



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

S CI 2012 07185

Case: S CI 2012 07185

Filed on: 26/02/2021 02:34 PM

BETWEEN

**LAURENCE JOHN BOLITHO & ANOR
(according to the attached Schedule)**

Plaintiffs

and

**JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE
RECEIVER OF BANKSIA SECURITIES LIMITED (RECEIVERS AND
MANAGERS APPOINTED) (IN LIQUIDATION) & ORS
(according to the attached Schedule)**

Defendants

AFPL'S CLOSING SUBMISSIONS

A. INTRODUCTION

1. AFPL has previously indicated to the Court and to the parties that it does not pursue its application for commission.¹ It follows that the Court need not consider or determine some of the legal issues that were raised in opening, in particular:
 - 1.1 whether the principles about agents being denied commission on account of misconduct should apply to reduce or eliminate the commission that may be awarded; and
 - 1.2 whether s 33ZF of the *Supreme Court Act 1986* (Vic) (**SC Act**) and/or ss 28/29 of the *Civil Procedure Act 2010* (Vic) (**CPA**) can be relied upon to reduce or eliminate a commission to which a funder is entitled under funding agreements entered into with group members.
2. These closing submissions address the following topics:
 - 2.1 AFPL's application for costs, which it continues to press to a limited extent only: see Part B.
 - 2.2 The effect of Mr O'Bryan's and Mr Symons' positions on AFPL: see Part C.

¹ See Transcript of hearing on 13 August 2020 (T665:27-28) [**TRA.500.007.0001 at 0008**].

- 2.3 Quantification of compensation: see Part D.
- 2.4 Apportionment: see Part E.
- 2.5 Penalty interest: see Part F.
- 2.6 Costs: see Part G.

B. AFPL'S COSTS APPLICATION

- 3. As senior counsel for AFPL indicated to the Court on 13 August 2020, AFPL only pursues its application for costs in respect of three categories of costs.
- 4. The **first category** are those costs which the Contradictor has not disputed.² AFPL understands those costs to be as follows.
 - 1. Counsel's fees – Simone Jacobson
\$65,340.00³ for the period 12 September 2017 to 10 November 2017
 - 2. Contradictor at partial settlement – David J O'Callaghan QC
One half of his fees were paid by AFPL pursuant to the orders made by Robson J on 26 August 2016 - \$46,750.00⁴
 - 3. Special Referee – Anthony Nolan SC
March to December 2017
\$16,713.75⁵
 - 4. Expert witness – Grant Sutherland
\$4,950.00⁶
 - 5. Expert witness – Kevin McCann
\$20,475.00⁷
 - 6. Cost of compliance with subpoena – ASIC

² See Transcript of hearing on 13 August 2020 (T665:28) [TRA.500.007.0001 at 0008] –(T666:4) [0009].
³ See Fourth Trimbo Report at [135] [EXP.020.001.0003 at 0035] – [144] [0037].
⁴ See Fourth Trimbo Report at [154] [EXP.020.001.0003 at 0038] - [158] [0039].
⁵ See Fourth Trimbo Report at [159]-[162] [EXP.020.001.0003 at 0039].
⁶ See Fourth Trimbo Report at [163]-[167] [EXP.020.001.0003 at 0040].
⁷ See Fourth Trimbo Report at [168] [EXP.020.001.0003 at 0040] - [174] [0042].

\$10,000.00⁸

7. Website services – NW Computing

\$3,965.50⁹

8. Advertisement – Milligan De Lany Advertising

\$64,058.46¹⁰

9. Advertisement – Lake Design

\$819.50¹¹

10. Registry Searches – Georgeson Shareholder Communications

\$1,303.50¹²

5. The Court should order that AFPL be reimbursed for these costs. There is sufficient evidence in the Fourth Trimbo Report for the Court to be satisfied that they were incurred, and reasonably so. And it is significant in that regard that the Contradictor did not dispute these costs. These amounts come to **\$234,375.71**.

6. The **second category** comprises the costs of Mr Crow in the amount of \$28,604.60¹³ for the period 27 May 2016 to 31 December 2018. There is no suggestion that those fees were not actually incurred, and there is no basis to find that they were not reasonably incurred.

7. *First*, it was not shown in his cross-examination that he was anything other than an honest witness and practitioner who assisted Mr Bolitho in the discharge of his functions as lead plaintiff. Indeed, he was cross-examined on the basis that he made “detailed narrations”.¹⁴ There was no suggestion that Mr Crow acted inappropriately.

8. *Second*, especially when it is contended by the Contradictor that the Lawyer Parties did not provide such assistance, there is no reason to deny costs for Mr Crow when he did provide such assistance as was within the limits of his retainer to provide.

⁸ See Fourth Trimbo Report at [175] [EXP.020.001.0003 at 0042] – [181] [0043].

⁹ See Fourth Trimbo Report at [182]-[184] [EXP.020.001.0003 at 0043].

¹⁰ See Fourth Trimbo Report at [185]-[188] [EXP.020.001.0003 at 0044].

¹¹ See Fourth Trimbo Report at [189]-[191] [EXP.020.001.0003 at 0044].

¹² See Fourth Trimbo Report at [192]-[197] [EXP.020.001.0003 at 0045].

¹³ See Fourth Trimbo Report at [72] [EXP.020.001.0003 at 0021] – [90] [0026].

¹⁴ Transcript of hearing on 3 August 2020 (T500:8) [TRA.500.005.0001 at 0087]; (T503:3-4) [0090].

9. The **third category** comprises the costs of Portfolio Law and Mr Zita. They invoiced and were paid \$401,808.00.¹⁵ That should be significantly reduced as Mr Trimbo opined in his fifth report.¹⁶ If the Court makes any findings against Portfolio Law and Mr Zita that has an impact on that figure, then the consequence is that AFPL paid those amounts to Portfolio Law and Mr Zita when they were not entitled to them. That difference will be recoverable by AFPL from Portfolio Law and Mr Zita. It is a matter for the Court to determine an appropriate reduction, noting that this is not a taxation,¹⁷ having regard to whatever findings it makes as to Portfolio Law and Mr Zita's conduct.

C. MR O'BRYAN AND MR SYMONS

10. Before the first day of the hearing, on 14 July 2020 (a revised version of the document was filed on 15 July 2020), AFPL filed a document making substantial admissions to allegations made by the Contradictor in Annexure A to their revised list of issues dated 3 July 2020 (**AFPL Admissions Document**).¹⁸
11. In that document, AFPL admitted the facts which would sustain a finding that Mr O'Bryan and Mr Symons were each agents of AFPL in respect of its application for commission and legal costs. Senior counsel for AFPL expressly indicated as much.¹⁹ AFPL admitted as follows:²⁰

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

- (a) Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law advanced the interests of AFPL; and
- (b) AFPL expressly or impliedly consented to Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law acting to advance the interests of AFPL in their application for commission and legal costs, ...

¹⁵ See Fourth Trimbo Report at [42] [**EXP.020.001.0003 at 0014**].

¹⁶ See Fifth Trimbo Report at [8(u)-(v)] [**EXP.020.008.0001 at 0009**].

¹⁷ See generally *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [177] [**ATH.600.039.0001 at 0042**] – [181] [**0044**]; *Lenahan v Powercor Australia Ltd* [2020] VSC 82 at [8] [**ATH.600.060.0001 at 0004**] – [18] [**0006**]; [36] [**0010**].

¹⁸ [**PLE.020.001.0001**].

¹⁹ Transcript of hearing on 3 August 2020 (T489:13-16) [**TRA.500.005.0001 at 0076**]; Transcript of hearing on 4 August 2020 (T540:8-14) [**TRA.500.006.0001_2 at 0002_2**].

²⁰ AFPL Admissions Document at [51] [**PLE.020.001.0001 at 0027**].

12. In the circumstances, then, the decision made by Mr O’Bryan²¹ and by Mr Symons²² not to maintain any further defence of the proceedings or to contend against the Court making any findings in accordance with the Contradictor’s allegations binds AFPL. AFPL accepts that to be so, and makes no submissions to the contrary.

D. CIVIL PROCEDURE ACT CLAIM

D.1 Principles

13. At paragraphs 196(a) and 196(d) of the Contradictor’s Revised List of Issues dated 27 October 2020 (**Contradictor’s Revised List of Issues**), the Contradictor claims that AFPL and the Lawyer Parties’ contraventions of the CPA caused group members loss, for which they seek compensation and penalty interest. We deal with interest below.
14. While not explicitly mentioned, this claim must be for an order under s 29(1)(c) of the CPA. That section provides:

Court may make certain orders

- (1) 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—

...

- (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;

15. Identification of loss necessarily entails a counterfactual analysis. Each member of the High Court in *Lewis v Australian Capital Territory* made this clear.²³
16. In that case, Gageler J said:²⁴

The analysis at the stage of attributing tortious liability is thus as to “how things came about” without needing to extend to “what made a difference”.

²¹ See Transcript of hearing on 3 August 2020 (T485:9-22) [TRA.500.005.0001 at 0072]; Letter from MinterEllison to the parties dated 3 August 2020 [MSC.010.004.0001].

²² See Transcript of hearing on 13 August 2020 (T661:9-15) [TRA.500.007.0001 at 0004].

²³ (2020) 94 ALJR 740 [ATH.600.253.0001].

²⁴ (2020) 94 ALJR 740 at 752 [29]-[31] [ATH.600.253.0001 at 0013].

Counterfactual analysis enters at the subsequent stage of determining whether, and if so to what extent, the liability of the Territory gives rise to an entitlement on the part of Mr Lewis to compensatory damages.

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”.

No threshold of “loss” needs to be met before the counterfactual analysis mandated by the compensatory principle is applied. Whether, and if so to what extent, compensable damage - “loss or harm occurring in fact” - has occurred is determined through the application of the same analysis. The outcome determines the entitlement of the victim of the tort to compensatory damages and sets the outer limit of the extent of that entitlement.

17. To identify the counterfactual, Gageler J said that “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.”²⁵ His Honour referred to “[t]he fact-specific inferential nature of the requisite counterfactual inquiry”.²⁶

18. Similarly, Gordon J said that:²⁷

...when assessing compensatory damages, some counterfactual analysis is necessary. It is necessary because the settled principle governing compensatory damages is that they *compensate* for loss or injury. The measure is to be, as far as possible, that amount of money which will put the *injured* party in the same position they would have been in had they not sustained the wrong. Put in negative terms, “a plaintiff cannot recover more than he or she has lost”. That reflects the fact that the compensatory principle is one *part* of the question of relief, and that relief must be appropriate for the situation of the plaintiff. ...

19. Her Honour added that “to refuse to consider the counterfactual scenario *when assessing damages* would be to have a court award damages while blind to the realities

²⁵ (2020) 94 ALJR 740 at 753 [35] [ATH.600.253.0001 at 0014].

²⁶ (2020) 94 ALJR 740 at 753 [36] [ATH.600.253.0001 at 0014].

²⁷ (2020) 94 ALJR 740 at 755-756 [50] [ATH.600.253.0001 at 0016].

of the situation”.²⁸ She said that “it is necessary to identify loss in order to award compensatory damages. It is *that* inquiry which involves the use of a counterfactual. The counterfactual is the position the plaintiff would have been in had the tort not been committed”.²⁹ She said that “a counterfactual is often useful in seeking to identify the loss or injury from a wrong for which a person may then be compensated” and that “[i]t is difficult to reach that conclusion [about compensable loss] without a counterfactual”.³⁰ “The counterfactual is directed only at determining the loss for which a person is to be compensated. It helps the court to fashion an appropriate remedy”.³¹ Gordon J said that “[t]he correct counterfactual in the assessment of loss and damage is what would have happened if the tort had not been committed”.³²

20. Kiefel CJ and Keane J likewise associated counterfactual analysis with the compensatory principle to identify the “real loss” suffered by a plaintiff.³³

21. Edelman J said:³⁴

Causation is a concept that establishes a link between a physical event and a 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? In other words, would the plaintiff have suffered the same loss but without a violation of their rights? If the loss would not otherwise have occurred then, subject to other legal issues including remoteness of damage, it is easy to see why the defendant should be responsible for the loss. Conversely, if the defendant’s act made no difference to the outcome, because “but for” the act of the defendant the loss would have occurred lawfully, then the defendant’s act was not a cause of the loss and the defendant’s responsibility for that loss becomes more difficult to justify.

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

²⁸ (2020) 94 ALJR 740 at 758 [67] [ATH.600.253.0001 at 0019].

²⁹ (2020) 94 ALJR 740 at 758 [69] [ATH.600.253.0001 at 0019].

³⁰ (2020) 94 ALJR 740 at 758 [71] [ATH.600.253.0001 at 0019].

³¹ (2020) 94 ALJR 740 at 758 [72] [ATH.600.253.0001 at 0019].

³² (2020) 94 ALJR 740 at 763 [94] [ATH.600.253.0001 at 0024].

³³ (2020) 94 ALJR 740 at 748 [2] [ATH.600.253.0001 at 0008] – [3] [0009].

³⁴ (2020) 94 ALJR 740 at 775 [151]-[152] [ATH.600.253.0001 at 0036].

defendant can be held responsible for a loss if their actions materially contributed to a loss which would have occurred in any event. A well-established example is where a defendant's fraudulent misrepresentation is a factor that induces an adverse decision resulting in loss even if that decision would have been made 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 imposition of responsibility as requiring the act to have "caused or materially contributed" to the loss. The extension of responsibility in exceptional cases based on material contribution was traced by four members of this Court in *Strong v Woolworths Ltd* to a Scottish decision in which several factories had contributed to the polluted state of a river. In that case, liability for nuisance did not require the act of any single factory to have been necessary for the nuisance. As French CJ, Hayne and Kiefel JJ said in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*, a material contribution has been said to "require only that the act or omission of a wrongdoer play some part in contributing to the loss".

22. His Honour also said:³⁵

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.

23. The facts that (a) AFPL made significant admissions of wrongdoing in the AFPL Admission Document, and that (b) the decisions of Mr O'Bryan and Mr Symons as to their non-defence of this proceeding affects AFPL, do not mean that this Court may assess loss **without** engaging in a counterfactual analysis. In this regard, Bell, Keane and Nettle JJ explained in *Berry v CCL Secure Pty Ltd* that:³⁶

³⁵ (2020) 94 ALJR 740 at 783 [178] [ATH.600.253.0001 at 0044].

³⁶ (2020) 94 ALJR 715 at 725 [27] [ATH.600.253.0001 at 0012].

Permitting a fraudster to plead and prove a lawful counterfactual which, but for its fraud, the fraudster would have pursued, is not in any sense to permit the fraudster to take advantage of its fraud. As will be explained, it is to do no more than to limit the amount recoverable by the victim to the amount of loss or damage which the victim is shown to have suffered “by” the contravening conduct within the meaning of s 82 of the TPA. That accords with the general principle at common law that a wrongdoer is not required to compensate a victim for loss which the wrongdoer does not cause, even where the cause of action is the tort of deceit.

24. On 28 July 2020, the Court asked questions about the role of a counterfactual in this proceeding.³⁷

25. In its written opening submissions, AFPL explained how it saw a counterfactual arising in this proceeding in the context of the Contradictor’s claims under the CPA:³⁸

113. Application of the compensatory principle requires the Court to identify the group members’ loss with precision. Only then can a money sum be quantified to compensate for that loss

114. AFPL submits that the relevant “loss” in this case is a lost opportunity to recover more and sooner. The Court should notice that there are three features embedded in this statement of the loss.

114.1 *First*, it is necessary for the Court to determine how much commission and costs AFPL would have obtained had the disentitling conduct not occurred.

114.2 *Second*, it is necessary for the Court to determine when that amount would have been distributed to group members.

114.3 *Third*, the Court then needs to compare that counterfactual to the payments which were in fact made, and assess the difference.

³⁷ Transcript of hearing on 28 July 2020 (T90:10-20) [TRA.500.007.0001 at 0008].
³⁸ AFPL Opening Submissions at [113] [SBM.020.002.0001 at 0036] - [115] [0037].

114.4 *Fourth*, it is a lost opportunity. Principles applicable to the assessment of opportunities apply to reduce the quantum unless the Court is satisfied that the opportunity would certainly have come to pass.

115. It is a matter for the Contradictor to prove the loss or damage on the balance of probabilities.

26. In short, AFPL’s submission was and is that in order to “compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation”, the Court must identify the “loss” that has been materially contributed to by the contravention. This is done by considering what would have occurred but for the contravention or contraventions. In this way, a counterfactual is required and introduced.

27. While the word “counterfactual” is not used in the Contradictor’s Revised List of Issues, it was and is implicit in it. Thus, for example:³⁹

27.1 paragraph 194(f) says that “[b]ut for the contraventions of the Paramount Duty and Overarching Obligations alleged above ... the court would have approved reasonable costs and funding commission in a significantly lower sum than currently claimed by AFPL”; and

27.1 the particulars to paragraph 196(a) say that “[b]ut for the Contraventions, debenture holders/group members would have received their proper entitlement to the Settlement Sum by about **21 March 2018** (assuming there had been no appeal) or alternatively by no later than **29 November 2018** (assuming there had been an appeal)”.

28. Group members should then be compensated by a sum of money that reflects the difference between what has occurred in fact and what would have occurred in the counterfactual analysis.

D.2 Allegations made

29. Notwithstanding the length with which AFPL has addressed the issue of a counterfactual above, there is some conceptual complexity in working out appropriate counterfactuals in this case. That is because several allegations of wrongdoing have

³⁹ Contradictor’s Revised List of Issues [PLE.010.005.0001].

been made (and will inevitably be found to have been established). The conceptual task of identifying and analysing counterfactuals, while clear in theory, is thus complex in practice.

30. It is for the party seeking compensation (usually, the plaintiff) to establish its loss.⁴⁰ In a proceeding in which serious allegations of wrongdoing are made, and where a detailed set of allegations has been frequently revised and relied upon, it is appropriate for this Court to proceed to identify the relevant “loss” by reference to what the Contradictor has alleged.⁴¹ In any event, none of the parties has proceeded otherwise than on the basis of the Revised List of Issues, and it would not be appropriate to proceed as if the matter were at large.
31. AFPL admits the following matters.
 - 31.1 In paragraph (1) to the particulars to paragraph 74 of the Revised List of Issues, the Contradictor alleges that \$30,000 plus GST in Mr Trimbos’s costs were wasted. AFPL admits this.
 - 31.2 Paragraph (1) to the particulars to paragraph 149 of the Revised List of Issues alleges that the Settlement Opinion Contraventions caused “wasted costs associated with the First and Second Bolitho Opinions and the First Approval Application” in the sum of approximately **\$125,000**. AFPL admits this.
 - 31.3 As to paragraph 194(j), AFPL admits those matters save for the costs of the Bolitho Scheme. As to the Bolitho Scheme, AFPL refers to **Part D.4** below.
32. In a number of places, the Contradictor articulates the loss alleged by reference to different points in time at which it is said that debenture holders would have received the settlement sum. For example, in paragraph (5) to the particulars to paragraph 74 of the Revised List of Issues, the Contradictor alleges that:⁴²

Accordingly, if the fees of Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law fees were limited to a fair and reasonable amount reflecting the work actually

⁴⁰ See, eg, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 (in the context of breach of contract) [ATH.600.244.0001 at 0017].

⁴¹ See and compare *Australian Building and Construction Commissioner v Hall* (2018) 261 FCR 347 at [49] [ATH.600.241.0001 at 0022] – [51] [0023] (civil penalty context).

⁴² This allegation is effectively repeated in paragraph (6) of the particulars to paragraph 98 [PLE.010.005.0001 at 0109], paragraph (5) of the particulars to paragraph 149 [0130], paragraph (4) of the particulars to paragraph 165 [0139], paragraph (2) of the particulars to paragraph 173 [0146], the particulars to paragraph 180 [0151] of the Revised List of Issues. See also paragraph 194(i) [0157] and 196(a) [0158].

undertaken by them and the rates they were properly entitled to charge, then by about 21 March 2018 or alternatively by about 29 November 2018, the Settlement Sum would have been distributed to debenture holders/group members. Debenture holders have suffered losses from the delay in payment of **\$5 - \$7 million**. The Contradictor refers to paragraph 196(a) below.

AFPL submits below in **Part D.3** that the appropriate date is 29 November 2018.

33. Several paragraphs in the Revised List of Issues seek costs associated with this remitter. Those paragraphs are:
- 33.1 Paragraphs (6) and (7) to the particulars to paragraph 74 of the Revised List of Issues.
 - 33.2 Paragraph 159(b) of the Revised List of Issues.
 - 33.3 Paragraph 194(k), (l) and (m) of the Revised List of Issues.
 - 33.4 Paragraph 196(b) of the Revised List of Issues.

AFPL resists this for the reasons set out in **Part D.4** below.

34. As to paragraph 159(a) of the Revised List of Issues, AFPL does not press for those costs, and there is therefore no “loss” to be compensated.
35. Leaving aside discrete heads of loss, the gist of the Contradictor’s alleged counterfactual is that but for the contraventions, Croft J would have approved applications by AFPL for a commission and costs at a lesser amount than actually occurred. That gives rise to a number of sub-issues.

D.2.1 Apportionment

36. The first sub-issue is how much of the \$64 million Settlement Sum would have been apportioned or attributed to the Bolitho Group Proceeding and how much would have been apportioned or attributed to the SPR proceeding.
37. AFPL submits that the Settlement Sum would have been apportioned on the basis that 66% is attributable to the Bolitho Group Proceeding, for the same reasons that were set out in opening and are repeated here. The reasons in summary for this contention are as follows.
- 37.1 This apportionment is consistent with the opinion of Mr Bolitho’s former counsel, Mr O’Byrne SC and Mr Symons, and the SPR’s counsel, Mr Dick SC,

Mr Redwood and Ms Bindon, that the Bolitho Group Proceeding had better prospects of success. It is only one percentage point above the range proffered by Mr Dick SC, Mr Redwood and Ms Bindon of 50-65%.

37.2 It is consistent with the Partial Settlement.

37.3 It is consistent with material contemporaneous with the settlement in November 2017.

38. *Advices of Mr Bolitho's counsel.* Mr O'Bryan SC and Mr Symons consistently opined that the Bolitho Group Proceeding had better prospects of success than the SPR's Proceeding.⁴³ As is apparent from the advices of the SPR's counsel, there seems to be no disagreement on this score.

39. *Advices of the SPR's counsel.* In the joint memorandum of advice of R A Dick SC and J A Redwood dated 12 May 2017, they "emphasise[d] the importance of viewing the two sets of claims by Banksia and Class Action, from the standpoint of the best interests of debenture-holders, as complementary such that in combination the position of debenture-holders is vastly improved than if either of them were being pursued singularly and without the other".⁴⁴ They opined that "Banksia's claims have reasonable prospects of success (slightly better than even)" and that "the Class Action's claims are more likely than not to prevail ... and probably enjoys better prospects than Banksia's claims".⁴⁵

40. By 19 March 2019, the views of Dick, Redwood and Bindon were "materially unchanged",⁴⁶ and they opined that they "consider[ed] a reasonable range for any apportionment ... of the settlement sum would be to attribute between 35% to 50% to Banksia's claims compromised by the Settlement Deed".⁴⁷

⁴³ See N O'Bryan SC and M Symons, Confidential and Privileged Joint Opinion in Reply dated 13 March 2019 at [82] [CCW.032.001.0253 at 0282].

⁴⁴ Joint memorandum of advice of R A Dick SC and J A Redwood dated 12 May 2017 at [5] [SPR.007.001.0001 at 0001].

⁴⁵ Joint memorandum of advice of R A Dick SC and J A Redwood dated 12 May 2017 at [34(a)-(b)] [SPR.007.001.0001 at 0008]. See also Joint supplementary memorandum of advice of R A Dick and J A Redwood dated 7 November 2017 at [2(b)-(c)] [SPR.007.001.0010 at 0010]; Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [3(a)-(b)] [CCW.022.001.0460 at 0460].

⁴⁶ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [14] [CCW.022.001.0460 at 0463].

⁴⁷ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [15] [CCW.022.001.0460 at 0463].

41. Further, they said:⁴⁸

At the outset we emphasise that in our opinion it is highly likely that the very favourable settlement of \$64 million against Trust Co (exhausting Trust Co's assets) was likely a result of both the Bolitho Proceeding and the SPR Proceeding. The settlement was the product of the combined forensic, legal and strategic advantages of the prosecution of the two sets of claims. For that reason, we think it would be somewhat artificial, as we emphasised in the Previous SPR Opinions, to fasten singularly on the claims made against Trust Co in the Bolitho Proceeding or the SPR Proceeding in isolation. Nothing that is said below is intended to suggest we think the settlement of \$64 million could necessarily have been achieved through the prosecution of the SPR Proceeding alone. We were always acutely conscious of the significance of the Bolitho Proceeding. Equally, however, we are confident that the settlement of \$64 million would not have been achieved had only the Bolitho Proceeding been prosecuted and without the immediate, and wider, benefits of the SPR Proceeding and the SPRs' conduct of the Proceedings.

42. They opined:⁴⁹

At the same time, we accept, other things being equal, Mr Bolitho's claims on behalf of debenture holders enjoyed better prospects of success than Banksia's claims because Banksia's claims had to confront some challenging and novel legal points. There would appear to be a fair degree of agreement between us and counsel for Mr Bolitho in that regard. In particular, we agree with the Bolitho Opinion (at [159]) that the claims made in the Bolitho Proceeding accorded with legal principle and were orthodox. It had that distinct and important advantage over the SPR Proceeding. ...

43. They rejected a 80/20 apportionment,⁵⁰ but said subject to certain qualifications “we think a more appropriate characterisation of the two claims, in light of the actual

⁴⁸ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [19] [CCW.022.001.0460 at 0465].

⁴⁹ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [89] [CCW.022.001.0460 at 0488].

⁵⁰ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [90] [CCW.022.001.0460 at 0488].

pleadings and evidence in the Proceedings rather than from a narrower juridical viewpoint only, is that Bolitho's claims enjoyed good prospects of success (around 60%) and Banksia's claims had reasonable prospects of success (around 50%) and together were clearly better than 60%".⁵¹

44. Ultimately, they opined:⁵²

In light of the Previous SPR Opinions and the above matters, we consider that a reasonable range for an apportionment (similar to the exercise performed for the Partial Settlement for purposes of determining a denominator for the funding commission) of the settlement sum would be to attribute between **35% to 50%** to the Banksia's claims compromised by the Settlement Deed. This assessment is necessarily based on a somewhat abstract legal assessment of the relative prospects of the two sets of claims and the different mix of advantages and challenges of those claims. However, we consider it a reasonable range within which some element of commercial latitude and judgment and a range of other relevant considerations could be brought to bear on the issue.

45. In their response opinion dated 2 April 2019, they repeated that "we have concluded Bolitho's claims enjoyed somewhat better prospects of success in all the circumstances if the SPRs continued to be principally responsible for prosecution of the Proceedings: which in turn informed our apportionable range of 35-50% for Banksia's claims out of the settlement sum of \$64 million".⁵³

46. Should the apportionment be at the low end (that is, 50:50) of the range contemplated by the SPR's counsel, taking into account the work actually done by the lawyers in the Bolitho Group Proceeding? AFPL submits no. The advices were prepared by the SPRs' counsel who were aware of the relative contributions of the legal teams to the successful settlement. Those contributions reflected the work done, not the work not done but billed for.

⁵¹ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [91] [CCW.022.001.0460 at 0488].

⁵² Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [241] [CCW.022.001.0460 at 0532].

⁵³ R A Dick SC, J A Redwood and P Bindon, Confidential and privileged joint opinion in further reply dated 2 April 2019 at [3] [CCW.032.001.0287 at 0287].

47. **Partial settlement.** In relation to defendants who were defendants in both the Bolitho Group Proceeding and the SPR's Proceeding, the partial settlement was apportioned as to two-thirds to the Bolitho Group Proceeding and one-third to the SPR's Proceeding.⁵⁴
48. **Contemporaneous documents.** Lindholm had agreed to a 80/20 split.⁵⁵ The Committee also considered it and was content to proceed.⁵⁶ Dick, Redwood and Bindon opined that “[n]othing said in this legal opinion is intended to any way detract from the pragmatic and commercial reasons explaining the SPRs' support, subject to independent Court assessment and approval, for the payments sought by AFPL”.⁵⁷
49. On 10 November 2017, Mr Paul Harlond of Ferrier Hodgson sent an email to Mr Lindholm that said relevantly:⁵⁸

As discussed, please find attached a spreadsheet, which sets out the estimated outcome for Debenture holders if the settlement with Trust Co proceeds at \$64 million. The spreadsheet:

* Includes an analysis as to how the split between Banksia and the Class Action may play out to assist in your meeting this afternoon with Mark.

...

50. The spreadsheet which Mr Harlond attached apportioned the sum on the basis that two-thirds should be apportioned to the Bolitho Group Proceeding and one-third to the SPR's Proceeding.⁵⁹ Mr Lindholm gives evidence that:⁶⁰

...Mr Harlond's spreadsheet adopts the apportionment of the Settlement Sum from the Partial Settlement as a starting point, but this had not been discussed with Mr Elliott and all figures in the spreadsheet could be changed depending

⁵⁴ This is explained in N O'Bryan SC and M Symons, Confidential and Privileged Joint Opinion in Reply dated 13 March 2019 at [26]-[27] [CCW.032.001.0253 at 0263].

⁵⁵ See Confidential affidavit of John Ross Lindholm dated 29 March 2019 at [16] [SPR.006.001.0005 at 0005_0004] - [20] [0005_0006].

⁵⁶ See Confidential affidavit of John Ross Lindholm dated 29 March 2019 at [18] [SPR.006.001.0005 at 0005_0004].

⁵⁷ Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [16] [CCW.022.001.0460 at 0464].

⁵⁸ Tab 1 in Confidential Exhibit JRL-1 to the Confidential Affidavit of John Ross Lindholm dated 29 March 2019 [SPR.006.001.0005 at 0009].

⁵⁹ Tab 1 in Confidential Exhibit JRL-1 to the Confidential Affidavit of John Ross Lindholm dated 29 March 2019 [SPR.006.001.0005 at 0009].

⁶⁰ Confidential Affidavit of John Ross Lindholm dated 29 March 2019 at [14] [SPR.006.001.0005 at 0003].

on what was discussed. Mr Harlond's email was not sent to Mr Elliott and was an internal document only.

51. An apportionment of the commission of two thirds in AFPL's favour and one third in favour of the SPR is reasonable.

D.2.2 Percentage of debenture holders by value

52. The second sub-issue is from what percentage of debenture holders by value would AFPL have been entitled to recover. In this remitter, AFPL did not adduce admissible evidence of this, and ultimately did not need to pursue an application to seek to file any late in light of Mr O'Bryan's and Mr Symons's decisions. But for the purpose of the counterfactual, the Court can and should proceed on the basis that AFPL had made funding agreements with 55% of debenture holders by value. That was the figure used at the partial settlement, and no misconduct has been alleged in respect of the use of that figure at that time. Nor has any of the disentiing conduct gone to the sub-issue of the percentage of debenture holders by value.

D.2.3 Percentage commission rate

53. The third sub-issue is the commission rate which would have been ordered. As at the end of 2017 and the beginning of 2018, it is very probable that a common fund order would have been sought rather than a claim under the funding agreements. But in identifying the counterfactual, the inference to be drawn is that AFPL would have opted for whichever option would lead to the best commercial outcome for itself as a rational commercial firm.
54. That means at a minimum, it would have sought the 30% commission it was entitled to from debenture holders with whom it had made funding agreements. In that regard, the standard form funding agreement titled "Banksia Class Action Litigation Funding Agreement" (**Funding Agreement**) contained the following clause concerning AFPL's entitlement to commission:⁶¹

12. Repayment of Case Costs and Consideration

⁶¹ The funding agreement with Mr Bolitho is [CCW.002.001.1511]. The standard form was attached to a letter to debenture holders which is [CCW.022.001.0090].

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

- (a) the Case Costs paid by BSLLP in relation to the Class Action to which the Resolution Sum relates; and
- (b) a further amount, as Consideration for the financing of the Case and performance by BSLLP of its various obligations under this BSLLP Agreement, being a maximum of 30% of that Resolution Sum.

12.2. No fees, commissions or other payments will become due or owing by the Plaintiff to BSLLP in relation to the Case.

55. Clause 1.1 contained definitions relevant to the operation of this clause as follows:

“Case” means the Proceedings;

“Case Costs” means the following costs and expenses:

- (a) the costs and expenses associated with the Case Investigation and Case Management by the Lawyers or BSLLP or both;
- (b) the costs involved in the provision by BSLLP of any security for costs;
- (c) any Adverse Costs Order paid by BSLLP;
- (d) the costs incurred by BSLLP in quantifying any Adverse Costs Order;
- (e) the reasonable legal fees and the reasonable disbursements (including Counsel fees) reasonably incurred by the Lawyers for the dominant purpose of preparing for, conducting and resolving the Proceedings;
- (f) any costs paid by BSLLP pursuant to this BSLLP Agreement;
- (g) all of BSLLP’s out of pocket costs and expenses paid or incurred in relation to the Case, including in relation to any consultants and experts engaged by BSLLP ; and
- (h) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred.

“**Claims**” means the claim or claims the Plaintiff has or may have against some or all of the Defendants and for loss and damage caused to the Plaintiff by the conduct of one or more of the Defendants in relation to or arising out of the acquisition by the Plaintiff of any Securities.

“**Class Action**” means the proceedings commenced by the Plaintiff in the Supreme Court of Victoria (SCI 2012 7185) against the Defendants.

“**Consideration**” has the same meaning as in the GST Act

“**Plaintiff**” means any company or individual who has agreed with BSLLP to be bound by this Agreement and the successors or assigns of that company or individual.

“**Proceedings**” means the Class Action concerning all or some of the Claims.

“**Resolution Sum**” means any money received or payment made to settle, compromise or resolve one or more or all of the Claims.

56. In short, clause 12.1(b) entitled AFPL to commission of up to 30% of the money received or payment made to settle the Bolitho group proceeding.
57. Clause 12.2 entitles AFPL to recover 30% of the Resolution Sum from each person who entered into a Funding Agreement. The words “being a maximum of 30% of that Resolution Sum” does not grant any discretion to select a commission in a range up to 30%. The contractual entitlement is 30%.⁶²
58. The words identify a fixed sum by way of percentage, and the language of “maximum” does nothing more than identify for group members, in simple language, that they are to pay 30% of the Resolution Sum to AFPL by way of commission and not more.

D.2.4 Commission

59. It is appropriate in the counterfactual to use this contractual claim, because it is improbable that any common fund order would have been made by Croft J which permitted AFPL to recover more than what it was entitled to under the funding agreements.

⁶² See also *Re Banksia Securities Ltd (rec and mgr apptd)* [2017] VSC 148 at [104] (Robson J) [ATH.600.098.0001 at 0026].

60. It follows that the commission which would have been ordered in the counterfactual is $66\% \times 55\% \times 30\% \times \$64 \text{ million} = \$6,969,600$.
61. It follows that, subject to the recovery of costs, group members would have received **\$57,030,400**.

D.2.5 Costs

62. In the counterfactual, AFPL would have also sought and been permitted to recover costs. The costs which would have been incurred and paid in accordance with usual terms would have included the following.
63. *First*, the costs which AFPL seeks to recover in **Part B** above.
64. *Second*, Mr O'Bryan's fees. While Mr 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.⁶³ An appropriate figure is the first draft of his fees prepared by Mr O'Bryan before any inflation, which was **\$1,049,300**.⁶⁴
65. *Third*, an allowance of **\$200,000** would be made for Mr Symons's fees.⁶⁵

D.2.6 Overall amount

66. It follows that debenture holders in the counterfactual would have received $\$57,030,400 - \$1,049,300 - \$200,000 - \$234,375.71 - \$28,604.60 - (\text{Portfolio Law/Zita}) = \$55,518,119.69 - (\text{Portfolio Law/Zita})$ (**Counterfactual Amount**).

D.3 Timing

67. The Court should find that Mrs Botsman would have sought leave to appeal Croft J's approval regardless of any disentitling conduct. That is because Mrs Botsman's proposed grounds of appeal extended to the fairness and reasonableness of the **total settlement sum**.

⁶³ See, eg, Transcript of hearing on 27 July 2020 (T78:8-16) [**TRA.500.001.0001 at 0079**]; Confidential and privileged joint opinion in reply of R A Dick SC, J A Redwood and P Bindon dated 19 March 2019 at [20] [**CCW.022.001.0460 at 0465**], [52] [**0476**], [60] [**0477**], [64] [**0479**], [77] [**0484**].

⁶⁴ See [**NOB.500.001.7416**].

⁶⁵ Mr Symons's billed a total of \$709,726 (inclusive of GST). His fee slips [**EXP.020.005.0001**] refer to approximately 1000 hours of attendances, conferences and appearances, equating to fees of approximately \$280,000. When the fee slip entries are compared against the available documentary evidence of work undertaken, in excess of \$160,000 in fees appear justified (see excel spreadsheet at Attachment A to these submissions). In the circumstances, AFPL suggests an allowance of \$200,000 is reasonable.

68. That Mrs Botsman was unsatisfied with the total settlement sum of \$64 million is clear from grounds 3 and 4 before the Court of Appeal. Those are set out in its judgment.⁶⁶
69. The fairness and reasonableness of the total settlement sum had nothing to do with any disentitling conduct. No evidence has been put before the Court to suggest that but for any disentitling conduct, Mrs Botsman would not have sought leave to appeal.
70. It follows that an application for leave to appeal was inevitable. It may be that the Court of Appeal would have determined such an appeal more quickly had there been less issues in dispute. It is nonetheless appropriate to fix the relevant time by which group members might have received a distribution of the Counterfactual Amount at 29 November 2018 (being 28 days after the delivery of judgment by the Court of Appeal).⁶⁷ That has a foundation in fact, not speculation. And it can be seen to be appropriate, having regard to the lack of any proper basis to infer when the Court of Appeal might otherwise have delivered a judgment.
71. In setting the date at 29 November 2018, the Court is thus not taking into account the possibility that group members would have received the Counterfactual Amount in December 2018 (or even February 2019 given the time of year), because 29 November 2018 assumes that funds could be distributed immediately. By not taking this into account, the Court is, in effect, but appropriately, splitting the difference and thereby appropriately doing the best that it can.

D.4 Costs

D.4.1 Costs of the remitter

72. The costs of the SPRs and of the Contradictor of the remitter should not be payable as compensation as a matter of legal principle.
73. The Contradictor is effectively in the position of a party, representing the interests of debenture holders in assisting the Court.⁶⁸ The SPRs are a party to the proceeding. As with any party which is successful, the Contradictor (or the group members to pay the Contradictor) and the SPRs will obtain costs orders in their favour. Any difference

⁶⁶ *Botsman v Bolitho* (2018) 57 VR 68 at 101-102 [158] [ATH.600.102.0001 at 0034], 136 [338] [0069] - 138 [347] [0071].

⁶⁷ Settlement Deed at cl 7.2.5 [MSC.020.002.0001 at 0012].

⁶⁸ *Bolitho v Banksia Securities Ltd (receivers and managers appointed) (in liq)* [2019] VSC 653 at [73(c)] [ATH.600.022.0001 at 0027].

between the costs order and fees actually incurred and payable cannot as a matter of long-standing legal principle be recovered as damages.⁶⁹ (And of course, if no costs order is obtained, then that does not mean that damages can be awarded instead to fill the gap; this just means that the difference between any cost order – on this hypothesis, none – and fees actually incurred is all the greater.)

D.4.2 Costs of First Approval

74. The approval before Croft J is part of this proceeding. Costs of that approval thus fall within the same principle above in **Part D.4.1**. Fees incurred by the SPRs are to be recovered if at all in the form of an order for costs, not as damages.

D.4.3 Court of Appeal Costs and High Court costs

75. The SPRs' costs of resisting Mrs Botsman's application for leave to appeal and resisting the High Court special leave application are not recoverable as damages in this proceeding.

76. It is unnecessary to determine whether the Court of Appeal proceeding and the special leave application are separate from or part of this proceeding. Either way, costs are not recoverable as damages.

77. If the appeal proceedings are seen as part of this proceeding, then the above principle in **Part D.4.1** applies with the same force.

78. If the appeal proceedings are separate, then a related principle derived from the High Court decision in *Anderson v Bowles*.⁷⁰ Costs incurred by one party in proceedings are not recoverable against a person who was also a party to those other proceedings in separate litigation.⁷¹

⁶⁹ See *Cockburn v Edwards* (1881) 18 Ch D 449 at 459 [ATH.600.243.0001 at 0011] (Jessel MR), 463 [ATH.600.243.0001 at 0015] (Cotton LJ); *Doe v Filliter* (1844) 13 M & W 47 at 51 (Pollock CB) [ATH.600.245.0001 at 0002]; *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 34 [ATH.600.242.0001 at 0034] – 36 [0036] (Sheller JA; Mason P and Priestley JA agreeing); *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100 at [34] [ATH.600.255.0001 at 0019] - [39] [0021] (Hamilton J); *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 9 [15] (Bennett, Gilmour and Gordon JJ) [ATH.600.247.0001 at 0009]; *Lamont v University of Queensland [No 2]* [2020] FCA 720 at [715] (Rangiah J) [ATH.600.252.0001 at 0155].

⁷⁰ See *Anderson v Bowles* (1951) 84 CLR 310 at 323 [ATH.600.014.0001 at 0014].

⁷¹ See also *McIntyre v Quality Roofing Services Pty Ltd [No 2]* [2019] SASCFC 69 at [16] [ATH.600.254.0001 at 0005].

E. APPORTIONMENT

79. AFPL does not advance any submissions on whether apportionment is possible under Part IVAA of the *Wrongs Act 1958* (Vic). No doubt the power to order compensation under s 29(1)(c) of the CPA requires separate orders against defendants, and in doing so an evaluation of each defendant’s contribution to a compensable loss.
80. On the assumption that apportionment is possible, and in the circumstances of Mr O’Bryan’s and Mr Symons’s decisions not to contest the allegations made against them, AFPL submits that counsel and AFPL are at least equally responsible.

F. PENALTY INTEREST

81. The Court can order penalty interest: s 29(c)(i) of the CPA. The Contradictor seeks such an order “for penalty interest in respect of the delay in the payment of an amount claimed in the civil proceeding”.⁷²
82. AFPL makes the following submissions.
83. *First*, there is no warrant for penalty interest to be imposed prior to 17 May 2019 when the High Court refused AFPL special leave to appeal from the orders of the Court of Appeal. Unless applying for special leave was in fact a breach of some contractual entitlement not to apply (which it is not), then AFPL, like any other litigant, had an entitlement to seek that special leave. No party should be penalised for doing so. That would itself undermine the administration of justice. Interest at a standard commercial rate would be more appropriate to strip AFPL of the benefit of the use of funds during that period, rather than to penalise it for exercising its right to seek special leave.
84. *Second*, it would be inappropriate to impose penalty interest on AFPL from 14 July 2020 onwards when AFPL filed the AFPL Admissions Document. Those admissions were appropriate on the documents and the evidence which Mr O’Bryan and Mr Symons proposed at the time to give. As each of them made their decisions not to contest the allegations made against them, AFPL has proceeded appropriately to confine its claims. It has not participated in the application for disqualification or the appeal from this Court’s ruling in that regard. Nor did it participate in the challenge to the list of issues and the scope of the Contradictor’s role.

⁷² See Revised List of Issues at [196(d)] [PLE.010.005.0001 at 0159].

85. *Third*, it would be wrong to order interest or penalty interest for the period of the prosecution of the allegations against the Estate of Mr Trimbos or Alex Elliott. The significant delay caused by these matters was not caused or contributed to by AFPL.

86. Some useful guidance can be gained from the context of s 60 of the SC Act, where the purposes of an award of interest have been described as follows:⁷³

There are three main objectives of the award of interest. First, as compensation to the judgment creditor for being out of the funds from the date of commencement of the proceeding until judgment; secondly, to deter judgment debtors from delaying proceedings and thereby having the use of the money for a longer period; and finally, to encourage defendants to make realistic assessments of their liability in a case and to take bona fide steps to compromise the claim.

87. Penalty interest from 14 July 2020 is unnecessary to achieve the second and third purposes. Any award must also account for the interest earned on the funds retained by the SPRs.

G. COSTS

88. In so far as the Contradictor and the SPRs seek their costs on an indemnity basis, the appropriate time to address the Court on those issues would appear to be after the delivery of judgment, in the usual way. No significant delay is occasioned by that course, in circumstances where it is clear that there will have to be post-judgment matters determined in any event. In that regard, the SPRs have foreshadowed enforcement issues that are yet to be properly ventilated.

89. But for the avoidance of doubt, AFPL contends that costs should not be awarded against it on an indemnity basis from 14 July 2020 onwards when it filed the AFPL Admissions Document. It engaged in no conduct at least from that point onwards warranting an award of costs on an indemnity basis.

⁷³ *Johnson Tiles [No 3]* [2003] VSC 244 at [61] (Gillard J) [ATH.600.249.0001 at 0016]; *Kalenik v Apostolidis [No 2]* [2009] VSC 410 at [83] (Hargrave J) [ATH.600.250.0001 at 0024]; *Amcor Ltd v Barnes [No 2]* [2019] VSC 849 at [87] (Sloss J) [ATH.600.240.0001 at 0031] - [88] [0032]; *Kilpatrick v Head, Transport for Victoria [No 2]* [2020] VSC 241 at [28] (Garde J) [ATH.600.251.0001 at 0006].

90. Further, a party should not necessarily be made liable for duplicative costs when parties with the same interest both choose to participate.⁷⁴ There is a general principle that where multiple defendants with the same interest are separately represented against the same plaintiff, it will generally be proper for the plaintiff, if unsuccessful, to be burdened with only one set of adverse costs. That is the position here. As this Court has observed, the role taken by the Contradictor is “akin to the role that might have been assumed by the SPRs”.⁷⁵ As Jordan CJ said in *Ex parte McCay* while considering costs in contempt proceedings:⁷⁶

There are two application before us, both arising out of the same paragraph, by two of the persons whose actions may be prejudicially affected. Each of those persons was, of course, entitled to bring the matter to the notice of the Court. But it does not follow that, if an order for costs should be made against the respondent, it should necessarily include costs of both applications...In the present case, it must have been manifest by the time that the rules nisi were granted that there was no possible cleavage between the two applicants, and no reason why they should not thenceforth join forces in presenting their applications to the Court, apart, of course, from a natural desire to be represented each by counsel of his own choice. But this is a desire that they are not entitled to indulge at another person’s expense, in the absence of some good reason.

91. If parties with the same interests elect to be separately represented, they bear the onus of demonstrating that a sufficient reason exists for departing from the general principle.⁷⁷ That burden is not discharged merely by pointing to factors which explain their decision to have separate representation.

92. Some closer scrutiny is warranted of the extent to which any costs of the SPRs are to be disallowed on this basis. Any amount unrecoverable by the SPRs against the parties will be borne by the group members.

⁷⁴ See and compare *Talacko v Talacko* [2017] VSC 804 [ATH.600.092.0001], referring to *Van Eeden v Henry* (2005) 62 NSWLR 301 [ATH.600.094.0001].

⁷⁵ *Bolitho v Banksia Securities Ltd (receivers and managers appointed) (in liq)* [2019] VSC 653 at [76] [ATH.600.022.0001 at 0028].

⁷⁶ (1936) 36 SR (NSW) 592 at 595 [ATH.600.246.0001 at 0004].

⁷⁷ *HP Mercantile Pty Ltd v Hartnett* [2017] NSWCA 79, [14]-[15] [ATH.600.248.0001 at 0009].

Date: 26 February 2021

S R Horgan

C J Tran

Counsel for AFPL

ATTACHMENT A

Date	Action	Hours	Documents substantiating this work - 14 May 2020 Discovery	Documents substantiating this work - 2 April 2020 Discovery	Documents substantiating this work - 6 February 2020 Discovery	Documents substantiating this work - Affidavit of Michael Symons dated 3 April 2020
28 Mar 2017	Conferring with Mr Elliott, Tony Zita and senior counsel re: Banksia distribution - letter to debenture holders with schedules; advising; consideration of discovery issues arising from correspondence with special referee.	3			* Mr Elliot sends letter with schedules in final Symons 6 February 2020 Discovery Part 1 Document No. 123	
19 Aug 2017	Conferring with Mr Elliott, senior counsel and Jonathon Redwood re: letter from Clayton Utz enclosing documents requested - para 11 of J Godfrey's witness statement; advising.	4	Symons 14 May 2020 discovery Document 2165			
23 Aug 2017	Conferring with Mr Elliott and senior counsel re: Banksia's further amended reply and defence to amended defence and counterclaim / amended restated consolidated statement of claim / schedule of Banksia's proposed new section F.5 to statement of claim, advising; considering Banksia's proposed amended pleadings; conferring with Mr Elliott and senior counsel re: same, advising; conferring with Mr Elliott, Alex Elliott and senior counsel re: Agricultural Land Management Ltd v Jackson & ors (No 2) (2014) 98 ACSR 615 conflicting duties, advising; research concerning causation principles following from senior counsels email of 23 July 2017.	10	Symons 14 May 2020 discovery Document 2166;			
24 Aug 2017	Identifying and reviewing additional sources of documents beyond Receivers' Court Book and Liquidators' Court Book.	10	Symons 14 May 2020 discovery Document 2167;			
12-Sep-17	Instructing Simone Jacobson concerning status of proceeding and re assistance required with document review and development of plaintiffs proposed Court Book Index; providing documents concerning status of proceeding and draft Index of Documents to Simone Jacobson; further work in relation to developing draft index of documents.	10	Symons 14 May 2020 discovery Document 2169			

15 Sep 2017	Further work in preparing draft court book index; conferring with senior counsel re: preparation of draft court book index; advising; drafting subpoena to ASIC; conferring with Tony Zita, Mr Elliott and senior counsel re: issue and serve subpoena on ASIC, advising; conferring with Jonathon Redwood and senior counsel re: trial framework; advising; conferring with special referee and all parties re: trial plans relating to Great Southern proceedings, advising.	10	Symons 14 May 2020 discovery Document 2170; Document 2172; Document 2173; Document 2174;			
18 Sep 2017	Conferring with senior counsel re: preparation of draft court book index, advising; conferring with all parties re: trial framework, advising; further work on Microsoft Excel version of Index of Documents; conferring with Simone Jacobson concerning inclusion of documents referred to in Bolitho's statement of claim not currently in index; providing additional electronic documents to Simone Jacobson for purpose of review of documents referred to in pleadings.	10	Symons 14 May 2020 discovery Document 2175; Document 2176;			
19 Sep 2017	Conferring with Mr Elliott and senior counsel re: trial framework, advising; conferring with senior counsel re: draft issues list, advising; reading Sparke Helmore / Moray & Agnew comments to combined position paper; conferring with senior counsel re: preparation of draft court book index, advising; reading special referee's report to Court, conferring with Tony Zita, Mr Elliott and senior counsel re: same, advising.	10	Symons 14 May 2020 discovery Document 2177;			

<p>20 Sep 2017</p>	<p>Reading special referee's report to Court dated 19 September 2017; conferring with Jonathon Redwood, Sam Kingston and senior counsel re: evidence of Trust Co's behaviour in other debenture collapses, advising; conferring with senior counsel re: interest calculation, advising; reading Trust Co/Harwood Andrews / Banksia amended comments on combined position paper; conference with John Lindholm re: Banksia strategy discussion; conferring with Tony Zita, Mr Elliott, senior counsel, Sam Kingston, Jonathon Redwood re: amended combined position paper, advising; conferring with senior counsel and Simone Jacobson re: preparation of draft court book index, advising.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document 2178; Document 2179;</p>			
<p>21 Sep 2017</p>	<p>Conferring with Tony Zita, senior counsel, Sam Kingston and Jonathon Redwood re: Trust Co's proposed court book index, advising; teleconference with Sam Kingston; reading Amtrust and Charmers comments to combined position paper; reviewing letter to Clayton Utz re: provision of a comprehensive list; conferring with senior counsel and Mr Elliott re: same, advising; conferring with senior counsel re: preparation of draft court book index, advising; conferring with Simone Jacobson concerning development of Excel index; further work on Excel index.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document 2180; Document 2181; Document 2182; Document 2183; Document 2184; Document 2185; Document 2186 (email chain);</p>			

22 Sep 2017	<p>Collation of hard copy index and Excel index to prepare comprehensive index including Simone Jacobson's review and showing documents included in Trust Co's Court Book Index; conferring with senior counsel re: preparation of draft court book index; advising; conferring with senior counsel re: Harwood Andrews' additions to court book index / proposed email to Sam Kingston / 10</p> <p>Jonathon Redwood regarding Trust Co's document list; advising; conferring with Tony Zita, Mr Elliott and senior counsel re: notice under s67(f) of Evidence Act for service on Maddocks and Clayton Utz; advising; conferring with Mr Elliott, Alex Elliott and senior counsel re: Trust Co's response to their list of documents, advising.</p>		Symons 14 May 2020 discovery Document 2186; Document 2187; Document 2188; Document 2189; Document 2190;			
24 Sep 2017	<p>Reviewing Dropbox folder "Audit documents in Trust Co CB index"; conferring with senior counsel, Mr Elliott and Alex Elliott re: same, advising. 10</p>		Symons 14 May 2020 discovery Document 2191;			
25 Sep 2017	<p>Conferring with senior counsel re: preparation of draft court book index, advising; conferring with senior counsel re: BSL MCAR calculations 2009-2012, advising; drafting notice to produce to Trust Co (Nominees) Ltd; conferring with senior counsel, Tony Zita, Sam Kingston and Jonathon Redwood re: same, advising. Conferring with senior counsel and Simone Jacobson re ASIC regulatory Guide RD 69 Debentures and noteholders</p>	10	Symons 14 May 2020 discovery Document 2194; Document 2195; Document 2196;	* time not billed for conferring re ASIC RG		
26 Sep 2017	<p>Conferring with senior counsel re: preparation of draft court book index, advising; conferring with Simone Jacobson concerning use of Excel index; drafting issues list for trial arising from claim made in Class Action; conferring with Ian Waller QC, Paul Liondas, Jonathon Redwood, senior counsel, Tony Zita and Sam Kingston re: draft issues list for trial, advising.</p>	8	Symons 14 May 2020 discovery Document 2222 (email chain) email from NO to IW, PL, JR about draft list of issues); Document 2197;			

<p>27 Sep 2017</p>	<p>Conferring with Tony Zita, Mr Elliott and senior counsel re: letter from ASIC to Prothonotary - subpoena for production / list of documents accompanying letter, advising; reviewing letter to Clayton Utz re: Trust Co's discovery production; conferring with senior counsel, Mr Elliott and Tony Zita re: same, advising; drafting email to Sam Kingston re: Banksia's list of documents; conferring with senior counsel, Mr Elliott and Tony Zita re: same, advising; conferring with Tony Zita, Mr Elliott and senior counsel re: application to have documents released - subpoena addressed to ASIC, advising; conferring with senior counsel re: TRU Perpetual Scheme Booklet October 2013 / need to have a close look at Lonergan's report for cross examination, advising; conferring with senior counsel re: Tony Zita inspecting subpoenaed documents, advising; preparing version of Plaintiffs proposed Court Book Index showing documents for which we have identified copies amongst discovery and Liquidators' and Receivers' Court book to facilitate further manual review.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document 2198; Document 2199; Document 2200; Document 2201; Document 2202; Document 2203; Documented 2204;</p>			
<p>28 Sep 2017</p>	<p>Conferring with senior counsel re: preparation of draft court book index, advising; conferring with Simone Jacobson re amended Court Book Index showing documents from TrustCo lists, advising; drafting letter to Clayton Utz re: Trust Co production; conferring with senior counsel and Mr Elliott re: same, advising; conferring with senior counsel and Mr Elliott re: draft notice to produce to Trust Co for all invoices sent to them by each of their expert witnesses (or any related entities) since 1/1/12 and to Perpetual for all invoices sent to it (or any related entity other than Trust Co) by Trust Co's expert witnesses (or any related entities) since 1/1/12, advising; conferring with senior counsel re: Maxwell Brown's draft court book index, advising.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document 2205; Document 2206; Document 2207;</p>			

01 Oct 2017	Conferring with senior counsel re: Campbell Jackson Contagion report July 2017, advising; further work in development of document review lists and review of Trust Co's evidence; identifying documents produced by PPB referred to in Clancy statement / Jackson report; reviewing same and providing to senior counsel.	10		Symons 14 May 2020 discovery Document 2208; Document 2209;			
02 Oct 2017	Reviewing issues list for trial; conferring with Jonathon Redwood, Geoff McArthur QC, Paul Santamaria QC, Ian Waller QC, Peter Cawthorn QC, Paul Liondas, Sandro Goubran, Hamish Redd, Fleur Shand and senior counsel re: Banksia (expert evidence dialogue - between counsel) / expert evidence / trial plans, advising; reviewing plaintiffs initial draft document list for inclusion in court book; conferring with senior counsel re: same / prepare agreed facts as between plaintiff and first defendant, advising; finalising and circulating draft document list.	10		Symons 14 May 2020 discovery Document 2210; Document 2211; Document 2212; Document 2213; Document 2214; Document 2215; Document 2216; Document 2217; Document 2218; Document 2219; Document 2220; Document 2221; Document 2222;			
03 Oct 2017	Conferring with Jonathon Redwood, Geoff McArthur QC, Paul Santamaria QC, Ian Waller QC, Peter Cawthorn QC, Paul Liondas, Sandro Goubran, Hamish Redd, Fleur Shand, Lachlan Carter and senior counsel re: Banksia (expert evidence dialogue - between counsel), advising; conferring with Tony Zita, Mr Elliott and senior counsel re: subpoena for production addressed to ASIC, advising; conferring with Jonathon Redwood, Sam Kingston, Tony Zita, Mr Elliott and senior counsel re: plaintiffs list of issues for trial / trial plans, advising; conferring with Jonathon Redwood and senior counsel re: no reply from Trust Co to our notice to produce, advising.	10		Symons 14 May 2020 discovery Document 2223;			
04 Oct 2017	Conferring with senior counsel re: preparation of draft court book index; conferring with Jonathon Redwood re: Kevin McCann, advising; analysing accounting documents for purpose of identifying how Banksia transferred Stateswide loans to Banksia at time of roll-over.	10		Symons 14 May 2020 discovery Document 2224;			

<p>06 Oct 2017</p>	<p>Conferring with senior counsel re, 2013 transcript /supplementary index (old) of all agendas and tabled documents at meeting / track down any documents that disclose changes in the interest rates offered by SL to debenture holders 2009 – 2012, advising; conferring with Jonathon Redwood, Sam Kingston, Tony Zita and senior counsel re: JH issues list, advising; conferring with senior counsel re: list of documents from receivers' volumes which are not in our's, Banksia's or Trust Co's court book indices, advising; reviewing spreadsheet - cash summary prepared by receivers (document 19 identified in paragraph 71(o) of Michael Hill's statement); conferring with Sam Kingston, Jonathon Redwood and senior counsel re: same, advising; finalising further version of document list.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document No. 2225;</p>			
<p>11 Oct 2017</p>	<p>Conferring with Jonathon Redwood, Sam Kingston, Tony Zita, Mr Elliott and senior counsel re: MB + M list of issues, advising; conferring with Mr Elliott, Jonathon Redwood and senior counsel re: letter from Clayton Utz regarding our notice to produce, advising; noting list of issues concerning all of Trust Co's third party claims from Paul Liondas; reviewing email from Simone Jacobson concerning missing rollover information and certificates and conferring in re same; conferring with senior counsel re: missing certificates/rollover information / ASIC transcripts, advising; conferring with Simone Jacobson in relation to ASIC examination of Silavecky and documents referred to therein for inclusion in index; further work in re document lists.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document No. 2228; Document No. 2227;</p>			

<p>12 Oct 2017</p>	<p>Conferring with senior counsel, Sam Kingston and Jonathon Redwood re: documents that disclose changes in the interest rates offered by BSL to debenture holders 2009 – 2012, advising; conferring with Jonathon Redwood, senior counsel and Mr Elliott re: special referee conference this evening - raise the outstanding issue of the production by Trust Co of documents relating to the other debenture issuer collapses, advising; drafting letter to Clayton Utz re: our notice to produce; conferring with senior counsel, Mr Elliott and Tony Zita re: same, advising; conferring with senior counsel re: preparation of court book index, advising; drafting agreed facts and issues forming part of terms of settlement as between Bolitho and Banksia; conferring with Jonathon Redwood, Sam King, Tony Zita, Mr Elliott and senior counsel for comment and review, noting current version of list of issues between Banksia and Trust Co inproceeding 2015 1384 from Paul Liondas; conferring with Simon Gerrard re: Maddocks' response to Trust Co regarding their discovery request, advising; further work in re document lists; conferring with senior counsel and Simone Jacobson concerning PPB Debenture Portfolio Spreadsheet and duration of debentures.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document No. 2233; Document No. 2232; Document No. 2231; Document No. 2230; Document No. 2229;</p>			
<p>13 Oct 2017</p>	<p>Conferring with senior counsel re: examination transcripts 2013, advising; conferring with Jonathon Redwood, Sam Kingston and senior counsel re: BSL debenture spreadsheet & Clancy's description of it / examination transcripts for discussion at Banksia settlement meeting on 19 October 2017; conferring with senior counsel re: preparation of court book index, advising; conferring with Tony Zita and senior counsel re: request from Clayton Utz for an unredacted version of SF debenture issuer client risk assessment May 2008 and document TCN.501.004.2187, advising; research concerning equitable compensation principles.</p>	<p>10</p>	<p>Symons 14 May 2020 discovery Document No. 2234</p>			

17 Oct 2017	<p>Conferring with senior counsel re: preparation of court book index, advising; drafting Bolitho objections to witness statement of Lee Renouf; conferring with Jonathon Redwood and senior counsel re: objections to witness statement of Silavecky, advising; considering application of Maguire v Makaronis; conferring with Simone Jacobson in re causation issues.</p>	10	Symons 14 May 2020 discovery Document No. 2235 (second email in chain)			
18 Oct 2017	<p>Conferring with senior counsel re: preparation of court book index, advising; conferring with Tony Zita and senior counsel re: subpoena for production addressed to ASIC, advising; conferring with Tony Zita, Mr Elliott, Alex Elliott and senior counsel re: letter to Clayton Utz - Silavecky s 19 transcript pp32-35 / follow up notice to produce on Angas, advising; conferring with Simone Jacobson in relation to RG69 quarterly reports; identifying RG69 quarterly reports completed by Trust Co amongst discovered documents; further work in relation to creation of index of documents.</p>	10	Symons 14 May 2020 discovery Document No. 2240 (second email in chain). Document No. 2236			
19 Oct 2017	<p>Conferring with Jonathon Redwood re: ASIC's submissions in the Godfrey agreed penalty case, advising; conferring with Tony Zita and Mr Elliott re: follow up with Grant Sutherland on his reply report, advising; conferring with Jonathon Redwood, Tony Zita, Sam Kingston, David Newman, Mr Elliott and senior counsel re: proposed resolution of issues in Bolitho's claims against Banksia / agenda for Banksia Bolitho settlement discussion, advising; conferring with senior counsel re: agreed facts and issues forming part of terms of settlement between Bolitho and Banksia, advising; conference with Jonathon Redwood, Sam Kingston. Mr Elliott and senior counsel re: Bolitho Banksia settlement discussion; conferring with senior counsel re: preparation of court book index, advising; conferring with Simone Jacobson in re: issues arising from Godfrey statement; reviewing documents returned on ASIC subpoena.</p>	10	Symons 14 May 2020 discovery Document No. 2240; Document No. 2239; Document No. 2238;			

10 Nov 2017	<p>Conferring with Paul Liondas concerning payment of \$75,000 to Bolitho; conferring with senior counsel and Mr Elliott re: \$75,000 payment to Laurie Bolitho, advising; conferring with Mr Elliott, Tony Zita, and senior counsel re: Bolitho's offer accepted by Trust Co, advising; drafting proposed deed of settlement.</p>	7			<p>Symons 6 February 2020 Discovery Part 1 Document No. 145; Document No. 146; Document No. 147; Document No. 148; Document No. 149; Document No. 151; Document No. 152; Document No. 153; Document No. 154; Document No. 155; Document No. 156; Document No. 160;</p>	
11 Nov 2017	<p>Drafting proposed deed of settlement;</p>	10			<p>Symons 6 February 2020 Discovery Part 1</p>	
12 Nov 2017	<p>Amending initial draft settlement deed circulated by David Newman; conferring with Mr Elliott; conferring with senior counsel and Jonathon Redwood re same, advising; preparing further amended versions of settlement deed incorporating Jonathon Redwood's proposed amendments; drafting email to David Newman; conferring with Mr Elliott, Alex Elliott and senior counsel re: same, advising. Conferring with senior counsel and Mr Elliot re confidentiality agreement</p>	10			<p>* time not billed for conferring re confidentiality agreement (Document No. 172)</p> <p>Symons 6 February 2020 Discovery Part 1 Document No. 171; Document No. 172; Document No. 173; Document No. 174; Document No. 175; Document No. 176; Document No. 177; Document No. 178; Document No. 179; Document No. 180; Document No. 181; Document No. 182; Document No. 183; Document No. 184; Document No. 185; Document No. 186; Document No. 187; Document No. 190; Document No. 191; Document No. 192; Document No. 193 Document No. 194; Document No. 195;</p>	
13 Nov 2017	<p>Drafting settlement deed; conferring with Mr Elliott re same</p>	10			<p>Symons 6 February 2020 Discovery Part 1 Document No. 198; Document No. 199;</p>	

14 Nov 2017	Amending deed of settlement; conferring with senior counsel, Mr Elliott and Tony Zita; commenting on proposed amendments received from Banksia.	6					Symons 6 February 2020 Discovery Part 1; Document No. 204; Document No. 205; Document No. 206; Document No. 208; Document No. 209; Document No. 210; Document No. 211; Document No. 212; Document No. 213; Document No. 215; Document No. 216;	
15 Nov 2017	Drafting proposed amendments to draft deed of settlement; conferring with Mr Elliott; conferring with the Liquidators.	5					Symons 6 February 2020 Discovery Part 1; Document No. 223; Document No. 224; Document No. 225;	
16 Nov 2017	Drafting further amendments to draft deed of settlement; conferring with Mr Elliott.	3					Symons 6 February 2020 Discovery Part 1 Document No. 229	
25 Nov 2017	Reviewing Trust Co's proposed amendments to deed of settlement; conferring with senior counsel re proposed amendments; drafting proposed responses to amendments; amending deed of settlement.	7					Symons 6 February 2020 Discovery Part 1 Document No. 262; Document No. 263; Document No. 264; Document No. 265; Document No. 266; Document No. 267; Document No. 268; Document No. 269; Document No. 274; Document No. 275; Document No. 276;	
26 Nov 2017	Conferring with Mr Elliott and senior counsel; amending deed of settlement; conferring with Tony Zita; drafting correspondence to be sent by Tony Zita to solicitors for Trust Co and Banksia.	5					Symons 6 February 2020 Discovery Part 1 Document No. 275; Document No. 278; Document No. 279; Document No. 280; Document No. 281; Document No. 282; Document No. 283; Document No. 284; Document No. 286; Document No. 287; Document No. 288 Document No. 289;	

27 Nov 2017	Attendance at mediation; drafting notice to group member; conferring with Mr Elliott.	10					Symons 6 February 2020 Discovery Part 1 Document No. 291 Document No. 293; Document No. 294; Document No. 295; Document No. 296; Document No. 297;	
28 Nov 2017	Drafting advertisement to group members	6					Symons 6 February 2020 Discovery Part 1	
29 Nov 2017	Considering Banksia's proposed amendments to deed; conferring with Mr Elliott; drafting proposed response.	4					Symons 6 February 2020 Discovery Part 1; Document No. 302; Document No. 303; Document No. 304; Document No. 305; Document No. 306; Document No. 307; Document No. 308; Document No. 309;	
30 Nov 2017	Conferring with senior counsel; conferring with Mr Elliott; drafting correspondence to be sent by Tony Zita.	4					Symons 6 February 2020 Discovery Part 1; Document No. 310; Document No. 311; Document No. 312; Document No. 313; Document No. 314; Document No. 315; Document No. 316; Document No. 317;	

01 Dec 2017	Amending deed for circulation; conferring with Mr Elliott and senior counsel; amending proposed forms of undertaking; reviewing form of deed circulated by Trust Co; reviewing proposed timetable for steps in December 2017 prepared by Alex Elliott; drafting correspondence.	10			Symons 6 February 2020 Discovery Part 1: Document No. 318; Document No. 319; Document No. 320; Document No. 321; Document No. 322; Document No. 323; Document No. 324; Document No. 325; Document No. 326; Document No. 327; Document No. 328; Document No. 329; Document No. 330; Document No. 331; Document No. 332; Document No. 333; Document No. 334; Document No. 335; Document No. 336; Document No. 337; Document No. 338; Document No. 339; Document No. 340; Document No. 341; Document No. 342;	
03 Dec 2017	Drafting summons and procedural orders, further amending proposed notice to group members and advertisement to give effect to final form of deed.	10			Symons 6 February 2020 Discovery Part 1 Document 343; Document 344 Document 345;	
04 Dec 2017	Drafting correspondence to the Court; drafting correspondence to Banksia and Trust Co concerning correspondence to the Court; preparing settlement approval application documents for provision to Banksia and Trust Co for purpose of satisfying clause 3.1 of the deed; conferring with senior counsel in re pari passu distribution.	10			Symons 6 February 2020 Discovery Part 1 Document 346; Document 350; Document 351; Document 355; Document 356; Document 357; Document 358; Document 359; Document 360; Document 361; Document 362; Document 363; Document 364;	
Amending proposed correspondence to the Court; considering Maddocks'				* Document 377 contains an email from MS at 6:49PM (individual document not discovered) containing draft correspondence to court concerning procedural hearing for 8 December 2017		

05 Dec 2017	proposed amendments to proposed correspondence to the Court; consideration of entitlement to proceed against Banksia; drafting further correspondence to the Court concerning listing of procedural hearing for 8 December 2017; conferring with Mr Elliott; conferring with Tony Zita; conferring with senior counsel.	8		CBP.001.011.1287	Symons 6 February 2020 Discovery Part 1 Document 365; Document 367; Document 368; Document 369; Document 370; Document 371; Document 372; Document 373; Document 374; Document 375; Document 376; Document 377;	
06 Dec 2017	Amending proposed correspondence to the Court; conferring with Jonathon Redwood; conferring with Mr Elliott; drafting correspondence to Banksia and Trust Co concerning procedural hearing; amending proposed procedural orders; conferring with Tony Zita in relation to provision of deed to the court; compiling procedural orders for provision to the Court (including version of procedural orders including alternative notices and orders).	10			Symons 6 February 2020 Discovery Part 1 Document 378; Document 379; Document 381; Document 382; Document 383; Document 384; Document 385; Document 386; Document 387; Document 390; Document 391; Document 392; Document 393; Document 394;	
07 Dec 2017	Preparation for directions hearing for the making of procedural orders; considering amendments to proposed orders, notice and advertisement proposed by Banksia and Trust Co; drafting correspondence to the Court; conferring with Tony Zita; conferring with Mr Elliott.	10			Symons 6 February 2020 Discovery Part 1 Document 395; Document 396; Document 397; Document 398; Document 399; Document 402; Document 403; Document 407; Document 408; Document 410; Document 411; Document 412; Document 413;	
					* time not billed for corresponding with NO/ME; quote for newspapers	

08 Dec 2017	Appearance at directions hearing for the making of procedural orders, consequential amendments to procedural orders.; conferring with Mr O'Bryan and Mr Elliott re further hearing	10				Symons 6 February 2020 Discovery Part 1 Document 418; Document 419; Document 420 Document 421; Document 423; Document 424; Document 425; Document 428; Document 429; Document 430;	
10 Dec 2017	Drafting letter describing process for managing enquiries from debenture-holders.	3.5				Symons 6 February 2020 Discovery Part 1 Document 436; Document 439;	
11 Dec 2017	Conferring with Alex Elliott concerning clarifying amendments to the notice to group members; drafting statement explaining proposed settlement for www.banksiaclassaction.com.au website; amending procedural orders; conferring with Tony Zita in relation to the provision of procedural orders to the Court; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: amended orders with Banksia's proposed minor addition to order 8; collating documents for provision to costs expert.	5				Symons 6 February 2020 Discovery Part 1 Document 442; Document 443; Document 444; Document 445; Document 447; Document 448; Document 449; Document 450; Document 451; Document 452; Document 453; Document 456; Document 457; Document 458;	
12 Dec 2017	Preparing standalone notice to group members; reviewing typeset newspaper notice.	10				Symons 6 February 2020 Discovery Part 1 Document 460;	
15 Dec 2017	Conferring with senior counsel re: <i>Camilleri v The Trust Company (Nominees) Ltd</i> [2015] FCA and relevance to the Banksia joint opinion, advising; collating documents for provision to costs expert.	2				Symons 6 February 2020 Discovery Part 1; Document 468; Document 470;	

19 Dec 2017	Collating documents for provision to costs expert; preparing curriculum vitae and related information for provision to costs expert.	4.5					Symons 6 February 2020 Discovery Part 1; Document 480; Document 481; Document 482; Document 483; Document 484; Document 485; Document 486; Document 487; Document 488; Document 489; Document 490; Document 491; Document 492; Document 493; Document 494; Document 495;
3 Jan 2018	Drafting settlement opinion; reading draft report / annexures from Peter Trimbos; conferring with senior counsel in relation to same.	10					Symons 6 February 2020 Discovery Part 1; Document No 504; Document No 505; Document No 506; Document No 507; Document No 512; Document No 513;
4 Jan 2018	Drafting settlement opinion; conferring with Mr Elliott and senior counsel re: reimbursement of plaintiff; advising; reading amended draft report from Peter Trimbos; instructing Yohan Philip in relation to research task.	10				* no evidence he read the report, affidavit at para 154 states he was on a family holiday. Symons 6 February 2020 Discovery Part 1; Document 516 Document 519; Document 520; Document 521;	
6 Jan 2018	Drafting settlement opinion; conferring with Mr Elliott in relation to Professor Morabito's 2014 article published in the Civil Justice Quarterly.	10				Symons 6 February 2020 Discovery Part 1; Document 532; Document 533;	
7 Jan 2018	Drafting settlement opinion; conferring with Mr Elliott in relation to the deed of settlement in the Great Southern Group Proceeding.	3				Symons 6 February 2020 Discovery Part 1; Document 534; Document 535; Document 536; Document 537; Document 538; Document 539; Document 540;	

8 Jan 2018	Conferring with Mr Elliott in relation to number of group members who executed Litigation Funding Agreements with funder; reading correspondence from Mr Bolitho's solicitor, Robert Crow; conferring with Yohan Philip in relation to research task; drafting settlement opinion.	10				Symons 6 February 2020 Discovery Part 1; Document 541;	
9 Jan 2018	Conferring with Mr Elliott in relation to the status of data produced by Georgeson Inc. in re. group membership and entry into Litigation Funding Agreements; drafting settlement opinion; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: letter from Sparke Helmore - index of Banksia's evidence / witnesses, advising.	10				Symons 6 February 2020 Discovery Part 1; Document 542; Document 543; Document 544; Document 545; Document 546;	
10 Jan 2018	Drafting settlement opinion; reading advice concerning application of GST; reading affidavit of John Ross Lindholm; conferring with Mr Elliott and senior counsel re: same, advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: redraft of response to Sparke Helmore, advising.	10				Symons 6 February 2020 Discovery Part 1; Document 547; Document 549; Document 550; Document 551; Document 552; Document 553;	
12 Jan 2018	Conferring with senior counsel re: draft settlement opinion; drafting settlement distribution scheme.	10				Symons 6 February 2020 Discovery Part 1; Document 560; Document 561; Document 562; Document 563; Document 564; Document 565; Document 566;	
15 Jan 2018	Drafting settlement distribution scheme; conferring with Mr Elliott and senior counsel re: email from Jonathon Redwood that Mr Bolitho needs to appear in the trial of Banksia third party claims but participation could be very limited, advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: ASIC's costs in relation to compliance with subpoena, advising; conferring with Mr Elliott and senior counsel re: Jonathon Redwood's response - Bolitho's claims against Banksia cannot be withdrawn or dismissed without court approval, advising.; draft settlement distribution scheme	10				* time not billed for sending draft distribution scheme Symons 6 February 2020 Discovery Part 1; Document 568; Document 569; Document 570; Document 571; Document 572; Document 573;	

16-Jan-18	Conferring with Mark Elliot re settlement distribution scheme					<p>* time not billed for conferring with Mr Elliot</p> <p>Symons 6 February 2020 Discovery Part 1; Document 574; Document 575;</p>	
17-Jan-18	Conferring with Mark Elliot and senior counsel re settlement distribution scheme; conferring with Mark Elliot, Alex Elliot and senior counsel re letter from Keith Pitman					<p>* time not billed</p> <p>Symons 6 February 2020 Discovery Part 1; Document 576; Document 577; Document 578; Document 579; Document 580; Document 581; Document 582; Document 583; Document 584; Document 585; Document 586; Document 587; Document 588; Document 589; Document 590; Document 591; Document 592;</p>	
18 Jan 2018	Finalising amendments to settlement distribution scheme; conferring with senior counsel re: same; considering senior counsel's amendments; finalising document.			7		<p>Symons 6 February 2020 Discovery Part 1; Document 593; Document 594; Document 595;</p>	
19 Jan 2018	Drafting affidavit of Tony Zita exhibiting confidential and privileged joint opinion; conferring with senior counsel re: Mr Bolitho has instructed Rob Crow, in light of risk of a waiver of privilege, we are not to give the settlement opinion to any third parties (including Jonathon Redwood), advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: obtaining Botsman objection to settlement and circulate, advising.			2.5		<p>Symons 6 February 2020 Discovery Part 1; Document 596; Document 597; Document 598; Document 599; Document 600; Document 601; Document 605;</p>	

21 Jan 2018	<p>Conferring with Mr Elliott and senior counsel re: when we have Chris Botsman's latest submissions, need to compare them carefully with his earlier communications about the case / how we should respond / prepare answering submissions to Chris Botsman and Keith Pitman, advising; reviewing litigation funding agreement and conferring with senior counsel in relation to operation of the litigation funding agreement executed by debenture-holders.</p>	1.5			<p>Symons 6 February 2020 Discovery Part 1; Document 606; Document 607; Document 608; Document 609;</p>	
22 Jan 2018	<p>Conferring with Tony Zita re: obtaining Chris Botsman's submissions from the Court; drafting email to Chris Symmonds re: settlement hearing on 30 January 2018 / will debenture holders know outcome of hearing; conferring with Mr Elliott, Tony Zita and senior counsel re: same, advising; drafting supplementary opinion addressing Keith Pitman's objections.</p>	1			<p>Symons 6 February 2020 Discovery Part 1; Document 612; Document 613; Document 614; Document 615; Document 616; Document 617; Document 618; Document 619; Document 620; Document 624;</p>	<p>* time not billed for drafting proposed orders.</p>

<p>23 Jan 2018</p>	<p>Conferring with Tony Zita re: service of Keith Pitman's objection on all parties; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: supplementary opinion; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: email from court with notice of objections from Wendy Botsman and Keith Pitman, advising: reading Chris Botsman's submissions; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: same / need to file answering submissions, advising: drafting amended supplementary confidential and privileged joint opinion; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: same, advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: amended originating process Banksia will seek leave to file, advising; conferring with Tony Zita and senior counsel re: Chris Botsman's email - typo error for date in paragraph 1 of the history section of his submissions sent 19 January 2018, advising; drafting affidavit of Tony Zita exhibiting supplementary opinion;</p>	<p>1</p>		<p>Symons 6 February 2020 Discovery Part 1; Document 625; Document 629; Document 630; Document 631; Document 632; Document 633; Document 634; Document 635; Document 638; Document 639; Document 640; Document 641; Document 642; Document 643; Document 644; Document 645; Document 646; Document 647; Document 648; Document 649;</p>	
<p>24 Jan 2018</p>	<p>Conferring with Tony Zita concerning filing of supplementary opinion; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: letter from Maddocks - Insurance House's solicitors have requested Banksia waive the benefit of clause 5.1.3 of the deed to allow Insurance House to rely upon the expert reports of Messrs Jaski, Carter and Officer and Ms Clancy, advising; conferring with Mr Elliott, Tony Zita and senior counsel re: email from Chris Botsman - his email referencing a typo error in submissions objecting inter alia to the settlement proceeding without a contradictor, advising; . conferring with Kane Loxley re brief</p>	<p>2</p>		<p>Symons 6 February 2020 Discovery Part 1; Document 652; Document 653; Document 654; Document 657; Document 658; Document 659;</p>	

25 Jan 2018	Collating authorities for provision to the Court; conferring with Tony Zita concerning provision of authorities to the Court; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: whether all material sought to be relied upon by the parties has been filed, advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: email from Keith Pitman - his attempts to obtain information referred to in class action notice at Portfolio Law, advising.	4				Symons 6 February 2020 Discovery Part 1; Document 660; Document 661; Document 662; Document 663; Document 664; Document 665; Document 666; Document 667; Document 668; Document 669; Document 670; Document 671;	
26 Jan 2018	Conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: what we have to give Keith Pitman, advising; conferring with senior counsel re: proposed orders for Banksia settlement, advising.	0.5				Symons 6 February 2020 Discovery Part 1; Document 672; Document 673; Document 683; Document 688;	
27 Jan 2018	Drafting proposed orders for hearing; conferring with senior counsel re: same.	2				Symons 6 February 2020 Discovery Part 1; Document 698; Document 700;	
29 Jan 2018	Drafting index of authorities; conferring with Tony Zita in relation to the provision of same to the Court; conferring with Tony Zita, Mr Elliott and senior counsel re: need to address in court tomorrow important allegation by Keith Pitman - Nikki, advising; reading authorities to be relied upon the SPRs and Banksia, conferring with Ian Waller, QC, Paul Liondas, Jonathon Redwood, Kane Loxley and senior counsel re: proposed settlement approval orders, advising; conferring with Mr Elliott, Tony Zita, Alex Elliott and senior counsel re: Paul Liondas' amendments to proposed orders, advising.	5				Symons 6 February 2020 Discovery Part 1; Document 704; Document 705; Document 706; Document 707; Document 708; Document 709; Document 710; Document 711; Document 712; Document 714; Document 715; Document 716; Document 718; Document 719; Document 720; Document 721; Document 722; Document 723; Document 724; Document 725; Document 726; Document 727; Document 728; Document 729; Document 730; Document 731;	

30 Jan 2018	Preparation for and appearance before Croft J.	10			Symons 6 February 2020 Discovery Part 1; Document 732; Document 733; Document 734; Document 735; Document 736; Document 737; Document 738; Document 739; Document 740; Document 741; Document 742; Document 743; Document 744; Document 745; Document 746; Document 747; Document 748; Document 749; Document 750; Document 751; Document 752; Document 753; Document 754; Document 757; Document 758; Document 759; Document 760; Document 761	
594.5						

594.5 x hourly rate of \$250 = \$ 148,625.00
Plus GST = \$ 163,487.50