



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

Case: S CI 2012 07185

Filed on: 26/02/2021 03:52 PM
No SCI 2012 07185

Between:

LAURENCE JOHN BOLITHO

First plaintiff

**AUSTRALIAN FUNDING PARTNERS PTY LIMITED
(ACN 167 628 597)**

Second plaintiff

and

**BANKSIA SECURITIES LIMITED (ACN 004 736 458)
(RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE**

Defendants

**SIXTH DEFENDANT'S WRITTEN CLOSING SUBMISSIONS
FILED PURSUANT TO THE DIRECTIONS OF THE HONOURABLE JUSTICE DIXON ON
11 DECEMBER 2020**

Date of document: 26 February 2021

Filed on behalf of: Sixth Defendant

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1. For the reasons set out in these submissions, Katerina Peiros as the representative of the estate of Peter Trimbos (**Estate**), the sixth defendant in this proceeding, S CI 2012 07185 (**Proceeding**), submits that the Court could not or should not make any orders against the sixth defendant pursuant to section 29(1) of the *Civil Procedure Act 2010 (Vic)* (**CP Act**).

Summary

2. In summary, the reasons are as follows:

- (a) Mr Trimbos passed away on 24 September 2020.¹ There was never a cause of action against Mr Trimbos in the Proceeding. Accordingly, the Proceeding against Mr

¹ See the affidavit of Ms Peiros dated 27 November 2020, exhibiting a redacted death certificate in respect of the late Mr Trimbos (**Mr Trimbos**), filed pursuant to the Court's Order of 2 November 2020 [**ORD.500.058.0001**].

Trimbos abated upon his death because there is no surviving cause of action against him or his Estate. In this regard, see paragraphs 4 to 48 below.

- (b) Alternatively and further, if the Court were to find and hold that the Proceeding has not abated, then Mr Trimbos did not contravene, and it has not been proven that he contravened, the paramount duty under section 16 of the CP Act or the overarching obligation under section 21 of the CP Act by his conduct in the course of the Proceeding. More specifically, Mr Trimbos' conduct in the course of the Proceeding, as alleged and set out in the Contradictor's "*Particulars of Allegations and Relief Sought Against Mr Trimbos*" dated 28 August 2020² (**PoA**)–
- (i) was not conduct which was misleading or deceptive, even if proven;
 - (ii) has not misled or deceived any person; and
 - (iii) has not materially contributed to any wasted legal costs *as loss* or other costs or expenses as loss, or any financial or other loss, even if proven.

In short, the assertions set out in the PoA, even if proven, do not justify or support any findings enabling orders to be made against the sixth defendant under section 29(1) of the CP Act. In this regard, see paragraphs 49 to 221 below.

- (c) Alternatively and further, if the Court were to find and hold that Mr Trimbos contravened section 16 and section 21 of the CP Act, the Court should exercise its discretion *not* to make any orders against the sixth defendant under section 29(1) of the CP Act, because, having regard to the circumstances of the matter (including, the conduct of the remitter), the conduct of the other parties in the course of the Proceeding, and Mr Trimbos' conduct in the course of those matters, to make any order would *not* be "*appropriate in the interests of justice*" (section 29 of the CP Act) and would *not* further the overarching purpose of the CP Act (section 7). In this regard, see paragraphs 222 to 230 below.
- (d) Alternatively and further, in any event, if the Court were to make orders against the sixth defendant under section 29(1) of the CP Act, the Court should apportion responsibility between the parties who contravened the CP Act pursuant to section 29 of the CP Act according to the principles applied to apportion responsibility for contributory fault in tort. The proportionate liability regime set out in Part IVAA of the *Wrongs Act 1958 (Vic)* (**Wrongs Act**) is not applicable to liability for

² [PAR.010.001.0001].

contravention of the CP Act. In so far as there may be any apportionment of responsibility to Mr Trimbos it should only be negligible. In this regard, see paragraphs 231 to 239 below.

3. Each of the reasons is now addressed in turn.

A. The Proceeding against Mr Trimbos abated upon his death

4. On 2 November 2020, pursuant to paragraph 1 of the Order of Dixon J of that date,³ Ms Peiros was appointed as the representative of the Estate under rule 16.03 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic) (Rules)*. The Court declined to hear and determine this issue as a preliminary issue and, as set out in *Bolitho v Banksia Securities Limited (No 15)* [2020] VSC 725 (*Bolitho No 15*) at [4], the Court ordered⁴ that the Revised List of Issues dated 27 October 2020 (**October 20 List of Issues**)⁵ be amended to include the question: "*Has any cause of action survived the death of Mr Peter Trimbos?*" (**Abatement Issue**).

5. To determine the Abatement Issue, one must first consider the relevant factual context. Those facts are uncomplicated, but unusual. Mr Trimbos was a costs consultant who provided expert reports in the Proceeding in the following circumstances:

- (a) A confidential expert report dated 4 January 2018⁶ (**Third Trimbos Report**) dealing with the fairness and reasonableness of the legal costs and disbursements of the legal representatives of the plaintiff, Laurence John Bolitho, in the Proceeding. BSL Litigation Partners Ltd, now known as Australian Funding Partners Pty Limited⁷ (**AFPL**) who was the funder, instructed Mr Trimbos to prepare the Third Trimbos Report on behalf of Mr Bolitho⁸ for the purpose of Mr Bolitho's application for approval of the settlement sum in the so-called "*Banksia class action*" (**Bolitho Approval Application**), pursuant to a Summons dated 7 December 2017⁹ (**Bolitho Summons**) filed by the fourth defendant (Portfolio Law Pty Ltd) (**Portfolio Law**) under sections 33V and 33ZF of the *Supreme Court Act 1986 (Vic)* (**SC Act**). The defendants were Banksia Securities Limited (receivers and managers appointed) (in liquidation) (**Banksia**) and The Trust Company (Nominees) Ltd (**Trust Co**).

³ [ORD.500.058.0001], [ORD.500.056.0001].

⁴ [ORD.500.058.0001 at 0002].

⁵ [PLE.010.005.0001].

⁶ [CBP.001.010.5957 at 5963].

⁷ T2:7-13 [TRA.500.001.0001 at 0003].

⁸ [CBP.001.010.5957 at 6002].

⁹ [CRT.550.005.0001].

- (b) For the sake of completeness, it should be noted that Mr Trimbos had previously provided an expert report on 8 July 2016¹⁰ (**First Trimbos Report**) and a confidential supplementary report dated 18 August 2016¹¹ (**Second Trimbos Report**) in the Proceeding, in support of an application by Mr Bolitho for approval of a partial settlement in the Banksia class action before Robson J (**Bolitho Partial Approval Application**). Mr Trimbos was instructed by AFPL on 4 July 2016¹² and 12 August 2016¹³ respectively. The Second Trimbos Report was prepared and provided pursuant to issues raised in submissions¹⁴ by the *amicus curiae*, Mr O'Callaghan QC (now the Honourable Justice), who was appointed by Robson J to consider, among other things, the First Trimbos Report and the sufficiency of information in the report to enable the Court to consider and determine the approval application. Robson J approved the partial settlement, as well as the proposed distribution from the settlement sum.¹⁵ Save in so far as the First and Second Trimbos Reports are referred to in the Third Trimbos Report, they are irrelevant for present purposes.
- (c) The Bolitho Approval Application was heard by Croft J on 30 January 2018. His Honour approved the settlement (**Settlement**), the settlement sum (**Settlement Sum**), and the reimbursement of Mr Bolitho for the sum of \$75,000 (**Bolitho Reimbursement**), as well as the proposed distribution from the Settlement Sum in respect of, amongst other things, AFPL's commission (**Commission**), and legal costs and disbursements (**Legal Costs**). Croft J's reasons are set out in his Honour's judgment reported as *Re Banksia Securities Limited (receivers and managers appointed (in liquidation) (No 2)* [2018] VSC 47 (**Banksia No 2**). His Honour made the orders set out in the Order dated 30 January 2018.¹⁶
- (d) A debenture holder and group member, Ms Botsman, sought to overturn the orders approving the Settlement (**Botsman Appeal**), and, in doing so, concentrated on three aspects of the approval: the quantum of the Settlement Sum, AFPL's Commission and Legal Costs.¹⁷ The Court of Appeal, while approving the Settlement Sum and the Bolitho Reimbursement, declined to approve the proposed distribution of AFPL's

¹⁰ [SYM.002.001.1890 at 1892].

¹¹ [CCW.031.001.0047].

¹² [SYM.002.001.1890 at 1921].

¹³ [CCW.031.001.0047 at 0020].

¹⁴ [AFP.001.001.1998].

¹⁵ His Honour's reasons are set out in *Re Banksia Securities Limited (receivers and managers appointed)* [2017] VSC 148.

¹⁶ [AFP.001.001.3793].

¹⁷ See *Botsman v Bolitho (No 2)* (2018) 57 VR 148, [18] (**Botsman No 2**); *Botsman v Bolitho (No 1)* (2018) 57 VR 68, [158] (**Botsman**).

Commission and Legal Costs, and remitted those matters for consideration by another judge of the Trial Division of the Court.¹⁸

- (e) on remittal, certain changes occurred in the Proceeding:
- (i) the remitter in the Proceeding became the AFPL Approval Application. The remitter is an application by AFPL, pursuant to sections 33V and 33ZF of the SC Act, for the approval of the distribution from the Settlement Sum of AFPL's Commission and Legal Costs, and for approval of the procedure of a Settlement Scheme (**AFPL Approval Application**).¹⁹ AFPL, the second plaintiff, was joined to the Proceeding as a party by an Order of Dixon J on 22 November 2018.²⁰ The Proceeding now being one between Mr Bolitho and AFPL as plaintiffs, and John Ross Lindholm in his capacity as Special Purpose Receiver (**SPR**) of Banksia as defendant;²¹
 - (ii) Mr Jopling AM QC and Ms J Collins were appointed as contradictor (**Contradictor**) in the Proceeding "*for purposes of the remitter [the AFPL Approval Application]*",²² with Mr Phillips appointed as the instructing solicitor of the Contradictor in the Proceeding for purposes of the AFPL Approval Application;²³ and
 - (iii) subsequently, about a year after the appointment of the Contradictor, the following persons were joined as parties to the Proceeding pursuant to paragraph 1 of the Order of Dixon J dated 15 November 2019:²⁴ Norman O'Bryan QC (as second defendant), Michael Symons (as third defendant), as well as Anthony Zita and Portfolio Law (as fourth defendant). Mr Lindholm as SPR of Banksia became the first defendant. It is pertinent to note that, although Dixon J alluded to the possibility of the Court considering whether the conduct of Mr Trimbos contravened the overarching obligations in the CP Act in his Honour's ruling in *Bolitho No 6* at [42] on 26 September 2019, Mr Trimbos was not then joined to the Proceeding.

¹⁸ *Botsman*, [401]. The Court of Appeal's reasons are set out in *Botsman*, and the orders are set out in the Order of the Court of Appeal dated 1 November 2018 [**ORD.500.002.0001**].

¹⁹ *Bolitho v Banksia Securities Limited (No 6)* [2019] VSC 653, [8] (*Bolitho No 6*).

²⁰ [**ORD.500.003.0001**].

²¹ Paragraph 10 of the Court of Appeal's Order of 1 November 2019 [**ORD.500.002.0001 at 0003**].

²² Paragraph 1 of the Order of Dixon J on 26 November 2018 [**ORD.500.004.0001**] and *Bolitho No 6*, [8].

²³ Paragraph 1 of the Order of Dixon J dated 1 February 2019 [**ORD.500.005.0001**].

²⁴ [**ORD.500.011.0001**].

- (f) Mr Trimbos was instructed by Arnold Bloch Liebler (**ABL**) on 15 February 2019²⁵ and on 2 June 2020²⁶ in the AFPL Approval Application to prepare expert reports on behalf of AFPL, namely reports dated 12 March 2019²⁷ (**Fourth Trimbos Report**) and 29 June 2020²⁸ (**Fifth Trimbos Report**). In the Fourth Trimbos Report, reference was made to the Third Trimbos Report. The Fourth Trimbos Report and the Fifth Trimbos Report are actually the first and the second reports in the AFPL Approval Application.
- (g) Approximately two years after the AFPL Approval Application had commenced, on 20 August 2020, the Honourable Justice Dixon also made orders of the Court's own motion, joining Mr Alexander Elliott (as fifth defendant) and Mr Trimbos (as sixth defendant) to the Proceeding.²⁹ The purpose of Mr Trimbos' joinder was to inquire into whether Mr Trimbos' conduct in the course of the Proceeding contravened the overarching obligations under the CP Act. On 27 August 2020, Dixon J ordered Mr Trimbos to provide an affidavit of full and frank disclosure of various matters.³⁰ This occurred after Mr Trimbos was required to give, and gave, evidence on 13 August 2020.³¹
- (h) Mr Trimbos affirmed and filed an affidavit on 21 September 2020³² (**Trimbos Affidavit**). Three days after the Trimbos Affidavit was filed, Mr Trimbos passed away. Notice was duly given on 27 November 2020 under section 67 of the Evidence Act of the intention to rely on the Trimbos Affidavit.³³ The Trimbos Affidavit was admitted into evidence³⁴ with two deletions sought by the fourth defendant which are not relevant for present purposes. Save for the two deletions, the Trimbos Affidavit stands un-contradicted.
6. In summary, for the reasons set out in paragraphs 7 to 48 below, it is submitted that there was no cause of action against Mr Trimbos in the Proceeding. Accordingly, no cause of action against Mr Trimbos survived his death such that it may be continued against his Estate, and there is no other basis for the Proceeding to continue against the Estate.

²⁵ [EXP.020.002.0001 at 0002].

²⁶ [EXP.020.008.0001 at 0020].

²⁷ [EXP.020.001.0003].

²⁸ [EXP.020.008.0001].

²⁹ Pursuant to paragraph 2 of the Order dated 20 August 2020 [ORD.500.040.0001].

³⁰ [ORD.500.042.0001].

³¹ T672:26 [TRA.500.007.0001 at 0015].

³² [LAY.090.001.0001].

³³ [CRT.100.002.0001].

³⁴ T2194:21-25 [TRA.500.022.0001 at 0101].

A.1. The basis for the joinder of Mr Trimbos

7. The starting point in determining the Abatement Issue is a proper understanding of the reason for, and the legal basis upon which, Mr Trimbos was joined to the Proceeding.
8. As mentioned in paragraph 5(g) above, on 20 August 2020, Dixon J ordered, relevantly, that Mr Trimbos be joined to the Proceeding and the title to the Proceeding be amended accordingly.³⁵ More specifically, Mr Trimbos was ordered to attend before the Court for directions in respect of the future hearing and determination of "*whether the court ought of its own motion make any, and if so, what orders under ss 28 and 29(1)*" of the CP Act against him. Those orders were themselves expressed to be obtained "*by direction of the court acting on its own motion*".
9. In his Honour's reasons for the decision in respect of the joinder of Mr Trimbos,³⁶ Dixon J stated that there was a case for Mr Trimbos to answer, being an expert witness in the Proceeding as contemplated in section 10(3) of the CP Act, that in his participation in the Bolitho Approval Application he engaged in conduct in the Proceeding that was misleading or deceptive, or likely to mislead or deceive, in breach of section 21 of the CP Act.
10. It was contemplated that the matters to be addressed by Mr Trimbos in any affidavit would include particulars of conduct identified by the Contradictor.³⁷
11. On 28 August 2020, the Contradictor filed and served the PoA.³⁸ The PoA sets out the scope of, and the basis upon which, the Contradictor is seeking "*relief*" or seeking that the Court makes orders under sections 28 and 29 of the CP Act.³⁹ In summary, the particulars therein were an elaboration and expansion upon the matters about which the Honourable Justice Dixon expressed concern in his reasons for ordering the joinder of Mr Trimbos.⁴⁰ The PoA are detailed and lengthy, and had they been contained in a pleading by a party claiming relief from Mr Trimbos they may well have been framed as allegations of negligence and possibly misleading or deceptive conduct, or some other causes of action.

³⁵ [ORD.500.040.0001].

³⁶ *Bolitho v Banksia Securities Limited (No 10)* [2020] VSC 524, [36] - [38] (*Bolitho No 10*).

³⁷ See paragraph 3 of the Orders made by Dixon J on 27 August 2020 [ORD.500.042.0001 at 0002]. It should be noted that, despite paragraph 6 of the Honourable Justice Dixon's Order of 2 November 2020

[ORD.500.058.0001], the Contradictor did not identify by a written document any "*remaining opening of his case*" (there was no opening by the Contradictor of the case against Mr Trimbos) against the sixth defendant).

³⁸ [PAR.010.001.0001].

³⁹ T18:18-19 [TRA.510.006.0001 at 0019].

⁴⁰ *Bolitho No 10*, [37].

12. The PoA may point to the potential existence of claims by group members against Mr Trimbos, but no group member has advanced any such claims. Rather, in the Proceeding, the Contradictor sought orders in the PoA⁴¹ that Mr Trimbos' breach of overarching obligations materially contributed to, amongst other things, wasted costs of the Bolitho Approval Application as loss, the costs of the Botsman Appeal as loss, the costs of the AFPL Approval Application as loss, and loss due to the delay in the receipt by group members of their distributions from the Settlement Sum approved by the Court of Appeal on 1 November 2018.⁴²
13. Hence, the allegations and "*relief*" sought against Mr Trimbos in the PoA remained consistent with the basis for his joinder to the Proceeding. The PoA was directed towards *sanctions* pursuant to sections 28 and 29 of the CP Act by reason of the alleged contravention by Mr Trimbos of his overarching obligations under the CP Act. The CP Act provides a framework for Courts to sanction certain persons, as set out in section 10, who contravene overarching obligations. The primary weapon in the Court's arsenal is section 29 of the CP Act.
14. However, those sanctions are not sought in a proceeding brought for that purpose. In considering the purpose for which Mr Trimbos was joined, it is important not to emasculate the questions arising under the CP Act from the context in which they arose. The Proceeding initially involved an application by Mr Bolitho for approval of a partial settlement (see paragraph 5(b) above), then an application by Mr Bolitho (the Bolitho Approval Application) seeking approval of the Settlement and Settlement Sum and - after the Botsman Appeal - an application by AFPL raising an inquiry as to whether proposed deductions from the Settlement Sum should be approved on account of AFPL's Commission and Legal Costs. The latter inquiry was recognised by Dixon J when his Honour said in *Bolitho No 6* at [42] that the question of whether the Court may of its own motion, acting under section 29(2)(b) of the CP Act, consider whether Mr Trimbos had breached his overarching obligations was necessarily linked to whether the Court should, in the interests of justice pursuant to section 29(1), "*make an order that might be to the financial benefit of group members entitled to a distribution from the remaining settlement sum*".

A.2. The CP Act does not create a cause of action

15. In light of the sources of power which are involved in the Proceeding, it is clear that the Contradictor cannot successfully seek the "*relief*" set out in paragraph 42 of the PoA, or any "*relief*" at all, against the sixth defendant, because –

⁴¹ [PAR.010.001.0001 at 0016], [42], [43].

⁴² [ORD.500.002.0001].

- (a) neither Part 4A of the SC Act nor sections 21, 28, and 29 of the CP Act create a cause of action; and
- (b) the terms of the provisions of the CP Act *do not* give rise to any statutory legal right that may be sued upon. The overarching obligation only arises in respect of a civil proceeding, regulating conduct within that civil proceeding. If an overarching obligation under the CP Act is contravened in the civil proceeding, the contravention gives rise to a possible *sanction* only within that civil proceeding or at least only prior to the finalisation of that civil proceeding. The provisions of the CP Act *do not* bestow legal rights on any person or party, and *do not* give rise to "*relief*" or otherwise. No civil proceeding or other proceeding could be commenced by any person based upon a contravention of the terms of the CP Act, whether seeking some "*relief*" or otherwise. To state the obvious, the terms of the CP Act also *do not* create a right that would enable a court to sue upon a breach of an overarching obligation in a civil proceeding before it.
16. In analysing the nature of the "*relief*", sanctions, or other consequences sought by the Contradictor in respect of Mr Trimbos, it is apparent from the summary of the procedural matters in paragraph 5 above that the only sources of power which might be said to be involved are those associated with settlement approval in Part 4A of the SC Act and those in sections 21, 28, and 29 of the CP Act.
17. The Court's powers in respect of a settlement approval application are essentially contained in section 33V of the SC Act, which necessarily relates to the proceeding proposed to be settled, and section 33ZF of the SC Act, containing the general power to make any order "*the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*" (emphasis added). Neither of these provisions nor any other provision in Part 4A of the SC Act, create a cause of action. Rather, Part 4A of the SC Act provides a procedural framework through which the causes of action of multiple persons might be resolved in a single proceeding.
18. Part 2.3 of the CP Act prescribes the "*overarching obligations*" that applied to Mr Trimbos in relation to his work as an expert witness, in the context of the section 33V application of Mr Bolitho in the Proceeding and AFPL's approval application. In particular, in considering whether the legal costs and disbursements proposed to be deducted from the Settlement Sum were fair and reasonable for purposes of approval under section 33ZF of the CP Act, which on remittal became the subject of the Proceeding.

19. The overarching obligation relied upon in respect of Mr Trimbo is the one set out in section 21 of the CP Act, namely not to engage in conduct that is misleading or deceptive, or likely to mislead or deceive "*in respect of a civil proceeding*". Pursuant to section 3 of the CP Act, "*civil proceeding*" means "*any proceeding in a court other than a criminal proceeding or quasi-criminal proceeding*".
20. Part 2.4 of the CP Act prescribes "*sanctions for contravening the overarching obligations*" (emphasis added). As said in *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 (*Yara*),⁴³ Part 2.4 of the CP Act governs the Court's power to issue sanctions for contraventions of the overarching obligations. It confers power to make orders by way of sanction to enforce the overarching obligations.⁴⁴
21. It is immediately apparent from this that the reference by the Contradictor to "*relief*" in the Particulars of Allegations is inapt, erroneous, and a mischaracterisation of the nature of the orders a Court can make under section 29(1) of the CP Act. Section 28 of the CP Act permits the Court, when "*exercising any power in relation to a civil proceeding*", including "*in exercising its discretion as to costs*", to "*take into account any contravention of the overarching obligations*". So, section 28 of the CP Act permits the Court when exercising its powers in relation to the Proceeding to take into account any contravention of the overarching obligations under the CP Act in the Proceeding by Mr Trimbo.
22. Section 29 of the CP Act provides that if a Court is satisfied on the balance of probabilities⁴⁵ that a person has contravened an overarching obligation under the CP Act in a civil proceeding, the Court has discretion to make "*any order it considers appropriate in the interests of justice*" in that civil proceeding, including an order that the person pay legal costs and expenses arising from the contravention, or an order that the person pay compensation for financial or other loss materially contributed to by the contravention in the civil proceeding. The legal costs and expenses and the loss to which the orders under section 29 of the CP Act refers, relates to the civil proceeding as set out in paragraph 25 below. In this Proceeding, had Mr Trimbo not passed away, if the Court were satisfied on the balance of probabilities that Mr Trimbo had contravened the overarching obligation in section 21 of the CP Act in the Proceeding, and that his contravening conduct materially contributed to legal costs and disbursements as loss, or financial loss, in the Proceeding, the Court could have made any order it considered in the interests of justice in the Proceeding which relates to such legal costs and disbursements as loss, or financial or other loss suffered.

⁴³ *Yara*, [16], [20].

⁴⁴ *Stewart v State of Victoria* [2015] VSC 373, [70] (*Stewart*).

⁴⁵ The application of the *Briginshaw* standard as set out in paragraphs 54 to 57 below.

23. When a Court is to consider whether it ought to make orders in a civil proceeding under section 29(1) of the CP Act against a person subject to the overarching obligations of the CP Act, it has to conduct an inquiry which necessarily requires the joinder of the relevant person to that civil proceeding. The joinder is pursuant to rule 9.06(b) of the Rules which provides, amongst other things, for the addition of a person as a party to a proceeding where that person's presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon, and to enable the determination of the question arising out of, relating to, or connected with the matters that are the subject of the proceeding.⁴⁶ The addition or joinder is not based on a cause of action.
24. In this Proceeding, Mr Trimbos was added as a defendant so as to enable the Court to inquire and consider whether it ought to make orders under section 29(1) of the CP Act against him regarding his alleged contravention of the overarching obligations of the CP Act in the Proceeding.
25. An order under section 29 of the CP Act can be made upon the application of a party or of the Court's own motion in the civil proceeding before the Court, but must, pursuant to section 29(2), be made prior to the finalisation of the civil proceeding to which the application relates.⁴⁷ A Court can only make orders under section 29(1) of the CP Act in the civil proceeding to which it relates and to which a person was joined. Thus, the Court could only have made an order under section 29(1) of the CP Act against Mr Trimbos in the Proceeding after he had been joined in the Proceeding.
26. At most, a party to, or a party with an interest in, the civil proceeding may apply for the joinder of a person so that the Court could impose a *sanction* for the contravention of an overarching obligation in that civil proceeding. No person or party made such application in the Proceeding. However, in the Proceeding, the Court of its own motion, as it could do, joined Mr Trimbos so as to enable the Court to impose a sanction for the alleged contravention of the overarching obligations of the CP Act (if proven), regardless of the position the affected parties took, in the Proceeding.
27. The provisions of the CP Act, in particular sections 16 and 21, do not create a cause of action as set out in paragraphs 28 and 29 below.
28. The purposes of the CP Act, as set out in section 1, do not point to a different conclusion. They do not include the creation of legal rights or causes of action. As the Honourable Justice Dixon said in *Hudspeth v Scholastic Cleaning and Consultancy Service (No 4)* [2013] VSC

⁴⁶ *Bolitho v Banksia Securities Limited (No 11)* [2020] VSC 567, [25] (***Bolitho No 11***).

⁴⁷ Section 30 of the CP Act.

14 (*Hudspeth No 4*) at [5], the statutory jurisdiction of the Court under the CP Act has its origins in the ability of the Courts to enforce duties owed by practitioners to the Court in conjunction with the jurisdiction to award costs against persons who are not parties to the civil proceeding. His Honour also observed in *Hudspeth No 4* at [15] that the purpose articulated in section 1 of the CP Act is to reform and modernise the laws, practice, procedure and processes relating to the resolution of civil disputes and to provide for overarching obligations to improve standards of conduct in litigation.

29. The purposes of the CP Act suggest that the overarching obligations which the CP Act imposes are owed to the Court rather than *inter partes*. It is also apparent from *Hudspeth No 4* at [7] and [12] and *Hudspeth v Scholastic Cleaning and Consultancy Services (Ruling No 8)* [2014] VSC 567 (*Hudspeth No 8*) at [185] that the overarching obligations in the CP Act are owed to the Court. Furthermore, it is apparent from the Court of Appeal's decision in *Yara* at [18] to [26] that the overarching obligations are not owed by the person upon whom they are imposed to another party to the civil proceeding, but rather to the Court. In this Proceeding, Mr Trimbos owed the overarching obligations to the Court and nobody else.
30. The role of the Contradictor in the Proceeding should also be noted. This was carefully considered by the Honourable Justice Dixon after full argument in *Bolitho No 6*. His Honour noted that it was inappropriate for the debenture holders to be a party to the Proceeding and that the contractual restraints upon the SPR made it impossible for them to undertake the inquiries into the expenditures that would ordinarily fall on them. The primary source for the powers of the Contradictor is the context of the Contradictor's appointment⁴⁸ which is the remittal by the Court of Appeal. Hence, Dixon J stated in *Bolitho No 6* –
- (a) (at [76]) that "*the role envisaged for the contradictor from both the context of a s 33V application and by the Court of Appeal cannot be regarded as limited to the traditional role of an amicus [but] is akin to the role that might have been assumed by the [SPR]*";
- (b) (at [80]) the role is expansive so that "*the Contradictor may take any step authorised or permitted by the Supreme Court (General Civil Procedure) Rules 2015 to be taken in the proceeding [the Proceeding] by a party to the proceeding [the Proceeding] and the Contradictor shall take such steps having regard to the interests of the group members (debenture holders) for the purpose of assisting the Court to determine*

⁴⁸ *Bolitho No 6*, [49].

whether the settlement is fair and reasonable as between the parties and is fair and reasonable in and between the interests of group members"; and

- (c) (at [123]) the Honourable Justice Dixon went on to recognise that the Contradictor was being appointed "*on a s 33V application in order to [permit the Court to] more effectively discharge its judicial function*".

31. Hence, there was no suggestion that the Contradictor's role as envisaged by his Honour somehow expanded the nature of the application in the Proceeding, the AFPL Approval Application, beyond that of one under section 33V of the SC Act.

A.3. Section 29 of the Administration and Probate Act

32. By virtue of the nature of the question added for determination as set out in paragraph 4 above, it is necessary to consider the term "*cause of action*" and the potential application of the phrase as it appears in section 29 of the *Administration and Probate Act 1958 (Vic)* (**A&P Act**) and rule 9.09 of the Rules.
33. The term "*cause of action*" may be used in different contexts and may be susceptible to slightly different interpretations. Context will affect the preferred interpretation. However, the generally accepted definitions of "*cause of action*" are a good starting point. The classic statement which much subsequent authority refers to is that of Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at [242] and [243], which delineates the concept as "*a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*". In *Do Como v Ford Excavations Pty Ltd* (1984) 154 CLR 234, at [13], Wilson J observed that "*the concept of a 'cause of action' would seem to be clear*" and that it "*is simply the fact or combination of facts which give rise to a right to sue*". More recently, in *Re Lauer, Corby and another v Lyttleton* [2017] VSC 728, at [60], McMillan J referring to *Rowson v Nelson* (2017) 53 VR 196 at [32] adopted the formulation "*every allegation of fact which the plaintiff must prove to establish the right to the relief claimed*".
34. These definitions are in a sense little more than an explanation of what the words themselves convey, namely the factual basis (or cause) for an action. What they make clear, however, is that a cause of action comprises the facts upon which one person relies for an entitlement to a remedy from another. Inherent in the concept is the right to bring a civil proceeding in a court to seek relief against another party in that civil proceeding. It is the basis for bringing a civil proceeding. It does not arise within a civil proceeding, but rather is the basis for the consideration of obligations and the determination of rights *inter partes*. A cause of action is

not the consideration of obligations between each party and their legal representatives or expert witnesses, on the one hand, and the Court, on the other.

35. Turning to section 29 of the A&P Act, there is nothing in its language or purpose that suggests a different meaning was intended for the phrase "*cause of action*" therein. Section 29 of the A&P Act relates to the effect of death of a party on certain causes of action.⁴⁹ Sub-section (1) speaks of causes of action surviving "*against*" or "*for the benefit*" of an estate, thus confirming the pursuit of rights through an adversarial suit in which relief is sought by one person against another. The proviso to section 29(1) of the A&P Act refers to "*causes of action for defamation [etc]*". By coupling "*causes of action*" with the word "*for*" the proviso assumes the conventional reference to judicial bases for one party to sue another. Sub-section (2) provides that where a cause of action survives for the benefit of an estate there are limits to "*the damages recoverable*". Sub-section 2A has "*dust*" exceptions, whilst sub-sections 3 and 3A contain temporal limitations on the right to bring civil proceedings not commenced before death and provide for exemptions with court approval. The section uses language that assumes a suit between parties with relief sought ("*plaintiff*", "*claimant*").
36. None of this is surprising when the genesis and purpose of section 29 of the A&P Act and corresponding provisions of the so-called "*survival of actions legislation*"⁵⁰ throughout the common law world are considered. It is presently unnecessary to discuss those matters, but there is a useful discussion of the history of section 29 of the A&P Act by Gillard J in *Lotter v Salmon Street Limited* [2006] VSC 495 (**Lotter**).⁵¹
37. What the discussion in *Lotter* makes clear is that it is highly unlikely that, when enacting section 29(1) of the A&P Act, parliament would have even contemplated, let alone intended, that the provision may be deployed to continue a civil proceeding against the estate of a deceased person where the foundation for the joinder of the person now deceased was not a claim or cause of action brought by the plaintiff in the civil proceeding for a remedy or relief but rather the potential breach of an obligation to the Court by the deceased during the course of a civil proceeding to which he was not previously a party. Furthermore, the CP Act was not intended and does not alter the rights under section 29 of the A&P Act.⁵²
38. The High Court in *Workcover Queensland*, dealing with section 66 of the Queensland legislation (which is similar to section 29 of the A&P Act) in the context of whether a cause

⁴⁹ *Re Apollo General Engineering (Aust) Pty Ltd (in liq)* [2016] VSC 533, [19] (**Re Apollo**).

⁵⁰ *Talbot & Oliver (a firm) v Witcombe* (2006) 32 WAR 179, [34].

⁵¹ See also the Full Court of the High Court in *Workcover Queensland v AMACA Pty Ltd* (2010) 241 CLR 420, [33] to [51] (**Workcover Queensland**).

⁵² *Re Apollo*, [79].

of action of a deceased person survived, stated that the section did not create a fresh cause of action in favour of the deceased estate; rather, all that the section did was to replace the operation of the common law principle *actio personalis moritur cum persona* (a personal right of action dies with the person). Thus, the cause of action of the deceased and that brought under section 29 of the A&P Act by the estate are one and the same. In the context of whether a cause of action against a deceased person survived, the position is thus that no fresh cause of action is created against his or her estate; rather, it is only the cause of action against the deceased person which survived that is continuing against his or her estate. There was never a cause of action against Mr Trimbos in the Proceeding, and thus there can be no surviving cause of action.

39. Section 29 of the A&P Act "*covers the field*" – if a matter does not fall within the ambit of the section the historical position prevails, being that the civil proceeding is at an end, it has abated. It is beyond doubt that this Proceeding is at an end; this Proceeding has abated, against Mr Trimbos in light of his death.

A.4. Rule 9.09 of the Rules

40. According to Robson J in *Re Apollo* at [91], rule 9.09 of the Rules must be read in light of section 29 of the A&P Act. The rule is there to assist and implement section 29 of the A&P Act. The purpose of rule 9.09 of the Rules is to facilitate the continuation of a civil proceeding, in circumstances where the proceeding had not abated due to the death of a party because the cause of action survived, without the need for a new proceeding.⁵³
41. As Robson J said in *Re Apollo* at [97], rule 9.09 of the Rules is procedural and its application is to give effect to the statutory rights granted by section 29 of the A&P Act. Rule 9.09 of the Rules provides the machinery for the substitution of a person in place of a deceased party, where the cause of action is one that survives against, or for the benefit of, a deceased party. Thus, a civil proceeding abates unless it is reconstituted under rule 9.09 of the Rules in the implementation of section 29 of the A&P Act. The order under rule 16.03 of the Rules which appointed Mr Peiros as the representative of the Estate does not change the position.
42. Needless to say, as a procedural provision to implement section 29 of the A&P Act, rule 9.09 does not create any cause of action.

⁵³ *Re Apollo*, [84].

A.5. Summary - the Proceeding abated, and no order can be made under section 29(1) of the CP Act

43. Mr Trimbos was not joined to the Proceeding by any party. The Court joined Mr Trimbos of its own motion. No party to the Proceeding sought any remedy or relief from Mr Trimbos. The Contradictor is not a party to the Proceeding and could therefore seek no remedy or relief on its own behalf; rather the Contradictor provided the PoA relevant to the sanctions the Contradictor submitted that the Court should make against Mr Trimbos under section 29(1) of the CP Act. There was no suit to which Mr Trimbos was made a party in the adversarial sense.
44. Mr Trimbos was joined to the Proceeding so that the Court might investigate potential breaches of the overarching obligations, particularly the obligation in the section 21 of the CP Act, owed to the Court in the Proceeding, not to another party to the Proceeding or anyone else. The overarching obligations arose under the CP Act which creates no basis for redress outside the Proceeding in which the contraventions by Mr Trimbos are alleged to have occurred.
45. Additionally, the alleged CP Act contraventions are themselves being considered only in the context of an application pursuant to section 33V of the SC Act. Neither that section, nor any other provisions of Part 4A of the SC Act, creates or gives rise to any right to relief that could be sued upon in another civil proceeding.
46. Neither sections 33V and 33ZF of the SC Act nor sections 21, 28, and 29 of the CP Act created or gave rise to a cause of action in the Proceeding, or created or gave rise to any right to relief that could be sued upon in the Proceeding. Neither section 29 of the A&P Act nor rule 9.09 of the Rules is available in the Proceeding because at no time was there a cause of action against Mr Trimbos in the Proceeding which could survive his death.
47. There was no "*cause of action*" against Mr Trimbos in the Proceeding before his death within the meaning of section 29 of the A&P Act. Thus, no cause of action which was the subject of the Proceeding against Mr Trimbos survives his death such that it may be continued against his Estate.
48. Since Mr Trimbos is no longer a party to the Proceeding and no other person could be substituted for him pursuant to rule 9.09 of the Rules, the Court can no longer make any order under section 29 of the CP Act against Mr Trimbos or his Estate in the Proceeding. The inquiry under the CP Act cannot exist without the Proceeding. The Proceeding in so far as it

relates to Mr Trimbos should be stated to have abated and be dismissed. No order under section 29 of the CP Act could be made against the sixth defendant.

B. If the Court were to find and hold that the Proceeding has not abated, then Mr Trimbos' alleged conduct did not contravene, and it has not been proven that it contravened, the CP Act as alleged in the Particulars of Allegations

49. To adjudicate this issue, it is necessary to consider the scope of the inquiry into the alleged contravening conduct of Mr Trimbos in the course of the Bolitho Approval Application, the Botsman Appeal, and the AFPL Approval Application as set out in the PoA; the burden and standard of proof in respect of inquiries and orders under section 28 and 29 of the CP Act; and the issues the Contradictor had to prove and the Honourable Justice Dixon has to consider before making any orders under section 29 of the CP Act.

B.1. Delineation of inquiry

50. The Court can act on its own motion under section 29(2) of the CP Act. However, as the Honourable Justice Dixon relevantly said in *Hudspeth No 4* at [17] "*it is desirable that the other parties identify whether, and to what extent costs expenses or financial loss arises from or has been material contributed to by a possible contravention of an overarching obligation before the court proceeds of its own motion*" (emphasis added).

51. The Honourable Justice Dixon invited the Contradictor and the SPR to make submissions identifying more precisely what sanctions the Court ought to impose on Mr Trimbos, pursuant to sections 28 and 29 of the CP Act, for the ultimate benefit of the debenture holders.⁵⁴ The Contradictor filed the PoA, which sets out the particulars and details of the “*relief*” (paragraph 21 above) which the Contradictor is seeking or inviting the Court to grant,⁵⁵ thereby delineating the scope of the inquiry into the conduct of Mr Trimbos in the course of the Proceeding in order to consider whether orders ought to be made under section 29(1) of the CP Act.

B.2. The burden and standard of proof in respect of orders under section 29(1) of the CP Act

Burden of proof

⁵⁴ *Bolitho No 10*, [40].

⁵⁵ T18:18-19 [TRA.510.006.0001 at 0019].

52. The burden of proof falls upon the person who asserts the contravention of an overarching obligation under the CP Act and who seeks a Court to sanction such contravention⁵⁶. In this Proceeding, the Court joined Mr Trimbos and asserted the possible contravention by him of the paramount duty and the overarching obligation under section 21 of the CP Act.⁵⁷ The role of the Contradictor in this Proceeding has been delineated by the Honourable Justice Dixon J as set out in paragraph 30 above and includes all the rights and powers of a party to the dispute.⁵⁸
53. Accordingly, the Contradictor bears the burden of proof in respect of the allegations set out in the PoA and the orders sought pursuant to sections 28 and 29 of the CP Act. Mr Trimbos *does not* bear any burden of proof. Although a Court could ask for an explanation about matters of concern relating to conduct in a civil proceeding, the Court's inquiry into conduct that allegedly contravenes the overarching obligations under the CP Act is not open-ended and is resolved if the Court receives a *satisfactory explanation of the matters of concern*.⁵⁹ The Court's matters of concern were set out in *Bolitho No 10* at [36] to [38] and expanded upon by the Contradictor in the PoA. In this Proceeding, Mr Trimbos provided a satisfactory explanation of the allegations raised in the PoA in the Trimbos Affidavit⁶⁰ which contains his un-contradicted evidence.

Standard of Proof

54. An allegation that a person has breached an overarching obligation under the CP Act is a serious matter.⁶¹ To make orders under section 29 of the CP Act is a serious matter, and a Court ought to take into account the repercussions of making such orders.⁶²
55. It is therefore not surprising that Courts have stated that the standard of proof applicable to applications for sanctions under section 29 of the CP Act is that stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) at 361 to 363.⁶³
56. Likewise, the test required under section 140(2)(c) of the *Evidence Act 2008 (Vic)* (**Evidence Act**) is the *Briginshaw* test or standard.⁶⁴ In *Giles v Jeffrey* [2016] VSCA 314 (*Giles*) at [121],

⁵⁶ *Stewart*, [75].

⁵⁷ *Bolitho No 10*, [33].

⁵⁸ *Bolitho No 6*, [123], [241].

⁵⁹ *Hudspeth No 4*, [22].

⁶⁰ [LAY.090.001.0001].

⁶¹ *Loustas v Sier* (2018) 57 VR 249, [32] (*Loustas*).

⁶² *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)* (2014) 48 VR 1, [103] and [108] (*Dura No 5*).

⁶³ *Dura No 5*, [108]; *Gatto Corporate Solutions Pty Ltd v Mountney* [2016] VSC 752, [15] (*Gatto*); *Gabelich v Donaghey* [2018] VSC 184, [79] (*Gabelich*).

the Court of Appeal stated that although section 29(1) of the CP Act refers to "*the balance of probabilities*", and that "*it is well established at common law under the Briginshaw principles and under s 140(2)(c) of the Evidence Act 2008 that the seriousness of an allegation and the gravity of the consequences flowing from a particular finding affect the level of satisfaction that must be reached before a court can find that the allegation has been proved on the balance of probabilities.*"

57. Thus, the burden of proof is higher than just the balance of probabilities. The *Briginshaw* gloss on the standard of proof requires "*clear and cogent proof*".⁶⁵ An actual persuasion of the occurrence or existence of the fact in issue must be felt before it can be found.⁶⁶ Moreover, as the Honourable Justice Dixon stated in *Dura No 5* at [108], the Court should not make an order solely based on *inference without evidence*.

B.3. Issues to consider before a Court can make an order under section 29 of the CP Act

58. In seeking orders under section 29 of the CP Act, every aspect of the allegations of misleading or deceptive conduct must be particularised and considered in detail.⁶⁷ In determining whether the Court *may* make an order under section 29 of the CP Act where there are assertions that a person has contravened the overarching obligation under section 21 of the CP Act, there are principally *four* conceptually separate but interrelated issues to consider, but not with the benefit of hindsight, and which must be proven on the *Briginshaw* standard: the so-called Conduct Issue, the Reliance Issue, the Characterisation Issue, and the Causation Issue.

B.3.1. The Conduct Issue

59. Since section 21 of the CP Act prohibits engaging in conduct that is misleading or deceptive or is likely to mislead or deceive in a civil proceeding, it is necessary to begin consideration of the application of the section by *identifying the conduct that is said to meet the statutory description of misleading or deceptive or likely to mislead or deceive*.⁶⁸ The first question for consideration is always: "*What did the alleged contravener do (or not do)?*".⁶⁹ This is the so-called "*Conduct Issue*". Having regard to what Sifris J said in *Bullhead Pty Ltd v Brickmakers Place Pty Ltd* [2017] VSC 206 at [238] (dealing with the misleading conduct provisions of the *Fair Trading Act 1999 (Vic) (FTA)*), the Conduct Issue comprises of two separate but related

⁶⁴ *Civil Procedure Victoria* at [12,790.0].

⁶⁵ *Stagliano (as administrator of the Estate of Manlio deceased) v Scerri* [2016] VSC 130, [5], [76], and [94] (*Stagliano*).

⁶⁶ *Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd (in liq)* [2013] VSC 482, [6]-[8] (*Ballantyne*).

⁶⁷ *Loustas*, [33].

⁶⁸ *Stewart*, [75].

⁶⁹ *Hudspeth No 8*, [195] quoting *Google Inc v ACCC* (2013) 249 CLR 435, [89] (*Google*)

elements which should not be conflated: the alleged contravening conduct engaged in, and the meaning conveyed by the conduct.

60. The Court has to consider and determine the precise conduct said to constitute breach of an overarching obligation under the CP Act, the obligation being on the party asserting breach to identify that conduct.⁷⁰ The issue in this Proceeding, is what conduct of Mr Trimbos allegedly breached the overarching obligations under the CP Act and what meaning such conduct conveyed.
61. The alleged contravening conduct must be proved with a degree of precision sufficient to enable a Court to be reasonably satisfied that the conduct was in fact misleading in the circumstances.⁷¹
62. Relevantly, there must be admissible evidence of, or evidence which actually persuades the Court of the actual existence of the Expert Witness Representations and the Continuing Opinion Representation as alleged in paragraphs 1 and 2 of the PoA.

What conduct of Mr Trimbos is said to constitute breach of an overarching obligation under the CP Act in the Proceeding and what meaning did that conduct convey?

63. The conduct of Mr Trimbos which allegedly constitutes contravention of the overarching obligation of the CP Act are representations and are set out in paragraphs 1 and 2 of the PoA;⁷² namely, the Expert Witness Representations, and the Continuing Opinion Representation.
64. It is also alleged in paragraph 4 of the PoA⁷³ that by reason of the conduct which caused the Expert Witness Representations and the Continuing Opinion Representation to be misleading or deceptive, Mr Trimbos also breached his paramount duty to the Court under section 16 of the CP Act. Thus, whether Mr Trimbos breached his duty under section 16 of the CP Act depends upon whether his conduct in the Proceeding has been misleading or deceptive in contravention of section 21 of the CP Act.
65. The Contradictor has similarly linked the Third Trimbos Report to the Expert Witness Representations and the Continuing Opinion Representation in paragraph 38 of the PoA⁷⁴

⁷⁰ *Stewart*, [52], [75].

⁷¹ *Watson v Foxman* (1995) 49 NSWLR 315, 318; Lockhardt, *The Law of Misleading or Deceptive Conduct* (LexisNexis, 2019), [3.36].

⁷² [PAR.010.001.0001 at 0001 and 0002].

⁷³ [PAR.010.001.0001 at 0002].

⁷⁴ [PAR.010.001.0001 at 0015].

where it is asserted that if the Third Trimbos Report had been “*accurate and not misleading with respect to the matters outlined above*” certain consequences would not have followed.

66. Thus, it is not asserted that the *opinions* expressed by Mr Trimbos in the Third Trimbos Report were false or misleading, but rather that the Third Trimbos *Report* was misleading *only in so far as the Expert Witness Representations and the Continuing Opinion Representation were misleading or deceptive* and that resulted in the events set out in paragraph 38(a) to (d) of the PoA.⁷⁵ Mr Trimbos’ opinions in the Third Trimbos Report could not now be said to be misleading or false with the benefit of hindsight because the facts he was instructed to assume and the documents with which he was provided for the purpose of his opinions expressed in the Third Trimbos Report (the **assumed facts and documents**) were false and misleading.
67. In so far as the Contradictor may imply that Mr Trimbos’ *opinions* about the reasonableness of the Legal Costs in the Third Trimbos Report and the Fourth Trimbos Report were misleading or deceptive, it is submitted that it is factually wrong and unsupported by any evidence. It is clear from *Banksia No 2* that Croft J was not relying on the Third Trimbos Report as such or the Expert Witness Representations, but on Mr Trimbos’ opinions therein because his Honour stated: First, that he was assisted by the “*independent costs expert’s [Mr Trimbos’] opinion*” and that his Honour relied on the material provided by Mr Bolitho to Mr Trimbos to prepare the Third Trimbos Report.⁷⁶ Secondly, that he was satisfied, on the basis of the opinions set out in the Third Trimbos Report and the annexed source material (that is, for example, the letter of instructions and the invoices), that, amongst other things, the Legal Costs were reasonable.⁷⁷
68. His Honour Justice Croft was neither misled by the Third Trimbos Report, nor by the Expert Witness Representations as such (or in so far as they might have rendered the Third Trimbos Report inaccurate or misleading), nor was his Honour misled by the opinions expressed by Mr Trimbos in the Third Trimbos Report. If Croft J was misled or deceived and led into error then his Honour was misled and deceived and led into error by the confidential submissions filed on behalf of Mr Bolitho, and the “*evidentiary material before the Court*”⁷⁸ - that is, the false assumed facts and documents which were put before his Honour, and which had to be proven, and apparently were so proved to his Honour’s satisfaction.

⁷⁵ [PAR.010.001.0015].

⁷⁶ *Banksia No 2*, [70].

⁷⁷ *Banksia No 2*, [71].

⁷⁸ *Banksia No 2*, [56].

The Expert Witness Representations

69. The Expert Witness Representations which are alleged to have been made in the context of Mr Trimbos "*proffering his opinion set out in the Third Trimbos report*" are asserted to consist of seven individual representations (paragraph 1 of the Particulars of Allegations); namely, Mr Trimbos represented that: he understood and agreed to be bound by the Code (paragraph 1(a) of the PoA) (**First Expert Witness Representation**); he was independent of AFPL (paragraph 1(b) of the PoA) (**Second Expert Witness Representation**); he was not an advocate for AFPL (paragraph 1(c) of the PoA) (**Third Expert Witness Representation**); he applied an objective process in his independent assessment of the claim for costs that enabled him to opine that claimed items of costs had been reasonably incurred and were of a reasonable amount (paragraph 1(d) of the PoA) (**Fourth Expert Witness Representation**); his opinions involved the application of specialised knowledge based on his training, study or experience (paragraph 1(e) of the PoA) (**Fifth Expert Witness Representation**); he had identified the facts, matters and assumptions on which each opinion expressed in his Reports was based (paragraph 1(f) of the PoA) (**Sixth Expert Witness Representation**); and he had made all the inquiries which he believed were desirable and appropriate, and that no matter of significance which he regarded as relevant had, to his knowledge, been withheld from the Court (paragraph 1(g) of the PoA) (**Seventh Expert Witness Representation**).

The alleged conduct constituting the Expert Witness Representations generally

Failure to plead and prove the two elements of the Conduct Issue in respect of the Second to Sixth Expert Witness Representations

70. In respect of the first element of the Conduct Issue, it is not stated in the PoA whether the Expert Witness Representations were implied or express, or whether they were made orally, in writing, or both orally and in writing, or by conduct. However, having regard to the footnotes to each of the asserted Expert Witness Representations, it is apparent that each of the Expert Witness Representations was allegedly express and in writing, and contained in the Third Trimbos Report only. The Contradictor has not pleaded and is not relying on any representation by implication or conduct or orally made. The Third Trimbos Report does not contain a statement or representation as asserted in paragraphs 1(b) to (f) of the PoA and there is no statement in the Third Trimbos Report which is the same or similar to the Second to Sixth Expert Witness Representations.

71. It is only the conduct constituting the First and Seventh Expert Witness Representations which has been properly pleaded and established in satisfaction of the first element of the Conduct Issue. Since the statements in the Third Trimbos Report relied upon for the conduct constituting the First and Seventh Expert Witness Representations (paragraphs 1(a) and (g) of the PoA)⁷⁹ involve Mr Trimbos' state of mind, it is accepted that those statements also conveyed the meaning of the First and Seventh Expert Witness Representations.

The Expert Witness Representations relate only to the Third Trimbos Report

72. The Expert Witness Representations only relate to the Third Trimbos Report. In this regard, it should be noted that the Fourth Trimbos Report is similar to the Third Trimbos Report, save for the changes due to the changed instructions which ABL gave to Mr Trimbos,⁸⁰ but the Expert Witness Representations are not alleged to relate to the Fourth Trimbos Report.

The "conduct" constituting the Second Expert Witness Representation as pleaded

73. Mr Trimbos neither stated nor represented in the Third Trimbos Report at paragraphs 2 and 23 that “*he was independent of [AFPL]*” as alleged in paragraph 1(b) of the PoA, nor did section 2 of the Code require him to state that he was independent as set out in paragraph 112 below. Section 2 of the Expert Code of Conduct requires impartial assistance to the Court in respect of the expert’s area of expertise. Mr Trimbos' statement in paragraph 23 of the Third Trimbos Report⁸¹ is in respect of his providing an independent opinion, not that he is independent of any person or persons.

The "conduct" constituting the Third Expert Witness Representation as pleaded

74. Mr Trimbos neither stated nor represented in the Third Trimbos Report that “*he was not an advocate for [AFPL]*” as asserted in paragraph 1(c) of the PoA.

The "conduct" constituting the Fourth Expert Witness Representation as pleaded

75. Mr Trimbos did not make a statement as pleaded in paragraph 1(d) of the PoA, and that is unambiguously clear from footnote 4 pleaded in support of the conduct constituting the Fourth Expert Witness Representation. The Fourth Expert Witness Representation as pleaded in paragraph 1(d) of the PoA is not asserted by reference to specific conduct but, rather, the

⁷⁹ [PAR.010.001.0001 at 0001 and 0002].

⁸⁰ ABL letter of instructions, [EXP.020.002.0001].

⁸¹ [CBP.001.010.5957 at 5968], [23].

Fourth Expert Witness Representation is purportedly referable to multiple unspecified paragraphs spread over 24 pages of the Third Trimbos Report.

The "conduct" constituting the Fifth Expert Witness Representation as pleaded

76. Mr Trimbos did not make the statements set in paragraph 1(e) of the PoA. Mr Trimbos stated in paragraph 11 of the Third Trimbos Report⁸² that: “*There are no questions, issues or matters in the brief or in my report that are outside my area of expertise*”, and in paragraph 13⁸³ he stated: “*The opinions expressed in this report are my opinions and are based on my experience as an expert costs lawyer and my own knowledge, save where otherwise stated*”.

The "conduct" constituting the Sixth Expert Witness Representation as pleaded

77. Mr Trimbos did not make the statements pleaded in paragraph 1(f) of the PoA. Mr Trimbos stated in paragraph 9 of the Third Trimbos Report that the facts, matters and assumptions on which the Third Trimbos Report proceeded were “*detailed in the body of my report.*” In *Banksia No 2* at [70], Croft J stated that Mr Trimbos had identified in great detail invoices relating to the work performed and that the “*material on legal costs prepared by Mr Trimbos and provided by*” Mr Bolitho properly addressed the relevant issues in considering the reasonableness and appropriateness of the legal costs and disbursements in the Bolitho Approval Application. In *Botsman* at [92] the Court of Appeal also stated that the Third Trimbos Report “*set out the factual and legal basis for [Mr Trimbos’] conclusions*” on the reasonableness and appropriateness of the legal costs and disbursements in the Bolitho Approval Application.

The conduct constituting the Continuing Opinion Representation

78. In so far as the Expert Witness Representations are relevant to the Continuing Opinion Representation due the incorporation of the Third Trimbos Report into the Fourth Trimbos Report, it is apparent from paragraph 2 of the PoA that they are not relied upon as conduct constituting the Continuing Opinion Representation.
79. The Continuing Opinion Representation is asserted in paragraph 2 of the PoA to be constituted essentially by Mr Trimbos' failure to forthwith provide a “*supplementary report disclosing any change to the opinions expressed in his prior reports on material matters*”. There was no obligation on Mr Trimbos to provide such a supplementary report. This

⁸² [CBP.001.010.5957 at 5965], [11].

⁸³ [CBP.001.010.5957 at 5966], [13].

assertion is based on a misapplication of paragraph 4 of the Code to the facts in this Proceeding. Paragraph 4 of the Code provides that an expert witness who has provided a report on behalf of a party for use in Court must forthwith provide a supplementary report if he or she subsequently changes his or her opinion on a material matter in the proceeding.

80. It is apparent that –

- (a) the Third Trimbos Report was prepared by Mr Trimbos on behalf of Mr Bolitho on instructions of AFPL and was filed in the Bolitho Approval Application which involved different parties to the parties in the AFPL Approval Application (see paragraphs 5(a) and (c) above);
- (b) after Mr Trimbos prepared the Third Trimbos Report in which he expressed opinions about the reasonableness of the legal costs and disbursements of Mr Bolitho's solicitors, his involvement in this Proceeding (and specifically the Bolitho Approval Application) then came to an end because neither he nor his conduct in the Bolitho Approval Application was part of the Botsman Appeal as set out in paragraph 5(d) above;
- (c) as set out in paragraphs 94 to 97 below, upon remittal the status of Mr Trimbos' opinions expressed in the Third Trimbos Report changed;
- (d) in those circumstances, the Fourth Trimbos Report was prepared by Mr Trimbos on behalf of AFPL on instructions of ABL and was filed, after the Court of Appeal remitted specific issues for determination,⁸⁴ in the AFPL Approval Application which involve different parties to those in the Bolitho Approval Application. It was Mr Trimbos' first expert report in the AFPL Approval Application and the first report instructed by ABL on behalf of AFPL. Mr Trimbos' opinions expressed in the Fourth Trimbos Report, although incorporating his opinions expressed in the Third Trimbos Report were subject to the change in his instructions from ABL⁸⁵ in respect of the changes that occurred since the Third Trimbos Report;⁸⁶

⁸⁴ The Court of Appeal remitted two specific issues for determination in the AFPL Approval Application (see the Order dated 1 November 2018 [**ORD.500.002.0001**]). The two issues, the real issues in dispute, are: the approval of the distribution of the Settlement Sum which related to AFPL's application for approval of its Commission and Legal Costs, and the procedure for a settlement scheme pursuant to section 33V and 33ZF of the SC Act for the payment of the debenture holders of the balance of the Settlement Sum after payment of the Bolitho reimbursement and taking into account whatever payments are ordered in respect of AFPL's Commission and Legal Costs.

⁸⁵ Fourth Trimbos Report [**EXP.020.001.0003 at 0056**], [249]-[251].

⁸⁶ ABL letter of instructions, [**EXP.020.002.0001 at 0004, 0005**], [14]-[23].

(e) after the Fourth Trimbo Report was filed, Mr Trimbo was not involved in the AFPL Approval Application until ABL instructed him with different assumed facts and documents which Mr Trimbo was not aware of prior to his receiving those instructions and which caused Mr Trimbo to prepare the Fifth Trimbo Report recanting the opinions he expressed in his preceding Reports.

81. It is not clear from the allegations in the PoA whether it is alleged that Mr Trimbo's opinions about the reasonableness of the legal costs and disbursements of Mr Bolitho's solicitors were misleading or deceptive. There is no specific or express assertion that Mr Trimbo's opinions in the Third Trimbo Report or as incorporated into the Fourth Trimbo Report were misleading or deceptive. In circumstances where it is neither alleged nor proven that the expert evidence or opinions expressed by Mr Trimbo in the Third Trimbo Report are false or misleading, Mr Trimbo's alleged failure to comply with his "duty" to forthwith provide a supplementary or further report is not and could not constitute conduct in contravention of section 21 of the CP Act.

B.3.2. The Characterisation Issue

82. The next issue to consider and determine is whether each of the alleged instances of conduct was misleading or deceptive, or likely to mislead or deceive,⁸⁷ the so-called "*Characterisation Issue*", which is a factual issue to be considered and determined objectively in the broader context of the proceeding as a whole⁸⁸ having regard to the surrounding or prevailing circumstances and the role of all the other parties and "players" in the proceeding.⁸⁹

83. As the Honourable Justice Dixon said in *Hudspeth No 8* at [194], section 21 of the CP Act requires a purely objective inquiry. The issue is whether a party's conduct can be characterised as misleading or deceptive in the context of a civil proceeding.⁹⁰ In other words, whether the alleged conduct, tested objectively, meets the statutory description in section 21 of the CP Act. The Characterisation Issue is conceptually distinct from the causation of loss alleged to result from the contravening conduct.⁹¹

84. It should be noted that the Contradictor has limited the inquiry to whether Mr Trimbo's contravening conduct *was* misleading or deceptive, and *not* whether it was likely to mislead or

⁸⁷ *Hudspeth No 8*, [195], quoting *Google*, [89].

⁸⁸ *Re Castlereas Carpenters Pty Ltd* [2019] VSC 303, [66].

⁸⁹ *Stewart*, [99].

⁹⁰ *Hudspeth No 8*, [184].

⁹¹ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [24]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, [49], [54].

deceive.⁹² The Contradictor has set out the matters which allegedly show that the Expert Witness Representations⁹³ and the Continuing Opinion Representation⁹⁴ were actually misleading or deceptive.

85. Relevantly, there must be admissible evidence of, or evidence which actually persuades the Court of the alleged misleading character of the Expert Witness Representations and the Continuing Opinion Representation respectively as alleged by the Contradictor in paragraphs 6 to 22 and 24 to 36 of the PoA respectively. There is no such evidence.
86. To determine the Characterisation Issue, it is necessary to consider: the status of an expert opinion and the applicable principles to determine whether conduct is misleading or deceptive, before turning to deal with the alleged contravening conduct *seriatim*.

The status of expert opinions – proof of the assumed facts and documents

87. In *Thiess Pty Ltd v Dobbins Contracting Pty Ltd* [2016] NSWSC 265 (**Thiess**) at [21], McDougall J said that lawyers must play an active, and important, part in the preparation of statements of expert evidence, and that the lawyers for the party who proposes to rely on expert evidence must comprehensively inform the expert of the *assumed facts (and of course, those facts include documents)* on which his or her opinion is to be based.
88. The expert's opinion, regardless of the field of expertise, must be founded upon facts and documents proven by evidence in the proceeding. As Kneipp J succinctly stated in *R v Tonkin* [1975] Qd R 1 at 17 (**Tonkin**): "*In general, the facts on which an expert's opinion is based not only may be proved, but must be proved by admissible evidence.*"
89. The so-called "*basis rule*" provides that an expert opinion is not admissible unless evidence has been or will be, admitted, whether from the expert (through his or her personal observations) or from some other source, which is capable of supporting findings of primary fact which are sufficiently like the factual assumptions and documents on which the opinion is based to render the opinion of value.⁹⁵ The facts need not be fully proved at the time the expert's opinion is tendered. If they are proved later, the expert's opinion is admitted unconditionally at that time; if they are not proved later, the condition on which admission

⁹² [PAR.010.001.0001 at 0002], [3].

⁹³ [PAR.010.001.0001 at 0003 to 0011], [6]-[22].

⁹⁴ [PAR.010.001.0001 at 0011 to 0014], [24]-[36].

⁹⁵ Heydon, *Cross on Evidence* (LexisNexis, 2015) at [29070].

depends would be unsatisfied and the expert's opinion could not be relied on by the trier of fact, and would thus be rejected.⁹⁶

90. In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (**Dasreef**), Heydon J relevantly stated at [90]: "*If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, useless cluttering up the evidentiary scene*" (emphasis added).⁹⁷
91. The expert opinion represents a reasoned conclusion based on certain facts or data, which are either common cause, or established by the expert's own evidence or that of some other competent witness.⁹⁸ The expert gives his or her evidence upon facts or documents which are admitted, or proved by them, or other witnesses in the hearing, or are matters of common knowledge. The expert's opinion is inadmissible if the material upon which the opinion is based is not established before the Court, or which have merely been reported by him or her by hearsay.⁹⁹

The status of Mr Trimbos' expert opinions in the Bolitho Approval Application

92. Mr Bolitho, through Portfolio Law, tendered Mr Trimbos' opinions in the Third Trimbos Report. It is not apparent whether the assumed facts and documents were proven by admissible evidence in the Bolitho Approval Application.
93. It appears that the only evidence which Mr Bolitho put before Croft J in the Bolitho Approval Application was Mr Trimbos' affidavit of 4 January 2018 to which the confidential Third Trimbos Report was exhibited, and two affidavits by Mr Zita exhibiting the two confidential opinions by Messrs O'Bryan and Symons.¹⁰⁰ Those affidavits did not contain, or were not, evidence to either prove the assumed facts and documents. Accordingly, Mr Trimbos' opinions in the Third Trimbos Report were inadmissible, and irrelevant. If Mr Trimbos' opinions (and therefore the Third Trimbos Report) were not admissible due to the lack of proof, then there was no conduct (in the sense of the Expert Witness Representations or at all)

⁹⁶ Heydon op cit at [29070]; and see also *Eric Preston Pty Ltd v Euroz Securities Ltd* (2011) 274 ALR 705, [171], [172].

⁹⁷ See also *Parrish v Specialized Australia Pty Ltd* [2020] VSC 15, [26].

⁹⁸ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MbH* 1976(3) SA 352 (A), 371 as quoted by Freckelton, *Expert Evidence* (Lawbook Co, 2019) at [2.20.40].

⁹⁹ *Sych v Hunter* (1974) 8 SASR 118, 119.

¹⁰⁰ *Banksia No 2* at [18]; *Botsman*, [89]-[93].

by Mr Trimbos in the course of the Bolitho Approval Application. In other words, neither Mr Trimbos' opinions nor the Third Trimbos Report could have been conduct in the Bolitho Approval Application meeting the statutory description of section 21 for purposes of orders under section 29 of the CP Act.

The status of Mr Trimbos' opinions after the Botsman Appeal

94. Even if it is assumed that the assumed facts and documents were proven, and thus admissible, the status of Mr Trimbos' opinions changed as a result of the Court of Appeal's setting aside of Croft J's orders on the basis that the Bolitho Approval Application miscarried due to the fact that critical matters were not subject to the scrutiny they required¹⁰¹ and remitting the approval of AFPL's Commission and Legal Costs (paragraph 5(e)(i) above).
95. The Court of Appeal made it clear that in the AFPL Approval Application it would be for the judge hearing the remitter to determine the approval of AFPL's Commission and Legal Costs¹⁰² and, accordingly, for the parties to fully ventilate those issues. To the extent that Croft J had made any findings about AFPL's Commission and Legal Costs they are not binding. Such findings by Croft J are to be treated in the AFPL Approval Application "*as tentative or provisional*", and whilst clearly not binding, could only be considered as being available "*as part of the analytical framework for determining the issues as raised and argued by the parties on the remitter*".¹⁰³

The status of Mr Trimbos' opinions in the AFPL Approval Application

96. It is apparent that Mr Trimbos' expert opinions expressed in the Third Trimbos Report filed in the Bolitho Approval Application were not automatically evidence in the AFPL Approval Application. The Contradictor tendered the Third and Fourth Trimbos Reports on 28 July 2020¹⁰⁴ and the Fifth Trimbos Report on 3 August 2020.¹⁰⁵ In other words, the Contradictor tendered Mr Trimbos' opinions or evidence expressed in those Reports. Accordingly, it is the Contradictor who had to prove the assumed facts and documents. The Contradictor did not prove the assumed facts and documents in respect of Mr Trimbos' opinions in the Third

¹⁰¹ *Botsman*, [5].

¹⁰² *Botsman*, [397].

¹⁰³ *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141, [142] referring to Sloss J's reasons at first instance; *Barfly's Nominees Pty Ltd v Kliger Partners (a firm)* [2020] VSC 277, [62].

¹⁰⁴ T118: 13-15 [TRA.500.002.0001 at 118], see [PLE.010.002.0001 at 0019] and [PLE.010.002.0001 at 0046] where Third and Fourth Trimbos Reports are referred to respectively in Revised List of Issues dated 21 July 2020. See also specific tender of Third Trimbos Report at T415:31 [TRA.500.005.0001 at 0002], T416:1-2 [0003].

¹⁰⁵ T417:24-T418:10 [TRA.500.005.0001 at 0004 to 0005] (Fifth Trimbos Report), T481:11-18 [TRA.500.005.0001 at 0068] (all documents in oral opening tendered),

Trimbos Report or the Fourth Trimbos Report, and Mr Trimbos' opinions in those Reports are therefore inadmissible and irrelevant in the AFPL Approval Application. Accordingly, if those Reports and the expert opinions therein are inadmissible, then they could not constitute conduct in the course of the AFPL Approval Application.

97. However, the Contradictor did put evidence before the Court to prove the assumed facts and documents with which Mr Trimbos was instructed by ABL, as set out in paragraph 5(f) above, for purposes of Mr Trimbos' opinions expressed in the Fifth Trimbos Report, and those opinions would be admissible. Mr Trimbos changed his opinions expressed in his earlier Reports and stated that having regard to his instructions for purposes of the Fifth Trimbos Report, he could no longer opine on the reasonableness or appropriateness of the Legal Costs.

Applicable principles to determine misleading or deceptive conduct

98. In *Hudspeth No 8* at [176] and [189], the Honourable Justice Dixon stated that in section 21 of the CP Act, the legislature adopted the wording of the repealed section 52 of the *Trade Practices Act 1974 (Cth)* (TPA) and the current section 18 of the *Australian Consumer Law (ACL)*, being Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*. Similarly, the case law in respect of the equivalent provisions in the FTA would also be applicable.¹⁰⁶ The difference between the provisions of the TPA and ACL and that of the CP Act is that in respect of the former the prohibitive conduct relates to a commercial transaction and in respect of the latter the conduct relates to a civil proceeding.
99. The principles which the Courts have developed in relation to section 52 of the TPA or section 18 of the ACL are summarised in Miller, *Miller's Australian Competition and Consumer Law Annotated 2020* (Lawbook Co, 2020) at [ACL.18.20]. The principles relevant to the consideration of section 21 of the CP Act in this Proceeding can briefly be stated as follows:
- (a) The alleged contravening conduct must lead a person into error and the error or misconception must result from the conduct of the person and not from other circumstances for which the person is not responsible.
 - (b) The section is concerned with the effect of the conduct on the mind of the person likely to be misled or deceived.

¹⁰⁶ *Stewart*, [93].

- (c) The test is objective and fact based and the judge must determine the question for himself or herself, but the section is not designed for the benefit of those who fail to take reasonable care.
 - (d) The relevant conduct must be identified and then consideration must be given to whether that conduct considered as a whole and in context is misleading or deceptive. It is wrong to select particular words or acts which although misleading in isolation, do not have that character when viewed in context.
 - (e) It is necessary to look at the potential practical consequences and effect of the conduct to ascertain whether there was a real but not remote chance or possibility that the conduct was misleading or deceptive.
 - (f) There must be a sufficient nexus between the alleged contravening conduct and the error. The error must result from that conduct and not from other circumstances for which the contravener was not responsible.
 - (g) A statement of opinion will not be misleading merely because it turns out to be incorrect. An expression of an opinion that is identifiable as an expression of opinion conveys no more than that the opinion is held and perhaps that there is a basis for the opinion. If that is so, an expression of opinion, however erroneous, misrepresents nothing.
100. The surrounding circumstances must be taken into account in considering whether conduct was misleading or deceptive. The relevant time for testing the character of the representation complained of is *at the date* of the making of the misrepresentation and not with the benefit of hindsight.¹⁰⁷ The Expert Witness representations and the Continuing Opinion Representation made in the course of the Bolitho Approval Application and the AFPL Approval Application respectively must be considered and determined having regard to the known facts and documents at the time of the Third Trimbos Report (more particularly, when the Third Trimbos Report was put before Croft J on 30 January 2018) or the Fourth and Fifth Trimbos Reports (more particularly, when those reports were put before Dixon J on 3 August 2020)¹⁰⁸ respectively, because those facts and documents constitute the surrounding circumstances.
101. If a misrepresentation is found to have been made by a party or a person identified in section 10 of the CP Act in a civil proceeding, then that person's conduct must be considered having

¹⁰⁷ Steinwall, *Annotated Competition and Consumer Legislation* (LexisNexis, 2017) at [14.590.95].

¹⁰⁸ T417:24-T418:10 [TRA.500.005.0001 at 0004 to 0005].

regard to the role of all the other "players", including the other parties.¹⁰⁹ In this Proceeding, it means that the conduct of the other players for example, the SPR, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Mr Alexander Elliott, must be analysed and considered.

The Expert Witness Representations were not misleading or deceptive

102. The Expert Witness Representations were not misleading or deceptive, individually, or cumulatively.

The First Expert Witness Representation was not misleading or deceptive

103. The First Expert Witness representation refers to and is based on the Code and it is therefore necessary to consider the provisions of the Code.

The Code and the CP Act

104. It is trite that an expert witness is subject to the provisions of the Code by virtue of rule 44.04(3) of the Rules and the provisions of the CP Act pursuant to section 10(3) thereof, and that the Code is supplemented by Part 4.6 of the CP Act.¹¹⁰ The Code is contained in Form 44A to the Rules.
105. The Code is not concerned with a Court's requirements for the receipt into evidence of expert opinion, and it does not affect the underlying principles in the law of evidence, including section 79 of the Evidence Act.¹¹¹
106. The primary intention of the Code is to operate as a code of conduct designed to improve the quality of expert evidence.¹¹² In that respect the Code is an important part of the rules about admissibility of expert evidence, even though strict compliance with the provisions of the Code is not intended as preconditions to the admissibility of such evidence.¹¹³
107. The Code stipulates in paragraph 2 that an expert owes two general duties to the Court, namely: the expert should not be an advocate for a party, and the expert has a paramount duty to *assist the Court impartially* on matters relevant to the area of his or her expertise.

¹⁰⁹ *Stewart* [99].

¹¹⁰ *Hudspeth No 8* [29], [36], [38].

¹¹¹ *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33, [15] (*FGT Custodians*); but see *Hudspeth No 8*, [149].

¹¹² *ASIC v Rich* (2005) 190 FLR 242, [333]; *Kuypers v Ashton Coal Operations Pty Ltd (No 8)* [2015] NSWSC 1284, [9] (*Kuypers*).

¹¹³ *Kuypers*, [3], [8]; *R v Warwick (No 65)* [2019] NSWSC 248, [44].

108. In *Hudspeth No 8* at [141], Dixon J essentially paraphrased paragraph 2 of the Code and relevantly said that: "*The Expert Code deals not with admissibility of opinion but with the manner in which the courts regulate the preparation and presentation of expert evidence ... [and] that the expert owes to the court a duty to impartially assist the court to form a correct judgment on matters about which judges, or juries, are not knowledgeable. This duty is paramount, and is owed to the court not to a party to whom the expert may owe other duties arising from contract or tort. An expert must not be an advocate for a party.*" (emphasis added)
109. What is required of an expert witness by the Code is not that he or she should be independent, but that they should assist the Court "*impartially on matters relevant to the area of expertise of the witness*". Moreover, there is nothing in the Evidence Act or at common law which requires an expert witness to be truly independent of the party on behalf of whom opinion evidence is to be provided. Indeed, as Williams, Anderson, Marychurch and Roy, *Uniform Evidence in Australia* (LexisNexis, 2015) at [79-16] observed: "*The fact that an expert has significant ties to one of the parties, and cannot be said to be truly independent of that party, does not disqualify the witness giving evidence under s 79*" - at most, ties to a party may affect the admissibility or weight given to the expert evidence.¹¹⁴
110. The basic principle is that the expert opinion presented to the Court should be, and should be seen to be, impartial and uninfluenced by the exigencies of litigation. It is not a requirement that an expert witness must be independent, a concept which relates to whether the expert is under the control of, or affiliated to, or aligned with either the person instructing him or her, or the person on whose behalf the expert is asked to provide an opinion. An expert witness being impartial and an expert witness being independent are not necessarily the same. The expert witness must be impartial providing fair-minded, unprejudiced, unbiased, objective, honest, disinterested, or uninvolved opinions based on the facts he or she has been asked to assume and the documents provided to them with their instructions. An expert witness can be impartial even if he or she is not independent, and equally, an expert witness can be independent but not impartial.
111. It is actual, not apprehended bias or the appearance of bias, that must be shown on the part of the expert,¹¹⁵ bearing in mind that a finding of partiality against a professional person is a serious matter.¹¹⁶

¹¹⁴ See also *SmithKline Beecham (Australia) Pty Ltd v Chipman* (2003) 131 FCR 500, [40].

¹¹⁵ See *The Gull Lexington Group Pty Ltd v Laguna Bay (Banongill) Agricultural Pty Ltd* (2008) 55 VR 273, [114] (*Gull*).

¹¹⁶ *Gull*, [90].

112. In paragraph 3 of the Code, it also provides for what should be contained in the expert's report. Mr Trimbos complied with this paragraph. It is pertinent to note that neither the Code nor the CP Act stipulates, for example, that the expert must state in his or her report whether he or she had previously been engaged by the same party or same instructor as those currently instructing him or her, or that he or she is independent.
113. What the Code requires is *not* that the expert must be independent (in the sense of no links to either the party on whose behalf the expert has been instructed to provide an opinion or the legal practitioner instructing the expert), but rather that the expert's opinion or evidence must be the expert's independent opinion or evidence (in the sense of being impartial, or uninfluenced by the exigencies of the litigation). In considering the issue of an expert's independence (or more correctly the expert's impartiality) what is important is that the expert's evidence presented to a Court should be and be seen to be the independent product of the expert, uninfluenced by form or content by the exigencies of litigation, or even an interest or perceived interest in the outcome of the litigation (see *FGT Custodians*).¹¹⁷

The allegations in support of the misleading character of the First Expert Witness Representation

114. By reason of the way in which the First Expert Witness Representation is pleaded, the false or misleading character of the First Expert Witness Representation depends upon there being clear and cogent evidence before Dixon J that each of those Representations was actually false or misleading, or there being evidence which could actually persuade the Court to infer and conclude that each of the Second to Seventh Expert Witness Representations was actually false or misleading.

The Second Expert Witness Representation was not misleading or deceptive

115. It is clear that the matters which allegedly support the Second Expert Witness Representation do not pertain to the independence or impartiality of Mr Trimbos' opinions in the Third Trimbos Report or his proffering such opinions, but rather the matters purport to show that Mr Trimbos was not independent of, for example, Messrs Elliott and O'Bryan which is not the touchstone for the determination of independence of an expert witness' opinion. Moreover, they do not relate to the time when the Second Expert Witness Representation is alleged to have been made - that is, the time of the Third Trimbos Report.

¹¹⁷ *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33.

The allegations in support of the misleading character of the Second Expert Witness Representation

Mr Trimbos was previously retained by Mr Elliott or associated entities

116. The first sentence in paragraph 7(a) of the PoA is an incorrect. What Mr Trimbos said in paragraph 25 of the Fourth Trimbos Report is that at the time of that Report (12 March 2019)¹¹⁸ - not the Third Trimbos Report (4 January 2018)¹¹⁹ - he had been engaged by Mr Elliott and associated entities as costs lawyer and prepared reports in eight different proceedings.
117. It is clear from the Trimbos Affidavit at paragraph 15¹²⁰ that Mr Trimbos was engaged by Mr Elliott and/or his associated entities on behalf of different clients on four occasions before he prepared the First and Second Trimbos Reports in the Bolitho Partial Approval Application and he was also engaged by Mr Elliott in connection with a security for costs application in this Proceeding.¹²¹ On the four other occasions mentioned in paragraph 15 of the Trimbos Affidavit, and the only other occasion as set out in paragraph 17(a) of that Affidavit,¹²² Mr Trimbos was engaged on behalf of different clients. His being engaged by Mr Elliott or associated entities on behalf of different parties was not an issue in the Bolitho Partial Approval Application, and the fact that the First and the Second Trimbos Reports did not provide any details of existing relationships or previous engagements were not raised by the *amicus* or Robson J in the Bolitho Partial Approval Application.
118. Mr Trimbos provided two reports in the Bolitho Partial Approval Application, and was thereafter engaged by Portfolio Law, not Mr Mark Elliott or an entity associated with him, to prepare a report in respect of a security for costs application in 2017.¹²³
119. So, in the period after providing the Second Trimbos Report and before Mr Trimbos' engagement by AFPL to prepare the Third Trimbos Report on behalf of Mr Bolitho he was engaged only once by Portfolio Law and on no occasion by Mr Mark Elliott or an associated entity. In light of Mr Trimbos' involvement in the Proceeding and his providing the First and Second Trimbos Reports in the Bolitho Partial Approval Application, it is not surprising that Mr Trimbos was engaged to provide the Third Trimbos Report for the Bolitho Approval Application.

¹¹⁸ [EXP.020.001.0003].

¹¹⁹ [CBP.001.010.5957 at 0063].

¹²⁰ [LAY.090.001.0001 at 0002 and 0003].

¹²¹ [LAY.090.001.0001 at 0003], [16].

¹²² [LAY.090.001.0001 at 0003].

¹²³ [LAY.090.001.0001 at 0003], [17(a)].

120. Mr Trimbos' un-contradicted evidence is that his prior work for Mr Mark Elliott did not influence the opinions expressed in his reports in this Proceeding,¹²⁴ including the Third Trimbos Report. In the circumstances set out in the Trimbos Affidavit and bearing in mind that Mr Trimbos charged his usual fees for the work he performed for Mr Elliott or associated entities in the same way as he had done in respect of other solicitors who had engaged him as costs consultant,¹²⁵ it is clear that there is no substance in the assertion that Mr Trimbos lacked independence in any way whatsoever, nor evidence on the *Briginshaw* standard to prove a lack of independence. Mr Trimbos' work for Mr Mark Elliott or associated entities has not been a large part of his practice.¹²⁶
121. Mr Trimbos was not Mr Elliott's "*dog's body*" as the Contradictor in a derogatory way put to him in cross-examination.¹²⁷ It is clear from the evidence that Messrs O'Bryan, Symons, and Elliott were conscious of the fact that Mr Trimbos would not accept anything and everything they put to him and that he would act independently. For example –
- (a) by email dated 22 November 2017,¹²⁸ in regard to whether a cancellation fee could be charged in the sum of \$15,000.00 per day, Mr O'Bryan stated that he "*reckon he [Mr Trimbos] will say no to both*";
 - (b) by a series of emails on 19 December 2017,¹²⁹ Mr Trimbos asked Mr Symons for documents pertaining to a number of issues, for example his costs agreement, draft joint settlement opinion and the index of documents;
 - (c) when Mr Trimbos identified and raised with Mr O'Bryan that it appeared from the documents with which he had been provided that there was an incorrect payment of \$22,000.00 to Mr O'Bryan, the latter emailed that he would do a reimbursement for the two days overcharged (email dated 1 January 2018),¹³⁰ and subsequently Mr Elliott emailed Mr O'Bryan sarcastically stating: "*Thanks Norm, Just send the cheque when able!*" and Mr O'Bryan responding: "It's in the mail", and Mr Elliott replying: "*I will check the box daily. However, things go missing*".¹³¹
122. To be engaged on behalf of different clients by the same solicitor or associated entity on four occasions over a period of about three years, and in the same Proceeding on three other

¹²⁴ [LAY.090.001.0001 at 0004], [20].

¹²⁵ [LAY.090.001.0001 at 0004], [20].

¹²⁶ [LAY.090.001.0001 at 0003, 0004] [18].

¹²⁷ T718:11-12 [TRA.500.007.0001 at 0061].

¹²⁸ [NOB.500.001.7493].

¹²⁹ [SYM.001.003.0372], [SYM.001.003.2605], [SYM.001.003.0213], [SYM.001.003.2154].

¹³⁰ [SYM.001.003.2825].

¹³¹ [NOB.500.001.7237].

occasions, is not evidence that Mr Trimbos was not independent or that he did not express impartial opinions in the Third Trimbos Report. Mr Trimbos' opinions as presented to Croft J in the Bolitho Approval Application were his independent product, uninfluenced in form or contents by the exigencies of the Proceeding. For example, although Mr Trimbos circulated a draft of the Third Trimbos Report to Messrs O'Bryan, Symons, Elliott, and Zita as he was entitled to do,¹³² none of those persons tried to, or did, influence Mr Trimbos' opinions in the Third Trimbos Report. None of those persons suggested or required any fundamental changes to the draft, and save for some typographical and calculation corrections, the draft became the Third Trimbos Report which was the result of Mr Trimbos' work (emails dated 3 and 4 January 2018).¹³³

Mr Trimbos failed to disclose his previous engagements by Mr Elliott and associated entities

123. The second sentence of the quote set out in paragraph 7(a) of the PoA is correct but, for the purposes of the Third Trimbos Report, unlike for the Fourth Trimbos Report, Mr Trimbos was not instructed to state how many times he had been engaged by Mr Elliott or his associated entities. It should be noted that Mr Trimbos did not make such disclosure statement in either the First or the Second Trimbos Reports, and the *amicus* appointed by Robson J in the Bolitho Partial Approval Application did not raise the lack of a disclosure statement as an issue at all.
124. Mr Trimbos was not required by the Code or otherwise to make such statement. What the Code requires is an impartial opinion, and that is what Mr Trimbos provided. The non-disclosure or silence by Mr Trimbos does not constitute misleading conduct in the absence of an obligation to make a disclosure. Mr Trimbos' un-contradicted evidence is that it was not his practice to disclose in an expert report whether he had done work for an instructing solicitor on prior occasions, and that it did not occur to him to do so in his first three Reports.¹³⁴ When Mr Trimbos provided the Third Trimbos Report it was well-known that he had provided the First and Second Trimbos Reports in this Proceeding.¹³⁵ Since his instructions for purposes of the Fourth Trimbos Report required him to disclose his previous work for Mr Mark Elliott or associated entities,¹³⁶ Mr Trimbos duly made the disclosure.¹³⁷

¹³² Freckleton op cit at [5.10.360]

¹³³ [SYM.001.002.9646], [SYM.001.002.9527], [SYM.001.002.9235], [NOB.500.005.2469], [NOB.500.005.2475], [SYM.001.002.9051], [SYM.001.002.9006], [SYM.001.002.8845].

¹³⁴ [LAY.090.001.0001 at 0004], [21].

¹³⁵ [LAY.090.001.0001 at 0004], [21].

¹³⁶ [EXP.020.002.0001 at 0003], [11].

¹³⁷ [LAY.090.001.0001 at 0004], [21].

Mr Trimbos failed in his duty to assist the Court impartially and provided reports favourable to AFPL

125. Mr Trimbos did assist Croft J impartially. Mr Trimbos expressed his opinions in the Third Trimbos Report having regard to the assumed facts and documents, all of which were put before his Honour Justice Croft by Mr Bolitho, and which material his Honour accepted as properly and adequately addressing the relevant issues regarding the legal costs so that he could make a determination as to the reasonableness and appropriateness of the legal costs and disbursements incurred by Mr Bolitho's solicitors.¹³⁸
126. The fact that the assumed facts and documents were false and misleading was only established subsequent to the Third Trimbos Report and the Bolitho Approval Application, and it is that fact, and not any of the Expert Witness Representations (including the Second Expert Witness Representation) that with the benefit of hindsight undermined the value of the evidence (including Mr Trimbos' expert evidence) which was before Croft J. If the falsity of the assumed facts and documents were known to Mr Trimbos at the time, his opinions would no doubt have been the same as that expressed in the Fifth Trimbos Report after he had been instructed to assume the Contradictor would prove such falsity.
127. Even if the Third Trimbos Report (or the Fourth Trimbos Report) were “*favourable*” to AFPL it is of no consequence, because it is neither proof that Mr Trimbos’ independence was affected in any way in providing his expert opinions in the Reports, nor that Mr Trimbos’ impartiality was compromised in any way in providing his expert opinions expressed in the Reports contrary to his duty under the Code, nor that Mr Trimbos’ assessment of the legal costs and disbursements set out in the Third Trimbos Report was misleading or deceptive. Even if Mr Trimbos’ opinions expressed in his Reports were “*favourable*” to AFPL, it is not proof of a lack of independence or impartiality because as the Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) (**VLRC Report**) pointed out at [5.56], “*the costs expert's role is not to represent the interests of the class members; their interests are for the court to consider*”.

Mr Trimbos provided kerbside advice

128. The Contradictor's allegation about kerbside advice in paragraph 7(b) of the PoA¹³⁹ is dealt with by Mr Trimbos in paragraphs 54 to 73 of the Trimbos Affidavit.¹⁴⁰ In regard to the “*cancellation fee*” issue, Mr Trimbos specifically address that in paragraphs 66 to 73 of the

¹³⁸ *Banksia No 2*, [56], [70]

¹³⁹ [PAR.010.001.0001 at 0003].

¹⁴⁰ [LAY.090.001.0001 at 0010 to 0013].

Trimbos Affidavit.¹⁴¹ Although it is correct that Mr Mark Elliott approached Mr Trimbos about the possibility of counsel charging a cancellation fee, it is pertinent to note the following: First, the circumstances in which their communication occurred. It was two days after Mr Elliott first emailed Mr Trimbos regarding his engagement to provide the Third Trimbos Report (Mr Elliott’s email dated 23 November 2017),¹⁴² and at a time when Mr Trimbos had not yet received any invoices of Messrs O’Bryan, and Symons, or any costs agreements or even a letter of instruction from AFPL.¹⁴³ So, the Contradictor’s assertion that Mr Trimbos must have known that counsel’s fee arrangements did not allow for a cancellation fee, is clearly wrong and unsupported by facts. Secondly, Mr Trimbos only received Mr O’Bryan’s costs agreement on 20 December 2017 (email dated 20 December 2017),¹⁴⁴ and Mr Symon’s costs agreement on 18 December 2017 (emails dated 18 and 19 December 2017),¹⁴⁵ and that was only after Mr Trimbos specifically asked for the costs agreements (email dated 18 December 2017).¹⁴⁶ Mr Zita provided his costs agreement on 19 December 2017 (email dated 19 December 2017).¹⁴⁷ Thirdly, Mr Trimbos did not just say yes or advise Mr Elliott what should be done, rather he asked Mr Elliott questions about counsel’s rates, and only gave an in-principle answer as set out in paragraphs 68 to 71 of the Trimbos Affidavit.¹⁴⁸ Lastly, in any event, counsel did not charge or attempt to charge a cancellation fee and it never became an issue to be addressed in the Third Trimbos Report.¹⁴⁹

129. There is nothing improper or compromising for an expert to address questions put to them by solicitors, or to talk to or have a discussion with legal representatives about the matter in respect of which they are instructed to provide an opinion, or to provide their instructor and legal representatives with a draft of their report, as long as they do not “settle” the evidence of the expert,¹⁵⁰ or the expert’s independence is not compromised or undermined.¹⁵¹
130. It is not uncommon for legal practitioners to work closely with experts and they are often directly involved in assisting in the preparation of the expert’s forensic reports and opinions.¹⁵² As Lindgren J said in *Harrington-Smith* at [27], it is not too difficult to

¹⁴¹ [LAY.090.001.0001 at 0012 to 0013].

¹⁴² [TRI.001.006.0072].

¹⁴³ [LAY.090.001.0001 at 0012], [67].

¹⁴⁴ [SYM.001.003.0203], [SYM.001.003.0204].

¹⁴⁵ [SYM.001.003.2842] [SYM.001.003.2844], [SYM.001.003.0372].

¹⁴⁶ [SYM.001.003.2854].

¹⁴⁷ [CBP.001.013.0922], [CBP.001.013.0923].

¹⁴⁸ [LAY.090.001.0001 at 0012].

¹⁴⁹ [LAY.090.001.0001 at 0013], [73].

¹⁵⁰ *Hudspeth No 8* at [167]; Freckelton op cit at [1.0.80]

¹⁵¹ *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd* (2014) 42 VR 236, [208] (***Hudspeth on appeal***).

¹⁵² *Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 7)* (2003) 130 FCR 424, [19] (***Harrington-Smith***).

distinguish between permissible guidance and improper influence as to the content of an expert's report. In this Proceeding, it is not difficult to make such distinction because there is no assertion or any evidence of influence or improper influence as to the content of the Third Trimbos Report; that is, as to the opinions expressed by Mr Trimbos in that Report. The assertions in paragraph 7 of the PoA do not pertain to the contents of the Third Trimbos Report or Mr Trimbos' opinions expressed therein, but rather to peripheral and irrelevant matters.

Mr Trimbos gave advice to Mr Elliott prior to the Second Trimbos Report

131. Paragraph 7(b) of the PoA also asserts that Mr Trimbos provided some advice to Mr Elliott *in advance of the Second Trimbos Report*. Mr Trimbos deals fully with this assertion in paragraph 61 to 65 of the Trimbos Affidavit,¹⁵³ and his evidence in that regard is uncontradicted. At no stage did Mr Trimbos say to Mr Elliott to manufacture statements or instructions or to say something which is not true and correct, but rather Mr Trimbos asked Mr Elliott for more information to understand his time spent, as relevant to Mr Trimbos' opinion on reasonableness. The matter referred to, even if correct, is alleged to have occurred in 2016, about 18 months before Mr Trimbos prepared the Third Trimbos Report and not at the time relevant for the determination of the misleading character of Mr Trimbos' conduct which purportedly establishes his lack of independence.

The Third Expert Witness Representation was not misleading or deceptive

132. Mr Trimbos did not make a statement as asserted in paragraph 1(c) of the PoA.

The allegations in support of the misleading character of the Third Expert Witness Representation

133. Paragraph 8 of the PoA is put in very vague words ("*those matters and the matters set out below*"). The allegations in paragraph 8 of the PoA as pleaded are inherently wrong and contradictory. The Third Expert Representation allegedly relates to Mr Trimbos' proffering of his opinions in the Third Expert Report. The Continuing Opinion Representation and the alleged conduct constituting it occurred after the conduct constituting the Third Expert Witness Representation and is irrelevant to the characterisation of the Third Expert Witness Representation as misleading.
134. Footnote 13 to paragraph 8 of the PoA refers to the transcript where Mr Trimbos denied that he was Mr Elliott's "*dog's body*" (paragraph 121 above). It is clear from the transcript that the

¹⁵³ [LAY.090.001.0001 at 0011 and 0012].

cross-examination of Mr Trimbos at that stage was not directed at Mr Trimbos' expert opinions expressed in the Third Trimbos Report and proffered in the Bolitho Approval Application but was directed at the conversation Mr Trimbos had with Mr O'Bryan after he had provided the Fourth Trimbos Report.

The Fourth Expert Witness representation was not misleading or deceptive

135. Before addressing the Contradictor's allegations in support of the characterisation of the Fourth Expert Witness Representation as misleading, it is necessary to deal with the process adopted, and expression of opinion, by experts, as well as the role and function of experts.

The expert's process and expression of opinions

136. A statement of opinion would not breach the statutory prohibition in section 21 of the CP Act merely because it proves to be inaccurate.¹⁵⁴ The nature of expert opinion evidence lends itself to a wide range of choices of what material to select, what weight to give to what material, and how to interpret material, as long as the expert restricts himself or herself to the proven facts or the assumed facts and documents, and which must be proven for the opinions to be admissible.¹⁵⁵
137. At the material time, the Supreme Court of Victoria Practice Note on the Conduct of Group Proceedings (Common Law Division)¹⁵⁶ was silent as to how the costs expert was to assess the reasonableness of legal costs and disbursements in a class action.¹⁵⁷ Indeed, in *Francis v Powercor Australia Ltd* [2020] VSC 405 (**Francis**) at [7], the Court said at sub-paragraph 12 that a Court “*may be satisfied as to the amount of costs that is reasonable and proportionate, in any one of a number of ways*”. As said in *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [53] and [54], the precision with which a Court will require a plaintiff to justify the quantum of costs incurred for the benefit of the group members will vary according to the circumstances of the case.

The function of an expert witness

138. In considering the application of the Code and the CP Act, one should not, however, lose sight of the function or role of expert witnesses. In *Forrester v Harris Farm Pty Ltd* (1995) 129

¹⁵⁴ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88; *Copperart Pty Ltd v Floan* (1991) 20 IPR 519, 521; *Bateman v Slayter* (1987) 71 ALR 553, 559.

¹⁵⁵ VLRC Report at [3.5.1].

¹⁵⁶ Practice Note No. 10 of 2015 (this was replaced on 30 January 2017 by the current practice note)

¹⁵⁷ Victoria Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Consultation Paper, July 2017) at [7.40]

FLR 431, Miles CJ stated at 438: "*It is trite principle of evidence law that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts, which facts are proved by the evidence in the case, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. Whether or not the expert believes in that sub-stratum of facts or knows them to be true or is satisfied that they are true, is completely beside the point. The expert's function is to express an opinion based on assumed facts, not to express a view on whether the assumptions are justified*" (own emphasis added).

139. The expert's function is not to investigate the truth of the assumed facts and documents, or, indeed, to uncover facts. It is also irrelevant whether the expert believes the assumed facts and documents to be true or is satisfied that they are true. It is not for the expert to express any view in respect of the assumed facts and documents. The expert's function is to express an opinion based on the assumed facts and documents. As Freckelton op cit at [4.0.40] observed, when commenting on the role of the judge as trier of fact, the "*role of the expert in this sense is no different from that of any other witness in court proceedings – it is merely to set material before the court to enable it to make its own determination about issues in dispute when it could not competently deal with such issues without expert assistance.*"

The allegations in support of the misleading character of the Fourth Expert Witness Representation

140. In paragraph 9 of the PoA,¹⁵⁸ the Contradictor raised concerns about the process followed by Mr Trimbos in reaching his opinions.
141. Mr Trimbos' assessment of the reasonableness of the plaintiff's legal representatives' legal costs and disbursements and his opinions expressed in the Third Trimbos Report is not alleged to be wrong or misleading. The issue raised by the Fourth Expert Witness Representation is the process adopted by Mr Trimbos. There is no prescribed process which Mr Trimbos was required to follow, or material which he had to access, in assessing the reasonableness of the costs and disbursements. The process adopted by Mr Trimbos as described in paragraphs 30 to 53 of the Trimbos Affidavit¹⁵⁹ has not been challenged. In the absence of evidence by, for example, a costs consultant to the effect that the process followed by Mr Trimbos was flawed and misleading, the inference that the Court must draw is that there is no such evidence.¹⁶⁰

¹⁵⁸ [PAR.010.001.0001 at 0004].

¹⁵⁹ [LAY.090.001.0001 at 0006 - 0010].

¹⁶⁰ See *Jones v Dunkel* (1958-9) 101 CLR 298.

142. The Contradictor's assertion in paragraph 10 of the PoA¹⁶¹ of the alleged "*uncritical acceptance*" by Mr Trimbos of whatever he was told, is not only contrary to the facts set out in Mr Trimbos' un-contradicted evidence in paragraphs 75 to 110 of the Trimbos Affidavit,¹⁶² but not in accordance with the role and function of an expert.

Mr Trimbos' assumption about the duration of the trial

143. In paragraph 10(a) of the PoA,¹⁶³ the Contradictor raised concerns about Mr Trimbos' acceptance of Mr O'Bryan's instruction to him that the trial would run for 120 days contrary to the information Mr Trimbos had that the trial was fixed for 50 days, in order for him to opine that Mr O'Bryan charged for 65 days preparation for trial. Mr Trimbos did not accept the estimate of 120 days by Mr O'Bryan, but rather assumed that the trial could have lasted 100 days, which assumption he explained in paragraphs 80 to 91 of the Trimbos Affidavit.¹⁶⁴

144. The Contradictor also asserted in paragraph 10(a) of the PoA that Mr Trimbos failed to raise the issue of the duration of the trial with Mr Zita. Mr Zita was copied with a draft of the Third Trimbos Report before it was filed on 3 January 2018, and the reference to the email to which the draft was attached.¹⁶⁵

145. In *Hudspeth on appeal* at [209], Whelan J said that the mere instructions to an expert to change the assumed facts are not, without more, something which is wrong or improper. Consistently with basic honesty and with the Code, those instructions have to be revealed in any report produced as a consequence. This is what Mr Trimbos did because he stated in paragraph 95 of the Third Trimbos Report¹⁶⁶ what Mr O'Bryan instructed him about the length of the trial in the Proceeding. Mr Trimbos made it clear that he was told that the trial of the Proceeding had been fixed for 50 days, that Mr O'Bryan was of the view that the trial would run for 120 days, and that he assumed for the purposes of his opinions that the trial would last 100 days. Croft J was aware of the estimated duration of the trial and that it was fixed for 10 weeks, because his Honour stated that the matter "*had been set down for a 12-week trial (now estimated 10-week trial commencing February 2018)*".¹⁶⁷ In light of paragraph 95 of the Third Trimbos Report it was open to his Honour to reject Mr Trimbos opinions and assessment of the legal costs and disbursements in so far as the duration of the trial impacted on such assessment.

¹⁶¹ [PAR.010.001.0001 at 0004].

¹⁶² [LAY.090.001.0001 at 0013 - 0023].

¹⁶³ [PAR.010.001.0001 at 0004].

¹⁶⁴ [LAY.090.001.0001 at 0017 - 0020].

¹⁶⁵ [NOB.500.005.2312], [SYM.001.003.0517].

¹⁶⁶ [CBP.001.010.5957 at 0085].

¹⁶⁷ *Banksia No 2*, [79].

146. The instruction to change assumed facts should not be confused with an instruction to an expert to alter his or her evidence or opinion.¹⁶⁸ Mr O'Bryan's instruction about the duration of the trial, even if it were accepted by Mr Trimbos, was an instruction about the assumed facts, and not an instruction to Mr Trimbos to change his opinions or evidence.

Mr Trimbos' reliance on fee slips and documents provided to him and his reliance on the tradition not to question counsels' fee slip

147. Paragraphs 1(b), (d) and (f) of the PoA,¹⁶⁹ raised concerns about Mr Trimbos' reliance on the fee slips and other documents with which he was provided for the purpose of his opinions and that "*would appear that Mr Trimbos saw his role as simply regurgitating what he was told by the Lawyer Parties*".

148. Mr Trimbos was not obliged to investigate the correctness or truthfulness of the assumed facts and documents – the fee slips and other documents - with which he was provided for the purpose of his opinions expressed in the Third Trimbos Report. Mr Trimbos did undertake an independent review of the costs claimed on the basis of the assumed facts and documents, and objectively and independently satisfied himself in those circumstances that the costs claimed were reasonable. To form an opinion based on the assumed facts and documents is not to regurgitate that information. The Contradictor is conflating the assumed facts and documents with Mr Trimbos' expert opinions based on those facts and documents.

149. Mr Trimbos provided a satisfactory explanation as he was required to do about his reliance on the assumed facts and documents with which he was instructed. Mr Trimbos' un-contradicted evidence in respect of these assertions is set out in paragraphs 92 to 106 of the Trimbos Affidavit.¹⁷⁰

Mr Trimbos performed inadequate sampling

150. In paragraph 10(c) of the PoA,¹⁷¹ the Contradictor raised concerns about Mr Trimbos' "*inadequate*" sampling. There is no prescribed process an expert costs consultant must follow in providing an expert opinion or about the reasonableness of legal costs or disbursements, nor is there any evidence of a cost consultant criticising the process adopted by Mr Trimbos, nor an assertion that, even if the sampling were inadequate, that Mr Trimbos' expert opinion about the assessment of the legal costs and disbursements were wrong, unreasonable, or

¹⁶⁸ *Hudspeth on appeal*, [210].

¹⁶⁹ [PAR.010.001.0001 at 0004, 0005, 0006].

¹⁷⁰ [LAY.090.001.0001 at 0020 to 0023].

¹⁷¹ [PAR.010.001.0001 at 0005].

misleading having regard to the assumed facts and documents. Mr Trimbos provided a satisfactory explanation about the sampling process he followed as set out in paragraph 100 of the Trimbos Affidavit.¹⁷²

Examination of duplication in respect of the work performed by Ms Jacobson and Mr Symons

151. In paragraphs 10(d) and (e) of the PoA,¹⁷³ the Contradictor raised concerns about Mr Trimbos' failure to examine the duplication of work performed by Ms Jacobson and Mr Symons for the same period as that of Mr Symons (12 September 2017 to 9 November 2017). Mr Trimbos provided a satisfactory explanation about this concern in paragraphs 103 to 110 of the Trimbos Affidavit.¹⁷⁴

The Fifth Expert Witness Representation was not misleading or deceptive

152. In paragraph 11 of the PoA,¹⁷⁵ the Contradictor raised concerns about Mr Trimbos' opinions not involving the application of specialised knowledge based on his training, study or experience and his 10 years' experience (at the time of the Third Trimbos Report) as costs consultant.

The allegations in support of the misleading characterisation of the Fifth Expert Witness Representation

153. In paragraphs 11 to 16 of the PoA,¹⁷⁶ the Contradictor criticised Mr Trimbos' reliance on the distinction between “taxation” and “assessment” and asserted that it is not apparent how Mr Trimbos' experience in taxations translated into his expert opinions expressed in the Third Trimbos Report, and that Mr Trimbos did not actually have real knowledge or experience of the work involved in running a large, complex class action. Mr Trimbos answered these assertions fully and satisfactorily in paragraphs 22 to 52 of the Trimbos Affidavit.¹⁷⁷

154. In the Third Trimbos Report Mr Trimbos expressed his opinions, provided his reasoning for such opinions, and the information upon which he relied in doing so. If his Honour Justice Croft were not satisfied with any aspect of the Report – the process followed by Mr Trimbos or his reasoning or inadequate referral to documents - then his Honour could have done a number of things: Croft J could have rejected Mr Trimbos' expert opinion, or requested Mr

¹⁷² [LAY.090.001.0001 at 0022].

¹⁷³ [PAR.010.001.0001 at 0005].

¹⁷⁴ [LAY.090.001.0001 at 0023].

¹⁷⁵ [PAR.010.001.0001 at 0007].

¹⁷⁶ [PAR.010.001.0001 at 0007 and 0008].

¹⁷⁷ [LAY.090.001.0001 at 0004 -0010].

Trimbos to explain or expand on his expert opinions, or requested a Registrar of the Court to opine on the costs and disbursements (see *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 (**Modtech**) where Gordon J sought and obtained the advice of a Registrar of the Court because her Honour was neither satisfied with the material nor with the expert opinions put before the Court by the plaintiff; see also *Modtech Engineering Pty Ltd v GPT Management Holdings Limited (No 2)* [2013] FCA 1163 (**Modtech No 2**) and *Modtech Engineering Pty Ltd v GPT Management Holdings Limited (No 3)* [2014] FCA 680 (**Modtech No 3**)).

The Sixth Expert Witness Representation was not misleading or deceptive

155. In paragraph 17 of the PoA,¹⁷⁸ the Contradictor raised concerns about Mr Trimbos' failure to identify facts, matters and assumptions on which his opinions expressed in the Third Trimbos Report and the Fourth Trimbos Report were based. As mentioned in paragraph 77 above, both Croft J and the Court of Appeal were satisfied that Mr Trimbos had identified and set out the factual and legal basis of his expert opinions or evidence.

The allegations in support of the misleading characterisation of the Sixth Expert Witness Representation

156. In paragraph 18 to 21 of the PoA,¹⁷⁹ the Contradictor pleaded certain matters which allegedly support the misleading character of the Sixth Expert Witness Representation. Mr Trimbos has dealt with the assertion fully and satisfactorily in paragraphs 114 to 118 of the Trimbos Affidavit.¹⁸⁰

The Seventh Expert Witness Representation was not misleading or deceptive

157. In paragraph 22 of the PoA,¹⁸¹ the Contradictor raised concerns about Mr Trimbos' "uncritical acceptance of the material that was presented to him and his failure to interrogate it as set out above". The assertion in paragraph 22 of the PoA does not support the characterisation of the Seventh Expert Witness Representation as misleading or deceptive because the Seventh Expert Witness Representation is that Mr Trimbos represented that "he had made all the inquiries *which he believed* were desirable and appropriate" (emphasis added) (that is, what he subjectively believed to be desirable and appropriate) and that "no matters of significance *which he regarded as relevant had, to his knowledge, been withheld*

¹⁷⁸ [PAR.010.001.0001 at 0008].

¹⁷⁹ [PAR.010.001.0001 at 0008 - 0009].

¹⁸⁰ [LAY.090.001.0001 at 0024 and 0025].

¹⁸¹ [PAR.010.001.0001 at 0010].

from the Court” (emphasis added) (that is, what he subjectively regarded as relevant and that in so far he was concerned).

158. Mr Trimbos specifically provided satisfactory explanations in respect of paragraph 22(a) of the PoA in paragraph 114 of the Trimbos Affidavit,¹⁸² and paragraph 22(b) of the PoA in paragraph 119 of the Trimbos Affidavit.¹⁸³ It is clear from Mr Trimbos’ satisfactory explanation about the objective and independent process which he followed as set out in paragraphs 74 to 101 of the Trimbos Affidavit¹⁸⁴ that he did make the inquiries which *he believed* were desirable and appropriate, and that he raised all the matter which *he thought* were significant.
159. Paragraph 22(e) of the PoA refers to Mr Trimbos’ failure to make inquiries to establish whether there was any duplication of work as between the legal teams acting in the Bolitho Approval Application and the SPR’s proceeding respectively. As the Court of Appeal in *Botsman* at [259] pointed out, Mr Trimbos was not asked to address the issue of the overlap between the work performed by Mr Bolitho’s legal representatives and the SPR’s legal representative.

The Continuing Opinion Representation was not misleading or deceptive

160. In paragraphs 24 to 36 of the PoA,¹⁸⁵ the Contradictor purports to enumerate a number of matters which allegedly support the misleading characterisation of the Continuing Opinion Representation. Mr Trimbos provided a satisfactory explanation in respect of those matters in paragraphs 122 to 145 of the Trimbos Affidavit.¹⁸⁶

The allegations in support of the misleading characterisation of the Continuing Opinion Representation

Change of Instructions for the Fourth Trimbos Report

161. In paragraphs 26 to 30 of the PoA, the Contradictor asserts that Mr Trimbos knew by no later than February 2019 that “*there were irregularities with respect to the dealing of AFP and the Lawyer Parties with Mr Trimbos relative to his Third Report*”. Mr Trimbos took into account the instructions of ABL, particularly regarding the events subsequent to December 2017, and

¹⁸² [LAY.090.001.0001 at 0024].

¹⁸³ [LAY.090.001.0001 at 0025].

¹⁸⁴ [LAY.090.001.0001 at 0022].

¹⁸⁵ [PAR.010.001.0001 at 0011-0014].

¹⁸⁶ [LAY.090.001.0001 at 0026-0030].

he expressed his opinion in paragraphs 249 to 251 of the Fourth Trimbos Report.¹⁸⁷ It matters not whether Mr Trimbos expressed his opinion at the end of that Report. Mr Trimbos did not “*gloss*” over this aspect of ABL’s instructions to him as asserted by the Contradictor in paragraph 29 of the PoA – he was instructed that the legal costs were not paid but that an irrevocable liability was incurred in respect thereof, and his opinion then responded to the instructions.

162. Paragraph 30 of the Particulars of Allegations contains a nonsensical assertion. It is not clear why Mr Trimbos ought to have asked any questions about whether counsel’s fees had been paid. As set out in paragraphs 249 to 251 of the Fourth Trimbos Report he was instructed that the legal costs for the period 1 July 2016 to 31 January 2018 were not paid, but a liability was incurred in respect thereof.
163. Mr Trimbos’ opinion took into account the instructions that the legal costs for the period 1 July 2016 to 31 January 2018 were yet to be paid and his expert opinion was that since AFPL incurred an undisputed liability to pay those costs, the costs related to the group proceedings and were properly incurred. His instructions were not that the costs set out in the invoices in support of the legal costs claim for that period were false in that those costs, or a substantial part thereof, were not incurred.
164. Mr Trimbos is being criticised and accused of misleading conduct on the basis of these “*irregularities*” in circumstances where the second to fourth defendant had not been joined and the Contradictor had not formulated his Revised List of Issue to take into account matters the Contradictor now expects Mr Trimbos to have had knowledge about. Mr Trimbos was not aware of the falsity of the assumed facts and documents,¹⁸⁸ and he was not instructed by ABL until 2 June 2020¹⁸⁹ to assume the falsity of those facts and documents. In paragraphs 121 to 128 of the Trimbos Affidavit,¹⁹⁰ Mr Trimbos provided a satisfactory explanation about the assertions in paragraphs 24 to 30 of the PoA.

Mr Trimbos’ contact with Mr O’Bryan in March 2019

165. Mr Trimbos provided a satisfactory explanation in paragraphs 129 to 136 of the Trimbos Affidavit¹⁹¹ in respect of the Contradictor’s assertions about his contract with Mr O’Bryan in March 2019. This contact occurred *after* Mr Trimbos had provided the Fourth Trimbos

¹⁸⁷ [EXP.020.001.0003 at 0056].

¹⁸⁸ Save for the fact that Mr Trimbos was instructed by ABL in February 2019 that the invoices were not paid, but that a liability had been incurred.

¹⁸⁹ [EXP.020.008.0001 at 0020].

¹⁹⁰ [LAY.090.001.0001 at 0027].

¹⁹¹ [LAY.090.001.0001 at 0027].

Report. There is no evidence or evidence which could actually persuade the Court to infer or conclude that Mr Trimbos provided “*some advice or guidance to Mr O’Bryan*”. Mr O’Bryan did not file an affidavit shortly after March 2019, and by paragraph 3 of an Order dated 29 March 2019,¹⁹² the Honourable Justice Dixon ordered AFPL and Mr Bolitho’s legal representatives, including Mr O’Bryan, to file affidavits in respect of the number of matters. This order was, however, vacated by paragraph 1 of an Order dated 26 September 2019.¹⁹³

B.3.3. The Reliance Issue

166. The next issue to consider and determine is *who has allegedly been misled or deceived*. In other words, who relied on the alleged contravening conduct? This is the so-called “*Reliance Issue*”. There is, however, a link between reliance and causation. In *Baxter v British Airways plc* (1988) 82 ALR 298 at 303, Burchett J said that: “*the language of [the TPA] s 52 evokes the question: misled or deceived into what?*” The prohibition of misleading conduct proscribes conduct having a particular effect upon the mind of its victim, which does not in itself constitute loss or damage. Rather, loss will be suffered by action or inaction under the influence of error induced by the breach.¹⁹⁴ Causation for purposes of misleading conduct claims consists of two limbs: First, it must be shown that the error induced by the breach resulted in particular acts being done or refrained from. Secondly, a sufficient link between that reliance and the loss or damage claimed must be proved. In other words, a plaintiff is entitled to the loss caused by its reliance on the misrepresentation.¹⁹⁵
167. The objective characteristics of the person who was allegedly misled or deceive is relevant.¹⁹⁶ In so far as –
- (a) the First to Seventh Expert Witness Representations are concerned the questions that must be answered are:
 - (i) into what was the Court (Croft J) in the Bolitho Approval Application misled by one or more of the Expert Witness Representations. What did Croft J do or not do in reliance on one or more of the Expert Witness Representations? In other words, what error on the part of Croft J resulted from his being misled

¹⁹² [ORD.500.033.0001 at 0002].

¹⁹³ [ORD.500.007.0001].

¹⁹⁴ Lockhart op cit at [10.8].

¹⁹⁵ Lockhart op cit at [10.9].

¹⁹⁶ *Casmpomar Sociedad Limitada v Nike International Ltd* [2003] HCA 12, [104].

in reliance on one or more of the Expert Witness Representations. Actual reliance is necessary;¹⁹⁷ and

(ii) has a sufficient link been proved between the reliance on one or more of the Expert Witness Representations and the loss, whether as legal costs or financial loss, sought to be compensated by an order under sections 28 and 29 of the CP Act.

(b) the Continuing Opinion Representation is concerned the questions that must be answered are:

(i) into what was the Court (Dixon J) in the AFPL Approval Application misled by the Continuing Opinion Representation. What did the Honourable Justice Dixon do or not do in reliance on one or more of the Continuing Opinion Representations? In other words, what error on the part of the Honourable Justice Dixon resulted from his being misled in reliance on the Continuing Opinion Representation. Actual reliance is necessary;¹⁹⁸ and

(ii) has a sufficient link been proved between the reliance on the Continuing Opinion Representation and the loss, whether as legal costs or financial loss, sought to be compensated by an order under sections 28 and 29 of the CP Act?

168. It is clear from *Banksia No 2* at [70] that Croft J was satisfied that "*the material on legal costs prepared by Mr Trimbos and provided by the Plaintiff*" (that is, the Third Trimbos Report in which Mr Trimbos expressed his opinion, and to which he exhibited his letter of instructions and the documents with which he was instructed) properly addressed the following issues: "*First, whether the work undertaken was appropriate; secondly, whether the work undertaken was undertaken efficiently; thirdly, whether the work undertaken was undertaken by a person of appropriate seniority; fourthly, whether the charge out rate was appropriate; and fifthly, whether the interrelation of the work undertaken by the solicitors and senior counsel and junior counsel was appropriate. Mr Trimbos deposes that, in his opinion, as explained in his Confidential Report [the Third Trimbos Report] costs incurred were reasonable and the work undertaken was appropriate. Mr Trimbos identifies in great detail invoices relating to the work performed.*"

¹⁹⁷ Lockhart op cit, [10.13].

¹⁹⁸ Lockhart op cit, [10.13].

169. Croft J did not rely on the Expert Witness Representations and those Representations did not render either the whole of the Third Trimbos Report or Mr Trimbos' opinions in the Third Trimbos Report inaccurate or misleading. The alleged consequences set out in paragraph 38 of the PoA could not have followed, and did not, follow:
- (a) The affidavit of Mr Trimbos to which the Third Trimbos Report was exhibited mentioned the quantified legal costs and disbursement, but not the reasoning of Mr Trimbos in forming his opinions. Since the amounts of the legal costs and disbursements were known to the SPR and the debenture holders they were in a position to object to the quantum of the costs and disbursements, and they did (for example, *Botsman* at [86]). It is speculation to make the assertion in paragraph 38(a) of the PoA.
 - (b) None of the matters pleaded in support of the Expert Witness Representations would have made any difference to Mr Trimbos' opinion in the Third Trimbos Report for the reasons set out in the Trimbos Affidavit. It is speculation to make the assertion in paragraph 38(b) of the PoA.
 - (c) It is speculation to make the assertions in paragraph 38(c) and (d) of the PoA. Croft J had all the material put before his Honour by Mr Bolitho and the SPR, and his Honour was satisfied that he had been informed of all the competing interests and despite being asked to appoint a contradictor or *amicus*, formed the view that it would be "*a gratuitous waste of limited resources*" to do so.¹⁹⁹
170. It is speculation to make the assertions in paragraph 39 of the PoA. There was no Contradictor in the Bolitho Approval Application. SPR was content with the confidentiality regime in the Bolitho Approval Application because the SPR assumed that:
- (a) the expert cost consultant's report would be made available to the SPR as was the case in the Bolitho Partial Approval Application;²⁰⁰ and
 - (b) AFPL's Legal Costs would be subject to independent approval and close scrutiny by the Court, since the SPR was aware that in the Bolitho Partial Approval Application Robson J approved the legal costs with some reductions.²⁰¹

¹⁹⁹ *Banksia No 2*, [61]; *Botsman*, [324]-[326].

²⁰⁰ Lindholm affidavit dated 2 June 2020 [SPR.006.001.0003 at 0007], [22(a)].

²⁰¹ Lindholm affidavit dated 2 June 2020 [SPR.006.001.0003 at 0007], [22(b)].

The Role of the Court in approving the legal costs and disbursements

171. Whether or not Croft J was misled or deceived by the Expert Witness Representations has to be considered in the context of the role of the Court in approving legal costs and disbursements as set out in paragraph 184 below. The principles have been set out often and require no repetition²⁰² and have been recognised and applied by Croft J in *Banksia No 2* at [42] and following.
172. The supervisory role of the Court extends to approving legal costs and funding fees which reduce the amounts available for class members. There is a heavy burden on the Court when it is considering and determining an application for approval of a funder's commission and the legal costs and disbursements.²⁰³
173. Emerton J said at [33]-[34] in *Williams v Ausnet Electricity Services Pty Ltd* [2017] VSC 474 (*Williams*) that when considering a proposed settlement (and it is submitted including the reasonableness of the legal costs and disbursements): *"The Court must be independently satisfied of the fairness and reasonableness of the proposed settlement. It will not be sufficient to simply assess whether the opinions expressed by the plaintiff's legal advisers appear, on their face, to be reasonable. The almost complete absence of substantive objections to the settlement cannot relieve the Court of its obligations. Nevertheless, the assessment which the Court is able to make can ultimately be no more than one which confirms whether or not the proposed settlement is within the range of fair and reasonable outcomes. Importantly, in making such an assessment, the relative prospects of success can only be broadly gauged."*
174. It is the judge, and not the costs expert, that is required to assess whether the fees and disbursements are fair and reasonable²⁰⁴ in all the circumstances, and it is the judge who must scrutinise²⁰⁵ the evidence to determine whether the evidence is sufficient to enable him or her to undertake that assessment.²⁰⁶
175. The precision with which the Court will require a person to justify the quantum of legal costs and disbursements will vary according to the circumstances of the case.²⁰⁷ A balance must be struck, affording the Court sufficient information to discharge its function, without the

²⁰² *Francis*, [7].

²⁰³ *Botsman*, [335]; *Bolitho No 6*, [70].

²⁰⁴ *Modtech*, [35]-[37]; *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663, [335] (*Matthews*), *Francis*, [7], *Modtech*, [32]; *Matthews*, [348]; *Schmid v Skimming* [2020] VSC 493, [53] (*Schmid*); *Banksia No 2*, [65], [70].

²⁰⁵ *Kelly v Willmott Forests Ltd* (2016) 335 ALR 439, [11] (*Kelly*).

²⁰⁶ *Botsman*, [224].

²⁰⁷ *Lenahan*, [13].

assessment itself significantly diminishing the *corpus* of the settlement funds.²⁰⁸ There is no closed list of factors which may be taken into account to assess the reasonableness of legal costs or disbursements.²⁰⁹ It is the *evidence* about those factors and the information provided to the judge (the assumed facts and documents) that have to be sufficient to enable the judge to undertake the assessment and determination of whether the fees and disbursements are reasonable and proportionate.

176. The Court must be satisfied that it has "*sufficient evidence*", and it is the plaintiff seeking approval who has to tender such evidence "*so as to enable the Court to make the assessment as to whether the costs were reasonably and proportionately incurred*".²¹⁰ Although the expert opinion can be evidence of the reasonableness of the costs and disbursements - having regard to the assumed facts and documents - and can assist the Court in its assessment, the expert opinion is not and cannot be the evidence to prove the assumed facts and document.
177. The requirement that there must be "*sufficient evidence*" refers to the assumed facts and documents. It is critical to draw a distinction between, and not conflate the assumed facts and documents and the expert opinion as to reasonableness of the legal costs and disbursements based on the assumed facts and documents.
178. In the Bolitho Approval Application, the question is whether Croft J had *sufficient evidence* before his Honour to enable his Honour to undertake the assessment of the Legal Costs. The answer depends on whether the assumed facts and documents were proven. If not proven, then the Third Trimbos Report and the opinions expressed in therein were irrelevant and inadmissible. If proven, then Croft J must have accepted those facts and documents as sufficient evidence which after scrutiny supported the conclusion that the Legal Costs were fair, reasonable, and proportionate. The opinions of Mr Trimbos in the Third Trimbos Report about the reasonableness of the costs and disbursements are then supported by evidence and did not lead his Honour into error. The fact that it appears with the benefit of hindsight that the facts with which Mr Trimbos were instructed and the documents with which he was provided for the Third Trimbos Report were false and misleading, does not now justify any attack on Mr Trimbos or the Third Trimbos Report.
179. If the Contradictor wanted to challenge the reasonableness of the Legal Costs, evidence of, for example, an expert costs consultant should have been put before the Court in light of the rule

²⁰⁸ *Lenehan*, [17].

²⁰⁹ *Banksia No 2*, [70], *Modtech*, [32], and *Lenehan*, [18] for some factors courts have taken into account.

²¹⁰ *Lenehan*, [13], [15]; *Francis*, [7]; *Banksia No 2*, [70].

in *Jones v Dunkel*.²¹¹ No legitimate explanation has been proffered for not calling someone to deal with the reasonableness of the Legal Costs.

180. The effect of the alleged misleading or deceptive conduct must be judged in accordance with the meaning that such conduct would convey to an ordinary and reasonable person.²¹² In the context of section 21 of the CP Act and this Proceeding, it is the effect of the alleged Expert Witness Representations that has to be judged in accordance with the meaning which such Representations conveyed to Croft J. The Honourable Justice Croft did not rely on the Expert Witness Representations but on Mr Trimbos' opinions in the Third Trimbos Report. His Honour was not actually misled by the Expert Witness Representations, but it appears with the benefit of hindsight that his Honour was misled by the falsity of the assumed facts and documents.
181. The lack of evidence of actual deception is a factor to be weighed on the scales.²¹³ An unexplained failure to lead evidence of actual deception may lead to the inference that no such evidence was available under the principle enunciated in *Jones v Dunkel*.²¹⁴
182. The best evidence of whether the Honourable Justice Croft was misled or deceived by the Expert Witness Representations would have been his Honour's evidence. Although the Honourable Justice Croft, who is no longer a judge of the Supreme Court of Victoria, is not a compellable witness, his Honour is a competent witness on matters which took place in court before him.²¹⁵ Indeed, Lord Woolf MR said in *Warren* at 497 that: "*the judge will remain competent to give evidence, and if the situation arises where his evidence is vital, the judge should be able to be relied on not to allow the fact that he cannot be compelled to give evidence to stand in the way of his doing so.*"
183. However, evidence of the response of the person allegedly misled or deceived must be scrutinised, and is "*quite irrelevant*" if it appears that the deception was due to "*circumstances for which the defendant was not responsible*" such as the actions of third parties.²¹⁶ In this Proceeding, it is apparent that Croft J was actually misled by the conduct of the Lawyer Parties for which Mr Trimbos was not responsible.

²¹¹ In general, Heydon op cit at [1215].

²¹² *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, [104].

²¹³ *Chase Manhattan Overseas Corp v Chase Corp* (1986) 12 FCR 380.

²¹⁴ *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 186; *Marlboro Shelving Systems Pty Ltd v ARC Engineering Pty Ltd* (1983) 72 FLR 418, 428; *Service Station Association Ltd v Berg Bennett & Association Pty Ltd* (1993) 117 ALR 393, 412.

²¹⁵ *Warren v Warren* [1997] QB 488 (*Warren*); Heydon op cit at [27205].

²¹⁶ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.

184. Croft J was fully aware of the Court's role in approving a settlement and, in particular the Legal Costs.²¹⁷ It is apparent from Croft J reasons in *Banksia No 2* at [61], [65], [70], [71], and [84] what caused his Honour to determine that the Legal Costs were reasonable and appropriate. It was not the Expert Witness Representations, either individually or cumulatively, which caused Croft J to determine that the Legal Costs were reasonable and appropriate, but it was the following matters which satisfied his Honour that the Legal Costs incurred were reasonable causing his determination:

- (a) First, the "*source material*" (that is, the invoices with which Mr Trimbos was provided and which he exhibited to the Third Trimbos Report) which Croft J had and considered himself, satisfied his Honour that the Legal Costs were not only reasonable but also incurred pursuant to the usual terms of engagement of Messrs O'Bryan and Symons, and Mr Zita/Portfolio Law, and the Legal Costs were paid by AFPL. The letter of instructions exhibited to the Third Trimbos Report setting out the assumed facts and documents were part of the "*source material*" in that it set out the assumed facts and documents which had to be proven for Mr Trimbos' opinions to be admissible.
- (b) Secondly, Croft J was reassured by the involvement of AFPL, one of the participants in the deliberate scheme to mislead his Honour, to satisfy him of the reasonableness of the legal fees and disbursements incurred. His Honour was clearly impressed with and relied upon the confidential opinions of Messrs O'Bryan and Symons and that they had put before the Court everything necessary for his Honour to consider, amongst other things, the reasonableness of the Legal Costs.
- (c) In other words, in light of the matters set out in sub-paragraphs (a) and (b) above, Croft J independently satisfied himself of the reasonableness and appropriateness of the legal costs and disbursements.
- (d) Thirdly, the opinions of Mr Trimbos in the Third Trimbos Report about the reasonableness of the legal costs and disbursements, which Croft J found to have addressed the five relevant matters set out in the quotation at sub-paragraph 168 above, only assisted his Honour in making his determinations as set out in sub-paragraphs (a) and (b) above.

185. The Honourable Justice Croft was the only person who had access to all the material that was put before the Court; namely, the confidential joint opinions of Messrs O'Bryan and Symons

²¹⁷ *Banksia No 2*, [42] et seq.

which were exhibited to the affidavits of Mr Zita, affidavits of Messrs Green and Lloyd, the affidavit of Mr Trimbos to which the Third Trimbos Report was exhibited, and the Third Trimbos Report²¹⁸ and the confidential opinions of the SPR's counsel and the affidavits of Mr Lindholm.²¹⁹

186. Unlike Mr Trimbos, Croft J had all the relevant information, and his Honour was aware of the competing interest and allegations which his Honour regarded as important in the exercise of his discretion whether the Legal Costs were reasonable and proportionate. For example –

- (a) the "*enormous practical, evidentiary and financial burden of the conduct of the Proceeding has been shouldered by the SPRs and their legal team, with the co-operation and assistance, where appropriate, of counsel for Mr Bolitho – in particular, Mr Norman O'Bryan SC*".²²⁰ In this regard, Croft J was aware that the SPR's legal costs and disbursements were approximately \$7.7 million²²¹ and that the Legal Cost claimed was \$3.46 million;²²²
- (b) the matter was a large and complex and that it "*had been set down for a 12-week trial (now estimated 10-week trial) commencing February 2018. [His Honour] was informed that there are 7,000 pages of witness statements and affidavits, and the documentary evidence relied on at the trial will be extensive*";²²³
- (c) the two objections received by the Court, even though the objectors did not have access to the Third Trimbos Report (contrary to what Croft J has stated in *Banksia No 2* at [45] - *Botsman* at [87]), drew a number of significant matters to his Honour's attention which were apparently ignored. For example, in the *Botsman* objection it was pointed out that the payment of \$17.6 million (plus GST) to the Mr Bolitho's lawyers "*appears to be extravagant, if ... the class action lawyers utilised work undertaken by the lawyers for the special purpose receiver on behalf of Banksia. That being so, the fee of \$4.75 million to the Plaintiff's lawyers appears on its face to be excessive*".²²⁴

187. As the SPR's counsel pointed out to Croft J, it was for Mr Bolitho's counsel to persuade the Court as to the appropriateness of the payments sought by AFPL and that, "*in respect of legal costs, the SPR and their legal advisers did not know the basis of the conclusions or the*

²¹⁸ *Banksia No 2*, [18]; *Botsman*, [90], [93].

²¹⁹ *Botsman*, [110], [119].

²²⁰ *Banksia No 2*, [22(d)].

²²¹ *Botsman*, [95].

²²² *Botsman*, [91].

²²³ *Banksia No 2*, [65].

²²⁴ *Botsman*, [85], and a similar objection was made by Mr Pitman (see *Botsman*, [129]).

information relied upon and that these were matters that 'only the Court is in a position to assess and scrutinize'" (emphasis added).²²⁵

Who relied on the alleged Continuing Opinion Representation and into what error was the person deceived?

188. Factually, nobody relied upon the Continuing Opinion Representation and nobody has been led into error. The Honourable Justice Dixon has not relied upon that Representation and has not been led into error.

B.3.4. The Causation Issue

189. The Court has to consider whether loss has been suffered before it could make an order under section 29 of the CP Act. In this regard, as Daly As J said in *Gabelich v Donaghey* [2018] VSC 184 (*Gabelich*) at [89] there are two issues to address: *first, whether the breach of the overarching obligation caused any loss, and secondly, if so, to whom?* At [90], her Honour stated that: "*Any claim for costs and/or damages for financial loss under s 29 of the [CP Act] is to be evaluated in accordance with the traditional principles of causation: that is, the conduct complained of must be a substantial cause of the losses suffered. When the claim is for legal costs, questions of causation, especially in a relatively simple case such as this, are not generally very difficult. Claims for financial loss are not necessarily so straightforward"* (emphasis added).

190. In *Dessco Pty Ltd v Davey* [2020] VSC 696 at [41] (*Dessco*), referring to *Gabelich*, Keith JR succinctly stated that the question whether loss has been suffered for purposes of section 29 of the CP Act illustrates the need to consider "*what loss has been suffered, whether as legal costs or as financial loss, and the associated issues of causation and identity of the person said to have suffered the relevant loss" (emphasis added). No doubt if a person has suffered such loss he or she would, and should, *advance evidence of such loss*.²²⁶*

191. Relevantly, there must be, but here are no, admissible evidence of, or evidence which actually can persuade the Court of –

- (a) the miscarriage of the Bolitho Approval Application *as loss*, the nexus between such loss and the Expert Witness Representations, and of the identity of the person or persons who suffered such loss, as well as the quantum of such loss;

²²⁵ *Botsman*, [123].

²²⁶ *Gabelich*, [91], [92].

- (b) wasted costs *as loss* (including, the quantum thereof) in the Bolitho Approval Application, the nexus between such loss and the Expert Witness Representations, and of the identity of the person or persons who suffered such loss;
- (c) costs *as loss* (including, the quantum thereof) in the Botsman Appeal, the nexus between such loss and the Expert Witness Representations, and of the identity of the person or persons who suffered such loss;
- (d) costs *as loss* (including, the quantum thereof) in the AFPL Approval Application, the nexus between such loss and the Expert Witness Representations and/or the Continuing Opinion Representation, and of the identity of the person or persons who suffered such loss; and
- (e) the financial loss claimed (including, the quantum of the loss), the nexus between such loss and the Expert Witness Representations and/or the Continuing Opinion Representation, and of the identity of the person or persons who suffered such loss.

192. In this Proceeding, there is no issue that if loss, whether as legal costs or financial loss, were suffered, it would have been the debenture holders who suffered the loss. There is, however, no assertion or particularisation of –

- (a) the wasted costs *as loss* allegedly suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's costs of the Bolitho Approval Application;
- (b) the costs *as loss* of the Botsman Appeal allegedly suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's costs of the Botsman Appeal; or
- (c) the costs *as loss* of the AFPL Approval Application allegedly suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's or the Contradictor's costs of the AFPL Approval Application.

193. In this Proceeding, it is apparent that –

- (a) the miscarriage of the Bolitho Approval Application as such is not a compensable loss and could not be quantified;

- (b) there is no identified sum of the wasted costs *as loss* in the Bolitho Approval Application established by admissible evidence, and the quantification thereof has neither been pleaded nor proven;
- (c) there is no identified sum of the costs *as loss* in the Botsman Appeal of the AFPL Approval Application established by admissible evidence, and the quantification thereof has neither been pleaded nor proven; and
- (d) there is no identified sum of the financial loss established by admissible evidence, and the quantification thereof has neither been pleaded nor proven.

194. In the absence of quantification, the Court is essentially asked to make compensation orders by reference to sums it cannot quantify on the current state of the evidence and which the Costs Court cannot determine on a taxation.²²⁷

Has the alleged Expert Witness Representations and Continuing Opinion Representation by Mr Trimbos in the Proceeding materially contributed to any loss, whether as costs or financial loss, as alleged by the Contradictor?

Identification of the alleged loss, whether as legal costs or financial loss, materially contributed to by Mr Trimbos' alleged Expert Witness Representations and/or the Continuing Opinion Representation

195. In *Hudspeth No 4* at [17], the Honourable Justice Dixon relevantly said that before a Court proceeds on its own motion to remedy a contravention of the overarching obligations contained in the CP Act, the other parties should "identify whether, and to what extent costs expenses or financial loss arises from or has been materially contributes to by a possible contravention". Neither the parties nor the Contradictor in paragraph 42 of the PoA²²⁸ identified whether and to what extent the stated costs and expenses (as loss) or financial loss had been materially contributed to by Mr Trimbos' alleged contravening conduct. Paragraph 42 of the PoA merely contains a bold un-particularised rolled-up statement that the alleged "*breaches of the overarching obligations materially contributed to*" loss, whether as legal costs or financial loss, without stating how the conduct materially contributed to such loss, the quantum of such loss, or to what extent Mr Trimbos' conduct had materially contributed to such loss. It is apparent, however, that –

- (a) it is only the alleged contraventions which relate to the Expert Witness Representations which are asserted to have substantially contributed to the

²²⁷ See paragraphs 202 and 203 below.

²²⁸ [PAR.010.001.0001 at 0016].

miscarriage of the Bolitho Approval Application as loss, the wasted costs as loss of the Bolitho Approval Application, the costs as loss of the Botsman Appeal and the AFPL Approval Application; and

- (b) it is only the alleged contravention which relates to the Continuing Opinion Representation which it is asserted substantially contributed to the costs as loss of the AFPL Approval Application; and
- (c) it is both the alleged Expert Witness Representations and the Continuing Opinion Representation which it is asserted substantially contributed the financial loss due to the delay in the debenture holders receiving the distributions due to them.

196. The Contradictor referred in paragraph 42 of the PoA in footnote 92 to paragraph 196 of the Second July 20 List of Issues,²²⁹ which is currently in the October 20 List of Issues.²³⁰ Paragraph 196 in both of the said Lists are the same save that it is alleged in the first of the Lists that the debenture holders/group members have suffered losses of "*at least \$5 million*" and in the latter List "*approximately \$10 million*".

197. Paragraph 42 of the PoA is not similar to paragraph 196 of the Second July 20 List of Issues,²³¹ or of the October 20 List of Issues.²³² Rather, paragraph 42 of the PoA is similar to paragraph 98 of the Second July 20 List of Issues²³³ and of the October 20 List of Issues,²³⁴ save that there are no particulars provided for paragraph 42 of the PoA.

198. The "*Particulars*" provided in respect of the said paragraph 98 are not particulars of loss, whether in the sense of wasted legal costs or financial loss. The "*Particulars*" provided in respect of the said paragraph 196 are more in the nature of particulars but are insufficient and are not supported by the evidence in the Proceeding. In paragraph 196 of the October 20 List of Issues²³⁵ there is reference to an interest calculation.²³⁶ It is assumed for purposes of these submissions that the particulars sub-joined to paragraph 196 of the October 20 Lists of Issues are to be read as particulars in support of paragraph 42 of the PoA.

²²⁹ [PLE.010.002.0001 at 0145].

²³⁰ [PLE.010.005.0001 at 0158].

²³¹ [PLE.010.002.0001 at 0097].

²³² [PLE.010.005.0001 at 0109].

²³³ [PLE.010.002.0001 at 0097].

²³⁴ [PLE.010.005.0001 at 0108].

²³⁵ [PLE.010.005.0001 at 0158].

²³⁶ [MSC.010.027.0001].

Costs are sought as loss

199. This Court's power to make orders for costs is conferred upon it by section 24 of the SC Act, rule 63.02 and 63.04 of the Rules, and section 65A to 65E of the CP Act. These provisions deal with costs orders against a party to a proceeding (and in some circumstances non-party costs orders can be made) in favour of another party to the proceeding. These provisions do not deal with costs orders in favour of a non-party.
200. Neither the SPR nor any other party seeks legal costs, whether as a loss, or as costs in the Proceeding pursuant to the courts discretion under section 24 of the SC Act read with rule 63.02 of the Rules, or sections 65A to 65E of the CP Act against the sixth defendant either as a party in the AFPL Approval Application or as a non-party in the Bolitho Approval Application or the Botsman Appeal. The Contradictor seeks orders under sections 28 and 29 of the CP Act against the sixth defendant for wasted legal costs in the Bolitho Approval Application and legal costs in the Botsman Appeal and the AFPL Approval Application *as a loss*.
201. Belatedly, and after the parties' cases had been closed, the SPR's solicitors wrote to the parties²³⁷ asserting that the costs purportedly incurred in the AFPL Approval Application are as follows:
- (a) *"Approximately \$5.6 million (including GST) has been incurred by the Contradictor between 1 May 2019 and 23 December 2020 and paid from the Maddocks Settlement Account. We note that the Contradictor has also incurred costs from the period following their appointment on 25 November 2018 to 30 April 2019. However, those costs were not paid from the Maddocks Settlement Account, and the SPR is not in a position to provide an accurate estimate of those costs" (emphasis added).*
- (b) This letter is not evidence, applying the *Briginshaw* standard, of the Contradictor's costs. Apart from the fact that the Contradictor's cost for a period (1 May 2019 to 23 December 2020) is stated as being "*approximately*" there is no underlying documents provided to substantiate the approximate amount of the costs or to establish that the costs were, for example, reasonably incurred. Similarly, there is no evidence about the Contradictor's costs for the period 25 November 2018 to 30 April 2019 apart from the fact that the letter specifically state that the SPR is not in a position to even provide "*an accurate estimate of those costs*".

²³⁷ [MSC.070.015.0001].

(c) "*Approximately \$3 million (including GST) has been incurred by the SPR between 22 November 2018 and 23 December 2020 and paid from the SPR Litigation Fund*".

Apart from the fact that the SPR's cost for a period (22 November 2018 to 23 December 2020) is stated as being "*approximately*" there is no underlying documents provided to substantiate the approximate amount of the costs or to establish that the costs were, for example, reasonably incurred.

202. Having regard to the fact that the legal costs *as loss* (either as wasted costs of the Bolitho Approval Application or cost of the Botsman Appeal or of the AFPL Approval Application) sought in the Particulars of Allegations have not been quantified nor proven, the Court is neither in the position to assess or quantify such legal costs *as loss* nor can it refer the assessment or quantification of such legal costs *as loss* to the Costs Court.
203. Although the Costs Court is established within the Trial Division of the Supreme Court under section 17C of the SC Act, its jurisdiction is circumscribed by section 17D of the SC Act, relevantly to hearing and determining the assessment, settling, taxation or review of costs in all proceedings in the court pursuant to orders made under section 24 of the SC Act and rule 63 of the Rules. Part 2 Division 2B of the SC Act, where sections 17C and 17D are located, does not grant any power to the Costs Court to assess, quantify or enforce an order under section 29 of the CP Act *for loss*, whether as legal costs or as financial loss.
204. Accordingly, the Court is not in a position to determine and quantify such costs *as loss* in order to consider and determine whether Mr Trimbos substantially contributed to such costs.

The miscarriage of the Bolitho Application

Did the alleged Expert Witness Representations in the Proceeding substantially contribute to the miscarriage of the Bolitho Approval Application as loss?

205. The reason for the miscarriage of the Bolitho Approval Application is clear from the Court of Appeal's reasons in *Botsman* holding that Croft J's decision to approve distributions to AFPL for its commission, legal costs, and disbursements miscarried.²³⁸ The Expert Witness Representations or otherwise were not referred to in the context of the miscarriage of the Bolitho Approval Application. The Court of Appeal's finding that the Bolitho Approval Application miscarried is regardless and independent of its refusal to allow an amendment of the application for leave to appeal to join Mr Trimbos to the appeal.²³⁹ The Expert Witness Representations played no role whatsoever in either Croft J's failure to give or allow scrutiny

²³⁸ *Botsman* [5], [266], [267].

²³⁹ *Botsman*, [157]-[159], [170], [175].

of the matters referred to by the Court of Appeal or his error in not appointing a Contradictor, or his Honour's dealing, determining, and making orders in circumstances where the approval of AFPL's commission, legal costs and disbursements were not properly before him.

The wasted costs of the Bolitho Approval Application

206. Due to the fact that the miscarriage of the Bolitho Approval Application occurred for the reasons set out in paragraph 205 above, the question of the wasted costs of the Bolitho Approval Application is irrelevant since it cannot be said that the costs of the Bolitho Approval Application were wasted as a result the Court of Appeal dismissing the Botsman Appeal in so far as it related to the approval of the Settlement Sum, and its approval in accordance with the orders made by Croft J in the Bolitho Approval Application.

What costs were incurred in respect of the Bolitho Approval Application?

207. The costs incurred in respect of the Bolitho Approval Application should be distinguished from the costs and expenses incurred in respect of the SPR's application before Croft J when the Bolitho Approval Application was heard. The SPR was not a party to the Bolitho Approval Application and could therefore not have incurred any costs that were wasted in that application which the debenture holders had to pay or in respect of which they incurred a liability.
208. Also, it is necessary to keep in mind that the costs in the Bolitho Approval Application were also properly incurred in respect of the approval of the Settlement and the Settlement Sum. The determination of the costs incurred in the Bolitho Approval Application is necessary in order to determine whether and what costs were wasted in the Bolitho Approval Application. It is submitted that the Contradictor failed to establish what costs *as loss* were incurred in the Bolitho Approval Application, let alone what costs were wasted in the Bolitho Approval Application.

Of the costs incurred in respect of the Bolitho Approval Application, what costs were wasted?

209. Wasted costs as *a loss* caused or materially contributed by a person's contravention of an overarching obligation for purposes of an order under section 29(1) of the CP Act is not the same as awarding costs in a proceeding. Wasted costs *as a loss* must be proven on the *Briginshaw* standard in accordance with the traditional principles of causation.

210. The loss in the sense of wasted costs in the Bolitho Approval Application has not been established, and such alleged loss cannot base an order that is essentially compensation by reference to a percentage of a sum of the costs of the Bolitho Approval Application to be determined by the Costs Court on taxation.

The costs as loss of the Botsman Appeal

211. The Bolitho Approval Application did not miscarry as a result of anything which Mr Trimbos did or did not do.²⁴⁰ The Expert Witness Representations were not the subject of the Botsman Appeal and played no part in the Court of Appeal's decision to uphold part of the Botsman Appeal.

212. The Botsman Appeal was only successful in part. Also, the Court of Appeal already made costs orders in the Botsman Appeal. Part of the Botsman Appeal related to the approval of the Settlement Sum which was the subject of the Botsman Appeal and in respect of which Ms Botsman was not successful. The debenture holders were not parties to the Botsman Appeal, and the Court of Appeal did not make any costs order in favour of the SPR upon the latter's submission that no cost order should be made. If the debenture holders paid the SPR's costs of the Botsman Appeal in those circumstances, it cannot be said that Mr Trimbos substantially contributed to the costs of the Botsman Appeal *as loss*.

The costs as loss of the AFPL Approval Application

213. As to the costs *as loss* in the AFPL Approval Application, the circumstances of Mr Trimbos' joinder must be kept in mind. After Mr Trimbos was joined to the Proceeding, he complied with the Court's orders and nothing he did after his joinder materially contributed to any delay or the costs incurred or to be incurred, especially if regard is had to the delays caused by the conduct of Mr Alexander Elliott in respect of, amongst other things:

- (a) discovery entailing a separate application before As J Daly (for example, the orders of Dixon J on 9 September 2020,²⁴¹ on 16 September 2020,²⁴² on 8 October 2020,²⁴³ on 21 October 2020,²⁴⁴ on 27 October 2020,²⁴⁵ and her Honour's reasons in *Bolitho v Banksia Securities Limited (No 14)*)²⁴⁶ which caused a delay and the incurring of costs

²⁴⁰ *Botsman*, [5].

²⁴¹ [ORD.500.048.0001].

²⁴² [ORD.500.045.0001].

²⁴³ [ORD.500.046.0001].

²⁴⁴ [ORD.500.054.0001].

²⁴⁵ [ORD.500.055.0001].

²⁴⁶ [2020] VSC 703.

in the Proceeding before the Honourable Justice Dixon which were not materially, or at all, contributed to by Mr Trimbos or the sixth defendant;

- (b) the application that the Honourable Justice Dixon had to recuse himself which entailed an unsuccessful application before his Honour²⁴⁷ and an unsuccessful appeal to the Court of Appeal²⁴⁸ which caused a delay and the incurring of costs in the Proceeding before his Honour which were not at all contributed to by Mr Trimbos or the sixth defendant; and
- (c) the conduct of his case by Mr Alexander Elliott, including the insistence on giving evidence in chief *viva voce* and refusal to file an affidavit (Orders of Dixon J on 2 November 2020,²⁴⁹ on 20 November 2020,²⁵⁰ and on 27 November 2020,²⁵¹ as well as the hearing between 2 and 11 December 2020), which caused a delay and the incurring of costs in the Proceeding before the Honourable Justice Dixon which were not at all contributed to by Mr Trimbos or the sixth defendant.

The financial loss due to the delay in the debenture holders not receiving their distribution from the Settlement Sum earlier

214. If the particulars to paragraph 196 of the Second July 20 List of Issues²⁵² or the October 20 List of Issues²⁵³ are read as applicable to paragraph 42 of the PoA,²⁵⁴ it appears that the Contradictor alleges that:

- (a) but for Mr Trimbos' alleged contravening conduct the debenture holders would have received their proper entitlements 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);
- (b) part of the Settlement Sum (\$42 million) was distributed to group members in about June 2019, with the balance (\$22 million) held by the SPR on account of claims on that fund by AFPL and in respect of costs of the remitter;

²⁴⁷ *Bolitho v Banksia Securities Limited (No 11)* [2020] VSC 567 (***Bolitho No 11***).

²⁴⁸ *Elliott v Lindholm in his capacity as SPR of Banksia Securities Limited (receivers and managers appointed) (in liquidation)* [2020] VSCA 260 (***Elliott***).

²⁴⁹ [ORD.500.058.0001].

²⁵⁰ [ORD.500.059.0001].

²⁵¹ [ORD.500.061.0001].

²⁵² [PLE.010.002.0001 at 0145].

²⁵³ [PLE.010.005.0001 at 0158].

²⁵⁴ [PAR.010.001.0001 at 0016].

- (c) assuming that debenture holders have been kept out of proceeds of \$64 million, they suffered losses up to June 2019 of \$7 million, and continue to suffer losses on the \$22 million held by the SPR at the rate of \$6.027 per day;
- (d) assuming that debenture holders have been kept out of proceeds of \$50 million, they suffered losses up to June 2019 of \$6 million, and continue to suffer losses on the \$12 million held by the SPR at the rate of \$3,288 per day; and
- (e) assuming that debenture holders have been kept out of proceeds of \$44 million, they suffered losses up to June 2019 of \$5 million, and continue to suffer losses on the \$2 million held by the SPR at the rate of \$548 per day.

215. The schedule²⁵⁵ purports to set out the following loss:

- (a) after deducting certain costs from the Settlement Sum, the principal for distribution to debenture holders on 21 March 2018 was \$63,765,624.29, and interest at the rate of 10% was accruing on that sum from that date until 13 June 2019 (450 days) amounting to interest in the sum of \$7,861,515.32;
- (b) on 13 June 2019, \$42 million was distributed to debenture holders, leaving a principal sum of \$21,765,624.29 in the Maddocks Settlement Account, and interest at the rate of 10% was accruing on that sum from that date until 30 September 2020 (date of the schedule) (475 days) amounting to interest in the sum of \$2,832,512.75; and
- (c) the total amount of interest being \$10,694,028.07.

216. The basis or reasoning behind the Contradictor seeking an order for compensation pursuant to section 29 of the CP Act for the financial loss allegedly suffered by the debenture holders due to them not having received their entitlements earlier based on a calculation referable to the penalty interest rate, appears to be the Honourable Justice Dixon's observation in footnote 67 to paragraph 147 in *Bolitho No 6* where his Honour made a statement about the particulars of the debenture holders alleged losses which were estimated at the time as a loss of use of the funds comprising the Settlement Sum. If this is the basis for the assertion in paragraph 42 of the Particulars of Allegations,²⁵⁶ then apart from it not providing evidence of such loss or the basis for such loss, it is flawed.

²⁵⁵ [MSC.010.027.0001].

²⁵⁶ [PAR.010.001.0001 at 0016].

217. It is the Botsman Appeal against the amount of the Settlement Sum which kept, or, at least contributed to the debenture holders being kept, out of their entitlement, until at least after 1 November 2019.
218. On 22 May 2019, Dixon J ordered that the transfer of the money to the Maddocks Settlement Account had to occur by 4 June 2019 and that by that date the SPR should distribute \$42 million to the debenture holders.²⁵⁷ Clearly, the distribution to the debenture holders did not occur by 4 June 2019 (allegedly it occurred on 13 June 2019) as ordered and there is no explanation why that did not occur.
219. Messrs O'Bryan and Symons informed the Court that they no longer seek payment of their fees in the Proceeding on 3²⁵⁸ and 6²⁵⁹ August 2020 respectively, and on 13 August 2020, AFPL informed the Court that it was no longer seeking payment of the Commission in the Proceeding.²⁶⁰ Accordingly, there is no reason why the remaining part of the Settlement Sum (after the \$42 million had been distributed), or at least a significant part thereof, could not have been distributed earlier. The effect of the delay could have been mitigated by distributing a significant sum of the remaining part of the Settlement Sum earlier in the AFPL Approval Application.
220. The alleged "*loss in use*" of the debenture holders' "*proper entitlement*" has neither been established, nor has it been established why the financial loss should be measured at the penalty interest rate. The loss set out in paragraph 42 of the PoA read with the particulars set out in paragraph 196 of the Second July 20 List of Issues or the October 20 List of Issues is allegedly a financial loss – that is, that the debenture holders (as a group and not as individuals) would have used their entitlement in some unspecified way that would have put them in a better financial position than what they would be in if they had received their entitlements earlier. In the absence of evidence what the debenture holders would have done with their entitlements (that is, that they or each of them would have used or invested their entitlements at a better rate than the interest accruing on the trust accounts and in safe ventures or investments) there is no reason why the interest accrued on the trust accounts does not compensate them for the consequences of any delay.
221. Section 29(1) of the CP Act does not provide a basis for asserting that the financial or other loss allegedly suffered by the debenture holders should be calculated by reference to the penalty interest rates or any other interest rates. Sub-section (c)(i) is of no assistance, because

²⁵⁷ [ORD.500.035.0001].

²⁵⁸ T485:12-31 [TRA.500.005.0001 at 0072], T486:1-11 [0073].

²⁵⁹ T661:9-28 [TRA.500.007.001 at 0004].

²⁶⁰ T665:26-30 [TRA.500.007.0001 at 0008].

it stipulates that "*an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of the amount claimed in the civil proceeding*" (own emphasis) could be made to compensate a person for any financial loss or other loss which was materially contributed by the contravening conduct. In the Proceeding, the debenture holders do not claim the payment of any amount, and thus there is no delay in the payment of the amount claimed by them. The fact that the debenture holders may suffer a financial loss or other loss because of a delay due to the AFPL Approval Application in them receiving their alleged entitlements must be proven like any other loss in a civil proceeding.

C. If the Court were to find and hold that the Expert Witness Representations and/or the Continuing Opinion Representation contravened the overarching obligations of the CP Act in the Proceeding, the Court should exercise its discretion not to make any orders under the CP Act

The application of the CP Act

222. In *Sam Law Pty Ltd v ADZ Homes Pty Ltd* [2016] VSC 41 at [41], As J Daly said that it was not only parties and practitioners who are subject to the obligations under the CP Act to promote the efficient use of court resources and to ensure that the resources devoted to an issue are proportionate, but that the same obligations are imposed on judicial officers as well as to identify and efficiently deal with the real issues in dispute.
223. The cornerstone of the CP Act is that in relation to civil proceedings the overarching purpose set out in section 7(1) is to facilitate the just, efficient, timely and cost-efficient resolution of the *real issues in dispute*.²⁶¹ The overarching purpose relates to the real issues in dispute, which, in the AFPL Approval Application, means the issues identified by the Court of Appeal as set out in paragraph 80 above. Pursuant to section 8 of the CP Act, a court is bound to give effect to the overarching purpose in the exercise of any of its powers, including those under section 28 and 29(1) of the CP Act. Thus, in a civil proceeding before a judge of the Court, there may be an inquiry into the conduct of a person who falls within the ambit of section 10 of the CP Act to ascertain whether such person's conduct in the course of the civil proceeding or aspect thereof contravened the overarching obligations and the impact of such conduct on the facilitation of the just, efficient, timely and cost-efficient resolution of the real issues in dispute before that judge.

²⁶¹ *Fenridge Pty Ltd v Retirement Care Australia Preston Pty Ltd* [2012] VSC 439, [25]; *Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 2)* [2011] VSC 518, [29].

224. In *Dura No 5* at [169], the Honourable Justice Dixon said, having regard to the purposes of the CP Act as a whole and the historical context in which the statutory regime now sits, that applications about the breach of overarching obligations under the CP Act *should be made promptly*.
225. In *Bolitho No 6* at [79], the Honourable Justice Dixon stated that: "*A contradictor always remains subject to the supervision of the court, both in terms of the tasks that are undertaken and the manner of their execution.*" The Contradictor is a "*player*" in the AFPL Approval Application.²⁶² The conduct of the Proceeding in the AFPL Approval Application is relevant - and should be taken into account if and when an order is made under section 29 of the CP Act - in particular, having regard to, amongst other things:
- (a) The matters set out in paragraph 5 above;
 - (b) After the Fourth Trimbos Report, the Contradictor filed a Revised List of Issues dated 27 March 2019²⁶³ (**March 19 List of Issues**) which did not make any allegations against Mr Trimbos regarding either the Third Trimbos Report or the First Trimbos Report in the AFPL Approval Application. The Contradictor did not mention or allude to the Expert Witness Representations set out in paragraphs 1 and 2 of the Particulars of Allegations.²⁶⁴ The March 19 List of Issues was filed after the Fourth Trimbos Report and it was not provided to Mr Trimbos at the time or any time thereafter. Accordingly, Mr Trimbos was not aware of it;
 - (c) The Contradictor filed a Revised List of Issues dated 16 April 2019²⁶⁵ (**April 19 List of Issues**) which also did not make any allegations against Mr Trimbos regarding either the Third Trimbos Report or the Fourth Trimbos Report. The particulars set out in Annexure A thereto referred to particulars of conduct by Mr Mark Elliott, AFPL, Mr O'Bryan, Mr Symons, and Mr Zita/Portfolio Law,²⁶⁶ and in paragraphs 26 to 35 of the April 19 List of Issues, the Contradictor set out their conduct in relation to providing misleading information to Mr Trimbos and procuring a misleading report (the Third Trimbos Report) from him;
 - (d) The April 19 List of Issues was not provided to Mr Trimbos at the time or any time thereafter, and, accordingly, Mr Trimbos was not aware of the allegations concerning

²⁶² *Stewart*, [99].

²⁶³ [SYM.002.002.9078].

²⁶⁴ [PAR.010.001.0001 at 0001, 0002].

²⁶⁵ [PLE.010.006.0001].

²⁶⁶ [PLE.010.006.0001 at 0006 and following].

the alleged conduct of the Lawyer Parties in relation to providing misleading information to him and procuring a misleading report (the Third Trimbo Report) from him;

- (e) The allegations in the April 19 List of Issues against the Lawyer Parties make it clear that Mr Trimbo did not engage in misleading or deceptive conduct, in the Bolitho Approval Application in contravention of section 21 of the CP Act, but rather that he was the victim of their providing him with misleading information, documents, and instructions in furtherance of their scheme to get approval of AFPL's Commission and Legal Costs;
- (f) Despite the Honourable Justice Dixon alluding to a possible joinder of Mr Trimbo in *Bolitho No 6* at [42], Mr Trimbo was not joined then. After dealing with the deficiencies in the then current revised List of Issues, the Honourable Justice Dixon said at [210] that once the allegations were clearly and distinctly articulated by the Contradictor in an updated Revised List of Issues, "*it will be appropriate to consider whether joinder of further parties into the proceeding is necessary, how procedural fairness will be afforded to all relevant parties and how the final hearing of the substantive issues in the remittal proceeding is to be conducted.*" Mr Trimbo was not joined then;
- (g) Approximately a year after the remitter started and after the Contradictor's appointment and about two months after the publication of *Bolitho No 6*, the second to fourth defendants, but not Mr Trimbo, were joined to the Proceeding on 15 November 2019.
- (h) On 2 June 2020, ABL instructed Mr Trimbo with, amongst other things, a Revised List of Issues dated 12 May 2020²⁶⁷ (**May 20 List of Issues**) pursuant to which the Fifth Trimbo Report was produced, filed and served as set out in paragraph 5(f) above without any demur. Up until then Messrs O'Bryan and Symons and AFPL maintained their position in respect of the AFPL Approval Application and there was, having regard to that, no reason or basis for Mr Trimbo to revisit the Fourth Trimbo Report;
- (i) The Contradictor did not mention or raise the Expert Witness Representations or the Continuing Opinion Representation set out in paragraphs 1 and 2 of the Particulars of

²⁶⁷ [EXP.020.008.0001 at 0020].

Allegations²⁶⁸ despite all of the information upon which the said Representations are based being known to the Contradictor well before Mr Trimbos' joinder;

- (j) the Contradictor filed and served a further Revised List of Issues dated 3 July 2020²⁶⁹ (**July 20 List of Issues**) after receipt of the Fifth Trimbos Report and before the hearing commenced. This July 20 List of Issues did not make any allegations against Mr Trimbos regarding either the Third Trimbos Report, or the Fourth and Fifth Trimbos Reports;
- (k) a further Revised List of Issues dated 21 July 2020²⁷⁰ (**Second July 20 List of Issues**) was filed and served by the Contradictor, and again it did not make any allegations against Mr Trimbos regarding either the Third Trimbos Report, or the Fourth and Fifth Trimbos Reports. This Second July 20 List of Issues was not provided to Mr Trimbos at the time;
- (l) during the Contradictor's opening dealing with the conduct of the second to fourth defendants,²⁷¹ there were no reference or evidence about any alleged contravention of overarching obligations by Mr Trimbos. In fact, the position was to the contrary. The Contradictor's opening was consistent with the allegations set out in the Second July 20 Lists of Issues and the previous versions of the Lists of Issues. For example:
 - (i) The Contradictor said²⁷² that the language they (Messrs O'Bryan and Symons) deployed was "*calculated ... to mislead Trimbos and in turn to mislead Justice Croft*".
 - (ii) Moreover, the Contradictor said: "*Your Honour, Justice Croft would have formed the conclusion from the 'paid' stamps that in fact these invoices had been paid because when he looked at O'Bryan's invoices they were all marked 'paid'. Justice Croft would form that conclusion from the instructions that were given to Trimbos that were annexed to the Trimbos report which stated that the costs incurred by Bolitho and paid by AFPL from 1 July to date included O'Bryan's fees of 2.3 million plus GST, Symons's fees of 600,000*".

²⁶⁸ [PAR.010.0001.0001 at 0001 and 0002].

²⁶⁹ [PLE.010.001.0001].

²⁷⁰ [PLE.010.002.0001].

²⁷¹ T118:13- T199:25 [TRA.005.002.0001 at 0030 to 0111].

T202:4-T309:25 [TRA.005.003.0001 at 0002 to 0109].

T310:14-T409:27 [TRA.005.004.0001 at 0002 to 0101].

T415:8-T475:10 [TRA.005.005.0001 at 0002 to 0062].

²⁷² T145:9-13 [TRA.005.002.0001 at 0057].

plus GST, and Portfolio Law's fees of 377,000 plus GST."²⁷³ (emphasis added).

- (iii) Furthermore, the Contradictor stated²⁷⁴ that an essential feature of the deliberate scheme perpetrated by Messrs O'Bryan, Symons and others was to mislead Mr Trimbos by providing him with "*false and misleading documentation O'Bryan and Symons created, including their fee arrangements and disclosure statements which did not reflect their real fee arrangements. They did not tell him they were engaged on a no win/no fee basis ... They provided him with documents that made it appear as if they had given costs estimates in advance of work being undertaken which appeared to support the fees they claimed. They provided Trimbos with their backdated invoices which in the case of O'Bryan ... were all stamped paid*".
- (iv) Lastly, the Contradictor stated²⁷⁵ again that O'Bryan and Symons had provided Mr Trimbos with false and misleading information and documents regarding the work they allegedly performed and their fees, and that Mr Trimbos confirmed in the Fifth Trimbos Report that "*he was misled and that he no longer holds the opinions expressed in his prior reports*".

226. The Contradictor filed and served two further versions of the Revised List of Issues, one dated 10 September 2020²⁷⁶ (**September 20 List of Issues**) and the October 20 List of Issues. If the Expert Witness Representations and the Continuing Opinion Representation had been such that it could be alleged and proved that Mr Trimbos contravened the overarching obligations under the CP Act:

- (a) he ought not to have been retained in providing any further expert reports in the AFPL Approval Application or have been called as a witness;
- (b) he ought to have been provided with the March 19 List of Issues, the April 19 List of Issues at the time when the Contradictor settled them and, at least, much earlier; and
- (c) there ought to have been an inquiry into his conduct much earlier and he should have been joined as a party to the Proceeding sooner than when he was joined, and, at the very least, at the same time as the second to fourth defendants.

²⁷³ T146:5-14 [TRA.005.002.0001 at 0058].

²⁷⁴ T182:22-183:7 [TRA.005.002.0001 at 0094-0095].

²⁷⁵ T183:8-18 [TRA.005.002.0001 at 0095].

²⁷⁶ [PLE.010.003.0001].

Even if the Court's discretion is enlivened, no orders must necessarily be made

227. The Court is not required if in a proper exercise of its discretion the making of orders is not warranted. As the Honourable Justice Dixon said in *Hudspeth No 8* at [255]: "*There are two stages in the exercise of the discretion. Should any order be made and, if so, what order should be made?" (emphasis added).*

Should the Court make any orders - the Court's discretion under section 29 of the CP Act

228. In *Hudspeth No 8* at [257], the Honourable Justice Dixon further stated that the statutory framework in which section 29 of the CP Act sits primarily conditions the Court's discretion. Clearly, an order under section 29(1) of the CP Act is discretionary. The Court has wide discretion which it has to exercise judicially²⁷⁷ and having regard to whether the making of an order or a specific order is "*appropriate in the interests of justice*" and whether an order would facilitate the overarching purpose of the CP Act of "*facilitating the just, timely and cost-effective resolution of the real issues in dispute*". The making of a section 29(1) order is unlike awarding damages which is not discretionary.

Relevant factors in the exercise of the Court's discretion

229. In exercising its discretion, the Court should consider factors such as: the nature and the gravity of the breach of the overarching obligations under the CP Act; any prejudice caused to a party to the proceeding, in which the Court is asked to make an order under section 29(1) of the CP Act, due to the breach of the overarching obligations; the underlying merits of making an order under section 29(1) of the CP Act; the duty of the court to give effect to the overarching purpose set out in section 7 of the CP Act having regard to the matters set out in section 9(1) relevant to the furthering of the overarching purpose; whether the party seeking an order under section 29(1) of the CP Act has itself breached the overarching obligations; whether an order under section 29(1) of the CP Act would undermine the principle of finality; and whether the interests of justice would be best served by making the orders sought under section 29(1) of the CP Act, some other order, or no order at all.²⁷⁸ Whether an order would be in the interests of justice necessarily depends on the circumstances of each case but must be informed by procedural fairness.²⁷⁹

²⁷⁷ *Actrol Parts Pty Ltd v Coppi (No 3)* (2015) 49 VR 573 (*Actrol*), [25].

²⁷⁸ Judicial College of Victoria, *Civil Procedure Bench Book* (2010-2014), [2.6]; *Gippsreal Ltd v Kenny* (2016) 52 VR 149, [57], [59], [99] (*Gippsreal*); *Giles* [126]-[128]; *Actrol*, [17].

²⁷⁹ *Hudspeth No 8*, [20].

What orders should the Court make?

230. Having regard to the matters set out in paragraph 225 above, it is submitted that it would be appropriate in the interests of justice *not* to make any order in respect of Mr Trimbos, and that it would *not* be contrary to the overarching purpose of the CP Act.

D. If the Court were to make orders under section 29(1) of the CP Act, the Court should apportion responsibility

Apportionment pursuant to the CP Act

231. The Contradictor is not seeking an order under sections 28 and 29 of the CP Act against any alleged contraveners contending for joint liability, with contribution rights between contraveners, in case any one of them later becomes unable to pay the sum ordered.²⁸⁰
232. Section 29(1) read with section 7 of the CP Act provide for a specific regime for sanctioning contravention of the overarching obligations under the CP Act. Inherently, the fact of discretion and the requirement for an order to be in the interest of justice, means that the Court must take into account the circumstances proven by the evidence which include, for example, the nature of the overarching obligation(s) and the contravention by the contravener or contraveners, if there are more than one; what loss or detriment such contravention(s) caused or contributed to; and the nature and extent of the sanction(s) appropriate to achieve justice having regard to the overarching purpose of the CP Act, to determine what order under section 29(1) of the CP Act is appropriate.
233. In *Hudspeth No 9* at [43] and [44], the Honourable Justice Dixon said that responsibility between persons who contravene overarching obligations is to be apportioned when making orders under section 29(1) of the CP Act having regard to the "*well-established principles*" applicable to apportioning responsibility for contributory fault in tort. His Honour referred to *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at [10]. Essentially, the Court must consider the whole conduct of each party in relation to the circumstances of the contravention which must be subjected to comparative examination. The significance of the various elements involved in such examination will vary from case to case. The Honourable Justice Dixon in *Hudspeth No 9* at [54] observed that it is both necessary and desirable that the Court avoid a disproportionate response and exercise particular care to avoid unintended consequences.

²⁸⁰ *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 9)* [2014] VSC 622 (*Hudspeth No 9*), [42].

234. Having regard to the said principles, the apportionment under section 29(1) of the CP Act would involve a comparison of both culpability and of the relative importance of the conduct of the parties involved in the contravention of the overarching obligations which have caused or contributed to the wasted costs as loss, or costs as loss, or expenses or financial or other loss in the civil proceeding. The Court is concerned with considering relative blameworthiness and the relative causal potency of the contravening conduct of each party.²⁸¹
235. In this Proceeding, if an order is made under section 29 of the CP Act against Mr Trimbo there should be an apportionment of responsibility with his responsibility being negligible.

Part IVAA of the Wrongs Act is not applicable

236. The fourth defendant served an amended proportionate liability notice dated 30 September 2020²⁸² and the fifth defendant served a proportionate liability notice dated 24 November 2020²⁸³ on the sixth defendant, who responded by notice dated 27 November 2020²⁸⁴ challenging the said notices.
237. Part IVAA of the Wrongs Act applies to "apportionable claims" which relevantly pursuant to section 24AF includes a "claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care" (emphasis added).
238. It is clear from the matters set out in 15 to 31 above that:
- (a) the provisions of the CP Act do not provide for or create a cause of action. They do not give rise to any statutory legal right that may be sued upon. The provisions of the CP Act do not give rise to "*relief*" or otherwise. In other words, there cannot be any action for damages by anyone based on the CP Act;
 - (b) sections 28 and 29(1) of the CP Act empowers the Court, at its discretion, to sanction contravention of overarching obligations owed to it by making orders under section 29(1) that are appropriate in the interests of justice having regard to the overarching purpose of the CP Act and the effect of the contravention, and not to award damages;
 - (c) the contravention of an overarching obligation under the CP Act involves a breach of a duty owed to the Court in a civil proceeding by a person referred to in section 10

²⁸¹ *Zwiersen v Field & Hall Pty Ltd* [2016] VSC 16, [16].

²⁸² [CRT.070.003.0001].

²⁸³ [PAR.080.002.0001].

²⁸⁴ [CRT.100.001.0001].

irrespective of the claims by and against parties in the civil proceeding, and a possible discretionary sanction imposed by the Court as set out in paragraph 228 above; and

- (d) the contravention of an overarching obligation under the CP Act does not "*arise from a failure to take reasonable care*".

239. There has never been a claim, let alone an "*apportionable claim*", against Mr Trimbos or, for that matter, against any of the other defendants in the Proceeding, and thus the provisions of Part IVAA of the Wrongs Act are not applicable.

Conclusion

240. In light of the foregoing, it is submitted that:

- (a) the Proceeding has abated upon the death of Mr Trimbos, and the Court can no longer make any order under section 29 of the CP Act against the sixth defendant;
- (b) there is no evidence or evidence to actually persuade the Court to infer or conclude that Mr Trimbos actually engaged in misleading or deceptive conduct in breach of section 21 of the CP Act, and, in particular that –
 - (i) Mr Trimbos engaged in the conduct constituting the Second to Sixth Expert Witness Representations;
 - (ii) the Expert Witness Representations and the Continuing Opinion Representation were misleading or deceptive;
 - (iii) any one relied upon and was led into error by the Expert Witness representations and the Continuing Opinion Representation;
 - (iv) the Expert Witness Representations and the Continuing Opinion Representation materially contributed to any loss, whether as cost or financial loss;
- (c) there is no evidence or evidence to actually persuade the Court of the actual *quantum* of the loss constituted by the –

- (i) wasted costs suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's costs of the Bolitho Approval Application;
- (ii) costs of the Botsman Appeal suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's costs of the Botsman Appeal;
- (iii) costs of the AFPL Approval Application suffered by the debenture holders to the extent that they had paid or are liable to pay the SPR's or the Contradictor's costs of the AFPL Approval Application; and
- (iv) financial loss which the debenture holders suffered as a result of delay in them receiving distributions from the remaining Settlement Sum.

241. In conclusion, it is submitted that the case against the sixth defendant and/or Mr Trimbos as set out in the Particulars of Allegations is fatally flawed, and legally unsustainable, even if the matters set out in the PoA were proven.

Dated: 26 February 2021

Anton Trichardt
Counsel for the sixth defendant

Lander & Rogers
Solicitors for the sixth defendant

SCHEDULE

LAURENCE JOHN BOLITHO

FIRST PLAINTIFF

AUSTRALIAN FUNDING PARTNERS PTY LIMITED

SECOND PLAINTIFF

AND

**JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE
RECEIVER OF BANKSIA SECURITIES LIMITED (RECEIVERS
AND MANAGERS APPOINTED) (IN LIQUIDATION)**

FIRST DEFENDANT

NORMAN O'BRYAN SC

SECOND DEFENDANT

MICHAEL SYMONS

THIRD DEFENDANT

ANTHONY ZITA AND PORTFOLIO LAW PTY LTD

FOURTH DEFENDANT

ALEXANDER CHRISTOPHER ELLIOTT

FIFTH DEFENDANT

**KATERINA PEIROS AS THE REPRESENTATIVE OF THE ESTATE
OF PETER TRIMBOS**

SIXTH DEFENDANT