree* [2005] HCA 69; (2005) 224 CLR 627, 642–3 [45] ; *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)* [2006] NSWCA 282; (2006) 67 NSWLR 341 (‘***Abigroup Contractors***’).

[402] *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 509 [163].

[403] *Gates* (1986) 160 CLR 1, 13.

[404] *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459; *Kenny & Good Pty Ltd v MGICA* (1992) Ltd [1999] HCA 25; (1999) 199 CLR 413.

[405] *Gates* (1986) 160 CLR 1; *Marks* [1998] HCA 69; (1998) 196 CLR 494.

[406] *Marks* [1998] HCA 69; (1998) 196 CLR 494, 514 [48]–[49].

[407] *Abigroup Contractors* [2006] NSWCA 282; (2006) 67 NSWLR 341, 354–5 [59]–[61].

[408] *Marks* [1998] HCA 69; (1998) 196 CLR 494, 503 [15], 510 [38], 529 [102]–[103].

[409] *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 493 [105]–[106].

[410] Ibid.

[411] [1997] FCA 12, 6.

[412] *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 469 (‘***Maguire***’), quoting *Target Holdings Ltd v Redferns* [1995] UKHL 10; [1996] 1 AC 421, 434 (‘***Target Holdings***’).

[413] Ibid 469–70.

[414] Ibid 474.

[415] *GM and AM Pearce & Co v Australian Tallow Producers Pty Ltd* [2005] VSCA 113, [71] (‘***Pearce***’), quoting *Maguire* [1997] HCA 23; (1997) 188 CLR 449, 493.

[416] *Premium Real Estate* [2009] NZSC 15; [2009] 2 NZLR 384, [85].

[417] *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 687. See also *AHRkalimpa Pty Ltd v Schmidt (No 3)* [2019] VSC 197, [32]–[34], quoting *Ancient Order of Foresters* [2018]

HCA 43; (2018) 265 CLR 1, 25 [88].

[418] In this context, I reject O'Bryan's contention that any period of delay referrable to AFP's application for special leave was not occasioned by any of his conduct for the reasons advanced by the Contradictor.

[419] *Maguire* [1997] HCA 23; (1997) 188 CLR 449, 470, quoting *Target Holdings* [1995] UKHL 10; [1996] 1 AC 421, 434.

[420] *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 556.

[421] *Myers* [1940] AC 282.

[422] Ibid 335.

[423] Ibid 302–3.

[424] See [1718].

[425] At [1773].

[426] This allowance was not quantified by AFP. It observed that Zita invoiced $401,808, which it paid, but that this amount should be significantly reduced, as Trimbos opined in the Fifth Trimbos Report. As will be explained, I find that AFP has no entitlement to any costs paid to Zita.

[427] Compare *Watson as trustee for the Murrindindi Bushfire Class Action Settlement Fund v Commissioner of Taxation* [2020] 277 FCR 253.

[428] See [1710].

[429] *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 470 [18].

[430] *Dura* [2014] VSC 400; (2014) 48 VR 1, 40 [102].

[431] *Whitfeld v De Lauret and Co Ltd* [1920] HCA 75; (1920) 29 CLR 71, 77; *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118, 158; *New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168.

[432] *Yara* [2013] VSCA 337; (2013) 41 VR 302, 305–7 [5]–[11], 309–10 [20], 311 [26].

[433] *Civil Procedure Act 2010* (Vic) s 13(3)(b).

[434] Ibid s 14.

[435] *Yara* [2013] VSCA 337; (2013) 41 VR 302, 309–10 [20].

[436] *Lewis* [2020] HCA 26; (2020) 94 ALJR 740, 752 [30], citing *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60, 63. See also 748 [3], 757–8 [65], 770 [139].

[437] Ibid 753 [35], [37]. See also 755–6 [50], 766–7 [88]–[91], 763 [94], where the court compared the counterfactual position with the position of the plaintiff in fact.

[438] Ibid 783 [178].

[439] *Pearce* [2005] VSCA 113, [65]

[440] *Target Holdings* [1995] UKHL 10; [1996] 1 AC 421, 439.

[441] (1990) 169 CLR 638, 642–3 (citations omitted).

[442] *Australian Executor Trustees (SA) Ltd v Kerr* (2021) 151 ACSR 204, 224 [99], citing JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) [23-230]. See also *Target Holdings* [1995] UKHL 10; [1996] 1 AC 421, 437.

[443] See above at [409].

[444] See *Legal Profession Uniform Law* (Vic) s 183, read with s 185(4).

[445] See [398]ff.

[446] See [444]ff.

[447] See section I.4.

[448] *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2017] NSWSC 540; *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2018] NSWSC 228; *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2018] NSWSC 229; *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2019] NSWSC 136.

[449] Partial Settlement Reasons, [69].

[450] Botsman Appeal Reasons, 132 [312].

[451] See [51].

[452] I speak of the intention or attitude of the Banksia legal team. Given the work product from the Bolitho legal team, there was little prospect of duplicated costs.

[453] See section B.6.

[454] See *Bolitho v Banksia Securities Ltd* [2014] VSC 8; *Bolitho v Banksia Securities Ltd (No 2)* [2014] VSC 184.

[455] Relying in particular on *Corporations Act* ss 283AC and 283DA(f).

[456] *Evidence Act 2008* (Vic) s 50.

[457] *BMW Australia Ltd v Brewster* (2019) ALJR 51; *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 384 ALR 650; *Brewster v BMW Australia Ltd* [2020] NSWCA 272.

[458] *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191, 209 [79].

[459] *Perera v GetSwift Ltd* [2018] FCA 732; (2018) 263 FCR 1 ('***Perera***'); *Lenthall v Westpac Life Insurance Services Ltd* [2018] FCA 1422; (2018) 363 ALR 698 ('***Lenthall***'); *CJMcG Pty Ltd (Trustee) v Boral Ltd (No 2)* [2021] FCA 350; (2021) 389 ALR 699.

[460] *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191, 210 [82].

[461] Botsman Appeal Reasons, 143 [382].

[462] Australian Law Reform Commission, *Integrity, fairness and efficiency—An inquiry into Class Action Proceedings and Third-Party Litigation Funders*, ALRC Report 134, December 2018.

[463] *Hall v Slater & Gordon Ltd* [2018] FCA 2071; *Perera* [2018] FCA 732; (2018) 263 FCR 1; *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191; *Lenthall* [2018] FCA 1422; (2018) 363 ALR 698; *Farey v National Australia Bank* [2016] FCA 340; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433; *Camping*

Warehouse v Downer EDI Ltd [2016] VSC 784; *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (recs and mgrs appt) (No 3)* [2017] FCA 330; (2017) 343 ALR 476; *HFPS Pty Ltd (trustee) v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650; *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842; (2018) 132 ACSR 258; *Smith v Australian Executor Trustees Ltd* [2018] NSWSC 1584.

[464] Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Enquiries in Law* 303.

[465] And the cognate provision in other jurisdictions.

[466] See [750]–[755].

[467] See section G.

[468] See [1900]–[1909].

[469] Mr Houston's citation to this category of order, an academic journal article, refers to two previous decisions involving an order for litigation funding that have been subsequently described as identical to a common fund order: *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191, 218 [133]–[136].

[470] *Perera* [2018] FCA 732; (2018) 263 FCR 1; *Lenthall* [2018] FCA 1422; (2018) 363 ALR 698.

[471] Mr Houston extracted that data from Robert S Harris, Tim Jenkinson and Steven N Kaplan, 'Private equity performance: What do we know?' (2014) 69(5) *The Journal of Finance* 1851, 1854.

[472] This is evident in different circumstances that are not those of this remitter. For example in *Money Max* [2016] FCAFC 148; (2016) 245 FCR 191, 194 [8], the Full Court made clear that the funding commission rate is to be later set and approved by the Court at the appropriate time. An application for a group costs order under s 33ZDA(3) of the *Supreme Court Act* is subject to later amendment by the court at any time during the course of the proceeding.

[473] This was the time line adopted by Mr McGing and used in his calculations. While it is imprecise in the counterfactual scenario and warranted adjustment, a varied calculation of this item will not make a material difference to the result and I saw no need to resubmit the calculation to Mr McGing.

[474] Botsman Appeal Reasons, 101–2 [158], 136 [388].

[475] Ibid 137–8 [339]–[347].

[476] *Amcor Ltd v Barnes (No 2)* [2019] VSC 849, [113] ('***Amcor***').

[477] *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60, 66.

[478] *Re SRW Nominees Pty Ltd* [2020] VSC 323, [281]–[298].

[479] Ibid.

[480] *Amcor* [2019] VSC 849.

[481] *Hartley Poyton Ltd v Ali* [2005] VSCA 53; (2005) 11 VR 568, 617–18 [106]–[107].

[482] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2003] VSC 244, [61].

[483] Even in the context of a judgment in accordance with these reasons, there remains a recovery risk through a Contravener's insolvency or inadequate insurance cover.

[484] *Talacko v Talacko* [2009] VSC 579, [11]; *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298, 367–9 [303]–[304].

[485] *Jaeger v Bowden (No 2)* [2016] NSWSC 897, [714].

[486] *Murdocca v Murdocca (No 2)* [2002] NSWSC 505, [24]; *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480, [13] (affirmed in relevant respects on appeal: *Kation Pty Ltd v Lamru Pty Ltd* [2009] NSWCA 145; (2009) 257 ALR 336).

[487] *Re Banksia Securities (in liq) (recs and mgrs apptd)* [2019] NSWSC 136.

[488] *Cockburn v Edwards* [1881] UKLawRpCh 203; (1881) 18 Ch D 449, 459, 463; *Doe v Filliter* [1844] EngR 622; (1844) 13 M&W 47, 51; *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1, 34, 36; *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100, [34]–[39]; *Gray v Sirtex Medical Ltd* [2011] FCAFC 40; (2011) 193 FCR 1, 9 [15] ('***Gray***'); *Lamont v University of Queensland (No 2)* [2020] FCA 720, [715].

[489] *Anderson v Bowles* [1951] HCA 61; (1951) 84 CLR 310, 323; *McIntyre v Quality Roofing Services Pty Ltd (No 2)* [2019] SASCFC 69, [16].

[490] *Bolitho No 8* [2020] VSC 174.

[491] *Bolitho v Banksia Securities Ltd (No 9)* [2020] VSC 309.

[492] *Gray* [2011] FCAFC 40; (2011) 193 FCR 1, 10 [22].

[493] James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) [21-016].

[494] [1962] 1 QB 306, 322.

[495] Ibid 322–3.

[496] *Civil Procedure Act 2010* (Vic) s 29(1)(a).

[497] Some of the Contraveners who resisted the issue of costs being determined as part of the principal findings (for example, Alex Elliott) nevertheless addressed the basis for making findings under the *Civil Procedure Act 2010* (Vic) in final submissions.

[498] See section P.

[499] *Bolitho No 6* [2019] VSC 653.

[500] See also Botsman Appeal Reasons, 143–5 [383]–[389], citing *Caason* [2018] FCA 527, [32].

[501] See [76], [1206].

[502] *Re Banksia Securities Ltd (in liq) (recs and mgs apptd)* [2019] NSWSC 1899, [14]; *Re Banksia Securities Ltd (in liq) (recs and mgrs appt)* (unreported, Supreme Court of New South Wales, Black J, 7 September 2020, 6); *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* (unreported, Supreme Court of New South Wales, Black J, 17 December 2020, 3).

[503] *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, [7]–[8].

[504] *Yara* [2013] VSCA 337; (2013) 41 VR 302, 317 [56].

[505] *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435; *Richfield Investments Pty Ltd v Oversea-Chinese Banking Corp Ltd* [2004] VSC 351.

[506] *National Australia Bank v Petit-Breuilh (No 2)* [1999] VSC 395.

[507] *Bolitho No 10* [2020] VSC 524.

[508] *Administration and Probate Act 1958* (Vic) s 29(1).

[509] Relying on *WorkCover Qld v Amaca Pty Ltd* [2010] HCA 34; (2010) 241 CLR 420, 434, 439 [33]–[51].

[510] [1981] HCA 45; (1981) 147 CLR 589, 610–11 (citations omitted).

[511] [1964] EWCA Civ 5; [1965] 1 QB 232, 242–3. See also *Harb v King Fahd Bin Abdul Azis* [2005] EWCA Civ 1324; [2006] 1 WLR 578, 584 [22]; *Doe Carmo v Ford Excavations Pty Ltd* [1984] HCA 17; (1984) 154 CLR 234, 240.

[512] [1957] P 120 ('***Sugden***').

[513] The legislation in question was *Law Reform (Miscellaneous Provisions) Act 1934* (UK) s 1(1).

[514] *Sugden* [1957] P 120, 134.

[515] *Stephenson v Human Rights & Equal Opportunity Commission* [1995] FCA 1757; (1995) 61 FCR 134, 146, revd (1996) 68 FCR 290.

[516] Unless an extension of time is granted for an application to be made after the civil proceeding has been finalised: *Civil Procedure Act 2010* (Vic) s 31.

[517] *Civil Procedure Act 2010* (Vic) s 7; *Yara* [2013] VSCA 337; (2013) 41 VR 302, 309–10 [20].

[518] *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd (No 4)* [2013] VSC 14, [5].

[519] (1996) 68 FCR 290.

[520] Ibid 296–7.

[521] Ibid 297.

[522] Ibid 299–300.

[523] [2018] HCA 23; (2018) 262 CLR 478.

[524] Ibid 501 [76].

[525] Ibid 500 [73] (citations omitted).

[526] *Legal Profession Uniform Law* (Vic) Part 4.4; *Legal Profession Uniform Law Application Act 2014* (Vic) s 13. Relevantly, *Legal Profession Act 2004* (Vic) s 3.5.2, as applied at the time the *Civil Procedure Act 2010* (Vic) commenced operation, required a law practice (including solicitors and barristers) to obtain a policy of insurance that provided cover for 'civil liability of the law practice ... in connection with the practice's legal practice and administration of trusts in this jurisdiction'. *Legal Profession Uniform Law Rules 2015* (Vic) rr 78–79, the presently operative statutory instrument, contains a substantially similar requirement, and additionally only permits the exclusion of indemnity for claims involving dishonesty or fraud if a claimant can claim and receive compensation from a fidelity fund or similar source established by legislation.

[527] [2007] FCA 1216; (2007) 164 FCR 450.

[528] [2008] NSWSC 187; (2008) 82 NSWLR 762 (‘***Reinhold***’). Reliance was also placed on *Dual Homes Victoria Pty Ltd v Moores Legal Pty Ltd* [2016] VSC 86; (2016) 50 VR 129; *Solak v Bank of Western Australia Ltd* [2009] VSC 82; *Trani v Trani (No 2)* (2019) 59 VR 362; *Pentridge Village Pty Ltd (in liq) v Capital Finance Australia Ltd (No 2)* [2020] VSC 284.

[529] [2021] VSCA 72 (‘***Tanah Merah***’).

[530] Ibid [11]–[15].

[531] Ibid [113].

[532] [2013] HCA 10; (2013) 247 CLR 613, 626–7 [15]–[18].

[533] [2013] NSWCA 58.

[534] Ibid [23].

[535] *Tanah Merah* [2021] VSCA 72, [120].

[536] *Dartberg* [2007] FCA 1216; (2007) 164 FCR 450, [30].

[537] *Tanah Merah* [2021] VSCA 72, [121].

[538] [2008] VSCA 208; (2008) 21 VR 84, 104–5 [107]–[109].

[539] *Tanah Merah* [2021] VSCA 72, [122]–[124]. A similar conclusion has also been reached in the ACT, see *Dunn v Hansen Australasia* Pty Ltd [2017] ACTSC 169; (2017) 12 ACTLR 138, 149, [48].

[540] *Tanah Merah* [2021] VSCA 72, [135].

[541] *Meagher* [1909] HCA 87; (1909) 9 CLR 655, 675.

[542] The rule is also referred to as the ‘joint and several liability rule’, see *Shrimp v Landmark Operations Ltd* [2007] FCA 1468; (2007) 163 FCR 510, 523 [62]. The same purpose has been noted by other courts in relation to proportionate liability regimes introduced in other states, see *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [93]–[94]. For a broad discussion of the history of the common law solidary liability rule and introduction of abrogating legislation, see *Hunt & Hunt* [2013] HCA 10; (2013) 247 CLR 613, 645–6 [80]–[84].

[543] *Hunt & Hunt* [2013] HCA 10; (2013) 247 CLR 613, 643–4. The background giving rise to the recommendations and ultimate implementation of proportionate liability, as well as its application beyond negligence, is detailed in the final report by Professor Davis commissioned by the Attorneys-General of the Commonwealth and New South Wales, see Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995).

[544] *Yara* [2013] VSCA 337; (2013) 41 VR 302, 305 [6]; *Hudspeth v Scholastic Cleaning & Consultancy Service Pty Ltd* [2014] VSCA 3; (2014) 42 VR 236, 246 [35]; *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 9)* [2014] VSC 622, [190] (‘***Hudspeth No 9***’); *Rozenblit v Vaner* [2018] HCA 23; (2018) 262 CLR 478, [76]. For discussions of similar reform in other jurisdictions, see *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1997] EWCA Civ 2999; [1998] 1 WLR 1426; 2 All ER 181, 191; *Bank of New Zealand v Savril Contractors Ltd* [2004] NZCA 4; [2005] 2 NZLR 475, 497 [85]–[87].

[545] Explanatory Memorandum, Civil Procedure Bill 2010 (Vic), 1. See also Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008); Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), 13.

[546] [2016] NSWCA 71.

[547] Ibid [21]. Basten JA identified that an objective test of responsibility was insufficient by reference to knowledge/notice requirement for equitable liability, citing *Grimaldi* [2012] FCAFC 6; (2012) 200 FCR 296.

[548] Ibid [22]–[23] (citations omitted).

[549] *Hudspeth No 9* [2014] VSC 622.

[550] Ibid [42].

[551] Ibid.

[552] See generally *Albion Insurance Co Ltd v Government Insurance Office (NSW)* [1969] HCA 55; (1969) 121 CLR 342, 351; *Burke v LFOT Pty Ltd* [2002] HCA 17; (2002) 209 CLR 282, 292–3, 299–303.

[553] For example, immunity from suit at common law and the right for their opinions to stand as evidence before a tribunal of fact.

[554] William Shakespeare, *Henry VI, Part III,* IV. 4.