

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

No. SCI 2012 7185

BETWEEN:
LAURENCE JOHN BOLITHO

Plaintiff

AND:
BANKSIA SECURITIES LIMITED (ACN 004 736 458) AND OTHERS

Defendants

CONTRADICTION'S CONTENTIONS

These are the contentions of the contradictor. They have not been the subject of determination by the court. The purpose of this document is to provide an outline of the arguments that will be made by the contradictor at the hearing of this matter.

OVERVIEW

- 1 This application raises the following main issues:
 - (a) What is a fair and reasonable amount for AFPL to recover from debenture holders in respect of legal costs incurred in connection with this proceeding (referred to here as the **Bolitho Proceeding**)?
 - (b) What is a fair and reasonable amount for AFPL to recover from debenture holders as consideration for the services (referred to as "**commission**") it provided in connection with the Bolitho proceeding?

LEGAL COSTS

What is AFPL claiming?

- 2 AFPL claims a payment of **\$5.1 million** in respect of costs incurred in connection with the Bolitho Proceeding, comprising:
 - (a) 30% of pre-July 2016 costs, totaling approximately **\$1 million**;
 - (b) costs incurred from 1 July 2016 to 30 January 2018, totaling approximately **\$3.9 million**;

(c) AFPL's costs of Mrs Botsman's appeal, totaling approximately **\$81,000**.

3 AFPL also seeks to recover the costs incurred in this remitter. It has not yet quantified those costs.

What has changed since the first approval application?

4 At the first approval application, Mr Bolitho/AFPL sought to recover a total amount of **\$5.225 million** by way of "reimbursement" of legal costs. Substantially all of those costs had not been paid at that time. AFPL has now paid some of those costs, but more than **\$3 million** of the sum that AFPL seeks to recover remains unpaid.

5 The other costs that AFPL seeks to recover include:

- (a) AFPL's costs incurred in the appeal that was heard in June 2018;
- (b) Mr Bolitho's costs of the first approval application.

Contradictor's contentions as to legal costs claimed up to 30 January 2018

6 The contradictor contends that the fees charged by Mr Bolitho's legal representatives:

- (a) are excessive;
- (b) were not reasonably incurred, in that AFPL and Mr Bolitho's legal representatives agreed between themselves that Mr Bolitho's legal representatives would defer the delivery of invoices until the matter with Trust Co settled, which was not a reasonable arrangement for them to make;
- (c) in the case of counsel fees, are not supported by costs agreements and disclosure statements in writing made in advance of the costs being incurred.

Contradictor's contentions as to costs of the appeal and the remitter

7 The contradictor contends that AFPL should not be permitted to recover costs incurred in the appeal by Mrs Botsman or in this remitter, because:

- (a) Mrs Botsman's appeal was largely successful, and costs were awarded against both Mr Bolitho and Trust Co; and
- (b) it would be unfair or unjust for debenture holders to be asked to pay AFPL's costs of the remitter.

Contradictor's contentions as to referring the costs out for assessment

- 8 AFPL contends that its claim for legal costs should be referred out for assessment by an independent expert or referee or by the costs court. The contradictor contends this is premature and inappropriate given (a) the interrelationship between the quantum of costs really incurred and the funding commission and (b) it involves several qualitative questions of principle to be determined by the court before a referee or the costs court could undertake any quantitative assessment.
- 9 The court should decide what to do about the costs once it has heard all the evidence and made findings on several important issues.

COMMISSION

What is AFPL claiming?

- 10 AFPL is seeking a commission of approximately **\$14.1 million** (incl GST).
- 11 The question that the court has been asked to determine is whether that is a fair and reasonable amount, and if not, what is a fair and reasonable amount.
- 12 The contradictor contends that the amount sought by AFPL is excessive. The contradictor contends that a fair and reasonable amount, if any, is a very substantially lower figure.

The correct approach to assessing a fair and reasonable commission

- 13 The contradictor contends that, in order to assess any entitlement to commission, including under the Funding Agreement,¹ it is necessary to consider a number of issues, including the following:
- (a) to the extent that it might be relevant, what is the true value of the settlement? The contradictor contends that the value to be attributed to the settlement is the settlement sum (\$64 million) and that no other consideration should be brought to account.

¹ Under clause 12.1.2 of the Funding Agreement, as consideration for the financing of the claims of Mr Bolitho in the Bolitho Proceeding, AFPL is entitled to a funding commission at a maximum rate of 30% on the monetary sum paid to settle the claims of Mr Bolitho in the Bolitho Proceeding. In a letter to debenture holders dated 6 June 2014, Mr Elliott informed debenture holders that the "maximum" rate of 30% related to the net settlement proceeds, not the gross sum.

- (b) To what extent should the value of the settlement be attributed to the Bolitho Proceeding, rather than the SPR Proceeding? The contradictor's case is that **no greater than 50%**² of the settlement value can be apportioned to the Bolitho Proceeding having regard to the relative prospects of Mr Bolitho's claims against Trust Co and Banksia's claims against Trust Co, and their relative contributions to the settlement. Costs must then be deducted from that amount.
- (c) To what extent did AFPL provide "financing" of the Bolitho proceeding? The contradictor contends that AFPL provided virtually no "financing" of the claims of Mr Bolitho in the Bolitho Proceeding. The financing of those claims was provided by others: namely, the debenture holders themselves (via the SPRs), and, to a lesser extent, the solicitors and counsel who, the contradictor asserts, acted for Mr Bolitho on a deferred or contingent fee basis. Further, AFPL did not have the financial capacity to meet those costs itself, and nor did it have financial capacity to meet adverse costs orders of any significant magnitude.
- (d) Who should bear the cost of the commission, noting that only 55% of debenture holders signed the Funding Agreement?

AFPL's proposed "common fund order"

- 14 AFPL is asking the court to make a "common fund order", under which all debenture holders are asked to contribute towards the payments sought by AFPL, regardless of whether they signed a Funding Agreement.
- 15 A common fund order should generally be made only if:
- (a) it is more advantageous to group members than pre-existing funding arrangements;
 - (b) it is necessary to do so in order to address a "free rider" problem;
 - (c) the intention to seek the common fund order has been disclosed to group members at an early stage, and they had a right to opt out.
- 16 The contradictor contends that AFPL's proposed order should not be made, as follows.

² The contradictor considers that a proper apportionment of the settlement sum may be that the settlement sum referable to the Bolitho Proceeding is less than 50%. This will depend on findings made by the court.

Debenture holders will be worse off

- 17 As set out above, the contradictor considers that, if AFPL's funding commission is calculated properly (either from the perspective of assessing a fair and reasonable entitlement or by applying the provisions of the Funding Agreement) the group members will not be better off.

Is there a "free rider" problem?

- 18 The justification for making a common fund order under section 33ZF of the *Supreme Court Act* 1986 (Vic) is that it addresses the "free rider" problem, where group members who have not entered into a contract with the litigation funder are nonetheless able to take the benefit of the work undertaken and paid for by the litigation funder. That problem is not present here. None of the debenture holders is a "free rider": all have contributed to the resolution sum achieved in the proceedings because funds of approximately \$10 million that would otherwise have been returned to them have been used to pay for work undertaken by the SPRs and their legal team for the benefit of both SPR Proceeding and the Bolitho Proceeding. In the circumstances of this case, it is AFPL that has been the "free rider", rather than debenture holders, because AFPL has relied substantially on the work undertaken by the SPRs and their legal team, financed by the debenture holders, to advance the Bolitho Proceeding.

What have group members been told?

- 19 The opt out notice issued to group members in 2016 did not inform them of AFPL's intention to seek a common fund order in connection with the claims against Trust Co. There was no opportunity to consider opting out having regard to the possibility of a common fund order being made.

What order should be made?

- 20 The contradictor contends that an order should be made on the basis that all group members contribute equally to the commission amount that AFPL is properly entitled to as set out above.
- 21 The contradictor also contends that any commission should be calculated on the basis of a methodology that links AFPL's reward to its real risk and cost exposure.³

³ At the first approval application, Mr Bolitho's legal representatives asserted that AFPL's cost exposure was in excess of \$15 million. The contradictor contends that AFPL's real cost exposure was significantly less than \$15 million, given that (1) the actual security for costs furnished by AFPL up to the time of settlement was only \$570,000 with a further tranche of

\$720,000 due to be provided by 31 January 2018 but which AFPL had not been required to provide at the time of settlement; (2) the quantum of security for costs provided is likely to be a reliable guide to the cost exposure of AFPL/Mr Bolitho in the Bolitho Proceeding; (3) AFPL had insufficient assets to meet a cost order of the magnitude it said it faced in the Bolitho Proceeding.