

IN THE MATTER OF BANKSIA SECURITIES LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

ACN 004 736 458

LAURENCE JOHN BOLITHO

Plaintiff

and

BANKSIA SECURITIES LIMITED ACN 004 736 458 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS

Defendant

SUBMISSIONS OF AFPL

Date of document: 6 February 2020
Filed on behalf of: the Second Plaintiff

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

Tel: 9229 9999

Fax: 9229 9900

Ref: 011907318

John Mengolian – jmengolian@abl.com.au

A. INTRODUCTION

1. In *BMW Australia Ltd v Brewster* [2019] HCA 45 (delivered on 4 December 2019) a majority of the High Court held that the Federal Court and the New South Wales Supreme Court did not have the power under statutory provisions equivalent to Part 4A of the *Supreme Court Act 1986* (Vic) to make common fund orders prior to settlement. Whether those courts and this Court have the power to make such orders at the stage of approving settlement under s 33V did not arise for determination, although Gordon J expressed the view in *obiter dicta* that such orders were not possible even at that stage.¹
2. Given this uncertainty, and in the interests of efficiently and expediently determining the present proceedings, AFPL informed the Contradictor on 20

¹ [2019] HCA 45 at [141], [143], [145], [147].

December 2019 that it proposed to amend its application to seek commission pursuant to the funding agreements it entered with funded group members. By no longer seeking a common fund order, the Court need not resolve whether it has the power to make one — a point which the Contradictor would presumably feel obliged to resist.

3. On 31 January 2020, AFPL provided the parties and the Contradictor with what it regarded as an appropriate list of issues (see **Attachment A**) given that AFPL was no longer pressing for a common fund order.
4. The limited purpose of these submissions is to explain the new list of issues and the reasons why they are suitable to guide the ongoing conduct of this proceeding. Consistently with the demands of procedural fairness, the time for final submissions on these matters is later, if the Court accepts AFPL's submission that a new list of issues is appropriate.

B. COSTS

5. Issues one and two concern legal costs, and are largely the same as the Contradictor's current list of issues.
6. These issues remain in play notwithstanding AFPL's amendment to its application for commission because, AFPL accepts, a process is required in order to determine the legal fees which Mr Bolitho's legal team is entitled to recover. Once that figure is determined, the amendment to AFPL's application does then lead to a different mechanism by which those legal costs are recovered by AFPL: AFPL is entitled to an amount for those legal costs payable by it to Mr Bolitho's legal team as "Case Costs" under the funding agreements and in particular clause 12 (relating to "Repayment of Case Costs and Consideration").

C. FUNDING COMMISSION

7. Issues three and four reflect AFPL's amended application to seek commission under the funding agreements rather than via the contestable and uncertain mechanism of a common fund order. There is no doubt that third party funders may recover the rate of commission promised under funding agreements. And as AFPL has already explained, to avoid the uncertainty attending common

fund orders so as to reduce the issues in dispute, it proposes to rely only upon this settled avenue for recovering commission.

8. Clause 12.1(b) of the funding agreements (see an example at **Attachment B**) entitles AFPL to “a further amount, as Consideration for the financing of the Case and performance by BSLLP of its various obligations under this BSLLP Agreement, being a maximum of 30% of that Resolution Sum”. AFPL submits that this gives rise to two issues for the Court’s determination:

- 8.1 *First*, is the entire \$64m paid by Trust Co as part of the settlement the “Resolution Sum” within the meaning of clause 1.1 of the funding agreements. While that sum was paid to resolve not only the group proceeding but the SPRS’ proceeding, was that sum nonetheless “any money received or payment made to settle, compromise or resolve one or more or all of the Claims” within the definition of “Resolution Sum”? AFPL submits “yes”.

- 8.2 *Second*, once the Resolution Sum is determined, is AFPL entitled to 30% of that sum pursuant to clause 12.1(b)? AFPL submits “yes”.

9. Issue five concerns whether a funding equalisation order should be made to spread the burden of the sums payable to AFPL across funded and unfunded group members. That is an issue on which AFPL expects to take no position. A procedural question arises as to how the Contradictor is to approach the question given the conflict of interest between funded and unfunded group members on the issue.

D. DISENTITLING CONDUCT

10. Issues six and seven concern the proper determination of the Contradictor’s allegations against AFPL and the Lawyer Parties.
11. Whether it is appropriate for those allegations to remain in this Court as part of this application by AFPL depends on whether those allegations intersect in any meaningful way with the issues above. If not (and even if so), then it is likely to be the case that some other mechanism or vehicle ought to be identified for the resolution of those allegations — some mechanism or vehicle which does not come at the expense of group members. The observations made in the plurality

judgment in *BMW* about the limitations of section 33ZF,² and the Contradictor's reliance on that provision as a source of power, are apposite.

12. AFPL will submit that the alleged disentitling conduct has no bearing whatsoever on its entitlement to commission under the funding agreements. No statutory power permits the Court to vary or diminish AFPL's contractual entitlement: see *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 at [18]-[58]; *Crown Resorts Ltd v Zantran Pty Ltd* [2020] FCAFC 1. And if, for example, it is alleged that the disentitling conduct is established and that it amounts to a breach of contract, that does not have any bearing on AFPL's entitlement under the agreements unless funded group members sought to terminate their agreements prior to crystallisation of AFPL's entitlement. That has not been done (and it is questionable how the Contradictor could have standing to make such an argument when they are not privy to the agreements).
13. The recovery of costs *may* be affected by the alleged Disentitling Conduct. But not all of the Disentitling Conduct is conceivably relevant to costs; the Contradictor will need to explain how each alleged instance of Disentitling Conduct is relevant to costs if that is the basis upon which it is pressed. An appropriate time to revisit this question may be following the filing of evidence.
14. If AFPL is correct that the Disentitling Conduct has no bearing upon the liability of funded group members to pay commission to AFPL, then a question arises as to how the Contradictor's allegations can impact the recovery of funds by group members, given that to at least some degree group members will likely bear some of the costs burden of the exercise. A question also arises as to how group members should be heard if at all on this issue, given the Contradictor presumably does not answer to them and might feel constrained in what can be done in apparent settlement of their interests.
15. At a minimum, the Court should give directions imposing appropriate limits on the Contradictor's allegations of Disentitling Conduct having regard to the nature of the application now pressed by AFPL. Two points may be observed immediately:

² See, eg, [2019] HCA 45 at [50]-[51], [53], [60].

- 15.1 That Disentitling Conduct did not result in a diminution of the \$64m settlement figure. Nothing AFPL did could have increased that amount. That fund remained intact regardless of the alleged Disentitling Conduct.
- 15.2 Even if the Disentitling Conduct had not occurred, group members would have been held out of their money for some time because Mrs Botsman would have applied for leave to appeal Croft J's orders in any event. That can be readily inferred because her application for leave to appeal challenged the finding that Trust Co could pay no more than \$64m.
16. In the circumstances, it is timely to consider the proportionality of the Contradictor's pursuit of the Disentitling Conduct having regard to the amount of "loss" which that Disentitling Conduct can realistically be regarded to have occasioned to group members even if all of that conduct be proved. The alleged loss of \$5 million could never be substantiated, and proportionality of the interlocutory steps being taken should *not* be assessed as if that figure is a likely and credible amount on the cards.

S.R. Horgan

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ATTACHMENT A

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

S CI 2012 07185

IN THE MATTER OF BANKSIA SECURITIES LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

ACN 004 736 458

LAURENCE JOHN BOLITHO

Plaintiff

and

BANKSIA SECURITIES LIMITED ACN 004 736 458 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS

Defendant

AUSTRILIAN FUNDING PARTNERS LIMITED'S AMENDED LIST OF ISSUES

Date of document: 31 January 2020

Filed on behalf of: the Second Plaintiff

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

Tel: 9229 9999

Fax: 9229 9900

Ref: 011907318

John Mengolian – jmengolian@abl.com.au

LEGAL COSTS

1. With respect to the legal costs and disbursements which AFPL seeks to recover by this application (**Legal Costs**):
 - (a) were they incurred in the conduct of Supreme Court Proceeding SCI 2012 7185 (**Bolitho Proceeding**) on behalf of Mr Bolitho and the representative group?
 - (b) were they reasonable in the circumstances?
 - (c) were they disproportionate or excessive having regard to the costs incurred by the SPRs in the Bolitho Proceeding and Supreme Court of Victoria Proceeding SCI 2015 01384 (**SPR Proceeding**) (collectively

the two proceedings), including work relied upon, directly or indirectly, by Mr Bolitho/AFPL in the Bolitho Proceeding?

- (d) are they required to be supported by valid and enforceable costs agreements and disclosure statements (Costs Agreements) between:
 - (i) between (A) Mr Bolitho and (B) Mark Elliott or Portfolio Law;
 - (ii) between (A) Mark Elliott or Portfolio Law and (B) counsel?
 - (e) If so:
 - (i) were they supported by Costs Agreements?
 - (ii) is any Cost Agreement void for the purposes of section 185 of the Legal Profession Uniform Law?
 - (f) have they been calculated and charged in accordance with the Costs Agreements and the funding agreement between Mr Bolitho and AFPL dated 13 March 2014 (Funding Agreement)?
 - (g) is AFPL entitled to recover costs incurred:
 - (i) in respect of the appeal by Mrs Botsman in S APCI 2018 0037?
 - (ii) in respect of this remitter?
2. Should the Legal Costs be referred out for assessment by an independent expert or referee or by the Costs Court? If not, in what if any sum is AFPL entitled to recover legal costs and disbursements from the proceeds of the settlement with Trust Co (**Settlement Sum**)?

FUNDING COMMISSION

- 3. Is the "Resolution Sum" within the meaning of the Funding Agreements the \$64 million settlement sum payable by Trust Co under the Settlement Deed, because it was "any money received or payment made to settle, compromise or resolve one or more or all of the Claims"?
- 4. Is AFPL entitled to a payment of \$10,944,000, being 30% of the Resolution Sum recovered by group members with whom AFPL had entered a Funding Agreement, plus GST?
- 5. Should a funding equalisation order be made?

DISENTITLING CONDUCT

6. Do the Contradictor's allegations of disentitling conduct affect:
 - (a) the recovery of commission on a contractual basis;
 - (b) the recovery of legal costs; or
 - (c) the recovery of any and what moneys for the debenture holders?
7. Should the Contradictor's allegations concerning the *Civil Procedure Act 2010* (Vic) be dealt with in this proceeding or otherwise?

ATTACHMENT B

INTERNATIONAL LITIGATION PARTNERS LIMITED

LITIGATION FUNDING AGREEMENT

BETWEEN:

INTERNATIONAL LITIGATION PARTNERS LTD

and

LAURENCE JOHN BOLITHO

**INTERNATIONAL LITIGATION PARTNERS LIMITED
LITIGATION FUNDING AGREEMENT**

Date	13 March 2014
Parties	INTERNATIONAL LITIGATION PARTNERS LTD of Level 2,90 William Street, Melbourne VIC 3000 (ILP) LAURENCE JOHN BOLITHO of 14 Bolitho Road, Kyabram, VIC 3620 (Plaintiff)

RECITALS

- A. The Plaintiff has one or more Claims against the Defendants and other persons have claims which are the same or similar to the Claims.
- B. A Class Action has already been commenced by the Plaintiff against the Defendants in respect of some or all of the Claims.
- C. The Plaintiff has requested ILP to manage the Case, pay the Case Costs and provide necessary funding and support for the Case.
- D. ILP is prepared to manage the Case, pay the Case Costs and provide necessary funding and support for the Case on the terms of this ILP Agreement

AGREEMENT

1. Definitions

1.1. In this ILP Agreement, unless the context otherwise requires:

“**Adverse Costs Order**” means any costs order made in favour of the Defendants (or any of them) against the Plaintiff and/or ILP in the Proceedings in respect of costs of any Defendant incurred during the term of this ILP Agreement.

“**Alternative Dispute Resolution Process**” means any form of negotiation, discussions, mediation, conciliation, expert determination or other form of consensual dispute resolution process which seeks to settle the Claims and/or the Proceedings.

“**Case**” means the Proceedings.

“**Case Costs**” means the following costs and expenses:

- (a) the costs and expenses associated with the Case Investigation and Case Management by the Lawyers and/or ILP;
- (b) the costs involved in the provision by ILP of any security for costs;
- (c) any Adverse Costs Order paid by ILP;
- (d) the costs incurred by ILP in quantifying any Adverse Costs Order;
- (e) the reasonable legal fees and the reasonable disbursements (including Counsel fees) reasonably incurred by the Lawyers for the dominant purpose of preparing for, conducting and resolving the Proceedings ;
- (f) any costs paid by ILP pursuant to this ILP Agreement;
- (g) all of ILP’s out of pocket costs and expenses paid or incurred in relation to the Case, including in relation to any consultants and experts engaged by ILP ; and

- (h) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred.

“Case Investigation” means the investigation referred to in sub-clause 4.1.

“Case Management” means the management described in clause 7.

“Claims” means the claim or claims the Plaintiff has or may have against some or all of the Defendants and for loss and damage caused to the Plaintiff by the conduct of one or more of the Defendants in relation to or arising out of the acquisition by the Plaintiff of any Securities.

“Class Action” means the proceedings commenced by the Plaintiff in the Supreme Court of Victoria (SCI 2012 7185) against the Defendants.

“Conflicts Management Policy” means ILP’s policy, as amended from time to time, for managing conflicts.

“Consideration” has the same meaning as in the GST Act

“Costs Order” means an order made by a Court requiring the Plaintiff and/or ILP to pay the costs incurred by another party to the Proceedings.

“Court” means the Supreme Court of Victoria being the court in which the Proceedings are being conducted.

“Date of Commencement” means the date this ILP Agreement signed by the Plaintiff.

“Defendants” means each of the individuals and corporations named as defendants in the Class Action and any others against whom Proceedings are commenced.

“GST” has the same meaning as in the GST Act.

“GST Act” means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

“ILP” means International Litigation Partners Limited (ACN 167 628 597).

“ILP Agreement” means this agreement between the Plaintiff and ILP and, if amended, this agreement as amended.

“Input Tax Credit” has the same meaning as in the GST Act.

“Judgment” means any judgment of a competent Court against any Defendant in respect of any Claim.

“Lawyers” means Mark Elliott of Level 2, 90 William Street, Melbourne, 3000 or any other solicitors appointed in their place as agreed between ILP and the Plaintiff.

“Legal Work” means advice and other legal services which the Lawyers consider reasonably necessary in relation to the Proceedings.

“Plaintiff” means the company or individual whose details appear on the front page of this ILP Agreement and the successors or assigns of that company or individual.

“Privilege” unless the context otherwise requires, means legal professional privilege .

“Proceedings” means the Class Action concerning all or some of the Claims,

“Regulations” means the Corporations Amendment Regulation 2012 (No. 6) as amended from time to time.

“Resolution Sum” means any money received or payment made to settle, compromise or resolve one or more or all of the Claims .

“Securities” means unlisted debentures issued by Banksia Securities Limited.

“Settlement”, means any agreement, compromise, discontinuance, waiver, payment, release, understanding or any other arrangement whatsoever where money, value or a benefit passes from or on behalf of a Defendant to the Plaintiff in respect of one or more of the Claims

“Supply” has the same meaning as in the GST Act.

“**Taxable Supply**” has the same meaning as in the GST Act.

“**Termination**” means:

- (a) a termination in accordance with this IPL Agreement; and
- (b) any completion, failure, avoidance, rescission, annulment or other cessation of effect of this IPL Agreement.

2. **General**

- 2.1. The written terms of this IPL Agreement constitute the entire agreement between the parties.
- 2.2. Neither the Plaintiff nor ILP intend to be partners or fiduciaries with or towards each other. Nothing in this IPL Agreement shall constitute the Plaintiff and ILP as partners or fiduciaries.
- 2.3. There will be no variation or amendment to the terms of this IPL Agreement except in writing signed by each of the Plaintiff and ILP.
- 2.4. A facsimile transmission of this IPL Agreement signed by any party to it will be treated as an original signed by that party.
- 2.5. If any provision of this IPL Agreement, or the application thereof to any person or circumstances, shall be or become invalid or unenforceable, the remaining provisions shall not be affected and each provision shall be valid and enforceable to the full extent permitted by law.
- 2.6. The Plaintiff and ILP will promptly execute all documents and do all things that either of them from time to time reasonably requires of the other to effect, perfect or complete the provisions of this IPL Agreement and any transaction contemplated by it.
- 2.7. The singular includes the plural in this IPL Agreement and vice versa.

2.8. All references to clauses, sub-clauses and paragraphs are references to clauses, sub-clauses and paragraphs in this ILP Agreement.

2.9. A reference in this ILP Agreement to any legislation or legislative provision includes any statutory modification, amendment or re-enactment of that legislation or legislative provision, and includes any subordinate legislation or regulations issued under that legislation or legislative provision.

3. **Cooling Off Period**

3.1. The Plaintiff may, by written notice given to ILP within 14 days after the Date of Commencement, withdraw from this ILP Agreement. Such withdrawal will cause this ILP Agreement to terminate but will not be treated as a Termination.

3.2. If the Plaintiff withdraws in accordance with sub-clause 3.1, the Plaintiff shall have no continuing or further obligation to ILP save for any obligations of confidence arising in respect of information received by the Plaintiff prior to the withdrawal.

4. **Case Investigation**

4.1. The Plaintiff consents to ILP, at ILP's discretion:

4.1.1. investigating the evidentiary basis for the Claims of the Plaintiff ;

4.1.2. collating the material documents;

4.1.3. investigating the capacity of any Defendants to pay any judgment, award or order which may be made against that Defendant relating to the Claims;

4.1.4. investigating the preparedness of the Defendants to resolve the Claims.

4.2. The Plaintiff will provide, or procure the provision of, all information, documents and assistance as ILP may reasonably request for the Case Investigation on the basis that the information and documentation is confidential, provided for the purpose of resolving the Claims of the Plaintiff, remains the exclusive property of the Plaintiff and will be returned by ILP at the conclusion of the Case.

- 4.3. Notwithstanding sub-clause 4.2 the Plaintiff agrees that any information or documents provided to ILP may be used by ILP in the Case Investigation and may be disclosed by ILP for the purposes of the Proceedings.
- 4.4. The Plaintiff hereby authorises ILP to seek and obtain any information and documentation which ILP believes may be relevant to the Claims of the Plaintiff from any person or entity.
- 4.5. The Plaintiff consents to ILP providing a copy of this ILP Agreement to third parties who request evidence of the authority granted to ILP pursuant to sub-clause 4.4.
- 4.6. Without derogating from anything else in this clause 4, ILP may use the results of its investigations:
 - 4.6.1. to assist ILP in the preparation or prosecution of any proceedings to which this ILP Agreement applies;
 - 4.6.2. to monitor its actual and potential obligations under this ILP Agreement;
 - 4.6.3. to review whether it provides or continues to provide funding in respect of any of the Claims or the Case.

5. **Proceedings**

- 5.1. The Plaintiff agrees that:
 - 5.1.1. the Lawyers and ILP will determine what Claims should be pursued in the Proceedings;
 - 5.1.2. ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims ; and
- 5.2. ILP may decide, in its sole discretion following consultation with the Lawyers to cease to fund any Claim by giving 14 days' written notice of its decision to the Plaintiff.

- 5.3. If ILP decides to cease funding any Claim under sub-clause 5.2, then all of ILP's obligations in relation to that Claim, other than ILP's accrued obligations, cease on the date ILP's notice becomes effective. The Plaintiff agrees that on ILP's notice becoming effective, the Lawyers will as soon as is reasonably possible discontinue the prosecution of the Claim concerned by taking any step necessary to discontinue the prosecution of the Claim. For the avoidance of doubt, any such decision by ILP will not result in a termination of this ILP Agreement.
- 5.4. The accrued obligations of ILP referred to in sub-clause 5.3 comprise:
- 5.4.1. payment of any outstanding Case Costs incurred in relation to the Claim referred to in that sub-clause up to the date the notice of ceasing to fund takes effect; and
- 5.4.2. payment of any Adverse Costs Order against the Plaintiff in the Case in respect of costs which arise in, or are attributed to, the period beginning on the Date of Commencement and ending on the date ILP's notice of ceasing to fund takes effect .

6. **The Plaintiff's Obligations**

- 6.1. For the duration of this ILP Agreement, the Plaintiff must:
- 6.1.1. subject to this ILP Agreement, follow all reasonable legal advice given by the Lawyers and by counsel retained by the Lawyers in relation to the Proceedings and the Claims ;
- 6.1.2. promptly provide full, frank and honest instructions to the Lawyers and counsel and provide the Lawyers with all documents in the Plaintiff's possession, custody or power that are relevant to the Claims or the Proceedings;
- 6.1.3. provide a signed, written witness statement to the Lawyers on their request for use in the Proceedings, attend the Court to give evidence in person if required by the Lawyers to do so and actively participate in any Alternative Dispute Resolution Process;

- 6.1.4. diligently prosecute the Proceedings and any appeals and do all things necessary to enable the Lawyers to ensure that the Proceedings and any appeals;
 - 6.1.5. comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Plaintiff in relation to the Claims and the Proceedings;
 - 6.1.6. provide ILP and the Lawyers with full contact details, including where possible an email address, and immediately inform the Lawyers and ILP of any change in contact details;
 - 6.1.7. immediately inform the Lawyers and ILP of any information, circumstance or change in circumstances likely to affect the Claims, any issue in any Proceedings or the recoverability of any Resolution Sum;
 - 6.1.8. promptly take all appropriate actions, at ILP's expense and with ILP's written agreement, to tax or assess any costs claimed by any Defendant in an Adverse Costs Order; and
 - 6.1.9. take all appropriate action to diligently enforce any judgment obtained in the Proceedings against any Defendant.
- 6.2. For the duration of this ILP Agreement, the Plaintiff must not, without the prior written consent of ILP:
- 6.2.1. discontinue, abandon, withdraw or settle the Proceedings or the Claims against any Defendant or make any admission in relation to the Claims;
 - 6.2.2. subject to clause 13, reject any Settlement offer made by any Defendant;
 - 6.2.3. reject any offer made by any Defendant to engage in any form of Alternative Dispute Resolution Process; or
 - 6.2.4. terminate the retainer of the Lawyers or retain any other solicitors in place of the Lawyers.

- 6.3. For the duration of this ILP Agreement, the Plaintiff instructs the Lawyers to:
- 6.3.1. subject to clause 13, comply with all instructions given by ILP or as is set out in this ILP Agreement;
 - 6.3.2. comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Plaintiff in relation to the Claims and the Proceedings;
 - 6.3.3. conduct the Proceedings efficiently and effectively;
 - 6.3.4. keep ILP fully informed of all material developments in the Proceedings and in relation to the Claims, including immediately informing ILP if, in the Lawyers' opinion, the Plaintiff's prospects of achieving success in the Proceedings or the Defendant's capacity to pay any judgment is or is likely to be impaired;
 - 6.3.5. provide ILP with a copy of all advice given by the Lawyers or counsel to the Plaintiff in relation to the Proceedings and the Claims and, if requested to do so by ILP, a copy of all documents obtained from, or provided to, any Defendant in the Proceedings;
 - 6.3.6. immediately inform ILP of all Settlement offers or offers to engage in an Alternative Dispute Resolution Process received from any Defendant and allow ILP the opportunity to attend any Alternative Dispute Resolution Process agreed with any Defendant;
 - 6.3.7. obtain, at ILP's expense and with ILP's written agreement, a taxation or assessment of any Defendant's costs comprising any Adverse Costs Order and provide a copy of all documents relating to the taxation or assessment to ILP; and
 - 6.3.8. provide full assistance and co-operation to ILP in relation to opposing, taxing, assessing or resolving any application for security for costs or any Adverse Costs Order.

6.4. The Plaintiff agrees to keep and preserve any documents relating to the Defendants, the Proceedings and/or the Claims that the Plaintiff has in his, her or its possession, custody or control and the Plaintiff:

6.4.1. will provide to the Lawyers all information and documents relevant to the Proceedings and the Claims if and when so requested by the Lawyers;

6.4.2. authorises the Lawyers, without waiving privilege, to provide the information and documents referred to above to ILP; and

6.4.3. if ordered to do so by a Court in any Proceedings relating to his, her or its Claims, authorises the Lawyers to provide the information and documents to the Defendants and to any third party the subject of a Court order.

6.5. The Plaintiff:

6.5.1. will immediately notify ILP if the Plaintiff is requested or required to disclose any information relating to the negotiation, existence, terms or performance of this ILP Agreement and if so requested by ILP will take such steps as may reasonably be available to prevent disclosure of such parts of the information as ILP may nominate;

6.5.2. will not disclose to any person, other than its legal and financial advisors for the purpose of obtaining confidential legal or financial advice, or ILP, any information:

6.5.2.1 to which Privilege or obligations of confidence attach; or

6.5.2.2 which is or may be protected from disclosure by reason that disclosure would or may provide the Defendants with a strategic or tactical advantage in any Proceedings;

unless the disclosure is in accordance with advice from the Lawyers and is necessary for the purposes of the prosecution of those Proceedings.

6.6. The obligations in sub-clause 6.5 are continuing obligations and survive the Termination of this ILP Agreement.

6.7. The Plaintiff will not, during the period of this ILP Agreement, have any communication with any Defendant, or any officer, servant or agent of any Defendant relating to the Claims .

7. **Case Management**

7.1. ILP will provide the following management services in respect of the Case during the term of this ILP Agreement:

7.1.1. advising the Plaintiff on strategy;

7.1.2. considering the advice of the Lawyers and providing day-to-day instructions to the Lawyers (subject to clause 13);

7.1.3. database and document management;

7.1.4. reporting to the Plaintiff in respect of progress; and

7.1.5. facilitating any Alternative Dispute Resolution Process.

7.2. the Plaintiff undertakes, if requested by ILP, to ratify and confirm in writing the validity of any act or exercise of power by ILP done in good faith.

7.3. For the duration of this ILP Agreement, ILP will:

7.3.1. by implementing the Conflicts Management Policy, comply with the requirements of the Regulations; and

7.3.2. provide timely and clear disclosure to the Plaintiff of any material breach of the Regulations by ILP in relation to the subject matter of this ILP Agreement.

8. Case Costs

- 8.1. ILP will pay the Case Costs on the terms of this ILP Agreement.
- 8.2. ILP will not seek reimbursement of any internal overheads incurred as part of the Case Costs, other than through the Consideration referred to in sub clause 12.1.2.
- 8.3. If any Defendant makes any payment by way of costs during the course of the Case then the payment may be utilised by ILP in paying or reimbursing any Case Costs. The Lawyers will pay such monies in accordance with this ILP Agreement as directed by ILP from time to time.
- 8.4. ILP will pay any Adverse Costs Order.
- 8.5. If the Court orders the Plaintiff to provide any security for the costs of any Defendant then ILP will provide the security for costs in such other form that ILP determines and the Defendants or the Court accept, relating to costs incurred by a Defendant during the term of this ILP Agreement.

9. Receipt of the Resolution Sum

- 9.1. The Plaintiff and ILP agree that the Lawyers will (and are hereby directed to):
 - 9.1.1. receive any Resolution Sum;
 - 9.1.2. immediately pay any Resolution Sum into a trust account.
- 9.2. The Lawyers will hold that part of the Resolution Sum ordered by the Court as being due to ILP under this ILP Agreement on trust for ILP and that part belonging to the Plaintiff and all other members of the Class Action on trust for each of them with the Resolution Sum to be dispensed in accordance with this ILP Agreement and any Court order.
- 9.3. The Plaintiff and ILP agree that the Lawyers are irrevocably instructed to pay to ILP all amounts ordered by the Court to be payable to ILP under this ILP Agreement;

10. **Payment of the Resolution Sum by the Lawyers**

- 10.1. If a lump sum amount is received in Settlement of the Claims, then after deducting all amounts required to be paid or reimbursed to ILP under this ILP Agreement, the balance will be distributed to the Plaintiff and other Class Action members on such basis as is ordered by the Court.

11. **Appeals**

- 11.1. If there is a final judgment in the Proceedings which is not in favour of the Plaintiff and ILP wishes an appeal to be lodged, then the Plaintiff will cause the Lawyers to lodge and prosecute the appeal in the name of the Plaintiff or other appropriate appellant. The Plaintiff and the Lawyers will take all reasonable steps to expeditiously prosecute the appeal. ILP will pay the legal costs and disbursements in connection with the appeal and will pay any Adverse Costs Order if the appeal is unsuccessful.
- 11.2. If there is a final judgment in the Proceedings in favour of the Plaintiff and the Defendant appeals, then ILP may elect to fund the legal costs and disbursements of the Plaintiff's defence of the appeal. If ILP so elects, the Plaintiff will cause the Lawyers to defend the appeal in the name of the Plaintiff or other appropriate defendant. The Plaintiff and the Lawyers will take all reasonable steps to expeditiously prosecute the defence of the appeal. ILP will pay any Adverse Costs Order if the appeal is lost by the Plaintiff.

12. **Repayment of Case Costs and Consideration**

- 12.1. Subject to any necessary Court order, the Plaintiff acknowledges and agrees that upon Resolution, ILP is entitled to be paid from the Resolution Sum as follows:
- 12.1.1. the Case Costs paid by ILP in relation to the Class Action to which the Resolution Sum relates; and
- 12.1.2. a further amount, as Consideration for the financing of the Case and performance by ILP of its various obligations under this ILP Agreement, being a maximum of 30% of that Resolution Sum.

12.2. No fees, commissions or other payments will become due or owing by the Plaintiff to ILP in relation to the Case.

13. The Lawyers' Retainer and Settlement

13.1. The Plaintiff acknowledges and accepts that the Lawyers have entered, or will enter, into an agreement with ILP for the provision of legal services.

13.2. ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings, however the Plaintiff may override any instruction given by ILP in so far as it concerns any Claim of the Plaintiff by the Plaintiff giving instructions to the Lawyers.

13.3. Except in relation to Settlement, which is dealt with below, if the Lawyers notify ILP and the Plaintiff that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to ILP and those they owe to the Plaintiff, the Plaintiff and ILP agree that, in order to resolve that conflict, the Lawyers may:

13.3.1. seek instructions from the Plaintiff, whose instructions will override those that may be given by ILP;

13.3.2. give advice to the Plaintiff and take instructions from the Plaintiff, even though that advice is, and instructions are, or may be, contrary to ILP's interests; and

13.3.3. refrain from giving ILP advice and from acting on ILP's instructions, where that advice is, or those instructions are, or may be, contrary to the Plaintiff's interests.

13.4. Nothing in sub-clause 13.3 entitles the Plaintiff to breach, or authorises the breach, of any terms of this ILP Agreement.

13.5. In recognition of the fact that ILP has an interest in the Resolution Sum, if the Plaintiff:

13.5.1. wants to Settle the Class Action for less than ILP considers appropriate; or

13.5.2. does not want to Settle the Class Action when ILP considers it appropriate to do so;

then the Plaintiff agrees that ILP and Plaintiff must seek to resolve their difference of opinion by referring it to counsel for advice on whether, in counsel's opinion, Settlement of the Class Action on the terms and in the circumstances is fair and reasonable in all of the circumstances.

13.6. If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and ILP agree that the Lawyers will be instructed to do all that is necessary to settle the Class Action provided that the approval of the Court is sought and obtained.

14. **Confidentiality and Provision of Documents**

14.1. In providing to ILP any documents or information about the Claims and any Proceedings, the Plaintiff does not intend to waive any Privilege that may attach to such documents or information.

14.2. Unless specifically prohibited by the terms of a court order or other professional obligation, the Lawyers will provide to ILP a copy of any document obtained in the Proceedings by way of discovery, subpoena or any other coercive power of the Court, subject to ILP's, and its officers' and employees', implied undertaking given to the Court.

14.3. ILP and the Plaintiff agree that all information, communications and documents provided to or acquired, exchanged or generated by or between either of them or the Lawyers in relation to the Case ("the Case Information") are provided, acquired, exchanged or generated in circumstances where the Plaintiff is contemplating or conducting litigation against the Defendant. As a result, ILP and the Plaintiff acknowledge that:

14.3.1. all the Case Information is confidential;

14.3.2. the Case Information may be subject to a claim of legal privilege by the Plaintiff;
and

14.3.3. the communications are “confidential communications” and the documents are “confidential documents” within the meaning of Part 3.10 of the Evidence Act 1995 (*Cth*);

unless any part of the Case Information is already in the public domain through no breach of this ILP Agreement.

14.4. ILP and the Plaintiff agree to maintain the confidentiality of, and any legal privilege attaching to, the Case Information that is not in the public domain unless the disclosure of any part of that Case Information is:

14.4.1. agreed to be made by the Plaintiff and ILP; or

14.4.2. authorised by this ILP Agreement; or

14.4.3. otherwise required by law.

15. Disclosure of Information

15.1. The Plaintiff warrants that, to the best of the Plaintiff’s knowledge, at the Date of Commencement there is no information in the custody, possession or control of the Plaintiff materially relevant to the Claims or the outcome of the Proceedings or the potential for any judgment sum to be recovered in respect of the Claims , which has not been disclosed to ILP.

15.2. If, after the Date of Commencement of this ILP Agreement, the Plaintiff becomes aware of any information which has or may have a material impact on the Claims or the potential for any judgment sum to be recovered, the Plaintiff will immediately inform ILP of that information.

16. Miscellaneous

16.1. The Plaintiff and ILP will not do or permit to be done, save as provided in this ILP Agreement, anything likely to deprive any party of the benefit for which the party entered into this ILP Agreement.

16.2. The Plaintiff and ILP will keep the contents of this ILP Agreement confidential in so far as it concerns the terms of the relationship between the Plaintiff and ILP.

17. Duration of this Agreement

17.1. This ILP Agreement commences on the Date of Commencement and continues in operation until:

17.1.1. all Proceedings have concluded;

17.1.2. ILP has complied with all of its obligations under this ILP Agreement.

18. Termination by ILP

18.1. ILP is entitled, in its sole discretion, to terminate its obligations under this ILP Agreement other than its accrued obligations, by giving 14 days' written notice to the Plaintiff that this ILP Agreement and ILP's obligations under it are terminated.

18.2. All obligations of ILP under this ILP Agreement cease on the date ILP's termination of its obligations referred to in sub-clause 18.1 becomes effective, save for obligations accrued to that date.

18.3. The accrued obligations of ILP referred to in sub-clause 18.1 comprise:

18.3.1. payment of any outstanding Case Costs incurred up to the date the notice of termination takes effect; and

18.3.2. payment of any Adverse Costs Order against the Plaintiff in any Proceedings in respect of costs which arise in, or are attributed to, the period beginning on the Date of Commencement and ending on the date ILP's termination becomes effective.

19. Termination by the Plaintiff

19.1. If ILP commits a material breach of this ILP Agreement and does not remedy the breach within 30 days after receiving written notice from the Plaintiff, the Plaintiff may terminate this ILP Agreement forthwith by written notice to ILP.

19.2. If ILP informs the Plaintiff that ILP has agreed to other solicitors becoming the Lawyers, those solicitors will become the Lawyers for the purposes of this ILP Agreement in place of the existing Lawyers.

19.3. Replacement of the Lawyers :

19.3.1. will not result in a Termination of this ILP Agreement; and

19.3.2. will not result in the replacement solicitors assuming any obligations of the Lawyers accrued to the date the appointment of the Lawyers is terminated.

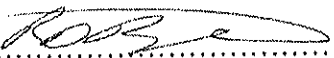
20. Governing Law

20.1. This ILP Agreement is entered into in Victoria and is to be construed in accordance with and governed by the laws of Victoria.

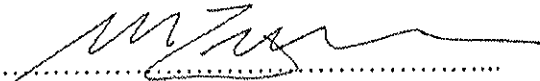
20.2. The parties submit to the exclusive jurisdiction of the Supreme Court of Victoria.

Executed:

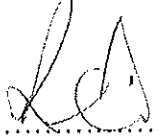
Signed by)
for and on behalf of **INTERNATIONAL**)
LITIGATION PARTNERS LIMITED)
the presence of:)


.....
Signature of Witness


RICHARD BASTOW
.....
(Print) Name of Witness


.....
Signature *DIRECTOR*

Signed by LAURENCE JOHN)
BOLITHO in the presence of:)


.....
Signature of Witness

Laurence Bolitho
.....
(Print) Name of Witness


.....
Signature