IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

BETWEEN

LAURENCE JOHN BOLITHO & ANOR **Plaintiffs**

AND

JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE RECEIVER OF BANKSIA SECURITIES (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 004 736 458 & ORS

Defendants

THE SPR'S CLOSING SUBMISSIONS

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A. INTRODUCTION AND OVERVIEW

1. This Remitter has exposed one of the darkest chapters in the legal history of this State. The Contradictors, through their own industry, resilience and tenacity, have uncovered misconduct of a shocking and egregious kind. It is misconduct that has debased the administration of justice, abused the representative proceeding regime, betrayed the solemn trust that the Court places in its officers, and brought the justice system into disrepute. In *AB (a pseudonym) v CD (a pseudonym)* 362 ALR 1 the Full Bench of the High Court spoke with one voice (at [10]) [**ATH.600.640.0001 at 0004]** in its condemnation of "*fundamental and appalling*" breaches by counsel that had "*debased fundamental premises of the criminal justice system*". Sadly, similar observations apply to the impact on the civil justice system in this case.

2. Whilst the public interest in the administration of justice is of vital significance, in all that has been heard it is to be remembered that there is a group of people who have suffered in a much more tangible way. They are, of course, the approximately 16,000 debenture holders of Banksia. This group of ordinary citizens are mostly elderly and mostly based in regional Victoria. They witnessed the collapse of Banksia almost a decade ago, with many losing substantial amounts. They have been engaged in litigation ever since. Whilst there have been very substantial litigation recoveries of over $84 million and distributions to them from the Banksia Proceedings, the realisation by them that the people who they entrusted to pursue justice on their behalf instead subordinated their interests to their own greed would no doubt be a matter of shock and disbelief. They have been kept out of their money and, significantly, they have funded the very substantial costs of this Remitter.

3. One can scarcely doubt that many, if not most, of the debenture holders upon learning of the events in the Remitter will have lost faith in the justice system and the legal profession. Now is the opportunity, through the Court's orders, to take an important step in restoring that faith and rehabilitating the proper administration of justice. Perhaps fortuitously, only shortly before the collapse of Banksia, the Parliament saw fit to pass the *Civil Procedure Act 2010* (Vic) ("*CPA*") **[LAW.700.001.0001]**. In expanding the Court's powers and plugging gaps in the law, this legislation has swept away any concern that might have existed about the Court's power to make appropriate orders to do justice in these unique circumstances. It sits comfortably with the other statutory power engaged in the Remitter, s 33ZF of the *Supreme Court Act 1986* (Victoria) ("*SCA*") **[LAW.700.007.0001]**, empowering the Court to make any order it thinks appropriate or necessary to ensure justice is done in a proceeding. That is the focus of these submissions – the orders that now ought to be made to ensure that justice is done.

4. The circumstances now confronting the Court are unusual in light of the various capitulations, concessions, admissions and acknowledgments made by several of the wrongdoers. There is no real doubt that orders for costs and compensation will be made in favour of debenture-holders. Leaving aside the position of Mr Alex Elliott and Mr Trimbos, the real question is the nature and extent of those orders and the factual substratum and findings in support of them. On any view, the SPR submits that the orders for costs and compensation will be substantial. On the Contradictor's case, orders for costs and compensation under section 29 of the CPA should be made significantly exceeding $20 million. In light of what has transpired, the SPR strongly supports the Contradictor's position in that regard.

5. ***Recoverability***. But there is a fundamental problem. Australian Funding Partner's Pty Ltd ("*AFP*"), and Mr O'Bryan, Mr Symons and Mr Zita ("*Lawyer Parties*") appear to be unable to meet orders for costs and compensation against them in view of their financial position.[1] That this is the position is itself scandalous, particularly in relation to AFP. It would appear that at least in the case of AFP and Mr O'Bryan, what assets that might have been available have been dissipated in legal costs for the Remitter.

6. AFP, represented and advised in the Court of Appeal, the High Court and this Remitter by the leading commercial law firm, Arnold Bloch Liebler ("*ABL*"), has spent well over $3 million in legal fees (up to 30 June 2020 as revealed in discovery produced by AFP to the SPR) vigorously defending, until the very end, its asserted entitlement to very substantial amounts from the settlement proceeds. As a result it is now apparently without the funds to meet either a substantial costs order against it in this Remitter or the claims for compensation made against it by the Contradictor. Substantial amounts it has received in funding commissions in other class actions during the course of the Remitter have apparently gone to meet ABL's and counsel's legal fees in the Remitter. AFP has also declined to confirm that its shareholders will put AFP into funds so as to meet orders made against it in the Remitter.[2] This is even though it filed expert evidence in these proceedings from Mr Houston to precisely that effect in support of the submission that a substantial adverse costs order against it in the underlying proceedings would be met by AFP.[3] Of course, all of that expenditure on legal fees resulted in nothing but ultimate capitulation.

7. ***The Non-Party Costs Summons***. The prospect that orders in favour of debenture holders in this Remitter are unlikely to be satisfied from the available assets of AFP and the Lawyer Parties caused the SPR to file the non-party costs summons.[4] Necessarily, that summons is to be heard and determined following findings and judgment in the Remitter, but for present purposes, in the unusual circumstances of this case, it is appropriate to foreshadow the SPR's position in general terms. Given his joinder to the proceeding and the Contradictor's more specific and detailed allegations and claims for relief against him, it is unnecessary for Mr Alex Elliott to remain the object of the SPR's summons.

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1 Affidavit of David Charles Newman dated 17 August 2020, [18]-[43] **[LAY.040.001.0001 at 0007-0015].** Further discovery received from the SPR under orders of this Court has confirmed this position.

2 Letter from Maddocks dated 5 August 2020 [**MSC.040.005.0001**]; Letter from ABL dated 7 August 2020 [**MSC.040.010.0001**].

3 Affidavit of David Charles Newman dated 17 August 2020, at [33] **LAY.040.001.0001 at 0012]**.

4 **[CRT.040.001.0001].**

8. The Court's power to award costs against a non-party is a function of its broad jurisdiction to determine by whom and on what basis costs are to be paid. The Court has the power to make a costs order against a non-party when, in the circumstances of the particular case, it is just and equitable to do so. As the exercise of a judicial discretion, the question turns on a fact specific inquiry informed by all relevant considerations. As the Court of Appeal has emphasised, in each case must depend on its own particular facts.[5] Accordingly, the courts have refused to lay down fixed rules, and the categories of case in which a non-party may be ordered to pay costs are not closed. Notions of the jurisdiction to award non-party costs being "extraordinary" or "exceptional" should also not be pressed too far. As the current President of the Supreme Court of the United Kingdom emphasised in *Travelers Insurance Company v XYZ*:

> *It is obvious that, as a general rule, orders for costs are made only against a party to the proceedings. That is because, in general, persons who are not parties do not have a sufficient connection with the proceedings to provide a proper basis for them to be held liable for the costs of the litigation. There are, however, circumstances in which considerations of justice may, in accordance with general principles, justify such an award against a non-party. Such cases might be described as exceptional in the sense that their outcome involves a departure from the general rule that orders for costs are made against a party to the proceedings, but not in the sense that their determination depends on the identification of some unique or extraordinary feature.*[6]

9. To similar effect in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)* Dixon J observed:[7]

> *The jurisdiction to order costs against a non-party has been described as exceptional and a power that must be exercised judicially. Exceptional in this context means no more than outside the ordinary run of cases, where parties pursue or defend claims for their own benefit and at their own expense and pay, or receive, costs as the court determines. It is a jurisdiction that may be called into play where the non-party funds, controls, or benefits from the litigation, although the circumstances that attract the jurisdiction may differ from those that are relevant when the non-party is a party's solicitor*

10. There can no doubt that where a proceeding has abused, or has had the effect of abusing, the processes of the Court, then the Court has the power to award costs against those who were involved in, or supported, or stood to benefit from such proceedings; even more so where the abuse arises in the Court's protective jurisdiction under Part IVA of the SCA.

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5 *Carton v Caason* [2016] VSCA 236 at [13] [**ATH.600.624.0001 at 0005**].
6 [2019] UKSC 48 at [108] [**ATH.600.637.0001 at 0030**].
7 (2014) 48 VR 1 at [48] [**ATH.600.263.0001 at 0019**].

11. In the final analysis, the SPR respectfully submits that the Court will be comfortably satisfied that non-party costs orders are appropriate for at least Mr Mark Elliott (which now mean against his estate) and Elliott Legal. It is appropriate to make this submission now given the inextricable interrelationship between findings to be made in this Remitter as regards AFP and the conduct and involvement of Mr Mark Elliott, Mr Alex Elliott and Elliott Legal in the nefarious activities of AFP. As expanded upon in Section G below, it does not assist to parse all of the misconduct and attempt to make fine judgments about what capacity Mr Elliott was acting in at certain times. It is the substance, not the form, that matters – particularly where fraud is concerned. In reality and substance, AFP and Elliott Legal were Mr Elliott's alter egos, deployed by him as critical instruments in the fraud as and when necessary. The scheme alleged, and ultimately proved, by the Contradictor was a joint enterprise between Mr Elliott, his entities (AFP and Elliott Legal), Mr O'Bryan and Mr Symons. In this sense there is a loose analogy to joint enterprises in the criminal law, where all participants "*in a common design are liable for all acts done by any of them in the execution of the design*".[8]

12. In every material respect Mr Mark Elliott was the "*real master of the litigation*" and the person responsible for the fraud and abuse that has been perpetrated on the Court and debenture-holders.[9] He was the individual that stood to benefit most from the fraudulent scheme. And in the case of Elliott Legal it is plain that it remained closely involved in the day-to-day conduct of the Banksia proceedings, notwithstanding the ruling in *Bolitho v Banksia Securities (No 4)* [2014] VSC 582. Both Mr Mark Elliott and Mr Alex Elliott corresponded using their Elliott Legal email addresses,[10] and many of Mr Mark Elliott's directions were sent with his Elliott Legal email signature. The principal findings that the SPR respectfully submits should be made in respect of Mr Mark Elliott and Elliott Legal are addressed further in Section G below.

13. ***The LPLC and Potential Insurance Moneys***. As far as the Lawyer Parties and Mr Trimbos are concerned (and possibly Mr Alex Elliott and Elliott Legal), the other avenue for practical recovery the SPR currently intends to pursue is through professional indemnity insurance with the LPLC as mandated by statute for all admitted legal practitioners in this State.

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8 *Johns v the Queen* (1980) 143 CLR 108 at 113[**ATH.600.932.0001 at 0006**].

9 Affidavit of David Charles Newman dated 17 August 2020, [45]-[47] **[LAY.040.001.0001 at 0016-0017].**

10 Contrary to the oral evidence of Mr Alex Elliot that he *"only had one email account that"* he used, being his Elliott Legal email account (Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 30 May 2019 at 1802, [21] – [28] [**TRA.500.018.0001 at 0026**]), the documentary evidence shows that Mr Alex Elliot did have a personal email address: aelliott001@gmail.com [**CBP.001.001.5820**].

14. The SPR understands that there are applicable policies with the LPLC for each of the Lawyer Parties, Mr Alex Elliott and Mr Trimbos.[11] The SPR also expects that LPLC policies will be engaged in respect of the SPR's third-party costs summons against Mr Mark Elliott and Elliott Legal. The applicable LPLC policies expressly provide cover in respect of non-party costs order against the insured. Consistently with the consumer protection objectives underpinning the LPLC policies, cover extends to claims involving fraud and dishonesty. The limit of liability under each of these seven (7) separate policies is $2 million (defence costs inclusive). The SPR understands that the policy limit in some cases has been significantly eroded by defence costs (subject to the claw-back provisions from the insured under the policies), but significantly the limit of $2 million applies for each separate "loss". The SPR's position in respect of the "loss" that will arise in these proceedings is that there are multiple losses giving rise to claims under the LPLC policies against the insureds. Whilst there is of course overlap in respect of several of the allegations made by the Contradictor in the List of Issues there are also several instances where claims and allegations made by the Contradictor in the List of Issues are sufficiently distinct and separate, temporally and substantively, to constitute separate losses on ordinary principle.[12] The SPR has set out its position in correspondence to the LPLC.[13] If the policies do respond and the SPR's position is correct as to separate losses then very substantial insurance moneys are likely to be available to meet orders made in favour of debenture holders in the Remitter.

15. Any issues of policy interpretation as between the SPR and the LPLC of course are not to be determined now but in light of the unusual circumstances of this case and the nature of the jurisdiction engaged in this proceeding it is appropriate for the SPR to signal to the Court this likely course of action upon delivery of judgment in the Remitter, especially since any future action by the SPR will depend on findings made in respect of each of the broad categories of acts and omissions alleged by the Contradictor in the List of Issues against the wrongdoers.

16. ***The Evidence of the SPR***. The evidence in the Remitter clearly establishes that the SPR and his lawyers have been intentionally misled, consistently pressured and intimidated and taken advantage of by AFP in order to advance its own rapacious commercial agenda.

17. The evidence of the SPR was not challenged at trial. It should all be accepted and adopted as an accurate and reliable account of what occurred and the reasons why certain decisions were

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11 [**SPR.100.195.0001]**; [**LAW.700.035.0001**].

12 *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43 [**ATH.600.633.0001**]; *AIG (Europe) Ltd v Woodman* [2017] UKSC 18 [**ATH.600.623.0001**]; *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 [**ATH.600.627.0001**].

13 Letter from Maddocks dated 19 February 2021 [**ATH.600.628.0001].**

made as to settlement terms in faithfully acting, often in very difficult circumstances, in the interests of debenture holders.

18. The Court can certainly accept without equivocation that substantially all of the evidence and work necessary to get both proceedings ready for trial was prepared, filed and paid for by the SPR. Other important aspects of the SPR's evidence were summarised for the assistance of the Court in opening. Everything that followed supported what was said in opening.

19. It is also appropriate to say something about clauses 3.10 and 3.11 of the Settlement Deed. As the Court of Appeal (at [336]) observed: "*The burden on the court should not be increased by terms of settlement that inhibit parties from assisting the court*." Leaving to one side the question left unanswered by the Court of Appeal as to whether such clauses are contrary to public policy, it is now tolerably clear that a salutary lesson of this proceeding ought to be that contractual restrictions of any kind imposed on an officer of the Court—in the Part IVA class-action setting—preventing or inhibiting them from candidly assisting the Court on relevant issues are to be strongly discouraged.

20. It also must be said that of all the specious submissions advanced by AFP in the Remitter since November 2018, one of most indefensible was the repeated suggestion, doubled-down on in opening submissions, that AFP's and Bolitho's use of the term "reimbursement" was appropriate and not misleading. The use of that term was calculated to mislead (i) debenture-holders in the notice to them, (ii) the SPR and (iii) the Court. And in fact it did mislead the SPR and the Court. In context, it clearly conveyed the impression that AFP had paid and met legal costs of over $5 million (or at the very least that it had been meeting and paying substantial legal costs along the way). AFP well knew that the terms of the Funding Agreement applied to legal costs that were "paid" when in fact nothing had even been properly "incurred" in any event because of the various irregularities in the costs arrangements with the Lawyer Parties. The brazen absurdity of AFP's position is exposed if it is imagined what the reaction of the SPR and the Court would have been had AFP and the Lawyer Parties informed them of the true position: that legal costs of over $3 million remained unpaid and no fees had been paid since the Partial Settlement. Yet it was seriously suggested up until the very end that the use of the term "reimbursement" was not misleading.

21. ***Aspects of the SPR Opinions***. The salient aspects of the SPR Opinions were identified in opening submissions.[14] The unnecessary debate as to relative prospects between the two

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[14] [**SBM.040.002.0001**]; Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 27 July 2020) at 63 [**TRA.500.001.0001 at 0064**] – 84 [**0085**].

proceedings largely fell away with AFP (belatedly) adopting in opening submissions a more measured and reasonable position. As emphasised in those opinions and in openings, the relative prospects of the two proceedings was but one important integer to the determination of a fair and appropriate funding commission. Perhaps more significant is the undeniable fact that the SPR/debenture-holders substantially funded *both* proceedings.

22. It is also now appropriate to state our views more definitively on two other matters mentioned in those opinions. We had eschewed expressing too strong a view on these two matters in the genuine hope an adequate explanation would emerge. The first concerns the position adopted by AFP, Mr O'Bryan and Mr Symons in relation to the Trust Co additional remuneration claim that was used to inflate the denominator so as to justify a larger commission. Regrettably, no satisfactory explanation or admissible evidence was advanced by those defendants at trial on this issue. In our submission, the position (secretly) taken before the Court at the First Approval Application and then in the Court of Appeal was grossly misleading. Similarly, the position taken as to AFP's adverse costs exposure (also adopted by Croft J) was totally without foundation and grossly misleading. AFP's true costs exposure was a fraction of that represented to the Court at the First Approval Application. Remarkably, these two serious breaches of duties to the Court have been overshadowed by far more egregious breaches.

23. ***Disbarment***. Regrettably, the Court should act on Mr O'Bryan's and Mr Symons' invitation that this Court exercise its inherent power to strike them off the Roll of Practitioners. This is because by their conduct they have undermined the confidence which the bench, the profession and the public are entitled to have in their probity and integrity as barristers.[15] As observed by counsel for the SPR in opening, by their conduct they have betrayed the exceptional obligations and privileges of counsel and fractured the delicate and special relationship—essential to the administration of justice—between the Court and the Bar.[16] The factual underpinning necessary for the Court make such an order will no doubt be set out in the Contradictor's submissions.

24. The balance of these submissions address the following topics in some detail:

    (a) the SPR's position and role in the Remitter (**Section B**);

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15 *Smith v New South Wales Bar Association* (1991) 104 ALR 386 at 388 per Mason CJ [**ATH.600.635.0001 at 0003**].

16 *D'Orta v Victoria Legal Aid* (2005) 223 CLR 1 at 39-40 [105]-[107] [**ATH.600.626.0001 at 0039**], [111] [**0041**], [113] [**0041**].

(b) the principles concerning appropriate orders as to the costs of the remitter, currently being funded by debenture-holders (**Section C**);

(c) the principles concerning appropriate orders to compensate debenture-holders for further loss and damage suffered by them as a direct consequence of the wrongdoing (**Section D**);

(d) the survivability of orders sought by the Contradictor against Mr Trimbos following his death (**Section E**);

(e) the inapplicability of the proportionate liability regime to the Remitter (**Section F**); and

(f) the principal factual findings that should be made now in respect of Mr Mark Elliott and Elliott Legal's involvement in the fraudulent scheme (**Section G**).

B. THE SPR'S POSITION AND ROLE IN THE REMITTER

25. Various assertions about the role of the SPR and his costs in the Remitter have been made in submissions filed by Alex Elliott on 18 September 2020, and correspondence from AFP's solicitors throughout the course of the Remitter.[17] For the reasons outlined below, complaints made about the SPR's involvement in the Remitter, and any suggestion of duplication of costs with the Contradictor, are misconceived and fail to understand the nature of the SPR's role.

26. AFP's correspondence and motivations in this regard ought to be viewed with great scepticism. They are to be seen against a background of repeated intimidation and pressure directed towards the SPR and his legal representatives, addressed further below. Furthermore, AFP's expressed concerns about the costs of the SPR's participation in the Remitter cannot be regarded as made *bona fide* where it has caused those costs to be incurred and, despite repeated representations to the contrary,[18] is evidently not now in a financial position to meet even a fraction of the costs it has caused to be incurred.[19]

27. The SPR has raised the scope of his involvement in the Remitter on numerous occasions, and in particular before this Court on 29-30 May 2019.[20] These issues have already been canvassed in written submissions filed on behalf of the SPR on 27 May 2019 and 22 September 2020, but are addressed here briefly for completeness in the event AFP persists,

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17 See letters dated 18 September 2020 [**MSC.040.050.0001**] and 30 September 2020 [**MSC.040.051.0001**].

18 Affidavit of David Charles Newman dated 17 August 2020, [24] **[LAY.040.001.0001 at 0007]** – [34] **[0013]**.

19 Ibid.

20 *Bolitho & Anor v Banksia Securities Limited & Ors (No 6)* [2019] VSC 653 (**Bolitho No 6**), [47] [**ATH.600.022.0001 at 0019**].

as intimated in previous correspondence, with questioning the appropriateness of the SPR's participation in, and costs of, the Remitter.

Background to the Appointment of the Contradictor

28. A full appreciation of the background to the appointment of the Contradictor is important to understand the role being played by the SPR in the proceeding, and how that role has evolved throughout the conduct of the trial.

29. In its judgment, the Court of Appeal identified several reasons why the procedure adopted at the hearing of the approval application before Croft J miscarried insofar as the payments to AFP were concerned. One of those reasons was that several critical matters were not given the close attention and "*rigorous scrutiny*" they required.[21] This was because clauses 3.10 and 3.11 of the Settlement Deed, procured by AFP, the Lawyer Parties and Mr Alex Elliott as a condition of any settlement,[22] meant that the SPR and his legal representatives were not in a position to actively test and contradict the payments of approximately $20 million sought by AFP from the settlement sum.[23] The Court of Appeal ultimately held it was necessary that a contradictor with access to all confidential material and uninhibited by any such contractual restriction be appointed to fulfil this critical role on behalf of debenture-holders.[24] Absent any restrictions under the Settlement Deed, the SPR, as a party to the proceedings, would have been free, and obliged in accordance with his statutory duties to debenture-holders, to actively scrutinize the payments sought by AFP.

The SPR's Position and Role on Remitter

30. Given the background set out above, the SPR's initial role in the Remitter was to assist the Court, as ordered and as an officer of the Court, in relation to those factual and legal matters bearing on the issues in dispute[25] that were uniquely within his knowledge in light of his previous conduct of the proceedings. In performing that role, the SPR has:

    (a) filed the following affidavit material as evidence in the Remitter:

Date	**Description**	**No. of pages (including exhibits or Annexures)**

21 *Botsman v Bolitho* (2018) 57 VR 68, [300] [**ATH.600.102.0001 at 0063]**, [395] **[0078**].

22 See Section E to the Contradictor's List of Issues at paragraphs [54] [**PLE.010.005.0001 at 0062]** – [65] [**0070**].

23 *Botsman v Bolitho* (2018) 57 VR 68, [320] [**ATH.600.102.0001 at 0066]** and [333] **[0069]**.

24 See, *Bolitho No 6* [10] [**ATH.600.022.0001 at 0005]**.

25 *In the matter of Banksia Securities Limited (in liq) (receivers and managers appointed)* [2019] NSWSC 1899 at [14] [**ATH.600.053.0001 at 0006]**.

25 March 2019	Affidavit of David Charles Newman **[SPR.006.001.0001]**	7,238
29 March 2019	Confidential Affidavit John Ross Lindholm [**SPR.006.001.0005**]	24
2 June 2020	Affidavit of David Charles Newman [**SPR.006.001.0002**]	463
2 June 2020	Affidavit of John Ross Lindholm [**SPR.006.001.0003**]	47
2 June 2020	Affidavit of Samuel Roadley Kingston [**SPR.006.001.0004**]	2,319

(b) delivered extensive discovery of in excess of 8,000 pages of documents;[26]

(c) produced confidential opinions of counsel dated 19 March 2019 [**CCW.022.001.0460**] and 2 April 2019 [**CCW.032.001.0287**] totalling 101 pages;

(d) filed written submissions in respect of a range of matters which have arisen in the proceeding, and Mr Alex Elliott's related appeal; and

(e) exchanged voluminous correspondence with all the parties to the Remitter in respect of a range of issues including, but not limited to:

(i) evidence the parties proposed to rely on at the trial of the Remitter;

(ii) the production of documents by way of discovery;

(iii) the financial capacity of the principal defendants to the Remitter to make good any adverse judgment and/or costs order that may be entered against them; and

(iv) the conduct of the trial of the Remitter generally.

31. The Contradictor was appointed to oppose the claims for legal costs and funding commission sought by AFP to address the concerns of the Court of Appeal;[27] a separate and distinct role.

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26 Exhibit DCN-2 to the Affidavit of David Charles Newman dated 5 December 2019, pages 141 [**CRT.040.005.0001 at 0152]** - 154 [**0165**].

27 *Bolitho & Anor v Banksia Securities Limited & Ors (No 13)* [2020] VSC 706 (**Bolitho No 13**), [10] [**RUL.500.002.0001 at 0004**].

32. As the Contradictor repeatedly emphasised, he only knows what the parties tell him.[28] The course of events in the Remitter has vindicated the critical need for the participation of the SPR to ensure that the information given to the Contradictor by the parties was accurate, complete, and in its proper context.

33. The SPR could not reasonably have anticipated many of the extraordinary matters that have emerged in the Remitter. Given his duties to debenture-holders and his position as an officer of this Court, these are not matters that either the SPR or Contradictor could have approached with equanimity as they emerged. This has meant that as the proceeding has progressed:

    (a) the role of the Contradictor has significantly expanded to advance the contention that group members should be compensated for alleged breaches of the *Civil Procedure Act 2010* (Vic) and other obligations as set out in the List of Issues; and

    (b) the role of the SPR has similarly expanded as result of the contentions made by the Contradictor and ultimately the admissions and concessions made by a majority of the principal defendants. Increased emphasis was placed by the SPR on taking steps to consider the recovery of sums that may ultimately be awarded in debenture holders' favour.[29] This resulted in the SPR filing his summons dated 18 August 2020 seeking costs orders against a number of non-parties.[30]

34. In furtherance of their role, the Contradictor has:

    (a) served eight versions of the list of issues which have sought to articulate the contentions referred to in paragraph 33(a) above;

    (b) served 14 subpoenas and two notices to produce; and

    (c) been involved in a number of discovery disputes with AFP, the Lawyer Parties and Alex Elliott, two of which were referred to be determined by her Honour Associate Justice Daly.

35. The SPR and the Contradictor each act, not in furtherance of any private interest, but for the benefit of approximately 16,000 group members/debenture holders in different ways. Each also acts in the broader public interest to assist the Court to determine serious issues concerning the proper administration of justice.[31] Given this, it is unremarkable that both the

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28 Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 20 November 2020) at 5 [**TRA.510.018.0001 at 0006]**.

29 Bolitho No 13, [11] [**RUL.500.002.0001 at 0005**].

30 Summons filed 18 August 2020, **[CRT.040.001.0001]**.

31 Ibid, [11] [**RUL.500.002.0001 at 0005]** and [22] **[0008**].

Contradictor and the SPR have considered it necessary to provide assistance to the Court from their vantage points. Nor is it at all surprising that the positions of the Contradictor and the SPR on a variety of issues have overlapped to a significant degree. That is simply a consequence of the interests that both were appointed by the Court to serve. Whilst their interests have overlapped, they have advanced those interests from the perspective of distinct and different roles. In particular, the SPR has done so from the perspective of his central role in the underlying Banksia Proceedings on behalf of debenture holders.

36. For the reasons identified above, the SPR and the Contradictor each have played distinct roles in the litigation, with the importance of the role performed by the SPR affirmed in open court and in numerous reported and unreported judgments of both the Supreme Court of New South Wales and the Supreme Court of Victoria.[32]

37. In particular:

(a) at a hearing before Dixon J on 30 May 2019, his Honour stated as follows:

> *It seems to me to quite clear, the special purpose receivers are sitting in court, and they have not hesitated to date to draw attention to issues of costs, issues of delay in seeing the debenture holders compensated. They are playing an appropriate role that is different to role that might have been subject to some form of contractual restraint, but is, nevertheless, an appropriate one that also exists in this proceeding as a protective process.*[33]

(b) *In the matter of Banksia Securities Limited (in liquidation) (receivers and managers appointed)* [2019] NSWSC 1899 at [14] **[ATH.600.053.0001 at 0006]** Black J stated:

> *It seems to me that the SPRs have an important role in protecting the debenture holders' interests in respect of inquiries as to those matters which are currently taking place in the Supreme Court of Victoria, and an equally important role in providing evidence and legal assistance to that Court in respect of those matters. I have no doubt that that role is properly incidental to the scope of the matters for which they were appointed by this Court.*

(c) *In the matter of Banksia Securities Limited (in liquidation) (receivers and managers appointed)* (unreported, Supreme Court of New South Wales, Black J, 7 September 2020) at 6 [**ATH.600.256.0001 at 0006]** – 7 [**0007**] Black J stated:

> *I am satisfied, having regard to the evidence led by the SPR, that the work undertaken by them has been reasonably necessary, in a matter that has always involved a significant degree of complexity, and where that*

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32 Ibid, [10] [**RUL.500.002.0001 at 0004**]; It is notable that full disclosure of the complaints made by AFP about the role of the SPR were made to the Supreme Court of New South Wales.

33 Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 30 May 2019) at 232 [**TRA.510.012.0001 at 0064**].

> *complexity is, in some respects, increasing rather than reducing as a result of the matters which have now emerged in the remittal proceedings. It seems to me that those matters have again emphasised the very significant role that the SPR has played, and continues to play, in protecting the debentures' holders interests in respect of the relevant proceedings, and the inquiries which are now taking place in the Supreme Court of Victoria, and also in assisting the Court in those matters. Mr Redwood pointed out, and I accept, that those matters involve a public interest in the administration of justice, which would have been sufficient to justify the SPR's taking a continuing role in them. As matters have developed, they also now involve a prospect that debenture holders will be able to recover costs which they have been put, by way of fees and disbursements, time costs, and potentially the SPR's remuneration, by reason of the matters that are the subject of the remittal proceedings. I emphasise that I do not, of course, express any merits view as to that matter, which is a matter for the Supreme Court of Victoria. I merely note that the prospect of such a recovery, in addition to the significant of these matters for the administration of the justice, are plainly sufficient to warrant the SPR's continuing role, with his legal advisers, in the remittal proceedings.*

(d) *In the matter of Banksia Securities Limited (in liquidation) (receivers and managers appointed)* (unreported, Supreme Court of New South Wales, Black J, 17 December 2020) at 3 [**ATH.600.257.0001 at 0003]** - 4 [**0004**] Black J stated:

> *I noted in my earlier judgment that it seems to me that the special purpose receiver is justified, for present purposes, in continuing his involvement in the remittal proceedings, so far as they arise from the issues in respect of the funding of the class action, and significantly impact upon the interests of debenture holders and the ultimate recoveries of debenture holders. I am satisfied that, in that context, the work undertaken by Mr Lindholm has been reasonably necessary, in proceedings that continue to involve a significant degree of complexity. I again bear in mind the public interest that exists in those proceedings, in respect of the administration of justice, which supports Mr Lindholm continuing to take a role in them, together with debenture holders private interests in seeking, initially, to preserve the recoveries they have made and now, potentially, to recover moneys which may not properly have been charged against the relevant fund in the class action.*

38. It also should be repeated that the SPR has at all times endeavoured to maintain a sense of proportionality in his role relative to that of the Contradictor. That is evident in many respects but two matters bear mention. First, the SPR's total costs, whilst themselves significant, constitute approximately half of the costs of the Contradictor. The SPR has conscientiously endeavoured to avoid duplication, where possible, but continued to provide reasonable assistance and co-operation to the Contradictor and the Court where appropriate. In that regard the role of the SPR has, if anything, enabled the Contradictor to conduct its role and function more efficiently and effectively. Second, although the SPR has utilised three separate counsel throughout the Remitter and at the trial itself, that is because the SPR has been concerned to

ensure the right level of counsel assistance to the Court on an issue-by-issue basis. Unlike the other parties, none of the counsel that that have appeared for the SPR have appeared for all aspects of the trial or during earlier stages of the Remitter.

39. It is no doubt regrettable that more than $10 million in legal costs has needed to be spent by the Contradictor and the SPR—from debenture-holders' funds— over the last three years to progress the very serious issues in the Remitter, but neither the Contradictor nor the SPR are open to sensible criticism in that regard. Rather, the extraordinary cost of the Remitter imposed on debenture-holders has been entirely a product of the appalling conduct of the wrongdoers in the first place, belated concessions and admissions and, it must be said, positions taken by some of those representing the wrongdoers at various points along the way that has assuredly resulted in the elongation and increased cost of the Remitter.

40. The SPR does not suggest the Court must now embark on a precise quantification exercise of the amount of the SPR's costs to be awarded in debenture-holders' favour. But it should emphatically now reject at the level of principle any suggestion that the SPR's role and degree of participation in the Remitter has not been reasonable and proportionate insofar as AFP or any other party may suggest otherwise in its closing submissions. In other words, any final determination on the amount of the SPR's costs to be awarded in favour of debenture-holders against AFP and other parties should proceed on the basis of a finding by this Court that the SPR's role and participation in the Remitter has been reasonable and appropriate and has <u>not</u> resulted in or encouraged unnecessary duplication of costs. Such a finding is also in the interests of bringing finality to this litigation.

C. THE COSTS OF THE REMITTER

41. The SPR submits that any one or more of AFP, the Lawyer Parties, Alex Elliott and the estate of Mr Trimbos should each pay the SPR and the Contradictor's costs of the Remitter on an indemnity basis.

42. The total legal costs of the Remitter to debenture-holders will significantly exceed **$10 million**. Those costs can be broadly divided into:

    (a) the costs incurred by the Contradictor of approximately $7 million up until 31 December 2020; and

    (b) the costs incurred by the SPR of approximately $3 million up until 31 December 2020.

43. Having regard to what has transpired in the Remitter, it scarcely needs mention that it would be an affront to justice if all or substantially all of those legal costs, insofar as they have been

reasonably incurred (as the SPR submits they have been), were not ultimately recovered from the wrongdoers.

44. The SPR's position is that orders as to the substantial costs of the Remitter can and should be made in the Court's principal judgment. Of course, usually such orders would be made after judgment. But in the unusual circumstances of this case, and in the interest of finality, particularly acute here, it is appropriate for orders as to the substantial costs of the Remitter to be addressed in the primary judgment, insofar as it is fair and expedient to do so. In other words, the Court should determine in principle that indemnity costs orders should be made against the wrongdoers in respect of the costs incurred by the Contradictor and the SPR. It may be that some aspects of the precise quantum of those costs and the apportionability of those costs between wrongdoers can only fairly be addressed following the findings made in the Court's judgment.

Relevant Principles

45. The principles regarding the imposition of indemnity costs are well-understood. They have already been summarised in the Court's reasons for ordering that AFP pay indemnity costs in relation to the Insurance House settlement.[34] However, the following matters bear emphasis.

46. *First*, the court has an "absolute and unfettered" discretion in awarding costs.[35] Costs are by default awarded on the standard basis, but the Court may order costs to be paid on the indemnity basis "*as and when the justice of the case might so require*".[36] That ordinarily requires the existence of "special circumstances" that justify costs being paid on the higher basis.

47. *Secondly,* in the oft-quoted case of in *Colgate Palmolive Co v Cusson Pty Ltd*,[37] Shephard J surveyed the authorities and summarised the kind of circumstances that had been held to justify the imposition of indemnity costs. They included evidence of misconduct that causes loss of time to the Court and parties, proceedings being commenced for an ulterior motive or in willful disregard of the facts, and the making of allegations that ought never

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34 *Banksia Securities Ltd v Insurance House Pty Ltd (Costs)* [2020] VSC 234 at [15] **[ATH.600.566.0001 at 0006]**.

35 *Re Wilcox (No 2)* (1996) 72 FCR 151 at 152 [**ATH.600.569.0001 at 0002**]; *Supreme Court Act 1986* (Vic), section 24(1) [**LAW.700.036.0001**].

36 *Andrews v Barnes* (1887) 39 Ch D 133 at 141 [**ATH.600.572.0001 at 0009**].

37 (1993) 46 FCR 225 **[ATH.600.375.0001].**

have been made or the undue prolongation of a case by groundless contentions.[38] However, the categories of case are not closed.[39]

48. *Thirdly,* it has been observed in this Court that the general presumption in favour of costs on a standard basis "*changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused*".[40] Where findings of dishonesty or serious misconduct are made against the party ordered to pay costs, they are "*more frequently if not invariably awarded on an indemnity basis*".[41]

49. *Fourthly,* while the primary purpose of an indemnity costs order is to compensate the innocent party by ensuring they obtain a greater indemnity for the legal costs, it has been recognised that the power carries a legitimate exemplary value. In particular, given the "*modern circumstances of enlarged attention to the efficient administration of justice*" the Court is entitled to "*keep in mind the consequence of an indemnity costs order not only for the particular parties before it but for the signal which it sends about the due administration of justice in like cases*".[42]

50. *Finally*, care must be taken in applying the above general law principles unmediated by the provisions of the CPA. The CPA provides a "*separate and independent basis*" for the imposition of indemnity costs.[43] Costs can be awarded on an indemnity basis as a "*sanction*" for a breach of the overarching obligations.[44]

51. Section 29(1)(a) of the CPA expressly provides for an order as to legal costs against the contravener "*arising from the contravention of the overarching obligation*". Section 29(1)(f) is a catch-all provision empowering the Court to make "*any other order that the court considers to be in interests of any person who has been prejudicially affected by the contravention of the overarching obligations.*" Section 29(3) otherwise makes clear that the express powers to make orders as to costs in s 29 do not limit any other power of a court to make an order as to costs.

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38 Ibid, at 233 **[ATH.600.375.0001 at 0009]**, *Martin v Norton Rose Fulbright Australia (No 12)* [2020] FCA 1795 at [29] [**ATH.600.573.0001 at 0012]**.

39 *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233, [4] **[ATH.600.375.0001 at 0009]**.

40 *Ugly Tribe Company Pty Ltd v Sikola* [2001] VSC 189, [12] **[ATH.600.420.0001 at 0006]**.

41 Ibid **[ATH.600.420.0001 at 0006]**.

42 *Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 at 246 [**ATH.600.574.0001 at 0005**].

43 *Macfadyen & Ellis v Bank of Queensland Ltd (Costs*) [2015] VSC 20 at [19] [**ATH.600.575.0001 at 0006**].

44 *Actrol Parts Pty Ltd v Coppi (No 3)* (2015) 49 VR 573 at 602 [105] **[ATH.600.276.0001 at 0030]**.

52. In considering whether indemnity costs should be ordered as a sanction under section 29 of the CPA, primacy must be given to the terms and purpose of the CPA.[45] Those powers cannot be fettered by principles developed by the general law in circumstances where the CPA was enacted to change the law and the culture of litigation. That is not to say that the principles developed by the general law are not useful guides to the sorts of considerations that may apply.

Circumstances Justifying Indemnity Costs

53. The SPR submits that there are three primary reasons why an award of indemnity costs should be made:

    (a) firstly, because of the fact of the contraventions themselves;

    (b) secondly, at a more general level, it would visit a substantial injustice upon the debenture holders if they were to be left out of pocket for the costs of a procedure and judicial inquiry within a civil proceeding that has uncovered substantial wrongdoing, but which they have funded in the first instance; and

    (c) finally, various aspects of the conduct of the parties in the Remitter itself.

54. To put it bluntly, it would be difficult to conceive of a clearer case warranting an order for payment of costs on an indemnity basis.

The Nature and Gravity of the Contraventions

55. This Remitter has uncovered breaches of the overarching obligations of the most serious and fundamental kind. The Court is empowered to make any order in relation to those contraventions that is in the interests of justice, including an order that the defendants "*pay some or all of the legal costs or other costs of expenses of any person arising from" those contraventions*. "Arising from" are words of wide import and, although denoting some causal connection, encompass more remote consequences than, for example, the phrase "caused by".[46] It does not require that the contravention be the sole, or even proximate, cause of the costs; merely that those costs originate in or flow from the contraventions.

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45 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)*(2014) 48 VR 1 at [90] [**ATH.600.263.0001 at 0035**] - [94] [**0037**].

46 *Government Insurance Office of NSW v Green & Lloyd* (1965) 114 CLR 437 at 445 [**ATH.600.577.0001 at 0009]**.

56. On any view, the costs incurred by the SPR and Contradictor in the Remitter arise from the contraventions of AFP and the Lawyer Parties. Indeed, those contraventions are the direct, sole and proximate causes of the costs incurred.

57. Since the very early stages of the Remitter, it has engaged Part 2.4 of the CPA in examining the adherence of the legal practitioners representing (or in the case of Mr Trimbos, giving expert evidence in support of substantial payments for AFP and the Lawyer Parties) debenture-holders in the Banksia group proceeding with their overarching obligations. Had any of the defendants properly discharged those overarching obligations, the dishonest and fraudulent scheme uncovered by the Contradictor would never have been devised and the need for such a wide-ranging and expensive inquiry within this civil proceeding would have been obviated.

58. The Contradictor has explained the many instances of gross dereliction of duty in comprehensive detail. It is pertinent on the issue of indemnity costs to mention two matters of particular relevance.

59. AFP, Mr O'Bryan and Mr Symons engaged in a high-handed negotiation strategy to secure settlement terms that were designed to divert an unjustified and substantial portion of the settlement proceeds into their own hands and shield their conduct from scrutiny. Those terms were not in the interest of debenture-holders and have been aptly described by the Contradictor as the "Adverse Settlement Terms". They procured the SPR's agreement to those terms while intentionally withholding critical information about the nature of their fee agreements, the fact that no fees had actually been paid, and the fact that the fees claimed were essentially a fabrication.[47] The SPR was therefore prevented from subjecting those fees, and hence the funding commission sought, to proper scrutiny in accordance with their statutory duties to debenture holders. In other words, a key plank of their misconduct was to deliberately mislead the SPR, an officer of the Court, and suppress highly relevant material from coming into the hands of the SPR's lawyers so that the approximately $20 million being sought, at the expense of debenture holders, could be tested.

60. Those parties continued their deception by procuring a misleading expert report by, inter alia, providing Mr Trimbos with false fee agreements and invoices containing false and misleading information (such as a PAID stamp). This, together with grossly misleading

47 Contradictor's List of Issues, at [60] [**PLE.010.005.0001 at 0066]**.

opinions filed by Mr O'Bryan and Mr Symons, in turn misled the Court and led to the approval of the AFP's costs and commission at the First Approval Application. And the Court of Appeal was then grossly misled in all the ways described by the Contradictor.

61. It is unnecessary to engage in any complicated causation analysis to establish that such conduct (amongst other conduct) is the direct and proximate cause of the need for this Remitter and the extraordinary expenses associated with it. It is a matter of experience and common sense. One can ask rhetorically, why else would this Remitter be required? In fact, but for this Remitter, the misconduct would never have been uncovered. It must follow that, in sanctioning the defendants for that misconduct, the costs of inquiring into, discovering and prosecuting that misconduct be paid by the wrongdoers on the basis that that most completely compensates those who have funded it.

The Funding of the Remitter/Part 2.4 of the CPA

62. This leads to a more general submission. From its early stages, the Remitter has engaged Part 2.4 of the CPA (partly of the Court's own motion) in tandem with AFP's application for very large payments to itself under Part IVA of the Act. Whilst Part 2.4 of the CPA has been engaged within this "civil proceeding", and it has had appropriate *compensation* to debenture-holders as its central focus, its engagement has meant the anterior question of *whether* overarching obligations have been breached by AFP and the Lawyer Parties has loomed large in the procedural orientation and cost of the Remitter.

63. Section 29 itself is silent on how an inquiry into any contravention of the overarching obligations is to be funded, although it is contemplated that the inquiry into any contravention occurs within an existing "civil proceeding". In this case, it so happened that there was a pool of funds available from which the costs of the Contradictor could be funded. Those funds, of course, belong to 16,000 mostly elderly debenture-holders.

64. The engagement of Part 2.4 of the Act in this civil proceeding was demonstrably in the public interest. The allegations made by the Contradictor struck at the very heart of the administration of justice. They raised important issues about the relationship between the Court and its officers, abuse of the class actions regime, and the standards of professional behaviour demanded by the CPA. In that sense what has occurred has served an important public purpose and has operated to bring officers of the Court to account for their misconduct.

65. The point of principle is that it would be unjust if the debenture holders, having funded the Remitter with its focus on whether overarching obligations have been contravened by several parties, are left out of pocket because of it. By the very nature of the order, costs on the standard basis would leave the debenture holders bearing the difference between the actual costs incurred and paid by them and the amount recoverable on a taxation by reference to the scale.

66. In this way, the Remitter is analogous to proceedings for contempt wherein it is a "*common or usual practice*" to award indemnity costs in favour of the person who brings the contempt proceeding.[48] That is due to a recognition that a person who comes to court to have a person dealt with for contempt "*should not be out of pocket*",[49] partly because such proceedings serve the public interest.[50] It is also a reflection of the principle that "*nothing should be done to deter a person from brining a contempt to the notice of the court; and the risk of having to bear any of the costs will often be a real deterrent*".[51] These considerations apply with equal force to this Remitter.

Specific Instances of Misconduct in the Remitter

67. Further, there are specific instances of misconduct within the course of the Remitter itself which justify an imposition of indemnity costs.[52]

(A) Proceeding without a proper basis (AFP); maintaining a defence without a proper basis (O'Bryan/Symons)

68. AFP, Mr O'Bryan and Mr Symons participation in the Remitter started with a bang,[53] but ended with a whimper. Despite maintaining a defence to the allegations, Mr O'Bryan capitulated on Day 5 of the trial in the course of the Contradictor's opening. Mr Symons capitulated two sitting days later. AFP quickly followed suit but its capitulation was a more gradual retreat. In the early stages of the Remitter, each of them to varying degrees made vigorous submissions maintaining that the Contradictor's allegations were without

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48 *Deputy Commissioner of Taxation v Gashi* (No 3) [2011] VSC 448 at [20] [**ATH.600.578.0001 at 0012**].
49 *Pico Holdings Inc v Voss* [2002] VSC 319 at [89] [**ATH.600.579.0001 at 0019**].
50 *McIntyre v Perkes* (1988) 15 NSWLR 417 at 436 **[ATH.600.580.0001 at 0020]**.
51 *EMI Records Ltd v Ian Wallace Ltd* [1983] Ch 59 at 76 **[ATH.600.581.0001 at 0018]**.
52 *Construction, Forestry and Energy Union v B Steel (AIS) Pty Ltd* (2003) 196 ALR 350 at 351 [**ATH.600.625.0001 at 0002]** - 352 [**0002**].
53 Mr O'Bryan and Mr Symons maintained a defence to the allegations and even went as far as to apply to strike out the list of issues.

merit. Yet they all must have known from the moment those allegations were made that they were indeed true.

69. Abandonment of a claim or defence does not always, of itself, justify an award of indemnity costs.[54] However, "*unexplained abandonment*" has been held to often justify such an award.[55] That is particularly so where the unexplained abandonment can found an inference that the party, property advised, ought to have known it had no proper claim or defence.[56]

70. Such an inference can readily be drawn here. In the case of Mr O'Bryan, no new evidence had been introduced, and no witness heard, in the trial of the Remitter that could have changed the forensic calculus. Rather, the Contradictor was merely opening his case, mostly be reference to documents extensively cited in the List of Issues. Similar considerations apply in respect of Mr Symons in circumstances where the Contradictor's case relied almost entirely on documentary evidence that was well known to the parties.

71. Ordinarily, consideration of such matters arises where the abandonment has meant that there has been no legal adjudication of the merits of the claim.[57] That is not the case here. The claims proceeded to be heard. The evidence was overwhelming. The Contradictor's case was mostly constructed on the basis of contemporaneous documents that spoke for themselves, and the obvious inferences that arose from such documents. There simply was not any innocent explanation open or available to the defendants. Mr O'Bryan and Mr Symons, properly advised, ought to have known that they could not resist the allegations made, and their belated abandonment of their respective defences recognises that fact. Whilst it was the proper course for Mr O'Bryan and Mr Symons to abandon any defence of the allegations against them when they did and submit to appropriate costs and compensatory orders from the Court, that late abandonment is not to their "credit" on any award as to indemnity costs. By that stage, the enormous costs of the Remitter had become sunk costs largely attributable to their underlying conduct and their staunch defence of the allegations made against them up until trial.

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54 *Ghougassian v Fairfax Community Newspapers Pty Ltd* [2015] NSWCA 307 at [53] **[ATH.600.585.0001 at 0019]**.

55 *Palmer v Parbery* [2018] QCA 268 at [31] **[ATH.600.584.0001 at 0009]**.

56 *Ghougassian v Fairfax Community Newspapers Pty Ltd* [2015] NSWCA 307 at [57] **[ATH.600.585.0001 at 0021]**.

57 *Re Minister for Immigration & Ethnic Affairs (Cth); Ex parte Lai Qin* (1997) 186 CLR 622 at 624 **[ATH.600.586.0001 at 0003**]- 625 [**0004**].

72. In fact, the situation here is even more egregious because the abandonment had been preceded by repeated submissions and correspondence accusing the Contradictor of making claims without merit or as exceeding their proper role.[58]

73. The same consideration applies to AFP. The Remitter was, in form, an application by AFP for the payments of a substantial funding commission and "reimbursement" of legal costs in support of that funding commission totaling approximately $20 million. It had maintained that claim in this Court for 30 months before it was abandoned during trial. The bringing and maintenance of a claim of that amount was without a proper basis. Properly advised, AFP ought to have known from the beginning, but certainly no later than the Court of Appeal's decision in November 2018, that its application for payments of $20 million had no realistic prospect of success; Properly assessed, according to the law and the known facts, AFP was at best only ever entitled to a fraction of that amount and must have known it had no entitlement at all in the view of the misconduct identified by the Contradictor. AFP similarly sought to constrain or limit the role of the Contradictor.[59]

74. However, in the result, AFP, after 30 months of pressing a claim for a substantial funding commission, was unable even to lead any admissible evidence of the existence of any funding agreements with debenture-holders, let alone the asserted 55% of debenture-holders by value. In other words, AFP could not even satisfy the most basic threshold requirement in support of its exorbitant claim.

75. AFP sought to do so in a hearsay manner through the evidence of Mr Horne. Mr Horne's evidence rose no higher than a spreadsheet purportedly prepared by other unnamed persons that was said to record the receipt of signed funding agreements. It was a stark example of inadmissible documentary hearsay and was immediately excluded as such. AFP, advised by experienced solicitors and counsel, must have known that to be the case. Accordingly, it can readily be inferred that AFP should never have brought or maintained its claim and, in any event, should have abandoned it well before Day 7 of the trial. This fact also casts doubt on the propriety of the prior commission paid to AFP as a consequence of the Partial Settlement.

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58 See, Bolitho No 6, [28] [**ATH.600.022.0001 at 0013**].

59 See for example, AFP's submission dated 6 February 2020 at [14] **[SBM.020.001.0001 at 0004]** – [16] **[0005]** and the correspondence referred to below.

(B) Pattern of Pressure and Intimidation

76. The Remitter itself dealt with allegations of AFP and the Lawyer Parties attempts to pressure or intimidate the SPR and his counsel during the Appeal by alleging, during the course of the SPR's counsel's submissions, that those submissions constituted a breach of the settlement deed. This Court has already found unwarranted pressure was applied on the SPR in connection with AFP's attempt to procure for itself responsibility for administering the settlement distribution scheme.[60] The Court also heard evidence about pressure applied to the SPR to secure the abandonment of the McKenzie Proceeding at the time of the Partial Settlement.[61] To be clear, AFP's conduct in these respects travelled well beyond a party robustly advancing its commercial interests. Its conduct was morally reprehensible.

77. This pattern of intimidation and pressure extended into the conduct of the Remitter itself where AFP, through its solicitors, sought to dissuade the Contradictor and the SPR from independently prosecuting the claims in the Remitter and/or taking an active role in the proceeding. Examples of that conduct are seen in the following correspondence:

    (a) letters from AFP's solicitors to the Contradictor's solicitors threatening personal costs orders against the Contradictor and their solicitors;[62]

    (b) letters from AFP's solicitors to the SPR's solicitors which, amongst other things, demanded that the SPR take a "restrained" approach, or take "no position", in respect of the matters for the final hearing of the Remitter and demanded, without justification or any proper basis, for certain matters to be placed before Black J in the Supreme Court of New South Wales in relation to the SPR's remuneration; [63]

    (c) letters from AFP's solicitors to the solicitors for the SPR and Contradictor making unwarranted allegations of inappropriate collusion against the SPR, the

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60 *Bolitho v Banksia Securities Limited (No 5)* (2019) 60 VR 486; [2019] VSC 554 at [79] [**ATH.600.587.0001 at 0018**].

61 See for example, Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 14 August 2020) at 794 **[TRA.500.008.0001 at 0010]** - 799 **[0015]**.

62 See letters dated 24 May 2019 **[AFP.005.001.0568]** and 28 May 2019 [**MSC.040.052.0001**].

63 See letters dated 7 December 2018 [**MSC.040.041.0001**], 10 December 2018 [**MSC.040.042.0001**], 12 December 2018 [**MSC.040.043.0001**], 18 December 2018 [**MSC.040.044.0001**], 6 February 2020 [**MSC.040.045.0001**], 28 February 2020 [**MSC.040.046.0001**], 14 July 2020 [**MSC.040.047.0001**], 17 July 2020 **[MSC.040.004.0001**], 24 July 2020 [**MSC.040.014.0001],** 30 July 2020 **[MSC.040.006.0001],** 2 August 2020 **[MSC.040.009.0001],** 5 August 2020 **[MSC.040.005.0001]**, 18 September 2020 [**MSC.040.050.0001**] and 30 September 2020 [**MSC.040.051.0001**].

Contradictor and Mrs Botsman's counsel, coupled with baseless discovery requests seeking to corroborate these confected claims of inappropriate collusion; [64]

(d) submissions asserting without any proper basis that counsel for the SPR had materially changed opinions to this Court as a result of conferrals with the appellant in the Court of Appeal;[65] and

(e) a letter from AFP's solicitors to the solicitors for the SPR, Contradictor and Trust Co indicating that AFP would withdraw its Special Leave Application to the High Court if a settlement distribution scheme was agreed to by the parties in a form suitable to AFP. The form of scheme sought to be made by AFP was ultimately rejected by this Court in *Bolitho v Banksia Securities Limited (No 5)* [2019] VSC 554.[66]

78. Even viewed in isolation and divorced from the context of the contraventions themselves, this conduct in the course of the Remitter alone would justify the imposition of indemnity costs against AFP, Mr O'Bryan and Mr Symons.

D. **"COMPENSATION" UNDER SECTION 29**

79. The Contradictor sets out, in broad terms, the losses said to have been suffered by debenture holders as result of the contraventions of the overarching obligations (in addition to the substantial costs of the Remitter addressed in the previous section). Those losses can be divided into two broad categories:

(a) the SPR's costs of aspects of the Banksia Proceedings in which costs orders have previously been made and where it was ordered by the Court that the SPR's costs be costs in the special purpose receivership of Banksia. This includes the costs of the First Approval Application (before Croft J), the appeal in the Court of Appeal, and the application for special leave in the High Court of Australia ("*Previous Costs Orders*"); and

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64 See letters dated 30 November 2018 [**MSC.040.039.0001**], 4 December 2018 [**MSC.040.040.0001**], 9 October 2019 [**MSC.040.049.0001**], 22 November 2019 **[CRT.040.007.0001 at 0016**], 29 November 2019 [**CRT.040.007.0001 at 0037**], 9 December 2019 [**CRT.040.006.0001 at 0011**], 12 December 2019 **[CRT.040.006.0001 at 0013**] and 16 December 2019 [**CRT.040.006.0001 at 0037**].

65 See submissions filed by the SPR dated 5 December 2019 [**SBM.040.007.0001**] and 18 December 2019 [**SBM.040.006.0001**] and submissions filed by AFP dated 10 December 2019 [**ATH.600.622.0001**].

66 See letter dated 18 February 2019 [**MSC.040.048.0001**].

(b) interest in the nature of damages arising as a result of the debenture holders being kept out of their rightful entitlement to distribution of the settlement proceeds for a substantial period of time.

80. Each broad head of loss falls to be considered, and determined, in different ways. Broadly, the SPR's submission (which will be expanded on below) is as follows:

(a) in relation to the Previous Costs Orders, it is unnecessary for the Court to be troubled by the general law's reluctance to characterise legal costs as a form of damage or otherwise treat costs of legal proceedings as recoverable as damages. It is also unnecessary for the Court to disturb the extant costs orders. The Court's powers under section 29 of the CPA (and section 33ZF of the SCA) are apt to allow it to make orders that those prior costs be payable by any person found to have breached the overarching obligations. In any event, the costs are recoverable as damages in accordance with established exceptions to the general law rule; and

(b) the Court is plainly empowered to, and should, award interest in the nature of compensation under section 29(1)(c) of the CPA.

First Category: Previous Costs Orders

81. Recovery is sought of the SPR's costs of the First Approval Application, the Botsman Appeal and the Special Leave Application. Each of those events in the litigation are the subject of existing costs orders, being:

(a) orders of the High Court on 17 May 2019 [**TRA.550.002.0001** at **0010**] that AFP pay the SPR's costs of its application for special leave to appeal to the High Court which amount to approximately $160,000 (including GST);

(b) orders of Justice Croft dated 30 January 2018 [**SPR.005.001.9716** at **9725**] that the SPR's costs of the First Approval Application before Justice Croft be costs in the special purpose receivership which amount to approximately $100,000 (including GST); and

(c) orders of the Court of Appeal dated 1 November 2018 [**SPR.005.001.8859** at **8865**] that the SPR's costs of the Appeal to the First Approval Application be costs in the special purpose receivership which amount to approximately $560,000 (including GST).

82. Relevantly, with the exception of the Special Leave Application costs order, none of those orders are *inter partes* costs orders in the sense that they make any party or other person liable

for the SPR's costs. Rather, they are orders directing or confirming that the costs of the SPR in relation to those events may be recovered from the assets of the receivership (i.e., the SPR Litigation Fund). Of course, in having resort to those assets to satisfy legal costs, the assets of Banksia were depleted and the funds available for distribution to the debenture holders were diminished.

83. It is without doubt the case that as a "general principle" the costs of a proceeding are not recoverable as damages in the same or in a subsequent proceeding.[67] However, that general principle cannot and does not operate to prevent the SPR from recovering his costs against any one or more of AFP, the Lawyer Parties, Mr Alex Elliott and the estate of Mr Trimbos in this case. That is for two reasons, which are expanded on below. *First*, because the recovery of legal costs against the Lawyer Parties is consistent with recognised exceptions to the general rule as well as broader legal principle. *Secondly*, because even if the general law did not recognise costs as a recoverable head of damage or compensation, the Court's powers under section 29 of the CPA or 33ZF of the SCA **[LAW.700.007.0001 at 0002]** are not constrained by such principle.

Costs as Damages

84. The rationale for the general principle identified above is the law's reluctance to permit "double adjudication on the same point".[68]

85. That general principle has long admitted of exceptions.[69] In *McGregor on Damages,* the learned author (Edelman J, writing extrajudicially) noted that in some cases, a "separate tort" may be involved in "instigating, assisting or causing" legal proceedings,[70] such as malicious prosecution, conspiracy and deceit.[71] The existence of a separate cause of action may be "a sufficient peg upon which to claim as damages costs incurred by them in the earlier proceeding".[72] Support for this proposition can be found in the judgment of Devlin LJ in *Berry v British Transport Commission*, who said it is:

> *…difficult to see why the law should not now recognise one standard of costs as between litigants and another when those costs form a legitimate item of damage in separate cause of action flowing from an additional wrong..* [73]

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67 *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 10 [22] [**ATH.600.247.0001 at 0010**].
68 *Berry v British Transport Commission* [1962] 1 QB 306 at 322 [**ATH.600.588.0001 at 0017**].
69 *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 11, [27] **[ATH.600.247.0001 at 0011].**
70 Edelman, J. et al. (2018), *McGregor on Damages,* 20th ed. Sweet & Maxwell, at [21-016] [**ATH.600.634.0001 at 0010**].
71 Ibid [**ATH.600.634.0001 at 0010**].
72 Ibid, at [21-015] [**ATH.600.634.0001 at 0010**].
73 [1962] 1 QB 306 at 322 [**ATH.600.588.0001 at 0017]**.

86. Lord Devlin's judgment in *Berry* was considered, approvingly, by the Full Federal Court in *Gray v Sirtex Medical*. There, the Full Court considered it well established that there existed an exception to the general rule permitting a defendant to recover as damages the costs of a prior action against a third party in a separate proceeding.[74] The Court observed that the rationale for the exception was that "*the third party was not a participant in the prior litigation and the court had not opportunity to adjudicate on the issue of costs as between the third party and the now plaintiff*".[75]

87. Nor are the damages recoverable against such third parties limited to an amount that would be taxed on a standard basis. In *Berry*, Devlin LJ remarked in a crucial passage that:

> *The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground … It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law. But the last person who ought to be able to share in that benefit is the man who ex hypothesi is abusing the legal process for his own malicious ends. In cases of malicious process [the general] rule … has not always been applied.*[76]

88. Some technical point may be taken by the defendants that the established exceptions are not on all fours with this case because here some of the costs are not sought to be recovered in a separate proceeding, but rather in the same proceeding in which those costs were incurred. Such a submission, if made and accepted, would be an absurd triumph of form over substance and legal principle. And it could only, at its highest, relate to the SPR's costs of the First Approval Application before Justice Croft as the other costs claimed plainly arise in separate and distinct proceedings.

89. True it is that, strictly speaking, the Remitter is being heard in the same proceeding as that which caused the losses complained of by the SPR. Nevertheless, for the following reasons, that fact should not disentitle recovery.

90. *First*, the Remitter is radically different from the initial proceedings in both form and substance. The proceedings have been effectively reconstituted. AFP, Mr O'Bryan, Mr Symons, Mr Zita, Portfolio Law, Mr Trimbos and Mr Alex Elliott were not parties to the substantive proceeding (although AFP was joined late to the Appeal at the initiation of the Court of Appeal). The claims considered in the Remitter bear no relation to the substance of

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74 *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1, at 12, [30] **[ATH.600.247.0001 at 0012].**
75 Ibid **[ATH.600.247.0001 at 0012]**.
76 [1962] 1 QB 306 at 322 [**ATH.600.588.0001 at 0017]** - 323 [**0018**].

the claims considered in the initial proceeding, but rather arise out of the conduct of those proceedings.

91. *Secondly*, during the development of the general rule and its exceptions the law would have assumed that claims of this nature would by necessity have occurred in separate proceedings. However, the CPA mandates that alleged contraventions of the overarching obligations be considered and determined in the same proceedings.

92. *Thirdly*, that the claims now considered arise in the same proceedings are in many ways an accident of the unique history and facts of this case. The conduct the subject of this Remitter was discovered after the appeal and the appointment of the Contradictor. It would be anomalous if the wrongdoers in this case could benefit from the fact that, in order to suit the exigencies of this matter, their conduct falls to be scrutinised within the same proceeding and not in a separate suit or inquiry.

93. *Fourthly*, to the extent that previous cases have considered that costs can only be recovered in a separate proceeding, principle demands that such a requirement not be followed in this case. It was opined in *McGregor on Damages* that, as a matter of principle, the only obstacle to recovery of costs as damages in a separate proceeding was "*whether the legal system would stultify itself if it were to order to party to pay costs only later to allow that party to recover those costs as part of its loss*".[77] That could hardly be said to be the case here. Conversely, it would be stultifying if the law was prevented from permitting the debenture holders to recover their significant losses by reason of a mere matter of form.

94. *Finally*, the rule or its exceptions cannot benefit a fraudster. After all, it is a salutary principle of the law that: "*Fraud unravels everything*".[78] It is an "*insidious disease*" which, if proven, "*spreads to and infects the whole transaction*".[79] Importantly, "*no court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud*".[80]

95. Although the Contradictor frames his case by reference to contraventions of the overarching obligations, the allegations (as noted above) made by the Contradictor are in substance that AFP and the Lawyer Parties, especially Mr O'Bryan and Mr Symons, engaged in a dishonest and fraudulent scheme. That is so even on the more stringent characterisation of fraud at

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77 Edelman, J. et al. (2018), *McGregor on Damages,* 20th ed. Sweet & Maxwell, at [21-026] [**ATH.600.634.0001 at 0010**].

78 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712 [**ATH.600.589.0001 at 0011**] – 713 [**0012**].

79 *Farley (Aust) Pty Ltd v JR Alexander & Sons (Q) Pty Ltd* (1946) 75 CLR 487 at 493 **[ATH.600.590.0001 at 0007**].

80 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712 [**ATH.600.589.0001 at 0011**] – 713 [**0012**].

common law, which has its origins in the tort of deceit and arises where a person knowingly or recklessly makes a false statement, with the intention that another person would rely on it to their detriment.[81] Many of the alleged contraventions, including those where the Court was misled, can be comfortably characterised in this way.

Section 29/33ZF

96. However, even if some principle of the general law prevented the recovery of the SPR's legal costs against the Lawyer Parties as damages in this proceeding, the Court's power under section 29 of the CPA, and/or section 33ZF of the SCA would not be constrained by such a rule.

97. Both section 29 of the CPA and section 33ZF are drafted in the broadest possible manner. They allow the court to make any order that (in the case of the CPA) it considers to be in the interests of justice following a breach of the overarching obligations; or (in the case of the SCA) it thinks appropriate or necessary to ensure that justice is done in a group proceeding.

98. The significance of the broad, ambulatory terms of these provisions cannot be overstated. The statutory language does not suggest restriction but rather "*denotes width, amplitude and flexibility*".[82] In relation to section 33ZF, it has been said that the language reflects Parliament's intention that courts would "*over time, in individual cases, develop new procedures in form and contour as it responded to the practical and economic circumstances*" in which the group proceeding regime was to operate.[83] The Full Federal Court has observed that the "wide and unstructured" form to the provision:

> *…reflects the common law process in its relationship with statute: the experience of the Court accumulated from individual cases applying the law to new facts as they arise*.[84]

99. Both the CPA and the class actions regime were novel. As such, "*it was impossible to foresee all the issues that might arise*".[85] Accordingly, it was said of the rationale for section 33ZF that:

> *in order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties, the only limitation being that the Court*

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81 *Derry v Peek* (1889) 14 App Cas 337 [**ATH.600.377.0001**].
82 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 44, [87] [**ATH.600.592.0001 at 0024]**.
83 Ibid, at 44, [88] [**ATH.600.592.0001 at 0024]**.
84 Ibid, at 44-45, [88] [**ATH.600.592.0001 at 0024]**.
85 *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4 [**ATH.600.593.0001 at 0004**].

> *must think the order appropriate or necessary to ensure 'that justice is done in the proceeding'.*[86]

100. In many ways, this case highlights the wisdom of that approach. The brazen, scandalising abuse of the class action regime witnessed in this case could hardly have been foreseen, and no set of rigid rules laid down at the outset would be appropriately adapted to ensure that the effect of the conduct is justly remediated. It falls to the Court to determine how to do justice in the unique circumstances of this case. The determinative question is simply whether the Court considers that ordering any one or more of AFP, the Lawyer Parties, Mr Alex Elliott and the estate of Mr Trimbos to pay the wasted costs of the First Approval Application, the Appeal, and the Special Leave Application is "*appropriate in the interest of justice*" having regard to the established contraventions of the CPA, or "*appropriate or necessary to ensure that justice is done*" in the Banksia class action. The gravity of the abuse of process perpetrated in this case is such that the answer to that question is self-evident. The conduct of AFP and the Lawyer Parties undoubtedly caused the First Approval Application to miscarry, and caused the SPR/debenture-holders to incur substantial costs in the Appeal and then the Special Leave Application. The costs of those events were borne by the victims of the fraudulent scheme: the debenture holders. It is plainly just that the debenture holders recover those losses from the perpetrators of the fraudulent scheme.

101. Importantly, section 29 of the CPA does not merely "*reaffirm the existing inherent powers of the court*" but rather is aimed at changing and modernising the law. [87] As Dixon J observed in Dura the CPA:[88]

> *[D]oes not merely reaffirm the existing inherent powers of the court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck. Parties to a civil proceeding are under a strict, positive duty to ensure that they comply with each of the overarching obligations and the court is obliged to enforce these duties. The statutory sanctions provide a valuable tool for improving case management, reducing waste and delay, and enhancing the accessibility and proportionality of civil litigation.*

102. Textual considerations also reinforce the approach adopted above. The types of orders that the Court can make under section 29 include an order that the contravener pay "*some or all of the legal costs or other costs or expenses of any person arising from the contravention*".

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86 Ibid [**ATH.600.593.0001 at 0004**].

87 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at 310, [22] [**ATH.600.166.0001 at 0009**].

88 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)*(2014) 48 VR 1 at [92] [**ATH.600.263.0001 at 0036**].

Clearly, it was contemplated that following proof of contraventions, orders could be made for the payment of legal costs or expenses incurred. That power is not fettered or limited because costs orders have been made in the past or the inquiry takes place in the same proceeding. It is silent as to the basis for quantification. Another example of an order that can be made is one requiring the contravener to "*compensate any person for any financial loss or other loss*". The section does not use the language of 'damages', but rather directs attention to the financial loss suffered as a result of the contraventions.

103. Bearing these matters in mind, it is plainly in the interests of justice, and necessary and appropriate to do justice in the proceeding, that any one or more of AFP, the Lawyer Parties, Mr Alex Elliott and the estate of Mr Trimbos pay the SPR's costs of the First Approval Application and the Appeal. The costs of the Special Leave Application arguably fall into a different category. Those costs fall squarely upon AFP to meet. It is remarkable that, despite repeated attempts to resolve those costs made by the SPR, they remain unpaid almost two years after the order was made.

Second Category: Delay in Distribution of Debenture-Holders' Proper Entitlement to Trust Co Settlement Proceeds

104. The principal category of loss pleaded by the Contradictor concerns losses of significantly more than **$10 million** arising from the lengthy delay in the distribution to debenture-holders of their proper entitlement to the Trust Co settlement proceeds of $64 million.[89] The Contradictor seeks compensation under s 29 of the CPA. The SPR supports the relief sought by the Contradictor and submits this Court plainly has the power under section 29 to make orders compensating debenture-holders for this loss.

Principles

105. The starting point of course is the terms of section 29 itself. Section 29(1)(c) is expressed expansively in empowering the Court to make any order compensating "*any person for any financial loss or other loss which was materially contributed to be the contravention of the overarching obligation*." That broad language is plainly apt to pick up compensation of the kind sought by the Contradictor for the delay caused by the wrongdoers in the distribution to the debenture-holders of their proper entitlement to the Trust Co settlement proceeds.

106. The causation inquiry set up by the statute of "materially contributed" is one well-known to the law and one applied in other analogous statutory settings. In particular, it is immaterial

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89 The SPR/Liquidator has calculated this loss and damage as at 26 February 2021 as approximately **$11.68 million** [**MSC.040.053.0001**].

that there may have been other causes of the loss suffered. The entire loss is recoverable so long as the wrongdoers' contraventions were *a* (material) cause of the loss suffered.[90] Here, there can be no real doubt that each of AFP and the Lawyer Parties materially contributed to the loss suffered by reason of their many contraventions of the overarching obligations. It is plain that the contraventions were so connected with the loss that, as a matter of ordinary common sense and experience, they should be regarded as the cause of them.

107. In applying s 29 the Court is also entitled to have regard principles of the general law by analogy where appropriate. It is suggested that several principles ought to inform the Court's exercise in this case.

108. *First*, the counterfactual hypothesis upon which the causation and quantification exercise takes place is what would have happened, on the balance of probabilities, had AFP and the Lawyers Parties faithfully discharged their overarching obligations under the CPA.[91] The precise boundaries of the compensatory principle cannot be stated in abstract terms. What is required will depend on the facts and nature of each case. [92] The relevant inquiry will depend in particular on the statutory context. As has been observed in other contexts, the task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case.[93]

109. *Secondly,* given the nature of the allegations, the principle applied to equitable compensation that the Court is not entitled to speculate against the plaintiff is relevant.[94]

110. *Thirdly,* a related and relevant principle is that the plaintiff need may only lead minimal evidence to discharge its evidentiary burden of causation and shift the onus to the defendant to demonstrate that all or part of the loss would have been suffered even if the defendant had not breached his fiduciary duty.[95]

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90 *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [25]-[26] [**ATH.600.048.0001 at 0011**], [31] [**0013**], [57] [**0020**] - [62] [**0022**].

91 For example, *Oliana Foods Pty Ltd v Culinary Co Pty Ltd* [2020] VSC 693 at [434] **[ATH.600.594.0001 at 0168]** - [435] **[0169]**.

92 *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at [66] per Gordon J **[ATH.600.253.0001 at 0019]**.

93 *Henville v Walker* (2001) 206 CLR 459 at [18] **[ATH.600.506.0001 at 0012]**.

94 *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113 at [66] **[ATH.600.595.0001 at 0022]**.

95 *Australian Executor Trustees (SA) v Kerr* [2021] NSWCA 5 at [99] **[ATH.600.596.0001 at 0041]**.

111. *Fourthly,* where the plaintiff is entitled to damages and their computation is made more difficult by the defendant's action, then the Court may assume the worst against the defendant consistent with the evidence.[96]

112. *Fifthly*, where "*a wrongdoer purposely chose to achieve a certain result by means of a calculated deceit, the natural inference is that the wrongdoer was not and would not have been prepared to bring that result by lawful means*."[97] That principle is relevant in assessing how the court treats, inter alia, the absence of any evidence from AFP as to the existence of funding agreement with 55% of debenture-holders by value.

113. *Sixthly*, given the Contradictor's case is that the SPR, on behalf of debenture holders, was intentionally misled by AFP in settlement negotiations, the principles applicable to causation and loss and damage for the tort of deceit are analogous. In particular, the relevant inquiry is what the SPR would have done had it been told the truth by AFP.

114. *Finally*, in its opening submissions AFP suggested that loss of chance or loss of commercial opportunity principles are relevant. However, with respect, that is a misunderstanding of how the Contradictor has put his case and of the circumstances in which those principles apply. The Contradictor's case is put on the all-or-nothing counterfactual that, on the balance of probabilities, a higher amount of the settlement proceeds of $64 million would have been distributed to debenture-holders *and* it would have been distributed far earlier had AFP and the Lawyer Parties discharged their obligations under the CPA. It is not put as a loss of chance or a lost opportunity. Nor is put on an 'alternative transaction' basis that needs to be proved on the balance of probabilities. Nor is it apt to be seen in either of those terms. There was no diversion of any contingent corporate opportunity to debenture-holders. Rather, in respect of the settlement that in fact did occur with Trust Co of $64 million there was a diversion from debenture-holders' of their proper entitlement to the fruits flowing from the sums of more than $10 million of their money that had been spent to finance and conduct the Banksia Proceedings and in order to realise *that* settlement.

The Relevant Counterfactual

115. The Contradictor's primary counterfactual (at [194] of the Contradictor's List of Issues **[PLE.010.005.0001 at 0156]**) is put on the straightforward basis that had the wrongdoers properly discharged their overarching and fiduciary duties the true facts would have come to

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96 *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337 at [218] **[ATH.600.597.0001 at 0076]**.

97 *Berry v CCL Secure Pty Ltd* (2020) 94 ALJR 715; 381 ALR 427 at [39] (Bell, Keane and Nettle JJ) **[ATH.600.598.0001 at 0016]**.

light and armed with true and complete information the SPR, Mr Trimbos, a contradictor and the Court, in whatever combination, would have ensured that AFP and the Lawyer Parties were awarded no more than their proper entitlement from the settlement sum by the Court in its protective supervisory jurisdiction. This pathway might have occurred in any one of a variety of ways. The precise pathway is not something that need trouble the Court. All that matters is that had the relevant matters been disclosed and given the proper scrutiny (uninhibited from any restriction) they warranted by any of these officers of the Court, or by the Court itself, it is highly improbable to postulate a scenario in which debenture-holders would not have (a) received substantially more than $42 million and (b) received that significantly larger sum much earlier than in fact occurred. This accords with common sense.

116. The Contradictor's counterfactual is also supported by the evidence of Mr Lindholm which was not challenged at trial.[98] And the wrongdoers led no evidence to the contrary. This is significant given the Contradictor had clearly met its evidentiary burden in making out a counterfactual that accorded with common sense.

117. It is appropriate to deal with some aspects of the relevant counterfactual and arguments made by AFP in opening submissions.

118. *First*, AFP raises a timing issue with the counterfactual on the basis that Mrs Botsman would have appealed to the Court of Appeal in any event because she was dissatisfied with the fairness and reasonableness of the settlement itself and not only the division of the settlement sum as between the funder and debenture-holders. That is a matter that the SPR did rely on before Black J in an application concerning his remuneration. The difficulty with this analysis though is that it fails to take account of what Mrs Botsman may been motivated to do upon the full truth being revealed to the SPR and others upon a proper discharge of duty by some or all of the wrongdoers. That is to suppose a very different state of affairs whereby the SPR, any contradictor appointed by the Court, and the Court itself would have in all probability taken appropriate steps to ensure a far higher return of the $64 million to debenture-holders. Having regard to what Mrs Botsman and Mr Pitman jointly submitted to the Court on 30 January 2018 as to withdrawing any objection if a contradictor were appointed, it is very much to be doubted whether in those different circumstances Mrs Botsman still would have appealed. The doubt in that regard is to be resolved on the basis least favourable to the wrongdoers.

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98 Affidavit of John Ross Lindholm dated 2 June 2020, at [13] **[SPR.006.001.0003 at 0004].**

119. *Secondly*, AFP's opening submissions suggest that it thinks an appropriate funding commission the Court would have allowed had it and the Lawyer Parties not breached their overarching duties is $6,969,600. This is calculated on the basis of $64 million x 66% proportionate attribution to the Bolitho Group Proceeding x 55% group members x 30% contractual entitlement. The analysis still grossly inflates AFP's proper entitlement under the funding agreement. As the Contradictor submitted in its opening submissions,[99] a proper application of the relevant integers under the Funding Agreement would yield a figure no higher than $1.2-$1.7 million. Taking each integer in turn:

(a) **Step 1**—the "Resolution Sum" of $64 million is accurate, unlike the inflated denominator presented to Croft J;

(b) **Step 2**—the apportionment of 66% to the Bolitho Group Proceeding is not beyond the range of reasonableness, although the SPR Opinions support an apportionment closer to 50% when the relative prospects are assessed in light of the pleadings and actual evidence filed and relied on;

(c) **Step 3**—the 55% of group members assumes there were in existence valid and binding funding agreements for 55% in value of debenture holders. Given the failure of AFP to adduce any evidence in support of this critical matter, combined with the natural inferences which emerge from AFP's fraudulent conduct, the Court has no basis whatsoever to make such an assumption in AFP's favour. Certainly, the fact that the Court proceeded on the basis of that *unproven assumption* for the purposes of the Partial Settlement does not provide a reliable basis for now doing the same given that the assumption in the Partial Settlement was made *before* AFP's fraudulent conduct had been revealed and the Court has otherwise heard evidence in the Remitter that calls into question the probity of that settlement process and the amount award to AFP;

(d) **Step 4**—it is the final step, however, that inflates the figure the most. It assumes that on its proper interpretation the Funding Agreement entitled AFP to 30% commission irrespective of the degree of actual financing it provided for the Banksia Proceedings. As submitted by the Contradictor and the SPR in the Insurance House settlement, that is an irrational construction that is unsupported by the language itself which expressly links the commission rate to the degree of financing provided. Given how little AFP actually financed the proceeding, and the extent of its free-riding off the work and investment of the SPR and debenture-holders, it would be generous to ascribe even a

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99 Contradictor's opening submissions at [36] **[SBM.010.002.0001 at 0009**].

10% contractual entitlement to AFP. And if the Funding Agreement did produce the bizarre consequence that AFP were entitled to a 30% contractual entitlement even if it contributed only $1 of financing then the outcome would be exorbitant and rejected by a Court under s 33ZF of the SCA.

120. The upshot is that even if it is assumed that there were valid and enforceable funding agreements in place for 55% by value of debenture-holders, it stills yield a funding commission of only **$1.7 million**.[100] But given the absence of any evidence in support of any funding agreements and AFP's wrongdoing, the only basis on which the Court can properly proceed on any counterfactual analysis is that it was not entitled to anything. That is, the counterfactual should proceed on the basis that $64 million was the debenture holders' proper entitlement from the settlement.

121. AFP's "risk assumed" in adverse costs orders or otherwise certainly does not suggest to the contrary. AFP was not exposed to a costs order of the kind it suggested to the Court and it certainly had no financial capacity to meet even the more modest costs orders to which it might have been exposed.

122. This matter was considered in the concurrent expert evidence of Mr Greg Houston and Mr McGing. Mr Houston's evidence was unpersuasive and discredited. In particular:

    (a) he applied assumptions as to "cost of investment" or "invested capital" that bore no resemblance to the facts of this case;

    (b) he did not consider the terms of the Funding Agreement; and

    (c) he relied on a range of commission rates in other cases that were not in fact comparable, and which did not otherwise reflect any settled expectations for funding commissions in future cases.

123. Mr McGing, on the other hand, otherwise offered this Court a serious and principled contribution to an area that has hitherto been largely bereft of fundamental analysis in proceedings from the received wisdom that funding commissions in the range of 20-30% are reflexively appropriate. Mr McGing offered a principled basis, grounded in financial and investment theory, for determining a fair and reasonable return to a litigation funder for costs expended and risks assumed. It is respectfully submitted it is appropriate for this Court to

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100 $64 million x 50% x 0.55 x 10%.

acknowledge Mr McGing's contribution and generally endorse it as a principled framework of analysis for future cases.

124. *Thirdly*, the correct counterfactual of course is manifestly *not* whether the debenture-holders are "better off" now than had the fraudulent and dishonest scheme succeeded (as it very nearly did). Even allowing for the substantial costs of the Remitter, it is probably the case that substantially all of the approximately $17.5 million in the Maddocks Settlement Account from the remaining Trust Co proceeds will be distributed to debenture-holders. Rather, the relevant inquiry is (a) what was the debenture-holders proper entitlement to the $64 million as at the time of settlement and (b) for how long, and to what extent, have debenture-holders been kept out of their money/proper entitlement by reason of the misconduct of the wrongdoers. The Contradictor's case, supported by the SPR, is that justice in this case requires that orders are ultimately made for debenture-holders to be distributed approximately a further **$40 million**, comprising (i) the balance of the settlement proceeds held in the Maddocks Settlement Account and (ii) the costs and compensation of over $20 million sought by the Contradictor. This is the amount that is necessary to restore debenture holders to the position they should have been in had the fraudulent scheme not been perpetrated upon them and this Court.

125. *Fourthly*, it is plainly realistic and appropriate to assume debenture holders would have received their proper entitlement to the settlement sum on 21 March 2018 since the SPR would have been in a position to efficiently distribute the settlement sum had the breaches and misconduct in relation to the settlement distribution scheme not occurred.

126. *Finally*, there is a further counterfactual on the Contradictor's case in Section L of the List of Issues that bears emphasis. The Court of Appeal, and counsel appearing for others, were grossly misled in the Appeal. Had they not been misled it would have resulted in a swift and decisive end to the scheme that had been successfully deployed before Croft J and a rapid distribution to debenture-holders of their proper entitlement.

Other Discretionary Considerations

127. It is also perhaps of some relevance in assessing the level of compensation that is appropriate in the interests of justice that (a) the evidence heard in the Remitter evidently calls into question the amount awarded to AFP in the Partial Settlement of $5.5 million and (b) the events of the Remitter and the misconduct of the wrongdoers had wider implications for the

prosecution of other valuable claims against Insurance House and were *a* reason for the SPR accepting a significantly lesser amount to settlement those claims.[101]

Penalty Interest

128. The Contradictor contends penalty interest should be used to determine the level of compensation for this head of damage. Section 29(1)(c)(i) provides an express statutory basis for the Court doing so. The SPR submits that penalty interest is plainly appropriate in this case. Penalty interest should be awarded against each of the defendants on that sum, and should be imposed at the rate presently fixed under the *Penalty Interest Rates Act 1983*.

129. Putting questions of the appropriate rate to one side, it is difficult to see how any of the defendants can resist an order that interest be paid. On the most elementary application of the principles of causation, it is their conduct that has delayed the payment to the debenture holders. That includes the period during which their conduct has been scrutinised in this Remitter.

130. The Court should have no hesitation in imposing interest at the penalty rate. Section 29 of the CPA expressly provides for orders for penalty interest "*in accordance with the penalty interest rate*" in respect of any delay in the payment of an amount claimed in a civil proceeding. By expressly referring to the penalty interest rate, the Parliament has squarely indicated that an order for interest at that rate is 'on the cards' when delay in payment is occasioned by reason of contraventions of the overarching obligations.

131. The following further matters are also relevant.

132. *Firstly*, an analogy can be drawn with awards of interest in equity. Equity did not hesitate to impose a higher rate of interest upon a defaulting fiduciary, particularly in the case of misconduct or "gross misappropriation".[102]

133. *Secondly,* the order sought is for simple interest, not compounding interest. Equity would award compounding interest "*not only where he has used the money for his own commercial purposes but also where he has been guilty of fraud or serious misconduct*".[103] In circumstances where interest will be calculated on a simple basis, a higher rate is evidently justified.

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101 *Banksia Securities Ltd v Insurance House Pty Ltd (Settlement Approval)* [2020] VSC 123, at [57] - [58] **[ATH.600.018.0001 at 0051]**.

102 *Talacko v Talacko* [2009] VSC 579 at [11] [**ATH.600.636.0001 at 0005**]; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 367 [303] **[ATH.600.383.0001 at 0070]** – [304] **[0072]**.

103 *Jaeger v Bowden (No 2)* [2016] NSWSC 897 at [714] [**ATH.600.631.0001 at 0162**], quoting *Southern Cross Commodities Pty Ltd (I liq) v Ewing* (1987) 11 ACLR 818 at [843] **[ATH.600.416.0001 at 0022]**.

E. THE SURVIVAL OF THE CLAIMS MADE AGAINST MR TRIMBOS IN REMITTER

134. Mr Trimbos was joined to these proceedings on 20 August 2020. He was joined of the Court's own motion,[104] a fact of significance to which we will return. On 24 September 2020, after filing his evidence in the proceeding, Mr Trimbos died. Subsequently, the Court made orders pursuant to section 16.03 of the Rules appointing Ms Katerina Peiros as the representative of the estate of Mr Trimbos (the Estate) for the purposes of these proceedings.[105]

135. Ms Peiros, along with Mr Trimbos' professional indemnity insurer (the LPLC),[106] apparently contend that any civil liability of Mr Trimbos under section 29 of the CPA did not devolve upon the Estate following his death. Put another way, she contends that the Court's jurisdiction and power to make an order against Mr Trimbos under section 29 of the CPA terminated upon his death and, consequently, these proceedings as against him have abated.

136. Ms Peiros and the LPLC have not articulated the precise basis for her contention that the Court's jurisdiction and power to make orders under section 29 of the CPA dissolved upon Mr Trimbos' death. Nevertheless, it appears to rest on the proposition there is no "cause of action" for the purpose of section 29 of the *Administration and Probate Act 1958* (Vic) ("AP Act") **[LAW.700.017.0001 at 0002]**. The contention is misconceived. The fundamental error is to presume that s 29 of the AP Act governs the present situation. It does not. Rather, the correct position may be summarised as follows:

    (a) the Court's power to make orders under section 29 of the CPA against a person who has contravened the overarching obligations is not, properly understood, a "cause of action";

    (b) section 29 of the AP Act does not, however, supply a code in relation to the survival of claims against a deceased estate. Where a statutory right or power does not have the character of a 'cause of action', the survivability of the claim is to be ascertained by reference to the intention of the legislation conferring the power; and

    (c) on the proper construction of the CPA, the legislature plainly intended that the Court's power to make orders under section 29 would survive the death of the contravenor. The contrary result would make a mockery of the object and purpose of section 29 of the CPA.

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104 Orders of Dixon J dated 20 August 2020: [**ORD.500.040.0001**]. The Orders noted that they were made "*by direction of the Court acting on its own motion*".

105 Orders of Dixon J dated 2 November 2020: [**ORD.500.058.0001**].

106 Letter from Landers & Rogers on behalf of the LPLC dated 28 October 2020 **[MSC.040.036.0001]**.

137. These submissions explain why that is the correct analysis below.

Transmissible and Non-Transmissible Claims

138. It is convenient to commence by considering the historical approach to the survival of claims and survey how courts have approached the issue in relation to statutory powers.

139. In early common law, "survival of causes of action was the rare exception, non-survival was the rule".[107] This was the result of the application of the maxim *actio personalis moritur cum persona* ('a personal right of action dies with this person'). As the High Court has observed, the early common law treated almost all private actions as being founded upon a personal relationship between two individuals. Claims based on the incidence of a personal relationship could not survive the death of one of those persons.[108] However, "early statues" intervened to establish a new "general rule that a right of action on which a person might have sued or been sued in his or her lifetime survived death and passed to their personal representative".[109] These statutes generally applied to proprietary claims or claims founded in contract, removing them from the pikestaff of actions considered to be personal to the individuals involved. The common law maxim continued to otherwise operate and, perhaps controversially, continued to consider claims in tort to be wrongs of a personal nature that were not transmissible to a person's legal representative following death.[110]

140. The perceived unfairness of the common law approach to the transmissibility of claims in tort led to the enactment of section 1(1) of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK), which finds almost identical expression in section 29(1) of the AP Act. That section was cast in wider terms than had ever previously been enacted, providing that:

> *Subject to the provisions of this section, on the death of any person, all causes of action subsisting against or vesting in him shall survive against or (as they case may be) for the benefit of his estate.*

141. The statute represented a radical intervention because it applied to "all causes of action", encompassing torts and other claims that the common law still regarded as personal but had not been previously the subject of statutory intervention. Although the effect of section 29(1) of the AP Act on general law claims (including equitable claims) is well settled, it is less clear whether and how it operates in relation to statutory causes of action and other powers. Of

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107 *Finlay v Chirney* (1887) 20 QBD 494 at 502 [**ATH.600.599.0001 at 0009**] - 504 [**0011**] (per Bowen LJ).

108 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at 435, [36] **[ATH.600.357.0001 at 0016]**.

109 See Alexander Learmonth, Charlotte Ford, Julia Clark and John Ross Martyn, *Williams and Mortimer on Executors, Administrators and Probate* (Thomson Reuters, 21st ed, 2018) [39-02] – [39-03] and [41-01] – [41-02] [**ATH.600.643.0001**].

110 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at 434, [34] **[ATH.600.357.0001 at 0015]**.

course, it must be kept in mind that although statutory causes of action are now legion, they would not have been a concept in ready contemplation during the development of the common law rules or, indeed, at the time that the *Law Reform (Miscellaneous Provisions) Act 1934* (UK) or the AP Act were enacted.

Statutory Claims – Two Different Approaches

142. Analysis of the authorities reveals two distinct approaches to determining whether a cause of action or other right or claim founded in statute survives the death of the claimant and/or defendant.

143. One approach is to apply the terms of section 29 of the AP Act by ascertaining whether the statutory claim in question has the character of a "cause of action" within the meaning of section 29(1). This approach can be found in a number of English cases,[111] and was the approach adopted by this Court in *Skene v Dale*,[112] and *Occidental Life Insurance Company of Australia Limited v Bank of Melbourne Limited*.[113] The alternative approach eschews the relevance of section 29 of the AP Act to claims founded in statute at all, and instead directs attention to the terms of the statute conferring the particular power to ascertain whether it was intended that the claim or power would survive death.

144. Turning firstly to the former approach, *Occidental Life Insurance* concerned claims against a director of a company under the provisions of sections 129 and 130 of the now repealed *Companies (Code) Victoria*, as well as certain provisions of the *Life Insurance Act*. The defendant director died during the course of the proceedings. O'Bryan J held that the claims survived by reason of section 29 of the *Probate and Administration Act*, which his Honour described as operating to ensure that "*all causes of action whether statutory or common law survive the death of any perso*n".[114] His Honour also noted that "*all causes of action*" are words of wide import and that there was no reason why they should not include "*a personal action founded upon a statutory obligation, trust or duty*".[115]

145. Significantly, in reaching this conclusion, his Honour cited with ostensible approval the dicta of Greene MR in *Attorney-General v Canter* that section 1(1) of the *Law Reform*

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111 See for example *Harris v Lewisham and Guy's Mental Health NHS Trust* [2000] ICR 707 [**ATH.600.629.0001**].

112 (1990) VR 605 (Kaye J) [**ATH.600.600.0001**].

113 (unreported, 31 May 1991, O'Bryan J) [**ATH.600.601.0001**].

114 Ibid, page 12 [**ATH.600.601.0001 at 0013]**.

115 Ibid, at page 10 [**ATH.600.601.0001 at 0011]**.

(Miscellaneous Provisions) Act 1934 "*may be said to form a code in relation to the survival of causes of action for the benefit or to the prejudice of estates of deceased persons*".[116]

146. Kaye J adopted a similar approach in *Skene v Dale*.[117]

147. A leading example of the alternative approach is *Dibble v Human Rights and Equal Opportunity Commission*.[118] There, the Full Federal Court allowed an appeal from an order of a trial judge dismissing a complaint made under the *Sex Discrimination Act 1984* (Cth) in circumstances where the plaintiff died after the complaint was made. The Court held that common law rules in relation to survival of actions were irrelevant in deciding the issue, because such rules "were evolved by judges as necessary ancillaries to substantive common law principles, also evolved by the judges".[119] It further held that because the common law rules were irrelevant, so too were the terms of the New South Wales analogue to section 29 of the AP Act.[120] As was observed in a later case, implicit in the reasoning was the assumption that section 29 of the AP Act did not apply to causes of action created by statute.[121] Rather, the Court considered that the answer to the survivability question sat exclusively in the terms of the statute conferring the right or claim. Wilcox J said:

> *Where a right of action is created by statute, guidance must be sought in the statute itself; a parliament that creates a cause of action may ordain as it pleases in relation to the cause of action's survival on death of a party*.[122]

148. A similar approach was adopted in two earlier New South Wales decisions. In *Managing Director, New South Wales Technical and Further Education Commission v Fines*,[123] the Court of Appeal was concerned with the survivability of a right of appeal in a disciplinary case under legislation regulating the employment of particular government employees. After reciting the common law rules, the Court noted that the position *in relation to those rules* was "now regulated by statute".[124] Once again, it was implicit in the Court's reasoning that section 29 had no relevance to the survivability of the statutory right in question. The Court considered that the Act in question "*provided the manner and…the sole manner in which the*

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116 *Attorney-General v Canter* (1939) 1 KB 318 at 327 **[ATH.600.610.0001 at 0010]** - 328 [**0011**].
117 *Skene v Dale* (1990) VR 605 [**ATH.600.600.0001**].
118 (1996) 68 FCR 290 [**ATH.600.552.0001**].
119 Ibid, at 296 [**ATH.600.552.0001 at 0007**].
120 Ibid, at 297 [**ATH.600.552.0001 at 0008**]. The analogous provision is section 2(1) of the *Law Reform (Miscellaneous Provisions) Act* (NSW).
121 See *Kalejs v Minister for Justice and Customs v Republic of Latvia* [2001] FCA 1769 at [18] [**ATH.600.609.0001 at 0006**].
122 *Dibble v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290 at 296 [**ATH.600.552.0001 at 0007**].
123 (1993) 32 NSWLR 385 [**ATH.600.607.0001**].
124 Ibid, at 387 [**ATH.600.607.0001 at 0003**].

rights there referred to could be enforced",[125] and that "*the question whether statutory rights of this kind are to survive death depends upon the intention of the legislature*", to be found in the particular statute conferring the right or claim.[126]

149. *McEvoy v Public Trustee*,[127] considered whether a testator's family maintenance claim survived the death of the claimant. Powell J decided the question by reference to the terms of the *relevant* family provision legislation, finding that the legislature had evinced an intention that the power to make orders under the Act could only be exercised in favour of a living person.[128] Again, his Honour considered that the NSW equivalent of section 29 of the AP Act was of no application, noting that the "evil" to which that legislation was directed was the unfairness of the common law rule against the survivability of certain personal actions.[129] Critically, his Honour continued:

> *...one must guard against being overly ready to extend, or widen, the meaning of the phrase "cause of action" into a different area of the law, particularly when that area of the law is the creature of statute, whether enacted before, or after, the coming into operation of [section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934].*[130]

150. But his Honour went even further. He held that because the effect of section 1(1) of the *Law Reform (*Miscellaneous *Provisions) Act 1934* is to transmit the title in the cause of action to the personal representative of the deceased, the provision could not operate unless the cause of action in question had "the quality of transmissibility".[131] A cause of action that was personal to the deceased was not transmissible, and therefore not within the scope of section 1(1).

151. In the more recent case of *Kalejs v Minister for Justice and Customs*,[132] Kenny J identified the two competing approaches. There, her Honour was concerned with the survivability of a right to judicial review of an extradition order made against the deceased plaintiff. Her Honour found it unnecessary in that case to seek to resolve the tension between the two approaches, holding that:

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125 Ibid, at 388 [**ATH.600.607.0001 at 0004**].
126 Ibid [**ATH.600.607.0001 at 0004**].
127 (1989) 16 NSWLR 92 [**ATH.600.608.0001**].
128 Ibid, at 99 [**ATH.600.608.0001 at 0008**].
129 Ibid, at 100 [**ATH.600.608.0001 at 0009**].
130 Ibid [**ATH.600.608.0001 at 0009**].
131 Ibid, at 102 [**ATH.600.608.0001 at 0011**].
132 [2001] FCA 1769 [**ATH.600.609.0001**].

(a) as a matter of statutory construction, the right of review of the extradition order was not 'transmissible';[133]

(b) because the right was not transmissible, it was not a "cause of action";[134]

(c) accordingly, section 29 of the AP Act was not engaged; and

(d) the question was therefore to be determined by reference to the proper construction of the statute conferring the right in question, and whether it was intended that such a right would survive the death of a party.[135]

The Proper Approach to the liability of Mr Trimbos under the CPA

152. Not only is there a difference in judicial opinion as to the manner in which the survivability of statutory claims is to be determined, but there are significant differences in reasoning and method within those two approaches. However the SPR submits that the correct state of the law, and the approach this Court should take to the question, is as follows.

153. *First,* it is plain that section 29 of the AP Act does not supply any sort of code in relation to the survival of actions against deceased estates. No Australian court has so held. Although O'Bryan J gave tacit approval to this notion in *Occidental Life Insurance*, nothing in the text, context or purpose of section 29 of the AP Act would indicate that the legislature intended to lay down any sort of code. Rather, it is well accepted that the purpose of the enactment was to make specific policy reforms to the common law to address the perceived unfairness of the *action personalis moritur cum persona* rule.

154. *Secondly,* and on the other hand, the SPR submits that it is incorrect to say that section 29 has no scope for operation in relation to rights that are created by statute. To the extent that *Dibble* is authority for such a proposition, it is respectfully submitted that it is plainly wrong. There can be no doubt that Acts of Parliament are capable of, and regularly do, create causes of action as that term is properly understood. Statutes also create rights that, although substantive and curative, are not strictly causes of action as such, but rights of a different nature. Where a right created by statute is, properly characterised, a cause of action; there is nothing in the text, context or purpose of section 29 that would indicate that the phrase "cause of action" should be given anything other than its full and ordinary meaning. There is nothing to indicate that the provision should be read down so as to exclude causes of action created by statute. If

133 Ibid, at [22] [**ATH.600.609.0001 at 0007**].
134 Ibid, at [21] [**ATH.600.609.0001 at 0007**].
135 Ibid, see the discussion at [22] [**ATH.600.609.0001 at 0007**] - [26][**0009**].

the phrase is cut down in that respect, there would be "*no ascertainable point at which the process is to stop*".[136]

155. Although it is true, as observed above, that the notion of a statutory cause of action might not have been front of mind when section 29 of the AP Act was enacted, it is a fundamental presumption of statutory construction that the legislation is "always speaking".[137] There is nothing in the statutory language that evinces a contrary intention and compels "cause of action" to be read as relating to only causes of action of a certain kind. The Parliament refrained from supplying any definition of cause of action, instead drafting the provision in general and ambulatory terms. Although the immediate focus of the provision might have been remedying the common law's approach to claims in tort, nothing in the provision indicates that the Parliament chose to set or define the metes and bounds of the section. Accordingly, 'cause of action' must be given its full and current meaning, which would embrace statutory causes of actions.

156. *Third,* the starting point is therefore to ascertain whether the statutory right in question is, properly construed, a 'cause of action'. If it is, then save for any contrary indication expressed in the legislation conferring the cause of action, section 29 will be engaged and the cause of action will survive.

157. *Fourth*, where a statutory right is not a cause of action, but a right of a different nature, section 29 of the AP Act has no application. In such a case, the question is to be determined by reference to the legislation conferring the right, and whether it was intended that the right would survive.

158. *Finally*, adopting the above approach, the SPR submits that for the reasons that follow:

(a) section 29 of the CPA*,* properly construed, does <u>not</u> create a cause of action engaging section 29 of the AP Act;

(b) however, having regard to the text, context and purpose of section 29 of the CPA, it was intended that the Court's jurisdiction and power to make orders under that provision would survive the death of the person against whom the order, including orders as to compensation, are to be made; and

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136 *Attorney-General v Canter* (1939) 1 KB 318 at 333 **[ATH.600.610.0001 at 0016]**.

137 *Imperial Chemical Industries of Australia and New Zealand Limited v Commissioner of Taxation* [1972] HCA 75; (1972) 46 ALJR 35 at 43 [**ATH.600.630.0001 at 0009**]; *BMW Australia Limited v Brewster* [2019] HCA 45 ; (2019) 94 ALJR 51 at [35] **[ATH.600.021.0001 at 0010]**, [171] **[0042]**.

(c) accordingly, the Court is able to make any orders it would have made in relation to Mr Trimbos against his Estate.

159. Each of these propositions is addressed in turn.

Does section 29 of the CPA create a "cause of action"?

160. Perhaps surprisingly, there is no clear or definitive formulation of the concept of a 'cause of action'. It has been observed by the High Court that there is a degree of "imprecision" in the meaning of the term,[138] which:

> *...is sometimes used to mean the facts which support a right to judgment (see per Williams J in Carter v Egg and Egg Pulp Marketing Board (Vic) (1942) 66 CLR 557 at 600–1); sometimes to mean a right which has been infringed (see Serrao v Noel (1885) 15 QBD 549), and sometimes to mean the substance of an action as distinct from its form (see Krishna Behari Roy v Brojeswari Chowdranee (1875) LR 2 Ind App 283).*[139]

161. Despite this imprecision, the common thread would appear to be the existence of facts which demonstrate that a right has been infringed resulting in a legally recognised entitlement to sue. That it, it is submitted, the sense in which the term must be understood in the context of section 29 of the AP Act. This position is supported by authority.

162. Diplock LJ defined "cause of action" in *Letang v Cooper* as:

> *... simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*.[140]

163. More recently, the English Court of Appeal observed that the definition in *Letang* "echoed definitions given in the previous century by Lord E Esher MR in *Cooke v Gill* [1973] L.R. 8C. P. 107 and later in *Read v Brown* [1988] 22 QBD 128".[141] In *R v Chong*,[142] de Jersey CJ referred to the definition in *Cooke v Gill* as the "traditional formulation" of what amounts to a cause of action, that is, "as comprehending 'every fact which is material to be proved to entitle the plaintiff to succeed'".[143] This was yet again emphasised by the High Court in *Do*

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138 *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589 at 610 (per Brennan J) **[ATH.600.544.0001 at 0022]**.
139 Ibid **[ATH.600.544.0001 at 0022]**.
140 *Letang v Cooper* [1965] 1 QB 232 at 242 **[ATH.600.318.0001 at 0011]** – 243 **[0012]**.
141 *Harb v King Fahd Bin Abdul Azis* [2006] 1 WLR 578 at 584, [22] **[ATH.600.545.0001 at 0007]**.
142 [2001] 2 Qd R 301 **[ATH.600.546.0001]**.
143 Ibid, at 303, [3] **[ATH.600.546.0001 at 0003]**.

Carmo v Ford Excavations Pty Ltd, where Wilson J described a cause of action as "simply the fact or combination of facts which gives rise to a right to sue".[144]

164. A critical case is the English Court of Appeal decision in *Sugden v Sugden.*[145] There, the Court was considering whether claims to spousal maintenance survived the death of the husband against whom such maintenance was sought. Denning LJ considered the meaning of cause of action within the context of section 1(1) of the *Law Reform (Miscellaneous Provisions) Act 1934* and observed:

> *The legislature had particularly in mind causes of action in tort which used to fall with the death of either party under the old common law maxim actio personalis moritur cum persona. "Causes of action" in the sub-section means, I think, rights which can be enforced, or liabilities which can be redressed, by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. "Causes of action" are not, however, confined to rights enforceable by action, strictly so called—that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court,* ***provided that they really are rights and not mere hopes or contingencies.***
>
> (Emphasis added).[146]

165. The Court held that the right did not survive death because, in the words of Denning LJ, on the terms of the relevant legislation "there is no right to maintenance, or to costs, or to a secured provision, or the like, until the Court makes an order directing it. There is therefore no cause of action for such matters until an order is made".[147] The applicant merely had a "hope or contingency" that such an order might be made.

166. Denning LJ was at pains to emphasise that this does not mean that just because a particular right or remedy is discretionary, that there is no cause of action, stating:

> *I do not think that the fact that a cause of action is discretionary automatically takes it out of the Act. An injunction is a discretionary remedy, but, if a cause of action for an injunction subsisted at the death, I should have thought that it would survive against the personal representatives. The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death.*[148]

167. Beazley J adopted this approach in *Dibble v Human Rights and Equal Opportunity Commission*, being the first instance decision of the appeal case considered at 102 above. Her Honour referred to *Sugden* with approval and noted that:

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144 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 240 **[ATH.600.298.0001 at 0007]**.
145 [1957] P 120 [**ATH.600.548.0001**].
146 Ibid, at 134 [**ATH.600.548.0001 at 0015**].
147 Ibid, at 135 [**ATH.600.548.0001 at 0016**].
148 Ibid [**ATH.600.548.0001 at 0016**].

> The position is similar under the [Sex Discrimination Act]. There is no entitlement to a remedy. HREOC may find that a complaint is substantiated but refuse to make any declaration. More fundamentally, a finding or declaration made by HREOC cannot be enforced — either by HREOC or by a court: see Brandy [Brandy v Human Rights and Equal Opportunity Commission] . In other words, a complaint under the SDA is 'in the nature of a claim yet to be made enforceable': see *Premiership Investments Pty Ltd v White Diamond Pty Ltd … Sugden v Sugden*.[149]

168. It is now necessary to considers the terms of section 29(1) of the CPA. It provides that if a court is *satisfied* that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to" a range of orders there enumerated. The fact that the Court "may" make an order makes plain that the exercise of the power is discretionary.

169. The section confers a plenary power on the Court to make any order which is appropriate in the interest of justice. The orders specifically referred to in the section make clear the power extends to ordering that a person pay compensation to a party who has suffered loss by reason of any contravention, or an order that a person pay costs.

170. Subsection (2) provides that an order can be made under the section on the Court's own motion, or on the application of any party to a civil proceeding or any person who has a sufficient interest in the proceeding.

171. Significantly, the jurisdiction to make an order under section 29 is enlivened once the court is satisfied that a person has contravened "any overarching obligation". The overarching obligations are set out in Part 2.3 of the Act. Those overarching obligations are not expressed to be owing to any particular person or parties but are manifestations of the paramount duty owed to the Court.[150]

172. Further, a person's right to apply for an order under section 29 is temporally limited. The application must be made in the Court in which the relevant proceeding is being heard and before the finalisation of the proceeding (subject to an extension of time under section 31).[151]

173. Two further matters about the power under section 29 must be emphasised.

174. *First*, the power under section 29 must be exercised in furtherance of and to give effect to the purposes of the CPA and, most importantly, the overarching purpose in section 8 to facilitate

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149 *Stephenson v Human Rights and Equal Opportunity Commission* (1995) 61 FCR 134 at 146 **[ATH.600.549.0001 at 0013]**.

150 See section 16 CPA **[LAW.700.001.0001 at 0003]**.

151 Section 30 CPA **[LAW.700.001.0001 at 0008]**.

the just, efficient, timely and cost-effective resolution of the real issues in dispute. The Court of Appeal said of section 29 that:

> *In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner.*[152]

175. In other words, the range of considerations that apply in determining whether an order should be made under section 29 and, if so, what order, extends well beyond the private interests of the particular parties before the Court. Rather, the exercise of the discretion is bound up with more fundamental considerations as to the administration of justice and the culture and conduct of litigation.

176. *Secondly*, in *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd (No 4)* [2013] VSC 14 **[ATH.600.159.0001]**, Dixon J commented that although the jurisdiction is predominantly compensatory (not punitive) where the "*jurisdiction is enlivened by a finding of a contravention of an obligation to the court there is a punitive, and a deterrent, slant that distinguishes the jurisdiction from the usual costs discretion*".[153] This was quoted with approval by the Court of Appeal in *Yara*.[154]

177. Properly construed, section 29 of the CPA does not create a "cause of action" within the meaning of section 29 of the AP Act. Whether the jurisdiction under 29 is engaged by the Court of its own motion or on the application of a person with sufficient interest, no person has a right to any relief but a mere hope or expectancy that the Court might, in furtherance of the overarching purpose, make an order in its favour.

178. That is so not merely because the power to make an order under section 29 is discretionary. Rather, at a more fundamental level, section 29 is not primarily concerned with the vindication of any private right or interest of a litigant or other sufficiently interested person. The

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152 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at 309-310, [20] **[ATH.600.166.0001 at 0008 – 0009]**.

153 *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd (No 4)* [2013] VSC 14 at [5] **[ATH.600.159.0001 at 0003]**.

154 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at 310, [24] [**ATH.600.166.0001 at 0009]**.

existence of loss and damage is not a requisite to the exercise of the power, nor does not fact that loss and damage has been suffered mean that an order will be made. The power to make orders is enlivened once the Court has found that a person has breached obligations owed not to the party who claims to have suffered loss, but to the Court itself. The power to then make orders is inextricably bound up with broader considerations of the public interest, the administration of justice, the regulation and control by the Court of its own officers, and the culture of litigation in the State. The power is, at least in part, a "sanction" by the Court for such breach,[155] and incorporates punitive and deterrent elements. That remains the case regardless of the fact that within the Court's armoury is the power to order compensation to a person who suffers loss as a result of the breach.

179. A factor of particular significance is that the power is exercisable not only on the application of a party, but of the Court's own motion. That is what occurred here. The exercise of a power by the Court at its own instigation in order to fulfil its duty to proactively enforce the provisions of the CPA is incompatible with the notion of a "cause of action". A critical feature of a cause of action is that a person with sufficient interest sues another person in the courts of justice to obtain a remedy. Courts do not initiate causes of action against a person of their own motion.

180. A breach of the overarching obligations is not, therefore, a factual situation the existence of which "entitles one person to obtain from the court a remedy against another person". At its highest, a person who alleges a breach of the overarching obligations is entitled to move the Court to inquire into the alleged breach. The Court may decline to do so. It may inquire and, if proved, will move to the next step of considering whether any order should be made and, if so, what order. Until such order is made by the Court, an applicant has no more than a mere hope or contingency that it might be awarded some redress in relation to that breach.

181. It follows that, in the SPR's submission, section 29 of the AP Act is not engaged and the claim against Mr Trimbos does not survive by reason of that provision. But that is far from the end of the analysis.

The Court's power under section 29 of the CPA nevertheless survives on its own terms

182. Rather, whether the power to make orders under section 29 otherwise survives therefore falls to be determined by reference to the legislation itself. Although there is no legal presumption

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155 See the heading of Part 2.4 to the CPA – "*Sanctions for contravening the overarching obligations*" **[LAW.700.001.0001 at 0007]**.

either way,[156] a consideration of the text, context and purpose of section 29 leads to the result that the jurisdiction and power survives. It is to be kept steadily in mind that a salient feature of the statutory scheme under section 29 is empowering the Court to make appropriate orders in the interests of justice to ensure that those who have suffered financial loss as a result of a contravention of overarching obligations are compensated for that loss.

183. In *Dibble*, Wilcox J observed that in relation to the legislation there considered (the Sex Discrimination Act), there was no evidence that the Parliament had any particular intention in relation to the survival of claims.[157] That will often be the case. Noting that the task was therefore to ascertain "*the unknowable*",[158] the exercise is "*really one of determining what result best accords with the scope and purpose of the Act, as disclosed by the provisions that were inserted in it*".[159]

184. The Court there held that the action did survive. A critical plank of its reasoning was that the purposes of the Act, disclosed in section 3, were "societal objects". Relevantly, the Court noted that although the act provided for payment of compensation in response to a complaint, that was not the primary purpose of the Act (that purpose being the elimination of discrimination).[160] Moreover, Wilcox J said that:

> *…it is, perhaps, a useful check on the cogency of the objective reasoning to stand back for a moment and ask whether the result is so out of line with general community opinion that it would have been rejected by parliament, if the issue had arisen in debate. Considering the matter in this way, and only as a check on what has gone before, I do not think it is. Although the common law rule that applied to most actions was that the cause of action died with a party, that position has been statutorily reversed in modern times in most common law jurisdictions, including in Australia. The reasons that have caused so many legislatures to provide an opposite rule, that most actions survive the death of a party, are reasons that apply equally to a complaint under the Sex Discrimination Act. I see no reason to believe that, if the issue of survivorship had been raised when this legislation was under debate, parliament would have taken a view different to that taken in respect of common law actions*.[161]

185. Turning attention to the terms of the CPA, its purposes can similarly be described as societal objects. Those objects strike at the very heart of the administration of justice, the primary concern of the legislation being to facilitate the just, efficient, timely and cost-effective

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156 *Jones v Simes* (1890) 43 Ch D 607 **[ATH.600.550.0001]**; *Dean v Wiesengrund* [1955] 2 QB 120 **[ATH.600.551.0001]**.

157 *Dibble v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290 at 297 **[ATH.600.552.0001 at 0008]**.

158 Ibid, at 299 **[ATH.600.552.0001 at 0010]**.

159 Ibid, at 297 **[ATH.600.552.0001 at 0008]**.

160 Ibid **[ATH.600.552.0001 at 0008]**.

161 Ibid, at 299 **[ATH.600.552.0001 at 0010]**.

resolution of the real issues in legal proceedings. This statutory regime was recently described by Gordon and Edelman JJ in *Rozenblit v Vainer* (2018) 262 CLR 478 (at [76]) [**ATH.600.553.0001 at 0024**] as effecting a "*culture shift*" and recognising the "*primary consideration of the courts to safeguard the administration of justice*". As they earlier observed (at [73] [**0023**]):

> *The overarching purpose of the [CPA], and the obligation for a court to give effect to and further that overarching purpose, reinforce that the power exists to enable a court to protect itself from abuse of its processes in order to safeguard the administration of justice, and that that purpose may transcend the interest of any particular party to the litigation.*

186. An important method by which the Court is to enforce and safeguard these purposes is the power to make orders under section 29.

187. The text of section 29 reinforces this view. The section is drafted in the widest possible terms. The Court is empowered to make "*any order*", so long as it considers the order to be "*appropriate in the interests of justice*".

188. Not only would the survival of the jurisdiction and power be in keeping with general community sentiment in the manner discussed by Wilcox J, but the opposite outcome would lead to an anomalous and absurd result. The facts of this case are apt to demonstrate that point. The debenture holders have been the victims of what on the Contradictor's case are fundamental and appalling breaches of the duties imposed on the defendants. On any view they have suffered considerable loss as a result of those breaches. It would be entirely inconsistent with the purposes of the CPA if those debenture holders were foreclosed from obtaining just compensation for those losses because of the unfortunate happenstance that any one or more of the defendants happens to die during the course of the proceedings. That is even more so where, as here, the conduct in question causes the prolongation of proceedings.

189. The Contradictor's allegations and the relief sought against Mr Trimbos reinforce this point. Whilst the SPR would certainly not put Mr Trimbos' moral culpability in the same category as AFP and some of the Lawyer Parties, his contraventions were serious and materially contributed to the Court approving $20 million in payments to AFP on 30 January 2018. The Court, and the SPR, were entitled to have confidence in Mr Trimbos properly performing his duties as an independent expert on costs assessment for a large settlement approval. The paramount obligation of an expert to further the administration of justice is essential to the

proper functioning of the system.[162] The notion that the Court is now paralysed from marking out its disapproval of Mr Trimbos' contraventions and making orders for appropriate compensation to those who have suffered loss and damage is unthinkable.

190. Similarly, not only would the result be incongruous when viewed through the private interests of the debenture holders, but is equally so when seen in the context of the broader interests of the administration of justice. As has been observed above, among the purposes of the legislation is to effect a change to the culture of civil litigation. Section 29 is directed towards that purpose and has a deterrent element. Those aims cannot be achieved if the Court is prevented from making orders that it has determined to be in the interests of justice by reason of the unfortunate fact that the defendant has died. The High Court has recently emphasised the importance of construing the statutory language in light of the mischief (a "*defect in the law which is now sought to be remedied*")[163] that the statute is intending to address.[164] To interpret section 29 as preventing the Court from making orders where a person who contravened their obligations would undermine the mischief towards which the CPA is directed: to give the Court greater powers to promote the administration of justice and uphold professional standards and the observance of important duties to the Court.

191. Further, section 29 was enacted against the background and context of an established statutory scheme of compulsory professional indemnity insurance for most of those persons to whom the overarching obligations will apply. It is entirely consistent with the purposes of the CPA that beneficiaries of a compensation order under section 29 might still be able to access such insurance notwithstanding that the contravener who caused financial loss has died. The requirement of compulsory insurance is, self-evidently, concerned with the protection of the public. It would be an unusual result where member of the public who suffered loss by reason of contraventions of the CPA could not seek redress from that scheme because the Court was unable to make orders under section 29 by reason of the death of the defendant.

192. Accordingly, the evident intention of the legislation is that the jurisdiction and power to make orders against a contravener of the overarching obligations does not terminate upon the death of the person during trial and devolves upon his personal representative. Accordingly, if the contraventions alleged against Mr Trimbos are proved, the Court may make orders against the Estate.

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162 *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567 at [21] [**ATH.600.454.0001 at 0009**]- [38] [**0016**].

163 *R v A2* (2019) 93 ALJR 1106; [2019] HCA 35 at [33] **[ATH.600.555.0001 at 0012]**.

164 Ibid, at [31] **[ATH.600.555.0001 at 0011]** - [37] **[0012]**.

193. If the Court makes such orders against the Estate then the SPR would seek enforcement of that order for monetary compensation directly against the LPLC under s 51 of the *Insurance* Contracts *Act 1984* (Cth) or otherwise, on the basis that Mr Trimbos' contract of insurance for professional indemnity cover plainly responds to an order for compensation under s 29 of the CPA as "*civil liability in connection with [Mr Trimbos'] practice*". Whether the SPR considered it necessary to take any further enforcement steps against the Estate would depend on the magnitude of recovery from the LPLC in respect of Mr Trimbos and more generally.

F. **PROPORTIONATE LIABILITY**

194. Each of AFP, Mr Symons, Mr Zita, Portfolio Law, and Mr Alexander Elliott have filed notices purporting to invoke the operation of the proportionate liability regime set out in Part IVAA of the *Wrongs Act 1958* (Vic) ("*Wrongs Act*") **[LAW.700.024.0001]**. On the other hand, Mr O'Bryan's position is that the proportionate liability regime has no application to the Remitter. The SPR agrees with Mr O'Bryan.

195. The proportionate liability regime is regularly applied by the courts and the procedure is well understood. Significantly, where the provisions apply, the liability of a defendant is statutorily limited to an amount reflecting the proportion of the loss claimed that the Court thinks just having regard to each defendants responsibility for the loss.[165] The operation of the regime is mandatory – where it applies, the Court "must not" give judgment for an amount greater than the Court thinks just having regard to their level of responsibility.[166]

196. For reasons that follow, the SPR submits that:

    (a) the proportionate liability regime does <u>not</u> apply to the relief sought in this Remitter;

    (b) nevertheless, the breadth of the Court's plenary power under section 29 of the CPA would permit it, where the interests of justice require, to limit the liability of any particular defendant to an amount proportionate to its share of the responsibility of the loss suffered; and

    (c) there are good reasons in this case why the Court should not apportion or limit the "compensation" ordered against any particular defendant having regard to the fact that each materially contributed to the large losses suffered by debenture-holders.

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165 Wrongs Act, section 24AI(1) [**LAW.700.024.0001 at 0004**].
166 Ibid, section 24AI(2) [**LAW.700.024.0001 at 0004**].

Part IVAA of the Wrongs Act does not apply

197. By its terms, Part IVAA applies to "*a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care*".[167] Although 'damages' is defined to include any form of monetary compensation,[168] considerations of the text, context and purpose of Part IVAA demonstrate that the Part is not intended to, and does not, apply to the exercise of the Court's power under section 29 of the CPA.

198. That is for three separate but related reasons. *First*, an application under section 29 of the CPA is not "a claim for economic loss" within the meaning of Part IVAA. *Secondly*, the allegations made by the Contradictor, which comprise alleged breaches of the overarching obligations, do not arise from any "failure to take reasonable care". These two reasons overlap because the stipulation that the loss arise from a failure to take reasonable care informs the types of claims for economic loss to which the regime is directed. *Finally*, section 29 of the CPA itself is part of self-contained and exhaustive statutory regime that was not intended to be limited in any way by earlier legislation of Parliament, and it contains no internal provision treating orders made under s 29 as "apportionable claims".

"A claim for economic loss"

199. The requirement in the statutory language—that there be a claim for economic loss arising from a failure to take reasonable care—together with considerations of the evident legislative purpose of the Part, make plain that Part IVAA is directed towards private causes of action to recover economic loss for negligence or some other breach of a similar duty to exercise reasonable care. An inquiry conducted by the Court of its own motion to consider breaches of the CPA and, if thought fit, make orders in respect of those breaches is of an entirely different character. Similarly, an application by a person for the Court to inquire into and, if thought fit, sanction another person for a breach of the overarching obligations under the CPA is, for the reasons set out above, not in the nature of a private cause of action to recover economic loss. Rather, as previously submitted, it is a discretionary power conferred on the Court as part of its role is safeguarding the administration of justice and facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. That remains so regardless of the fact that the Court might, where the interests of justice require it, order costs

167 Ibid, 24AF(1) **[LAW.700.024.0001 at 0001 -0002].**
168 Ibid, 24AE **[LAW.700.024.0001 at 0001].**

or other monetary compensation to be paid to a party who suffers loss as a result of a contravention.

200. The object of Part IVAA was explained by Palmer J in *Yates v Mobile Marine Repairs Pty Ltd*[169] (in relation to the comparable provisions of Pt IV of the *Civil Liability Act 2002* (NSW) as follows:

> *The object of [the part] is remedial and it dramatically changes the previous law. Formerly, a plaintiff could choose to sue only one of several wrongdoers who caused the same loss and the Court could enter judgment for the whole of that loss against that defendant. Even if the defendant cross claimed in the proceedings for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss, leaving the defendant to recover from the cross defendants, if it could. Sometimes the defendant obtained judgment against a cross defendant but could not recover the judgment because of the cross defendant's insolvency.*
>
> *[The Part] is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers "just", having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss*.[170]

201. The purpose of the provision, therefore, was to reform the common law joint and several liability rule. That was the view of Besanko J in the Federal Court who remarked that:

> *... the mischief to which the amendments were directed was a plaintiff being able to recover 100% of his damages from any one of several wrongdoers when that wrongdoer's 'fault', when compared with the other wrongdoers, was less or far less than that. In other words, the amendment was directed to what were considered to be the undesirable consequences of the joint and several liability rule. There is no suggestion that the mischief the amendments were designed to remedy was any wider than that.*[171]

202. The joint and several rule was the manifestation of the common law solidary liability principle, whereby every defendant who contributed to the plaintiff's loss could be treated as the effective cause of that loss and therefore liable for the whole of the loss. The risk of any co-defendant being unable to pay or contribute to the damages ordered lay with the defendant.

203. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,[172] Bell and Gageler JJ observed that the enactment of proportionate liability regimes, including Part IVAA was "part of a co-ordinated national response to what was seen as an unavailability of reasonably priced

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169 [2007] NSWSC 1463 **[ATH.600.556.0001]**.
170 Ibid, at [93]–[94] **[ATH.600.556.0001 at 0015]**.
171 *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 523 **[ATH.600.558.0001 at 0014]**.
172 (2013) 247 CLR 613, **[ATH.600.266.0001]**.

insurance to indemnify against liability for negligence".[173] The plurality (French CJ, Hayne and Kiefel JJ) identified the progenitor of the various (and analogous) State proportionate liability regimes as the *Davis Inquiry into the Law of Joint and Several Liability.*[174] That report, the Court noted, recommended that "*joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss*". [175]

204. *Hunt v Hunt* considered the analogous NSW proportionate liability regime embodied in the *Civil Liability Act.* The High Court observed:

> *The Davis Report was not mentioned in the Second Reading Speech or the Explanatory Notes to the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW), which introduced Pt 4 of the Civil Liability Act… Nevertheless, there is a clear connection between the Davis Report and Pt 4 of the Civil Liability Act. In 1996, the Standing Committee of Attorneys-General released draft model provisions which reflected the recommendations of the Davis Report. The draft model provisions were eventually adopted, in substantially the same form, in Pt 4 of the Civil Liability Act in New South Wales and by the other States and Territories.*[176]

205. The Davis Report was not directly referred to in the Second Reading Speech commending the Victorian legislation, however the Speech did note that the "move to proportionate liability for economic loss comes after extensive research and consultation over the last decade by attorneys-general and others across Australia".[177] Of the regime generally, the Premier said during the Speech:

> *The bill implements 'proportionate liability' in place of join and several liability for purely economic losses – that is, losses that do not relate to death or personal injury. That means that persons or entities, including government, will each only be liable for the proportion of economic loss caused by their own negligence (Emphasis added).*[178]

206. Evidently enough, the focus of national push for reform to the common law solidary liability rule was the law of negligence. The scope of Part IVAA is not limited to actions in negligence per se, but rather extends to claims for economic loss arising from a failure to take reasonable care. Whatever the precise contours of that formulation, the history, scope, purpose and text

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173 Ibid, at 643-644, [78] **[ATH.600.266.0001 at 0031 - 0032].**

174 Ibid, at 624 **[ATH.600.266.0001 at 0012]** – 625 **[0013]**. The Report is: Commonwealth of Australia, Inquiry into the Law of Joint and Several Liability: Report of Stage Two, (1995) **[ATH.600.560.0001]**.

175 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, at 625[13] **[ATH.600.266.0001 at 0013]**.

176 Ibid, at 626 [15] **[ATH.600.266.0001 at 0014]**.

177 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 1785 (Steve Bracks, Premier) [**LAW.700.032.0001 at 0167**].

178 Ibid [**LAW.700.032.0001 at 0167**].

of the provision make plain that it does not extend to the exercise of the Court's power to make orders under section 29. The regime is directed to causes of action wherein a claimant seeks to redress a private right to damages or compensation arising from the failure of another person to take reasonable care. As has been seen above, the jurisdiction under the CPA is of an altogether different nature.

Part IVAA cannot fetter section 29

207. Moreover, there is nothing in the text or purpose of either Part IVAA or section 29 that would suggest that the plenary power conferred by section 29 is fettered by Part IVAA. By section 29, the Court is entitled to make "any order" that is considered appropriate in the interests of justice. As has been observed, the power is directed to the maintenance of matters of critical public importance relating to the administration of justice. The submission put by AFP, Mr Elliott and some of the Lawyer Parties would require section 29 to yield to the limitation of liability imposed by Part IVAA, an earlier Act of Parliament.

208. There is no rational basis to suggest that the plenary power in section 29 is constrained or circumscribed by the requirements of Part IVAA. If it were, it would lead to the unusual and absurd outcome whereby a court might be prevented from making an order that it thought to be in the interests of justice, so as to conform with the regime supplied by Part IVAA. Nor is it consistent with the purposes of Part IVAA.

209. This case highlights the unsatisfactory outcomes that such a construction would produce. For example, it would be open to the Court to conclude in this case that, if the contraventions were proven, Mr Zita's culpability for the debenture holders' loss is, by comparison, less than that of AFP, Mr O'Bryan and Mr Symons. Yet it is equally open to the Court to conclude that due to the nature, extent and multitude of breaches, the interests of justice require Mr Zita to be liable for the whole of the loss suffered by debenture holders (in substance his former clients, approximately 16,000 debenture-holders). In coming to this view, the Court would not only consider the position of the debenture holders vis-à-vis Mr Zita, but broader notions of the public interest, the desirability of sanctioning Mr Zita, the importance of deterrence, the need to highlight the importance of responsibilities and duties of the plaintiff's lawyers to thousands of vulnerable absent group members in a class action, the need to effect changes to the culture of litigation in that setting in particular. The observance of Part IVAA could inhibit the Court from achieving those legislatively mandated objectives. The Parliament could not have had in mind restricting the Court's discretion by reference to strict rules of apportionability under Part IVAA when passing the CPA. Such an intention cannot rationally be attributed to Parliament *sub silentio*.

210. There is a related consideration of statutory context. The CPA itself is a self-contained, distinct and exhaustive statutory regime.[179] Any limitation on the orders the Court may make against a particular contravener are to be found from within the text and structure of the CPA itself. Not the provisions of another statute. This is also consistent with the High Court's decision in *Selig v Wealthsure Pty Ltd*.[180] There it was held that the proportionate liability regime in Div 2A of Part 7.10 of the *Corporations Act* was limited to by the terms of the statute to a claimed based on a contravention of section 1041H. It did not extent to other statutory causes of action.

"***arising from a failure to take reasonable care***"

211. In order for Part IVAA to apply, the claim for economic loss must arise from "a failure to take reasonable care". The authorities reveal a difference in judicial opinion as to the proper construction of this requirement. One view, endorsed in particular by the New South Wales Court of Appeal, is that claim or cause of action in question must have as a necessary element a failure to take reasonable care. The alternate, wider view posits that the section merely requires that there be a factual finding that the defendant failed to take reasonable care.

212. The wider view was first promulgated by Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*,[181] who held that:

> *Where a claim brought by an applicant does not have one as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a 'failure to take reasonable care' in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence it may be found that Pt IVAA applies*.[182]

213. This approach was favoured in a number of decisions of Justice Barrett of the Supreme Court of New South Wales. In particular, in *Reinhold v NSW Lottery Corporation (No 2)*,[183] his Honour stated that:

> *...a claim may properly be regarded as one 'arising from a failure to take reasonable care' if, 'at the end of the trial', the evidence warrants a finding to that effect and regardless of the absence of 'any plea of negligence or a "failure to take*

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179 *International Finance Trust Company v New South Wales* (2009) 240 CLR 319 at [44] **[ATH.600.561.0001 at 0032]**, [79] - [80] **[0042]** and [162] **[0069]**.
180 (2015) 255 CLR 661 [**ATH.600.562.0001**].
181 (2007) 164 FCR 450 **[ATH.600.262.0001]**.
182 Ibid, at 458, [30] **[ATH.600.262.0001 at 0009]**.
183 (2008) 82 NSWLR 762 **[ATH.600.488.0001]**.

> *reasonable care"'. The nature of the claim, for the purposes of Part 4, is to be judged in the light of the findings made and is not determined by the words in which it is framed.*[184]

214. Ashley JA cited that passage with approval in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd.*[185] It has been favoured in a number of other first instance decision in Victoria and elsewhere, many of which however merely consider the issue at the joinder or summary judgement stage.[186]

215. The former view has been adopted in a number of decisions of the New South Wales Court of Appeal. In *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)*,[187] Macfarlan JA held that for the action to arise from a failure to take reasonable care it is "necessary that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeded".[188]

216. In following this approach in *Dunn v Hanson Australasia,*[189] Mossop J said, in comments that the SPR would respectfully adopt, that:

> *In my view the expression "failure to take reasonable care" is designed to encompass actions which involve the establishment of that legal standard. It is not meant in some non-technical sense that invites a characterisation exercise so as to establish that the breach of some other legal standard involves a failure take reasonable care.*[190]

217. The New South Wales Court of Appeal case of *Cassegrain v Cassegrain* is an instructive example of this approach.[191] There, the Court was concerned with whether a claim for equitable compensation for knowing receipt of property transferred in breach of fiduciary duty was an apportionable claim. Basten JA summarised the true controversy in the conflicting authorities as being whether it is correct to apply the proportionate liability regime where a cause of action involves strict liability; that is, in circumstances whether there is in

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184 Ibid, at 771, [30] **[ATH.600.488.0001 at 0010]**.
185 (2008) 21 VR 84 [**ATH.600.564.0001**].
186 See *Main Road Property Group Pty Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5 (Croft J) **[ATH.600.464.0001]**; *Trani v Trani* (No 2) [2019] VSC 723 (Forbes J) **[ATH.600.271.0001]**; and, *Pentridge Village Pty Ltd (In Liq) v Capital Finance Australia Ltd (No 2)* [2020] VSC 284 (Connock J) [**ATH.600.268.0001**].
187 [2013] NSWCA 58 **[ATH.600.269.0001]**.
188 Ibid, at [22] **[ATH.600.269.0001 at 0011]**.
189 (2017) 12 ACTLR 138 [**ATH.600.567.0001**].
190 Ibid, at 149, [48] [**ATH.600.567.0001 at 0012**].
191 [2016] NSWCA 71 [**ATH.600.568.0001**].

fact a failure to take reasonable care, notwithstanding that liability would be established without such a finding.[192] His Honour found the question did not apply in that case because:

> The conduct of the appellant in the present case, as a knowing recipient of property transferred in breach of fiduciary duties, involved neither strict liability nor negligence, *but a higher level of moral responsibility*.[193] (Emphasis added.)

218. Further, and critically, his Honour proceeded to consider whether there was implicit in the phrase "failure to take reasonable care" an assumption as to the existence of a legal duty which has been breached. In a learned passage, which the SPR respectfully submits is correct and apposite to this case, his Honour remarked:

> *[T]he question is useful because the answer illustrates the distinction between strict liability, a failure to exercise reasonable care and intentional misconduct. In broad terms, strict liability does not depend upon advertence by the tortfeasor to the consequences of his or her action. An intentional tort, on the other hand, clearly does. One can articulate an intentional tort, such as trespass to the person, in terms of a duty to avoid certain conduct, but the "duty", so formulated, is to avoid deliberately assaulting another person without his or her consent; it is not a duty to take reasonable care not to assault a person without consent. On the other hand, the tort of negligence is always expressed in terms of a duty to take reasonable care. It is wrong to describe an element of negligent driving as an obligation not to run down a pedestrian or an obligation to ensure that pedestrians are not run down; the correct formulation is a duty to take reasonable care to avoid running down a pedestrian.*
>
> *In this sense, the phrase "failure to take reasonable care" does envisage a duty expressed in negative terms but, more importantly, in terms which are inapt with respect to an intentional tort. Similar reasoning applies to the liability based on receipt of property transferred in breach of a fiduciary duty. The duty of a person dealing with fiduciaries is not to take reasonable steps to avoid becoming party to their breach of duty, but rather not knowingly to receive the property of the company with knowledge of circumstances which would allow an honest and reasonable person to recognise that an impropriety had been committed*.[194]

219. It is necessary at this point to consider the claims made in this remitted proceeding by the Contradictor. It is alleged by the Contradictor that each of the defendants breached various overarching obligations imposed on them under the CPA, including:

(a) the duty to act honestly at all times in relation to a civil proceeding;

(b) the obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and

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192 Ibid, at [20] [**ATH.600.568.0001 at 0008**].
193 Ibid, at [21] [**ATH.600.568.0001 at 0009**].
194 Ibid, at [22]-[23] [**ATH.600.568.0001 at 0009**].

(c) the obligation to use reasonable endeavours to ensure that legal and other costs are reasonable and proportionate.

220. Plainly, the duties are each expressed in positive terms and impose *strict liability* on those who breach them. None of them impose, either expressly or impliedly, an obligation to take reasonable care by reference to a normative, objective standard. Like most claims however, it is easy to conceive of situations where a person might breach the obligation because that person failed to take reasonable care to observe the duty. But that does not and cannot mean that that liability for a contravention arises from a failure to take reasonable care; it arises by reason of the person breaching a positive duty imposed upon them by the Act. The greater does not include the lesser.[195]

221. A breach of an overarching obligation imposed by the CPA is, in both effect and substance, more analogous to a breach of fiduciary duty than to a claim in negligence. It imposes a "*higher level of moral responsibility*".[196] That is certainly the way in which the Contradictor has framed their case against AFP, Mr Alex Elliott and the Lawyer Parties. In large part, it has been put on the basis of intentional wrongful conduct. The Contradictor squarely makes allegations of participation in a dishonest and fraudulent design against AFP, Mr Alex Elliott, Mr O'Bryan and Mr Symons.[197] It is difficult to conceive of a claim alleging fraud as one arising from a failure to exercise reasonable care. And *Hunt v Hunt* does not suggest to the contrary because the plaintiff in that case did not contend that the solicitors could not seek apportionment because the (notional) claim by the plaintiff against the fraudsters was not an "apportionable claim".

Power to Apportion or Limit Liability under Section 29

222. It has been noted above that section 29 is cast in the widest possible terms. The language makes clear that section was intended to confer on the Court the widest power to do whatever is appropriate in the interest of justice to achieve the purposes of the CPA. The language is similar to the analogous plenary power in the class action legislation to make any order necessary to do just in the proceeding. Of those provisions, it has been observed that "*the injunction against reading down statutory powers given to courts, absent clear indication in terms or context is of particular force*".[198]

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195 Clarke, "Proportionate Liability in Commercial Cases: Principles and Practice" (2019) 93 ALJ 188 at 197 [**ATH.600.570.0001 at 0010**].

196 *Cassegrain v Cassegrain* [2016] NSWCA 71, at [21] [**ATH.600.568.0001 at 0009**].

197 Contradictor's List of Issues at [174] **[PLE.010.005.0001 at 0147]** – [177] **[0148]**.

198 *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 at [86] [**ATH.600.571.0001 at 0024**].

223. The only textual limitation on the power is that Court must consider that the order is appropriate in the interest of justice. As a matter of construction, it follows that if the Court considered it was appropriate in the interests of justice to limit the liability of any particular defendant, it would have the power to do so. Similarly, if the Court considered it was appropriate in the interest of justice to apportion liability (whether in terms of the "costs" of the Remitter or the "compensation" sought by the Contradictor, as between joint contraveners, it could do so. The Court is not constrained however by any *a priori* requirement to limit liability according to principles of proportionate liability under Part IVAA of the *Wrongs Act*.

224. This approach was adopted by Dixon J in *Hudspeth*, in apportioning liability in that case but warning against the creation of any general rule that pecuniary orders under section 29 are "*proportionate rather than solidary*".[199]

No Apportionment or Limitation

225. However, the SPR submits that at least in respect of the "compensation" sought by the Contradictor (discussed in Section D above) it is not appropriate in the interests of justice to limit liability or apportion the debenture holders' loss as between the various defendants in this remitter.

226. The common law solidary liability rule in relation to torts was developed on the basis that in all but exceptional cases, the causal responsibility of each wrongdoer extends to the whole of the plaintiff's loss. That is, each defendant's wrongdoing can be seen to be the proximate cause of the plaintiff's loss on the basis that the loss would not have been sustained but for that defendant's conduct. Given that to be the case, it was seen as unfair to force the plaintiff to carry the risk of a defendant becoming insolvent or otherwise being unable to meet a judgment. That risk lay with the tortfeasors.

227. As was developed above, that rule was reformed largely on the basis of broad policy considerations. Chiefly, the desire to rein in judgments for negligence and a perceived crisis in the cost of liability insurance. The circumstances of this case are radically different to the considerations applying to those sorts of claims. Here, the defendants have are accused of serious and fundamental breaches of the most solemn duties. Each was an officer of the Court. The debenture holders, who were in a position of considerable vulnerability at the hands of their lawyers, have suffered significant and continuing losses by reason of those breaches.

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199 *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 9)* [2014] VSC 622 at [42] **[ATH.600.312.0001 at 0014 – 0015]**.

228. It is not in the interests of justice for the Court to apportion liability as between those defendants and shift the risk of insolvency onto the debenture holders. To put it colloquially – the debenture holders have suffered enough. It does not require rigorous analysis to establish that had *any* of the defendants complied with their duties, the dishonest and fraudulent scheme perpetrated upon debenture-holders and the administration of justice in this State could have been brought to an end and the losses suffered by the debenture holders and the damage to administration of justice both avoided.

229. The interests of justice also require consideration of the practical position that debenture-holders are now in given the financial position of AFP and the Lawyer Parties noted in the introduction to these submissions.

G. MARK ELLIOTT AND ELLIOTT LEGAL

230. The trial of this Remitter heard much evidence about the role and involvement of Mr Mark Elliott and Elliott Legal in the impugned conduct. It is open to the Court to make findings about the role and participation of Mr Mark Elliott and Elliott Legal in the scheme uncovered by the Contradictor, and the SPR submits that the Court should now do so, even though the SPR's non-party costs summons against Mr Mark Elliott's estate and Elliott Legal will be heard and determined at a later stage in the proceedings.

231. Plainly, on the evidence led in the Remitter, it is open to the Court to find that Mark Elliot was the initiator and driving force behind the misconduct. That is not to downplay the significance of the involvement of Mr O'Bryan, Mr Symons and Mr Zita - they were witting and willing accomplices. But Mr Elliott, through his controlling stakes in AFP and Elliott Legal, stood to gain the most from the scheme, and exerted a great deal of control over the manner in which the Banksia Proceedings were conducted. In his own words, he had responsibility for the day-to-day conduct of the Banksia Proceedings and ran the litigation as he saw fit.[200]

232. Mr Elliott ran AFP as he saw fit. He was also the sole director of Elliott Legal, save for a period between 16 May 2016 and 5 June 2017 during which Alex Elliott was also a director. Despite being a director, Alex Elliott gave evidence that he did not participate in board level decision making.[201] Clearly enough, Mark Elliott was the sole guiding mind of Elliott Legal.

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200 *Australian Funding Partners Limited v Botsman* [2018] VSC 303, at [67] [**ATH.600.148.0001 at 0016**].

201 Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 1 December 2020), 1653, L1-18 **[TRA.500.016.0001 at 0066]**.

233. In assessing the conduct of Mark Elliott (and indeed, Alex Elliott) it is unnecessary to get bogged down in what particular capacity he was acting in at any given time. There was discussion and evidence during the trial about "what hat" Mark Elliott was wearing when he engaged in certain acts.[202] However, in the SPR's submission such analysis is artificial and of little utility because the simple reality is that AFP and Elliott Legal were the alter ego of Mr Elliott, and were instruments used by him to further the interests of the scheme.

234. Mark Elliott himself adverted to the participation of Elliott Legal in a telling email to Mr Symons on 23 January 2018. Mr Zita had, earlier in the email chain, estimated to Mr Symons that there had been "about 25" debenture-holder enquiries. Mr Symons sought confirmation from Mr Elliott that this was correct. Mr Elliott responded:

> *Maybe for TZ but we have our own at BSLLP and EL given the 5 year involvement of BSLLP and by default me and EL.*[203]

235. It was a revealing statement that demonstrated the interconnected, inseparable involvement of Mr Elliott, AFP and Elliott Legal.

236. Elliott Legal was, of course, the firm on the record for Mr Bolitho at the commencement of the class action. They were restrained from continuing to act, leading to the appointment of Mr Zita and Portfolio Law. The Contradictor alleges that Mr Zita/Portfolio Law was a "post box". That allegation was clearly established. Mr Elliott retained a tyrannical level of control over Mr Zita and the conduct of the proceedings. There is no evidence of Mr Zita at any stage exercising any independent legal judgment. Conversely, there is an abundance of evidence of Mr Zita doing what he was told to do by Mr Elliott. Even if one takes the most limited view of the role of a solicitor in commercial litigation, such as dealing with correspondence and administrative matters, Mr Zita was barely permitted to do even that. All correspondence to the group class action emails, for example, were accessible by Mr Mark Elliott and Mr Alex Elliott of Elliott Legal.

237. The inference is clearly open that Elliott Legal continued to act as the de facto solicitors for the class action. The Online Court Book is replete with examples of Mr Elliott corresponding using his Elliott Legal email address. It may otherwise be inferred that the bulk of the conduct alleged in this Remitter took place at the offices of Elliott Legal. This submission is further supported by the following examples:

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202 Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 3 December 2020) at 1802, L11-20 **[TRA.500.018.0001 at 0026]**.

203 **[SYM.002.001.9987]**.

(a) On 5 December 2014, each of the defendants to the Banksia Proceedings with the exception of Trust Co made an offer to settle the proceedings. That offer was sent directly to Mr Elliott. Mr Elliott forwarded it on to Mr Zita on 7 December 2014, informing him that he will "send draft reply for you to send tomorrow". He then instructed Mr Zita to "please 'blind' cc on all correspondence". In an inversion of the usual solicitor relationship, Mr Elliott was informing Mr Zita of developments in the litigation, drafting correspondence for Mr Zita to send, and demanding to be copied on all correspondence.[204]

(b) Mr Elliott routinely drafted correspondence for Mr Zita to send.[205]

(c) Mr Elliott would admonish Mr Zita when he felt he was not being included, such as:

> *Tony*
>
> *Please make sure that I am being copied ALL emails*
>
> *Cheers*
>
> *Mark Elliott – ELLIOT LEGAL*[206]

(d) In response to enquiries from debenture-holders about the Partial Settlement, Mr Zita sought advice from Mr Elliott as to how to respond. Mr Elliott responded:

> *Hi,*
>
> *Send me everything, as always*
>
> *Refer all callers to Alex at info@banksia email address or on 96055955*
>
> *Cheers*
>
> *Mark Elliott*
>
> *Elliott Legal P/L*[207]

(e) The telephone number was the number for Elliott Legal.[208]

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204 **[CBP.004.005.7912]**.
205 See for example **[CBP.004.003.5364], [CBP.004.005.4636]**.
206 **[CBP.004.005.5544]**.
207 **[CBP.001.006.4733]**.
208 See **[TRI.003.013.0346]**.

(f) Mr Zita was prohibited from dealing substantively with debenture holder enquiries in relation to the Trust Co settlement other than in accordance with an agreed script.[209]

238. Neither Mr Zita or his firm were experienced in class actions.[210] Mr Zita accepted that he performed no legal analysis or research.[211] He repeatedly accepted in cross-examination that his input on key aspects of the proceeding was never sought.[212]

239. Throughout this time, Elliott Legal continued to have a financial interest in and benefit from the proceedings. It charged fees of $797,500 prior to being restrained from acting. For the purposes of the Partial Settlement, it apportioned 75% of those fees as relating to the settled claims and its fees were approved in the sum of $598,125. However, it was only paid $397,500 on account of its legal fees, suggesting that it retained an interest in the Banksia Proceeding to recover the balance.[213] There is evidence of other financial transactions between AFP and Elliott Legal.[214]

5 March 2021

R DICK

J A REDWOOD

M GRADY

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209 **[ABL.001.0627.00038], [ABL.001.0627.00039], [ABL.001.0627.00040]**.

210 Transcript of Proceedings, *Bolitho & Anor v Banksia Securities Limited & Ors* (Supreme Court of Victoria, S CI 2012 7185, Dixon J, 26 November 2020), 1307 **[TRA.500.013.0001 at 0015]**.

211 Ibid, 1352, L1-7 **[TRA.500.013.0001 at 0060]**,

212 See for example Ibid, 1356 **[TRA.500.013.0001 at 0064]**.

213 Affidavit of David Charles Newman sworn 17 August 2020, at 67(e) **[LAY.040.001.0001 at 0025]**.

214 Ibid, at 67(f) **[LAY.040.001.0001 at 0025]**.