



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

Case: S CI 2012 07185
S CI 2012 7185
Filed on: 03/03/2021 11:08 AM

BETWEEN:

LAURENCE JOHN BOLITHO & ANOR

Plaintiffs

and

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

Defendants

SUBMISSIONS OF ALEXANDER CHRISTOPHER ELLIOTT

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OVERVIEW OF SUBMISSIONS

1. Alexander Christopher (**Alex**) Elliott was joined as a party to these proceedings on 19 August 2020 by motion of the Court.
2. These submissions are divided into the following parts:
 - a. Overview of Submissions;
 - b. Application of CPA to Alex;
 - c. Alleged Contraventions of the Overarching Obligations; and
 - d. Loss, Relief and Apportionment.
3. Alex has made extensive admissions in this case by his factual admissions dated 24 November 2020.¹ These submissions should be read together with the admissions made in that document.

THE CONTRADICTION'S CASE AGAINST ALEX ELLIOTT

4. The questions raised by the Contradictor in relation to Alex are:²
 - a. whether there has been any conduct by Alex that contravened an **overarching obligation** under the *Civil Procedure Act 2010* (the **CPA**);
 - b. whether he should be ordered to pay a sum into the Settlement Sum; and/or
 - c. whether he should be ordered to compensate debenture holders for losses they have suffered or will suffer by reason of that conduct.
5. The Contradictor asserts a case in relation to these questions as follows:
 - a. The Contradictor alleges that from around early or mid 2016, Alex was:³
 - i. an in-house solicitor for the second plaintiff, the litigation funder **AFPL**;

¹ [PAR.080.001.0001].

² *Contradictor's Revised List of Issues* dated 27 October 2020 (CRLI), [10] [PLE.010.005.0001 at 0009]. Terms defined in the CRLI are adopted here except where otherwise specified.

³ CRLI, [9(f)] [PLE.010.005.0001 at 0014].

- ii. a solicitor acting for the plaintiff Mr Laurence **Bolitho** and group members pursuant to an alleged arrangement whereby Portfolio Law sub-contracted its duties to **Elliott Legal**; and/or
 - iii. an employee or agent of AFPL.
- b. The Contradictor alleges that, by reason of the above, Alex owed the following overarching obligations under the CPA:⁴
- i. The overarching obligation to act honestly;⁵
 - ii. The overarching obligation to refrain from making any claim in a civil proceeding that did not have a proper factual or legal basis;⁶
 - iii. The overarching obligation to not take any step in connection with any claim or response to any claim in a civil proceeding unless he reasonably believed it was necessary to facilitate the resolution or determination of the proceeding;⁷
 - iv. The overarching obligation to refrain from engaging in any conduct which is misleading or deceptive or likely to mislead or deceive;⁸
 - v. The overarching obligation to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate;⁹
 - vi. The overarching obligation to minimise delay;¹⁰ and
 - vii. The **paramount duty** to further the administration of justice.¹¹

⁴ CRLI, [9(f)] [PLE.010.005.0001 at 0014], [13(b)] [0015], and [30B] [0024].

⁵ CPA s 17.

⁶ CPA s 18.

⁷ CPA s 19.

⁸ CPA s 21.

⁹ CPA s 24.

¹⁰ CPA s 25.

¹¹ The paramount duty applies to each person who owes an overarching obligation (see s 16) and is included in the definition of “overarching obligations” in s 3 of the CPA.

- c. The Contradictor alleges that Alex contravened his overarching obligations in the following ways:
- i. By acting as solicitor for Mr Bolitho (in contravention of the Bolitho No 4 Decision) Alex contravened the paramount duty; and the overarching obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive (the **Continuing Conflict Contraventions**);¹²
 - ii. By his conduct in connection with procuring an agreement containing the “adverse settlement terms”, Alex contravened the paramount duty (the **Settlement Negotiation Contraventions**);¹³
 - iii. By his conduct in seeking to recover from group members fees for Mr O’Bryan and Mr Symons that exceeded a fair and reasonable amount, Alex contravened the paramount duty; and the overarching obligations not to engage in conduct that is misleading or deceptive or likely to mislead or deceive; to act honestly; and to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate (the **Overcharging Contraventions**);¹⁴
 - iv. By his conduct in preparing and issuing a summons and notice to group members stating that AFPL was seeking “reimbursement” of legal costs for which it had not yet paid, Alex contravened the overarching obligations not to mislead or deceive; and to only make claims that have a proper basis (the **Summons Contraventions**);¹⁵
 - v. By his conduct in connection with the Third Trimpos Report, Alex contravened the paramount duty; and the overarching obligations not to mislead or deceive; and to ensure that legal costs are reasonable and proportionate (the **Expert Witness Contraventions**);¹⁶

¹² CRLI, Part B, [39] [PLE.010.005.0001 at 0036].

¹³ CRLI, Part E, [58] [PLE.010.005.0001 at 0064].

¹⁴ CRLI, Part F, [66] [PLE.010.005.0001 at 0071].

¹⁵ CRLI, Part G, [75] [PLE.010.005.0001 at 0088].

¹⁶ CRLI, Part H, [79] [PLE.010.005.0001 at 0093].

- vi. By his conduct in drafting, settling and giving instructions to file the First and Second Bolitho Opinions, Alex contravened the paramount duty; and the overarching obligations to act honestly; and not to mislead or deceive (the **Settlement Opinion Contraventions**);¹⁷
 - vii. By his conduct in connection with seeking excessive fees for AFPL and Portfolio Law to administer a settlement distribution scheme, Alex contravened the paramount duty; and the overarching obligations to act honestly; not to mislead or deceive; and to ensure that legal costs were reasonable and proportionate (the **SDS Contravention**);¹⁸
 - viii. By his conduct in connection with Mrs Botsman's appeal, Alex contravened the paramount duty; and the overarching obligations not to mislead or deceive; and to only take steps that are necessary to facilitate the resolution or determination of the proceeding (the **Appeal Contraventions**);¹⁹
 - ix. By his conduct above, Alex contravened the paramount duty by failing to meet duties he owed to manage and/or avoid conflicts of interest, and by pursuing his own interests and the interests of others in seeking to secure payments that exceeded a fair and reasonable amount (the **Fiduciary Duty Contraventions**);²⁰
 - x. By his conduct in connection with the discovery of certain documents, Alex contravened the paramount duty; and the overarching obligations to act honestly; not to mislead or deceive; and to ensure that legal costs are reasonable and proportionate (the **Misleading Discovery Contraventions**).²¹
- (together, the **alleged contraventions**.)

¹⁷ CRLI, Part I, [99] [PLE.010.005.0001 at 0110].

¹⁸ CRLI, Part J, [150] [PLE.010.005.0001 at 0131].

¹⁹ CRLI, Part L, [168] [PLE.010.005.0001 at 0140].

²⁰ CRLI, Part M, [174] [PLE.010.005.0001 at 0147].

²¹ CRLI, Part N, [181] [PLE.010.005.0001 at 0152].

- d. The Contradictor alleges that the alleged contraventions contributed to losses on the part of debenture holders in a number of particularised ways, each of which is based on an allegation about what would have happened but for the alleged contraventions of the overarching obligations by Alex and the other parties.²²
 - e. No allegation is made against Alex in relation to the “Fee Arrangement Contraventions.”²³
6. The Contradictor also alleges that Alex breached his duties under the Solicitors’ Rules, engaged in conduct that was prejudicial to the administration of justice, engaged in unsatisfactory professional conduct and/or professional misconduct, and committed an abuse of process.²⁴ However, these alleged breaches are not relevant to the relief sought by the Contradictor against Alex since relief is only sought against Alex under ss 28 and 29 of the CPA,²⁵ and relief under those sections is conditional on establishing that there has been a breach of an overarching obligation. Although these other allegations against Alex are denied, because they are not relevant to any relief claimed and this Court does not have to make findings in relation to them, these submissions will not address them. Rather, these submissions focus on the allegations that would give rise to a claim for relief against Alex, namely the allegations that he contravened his overarching obligations under the CPA.

QUESTIONS TO BE DETERMINED

7. In light of the Contradictor’s case, the questions relevant to Alex are as follows:
- a. The first question: Did any of the overarching obligations under the CPA apply to Alex in respect of the Bolitho Proceeding, and if so, at what times and in what ways?
 - b. The second question: If “yes” to the first question, has it been established that Alex contravened any of those overarching obligations?

²² CRLI, Part O, [194] [PLE.010.005.0001 at 0156-157].

²³ CRLI, Part C, [46]–[50] [PLE.010.005.0001 at 0043-0055].

²⁴ CRLI, Part Q, [198] [PLE.010.005.0001 at 0161-0162].

²⁵ CRLI, Part P, [196(d) and (e)] [PLE.010.005.0001 at 0159].

- c. The third question: If “yes” to the first and second questions, has it been established that any such contravention “materially contributed” to any loss suffered by the debenture holders (see s 29(1)(c) of the CPA)?
- d. The fourth question: If “yes” to the first, second and third questions, is liability apportionable under the **Wrongs Act 1958**? Alternatively, should Alex’s liability be limited, in the interests of justice, pursuant to s 29(1) of the CPA?
- e. The fifth question: If “yes” to the first, second, third and fourth questions, what was Alex’s relative contribution to any loss suffered by debenture holders?
- f. The sixth question: If “yes” to the first, second and third questions, how should any loss suffered by debenture holders be identified and calculated? Should the costs of the Contradictor be dealt with as a head of liability under the CPA, or should they be dealt with as an ordinary question of the costs of the proceeding?

SUMMARY OF ALEX ELLIOTT’S RESPONSES TO THE QUESTIONS²⁶

8. In relation to the first question, Alex submits that he was never a person to whom the overarching obligations in s 10 of the CPA applied, because he never acted as an in-house solicitor for AFPL, or as a solicitor for Mr Bolitho and group members.
9. Although Alex was not formally employed by AFPL at the relevant times, he can be regarded as an agent of AFPL on the basis that he regularly assisted AFPL and its managing director, his father, **Mr Elliott senior**; however, in that latter capacity he was not a person to whom the overarching obligations applied.
10. In relation to the second question (assuming that Alex was subject to the overarching obligations), he did not contravene them:

²⁶ Alex’s responses are based on the evidence that was adduced at trial, which was limited by rulings made in relation to the testimony and affidavits of Mr O’Bryan, and the affidavits of Mr Symons. That evidence could have been used in relation to, *inter alia*, the roles played and actions taken by the various parties; the relative culpability of the various parties; and to contest the allegations in the CRLI that those other parties had themselves contravened the overarching obligations (as Alex could not be complicit in a contravention if the contravention did not occur).

- a. There is no direct evidence, and it was never squarely put to Alex in cross examination, that he was knowingly complicit in the deception of others, or that he acted dishonestly;²⁷
 - b. Although, and particularly with the benefit of hindsight, Alex was at various times privy to enough information to have made it possible for him to work out that deception was being practised by others, his failure to identify that deception is explained by the complexity of the deception, his very limited legal experience, the trust he understandably and reasonably placed in others, and his natural deference to the judgment of those others;
 - c. Any role played by Alex himself in furthering any such deceptions was unwitting and limited; and
 - d. Alex was not in a position to control or influence the way in which the proceedings were conducted.
11. In relation to the third question, there is no evidence of any concrete step that Alex could have taken that would have prevented or reduced any loss suffered by the debenture holders. His conduct cannot be said to have materially contributed to any loss suffered by the debenture holders.
12. In relation to the fourth question, liability is apportionable under the *Wrongs Act*. Even if liability is not apportionable under the *Wrongs Act*, s 29(1) of the CPA empowers the Court to make such orders as are appropriate in the interests of the administration of justice. This extends to crafting an order that appropriately limits Alex's liability to reflect his peripheral contribution to any loss suffered by debenture holders.
13. In relation to the fifth question, Alex's degree of responsibility should be found to be extremely low. Alex had no material involvement in the claim for a funding commission and legal costs, let alone in any deception in that regard. Nor is Alex responsible for the costs of the Contradictor, at least prior to being joined as a party.
14. In relation to the sixth question:

²⁷ Cf *Nadinic v Drinkwater* (2017) 94 NSWLR 518, [48] (Leeming JA): "the seriousness of a finding of dishonesty or reckless indifference to the truth will ordinarily mean that it may not be made without an opportunity being given to deal with the criticism" [ATH.600.267.0001 at 0013].

- a. In relation to the claim that debenture holders have suffered loss by having been kept out of their money:
- i. Since an order under s 29 of the CPA is compensatory in nature, it is not appropriate to apply penalty interest unless the debenture holders would themselves have been entitled to accrue penalty interest on any particular sum.
 - ii. Debenture holders' only entitlement to penalty interest was by dint of the usual claim for interest on a money claim, being pursuant to statute, and commencing to accrue on the date when the Bolitho Proceeding commenced. However, that claim was part of what was compromised in the Trust Co settlement, and debenture holders were not otherwise entitled to penalty interest in any respect.
 - iii. Accordingly, in relation to the claim that debenture holders have suffered a loss by reason of being kept out of their money, that claim is a "*Hungerfords* claim"²⁸ for interest, and it is necessary for the Contradictor to have set out the basis for any claim for interest and adduced evidence in support of the claim. A simple averment to the existence of power to award penalty interest under s 29(1)(c)(i) of the CPA is not sufficient.
- b. In relation to legal costs, that question should be dealt with in the usual jurisdiction to make orders as to costs, and not as a head of loss under the CPA. That is because there are applications on foot for non-party costs orders, which concern the same costs as being claimed under the CPA. It is more efficient that costs be dealt with in the usual way, so that the liability of non-parties to pay costs can be taken into account in making orders as to costs in respect of the parties.

²⁸ *Hungerfords v Walker* (1989) 171 CLR 125 (*Hungerfords*) [ATH.600.265.0001].

APPLICATION OF CPA TO ALEX

SUMMARY OF POSITION

15. The Fifth Defendant submits that:
 - a. Alex never acted as an in-house solicitor for AFPL, or as a solicitor for Mr Bolitho and group members;
 - b. Although Alex was not formally employed by AFPL at the relevant times, he can be regarded as an agent of AFPL on the basis that he regularly assisted AFPL and its managing director, his father, Mr Elliott senior;
 - c. However, in that latter capacity he was not a person to whom the overarching obligations applied.
16. Given the above, the Fifth Defendant submits that he was never subject to the overarching obligations in the CPA in respect of the Bolitho Proceeding.²⁹

FACTUAL BACKGROUND

17. Alex Elliott was born on 16 January 1992.³⁰ He is currently employed by Elliott Legal.³¹ He completed his law degree at Deakin University in October 2015 and completed the practical legal training course at the Leo Cussen Institute between January and June 2016.³² He was admitted to practice on 13 December 2016.³³ He has held a practicing certificate since 11 May 2017.³⁴
18. While attending university, Alex worked as a casual employee in an administrative role in a law firm known then as IDP, now as Thomson Geer, for around five months in early 2014. Alex also completed a ten-day clerkship with the Fair Work Commission in 2015.³⁵

²⁹ At least not until Alex himself was joined as a party; however, no contravention has been alleged against him in his capacity as a party to the proceeding.

³⁰ Alex Elliott XN, 1 December 2020, T1645:3 [TRA.500.016.0001 at 0058].

³¹ Alex Elliott XN, 1 December 2020, T1645:4–5 [TRA.500.016.0001 at 0058].

³² Alex Elliott XN, 1 December 2020, T1646:4–17 [TRA.500.016.0001 at 0059].

³³ Alex Elliott XN, 1 December 2020, T1647:1–2 [TRA.500.016.0001 at 0060].

³⁴ Alex Elliott XN, 1 December 2020, T1647:3–4 [TRA.500.016.0001 at 0060].

³⁵ Alex Elliott XN, 1 December 2020, T1667:22–31 [TRA.500.016.0001 at 0080].

Alex did some work for AFPL in 2014 and 2015, liaising with clients who had signed funding agreements.³⁶

19. Sometime during 2016, Alex started working with his father, Mr Elliott senior. The work was initially “administrative sort of things” and “following him around to meetings and attending court with him.”³⁷
20. At this time, Mr Elliott senior was the managing director of Elliott Legal, which was staffed by just Mr Elliott senior and a few (non-legal) support staff.³⁸ Mr Elliott senior was keen for Alex to join the litigation funding business,³⁹ and also involved Alex in his other businesses, including a property development company, MCM Developments; a hotel at Mt Buller known as Buller Central; a farm at Flinders with 300 head of cattle, sheep and a vineyard.⁴⁰
21. Mr Elliott senior maintained an office from which he conducted his affairs, including Elliott Legal. Initially, this was in William Street, but from 2017 Mr Elliott senior operated from premises in Exhibition Street.⁴¹
22. Alex knew that Elliott Legal was his official employer.⁴² However, he did not have any written employment agreement with Elliott Legal.⁴³ He was paid around \$650 per week after tax.⁴⁴
23. Alex became a director of Elliott Legal on 19 February 2020, after his father’s death.⁴⁵ Alex was also a director of Elliott Legal, briefly, in 2016. The 2016 appointment was made on Mr Elliott senior’s initiative, and the reasons for it are unclear.⁴⁶ Alex did not perform any duties that one might expect of the director of a company, and instead trusted his father to run Elliott Legal “in a manner that was in accordance with all its

³⁶ [AFP.100.011.0001], [1].

³⁷ Alex Elliott XN, 1 December 2020, T1648:18–24 [TRA.500.016.0001 at 0061].

³⁸ Alex Elliott XN, 1 December 2020, T1648:28–31 [TRA.500.016.0001 at 0061].

³⁹ O’Bryan, XN, 30 November 2020, T1467:14-18 [TRA.500.015.0001 at 0046].

⁴⁰ Alex Elliott XN, 1 December 2020, T1649:1–27 [TRA.500.016.0001 at 0062].

⁴¹ Alex Elliott XN, 1 December 2020, T1651:21–1652:9 [TRA.500.016.0001 at 0064 - 0065].

⁴² Alex Elliott XN, 1 December 2020, T1652:17–20 [TRA.500.016.0001 at 0065].

⁴³ Alex Elliott XN, 1 December 2020, T1652:25–26 [TRA.500.016.0001 at 0065].

⁴⁴ Alex Elliott XN, 1 December 2020, T1652:21–24 [TRA.500.016.0001 at 0065].

⁴⁵ Alex Elliott XN, 1 December 2020, T1652:27–31 [TRA.500.016.0001 at 0065].

⁴⁶ Alex Elliott XN, 1 December 2020, T1653:1–10 [TRA.500.016.0001 at 0066].

director's duties and obligations".⁴⁷ It is perhaps significant that Mr Elliott senior bestowed a similarly lofty title on Alex's younger brother, Max, who was designated the "General Manager" of Elliott Legal⁴⁸ despite still being at university and not being in the office day-to-day.⁴⁹

24. As a general rule, Mr Elliott senior would give instructions to Alex every morning about what he wanted Alex to do on any given day in relation to Mr Elliott senior's various enterprises.⁵⁰
25. Alex's primary work with Elliott Legal in 2016 was in relation to the distribution scheme for another class action that had settled, the Downer class action.⁵¹ In that case, Alex was the primary contact for group members and was involved in helping them deal with various forms, making distributions of money and referring them to independent counsel if any issues arose.⁵²
26. In late 2016 and early 2017, Alex worked on the Murray Goulburn class action, where Elliott Legal were the solicitors on the record.⁵³ Alex recalled doing a lot of "solicitor type things" in that case, including reviewing and considering documents, researching, attending to the client, going to court and instructing counsel.⁵⁴ That proceeding also had a litigation funder, Mr William Crothers.⁵⁵
27. At around this time, Alex would also accompany his father to meetings so that he could be exposed to respected people in the legal and business world and to "see how things operated".⁵⁶
28. It is submitted that Mr Elliott senior was, essentially, just exposing Alex to his various businesses. For example, between 2016 and 2017, Alex was involved in the property development business, which was dealing with architects, builders, as well as

⁴⁷ Alex Elliott XN, 1 December 2020, T1653:13–1654:2 [TRA.500.016.0001 at 0066].

⁴⁸ See email from Maximilian Elliott dated 21 November 2017 [AFP.007.001.0001].

⁴⁹ Alex Elliott XXN, 11 December 2020, T2117:8–16 [TRA.500.022.0001 at 0024].

⁵⁰ Alex Elliott XN, 1 December 2020, T1651:16–20 [TRA.500.016.0001 at 0064]; T1652:12–16 [0065].

⁵¹ See *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784 [ATH.600.007.0001].

⁵² Alex Elliott XN, 1 December 2020, T1650:6–11 [TRA.500.016.0001 at 0063].

⁵³ See *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [ATH.600.111.0001].

⁵⁴ Alex Elliott XN, 1 December 2020, T1654:22–28 [TRA.500.016.0001 at 0067].

⁵⁵ Alex Elliott XN, 1 December 2020, T1654:29–1655:3 [TRA.500.016.0001 at 0067 - 0068].

⁵⁶ Alex Elliott XN, 1 December 2020, T1650:12–19 [TRA.500.016.0001 at 0063].

proceedings in VCAT and the Supreme Court.⁵⁷ Alex was also involved in managing the hotel at Mt Buller and the farm at Flinders.⁵⁸

29. This is consistent with the opinion of Mr White, the costs assessor in the Murray Goulburn litigation, who stated in his independent report that the amount claimed by the funder in respect of Alex's involvement ought be reduced by 50 per cent because from the date of his admission as a lawyer until at least July 2017, "Alex Elliott was being mentored by Mark Elliott" and "A lawyer cannot charge for learning".⁵⁹

PERIODS PRIOR TO HOLDING A PRACTISING CERTIFICATE AND AFPL BEING JOINED

30. Alex was not admitted to practice until 13 December 2016 and did not hold a practicing certificate until 11 May 2017.⁶⁰ Prior to 11 May 2017, Alex was not a legal practitioner within the meaning of the CPA.⁶¹ Alex could not therefore be subject to the overarching obligations under the CPA on the basis that he was a "legal practitioner ... acting for or on behalf of a party".⁶² Accordingly, none of Alex's conduct prior to 11 May 2017 can constitute a contravention of the overarching obligations under the CPA.
31. AFPL was joined as a party to the proceeding on 22 November 2018.⁶³ Prior to that date Alex could not have been subject to the overarching obligations under the CPA on the basis that he was a "legal practitioner ... acting for or on behalf of" AFPL. Even if Alex were found to have been an in-house solicitor for AFPL, his conduct prior to that date cannot constitute a contravention of overarching obligations that he owed on that basis.

⁵⁷ Alex Elliott XN, 1 December 2020, T1650:30–1651:4 [TRA.500.016.0001 at 0063 - 0064].

⁵⁸ Alex Elliott XN, 1 December 2020, T1651:10–15 [TRA.500.016.0001 at 0064].

⁵⁹ See *Referee's Report* of John White dated 24 March 2020 [148], [CCW.018.004.0001 at 0033].

⁶⁰ See Alex Elliott practicing certificate dated 11 May 2017 [LSB.001.003.0001].

⁶¹ CPA s 3 defines "legal practitioner" as "an Australian legal practitioner". The Legal Profession Uniform Law defines "Australian legal practitioner" at s 6 as meaning "an Australian lawyer who holds a current Australian practising certificate."

⁶² The Contradictor alleges that Alex was subject to the overarching obligations because he was acting as a "solicitor" (that is, a legal practitioner), not as an "other representative". However, Alex would not appear to have been an "other representative" within the meaning of s 10(1)(c). The only "other" kind of representative referred to in the CPA is a "litigation guardian or similar representative" (CPA, s 41(3)), and there is no suggestion that Alex ever acted in such a capacity.

⁶³ See orders of John Dixon J dated 22 November 2018 [ORD.500.003.0001].

32. On the pleadings as they stand, the fact AFPL were joined as a party to the Botsman appeal at an earlier date is immaterial. The Botsman appeal is a different “civil proceeding”, within the meaning of s 3 of the CPA, to the civil proceeding that is presently before the Court and in which the Contradictor makes allegations against Alex.

EMPLOYEE OR AGENT OF AFPL

Employee of AFPL

33. Alex signed a witness statement⁶⁴ on 8 May 2018 in the proceeding commenced by AFPL seeking to restrain Ms Botsman from appealing the settlement approval.⁶⁵ In that statement, Alex said that he was employed by AFPL in 2014, but did not mention any end date for his employment with AFPL.⁶⁶ Alex gave evidence that he finished this employment in 2015.⁶⁷ There is no evidence to contradict his testimony on this point. Alex accepted that “looking at it now” the statement “looks misleading”,⁶⁸ but said that the statement had been reviewed by senior lawyers, including by counsel and AFPL’s lawyers, Arnold Bloch Leibler (**ABL**), in circumstances where Alex believed that they all knew that he had ceased employment with AFPL in 2015.⁶⁹
34. The Court should find that Alex ceased employment with AFPL in 2015 and was not an employee of AFPL during the relevant times. There are too few of the indicia of employment present to have established a legal relationship of employment at the relevant times.⁷⁰
35. Alex freely admitted that he provided assistance to AFPL by providing assistance to its managing director, his father. On that basis he might be regarded as an “agent” of AFPL.

⁶⁴ [AFP.100.011.0001].

⁶⁵ Proceeding S CI 2018 00076.

⁶⁶ At paragraph 1 of Alex’s witness statement dated 8 May 2018 [AFP.100.011.0001].

⁶⁷ Alex Elliott XN, 1 December 2020, T1659:22–26 [TRA.500.016.0001 at 0072].

⁶⁸ Alex Elliott XXN, 9 December 2020, T1936:17 [TRA.500.020.0001 at 0005].

⁶⁹ Alex Elliott XXN, 9 December 2020, T1936:18–21 [TRA.500.020.0001 at 0005].

⁷⁰ There was no written employment agreement between Alex and AFPL; Alex did not consider himself to be employed by AFPL; Alex was not paid by AFPL; Alex’s work day was not controlled by AFPL; Alex did not exhibit to the world at large that he was an employee or held a position with AFPL (ie, there is no “branding” to associate Alex with AFPL). See *ACE Insurance Limited v Trifunovski* (2013) 209 FCR 146, [23]–[101] [ATH.600.258.0001 at 0005–0028] (Buchanan J) for a comprehensive discussion of the indicia of employment.

Although AFPL was at all relevant times subject to the overarching obligations by reason of s 10(1)(d) of the CPA, Alex himself does not fall within the terms of that section. There is no basis to suggest that Alex provided “other assistance” to AFPL in the sense contemplated by the words of s 10(1)(d) of the CPA as there is no evidence that Alex exercised “direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding”.

36. In other words, the fact that Alex might be regarded as an agent of AFPL did not make him subject to the overarching obligations under the CPA.⁷¹

Personal assistant

37. In a letter dated 12 April 2019 to the Contradictor, ABL described Alex as a “personal assistant” to Mr Elliott senior in the latter’s capacity as a “director of AFPL”.⁷² The Contradictor has taken issue with the accuracy of the description, and implied that Alex was thereby complicit in an attempt to mislead the Contradictor in relation to AFPL’s discovery.
38. It was Mr Elliott senior who instructed ABL to describe Alex in that way.⁷³ Alex did not speak with Mr Elliott senior about the description.⁷⁴ Alex cannot recall seeing a draft of the letter or having a discussion with Mr Symons about how he should be described.⁷⁵ Alex does not recall any specific discussions about it.⁷⁶
39. However, even though Alex was not responsible for describing himself as his father’s “personal assistant”, he did consider the description to be accurate in the context of

⁷¹ See the Victorian Law Reform Commission, *Civil Justice Review*, Report No 14, 2014, 151 [ATH.600.272.0001 at 0153]: “In general, it is not the commission’s intention to render employees of parties or other participants personally liable for breach of the overriding obligations. In the case of corporations, it is intended that the corporation should be liable for the acts of any director, servant or agent acting within the scope of their actual or apparent authority.”

⁷² See draft letter at [NOB.500.007.2078] and final letter as sent [AFP.005.001.0374].

⁷³ Alex Elliott XN, 1 December 2020, T1656:7–10 [TRA.500.016.0001 at 0069]; see also Alex Elliott XXN, 8 December 2020, T1887:8–10 [TRA.500.019.0001 at 0058].

⁷⁴ Alex Elliott XXN, 8 December 2020, T1888:31–1889:1 [TRA.500.019.0001 at 0059-0060].

⁷⁵ Alex Elliott XXN, 8 December 2020, T1881:25-1882:6 [TRA.500.019.0001 at 0052-0053], T1884:18-T1885:17 [0055-0056].

⁷⁶ Alex Elliott XXN, 8 December 2020, T1887:2–4 [TRA.500.019.0001 at 0058].

the Banksia proceeding.⁷⁷ This is because, in Alex’s view, it “captured what I did in Banksia in 2016 and 17. I never saw myself as the solicitor, I was just helping dad”.⁷⁸

40. In any event, the fact that Alex’s role was described by AFPL on Mr Elliott senior’s instructions as that of a “personal assistant” does not shed any light on whether he was in fact acting as a solicitor or in-house counsel. The statement is, at best, a prior consistent statement supportive of Alex’s oral evidence in this case.

Solicitor acting for Mr Bolitho and group members, in-house solicitor for AFPL

41. The Contradictor’s allegation that Alex was a “solicitor acting for Mr Bolitho and group members”⁷⁹ is founded on allegations that:

- a. Following the Bolitho No 4 decision, Mr Elliott senior arranged for Portfolio Law to be retained as a “post-box” solicitor, enabling Mr Elliott senior to remain in control of the Bolitho proceeding;⁸⁰
- b. From about March 2016, Alex became involved in the Bolitho proceeding in his capacity as a solicitor, and was included in emails as though he was another solicitor acting on the matter;⁸¹
- c. Alex had an indirect financial interest in the outcome of the Bolitho proceeding;⁸²
- d. Alex was a solicitor, employee or agent of Elliott Legal and worked as Mr Elliott senior’s right-hand man;⁸³ and
- e. Alex “must have known” of the Bolitho No 4 decision.⁸⁴

42. The Contradictor has set out allegations about Alex’s role in the Bolitho Proceeding,⁸⁵ as well as 15 specific allegations of work supposedly undertaken by Alex, as allegations

⁷⁷ Alex Elliott XXN, 8 December 2020, 1887:8–13 [TRA.500.019.0001 at 0058].

⁷⁸ Alex Elliott XN, 1 December 2020, T1656:28–1657:6 [TRA.500.016.0001 at 0069-0070]. See also Alex Elliott XXN, 8 December 2020, 1887:11–23 [TRA.500.019.0001 at 0058].

⁷⁹ CRLI, [30B(b)] [PLE.010.005.0001 at 0024].

⁸⁰ CRLI, [30A(a)] [PLE.010.005.0001 at 0023].

⁸¹ CRLI, [30A(b)] [PLE.010.005.0001 at 0023] and [30A(c)] [0024].

⁸² CRLI, [30A(d)] [PLE.010.005.0001 at 0024].

⁸³ CRLI, [30A(e)] [PLE.010.005.0001 at 0024].

⁸⁴ CRLI, [30A(f)] [PLE.010.005.0001 at 0024].

⁸⁵ CRLI, [30A(b)] [PLE.010.005.0001 at 0023] and [30A(c)] [0024].

that establish that Alex's role in the Bolitho Proceeding encompassed AFPL's claim for costs and commission.⁸⁶

43. None of these matters show that Alex was a solicitor acting for Mr Bolitho and group members, nor that he was an in-house solicitor for AFPL. There are four preliminary points to make before addressing the allegations that Alex acted as a solicitor in the Bolitho proceeding or as an in-house solicitor for AFPL.
44. First, Alex acknowledged that he knew in general terms of the Bolitho No 4 decision (although he had never read it),⁸⁷ but did not think that it was being contravened.⁸⁸ Moreover, even if there was a "post-box" arrangement, that does not mean that Mr Elliott senior and Elliott Legal (or even less, Alex) were the actual solicitors for Mr Bolitho and group members. The control exercised by Mr Elliott senior over the conduct of the proceedings is consistent with the control litigation funders commonly exercise over such proceedings, and there is no direct evidence that Mr Elliott senior formally did anything that could only be done by a solicitor acting for the group members.
45. If Mr Zita unduly deferred to the judgment of Mr Elliott senior, or others, it does not mean that Mr Zita was not the solicitor for Mr Bolitho and the group members. All that follows is an assessment of whether it was reasonable for Mr Zita to defer to the judgment of experienced senior counsel and an experienced litigation funder in the conduct of the proceedings. In light of the fact that Mr Zita was the solicitor on the record for the Bolitho Proceeding, and Alex's lack of knowledge about the substance of any arrangement between Mr Elliott senior and Mr Zita, whatever be the ultimate findings on the "post box" allegations, responsibility for that arrangement cannot be sheeted home to Alex.
46. Second, no particulars have been provided of the "indirect financial interest" in the Bolitho Proceeding that the Contradictor alleges against Alex. That is telling, noting that there has been discovery of the family trust deeds, and extensive cross examination of

⁸⁶ CRLI, [30C] [PLE.010.005.0001 at 0025].

⁸⁷ Alex Elliott XN, 1 December 2020, T1673:19–1674:6 [TRA.500.016.0001 at 0086-0087]; Alex Elliott XN, 8 December 2020 T1871:10–12 [TRA.500.019.0001 at 0042].

⁸⁸ Alex Elliott XN, 1 December 2020, T1674:7–21 [TRA.500.016.0001 at 0087].

Alex and the family accountant, Mr De Bono. Even if the Court was satisfied that Alex did have an indirect financial interest in the Bolitho Proceeding, that is not probative as to whether or not he was acting as a solicitor: presumably—having regard to the character of the allegation—each of Alex’s siblings, as well as his mother, would have similar financial interests.

47. Third, Alex was—for at least part of the relevant time—a person who happened to be a solicitor, and he was employed by Elliott Legal. Although Alex did substantial legal work for Elliott Legal, that legal work was only in relation to matters other than the Bolitho Proceeding.⁸⁹ Accordingly, the fact that Alex was employed by Elliott Legal as a solicitor is immaterial to the substantive allegations of breach against him.
48. Fourth, if Alex was indeed an in-house solicitor for AFPL one might have expected that AFPL would claim privilege over communications between Alex and others, including his father. The fact that AFPL failed to do so on this basis strongly suggests that no lawyer-client relationship ever existed between Alex and AFPL.

Allegations in para 30A(b) and 30A(c) of the CRLI

49. When Alex became employed by Elliott Legal, in early 2016, he did not have any role in the Banksia class action.⁹⁰ Alex was not admitted to practice until December 2016 and did not hold a practising certificate until May 2017, and gave evidence that thereafter, he was not doing the work of a solicitor in the Banksia case.⁹¹ Alex did not bring an independent mind to the Banksia litigation⁹² and just did what his father told him to do.⁹³ Any work that Alex did was guided by what he regarded as “incredibly superior people”, and accordingly Alex believed that everything was being run as it should be.⁹⁴
50. Despite Alex’s perception that those around him were “incredibly superior”, it has become apparent that Messrs O’Bryan, Symons and Elliott senior failed on multiple

⁸⁹ For example, the Murry Goulburn class action: Alex Elliott XN, 1 December 2020, T1654:22–28 [TRA.500.016.0001 at 0067].

⁹⁰ Alex Elliott XN, 1 December 2020, T1663:1–7 [TRA.500.016.0001 at 0076].

⁹¹ Alex Elliott XXN, 8 December 2020, T1875:28–29 [TRA.500.019.0001 at 0046].

⁹² Alex Elliott XXN, 8 December 2020, T1873:19–29 [TRA.500.019.0001 at 00444].

⁹³ Alex Elliott XXN, 8 December 2020, T1873:31–1874:1 [TRA.500.019.0001 at 0044-0045]; T1875 [0046].

⁹⁴ Alex Elliott XXN, 8 December 2020, T1874:31–1875:5 [TRA.500.019.0001 at 0045-0046].

occasions to comply with their obligations, particularly in relation to costs disclosure and the recording of fees. The report of Mr White, the costs assessor in the Murray Goulburn litigation, makes that plain when he says “The outcome of my inquiry is that some of the law practices involved in this matter have (a) problems in respect of compliance with their disclosure obligations under the Uniform Law and (b) problems with their costs agreements”.⁹⁵ These practitioners were the examples or role models available to Alex as a junior solicitor as to how to conduct litigation, and manage a legal proceeding, and it is therefore unsurprising that he did not identify any discrepancy in relation to costs during the Banksia class action settlement approval process.

51. Alex started to be copied into correspondence in mid-2016, as he understands it, so that his father could give him exposure to “the course of negotiation” and “how things got done”.⁹⁶ That this occurred before Alex was admitted to practice suggests that Alex was being copied in for some reason other than because he was “another solicitor acting on the matter.”
52. From that time onward, Alex was copied to most of Mr Elliott senior’s emails, not just in the Banksia class action.⁹⁷ Alex is not exactly sure why Mr Elliott senior chose to arrange his affairs in that way, but believes that it was so that Alex “could be across generally where the case was at from month to month.”⁹⁸ Where Alex was copied to emails, he would usually print off the emails for his father, and read them himself.⁹⁹ However, he was never required to do anything else with the emails and was generally not given tasks.¹⁰⁰
53. Despite being copied to emails in the Banksia class action during 2017, Alex did not have any role or any responsibilities in the case in that period.¹⁰¹ This is to be contrasted with

⁹⁵ See *Referee’s Report* of John White dated 24 March 2020 at [47] [CCW.018.004.0001 at 0013].

⁹⁶ Alex Elliott XN, 1 December 2020, T1663:4–26 [TRA.500.016.0001 at 0076]; T1675:7–21 [0088].

⁹⁷ Alex Elliott XN, 1 December 2020, T1663:15–17 [TRA.500.016.0001 at 0076].

⁹⁸ Alex Elliott XN, 1 December 2020, T1663:12–13 [TRA.500.016.0001 at 0076].

⁹⁹ Alex Elliott XN, 1 December 2020, T1663:18–22 [TRA.500.016.0001 at 0076].

¹⁰⁰ Alex Elliott XN, 1 December 2020, T1663:18–26 [TRA.500.016.0001 at 0076]; T1687:7 [TRA.500.016.0001 at 0100].

¹⁰¹ Alex Elliott XN, 1 December 2020, T1663:31–1664:3 [TRA.500.016.0001 at 0076-0077].

the Murray Goulburn litigation, where Elliott Legal were the solicitors on the record, and Alex was required to give a lot of attention to that matter and do a lot of work.¹⁰²

54. If Alex was indeed a solicitor on the Banksia class action during 2017 as alleged, one would expect that he would have been allocated specific work tasks in the many emails to which he was copied by members of the **Bolitho legal team**,¹⁰³ and would have initiated many emails himself. The fact that the evidence only shows that Alex was receiving and reading emails, and little more, is consistent with his role as an assistant to Mr Elliott senior and agent of AFPL .
55. As a general practice, Alex attended most meetings that Mr Elliott senior attended.¹⁰⁴ In relation to the Banksia class action, Alex attended conferences between the Bolitho legal team, for example, conferences following directions hearings. However, Alex does not recall contributing in any meeting.¹⁰⁵ Sometimes he would take notes, but only for his own benefit and not for any other purpose.¹⁰⁶ Alex was not allocated legal tasks, and only ever undertook administrative tasks like getting a notice to group members or liaising with group members.¹⁰⁷ He was never asked to do any substantive work in relation to the “prosecution” of the Banksia Proceedings.¹⁰⁸ It follows that the mentions of Alex’s name in the ABL letter dated 5 April 2019 as having attended conferences with counsel are not probative of him being a solicitor in the Bolitho Proceeding.¹⁰⁹
56. Mr Zita gave evidence that Alex’s usual conduct when he attended meetings of the Bolitho legal team was to sit there and not contribute anything.¹¹⁰ Mr O’Bryan corroborated this, testifying that:

¹⁰² Alex Elliott XN, 1 December 2020, T1664:4–15 [TRA.500.016.0001 at 0077].

¹⁰³ As defined in the affidavit of Tony Zita dated 30 April 2020 [44], [CCW.036.001.0001 at 0009-0010], and comprising Messrs Elliott senior, O’Bryan, Symons and Zita.

¹⁰⁴ Alex Elliott XN, 2 December 2020, T1768:29–31 [TRA.500.017.0001 at 0082].

¹⁰⁵ Alex Elliott XN, 2 December 2020, T1769:26–31 [TRA.500.017.0001 at 0083].

¹⁰⁶ Alex Elliott XN, 2 December 2020, T1770:2–3 [TRA.500.017.0001 at 0084].

¹⁰⁷ O’Bryan XN, 30 November 2020, T1458:3 [TRA.500.015.0001 at 0037].

¹⁰⁸ Alex Elliott XN, 2 December 2020, T1770:4–27 [TRA.500.017.0001 at 0084].

¹⁰⁹ [AFP.005.001.0354].

¹¹⁰ Zita XXN, 26 November 2020, T1324:25–1325:8 [TRA.500.013.0001 at 0032].

- a. Alex’s only contribution at meetings was in relation to matters concerning liaison with group members (which it is submitted is inherently the work of the litigation funder and does not relate to the performance of legal services);¹¹¹ and
- b. Alex did not, in Mr O’Bryan’s presence, make any substantive contribution or any comments or suggestions in relation to legal matters.¹¹²

Class actions email accounts (para 30C, particular A)

57. There has been evidence about the setting up in April and May 2017 of two email accounts, one called the Bolitho Class Action email account and the other the General Class Action email account.
58. These were set up in a context where Messrs Elliott senior, O’Bryan, Symons and Zita were involved in running several class actions. The evidence was that on a particular occasion Mr Zita had failed to forward some correspondence to counsel, and counsel had almost missed attendance at an application in Court.¹¹³ Alex says that, to avoid this happening again, a system was established, based on a decision by Messrs O’Bryan and Zita,¹¹⁴ whereby Messrs O’Bryan and Symons could view all correspondence in the various cases they were running.¹¹⁵ The idea was to forward all of the emails from the various class actions into a single email account which the barristers could access.¹¹⁶
59. Around 24 April 2017, Mr Zita asked Alex to get Mr Zita’s “IT guy” to set up the email account. Alex sent test emails on 26 April 2017 and 2 May 2017 as part of helping Mr Zita or his “IT guy” to get the email accounts set up.¹¹⁷
60. Mr Zita gave evidence that, while it was possible, he wasn’t sure whether Alex had access to the “General Class Action” email account, and that Alex did not have access to the “Bolitho Class Action” email account, as it had been set up for the Bolitho legal

¹¹¹ O’Bryan XN, 30 November 2020, T1463:16–27 [TRA.500.015.0001 at 0042].

¹¹² O’Bryan XN, 30 November 2020, T1463:28–1464:6 [TRA.500.015.0001 at 0037-0038]; T1504:9–26 [0083].

¹¹³ Alex Elliott XN, 1 December 2020, T1684:29–1685:6 [TRA.500.016.0001 at 0097-0098].

¹¹⁴ Alex Elliott XN, 1 December 2020, T1685:9 [TRA.500.016.0001 at 0098].

¹¹⁵ Alex Elliott XN, 1 December 2020, T1684:23 [TRA.500.016.0001 at 0097].

¹¹⁶ Alex Elliott XN, 1 December 2020, T1686:6–12 [TRA.500.016.0001 at 0099].

¹¹⁷ [CBP.001.001.5820], [CBP.001.007.3869] and [CBP.001.008.1167]. See Alex Elliott XN, 1 December 2020, T1685:17–25 [TRA.500.016.0001 at 0098].

team.¹¹⁸ In fact, Alex did have access to the “General Class Action” email account, which also received emails that were sent to the “Bolitho Class Action” email account.¹¹⁹ However, he could not send emails from the “Bolitho Class Action” account.¹²⁰

61. Once the two email accounts were set up, Alex continued a general practice of reading any emails he received and printing them for his father.¹²¹ Alex did not send emails.¹²² Alex did not use the accounts in any way that might indicate that he was a solicitor acting on the matter.

The Trimbos reports (para 30C, particular B)

62. Alex’s role in relation to the Trimbos reports was to “have collated the folder that went to Mr Trimbos, but it didn’t extend far beyond that”.¹²³ Alex did not analyse any of the material that was furnished to Mr Trimbos, nor did he have any discussions with counsel about their fee slips, or with Mr Elliott senior about the matter.¹²⁴ There is no documentary evidence suggesting that Alex performed any substantive work in relation to the instructions that were given to Mr Trimbos. Mr Elliott senior wrote the letter and was the person instructing Mr Trimbos, not Alex.¹²⁵
63. Alex received the Trimbos reports, and although he may have skimmed through the reports for typographical or cross-referencing errors, he did not make any substantive comments or do anything in relation to the reports.¹²⁶ He first read a draft of the First Trimbos Report in January 2018;¹²⁷ that is, after it had been submitted to the Court.
64. None of Alex’s conduct suggests that he was effectively a solicitor instructing an expert witness. Rather, it is wholly consistent with Alex assisting his father with administrative work for AFPL—in this instance, facilitating AFPL’s briefing Mr Trimbos to provide

¹¹⁸ Affidavit of Tony Zita dated 30 April 2020 [47-48], [CW.036.001.0001 at 0010]. See also Zita XXN, 26 November 2020, T1308:26–1309:14 [TRA.500.013.0001 at 0016-0017].

¹¹⁹ Alex Elliott XN, 1 December 2020, T1686:18–27 [TRA.500.016.0001 at 0099].

¹²⁰ Alex Elliott XN, 1 December 2020, T1686:28–1687:1 [TRA.500.016.0001 at 0099-0100].

¹²¹ Alex Elliott XN, 1 December 2020, T1687:7–25 [TRA.500.016.0001 at 0100].

¹²² Alex Elliott XN, 1 December 2020, T1687:6 [TRA.500.016.0001 at 0100].

¹²³ Alex Elliott XN, 2 December 2020, T1688:22–1689:3 [TRA.500.016.0001 at 0097].

¹²⁴ Alex Elliott XN, 2 December 2020, T1688:31–1689:2–5 [TRA.500.017.0001 at 0002-0003].

¹²⁵ See email from Mr Elliott senior to Mr Trimbos dated 24 November 2017 [AFP.001.001.2226]; Alex Elliott XXN, 11 December 2020, T2134:18–2137:25 [TRA.500.022.0001 at 0041-0044].

¹²⁶ Alex Elliott XN, 2 December 2020, T1689:10–24 [TRA.500.017.0001 at 0003].

¹²⁷ Alex Elliott XXN, 11 December 2020, T2165:12–15 [TRA.500.022.0001 at 0072].

evidence in support of AFPL’s claim for a funding commission and legal costs. It is not probative of Alex being a solicitor for Mr Bolitho, as it was not work done for Mr Bolitho but for AFPL. It is not probative of Alex being an in-house solicitor for AFPL, as it involves nothing more than administrative work in collating material to be sent to another person.

“Wrap up meeting” on 14 November 2017 (para 30C, particular C)

65. Although they were taken to an electronic meeting invitation receipt for a meeting proposed to be held at Dawson Chambers on 14 November 2017,¹²⁸ each of Mr O’Bryan and Alex gave evidence that they did not recall the meeting occurring.¹²⁹

The Banksia Expenses Spreadsheet (para 30C, particular D)

66. It is true that Alex was involved in working up the Banksia Expenses Spreadsheet. However, nothing about the nature of his involvement with the Banksia Expenses Spreadsheet is probative of Alex being a solicitor for Mr Bolitho and group members, or an in-house solicitor.

67. Alex did not create the Banksia Expenses Spreadsheet.¹³⁰ Alex first saw the Banksia Expenses Spreadsheet when it was emailed¹³¹ to Mr Elliott senior and Alex by his younger brother Max.¹³² Alex does not know what role, if any, Max played in creating the document.¹³³ Alex’s understanding was that Max was sending the Banksia Expenses Spreadsheet to Mr Elliott senior, and that Alex was copied into the email “by default”; that is, in accordance with the usual practice of copying Alex to Mr Elliott senior’s communications.¹³⁴

68. Alex understood the Banksia Expenses Spreadsheet to be an itemised list of legal costs and disbursements that was being provided to Mr Trimbo for his report.¹³⁵ When Alex

¹²⁸ [SYM.001.001.4401].

¹²⁹ O’Bryan XN, 30 November 2020, T1481:9–31 [TRA.500.015.0001 at 0060]; Alex Elliott XN, 2 December 2020, T1688:8–21 [TRA.500.017.0001 at 0002].

¹³⁰ Alex Elliott XN, 2 December 2020, T1692:7 [TRA.500.017.0001 at 0006].

¹³¹ Email from Max Elliott to Mr Elliott senior and Alex on 21 November 2017 [AFP.007.001.0001].

¹³² Alex Elliott XN, 2 December 2020, T1691:27–1692:5 [TRA.500.017.0001 at 0005-0006].

¹³³ Alex Elliott XN, 2 December 2020, T1693:5–7 [TRA.500.017.0001 at 0007].

¹³⁴ Alex Elliott XN, 2 December 2020, T1693:9–12 [TRA.500.017.0001 at 0007].

¹³⁵ Alex Elliott XN, 2 December 2020, T1692:11–15 [TRA.500.017.0001 at 0006].

first saw the Banksia Expenses Spreadsheet, it was already populated with information.¹³⁶

69. Alex updated the Banksia Expenses Spreadsheet with additional information provided to him by Mr Elliott senior, specifically adding disbursement amounts and amending the amount of Mr O'Bryan's bill.¹³⁷ Alex could not recall how Mr Elliott senior had told him that Mr O'Bryan's bill had been amended,¹³⁸ which Alex assumed had been provided to Mr Elliott senior by Mr O'Bryan.¹³⁹ Alex says that he was not shown any of Mr O'Bryan's invoices.¹⁴⁰ Having updated the Spreadsheet in accordance with his father's instructions, Alex emailed it to his father.¹⁴¹
70. Alex's evidence should be accepted. Mr Elliott senior was very "hands on" with the finances of AFPL,¹⁴² and Alex did not know anything about Mr O'Bryan's fees and was not in a position to question or challenge those fees.¹⁴³ Mr O'Bryan confirmed that he had never discussed his fees with Alex, nor had he discussed his fees, their calculation or their payment in the presence of Alex.¹⁴⁴
71. Mr Elliott senior maintained expenses spreadsheets in the other cases he was involved in,¹⁴⁵ although Alex was not aware of them specifically, as Mr Elliott senior always dealt with them himself.
72. In these circumstances, Alex was not performing work that was indicative of him being a solicitor for Mr Bolitho and group members, or an in-house solicitor for AFPL.

Alex's involvement in AFPL's financial affairs (para 30 C, particular E)

73. Alex did not have any meaningful knowledge of the financial affairs of AFPL.

¹³⁶ Alex Elliott XN, 2 December 2020, T1692:8–10 [TRA.500.017.0001 at 0006].

¹³⁷ Alex Elliott XN, 2 December 2020, T1693:25–29 [TRA.500.017.0001 at 0007].

¹³⁸ Alex Elliott XN, 2 December 2020, T1693:30–1694:6 [TRA.500.017.0001 at 0007-0008].

¹³⁹ Alex Elliott XN, 2 December 2020, T1694:14–20 [TRA.500.017.0001 at 0008]; Alex Elliott XXN, 11 December 2020, T2128 [TRA.500.022.0001 at 0035]; T2131:11–19 [0038].

¹⁴⁰ Alex Elliott XN, 2 December 2020, T1694.6 [TRA.500.017.0001 at 0008].

¹⁴¹ Email from Alex to Mr Elliott senior dated 24 November 2017 [ABL.001.0599.00009] and attachment [ABL.001.0599.00010].

¹⁴² Alex Elliott XXN, 11 December 2020, T2111:20–22 [TRA.500.022.0001 at 0018].

¹⁴³ Alex Elliott XN, 2 December 2020, T1694:21–30 [TRA.500.017.0001 at 0008].

¹⁴⁴ O'Bryan XN, 30 November 2020, T1475:18–20 [TRA.500.015.0001 at 0054] T1477:29–1478:12 [0056-0057].

¹⁴⁵ Alex Elliott XXN, 11 December 2020, T2103:4–7 [TRA.500.022.0001 at 0010].

74. Mr Elliott senior was very “hands on” in managing the financial affairs of his businesses¹⁴⁶ and “wasn’t a great delegator”:¹⁴⁷ “If he could do something himself, he would.”¹⁴⁸ Alex described his father as “a control freak. He didn’t have a personal assistant. He did all those sort of things [administrative tasks of making payments] himself. That was just the nature of my Dad.”¹⁴⁹
75. Mr Elliott senior controlled access to the bank accounts and paid all legal costs and most disbursements himself.¹⁵⁰ Alex did not have access to the bank accounts.¹⁵¹ Occasionally, Alex would pay some small disbursements on the credit card.¹⁵² Alex never paid for legal costs.¹⁵³
76. On a few occasions, Alex was copied into emails with the accountant, Mr De Bono. For example, on 18 November 2017, Mr Elliott senior sent an email to Mr De Bono copying Alex.¹⁵⁴ Alex does not know why his father copied him to this email.¹⁵⁵ The best explanation is probably that Mr Elliott senior thought that there might have been some work to do in “chasing up” various documents or other miscellaneous matters, which he would have instructed Alex to do, and Mr Elliott senior “looped in” Alex at the beginning. That inference follows from the evidence that:
- a. Alex did not have any role in the relationship between Mr Elliott senior and his accountant Mr De Bono. Mr Elliott senior usually dealt directly with Mr De Bono and provided materials to Mr De Bono himself.¹⁵⁶
 - b. Alex recalls that he may have obtained documents for the auditor (who was also part of Mr De Bono’s firm).¹⁵⁷

¹⁴⁶ Alex Elliott XXN, 11 December 2020, T2111:20–22 [TRA.500.022.0001 at 0018].

¹⁴⁷ Alex Elliott XN, 1 December 2020, T1679:26–27 [TRA.500.016.0001 at 0092].

¹⁴⁸ Alex Elliott XN, 1 December 2020, T1679:28–1680:1 [TRA.500.016.0001 at 0092-0093].

¹⁴⁹ Alex Elliott XN, 2 December 2020, T1746:31–1747:2 [TRA.500.017.0001 at 0060-0061].

¹⁵⁰ Alex Elliott XN, 2 December 2020, T1746:10–12 [TRA.500.017.0001 at 0060].

¹⁵¹ Alex Elliott XN, 2 December 2020, T1751:1–2 [TRA.500.017.0001 at 0065].

¹⁵² Alex Elliott XN, 2 December 2020, T1746.12–14 [TRA.500.017.0001 at 0060].

¹⁵³ Alex Elliott XN, 2 December 2020, T1746.15 [TRA.500.017.0001 at 0060].

¹⁵⁴ [ABL.001.0600.00007].

¹⁵⁵ Alex Elliott XN, 2 December 2020, T1696:16 [TRA.500.017.0001 at 0010].

¹⁵⁶ Alex Elliott XXN, 9 December 2020, T1969:20–30 [TRA.500.020.0001 at 0038].

¹⁵⁷ Alex Elliott XN, 2 December 2020, T1697:14–23 [TRA.500.017.0001 at 0011].

- c. Mr De Bono's evidence that Mr Elliott senior would get "Alex or the boys" to chase up some item of information for the auditor.¹⁵⁸ That practice was explained by Mr Elliott senior not wanting to deal with "external people", avoiding doing so where he could (including by relying upon or interposing his sons).¹⁵⁹
77. The email from Mr Elliott senior to Mr De Bono referred to in the preceding paragraph is not probative of Alex being significantly involved in the financial affairs of AFPL. Alex was not asked to do anything in relation to the matters set out in that email by Mr Elliott senior, and there is nothing that indicates that Alex understood what Mr Elliott senior was discussing. A subsequent email from Mr Elliott senior to Mr De Bono dated 19 November 2017,¹⁶⁰ continuing the discussion from the previous day, is to similar effect—Alex's evidence was that he did not understand the figures being discussed in this email.¹⁶¹
78. The email from Mr Elliot senior to Mr Symons dated 5 April 2017 titled "FW: Downer settlement"¹⁶² is probative of Alex not having any involvement in the financial affairs of AFPL. This is the email chain where Mr O'Bryan "confirms" that he is acting on a no-win, no-fee basis to AFPL's auditor, and Alex has been dropped from the email chain before any statement to that effect is made.
79. There is nothing in the events surrounding the order that AFPL pay security for costs that shows Alex being involved in AFPL's financial affairs, let alone in any way that might suggest that his role was as an in-house solicitor for AFPL. Alex was not aware of any difficulty that AFPL might have had in meeting any order for security for costs.¹⁶³ Alex did not have any direct knowledge of the financial position of the funder and relied on what his father had told him.¹⁶⁴ Alex recalls that security for costs was paid by AFPL.¹⁶⁵

¹⁵⁸ De Bono XN, 30 November 2020, T1517:14–22 [TRA.500.015.0001 at 0096].

¹⁵⁹ Alex Elliott XN, 2 December 2020, T1697:24–31 [TRA.500.017.0001 at 0011].

¹⁶⁰ [ABL.001.0599.00008].

¹⁶¹ Alex Elliott XXN, 11 December 2020, T2110 [TRA.500.022.0001 at 0017].

¹⁶² [SYM.008.001.0017].

¹⁶³ Alex Elliott XN, 2 December 2020, T1753:7–30 [TRA.500.017.0001 at 0067].

¹⁶⁴ Alex Elliott XN, 2 December 2020, T1753:31–T1755:1 [TRA.500.017.0001 at 0067-0069].

¹⁶⁵ Alex Elliott XN, 2 December 2020, T1755:6 [TRA.500.017.0001 at 0069].

80. Alex did not know anything about the fee arrangements between AFPL and counsel. The only relevant document referred to in evidence by the Contradictor is the email from AFPL's auditor dated 29 November 2017:¹⁶⁶
- a. That email recorded the auditor asking AFPL's accountant, Mr De Bono, whether AFPL still had in place no-win, no-fee agreements with Messrs O'Bryan and Symons from the previous year, and whether any new no-win, no-fee agreements had been raised.
 - b. Mr De Bono forwarded the email to Mr Elliott senior, copying Alex, seeking confirmation of the position.
 - c. Mr Elliott senior removed Alex from the chain, and added Max Elliott, and then confirmed that the no-win, no-fee agreements with Messrs O'Bryan and Symons from the previous year were still in place, and did not respond to the question about whether any new no-win, no-fee agreements had been raised.
 - d. Mr De Bono explained that the only reason that Alex was included in the email was because of a practice to do so in case Mr Elliott senior wanted "the boys" to chase up some item of information for the auditor.¹⁶⁷
81. Alex agreed that his general practice was to read emails where he was copied into them,¹⁶⁸ but he maintained that he had never thought Messrs O'Bryan or Symons were on no-win, no-fee agreements:¹⁶⁹ "I just never thought that Norman and Michael were on a no win, no fee... I just — it never came across as anything of the sort was possible."¹⁷⁰ That evidence should be accepted.
82. The email from the auditor was not directed to the Bolitho Proceeding specifically but rather to all matters in which AFPL had retained Messrs O'Bryan and Symons. Messrs O'Bryan and Symons were counsel in other matters involving Mr Elliott senior (through AFPL or Elliott Legal), and Alex accepted in evidence that they might have been on no win, no fee arrangements in those other matters, although Alex does not know

¹⁶⁶ [MAZ.004.001.0423]; also at [ABL.001.0703.00068].

¹⁶⁷ De Bono XN, 30 November 2020, T1517:14–21 [TRA.500.015.0001 at 0096].

¹⁶⁸ Alex Elliott XXN, 11 December 2020, T2106:19–20 [TRA.500.022.0001 at 0013].

¹⁶⁹ Alex Elliott XN, 2 December 2020, T1698:31–1699:1 [TRA.500.017.0001 at 0012-0013], T1700:25 [0014].

¹⁷⁰ Alex Elliott XXN, 11 December 2020, T2107:29–2108:16 [TRA.500.022.0001 at 0014-0015].

whether or not that was so: “They were counsel for so many different matters they may have been I guess in other matters but it wasn’t something that I was across... Dad dealt with Norman and Michael about costs, I didn’t really deal with them.”¹⁷¹ Alex’s evidence that Mr Elliott senior dealt with counsel directly about costs, and Alex did not deal with counsel fees or costs, was consistent with Mr O’Bryan’s evidence.¹⁷²

The Trust Co Settlement Terms (para 30C, particular F)

83. On 9 November 2017, Alex attended the mediation that led to the Trust Co settlement. He did not have any substantive input. Alex was “sitting on the sidelines” of the negotiation and the settlement was his father’s deal.¹⁷³ Alex remembers the day well because it was Oaks Day, and he and Mr Bolitho watching the horse racing together during the day. That was the first time that Alex had met Mr Bolitho. Alex spoke with Mr Bolitho only about “basic chit-chat back and forth”, and did not play any substantive role at the mediation.¹⁷⁴
84. Alex helped to proofread the deed of settlement, including identifying consequential changes to numbering and figures.¹⁷⁵ This was to ensure accuracy of cross referencing and tracking of changes on versions being exchanged between the parties during negotiations: “there was always, you know, the risk that, I guess you could get the settlement deed back and it wouldn’t be marked up so you wouldn’t know what was coming in or out of the deed. So that was what I was doing now, just cross-referencing a clause that had been changed and because there were so many different clauses going in and out of that deed, all the numbering was always off.”¹⁷⁶
85. Alex was not engaged in any substantive analysis of the terms of the deed or any of the clauses, that was for Messrs O’Bryan, Symons and Zita.¹⁷⁷ Alex did not have any opinion about whether the terms of settlement were reasonable or unreasonable: “No, this was

¹⁷¹ Alex Elliott XN, 2 December 2020, T1700:27–29 [TRA.500.017.0001 at 0014].

¹⁷² O’Bryan XN, 30 November 2020, T1475:18–20 [TRA.500.015.0001 at 0054], T1477:29–1478:12 [0056-0057]; Alex Elliott XN, 2 December 2020, T1700:31–1701:1 [TRA.500.017.0001 at 0014-0015].

¹⁷³ Alex Elliott XXN, 10 December 2020, T2080:10–20 [TRA.500.021.0001 at 0048].

¹⁷⁴ Alex Elliott XN, 2 December 2020, T1710:4–8 [TRA.500.017.0001 at 0024].

¹⁷⁵ See email from Alex Elliott to Mr Elliott senior and Mr Symons dated 14 November 2017 [SYM.001.001.8964].

¹⁷⁶ Alex Elliott XN, 2 December 2020, T1708:1–16 [TRA.500.017.0001 at 0022].

¹⁷⁷ Alex Elliott XN, 2 December 2020, T1708:21–28 [TRA.500.017.0001 at 0022].

beyond me”.¹⁷⁸ Alex did not have the ability to make any substantive input: “this was beyond me, these were the big boys. Like this is a \$64 million settlement. I didn’t really have any ability or say in what was going to go into a settlement deed that was being looked at by half a dozen law firms and QCs and the like, no.”¹⁷⁹

Draft summons and notice to group members (para 30C, particular G)

86. Although Alex was copied to emails that enclosed drafts of the summons seeking approval of the Trust Co settlement, and the notice to group members, Alex did not draft these documents and did not have any substantive input into their content.¹⁸⁰ He was not asked to review them for any substantive purpose and did not do so: “It wasn’t really directed for my attention, it was for those guys to look at.”¹⁸¹ Alex being copied to these emails is just another example of him being copied into correspondence that concerned his father’s business, here, as the funder of a class action litigation that had just settled.
87. This is not probative of Alex being a solicitor for Mr Bolitho and group members, or as an in-house solicitor for AFPL.

The Bolitho Opinions (para 30C, particular H)

88. Alex received the Bolitho Opinions but did not read the First Bolitho Opinion page to page and might have just skimmed over it.¹⁸² Alex recalls preparing to go overseas at that time and did not have time to read it in detail.¹⁸³ Alex also saw it as being Counsel’s opinion, and that it was not his role to analyse or review whether their opinion was sound.¹⁸⁴ Even if Alex had anything to say about the Bolitho Opinions, Counsel would not have listened to him as he was so “inferior” to them.¹⁸⁵

¹⁷⁸ Alex Elliott XN, 2 December 2020, T1708:29–31 [TRA.500.017.0001 at 0022].

¹⁷⁹ Alex Elliott XN, 2 December 2020, T1708:29–1709:3 [TRA.500.017.0001 at 0022-0023].

¹⁸⁰ Alex Elliott XXN, 11 December 2020, T2172:15–22 [TRA.500.022.0001 at 0079].

¹⁸¹ Alex Elliott XXN, 11 December 2020, T2174:5–8 [TRA.500.022.0001 at 0081].

¹⁸² Alex Elliott XN, 2 December 2020, T1713:7-8 [TRA.500.017.0001 at 0027].

¹⁸³ Alex Elliott XN, 2 December 2020, T1713:11-17 [TRA.500.017.0001 at 0027].

¹⁸⁴ Alex Elliott XN, 2 December 2020, T1713:18-20 [TRA.500.017.0001 at 0027], Alex Elliott XXN, 10 December 2020, T2084:10-21 [TRA.500.021.0001 at 0052].

¹⁸⁵ Alex Elliott XN, 2 December 2020, T1713:21-30 [TRA.500.017.0001 at 0027].

89. Alex was overseas at the time of receiving the Second Bolitho Opinion and does not recall reading it at all.¹⁸⁶ Although in [SYM.001.002.3778], Mr Elliott senior says that “we’ve” provided comments in a context that might suggest Alex also provided comments on the Bolitho Opinion, what Mr Elliott actually meant by the use of this pronoun can never be known.¹⁸⁷ However, the fact is that Alex was overseas at the time of receiving the Second Bolitho Opinion.

The Settlement Distribution Scheme (para 30C, particular I)

90. Alex did not have any role in relation to the architecture of the settlement distribution scheme (SDS). Alex recalls that a figure was mentioned of \$20 per debenture holder for the SDS¹⁸⁸ but he did not have any role in determining that figure and did not have any thoughts about its correctness. Alex did not participate in this discussion. Mr Elliott senior was well versed in such matters and Alex did not involve himself in them.¹⁸⁹ Although Alex sent Mr Elliott senior a clause about “administration expenses” apparently in connection with another settlement distribution scheme,¹⁹⁰ that does not show Alex being involved in any substantive discussion about the SDS in the Bolitho proceeding.

The Script (para 30C, particular J)

91. Following the settlement of the Banksia class action, Alex was asked by Mr Elliott senior to prepare a script to be used by Mr Zita in Mr Zita’s communications with group members about the settlement.¹⁹¹ Mr Zita says that the script was prepared to ensure that everyone was consistent in their dealings with debenture holders.¹⁹²

¹⁸⁶ Alex Elliott XN, 2 December 2020, T1713:9-10 [TRA.500.017.0001 at 0027].

¹⁸⁷ Alex Elliott XXN, 11 December 2020, T2097 [TRA.500.022.0001 at 0004].

¹⁸⁸ Alex Elliott XN, 2 December 2020, T1714:22 [TRA.500.017.0001 at 0028].

¹⁸⁹ Alex Elliott XN, 2 December 2020, T1714:23-31 [TRA.500.017.0001 at 0028], Alex Elliott XXN, 11 December 2020, T2178:13-16 [TRA.500.022.0001 at 0085] and T2179-T2180 [0086-0087].

¹⁹⁰ [SYM.001.002.3872].

¹⁹¹ Alex Elliott XN, 2 December 2020, T1718:29–1719:2 [TRA.500.017.0001 at 0032-0033], T1720:29–1721:6 [0034-0035].

¹⁹² Zita XXN, 26 November 2020, T1313:10–27 [TRA.500.013.0001 at 0022].

92. The process that Alex adopted in preparing the script was to examine the notice to group members approved by Justice Croft,¹⁹³ and a “Q&A” section on the website maintained for the Banksia Class Action.¹⁹⁴ Alex had not himself drafted either of those documents.¹⁹⁵ Alex relied on these documents for the content of the script that he then produced, which he gave to Mr Elliott senior and Mr Zita for review.¹⁹⁶ Alex sent a draft to Mr Elliott senior by email on 14 December 2017.¹⁹⁷ Alex did not know at the time of preparing it that the script contained misleading information.¹⁹⁸
93. Prior to trial, Alex prepared a document cross referencing each point in the script with the Notice to Group Members and the Q&A document and explaining the source of each of the information for each part of the script.¹⁹⁹
94. In cross examination, Alex acknowledged that there is a discrepancy between the script and other documents as to the value to debenture holders of the settlement of the Trust Co remuneration claim.²⁰⁰ Alex says that the figure in the script came from his father.²⁰¹ He also says that the value determined by Messrs O’Bryan and Symons was based on their “full information about the remuneration claim”, and that he had “zero information” about the claim and did not turn his mind to its correctness.²⁰²
95. In light of the above evidence, the Court should find that Alex was not acting as a solicitor in the Bolitho Proceeding or in-house solicitor for AFPL in preparing the script, but was simply assembling the key points from two sources that had been prepared by others, and which were already in the public domain, one of which was an authenticated Court Order.

¹⁹³ [SYM.002.003.2274].

¹⁹⁴ [AEL.100.003.00001].

¹⁹⁵ Alex Elliott XN, 2 December 2020, T1719:16–17 [TRA.500.017.0001 at 0033].

¹⁹⁶ Alex Elliott XN, 2 December 2020, T1721:12 [TRA.500.017.0001 at 0035].

¹⁹⁷ See email from Alex to Mr Elliott senior of 14 December 2017 [ABL.001.0594.00005] attaching a draft script [ABL.001.0594.00006].

¹⁹⁸ Alex Elliott XXN, 11 December 2020, T2175:17–2176:23 [TRA.500.022.0001 at 0082-0083].

¹⁹⁹ A copy of the document prepared by Alex is at [AEL.100.074.0001] and an electronic transcription by his solicitor is at [AEL.100.073.0001]. Alex’s evidence about the sources, preparation and content of that document is at Alex Elliott XN, 2 December 2020, T1722:13–1726:31 [TRA.500.017.0001 at 0036-0040].

²⁰⁰ Alex Elliott XXN, 10 December 2020, T2052:15–2054:8 [TRA.500.021.0001 at 0020-0022].

²⁰¹ Alex Elliott XXN, 10 December 2020, T2054:24–25 [TRA.500.021.0001 at 0022].

²⁰² Alex Elliott XXN, 10 December 2020, T2054:24–31 [TRA.500.021.0001 at 0022], T2056:20–28 [0024].

Discussions about objections to the Trust Co Settlement (para 30C, particular K)

96. The documents referred to by the Contradictor do not show Alex having any meaningful involvement in the discussions about the objections that were made to the approval of the Trust Co Settlement approval application.

Instructing Mr Loxley in court (para 30C, particular L)

97. Alex denied that he instructed Mr Loxley,²⁰³ and there is no evidence that he did so. Alex was overseas at the time of the settlement approval application.²⁰⁴ The appearance slip relied on by the Contradictor records that Mr Loxley believed that he was instructed by “Elliott Legal”. However, that does not connect Alex with the attendance at Court, or the provision of instructions to counsel.

The Botsman appeal (para 30C, particular M)

98. Once Mrs Botsman had lodged an appeal from the settlement approval, Alex agrees that he became “more interested and more actively involved in what was happening... with AFPL”.²⁰⁵ Alex gave evidence that “I was starting to find my feet a bit more in 2018 and that was really referable to AFPL. I think as Your Honour just said, AFPL sort of became - got split from the pack a little bit and I accept that I was, you know, doing things for dad that was doing things for AFPL.”²⁰⁶

99. That evidence is wholly consistent with Alex’s role in the Bolitho Proceedings always having been that of an assistant to his father, on behalf of AFPL. When the appeal was lodged, AFPL’s stake in the litigation was in doubt, and it was natural for Alex, through his father, to have been drawn into the matter in that way.

100. The Contradictor relies on a series of emails where Alex is recorded as having done some tasks for his father. None of these are probative of the Contradictor’s allegations that

²⁰³ Alex Elliott XN, 3 December 2020, T1819:24-27 [TRA.500.018.0001 at 0043].

²⁰⁴ Alex Elliott XN, 3 December 2020, T1820:8-13 [TRA.500.018.0001 at 0044]. See appearance sheet listing Mr Loxley appearing at the settlement approval application on 31 January 2018 [CBP.001.001.0460 at 0465].

²⁰⁵ Alex Elliott XXN, 10 December 2020, T2081:15-21 [TRA.500.021.0001 at 0049].

²⁰⁶ Alex Elliott XXN, 10 December 2020, T2082:25-30 [TRA.500.021.0001 at 0050].

Alex was performing *legal* services for anyone during this time, either as a solicitor acting for Mr Bolitho and group members, or as in-house solicitor for AFPL.

101. On 3 March 2018, Mr Elliott senior had struck a “deal” with Mr Symons for AFPL to place Mr Symons on retainer, and Mr Elliott senior forwarded that email to Alex for Alex’s information.²⁰⁷ As the email shows, the deal had already been done. Alex’s response, “agreed”, was Alex “just being polite”²⁰⁸ and “agreeable”.²⁰⁹ Alex’s evidence was that Mr Elliott senior was just “looping me in”,²¹⁰ rather than seeking his input: “He’s done the deal prior to sending that to me, he’s not consulting me on aspects of the email.”²¹¹ Mr Elliott senior’s use of the acronym “fyi” supports that view.
102. AFPL’s retainer with Mr Symons reflects the reality that when Mr Elliott senior needed *legal* analysis or assistance, it was often Mr Symons to whom he turned. For example, on 2 August 2018, Mr Elliott senior emailed Mr Symons to ask him about the arguments that AFPL could make on the appeal (even though this was after Mr Symons had returned the brief for the debenture holders).²¹² Alex says that Mr Elliott senior often consulted Mr Symons in this way.²¹³
103. On 21 March 2018, while the matter was in the Court of Appeal, Alex sent an email to Mr O’Bryan (copying Mr Elliot senior) about a recent case that he had found in relation to the question of security for costs.²¹⁴ At the time Alex thought that it might be helpful to Mr O’Bryan and remembers Mr O’Bryan responding by saying something like “well done” to Alex. Alex forwarded that response to his brother Max boasting of “cred from a QC”.²¹⁵ This is not the performance of legal services. No one asked Alex to do this work, and it was not something likely to assist Mr O’Bryan. As Alex said, he was “just trying to impress Norman”.²¹⁶

²⁰⁷ [AEL.100.070.0001].

²⁰⁸ Alex Elliott XXN, 8 December 2020, T1883:25–27 [TRA.500.019.0001 at 0054].

²⁰⁹ Alex Elliott XXN, 8 December 2020, T1883:5–6 [TRA.500.019.0001 at 0054].

²¹⁰ Alex Elliott XXN, 8 December 2020, T1883:1–2 [TRA.500.019.0001 at 0054].

²¹¹ Alex Elliott XXN, 8 December 2020, T1883:25–28 [TRA.500.019.0001 at 0054].

²¹² [AEL.100.041.0001].

²¹³ Alex Elliott XXN, 10 December 2020, T2069:29-30 [TRA.500.021.0001 at 0054].

²¹⁴ [AFP.001.001.4188].

²¹⁵ Alex Elliott XN, 2 December 2020, T1758:25-27 [TRA.500.017.0001 at 0072].

²¹⁶ Alex Elliott XN, 2 December 2020, T1760:5-11 [TRA.500.017.0001 at 0074].

104. On 18 April 2018, Alex sent an email to Mr Elliott senior, setting out some comments on “the defence”, which appears to be a reference to the defence to AFPL’s application for an injunction to prevent Mrs Botsman’s appeal.²¹⁷ Plainly, Alex is acting in AFPL’s interest, and only in AFPL’s interest.
105. On 27 April 2018, Alex sent an email to Mr Elliott senior about a recent case involving security for costs.²¹⁸ No one asked Alex to seek out this case, and it was only sent to Mr Elliott senior.²¹⁹ Alex explained that he was “just showing dad something interesting that had happened in a court”.²²⁰
106. On 8 May 2018, Alex signed a witness statement in the proceeding commenced by AFPL seeking to restrain Ms Botsman from appealing the settlement approval.²²¹ Alex was qualified in that statement through his employment with AFPL in 2014, rather than as a solicitor for AFPL. The reason why Mr Elliott senior asked Alex to make the statement is because his father “didn’t want to be cross-examined and he thought it would be a good experience for me”; and because Alex “didn’t really know the ins and outs that well so there wasn’t a huge amount they could ask me about”.²²²
107. On 11 June 2018, Alex prepared a table for his father setting out various options in relation to AFPL’s funding commission.²²³ This is probative of Alex becoming more involved in the commercial affairs of AFPL, rather than being its in-house solicitor (and even less, a solicitor acting for Mr Bolitho and group members):
- a. Alex prepared the table in order to set out the various available calculations of the funder’s commission.²²⁴ He took the figure of 20% as being the lower end of the range, based on his father’s view that a funder’s commission was usually in the range of 20% - 30% of the settlement sum.²²⁵ Alex took the figure of 25% from

²¹⁷ [AEL.100.030.0001].

²¹⁸ [AEL.100.026.0001].

²¹⁹ Alex Elliott XXN, 9 December 2020, T1988:31-1989:2 [TRA.500.020.0001 at 0057-0058].

²²⁰ Alex Elliott XXN, 9 December 2020, T1987:24-27 [TRA.500.020.0001 at 0056].

²²¹ [AFP.100.011.0001].

²²² Alex Elliott XN, 1 December 2020, T1657.24-1658:1 [TRA.500.016.0001 at 0070-0071].

²²³ [ABL.001.0615.00020].

²²⁴ Alex Elliott XN, 3 December 2020, T1791:1-1793:13 [TRA.500.018.0001 at 0015-0017].

²²⁵ Alex Elliott XN, 3 December 2020, T1792:1-5 [TRA.500.018.0001 at 0016].

AFPL's claim in the partial settlement.²²⁶ Alex took the figure of 30% from the litigation funding agreements.²²⁷ Alex does not recall exactly where he found the figures for the various denominators, but it was either the Bolitho Opinions or from Mr Elliott senior.²²⁸

- b. Alex understood that the apportionment of the settlement sum as between the Bolitho Proceeding and the SPR proceeding was now a major issue in the case, and that it was Mr Elliott senior's view that the Bolitho Proceeding was substantially the stronger case of the two.²²⁹ However, Alex had earlier understood the SPR team to think that apportionment was not necessary, and that was in the context of Alex's understanding that the SPR was acting for all of the debenture holders.²³⁰ Alex did not understand how to quantify the denominator for any apportionment or commission analysis.²³¹
- c. None of this tends to suggest that Alex was acting in the capacity of a solicitor.

108. On 12 June 2018, after the first day of hearing in the Court of Appeal, Alex prepared a note for his father recording Alex's "thoughts" on the situation.²³² This note does not suggest that Alex was performing legal services as a solicitor for Mr Bolitho and group members, or as an in-house solicitor for AFPL. The note was prepared when Mr Elliott senior was in Europe.²³³ It was Alex summarising for Mr Elliott senior the live issues that fell out of day one of the appeal,²³⁴ done for the purpose of giving Mr Elliott senior a summary of the day's events.²³⁵ It was prepared for Mr Elliott senior only, and not for any other reason.²³⁶

²²⁶ Alex Elliott XN, 3 December 2020, T1792:8-13 [TRA.500.018.0001 at 0016].

²²⁷ Alex Elliott XN, 3 December 2020, T1792:14-16 [TRA.500.018.0001 at 0016].

²²⁸ Alex Elliott XN, 3 December 2020, T1793:7-13 [TRA.500.018.0001 at 0017].

²²⁹ Alex Elliott XN, 3 December 2020, T1794-1795 [TRA.500.018.0001 at 0018-0019].

²³⁰ Alex Elliott XXN, 10 December 2020, T2038 [TRA.500.021.0001 at 0006].

²³¹ Alex Elliott XXN, 10 December 2020, T2040:7-9 [TRA.500.021.0001 at 0008].

²³² [ABL.001.0643.00243].

²³³ Alex Elliott XN, 3 December 2020, T1787:26 [TRA.500.018.0001 at 0011].

²³⁴ Alex Elliott XN, 3 December 2020, T1787:29-31 [TRA.500.018.0001 at 0011].

²³⁵ Alex Elliott XN, 3 December 2020, T1788:11-12 [TRA.500.018.0001 at 0012].

²³⁶ Alex Elliott XN, 3 December 2020, T1789:6 [TRA.500.018.0001 at 0013]. See also Alex Elliott XXN, 9 December 2020, T2012:11-20 [TRA.500.020.0001 at 0081].

109. It is probative that Mr Elliott senior had been sitting at court with Alex for much of the day.²³⁷ As Alex said, the note was a mixture of a summary of the day, a summary of Mr O'Bryan's submissions, and what Mr Elliott senior had said to Alex about Mrs Botsman's appeal submissions,²³⁸ including in relation to the issues of apportionment and the relative contribution of the Bolitho team and the SPR team to the advancement of the case.²³⁹ That is consistent with Alex assisting his father in running the business of AFPL, and the fact that it is a legal case that is being discussed is a function of the fact that the business of AFPL is funding litigation. The email sets out the matters affecting AFPL's *commercial* position and its strategic outlook, and while the email also summarises Mrs Botsman's submissions in point form, it does not descend into any analysis of the legal issues underlying those matters.
110. There is no suggestion that this note somehow affected the conduct of the appeal by AFPL, or its position in the appeal. It is also probative that Alex never looked at the situation as him writing the memo "as a lawyer".²⁴⁰
111. On 13 June 2018, Alex sent an email about the "Caason case".²⁴¹ Alex had this case brought to his attention during the hearing of the appeal (and did not find it himself).²⁴² Alex thinks that Mr Elliott senior asked him to prepare the note²⁴³ and does not recall Mr Elliott senior doing anything with it.²⁴⁴
112. There is no inference to be drawn that Alex was performing legal services for AFPL, or anyone else, by his attendance at court during the hearing of the appeal. Alex did not, for example, sit at the bar table and instruct counsel.²⁴⁵ That the "client" or an agent of the client might attend court when their case is called on for hearing is routine.

²³⁷ Alex Elliott XXN, 9 December 2020, T1998:16-23 [TRA.500.020.0001 at 0067].

²³⁸ Alex Elliott XXN, 9 December 2020, T1989:28-31 [TRA.500.020.0001 at 0058].

²³⁹ Alex Elliott XXN, 9 December 2020, T1991.1-3 [TRA.500.020.0001 at 0060], T1997.6-14 [0066].

²⁴⁰ Alex Elliott XXN, 9 December 2020, T1999:19-25 [TRA.500.020.0001 at 0068].

²⁴¹ [AEL.100.048.0001]. See also Alex Elliott XN, 3 December 2020, T1784 [TRA.500.018.0001 at 0008].

²⁴² Alex Elliott XXN, 9 December 2020, T2029:10-15 [TRA.500.020.0001 at 0098].

²⁴³ Alex Elliott XXN, 9 December 2020, T2029:16-19 [TRA.500.020.0001 at 0098].

²⁴⁴ Alex Elliott XN, 3 December 2020, T1785:2 [TRA.500.018.0001 at 0009].

²⁴⁵ Alex Elliott XN, 3 December 2020, T1811:10 [TRA.500.020.0001 at 0035].

113. On 15 June 2018, Alex received an email from Mr Elliott senior attaching submissions made to the Court of Appeal.²⁴⁶ Although Mr Elliott senior asked Alex what he thought of the submissions, he was not asking for Alex's input on the submissions.²⁴⁷ The submissions had already been filed by the time that Alex received them. Rather, Mr Elliott senior was trying to involve Alex in the matter, consistent with his general practice of drawing Alex into the various family businesses.
114. On 17 June 2018, Mr Elliott senior forwarded to Alex an email chain flowing from a request made by Mr Elliott senior to Mr Symons, that Mr Symons speak with Paul Liondas (counsel for Trust Co) about various issues.²⁴⁸ Alex replies "interesting" five minutes after receiving the email, and it goes no further.
115. On 18 June 2018, Alex emailed Mr Elliott senior a summary of the Trust Co submissions.²⁴⁹ In these emails, Alex is setting out a summary at a high level of abstraction, of submissions made by another party. These emails show Alex applying his mind, which includes legal training, to assist his father by providing a short summary of Trust Co's submissions.
116. On 20 June 2018, Alex sent an email to his father discussing various aspects of the Trust Co settlement deed.²⁵⁰ Alex said that it was done for the purpose of providing it to counsel for AFPL,²⁵¹ which is essentially the "client" preparing material to send to the legal team. Alex did not need to do anything with the email after sending it to his father.²⁵²
117. On 24 June 2018, a Sunday night, there was a meeting at Mr Elliott senior's house between him, Messrs O'Bryan, Symons and Zita, which Alex attended. Mr Elliott senior had returned from overseas two days earlier, on 22 June 2018.²⁵³ The meeting was

²⁴⁶ [AEL.100.009.0001].

²⁴⁷ Alex Elliott XXN, 10 December 2020 T2047:17–26 [TRA.500.021.0001 at 0015].

²⁴⁸ [AEL.100.038.0001].

²⁴⁹ [AEL.100.019.0001], [AEL.100.021.0001]. See Alex Elliott XXN, 10 December 2020, T2050-2051 [TRA.500.021.0001 at 0018-0019].

²⁵⁰ [AEL.100.066.0001].

²⁵¹ Alex Elliott XN, 3 December 2020, T1812:22-25 [TRA.500.018.0001 at 0036].

²⁵² Alex Elliott XN, 3 December 2020, T1812:28-1813:3 [TRA.500.018.0001 at 0036-0037].

²⁵³ Alex Elliott XN, 2 December 2020, T1751:7 [TRA.500.017.0001 at 0065]; 3 December 2020, T1780:21–31 [TRA.500.018.0001 at 0004].

intended to discuss the position of AFPL in the Botsman appeal, once it had been joined as a party.²⁵⁴ Alex does not specifically recall the meeting, but recalls the issues set out in his note of the meeting being live issues at that time.²⁵⁵ Alex says that his note was prepared to record action items for Mr Elliott senior and AFPL.²⁵⁶ Mr Zita said that Alex's role at this meeting was to "pour the wines", and otherwise he was just sitting there not contributing, as was his usual conduct at meetings of the Bolitho legal team.²⁵⁷ This was corroborated by Mr O'Bryan.²⁵⁸

118. On 19 July 2018, Alex is copied to an email between Mr Elliott senior and ABL.²⁵⁹ Alex did not take any active role in this communication. The "draft submissions" mentioned in this document were not something that Alex was going to prepare.²⁶⁰
119. On 24 July 2018, Alex sent an email to Mr Elliott senior highlighting some clauses in the Trust Co settlement deed.²⁶¹ Alex pulled out important definitions and clauses in the deed of settlement and how they would interact with the interpretation of the deed being suggested by Justice Whelan. He did so on his father's instruction²⁶² and for the benefit of AFPL.²⁶³ Again, this appears to be the work of an assistant to Mr Elliott senior, and an agent for AFPL.
120. On 7 August 2018, at 12.39pm Alex sent an email to his father setting out draft instructions for his father to send to counsel on behalf of AFPL, ahead of ABL formally briefing him.²⁶⁴ We note that (as with many other emails sent to Alex by his father and vice versa) AFPL did not claim privilege over this email, which suggests that AFPL did not perceive that Alex was acting as in-house solicitor for AFPL. That Alex was not

²⁵⁴ Zita XXN, 26 November 2020, T1325:28-30 [TRA.500.013.0001 at 0033].

²⁵⁵ [AEL.100.020.0001]; Alex Elliott XN, 3 December 2020, T1783:1 [TRA.500.018.0001 at 0007].

²⁵⁶ Alex Elliott XN, 3 December 2020, T1783:19-26 [TRA.500.018.0001 at 0007].

²⁵⁷ Zita, XXN, 26 November 2020, T1324:25-T1325:8 [TRA.500.013.0001 at 0032-0033].

²⁵⁸ O'Bryan, Re-XN, 30 November 2020, T1504 [TRA.500.015.0001 at 0083].

²⁵⁹ [TRI.006.001.0004].

²⁶⁰ Alex Elliott XXN, 10 December 2020, T2060:27-2062:3 [TRA.500.021.0001 at 0028-0030].

²⁶¹ [AEL.100.032.0001].

²⁶² Alex Elliott XN, 3 December 2020, T1813:30-1814:26 [TRA.500.018.0001 at 0037-0038].

²⁶³ Alex Elliott XN, 3 December 2020, T1815:3 [TRA.500.018.0001 at 0039]; Alex Elliott XXN, 10 December 2020, T2063:9 [TRA.500.021.0001 at 0031].

²⁶⁴ [AEL.100.056.0001].

performing this role is also consistent with the fact that AFPL arranged for ABL to retain and instruct counsel.²⁶⁵

121. On 7 August 2018, at 5.11pm, Alex sent an email to Mr Elliott senior, setting out some issues affecting AFPL's position in the appeal.²⁶⁶ Alex prepared this document based on the written and oral submissions made to the Court of Appeal²⁶⁷ and for the purpose of "assisting dad to brief counsel for AFPL".²⁶⁸ The fact that the subject matter of the instructions concerned the application for approval of AFPL's funding commission is a function of AFPL's business being litigation funding, and its profits being tied up with the funding commission.
122. By mid-2018, there was a clear division between the position of Mr Bolitho and group members and the position of AFPL, and the documents tendered by the Contradictor relevant to the appeal show Alex engaged in the matter on behalf of AFPL. It is, with respect, untenable to suggest that he was acting as de facto solicitor for Mr Bolitho and group members at this time.
123. Although by this stage Alex had a "reasonable understanding" of the issues in the case from AFPL's perspective,²⁶⁹ this does not mean he was acting as its in-house solicitor. For example, when attending the Court of Appeal Alex says he was "sitting there I think just to help dad, just to fill him in while he was away. I never saw myself sitting there as a solicitor trying to I guess provide services or anything. I was just sitting there to help dad and keep across where I guess things were at generally with, you know, what he was involved in".²⁷⁰
124. In an affidavit sworn on 28 February 2020, John Mengolian (a partner of ABL and the solicitor acting for AFPL in the appeal) says that prior to Mr Elliott senior's death, his firm sometimes took instructions for AFPL from Alex on Mr Elliott senior's authority.²⁷¹ Alex recalls that he sometimes conveyed to ABL instructions given to him by Mr Elliott

²⁶⁵ Alex Elliott XN, 3 December 2020, T1819:22-23 [TRA.500.018.0001 at 0043].

²⁶⁶ [AEL.100.043.0001]

²⁶⁷ Alex Elliott XN, 3 December 2020, T1817:18-19 [TRA.500.018.0001 at 0041].

²⁶⁸ Alex Elliott XN, 3 December 2020, T1818:17-25 [TRA.500.018.0001 at 0042].

²⁶⁹ Alex Elliott XN, 3 December 2020, T1818:26-1819:18 [TRA.500.018.0001 at 0042-0043].

²⁷⁰ Alex Elliott XN, 3 December 2020, T1819:31-1820:7 [TRA.500.018.0001 at 0043-0044].

²⁷¹ [CRT.020.020.0001].

senior, which were usually very specific.²⁷² That Alex occasionally furnished instructions to ABL is not probative of Alex being a solicitor for Mr Bolitho and group members or in-house solicitor for AFPL. Rather, it tends to corroborate that Alex was his father's assistant, and an agent for AFPL.

The cheques (para 30C, particular N)

125. Following the first day of the appeal from the settlement approval, Mr O'Bryan sent an email to Mr Elliott senior with instructions to ensure that Messrs Symons and Zita were paid.²⁷³ This was prompted by Mr O'Bryan's apparent belief that Whelan J was going to ask whether Messrs Symons and Zita had in fact been paid when the hearing of the appeal was to resume.
126. Although Alex was in Court for much of the first day of the hearing of the appeal, there is nothing recorded in the transcript of that day which indicates why Mr O'Bryan thought that Whelan J was going to ask that question.
127. Mr Elliott senior was in Europe at the time of Mr O'Bryan's instruction,²⁷⁴ and he instructed Alex to attend to the "payment" of Messrs Symons and Zita by producing cheques with sums taken from the Third Trimbos Report, forward dating them, and then placing those cheques in envelopes with instructions that they not be opened by Messrs Symons and Zita until they had spoken with Mr Elliott senior.²⁷⁵
128. Alex prepared the cheques and signed them for Mr Elliott senior.²⁷⁶ It was common for Alex to apply Mr Elliott senior's electronic signature to documents.²⁷⁷ Alex does not know why the cheques are dated 1 July, rather than 1 August as instructed by his

²⁷² Alex Elliott XN, 1 December 2020, T1680:14 [TRA.500.016.0001 at 0093].

²⁷³ [ABL.001.0601.00003].

²⁷⁴ Alex Elliott XN, 2 December 2020, T1728:9-11 [TRA.500.017.0001 at 0042].

²⁷⁵ [ABL.001.0601.00003].

²⁷⁶ [CBP.004.009.0215], [AFP.003.001.0386], Alex Elliott XN, 2 December 2020, T1728:25-31 [TRA.500.017.0001 at 0042], T1729:6-13 [0043], T1729:23-28 [0043], Alex Elliott XXN, 8 December 2020, T1901:19-22 [TRA.500.019.0001 at 0072].

²⁷⁷ Alex Elliott XN, 2 December 2020, T1729:28 [TRA.500.017.0001 at 0043].

father.²⁷⁸ Alex left the cheques in Mr Elliott senior's office and did not deliver them.²⁷⁹ Alex does not recall putting the cheques into envelopes.²⁸⁰

129. Alex accepts that he would have read the passage from Mr O'Bryan that led to Mr Elliott senior asking Alex to prepare the cheques,²⁸¹ but he did not give any thought to the forward dating of the cheques.²⁸² Mr Elliott senior did not tell Alex why he wanted the cheques to be forward dated.²⁸³ Alex does not have a cheque book and he had not previously prepared many cheques.²⁸⁴ Alex did not like the idea of signing the cheques.²⁸⁵
130. In the end, Mr Elliott senior withdrew the instruction to deliver the cheques,²⁸⁶ and that is where the matter was left.²⁸⁷
131. There is nothing about the cheques episode that suggests that Alex was acting as solicitor for Mr Bolitho and group members or as in-house solicitor for AFPL. The preparation of these cheques was essentially administrative in nature.

The remitter (para 30C, particular O)

132. In relation to the allegation that "Alex Elliott was involved in and/or consented to AFPL's "Factual Admissions" dated 14 July 2020",²⁸⁸ this was not put to Alex at any time during his cross examination. The allegation must be taken to have been abandoned. In any event, Alex has made extensive admissions himself.
133. In relation to the allegation that "Alex Elliott has been involved in the conduct of the remitter", Alex gave evidence that after his father's death, he was in "quite a dark place and I really distanced myself generally from this case and anything to do with it."²⁸⁹

²⁷⁸ Alex Elliott XN, 2 December 2020, T1729:14-15 [TRA.500.017.0001 at 0043].

²⁷⁹ Alex Elliott XN, 2 December 2020, T1730:6-8 [TRA.500.017.0001 at 0044], T1733:29 [0047] T1734:11 [0048], Alex Elliott XXN, 9 December 2020, T2027:16-27 [TRA.500.020.0001 at 0096].

²⁸⁰ Alex Elliott XN, 2 December 2020, T1730:10 [TRA.500.017.0001 at 0044].

²⁸¹ Alex Elliott XN, 2 December 2020, T1730:15 [TRA.500.017.0001 at 0044].

²⁸² Alex Elliott XN, 2 December 2020, T1731:6 [TRA.500.017.0001 at 0045].

²⁸³ Alex Elliott XXN, 9 December 2020, T2016:3-4 [TRA.500.020.0001 at 0085].

²⁸⁴ Alex Elliott XN, 2 December 2020, T1731:8-10 [TRA.500.017.0001 at 0045].

²⁸⁵ Alex Elliott XXN, 9 December 2020, T2023:12 [TRA.500.020.0001 at 0092].

²⁸⁶ [AEL.100.047.0001].

²⁸⁷ Alex Elliott XN, 2 December 2020, T1732:26 [TRA.500.017.0001 at 0046].

²⁸⁸ [PLE.020.001.0001]

²⁸⁹ Alex Elliott XXN, 9 December 2020, T1971:6 [TRA.500.020.0001 at 0040].

134. After Mr Elliott senior's death, Alex was not in charge of AFPL's affairs, including in relation to this proceeding. It fell to the remaining directors of AFPL, and ABL, to attend to those matters.²⁹⁰
135. Alex was taken to the minutes of a meeting of the directors of AFPL on 30 March 2020 at 5.15pm, which recorded Alex as attending by invitation.²⁹¹ Alex gave evidence that he did not specifically recall attending the telephone meeting²⁹² but that he and the directors of AFPL spoke "quite often", and that during that period he "was just sort of trying to help out the directors after dad had died",²⁹³ "to give them whatever information I had at hand for them to continue operating the company."²⁹⁴
136. Alex's evidence was that "the information [he] had at hand" was information about "other cases as well that AFPL were funding", and "where things were at" with the remitter, based on his involvement during the preceding 12 months.²⁹⁵ Alex was providing information to the directors of AFPL, not instructions or directions.²⁹⁶
137. Alex was taken to a minute dated 30 March 2020 that referred to the Banksia proceedings and listed the directors of AFPL under the heading "Person Responsible" and included the comment, "Alex Elliott liaising and recommending to directors".²⁹⁷ Alex says he had not read those minutes and that he was not making recommendations to the directors, and that AFPL's directors were in primary contact with ABL.²⁹⁸
138. Alex agreed with the proposition in cross-examination that, after Mark Elliott's death, he was the only person left at AFPL with any knowledge of the day to day running of the Banksia litigation,²⁹⁹ but denied the suggestion that he was "in effect in charge of the conduct of the [Banksia] file after [Mr Elliott senior] died".

²⁹⁰ Alex Elliott XXN, 8 December 2020, T1900:5-8 [TRA.500.019.0001 at 0071].

²⁹¹ [ABL.900.0001.0005].

²⁹² Alex Elliott XN, 1 December 2020, T1681:21 [TRA.500.016.0001 at 0094].

²⁹³ Alex Elliott XN, 1 December 2020, T1681:26 [TRA.500.016.0001 at 0094].

²⁹⁴ Alex Elliott XN, 1 December 2020, T1682:3 [TRA.500.016.0001 at 0095].

²⁹⁵ Alex Elliott XN, 1 December 2020, T1682:8 [TRA.500.016.0001 at 0095].

²⁹⁶ Alex Elliott XN, 1 December 2020, T1682:12 [TRA.500.016.0001 at 0095].

²⁹⁷ [ABL.900.0001.00005].

²⁹⁸ Alex Elliott XXN, 9 December 2020, T1959:6 [TRA.500.020.0001 at 0028].

²⁹⁹ Alex Elliott XXN, 9 December 2020, T1957:24 [TRA.500.020.0001 at 0026].

139. It was ABL and AFPL's directors who were in charge of conducting the remitter. ABL continued to copy Alex on emails in relation to the remitter until he was joined as a party,³⁰⁰ and he spoke with them from time to time.³⁰¹ However, Alex denies that AFPL's directors relied on him: according to Alex "they relied on ABL and on their own judgment".³⁰² Alex said that "ABL really took carriage of the remitter after dad died and I didn't have a huge involvement in it."³⁰³
140. Alex was taken to a letter sent by ABL on behalf of AFPL on 22 April 2020 which referred to searches of Alex's emails, and gave evidence that the instructions informing that part of the letter had likely been provided by Mr Elliott senior prior to his death.³⁰⁴ It was not put to Alex he had given instructions to ABL on behalf of AFPL in relation to the conduct of the remitter following his father's death, and there is no evidence to suggest that he did.
141. Alex was taken to the minutes of a meeting of the directors of AFPL on 6 April 2020,³⁰⁵ where a director of AFPL raised the issue of AFPL's ongoing payment of legal fees to Elliott Legal.³⁰⁶ Alex gave evidence that Elliott Legal, on his decision, refunded past legal fees that it had charged.³⁰⁷
142. It was put to Alex that Mr Elliott senior had sent an email to Alex on 14 January 2020 attaching a large number of documents.³⁰⁸ Alex said that his father was "probably sending them to me to just collate, to give to ABL in hard copy or put in the Dropbox link, but that was the extent of my role."³⁰⁹
143. The contradictor asked Alex whether, after his father's death, Alex had reconsidered the discovery orders that had previously been made in respect of AFPL, and Alex said that he had not but had assumed that AFPL had already complied with its discovery

³⁰⁰ Alex Elliott XXN, 9 December 2020, T1980:12 [TRA.500.020.0001 at 0049].

³⁰¹ Alex Elliott XXN, 9 December 2020, T1959:12 [TRA.500.020.0001 at 0028].

³⁰² Alex Elliott XXN, 8 December 2020, T1900:9-16 [TRA.500.019.0001 at 0071].

³⁰³ Alex Elliott XXN, 9 December 2020, T1963:16 [TRA.500.020.0001 at 0032].

³⁰⁴ Alex Elliott XXN, 9 December 2020, T1963:18 [TRA.500.020.0001 at 0032].

³⁰⁵ [ABL.902.0001.00099].

³⁰⁶ Alex Elliott XN, 1 December 2020, T1682:27 [TRA.500.016.0001 at 0095].

³⁰⁷ Alex Elliott XN, 1 December 2020, T1682:27 [TRA.500.016.0001 at 0095].

³⁰⁸ See list of documents at [MSC.010.072.0007].

³⁰⁹ Alex Elliott XXN, 8 December 2020, T1837:28 [TRA.500.019.0001 at 0008].

obligations.³¹⁰ Alex gave evidence that ABL had asked him to search for some documents in response to discovery orders made in respect of AFPL in April and June 2020, and that he made those searches as requested.³¹¹

144. Alex's evidence is consistent with the information disclosed by AFPL's list of privileged documents³¹² relied upon by the contradictor at paragraph 30C particular "O". Alex communicated with the directors of AFPL during the remitter for the purpose of answering their questions about the litigation, and with ABL for the purpose of answering its questions about AFPL's discovery.
145. Of the seven documents listed in the discovered documents at [CRT.020.025.0001] that were initiated by Alex (with Alex under the heading "Sender"), the only one which is not prefaced by the word "Re:", signifying a reply, is an email dated 30 June 2020 to the directors of AFPL titled simply "Meeting".³¹³ Of the nine documents listed in document [MSC.010.072.0001] that were initiated by Alex (with Alex under the heading "Sender"), only two emails are not prefaced by the word "Re:", being the emails dated 28 July 2020 to ABL titled "bank statements" and "bank statements (2/2)".³¹⁴
146. The suggestion, based on these lists of documents, that Alex was "heavily involved" in the remitter do not go any further than what was canvassed in oral evidence, and do not support any allegation of active involvement in the conduct of the remitter. Alex was just giving facts to those who were running the remitter.
147. However, even if the Contradictor's allegations that Alex was involved in the conduct of the remitter are accepted, this does not establish that Alex was acting as the in-house solicitor for AFPL (and still less, as solicitor for Mr Bolitho and group members). The gist of the Contradictor's allegations is that Alex was giving instructions to ABL on behalf of AFPL: this is consistent with him being an agent of AFPL, not its in-house solicitor.

³¹⁰ Alex Elliott XXN, 8 December 2020, T1855:13 [TRA.500.019.0001 at 0026].

³¹¹ Alex Elliott XXN, 8 December 2020, T1927:26; XXN [TRA.500.019.0001 at 0098], Alex Elliott XX, 9 December 2020, T1964:29 [TRA.500.020.0001 at 0033], T1966:18 [0035]; see also [LAY.080.001.0001] at paragraph 15 [0007].

³¹² [CRT.020.025.0001]; [MSC.010.072.0001].

³¹³ [CRT.020.025.0001].

³¹⁴ [MSC.010.072.0001].

Conclusion

148. The evidence relied on by the Contradictor does not show:

- a. That Alex was acting as solicitor for Mr Bolitho and group members from 11 May 2017 (when he first obtained a practising certificate and became an “Australian legal practitioner”); nor
- b. That Alex was acting as in-house solicitor for AFPL from 22 November 2018 (when AFPL was joined as a party).

149. The evidence does show that by assisting his father, who was the managing director of AFPL, Alex was himself an agent of AFPL. However, in that capacity he was not subject to the overarching obligations.

ALLEGED CONTRAVENTIONS OF THE OVERARCHING OBLIGATIONS

151. This section of the submissions is structured as follows:

- a. An introduction and summary, setting out the issues to be determined and matters the Fifth Defendant submits should be kept in mind when examining the details of the evidence and the allegations made against him.
- b. A discussion of the key events, setting out the evidence in relation to those matters and submissions about what findings should be made.
- c. A response to the specific allegations set out in the CRLI.

INTRODUCTION AND SUMMARY

152. In determining whether Alex contravened his overarching obligations three questions will recur:

- a. Was Alex actually aware of any deceptions being committed by Mr O’Bryan, Mr Symons and AFPL?
- b. If not, should Alex have been aware of those deceptions?
- c. What should Alex have done in order to comply with his overarching obligations?

153. *First*, while Alex accepts with the benefit of hindsight that he did, at various times, have sufficient information available to him “to identify or at least have a query about whether there was a deception occurring”,³¹⁵ he never “put two and two together” until at some time during the remitter,³¹⁶ and there is no evidence that proves the contrary.

154. *Second*, the question whether Alex should have been aware of the deceptions must take into account the reality of his situation as a very junior and inexperienced lawyer who was involved in a legal proceeding that was being conducted by then eminent senior counsel, and who was being supervised by an extremely experienced legal practitioner who happened to be his father. The answer to this question must also take into account the complexity of the deception, and the difficulty of unravelling it.

³¹⁵ Alex Elliott Re-XN, 11 December 2020, T2186:8-11 [TRA.500.022.0001 at 0093].

³¹⁶ Alex Elliott XXN, 9 December 2020, T2019:26–28 [TRA.500.020.0001 at 0088].

155. In answering the second and third questions, the Court should also be careful to avoid imposing unreasonable and unrealistic standards on junior solicitors. For example, is a junior solicitor who files a summons required to independently verify the truth of every representation made within it? Or are they entitled to act on the assumption that senior counsel and/or their principal have a proper basis for making the representations? As Alex responded to a question from the Contradictor about whether what he had done “was the correct thing for you as a qualified and practising solicitor to do”:³¹⁷

It’s a difficult question. I mean at the time I’m being guided by, you know, incredibly superior people and I have an anticipation and expect that everything is being run in accordance with how it should be run. Looking back now I can see, you know, there are issues and it’s a really difficult, difficult position to be in. *I’m not really sure what I’m supposed to do.*

156. The question of what a person in Alex’s position should have done in order to comply with his overarching obligations is closely connected to the question whether any contravention by Alex materially contributed to any losses suffered by the debenture holders.

157. In his opening, the Contradictor suggested that Alex could have emailed Mr Trimbos to tell him “that what Symons is asserting is false”,³¹⁸ or could have informed Justice Croft “of his own volition ... the fact that the [Trimbos] report is misleading or that it has been procured by misleading information and instructions being provided to Trimbos”.³¹⁹ Although the Contradictor never tested these propositions with Alex in cross-examination, he did suggest some other steps that Alex could have taken:

- a. In relation to the “script”, the Contradictor suggested that Alex could have told Mr O’Bryan that he thought he had got the trustee remuneration figure wrong. Alex responded:

I’m a first year lawyer. Are you telling me I’m supposed to go to Norman O’Bryan and say, ‘Norman, your figures and how you calculate a trustee remuneration is

³¹⁷ Alex Elliott XXN, 8 December 2020, T1874:28-1875:5 (emphasis added) [TRA.500.019.0001 at 0045-0046].

³¹⁸ Contradictor’s opening, 2 November 2020, T1172:10-12 [TRA.500.011.0001 at 0054].

³¹⁹ Contradictor’s opening 2 November 2020, T1176:20-24 [TRA.500.011.0001 at 0058].

wrong', when I don't have any of the facts? I haven't been involved in the case since its commencement. It's not my position to do so.³²⁰

- b. The Contradictor suggested that Alex could have challenged his father about the "adverse settlement terms". Alex responded that his father "wasn't going to listen to me about a substantive change of a term in a settlement deed that was for \$64 million".³²¹
- c. The Contradictor suggested that Alex should have queried the fees that Mr O'Bryan had charged for trial preparation. Alex responded:

I mean at that time, like I'd been, I was freshly minted, I had been a solicitor for three weeks. I'm not sure I would have been in a position to question how senior counsel would prepare. The description's, it's pretty broad, I don't know whether he was doing different work for what.³²²

158. Finally, in re-examination Alex was asked "if you had at that time, or at any other time thereafter, put two and two together and identified or at least had concerns that there was deception and misleading conduct occurring, what could you or would you have done?" Alex responded that it was a "really hard question":

I'm not sure I could have done anything or influenced the outcome. I should, I would have gone and probably sought advice from a lawyer who was a family friend of mine and asked what I'm supposed to do, you know, should I remove myself from the situation, you know, should I try and do something else? But it's an incredibly difficult situation to be in and I would have had to have sought advice on it I think, Your Honour, as to what I could actually do.³²³

159. The difficulty of identifying a step that a person in Alex's position could have taken and that would have materially altered the outcome in this case means (the Fifth Defendant submits) that the Court should be slow to find that any alleged contravention by Alex materially contributed to any loss suffered by the debenture holders. We return to this argument in the next section of these submissions.

³²⁰ Alex Elliott XXN, 10 December 2020, T2056:29-2057:8 [TRA.500.021.0001 at 0024-0025].

³²¹ Alex Elliott XXN, 10 December 2020, T2083:21-23 [TRA.500.021.0001 at 0051].

³²² Alex Elliott XXN, 11 December 2020, T2171:3-8 [TRA.500.022.0001 at 0078].

³²³ Alex Elliott Re-XN, 11 December 2020, T2186:14-30 [TRA.500.022.0001 at 0093].

KEY PEOPLE AND EVENTS

The key people and their relationship with Alex

160. From 2016 onward, as Alex observed it, Mr Elliott senior's role in the Banksia class action was as the funder.³²⁴ Although Alex has not read the Bolitho No 4 decision,³²⁵ he became aware of the decision around the time that it was made, as he was involved in liaising with group members around that time.³²⁶ He understood that Mr Elliott senior could not be the funder and solicitor in the class action.³²⁷ Alex's understanding was, that from the time of that judgment, his father was acting as the funder, and not as the solicitor on the record.³²⁸
161. From what Alex observed and noticed, Mr Elliott senior gave instructions as the litigation funder, on behalf of group members who had signed the funding agreement.³²⁹ That is standard, as recognised in the terms of s 10(1)(d) of the CPA, which contemplate that a litigation funder would exercise substantial control over the conduct of litigation.
162. Mr Zita said that Mr O'Bryan steered the litigation, including the work and procedural steps to be taken.³³⁰ Mr Symons was the "workhorse" and did a lot of the drafting work. Mr Elliott senior was principally involved in the strategic decision making, and in his capacity as the managing director of the funder.³³¹ Mr O'Bryan and Mr Elliott senior made the decisions in the case, and to a lesser extent Mr Symons.³³²
163. Mr O'Bryan described the same distribution of responsibility in the case.³³³

³²⁴ Alex Elliott XN, 1 December 2020, T1660:19 [TRA.500.016.0001 at 0073].

³²⁵ Alex Elliott XXN, 8 December 2020, T1871:12 [TRA.500.019.0001 at 0042].

³²⁶ Alex Elliott XN, 1 December 2020, T1673:31 [TRA.500.016.0001 at 0086].

³²⁷ Alex Elliott XN, 1 December 2020, T1673:27 [TRA.500.016.0001 at 0086].

³²⁸ Alex Elliott XN, 1 December 2020, T1674:9 [TRA.500.016.0001 at 0087].

³²⁹ Alex Elliott, XN, 1 December 2020, T1674.19-21 [TRA.500.016.0001 at 0087].

³³⁰ Zita XN, 26 November 2020, T1303-1305 [TRA.500.013.0001 at 0011-0013].

³³¹ Zita XN, 26 November 2020, T1303-1305 [TRA.500.013.0001 at 0011-0013].

³³² Zita XN, 26 November 2020, T1303-1305 [TRA.500.013.0001 at 0011-0013].

³³³ O'Bryan Re-XN, 30 November 2020, T1506 [TRA.500.015.0001 at 0085].

164. Mr Zita trusted Messrs O’Bryan, Elliott senior and Symons to guide him in the litigation.³³⁴ Mr Zita had no reason to doubt the integrity of Messrs O’Bryan, Elliott senior or Symons.³³⁵
165. Mr O’Bryan said that Alex did not make any contribution to the content of any legal opinion or decision that was made,³³⁶ nor any advice or opinion prepared, nor the notice to group members, nor the settlement distribution scheme.³³⁷ Mr O’Bryan also said that Alex mostly stayed silent at meetings,³³⁸ and that his role was to assist the funder in its business.³³⁹
166. Alex said he “idolised” his father.³⁴⁰ Alex admired Mr Elliott senior’s “attention to detail”, how “he could get things done”, and his “incredible vision”,³⁴¹ and he was “a pretty special person”.³⁴² Alex had no reason to question his father’s honesty and integrity, and believed that he was an honest person.³⁴³ However, his father did not “respond positively to having independent views put to him” by Alex; and Alex thought that Alex’s views “were not something [his father] would consider”.³⁴⁴
167. Alex understood that Mr O’Bryan was the senior counsel for the class members.³⁴⁵ He had final say over the documents that were filed with the court, the correspondence, and appeared in court.³⁴⁶ Alex thought that Mr O’Bryan was “brilliant”,³⁴⁷ “ethical” and a “really amazing operator”.³⁴⁸ Alex understood that Mr O’Bryan was a Senior Counsel and Member of the Order of Australia.³⁴⁹ Alex did not have dealings of a personal

³³⁴ Zita XN, 26 November 2020, T1307 [TRA.500.013.0001 at 0015].

³³⁵ Zita XN, 26 November 2020, T1308:13-20 [TRA.500.013.0001 at 0016].

³³⁶ O’Bryan XN, 30 November 2020, T1463:30 [TRA.500.015.0001 at 0042].

³³⁷ O’Bryan XN, 30 November 2020, T1464:2-6 [TRA.500.015.0001 at 0043].

³³⁸ O’Bryan XN, 30 November 2020, T1464:11-12 [TRA.500.015.0001 at 0043].

³³⁹ O’Bryan XN, 30 November 2020, T1465:17-19 [TRA.500.015.0001 at 0044].

³⁴⁰ Alex Elliott XN, 1 December 2020, T1668:8 [TRA.500.016.0001 at 0081].

³⁴¹ Alex Elliott XN, 1 December 2020, T1668:10 [TRA.500.016.0001 at 0081].

³⁴² Alex Elliott XN, 1 December 2020, T1670:5 [TRA.500.016.0001 at 0083].

³⁴³ Alex Elliott XN, 1 December 2020, T1670:18 [TRA.500.016.0001 at 0083].

³⁴⁴ Alex Elliott XN, 3 December 2020, T1806:18-1807:4 [TRA.500.018.0001 at 0030-0031].

³⁴⁵ Alex Elliott XN, 1 December 2020, T1660:27 [TRA.500.016.0001 at 0073].

³⁴⁶ Alex Elliott XN, 1 December 2020, T1661:1 [TRA.500.016.0001 at 0074].

³⁴⁷ Alex Elliott XN, 1 December 2020, T1665:3 [TRA.500.016.0001 at 0078].

³⁴⁸ Alex Elliott XN, 1 December 2020, T1665:8-10 [TRA.500.016.0001 at 0078].

³⁴⁹ Alex Elliott XN, 1 December 2020, T1665:14-19 [TRA.500.016.0001 at 0078].

nature with Mr O’Bryan, perhaps because Mr O’Bryan viewed Alex as a “kid”.³⁵⁰ Alex had every reason to place substantial trust in Mr O’Bryan’s integrity, judgment and skill.

168. Mr Symons was junior counsel for the class members,³⁵¹ and most of his work was preparing drafts of documents for Mr O’Bryan to settle, doing research and appearing in court. Alex understood that Mr O’Bryan stood “on top” of Mr Symons.³⁵² Alex saw that Mr Symons and Mr Elliott senior worked very closely, with Mr Elliott senior running a lot of things past Mr Symons.³⁵³ Mr Symons became a personal mentor for Alex.³⁵⁴ Alex thought that Mr Symons was “brilliant”³⁵⁵ and had no reason to question his professional integrity.³⁵⁶
169. Alex understood that Mr Zita’s role in the case was as the solicitor on the matter, and to send correspondence, swear affidavits, file documents in court, and attend court to instruct counsel.³⁵⁷ Alex thought that Mr Zita seemed like a good operator.³⁵⁸ Alex did not have a “measuring stick” for such matters because he did not know many other solicitors. Mr Zita had been a lawyer for more years than Alex had been alive.³⁵⁹

Alex as his father’s “right-hand man”

170. Whether or not Alex is properly characterised as Mr Elliott senior’s “right hand man” is not probative of the issues in the case. In Mr Zita’s second affidavit,³⁶⁰ Mr Zita was specifically thinking about the role of Alex in the Banksia class action, and gave a complete and accurate picture of what he knew about Alex’s role in the case:³⁶¹
- a. Mr Elliott senior was always the person giving the instructions, not Alex, even if those instructions were communicated through Alex.³⁶²

³⁵⁰ Alex Elliott XN, 1 December 2020, T1665:23 [TRA.500.016.0001 at 0078].

³⁵¹ Alex Elliott XN, 1 December 2020, T1661:13 [TRA.500.016.0001 at 0074].

³⁵² Alex Elliott XN, 1 December 2020, T1661:21 [TRA.500.016.0001 at 0074].

³⁵³ Alex Elliott XN, 1 December 2020, T1662:7 [TRA.500.016.0001 at 0075].

³⁵⁴ Alex Elliott XN, 1 December 2020, T1665:30 [TRA.500.016.0001 at 0078].

³⁵⁵ Alex Elliott XN, 1 December 2020, T1666:1 [TRA.500.016.0001 at 0079].

³⁵⁶ Alex Elliott XN, 1 December 2020, T1666:5 [TRA.500.016.0001 at 0079].

³⁵⁷ Alex Elliott XN, 1 December 2020, T1662:9 [TRA.500.016.0001 at 0075].

³⁵⁸ Alex Elliott XN, 1 December 2020, T1667:12 [TRA.500.016.0001 at 0080].

³⁵⁹ Alex Elliott XN, 1 December 2020, T1667:10 [TRA.500.016.0001 at 0080].

³⁶⁰ [CCW.034.006.0001].

³⁶¹ Zita XXN, 26 November 2020, T1311:3-17 [TRA.500.013.0001 at 0019], T1314:24 [0022].

³⁶² Zita XXN, 26 November 2020, T1311:18-22 [TRA.500.013.0001 at 0019].

- b. Alex assisted Mr Elliott senior in monitoring the class action on behalf of AFPL.³⁶³
 - c. Alex worked in dealing with debenture holders, although that was only administrative work.³⁶⁴
 - d. Alex had a very limited role and was not part of the Bolitho legal team.³⁶⁵
 - e. When Mr Zita accepted the suggestion from Mr Jopling in cross examination that Alex did “leg work” for his father, the only leg work that Mr Zita had in mind was that set out in Mr Zita’s first and second affidavits.³⁶⁶ Similarly, when Mr Zita agreed with the proposition put by Mr Jopling that he exchanged correspondence with Alex and that Alex was actively involved in the case, that too was limited to that which is set out in the first and second affidavits.³⁶⁷
171. Mr Zita’s agreement with the proposition that Alex was his father’s “right hand man” does not take Mr Zita’s evidence any further than that which is set out in Mr Zita’s first and second affidavits. It was these matters only that Mr Zita had in mind when he agreed with Mr Jopling in that respect.³⁶⁸
172. Mr O’Bryan did not think that Mr Elliott senior had, or needed, any “right-hand man” saying that “in the period that we are talking about my observation was Alex was a very young man, he had only recently come out of law school and qualified. His father by contrast, you know, was many, many years older and had been a legal practitioner for more than 30 years, perhaps more than 35 years, and he didn’t, didn’t have a right-hand man so far as I observed.”³⁶⁹
173. Mr De Bono gave evidence that he didn’t agree with the characterisation of Alex as Mr Elliott senior’s “right-hand man”, because he “only ever saw Alex, as I mentioned earlier, in the office being called in for when he was needed on particular document. I

³⁶³ Zita XXN, 26 November 2020, T1311:24-25 [TRA.500.013.0001 at 0019].

³⁶⁴ Zita XXN, 26 November 2020, T1312:1-8 [TRA.500.013.0001 at 0020].

³⁶⁵ Zita XXN, 26 November 2020, T1312:9-15 [TRA.500.013.0001 at 0020].

³⁶⁶ Zita XXN, 26 November 2020, T1315:14-23 [TRA.500.013.0001 at 0023]. See affidavit of Anthony Zita sworn 30 April 2020 [CCW.036.001.0001] and affidavit of Anthony Zita sworn 12 June 2020 [CCW.034.006.0001].

³⁶⁷ Zita XXN, 26 November 2020, T1315:25-1316:7 [TRA.500.013.0001 at 0023-0024].

³⁶⁸ Zita XXN, 26 November 2020, T1317.24-31 [TRA.500.013.0001 at 0025].

³⁶⁹ O’Bryan XN, 30 November 2020, T1467:22–1468:2 [TRA.500.015.0001 at 0046-0047].

never was in a meeting where he was part of that meeting discussing the accounts or anything along those lines.”³⁷⁰

Summons for the partial settlement

174. In June 2016, Alex filed the summons seeking approval of the partial settlement.³⁷¹ Alex did this because Mr Zita was “jammed” and because the Elliott family offices were then in William Street. Alex printed off the summons, walked it up to the Court and filed it.³⁷² Alex’s role was simply to furnish it to the Registry.³⁷³ Alex was not admitted to practice at this time, and did not verify the contents of the summons.³⁷⁴

Class actions email accounts

175. Between about 24 April 2017 and 2 May 2017, Alex and Mr Zita’s “IT guy” together set up the class actions email accounts, at Mr Zita’s direction, based on a system agreed between Mr Zita and Mr O’Bryan. The facts are set out at paragraphs 59 to 61 above.

The Trust Co mediation

176. On 9 November 2017, Alex attended the Trust Co mediation, where he spent most of his time with Mr Bolitho making “chit chat” and did not make any substantive contributions. That event is discussed at paragraph 83 above.

The settlement deed

177. In November 2017, around the time of the time of the Trust Co mediation, the parties negotiated the settlement deed. Alex’s involvement was limited to proof-reading for cross-referencing and paragraph numbering, as set out at paragraph 84 above.

178. At the time of the execution of the settlement deed, Alex did not think that there was any problem with conflicts of interest.³⁷⁵ Alex was questioned in cross examination about whether he might have said something about AFPL’s position of conflict in the

³⁷⁰ De Bono XN, 30 November 2020, T1527:13–26 [TRA.500.015.0001 at 0106].

³⁷¹ [CBP.004.004.1652].

³⁷² Alex Elliott XN, 2 December 2020, T1711 [TRA.500.017.0001 at 0025].

³⁷³ Zita XXN, 26 November 2020, T1312:20-29 [TRA.500.013.0001 at 0020].

³⁷⁴ [SYM.002.001.5313].

³⁷⁵ Alex Elliott XXN, 10 December 2020, T2075:26-30 [TRA.500.021.0001 at 0043].

settlement negotiations,³⁷⁶ noting that Alex did raise an issue about it during the process of the consideration of terminating the deed.

179. Alex said that by the time that termination of the deed arose as an issue, his interest in the matter had substantially increased, and that “I was starting to find my feet a bit more in 2018 and that was really referable to AFPL. I as your Honour just said, AFPL sort of became – got split from the pack a little bit and I accept that I was, you know, doing things for dad and that was doing things for AFPL”.³⁷⁷ By this time, Alex also had the benefit of seeing Mrs Botsman’s submissions on the topic.
180. However, at the time of executing the deed, Alex was not concentrating on the conflicts issues because there were other more experienced people involved: “I had no idea about that when this was being negotiated... It wasn’t something that I, I turned an active mind to at this point in time because I had people far more superior doing the deal and negotiating terms.”³⁷⁸ Nor at this time had Alex been asked to read the litigation funding agreement or the Conflict Management Policy.³⁷⁹ Alex agreed that, by the time of his witness statement in the Botsman proceeding, being 8 May 2018, he had read through the Conflict Management Policy but says that he did not have a clause-by-clause understanding of it.³⁸⁰ Alex accepted that, although he couldn’t now remember considering the Conflict Management Policy in detail, he must have looked at the relevant clauses in 2018.³⁸¹ However, he had not turned his mind to the relationship between the relevant clauses and the alleged conflicts of interest: “It does appear at the time that I have gone to that clause and looked at it, I accept that. Actually thinking about the consequence of that clause with Michael and Norman and them drafting letters about terminations of settlement deeds is not something I recall triggering in my mind as a breach of the LFA.”³⁸²

³⁷⁶ Alex Elliott XXN, 10 December 2020, T2080 [TRA.500.021.0001 at 0048].

³⁷⁷ Alex Elliott XXN, 10 December 2020, T2082:26 [TRA.500.021.0001 at 0050].

³⁷⁸ Alex Elliott XXN, 10 December 2020, T2081:23–2082:9 [TRA.500.021.0001 at 0049-0050].

³⁷⁹ Alex Elliott XN, 1 December 2020, T1672:5–12 [TRA.500.016.0001 at 0085]. The Conflict Management Policy dated 16 March 2014 is at [AFP.006.001.0001].

³⁸⁰ Alex Elliott XXN, 10 December 2020, T2043:20–2044:29 [TRA.500.021.0001 at 0011-0012].

³⁸¹ Alex Elliott XXN, 10 December 2020, T2048:29–2050:23 [TRA.500.021.0001 at 0016-0018].

³⁸² Alex Elliott XXN, 10 December 2020, T2050:15–23 [TRA.500.021.0001 at 0018].

181. No one thought there was any problem with the deed, and that includes Mr Lindholm, and the SPR legal team. The day after the mediation, Mr Elliott senior and Mr Lindholm had a meeting where they agreed the costs and funding commission payable from the \$64m settlement.³⁸³ Alex knew that fact.
182. It is unrealistic to expect Alex to have held any opinion about the reasonableness, or otherwise, of the supposed “adverse settlement terms”:
- a. The settlement terms were advanced by Mr Bolitho’s senior counsel.
 - b. The settlement terms, and the costs and funding commission allocations, had been agreed to by Mr Lindholm, whose statutory duty was to look after the interests of debenture holders.
 - c. The Supreme Court would have to scrutinise and approve the deal before it took effect.
183. In these circumstances, Alex denies that he bears any responsibility for any “adverse settlement terms”.

The Bolitho Opinions

184. In January 2018, Messrs O’Byrne and Symons settled the First and Second Bolitho Opinions. Alex did not read the First Bolitho Opinion closely and did not read the Second Bolitho Opinion. The circumstances of the Bolitho Opinions are set out at paragraphs 88 to 89 above.

Notice to group members

185. The circumstances of the notice to group members are set out at paragraph 86 above.

Liaison with group members

186. The circumstances of Alex’s liaison with group members are set out at paragraphs 18, 55, 56(a) and 160 above.

³⁸³ Alex Elliott XXN, 10 December 2020, T2073:21-24 [TRA.500.021.0001 at 0041].

The Script

187. In around December 2017, Alex was asked by Mr Elliott senior to prepare a script for Mr Zita to use in his communications with group members. The circumstances of Alex's involvement in preparing the script are set out at paragraphs 91 to 95 above.
188. The false information in the script was derived from documents that were apparently reliable, including the Notice to Group Members which formed part of an authenticated Court Order. Alex was not in a position to, nor was he asked to, verify the accuracy of the statements contained in these documents.

Settlement Distribution Scheme

189. Alex was not involved in the design of the SDS. The evidence as to his limited knowledge of it is set out at paragraph 90 above.

The Banksia Expenses Spreadsheet

190. Alex's involvement in updating the Banksia Expenses Spreadsheet was limited, and he had no knowledge of the truth or otherwise of the figures contained in it or which he was asked to add to it. The evidence is set out at paragraphs 66 to 72 above.
191. Alex did not have any reason to think that the figures in the spreadsheet were not based on actual work done or fees properly incurred.³⁸⁴ Nor could Alex have had any reason to doubt those figures, given that he did not work in chambers with counsel, or sit in Mr Zita's office, and did not have any idea of the work that they had undertaken in the case.³⁸⁵
192. Alex was not aware of any supposed exercise in matching invoices to the figures set out in the Banksia Expenses Spreadsheet, and where Alex sought Mr Zita's invoices, that was only so that Alex could furnish that material to Mr Trimbos.³⁸⁶
193. There is nothing probative to be taken from the column of the spreadsheet headed "Invoice". Alex does not recall whether the Y or N meant that he had seen an invoice,³⁸⁷

³⁸⁴ Alex Elliott XN, 2 December 2020, T1695:22-27 [TRA.500.017.0001 at 0009].

³⁸⁵ Alex Elliott XN, 2 December 2020, T1695:20 [TRA.500.017.0001 at 0009].

³⁸⁶ Alex Elliott XXN, 11 December 2020, T2127 [TRA.500.022.0001 at 0034].

³⁸⁷ Alex Elliott XN, 2 December 2020, T1695:4 [TRA.500.017.0001 at 0009].

and it might have been to record whether any invoices had been collated for Mr Trimbos.³⁸⁸

194. There is nothing strange or surprising about Alex not having seen invoices in the matter prior to the Banksia Expenses Spreadsheet coming across his desk. The evidence established that Alex was not charged with managing the finances of AFPL or Elliott Legal: see paragraphs 73 to 82 above. Alex similarly did not see invoices from counsel in the Murray Goulburn litigation.³⁸⁹
195. Any suggestion that Alex was required to monitor legal costs proceeds on a false premise.³⁹⁰ In circumstances where two senior practitioners, Mr Elliott senior and Mr Zita, were each responsible for monitoring the costs of the litigation, it is unrealistic to suggest that “the junior solicitor on the file” (assuming, contrary to these submissions, that Alex was performing that role) should be under an obligation to effectively supervise their work.
196. Moreover, Alex did not know how Mr O’Bryan would prepare for a trial and was not in a position to question Mr O’Bryan about how he would do this.³⁹¹ Simply put, it was not Alex’s responsibility at AFPL to be scrutinising counsel fee slips and Alex had no reason to doubt the legitimacy of the information in the Spreadsheet.³⁹²

The Trimbos reports

197. The evidence as to Alex’s limited involvement in collating material for Mr Trimbos is set out at paragraphs 62 to 64 above.
198. Alex accepts that Mr Trimbos was instructed prior to receipt of Mr Zita’s invoices,³⁹³ but Alex understood that the figures being claimed for Mr Zita were told to Mr Elliott senior orally, and Alex did not know anything more about the matter.³⁹⁴

³⁸⁸ Alex Elliott XN, 2 December 2020, T1695:7 [TRA.500.017.0001 at 0009].

³⁸⁹ Alex Elliott XXN, 11 December 2020, T2104:29 [TRA.500.022.0001 at 0011].

³⁹⁰ See Alex Elliott XXN, 11 December 2020 T2132:5-8 [TRA.500.022.0001 at 0039].

³⁹¹ Alex Elliott XXN, 11 December 2020, T2168:20-23 [TRA.500.022.0001 at 0075], T2170:26 [0077], T2171:13 [0078].

³⁹² Alex Elliott XXN, 11 December 2020, T2171:14-21 [TRA.500.022.0001 at 0078].

³⁹³ [AFP.001.001.2226].

³⁹⁴ Alex Elliott XXN, 11 December 2020, T2139-T2142 [TRA.500.022.0001 at 0046-0049].

199. There is nothing in Alex's email to his father on 24 November 2017,³⁹⁵ attaching the Banksia Expenses Spreadsheet, that might suggest otherwise. Alex vaguely recalls having a conversation with Mr Zita as mentioned in this email, where he told Mr Zita to provide his invoices in final form so that they could be furnished to Mr Trimbo.³⁹⁶ In speaking with Mr Zita, Alex was acting on Mr Elliott senior's authority.³⁹⁷
200. Mr Zita confirmed³⁹⁸ Alex's evidence³⁹⁹ that Alex had asked Mr Zita to produce his final invoices, but had not done so in the terms recorded in the email from Alex to his father dated 24 November 2017, namely that "he will be left behind if he doesn't produce".⁴⁰⁰
201. Alex did not know when counsel had issued their invoices.⁴⁰¹
202. In relation to the amount of costs that Mr Trimbo was asked to opine about, Alex does not recall what work Mr Elliott senior had done on the Banksia matter prior to 2016 and did not know whether Mr Elliott senior had charged for reviewing discovery.⁴⁰² Alex did not know whether Mr Symons actually reviewed the discovered documents.⁴⁰³
203. Alex believed that there was a lot of work involved in gearing up for trial in the second half of 2017 as it did not seem that the matter would settle.⁴⁰⁴
204. Alex did not have any reason to doubt Mr O'Bryan's estimate of the length of the trial because Alex was not in a position to judge such matters, even if Mr O'Bryan's estimate was different to the agreed estimate presented to the Court⁴⁰⁵ (noting that Alex was not aware that such an estimate had been made to the Court).⁴⁰⁶

³⁹⁵ [ABL.001.0599.00009].

³⁹⁶ Alex Elliott XN, 2 December 2020, T1712:12 [TRA.500.017.0001 at 0026].

³⁹⁷ Alex Elliott XN, 2 December 2020, T1712:27 [TRA.500.017.0001 at 0026].

³⁹⁸ Zita XXN, 26 November 2020, T1316:9–1317:12 [TRA.500.013.0001 at 0024-0025] (referring back to XXN, T856:30–866:28 [TRA.500.008.0001 at 0072-0082]); and Zita XXN, 27 November 2020, T1381:4-18 [TRA.500.014.0001 at 0022].

³⁹⁹ Alex Elliott XN, 2 December 2020, T1712:9-28 [TRA.500.017.0001 at 0026].

⁴⁰⁰ [ABL.001.0599.00009].

⁴⁰¹ Alex Elliott XN, 2 December 2020, T1745:28-30 [TRA.500.017.0001 at 0059].

⁴⁰² Alex Elliott XN, 2 December 2020, T1737 [TRA.500.017.0001 at 0051].

⁴⁰³ Alex Elliott XN, 2 December 2020, T1738 [TRA.500.017.0001 at 0052].

⁴⁰⁴ Alex Elliott XN, 2 December 2020, T1738:13-28 [TRA.500.017.0001 at 0052].

⁴⁰⁵ Alex Elliott XN, 2 December 2020, T1739:12-17 [TRA.500.017.0001 at 0053].

⁴⁰⁶ Alex Elliott XN, 2 December 2020, T1739:18-22 [TRA.500.017.0001 at 0053].

205. In relation to the cancellation fee for counsel,⁴⁰⁷ Alex did not see anything untoward in this. Alex recalls Mr Elliott senior saying something about Mr O’Bryan being allowed to charge a cancellation fee and it did not seem unusual.⁴⁰⁸ Alex did not know whether there had been any (genuine) negotiation between Mr O’Bryan and Mr Elliott senior about the cancellation fee.⁴⁰⁹ Prior to this episode, Alex had not had any experience with cancellation fees for counsel.⁴¹⁰
206. Alex did not know at the time of the Trimbos reports whether Mr O’Bryan had actually been paid,⁴¹¹ and never had discussions with Mr Elliott senior or Mr O’Bryan about whether invoices should be marked paid or unpaid.⁴¹² Nor did Alex ever speak to either counsel about their fees.⁴¹³ Alex did not see an invoice from Mr O’Bryan until 2019.⁴¹⁴ Alex did not deal with this (financial) side of the business.⁴¹⁵
207. In light of the above matters, Alex was not in a position to notice any deceptive conduct involved with the Trimbos reports. Indeed, Mr Trimbos did not notice any such conduct, nor did he wonder about the probity of the fee slips presented to him (including, for example, in relation to counsel working a whole day on 3 January 2017). If Mr Trimbos did not notice a problem, it is unrealistic to think that Alex should have done.

Confidentiality of the Trimbos reports

208. An issue arose during the settlement approval application before Justice Croft about the confidentiality of the Trimbos reports. Mr Elliott senior opposed giving Mrs Botsman copies of the Trimbos report.⁴¹⁶ There is nothing about this situation that suggests that Alex knew or should have known that this was because there were “vulnerabilities” in the Trimbos report. Alex says that Mr Elliott senior’s opposition was

⁴⁰⁷ See [NOB.500.005.2262], [TRI.001.006.0072].

⁴⁰⁸ Alex Elliott XN, 2 December 2020, T1740:7-31 [TRA.500.017.0001 at 0054], T1741:30-T1742:10 [0055-0056], Alex Elliott XXN, 11 December 2020, T2145:15-21 [TRA.500.022.0001 at 0052].

⁴⁰⁹ Alex Elliott XN, 2 December 2020, T1742:20-21 [TRA.500.017.0001 at 0056].

⁴¹⁰ Alex Elliott XN, 2 December 2020, T1742:12 [TRA.500.017.0001 at 0056].

⁴¹¹ Alex Elliott XN, 2 December 2020, T1741:8 [TRA.500.017.0001 at 0055].

⁴¹² Alex Elliott XN, 2 December 2020, T1741:11 [TRA.500.017.0001 at 0055].

⁴¹³ Alex Elliott XN, 2 December 2020, T1742:17-18 [TRA.500.017.0001 at 0056].

⁴¹⁴ Alex Elliott XN, 2 December 2020, T1741:12-14 [TRA.500.017.0001 at 0055].

⁴¹⁵ Alex Elliott XXN, 11 December 2020, T2101:26 [TRA.500.022.0001 at 0008].

⁴¹⁶ [SYM.002.002.0505], [SYM.001.002.8843].

typical of his style, which was “don’t give anyone anything unless they ... claw it from you”.⁴¹⁷

209. Mr O’Bryan took the opposite view, writing that the “The notice of settlement published by court order clearly states that the cost consultant’s affidavit will be available for inspection at Portfolio Law. We must give it to him or we risk the settlement approval (not to mention raising suspicions as to why it’s been kept secret). This is a fuck up that we must fix quickly today so far as we are able to.”⁴¹⁸
210. Alex did not see anything suspicious in his father’s desire to keep the Trimbo’s report confidential because it was consistent with what he knew of his father that he “just wasn’t going to give anyone a leg up if they didn’t you know, absolutely try really hard to get it. So it didn’t, it doesn’t seem to me like he thought there were vulnerabilities in it or anything.”⁴¹⁹ And further, “that was his style, don’t give someone, or don’t give across extra things you don’t need to give. I never, I never had a conversation with him about him thinking the Trimbo’s report was vulnerable or anything of that nature.”⁴²⁰
211. At the time that Mr Trimbo’s was preparing his reports, Alex did not appreciate the significance of whether counsel fees were paid, or payable, as having any relevance to the funding commission to be paid in this case.⁴²¹
- a. In 2017 Alex thought that the funding commission depended on AFPL’s contractual entitlement to a commission;⁴²²
 - b. Mr Elliott senior never suggested to Alex that the funding commission turned in part on whether or not fees had actually been paid;⁴²³
 - c. Alex accepted that “It’s obviously an issue in dispute at the moment and a big reason why everyone is here. But at the time it was not something I ever turned

⁴¹⁷ Alex Elliott XN, 2 December 2020, T1744:19-20 [TRA.500.017.0001 at 0058], T1744-T1755 [0058-0059].

⁴¹⁸ Email from Mr O’Bryan dated 26 January 2018 [SYM.002.002.0505].

⁴¹⁹ Alex Elliott XN, 2 December 2020, T1744:21-25 [TRA.500.017.0001 at 0058].

⁴²⁰ Alex Elliott XN, 2 December 2020, T1745:14-21 [TRA.500.017.0001 at 0059].

⁴²¹ Alex Elliott XN, 2 December 2020, T1704:9-T1705:10 [TRA.500.017.0001 at 0018-0019].

⁴²² Alex Elliott XN, 2 December 2020, T1705:15 [TRA.500.017.0001 at 0019], T1689:26 [0003].

⁴²³ Alex Elliott XN, 2 December 2020, T1706:28-31 [TRA.500.017.0001 at 0020], T1707:1 [0021].

my mind to as a significant factor. I never considered whether something had been paid or payable or incurred.”⁴²⁴

- d. Alex never put “two and two together” that the amount of costs actually paid had any impact on the funding commission.⁴²⁵

212. That is not unreasonable. There is nothing in *Money Max*, or any of the authorities about funding commissions in class action settlements that expressly draws attention to the significance of the point. One needs to adopt a careful economic analysis to work out why that is so, by reference to the risk being undertaken.⁴²⁶ Alex accepted that he would have read the *Money Max* decision prior to the Trust Co settlement approval application,⁴²⁷ but maintained that he did not know that whether costs have actually been paid by the funder affected the funder’s commission.⁴²⁸ Alex first appreciated that point during the remitter, when it was raised by the Contradictor.⁴²⁹
213. Although Alex now understands the role of capital outlay in calculating a funding commission,⁴³⁰ at the time of the Trust Co settlement approval application he understood that the funding commission started with the contractual entitlement and then being upped to 20 per cent was fair value for all the work that AFPL had done (at that higher level of abstraction), and it was relevant to Alex that everyone involved (including the SPR) had agreed to AFPL’s commission claim.⁴³¹
214. Mr Elliott senior did not ever say or suggest to Alex that the funding commission turned in part on whether or not fees had actually been paid. Mr Elliott senior set out an analysis of AFPL’s legal costs liabilities in an email to Mr De Bono on 14 February 2019,

⁴²⁴ Alex Elliott XN, 2 December 2020, T1704:22–1705:3 [TRA.500.017.0001 at 0018-0019].

⁴²⁵ Alex Elliott XN, 2 December 2020, T1705:6 [TRA.500.017.0001 at 0019].

⁴²⁶ For example, if one assumes that counsel are retained on “deferred fee arrangements” as appears to have been Mr Elliott senior’s understanding – see [CCW.010.001.0022] – the funder’s “risk” in the litigation starts from the premise that it is the same risk as where counsel are paid on the usual basis of monthly invoices, but deducts from that an amount to reflect that the funder enjoys the benefit of not having to find cash to pay counsel monthly, and deducts further from that an amount to reflect the fact that counsel wear the risk of the funder being unable to pay when called upon. The first point would always result in some, small, deduction, and the second point might result in no deduction in some cases for an established and solid funder, or a large deduction in other cases with less solid funders.

⁴²⁷ Alex Elliott XXN, 10 December 2020, T2088:31 [TRA.500.021.0001 at 0056].

⁴²⁸ Alex Elliott XXN, 10 December 2020, T2091:21 [TRA.500.021.0001 at 0059].

⁴²⁹ Alex Elliott XXN, 10 December 2020, T2091:23-24 [TRA.500.021.0001 at 0059].

⁴³⁰ Alex Elliott XXN, 10 December 2020, T2093:7-9 [TRA.500.021.0001 at 0061].

⁴³¹ Alex Elliott XXN, 10 December 2020, T2094 [TRA.500.017.0001 at 0062].

copied to Alex and Max Elliott,⁴³² where he wrote that the “deferred fee” arrangement was a “contingent liability”, rather than a present liability, because it depended on a call by counsel for payment of their fees. Mr Elliott senior expressed this to be so, even though he also said in the same email that “eventually payment is required irrespective of the case outcome and it is not contingent on success”.

Class action checklists

215. In early 2018, Alex prepared “Class Action Checklists”.⁴³³ These were done across a couple of months, on Mr Elliott senior’s instruction.⁴³⁴ Alex cannot remember why he was asked to do them and cannot remember why he stopped preparing them, although it may have been because he did not think they were being read.⁴³⁵ The checklists were done in other matters on which Elliott Legal acted.⁴³⁶
216. There was no legal analysis involved in preparing the checklists, and “they were just procedural”.⁴³⁷ The checklists never analysed anything to do with the costs of the litigation.⁴³⁸ The checklists were not instructions to any person, they were just a record of things that needed to be done.⁴³⁹
217. Mr Elliott senior wanted a document setting out all upcoming procedural steps in the various legal proceedings in which he was involved. That is precisely what one would ask of a personal assistant. Significantly, at the time that Alex was doing this work for this father, his father did not have any other secretarial assistants, personal assistants or paralegals.⁴⁴⁰

⁴³² [CCW.010.001.0022].

⁴³³ An example is at [CBP.001.002.1067]. See Alex Elliott XN, 1 December 2020, T1676:26 [TRA.500.016.0001 at 0089].

⁴³⁴ Alex Elliott XN, 1 December 2020, T1677:8–9 [TRA.500.016.0001 at 0090]. During the time that Alex prepared the checklists, Mr Elliott senior did not have any secretarial or paralegal assistance: Alex Elliott XN, 1 December 2020, T1679:5 [TRA.500.016.0001 at 0092].

⁴³⁵ Alex Elliott XN, 1 December 2020, T1677 [TRA.500.016.0001 at 0090].

⁴³⁶ Alex Elliott XN, 1 December 2020, T1678:1 [TRA.500.016.0001 at 0091].

⁴³⁷ Alex Elliott XN, 1 December 2020, T1678:27 [TRA.500.016.0001 at 0091].

⁴³⁸ Alex Elliott XN, 1 December 2020, T1678:25 [TRA.500.016.0001 at 0091].

⁴³⁹ Alex Elliott XN, 1 December 2020, T1678:30-1679:2 [TRA.500.016.0001 at 0091-0092].

⁴⁴⁰ Alex Elliott XN, 1 December 2020, T1679:3-5 [TRA.500.016.0001 at 0092].

Clause re administration expenses

218. In January 2018, Alex responded to a request from his father to find, and copy and paste into an email, a specific clause regarding the administration expenses of what seems to be a settlement distribution scheme in another matter.⁴⁴¹ Alex did so.⁴⁴² This is a specific and narrow task which does not indicate that Alex was, or should have been, aware of any deceptive conduct.

Alex's involvement in AFPL's financial affairs

219. This matter is discussed in paragraphs 73-82 above, and the evidence suggests that Alex did not have any involvement in AFPL's financial affairs.

Alex's role in the appeal

220. This matter is discussed in paragraphs 98-124 above.

Seeking security for costs from Mrs Botsman

221. On 7 May 2018, the Court of Appeal refused an application for security for costs made by AFPL, in respect of the appeal by Mrs Botsman from the settlement approval.⁴⁴³

222. Alex thought that seeking security for costs was a "just a standard step in litigation", and that since Messrs O'Bryan, Symons, Zita and Elliott senior were "happy to do it", he was not in a position to question that.⁴⁴⁴ Alex was aware of other cases where security for costs had been sought against AFPL or a client for whom Elliott Legal was acting, so he did not consider it to be "unusual".⁴⁴⁵

AFPL's suit for an injunction and Alex's witness statement

223. On 7 June 2018, Justice Robson dismissed AFPL's application for an injunction against Mrs Botsman, seeking to restrain her maintaining her appeal.⁴⁴⁶ Alex signed a witness statement on 8 May 2018 in the proceeding commenced by AFPL seeking to restrain

⁴⁴¹ [SYM.001.002.3872].

⁴⁴² Alex Elliott XN, 2 December 2020, T1715 [TRA.500.017.0001 at 0029].

⁴⁴³ *Botsman v Bolitho & Ors* [2018] VSCA 111 [ATH.600.260.0001].

⁴⁴⁴ Alex Elliott XN, 2 December 2020, T1759:10-17 [TRA.500.017.0001 at 0073].

⁴⁴⁵ Alex Elliott XN, 2 December 2020, T1760:24-1761:1 [TRA.500.017.0001 at 0074].

⁴⁴⁶ *Australian Funding Partners Limited v Botsman* [2018] VSC 303 [ATH.600.259.0001].

Ms Botsman from appealing the settlement approval.⁴⁴⁷ This is discussed above at paragraphs 33 and 106.

224. In relation to AFPL's claim for an injunction to prevent Mrs Botsman maintaining her appeal, ABL and counsel for AFPL were the legal practitioners in the matter. Alex's role was again, assisting his father and thereby acting as an agent of AFPL. In that context, there is nothing unusual about Alex assisting his father to instruct ABL.⁴⁴⁸

Proposed termination of the settlement deed by AFPL

225. In mid-June 2018, Mr Elliott senior was considering sending a letter to the SPR that would terminate the deed of settlement.⁴⁴⁹

226. Alex thought that the settlement was a good deal and that it did not need to be terminated. He thought that it was "just going to cause more chaos than ... its utility".⁴⁵⁰ This is because Alex thought that terminating the deed would end the collaboration between the Bolitho team and the SPR team,⁴⁵¹ might result in Trust Co not wanting to do another deal,⁴⁵² and might not therefore be in the interests of group members.⁴⁵³ In addition, Alex said "It just didn't feel right", because it would look like AFPL "had a bit too much ... control over the matter".⁴⁵⁴

227. On 14 June 2018, Alex sent an email to his father setting out his concerns.⁴⁵⁵ In writing the email, Alex was not thinking "about the ethical position of Mr O'Bryan and Mr Symons";⁴⁵⁶ nor was Alex thinking of the issue as an "ethical problem" for AFPL.⁴⁵⁷ Rather, Alex was concerned that his father would "want to make sure you can do a better deal if you want to cancel this one".⁴⁵⁸

⁴⁴⁷ [AFP.100.011.0001].

⁴⁴⁸ [AEL.100.030.0001]; Alex Elliott XN, 2 December 2020, T1786:5-15 [TRA.500.018.0001 at 0010].

⁴⁴⁹ [NOB.500.003.5729].

⁴⁵⁰ Alex Elliott XN, 3 December 2020, T1799:14-24 [TRA.500.018.0001 at 0023], Alex Elliott XXN, 10 December 2020, T2067:19-30 [TRA.500.021.0001 at 0035].

⁴⁵¹ Alex Elliott XN, 3 December 2020, T1800:4-9 [TRA.500.018.0001 at 0024].

⁴⁵² Alex Elliott XN, 3 December 2020, T1801:17-22 [TRA.500.018.0001 at 0025].

⁴⁵³ Alex Elliott XN, 3 December 2020, T1800:10-19 [TRA.500.018.0001 at 0024].

⁴⁵⁴ Alex Elliott XN, 3 December 2020, T1801:5-9 [TRA.500.018.0001 at 0025].

⁴⁵⁵ [AEL.100.058.0001].

⁴⁵⁶ Alex Elliott XXN, 10 December 2020, T2037:16-30 [TRA.500.021.0001 at 0005].

⁴⁵⁷ Alex Elliott XXN, 10 December 2020, T2035:18-27 [TRA.500.021.0001 at 0003].

⁴⁵⁸ Alex Elliott XXN, 10 December 2020, T2035:18-27 [TRA.500.021.0001 at 0023].

228. Alex understood that Mr Elliott senior was acting as the Managing Director of AFPL in purporting to terminate the deed.⁴⁵⁹ In challenging his father, Alex was wearing the hat of “an interested son”, who was “just trying to help dad, just give some thoughts to dad so that he could think about them. He clearly didn’t have regard to them”.⁴⁶⁰ Questioning his father’s judgment in this way was not something Alex would normally do, and he “would have been a bit scared of sending” the email.⁴⁶¹
229. The termination letter was actually drafted by Mr Symons, with edits being made by Mr O’Bryan.⁴⁶² In sending the email to the SPR, Alex strictly followed his father’s instructions, as it was above his “pay grade” to have any substantive input into the content or recipients of the letter.⁴⁶³
230. There is nothing in this transaction which suggests that Alex was aware of the detailed and complicated issues regarding conflicts management. Even if it did, it is hard to see how Alex having some awareness of AFPL being in a position of conflict has any rational connection with any loss suffered by debenture holders. The episode is also illustrative of Alex’s lack of influence over the conduct of the proceedings or the key players: as Alex noted, his father “clearly didn’t have regard” to his concerns.

The cheques

231. As set out above in paragraphs 125–131 above, in June 2018, Alex prepared two cheques, one to Mr Symons and one to Mr Zita, on the instructions of Mr Elliott senior.
232. One inference from this episode is that Mr Elliott senior was willing to create a false basis for Mr O’Bryan to be able to tell the Court that Messrs Symons and Zita had in fact been paid, without having to actually pay them.
233. However, Alex himself did not give any thought to whether Mr O’Bryan was engaging in some deception on the Court in his email to Mr Elliott senior,⁴⁶⁴ and there was no reason for him to do so. As noted above, Alex did not understand that there was an

⁴⁵⁹ Alex Elliott XN, 3 December 2020, T1802:11–15 [TRA.500.018.0001 at 0026].

⁴⁶⁰ Alex Elliott XN, 3 December 2020, T1802:16–22 [TRA.500.018.0001 at 0026].

⁴⁶¹ Alex Elliott XN, 3 December 2020, T1806:18–1807:9 [TRA.500.018.0001 at 0030–0031].

⁴⁶² Alex Elliott XXN, 10 December 2020, T2047:2–10. See also [NOB.500.003.5728].

⁴⁶³ Alex Elliott XN, 3 December 2020, T1808:17–22 [TRA.500.018.0001 at 0032].

⁴⁶⁴ Alex Elliott XN, 2 December 2020, T1731:16 [TRA.500.017.0001 at 0045].

issue in the appeal as to whether costs had been paid or not.⁴⁶⁵ Alex never would have thought that Mr O'Bryan would try to make a misleading representation to the Court of Appeal, "given his standing",⁴⁶⁶ or that Mr O'Bryan would put Alex in a position to mislead the Court of Appeal.⁴⁶⁷

234. Alex did not see the cheques as a "big deal" at the time because he never really understood ... the gravity of what was going on".⁴⁶⁸ Nor did Alex think he was in any position to question an instruction given to him by his father on the instruction of Mr O'Bryan.⁴⁶⁹ Alex saw the cheques as being "almost procedural", in the sense that Mr O'Bryan is asking for something to be done before court, and it was "just an instruction, Do this, get it done, cheers".⁴⁷⁰
235. Alex now accepts that by receiving forward dated cheques, Messrs Symons and Zita would not have been "paid", but says that he did not think about that issue at the time.⁴⁷¹ The cheques episode should also have revealed to Alex that Messrs Symons and Zita had not yet been paid. Armed with that knowledge, Alex might have been able to go back to the Bolitho Opinions and the settlement approval application and notice that a claim had been made that Messrs Symons and Zita had been paid. That he did not do so is, we submit, explained by the trust he placed in the integrity of Mr O'Bryan and his father.
236. In the end, the cheques did not contribute to any part of the deception or any loss of the debenture holders. Their significance could only be as an indication of Alex's knowledge of a deception, and for the reasons above, no such inference should be drawn.

⁴⁶⁵ Alex Elliott XN, 2 December 2020, T1731:22-23 [TRA.500.017.0001 at 0045], see also Alex Elliott XN, 9 December 2020, T2013:15-25 [TRA.500.020.0001 at 0082], T2014 [0083].

⁴⁶⁶ Alex Elliott XN, 2 December 2020, T1731:25-31 [TRA.500.017.0001 at 0045].

⁴⁶⁷ Alex Elliott XN, 9 December 2020, T2018:6-17 [TRA.500.020.0001 at 0087].

⁴⁶⁸ Alex Elliott XN, 2 December 2020, T1732:27-1733:1 [TRA.500.017.0001 at 0046-0047].

⁴⁶⁹ Alex Elliott XN, 2 December 2020, T1733:2-11 [TRA.500.017.0001 at 0047].

⁴⁷⁰ Alex Elliott XN, 2 December 2020, T1731:31-1732:16 [TRA.500.017.0001 at 0045-0046].

⁴⁷¹ Alex Elliott XN, 9 December 2020, T2018:30-2019:3 [TRA.500.020.0001 at 0087-0088].

Fee Agreements with Counsel

237. This issue is discussed in paragraph 80 above. Further to that discussion, in an email from Mr Elliott senior to Mr De Bono dated 14 February 2019, copying Alex and Max,⁴⁷² Mr Elliott senior explained to Mr De Bono that the business of AFPL includes retaining counsel on various bases, including traditional no-win, no-fee arrangements, or “deferred fee” arrangements. This differing basis for retaining counsel suggests that Alex cannot be fixed with any specific knowledge about the Banksia class action from that email.
238. Alex was not copied to the email where Mr Elliott senior confirmed the arrangements being in place. The choice by Mr Elliott senior to omit Alex and substitute Max to the email chain fortifies the claim that Alex was not involved in the financial affairs of AFPL and in particular was not charged with any responsibility in relation to counsel fees. Further, taken with the first point above, Alex cannot be taken to have absorbed any information about counsel acting on a no-win, no-fee basis in the Banksia class action. Nothing in cross examination of Alex revealed anything different.⁴⁷³
239. In an email chain that initially included Alex, where Mr Elliott senior sought Mr O’Bryan’s confirmation that he is acting on a no-win, no-fee arrangement, Mr O’Bryan dropped Alex from the email chain before confirming that he was acting on a no-win, no-fee basis to AFPL’s auditor.⁴⁷⁴ Alex’s deliberate omission is probative of Alex not having any awareness of there being no-win, no-fee agreements in place, for, if Alex was aware of such matters, there would not be any sense in breaking from the routine practice of “replying all” and omitting Alex from the chain.
240. Until 3 August 2020 for Mr O’Bryan, and apparently until 6 August 2020 for Mr Symons (announced to the Court on 13 August 2020), counsel for Mr Bolitho maintained a position in this case that they were not acting on a no-win, no-fee basis in the Banksia class action, and that instead, it was a deferred fee arrangement. Whatever might have been the true arrangement, in circumstances where Alex did not have discussions with

⁴⁷² [CCW.010.001.0022].

⁴⁷³ Alex Elliott XXN, 11 December 2020, T2109 [TRA.500.022.0001 at 0016].

⁴⁷⁴ [SYM.008.001.0017].

counsel about their fees, it is unrealistic to think that Alex would have been able to work out for himself that counsel were acting on a no-win, no-fee basis (if that be the case).

AFPL Directors Meetings

241. This is discussed at paragraphs 133-139 above.

SPECIFIC CONTRAVENTIONS ALLEGED IN THE CRLI

242. The contraventions alleged against Alex by the Contradictor are summarised in paragraph 5 above. They include several allegations that Alex contravened the overarching obligation to refrain from engaging in any conduct which is misleading or deceptive or likely to mislead or deceive.⁴⁷⁵ Before turning to the alleged contraventions we discuss the content of that duty.
243. We also note that many of the Contradictors' allegations involve allegations of serious wrongdoing, including allegations that the various parties (including Alex) breached their overarching obligations to act honestly and not to engage in misleading or deceptive conduct. In determining whether such matters have been proved the Court is required to take into account the gravity of the allegations,⁴⁷⁶ and to apply the *Briginshaw* principles.⁴⁷⁷

The obligation not to mislead or deceive

244. Section 21 of the CPA provides that:

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

- (a) misleading or deceptive; or
- (b) likely to mislead or deceive.

245. The Contradictor alleges that Alex has breached section 21 of the CPA by engaging in conduct that was misleading or deceptive.⁴⁷⁸ In each instance, except for the alleged Summons Contravention, the conduct alleged against Alex is either that:
- a. Alex knew or “must have known” of other alleged wrongdoing but failed to bring it to the Court’s attention;⁴⁷⁹

⁴⁷⁵ CPA, s 21.

⁴⁷⁶ *Evidence Act 2008*, s 140(2)(c).

⁴⁷⁷ *Giles v Jeffrey* [2016] VSCA 314, [120]-[123] (*Giles*) [ATH.600.264.0001 at 0042-0043]; and *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)* (2014) 48 VR 1, [108] [ATH.600.263.0001 at 0042]; referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336 [ATH.600.261.0001].

⁴⁷⁸ See eg CRLI, [43(b)] [PLE.010.005.0001 at 0041], [73(b)] [0085], [78A]-[78D] [0091-0092], [79] [0093], [85(b)]-[85(e)] [0095-0096], [90A] [0100-0101], [140A] [0124-0125], [157] [0135], [169] [0140-0142], [171A] [0143-0144], [192] [0154-0155].

⁴⁷⁹ See eg CRLI, [90A] [PLE.010.005.0001 at 0100-0101].

- b. Alex assisted or acquiesced in another party's wrongdoing;⁴⁸⁰
 - c. Alex was complicit in an arrangement;⁴⁸¹ or
 - d. Alex received or reviewed material.⁴⁸²
246. The duty in s 21 is derived from the longstanding prohibition in Australian consumer protection law on misleading or deceptive conduct.⁴⁸³ As the Victorian Law Reform Commission observed, whether conduct is misleading or deceptive in consumer protection law “involves an objective test, and does not require proof of intention or knowledge”.⁴⁸⁴ However, if “the circumstances are such as to make it apparent that [a person] is not the source of the information and ... expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth”, then they are unlikely to have engaged in misleading or deceptive conduct.⁴⁸⁵
247. Moreover, the application of the *Briginshaw* standard to alleged contraventions of the overarching obligations suggests that a court should be slow to find that the duty to not mislead or deceive has been contravened absent evidence of any intention to mislead or deceive. For example, in *Giles v Jeffrey* the Court of Appeal upheld McDonald J's finding that the respondent had not contravened s 21 because any inaccuracies in their statements could “easily be attributed to mistake or exaggeration for the purpose of emphasising a point rather than for the purpose of lying or misleading the Court”, and because they “had not deliberately lied”.⁴⁸⁶
248. In the present case there is no evidence of an intention to mislead or deceive on Alex's part. Furthermore, much of Alex's alleged misleading or deceptive conduct involves a failure to say something, or silence; and in consumer protection law silence is only classified as misleading or deceptive conduct where it is deliberate.⁴⁸⁷ Inherent in the

⁴⁸⁰ See eg CRLI, [73(b)] [PLE.010.005.0001 at 0085].

⁴⁸¹ CRLI, [43(b)] [PLE.010.005.0001 at 0041].

⁴⁸² See eg CRLI, [102] [PLE.010.005.0001 at 0110-0111].

⁴⁸³ See Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), pp 184-7 [ATH.600.272.0001 at 0186-0189], referring to *Trade Practices Act 1974* (Cth), s 52, and *Fair Trading Act 1999* (Vic), s 9(1). The Commonwealth provision is now found in s 18 of the *Australian Consumer Law*.

⁴⁸⁴ Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), p 185 [ATH.600.272.0001 at 0187].

⁴⁸⁵ *Yorke v Lucas* (1985) 158 CLR 661, 666 (*Yorke*) [ATH.600.273.0001 at 0006].

⁴⁸⁶ *Giles* [188] [ATH.600.264.0001 at 0063-0064].

⁴⁸⁷ See Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), p 185 [ATH.600.272.0001 at 0187], referring to *Trade Practices Act 1974* (Cth), s 4(2)(c).

need to show “deliberate” silence in a situation where silence is said to amount to the misleading conduct, is that it must be shown that the person knew the true position.

The Continuing Conflict Contraventions (Part B of the CRLI)

249. Alex did not contravene the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, nor did he contravene the paramount duty, in connection with any supposed arrangement whereby the Bolitho No 4 decision was circumvented.

250. *First*, Alex denies that the Bolitho No 4 decision was circumvented at all.

251. *Second*, for the reasons set out above, from Alex’s perspective:

- a. Mr Zita was the solicitor on the record in the Bolitho proceeding, and acted accordingly.
- b. The impression that Mr Zita was duly acting as the solicitor on the record in the Bolitho proceeding was conveyed to the world at large by Messrs Elliott senior, O’Bryan, Symons and Zita, and was apparently maintained as a defence in this case by Mr O’Bryan and Mr Symons until they changed their position to submit to the judgment of the Court. It remains Mr Zita’s position that he was acting as the solicitor in the Bolitho proceeding.
- c. Alex’s only experience of litigation was through the example set by Messrs Elliott senior, O’Bryan, Symons and Zita. In that context, Alex was not aware of any alleged understanding or arrangement between Mr Elliott senior and Mr Zita to the contrary. Alex did not realistically have a basis to have inquired into any such understanding or arrangement.

252. In these circumstances, the Contradictor has not shown that Alex had any knowledge of the supposed arrangement between Mr Elliott senior and Mr Zita, as alleged in Part B of the CRLI. Nor has the Contradictor shown that Alex had any reason to be suspicious about the legitimacy of any arrangement between Mr Elliott senior and Mr Zita.

253. *Third*, specifically responding to the allegations at CRLI [42A]:

- a. Alex did know, in general terms about the Bolitho No 4 decision.

- b. Alex did not know about any of the matters set out in CRLI [40(a)]. Alex was unaware of the financial affairs or arrangements of AFPL, and did not know anything about Mr O'Bryan's financial arrangements.
 - c. Alex did not know about any of the matters set out in CRLI [40(b)]. He was not privy to any of the discussions between Mr Elliott senior and Mr Zita about these matters, and from Alex's perspective, there was no reason to doubt the propriety of his father's or Mr Zita's conduct.
 - i. That enquiries from group members were directed to Alex does not suggest that he must have been aware that the Bolitho Number 4 decision was being circumvented. It is normal that a litigation funder would communicate with group members. There were contractual arrangements in place between many group members and the litigation funder, for whom Alex was an agent. It is also natural that group members who did not yet have contractual arrangements in place with the funder might nonetheless speak with the funder, either to enter into such arrangements or to understand the implications of the litigation being funded as it was.
 - ii. Alex's role in relation to the General Class Action Email and the Bolitho Class Action Email has been discussed above, and there is no basis on which these matters impute to Alex any knowledge of the supposedly misleading arrangement between Mr Elliott senior and Mr Zita.
 - d. The evidence does not support the allegation that Alex was or must have been aware of the matters set out in CRLI [40(c)]. There is no basis to support a finding that Alex knew that Mr Elliott senior exercised control over the matter as a "de facto solicitor". From Alex's perspective, Mr Elliott senior was acting as the funder in the Bolitho proceeding, and Mr Zita was acting as the solicitor on the record.
 - e. As set out above, there is no basis in the evidence to find that Alex acted as a de facto solicitor for Mr Bolitho as alleged in CRLI [40(d)].
254. Even if, somehow, Alex is found to have known of the matters alleged in CRLI [40], it is unclear why it is said that Alex must have known that the *effect* of the arrangement

would be that the conduct of the Bolitho proceeding would advance the interests of AFPL over the interests of Mr Bolitho and group members.

- a. From Alex's perspective, all of the lawyer parties were ethical, senior practitioners. There was no reason to doubt their integrity. In that circumstance, Alex had no reason to doubt that any conflict of interest that did arise would be resolved in the appropriate way (ie, for the interests of Mr Bolitho and group members to prevail over the interests of AFPL).
- b. Accordingly, the allegation in CRLI [42A(c)] is not proven.

Conduct in relation to Fee Agreements (Part C of the CRLI)

255. No allegations are made against Alex in Part C of the CRLI. That is a significant matter in relation to any loss suffered by debenture holders. The structure of the CRLI indicates that any contraventions under Part C are a highly significant contributing factor to any ultimate loss suffered by debenture holders. Since Alex is not implicated in this breach, an appropriate allowance must be made, by way of reduction, to his liability, to reflect that Alex was not involved in the breaches alleged in Part C.

Liability of AFPL for the conduct of the Bolitho Lawyers (Part D of the CRLI)

256. No allegations are made against Alex in Part D of the CRLI.

The Settlement Negotiation Contraventions (Part E of the CRLI)

257. It is alleged that Alex contravened the overarching obligation not to engage in conduct which is misleading or deceptive, or likely to mislead or deceive, and the paramount duty, in procuring an agreement containing the Adverse Settlement Terms (CRLI [58]).
258. As is set out above, Alex had no substantive involvement in the Trust Co settlement discussions. He did not have the capacity to influence the content of any of the terms of the deed, including the inclusion, or not, of the Adverse Settlement Terms. The highest that the evidence shows of Alex's involvement in the Trust Co Settlement is that he proofread the deed for his father, and made a suggestion about a point of internal cross-referencing.

259. Accordingly, Alex did not “review and consider” the Adverse Settlement Terms (cf CRLI [59(c)]), or draft, negotiate, review, consider, or procure the Adverse Settlement terms (particular A to CRLI [59]).
260. Alex did not have any knowledge of the “Undisclosed Matters” set out in CRLI [60], and there is no basis on which it can be found that he should have known those matters, given that he was not involved in the financial affairs of AFPL.
261. It is unrealistic to have expected Alex to know that the Adverse Settlement Terms were not in the interests of group members (cf CRLI [61]):
- a. *First*, insofar as the Adverse Settlement Terms conditioned the deed on approval of AFPL’s claim for a funding commission and legal costs, the SPR did not think that this was contrary to the interests of group members. If there is no allegation of wrongdoing against the SPR in this respect, it is untenable to suggest wrongdoing by Alex.
 - b. *Second*, as explained above, Alex was not involved in the financial affairs of AFPL and did not know of the matters set out in CRLI [61].
262. Although it is clear that Alex did not take any of the steps set out in CRLI [63], Alex denies that he was under a duty to do so.
263. In relation to CRLI [63(a)], Alex was not a solicitor acting for Mr Bolitho or other group members. Alex first met Mr Bolitho at the Trust Co mediation, and their conversation was not about the substance of the settlement, but about horse racing and “chit chat”.
264. There is no tenable basis for Alex to have sought out Mr Bolitho to advise him that the Adverse Settlement Terms were unreasonable. Mr Bolitho was separately advised by Mr Crow, and the interests of group members were in some measure being protected by the SPR, and ultimately by the Court.
265. If the Court were to find that Alex was under such a duty, it would create an unworkable expectation for junior solicitors to “supervise” the work of their principals, such that the junior solicitor would need to be independently satisfied that their principal was giving correct advice to the client.

266. It is also important that no evidence has been led about what Mr Bolitho might have done even if Alex had given him the advice postulated in CRLI [63(a)]. Given that Mr Bolitho was independently advised by Mr Crow, and the settlement was apparently being agreed to by the SPR, and Messrs O'Bryan and Elliott senior, it is hard to imagine that Mr Bolitho would have accepted Alex's advice, and acted differently. In the absence of such evidence, it is unclear how this allegation against Alex, even if proven, could have made a material contribution to any loss suffered by debenture holders.
267. In relation to CRLI [63(b)], it is untenable to suggest that Alex was obliged to inform AFPL that the Adverse Settlement Terms were unreasonable. AFPL was acting through the mind of Mr Elliott senior. There was no prospect that Alex could have affected the thinking of Mr Elliott senior in relation to the terms of the settlement deed.
268. In relation to CRLI [63(c)], Alex did not understand, and was not in a position to understand, that conflicts of interest might have arisen such as to justify the triggering of cl 13.3 or 13.5 of the Funding Agreement. It follows that there cannot have been any duty upon him to trigger those clauses.
269. In any event, Mr Bolitho was independently represented by Mr Crow. Mr Crow could have identified that aspects of the Adverse Settlement Terms, especially the conditioning of the settlement on acceptance of APLF's claimed funding commission and legal costs, were not in the best interests of Mr Bolitho. Absent any allegations of wrongdoing against Mr Crow, it is untenable to suggest that Alex engaged in wrongdoing in this respect. The same point applies, *mutatis mutandis*, in respect of the SPRs.
270. Alex did not know of the matters that premise CRLI [63(d)], and it follows that he cannot have been in breach of any duty in this respect.
271. Accordingly, Alex did not breach any of the overarching obligations under the CPA in relation to the settlement negotiations (cf CRLI [64]).

The Overcharging Contraventions (Part F of the CRLI)

272. It is alleged that Alex contravened the obligations not to engage in conduct that was misleading or deceptive or likely to mislead or deceive, to act honestly, to use

reasonable endeavours to ensure that legal costs were reasonable and proportionate and properly incurred, and also contravened the paramount duty (CRLI [66]).

273. Alex did not have any involvement with the payment of counsel fees in the Bolitho proceeding (or in any other proceeding). That was handled by Mr Elliott senior. Alex did not discuss fees with Mr O'Bryan at any time, and did not see any of Mr O'Bryan's invoices until 2019 (during the remitter).
274. The critical emails supporting the Contradictor's allegations against Mr Elliott senior, Mr O'Bryan, and Mr Symons, omitted Alex (despite the usual practice to copy Alex into communications involving Mr Elliott senior). This supports Alex's evidence that he was not involved in the payment of counsel's fees. It also suggests that, to the extent that the other lawyer parties were aware that they were engaging in deceptive conduct, they tried to ensure that Alex was not privy to or part of the deception.
275. There was no basis on which Alex could realistically have been expected to second guess the fees claimed by counsel. The Bolitho proceeding was a complicated and long running class action, having commenced years earlier in 2012, and it was to be expected that legal costs would be large.
276. With the benefit of hindsight and the Contradictor's forensic examination of the matter as set out in the CRLI, Alex accepts that he was (for example, by the time of the cheques episode) privy to enough information that, had he critically examined the matter, he might have been able to identify that a deception was occurring. However, there is no evidence that Alex did identify that. As he explained, this is because he was a very junior member of the legal profession, and the Bolitho proceeding was being run by very senior members of the profession.
277. There was no reason for Alex even to pause and second guess their judgment or integrity; and even if he had tried to do so, it is unrealistic to expect that he had the skill and resources to have undertaken the sophisticated analysis needed to expose the deception (as carried out by the Contradictor and set out in the CRLI). Further, the legitimacy of the costs claim was being reviewed by Mr Trimbos, a costs expert, and ultimately, the Court.

278. In these circumstances, and having regard to the submissions set out above, the matters set out at CRLI [68] and [70] cannot be sheeted home to Alex.
279. Having regard to the above submissions, it is even less likely that Alex was aware of the implications of inflated costs claims on AFPL's funding commission (CRLI [71]).
280. It follows that Alex did not contravene any obligation under the CPA as alleged.
281. Even if it is found that Alex did contravene an obligation under the CPA, it is unclear how Alex's specific contraventions made a material contribution to any loss suffered by debenture holders. In particular, there is no specific allegation of what Alex should have done differently in the circumstances, and thus, what specific thing he is said to have failed to do (contrast, CRLI [63], in relation to the Trust Co Settlement Contraventions).

The Summons Contraventions (Part G of the CRLI)

282. It is alleged that Alex contravened the overarching obligation not to mislead or deceive, and the overarching obligation only to make claims that have a proper basis, in relation to the issuing of the summons seeking approval of the settlement, and publishing a notice to group members of AFPL's claims for a funding commission and legal costs (CRLI [75]-[76]).
283. As set out above, Alex did not have any role in preparing the summons or the notice to group members, and he did not know that the claim for "reimbursement" of legal costs was false. The summons recorded that it was filed by "Portfolio Law Pty Ltd" on behalf of the plaintiff, Mr Bolitho.⁴⁸⁸
284. This is a situation that is analogous to the situation where a person passes on a statement made by someone else, in circumstances that impliedly disclaim any belief as to its truth or falsity.⁴⁸⁹ Alex was just passing on a document from Portfolio Law to the registry.
285. It is also not clear why the Summons is misleading at all. The Summons does not make any representation that the plaintiff has incurred specified costs—it simply gives notice to affected parties that they must attend court for the hearing of applications that are

⁴⁸⁸ [SYM.002.001.5313].

⁴⁸⁹ *Yorke*, 666 [ATH.600.273.0001 at 0006].

going to be made on behalf of the plaintiff. Any misleading conduct can only arise in the material that was filed in support of those applications.

286. Alex did not breach the duty only to make claims that have a proper basis. It is sufficient for Alex to have relied on instructions from his superiors, and Alex's participation in the summons and notice to group members was peripheral and perfunctory. He did not have an independent duty to review the veracity of statements made in the Summons.
287. In relation to the allegations regarding the script, at CRLI [78A]–[78D], as set out above, the script was an amalgamation of information from the notice to group members and information already published on the Banksia class action website. It is true that the script carried through misleading representations made in the notice to group members, but Alex did not prepare the script “in respect of a civil proceeding” as required by s 21 of the CPA. Rather, Alex prepared the script on his father's instructions for the purpose of assisting Mr Zita in Mr Zita's communications with group members. The connection with a “civil proceeding” required to engage s 21 of the CPA would arise only once someone actually spoke with a group member, and there is no evidence that Alex did so. Until that time, the script was just an academic exercise.
288. Accordingly, none of the misleading or deceptive conduct alleged in this part of the CRLI can be sheeted home to Alex. Indeed, it would have been highly problematic for Alex to have prepared a script that was not consistent with the notice to group members approved by Justice Croft.

The Expert Witness Contraventions (Part H of the CRLI)

289. It is alleged that Alex contravened the overarching obligation to act honestly, not to mislead or deceive, to ensure that legal costs are reasonable and proportionate, and contravened the paramount duty, in providing misleading information to Mr Trimbos and procuring the Trimbos reports.
290. As set out above, Alex's role in relation to the Trimbos reports was administrative. Alex furnished Mr Trimbos with material, on the instructions of his father. Alex's role in relation to the Trimbos reports was administrative. Mr Trimbos was instructed by Mr Elliott senior, not Alex. Alex furnished Mr Trimbos with material, on the instructions of his father. Alex did not know that the Trimbos reports were based on false claims

about legal work. It is also relevant that Mr Trimbos did not pick up any discrepancies in, or issues with, the invoices of counsel.

291. In those circumstance, even if Alex had been asked to examine the material underlying the Trimbos reports, it is unrealistic to expect that Alex could have detected any deception. Indeed, it would be inconsistent with the duty to ensure that costs are reasonable proportionate for Alex to have independently checked and verified the factual foundations of Mr Trimbos's work.
292. Further, there is no evidence to suggest that Alex played any role in the decision to provide the Trimbos reports to the Court on a confidential basis.
293. In relation to CRLI [85(a)], Alex did not know that AFPL had not paid Portfolio Law or counsel at the time that the Trimbos reports were prepared. The earliest that Alex might have noticed that Portfolio and Mr Symons had not been paid was the cheques episode, in June 2018, well after the settlement approval. Alex did not know until some time into the remitter that Mr O'Bryan had not been paid.⁴⁹⁰
294. In relation to CRLI [85(b)], further to the responses to CRLI [68]-[70] set out above, Alex had no way of knowing whether or not the fees claimed by counsel were based on work that counsel had not in fact done. The Bolitho proceeding was a long running and complex piece of litigation. Alex did not sit in chambers with counsel to review their conduct. There is nothing inherently unreasonable about the sums being claimed; indeed, none of Mr Crow, Mr Trimbos, the SPR, nor Justice Croft detected any obvious irregularity simply from the sums being claimed.
295. In relation to CRLI [85(c)], there is no evidence to support the allegation that Alex knew that invoices had not been sent to Mr Zita; and Alex was not cross examined about that point. The allegation is not proven.
296. In relation to CRLI [85(d)] and [85(e)], Alex did not know anything about the billing practices of counsel. In relation to CRLI [85(f)]-[85(s)], no allegations are made against Alex. In relation to CRLI [86]-[90A], it is an answer to these allegations that Alex did not know that any deception was occurring in the presentation of the Trimbos reports.

⁴⁹⁰ Alex Elliott XN, 2 December 2012, T1741:1-12 [TRA.500.017.0001 at 0055].

297. However, even if it is found that Alex did have knowledge of the deception, the allegations in CRLI [90] and [90A] assume that Alex had an independent obligation to bring that matter to the attention of Justice Croft, or to ensure that counsel did so. That is denied:
- a. Alex could not simply approach the Court himself, or give instructions to counsel. Alex did not have any instructions from a party that would have entitled him to address Justice Croft, and counsel would not have taken instructions from Alex that were at odds with those coming from AFPL or Mr Bolitho.
 - b. Alex was not a solicitor acting for Mr Bolitho, did not have a position from which he could speak directly with Mr Bolitho, and could not have obtained instructions to undertake the steps suggested by the Contradictor. Even if Alex is found to have been a solicitor acting for Mr Bolitho and group members, the instructions that Alex would have needed to obtain would have effectively required Mr Bolitho to prefer the advice of Alex ahead of that of Mr O'Bryan, Mr Symons, Mr Zita and Mr Elliott senior.
 - c. Any suggestion that Alex could have sought instructions to appear on behalf of AFPL is untenable. Mr Elliott senior was firmly in control of AFPL and there is no evidence that he would have been influenced by anything that Alex might have said or done, or that he would have allowed Alex to give instructions to counsel to raise any issue concerning a deception being practiced by AFPL.
 - d. Accordingly, there was no realistic prospect of Alex achieving the matters postulated in CRLI [90A].
298. For the same reasons, the allegations against Alex in CRLI [92]–[95], and [97] fail. If Alex also had an obligation to that effect, he would have been obliged to immerse himself in the detail of the litigation to a greater degree than he did, so that he could realistically fulfil that obligation. That is, a high level of engagement in, and knowledge about, the matter would have been a pre-requisite to Alex being able to make any sensible judgment about whether counsel's fees were reasonable in the circumstances. In circumstances where two senior practitioners were already responsible for supervising

the fees of two then respected members of counsel, substantial waste would be occasioned in having a third, junior, person re-do the same work.

299. Having regard to the above matters, it is unclear how Alex's conduct has materially contributed to any of the losses alleged in Part H of the CRLI.

The Settlement Opinion Contraventions (Part I of the CRLI)

300. As set out above, Alex did not "review" the draft Bolitho Opinions (cf CRLI [102]), and he did not know that they were misleading, including because he did not know "the true position" that was misrepresented in the Bolitho Opinions (cf CRLI [104]).

301. For that reason, the allegations against Alex at CRLI [126]–[127] are not established. However, there are further difficulties with these allegations.

a. *First*, the Bolitho Opinions were *Counsel's* own opinion being furnished to the Court. The Bolitho Opinions were not documents produced on instructions. It follows that whatever Counsel said in those opinions was a matter for them, and not anyone else.

b. *Second*, it is unrealistic to expect Alex to have been able to second guess the opinion of Senior Counsel or Mr Elliott senior in relation to any of the matters set out in CRLI [126]. Even if Alex had been in a position to do so, there is no evidence that his opinion on the subject would have carried any influence with Counsel, Mr Elliott senior, or the Court.

c. *Third*, it is unclear whether the allegation in CRLI [126(h)] is proven. AFPL met all obligations that it was called upon to meet, as and when called upon. There is no basis for finding that it would not have done so again, in the event of an adverse costs order.

302. The allegation at CRLI [140A] is not established. Alex was cross examined about this issue, and gave evidence that indicated he was simply not in a position to assess the "true value" of the Trust Co remuneration claim.

303. Having regard to the above matters, Alex did not contravene any of the overarching obligations or the paramount duty as alleged.

304. If it is found that Alex did contravene any of the overarching obligations or the paramount duty, it is unclear how any such contravention could have made a material contribution to any loss suffered by debenture holders. There was no realistic prospect of Alex being able to do anything that could have affected the contents of the Bolitho Opinions.

The SDS Contraventions (Part J of the CRLI)

305. It is alleged that Alex knew that the SDS costs were unreasonable or that there was no proper basis for the amounts sought for the SDS (CRLI [152]).

306. As set out above, there is no evidence to suggest that Alex knew anything about the propriety, or otherwise, of the costs claimed for the SDS. Alex was not responsible for, and had no influence over, determining the amounts claimed.

307. In the circumstances, Alex was not under any obligation, and certainly did not breach any obligation, as alleged at CRLI [156]–[157].

The No Contradictor Contraventions (Part K of the CRLI)

308. No contravention is alleged against Alex in this part of the CRLI.

The Appeal Contraventions (Part L of the CRLI)

309. It is alleged that Alex contravened the overarching duty not to mislead or deceive, the overarching obligation only to take steps necessary to facilitate the just resolution or determination of a proceeding, and the paramount duty, in relation to his conduct in preventing or dissuading Mrs Botsman from pursuing her appeal and preventing or dissuading the SPR and his counsel from assisting the Court of Appeal (CRLI [168]–[169]).

310. The particulars to the allegation allege that there was in place a strategy to dissuade Mrs Botsman from pursuing her appeal and that Alex “knew of that strategy and was complicit in it”. It is accepted that Alex knew of the strategy, in general terms; however, that does not mean that he was “complicit in it”.

311. The CRLI does not establish how the appeal is a “civil proceeding” which can be the subject of orders under s 29 of the CPA in *this* civil proceeding. The appeal, and the

present proceeding, are each a separate “civil proceeding” within the meaning of s 3 of the CPA.

312. Alex did not have any influence over the choices made by AFPL, apparently based on legal advice provided to AFPL, in pursuing a strategy that sought to enjoin Mrs Botsman from appealing, and to erect road blocks in her appeal.
313. The most that can be said is that Alex provided a procedural witness statement in AFPL’s injunction application, and discussed the appeal with his father. However, the witness statement does not indicate that Alex had any influence over the strategy or its execution, and Alex’s discussions with his father do not reveal anything which suggests that Alex had any influence over the decision making of Mr Elliott senior.
314. There are further difficulties with the suggestion that the conduct alleged amounted to a breach of Alex’s overarching obligations. Alex was a very inexperienced person relative to the other players. He was not in a position to influence their thinking or decision making. Alex did not himself make any misleading or deceptive representation, or mislead or deceive by omission. Alex did not take any “step” that contravened the overarching obligation to “only take steps necessary to facilitate the resolution or determination of the proceeding”, as alleged in CRLI [168(b)].
315. In relation to CRLI [171A]:
 - a. There is no wrongdoing by Alex in connection with the Trimbos reports being before the Court of Appeal, for the reasons set out in paragraphs 197 to 214 above.
 - b. Although the cheques episode might have put Alex in a position where he could “put two and two together” in relation to Mr Symons and Mr Zita not having been paid, for the reasons set out above, Alex did not in fact put “two and two together”.
 - c. It is unclear what Alex should have done differently in the circumstances. As noted above, Alex could not simply appear before the Court of Appeal and make submissions, without instructions from a party. Alex did not have the authority to make submissions on behalf of AFPL, nor did he have the authority to give instructions on behalf of AFPL, except on the express authority of Mr Elliott senior.

Alex could not have done anything to affect the course of the appeal on behalf of AFPL, or AFPL's strategy to deter Mrs Botsman from appealing – that was in the hands of Mr Elliott senior.

- d. The Contradictor has not provided particulars of what it is alleged that Alex should have done differently, or evidence to support those particulars. In the circumstances, it cannot be found that Alex contravened the overarching obligations (because one cannot contravene an obligation by some conduct or omission if there was no alternative course available in the circumstances).

The Fiduciary Duty Contraventions (Part M of the CRLI)

316. This allegation proceeds by reference to the conduct set out in Parts B to L of the CRLI, all of which have been discussed above.

The Misleading Discovery Contraventions (Part N of the CRLI)

317. As set out above, Alex's role in the remitter has been insignificant. Indeed, since his father's death, any suggestion that Alex was a solicitor for Mr Bolitho and group members, or an in-house solicitor for AFPL, is untenable. After his father's death Alex was in "quite a dark place and I really distanced myself generally from this case and anything to do with it" (until joined as a party).⁴⁹¹

318. In relation to CRLI [184]–[192], Alex's involvement in giving instructions to ABL in relation to discovery was canvassed extensively by the Contradictor during his cross-examination of Alex. However, none of that cross-examination related to the two specific documents which are the subject of the "misleading discovery contraventions".⁴⁹² There is no evidence, therefore, that Alex contravened any overarching obligations in relation to the "misleading discovery contraventions".

⁴⁹¹ Alex Elliott XXN, 9 December 2020, T1971:6 [TRA.500.020.0001 at 0040].

⁴⁹² Namely, the "O'Bryan December 2017 Costs Agreement" and the "Symons December 2017 Cost Disclosure Statements": CRLI, [181] [PLE.010.005.0001 at 0152].

LOSS, RELIEF AND APPORTIONMENT

ALLEGED LOSSES

319. It is necessary to pay close attention to Part O of the CRLI to identify precisely what losses debenture holders have actually suffered, and to assess Alex's contribution to any such losses.
320. One of the difficulties in doing so is a lack of evidence connecting specific alleged contraventions by particular parties with specific losses, which s 29(1)(c) of the CPA implicitly requires. In particular, there is a lack of evidence about what would have happened if the various parties had not contravened their overarching obligations in the various ways alleged. Absent evidence that a particular contravention by Alex materially contributed to an identifiable, specific loss, the Court could not be satisfied that the debenture holder's "financial or other loss ... was materially contributed to by the contravention of the overarching obligation".

Independent lawyers

321. In relation to CRLI [194(a)], it is unclear how any contravention alleged against Alex engages with this head of loss. Nor is it clear how the lack of independent lawyers amounts to a "loss", in circumstances where it has been accepted that the Trust Co settlement sum was the most that was available to debenture holders and was a reasonable settlement sum in the circumstances. That is even more seriously so in circumstances where debenture holders would have otherwise had to pay for such lawyers, and they are not now being asked to pay for any funding commission or legal costs.

Adverse settlement terms

322. In relation to CRLI [194(b)], as set out above, the proposition that Alex could have in any way affected the situation that led to the inclusion of the Adverse Settlement Terms cannot be sustained. None of the contraventions alleged against Alex, even if proven, contributed to the loss said to have been suffered. Indeed, it is unclear how this even amounts to "loss".

Costs disclosure to Mr Bolitho and group members

323. In relation to CRLI [194(c)], as set out above, Alex did not know anything about the “true costs” of the Bolitho proceeding. It follows that none of the allegations against Alex have any connection with this claimed loss.

Disclosure of “undisclosed matters” to the SPR

324. In relation to CRLI [194(d)], as set out above, Alex was not in a position to influence the conduct of AFPL in relation to its communications with the SPR. It follows that none of the allegations against Alex have any connection with this claimed loss.

Disclosure to Mr Trimbos and the Court

325. In relation to CLRI [194(e)], as set out above, Alex did not know the “true position” posited in this paragraph. In any event, Alex was not in a position to make any disclosure to Mr Trimbos, and even if Alex had attempted something of that kind, it is not clear from the evidence that Mr Trimbos would have acted any differently (Mr Trimbos’s evidence is that he accepted the bills of counsel). Further still, Alex had no way of disclosing anything to Justice Croft, as he did not have any right to be heard and could not have obtained instructions from any party to appear before Justice Croft. It follows that the allegations against Alex in this respect have not been proven.

Court approval of reasonable costs and commission

326. In relation to CRLI [194(f)], since the claim for legal costs and funding commission has been abandoned, this allegation is no longer relevant in its primary force. However, the allegation is relevant for the purpose of assessing why this litigation has carried on for as long as it has, which is addressed below.

Appointment of a contradictor

327. In relation to CRLI [194(g)–(h)], none of the allegations against Alex have any connection with the decision to appoint a Contradictor, or not.

Remaining matters

328. In relation to CRLI [194(i)–(m)], as set out above, it is not established that Alex owed any of the obligations alleged, let alone that Alex breached any of those obligations. It follows that Alex is not responsible for any of the losses alleged in these paragraphs.

329. However, if Alex is found to have owed, and to have breached, any obligation, the following matters must be taken into account.

- a. The costs of the application for special leave to appeal to the High Court, and the time that this application took to resolve (delaying the remitter), are not the subject of any allegation against Alex. Thus, to the extent that debenture holders had to pay legal costs associated with this application, and to the extent that they suffered any loss by reason of being kept out of their money for this period, there is no basis to sheet home those matters to Alex.
- b. The entirety of any losses suffered by debenture holders is to be traced to the application for legal costs and a funding commission to be paid out of the settlement sum – but for these applications, debenture holders would not have suffered any loss. The evidence establishes that Alex did not have any capacity to influence these applications. Alex was not involved in the decision-making process about whether or not to make any application for payment out of the settlement funds and in what amount. It follows that Alex was not responsible for the events that have led to debenture holders suffering any loss.
- c. Further, or alternatively, at least until the time when Mr O’Bryan abandoned his defence, or when Mr Symons abandoned his defence, or when AFPL abandoned its claim for a funding commission, Alex’s conduct was not a contributing factor to the course of this proceeding and did not contribute to any loss suffered by debenture holders. Plainly, the other Lawyer Parties were the principal actors in the matters set out in the CRLI, and Alex is not responsible for their conduct. It follows that even if the court finds that Alex owed, and has breached, any overarching obligation, Alex cannot be held responsible for any loss suffered until at least the time that Alex was himself made a party to this proceeding.

RELIEF SOUGHT

330. Part P of the CRLI sets out claims to relief under the CPA, as well under the *Supreme Court Act 1986*. In light of there no longer being any claim for funding commission or legal costs pressed, the only relevant claims are those under the CPA.

Procedure for determining what orders, if any, should be made by way of relief

331. There are two general claims for monetary relief suggested by the Contradictor:

- a. Money being paid into the fund to compensate debenture holders for being kept out of their money for longer than they should have been.
- b. Money being paid to compensate debenture holders for legal costs associated with the initial approval application, the appeal to the Court of Appeal, the application for special leave to appeal to the High Court, and the remitter.

332. Although the Court may wish to determine questions of relief together with the substantive questions (and submissions are made on that assumption), it is submitted that there may be an efficiency in the Court making findings and giving reasons on the substantive issues, and then giving the parties an opportunity to make further submissions about what orders, if any, should be made to give relief in respect of any liability found to have been established. In essence, this procedure would be analogous to separating questions of “liability” and “quantum” as is done in many civil trials.

Legal costs

333. There is an additional procedural issue in relation to legal costs. It is submitted that legal costs should not be addressed in the main proceeding in respect of the named parties only, in the case under CPA, and should instead be dealt with in the usual jurisdiction of the Court to make orders as to costs under s 24 of the *Supreme Court Act*. The primary reason favouring this course is that there are applications for non-parties to pay legal costs. It would be most efficient for all questions concerning costs to be heard and determined together.

334. If it were otherwise, there is potential for a multiplicity of proceedings. That is because the SPR’s application for costs to be paid by non-parties would remain to be determined

at a later stage, at which point any party ordered to pay costs under the CPA might raise an argument that a non-party should bear some of the costs liability already ordered.

335. There is an additional advantage in dealing with costs in this way. This would enable costs to be dealt with in an omnibus fashion, after findings have been made on the substantive issues. Having the benefit of findings and reasons would make submissions as to costs more certain, and therefore more efficient.

Causation – material contribution

336. The presence of s 29(1)(c) of the CPA is a powerful indication that any order for financial compensation under the CPA is to be compensatory in nature to the victim, rather than to serve any other objectives (such as, eg, punishment, deterrence etc). Compensatory orders inherently direct attention to a “causation question” – what loss has been caused by the wrongdoing of another.
337. It may be accepted that this is not a “but for” test, but the provision nonetheless calls for findings to be made that a party has, as shown on the balance of probabilities and subject to the *Briginshaw* standard, materially contributed to any losses suffered by a party seeking relief under s 29(1) of the CPA.
338. As is set out above, it is difficult to see how any contravention of an overarching obligation by Alex could have made a material contribution to any financial loss suffered by debenture holders. Alex was not in a position to affect the course of events, and did not have any realistic basis to detect, let alone reveal, the deception that was at play. Nor did Alex have any realistic prospect of altering the positions of AFPL, Mr Elliott senior, Mr O’Bryan, Mr Symons, Mr Zita or Mr Trimbos. Simply put, nothing that Alex could have done, or refrained from doing, was realistically capable of making any difference to what in fact occurred. In these circumstances, Alex cannot be found to have “materially contributed” to any loss suffered by debenture holders, and there is no basis for him to be ordered to pay compensation to debenture holders.

Apportionment and limitation of liability

339. In relation to losses arising from debenture holders being kept out of their money, Alex makes two legal submissions:

- a. *First*, the claim is apportionable under the *Wrongs Act*.
- b. *Second*, the claim is subject to appropriately crafted orders under s 29(1) of the CPA, in the interests of justice, that would properly reflect the relative contributions of each party to any such losses.

Wrongs Act Part IVA A apportionment

340. In accordance with Alex's **Proportionate Liability Notice** dated 24 November 2020,⁴⁹³ the Fifth Defendant submits that, if—contrary to the submissions above—he is found to be liable, then:

- a. each of Mr Elliott senior, AFPL, Messrs O'Bryan, Symons, Zita/Portfolio Law and Trimbo is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*;
- b. any liability in relation to the Contradictor's claim is therefore limited to the amount reflecting that proportion of the loss and damage claimed that the Court considers just having regard to the extent of his responsibility for the loss and damage;⁴⁹⁴ and
- c. judgment must not be given against Alex for more than that amount.⁴⁹⁵

341. The following propositions are necessary to establish that the Contradictor's claim in respect of Alex is an apportionable claim: *first*, that the relief claimed is "damages" within the meaning of s 24AF(1)(a); *second*, that the damages arise from a failure to take reasonable care within the meaning of s 24AF(1)(a); and *third* that one or more of the persons identified in the Proportionate Liability Notice is a person whose acts or omissions caused the loss or damage.

342. *First*, the Contradictor's claim for an order under s 29 of the CPA is a claim for "economic loss... in an action for damages" within the meaning of s 24AF(1)(a). The definition of "damages" is set out in s 24AE: "any form of monetary compensation." Plainly, the Contradictor is seeking that debenture holders receive "monetary compensation"

⁴⁹³ [PAR.080.002.0001].

⁴⁹⁴ *Wrongs Act*, s 24AI(1)(a).

⁴⁹⁵ *Wrongs Act*, s 24AI(1)(b).

under s 29 of the CPA. That is a form of “damages” for the purpose of s 24AF of the *Wrongs Act*. Indeed, it is well established that “loss of use” interest is a form of compensatory damages.⁴⁹⁶

343. *Second*, if, contrary to these submissions, Alex is found to have materially contributed to the debenture holders’ loss or damage, that contribution must be shown to have been by reason of a failure to take reasonable care.
344. The *Wrongs Act* does not confine the expression “reasonable care” to its use in the law of negligence, or otherwise in relation to tortious liability. Rather, a “failure to take reasonable care” might result from a breach of duty, a breach of contract or a statutory breach: “whether in tort, in contract, under statute or otherwise”.⁴⁹⁷ As Middleton J observed in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*:⁴⁹⁸

The provisions do not require that the claim itself be a claim in negligence or for a breach of duty — it only requires that the claim arise from a failure to take reasonable care. The expressions “arising from” or “arising out of” are of wide import.

345. Following the reasoning of Middleton J, a failure to take reasonable care should be understood in its broader, plain English sense, which can extend to a more general failure to comply with some duty or obligation. That is because, translated into plain English terms, a failure to comply with a duty or obligation will often be due to a failure to take reasonable care. The duty or obligation in question does not itself have to be a duty or obligation to take reasonable care (whether as understood in negligence law, or otherwise).
346. This becomes a question to be determined by reference to the evidence as to how any loss arose, and not by reference to the character or content of the alleged duty said to have been breached.⁴⁹⁹

⁴⁹⁶ *Hungerfords* 143 (Mason and Wilson JJ) [ATH.600.265.0001 at 0019].

⁴⁹⁷ *Wrongs Act*, s 24AF(1)(a).

⁴⁹⁸ (2007) 164 FCR 450 (*Dartberg*), [29] [ATH.600.262.0001 at 0009].

⁴⁹⁹ While Macfarlan JA in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, [22]–[23] [ATH.600.269.0001 at 0011–0012] adopted an approach based on the elements of the duty, that approach was apparently disclaimed by Meagher JA in his reasoning (at [36] [0016] and is contrary to the evidence-based approach that was adopted in *Dartberg* [ATH.600.262.0001] and subsequently approved in decisions of this

347. This approach was applied by Pagone J in *Solak v Bank of Western Australia Ltd*, where his Honour held that “Bank West’s claim for indemnity based upon a failure to sight original documents (that is, a breach of contract) may aptly be described as a failure to take reasonable care”.⁵⁰⁰ Similarly, Forbes J observed in *Trani v Trani* that:⁵⁰¹

The third defendant’s evidence was that she did not attempt to contact the plaintiffs because she wrongly assumed that the first defendant was acting on behalf of all three siblings. This amounts to a failure to take reasonable care.

348. The Contradictor’s allegations of contravention of the overarching obligations are such that Alex’s liability, if any, arises because he did not “do enough” to protect the interests of debenture holders.

349. This is similar to that of the defendants in *Trani v Trani* and *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,⁵⁰² where the issue was a failure to advert to or correct another party’s wrongdoing, which was treated as a failure to take reasonable care and therefore apportionable.

350. Apportioning Alex’s liability under Part IVAA of the *Wrongs Act* does not limit the liability of any concurrent wrongdoer who is found to have acted fraudulently: any person against whom a finding of fraud has been made will be jointly and severally liable for the whole of the loss, regardless of any apportionment made under Part IVAA of the *Wrongs Act*.⁵⁰³

351. *Third*, each of the persons listed in the Proportionate Liability Notice is a concurrent wrongdoer insofar as each is a person whose acts, independent or jointly, caused the claimed loss.⁵⁰⁴ It is not necessary for the purpose of apportioning Alex’s liability that the concurrent wrongdoers have “failed to take reasonable care”. It is only necessary that their acts were a cause of the loss. By reason of each of the individual concurrent wrongdoers’ respective:

Court: see further *Pentridge Village Pty Ltd (in liq) v Capital Finance Australia Ltd (No 2)* [2020] VSC 284, [107] per Connock J [ATH.600.268.0001 at 0040].

⁵⁰⁰ [2009] VSC 82, [19] [ATH.600.270.0001 at 0015].

⁵⁰¹ (2019) 59 VR 362, [26] [ATH.600.271.0001 at 0008].

⁵⁰² (2013) 247 CLR 613 [ATH.600.266.0001].

⁵⁰³ *Wrongs Act 1958* s 24AM.

⁵⁰⁴ *Wrongs Act 1958* s 24AH.

- a. seniority;
- b. independence;
- c. experience;
- d. position of responsibility in relation to the conduct of the Bolitho Proceeding;
- e. position of responsibility in relation to the management of their practice and affairs;
- f. initiative;
- g. degree of control over the circumstances of the alleged wrongdoing generally; and
- h. contribution to the specific alleged acts of wrongdoing,

each of the concurrent wrongdoers is to be regarded as having significantly more responsibility than Alex for loss and damage suffered.

352. Alex's responsibility is of a significantly lesser order of magnitude than that of Messrs Elliott senior, O'Bryan, Symons and Zita. All of the conduct alleged against Alex is essentially by way of complicity in the actions of those persons.

353. It is noted that Mr Elliott senior is a concurrent wrongdoer within the meaning of the *Wrongs Act* in respect of any wrongdoing by Alex until the date of Mr Elliott senior's death, despite not being a party to the proceeding, because the reason that he is not a party to the proceeding is that he is dead.⁵⁰⁵

354. In respect of each of the particular allegations against him, Alex relies on the alleged concurrent wrongdoing set out paragraphs 5 and 6 of the Proportionate Liability Notice.

355. Having regard to the above (and pending the findings of fact made by the Court), the Fifth Defendant will submit that his contribution to any loss of the debenture holders is extremely small.

⁵⁰⁵ *Wrongs Act 1958* s 24A(3).

Section 29 of the CPA

356. Section 29 of the CPA is the principal remedial provision in respect of any contravention of an overarching obligation. The power of the Court is to make “any order it considers appropriate in the interests of justice”, and there is a non-exhaustive list of examples of the kind of orders that may be made in sub-sections (a)–(f).
357. The terms of the power are broad , confined only by the subject matter, scope and purpose of the CPA, and the nature of any contravention in issue.
358. There are two legal points to be made about the power under s 29:
- a. *First*, that it permits orders to be crafted that limit a party’s liability as necessary in the interests of the administration of justice.
 - b. *Second*, the use of the expression “materially contributed” in s 29(1)(c) indicates that there is a causation requirement that must be shown before any financial compensation is to be ordered.

Limiting liability under the CPA

359. It is submitted that the power under s 29 is broad enough to enable the Court to craft orders that limit liability for any monetary order that is to be made to compensate any party in respect of them being a victim of a contravention of an overarching obligation. In cases where there are multiple parties that have contributed to loss, an order might be crafted along the following lines:
- a. To apportion liability, in the strict sense of dividing liability, analogously to how apportionment might be done under the *Wrongs Act*. This might be done in respect of some parties, but not in relation to others.
 - b. To limit the individual liability of one or more parties, to a capped amount of money. An order in this form would result in “joint and several” liability, but subject to a maximum contribution as determined by the Court. Again, this might be done in relation to some parties, but not in relation to others.
360. In the event that the Court finds that some parties were dominant contributors to any losses suffered by debenture holders, and that Alex (and perhaps others) were minor or peripheral contributors, it is “in the interests of the administration of justice” that

the Court make orders that reflects the relative degree of wrongdoing, and the relative contribution to any loss suffered by debenture holders.

361. Having regard to the discussion above, it is respectfully submitted that if Alex is ordered pay anything to compensate debenture holders for having been kept out of their money, it should be minimal.

CONCLUSION

362. For the reasons set out above, Alex:

- a. Was not subject to the overarching obligations in the CPA; and
- b. Did not contravene any overarching obligations under the CPA; and
- c. Did not materially contribute to any loss suffered by debenture holders.

ANDREW PALMER QC

Castan Chambers

ANGEL ALEKSOV

Castan Chambers

ANGUS CHRISTOPHERSEN

Owen Dixon Chambers

3 March 2021