

## FUNDER'S CONTENTIONS

### INTRODUCTION

1. Two principal issues will be determined by the Court:
  - 1.1 What is a fair and reasonable amount for AFPL to recover out of the settlement sum in respect of legal costs incurred in connection with the Bolitho Proceeding?
  - 1.2 What is a fair and reasonable amount for AFPL to recover from group members as a commission for the services and funding it provided in connection with the Bolitho Proceeding?
2. These contentions respond to the contentions of the contradictor from time to time. The lack of an express response should not be taken as any concession. Rather, these contentions simply identify AFPL's position on the issues before the Honourable Justice John Dixon as AFPL sees it, and where that can be done conveniently by responding to the contradictor's contentions AFPL does so.

### LEGAL COSTS

3. ***Paid fees.*** As to fees which have already been paid by AFPL to the solicitors and counsel for Mr Bolitho, AFPL contends that it should recover those fees because:
  - 3.1 the fees were reasonably incurred and in an amount that is fair, reasonable and proportionate; and
  - 3.2 in so far as they were not reasonably incurred and in an amount that is fair, reasonable and proportionate for any reason, the consequences lie with the solicitors and counsel for Mr Bolitho, not AFPL.
4. ***Fees payable but not yet paid.*** As to fees which AFPL is liable to pay to the solicitors and counsel for Mr Bolitho which AFPL has not yet paid, AFPL contends that it should recover an amount reflecting that liability because:
  - 4.1 the fees were reasonably incurred and in an amount that is fair, reasonable and proportionate; and
  - 4.2 obtaining an order entitling AFPL to recover reasonable legal costs incurred does not require that those costs have already been paid;
  - 4.3 in so far as they were not reasonably incurred and in an amount that is fair, reasonable and proportionate for any reason, then:

- (i) the solicitors and counsel for Mr Bolitho would not be entitled to the payment of those fees; and
  - (ii) it follows that AFPL would not be entitled to a sum reflecting a liability which to that extent no longer exists.
- 5. **Appeal costs.** As to fees incurred in the appeal by Mrs Botsman, AFPL contends that it should recover an amount reflecting those fees because:
  - 5.1 Mrs Botsman sought orders setting aside the entire approval of the settlement, and Mr Bolitho and AFPL were successful in resisting those orders;
  - 5.2 AFPL was made a party to the appeal by the Court of Appeal, not by its own choice.
- 6. **AFPL's costs of the proceeding before the Honourable Justice John Dixon.** As to fees incurred or to be incurred in the proceeding remitted by the Court of Appeal to the Honourable Justice John Dixon, AFPL contends that it should recover those fees because costs usually follow the event. AFPL contends that much of the costs in this application have been unnecessarily incurred.
- 7. **The contradictor's costs.** AFPL contends that the contradictor's costs should be recovered from the settlement sum because:
  - 7.1 the contradictor was appointed by the Court to assist in protecting the interests of group members, and those who receive the benefit should bear the costs; and
  - 7.2 in respect of the proceeding before the Honourable Justice John Dixon in which the contradictor has been appointed, AFPL has not acted in any way which would require it to pay the costs of solicitors and counsel appointed for the express purpose of opposing it.
- 8. **Process and procedure.** AFPL contends that:
  - 8.1 The contradictor, as legal practitioners appointed by the Court, should disclose (prior to the hearing and on a regular basis) the fees being incurred by them so that it is transparent to AFPL, debenture holders and the Court how much may be payable by whomever is ordered to pay them.
  - 8.2 The question(s) of whether costs have been reasonably incurred and in an amount that is fair and reasonable should be referred to the Costs Court for determination prior to the Honourable Justice John Dixon determining any costs issues.

- (i) Because of what the contradictor describes as “the interrelationship between the quantum of costs really incurred and the funding commission”, the funding commission cannot be finally determined until the question costs is determined or at the same time as the question of costs is determined. Accordingly, the Honourable Justice John Dixon cannot determine the funding commission unless all costs questions can be determined beforehand or at the same time.
- (ii) The Costs Court will not engage in a mere “quantitative assessment”. Consideration of the granular details of the fees incurred will necessarily assist in the determination of the “questions of principle” that the contradictor seeks to argue. Those granular details are best determined by the Costs Court, which can refer a matter to the Supreme Court if considered appropriate.
- (iii) AFPL’s proposed course does not prevent the contradictor from arguing whatever they seek to argue about costs. AFPL’s proposed course seeks to avoid, to the extent possible, having multiple hearings before the Honourable Justice John Dixon, which AFPL contends is inevitable upon the contradictor’s preferred course.

## **FUNDING COMMISSION**

- 9. ***Common fund order.*** AFPL contends that a common fund order should be made so that funded and unfunded group members equally bear the burden of the commission, just as they equally bear the burden of costs.
  - 9.1 The amount of the commission is within the supervisory control of the Court. Accordingly, it can be supposed that the Court is unlikely to set a commission rate that is higher than the 30% to which AFPL is entitled under the funding agreement. Compare the contradictor’s contentions at paragraph 19.
  - 9.2 Unless it is argued that debenture holders received no value from the Bolitho proceeding and from the work of Mr Bolitho’s legal representatives, then the issue is whether only funded group members should bear the burden of the commission for that work. Compare the contradictor’s contentions at paragraph 20.
- 10. ***Amount of the commission.*** AFPL contends that a commission of \$12.8 million (plus GST) is fair and reasonable, having regard to:

- 10.1 the fact that this amount was agreed at the time of settlement as appropriate, including by the SPRs who are court appointed officers acting in the best interests of the debenture holders;
  - 10.2 the similar allocation of the earlier partial settlement in which O'Callaghan QC acted as a contradictor and which was approved by Robson J notwithstanding the existence of the Liquidators / SPRs proceeding;
  - 10.3 the monetary value of the settlement should be principally attributed to the Bolitho proceeding, and after doing so the amount of the commission is not disproportionate to the actual settlement achieved or out of the range of commissions in the marketplace;
  - 10.4 the amount of the commission is not disproportionate to the amount sought in the Bolitho proceeding, which is a relevant consideration;
  - 10.5 the litigation risks, adverse costs risks of litigation and the costs incurred in conducting the proceeding that were borne by AFPL in funding the Bolitho proceeding.
11. ***Allegations made by the contradictor.*** For the avoidance of doubt, AFPL disputes that it “provided virtually no ‘financing’ of the claims”.

**Date: 6 May 2019**