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

Not Restricted

S CI 2012 07185

LAURENCE JOHN BOLITHO — First Plaintiff

AUSTRALIAN FUNDING PARTNERS LIMITED (ACN 167 628 597) — Second Plaintiff

v

BANKSIA SECURITIES LIMITED (ACN 004 736 458) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS (according to the attached Schedule) — Defendants

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JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	On the papers
DATE OF RULING:	2 June 2020
CASE MAY BE CITED AS:	Bolitho & Anor v Banksia Securities Limited & Ors (No 9)
MEDIUM NEUTRAL CITATION:	[2020] VSC 309

PRACTICE AND PROCEDURE — Courts and judges — Court file — Application for certain documents to be confidential and not available to non-parties for inspection — Whether legitimate public interest in documents outweighs detriment capable of being occasioned to applicant — Whether documents akin to a pleading should be kept confidential.

Written Submissions	Counsel	Solicitors
For the Second Plaintiff	Mr S Horgan QC	Arnold Bloch Leibler
For the First Defendant	Mr J Redwood	Maddocks
For the Contradictor	Mr P Jopling QC with Ms J Collins	Corrs Chambers Westgarth

HIS HONOUR:

1 This proceeding, on remittal to the Trial Division from the Court of Appeal,[1] concerns the partial settlement in November 2017 of a class action commenced by the first plaintiff against Banksia Securities Limited. The issues the subject of the remitter relevantly include the reasonableness of the claim for legal costs incurred and the claim for litigation funding commission. The proceeding is listed for trial in July 2020. Previous pre-trial rulings provide more detail of the subject matter of the remitter.[2]

2 As this present proceeding follows on from an appeal against approval of a settlement of a group proceeding, the court file in respect of the remitter is not composed of documents usually required by the *Supreme Court (General Civil Procedure) Rules 2015* ('***Rules***') to be filed in anticipation of a trial. The court invited the parties to develop a list of the issues to be resolved on the remitter and had directed that evidence be filed by way of affidavit and confidential memoranda of trial counsel. Following media requests to search the file, I invited the parties to make any submission they considered appropriate about non-party access to the file in respect of the remitter.

3 The second plaintiff ('**AFPL**') seeks orders that three documents on the court file be confidential. Those documents are:

(a) exhibit LOR-1 to the affidavit of Lara Helen O'Rorke sworn 25 March 2020 ('**O'Rorke Exhibit**');

(b) the affidavit of John Mengolian sworn 17 March 2020 ('**Mengolian Affidavit**'); and

(c) **Annexure A** to the Contradictor's Revised List of Issues,[3] being the particulars of alleged conduct by Mr Norman O'Bryan AM SC, Mr Michael Symons and Mr Anthony Zita/Portfolio Law Pty Ltd (together, the '**Lawyer Parties**') and AFPL.

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1 *Botsman v Bolitho* (2018) 57 VR 68.

2 *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 ('***Banksia No 6***'); *Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174.

3 Including all previous iterations of that annexure.

4 The Contradictor and the first defendant ('**SPR**') oppose orders being made as sought by AFPL in respect of Annexure A. The Contradictor also opposes orders being made in respect of the Mengolian Affidavit. The Contradictor submits that the documents should be available in full for non-party inspection. The SPR contends that some redaction of Annexure A is appropriate.

5 The *Rules* relevantly provide:

> **28.05 Inspection of documents**
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> (1) When the office of the Court is open, any person, on payment of the proper fee, may inspect and obtain a copy of any document filed in a proceeding.
>
> (2) Notwithstanding paragraph (1)—
>
> (a) no person may inspect or obtain a copy of a document which the Court has ordered remain confidential;
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> (b) a person not a party may not, without leave of the Court, inspect or obtain a copy of a document which in the opinion of the Prothonotary ought to remain confidential to the parties.

6 Longstanding Victorian practice has allowed non-party inspection of filed pleadings and affidavits, but not exhibits. However, rule changes are being developed that will exclude both affidavits and exhibits from non-party inspection on the court file until such time that the affidavit and exhibits are used, read, or tendered in an open court hearing, which will bring the practice in this court much closer to that in the Federal Court and the Supreme Court of New South Wales. In the meantime, this practice remains relevant. Inspection is subject to any order of the court.

7 On 19 May 2020, I ordered that any affidavit that has been filed by direction to stand as evidence at the trial of the remitter is confidential, and shall remain confidential until it is relied on in open court. Pursuant to r 28.05(2)(a) of the *Rules*, such affidavits may not be inspected.

8 In *Smith v Harris*, Byrne J said (in a defamation proceeding):

> It seems to me, with respect, that there is a significant distinction between a writ of summons filed in the registry and the hearing in open court and that this distinction touches the policy underlying the immunity in question. …

> This other right … is that which says that the court's proceedings must be open to the public, so that the public has confidence in their integrity. A document prepared for, filed and even served is not in that sense part of the court's proceedings, at least until it is deployed as part of the judicial process. A like distinction between documents filed and served and documents deployed in court is observed with respect to discovered documents, and witness statements. This distinction may be applicable, too, to affidavits which are filed in court and which may be never read or tendered. It may be that the parties have compromised the proceeding before their use in court, perhaps in order that their private dealings contained in the pleadings or other documents be not made public. What good purpose would then be served for them or for the public if some reporter were permitted to broadcast these matters for the gratification of the curious public? … There is, too, the possibility that the document, even when deployed in court, may be ordered to be confidential or some restraint may be imposed on it or, it may even be that the court may make an order that the hearing at which the document is used be in closed court pursuant to the *Supreme Court Act 1986* s 18 or its equivalent in other jurisdictions. The publication of a filed document before the hearing would defeat the purpose of such an order...[4]

9 I respectfully agree with Byrne J's observations and add to them that the disclosures made in the affidavits filed in the remitter were compelled by court order. Traditionally, a common law court would not become aware of the evidence to be given by a witness until it was stated by that witness in open court from the witness box. By that process, objection could be taken to the admissibility of evidence that might be adduced in answer to questions. The fact that modern case management has required earlier disclosure to the court file does not alter the fact that before affidavits are read, tendered, or used in a proceeding, if at all, they are subject to scrutiny as to admissibility and may be rejected, redacted or supplemented. Moreover, forensic decisions may limit or vary the extent of use of affidavits that have been filed. What is filed may not be what is received in open court.

10 I need not dwell on the O'Rorke Exhibit, an exhibit to an affidavit sworn by a solicitor in connection with a claim to legal professional privilege that I referred to an associate judge for determination. Apparently, its purpose was to provide documents to the associate judge to assess that claim. The O'Rorke Exhibit contained unredacted copies of the documents that were subject to a claim for privilege by AFPL.

11 No party submits that the O'Rorke Exhibit ought to be available for non-party

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4 [1996] 2 VR 335, 341–2 (citations omitted).

inspection or otherwise be available to the parties.

12 AFPL's application in respect of this document is not opposed by the Contradictor or the SPR. I see no reason why the O'Rorke Exhibit, and, assuming its only purpose was to file the O'Rorke Exhibit, the affidavit of Lara O'Rorke itself, need to be retained on the court file and I grant AFPL leave to uplift them.

13 The Mengolian Affidavit is an affidavit sworn by AFPL's solicitor at my direction. Its subject matter is somewhat peripheral to the issues to be resolved on the remitter. On 6 March 2020, I required AFPL's instructing solicitors to file and serve an affidavit deposing to their attempts to locate a Blackberry mobile phone. The Mengolian Affidavit was made in accordance with that order, and provided to my chambers and the Contradictor by email on a confidential basis. The mobile phone was located and it is the data on that phone that might be relevant to the issues on the remitter, not the inquiries undertaken to locate it.

14 This affidavit should also remain confidential to the parties.

15 The Contradictor's Revised List of Issues ('**RLOI**') identifies 12 discrete questions for the court to determine in the remitter. Those questions fall under the headings of 'Legal Costs', 'Funding Commission' and 'Disentitling Conduct and Conduct Attracting Relief Under the *Civil Procedure Act*'. Annexure A identifies the alleged 'particulars of conduct' by AFPL and the Lawyer Parties that the Contradictor asserts are relevant to the questions posited in the RLOI.

16 The RLOI is in the nature of a pleading, in that it identifies the issues that the court must resolve to finalise the aspects of the settlement approval that were remitted by the Court of Appeal. No party submitted that the RLIO as a whole should not be available for non-party inspection. The debate centred on Annexure A to that document. The scope of the material in Annexure A that is contentious is sufficiently identified from the parties submissions.

17 AFPL submitted that Annexure A should be confidential until all of the evidence had

been filed in the proceeding. It submitted that the annexure contains grave allegations that the Contradictor seeks to prove, which are built upon inference, circumstantial evidence and untested charges. The broad thrust of those allegations are already in the public domain as a result of my reasons for decision in *Banksia No 6*, and AFPL submitted that by reference to those reasons, the substance of the issues on the remitter are capable of being appreciated without the need for access to Annexure A. It further submitted that to allow unrestricted public access to the particulars of 'Disentitling Conduct and Conduct Attracting Relief Under the *Civil Procedure Act*' would be both premature and unfair. Access would be premature until such time as those responding to the allegations had filed responsive evidence, and access would be unfair as prurient interest in bald allegations of that nature could be detrimental to the commercial, private and reputational interests of those parties.[5] Interested persons could appreciate the substance of the allegations to be tried by reading *Banksia No 6*, and restricting access to the detailed particulars of those allegations would represent an appropriate balance of the competing interests of open justice and fairness to the responding parties.

18 The Contradictor opposed the application, submitting:

(a) AFPL had not demonstrated a basis for restricting access to Annexure A and its application was unsupported by any evidence;

(b) AFPL had fashioned its submissions by reference to the interests of the Lawyer Parties, who had not themselves made any application to restrict access to Annexure A;

(c) Annexure A is akin to a pleading and contains allegations supported by documentary proof. The fact that those allegations are untested is not an unusual feature in civil litigation and to restrict access to a document on that

5 Citing *eisa Ltd v Brady* [2000] NSWSC 929; *ASIC v Rich* [2002] NSWSC 198, [13]; *Strategic Management Australia AFL Pty Ltd v Precision Sports & Entertainment Group Pty Ltd* [2015] VSC 717, [16], [20]; *Van Stokkum v Finance Brokers Supervisory Board* [2002] WASC 192, [27]; *Macquarie Radio Network Pty Ltd v Australian Broadcasting Authority* [2002] FCA 1408, [21].

basis does not accord with open justice;[6]

(d) the allegations in Annexure A were first raised more than a year ago, and AFPL has had several opportunities file its evidence in response;

(e) 16,000 debenture holders in Banksia have a real interest in being informed about the issues that are the subject of the remitter litigation. The legitimate public interest favours making Annexure A available, in circumstances where those debenture holders do not know, nor cannot access, details about the allegations made against their former legal representatives and litigation funder; and

(f) the allegations made in the remitter would, if proven, amount to the existence of an iniquity, and lack the necessary attribute of confidence to prevent disclosure.

19 The SPR opposed AFPL's application for Annexure A to be confidential in its entirety. It proposed that Annexure A be redacted to remove minor references to documents filed on a confidential basis by the SPR. The SPR submitted there was a legitimate public interest in making Annexure A available to debenture holders. It submitted that debenture holders had only received 'snippets' of information since the remittal was ordered, and the website for debenture holders established for the receivership of Banksia contained little information about the issues to be determined. Debenture holders have a real and significant interest in the remitter, particularly as the Contradictor, in addition to opposing AFPL's application for payment of legal fees and funding commission, advances positive claims, possibly of monetary value, against AFPL and the Lawyer Parties. If the Contradictor is entirely successful in the remitter, debenture holders could receive a further distribution of $30 million. In contrast, if the Contradictor is unsuccessful, debenture holders would have incurred substantial unrecoverable costs. The SPR should be enabled to upload a copy of the RLOI, including Annexure A, to the website.

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6 *Llewellyn v Nine Network Australia Pty* Ltd (2006) 154 FCR 293, 298–9 [27]–[28] ('***Llewellyn***').

20 The parties' submissions refer to the principle of open justice, a fundamental rule of the common law principally concerned with ensuring that the administration of justice takes place in open court. Among its purposes is the maintenance of public confidence in the justice system.[7] In *Commissioner of the Australian Federal Police v Zhao*, the High Court observed:

> [T]he rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances.[8]

21 A distinction is to be drawn between open justice as it relates to court hearings, and to access to documents on the court file, particularly where documents have not been relied on in open court.[9] There is no common law right to obtain access to a document filed in proceedings and held as part of a court record.[10] In *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors,*[11] Spigelman CJ observed that the principle of open justice is not engaged at the time of the filing of the proceedings. It is only when relevant material is used in court that it becomes relevant. There is no doubt that the trial of the remitter will be held in open court. It is not being suggested that the RLOI, including Annexure A, would be kept confidential at that stage of the proceeding.

22 The Rules create a presumption in favour of open access to documents that have been filed with the court, with inspection to be limited by the court exercising its inherent jurisdiction to restrict access when the interests of justice so demand.[12] The *Open Courts Act 2013* (Vic) has no application, as the of access to documents on a court file is expressly excluded from its operation.[13]

23 The guiding principle in any case is what, in the particular circumstances of the case, is necessary to secure the proper administration of justice.[14]

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7 *Hogan v Hinch* (2011) 243 CLR 506.
8 (2015) 255 CLR 46, 60 [44].
9 *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors* (2005) 62 NSWLR 512, 526 [65].
10 Ibid, 521 [31].
11 (2005) 62 NSWLR 512.
12 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21] ('***Hogan***').
13 *Open Courts Act 2013* (Vic) s 7(d)(iii); *Secretary, Department of Justice and Regulation v Zhong (No 2)* [2017] VSCA 19, [3].
14 *Hogan*, 534 [26].

24 In *HT v R*,[15] the appellant, who was a registered police informer who had provided assistance to law enforcement authorities and remained a registered informer, was sentenced on material that included confidential evidence disclosed to the prosecution but not to the appellant's counsel. The issue was whether the denial of procedural fairness was justified. Kiefel CJ, Bell and Keane JJ noted that it is well known that the courts have modified and adapted the content of the general rules of open justice and procedural fairness in particular kinds of cases.[16] The nature and extent of such modifications are fact sensitive, generally assessed on a broad principle that the court has the task of deciding how justice can be achieved, taking into account the rights and needs of the parties.

25 The relevant party should have as full a depth of disclosure as would be consistent with the competing rights of the other party. As Gordon J noted, a court must balance competing interests in a fashion that, to the extent possible, meets each of them. Gordon J also noted[17] the distinction between material admitted into evidence and thus being part of the court record that ordinarily will be open and available to the public, as the principle of open justice requires,[18] and material that is not admitted into evidence.

26 AFPL's contention was that public access to the annexure was premature because of the grave, untested and one-sided nature of allegations it contained. This notion of a danger of 'prematurity' was developed by Santow J in *eisa Pty Ltd v Brady* and approved by Barrett J in *ASIC v Rich.*[19] Santow J said*:*

> It is at the trial that public and Press will ordinarily have full and unfettered opportunity to be present and hear what is said, and where pleadings can be understood in their proper context. It may well then be possible to release a copy of the pleadings without danger of prematurity, though the circumstances would need still to be considered.
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> …

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15 (2019) 374 ALR 216, 238 [82] ('***HT***').
16 *HT*, 228–9 [44].
17 *HT*, 238 [81].
18 See *Scott v Scott* [1913] AC 417, 441, 445; *Russell v Russell* (1976) 134 CLR 495, 520; *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 67 ATR 82, 85 [10].
19 [2002] NSWSC 198, [13].

> Clearly if the court were thus to make available to the Press prematurely, affidavits or pleadings containing damaging allegations not read in court or sufficiently described in open court, this may severely and unfairly prejudice those the subject of these damaging allegations, with no necessary redress in defamation.[20]

27 Bearing in mind that there are different regimes for inspection of documents on court files in other states and federally, and the authorities should be understood in this context, Rares J in *Llewellyn*, rejected the approach of Santow J and Barrett J as fundamentally erroneous. His Honour said:

> It misunderstands the function of fair reports of proceedings and the availability to all persons of the right to be able to make fair reports of proceedings that have been initiated in courts. Ordinary members of the public are well aware of the difference between allegations made in courts and findings made by courts. People who make allegations or cause the processes of courts to be invoked do so in the circumstance that they are asking for the judicial power of the state or, here, the Commonwealth to be applied to the resolution of their dispute. [21]

28 Citing by way of analogy what Mason J said in *Mirror Newspapers Limited v Harrison* about the distinction that an ordinary reasonable reader would draw between arrest and guilt,[22] Rares J opined that the proposition that untested allegations in civil proceedings are somehow to be shielded from public view merely because they are untested allegations, and could only possibly be properly understood in the context of a fully contested hearing, could not sit with the principle of open justice or the right of anyone fairly to report proceedings in a court of justice.[23] With respect, I agree.

29 There is a second guiding factor particular to this litigation that favours that the RLOI (with Annexure A) should not be kept confidential until trial that is founded in the fact that this is a group proceeding. In some cases, a comparison has been between the public interest in open justice and the private interest, or right to privacy, of those who are subject to serious but unproven allegations, in this case of disentitling conduct and conduct attracting relief under the *Civil Procedure Act 2010* (Vic). Both the SPR and the Contradictor stressed the legitimate interest of 16,000 debenture holders in being

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20 [2000] NSWSC 929, [18], [21].
21 *Llewellyn*, 298 [24].
22 (1982) 149 CLR 293, 300–1.
23 *Llewellyn*, 298–9 [28].

informed of the issues that remain to be resolved in this litigation, and in receiving some information to assist them in understanding the financial and other implications of the resolution of those issues. Those debenture holders have, as the SPR submitted, a real and significant interest in the detail of the issues being considered on the remitter. This interest is distinct from the general public interest in open justice.

30 I am satisfied that Annexure A should not be confidential.

31 First, the legitimate public interest weighs strongly in favour of disclosure of Annexure A. The conduct that forms the factual basis of the issues to be resolved is capable of being of genuine public interest, albeit that there is overlap with interests that might be regarded as commercially private. The limitation on that overlap is that the remitter does not simply concern the rights and interests of the six named parties who might advance a contention that their commercial activities are private. It affects the rights and entitlements of 16,000 debenture holders. It is evident that the debenture holders may be financially affected by any decision, either favourably or unfavourably. Notwithstanding the role of both the Contradictor and the SPR, it is not in the interests of the proper administration of justice that the debenture holders be denied important information that would ordinarily be available to a party in litigation.

32 Second, AFPL did not establish, other than in generic terms, that it will suffer any prejudice or other detriment from the disclosure of Annexure A. It did not adduce any evidence going to the issue of damage to reputation or to commercial interests beyond a bare submission, without evidence, about the potential consequences for the Lawyer Parties if disclosure occurred. However, even if this contention had been substantiated by AFPL, the Lawyer Parties made no positive application. The submission failed to grapple with the principle identified in *Llewellyn*.

33 Third, AFPL's primary basis for asserting that Annexure A ought to be confidential has largely fallen away. Its application was initially made in March 2020 concerning the Contradictor's RLOI dated 11 March 2020. The Contradictor filed its foreshadowed

amendments to the RLOI on 12 May 2020. In the intervening period, the Lawyer Parties filed their evidence in chief, and AFPL has filed its responsive expert evidence. AFPL and the Lawyer Parties are permitted under current directions to file and serve some further evidence limited to responses to specific matters. Should AFPL wish to publish a statement of its response to the RLOI either to debenture holders via the website or more generally, it may now do so.

34 Fourth, the remitter is at an advanced stage. Earlier, the Lawyer Parties applied to strike out the RLOI, including Annexure A, substantially in its current form and that application, which was unsuccessful, resulted in the court rejecting the notion that the RLOI raised issues that had no real prospect of success at trial.[24] The majority of the evidence has been finalised, the court book is being compiled and the trial will commence in less than two months' time.

35 Finally, Annexure A is, in essence, a pleading. It identifies the issues that AFPL submits to the court for determination and the allegations the Contradictor intends to make at trial, particularised by the material facts it will set out to prove. It is neither evidence, nor the findings of the court. Properly described, its content will not cause unfair prejudice with no recourse for the allegations to be addressed.

36 For these reasons, AFPL's application that Annexure A be kept confidential to the parties is refused.

37 Finally, I will not redact Annexure A in the manner suggested by the SPR. The proposed redactions were limited to pinpoint references to an opinion by the SPR's counsel and an affidavit of the SPR's instructing solicitor. Those documents remain confidential at this stage, pursuant to orders of the court. Not redacting those references, which are in general terms only, will not waive or otherwise restrict confidentiality over the substantive content of these documents.

38 For the reasons above, I will make the following orders:

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24 *Banksia No 6*.

(a) With the exception of the affidavit of John Mengolian sworn 17 March 2020, all Public Court Documents (as defined by the orders of the Honourable Justice John Dixon made 6 March 2020) filed in the proceeding from 1 November 2018 may be inspected at the office of the Prothonotary.

(b) The affidavit of John Mengolian sworn 17 March 2020 is confidential and shall remain confidential unless and until it is relied on in open court or further order.

(c) Exhibit LOR-1 to the affidavit of Lara Helen O'Rorke sworn 25 March 2020 may be uplifted from the court file.

(d) By 9 June 2020, the SPR cause a copy of the Revised List of Issues dated 12 May 2020, including Annexure A, to be uploaded to the website maintained by the SPR for the receivership of Banksia.

(e) Liberty to apply is reserved in respect of costs.

39 The parties should confer as to how the issue of the costs of this application are to be resolved, and if possible, submit a consent minute. Otherwise, I direct that by 9 June 2020, the parties file and exchange submissions in respect of costs. Unless persuaded by those submissions to do otherwise, I will determine the question of costs on the papers.

CERTIFICATE

I certify that this and the 11 preceding pages are a true copy of the reasons for ruling of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 2 June 2020.

DATED this second day of June 2020.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

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Associate