

BETWEEN:

LAURENCE JOHN BOLITHO

Plaintiff

and

BANKSIA SECURITIES LIMITED (ACN 004 736 458)
and others in accordance with the schedule

Defendants

NOTICE TO DEBENTURE HOLDERS

15 April 2019

Dear Sir/Madam

BANKSIA CLASS ACTION – WHAT YOU NEED TO KNOW

- **The class action litigation funder seeks approval for payments to it of its costs and commission out of settlement proceeds. You can support or object to these payments. There will be a hearing in the Supreme Court of Victoria from 3 to 6 June 2019.**
- **The class action litigation funder (AFPL) has made an application to the High Court seeking to set aside the decision of the Court of Appeal, which approved the settlement with Trust Co (but not the payments to AFPL). AFPL argues that this means that the settlement in its current form will not proceed. There will be an initial hearing in the High Court on 17 May 2019.**

The Supreme Court of Victoria has ordered that this notice be sent to tell you about **two** matters:

1. Litigation funder's claim for costs and commission: The Banksia class action litigation funder (Australian Funding Partners Limited or **AFPL**) is seeking to claim payments for its legal costs and commission totaling about \$19 million including GST out of the \$64 million cash proceeds of the overall settlement with Trust Co. **You have the right to support or object to AFPL's claims for these payments, as set out below.**

2. Litigation funder's High Court special leave application: AFPL argues that the Court of Appeal could not approve the settlement with Trust Co without also approving the payments to AFPL of its legal costs and funding commission. The High Court special leave application could ultimately result in the Trust Co settlement being upheld, or it might result in AFPL overturning the Trust Co settlement, or it might require the parties to renegotiate.

This has no immediate impact on the application in the Supreme Court of Victoria for review of AFPL's costs and commission. **It will be a matter for the Supreme Court whether the hearing on 3 June 2019 proceeds if the High Court grants special leave. AFPL's application is listed to run in the Supreme Court of Victoria from 3 to 6 June 2019.** You should check our website at <https://www.ferrierhodgson.com/au/creditors/banksia-securities-ltd> in case that date changes.

Background information about litigation funder's claims for costs and commission of about \$19 million (inc GST)

There were **two legal proceedings** brought against Banksia's trustee, **Trust Co**, to recover losses suffered by the debenture holders of Banksia.

- (1) The **class action** (a group proceeding brought by Mr Laurence Bolitho as lead plaintiff on behalf of himself and other debenture holders), was commenced on 24 December 2012 and was funded by AFPL.
- (2) The **liquidators' proceeding** (a proceeding which the liquidators / special purpose receivers of Banksia were pursuing), was commenced on 27 March 2015 and was funded by the liquidators out of the assets of Banksia.

In December 2017, Trust Co agreed to settle **both the class action and the liquidators' proceeding**. Trust Co agreed to pay a settlement sum of **\$64 million** and to give up its claimed entitlement to additional remuneration arising from work it said it performed as a result of Banksia's external administration.

AFPL provided litigation funding for the class action. AFPL did **not** provide litigation funding for the liquidators' proceeding. The liquidators' proceeding was funded out of the assets of Banksia.

The focus of the proceedings at present is the costs and commission payments claimed by AFPL.

AFPL is asking the court to approve payments to it of about **\$5.1 million (inc GST) in legal costs** and about **\$14 million (inc GST) as a funding commission**.

AFPL is asking the court to order that these payments be deducted from the cash settlement proceeds of **\$64 million**. This means that the payments that AFPL is seeking will be met by **all** debenture holders, whether or not they signed a Funding Agreement, and whether or not they previously opted out of the class action.

The court will consider whether the payments are fair and reasonable. If the court considers the payments are excessive, **the court may reduce them**, with the result of **increasing** the funds available for distribution to you.

The court previously approved the payments to AFPL, but a debenture holder objected and then appealed from the decision. The Court of Appeal upheld the appeal and said that AFPL's claims for the payments had not been submitted for approval. The court has now appointed a "contradictor" to ensure that the issues raised for the court's consideration are subject to a proper contest, thereby facilitating the effective determination of those issues to ensure that justice is done for all debenture holders.

You can access further information about the arguments / issues raised in the application about AFPL's claims for its costs and commission on our website:

<https://www.ferrierhodgson.com/au/creditors/banksia-securities-ltd>

First claim: AFPL's legal costs (\$5.1 million) (inc GST)

AFPL is seeking to recover about **\$5.1 million (inc GST)** for legal costs that it says it incurred in running the class action against Trust Co and incurred in the Court of Appeal last year. AFPL has also indicated that it will seek to claim costs incurred in the current application in the Supreme Court of Victoria.

The costs that AFPL is seeking to recover will be examined by the court. There may be an additional review of the costs that AFPL is seeking to recover by an independent costs expert or a costs referee or the Costs Court.

The costs of the contradictor in the first instance have and will continue to be deducted from settlement proceeds. The Court will determine who will ultimately be responsible for these costs.

Second claim: AFPL's commission (about \$14 million (inc GST))

Litigation funders usually receive a commission for providing litigation funding. Often, the court will allow the litigation funder to deduct their commission from settlement proceeds before the funds are distributed to group members, irrespective of whether all group members signed a funding agreement. The court will only make such an order if satisfied that it is appropriate to do so and that the amount of the commission is reasonable.

Your right to support or object to the payments to AFPL

Debenture holders have the right to support or object to the payments AFPL is seeking. Objecting does not expose you to any liability for costs.

You can support or object in writing by 17 May 2019

You can support or object to the payments to AFPL in writing (without the need to appear at a court hearing) by sending a written notice to the Supreme Court of Victoria. **You should send your notice of support or objection by 17 May 2019.**

Your notice should outline why you support or object to the payments to AFPL (or the amount of those payments). You can attach documents to your notice if you wish. The Supreme Court will send a copy of your support or objection to AFPL and the other parties to the proceeding (and the contradictor).

Notices can be given to the Supreme Court of Victoria by **post or email** to:

The Associate to the Honourable Justice John Dixon
Supreme Court of Victoria
Commercial Court Registry
450 Little Bourke Street
Melbourne VIC 3000
chambers.justicejohndixon@supcourt.vic.gov.au

You can ask the court to hear your support or objection in person

If you support or object and would like to address the court in person, you can ask the court for permission to appear at the hearing of AFPL's application by notifying the Supreme Court at the address or email address set out above by **24 May 2019**.

You may contact Mr Craig Phillips, the solicitor assisting the contradictor, on (03) 9672 3000 for information about how to seek permission to appear.

Inspecting documents relating to AFPL's application

If you wish to inspect documents relating to AFPL's application, you may do so on our website at <https://www.ferrierhodgson.com/au/creditors/banksia-securities-ltd>. Some documents upon which the parties rely are confidential (eg, reports relating to the legal costs AFPL seeks to recover), and you may be required to enter into a confidentiality agreement before you are permitted to inspect those documents. It may be necessary to inspect confidential documents at the offices of Arnold Bloch Leibler.

Arnold Bloch Leibler's offices are at Level 21, 333 Collins Street, Melbourne VIC 3000. To make an appointment to inspect documents or to arrange to be sent non-confidential documents by email, you may contact John Mengolian by phone on (03) 9229 9953 or by email at JMengolian@abl.com.au.

Updating your contact details

If the settlement with Trust Co goes ahead, there will be a distribution to you. Please notify any change of address or circumstances by contacting Link Market Services on (02) 8767 1029 or by writing to banksia@linkmarketservices.com.au.

If you know any other debenture holder who has changed address, please bring this letter to their attention.