

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

No. SCI 2012 7185

BETWEEN:

LAURENCE JOHN BOLITHO & ANOR

Plaintiffs

AND:

**JOHN ROSS LINDHOLM
in his capacity special purpose receiver of Banksia
Securities Limited (receivers and managers appointed)
(in liquidation) and others in accordance with the schedule**

Defendants

CONTRADICTION'S CLOSING SUBMISSIONS

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PART 1: OVERVIEW OF CASE

- 1 The Contradictors' case is that:
 - (a) AFP is disentitled from recovering any remuneration (including its claims for costs) by reason of its dishonesty and misconduct, and the dishonesty and misconduct of its agents, the Lawyer Parties.
 - (b) AFP, the Lawyer Parties, Alex Elliott and Mr Trimbos should be ordered to pay compensation to debenture holders, and to pay full indemnity costs to indemnify debenture holders in relation to the costs of the remitter incurred by the Contradictors and the SPR.

- 2 The trial was characterised by a process of eleventh-hour capitulation by AFP, Mr O'Bryan and Mr Symons at the end of an 18 month period of interlocutory contests, and brazen dishonesty and contempt for the processes of the Court by them, ranging across a period of several years.

- 3 AFP made admissions on 14 July 2020, two weeks prior to trial, but bizarrely continued to maintain its claim for legal costs and for commission in the sum of nearly **\$7 million**,¹ only abandoning that claim after Mr O'Bryan and Mr Symons capitulated.² AFP's contention that it was entitled to maintain its claim on the basis of the evidence of Mr O'Bryan and Mr Symons³ cannot be accepted in circumstances where it knew all the facts throughout the remitter.

- 4 The Contradictors acknowledge that Mr Zita/Portfolio Law made concessions at an earlier stage,⁴ albeit concessions which did not fully recognise the complicit nature of his conduct, and which were made more than 2 years after the events in issue.

- 5 After the conclusion of the Contradictors' opening, Mr O'Bryan, through his senior counsel, informed the Court that he no longer intended to contest the allegations made against him, would consent to judgment in accordance with the Revised List of Issues (**RLOI**) dated 21 July 2020,⁵ and would not give evidence in his case.⁶

¹ [SBM.020.002.0001], para [2.1].

² Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 665:25-28.

³ AFP's opening submissions [SBM.020.002.0001], paras [80] and [89].

⁴ Mr Zita's April 2020 Affidavit [CCW.036.001.0001].

⁵ [PLE.010.002.0001].

⁶ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24.

- 6 Mr Symons followed suit shortly thereafter,⁷ though not before his senior counsel cross-examined some witnesses,⁸ in what should be characterised as an ill-conceived and failed attempt to give Mr Symons some unspecified evidentiary advantage before he too consented to judgment and informed the Court that he no longer intended to contest the allegations made against him.
- 7 Over an 18 month period prior to the trial in this remitter, Mark Elliott/AFP, Mr O'Bryan and Mr Symons vigorously resisted the Contradictors' attempts to uncover the nature and extent of their misconduct and dishonesty, in circumstances where the full facts were known only to them. This Court should find that all three attempted to conceal the true facts from the Contradictor, the Court, and their clients, at every step of the way until the abandonment of their defences.
- 8 In addition to putting debenture holders to substantial expense only to capitulate at trial, Mr O'Bryan sought to collude with Mr Zita⁹ and Mr Trimbo¹⁰ about their evidence; and AFP and Mr Symons made threats of personal costs orders against the Contradictors and their solicitor in the remitter.¹¹ AFP, Mr O'Bryan, Mr Symons, Mr Zita and Alex Elliott each involved themselves in threatening Mrs Botsman and her son Mr Botsman with security for costs and personal costs orders respectively in what can only be viewed as an attempt to intimidate the Botsmans to prevent the prosecution of her appeal. AFP commenced a proceeding against Mrs Botsman seeking to restrain her appeal and claiming damages against her, in respect of which Mark Elliott outrageously boasted to Mr Lindholm and Alex Elliott: ***"I fully expect to own a holiday house in Magill SA in due course, that being the current home of Wendy Botsman"***.¹² Such conduct was unbecoming of a member of the legal profession and the CEO of a litigation funder, particularly when one considers the fact that Mrs Botsman had signed the Funding Agreement and was AFP's client.
- 9 Mark Elliott/AFP, Mr O'Bryan and Mr Symons put no evidence before the Court which could explain, let alone excuse, their conduct. The failure of these three

⁷ See [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

⁸ Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 597:30-601:11 (Mr Samuel), 634:9-649:20 (Mr Newman).

⁹ [CBP.001.002.8464] and Mr Zita's July 2020 Affidavit [LAY.070.002.0001], paras [9] – [20].
¹⁰ [CCW.016.001.0006] [CCW.016.001.0007].

¹¹ Letter from King & Collins to Corrs dated 26 April 2019 [AFP.005.001.0434];
Letter from ABL to Corrs dated 24 May 2019 [AFP.005.001.0568].

¹² [NOB.500.004.5426].

legal practitioners to file honest, frank and truthful affidavits and to take the stand is indefensible. In the end, the fear of the witness box and the proffering of an explanation for their conduct which could be tested by cross-examination proved too much for Mr O'Bryan and Mr Symons. Both withdrew their defences at trial and acknowledged that their respective names should be struck from the roll of Supreme Court practitioners and the roll of counsel.¹³ AFP then abandoned its claim for any commission, and substantially abandoned its claim for costs.¹⁴ Given the position they held as officers of the Court and members of the legal profession, the conduct of the litigation by all three individuals was cowardly.

- 10 The misconduct at issue in this remitter comprised a calculated pattern of misconduct over a long period, in complete defiance of AFP and the Lawyer Parties' responsibilities. It involved a deliberate scheme of dishonesty by Mark Elliott/AFP, Mr O'Bryan and Mr Symons, and substantial amounts of money. Their positions of trust relative to the group members whose claims they represented made it possible to conceal their misconduct. They assumed that discovery or proof of their wrongdoing could be avoided. Uncovering the misconduct has been lengthy and expensive; and in the first instance, that cost has been met by their former clients. In addition to meeting significant legal costs, debenture holders have been held out of their settlement funds pending the determination of what turned out to be an indefensible case by AFP and the Lawyer Parties.
- 11 Behaviour by legal practitioners in such complete disregard of their obligations brings the entire legal profession into disrepute. Throughout the litigation, the Lawyer Parties engaged in the rank hypocrisy of advocating that other people should perform their legal obligations,¹⁵ while systematically refusing to perform their own. Their misconduct arose from greed rather than need, and from a belief that by staring down and dragging out this remitter for nearly two years, they could bury the enormity of their collective misdeeds. Mark Elliott was a solicitor, businessman, and CEO of a litigation funder; Mr O'Bryan was a senior member of the inner Bar and a member of the Order of Australia; and Mr Symons was a well-educated, intelligent, and financially astute junior counsel.¹⁶ All were privileged by

¹³ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:28-30; transcript of hearing on 13 August 2020 [TRA.500.007.0001], 661:21-23.

¹⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 665:25-666:10.

¹⁵ See eg [NOB.500.009.7870]; [CBP.004.001.9880]; [CBP.004.003.6416]; [SYM.001.002.4224] [SYM.001.002.4225]; [NOB.500.004.2732]; [NOB.500.003.5728] [NOB.500.003.5729].

¹⁶ [SYM.001.003.2059].

reason of their legal rank and standing in their profession, their familiarity with class action litigation, and their understanding of the weaknesses of a system that has hitherto allowed limited objective and critical investigation of settlements at the time of their approval.

- 12 To his credit, when he finally did capitulate, Mr O’Bryan expressed contrition for his conduct, in a statement that his senior counsel delivered to the Court on 3 August 2020.¹⁷ Mr Symons replicated Mr O’Bryan’s 3 August 2020 statement, almost verbatim, in an email his senior counsel sent to the Court on 6 August 2020¹⁸ and which his senior counsel subsequently delivered orally on 13 August 2020.¹⁹ But Mr Symons pointedly omitted Mr O’Bryan’s expression of contrition, which is telling, and reflects poorly on him.
- 13 Mr Symons conveyed regret only for “*the circumstances that have given rise to the remitter*” and “*the allegations in the revised list of issues*”.²⁰ It would appear that Mr Symons most regrets that his misconduct was exposed. Mr Symons has offered no apology to the Court, his former clients, or his former colleagues, including his fellow junior counsel who were subjected to the threatening letters he drafted for others to send,²¹ or which were sent on his behalf.²²
- 14 The omission is striking. Mr Symons profited from his misconduct: for his “*valuable contribution*”²³ in securing the approval of costs and commission before Justice Croft, AFP offered Mr Symons a lucrative retainer deal,²⁴ for which he was paid approximately \$600,000 in 2018.²⁵ He was paid a further \$608,031 in January 2019²⁶ – a sum he did not earn by honest work on the case. In contrast, Mr O’Bryan’s receipts from the five year litigation comprised the sum of \$800,000 that

17 Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:9-486:24.

18 [MSC.010.083.0001].

19 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

20 [MSC.010.083.0001].

21 See: (1) letter threatening Mr Botsman with personal costs [NOB.500.004.7557] [NOB.500.004.7560] [SYM.001.002.1758] [SYM.001.002.1759]; (2) letter to the SPR alleging breach of the Settlement Deed by reason of Mr Redwood’s submissions in the Court of Appeal [NOB.500.003.9554] [NOB.500.003.9555] [NOB.500.004.6850] [NOB.500.004.6851] [NOB.500.004.6850] [NOB.500.004.6851]; [SYM.001.002.2297] [SYM.001.002.2299]; [NOB.500.004.6847] [NOB.500.004.6848].

22 [AFP.005.001.0434] (Letter from King & Collins to Corrs dated 26 April 2019 threatening the Contradictors and their solicitor with personal costs).

23 [SYM.008.001.0013].

24 [SYM.008.001.0013].

25 [ABL.001.0370.01028]; [SYM.009.001.0003]; [AFP.014.001.0074]; [SYM.009.001.0005]; [AFP.014.001.0080]; [SYM.009.001.0001]; [AFP.014.001.0086].

26 [SYM.004.001.1206]; [AFP.003.001.0386]; [SYM.004.001.1179]; [AFP.007.001.0003].

AFP paid to him in December 2016,²⁷ for work which the Contradictors do not dispute he did. For all his deceit and recklessness, Mr O'Bryan did not prosper financially from the litigation. This remitter cut short his payday, which was only to come on the approval of his fees for the period 1 June 2016 to 30 January 2018 in the sum of approximately **\$2.5 million**, and from the commission that he would earn by reason of the continuing interest that he and/or his family held in the litigation funding enterprise conducted by AFP, contrary to the ruling of the Chief Justice in Bolitho No 4.

- 15 In the end, neither counsel were in the virtual courtroom when their respective senior counsels conveyed their capitulations.
- 16 Mr Zita eventually made admissions and concessions in April 2020,²⁸ entered the witness box to provide the Court with an explanation, and in cross-examination, publicly apologised to Mrs Botsman²⁹ and Mr Botsman.³⁰ However, his evidence did not amount to a complete acceptance of his failure to comply with his duties to the Court and to his clients. He continued to maintain the inexplicable stance that he had acted “independently” and in the best interests of his clients,³¹ contrary to the totality of the evidence which makes it plain that Mr Zita/Portfolio Law completely abrogated their duties as solicitor for Mr Bolitho and group members, permitting Mark Elliott to have total control over the litigation. Mr Zita lent his name and that of his firm to be used by Mark Elliott, Mr O'Bryan and Mr Symons exactly as they pleased, and he signed, endorsed, sent and/or filed anything that they put before him, not caring whether there was a proper basis for what he thereby endorsed.³² He consciously allowed himself to be used as a postbox solicitor, and relinquished all his duties and responsibilities to his clients and the Court into the hands of the cabal of lawyers whose directions and bidding he, without questioning, acceded to.
- 17 Mark Elliott's death in the course of the remitter denied the Court an opportunity to hear his testimony, and AFP did not call evidence from Alex Elliott, his son and right hand man.³³ It was left to the Court of its own motion, and mid trial, to join

²⁷ [AFP.014.001.0046]; [NOB.503.003.0029] at .0034.

²⁸ Mr Zita's April 2020 Affidavit [CCW.036.001.0001].

²⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 983:14-15.

³⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 986:15-17.

³¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 822:11-830:31, 847:27-852:11.

³² cf *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 669, 675 ('*Meagher*') (addressed further in **Part 4, Sections B and J**).

³³ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

Alex Elliott,³⁴ following a summons filed by the SPR seeking limited discovery of financial documents from him,³⁵ where counsel for Alex Elliott objected to the summons, and in argument found his client joined as a party.

- 18 The Court should find that Alex Elliott was complicit in his father's wrongdoing. In the Court's inquiry, initiated to seek an explanation from him about his role in the events in issue, he adopted a recalcitrant stance and required the trial of the allegations against him to be conducted at the greatest possible expense to the five remaining parties.
- 19 Mr Trimbos held himself out to be an expert costs consultant. He provided a report which was relied upon by the Court at the First Approval Application, purporting to opine that the claim for costs had been properly scrutinised by him, and was fair and reasonable.³⁶ Contrary to his representations to the Court, he had not properly scrutinised the claim for costs, and he had ignored every red flag that ought to have put him on enquiry. He repeated his opinions in a further report filed in March 2019,³⁷ only retracting them on the eve of trial, in June 2020.³⁸ His death in September 2020, though tragic, ought not detract from his responsibility for the events in issue in this remitter or for his serious breach of his duties to the Court.
- 20 The comparative responsibility of the wrongdoers ought to inform questions of contribution that might arise between those wrongdoers in relation to their primary liabilities arising out of the judgment in this remitter. But they ought not affect the debenture holders. The debenture holders should be entitled to recover their losses and costs from AFP, the Lawyer Parties, Alex Elliott and Mr Trimbos jointly and severally, save that Alex Elliott should bear all the costs of the remitter from the time he was joined, in circumstances where his joinder and the egregious conduct of his defence was beyond the control of the other parties.

Issues arising on the Revised List of Issues

- 21 Following the remittal of this matter by the Court of Appeal, the Court directed that the parties develop a list of issues. Thereafter, in December 2018, AFP and the Contradictors submitted a list of issues, which has since undergone numerous

³⁴ [ORD.500.040.0001]; *Bolitho v Banksia Securities Limited & Ors (No 10)* [2020] VSC 524.

³⁵ [CRT.040.001.0001] [LAY.040.001.0001].

³⁶ Third Trimbos Report [CBP.001.010.5957].

³⁷ Fourth Trimbos Report [EXP.020.001.0001].

³⁸ Fifth Trimbos Report [EXP.020.008.0009].

revisions. At the commencement of the trial, there were 10 issues to be determined which were set out in the RLOI dated 21 July 2020.³⁹ By the end of the trial, those issues had substantially evaporated by reason of AFP's abandonment of its claim for commission and its substantial abandonment of its claim for costs.

- 22 Following the joinder of Mr Trimbos and Alex Elliott, the RLOI was further revised.⁴⁰
- 23 The primary issue that arises for the determination by the Court under the RLOI are the issues of disentitling conduct and breach of the *Civil Procedure Act* 2010 (Vic) (**CPA**). There also remains a question about whether AFP should be entitled to recover the costs of Mr Zita/Portfolio Law and junior counsel fees for Ms Jacobson and Mr Loxley. Those matters are addressed below.

AFP ought not be permitted to recover the limited costs it now seeks

- 24 AFP ought not be entitled to recover any of the limited costs it now seeks for the following reasons.
- 25 **First**, in relation to the costs of Mr Zita/Portfolio Law, AFP is disentitled from recovering those costs in circumstances where:
- (a) Following Mr Zita/Portfolio Law's appointment, Mark Elliott continued to control the litigation and to act as the real solicitor, contrary to the Court's ruling in Bolitho No 4. Mr Zita/Portfolio Law consciously allowed that to occur, in spite of the ruling in Bolitho No 4 which he conceded he read shortly after he was retained to act.⁴¹ It beggars belief that AFP should be holding out for the fees of Mr Zita/Portfolio Law, in circumstances where AFP improperly retained Mr Zita/Portfolio Law as the "post box" solicitor as a ruse enabling it to defy the Court's ruling in Bolitho No 4.⁴²
 - (b) By reason of (1) AFP's dishonesty and misconduct, especially its defiance of the ruling in Bolitho No 4; (2) the dishonesty and misconduct of Elliott Legal, Mr O'Bryan and Mr Symons to whom Mr Zita/Portfolio Law's effectively delegated its role; and (3) Mr Zita/Portfolio Law's own numerous breaches of the CPA and their fiduciary obligations, all of which were

³⁹ RLOI dated 21 July 2020: [PLE.010.002.0001].

⁴⁰ The current iteration of the RLOI is dated 27 October 2020: [PLE.010.005.0001].

⁴¹ Transcript of hearing on 17 August 2020 [TRA.500.007.0001], 767:9-768:27.

⁴² See **Part 4, Section B**.

encouraged and procured by AFP, the Court should exercise its power under s 28 of the CPA and/or s 33ZF of the *Supreme Court Act 1986* (Vic) (**SCA**) to disallow AFP to recover any part of Mr Zita/Portfolio Law's fees from debenture holders.

- (c) Mr Zita/Portfolio Law did not undertake any real valuable legal work on the matter. Mr Zita was unable to plausibly describe any substantive contribution he made to the case as solicitor on the record.⁴³ By his own admission, he exercised no independent judgment on the matter.⁴⁴
- (d) The fees charged by Mr Zita/Portfolio Law were quantified on the basis of "guesswork" after a settlement was reached with Trust Co, and Mr Zita himself conceded group members ought not be required to pay them.⁴⁵
- (e) AFP abandoned its application⁴⁶ to refer any part of the costs to taxation,⁴⁷ and adduced no evidence as to the quantum of Mr Zita/Portfolio Law's fees calculated on the LPRO scale, even though it had ample opportunity to obtain that evidence from Mr Trimbos, who was provided with Portfolio Law's complete file in **December 2017**.⁴⁸

26 That AFP should persist in its claim for Mr Zita/Portfolio Law's fees is perplexing, having regard to Mr Zita's evidence (including his evidence about the conduct of Mark Elliott) and the provisions of the CPA. It is to be noted that substantially all of the \$377,795 that AFP paid to Portfolio Law is presently held by Portfolio Law in its trust account and Portfolio Law has agreed not dissipate those funds pending the resolution of this litigation.

27 **Second**, in relation to the costs of Mr Crow, group members should not be asked to pay the duplicative expense of a private solicitor advising Mr Bolitho, when he was not required to, and did not, undertake the role of acting as solicitor for the class.⁴⁹

⁴³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:847:17, 905:28-23.

⁴⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-16.

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 848:10-14.

⁴⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 880:7-17, 882:4-883:21, 884:28-886:20.

⁴⁶ [CRT.020.003.0001].

⁴⁷ Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 540:6-20.

⁴⁸ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [165].

⁴⁹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], T528:8-12.

- 28 **Third**, as agent for the group members, AFP is disentitled from recovering any remuneration for itself or for its agents by reason of its misconduct and dishonesty and the misconduct and dishonesty for which it is vicariously liable.

Orders should be made for payment of interest and indemnity costs

- 29 Debenture holders are entitled to the relief sought in respect of the misconduct that has been established on the evidence. The relief sought is for interest in respect of the delay in the payment of the settlement proceeds to debenture holders, and full indemnity costs. The responsibility for the delays lies solely with AFP, the Lawyer Parties, and Mr Trimbos, who relentlessly frustrated the Contradictors' enquiries at every step of the way during the course of the remitter. Further, given his complicity in AFP's misconduct, Alex Elliott also shares responsibility for the loss caused to debenture holders.
- 30 In the end, extensive admissions and concessions were made by AFP, the Lawyer Parties and Alex Elliott, all very late in their respective trials (save for Mr Zita/Portfolio Law, who made concessions in April 2020).
- 31 Having regard to the provisions of the CPA, and the stark reality that this remitter has been conducted at the expense of debenture holders who are and/or were the clients of AFP and the Lawyer Parties, the Court should not countenance an approach where a litigation funder and legal practitioners choose to put the Contradictors to proof without having any evidence to contradict the allegations made, in circumstances where they were the sole repository of the evidence and at all times knew the facts. This disgraceful conduct has resulted in over two years of wasted expense and wasted court time, for which AFP, the Lawyer Parties, Alex Elliott and Mr Trimbos should be the subject of the harshest criticism. This inappropriate and scandalous waste of the Court's time and the debenture holders' precious settlement monies reveals a contemptible arrogance in the mindset of AFP, the Lawyer Parties, Alex Elliott, and Mr Trimbos, and their disregard of the privilege of serving as officers of this Court in professional legal practice, which this Court should publicly condemn.
- 32 AFP's extensive admissions filed two weeks prior to trial⁵⁰ bring into sharp focus its aggressive stance throughout the litigation. History records that AFP only

⁵⁰ [PLE.020.001.0001].

yielded to a position of concession after facts known only to itself and the Lawyer Parties were extracted through court orders over the two-year period of the remitter. This conduct of itself should be the subject of the Court's rebuke; all the more so when AFP is a litigation funder (and therefore a professional user of the Court's services for its own profit), and its controlling minds at all times have been legally qualified.

PART 2: PARTIES AND WITNESSES

A. AFP, Elliott Legal, Mark Elliott and Alex Elliott

A1. AFP

33 AFP was a litigation funder providing financial assistance or other assistance to Mr Bolitho and/or exercising control and/or influence over the conduct of the Bolitho Proceeding or of Mr Bolitho in respect of that proceeding, within the meaning of section 10 of the CPA.⁵¹ It was therefore subject to the CPA.⁵²

34 AFP initially maintained an application for **\$20 million** in costs and commission, and strenuously denied the allegations of disentitling conduct that were raised by the Contradictors for the first time in March/April 2019. On 24 May 2019, AFP's solicitors wrote to Corrs:⁵³

*“Presently, the Contradictors' allegations are incomplete and subject to further discovery. **Our client will resist any further discovery in relation to allegations of fraud and breach of trust, which are incomplete and improperly based, and should never have been made by the Contradictors.**”*

35 As set out in paragraphs 94 to 175 below, the Court should find that, in around April/May 2019, Mark Elliott, the CEO and controlling mind of AFP, deliberately destroyed documentary evidence from his computer and email accounts, and thereafter from Alex Elliott's computer and email accounts.

36 Following Mark Elliott's death on 13 February 2020, AFP filed a fifth expert report from Mr Peter Trimbos dated **29 June 2020 (Fifth Trimbos Report)**.⁵⁴ In the Fifth Trimbos Report, Mr Trimbos recanted his earlier reports opining that the legal costs claimed by AFP were fair and reasonable, and said that he had been misled.⁵⁵

37 Two weeks later, on **14 July 2020**, AFP filed extensive admissions to the allegations made against it and the Lawyer Parties, including admissions of dishonesty by AFP, Mr O'Bryan and Mr Symons.⁵⁶ The documentary evidence

⁵¹ AFP admits this: [PLE.020.001.0001] at .0003, para [8].

⁵² AFP admits this: [PLE.020.001.0001] at .0003, para [8].

⁵³ [AFP.005.001.0568], para [13].

⁵⁴ [EXP.020.008.0001].

⁵⁵ [EXP.020.008.0001], paras [8.b], [8.h], [8.i], [8.j], [8.k], [8.l], [8.m], [8.n], [8.q], [8.s], [8.t], [8.v], [8.w], [8.x], [8.y], [10], [12].

⁵⁶ [PLE.020.001.0001].

reveals that Alex Elliott was consulted about those AFP admissions, and approved them.⁵⁷ Indeed, Alex Elliott filed his own admissions shortly prior to opening his case which substantially replicated AFP's admissions as to AFP's conduct and the conduct of the Lawyer Parties.⁵⁸

38 AFP, a shell company, made those admissions two week prior to trial, more than 18 months after the remitter commenced, and in circumstances where assembling the documentary evidence to prove the allegations involved significant expense to debenture holders. It would appear that AFP's admissions were driven by a desire by AFP's remaining directors and Alex Elliott to mitigate their exposure to non-party costs orders.⁵⁹

39 At trial, AFP called evidence from two witnesses: Mr Crow (Mr Bolitho's personal solicitor at relevant times), and Mr Houston (an expert witness who addressed the reasonableness of the funding commission then sought by AFP). Their evidence is addressed in paragraphs 269 to 278 below. AFP did **not** call Alex Elliott or any of its current directors to give evidence, and nor did it seek to call evidence from Mr O'Bryan or Mr Symons following their abandonment of their defences.

A2. Elliott Legal

40 On **6 May 2014**, Elliott Legal Pty Ltd was incorporated, with Mark Elliott as its sole director.⁶⁰

41 From **24 December 2012 to 5 December 2014**, Mark Elliott acted as solicitor on the record for Mr Bolitho and/or group members in the Bolitho Proceeding.⁶¹

42 In about **April 2015**, Elliott Legal took over the conduct of Mark Elliott's private practice.⁶²

⁵⁷ See [AID.010.030.0001_2], and the extensive references to ABL consulting AFP's directors and Alex Elliott in relation to "admissions".

⁵⁸ [PAR.080.001.0001].

⁵⁹ On 5 August 2020, ABL emailed AFP's directors and Alex Elliott attaching a "**Joint Memorandum of Advice on Non-Party Costs Orders**", prepared by AFP's counsel: see document 75 in Alex Elliott's discovery list [MSC.010.086.0001] [MSC.010.087.0001].

⁶⁰ [CCW.059.001.0001].

⁶¹ First Trimbos Report [SYM.002.001.1890] at .1928, third para.

⁶² See Mr Trimbos's affidavit in the Camping Warehouse v Downer matter dated 16 March 2016, Annexure A [CCW.060.001.0001] at 0020, sixth para.

- 43 From **16 May 2016 to 5 June 2017**, Alex Elliott was also a director of Elliott Legal.⁶³ He worked for Elliott Legal on a full time basis from **June 2016**, including as a qualified solicitor from **December 2016**.
- 44 On **13 February 2020**, Mark Elliott died.
- 45 On **19 February 2020**, Alex Elliott and Richard Earl were appointed as directors of Elliott Legal.

A3. Mark Elliott

- 46 Mr Mark Elliott was AFP's managing director and secretary, and via entities he controlled, was its major shareholder. He was the directing mind and will of AFP.⁶⁴ He was also the controlling mind of Elliott Legal. He, together with his son Alex Elliott, controlled all of the actions of AFP and Elliott Legal until his death on 13 February 2020.
- 47 The Court should find that:
- (a) Mark Elliott was the mastermind of the misconduct at issue in this remitter, together with Mr O'Bryan.⁶⁵
 - (b) After the Court ruled on 26 November 2014 that Mark Elliott could not act as solicitor for Mr Bolitho and group members having regard to his substantial financial interest in the outcome of the proceeding, Mark Elliott arranged for Portfolio Law to be retained and to act as a "post box" solicitor, thereby enabling Mark Elliott to remain in control of the Bolitho Proceeding, as alleged in **Section B** of the Revised List of Issues.⁶⁶
 - (c) Mark Elliott thereafter continued to exercise control over the proceeding, which extended to directing and controlling the day-to-day aspects of the conduct of the proceeding.⁶⁷ He considered that AFP was empowered under the Funding Agreement to "run the litigation" as AFP saw fit.⁶⁸ AFP

⁶³ [CCW.059.001.0001].

⁶⁴ AFP admits this: [PLE.020.001.0001] at .0002, [4].

⁶⁵ See eg **Part 4, Section C3.6**.

⁶⁶ Transcript of hearing on 28 July 2020 [TRA.500.002.0001] T132:3-6; 137:10-138:23;

Transcript of hearing on 29 July 2020 [TRA.500.003.0001] T227:4-243:30.

See further **Part 4, Section B**.

⁶⁷ AFP admits this: [PLE.020.001.0001] at .0020, [40.c].

⁶⁸ AFP admits this: [PLE.020.001.0001] at .0021, [40.c.iii].

admits that Mark Elliott controlled all settlement negotiations relating to the claims of Mr Bolitho and group members, and exercised that control to refuse to settle the proceeding on otherwise reasonable terms unless the settling parties (including the SPRs) agreed that AFP would be entitled to recover substantial sums from the settlement by way of costs and commission.⁶⁹

- (d) Elliott Legal was the alter ego of AFP and continued to act as de facto solicitor for Mr Bolitho and group members from December 2014 until Mr Zita/Portfolio Law themselves ceased acting in the course of the remitter.⁷⁰
- (e) Mark Elliott held in contemptuous disregard his clients, the Court, his colleagues, and the administration of justice. He was driven by greed and prepared to do anything to obtain financial reward for himself, without concern as to whether his actions were lawful.⁷¹
- (f) Mark Elliott fraudulently inflated his claim for fees at the time of the Partial Settlement.⁷² He encouraged Mr O'Bryan and Mr Symons to fraudulently inflate their claims for fees at the time of the Trust Co Settlement.⁷³ He destroyed documentary evidence.⁷⁴ He lied in his affidavit filed in this remitter in which he claimed that he did not know who stamped Mr O'Bryan's invoices as "PAID" or why this was done.⁷⁵ He gave false information and instructions to AFP's solicitors which was then conveyed to the Contradictors in correspondence.⁷⁶ He was an odious individual who heaped shame on the legal profession, and the exposure of his conduct

⁶⁹ AFP admits this: [PLE.020.001.0001] at .0021, [40.c.iv].

⁷⁰ See further **Part 4, Section B**.

⁷¹ See especially **Part 4, Sections C and F**.

⁷² Compare [NOB.500.011.8020] with [SYM.002.001.1890] at Annexures D and F, whereby Mark Elliott's claim for fees morphed from "**\$220K**" on 8 May 2016 to **\$797,500** on 4 July 2016, including on the basis of alleged work including "*Discovered documents(Receivers/Liquidators Hearings + other material)-approx:55,000 folios -perusal (20,000 folios) /scan (25,000 folios) /examine 10,000 pages*".

⁷³ See **Part 4, Section F5.1**.

⁷⁴ See **Part 2, Section A5**.

⁷⁵ [CBP.004.010.0036] paras [3] to [6]; cf [NOB.500.001.7495] (where Mr O'Bryan said: "*I will correct my invoices via Florence over the next few days **and issue them as 'paid' for Trimbos's purposes (as per the mini settlement)***"; [NOB.500.005.2262] (where Mr O'Bryan asked: "*Do you want the invoices **shown as paid or unpaid? I prefer paid & so will Trimbos***"; [SYM.008.001.0022] (where Mr Elliott joked: "**All the invoices I got from you have a paid stamp on them!**" and Mr O'Bryan replied: "*My clerk must have made a mistake!*").

⁷⁶ See eg [AFP.005.001.0374] and paras 111 - 112 below; [MSC.010.016.0001] and paras 124 - 140 below.

should act as a lesson to all lawyers that conduct of this kind will be found out, and will not be countenanced.

- (g) Mark Elliott acted so egregiously throughout the litigation as to warrant an order for indemnity costs against his estate.

Mark **Elliott's affidavits**

48 On 29 March 2019, the Court ordered Mark Elliott and the Lawyer Parties to provide affidavits addressing the following questions (**29 March 2019 Affidavit Order**):⁷⁷

- (a) Why was a summons issued in this court on 7 December 2017 seeking payment out of the settlement to AFP for "reimbursement" of legal costs?
- (b) Why did counsel's invoices in respect of the post-1 July 2016 period have a "processed date" which made them appear as if they were issued monthly?
- (c) Why were invoices stamped as "PAID" when they had not been paid? Who stamped them as "PAID"?
- (d) Why were invoices stamped as "PAID" provided to the expert witness Mr Trimbos? Who provided them to Mr Trimbos?
- (e) Why did senior counsel for Mr Bolitho inform the expert witness Mr Trimbos that fees had been duly paid, when they had not been paid?
- (f) Why were fee agreements created in December 2017 after Mr Trimbos asked for them, and why were they provided to Mr Trimbos?
- (g) Precisely what discussions occurred at relevant times between AFP and Mr Bolitho's representatives about the costs incurred and to be incurred in the proceeding, and the terms upon which Mr Bolitho's representatives were asked to act, and the terms upon which Mr Bolitho's representatives agreed to act (**Costs Discussion Question**)?
- (h) Why was the Trimbos Report filed with the court annexing invoices stamped as "PAID"?

⁷⁷ [ORD.500.033.0001].

- (i) Why did counsel for Mr Bolitho rely upon and endorse the Trimbo's Report, including the annexures in their confidential counsel opinion dated 19 January 2018 filed with the court?
- (j) Why did counsel for Mr Bolitho state in their opinion at para 116 that Mr Bolitho's solicitors and counsel had been engaged on their usual terms? Do those terms usually include an arrangement to defer the delivery of invoices and the payment of fees?
- (k) Why did counsel for Mr Bolitho state in their opinion that AFP's commission was justified by the legal costs it absorbed without informing the court that most of those costs had not been paid (and in circumstances where the Trimbo's report, which was referred to in the opinion, stated the costs had been paid, and the summons sought payment of legal costs by way of "reimbursement")?
- (l) Why did Mr Bolitho's representatives and AFP permit the Trimbo's Report and confidential counsel opinion to then be relied upon in the Court of Appeal?

49 In response to this order, Mark Elliott swore two affidavits, the first dated 23 April 2019⁷⁸ and at the request of the Contradictors, the second dated 9 May 2019,⁷⁹ which were filed by AFP.

50 The affidavits are telling for their omissions, their admissions, and their statements which are revealed to have been deliberately false by documentary evidence that emerged in discovery.

51 **First**, in neither affidavit did Mark Elliott attempt to provide the Court with a frank account in relation to the questions raised by the 29 March 2019 Affidavit Order. Indeed, the affidavits do not provide *any* kind of account of what actually occurred. His affidavits do not directly respond to the questions asked or the issues that had arisen at the time of the 29 March 2019 Affidavit Order.

⁷⁸ [CBP.004.010.0001]. The Contradictors read paragraphs 10 to 17 of Mark Elliott's 23 April 2019 Affidavit into evidence.

⁷⁹ [CBP.004.010.0033] [CBP.004.010.0036]. The Contradictors read the entirety of the 9 May 2019 Affidavit into evidence.

52 **Second**, a key example of this relates to Mark Elliott's response to the Costs Discussion Question. He said:⁸⁰

"From March 2014, in my capacity as managing director of AFPL, I regularly conferred by telephone, at counsel's chambers and otherwise in conference, on a privileged and confidential basis, with all of Mr Bolitho's representatives on many matters regarding the conduct and settlement of the Bolitho Proceeding, including the progress of the proceeding, counsel fee rates, estimates of counsel and solicitor costs incurred and to be incurred in the conduct of the proceeding, the prospects of success of the proceeding, settlement discussions, proposed terms of settlement and what legal resources (in addition to counsel) were necessary to conduct the proceeding.

After the approval of the partial settlement in August 2016, each of Mr Bolitho's legal representatives (being Mr Norman O'Bryan, Mr Michael Symons and Mr Tony Zita of Portfolio Law) agreed to:

(a) keep contemporaneous records of time spent by each of them, and detailed descriptions of work performed by each of them, in the conduct of the Bolitho Proceeding; and

(b) to defer the issue of their invoices seeking payment for their work for an unspecified period."

53 This evidence was so deliberately vague as to be almost meaningless. Critically, Mark Elliott did **not** give any evidence of any conversation that was capable of supporting the thesis that costs had been discussed and/or monitored throughout the litigation, or that rate increases had been agreed orally.

54 **Third**, the only Lawyer Party who gave evidence about paragraph 12 of Mark Elliott's 23 April 2019 Affidavit was Mr Zita. He denied the conversation.⁸¹ There is no other evidence to corroborate the conversation, and indeed, AFP now admits that it did not sufficiently monitor or manage costs on an interim basis throughout the litigation.⁸²

55 **Fourth**, in his 9 May 2019 affidavit, Mark Elliott claimed:⁸³

"None of the matters referred to in paragraphs 3(b) - (f) and (i) - (k) of the Orders are within my knowledge.

I do not know why Mr O'Bryan's invoices were stamped 'PAID' when the invoices had not been paid.

⁸⁰ Mark Elliott's 23 April 2019 Affidavit [CBP.004.010.0001], paras [11] – [12].

⁸¹ Mr Zita's 22 July 2020 Affidavit [LAY.070.002.0001], [7] – [8].

⁸² [PLE.020.001.0001], para [47.f].

⁸³ [CBP.004.010.003] paras [3] to [6].

I do not know who stamped Mr O'Bryan's invoices as 'PAID'.

I did not provide the invoices of Mr O'Bryan to Mr Trimbos."

56 That was deliberately false evidence:

- (a) Mark Elliott knew that Mr O'Bryan had arranged his secretary to stamp his invoices as "PAID". They had explicitly discussed Mr O'Bryan stamping his invoices as "PAID" on several occasions in contemporaneous emails they exchanged.⁸⁴ They joked with one another about that practice.⁸⁵
- (b) Those contemporaneous emails reveal that Mark Elliott knew that one reason the invoices were stamped as "PAID" was to conceal from Mr Trimbos the fact that Mr O'Bryan was retained on a contingent and conditional fee basis.⁸⁶
- (c) Alex Elliott delivered Mr O'Bryan's invoices to Mr Trimbos at the request of his father.⁸⁷
- (d) Mark Elliott suggested to Mr O'Bryan in November 2017 that he should increase his rates and fabricate a costs agreement containing a cancellation fee to reach his fee target.⁸⁸ He knew precisely why fee agreements were created in December 2017 when Mr Trimbos asked for them.

57 **Fifth**, in his 23 April 2019 affidavit, Mark Elliott said:⁸⁹

"The commercial advantage, of the deferral of fees, to AFPL, who at all relevant times was conducting multiple class actions, is that its working capital requirements were reduced as the deferral of payment to creditors permits the matching of payments with receipts."

⁸⁴ [NOB.500.001.7495] (where Mr O'Bryan said: "*I will correct my invoices via Florence over the next few days and issue them as 'paid' for Trimbos's purposes (as per the mini settlement)*");

[NOB.500.005.2262] (where Mr O'Bryan asked: "*Do you want the invoices shown as paid or unpaid? I prefer paid & so will Trimbos*").

⁸⁵ [SYM.008.001.0022] (where Mr Elliott joked: "*All the invoices I got from you have a paid stamp on them!*") and Mr O'Bryan replied: "*My clerk must have made a mistake!*").

⁸⁶ See Mr O'Bryan's draft affidavit in response to the 29 March 2019 Affidavit Order [CCW.016.001.0007], para [7].

⁸⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:7-9, 2130:8-23, 2135:5-27.

⁸⁸ [NOB.500.001.7504]; [NOB.500.001.7495].

⁸⁹ Mark Elliott's 23 April 2019 Affidavit [CBP.004.010.0001], para [13].

58 That evidence confirms that the arrangements AFP struck with the Lawyer Parties permitted AFP to reduce its funding risk, which was highly relevant to its entitlement to a funding commission.

59 **Sixth**, Mark Elliott also contended:⁹⁰

“At no time has AFPL had a contingent or conditional fee arrangement with any of Mr Bolitho’s legal representatives in the Bolitho Proceeding.”

60 That was deliberately false evidence. Documentary evidence discovered by AFP and Mr Symons a short time prior to trial confirmed that Mr O’Bryan and Mr Symons **were retained on a “no win no fee” arrangement**,⁹¹ and the evidence confirms that arrangement to involve a contingency fee.⁹² Further, for reasons set out in **section C3.4** (paras 678 to 686 below), the Court should find that Mr Zita/Portfolio Law were also retained on a “no win no fee” arrangement.

A4. Alex Elliott

Basis for liability under the CPA

61 The claim against Alex Elliott is advanced on the basis (and the Court should find) that Alex Elliott owed overarching obligations as:

- (a) a solicitor employed by Elliott Legal who were retained to act for AFP;
- (b) a solicitor acting for Mr Bolitho and group members pursuant to the arrangement by which Portfolio Law effectively sub-contracted its duties to Elliott Legal; and/or
- (c) an employee or agent of AFP.⁹³

Preliminary facts

62 **At all relevant times until mid 2018**, Alex Elliott lived with his mother, father and siblings in East Melbourne.⁹⁴

⁹⁰ Mark Elliott’s 23 April 2019 Affidavit [CBP.004.010.0001], para [13].

⁹¹ [ABL.001.0685.00008] [ABL.001.0685.00009]; [AFP.015.001.0001].

⁹² See **Section C3.6**.

⁹³ *Bolitho v Banksia Securities Ltd (No 10)* [2020] VSC 524, [13] – [14] (**‘Bolitho No 10’**).

⁹⁴ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1645:23-29.

- 63 In **2014**, while studying law, Alex Elliott commenced employment with AFP.⁹⁵ He assisted AFP with book building activities and *“also assisted the solicitors for Mr Bolitho in the Bolitho Group Proceeding with the management of the process of sending correspondence to Group Members”*.⁹⁶
- 64 In **February/March 2015**, Alex Elliott said that he ceased employment with AFP.⁹⁷
- 65 In **October 2015**, Alex Elliott graduated from Deakin University with a law degree and a major in accounting.⁹⁸
- 66 From **January 2016 to mid-June 2016**, Alex Elliott completed his practical legal training requirements at Leo Cussen.⁹⁹
- 67 In **February/March 2016**, Alex Elliott began working with his father, Mark Elliott on a *“part-timish”* basis.¹⁰⁰ At that time, the *“family business”* operated out of a serviced office in William Street, Melbourne.¹⁰¹
- 68 On **16 May 2016**, Alex Elliott was appointed as a director of Elliott Legal.¹⁰²
- 69 In **June 2016**, Alex Elliott began working with his father on a full-time basis.¹⁰³
- 70 On **13 December 2016**, Alex Elliott was admitted to practice as a solicitor.¹⁰⁴
- 71 In **early 2017**, AFP/Elliott Legal relocated to 41 Exhibition Street, Melbourne.¹⁰⁵
- 72 On **11 May 2017**, Alex Elliott was granted a practising certificate.¹⁰⁶
- 73 On **5 June 2017**, Alex Elliott ceased to be a director of Elliott Legal¹⁰⁷ but continued to be employed by Elliott Legal as a solicitor.¹⁰⁸

⁹⁵ Alex Elliott’s witness statement in AFP v Botsman [AFP.100.011.0001].

⁹⁶ Alex Elliott’s witness statement in AFP v Botsman [AFP.100.011.0001], para [2]; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2040:31-2041:6.

⁹⁷ Transcript of hearing on 1 December 2020 [TRA.500.001.0001], 1659:22-26.

⁹⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:2-13.

⁹⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:14-17.

¹⁰⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:18-25.

¹⁰¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1651:21-26.

¹⁰² [CCW.059.001.0001].

¹⁰³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:26-30.

¹⁰⁴ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:31-16472.

¹⁰⁵ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1651:21-23.

¹⁰⁶ Transcript of hearing on 1 December 2020 [TRA.500.001.0001], 1647:3-4.

¹⁰⁷ [CCW.059.001.0001].

¹⁰⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1652:17-20, 25-26.

The work practices of Mark and Alex Elliott

74 Alex Elliott gave evidence of his own work practices, his father's work practices, and their working relationship generally:

- (a) From the start of 2017 until February 2020, it was Mark and Alex Elliott's usual practice to meet together each morning to discuss the work to be done that day. They usually worked together on those tasks.¹⁰⁹
- (b) His father expected him to read emails that he was copied into,¹¹⁰ and he did in fact read emails that he was copied into.¹¹¹
- (c) He discussed with his father the emails that he received.¹¹²
- (d) He and his father usually "*printed off most things we received*" for discussion with each other.¹¹³ His father asked him to print things for him "*all the time*".¹¹⁴ It was Alex Elliott's usual practice to "*print out everything for him*" for his father to read and/or discuss with him.¹¹⁵
- (e) It was Mark Elliott's usual practice to send private/internal emails to Alex Elliott setting out his thoughts on issues arising in litigation and how those issues should be addressed.¹¹⁶
- (f) He accompanied his father to most meetings or conferences that his father attended.¹¹⁷
- (g) It was "usual practice" to have a conference at Mr O'Bryan's and Mr Symons' chambers before and/or after court hearings in the matter.¹¹⁸
- (h) He wanted to be across everything his father wanted him to be across.¹¹⁹

¹⁰⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1651:30-1652:16, 1653:11-12.

¹¹⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:19-23.
Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:19-20.

¹¹¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:15-17.

¹¹² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:24-26.

¹¹³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:7-18.

¹¹⁴ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:19-20.

¹¹⁵ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:21-25;

Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1703:1-5.

¹¹⁶ See [AEL.100.069.0001] and transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1811:27-1812:15.

¹¹⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1768:26-31

¹¹⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

¹¹⁹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:13-15.

- (i) He tried to please his father.¹²⁰
- (j) He worked hard for his father.¹²¹
- (k) He did what his father wanted him to do.¹²²

Alex Elliott's conduct of his defence in this remitter and his demeanour in the witness box

75 Alex Elliott's defence to the case against him was conducted as follows.

76 **First**, Alex Elliott adopted a **defiant stance** in the remitter, which informed his entire approach to this inquiry, which was initiated by the Court acting of its own motion seeking an explanation from him as an officer of the Court.

77 **Second**, that defiant stance saw him pursue **numerous interlocutory battles** following his joinder to the proceeding, including a recusal application,¹²³ a stay application,¹²⁴ an appeal from the dismissal of his recusal application,¹²⁵ and an appeal from orders requiring him to file an affidavit.¹²⁶

78 **Third**, Alex Elliott's combative and recalcitrant attitude was most evident in relation to his approach to discovery:

- (a) Despite consenting to discovery orders on **16 September 2020** requiring him to provide discovery by **30 September 2020**,¹²⁷ **Alex Elliott refused to give the Contradictors his list of documents (Elliott List)**.¹²⁸
- (b) Late in the evening of **7 October 2020**, after failing to respond to multiple requests from the solicitors for the Contradictors from **2 October 2020** onwards, the solicitors for Alex Elliott first raised an objection to giving discovery, including production of the Elliott List.¹²⁹

¹²⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:16.

¹²¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:17.

¹²² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:18.

¹²³ [CRT.080.005.0001].

¹²⁴ [CRT.080.009.0001].

¹²⁵ See *Elliott v Lindholm* [2020] VSCA 260.

¹²⁶ See *Elliott v Lindholm* [2020] VSCA 260.

¹²⁷ [ORD.500.045.0001] and [MSC.010.026.0001].

¹²⁸ See [MSC.010.030.0001], [MSC.010.035.0001]; [MSC.010.034.0001]; [MSC.010.046.0001] and [CRT.500.004.0001]; [ORD.500.046.0001]; [CRT.080.011.0001]; [MSC.010.042.0001]; [CRT.080.013.0001].

¹²⁹ *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703, [86.f] ('**Bolitho No 14**') and [MSC.010.046.0001], [CRT.500.004.0001].

- (c) The Court then ordered him to produce the Elliott List unless an application to relieve him from doing so was made by a specified date.¹³⁰ On that date, he filed an affidavit from his solicitor asserting that, despite the Court's orders, *"it appears that is not necessary for there to be any formal application made"*.¹³¹
- (d) Following correspondence with the Contradictors' solicitor,¹³² Alex Elliott and his advisers changed their minds and filed the application after all.¹³³
- (e) In her reasons delivered on that application, Daly AsJ observed Alex Elliott had failed to appeal the discovery orders, despite his amended notice of appeal filed on **18 September 2020**¹³⁴ squarely raising issues about the privilege against self-incrimination and penalty privilege.¹³⁵ Her Honour did not accept Alex Elliott's attempt to argue that this did not waive the privilege. Notably, her Honour observed:

"A further explanation proffered on behalf of Alex Elliott is that his legal team were endeavouring to be helpful and cooperative in agreeing to orders for discovery on 16 September 2020. Again, such an explanation carries with it the implication that Alex Elliott always intended to take an in limine objection to giving discovery, but did not do so at the time so as not to be perceived to be unhelpful and uncooperative. Again, such an explanation is not supported by the by the chronology of events, **but if indeed Alex Elliott's objectives were to facilitate the expeditious and efficient conduct of the remitter proceeding, then those objectives have not been achieved.** If the objection had been taken at that point (on 15 September 2020), the argument could have been had on that day, or shortly thereafter, and if the outcome of the argument had been decided adversely to Alex Elliott, the issue could have been dealt with by the Court of Appeal in the hearing on 23 September 2020, and in its reasons of 2 October 2020. Now that the point has been taken late, **more time and money has been spent, the trial has been delayed further, and may well be delayed further by further interlocutory appeals.**"

- (f) Her Honour was asked to, and did, stay the orders requiring Alex Elliott to provide the Elliott List until **4pm on Friday 30 October 2020** to permit him to consider an appeal.¹³⁶ Alex Elliott did not appeal the order. He delivered

¹³⁰ [ORD.500.046.0001].

¹³¹ [CRT.080.011.0001].

¹³² [MSC.010.042.0001].

¹³³ [CRT.080.013.0001].

¹³⁴ *Bolitho No 14* at [82].

¹³⁵ *Bolitho No 14* at [82].

¹³⁶ *Bolitho No 14* at [122] (Order 6).

the Elliott List at **5pm on Friday 30 October 2020**, thus ensuring that the Contradictors did not receive it **until after they had commenced to open their case** against Alex Elliott.

79 **Fourth**, Alex Elliott declined to substantively identify his position on any of the allegations made against him until after the Contradictors' opening of the case against him. The defence his senior counsel then articulated (on **2 November 2020**) was that *"given the people whom he was being mentored by, given his youth and inexperience, given his relationships with his father, a fierce litigator on the evidence presented in this court, and Mr Norman O'Bryan, who until recently was a very highly regarded leader of this Bar... he may not have understood... that there was something wrong going on"*.¹³⁷

80 **Fifth**, Alex Elliott thereafter sought to advance a significantly different defence, in which he sought to adopt and tender the affidavits filed by Mr O'Bryan and Mr Symons, which they abandoned when they capitulated,¹³⁸ evidently with a view to running a case that the misconduct alleged by the Contradictors did not occur.¹³⁹ In the pursuit of that strategy, he called Mr O'Bryan as a witness in his defence – **a circus that was ultimately productive of nothing more than mischief and expense:**

- (a) On **18 November 2020**, Alex Elliott's solicitors notified the Contradictors of his intention to call Mr O'Bryan.¹⁴⁰ That letter asserted that Alex Elliott would tender the affidavits of Mr O'Bryan dated 7 April 2020 and 16 June 2020 – both of which Mr O'Bryan had abandoned in the defence of his own case in favour of a decision to consent to judgment. In this way, Alex Elliott sought to reopen the entire case conceded by Mr O'Bryan.
- (b) Contrary to Court orders made on **2 and 20 November 2020**,¹⁴¹ Alex Elliott did not provide a proper outline of the evidence to be led from Mr O'Bryan. Rather, he provided a bullet point list of topics.¹⁴²

¹³⁷ Transcript of hearing on 2 November 2020 [TRA.500.011.0001], 1246:30-1247:13.

¹³⁸ [MSC.010.100.0001].

¹³⁹ See, eg, transcript of hearing on 20 November 2020 [TRA.510.018.0001], 10:27-30, 40:19-41:29.

¹⁴⁰ [MSC.010.101.0001].

¹⁴¹ [ORD.500.059.0001], para [1]; [ORD.500.058.0001], para [4.a].

¹⁴² [MSC.010.101.0001]; [MSC.010.105.0001].

- (c) On **27 November 2020**, the Court ruled on the evidence that could be led from Mr O’Bryan and the use that could be made of that evidence.¹⁴³
- (d) On **30 November 2020**, Mr O’Bryan gave evidence, but not before a further ruling was required on a new list of topics, this time in the form of questions that Alex Elliott’s senior counsel wanted to ask Mr O’Bryan.¹⁴⁴
- (e) Between **18 and 30 November 2020**, substantial cost was incurred in connection with the evidence of Mr O’Bryan, having regard to Alex Elliott’s express intention to reopen the entire case conceded by Mr O’Bryan.
- (f) When Mr O’Bryan eventually entered the witness box, he gave evidence of **Alex Elliott’s attendance at numerous conferences in his chambers**, which he said were recorded in his monthly fee summaries.¹⁴⁵ Under cross-examination, Mr O’Bryan agreed that **the subject matter of those conferences as set out in his fee summaries related to legal issues**¹⁴⁶ – contrary to Alex Elliott’s case that he was not a member of the “legal team”.¹⁴⁷ When questioned about those conferences by his own senior counsel, **Alex Elliott said he could not recall all of them**,¹⁴⁸ which was then used by his senior counsel as a springboard for a submission that Alex Elliott was suffering from concentration difficulties, and on that basis sought **yet another adjournment of the trial**.¹⁴⁹ Alex Elliott took his senior counsel’s lead and responded: *“I’m quite clouded at the moment... I’m sort of struggling to concentrate”*.¹⁵⁰ **The truthful answer, which Alex Elliott declined to give** in examination in chief, was that some of the conferences referred to in the fee slips **could not have occurred**, particularly the conferences involving Mr Redwood and Mr Kingston, **because Alex Elliott had never met Mr Redwood and did not believe he had ever met Mr Kingston**.¹⁵¹ Indeed, when the trial resumed the following day, it was suggested by the Court to Alex Elliott’s senior counsel

¹⁴³ [ORD.500.061.0001].

¹⁴⁴ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1423:12-1426:30.

¹⁴⁵ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-1461:2.

¹⁴⁶ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1488:25-1494:19.

¹⁴⁷ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1303:5-24, 1309:13-14, 1310:25-27, 1312:12-15, 1314:25-31.

¹⁴⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1770:29-1775:13.

¹⁴⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1774:31-1775:13.

¹⁵⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1772:4-9.

¹⁵¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2006:8-10.

that Mr O’Bryan’s fee summaries might be unreliable – a suggestion which senior counsel was quick to embrace,¹⁵² underscoring the question as to **why he chose to call Mr O’Bryan as a witness at all.**¹⁵³

- (g) Alex Elliott’s senior counsel attempted to elicit evidence from Mr O’Bryan to prove that, when he copied Alex Elliott into emails, it was in consequence of using the “reply all” function.¹⁵⁴ Mr O’Bryan was asked: “*when you sent emails that copied Alex in as a recipient, do you know why you did that?*”¹⁵⁵ But Alex Elliott was privy to hundreds of emails initiated by various people about various subject matters. The idea that Mr O’Bryan could give a meaningful answer covering all of those emails was absurd. Alex Elliott’s senior counsel then took Mr O’Bryan to two particular emails to which Alex Elliott was copied, containing a reply from Mr O’Bryan copying all recipients.¹⁵⁶ Mr O’Bryan agreed that, in relation to those particular emails, he replied using the “reply all” function.¹⁵⁷ Alex Elliott’s senior counsel did **not** take Mr O’Bryan to any email where Mr O’Bryan added Alex Elliott to the “cc” list of his own accord.¹⁵⁸ **Mr O’Bryan’s cursory evidence on this issue did not advance Alex Elliott’s case** or justify the substantial trouble and expense associated with Mr O’Bryan’s re-appearance in the case, and ought count for nothing more than confirmation that Alex Elliott was in attendance at conferences as a member of the legal team.

- 81 **Sixth**, Alex Elliott declined to file an affidavit or an outline of evidence in advance of the trial.¹⁵⁹ Indeed, he successfully appealed the Court’s order compelling him

¹⁵² Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1780:22-1782:3.

¹⁵³ See transcript of hearing on 27 November 2020 [TRA.500.014.0001], 1401:30-1402:13, where Alex Elliott’s senior counsel was asked: “*Do you seriously contend that this evidence will have any credibility at all, Mr Palmer?*”, to which the answer was given: “Yes... ***I wouldn’t be leading it if I didn’t contend that it would have some credibility.***”

¹⁵⁴ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1468:1-1470:21, 1472:2-18.

¹⁵⁵ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1470:1-6.

¹⁵⁶ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1482:1-1484:25; [NOB.500.002.2036] and [CBP.004.005.1309].

¹⁵⁷ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1482:13-23.

¹⁵⁸ By way of example only, see [SYM.001.003.2062] and [SYM.001.003.2063] (an email chain between Mark Elliott, Norman O’Bryan and Michael Symons) and [NOB.500.004.2732] (Mr O’Bryan’s reply to that email, **copying in Alex Elliott who was not included in the earlier email**). See also [NOB.500.005.1238] [NOB.500.005.1239] (email from Mr Symons to Mr O’Bryan, attaching draft submissions to be filed by Mr Bolitho “in reply” to submissions by AFP in the Botsman Appeal), and [NOB.500.005.1320] [NOB.500.005.1321] (Mr O’Bryan’s email in response, copying Mark and Alex Elliott and attaching his edits to the draft submissions).

¹⁵⁹ Transcript of hearing on 2 November 2020 [TRA.500.011.0001], 1246:15-1247:13.

to file an affidavit,¹⁶⁰ insisting instead upon giving his evidence in chief orally over several days,¹⁶¹ at the expense of five other parties and legal teams.

82 **Seventh**, despite the vigour with which Alex Elliott fought the Contradictors about discovery, **he inexcusably failed to undertake proper searches to comply with the discovery orders.**¹⁶² Alex Elliott's conduct with respect to discovery is considered in further detail at paragraphs 94 to 175 below. Notably:

- (a) New documents emerged on the eve of the opening of Alex Elliott's case.¹⁶³ **The trial was adjourned** to allow those documents to be considered, and for further searches to occur.¹⁶⁴ Although Alex Elliott provided further documents to his legal team at about **2pm that day**,¹⁶⁵ his legal team did not produce that further discovery until **late that evening**, requiring **yet another adjournment of the trial** the following morning.¹⁶⁶
- (b) In that context, the Contradictors pressed Alex Elliott to provide an affidavit of discovery under rule 29.04 verifying *“(a) precisely what steps he undertook to ensure that AFP provided proper discovery prior to his joinder as a party; (b) precisely what steps he has now undertaken to ensure that he now provides proper discovery; and (c) the matters required to be addressed by rule 29.04(1)(c)”*.¹⁶⁷ **Alex Elliott's solicitors flatly refused to provide any such affidavit.**¹⁶⁸
- (c) When the trial resumed, senior counsel for Alex Elliott informed the Court that Alex Elliott had **“made efforts” at only some parts** of the discovery order made against him.¹⁶⁹ Critically, and without any explanation, senior counsel informed the Court that **Alex Elliott had made no attempt to search for “all documents within the scope of the Court's discovery orders dated 1 February 2019, 1 March 2019, 20 December 2019, 24 April**

¹⁶⁰ *Elliott v Lindholm* [2020] VSCA 260, [120] – [121].

¹⁶¹ Transcript of hearing from 1 to 3 December 2020 [TRA.500.016.0001], [TRA.500.017.0001], [TRA.500.018.0001].

¹⁶² See transcript of hearing on 25 November 2020 [TRA.500.012.0001], 1271:16-1273:7.

¹⁶³ Being the documents listed in [TDL.010.003.0001].

See transcript of hearing on 25 November 2020 [TRA.500.012.0001], 1271:16-1273:7, and transcript of hearing on 27 November 2020 [TRA.500.014.0001], 1386:18-31.

¹⁶⁴ See transcript of hearing on 25 November 2020 [TRA.500.012.0001], 1293:14-31.

¹⁶⁵ See eg [AEL.100.024.0001].

¹⁶⁶ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1294:1-1299:18.

¹⁶⁷ [MSC.010.113.0001].

¹⁶⁸ [MSC.010.115.0001].

¹⁶⁹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1300:9-27.

2020 and 30 June 2020” as required by paragraph 1(a) of the Court’s 16 September 2020 order (**Category 1(a) Documents**).¹⁷⁰

83 **Eighth**, at the conclusion of his oral evidence in chief on 3 December 2020, **Alex Elliott proffered an affidavit** containing, for the first time, a detailed (but incomplete) narrative of events with respect to the provision of discovery.¹⁷¹

84 The proffering up of that affidavit was astonishing in circumstances where:

- (a) Alex Elliott had **appealed this Court’s order** made on 9 September 2020 requiring him to file an affidavit.¹⁷²
- (b) Alex Elliott had **insisted upon providing his oral evidence viva voce**, and not by affidavit, and had refused to provide even an outline of evidence.¹⁷³
- (c) Alex Elliott **bluntly refused to provide an affidavit of discovery** when requested to do so by the Contradictors on 25 November 2020.¹⁷⁴
- (d) Alex Elliott revealed in the witness box that **he was not consulted about the Contradictors’ request for an affidavit of discovery**, and did not provide the instructions for the letter his solicitors sent in response refusing that request.¹⁷⁵
- (e) The affidavit that Alex Elliott proffered up **was not, in fact, an affidavit of discovery**. It was an extension of his evidence in chief which had been given orally.
- (f) The affidavit did not address the matters required to be addressed by rule 29.04(1)(c).
- (g) The affidavit confirmed that Alex Elliott **did not search for the Category 1(a) Documents**, and proffered no explanation for that refusal. Paragraph 20 of the affidavit states that Alex Elliott “*continued searching for categories*

¹⁷⁰ [ORD.500.045.0001];
Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1300:9-27.

¹⁷¹ Affidavit of Alex Elliott dated 3 December 2020 [LAY.080.001.0001].

¹⁷² *Elliott v Lindholm* [2020] VSCA 260.

¹⁷³ Transcript of hearing on 2 November 2020 [TRA.500.011.0001], 1243:23-1244:2, 1245:15-1248:8, 1250:8-28.

¹⁷⁴ 25 November 2020 letters between GHB and Corrs [MSC.010.115.0001]; [MSC.010.113.0001].

¹⁷⁵ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1929:3-1930:2.

(b) – (j)” – ie, he did **not** continue searching for Category 1(a), being documents within the scope of all prior discovery orders made by the Court.

(h) The affidavit was provided to the Contradictors in court at **1pm on 3 December 2020**, immediately before Alex Elliott’s cross-examination was due to commence. Alex Elliott’s late proffering up of a substantial affidavit caused **yet another adjournment** of the trial.¹⁷⁶

85 **Ninth**, at trial, Alex Elliott denied acting in a professional legal capacity in connection with the Banksia litigation. He adopted the description of his role advanced in correspondence from ABL in April 2019, which asserted that he acted as a **“personal assistant”** to AFP.¹⁷⁷ He sought to characterise his role as an **“administrative”** role¹⁷⁸ and as an **“errand boy”**.¹⁷⁹ It was his case that he did not provide any substantive legal input in connection with the litigation.¹⁸⁰ The Court should reject that evidence as set out at paragraphs 176 to 196 below, and condemn that evidence in the strongest terms, given that it came from a lawyer and an officer of the Court in the context of the Court’s examination of the role of its officers in the course of the proceeding and the remitter more generally.

86 **Tenth**, following his own late discovery of documents on the eve of the opening of his own case which revealed him as a **bright junior solicitor, closely engaged in the legal issues in the Botsman Appeal**, Alex Elliott sought to adapt his narrative to those documents:

(a) In his evidence in chief, he claimed that he thought ABL’s description of him as a **“personal assistant”** related to the period up to the settlement approval application (on 30 January 2018).¹⁸¹

¹⁷⁶ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1822:2-1826:29.

¹⁷⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1656:6-1657:6;

Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1887:11-23.

¹⁷⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:18-24.

¹⁷⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1887:14-17.

¹⁸⁰ Transcript of hearing on 26 November 2020 [TRA.500.013.0001] 1310:28-1311:2;

Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1500:2-1504:26, transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:15-18, transcript of hearing on 2 December 2020 [TRA.500.017.0011], 1689:10-12, 1708:17-20; 1710:7-8; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2078:1-2079:5.

¹⁸¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1655:4-1657:1.

- (b) He claimed that he became engaged with the Botsman Appeal “*out of general interest*”¹⁸² because “*it was incredibly novel*”.¹⁸³ Thus, he sought to promote a story that his level of engagement with the Banksia litigation radically changed in 2018 in connection with the Botsman Appeal,¹⁸⁴ for no other reason than his own fascination with the issues.
- (c) He remained intent on refuting the proposition that he acted in a professional legal capacity at any time in connection with the Banksia litigation. For example, he was taken to an email he sent to his father on 12 June 2018 headed “*Botsman appeal submissions - my thoughts*” setting out an analysis of issues arising in the appeal.¹⁸⁵ He denied that the email was his analysis of issues in the appeal.¹⁸⁶ He denied having any independent legal input into his own email – he said “*It wasn’t through my lens. It was just a regurgitation of what was said that day.*”¹⁸⁷ He denied that the email was his account of what happened in the Court of Appeal, insisting: “*I just didn’t really look at it as my account*” – despite entitling it “*my thoughts*”.¹⁸⁸
- (d) He conceded that his business card described him as a solicitor, and that his signature on his emails described him as a solicitor.¹⁸⁹ He conceded that “*I wasn’t a secretary, I can accept that. I was a lawyer, but I considered I guess in respect of Banksia that I just came and just assisted dad with what he required to be done.*”¹⁹⁰ Despite those concessions, he maintained his denial that he did solicitor’s work in the Banksia matter.¹⁹¹

¹⁸² Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1758:29-31.

¹⁸³ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1759:1-1761:2; transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1784:9-15; 1790:9-23; 1811:12-15 and 1819:12-18; transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1987:23-27, 1988:18-1989:7; 1997:6-1998:3.

¹⁸⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2083:27-31.

¹⁸⁵ [ABL.001.0643.00243];

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:25-1999:25.

¹⁸⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:25-1990:5, 1998:8-1999:25.

¹⁸⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1991:15-23, 1992:17-20.

¹⁸⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1999:6-12.

¹⁸⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1875:20-23.

¹⁹⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1875:13-19.

¹⁹¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1875:24-29.

87 **Eleventh**, Alex Elliott was an unsatisfactory witness. The Court should find that:

- (a) His evidence was self-serving and tailored to accommodate the documentary evidence and the perceived forensic exigencies of the moment.
- (b) His general demeanour in the witness box was evasive. His evidence was deliberately vague to avoid it being scrutinised. He appeared to have a very selective recall of relevant matters and events. He was unable to recall virtually any of the events in issue in the remitter, even events which had occurred quite recently. For instance:
 - (i) He was firm in his recollection that he left Court on 8 June 2018 before Mr Redwood’s submissions¹⁹² (and presumably he considered it helpful to his case that he was not in Court for those submissions), and yet he claimed he could not recall other significant events around that time, including his conversations with his father about the drawing of cheques¹⁹³ (which he conceded was an unusual request¹⁹⁴ which made him feel “*uneasy*” at the time,¹⁹⁵ such that it is unlikely to have been easily forgotten).
 - (ii) He was evasive when pressed about his knowledge of the payment arrangements between AFP and Mr O’Bryan. It was put to him that he knew AFP was not paying Mr O’Bryan on a regular basis in Banksia. He repeatedly offered oblique responses, saying “*I’d never really discussed it with dad*”, “*I just didn’t deal with that side of the business*”.¹⁹⁶ The Court should reject his evidence that he was unaware that AFP was not paying Mr O’Bryan on a regular basis throughout the litigation,¹⁹⁷ which was fundamental to the business model of AFP in which the Elliott family had a substantial interest.
 - (iii) In cross-examination in the morning of 8 December 2020, Alex Elliott denied that he saw a draft of ABL’s 11 February 2020 letter to Corrs

¹⁹² Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2008:25-29.

¹⁹³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2016:10-22.

¹⁹⁴ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:2.

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:5-14.

¹⁹⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2023:7-18.

¹⁹⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:19-31.

¹⁹⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:8-2102:25.

outlining Mark Elliott’s alleged practice of routinely destroying emails.¹⁹⁸ During the luncheon adjournment, his solicitors were served with a notice to produce requiring him to produce all iterations of the 11 February 2020 letter and all emails attaching the letter or any draft.¹⁹⁹ When court resumed after the luncheon adjournment, Alex Elliott’s senior counsel drew attention to the notice to produce, and sought to object to it.²⁰⁰ Thereafter, in cross-examination, but before the notice was called upon, Alex Elliott gave different evidence: he said that his father had “*sent a draft I think to ABL that they'd used or assisted with this letter*” and “*I saw an ABL draft*”.²⁰¹

- (c) By reason of the destruction of documents by AFP and Elliott Legal, his evidence was incapable of corroboration. Only a handful of internal emails between Mark and Alex Elliott prior to 30 January 2018 were produced in discovery by AFP and Alex Elliott. In the critical period of **1 November 2017 to 30 January 2018 (“Trust Co Settlement Period”)**, **six emails** were produced.²⁰² Alex Elliott declined to provide the Court with specific evidence beyond what was revealed by documentary evidence.²⁰³
- (d) He refused to make obvious concessions. For example, he refused to concede that an email which he sent to his father entitled “*my thoughts*” was in fact an email setting out his thoughts.²⁰⁴ He refused to concede that searching for and locating an authority relating to the security for costs application in the Botsman Appeal constituted “*legal research*”.²⁰⁵ He refused to concede that his father valued his opinion.²⁰⁶

¹⁹⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1844:6-9.

¹⁹⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1897:25-1898:1.

²⁰⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1897:25-1898:1.

²⁰¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1921:2-7.

²⁰² (1) [ABL.001.0594.00005] [ABL.001.0594.00006]; (2) [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011]; (3) [AFP.001.001.2548] [AFP.001.001.2549] [AFP.001.001.2550]; (4) [AFP.001.001.3429] [AFP.001.001.3435]; (5) [AFP.007.001.0001] [AFP.007.001.0002]; (6) [AEL.100.076.0001].

See transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2084:3-9.

²⁰³ For instance, he denied that he had read and considered the Funding Agreement in Banksia in any detail, until confronted with documentary evidence of his own detailed analysis of it: see transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1864:2-5, 1964:22-1867:7; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2040:27-2044:29, 2045:26-30, 2048:29-2050:23.

²⁰⁴ [ABL.001.0643.00243]; transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:25-1999:25.

²⁰⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1987:3-1988:28.

²⁰⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2099:17-18.

- (e) The construct that Alex Elliott suddenly morphed from a “personal assistant” into a solicitor in early 2018 is artificial, implausible, and inconsistent with objective facts, including the fact that Alex Elliott was admitted to practice in December 2016²⁰⁷ and was thereafter involved in all aspects of the work undertaken by his father,²⁰⁸ including other class actions where Elliott Legal acted as solicitor. It is not believable that Alex Elliott did “*legal*” things on other matters but only did “*administrative*” things²⁰⁹ on the Banksia matter. His own evidence was that he followed his father around,²¹⁰ including to court hearings on the Banksia matter,²¹¹ that his father wanted him to get exposure to both “*the legal world*” and “*the business world*”,²¹² and he did whatever his father asked him to do.²¹³
- (f) Even on Alex Elliott’s own case, the work that he assisted with in the context of the Banksia litigation was “*legal*” work and not “*administrative*” work, such as reviewing documentation for the settlement deed,²¹⁴ collating a brief for an expert witness,²¹⁵ and reviewing documents for privilege.²¹⁶
- (g) Alex Elliott’s demeanour in the witness box displayed a concern for himself by reason of the circumstances of his joinder to the proceeding, about which he clearly felt aggrieved, but no concern for the 16,000 debenture holders who had been adversely affected by the admitted fraudulent conduct of his father and AFP. He frequently referred to the fact that the remitter had been

²⁰⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1646:31-1647:2.

²⁰⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1649:15-19; transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1768:26-1769:25; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2082:16-21.

²⁰⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:18-24; Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1887:14-17.

²¹⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:21-24.

²¹¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

²¹² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1650:12-19.

²¹³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1649:28-1650:2, 1651:16-20, 1652:14-16.

²¹⁴ See eg [SYM.001.001.4697]; [AFP.001.001.2053]; [SYM.001.001.0635]; [SYM.001.001.0894]; [SYM.001.001.8964]; [SYM.001.001.8995]; [SYM.001.002.1383]; [SYM.001.002.1553]; [SPR.500.001.5873]; [AFP.001.001.2141]; [AFP.001.001.2167]; [AFP.001.001.2170]; [SPR.003.013.0138]; [SYM.001.001.4837]; [SYM.001.001.3649].

²¹⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15
See eg [TRI.001.005.0169] [TRI.001.005.0171] [SYM.001.003.0235] [AFP.001.001.2224] [AFP.001.001.2225]; [SYM.001.003.3453] [SYM.001.003.3454] [SYM.001.003.3457]; [SYM.001.002.8281]; [SYM.001.002.5447]; [SYM.001.002.5449]; [SYM.002.001.5568]; [AFP.001.001.2531]; [NOB.500.001.7272] [NOB.500.001.7273]; [AFP.001.001.2548] [AFP.001.001.2550]; [AFP.001.001.3137] [AFP.001.001.3138]; [TRI.001.006.0063] [TRI.001.006.0064] [TRI.001.006.0067]; [ABL.001.0602.00009] [ABL.001.0602.00011].

²¹⁶ See [MSC.010.072.0001] at page 0009, 0019-0020 and transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1838:17-1840:20.

traumatic for him,²¹⁷ without showing any insight into the gravity of the events in which he had played a part. He failed to offer up a frank account of what had occurred. It was not until re-examination that he was prepared to concede any possible responsibility for any aspect of what had occurred, and even then, he demonstrated no remorse.²¹⁸

88 All these matters call into doubt the credibility of the evidence that Alex Elliott gave, particularly his evidence about his own role.

89 **Twelfth**, Alex Elliott made **no admissions** until shortly prior to the opening of his own case. In the litigation, he initially adopted the stance that AFP's admissions were not binding on him,²¹⁹ despite the fact that ABL had consulted him about them before they were made.²²⁰ On 24 November 2020, he abandoned that position, substantially adopting AFP's admissions relevant to its own misconduct and the misconduct of the Lawyer Parties, but not conceding any complicity in any such misconduct.²²¹

90 **Thirteenth**, only in re-examination, following **eight days** of his evidence, and after being afforded the opportunity to consult with his senior counsel before his re-examination commenced,²²² did Alex Elliott offer the following weak concession about the 11 June 2018 email²²³ from his father asking him to draw cheques to make sham payments to Mr Symons and Portfolio Law:

“Do you now accept that what was being suggested here involved a deception or misleading of the court?---Yes, I do.

Do you accept that in June 2018 if you had looked at things critically, that you had enough information available to you to identify or at least have a query about whether there was a deception occurring?---Yes. Yes, I do.

Can I ask you how you feel now about having been drawn into that deception?---I don't know. I don't know.

The final question I want to ask you, Alex, is if you had at that time, or at any other time thereafter, put two and two together and identified or at least

²¹⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:9-13;
 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1969:23-27, 1971:6-10;
 Alex Elliott's 3 December 2020 affidavit [LAY.080.001.0001], para [17].

²¹⁸ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

²¹⁹ Transcript of hearing before Associate Justice Daly on 15 October 2020 [TRA.550.003.0001_2], 9:30-10:2

²²⁰ Transcript of hearing on 30 October 2020 [TRA.500.010.0001], 1041:11-1044:18.

²²¹ [PAR.080.001.0001].

²²² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2185:20-23.

²²³ [ABL.001.0601.00003].

had concerns that there was deception and misleading conduct occurring, what could you or would you have done?---It's a really hard question.

HIS HONOUR: Think about it. There's two different questions I think. What could you have done and then you can answer what would you have done.

*MR PALMER: Thank you, Your Honour?---I'm not sure I could have done anything or influenced the outcome. I should, I would have gone and probably sought advice from a lawyer who was a family friend of mine and asked what I'm supposed to do, you know, **should I remove myself from the situation**, you know, should I try and do something else? But it's an incredibly difficult situation to be in and I would have had to have sought advice on it I think, Your Honour, as to what I could actually do.”²²⁴*

- 91 This was puzzling and disturbing evidence. To ask a legal practitioner what they would have done if they had identified a deception perpetrated on the Court should not be “*a really hard question*”. A legal practitioner in that situation ought not need to ask a friend “*should I remove myself from the situation*”. No legal practitioner should ever involve themselves in deceiving the Court. There are no complexities to that proposition. It has been described as the most fundamental “*commandment of behaviour*” and a “*beacon of integrity which ought to burn bright in every lawyer, and should guide the way we think*”.²²⁵
- 92 Alex Elliott’s concession underscored his moral obtuseness. He offered no explanation as to why he had fought the case against him with such vigour and at such expense in circumstances where, at least in hindsight and at a minute to midnight, he was able to recognise that he had been drawn into a deception perpetrated on the Court. Significantly, **he offered the Court and the class members no apology.**

The relative weight of the evidence relevant to Alex Elliott

- 93 It is submitted that the evidence²²⁶ relevant to Alex Elliott’s involvement in the misconduct in issue in the remitter should be weighed as follows:
- (a) The contemporaneous documentary evidence relating to the Botsman Appeal provides the best insight into Alex Elliott’s role (**2018 Emails**).

²²⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

²²⁵ Morley, I., 2015. *The Devil's Advocate*. 3rd ed. London: Sweet & Maxwell, p47.

²²⁶ The evidence relevant to Alex Elliott consists of five primary categories. (1) Contemporaneous documentary evidence, which in the circumstances of the present case has the curious feature that few emails actually sent by Alex Elliott remain in existence and/or were discovered and produced by him, notwithstanding that the documentary evidence reveals that he was involved in a vast array of activities and communications over the relevant period. (2) Evidence of surrounding circumstances. (3) Third, Alex Elliott’s direct evidence given in

- (b) Alex Elliott did not provide a frank and credible account of his involvement in the matter. The Court should reject his self-serving assertion that he was ignorant of any impropriety.
- (c) In circumstances where Alex Elliott was an unsatisfactory witness, the Court should not rely upon his uncorroborated evidence about contentious issues, particularly his evidence that he did not know that the Lawyer Parties issued substantially all their invoices at the end of the matter,²²⁷ and that he did not know that they had not been paid on a regular basis throughout the litigation.
- (d) Mr Zita, Mr O’Bryan and Mr De Bono had limited ability to observe the interactions between Mark and Alex Elliott at the Elliott Legal office, at the homes they shared, or in the emails they exchanged privately with one another.
- (e) The most compelling evidence that Mr Zita gave about Alex Elliott was his unrehearsed evidence in cross-examination, where he agreed that Alex Elliott was his father’s “right hand man”.²²⁸ The Court should find that evidence was based on his overall assessment of the relationship between Mark and Alex Elliott. The attempt by Alex Elliott’s senior counsel to confine that evidence in his later cross-examination of Mr Zita was unpersuasive.²²⁹
- (f) Mr De Bono’s evidence was significant insofar as he confirmed that Alex Elliott attended a meeting on 20 November 2017 about lining up AFP’s accounts with the claim for costs that AFP wanted to advance.²³⁰ Mr De Bono made it plain in an email he sent to Mark and Alex Elliott in advance of that meeting that the only costs of the Lawyer Parties that had been expensed (paid) in FY2017 were the costs billed up to the time of the Partial

the witness box and in the affidavit he adopted on 3 December 2020. (4) The evidence given by Mr Zita, Mr O’Bryan, and Mr De Bono. (5) Inferences which can be drawn by reason of Alex Elliott’s conduct in the litigation.

²²⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2127:11-20, 2128:8-11, 2132:10-30, 2135:15-2136:1.

²²⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

²²⁹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1315:14 – 1316:7, 1317:19 – 1318:14..

²³⁰ [ABL.001.0599.00008]; [MAZ.001.001.0021]; [AEL.100.065.0001].

Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1603:29-1611:26.

Settlement.²³¹ Alex Elliott did not deny that the meeting occurred, but claimed he could not recall it.²³²

- (g) Mr O'Bryan's evidence was significant insofar as he said that Alex Elliott attended numerous conferences in his chambers²³³ which were held for the purpose of discussing legal issues.²³⁴ That evidence is corroborated to the extent that Alex Elliott had an independent recollection of some of those conferences²³⁵ and confirmed that it was "usual practice" to have a conference at Dawson Chambers before and/or after all directions hearings in the matter.²³⁶
- (h) If the internal emails between Mark and Alex Elliott in the Trust Co Settlement Period provided support for the thesis that Alex Elliott acted in an administrative, non-legal capacity and/or that he had little to no involvement with or knowledge of the misconduct in issue in this remitter, they would not have been destroyed by AFP and Mark Elliott and suppressed by Alex Elliott's failure to conduct proper searches, comply with the Court's orders, and reveal the existence of the documents and his belief as to what happened to them.
- (i) The Court should infer that those emails would have supported the thesis that Alex Elliott was involved, in a professional legal capacity, in the Trust Co Settlement, the Third Trimbo's Report, and the First Approval Application, in a manner that was consistent with his role as revealed by the 2018 Emails.

²³¹ [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024; Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:4-28; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:17-2110:30.

²³² Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8.

²³³ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-31, 1460:14-1461:4.

²³⁴ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1488:15-1494:19.

²³⁵ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1770:29-1775:13.

²³⁶ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

A5. Deliberate destruction of documents and withholding of evidence by AFP, Elliott Legal, Mark Elliott and Alex Elliott

94 The Court should find that:

- (a) Mark Elliott's typical style was aptly characterised by his son and right hand man as "*don't give anyone anything unless they, you know, claw it from you*".²³⁷ His modus operandi was that "*He just wasn't going to give anyone a leg up if they didn't, you know, absolutely try really hard to get it*".²³⁸
- (b) Mark Elliott was revealed by the totality of the evidence to be a highly unethical and dishonest person with a "win at all costs" mentality, who evidently held little regard for his professional obligations, and ultimately, was a disgraceful stain on the profession of which he was a member, and the Court he purported to serve as an officer.
- (c) In reaction to discovery requests by the Contradictors in April/May 2019, Mark Elliott/AFP deliberately destroyed documentary evidence relating to the Trust Co Settlement Period, especially Mark Elliott's internal emails exchanged with Alex Elliott over that period.
- (d) Mark Elliott's destruction of documents explains why only **six** internal emails exchanged between Mark and Alex Elliott over the Trust Co Settlement Period were produced in discovery.²³⁹ This was a very busy period in the litigation²⁴⁰ during which one would expect Mark and Alex Elliott to have exchanged a large number of emails.
- (e) Alex Elliott knew of his father's deliberate destruction of evidence by no later than February/March 2020 (see paragraphs 124 to 140 below), and had probably discussed it with his father by no later than early February 2020.
- (f) Against a background of acquiescence in, or at least knowledge of, his father's deliberate destruction of evidence, Alex Elliott's own failure to search for documents as required by the 16 September 2020 Orders was a

²³⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1744:18-20

²³⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1744:21-23.

²³⁹ (1) [ABL.001.0594.00005] [ABL.001.0594.00006]; (2) [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011]; (3) [AFP.001.001.2548] [AFP.001.001.2549] [AFP.001.001.2550]; (4) [AFP.001.001.3429] [AFP.001.001.3435]; (5) [AFP.007.001.0001] [AFP.007.001.0002].

²⁴⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2079:6-7.

flagrant and continuing affront to the Court. To this day, Alex Elliott has not searched for all the documents he has been ordered to discover,²⁴¹ and has not provided an affidavit addressing the matters in rule 29.04(1)(c) – in particular, his views as to the documents that once existed within the scope of the Court’s discovery orders and his belief as to what happened to those documents. He has provided no explanation for his continuing flagrant disregard of the Court’s orders. Such contumelious behaviour by an officer of this Court should be condemned in the strongest possible terms.

- (g) The destruction of emails by Mark Elliott permits the Court to infer his consciousness of his own guilt, and thereby permits the Court to more confidently make findings of dishonesty against him and AFP (which are otherwise overwhelmingly available on the contemporaneous documentary evidence discovered by the Lawyer Parties, particularly Mr O’Bryan).
- (h) Alex Elliott’s own conduct with respect to failing to search for and discover documents in defiance of the Court’s orders was a serious breach of his professional obligations and his duties to the Court. That conduct highlights his lack of understanding of the gravity of the events in issue in this remitter.
- (i) Alex Elliott’s conduct with respect to discovery emerged in the course of the running of the case against him. It was revealed in oral submissions made by his senior counsel,²⁴² and outlined in the affidavit he proffered on 3 December 2020,²⁴³ neither of which is protected by any certificate under section 128 of the *Evidence Act 2008* (Vic).

95 The evidence establishing these findings is set out below.

November 2018 – March 2019: Issues raised and discovery sought in the remitter

96 In **November 2018**, the remitter commenced.

97 In **December 2018**, the Contradictors submitted their List of Issues for determination in the remitter, which included the following issues:

²⁴¹ Alex Elliott’s 3 December 2020 affidavit [LAY.080.001.0001], para [18.a] and [20].

²⁴² Transcript of hearing on 25 November 2020 [TRA.500.012.0001], 1271:16-1273:7; Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1300:9-27.

²⁴³ Alex Elliott’s 3 December 2020 affidavit [LAY.080.001.0001].

- (a) With respect to the legal costs and disbursements that AFP seeks to recover (**Legal Costs**), are they supported by valid and enforceable costs agreements and disclosure statements?²⁴⁴
- (b) With respect to AFP 's application for a common fund order:
- (i) What were the risks and expenses to which AFP exposed itself in this case by agreeing to fund the Bolitho Proceeding pursuant to the Funding Agreement?²⁴⁵
- (ii) What financing obligations did AFP undertake and perform in relation to the Bolitho Proceeding?²⁴⁶
- (iii) Has AFP paid the Legal Costs in respect of which it claims reimbursement, and if so, when?²⁴⁷

98 In **late January 2019**, the Contradictors sought orders for discovery of documents.²⁴⁸ Those orders were largely consented to in the terms sought.²⁴⁹

99 On **1 February 2019**, the Court made orders for discovery, including orders for discovery of *“all communications between Mr O'Bryan or Mr Symons and AFPL or the solicitors for Mr Bolitho relating to the costs incurred by counsel or expected to be incurred by counsel in conducting the Bolitho Proceeding”*.²⁵⁰

100 In **February 2019**, the Contradictors pressed AFP and the Lawyer Parties for additional documents relating to the claims for costs and commission.²⁵¹

101 On **1 March 2019**, the Court made orders for discovery of further documents, including documents relating to counsel's fee agreements, fee quotes, case budgets, and information provided to Mr Trimbos for his report.²⁵²

²⁴⁴ [SYM.001.003.1799], para [1.d].

²⁴⁵ [SYM.001.003.1799], para [5.b].

²⁴⁶ [SYM.001.003.1799], para [5.b.i].

²⁴⁷ [SYM.001.003.1799], para [5.b.v].

²⁴⁸ [SYM.001.001.5424], [SYM.001.001.5425].

²⁴⁹ [CBP.001.002.1745]; transcript of hearing on 1 February 2019 [TRA.510.017.0001], 2:21-23.

²⁵⁰ [ORD.500.005.0001] at 0003, [11.c].

²⁵¹ [SYM.002.002.8565].

²⁵² [ORD.500.031.0001].

27 March 2019: Revised List of Issues raising disentitling conduct

102 On **27 March 2019**, the Contradictors filed a RLOI which raised, for the first time, the issue of disentitling conduct affecting AFP's entitlement to succeed on its application for costs and commission.²⁵³

29 March 2019: Affidavit order

103 On **29 March 2019**, the Court made orders requiring Mark Elliott and the Lawyer Parties to file affidavits answering questions about irregularities identified by the Contradictors up to that time.²⁵⁴

3 and 5 April 2019: Letters from Corrs focusing on Alex Elliott's role

104 On **3 April 2019**, Corrs wrote to ABL seeking documents and information about Alex Elliott's involvement and role in the litigation.²⁵⁵ That letter:

- (a) summarised discovery provided by the SPRs on 2 April 2019 relating to the settlement negotiations between Mr Bolitho/AFP and the SPRs;
- (b) alleged that the Lawyer Parties had assisted to procure a settlement containing terms that were adverse to the interests of AFP and the Lawyer Parties, which terms had led directly to AFP's special leave application which threatened the settlement;
- (c) said that the settlement negotiation conduct would be included in the Contradictors' particulars of disentitling conduct; and
- (d) requested production of "***all documents held by Mr Alex Elliott and Mr Robert Murray-Crow recording or evidencing communications in connection with the settlement***" (the **Paragraph 31 Request**).

105 Alex Elliott:

- (a) conceded that he likely would have printed the letter off for discussion with his father, and would have read it;²⁵⁶

²⁵³ [CBP.001.002.3065] and [CBP.001.002.3071].

²⁵⁴ [ORD.500.033.0001], para [2].

²⁵⁵ [AFP.005.001.0345].

²⁵⁶ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1868:20-22.

- (b) refused to concede that he understood from the 3 April 2019 that an issue had arisen in the remitter about the negotiation of the settlement deed;²⁵⁷
- (c) denied that he understood that the Contradictors were beginning to focus on his own role in connection with the litigation;²⁵⁸ and
- (d) said that he could not recall any discussion with his father about how the two of them were going to approach the Paragraph 31 Request for documents.²⁵⁹

106 On **5 April 2019**, Corrs wrote again to ABL and Portfolio Law.²⁶⁰ That letter:

- (a) summarised documentary references to communications between Mr O'Bryan, Mr Symons, Mr Mark Elliott, Mr Alex Elliott, Mr Zita and Mr Trimbos about the Third Trimbos Report;
- (b) sought production of those communications;
- (c) identified (under the heading "***Role of Alex Elliott and Elliott Legal***") numerous references to Alex Elliott's involvement in the litigation from the fee slips of Mr O'Bryan and Mr Symons;
- (d) noted that, on 26 November 2014 Justice Ferguson ruled that Mr Mark Elliott could not continue to act for Mr Bolitho in this litigation, and said: "*In light of her Honour's ruling, **could you please provide full details of the respective roles of Mr Alex Elliott and Elliott Legal in this proceeding after 26 November 2014, particularly having regard to the matters recorded in the fee slips referred to above.***"²⁶¹

107 Alex Elliott:

- (a) agreed that he would have printed off the letter for his father at the time;²⁶²
- (b) denied any recollection of reading the letter;²⁶³

²⁵⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1863:16-28.

²⁵⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1860:1-6.

²⁵⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1868:27-31. [AFP.005.001.0354].

²⁶⁰ [AFP.005.001.0354], para [13].

²⁶¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1869:15-20.

²⁶² Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1869:15-17.

²⁶³

- (c) denied that the letter caused him any concerns about being drawn into the allegations in the remitter, and denied any discussions with his father about that matter;²⁶⁴
- (d) implausibly claimed that he could not recall there “*ever being an issue*” as to his role in the litigation;²⁶⁵
- (e) asserted that “*it didn’t cross my mind*” to consider the issue raised in the letter about the ruling in Bolitho No 4 and the role of Elliott Legal;²⁶⁶
- (f) claimed that he relied on his father as to how to deal with the 5 April 2019 letter and that he “*didn’t really think about it too much*”.²⁶⁷

108 The Court should reject Alex Elliott’s evidence about the 3 and 5 April 2019 letters, for the following **seven** reasons:

- (a) Alex Elliott was assisting his father with the conduct of the remitter at the time of those letters, and he knew that the focus of the remitter had turned to allegations of serious misconduct which the Contradictors were pursuing.²⁶⁸
- (b) The gravity of the situation was underscored by the fact that, **four days earlier**, the Court had made orders requiring Mark Elliott and the Lawyer Parties to file affidavits explaining matters that amounted to serious misconduct,²⁶⁹ which the Contradictors were pursuing as a basis for defeating AFP’s claim for funding commission and costs totalling nearly **\$20 million**.
- (c) It is not plausible that Alex Elliott could have been so cavalier about the prospect of becoming embroiled with serious allegations of the kind that were then being pursued by the Contradictors. Any legal practitioner would have been deeply troubled about becoming drawn into such a scandal.

²⁶⁴ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1870:8-20.

²⁶⁵ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1870:27-30.

²⁶⁶ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1871:4-12.

²⁶⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1871:13-18.

²⁶⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1903:26-28.

²⁶⁹ [ORD.500.033.0001], para [3].

- (d) On **4 April 2019**, Mark Elliott sent an email to ABL, copied to Alex Elliott,²⁷⁰ in which he referred to the prospect that the debenture holders would be “*ultimately worse off*” if AFP’s special leave application were to succeed.²⁷¹ Accordingly, Mark Elliott was in no doubt that the Contradictors were asserting impropriety in connection with the settlement negotiations, and he involved his son in his communications with ABL, Mr O’Bryan, and Mr Symons about responding to this allegation.
- (e) Alex Elliott would have readily understood the allegation of impropriety that the Contradictors were making in the 3 and 5 April 2019 letters. The concerns raised by the Contradictors were similar to the concerns he himself had voiced in his 14 June 2018 emails with his father,²⁷² in which he expressed reservations about his father’s decision to terminate the Settlement Deed. Those emails show that Alex Elliott knew that it was contrary to the interests of the debenture holders for AFP to terminate the Settlement Deed.²⁷³ He likewise must have understood that the terms of the Settlement Deed which purported to entitle AFP to terminate were not in the interests of debenture holders, and the Court should reject his evidence to the contrary.²⁷⁴ Alex Elliott also knew that there were provisions of the Funding Agreement that permitted “the Lawyers” to protect the interests of the debenture holders in the event of conflicts of interest.²⁷⁵ He knew that the Lawyer Parties owed duties to all group members²⁷⁶ and that they had not sought to activate those clauses during the settlement negotiations.
- (f) Alex Elliott conceded that he “*became more interested and more actively involved in what was happening*” with AFP in connection with the litigation from mid 2018 in connection with the appeal,²⁷⁷ particularly when he “*had the benefit of, I guess, a counter argument from another party*”²⁷⁸ (namely Mrs Botsman and her son Mr Botsman who acted for her). Yet he asks the

²⁷⁰ [NOB.500.007.2075_R]; [NOB.500.007.2078].

²⁷¹ [NOB.500.007.2075_R].

²⁷² [AEL.100.058.0001].

²⁷³ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2034:12-2037:15.

²⁷⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:14-2078:30.

²⁷⁵ [AEL.100.030.0001];

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2048:29-2050:23.

²⁷⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2037:20-27.

²⁷⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2081:6-21.

²⁷⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2081:6-9.

Court to believe that, having grasped the ethical issues that affected the Trust Co Settlement when Mrs Botsman raised them in 2018, he reverted to a state of ignorance when similar issues were raised by the Contradictor in 2019. That is implausible. It is also inconsistent with his evidence that he became even *more* involved with the litigation in the course of the remitter.²⁷⁹

- (g) Against this background, it was patently false for Alex Elliott to say that he did not understand that the Contradictors had alleged any impropriety in relation to the negotiation of the Settlement Deed in April 2019.²⁸⁰ That allegation was clearly and unmistakably asserted in the 3 April 2019 letter, which Alex Elliott received. The Court should find that Mark and Alex Elliott were in no doubt that grave issues had arisen with respect to their conduct and the conduct of the Lawyer Parties during the Trust Co Settlement Period, and these were the subject of the Contradictors' allegations and inquiries.

5 April 2019: Mr Symons drafts response to Corrs

- 109 On **5 April 2019**, Mr Symons drafted a letter to be sent by ABL to Corrs in response to the 3 April 2019 letter, which he sent to Mark Elliott and copied to Mr O'Bryan.²⁸¹ That letter stated:

- “(a) *we are instructed that Mr Alexander Elliott was at relevant times a **law graduate**. Mr Alexander Elliott was copied to emails for education purposes and did not originate any relevant documents. **Mr Alexander Elliott does not hold any documents relevant to the request made in paragraph 31 of the letter which have not already been produced;***
- (b) ***our client has complied with all existing discovery orders. The documents which are now sought are subject to claims of privilege and are not relevant to any matter in dispute. **Should the Contradictor seek orders for discovery, they will be opposed on the grounds that they are a speculative fishing exercise.*****”

²⁷⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1873:4-7.

²⁸⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1863:16-28.

²⁸¹ [NOB.500.007.2075_R]; [NOB.500.007.2078].

10 April 2019: Corrs reiterates request for information and documents

110 On **10 April 2019**, Corrs sent a further letter to ABL, reiterating the request for information about Alex Elliott’s role and for documents held by Alex Elliott.²⁸²

12 April 2019: ABL write to Corrs describing Alex Elliott as a “personal assistant” and conveying AFP’s instructions that there are no further documents

111 On **12 April 2019**, ABL wrote a letter to Corrs which was substantially based on the letter that Mr Symons had drafted on 5 April 2019, except, in the space of one week, Alex Elliott was now described as a “**personal assistant**”.²⁸³

112 Alex Elliott:

- (a) received at least two drafts of the 12 April 2019 letter, as well as the final version of the letter once it had been sent by ABL;²⁸⁴
- (b) claimed that he could not recall a discussion about the reference in the letter to him as a “law graduate”,²⁸⁵ but he confirmed that he recalled the phrase “personal assistant” being used in the letter, and he “*thought it was a proper description*”;²⁸⁶
- (c) said that he did not give the instructions that he held no documents relevant to the request for documents held by him,²⁸⁷ and that, since he did not give those instructions, they must have been given by his father;²⁸⁸
- (d) said that he did not speak with his father about whether he held any documents before the 12 April 2019 letter was sent,²⁸⁹ and nor did he look at his own documents to satisfy himself that there was a proper basis for the statement that he did not hold any documents;²⁹⁰

²⁸² [AFP.005.001.0360].

²⁸³ [AFP.005.001.0374].

²⁸⁴ See [MSC.010.135.0001], being Alex Elliott’s list of documents in response to a notice to produce issued by the Contradictors to him during the trial, in respect of which AFP claimed privilege, and transcript of hearing on 8 December 2020, [TRA.500.019.0001], 1890:18-1891:10.

²⁸⁵ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1884:18-22.

²⁸⁶ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1886:30-1887:23.

²⁸⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1887:24-1888:20.

²⁸⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1888:24-25.

²⁸⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1888:26-1889:1.

²⁹⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1889:2-5.

- (e) was shown examples of communications to which he was privy that were within the scope of the request in paragraph 31 of the 3 April 2019 letter and/or within the scope of existing discovery orders, which had not been produced by AFP at the time of the 12 April 2019 letter,²⁹¹ and agreed that those emails would have been readily identifiable on his computer at the time of the 12 April 2019 letter;
- (f) did not accept that there was any need for him to apply his own independent mind to issues of discovery,²⁹² notwithstanding that the focus of the remitter had turned to allegations of misconduct,²⁹³ and inquiries were being made as to his role (see the 3 and 5 April 2019 letters).

16 April 2019 – 14 May 2019: Particulars of disintitling conduct

- 113 On **16 April 2019**, the Contradictors filed detailed particulars of the allegations of disintitling conduct.
- 114 On **30 April 2019**, ABL wrote to Corrs seeking further and better particulars of the allegations of disintitling conduct.²⁹⁴
- 115 On **14 May 2019**, Corrs wrote to ABL providing further and better particulars of the allegations of disintitling conduct.²⁹⁵ That letter stated that, in relation to a number of matters, further particulars would be provided following further discovery.

24 May 2019: ABL's letter advising that AFP would resist any further discovery

- 116 On **24 May 2019**, ABL wrote to Corrs stating:

*“Presently, the Contradictors' allegations are incomplete and subject to further discovery. **Our client will resist any further discovery** in relation to allegations of fraud and breach of trust, which are incomplete and improperly based, and should never have been made by the Contradictors.”²⁹⁶*

²⁹¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1892:16-1894:24, 1898:26-1902:21 and [SYM.001.001.0894], [SYM.001.002.1536], [ABL.001.0601.00003].

²⁹² Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1903:29-31.

²⁹³ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1903:26-28.

²⁹⁴ [MSC.010.120.0001].

²⁹⁵ [MSC.010.119.0001].

²⁹⁶ [AFP.005.001.0568], para [13].

Mark Elliott was concerned about the Contradictors' quest for documents

117 In relation to the position as at April/May 2019, the Court should find as follows:

- (a) Mark Elliott was concerned about the Contradictors' enquiries about the role of Alex Elliott in the litigation. He wanted to deflect the Contradictors' attention on his son, and minimise his role. For that reason he altered the description of Alex Elliott's role in the draft letter prepared by Mr Symons on 5 April 2019 from "*law graduate*" to "*personal assistant*".
- (b) Alex Elliott must have had some anxiety about becoming embroiled in the scandal. Indeed, in the witness box he said that he had "*an incredibly traumatic year*"²⁹⁷ which he attributed in part to "*Mr Trimbos and his death and everything else that was going on with my joinder*".²⁹⁸
- (c) Mark Elliott was concerned in April and May 2019 about the Contradictors' quest for documents.
- (d) The further discovery that the Contradictors were seeking was the subject of discussion between Mark Elliott and ABL, who would have been concerned to understand what documents AFP held that might affect its interests in the litigation.
- (e) Mark Elliott was determined that the Contradictors should not obtain further documents to substantiate their allegations (hence his instructions to ABL, reflected in the letters of 12 April 2019 and 24 May 2019 that AFP would resist providing any further discovery).
- (f) In April and May 2019, the Contradictors' quest for documents principally related to the Trust Co Settlement, the Third Trimbos Report, and the Settlement Approval Application (ie, the period from 1 November 2017 to 30 January 2018). **The Contradictors had not expressly sought documents in connection with Botsman Appeal.**

²⁹⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:9-13.

²⁹⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1968:8-11.

May – November 2019: Strike out applications and joinder of Lawyer Parties

- 118 In **May 2019**, the Lawyer Parties filed applications to strike out the allegation of disentitling conduct and the particulars thereto.
- 119 In **September 2019**, the Court dismissed the Lawyer Parties' applications.
- 120 In **October 2019**, the Contradictors filed a further Revised List of Issues.
- 121 In **November 2019**, the Lawyer Parties were joined as parties to the proceeding.

20 December 2019: Discovery order

- 122 On **20 December 2019**, the Court made orders requiring AFP and the Lawyer Parties to discover documents in various categories,²⁹⁹ including:
- (a) documents in the Trust Co Settlement Period (from November 2017 to January 2018) relating to the Trust Co Settlement, the costs and disbursements to be recovered from the settlement, and the Third Trimbos Report, which the Contradictors had been seeking in correspondence since April 2019; and
 - (b) documents in the period from 20 March 2018 to 1 November 2018 relating to the Botsman Appeal.
- 123 The discovery order extended to communications between the "Relevant Individuals", defined to include Mark Elliott and Alex Elliott.

Early February 2020: AFP's discovery and the "searches" of Alex Elliott's computer

- 124 From about **16 or 17 January 2020** until about **1 or 2 February 2020**, Mark Elliott was overseas on holiday.³⁰⁰

²⁹⁹ [ORD.500.013.0001].

³⁰⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1836:1-5; 1837:17-21.

125 In or around **early February 2020**, Mark Elliott informed ABL that AFP had limited documents to discover because he had deleted most of his relevant emails.³⁰¹ In the context of that revelation:

- (a) Mark Elliott informed ABL that he had a *“long standing and invariable practice (which he observed at all relevant times during this proceeding)”* of routinely deleting most of his emails.³⁰²
- (b) Alex Elliott said that was the first time he had ever heard about his father’s alleged *“long standing”* practice of routinely deleting most of his emails.³⁰³ That was despite the fact that Alex Elliott had worked in his father’s office continuously since February/March 2016 and had been a director of Elliott Legal from 16 May 2016 until 5 June 2017.
- (c) In response to that revelation, ABL requested Mark and/or Alex Elliott to discover documents held by Alex Elliott.³⁰⁴

126 Alex Elliott gave two different versions of what thereafter occurred:

- (a) In the affidavit that he proffered at the conclusion of his evidence in chief,³⁰⁵ Alex Elliott asserted that: *“Prior to my father’s death on 13 February 2020, my father told me that he undertook all of the searches in response to discovery orders, including undertaking any searches of my computer. None of those searches were done in my presence”* (**Affidavit Version of Events**).³⁰⁶ The Affidavit Version of Events involved Mark Elliott informing Alex Elliott after-the-event that searches had been undertaken of Alex Elliott’s computer.
- (b) Under cross-examination, Alex Elliott said that the conversation with his father occurred *“some time in early February”*.³⁰⁷ **He was evasive as to the specific details of the conversation.** When asked whether the conversation occurred at the Elliott Legal office, he answered: *“It may have*

³⁰¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1834:18-22, 1925:16-26.

³⁰² See transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1834:18-22, 1925:16-26; [MSC.010.016.0001] (ABL’s 11 February 2020 letter).

³⁰³ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1906:13-31; transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1939:14-1940:1.

³⁰⁴ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1834:18-22 and 1925:16-26.

³⁰⁵ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1778:12-1779:13, 1882:9-1826:29.

³⁰⁶ Alex Elliott’s 3 December 2020 affidavit [LAY.080.001.0001], para [2].

³⁰⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1831:27-1832:25.

*been... I can't remember exactly where it was*³⁰⁸ Yet a short time later in his evidence, he elaborated that the context was that his father *"took the driver's seat"* in his office to undertake the searches, *"because I've only got one seat in my office"*. Thus, under cross-examination, Alex Elliott gave a different version of events, in which Mark Elliott asked Alex Elliott to move away from Alex Elliott's own computer while he sat down at that computer to do the searches (**Cross-Examination Version of Events**).³⁰⁹

127 The evidence that Alex Elliott gave in cross-examination revealed that **Mark Elliott had ample opportunity in February 2020 and prior to that time to delete emails from Alex Elliott's email account and/or computer**. Alex Elliott said:

- (a) He did not regard his computer at Elliott Legal's office as his *"personal"* computer,³¹⁰ although he agreed that it was in his office,³¹¹ that he used it to send both work emails and personal emails,³¹² and that it was *"mostly"* used exclusively by him.³¹³
- (b) ***"We all had our pass codes on pieces of paper just at the base of our screen"***.³¹⁴
- (c) **His father could have deleted emails from his email account.**³¹⁵
- (d) His father was ***"across all the passwords"*** which were all written down in a list, and his father could access his email account.³¹⁶
- (e) **His father had Alex Elliott's email account on his own computer** for a period of time.³¹⁷

128 Alex Elliott claimed that:

- (a) He had no idea what searches his father had undertaken.³¹⁸

³⁰⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1834:15-17.

³⁰⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1832:14-15; 1849:16-27.

³¹⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1846:12-28.

³¹¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1846:31.

³¹² Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1846:18-21.

³¹³ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1846:19-30.

³¹⁴ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1835:24-31.

³¹⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2123:27-30.

³¹⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2123:31-2124:4.

³¹⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2124:6-9.

³¹⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1968:12-13.

- (b) *“I thought that **because my father was an experienced lawyer, and was being assisted by ABL, that the search of my computer and email account was comprehensive and done correctly.**”*³¹⁹

129 The Court should reject Alex Elliott’s evidence that he believed his father had approached discovery comprehensively and correctly, for the following reasons.

- (a) **The narrative that Alex Elliott sought to promote in his evidence was one of blind faith in his father’s integrity**, and complete ignorance of any possibility of impropriety by his father.³²⁰ **That narrative was fundamental to Alex Elliott’s evidence** that he believed that his father’s search of his computer and email account was comprehensive and done correctly.
- (b) **That narrative is not plausible.** By the time AFP provided discovery in February 2020, the Contradictors had made very serious allegations of impropriety amounting to criminal wrongdoing against Mark Elliott.
- (c) Even accepting Alex Elliott’s evidence that he *“idolised”* his father,³²¹ it is not plausible that Alex Elliott could have blindly trusted in his father to undertake *“comprehensive”* and *“correct”* searches of Alex Elliott’s own personal computer for discovery purposes when his father had such a significant personal stake in the litigation.
- (d) That was particularly so in the **highly suspicious circumstances** of Mark Elliott’s revelation a short time before his death that he had **destroyed most of his relevant emails in accordance with an alleged “long standing and invariable practice”** which Alex Elliott had never heard of before, despite working continuously in his father’s legal office since early 2016.
- (e) The fact that Alex Elliott gave **two different versions of events** in relation to his father’s searches of his computer reveals that he felt he had something to hide in relation to the searches his father had undertaken of his computer.
- (f) Alex Elliott was not in the ordinary position of a junior solicitor vis a vis managing partner. He was Mark Elliott’s son, and he was at various

³¹⁹ [LAY.080.001.0001], para [2].

³²⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1669:14-1670:23

³²¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1668:5-9

relevant times a co-director with his father of Elliott Legal. Mark Elliott had not sought to limit Alex Elliott's exposure to Mark Elliott's dubious business practices. To the contrary, he had drawn Alex Elliott into those practices.³²² The more probable scenario is that Mark Elliott joked with his son about deleting his emails, in the same way that he joked with Mr O'Bryan about inflating his fees³²³ and falsely stamping his invoices as "PAID".³²⁴

- (g) Mark Elliott could not conceal from his son that he planned to destroy (or had destroyed) emails exchanged between the two of them in connection with the Banksia matter. It would have been obvious to Alex Elliott that their private emails were missing from the discovery and from his own computer. Accordingly, it was not logical for Mark Elliott to exclude Alex Elliott from his plan. The more logical and probable course was for Mark Elliott to inform his son of what he had done or planned to do, to ensure that he was "on board" and did not (for example) make any statements to ABL that might invite scrutiny about the deletion of the emails. The Court should find that Alex Elliott acquiesced in his father's destruction of documents when he sat back and allowed his father to take control of his computer in February 2020, in circumstances where Alex Elliott was evasive about that event and provided this Court with two different accounts of what had occurred, neither of which was credible.
- (h) In the end, the Court should find that the description that Alex Elliott gave of his father – *"don't give anyone anything unless they, you know, claw it from you"* – is an apt descriptor of the litigation practices of Mark Elliott which Alex Elliott learned at the seat of his father.

ABL's 11 February 2020 letter about discovery and events that follows

- 130 On **11 February 2020**, ABL wrote to Corrs on behalf of AFP providing discovery in response to the 20 December 2019 discovery orders and setting out their instructions with respect to Mark Elliott's alleged practice of routinely deleting documents.³²⁵

³²² [ABL.001.0601.00003]; [AEL.100.013.0001]; Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2011:6-2023:31; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

³²³ [NOB.500.001.7495].

³²⁴ [SYM.008.001.0017].

³²⁵ [MSC.010.016.0001].

131 The following matters relating to the letter are noteworthy:

- (a) On **10 February 2020**, Alex Elliott, together with his father, attended a meeting with ABL at their offices and separately spoke to ABL on the telephone.³²⁶ He claimed that he could not recall any discussion at that meeting with respect to AFP’s instructions concerning discovery and the destruction of documents,³²⁷ but there must have been such a discussion, given the letter that ABL sent out the following day, on 11 February 2020. Alex Elliott’s evidence that the meeting related to issues of privilege and did not relate to the letter about the destruction policy lacks credibility,³²⁸ not least because he claimed to have no recollection of other more recent events in the course of this remitter.³²⁹
- (b) The document ID of that letter allocated by ABL’s internal document management system is “ABL/7702991**v5**”, suggesting that the letter underwent **five iterations** before it was finalised. The Court should find that it was the subject of much discussion between ABL and AFP. Given the close working relationship between Mark and Alex Elliott, and Alex Elliott’s involvement with the remitter, and given the contents of the letter, the Court should find that Alex Elliott was involved in those discussions.
- (c) Under cross-examination in the morning of 8 December 2020, Alex Elliott initially denied that he saw a copy of the 11 February 2020 letter before it was sent.³³⁰ During the luncheon adjournment, his solicitors were served with a notice to produce requiring him to produce all versions and iterations of the 11 February 2020 letter and all emails attaching the letter and any prior drafts of it.³³¹ When court resumed after the luncheon adjournment, Alex Elliott’s senior counsel drew attention to the notice to produce, and sought to object to it.³³² Thereafter, in cross-examination, but before the notice was called upon, Alex Elliott gave different evidence: he said that his

³²⁶ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1844:10-1845:4 [ABL.901.0001.00002] at p3.

³²⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1844:16-1845:4.

³²⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1844:26-1845:4.

³²⁹ Eg, transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1970:7-1971:29

³³⁰ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1844:6-9.

³³¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1897:25-1898:1.

³³² Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1897:25-1898:1.

father had “sent a draft I think to ABL that they’d used or assisted with this letter” and “I saw an ABL draft”.³³³

132 On **12 February 2020**, Corrs wrote to ABL, seeking an affidavit from Mark Elliott to verify AFP’s discovery and his alleged practice of routinely deleting documents.³³⁴

133 On **13 February 2020**, Mark Elliott died.

134 Alex Elliott:

(a) agreed that, following his father’s death, he was the only person left with any knowledge of the day-to-day running of the Banksia litigation;³³⁵

(b) said that he at no stage revisited the discovery that had been provided or undertook any searches to ensure that all relevant documents on his own computer had been discovered.³³⁶

5 March 2020: Alex Elliott meets with John White in relation to Webster v Murray Goulburn, and produces more than 11,000 emails and documents

135 On about **5 March 2020**, less than a month after ABL’s 11 February 2020 letter, Alex Elliott met with John White, the expert costs consultant appointed by the Federal Court to assess Elliott Legal’s claim for costs on the Webster v Murray Goulburn matter,³³⁷ and provided him with emails relating to that matter from his computer and from his father’s computer.³³⁸

136 Alex Elliott did not tell Mr White about his father’s alleged invariable practice of deleting emails.³³⁹ It would have been highly relevant for Mr White to know about any such practice, which could explain any gaps in the evidence supporting Elliott Legal’s claim for costs.

³³³ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1921:2-7.

³³⁴ [MSC.010.131.0001] [MSC.010.132.0001].

³³⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1957:24-27.

³³⁶ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1900:2-18; 1926:2-1927:26.

³³⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1940:23-1942:13.

³³⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1946:15-1948:4

³³⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1940:23-1941:4, 1942:16-1843:2, 1945:15-19.

- 137 The volume of documents that Alex Elliott provided to Mr White (more than **11,000 documents**)³⁴⁰ is inconsistent with Mark Elliott's alleged practice of routinely deleting most of his emails, and stands in sharp contrast to the **197 documents** that AFP discovered in February 2020 in this remitter.³⁴¹
- 138 Alex Elliott confirmed in his evidence that the file in relation to the Murray Goulburn matter appeared to be "**quite a complete file**" and he could see no evidence that documents had been deleted.³⁴²
- 139 When Alex Elliott was asked how he could explain the discrepancy between the volume of documents he was able to provide in the Murray Goulburn matter and the small number of documents AFP was able to provide in February 2020 in the Banksia matter, Alex Elliott said: "**I can't explain it.**"³⁴³ The Court should find that it was clear from his demeanour in the witness box that he did not believe that there was a practice of the kind described in the 11 February 2020 letter, and that he knew that his father's deliberate destruction of documents was confined to the Banksia matter and was brought about by the ongoing requests of the Contradictors.
- 140 It was telling that the alleged practice was disclosed two days prior to Mark Elliott's death, and approximately one week after the incident in which Mark Elliott sat at Alex Elliott's computer. If Mark Elliott had not already deleted relevant emails from Alex Elliott's computer in April/May 2019, the Court should find that was the occasion on which he undertook and/or completed that process.

6-25 March 2020: Forensic search of Mark Elliott's devices

- 141 On **6 and 25 March 2020**, the Court made orders requiring ABL to secure all computer devices used by Mark Elliott, and for the hard drives to be forensically examined for the purposes of discovery.³⁴⁴ Those orders were limited to Mark Elliott's email accounts.

³⁴⁰ [CCW.018.004.0065], Item 3;
Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1948:6-24.

³⁴¹ [CCW.013.001.0001] at 0027;

³⁴² Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1919:26-1920:14.

³⁴³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1943:17-1944:16.

³⁴⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1948:30-1949:5.

³⁴⁴ [ORD.500.015.0001], [ORD.500.017.0001].

20 – 24 April 2020: Correspondence and orders about discovery

142 On **20 April 2020**, the Court made orders requiring AFP to discover relevant documents on Mark Elliott’s devices.³⁴⁵

143 On **21 April 2020**, Corrs wrote to ABL,³⁴⁶ stating:

*“[W]e note that, from the Contradictor’s review of documents recently discovered by the parties, it appears that Alex Elliott was copied to most emails that were sent between AFPL and the Lawyer Parties. You have advised that Alex Elliott acted as an assistant to Mark Elliott in his capacity as director of AFPL. **Would you please confirm that, in complying with its discovery obligations in this proceeding, AFPL has secured all of the documents and communications of Alex Elliott (and has not limited itself to the documents and communications of Mark Elliott).**”*

144 On **22 April 2020**, ABL responded,³⁴⁷ stating that:

*“Mr Elliott, on behalf of our client, arranged for **Mr Alex Elliott’s emails to be reviewed for the purposes of discovery**. Further, we advise that our client has arranged for Mr Alex Elliott’s emails to be searched for the ‘Banksia expenses’ spreadsheets sought by the contradictor.”*

145 In relation to this letter, Alex Elliott said in his affidavit:³⁴⁸

“As far as I was aware, AFPL and ABL had arranged for all of my emails to be searched and that any of my emails that were discoverable had been discovered through that process.”

146 On **24 April 2020**, the Court made orders requiring AFP to discover:

- (a) all versions of Mark Elliott’s “Banksia expenses” spreadsheet, and all communications about the spreadsheet or the costs / expenses / disbursements recorded therein created in the period of 1 November 2017 to 4 January 2018;
- (b) all communications between any two or more of Mark Elliott, Norman O’Bryan, Michael Symons, Alex Elliott and Max Elliott about the “Banksia expenses” spreadsheet, and all communications about the spreadsheet or the costs/expenses/disbursements recorded therein made in the period of 1 November 2017 to 4 January 2018;

³⁴⁵ [ORD.500.019.0001].

³⁴⁶ [MSC.010.010.0001].

³⁴⁷ [MSC.010.011.0001] at page 3, para [21].

³⁴⁸ [LAY.080.001.0001], para [11].

- (c) the email from Mark Elliott to Norman O'Bryan and Michael Symons copied to Alex Elliott dated 21 November 2017 (being an email sent at **4.07pm** that day) re "Banksia costs", with its attachments (**4.07pm Banksia Expenses Email**).

147 Under cross-examination, Alex Elliott gave the following evidence:

- (a) He claimed that he did not know on 21 and 22 April 2020 that the Contradictors had sought confirmation from ABL that, in complying with its discovery obligations, AFP had secured all of the documents and communications of Alex Elliott.³⁴⁹
- (b) He claimed that he could not recall ABL drawing that request to his attention.³⁵⁰
- (c) He agreed that it was ABL's usual practice to copy him into drafts of letters and the final versions of letters that were sent on the matter,³⁵¹ but he would only reluctantly concede that he "*may have read*" the letters.³⁵²
- (d) Somewhat inconsistently, he claimed that "*there are some facts out of that letter that I remember*", being the statement in the letter that Forensic IT had extracted 30,000 documents from Mark Elliott's devices.³⁵³ On that basis, he claimed that he did not do a wholesale review of what was on his computer because "*I just recall thinking at the time that Forensic IT had recovered 30 or 40,000 documents and all the other lawyer parties were subject to the same discovery and I expected that everything would be, I guess, captured.*"³⁵⁴
- (e) He confirmed that he knew that Forensic IT's searches were confined to his father's computers and accounts.³⁵⁵

³⁴⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1961:14-1962:2.

³⁵⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1962:3-4.

³⁵¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1962:10-12.

³⁵² Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1963:3-9.

³⁵³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1960:20-25.

³⁵⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1965:14-24.

³⁵⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1965:28-1966:5.

- (f) He claimed that, at the time in late April 2020, he did not realise that Forensic IT could not recover any documents that had been permanently deleted by Mark Elliott.³⁵⁶
- (g) He said that the 21 and 22 April 2020 letters and 24 April 2020 discovery order did not prompt him to go back and check his computer himself to see whether his father's searches had been comprehensive.³⁵⁷
- (h) He agreed that, at that time, he was the only person in the office of AFP and Elliott Legal with knowledge about what was on his computer.³⁵⁸
- (i) He agreed that any email communications between himself and his father which were on his computer but not his father's computer would have been relevant and discoverable.³⁵⁹
- (j) He said that, in relation to the 24 April 2020 discovery order, ABL asked him to conduct specific searches for documents such as the Banksia expenses spreadsheet and other financial information,³⁶⁰ and he conducted those searches in around late April/early May 2020.³⁶¹
- (k) He said that, from those searches, he located the email from Max Elliott to Mark Elliott and Alex Elliott dated 21 November 2017 at **4.05pm** attaching the Banksia Expenses Spreadsheet (**4.05pm Banksia Expenses Email**).³⁶²
- (l) He said he found the 4.05pm Banksia Expenses Email on "*a work computer we had at home*".³⁶³ He said that he, his brother Max and his father used that computer interchangeably.³⁶⁴

³⁵⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1966:6-8.

³⁵⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1962:21-23.

³⁵⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1963:24-27.

³⁵⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1966:10-13.

³⁶⁰ [LAY.080.001.0001], para [13].

³⁶¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1964:14-16.

³⁶² [AFP.007.001.0002]; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2121:8-18

Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2121:8-18.

³⁶³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2122:3-5.

³⁶⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2122:9-10.

- (m) He agreed that he knew that neither he nor AFP was able to produce the 4.07pm Banksia Expenses Email³⁶⁵ - ie, because it had been deleted from all email accounts and devices.
- (n) He agreed that the 4.07pm Banksia Expenses Email should have been on his computer, because he was copied to the email.³⁶⁶
- (o) He confirmed that he never provided his computer to ABL for them to undertake their own searches of his emails.³⁶⁷
- (p) He implausibly contended that he formed the view that all of his emails had been discovered because of ABL *“putting, I guess, their – I don’t know, their services over it, over the documents and deciding what’s relevant and what’s not relevant”*.³⁶⁸

148 The Court should find that:

- (a) The 4.07pm Banksia Expenses Email was deleted by everyone who was privy to it because it was a damaging document which revealed the process by which the fees had been quantified.
- (b) Mark Elliott deleted virtually all the emails between himself and Alex Elliott from his own computer and from Alex Elliott’s computer. If the 4.05pm Banksia Expenses Email remained in Alex Elliott’s email account, it would have been destroyed by his father in or before early February 2020.
- (c) Alex Elliott found the 4.05pm Banksia Expenses Email on the work computer that was located at home.
- (d) The only rational inference is that the email was found on the computer largely used by **Max Elliott** and on **Max Elliott’s email account**. That document had not been destroyed by Mark Elliott, because the Contradictors had never sought documents held by Max Elliott, and therefore Mark Elliott had not examined that account or the home computer.

³⁶⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2121:19-21.

³⁶⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2121:22-23.

³⁶⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1857:23-1858:3.

³⁶⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1858:4-15.

149 The Court should reject Alex Elliott's evidence that he thought all relevant documents were recovered by Forensic IT or had been discovered by the Lawyer Parties, because:

- (a) It is more likely than not that ABL would have informed Alex Elliott about the results of the process undertaken by Forensic IT, given the timing of the Court's orders in that regard, and Alex Elliott's interest and ongoing role in the litigation following his father's death.
- (b) If Forensic IT had been able to recover deleted documents from Mark Elliott's devices, it would have been unnecessary for Alex Elliott to search for such documents. Why would Alex Elliott need to search through multiple computers to find communications with his father relating to the Banksia Expenses Spreadsheet if those communications had been recovered from his father's email account?
- (c) Alex Elliott knew that neither he nor AFP could locate the 4.07pm Banksia Expenses Email. Again, this showed that Forensic IT had been unable to restore deleted emails from his father's devices.
- (d) The fact that Forensic IT had identified more than 30,000 documents on Mark Elliott's devices did not support the thesis that they had recovered deleted items. Rather, it supported a thesis that Mark Elliott had only destroyed documents on the Banksia matter, which Corrs expressly noted in the 21 April 2020 letter.³⁶⁹
- (e) Alex Elliott already knew that Mark Elliott's devices contained thousands of documents relating to other matters, because he had produced more than 11,000 documents to Mr White in connection with the Murray Goulbourn matter a month earlier. He saw no evidence that Mark Elliott had deleted emails in relation to that matter.
- (f) Alex Elliott knew that private emails exchanged only between himself and his father would **not** be discovered by the Lawyer Parties.
- (g) Alex Elliott is a practising solicitor. He therefore had a heightened understanding of the rules in relation to discovery. The Contradictors were

pressing the issue of discovery of Alex Elliott's emails. No legal practitioner in Alex Elliott's position would think it sufficient to rely upon an unverified belief in the adequacy of his father's searches undertaken a short time before his death in a case primarily concerned with his father's serious misconduct, particularly in circumstances where Alex Elliott had only recently examined his father's computer to produce documents on the Webster v Murray Goulburn matter, and had seen no evidence that his father had deleted emails relating to that matter, and had therefore seen no evidence of a longstanding destruction policy.

150 The weak explanations Alex Elliott gave as to why he did not revisit the documents on his computer are consistent with an approach of seeking to maintain plausible deniability. The Court should find that:

- (a) By February 2020, the Lawyer Parties had discovered documents providing compelling evidence of the very serious misconduct alleged by the Contradictors,³⁷⁰ being documents which AFP had **not** discovered and which Mark Elliott had evidently destroyed.³⁷¹
- (b) There was no basis for Alex Elliott to believe that his father's searches of his computer were properly done, and he did not in fact hold such a belief as he asserted in his evidence.
- (c) He did not revisit the documents on his computer, because **he knew or believed that Mark Elliott had deleted the documents the Contradictors had been seeking from April 2019 onwards**, for which orders for discovery were eventually made.
- (d) He was wilfully blind to the previous discovery orders and the documents on his computer, because he hoped he could fly under the radar and:
 - (i) avoid having to disclose to ABL what he knew about the deletion of emails from his own computer and email account; and

³⁷⁰ Many of these documents were summarised in the Contradictors' submissions dated 27 March 2020 filed in connection with a privilege dispute with AFP and Mr O'Bryan: see Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [172] – [173].

³⁷¹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1910:25 – 1914:31 (referring to particular examples: [SYM.001.001.6715], [NOB.500.001.7516], [NOB.500.001.7504], [NOB.500.001.7495], [NOB.500.001.7493]).

- (ii) avoid having to discover any relevant emails that might remain on his computer, which might draw greater attention to him and his role in connection with the matters in issue in the remitter.

30 June 2020: Further discovery orders

- 151 On **30 June 2020**, the Court made orders requiring AFP to discover documents in specified categories.³⁷²
- 152 Alex Elliott said that *“In complying with the Order of 30 June 2020, I conducted specific searches at the request of ABL”*.³⁷³ He said he did not revisit his emails or the previous discover orders at that time.³⁷⁴

20 August 2020: Joinder of Alex Elliott

- 153 On **20 August 2020**, Alex Elliott was joined to the proceeding.³⁷⁵

September – October 2020: Discovery orders against Alex Elliott and the approach Alex Elliott thereafter took to providing discovery

- 154 On **8 September 2020**, Corrs wrote to the parties proposing orders, including orders for discovery to be provided by Alex Elliott.³⁷⁶
- 155 On **9 September 2020**, there was a directions hearing in the matter. Counsel who was then acting for Alex Elliott resisted the discovery order, including on the following basis:³⁷⁷

“[W]hen one writes to an instructing solicitor and says make discovery to the extent it has not already been discovered, that involves the following. First, one has to get all the documents from their client and then they must cross-reference it to what’s been discovered. That is the only way one could check independently. That is the only way one could check independently.

*If what Mr Jopling is asking for is for my instructor to pick up the phone and call Mr Horgan's instructor and say, 'Did you make discovery,' well, yes, that's not a particularly difficult task... **But the task involved is to get all the documents from our client, identify what is discoverable and then cross-check it against what has been discovered to see what has and***

³⁷² [ORD.500.030.0001].

³⁷³ [LAY.080.001.0001], para [15].

³⁷⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1966:27-1967:2.

³⁷⁵ [ORD.500.040.0001].

³⁷⁶ [MSC.010.026.0001].

³⁷⁷ Transcript of hearing on 9 September 2020 [TRA.510.008.0001], 18:1-20.

has not been discovered. That's the process, your Honour, and it will take time.

156 Alex Elliott gave inconsistent accounts of his knowledge of the submission made to the Court on his behalf on 9 September 2020:

- (a) He initially said he could not recall being told about the discussion that had taken place in Court,³⁷⁸ and could not recall giving instructions to his solicitors or counsel about the work involved in providing discovery.³⁷⁹
- (b) He then conceded he *“may have”* told his solicitor that it was going to take a lot of time to do the work.³⁸⁰
- (c) Later, when pressed about whether he had been told the substance of what his counsel submitted to the Court on 9 September 2020, he conceded *“I recall – I do recall I guess the concept of it, yes.”*³⁸¹

157 On **16 September 2020**, the Court ordered Alex Elliott to discover documents in the following categories, to the extent not already discovered:³⁸²

- (a) All documents within the scope of the Court's discovery orders dated 1 February 2019, 1 March 2019, 20 December 2019, 24 April 2020 and 30 June 2020 (**Category 1(a) Documents**).
- (b) All documents which record or evidence communications between Mark Elliott and Alex Elliott, and which directly relate to Alex Elliott's role and responsibilities in connection with the conduct of the Bolitho Proceeding, from 1 March 2016 to 20 August 2020.
- (c) All documents which record or evidence communications between Alex Elliott and any other person about the terms on which Mr O'Bryan, Mr Symons and/or Portfolio Law were retained by AFP, either generally, or specifically in the Bolitho Proceeding, from 1 March 2016 to 30 June 2019.

³⁷⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1971:4-10.

³⁷⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1971:11-20.

³⁸⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1971:21-22.

³⁸¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1975:11-15.

³⁸² [ORD.500.045.0001].

- (d) All documents which record or evidence communications between Alex Elliott and any other person in relation to the "Banksia Expenses" spreadsheet, from 1 November 2017 to 27 July 2020.
- (e) All documents which record or evidence communications between Alex Elliott and Peter Trimbos in relation to any or all of the First to Fifth Trimbos Reports, from 1 June 2016 to 30 June 2020.
- (f) All documents which record or evidence communications between Alex Elliott and any other person about the payment of fees to Mr O'Bryan, Mr Symons and/or Portfolio Law, and/or the terms of any such payment and/or the reason/s for making any such payment, from 1 June 2018 to 1 February 2019, including:
 - (i) all communications relating to the cheques that Alex Elliott was asked to prepare by Mark Elliott in the email dated 11 June 2018 [ABL.001.0601.00003] (**Cheques**) in respect of the fees of Mr Symons and Portfolio Law (**Fees**) (or either one of those Cheques);
 - (ii) all communications relating to Mr Symons and/or Portfolio Law presenting their Cheques in January 2019; and
 - (iii) all communications relating to any arrangement or understanding in respect of the payment of the Fees.
- (g) All documents which record or evidence communications between Alex Elliott and any other person about the response to be provided to the questions asked by Corrs on behalf of the Contradictor in February and March 2019 relating to the fees and fee arrangements in place with Mr O'Bryan, Mr Symons and/or Portfolio Law, from 1 February 2019 to 10 April 2019.
- (h) All documents which record or evidence communications between Alex Elliott and any other person about the deletion or destruction of emails or other documents by Mark Elliott/AFP in the course of the remitter, from 1 February 2019 to 20 August 2020.
- (i) All documents which record or evidence communications between Alex Elliott and any officer or agent of AFP (including its legal representatives) in

relation to the admissions to be made by AFP in response to allegations made in the various iterations of the Contradictors' RLOI filed in the proceeding, from 1 June 2020 to 14 July 2020.

- (j) All documents which record or evidence communications between Alex Elliott and any officer or agent of AFP in relation to the trial of this proceeding, from 27 July 2020 to 20 August 2020.
- (k) All documents evidencing or recording Alex Elliott's direct or indirect financial interest in AFP and its shareholders and/or in Elliott Legal.

158 On or about **1 October 2020**, Alex Elliott produced **146 documents** to ABL in response to the 16 September 2020 Orders.³⁸³

159 On **7 October 2020 at 9.32pm**, after failing to respond to requests from the solicitors for the Contradictors from **2 October 2020**,³⁸⁴ the solicitors for Alex Elliott raised, for the first time, an objection to giving discovery, including production of the Elliott List.³⁸⁵

160 That objection carried the obvious prospect that the Contradictors might never learn precisely what Alex Elliott had or had not discovered, or might only learn what had discovered late in the trial, when there was less opportunity for further interlocutory applications to be made about discovery (which is in fact what occurred).

161 Alex Elliott said that he approached the 16 September 2020 Orders as follows:³⁸⁶

*“(a) In relation to order (a), I considered that **discovery already made in the proceeding, including searches of my accounts, together with the discovery made by the other Lawyer Parties, meant that there would not be any further documents to be found in this category**, and so ‘to the extent that it had not already been discovered’ qualified this category entirely. I did not search in this category.*

...

(c) In relation to order (c), I relied on the same analysis as with order (a).

(d) In relation to order (d), I relied on the same analysis as with order (a).

³⁸³ [MSC.010.032.0001]; [MSC.010.045.0001].

³⁸⁴ [MSC.010.030.0001], [MSC.010.035.0001]; [MSC.010.034.0001].

³⁸⁵ *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703, [86.f] and [MSC.010.046.0001], [CRT.500.004.0001].

³⁸⁶ [LAY.080.001.0001], para [18].

(e) *In relation to order (e), I relied on the same analysis as with order (a).*

(f) *In relation to order (f), I relied on the same analysis as with order (a).*

(g) *In relation to order (g), I relied on the same analysis as with order (a)."*

162 When he was pressed about his approach to discovery in cross-examination, Alex Elliott said: *"I thought I had a reasonable expectation that they'd been produced and that's what I ran with at the time"*.³⁸⁷

163 Alex Elliott further claimed that his approach to discovery was somehow affected by the fact that he was *"greatly saddened"* by the death of Mr Trimbos, *"particularly given that Mr Trimbos had been added as a party at the same time as me"*.³⁸⁸

164 The Court should find that:

- (a) Alex Elliott could not have, and did not, honestly believe that *"dad had undertaken proper searches for the previous period"*,³⁸⁹ given what he knew about the destruction of documents, his father's personality, and the volume of documents he was later to make available to Mr White in the Murray Goulburn matter.
- (b) Alex Elliott therefore could not on that basis have believed that *"discovery already made in the proceeding, including searches of my accounts, together with the discovery made by the other Lawyer Parties, meant that there would not be any further documents to be found"*.³⁹⁰
- (c) Rather, Alex Elliott believed that his father had deleted most of the relevant internal emails exchanged between them, which the Contradictors had been seeking.
- (d) In circumstances where Alex Elliott knew or believed that there had been impropriety with respect to discovery, he should have:
 - (i) undertaken very thorough searches of his own computer;

³⁸⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1973:4-8.

³⁸⁸ [LAY.080.001.0001], para [17].

³⁸⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1967:25-1968:11.

³⁹⁰ [LAY.080.001.0001], para [18.a]

- (ii) disclosed or identified those documents which were no longer in his possession and his belief as to when he parted with those documents, and what became of them.
- (e) Alex Elliott's excuse for his inadequate discovery was disingenuous, and the Court should reject it. The death of Mr Trimbos was totally irrelevant to his approach to discovery.
- (f) Alex Elliott's own legal advisers had told him around 9 September 2020 that he needed to undertake a wholesale review of what was on his computer for the purposes of providing discovery. His failure to do so did not reflect an honest mistake, but rather a deliberate stance of wilful blindness and of seeking to maintain plausible deniability. He "*ran with*" what he thought was a defensible story, but which was indefensible in circumstances where he knew that his father had deliberately destroyed the documents on his computer in either April/May 2019 or early February 2020.
- (g) Alex Elliott's approach to discovery amounted to a serious breach of his duties as a litigant and as an officer of the Court.
- (h) To this day, Alex Elliott has not searched for the Category 1(a) Documents³⁹¹ or explained his failure to search those documents, and has not disclosed the matters required to be addressed by rule 29.04(1)(c).

8 October 2020: Subpoena to Elliott Legal

- 165 On **8 October 2020**, after Alex Elliott adopted the stance of refusing to provide his discovery list, the Contradictors served a subpoena on Elliott Legal seeking the same documents as those specified in the discovery order.³⁹²
- 166 There were lengthy delays in complying with that subpoena.³⁹³
- 167 On **21 October 2020**, Garland Hawthorn Brahe (who acted for both Alex Elliott and Elliott Legal) wrote to Corrs, seeking to clarify the scope of the subpoena and stating:³⁹⁴

³⁹¹ Alex Elliott's 3 December 2020 affidavit [LAY.080.001.0001], para [18.a] and [20].

³⁹² [ORD.500.046.0001].

³⁹³ See Transcript of directions hearing on 19 October 2020 [TRA.510.013.0001], 2-6.

³⁹⁴ [MSC.080.003.0001].

“ELPL’s response to the subpoena to date has been predicated on its natural reading of the subpoena, including communicating with Mr Brendan McCreesh, the IT expert previously retained in the proceeding, and with Arnold Bloch Leibler regarding efficient methods of access to and review of responsive documents.”

168 The fact that Alex Elliott’s solicitors conferred with ABL and Forensic IT in October 2020 about discovery and the extraction of emails from Alex Elliott’s devices underscores the improbability that Alex Elliott had any misconception about what Forensic IT had been able to recover from Mark Elliott’s devices.

30 October 2020 – 2 November 2020: Opening of case against Alex Elliott

169 On **30 October 2020** and **2 November 2020**, the Contradictors opened their case against Alex Elliott.

24-25 November 2020: Late discovery of documents

170 On **24 November 2020** (the night before the trial was to resume) and **25 November 2020**, Alex Elliott discovered and produced a number of highly significant documents, being internal emails between himself and his father in 2018 in the context of the Botsman Appeal.³⁹⁵ These documents had not previously been discovered by any party.

171 On **3 December 2020**, Alex Elliott proffered his affidavit to the Court which purported to explain his approach to discovery.³⁹⁶

Implications of deliberate destruction of documents

172 In *Allen v Tobias*,³⁹⁷ the High Court adopted the exposition in *The Ophelia*³⁹⁸ of the maxim *omnia praesumuntur contra spoliatores*:

“If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he

³⁹⁵ [LAY.080.001.0001], para [19]; [TDL.010.003.0001].

³⁹⁶ [LAY.080.001.0001].

³⁹⁷ (1958) 98 CLR 367, 375.

³⁹⁸ (1916) 2 AC 206.

has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.”

173 Similarly, in *Katsilis v Broken Hill Pty Co Ltd*,³⁹⁹ Barwick CJ said that:

“Ordinarily, though a case is normally better tried on the evidence which is produced than on that which is not, it can properly be said that the failure of a party to give or produce evidence which, in the circumstances of the case, that party in its own interest would be expected to give or produce, warrants the conclusion that, if given or produced, the evidence would not support that party’s case. **Indeed, in some circumstances it might be inferred that it would support the opponent’s case**; but, if so, it must depend very much on the circumstances. But, in any case, the inference would depend upon some element of conscious repression or withholding of the evidence. The warrant for the inference must depend upon the deliberation with which the evidence is withheld and the appreciation or likely appreciation of the party of its significance in the case.”

174 The deliberate destruction of documents may permit the Court to infer consciousness of guilt.⁴⁰⁰

175 The Court should find that:

- (a) Mark Elliott’s typical style was “*don’t give anyone anything unless they, you know, claw it from you*”.⁴⁰¹ His modus operandi was that “[h]e just wasn’t going to give anyone a leg up if they didn’t, you know, absolutely try really hard to get it”.⁴⁰²
- (b) Mark Elliott was revealed by the totality of the evidence to be a highly unethical and dishonest person with a “win at all costs” mentality, who evidently held little regard for his professional obligations or his duties as an officer of the Court.
- (c) In reaction to the Contradictors’ requests for documents in April/May 2019 about the Trust Co Settlement, the Third Trimbo Report, the First Approval Application, and the role of Alex Elliott, Mark Elliott deliberately destroyed inculpatory documents which the Contradictors were seeking, from his own

³⁹⁹ (1978) 52 ALJR 189, 197.

⁴⁰⁰ *Micheletto (Trustee), El-Debel (Bankrupt) v El-Debel* [2020] FCA 1031, [130].

⁴⁰¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1744:18-20

⁴⁰² Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1744:21-23.

computer and from Alex Elliott's computer, with the intention of destroying evidence.⁴⁰³

- (d) As the Contradictors were at that time focused on obtaining documents in the Trust Co Settlement Period, Mark Elliott also focused on deleting documents in that same time period. That explains why:
- (i) virtually no private/internal emails between Mark and Alex Elliott **in the Trust Co Settlement Period** were discovered;⁴⁰⁴
 - (ii) internal emails exchanged between Mark and Alex Elliott **about the Botsman Appeal in 2018** remained on Alex Elliott's computer.
- (e) Alex Elliott's evidence that he believed his father had undertaken thorough and complete searches of his computer is not credible in the circumstances. Rather, his own failure to undertake thorough and complete searches is consistent with a concrete belief that his father had deleted all the relevant emails between father and son relating to the Banksia matter, from both of their computers. If Alex Elliott did not know that his father had deleted documents from his computer, or was uncertain as to what his father had or had not deleted, he would have reviewed his own emails against the discovery orders. The fact that he never did that is consistent with a definitive belief that all evidence had been erased. That suggests his father expressly informed him what documents he planned to destroy or had destroyed and/or that they had an understanding about the specific documents that had been destroyed.
- (f) Alex Elliott's lack of any belief in a long standing destruction policy is evidenced by the fact that three weeks later, he produced up to Mr White in relation to the Murray Goulburn matter "*quite a complete file*" comprising more than 11,000 documents, and made no reference to any long standing destruction policy.

⁴⁰³ See *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66, [30]–[34], where it was suggested that such intention must be shown; cf *MCT Dairies Inc v Probiotec Ltd* [2009] FCA 1385, [36], where Rares J considered that the presumption arises even if no intention to destroy evidence has been shown.

⁴⁰⁴ The emails that have been discovered in the Trust Co Settlement Period are: (1) [ABL.001.0594.00005] [ABL.001.0594.00006]; (2) [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011]; (3) [AFP.001.001.2548] [AFP.001.001.2549] [AFP.001.001.2550]; (4) [AFP.001.001.3429] [AFP.001.001.3435]; (5) [AFP.007.001.0001] [AFP.007.001.0002].

- (g) Against a background of knowledge of and/or acquiescence in the deliberate destruction of evidence, Alex Elliott's own failure to search for documents as required by the 16 September 2020 Orders was a **flagrant and continuing affront to the Court**. To this day, Alex Elliott has not searched for the Category 1(a) Documents⁴⁰⁵ or provided an affidavit addressing the matters in rule 29.04(1)(c).
- (h) The conduct in the litigation of Mark and Alex Elliott in the concealment, suppression, and/or destruction of evidence permits the Court to infer their "consciousness of guilt, and [their] desire to evade the pressure of facts tending to establish it".⁴⁰⁶
- (i) If the internal emails between Mark and Alex Elliott in the Trust Co Settlement Period provided support for the thesis that Alex Elliott acted in an administrative, non-legal capacity and/or that he had little to no involvement with the events in issue in this remitter, they would not have been suppressed by AFP, Mark Elliott, and Alex Elliott.
- (j) The Court should infer that if those emails had been available to the Court they would have supported the thesis that Alex Elliott was involved, in a professional legal capacity, in the Trust Co Settlement, the Third Trimbo Report, and the First Approval Application, in a manner that was consistent with his role as revealed by 2018 Emails which he discovered on 24 and 25 November 2020 in connection with the Botsman Appeal.

A6. Alex Elliott and Elliott Legal acted in a professional legal capacity in the Banksia litigation

- 176 Alex Elliott claimed that he had no "substantive"⁴⁰⁷ involvement in the Banksia litigation, and that his role was purely administrative.⁴⁰⁸

⁴⁰⁵ Alex Elliott's 3 December 2020 affidavit [LAY.080.001.0001], para [18.a] and [20].

⁴⁰⁶ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [81].

⁴⁰⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:17-18; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12, 1708:17-20, 1710:7-8, 2078:31-2079:5, 2083:11-13.

⁴⁰⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:18-24.

177 He sought to characterise his role as follows:

- (a) *“It was mainly administrative sort of things, I was just sort of following him around to meetings and attending court with him and a few other sort of things here and there.”*⁴⁰⁹
- (b) *“Dad was just trying to give me exposure” and “he was just trying to show me how things got done.”*⁴¹⁰
- (c) *“I never really saw myself sitting there as a solicitor trying to I guess provide services or anything”.*⁴¹¹
- (d) *“I always looked at it as just sort of helping dad and just doing whatever he wanted in his direction.”*⁴¹²
- (e) *“I never saw myself as the solicitor, I was just helping dad.”*⁴¹³

178 He sought to distinguish his role on the Webster v Murray Goulburn matter (where Elliott Legal was solicitor on the record) from his work on the Banksia matter in the following way:⁴¹⁴

“Well I wasn’t solicitor in Banksia so I didn’t do any of those solicitor type things of, I guess filing affidavits or instructing counsel or anything like that. I did a lot more work in Murray Goulburn in respect of, I just guess reviewing and considering documents, researching, you know, attending to the client, going to court, instructing, that sort of stuff.”

179 The Court should reject Alex Elliott’s evidence that he had a “non-legal” or “administrative” role in the Banksia matter, and that there was any relevant distinction between the roles of Elliott Legal in the Murray Goulburn matter as opposed to the Banksia matter.

180 On the Banksia matter, Alex Elliott:

- (a) filed documents;⁴¹⁵

⁴⁰⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:18-24.

⁴¹⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:9-12.

⁴¹¹ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1819:28-1820:7.

⁴¹² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1658:28-1820:7.

⁴¹³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1657:5-6.

⁴¹⁴ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1654:15-28.

⁴¹⁵ [CBP.004.004.1652] [CBP.004.004.1653].

- (b) regularly attended court;⁴¹⁶
- (c) was included in emails as if he was another solicitor acting on the matter,⁴¹⁷ which emails his father expected him to read,⁴¹⁸ and which he did read;⁴¹⁹
- (d) assisted with the establishment of the “**Bolitho Class Action Email Account**” (BolithoClassAction@portfoliolaw.net.au) and the “**General Class Action Email Account**” (classactions@portfoliolaw.net.au) to which he thereafter had access,⁴²⁰ by which third parties were led to believe they were corresponding with Portfolio Law, when in fact, those email accounts were established to allow the litigation to be conducted with minimal reliance on Portfolio Law;⁴²¹
- (e) had a general practice of printing most correspondence that was sent to the Bolitho Class Action Email Account and the General Class Action Email Account for discussion with his father;⁴²²
- (f) reviewed and considered documents, such as the Trust Co Settlement Deed,⁴²³ the Third Trimbos Report (which he received in both draft and final form),⁴²⁴ and the First Bolitho Opinion (though he denied that he read them in any detail, or that he did so in a professional legal capacity);⁴²⁵

⁴¹⁶ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1329:4-6; 1333:13-20; Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:21-24; Transcript of hearing on 3 December 2020 [TRA.500.018.0001] 1788:2-3; Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1915:24-1916:13; Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:10-19; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:3-24, 2075:5-25.

⁴¹⁷ See the hundreds of emails referred to in [AID.010.026.0001_3]. By way of example only see [CBP.004.004.7694]; [CBP.004.006.9410]; [CBP.001.006.0292]; [CBP.001.006.4026]; [CBP.004.004.3691].

⁴¹⁸ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:19-23; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:19-20.

⁴¹⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:15-17.
⁴²⁰ [CBP.001.001.6342]; [CBP.001.001.6345]; [CBP.001.001.5820]; [CBP.001.007.3869]; [CBP.001.008.1167]; Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1684:12-1686:27

⁴²¹ See Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [47] – [50] and transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:27-869:19.

⁴²² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:7-18.

⁴²³ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

⁴²⁴ [NOB.500.005.2485] [NOB.500.005.2487]; [NOB.500.005.2312] [NOB.500.005.2314] [NOB.500.005.2354] [NOB.500.005.2457] [NOB.500.005.2458].

⁴²⁵ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2095:11-13.

⁴²⁵ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:6-20, 1707:18-1709:3; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:13-18, 2075:5-13.

- (g) was involved in procuring evidence from Mr Trimbos to support the fee and commission claims advanced by Mr Bolitho/AFP at the time of the Partial Settlement and the Trust Co Settlement,⁴²⁶ including collating the folder of invoices for Mr Trimbos for the Third Trimbos Report⁴²⁷ and delivering that folder to him;⁴²⁸
- (h) understood the difference between a funding equalisation order and a common fund order, and was across the principles in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*⁴²⁹ (*‘Money Max’*);⁴³⁰
- (i) was invited to the **“Banksia Wrap Up Meeting”** on 14 November 2017 with Mark Elliott, Mr O’Bryan and Mr Symons, which the Court should find he attended;⁴³¹
- (j) worked up the script for Mr Zita/Portfolio Law to follow in their dealings with group members;⁴³²
- (k) received enquiries from group members, who were told in the opt out notice issued to them and in other written communications to contact **“Portfolio Law”** using contact details **which were in fact routed directly or indirectly to Elliott Legal**;⁴³³
- (l) critically analysed legal issues and expressed his own independent views, and conferred with his father about his father’s views on legal issues;⁴³⁴

⁴²⁶ See eg [TRI.001.005.0169] [TRI.001.005.0171] [SYM.001.003.0235] [AFP.001.001.2224] [AFP.001.001.2225]; [SYM.001.003.3453] [SYM.001.003.3454] [SYM.001.003.3457]; [SYM.001.002.8281]; [SYM.001.002.5447]; [SYM.001.002.5449]; [SYM.002.001.5568]; [AFP.001.001.2531]; [NOB.500.001.7272] [NOB.500.001.7273]; [AFP.001.001.2548] [AFP.001.001.2550]; [AFP.001.001.3137] [AFP.001.001.3138]; [TRI.001.006.0063] [TRI.001.006.0064] [TRI.001.006.0067]; [ABL.001.0602.00009] [ABL.001.0602.00011].

⁴²⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15.

⁴²⁸ [TRI.001.006.0001];
Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2133:7-27.

⁴²⁹ (2016) 245 FCR 191.

⁴³⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2087:11-2094:21.

⁴³¹ [SYM.001.001.4401].

⁴³² [ABL.001.0594.00005] [ABL.001.0594.00006]; [ABL.001.0627.00038] [ABL.001.0627.00039] [ABL.001.0627.00040].

⁴³³ [CCW.061.001.0001], [MSC.020.014.0001]; Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1336:7-1337:21.

⁴³⁴ [AEL.100.058.0001]; [AEL.100.030.0001]; [ABL.001.0643.00243]; [ABL.001.0615.00020]; [AEL.100.038.0001]; [AEL.100.066.0001]; [AEL.100.069.0001]; [AEL.100.032.0001]; [AEL.100.041.0001]; [AEL.100.043.0001]; [AEL.100.056.0001];
Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1784:1-1786:20, 1787:19-1803:15, 1806:16-1807:9, 1809:1- 1820:13;
Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1986:24-2033:7;
Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2034:4-2073:11.

- (m) undertook legal research;⁴³⁵
- (n) attended conferences in counsel's chambers to discuss legal issues.⁴³⁶

181 By way of contrast, Mr Zita/Portfolio Law:

- (a) often forgot to promptly attend to correspondence and court documents, which prompted Mr O'Bryan and Mark Elliott to set up the Bolitho Class Action Email Account and the General Class Action Email Account which could be monitored by them with minimal reliance on Mr Zita/Portfolio Law;⁴³⁷
- (b) drafted no correspondence of any substance, but rather, sent correspondence that was drafted by others (which he did not carefully read or check before sending);⁴³⁸
- (c) accordingly, cannot have spent the significant time that he claimed to have spent reading correspondence that was sent to the Bolitho Class Action Email Account and the General Class Action Email Account;
- (d) was often excluded from analytical discussions about legal issues which were conducted between Mark Elliott, Alex Elliott, Mr O'Bryan, and Mr Symons;⁴³⁹

⁴³⁵ [AEL.100.048.0001]; Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1784:1-31; Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1987:3-1988:28.

⁴³⁶ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-1461:2, 1488:25-1494:19; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24 – 1770:3, 1772:19-1774:10.

⁴³⁷ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [47] - [50]; Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1684:28-1685:6; See also [CBP.004.001.1833] ("*These important things are taking us far too long to progress*"); [SYM.001.002.3761] ("*Why are we receiving this 4 days later via the judge and not directly? What is wrong with our communication system?*"); [CBP.001.007.0001]; [SYM.002.002.9133] ("*Tony, Why am I receiving the letter from Corrs of 25/3 today for the first time?*").

⁴³⁸ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [91], [141], [154] – [164] (referring to [CBP.001.013.0245], [CBP.001.002.2929], [CBP.001.013.0245], [CBP.001.013.0245], [CBP.001.013.0252], [CBP.001.011.5727], [CBP.001.011.5729] [CBP.001.011.3217], [CBP.001.011.3218], [CBP.001.012.0165]); [CBP.004.007.2195] [CBP.004.006.6990] and Transcript of hearing 13 August 2020 [TRA.500.007.0001], 777:7-778:29, 780:6-9. Transcript of hearing on 14 August 2020 [TRA.500.008.0001] T869:11-13, 17-19. Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1307:16-18.

⁴³⁹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1356:15-1357:22.

- (e) was left out of communications about the terms of the Trust Co Settlement Deed, and did not seek to involve himself in those communications;⁴⁴⁰
- (f) on his own admission, only “skim read” the Third Trimbos Report;⁴⁴¹
- (g) was not provided with the various drafts of the First Bolitho Opinion, save for the final version when he was asked to file it;⁴⁴²
- (h) on his own admission, did not read the First Bolitho Opinion before he filed it;⁴⁴³
- (i) had no skills or experience in class actions;⁴⁴⁴
- (j) was unfamiliar with the Money Max principles referred to in the First Bolitho Opinion;⁴⁴⁵
- (k) was not invited to the “Banksia Wrap Up Meeting” on 14 November 2017;⁴⁴⁶
- (l) was told what to say in his dealings with group members in a script drafted for him by Alex Elliott,⁴⁴⁷ and/or was told to direct such enquiries to Alex Elliott;⁴⁴⁸
- (m) undertook no legal research or analysis at all;⁴⁴⁹
- (n) prepared no memorandum of advice⁴⁵⁰ or other legal analysis;⁴⁵¹
- (o) by his own admission, exercised no independent judgment on the matter;⁴⁵²

440 Mr Zita’s April 2020 affidavit [CCW.036.001.0001], [207] – [228], [442]-[443];
Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 821:16-828:10, 851:25-30;
Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1348:24-1349:23

441 Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [168] and [243];
transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:21-22, 893:23-25.

442 Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [303] – [307], [320], [323] – [324],
[333].

443 Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:2.

444 Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [91] - [93].

445 Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [310].

446 [SYM.001.001.4401].

447 [ABL.001.0594.00005] [ABL.001.0594.00006]; [ABL.001.0627.00038] [ABL.001.0627.00039]
[ABL.001.0627.00040].

448 [CBP.001.006.4733]; Transcript of hearing on 26 November 2020 [TRA.500.013.0001],
1334:6-1339:22.

449 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1351:23-1352:10.

450 Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 906:10.

451 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1355:25-1356:14.

452 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-16.
Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 848:10-14.

(p) was unable to plausibly describe any substantive contribution he made to the case as solicitor on the record.⁴⁵³

182 Notably, **Mr Zita was directed to send enquiries received from group members to Alex Elliott**, and in written communications, group members were provided with contact details for “Portfolio Law”, but their telephone calls and emails were in fact routed directly or indirectly to Elliott Legal.⁴⁵⁴ In cross-examination, Mr Zita was taken to documentary evidence of enquiries that were received at Portfolio Law’s own offices, which were sent to him by **administrative staff**, and which he **forwarded to Alex Elliott**.⁴⁵⁵ When asked why one of his administrative employees did not handle those enquiries, Mr Zita said: “**that wasn’t her role, she was just the receptionist**”.⁴⁵⁶ He agreed that group members expected their queries to be handled by someone from Portfolio Law⁴⁵⁷ within the legal team⁴⁵⁸ – not by a “**personal assistant**”.⁴⁵⁹

A7. Alex Elliott was a solicitor for and/or officer or agent of AFP

183 The Court should find that:

- (a) Alex Elliott was his father’s “right hand man”;
- (b) he provided support and assistance to both AFP and Elliott Legal;
- (c) he thereby provided support and assistance to Mr Bolitho and group members, and exercised control or influence over the conduct of the Bolitho Proceeding or of Mr Bolitho and group members in respect of that proceeding (within the meaning of s10(1)(d) of the CPA); and
- (d) in assisting with the affairs of AFP and Elliott Legal, he thereby acted as a legal representative or other representative for or on behalf of Mr Bolitho and group members (within the meaning of s10(1)(d) of the CPA).

⁴⁵³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:847:17, 905:28-23.

⁴⁵⁴ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1334:6-1338:23, 1343:1-1344:31.

⁴⁵⁵ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1337:8-1344:31; [CBP.001.006.4734] [CBP.001.006.5841] [CBP.001.006.5815] [CBP.001.006.8095] [CBP.001.006.7752] [CBP.001.006.4725] [CBP.001.006.8056] [CBP.001.006.5844] [CBP.001.006.5845] [CBP.001.006.7200] [CBP.001.006.8220].

⁴⁵⁶ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1340:2-6.

⁴⁵⁷ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:28-31.

⁴⁵⁸ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:10-13.

⁴⁵⁹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:7-9.

184 The following matters are noteworthy.

185 **First**, Mr Zita’s evidence under cross-examination in August 2020 was that Alex Elliott was his father’s “right hand man”.⁴⁶⁰ The attempt by Alex Elliott’s senior counsel to qualify his evidence given under cross-examination as limited to “*the involvement that you described in your affidavits*” was unconvincing.⁴⁶¹ The Court should find that Mr Zita’s evidence under cross-examination about Alex Elliott’s role was given on the basis of his own recollection of events, informed by his own direct observation of the totality of the interactions between Mark and Alex Elliott, and not through the narrow prism of what he had described in an affidavit he swore many months earlier.

186 **Second**, incontrovertible facts reveal that Alex Elliott was his father’s “right hand man”. On his own evidence, he went along with his father to all meetings his father attended, and assisted his father in all his various businesses.

187 The best example of Alex Elliott’s role as his father’s “right hand man” relates to the drawing of the cheques in June 2018. Following the first day of hearing in the Botsman Appeal on **8 June 2018**, Whelan JA asked pointed questions of Mr O’Bryan about Third Trimbo’s Report and the fee notes attached to that report, which he said he had read. Mark Elliott went on holiday that night. On **10 June 2018**, Mr O’Bryan sent an email to Mark Elliott stating:⁴⁶²

“Having regard to what Whelan said on Friday about our bills & legal costs, I think it is vitally important that AFP pays MS & PL in respect of the accounts that Trimbo’s has opened on, so that I can confirm to the court when asked (which I now think highly probable) that they have been paid. If I am asked on 19/6, I will need to be able to answer yes very quickly, since MS & TZ will be in court. Let me know if this causes any problem.”

188 On **11 June 2018**, Mark Elliott forwarded that email to Alex Elliott, stating:⁴⁶³

“Alex, I think we should draw cheques to MS and PL. Use old BSL cheque book. Date cheques 1 August 2018. Use Trimbo’s report to get \$ amounts correct. Put in envelopes marked ‘do not open until you talk to MEE’. Give to each of TZ and MS before 19 June. Let’s discuss.”

⁴⁶⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

⁴⁶¹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1315:14 – 1316:7, 1317:19 – 1318:14..

⁴⁶² [ABL.001.0601.00003].

⁴⁶³ [ABL.001.0601.00003].

- 189 Alex Elliott thereafter drew cheques for nearly **\$1 million** and signed them with his father's signature at his father's direction. Contrary to Alex Elliott's denial in the witness box, that was the job of a "right hand man".⁴⁶⁴
- 190 **Third**, Alex Elliott gave evidence in AFP v Botsman that he "*commenced employment with [AFP] in 2014*".⁴⁶⁵ In his evidence in this proceeding, he sought to qualify the evidence he gave in AFP v Botsman: he said that he ceased employment with AFP in around February or March 2015,⁴⁶⁶ when the book building activities were completed. But he did not qualify his witness statement in that way. And even on his own case, he continued to assist AFP in its dealings with debenture holders throughout the litigation. It was unclear why, on his case, he should be treated as an "employee" of AFP for the 2014/15 period, but not in any later period.
- 191 **Fourth**, the documentary evidence reveals (and the Court should find) that Mark Elliott routinely consulted Alex Elliott about the conduct of the affairs of AFP and Elliott Legal, including in relation to the Bolitho Proceeding, and that Mark Elliott valued his son's opinion. The best example of this relates to their 14 June 2018 email exchange about the letter Mark Elliott wanted to send to the SPRs terminating the Settlement Deed.⁴⁶⁷ Alex Elliott cautioned his father not to terminate the Settlement Deed, and queried whether AFP could do so in circumstances where it represented 5,600 group members pursuant to the Funding Agreement.⁴⁶⁸ It is evident from this exchange that Alex Elliott was exercising control or influence over the conduct of the Bolitho Proceeding, and was exercising an active role in seeking to influence the conduct of AFP who acted as representative for Mr Bolitho and group members in that proceeding.

A8. Alex Elliott's complicity in the misconduct of AFP and the Lawyer Parties in connection with the Trust Co Settlement

- 192 The case that Alex Elliott sought to advance at trial was that he was unaware of any impropriety in connection with the Trust Co Settlement, and that he positively

⁴⁶⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2025:9-2026:27.

⁴⁶⁵ [AFP.100.011.0001].

⁴⁶⁶ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1659:19-26.

⁴⁶⁷ [AEL.100.058.0001].

⁴⁶⁸ [AEL.100.058.0001].

believed in the integrity of his father, Mr O'Bryan, and Mr Symons in relation to the Trust Co Settlement.⁴⁶⁹

193 The Court should reject that evidence, and should find that Alex Elliott subjectively intended to assist his father in a course of conduct that was objectively dishonest according to the standards of ordinary and reasonable people. In particular, the Court should find that:

- (a) On **18-20 November 2017**, Alex Elliott was involved in discussions with AFP's accountant Mr De Bono from which he knew that the only invoices recognised in AFP's draft FY2017 accounts were those issued by the Lawyer Parties at the time of the Partial Settlement.⁴⁷⁰
- (b) Alex Elliott thereafter assisted his father to prepare the "Banksia Expenses Spreadsheet",⁴⁷¹ which included an "**INVOICE YES/NO**" column which stated that no invoices had been received for Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law.
- (c) On **24 November 2017**, Alex Elliott emailed his father about chasing Portfolio Law for invoices.⁴⁷²
- (d) On **24 November 2017**, Alex Elliott updated the Banksia Expenses Spreadsheet to record Mr O'Bryan's fees in a sum that was quite different from that shown in the first iteration of the Banksia Expenses Spreadsheet, and thus knew that the figure inserted in the **21 November 2017** version of the spreadsheet was not the final figure and had changed since then.⁴⁷³
- (e) On **24 November 2017**, Alex Elliott was copied to an email from Mr O'Bryan in which he said he would ask his secretary to "*amend accounts accordingly*".⁴⁷⁴

⁴⁶⁹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1665:1-1666:8, 1668:5-13, 1670:18-23.

⁴⁷⁰ [ABL.001.0600.00007]; [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024; Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:20-28; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:21-2110:30 (Alex Elliott did not deny that the meeting occurred, but said he could not recall it).

⁴⁷¹ [AFP.007.001.0001] [AFP.007.001.0002].

⁴⁷² [ABL.001.0599.00009].

⁴⁷³ [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011].

⁴⁷⁴ [SYM.001.001.4890].

- (f) **All this time, Alex Elliott was preparing a tabulated, hard copy folder of invoices**⁴⁷⁵ to brief to Mr Trimbo.⁴⁷⁶ He therefore knew which invoices were missing and when they were received.
- (g) On **29 November 2017**, Alex Elliott was copied into another email with Mr De Bono and Mark Elliott, forwarding an email from the auditor, in which the auditor referred to the “no win no fee” agreements received from Mr O’Bryan and Mr Symons and sought confirmation that those arrangements remained in place, and Mr De Bono advised: *“I expect the arrangements to stay in place as was last year”*.⁴⁷⁷ Alex Elliott claimed to have no recollection of the email and inexplicably contended that *“I didn’t think Michael or Norman were on a no win no fee”*.⁴⁷⁸
- (h) As late as **8 December 2017**, Mark Elliott copied Alex Elliott to an email in which he pressed Mr Symons, Mr Zita and Mr O’Bryan for their invoices.⁴⁷⁹
- (i) **On about 11 December 2017**, Alex Elliott finally received invoices for Mr O’Bryan⁴⁸⁰ and Portfolio Law,⁴⁸¹ and on **12 or 13 December 2017**, he delivered the folder to Mr Trimbo,⁴⁸² as soon as it was complete.
- (j) It follows (and the Court should find) that **Alex Elliott knew that the Lawyer Parties issued their invoices in respect of the Relevant Period only in November/December 2017**. The Court should reject Alex Elliott’s evidence to the contrary.⁴⁸³

⁴⁷⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15.

⁴⁷⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2130:8-13.

⁴⁷⁷ [ABL.001.0703.00068]; [MAZ.004.001.0423].

⁴⁷⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1698:1-1701:3; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2105:6-2108:16.

⁴⁷⁹ [SYM.001.002.8281]; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2154:29-2155:24 (Alex Elliott only conceded that it was “possible” that his father was pressing for the invoices in that email, but the Court should find that is the plain meaning of the email).

⁴⁸⁰ Alex Elliott said he received Mr O’Bryan’s invoices that he gave to Mr Trimbo *“some time in early or mid-December”* (transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2133:15-18). Metadata shows that Mr O’Bryan finalised his invoices on **11 December 2017**: [NOB.503.001.0162] [NOB.503.001.0159] [NOB.503.001.0154] [NOB.503.001.0148] [NOB.503.001.0142] [NOB.503.001.0139] [NOB.503.001.0138] [NOB.503.001.0130] [NOB.503.001.0128] [NOB.503.001.0125] [NOB.500.001.7273] [NOB.500.001.7272].

⁴⁸¹ [SYM.001.002.5447] [SYM.001.002.5449];

⁴⁸² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2152:3-26.

⁴⁸³ [TRI.001.006.0001].

⁴⁸³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2127:11-20, 2128:8-11, 2132:10-30, 2135:15-2136:1.

- (k) Alex Elliott therefore knew that AFP had **first**, agreed to a total figure in respect of legal costs with Mr Lindholm;⁴⁸⁴ **second**, prepared a spreadsheet with a list of expenses which together matched that agreed figure,⁴⁸⁵ **third**, sent that spreadsheet to Mr O'Bryan and Mr Symons for their "**information**" and "**comments**", and **fourth**, received invoices from the service providers closely proximate to the final figures used in the spreadsheet. **An honest solicitor in Alex Elliott's position would think that this sequence of events was highly irregular.**
- (l) Alex Elliott conceded the obvious point that AFP had a duty to group members to scrutinise the legal costs.⁴⁸⁶ But he did not scrutinise the fee slips himself,⁴⁸⁷ and was **completely indifferent to whether there was a proper basis for the costs sought to be recovered**,⁴⁸⁸ in circumstances where it must have been obvious to him that his father was, **at best**, likewise indifferent to the scrutiny of the costs. Indeed, he knew that his father had invited counsel to maximise their fees by charging cancellation fees, to the detriment of group members.⁴⁸⁹ An honest solicitor in Alex Elliott's position would have thought it irregular and improper for AFP to support a cancellation fee which was not provided for in counsel's fee agreements.
- (m) Alex Elliott said that he regarded it as the role of the expert cost assessor to determine whether the fees were fair and reasonable.⁴⁹⁰ But he knew that the cost assessor relied upon the integrity of the invoices and fee slips provided to him.⁴⁹¹ Alex Elliott provided the cost assessor with the invoices and fee slips in circumstances where **he knew there were irregularities in the way those fees had been quantified**, and where **neither he nor his father cared about the veracity of those fees**, because (as he knew) AFP had not been required to pay them.⁴⁹²

⁴⁸⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2073:21-25.

⁴⁸⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2118:2-16.

⁴⁸⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2131:20-21.

⁴⁸⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:16.

⁴⁸⁸ See eg transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:14-21.

⁴⁸⁹ [TRI.001.006.0072];

Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1741:29-1742:10;

Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2144:21-2145:10.

⁴⁹⁰ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:14-21.

⁴⁹¹ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:22-24.

⁴⁹² The Court should find that Alex Elliott knew that AFP had not paid the costs in circumstances where: (1) he knew the invoices were issued only in November/December 2017; (2) he was involved in discussions with Mr De Bono on 18-20 November 2017 in which Mr De Bono made it plain that the only costs that had been expensed (paid) in FY2017 were the costs

- (n) Alex Elliott read the Third Trimbos Report.⁴⁹³ He must therefore be taken to have read the statements in the Third Trimbos Report about Mr O’Bryan charging 65 days in trial preparation time. He knew that the Lawyer Parties had begun their trial preparation work only in the second half of 2017.⁴⁹⁴ **He did not seek to critically examine Mr O’Bryan’s trial preparation charges at that time,⁴⁹⁵ or indeed, at any time.⁴⁹⁶**
- (o) **The funding commission sought by AFP was a very good outcome for AFP, and indeed, for the Elliott family,⁴⁹⁷** which held 76 per cent of the shares in AFP via corporate entities including Decoland Holdings Pty Ltd (**Decoland**), which was the trustee of two trusts⁴⁹⁸ of which Alex Elliott was and remains a beneficiary.⁴⁹⁹
- (p) Alex Elliott knew that AFP was seeking a common fund order⁵⁰⁰ and that funding risk was relevant to the Court’s assessment of that claim.⁵⁰¹ He had read the decision in *Money Max*⁵⁰² and other relevant decisions.⁵⁰³ He described the *Money Max* decision as “*a big moment in time*” in the litigation funding industry.⁵⁰⁴ He can therefore be taken to have known that one of the *Money Max* factors was “***the legal costs expended and to be expended... by the funder***”.⁵⁰⁵
- (q) It cannot have escaped Alex Elliott’s attention that Mr O’Bryan and Mr Symons produced all of their invoices to appear as if they had been issued monthly.⁵⁰⁶ He likewise must have noticed that Mr O’Bryan’s invoices were

billed up to the time of the Partial Settlement; (3) he was his father’s right hand man and would have been privy to the details of his father’s business model, which affected the financial interests of his whole family; and (4) his evidence that he did not know whether or not the Lawyer Parties had been paid was given evasively and lacked credibility. These matters are addressed in **Part 4, section F5.2** below.

493 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12.
 494 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23.
 495 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:15.
 496 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2165:12-16.
 497 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:6-15.
 498 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:16-31.
 499 Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1599:3-12, 1601:23-1602:1; [MAZ.005.001.0001].
 500 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.
 501 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.
 502 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.
 503 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.
 504 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.
 505 *Money Max* at [80.f].
 506 [CBP.001.010.5957] at .6155 - .6282.

stamped as “PAID”.⁵⁰⁷ He therefore knew that the invoices conveyed a false impression. He was completely indifferent to these irregularities.

- (r) Alex Elliott must also be taken to have read the statements in the Third Trimbos Report drawing a distinction between “*costs incurred to date*” or “*fees marked to date*” (on the one hand), and “*anticipated*” or “*prospective*” fees “*to finalise the matter*” (on the other),⁵⁰⁸ and the statements in the First Bolitho Opinion (which he also read)⁵⁰⁹ which implied that AFP had paid those costs apart from the “anticipated” or “prospective” costs of attending to the settlement approval.⁵¹⁰ He must be taken to have read the statements in the First Bolitho Opinion that the legal costs were “**a significant expense to [AFP]**” and that “**the magnitude of this funding risk justifies the Funder's Commission now sought.**”⁵¹¹
- (s) Alex Elliott read the summons seeking approval of the settlement in draft form, and therefore must be taken to have known that it referred to a claim for “*reimbursement*” of legal costs.⁵¹² He conceded that, at least in hindsight, **the summons was misleading.**⁵¹³
- (t) Alex Elliott knew that the First Bolitho Opinion opined that AFP’s funding commission should be assessed on the basis that the total settlement value was **\$75 million**, including an asserted value for the release of the Trust Co Remuneration Claim of **\$11 million.**⁵¹⁴ That figure conflicted with information that his father had given him about the value of the claim.⁵¹⁵ He was indifferent to resolving the discrepancy.⁵¹⁶
- (u) In short, Alex Elliott was indifferent to whether the Court was presented with accurate and correct information about the claims for costs and

⁵⁰⁷ [CBP.001.010.5957] at .6155 - .6244.

⁵⁰⁸ [CBP.001.010.5957], paras [55], [71], [82], [100]-[101], [121]-[122], [164]-[168].

⁵⁰⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:11-14 (he only conceded that he read “parts” of the opinion).

⁵¹⁰ [SYM.005.001.1400], paras [134], [145], [183].

⁵¹¹ [SYM.005.001.1400], para [183].

⁵¹² [SYM.001.001.8817] [SYM.001.001.8840].

⁵¹³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2173:12-14.

⁵¹⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:6-22; First Bolitho Opinion [SYM.005.001.1400], paras [55.b], [84.d], [85], [87] – [88], [120].

⁵¹⁵ [ABL.001.0627.00039] (third page);

⁵¹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:2-9.

⁵¹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:3-31, 2056:29-2057:23.

commission, and indeed, he knew there were irregularities in the presentation of those claims, but chose to do nothing.

- (v) This conclusion is fortified by reference to the evidence of Alex Elliott's state of mind and conduct after the First Approval Application. For instance, Alex Elliott was in Court while Whelan JA pointedly questioned Mr O'Bryan about the fee notes annexed to the Third Trimbos Report. In that context, his father sent him Mr O'Bryan's emails conveying his concern that, having regard to Whelan JA's questions, it was "*vitaly important that AFP pays MS & PL*".⁵¹⁷ His father asked Alex Elliott to address those concerns by drawing sham cheques to Mr Symons and Portfolio Law – a highly irregular request⁵¹⁸ about which he rightly felt uneasy.⁵¹⁹ **An honest solicitor would at that point revisit the fee notes annexed to the Third Trimbos Report to form their own view about whether there was any substance to the issue raised by Mrs Botsman.** Yet on Alex Elliott's own evidence, he did not do so at that time,⁵²⁰ **even though he had to consult the Third Trimbos Report anyway, for the purpose of identifying the sum for which he should draw the sham cheques.**⁵²¹ His actions are not consistent with his position that he held an honest belief in the veracity of the claim for costs and commission advanced at the time of the First Approval Application. **Rather, they are consistent with an unwavering indifference to the veracity of that claim.** On his own concession, he had enough information to identify that there had been a deception on the Court.⁵²² His actions reveal, and the Court should find, that **he did not care.**

194 At its base, Alex Elliott's case appears to be that he should be permitted by this Court to engage in the wrongs alleged because he was a junior lawyer overborne, not by his duties to the Court and the debenture holders, but by his father and the Lawyer Parties whose conduct he admired.⁵²³

⁵¹⁷ [ABL.001.0601.00003].

⁵¹⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:2.

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:5-14.

⁵¹⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2023:7-18.

⁵²⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1994:13-29.

⁵²¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:22-31.

⁵²² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

⁵²³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1664:23-1665:19, 1665:25-1666:8, 1667:10-21, 1668:5-13, 1670:6-23, 1774:17-23.

195 The Court should not permit Alex Elliott to escape responsibility under the rubric of an excuse that he was a junior solicitor being mentored by his father who was his principal solicitor, and by an unsavoury silk and junior counsel. All officers of the Court are trained in their professional duties, and their paramount duty to the Court is not diminished by their seniority or experience, or lack thereof. To countenance the submission that his youth diminished his responsibilities is offensive to the overwhelming majority of junior practitioners who take their oath of office with the gravity that it warrants, and who show themselves capable of adhering to the ethical standards demanded by that office.

A9. Findings the Court should make

196 The Court should find that, at all relevant times from about **13 December 2016** when he was admitted to practise:

- (a) Alex Elliott worked as Mark Elliott’s “right hand man” for both AFP and Elliott Legal.⁵²⁴
- (b) Alex Elliott was involved in the conduct of the Bolitho Proceeding in his professional capacity as a solicitor and director of Elliott Legal,⁵²⁵ as was Mark Elliott, despite the Court having ruled that Mark Elliott could no longer act as solicitor on the record, and despite Mark Elliott filing a notice of ceasing to act.
- (c) Alex Elliott knew that Mr Zita/Portfolio Law acted as little more than a “post box” solicitor.
- (d) In addition to acting in the capacity as a junior solicitor on the Banksia litigation, Alex Elliott acted as a solicitor for AFP in the pursuit of its financial interests, which were practically indistinguishable from his own interests given his family’s significant financial stake in the litigation,⁵²⁶ his beneficial

⁵²⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T934:18-935:2.
⁵²⁵ Alex Elliott was copied to emails about the Partial Settlement from March/April 2016 onwards [CBP.004.003.6080] [CBP.001.006.6606]. The summons seeking approval of the Partial Settlement was filed on 2 June 2016 by Alex Elliott on behalf of AFP and Portfolio Law [CBP.004.004.1652] [CBP.004.004.1653]; see AFP’s admissions [PLE.020.001.0001], para [31]. Thereafter Alex Elliott was copied extensively to emails, and these are readily identifiable by conducting a search of the Contradictors’ chronologies. See further Alex Elliott’s admissions [PAR.080.001.0001], para [40.b.ii].

⁵²⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:14-15 (Alex Elliott confirmed that the settlement was a good outcome for his family).

interest in the Elliott Equity Investment Trust in which a large part of his family's shares in AFP were held,⁵²⁷ and his father's effective control of the litigation.

- (e) Although Alex Elliott acted under the direction of his father, he was capable of identifying ethical problems with the course charted by his father, Mr O'Bryan and Mr Symons in the conduct of the litigation, such as those he raised for discussion with his father in June 2018,⁵²⁸ but **he chose to ignore such problems** and his professional duties at the expense of his own professional integrity.

B. **Mr O'Bryan** and Mr Symons

- 197 From about December 2012 to 29 March 2019, Mr O'Bryan acted as senior counsel for Mr Bolitho and/or group members in the Bolitho Proceeding. He was throughout that period a senior counsel of many years standing. He had a pedigreed and privileged background, and was steeped in understanding of legal practice and professional duties. He was a member of the Order of Australia.
- 198 From about September 2014 to about April 2019, Mr Symons acted as junior counsel for Mr Bolitho and/or group members in the Bolitho Proceeding. He was an astute junior barrister with a financial background.⁵²⁹ He had served as an associate in this Court.⁵³⁰
- 199 In light of the 29 March 2019 Affidavit Order, Mr O'Bryan and Mr Symons returned their briefs.⁵³¹ Despite that, documentary evidence revealed that they continued to consult with Mark Elliott and Alex Elliott about the strategic course of this remitter.⁵³² They were thoroughly entwined with the affairs of Mark Elliott and AFP.
- 200 The first move of Mr O'Bryan and Mr Symons in response to the 29 March 2019 Affidavit Order and the allegations raised was to seek to defeat those allegations on technical and procedural grounds, and to set aside the order requiring them to provide the Court with an explanation for their conduct.

⁵²⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:15-31.

⁵²⁸ [AEL.100.058.0001]; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2034:5 – 2040:26.

⁵²⁹ [SYM.001.003.2057] [SYM.001.003.2059].

⁵³⁰ [SYM.001.003.2059].

⁵³¹ Transcript of hearing on 29 March 2019 [TRA.510.015.0001].

⁵³² [NOB.500.007.0275] [NOB.500.007.2078].

- 201 Incongruously and disingenuously, at that hearing, Mr Symons, though his senior counsel, submitted that Mr Symons “*recognises his duty to the court and seeks to ensure that the court is in possession of all the assistance reasonably required for the conduct of the remitter.*”⁵³³ In defiance of that assurance, Mr Symons never provided the Court with a frank explanation of the events in issue in this remitter, and never offered the Court or the debenture holders any apology. The Court should find that Mr Symons’ only regret was that he got caught out.
- 202 The Court should find that both Mr O’Bryan and Mr Symons knew throughout the remitter that the facts were against them. In the meantime, they put their former clients, the debenture holders, to the expense of proving that they had not undertaken the work to justify the fees they had charged, and that they had deceived the Court in their effort to recover exorbitant sums for their real client, AFP.
- 203 Following their joinder to the proceeding, Mr O’Bryan and Mr Symons filed several affidavits purporting to advance their defences, only to abandon their affidavits and their defences midway through the trial, after substantially all the expense of the remitter had been incurred. They did not offer any explanation for the conduct alleged against them or why they held out until the very end, at such expense to the 16,000 debenture holders who were their former clients. It should be remembered that these men are no ordinary litigants. They are men well versed in the processes and intricacies of the law and class actions in particular. That knowledge and understanding makes their conduct all the more galling and egregious. Their conduct has to be viewed from the prism of an insider, who deceived the Court and their clients in the arrogant and defiant belief, until the eleventh hour, that their conduct would go undetected.
- 204 Mr O’Bryan’s conduct as senior counsel, a member of the inner Bar, and an officer of the Order of Australia deserves the strongest condemnation, as it has the effect of undermining the public’s confidence in the integrity of legal practitioners, who are afforded the privilege of acting as fiduciaries for their clients, and who enjoy a special relationship of trust with the Court by virtue of their position as lawyers. His breach of trust is all the more egregious because of his seniority, and his standing and influence over all those lawyers in the Banksia Proceeding, whom he sought

⁵³³ Transcript of hearing on 29 May 2019 [TRA.510.001.0001], 155:22-25.

to influence with the force of his demeanour and standing. The scale and the brazenness of his conduct was breathtaking.

205 It should also be noted that the cross-examination of Mr Newman and Mr Samuel by Mr Symons' senior counsel on **4 August 2020**⁵³⁴ (the day after Mr O'Bryan's capitulation)⁵³⁵ was presumably advanced on the basis of Mr Symons' instructions set out in his affidavits which he expressly abandoned and did not tender when conceding the case against him **two days** later.⁵³⁶ In those circumstances, the cross-examination of both witnesses should be entirely disregarded.

206 The failure of Mr O'Bryan and Mr Symons to give evidence provides a **strong** basis for the Court to:

- (a) infer that any evidence they might have given would not have assisted them or AFP; and
- (b) more confidently draw against them adverse inferences that are available from other evidence tendered in the case.

B.1 Mr O'Bryan's discovery affidavit

207 On **24 April 2020**, Mr O'Bryan was ordered to discover evidence of his work product. That led to his discovery affidavit sworn on **20 May 2020**,⁵³⁷ **two months** prior to the commencement of trial. In that affidavit, Mr O'Bryan purported to assert that his work product in the period from 1 June 2016 to 30 January 2018 (**Relevant Period**) was evidenced by **46 hard copy folders**.⁵³⁸ That was the first occasion on which that evidence was revealed.

208 In circumstances where Mr O'Bryan ultimately did not give evidence in his own defence, Mr O'Bryan's attempt to confront the question of his work product is confined to the discovery affidavit that he swore.

209 The Court should find that Mr O'Bryan's evidence in that affidavit was false, for the following reasons.

⁵³⁴ Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 597:31-601:24 (Mr Samuel), 634:9-649:19 (Mr Newman).

⁵³⁵ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:9-486:24.

⁵³⁶ [MSC.010.083.0001].

⁵³⁷ [CCW.016.001.0013].

⁵³⁸ [CCW.016.001.0013] at .0032 (Schedule 1, Part 2).

- 210 **First**, if the 46 volumes had supported Mr O’Bryan’s case, it beggars belief that they would not have been discovered two years earlier, in an endeavour to promptly answer the serious allegations levelled against him.
- 211 **Second**, the case as opened by the Contradictors⁵³⁹ was that the **46 folders** largely existed **prior** to the Relevant Period, and largely comprised evidence of work product in the period prior to 1 July 2016. The case as opened by the Contradictors was that:
- (a) Mr O’Bryan had done a significant amount of work on the case prior to 1 July 2016.⁵⁴⁰
 - (b) Mr O’Bryan had about **49 folders** in his chambers as at 1 July 2016.⁵⁴¹
 - (c) Many of the documents in the **46 folders** were included in the materials briefed to Mr Trimbo in **July and August 2016**.⁵⁴²
- 212 **Third**, Mr O’Bryan ultimately did not seek to tender any of the 46 folders into evidence.
- 213 **Fourth**, following the Contradictors’ opening, Mr O’Bryan abandoned his affidavits and his defence to the Contradictors’ allegations of overcharging. He expressly abandoned any claim for unpaid fees. He did not seek to rely upon his affidavits, and did not make himself available for cross-examination in his case.
- 214 The Court should find that Mr O’Bryan’s claim for fees for “trial preparation” work in the Relevant Period had no basis in work he undertook in the Relevant Period. Mr O’Bryan’s conduct with respect to the **46 hard copy folders** provides yet a further example of the defiant tone he adopted until the end of the Contradictors’ opening of the case against him. He was content to put the Contradictors (and thereby his former clients) to the expense of trawling through those folders on the premise that they offered proof of the work allegedly done, when it is plain that they did not, and which he must have always known.

⁵³⁹ [TRA.500.004.0001] T341:10-348:16.

⁵⁴⁰ See [SYM.002.001.2040] [SYM.002.001.2014], being a Dropbox listing of documents briefed to Mr Trimbo on 30 June 2016 evidencing that Mr O’Bryan and his juniors had undertaken significant work on the matter up to that time.

⁵⁴¹ [NOB.500.012.3839]; [TRA.500.004.0001] 347:8-26.

⁵⁴² See [SYM.002.001.2040] [SYM.002.001.2014] and [TRA.500.004.0001] 345:6-347:7.

B.2 Mr O'Bryan's evidence in Alex Elliott's case

- 215 Following the joinder of Alex Elliott to the proceeding, Mr O'Bryan gave evidence in Alex Elliott's defence.
- 216 It is noteworthy that Mr O'Bryan did not enter the witness box as an unwilling witness. Senior counsel for Alex Elliott had conferred with Mr O'Bryan on 5 November 2020, **prior** to serving a subpoena on him requiring him to attend.⁵⁴³ There was a close friendship between Mr O'Bryan and Mark Elliott, cemented in their time as partners at Minter Ellison, and those bonds of friendship extended to Mr O'Bryan's son clerking at Elliott Legal.⁵⁴⁴ The Court should find that Mr O'Bryan was a witness who was willing to assist the cause of Alex Elliott.
- 217 In this context it should be recalled that there was debate about the evidence that Alex Elliott sought to lead from Mr O'Bryan,⁵⁴⁵ much of which appeared to be an attempt to substantially if not completely reopen the case that Mr O'Bryan had conceded.⁵⁴⁶
- 218 Those background matters contextualise Mr O'Bryan's evidence and inform the weight to be afforded to his efforts to confine Alex Elliott's role to "*the interactions between the litigation funding company and the debenture holders*".⁵⁴⁷
- 219 However, Mr O'Bryan's evidence was significant insofar as he said that Alex Elliott attended numerous conferences in his chambers⁵⁴⁸ which were held for the purpose of discussing legal issues.⁵⁴⁹ **That evidence is corroborated** to the extent that Alex Elliott had an independent recollection of some of those conferences⁵⁵⁰ and confirmed that it was "usual practice" to have a conference at Dawson Chambers before and/or after all directions hearings in the matter.⁵⁵¹

⁵⁴³ [MSC.010.105.0001].

⁵⁴⁴ See: (1) John White Report in the Webster v Murray Goulburn class action [CCW.018.004.0001] at .0028, .0030 (para [136.iii]), .0038, .0050 (para [228]); and (2) [MAZ.002.001.0083] at .0094 (AFP's "Class Action Account List" for the Myer class action).

⁵⁴⁵ Transcript of hearing on 27 November 2020 [TRA.500.014.0001], 1397:22-1471:17;

Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1423:12-1433:31.

⁵⁴⁶ [MSC.010.101.0001] ("*The Fifth Defendant will tender the affidavits of Mr O'Bryan in this matter dated 7 April 2020 (CCW.034.003.0284) and 16 June 2020 (CCW.035.001.0001)*");

Transcript of hearing on 27 November 2020 [TRA.500.014.0001], 1397:22-1471:17;

Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1425:27-1426:30.

⁵⁴⁷ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-1458:9.

⁵⁴⁸ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-31, 1460:14-1461:4.

⁵⁴⁹ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1488:15-1494:19.

⁵⁵⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1770:29-1775:13.

⁵⁵¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

220 In short, the Court should find that Mr O'Bryan's evidence did not advance Alex Elliott's case.

The application to recall Mr O'Bryan

221 Near the conclusion of Alex Elliott's evidence, his senior counsel applied to reopen his case and recall Mr O'Bryan as a witness, on the premise that Alex Elliott had suffered some prejudice or unfairness because Mr O'Bryan had not been asked about an email Mr O'Bryan sent to Mr Symons, Mark Elliott and Alex Elliott on 17 January 2018 regarding the First Bolitho Opinion in which he said: "**How is this progressing, lads?**"⁵⁵²

222 Alex Elliott's senior counsel said:

*"[I]f the inference [is] that Mr O'Bryan is distinctly choosing to email to Alex Elliott, among the other ones, that's again a matter, Your Honour, on which, in my submission Mr O'Bryan could give evidence.... I would prefer not to, but if submissions are going to be made that Mr O'Bryan intended to ask my client to carry out particular work, or that Mr O'Bryan deliberately chose to include my client in email threads because he wanted something from him and because it was a particular work, or that Mr O'Bryan deliberately chose to include my client in email threads because he wanted something from him... it's just a matter of fairness that I should be permitted to ask Mr O'Bryan that."*⁵⁵³

223 Alex Elliott's senior counsel developed that application a short time later,⁵⁵⁴ submitting that "*It's unfair to my client that Mr Jopling didn't cross-examine Mr O'Bryan on these matters when he was in court and could have.*"⁵⁵⁵

224 The application to recall Mr O'Bryan was misconceived as set out below.

Evidence Act, section 46

225 Section 46 provides that the court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence has been admitted and:

- (a) it contradicts evidence about the matter given by the witness in examination in chief; or

⁵⁵² [SYM.001.002.3778].

⁵⁵³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2157:19-2158:4.

⁵⁵⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2187:20-

⁵⁵⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2189:13-15.

- (b) the witness could have given evidence about the matter in examination in chief.

No inconsistency with Mr O'Bryan's evidence (section 46(a))

- 226 The finding sought by the Contradictors on the basis of the 17 January 2018 email is that Alex Elliott reviewed the First Bolitho Opinion in a professional legal capacity and provided comments.⁵⁵⁶ The 17 January 2018 email is expressly referred to in the RLOI dated 27 October 2020 in support of that allegation, and was expressly referred to in the Contradictors' opening.⁵⁵⁷
- 227 The 17 January 2018 email supports those findings, because:
- (a) Mr O'Bryan collectively addressed the email to Mr Symons, Mark Elliott and Alex Elliott, and asked them: *"How is this progressing, lads?"* **"Lads"** can only be understood to refer to all three recipients of the email.
- (b) Mark Elliott replied to that email stating: *"MS has done a great job. We have provided minor comments."* **"We"** can only be understood to refer to **both him and his son.**
- 228 These obvious and inevitable conclusions about the 17 January 2018 email are not inconsistent with any evidence that Mr O'Bryan gave in examination in chief. Indeed, he was not asked about the 17 January 2018 email in examination in chief.
- 229 Mr O'Bryan's oral evidence in chief was given in terms of sweeping generality, because he was asked questions in terms of sweeping generality, and not taken to particular documents by Alex Elliott's senior counsel. Mr O'Bryan gave evidence as follows:⁵⁵⁸

*"My best recollection is that Alex Elliott was not involved in any respect prior to the partial settlement in 2016 and that he thereafter became involved in the class action in the sense that **he certainly attended a number of conferences in my chambers, which I shared with Mr Symons and based on what I observed of him and what he was doing, his involvement seemed mostly to have to do with communications between the litigation funding company and the debenture holders, and he - the comments that he made when he attended those conferences related to topics to do with the interactions between the litigation funding company and the***

⁵⁵⁶ [PLE.010.005.0001], paras [30A.b], [30B], [30C], particular (H) and [102].

⁵⁵⁷ Transcript of hearing on 2 November 2020 [TRA.500.011.0001], 1179:14-26.

⁵⁵⁸ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-1458:9.

debenture holders, things like the notices that were being sent, the enquiries that were being received.”

- 230 The questions that Alex Elliott’s senior counsel thereafter directed to Mr O’Bryan in his evidence in chief related to Alex Elliott’s attendances at conferences,⁵⁵⁹ save for two emails⁵⁶⁰ he asked Mr O’Bryan about, which did not include the 17 January 2018 email. **The 17 January 2018 email relates to a task discussed via email, and not to a conference.**
- 231 Alex Elliott’s senior counsel also asked Mr O’Bryan *“to characterise his (Alex Elliott’s) role”*. Mr O’Bryan said that, based on his direct observation of what he observed Alex Elliott saying and doing, *“my observation was that he was assisting the funder in its business, in particular in relation to its communications with debenture holders”*.
- 232 It is conceded by all parties, including Alex Elliott, that Mr O’Bryan and Mr Symons acted for AFP in recovering the costs and commission it claimed from the Trust Co Settlement, and the First Bolitho Opinion supported those payments to AFP.⁵⁶¹ **The 17 January 2018 email relates to “assisting the funder in its business”,** and it does not contradict any evidence that Mr O’Bryan gave.

No relevant evidence could have been given (section 46(b))

- 233 Mr O’Bryan could not have given relevant evidence about whether or not Alex Elliott reviewed the First Bolitho Opinion and provided comments to Mark Elliott and/or to Mr Symons. He could only give evidence about what he directly observed. Section 46(b) is therefore not enlivened.

No unfairness

- 234 Section 46 is a rule of fairness which reflects or overlaps with the common law rule in *Browne v Dunn*.⁵⁶²

⁵⁵⁹ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1460:14-17, 1461:3-4, 1461:10-17, 1462:10-12, 1463:16-1464:27, 1464:30-1465:7, 1465:21-25, 1478:16-1479:17.

⁵⁶⁰ [NOB.500.002.2036] and [CBP.004.005.1309].

⁵⁶¹ See [PAR.080.001.0001] at page 0046-0048, para [51.a], [51.n] and page [0100], para [101].

⁵⁶² (1893) 6 R 67.

235 As Mason P explained in *Scalise v Bezzina*:⁵⁶³

“The rule does not undermine the adversary nature of proceedings or make one party the other’s keeper. Thus, a party who proves facts sufficient to establish a cause of action or a defence upon which that party bears the onus does not have to confront the other side’s witnesses with the issue if they do not address it in their own evidence. To require this would invert that aspect of the rule grounded in what I have described as judicial economy. There is no unfairness in letting the sleeping dog lie and also invoking *Jones v Dunkel* (1959) 101 CLR 298 so long as the moving party has by pleadings or otherwise signalled the matter sought to be proved and led necessary evidence on the topic. There is no need to confront an opponent’s witnesses by cross-examination if they fail to contradict evidence earlier called by the moving party in support of an issue raised in the pleadings or otherwise.”

236 The Contradictors expressly alleged that:

- (a) Alex Elliott was included in emails as if he was another solicitor acting on the matter.⁵⁶⁴
- (b) Alex Elliott provided comments on the First Bolitho Opinion.⁵⁶⁵

237 Both allegations were proved by the documentary evidence tendered by the Contradictors, including the 17 January 2018 email, which is itself expressly referred to in the Revised List of Issues.

238 Alex Elliott’s senior counsel chose to ask Mr O’Bryan about only two emails⁵⁶⁶ that he sent to Alex Elliott, which were email chains initiated by others. Mr O’Bryan said that he presumably replied to those emails using the “reply all” function.⁵⁶⁷ Alex Elliott’s senior counsel did **not** ask Mr O’Bryan about the 17 January 2018 email, or about the preceding email from Mr O’Bryan to Mr Symons copied to Mark and Alex Elliott on 12 January 2018 attaching a draft of the First Bolitho Opinion, where Alex Elliott was copied as a result of a deliberate action by Mr O’Bryan,⁵⁶⁸ which is also referenced in the RLOI.⁵⁶⁹ It was for Alex Elliott’s senior counsel to lead

⁵⁶³ [2003] NSWCA 362, citing *Flower v Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 at 148–9; *Stern & Anor v National Australia Bank Ltd* (2000) 171 ALR 192 at 203 [42].

⁵⁶⁴ [PLE.010.005.0001] at 0024, para [30A.c].

⁵⁶⁵ Transcript of hearing on 2 November 2020 [TRA.500.011.0001], 1179:14-26.

⁵⁶⁶ [NOB.500.002.2036] and [CBP.004.005.1309].

⁵⁶⁷ Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1468:1-1470:21, 1472:2-18.

⁵⁶⁸ [NOB.500.005.2485].

⁵⁶⁹ [PLE.010.005.0001], para [30C] particular (H) and [102].

evidence from Mr O'Bryan to contradict what had already been established by the Contradictors; not the other way around.

239 Indeed, it must be recalled that Alex Elliott's senior counsel told the Court that he had conferred with Mr O'Bryan on 5 November 2020, **prior** to serving a subpoena on him.⁵⁷⁰ Alex Elliott was not prevented from asking questions of Mr O'Bryan about his observations of Alex Elliott's engagement in the matter.⁵⁷¹ It is open to the Court to infer that any evidence Mr O'Bryan might have given about emails that he deliberately sent to Alex Elliott (as distinct from emails he sent using the "*reply all*" function) **would not have assisted Alex Elliott's case.**

C. Mr Zita/Portfolio Law

240 From about December 2014 to about May 2019, Mr Zita/Portfolio Law acted as solicitor for Mr Bolitho and/or group members in the Bolitho Proceeding.

241 Mr Zita swore three affidavits for the purposes of setting out his defence in this remitter.⁵⁷² He was cross-examined on 13, 14 and 17 August 2020, prior to the joinder of Alex Elliott, and on 26 November 2020, after Alex Elliott's joinder.

242 Mr Zita is a solicitor of many years standing. When giving evidence in his own case, he showed an appreciation of the gravity of the matters in issue in this remitter and his own errors. His evidence was in many respects unsatisfactory, but concessions were given, both before trial and in cross-examination.

243 The critical fact to emerge from Mr Zita's evidence is that Mr Zita/Portfolio Law completely abrogated their duties as solicitor for Mr Bolitho and group members, permitting Mark Elliott to have complete control over the litigation. Mr Zita lent his name and that of his firm to be used by Mark Elliott, Mr O'Bryan and Mr Symons exactly as they pleased, and he signed, endorsed, sent and/or filed anything that they put before him, not caring whether there was a proper basis for what he thereby endorsed.⁵⁷³ He consciously allowed himself to be used as a postbox solicitor, and relinquished all his duties and responsibilities to his clients and the

⁵⁷⁰ [MSC.010.105.0001].

⁵⁷¹ Order dated 27 November 2020 [ORD.500.061.0001], para [3].

⁵⁷² Mr Zita's affidavits dated April 2020 [CCW.036.001.0001], June 2020 [CCW.034.006.0001] and July 2020 [LAY.070.002.0001].

⁵⁷³ cf *Meagher* at 675 (addressed further in **Part 4, Sections B and J**).

Court into the hands of the cabal of lawyers whose directions and bidding he, without questioning, acceded to.

- 244 In cross-examination on 17 August 2020, Mr Zita agreed that Alex Elliott was his father’s “right hand man”.⁵⁷⁴ The attempt by Alex Elliott’s senior counsel to qualify Mr Zita’s evidence given under cross-examination as limited to “*the involvement that you described in your affidavits*” was unconvincing.⁵⁷⁵ The Court should find that Mr Zita’s evidence under cross-examination about Alex Elliott’s role was given on the basis of his own recollection of events, informed by his own direct observation of the totality of the interactions between Mark and Alex Elliott, and not through the narrow prism of what he had described in an affidavit he swore many months earlier.
- 245 When giving evidence in Alex Elliott’s case, Mr Zita appeared reluctant to acknowledge that Alex Elliott had a role as a solicitor on the case. For instance, in relation to the 24 June 2018 meeting at the Elliott family home (which was attended by Mark and Alex Elliott and the Lawyer Parties), Mr Zita initially said that Alex Elliott was there “*pouring the wines*”.⁵⁷⁶ He then changed his answer to: “**He was just sitting there like he usually does in a meeting**”.⁵⁷⁷ Oddly, Mr Zita then changed his answer again – when asked whether it was Mr Zita’s evidence that Alex Elliott: “*just poured the wine and thereafter he just sat there*” he answered: “No.”⁵⁷⁸ This puzzling and equivocal exchange demonstrates that the Court should treat Mr Zita’s evidence in the case against Alex Elliott with some caution, particularly the evidence given when he was recalled and cross-examined by Alex Elliott’s senior counsel, several months after his first cross-examination.
- 246 Mr Zita gave the following evidence about objective facts which are relevant to Alex Elliott’s role:
- (a) He said that Alex Elliott attended “*a number of meetings that we had*”.⁵⁷⁹

⁵⁷⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

⁵⁷⁵ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1315:14 – 1316:7, 1317:19 – 1318:14.

⁵⁷⁶ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:25-26.

⁵⁷⁷ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:27-28.

⁵⁷⁸ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:29-31.

⁵⁷⁹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1326:2-4.

- (b) He said that Mark Elliott frequently brought Alex Elliott along with him to court hearings in connection with the Banksia litigation.⁵⁸⁰
- (c) He said he was “*helping his father*” to “*keep on top of things I suppose*”,⁵⁸¹ those things being “*the Banksia matter and the class action*”⁵⁸² and “*whatever else they were doing*”.⁵⁸³
- (d) He was shown numerous communications between Mark Elliott, Alex Elliott, Mr O’Bryan and Mr Symons in which they discussed legal issues relating to the Bolitho Proceeding. He agreed that he was not consulted about any of those communications, and was not aware of them at the time.⁵⁸⁴

D. Mr Crow

247 From about December 2012 onwards, Mr Robert Crow also acted as a solicitor for Mr Bolitho in connection with the Bolitho Proceeding (but was not solicitor on the record for Mr Bolitho).

248 AFP tendered two affidavits sworn by Mr Crow.⁵⁸⁵ He was cross-examined on his affidavits by counsel for the SPR. Mr Crow gave the following relevant evidence:

- (a) He attended the mediation on **9 November 2017** and left late in the day when discussions were ongoing.⁵⁸⁶
- (b) On **10 November 2017** he spoke with Mark Elliott twice by telephone. In the first call, Mark Elliott said that negotiations were continuing and there was a possibility of a settlement which would represent **10 cents in the dollar for each debenture holder**. Mr Crow said he thought Mr Bolitho would give instructions to settle on that basis.⁵⁸⁷ In the second call, Mark

⁵⁸⁰ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1329:4-6.

⁵⁸¹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1326:10-16.

⁵⁸² Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1326:19-20.

⁵⁸³ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1326:17-18.

⁵⁸⁴ [SYM.001.001.8023], [ABL.001.0643.00243] [AEL.100.048.0001], [AEL.100.058.0001], [AEL.100.068.0001], [AEL.100.032.0001], [AEL.100.041.0001], [AEL.100.043.0001]; Transcript of hearing on 26/27 November 2020 [TRA.500.013.0001] [TRA.500.014.0001], 1347:7 – 1367:12.

⁵⁸⁵ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2].

Mr Crow’s 22 July 2020 Affidavit: [LAY.020.006.0001].

⁵⁸⁶ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [16].

⁵⁸⁷ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [17].

Elliott said that a settlement looked likely and Mark Elliott would seek instructions from Mr Bolitho before agreeing to the settlement.⁵⁸⁸

- (c) On **10 November 2017** at **5.20pm**, Mark Elliott emailed Mr Crow stating: *“We are agreed, its just come through. **The headline figure is approx.\$85 M and the debenture holders will get at least 10 cents each (possibly by Xmas).** Can you please let LB know about the terms (and about his fee!)”*. He forwarded an earlier email chain setting out the terms agreed with Trust Co, including *“**Trust Co will support the application for approval, including the plaintiffs’ claims for legal fees and the litigation funder’s fee as agreed between the plaintiffs**”*.⁵⁸⁹ Mr Crow agreed that **one cent in the dollar translated to a settlement of approximately \$6.6 million**⁵⁹⁰ and that he did not know what Mark Elliott meant by referring to a settlement of \$85 million.⁵⁹¹ He thought that it might have included the Partial Settlement.⁵⁹²
- (d) On **13 November 2017**, Mr Crow spoke to Mr Bolitho. Mr Bolitho told Mr Crow that he had received a telephone call from Mr O’Bryan over the weekend to tell him that they had reached an agreement for settlement. Mr Bolitho also said that Mr O’Bryan had explained the terms of the proposed settlement to him, and, according to Mr Crow, *“**he confirmed to me that he was happy to settle on the basis that the settlement sum represented not less than 10 cents in the dollar for all debenture holders**”*.⁵⁹³ **Mr Crow confirmed that 10 cents in the dollar translates to a settlement of about \$65 million.**⁵⁹⁴
- (e) On **16 November 2017**, Mr Crow called Mark Elliott, *“who then told me that the SPRs still wanted to proceed against Insurance House, who had been Banksia’s insurance brokers, and explained how the settlement would work if that claim did not settle. He told me that in those circumstances the class action would receive its share of the Trustee settlement, pay associated costs and expenses and then distribute to debenture holders 6 to 7 cents in*

⁵⁸⁸ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [18].

⁵⁸⁹ [BOL.001.001.0004].

⁵⁹⁰ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:11-13.

⁵⁹¹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:14-17.

⁵⁹² Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:17-19.

⁵⁹³ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [20].

⁵⁹⁴ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:25-26.

the dollar and the liquidator would then keep his part of the money until settled with Insurance House and then distribute another 3 to 4 cents in the dollar".⁵⁹⁵ Mr Crow said that he thought Mark Elliott explained the settlement was apportioned 80:20 in favour of the Bolitho Proceeding.⁵⁹⁶

- (f) Under cross-examination, Mr Crow confirmed that Mark Elliott did not tell him that out of the settlement of **10 cents** in the dollar he was seeking **3 cents** in the dollar in costs and commission.⁵⁹⁷
- (g) On **17 November 2017**, Mark Elliott sent Mr Crow a draft Settlement Deed.⁵⁹⁸
- (h) Mr Crow said he knew that there was a provision in the settlement deed which said that the claim for costs had to be supported by an independent cost consultant, but he did not know (because nobody told him) that the SPRs had insisted upon that clause.⁵⁹⁹
- (i) On **1 December 2017**, Mark Elliott sent Mr Crow a revised draft Settlement Deed.⁶⁰⁰
- (j) On **4 December 2017**, Mr Crow met with Mr Bolitho to review the Settlement Deed, and Mr Bolitho signed it.⁶⁰¹
- (k) On **18 January 2018 at 7.59am**, Mark Elliott asked Mr Crow to contact Mr Pitman to persuade him to withdraw his objection to the Trust Co Settlement, and forwarded emails from Mr O'Bryan setting out 10 points to be covered in the telephone call directed at persuading Mr Pitman to withdraw his objection.⁶⁰²
- (l) On **18 January 2018** following receipt of Mark Elliott's email, Mr Crow called Mr Pitman and spoke to him at length to attempt to persuade him to

⁵⁹⁵ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [21].
⁵⁹⁶ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [22].
⁵⁹⁷ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 522:16-20.
⁵⁹⁸ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [23].
⁵⁹⁹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 529:8-15.
⁶⁰⁰ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [24].
⁶⁰¹ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], paras [27] – [30]; Trust Co Settlement Deed [SYM.002.001.4695].
⁶⁰² [BOL.001.001.0050]; Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 507:1-11.

withdraw his objection.⁶⁰³ Mr Crow gave the following explanation, which was in several respects internally inconsistent, as to why he thought it was in the best interests of debenture holders to persuade Mr Pitman to withdraw his objection:

- (i) He said that he understood that if Mr Pitman maintained the objection and the settlement fell over, then the matter would proceed to trial.⁶⁰⁴
- (ii) He said that he explained to Mr Pitman that the commission “*would be the subject of an inquiry by the court and ultimately the court would determine whether or not that was a reasonable commission*”⁶⁰⁵ and that “*ultimately the fact that we were agreeing to this settlement didn’t necessarily mean that AFP would receive a commission of \$12.8 million, that ultimately was a matter for the court.*”⁶⁰⁶
- (iii) He said that “*if the commission could not be supported by AFP before the court, then the court would take care of that*”, because he was satisfied that “*if the court scrutinised the commission and considered it wasn’t fair and reasonable, [then] it had the power to reduce it*”.⁶⁰⁷
- (iv) He agreed that he understood that Mr Pitman was not objecting to the Trust Co Settlement; he was objecting solely to the amount of the commission and costs,⁶⁰⁸ and that he was exercising his statutory right to object.⁶⁰⁹ He agreed that, in assessing the commission, it would be relevant to the Court to hear the views of Mr Pitman.⁶¹⁰

⁶⁰³ [LAY.020.007.0001]; Mr Crow’s 22 July 2020 Affidavit: [LAY.020.006.0001], paras [3] – [8].

⁶⁰⁴ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 509:25-27.

⁶⁰⁵ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 510:3-7.

⁶⁰⁶ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 510:31-511:3.

⁶⁰⁷ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 516:8-20.

⁶⁰⁸ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 509:23-25.

⁶⁰⁹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 513:23-26.

⁶¹⁰ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 516:21-25.

- (v) He said he attempted to explain to Mr Pitman that *“the claim for commission appeared to me to be within the terms of the litigation funding agreement”*.⁶¹¹
 - (vi) He said he had studied the terms of the Funding Agreement⁶¹² and knew that the commission rate specified in the Funding Agreement was a maximum of 30 per cent and that the commission rate only applied in respect of those that had signed a Funding Agreement which AFP had asserted to be 55 per cent of the class.⁶¹³
 - (vii) He said he knew that the Funding Agreement provided that the consideration for the commission was in return for the financing by AFP in the conduct of the case.⁶¹⁴
 - (viii) He said he knew that Mark Elliott had acted on the basis of a “no win/no fee” agreement, and that he assumed Mr O’Bryan acted on the same basis.⁶¹⁵
 - (ix) He said he thought that the funding commission was calculated by apportioning the settlement sum 80:20 in favour of the Bolitho Proceeding, and by applying a commission rate of 25%.⁶¹⁶
 - (x) He said that he thought the 80:20 apportionment was justified because the Bolitho Proceeding was a stronger claim.⁶¹⁷ He agreed that this view was based solely on what he had been told by Mr O’Bryan.⁶¹⁸
- (m) On **18 January 2018**, Mark Elliott emailed Mr Crow attaching a draft of the First Bolitho Opinion and stating: *“Rob, As discussed, draft opinion attached. Share it with Hines(?). **Whatever it takes to get Pitman to FO is approved**”*.⁶¹⁹ (“Hines” was a reference to Peter Heinz, Mr Pitman’s solicitor). Mr Crow said that he paid no attention to the direction that he was

⁶¹¹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 509:29-30, 510:27-31.

⁶¹² Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 511:5-8.

⁶¹³ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 511:9-14.

⁶¹⁴ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 511:15-18.

⁶¹⁵ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 503:27-504:4.

⁶¹⁶ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 524:3-11.

⁶¹⁷ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [22].

⁶¹⁸ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 526:28-527:4.

⁶¹⁹ [BOL.001.001.0054].

to do “*whatever it takes to get Pitman to FO*”⁶²⁰ but that he did speak with Mr Heinz.

- (n) Mr Crow said he did not seek instructions from Mr Bolitho prior to speaking with Mr Pitman and Mr Heinz.⁶²¹
- (o) Mr Crow said that he was not provided with a breakdown of the claim for \$4.75 million plus GST in legal costs, and that it did not occur to him to ask for a breakdown **because he was not the solicitor on the record. Mr Bolitho was represented by Mr Zita.**⁶²²
- (p) Mr Crow said that nobody told him that most of the evidence had been provided by the SPR and not by the class action.⁶²³
- (q) Mr Crow conceded that AFP paid Mr Bolitho a sum of \$25,000 in December 2016 for his services in acting as representative plaintiff. Mr Crow conceded that the Court should have been informed of that payment at the time of approving the Trust Co Settlement and the further payment of \$75,000 to Mr Bolitho.⁶²⁴

249 Mr Crow’s evidence therefore confirms that:

- (a) Mr Bolitho did not give instructions to permit his representatives to pursue a settlement that was conditional upon deductions of \$20 million in costs and commission. To the contrary, his instructions were to settle on a basis that represented not less than 10 cents in the dollar for each debenture holder (ie, approximately \$65 million, without deductions).
- (b) Mr Bolitho was not informed of the settlement negotiations conducted between his own representatives and the SPRs between 12 and 16 November 2017. In particular, Mr Bolitho was not consulted about his representatives’ decision to insist upon terms that were adverse to the interests of group members, and to refuse the more favourable terms proposed by the SPRs over that period.

⁶²⁰ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 513:3-22, 514:14-17.

⁶²¹ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 514:18-24.

⁶²² Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 528:2-12.

⁶²³ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 529:2-7.

⁶²⁴ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 530:1-17; [BOL.001.004.0001].

(c) The actions of Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons in relation to procuring and documenting terms of settlement that were adverse to the interests of Mr Bolitho and group members (**Adverse Settlement Terms**)⁶²⁵ were conducted without his authority.

250 The Court should find that Mr Crow was unwittingly used by Mark Elliott and Mr O'Bryan to achieve their own commercial objectives, including by failing to inform him of critical facts relevant to the assessment of the settlement, and most notably, by failing to consult him about the settlement terms proposed by the SPRs which were more favourable to the interests of debenture holders than the terms that they insisted upon instead.

E. Peter Trimbos

251 Mr Trimbos was an expert costs consultant who was retained by AFP to prepare **five** reports in relation to the costs and expenses claimed by AFP in this proceeding, being the following:

(a) First Trimbos Report dated 8 July 2016.⁶²⁶

(b) Second Trimbos Report dated 18 August 2016.⁶²⁷

(c) Third Trimbos Report dated 4 January 2018.⁶²⁸

(d) Fourth Trimbos Report dated 12 March 2019.⁶²⁹

(e) Fifth Trimbos Report dated 29 June 2020.⁶³⁰

252 The First and Second Trimbos Reports were filed in connection with the application for approval of the Partial Settlement. At that time, AFP claimed to have incurred costs of \$3.53 million in respect of the proceeding up to about 1 July 2016 (**Pre-July 2016 Costs**).⁶³¹

⁶²⁵ See Section E below.

⁶²⁶ [SYM.002.001.1890].

⁶²⁷ [CCW.031.001.0047].

⁶²⁸ [CBP.001.010.6230]

⁶²⁹ [EXP.020.001.0001] [EXP.020.001.0003] [EXP.020.002.0001] [EXP.020.003.0001]; [EXP.020.004.0001] [EXP.020.005.0001] [EXP.020.006.0001].

⁶³⁰ [EXP.020.007.0001] [EXP.020.008.0001].

⁶³¹ See the First Trimbos Report, [SYM.002.001.1890] at .1918, paras [120] – [121].

- 253 AFP, Mr O'Bryan and Mr Symons told the Court that **75% of the Pre-July 2016 Costs** had been incurred in respect of the claims against the settling defendants.⁶³²
- 254 AFP sought **30% of the Pre-July 2016 Costs** from the Trust Co Settlement, and continued to rely upon the First and Second Trimbos Reports for that purpose. It has since abandoned that claim.
- 255 The Third Trimbos Report was filed in the First Approval Application for approval of the Trust Co Settlement before Justice Croft. It opined that the legal costs sought to be recovered by AFP were fair and reasonable, including **\$3.5 million** in fees charged by the Lawyer Parties since the Partial Settlement. It was a highly misleading report which was the focus of much of this remitter. Notably, it exhibited all of Mr O'Bryan's invoices which were **stamped as "PAID"**.⁶³³
- 256 The Fourth Trimbos Report was filed by AFP early in this remitter.⁶³⁴ In that report, Mr Trimbos substantially reiterated the opinions he had expressed in the Third Trimbos Report. Notably, his report exhibited a substitute set of Mr O'Bryan's invoices, which were **not stamped as "PAID"**.⁶³⁵
- 257 In the Fifth Trimbos Report, Mr Trimbos recanted the opinions expressed in his earlier reports, and said that he had been misled.⁶³⁶
- 258 Mr Trimbos gave evidence on **13 August 2020**.⁶³⁷ He was an unsatisfactory witness. His evidence is substantively addressed at paragraphs 1121 to 1169 below.
- 259 On **20 August 2020**, Mr Trimbos was joined to the proceeding.
- 260 On **21 September 2020**, Mr Trimbos filed an affidavit, which was tendered following his death on 23 September 2020 with some limited exceptions.⁶³⁸

⁶³² See the confidential opinion of Mr O'Bryan and Mr Symons dated 8 July 2016 [CCW.032.001.0001] at .0053, para [129], and see also the First Trimbos Report, [SYM.002.001.1890] at .1918, paras [123] – [126].

⁶³³ [CBP.001.010.5957] at .6155 - .6244.

⁶³⁴ EXP.020.001.0001]

⁶³⁵ [EXP.020.004.0001] at .0003.

⁶³⁶ [EXP.020.008.0001], paras [8.b], [8.h], [8.i], [8.j], [8.k], [8.l], [8.m], [8.n], [8.q], [8.s], [8.t], [8.v], [8.w], [8.x], [8.y], [10], [12].

⁶³⁷ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 668:18-726:7.

⁶³⁸ [LAY.090.001.0001] (the exceptions are: the second sentence of para [90], from "moreover" to the end of the paragraph; the sentence "I was shocked and dumbfounded when I read the Contradictor's list of issues; and "I could not believe what was reading". See Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2191-2194).

261 The **factual issues** relating to the claim against the estate of Mr Trimbos are addressed separately in paragraphs 1121 to 1169 below.

262 Subject to any points of clarification or reply that might appropriately be made by the Contradictors in oral closing address, the **legal issues** relating to the survival of the cause of action against Mr Trimbos's estate are to be addressed by the SPR, and the Contradictors reserve their rights to respond to that submission in the unlikely event that there is a need to.

F. SPR witnesses

263 The SPR called evidence from Mr Lindholm,⁶³⁹ Mr Newman,⁶⁴⁰ and Mr Kingston.⁶⁴¹ Their evidence was relevant to:

- (a) the relative contributions of the Bolitho team and the SPR team to the practical, evidentiary, and financial burden of conducting the two proceedings;
- (b) the negotiation of the Trust Co Settlement; and
- (c) the McKenzie Group Proceeding and the negotiation of the Partial Settlement.

264 Mr Lindholm and Mr Newman were cross-examined by counsel for AFP and Mr Symons respectively. Their evidence was not disturbed in cross-examination and should be accepted by the Court. Mr Kingston was not cross-examined, and his evidence should be accepted by the Court.

265 The SPR also tendered two counsel opinions,⁶⁴² prepared in response to the Court's orders dated 1 February 2019, containing thorough analysis of the legal issues in the Bolitho Proceeding and the SPR Proceeding, the relative merits of the two proceedings (which was relevant to AFP's commission claim, which it has since abandoned), and the cooperation between the two legal teams.

⁶³⁹ Mr Lindholm's 29 March 2019 Affidavit [SPR.006.001.0005];

Mr Lindholm's 3 June 2020 Affidavit [SPR.006.001.0003].

⁶⁴⁰ Mr Newman's 29 March 2019 Affidavit [SPR.006.001.0001];

Mr Newman's 3 June 2020 Affidavit [SPR.006.001.0002].

⁶⁴¹ Mr Kingston's 3 June 2020 Affidavit [SPR.006.001.0004].

⁶⁴² Further SPR Opinion [CCW.032.001.0287] [CCW.032.001.0287] [CCW.022.001.0541];
Responsive SPR Opinion [CCW.032.001.0287].

G. Keith Pitman

266 The Contradictors tendered an affidavit from Mr Pitman.⁶⁴³ Mr Pitman is a debenture holder in Banksia and a group member in the proceeding.⁶⁴⁴ He is a retired farmer and licensed post office operator and was aged 84 at the time of swearing his affidavit.⁶⁴⁵

267 Mr Pitman gave the following evidence:

- (a) He was a member of the debenture holder committee (**Committee**).
- (b) Mark Elliott was also a member of the Committee in 2013 and 2014, and in that context received information about the Trust Co Remuneration Claim.⁶⁴⁶ That documentary material shows that Mark Elliott knew that the Trust Co Remuneration Claim could not be worth \$11 million as asserted in the First Bolitho Opinion.
- (c) The Committee thought the Trust Co Remuneration Claim was egregious, and would not support it.⁶⁴⁷ That too shows that Mark Elliott knew that the claim was not worth \$11 million as asserted in the First Bolitho Opinion.
- (d) When the Committee decided to support the Trust Co Settlement on 30 November 2017, the Committee was not informed of (and Mr Pitman did not know or suspect) any of the matters forming the substance of the allegations in this remitter.⁶⁴⁸ If he had known of such conduct, he would have made sure the Committee was aware of it, and he would have recommended that the Committee object to any commission and payment of legal fees to AFP as a component of the settlement "package".⁶⁴⁹
- (e) Mr Pitman made numerous attempts to access the Trimbos Report and other documents at Portfolio Law's offices, but he was not permitted to access them.⁶⁵⁰

643 [CCW.036.001.0395].

644 [CCW.036.001.0395], para [1].

645 [CCW.036.001.0395], para [1].

646 [CCW.036.001.0395], paras [9] – [18].

647 [CCW.036.001.0395], paras [19] – [22].

648 [CCW.036.001.0395], para [68].

649 [CCW.036.001.0395], para [70].

650 [CCW.036.001.0395], paras [30] – [40].

- (f) After Mr Pitman objected to the settlement, he was subject to a concerted campaign by Mark Elliott, Mr O’Bryan and Mr Crow in an effort to persuade him to withdraw his objection.⁶⁵¹
- (g) Mr Pitman appeared at the hearing before Justice Croft. At that hearing, he said:

*“In my letter I said I would reluctantly withdraw my objection if I had, if it had the effect of delaying payment to debenture holders. I wish to take the opportunity to vary that position. The position I take today is that I will withdraw my objection and Mr Botsman will too, if a contradictor considers that the settlement is fair and reasonable to debenture holders.”*⁶⁵²

*“The payment of \$4.75m in fees to the lawyers for the class action plaintiff seems excessive when the lawyers for the liquidator/special purpose receiver are likely to have made most of the money in progress in the pleadings and the proceedings generally.”*⁶⁵³

*“The arithmetic of this settlement compared with the [partial] settlement suggests that either one, the special purpose receiver has agreed to the class action funder receiving the windfall of about \$7.52m, or two, the special purpose receiver has agreed to the class action plaintiff receiving more than 50 per cent of the settlement sum.”*⁶⁵⁴

“I wish to conclude by noting that as I said in my letter, about 80 per cent of the bank’s investors are over 55 years of age. I, myself are nearly 82, and most are in their 70s or 80s. In an age where income and equality is making news all over the world, it beggars belief that already wealthy lawyers should profit at the expense of retirees who stand to receive a partial return on investments that in many cases they could not afford to lose. The unfairness is all the more stark when one considers that it would have been an easy matter, based on established precedents in this case, to appoint a contradictor to

⁶⁵¹ [CCW.036.001.0395], paras [41] – [62].

⁶⁵² Transcript of hearing on 30 January 2018 [SYM.001.001.5149], 27:17-23.

⁶⁵³ Transcript of hearing on 30 January 2018 [SYM.001.001.5149], 28:14-18.

⁶⁵⁴ Transcript of hearing on 30 January 2018 [SYM.001.001.5149], 29:1-7.

*provide some comfort to debenture holders and the court, that the settlement is fair and reasonable. As matters stand, the only independent lawyer who has an opportunity to consider the notice is Mr Botsman. And as I have already explained, Mr Botsman has been prevented from reviewing the deed of settlement.*⁶⁵⁵

268 Mr Pitman was not cross-examined, and his evidence should be accepted by the Court.

H. Mr Houston and Mr McGing

269 Expert evidence was given by Mr Houston⁶⁵⁶ and Mr McGing,⁶⁵⁷ in reports filed prior to trial, as to the reasonableness of the funding commission sought by AFP. Mr Houston and Mr McGing gave oral evidence concurrently.⁶⁵⁸

270 Following the abandonment of AFP's claim for a funding commission, their evidence may be relevant to the question of damages, for the reasons that follow. The Contradictors' damages claim is quantified in **Annexure A**, which sets out how the interest claim should be calculated having regard to the sum of money that debenture holders have been held out of for each relevant time period.

271 **Annexure A** has been prepared to reflect a counterfactual where AFP is assumed not to have engaged in misconduct as at the First Approval Application.

272 Clause 12 of the Funding Agreement⁶⁵⁹ provides that AFP is entitled to recover from the Resolution Sum "*a further amount, as Consideration for the financing of the Case and performance by [AFP] of its various obligations under this [Funding Agreement] up to a maximum of 30% from that Resolution Sum*".

273 In assessing AFP's commission, the Funding Agreement directs attention to two criteria: (1) the extent of "financing of the Case" undertaken by AFP ("the financing criterion") and (2) performance by AFP of its various obligations under the Funding Agreement ("the performance criterion").

⁶⁵⁵ Transcript of hearing on 30 January 2018 [SYM.001.001.5149], 29:9-26.

⁶⁵⁶ [EXP.020.009.0001] [EXP.020.010.0001] (Mr Houston's 13 March 2019 and 6 May 2020 reports); [EXP.500.001.0001] (joint report of Houston/McGing dated 5 July 2020).

⁶⁵⁷ [EXP.010.015.0001] (Mr McGing's 28 February 2020 report).

⁶⁵⁸ Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 545:8 – 595:15.

⁶⁵⁹ [AFP.006.001.0014].

- 274 Mr McGing’s report is relevant to the application of these criteria.⁶⁶⁰ Mr McGing’s evidence is that a fair and reasonable return for a litigation funder should be driven by the inputs specific to the litigation funder, and no more: certainly not some pre-determined “maximum rate”, without further consideration of specific inputs and entitlements identified by the Funding Agreement and without regard to the risk actually taken by the funder. Mr McGing opined that it was **not** fair to group members, and therefore not reasonable, to determine a funding commission by reference to the funding commissions awarded in other cases (a methodology advanced by Professor Morabito, adopted by Mr Houston in his report, and implicitly accepted without analysis in numerous class action cases).
- 275 Mr McGing prepared his report on the assumption that the Lawyer Parties acted on a **deferred fee arrangement rather than on the basis of no win no fee**. Mr McGing’s report discloses the adjustments that should be made if that assumption were incorrect.⁶⁶¹ In light of the documentary evidence which emerged shortly before trial confirming that Mr O’Byrne and Mr Symons acted on a **no win no fee** basis,⁶⁶² Mr McGing’s evidence is to the effect that a return of approximately **\$959,000** is reasonable.⁶⁶³
- 276 The Contradictors’ primary position is that, in assessing **interest** on the sum that debenture holders have been held out of by reason of the misconduct in issue in this remitter, **no allowance** should be made for **any funding commission** that might have been awarded to AFP absent that misconduct (“the Counterfactual”), **because AFP failed to prove that it had entered into Funding Agreements with the group members** (apart from Mr Bolitho and Mrs Botsman). Indeed, midway through the trial, AFP sought to introduce evidence of Mr Horne, and when that evidence was put in issue,⁶⁶⁴ AFP declined to call Mr Horne and shortly thereafter abandoned its claim for commission.⁶⁶⁵ It should be inferred that the evidence would not have assisted AFP.
- 277 If, contrary to the Contradictors’ primary position – and indeed AFP’s position, having regard to the abandonment of its claim for commission – the Court was

⁶⁶⁰ [EXP.010.015.0001].

⁶⁶¹ [EXP.010.015.0001] at p.0005 (Table 1.2).

⁶⁶² [ABL.001.0685.00008] [ABL.001.0685.00009].

⁶⁶³ [EXP.010.015.0001] at p.0005 (Table 1.2) (ie, excluding any return to AFPL in relation to “lawyer costs/fee arrangements”, given that AFPL took no risk in relation to those fees).

⁶⁶⁴ [OBJ.040.001.0001]; transcript of hearing on 4 August 2020 [TRA.500.006.0001], 608:19-622:17.

⁶⁶⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 665:25-28.

mindful to make some allowance for AFP's funding commission in the Counterfactual, that allowance should be assessed on the basis of Mr McGing's evidence, and not on the basis of Mr Houston's evidence.

278 Thus, the Court should find that, absent misconduct, *if* any funding commission would have been approved to AFP at all, **it would have been necessary to deploy a methodology akin to that advanced by Mr McGing**, and the funding commission thus approved would have been limited to an amount of about **\$959,000**.

I. Mr Samuel

279 The Contradictors called evidence from Mr Samuel, an expert accountant,⁶⁶⁶ to establish that AFP's accounts disclosed no liability for the Lawyer Parties' fees for the Relevant Period and that they were therefore retained on a "no win no fee" basis.

280 Mr Samuel was briefed to prepare his report in late 2019, and issued two reports in January/February 2020. In July 2020,⁶⁶⁷ AFP and Mr Symons discovered the "no win no fee" letters that Mr O'Bryan and Mr Symons issued in March/April 2017 in which they expressly confirmed they were retained on a "no win no fee" basis in all matters funded by AFP.⁶⁶⁸ Those letters offer direct proof of the "no win no fee" terms upon which Mr O'Bryan and Mr Symons were retained. It is therefore unnecessary to further address Mr Samuel's evidence, save to comment on the wasted expense associated with the battle of tactics that AFP, Mr O'Bryan and Mr Symons deployed by withholding the "no win no fee" letters, which should have been discovered in response to the Court's 1 February 2019 discovery orders⁶⁶⁹ and pursuant to section 26 of the CPA.

⁶⁶⁶ [EXP.010.001.0001] [EXP.010.013.0001_2] [EXP.010.016.0001].

⁶⁶⁷ [MSC.010.018.0001].

⁶⁶⁸ [SYM.008.001.0017]; [ABL.001.0685.00008] [ABL.001.0685.00009]; [AFP.015.001.0001].

⁶⁶⁹ [ORD.500.005.0001], para [11.a].

PART 3: LEGAL PRINCIPLES FOR LIABILITY

A. Civil Procedure Act

281 Each of AFP, Mr O’Bryan, Mr Symons, Mr Zita/Portfolio Law, Mr Trimbos, and Alex Elliott were subject to the paramount duty and overarching obligations imposed under the CPA.

A1. Scope of application

282 Section 10 of the CPA provides:

- “(1) The overarching obligations apply to—
- (a) any person who is a party;
 - (b) any **legal practitioner** or **other representative** acting for or on **behalf of a party**;
 - (c) any law practice acting for or on behalf of a party;
 - (d) any person who provides **financial assistance** or **other assistance** to any party in so far as that person exercises **any direct control, indirect control or any influence** over the **conduct of the civil proceeding or of a party** in respect of that civil proceeding, including, but not limited to—
 - (i) an insurer;
 - (ii) a **provider of funding** or **financial support**, including **any litigation funder**.
 - (2) Subject to subsection (3), the overarching obligations do not apply to any witness in a civil proceeding.
 - (3) The overarching obligations (other than the overarching obligations specified in sections 18, 19, 22 and 26) apply to any expert witness in a civil proceeding.
 - (4) Subsection (3) is in addition to, and not in derogation of, any existing duties applying to expert witnesses.”

283 “Party” is defined in section 3 of the CPA to mean “party to a civil proceeding”.

284 Accordingly, on the express terms of section 10, the overarching obligations apply to AFP, the Lawyer Parties and Mr Trimbos (who was an expert witness in relation to the First Approval Application before Justice Croft).

285 It is submitted that Alex Elliott is likewise subject to the overarching obligations, on the basis that he was:

- (a) a legal practitioner or other representative acting for or on behalf of a party (Mr Bolitho and group members);
- (b) a person providing assistance to any party, insofar as he exercised indirect control and/or influence over the conduct of the Bolitho Proceeding or the conduct of Mr Bolitho in respect of that proceeding;
- (c) a legal practitioner or other representative acting for or on behalf of AFP, which was joined to the Bolitho Proceeding on 18 July 2018.

A2. Paramount Duty

286 Section 16 of the CPA provides:

“Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.”

287 The concept of the lawyer’s paramount duty to the court as an officer of the court has existed for 800 years. It emerged simultaneously with the legal profession. An early example of statutory regulation of the legal profession is chapter 29 of the Statute of Westminster I (1275), in which “*deceit or collusion*” by lawyers was forbidden.⁶⁷⁰ The legal profession was also regulated by the lawyers’ oath, a “condensed code of legal ethics”,⁶⁷¹ by which lawyers were required to swear that

⁶⁷⁰ Benton, J H. (1909). *The lawyer’s official oath and office*. Boston: Boston Book Co.

⁶⁷¹ Rice Andrews, C. (2004) *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. Rev. 1385, 1388.

they would “*not themselves, or by means of others, suborn witnesses, or instruct the parties to give false evidence, or to suppress the truth*”.⁶⁷²

- 288 The legal profession has long required the highest standards of integrity.⁶⁷³ There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and the public in the performance of professional obligations by professional people.⁶⁷⁴
- 289 The CPA was enacted in the context of existing principles, developed over centuries, as to the lawyer’s duty to and relationship with the Court. The unifying force of these principles is the need to serve and protect the justice system by requiring lawyers to act with honesty, fairness, expedition, efficiency and restraint.⁶⁷⁵
- 290 The CPA does 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.⁶⁷⁶ 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.⁶⁷⁷
- 291 Existing principles continue to provide guidance as to the paramount duty as reflected in the CPA. At common law, a lawyer’s paramount duty encompasses all of the following:
- (a) Lawyers must be candid with the Court and not mislead the Court in any way.⁶⁷⁸

⁶⁷² Benton, J H. (1909). *The lawyer's official oath and office*. Boston: Boston Book Co, p 15.
⁶⁷³ *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, [19] (*'Cummins'*).

⁶⁷⁴ *Cummins* at [20].

⁶⁷⁵ DA lpp “*Lawyers' Duties to the Court*” (1998) 114 LQR 63, 106.

⁶⁷⁶ *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 311 [26] (*'Yara'*); *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 5)* (2014) 48 VR 1, 36 [92] (*'Dura No 5'*).

⁶⁷⁷ *Dura No 5* at 36 [92].

⁶⁷⁸ DA lpp “*Lawyers' Duties to the Court*” (1998) 114 LQR 63, 105.

- (b) Lawyers must not corrupt the administration of justice, and this requires lawyers to conduct cases with due propriety and not to further dishonest conduct on the part of the client. A lawyer must not assert a case he knows is false, nor connive at or attempt to substantiate a fraud, nor assist in any way in dishonourable or improper conduct.⁶⁷⁹ If the client insists on the lawyer conducting the case improperly, the lawyer must withdraw.⁶⁸⁰
- (c) If a lawyer discovers that a witness intends or is likely to give false testimony, he is duty bound not to produce that individual as a credible witness. A lawyer must not produce a witness statement which the lawyer knows to be false or where the lawyer knows that the witness does not believe the statement to be true in all respects. If the lawyer is put on inquiry as to the truth of the facts stated in the statement, the lawyer should, where practicable, check whether those facts are true. If a lawyer discovers that a witness statement served by the lawyer is incorrect, the lawyer must inform the other parties immediately.⁶⁸¹
- (d) For a lawyer to have a conflict of interest in representing a client is a breach of duty, not only in respect of the fiduciary relationship with the client, but also to the Court. The duty to the Court arises from the Court's concern that it should have the assistance of independent legal representation for the litigating parties. The integrity of the justice system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice.⁶⁸²
- (e) Lawyers must exercise judgment in the presentation of cases. They must advance only those points that are reasonably arguable.⁶⁸³

⁶⁷⁹ DA lpp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 89, 104.

⁶⁸⁰ DA lpp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 105.

⁶⁸¹ DA lpp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 92.

⁶⁸² DA lpp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 93, 104, citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; *Black v Taylor* [1993] 3 NZLR 403; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Keys v Boulter* [1971] 1 QB 300 at pp 306, 309; *Everingham v Ontario* (1992) 88 DLR (4th) 755.

⁶⁸³ DA lpp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 104.

- (f) Mere mistake or error of judgment is not a breach of duty to the Court. But misconduct, default or negligence of a serious nature may be a breach of the paramount duty sufficient to justify an appropriate order.⁶⁸⁴
- (g) A solicitor cannot escape liability for lack of diligence on the ground that counsel has been briefed. Although, in general, a solicitor is entitled to rely on the advice of counsel properly instructed, he is not entitled to follow such advice blindly and must apply his own professional mind to the issue. The solicitor is expected to be experienced in his particular legal fields and the briefing of counsel does not operate so as to give automatic immunity.⁶⁸⁵

292 The CPA has extended the compass of the paramount duty to other participants in civil proceedings, including parties, litigation funders, expert witnesses, and others who exercise influence over the conduct of a civil proceeding.⁶⁸⁶ Accordingly, the principles set out above apply, where relevant, to such persons.

293 The obligations imposed by the CPA ought be regarded as non-delegable.⁶⁸⁷

A3. Duty not to mislead or deceive

294 Section 21 of the CPA provides:

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

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

295 The content of the obligation in section 21 is informed by jurisprudence on section 18 of the Australian Consumer Law in the context of trade or commerce. Intention to mislead is irrelevant for the purposes of section 21.⁶⁸⁸

⁶⁸⁴ *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8)* [2014] VSC 567 (**'Hudspeth No 8'**), [166]; DA Ipp *"Lawyers' Duties to the Court"* (1998) 114 LQR 63, 95, citing *Ridehalgh v Horsefield* [1994] Ch 205; *Myers v Elman* [1940] AC 282; *Cassidy v Murray* (1995) FLC 92-633.

⁶⁸⁵ DA Ipp *"Lawyers' Duties to the Court"* (1998) 114 LQR 63, 95, citing *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48.

⁶⁸⁶ CPA s 10.

⁶⁸⁷ *Dura No 5* at [131] – [132].

⁶⁸⁸ *Hudspeth No 8* at [177] – [194]; *Brown v Guss* [2015] VSC 57 [171].

296 It is necessary to begin consideration of the application of section 21 by identifying the conduct that is said to meet the statutory description of “misleading or deceptive or... likely to mislead or deceive”. The first question for consideration is always: “What did the alleged contravener do (or not do)?”⁶⁸⁹

A4. Duty to act honestly

297 Section 17 of the CPA provides:

“A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.”

298 Dishonesty is assessed by reference to the standard of ordinary, honest persons and is not a term of art.⁶⁹⁰ It is to be determined by reference to the mental state of the person whose conduct is in issue.⁶⁹¹ In most cases where the question is whether some positive act was dishonest, the question is whether the act was done **with knowledge or belief of some specific thing** or **with some specific intent**.⁶⁹²

299 A conclusion that something is said dishonestly cannot be reached if they believe in the truth of the statement.⁶⁹³ A person is deceitful if they know or believe that that which they say is false.⁶⁹⁴ It is not however necessary that the person making the false statement understood it to be dishonest by that standard. In *McCarthy*, Kiefel J said:⁶⁹⁵

“it is incongruous to ask whether a person accused of dishonesty appreciated that to be the case. Ordinary honest persons determine whether a person’s act is dishonest by reference to that person’s knowledge or belief as to **some fact relevant to the act in question**, or **the intention with which it was done**. They do not enquire whether the accused must have realised the act was dishonest. The ordinary person would consider it to be dishonest to assert as true something which is known to be false.”

⁶⁸⁹ *Hudspeth No 8* at [195], referring to Google [2013] HCA 1, [89].

⁶⁹⁰ *McCarthy v St Paul International Insurance Co Ltd* (2007) 157 FCR 402, [34] (*‘McCarthy’*), citing *Peters* at [15] and [18], *McCann* at [55], *Comino v Manettas* (1993) 7 ANZ Insurance Cases 61-162, 77,869 and *Harle v Legal Practitioners Liability Committee* (2004) 13 ANZ Insurance Cases 61-605, 77,302.

⁶⁹¹ *McCarthy* at [34]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, [55] (*‘McCann’*).

⁶⁹² *McCann* at [55], citing *Peters v R* (1998) 192 CLR 493 (*‘Peters’*), [16].

⁶⁹³ *McCarthy* at [34], citing *Derry v Peek* (1889) 14 App Cas 337, 361 (*‘Derry v Peek’*).

⁶⁹⁴ *McCarthy* at [34], citing *Derry v Peek* at 343, 351, 374.

⁶⁹⁵ *McCarthy* at [34], citing *Peters* at [15].

- 300 Thus, what must be established is that the person **subjectively intended** to do the acts which are said to be **objectively dishonest** by the **ordinary standards of reasonable and honest people**.⁶⁹⁶
- 301 There is little, if any, difference between failing to act honestly and engaging in conduct that knowingly misleads or deceives.⁶⁹⁷
- 302 The question whether a **failure to act** is dishonest is usually answered by considering whether that failure was motivated by a **desire to conceal the truth or to obtain an advantage** to which the person concerned knew he or she was not entitled.⁶⁹⁸
- 303 Dishonesty encompasses recklessness – that is, a statement made not caring whether it be true or false, or without an honest belief as to its truth;⁶⁹⁹ an indifference to, or disregard of, whether a statement be true or false.⁷⁰⁰
- 304 A dishonest state of mind may be inferred from wilful blindness or from dishonest or deliberate ignorance.⁷⁰¹ “Wilful blindness, the deliberate shutting of one’s eyes to what is going on, is equivalent to knowledge.”⁷⁰² In *Pereira v Director of Public Prosecutions*,⁷⁰³ in dealing with knowledge proved by inference from surrounding circumstances, the High Court said:
- “... a combination of suspicious circumstances and failure to make enquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter.”
- 305 Where, in a civil case, knowledge is to be inferred from the surrounding circumstances, it must be the more probable inference available.⁷⁰⁴

⁶⁹⁶ *SAJ v R* [2012] VSCA 243 [6], [56]-[57]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [173] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

⁶⁹⁷ *Hudspeth No 8* at [192].

⁶⁹⁸ *McCann* at [56].

⁶⁹⁹ *Derry v Peek*.

⁷⁰⁰ *R v Staines* (1974) 60 Cr App R 160.

⁷⁰¹ *ASIC v Rent 2 Own Cars Australia Pty Ltd* (2020) 147 ACSR 598, [372].

⁷⁰² *Giorgianni v R* (1985) 156 CLR 473, 482.

⁷⁰³ (1988) 82 ALR 217, 220.

⁷⁰⁴ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 [88], [373].

A5. Duty to ensure that legal costs are reasonable and proportionate

306 Section 24 of the CPA provides:

“A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.”

307 Section 24 imposes a positive obligation to take steps to ensure that costs are not excessive.⁷⁰⁵ Parties and their legal representatives are each obliged to comply with the overarching obligation.⁷⁰⁶ The legal practitioners’ duty is non-delegable.⁷⁰⁷

A6. Duty not to make claims that lack a proper basis

308 Section 18 of the CPA provides:

“A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

- (a) is frivolous; or
- (b) is vexatious; or
- (c) is an abuse of process; or
- (d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.”

309 “Claim” refers to a cause of action or the assertion of a right that entitled the asserting party to relief from the court.⁷⁰⁸ Section 18 applies equally to claims for interlocutory relief.⁷⁰⁹ An assessment of proper basis must be made at the time of filing a document to advance the claim or the response to the claim, or at the time of making or responding to an oral application. The overarching obligation requires that, at that time, the claim or response to a claim has a proper basis, assessed on

⁷⁰⁵ *Yara* at [12].

⁷⁰⁶ *Yara* at [14].

⁷⁰⁷ *Yara* at [14].

⁷⁰⁸ *Dura No 5* at [88].

⁷⁰⁹ *Dura No 5* at [88].

the factual and legal material available to the person making the claim or response.⁷¹⁰

310 Where a solicitor has arranged matters so that the retained counsel undertakes the conduct of the proceeding with respect to matters ordinarily managed by the solicitor, the solicitor not only authorises the barrister to perform all necessary steps but also places the barrister in the position of acquiring firsthand knowledge of relevant facts; and the solicitor is to be fixed with knowledge acquired by the barrister.⁷¹¹

B. Agency

311 AFP acted as agent for the group members. AFP's claim against Mrs Botsman was brought on that express premise.⁷¹²

312 A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission.⁷¹³ If an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any fee.⁷¹⁴

313 Once a conflict of interest is shown, "the right to remuneration goes".⁷¹⁵ The remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction.⁷¹⁶

314 There is no inconsistency in awarding the principal both damages and the refund of the commission.⁷¹⁷ The agent has no right to be paid or to retain any commission and must also compensate the principal for any loss which the agent has caused.⁷¹⁸

315 This rule operates as a deterrent to betrayal by the agent.⁷¹⁹

⁷¹⁰ *Dura No 5* at [88].

⁷¹¹ *Hudspeth No 8* at [226].

⁷¹² See the transcript of the hearing in *AFP v Botsman*, [NOB.500.004.4522] at page .4542 (lines 19 – 24), page .4558 (lines 12-30); page .4605 (lines 3-5 & 22-23); [CCW.005.003.0001], page .0007 (lines 16-20 & 30-31); page .0008 (lines 15-16).

⁷¹³ *Andrews v Ramsay & Co* [1903] 2 KB 635, 638.

⁷¹⁴ *Andrews v Ramsay & Co* [1903] 2 KB 635, 638.

⁷¹⁵ *Imageview Management Ltd v Jack* [2009] Bus LR 1034, [43] – [44], [50].

⁷¹⁶ *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, [90].

⁷¹⁷ *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, [90].

⁷¹⁸ *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, [90].

⁷¹⁹ *Imageview Management Ltd v Jack* [2009] Bus LR 1034, [50].

C. **A solicitor's entitlement to costs where the solicitor has been negligent**

C1. Claim for costs where solicitor has been negligent

316 A solicitor is generally not entitled to costs for work that is useless.⁷²⁰

317 In addition, rule 63.23(1) provides:

“Where a solicitor for a party, whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by a failure to act with reasonable competence and expedition, the Court may make an order that—

- (a) all or any of the costs between the solicitor and the client be disallowed or that the solicitor repay to the client the whole or part of any money paid on account of costs;
- (b) the solicitor pay to the solicitor's client all or any of the costs which the client has been ordered to pay to any party;
- (c) the solicitor pay all or any of the costs payable by any party other than the client.”

318 Pursuant to this rule, costs may be disallowed if they have been incurred improperly, or without reasonable cause. That encompasses expenditure incurred through a solicitor's negligence or ignorance, or costs wasted by undue delay or other misconduct or default on the part of the solicitor.⁷²¹

319 The primary object of r 63.23(1) is not punitive or disciplinary but compensatory, enabling reimbursement of a party's costs incurred because of the default of the solicitor.⁷²² The primary object of the Rule is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. Rule 63.23(1) also protects solicitors from the negligence or incompetence of counsel.

320 The words “reasonable competence and expedition” invoke a standard capable of being satisfied on proof of a failure to act with the standard of competence expected of ordinary members of the legal profession⁷²³ - acting “*in a way no reasonably*

⁷²⁰ *Re Windeyer, Fawl & Co; Ex parte Foley* (1930) 31 SR (NSW) 145, 149.

⁷²¹ *Ryan v Hansen t/as Hansens Solicitors* (2000) 49 NSWLR 184, [71], citing *Re Massey and Carey* (1884) 26 Ch D 459, 464.

⁷²² *Yara* at [18], citing *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 229.

⁷²³ *Dura No 5* at 20-21, referring to *Ridehalgh v Horsefield* [1994] Ch 205, 232.

well-informed and competent ordinary member of the profession would have done".⁷²⁴ It is a lower threshold than gross negligence or dereliction of duty.⁷²⁵ The standard may be assessed by reference to any special qualifications, experience, or attributes possessed by the legal practitioner, such as a speciality area of practice or field of law.⁷²⁶

- 321 A solicitor, who has been found to be negligent, may nonetheless recover from his client those costs which are severable, untainted by negligence and which relate to matters distinct from those upon which the solicitor has been found negligent.⁷²⁷ He may not recover fees in respect of the very proceedings in which he has been found negligent, unless he can show (the onus being on him) that, despite the negligence, some real advantage has accrued to the client from those services, or some of them, which would render it unjust for the client to escape liability for those fees or part of those fees.⁷²⁸
- 322 It is submitted that all of those principles are relevant to AFP's claim for the Court's approval to recover Portfolio Law's costs from the settlement fund, particularly having regard to the concessions and admissions by AFP and Mr Zita/Portfolio Law about Mr Zita/Portfolio Law's carelessness and failure to exercise independent judgment, namely that:
- (a) Mr Zita/Portfolio Law were careless in numerous respects,⁷²⁹ including in failing to monitor counsel's fees and retainer arrangements;⁷³⁰
 - (b) Mr Zita/Portfolio Law failed to exercise sufficient independent judgment when acting for Mr Bolitho;⁷³¹

⁷²⁴ *Dura No 5* at 22 [57.b].

⁷²⁵ *Dura No 5* at 20-21.

⁷²⁶ *Dura No 5* at 20-21.

⁷²⁷ *Ryan v Hansen t/as Hansens Solicitors* (2000) 49 NSWLR 184, [71]; *Cachia v Isaacs* (1985) 3 NSWLR 366, 371.

⁷²⁸ *Ryan v Hansen t/as Hansens Solicitors* (2000) 49 NSWLR 184, [71]; *Cachia v Isaacs* (1985) 3 NSWLR 366, 371.

⁷²⁹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [92], [164], [204];

Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 954:11-16.

⁷³⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [38], [42], [281], [288] – [289]; see also [PLE.020.001.0001] & [PAR.080.001.0001], para [72.d] and [PLE.070.001.0001_2].

⁷³¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-16.

- (c) the Bolitho Class Action Email Account and the General Class Action Email Account were established to reduce the need for Mr Zita/Portfolio Law to attend to correspondence;⁷³²
- (d) nearly all the correspondence that Mr Zita/Portfolio Law sent was authored by others;⁷³³
- (e) Mr Zita/Portfolio Law sent out correspondence that was factually wrong and/or misleading;⁷³⁴
- (f) much of the work that Mr Zita allegedly did on the matter was of no utility, including reading witness statements and expert reports without annotating them or taking any notes of what he had allegedly read; and
- (g) Mr Zita did not involve himself in the documentation of the Trust Co Settlement and did not provide Mr Bolitho with any advice about the Trust Co Settlement.⁷³⁵

C2. Abrogation of duties

323 The Court relies upon the solicitor on the record for a party on the basis that legal practitioners have a duty to the Court as well as a duty to their clients.⁷³⁶ In *Wentworth v Rogers*,⁷³⁷ the Court of Appeal said:

“Mr Russo lent himself to a situation in which he allowed himself to be controlled by his client. It is one thing to take instructions but it is another thing to allow the client to have complete control of the litigation in the way that Ms Wentworth had control of this litigation. We do not mean to be unkind but the objective facts of the matter are open to the inference that Mr Russo acted as Ms Wentworth's lackey. He did her bidding and allowed her to conduct the various applications which were before the Court in whatever way she chose. He had no control over her and, **if what she was doing would have amounted to misconduct by a practitioner, he must bear responsibility for what she did.**”

⁷³² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 869:14-16.

⁷³³ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [91]; transcript of hearing on 14 August 2020 [TRA.500.008.0001] 869:11-19; see also [PLE.020.001.0001] & [PAR.080.001.0001], para [62] & [PLE.070.001.0001_2].

⁷³⁴ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [164]

⁷³⁵ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [207].

⁷³⁶ *Wentworth v Rogers* [1999] NSWCA 403, [43].

⁷³⁷ [1999] NSWCA 403, [46].

324 It is submitted that this principle is relevant to AFP's claim for Portfolio Law's costs in circumstances where Mr Zita relinquished his responsibilities as solicitor on the record in favour of Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons. Mr Zita/Portfolio Law must bear responsibility for the way in which the proceedings were conducted by them. This, in turn, informs the Court's assessment of AFP's claim to recover the fees of Mr Zita/Portfolio Law.

D. Funding Agreement

325 The Corporations Regulations 2001 (Cth) specify that the providers of litigation funding schemes and arrangements are exempt from the requirement to hold an Australian Financial Services Licence as long as they have appropriate processes in place to manage conflicts of interest.⁷³⁸

326 Clause 7.3 of the Funding Agreement provides:

"For the duration of this... Agreement, [AFPL] 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 [AFPL] in relation to the subject matter of this... Agreement."

327 AFP provided group members with copies of its Conflict Management Policy dated 16 March 2014 (**Conflict Management Policy**) and Disclosure Statement dated 2 June 2014 (**Disclosure Statement**).⁷³⁹

328 The Conflicts Management Policy⁷⁴⁰ includes the following provisions:

- (a) "Our standard agreement with the Lawyers (Standard Lawyers Terms) requires the Lawyers to disclose to each member of the group which has entered into a funding agreement with [AFP] (Funded Person) the sources of all fees or other income they may receive in relation to the litigation being funded by [AFP], including providing a budget for all estimated costs and expenses up to the conclusion of a trial in any funded Proceedings".⁷⁴¹

⁷³⁸ Regs 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.

⁷³⁹ [MSC.020.012.0001]; [AFP.006.001.0001].

⁷⁴⁰ [AFP.006.001.0001].

⁷⁴¹ [AFP.006.001.0001], Conflicts Management Policy, para [4].

- (b) “We will appoint the lawyers to work for you on the terms of an agreement, known as the Standard Lawyers Terms, between us and the lawyers. The lawyers may also have a retainer agreement directly with you. The lawyers’ retainer agreement explains in detail how the lawyers are paid and how their fees are calculated.”⁷⁴²
- (c) “As well as providing funding for the claim, we usually also investigate the claim and provide project management services, which include discussing strategy with the lawyers and monitoring costs and budgets. We will also provide any other non legal assistance which you or your lawyers may reasonably request.”⁷⁴³
- (d) “ASIC considers that a divergence of interests may arise because (1) [AFP] wishes to keep the legal and administrative costs of the funded litigation low to maximize its return; (2) the lawyers may be seen to have an interest in maximizing their fees; and (3) you have an interest in minimizing the returns of both [AFP] and the lawyers.”⁷⁴⁴
- (e) “If we identify a conflict which arises during the course of your funded litigation which has not been disclosed to you, we will bring it to your attention.”⁷⁴⁵
- (f) AFP seeks to ensure that the interests of group members are adequately protected by (amongst other things):
- (i) carrying out its Conflicts Management Policy;⁷⁴⁶
 - (ii) appointing a “Senior Officer” who is responsible for implementing, monitoring, and managing the Policy (the Conflicts Management Policy states that the Senior Officer is “*Diane Jones*”);⁷⁴⁷
 - (iii) seeking to identify actual or potential conflicts in relation to the litigation in a timely manner and disclosing them to group members;⁷⁴⁸

⁷⁴² [AFP.006.001.0001], Disclosure Statement, para [3.8].

⁷⁴³ [AFP.006.001.0001], Disclosure Statement, para [3.10].

⁷⁴⁴ [AFP.006.001.0001], Disclosure Statement, para [4.2].

⁷⁴⁵ [AFP.006.001.0001], Disclosure Statement, para [4.4].

⁷⁴⁶ [AFP.006.001.0001], Disclosure Statement, para [4.27.b].

⁷⁴⁷ [AFP.006.001.0001], Disclosure Statement, para [4.27.c].

⁷⁴⁸ [AFP.006.001.0001], Disclosure Statement, para [4.27.d].

- (iv) “acknowledging and accepting that the professional and fiduciary duties owed to you by the lawyers (being funded by [AFP] to pursue your claim) take precedence over any duties or obligations those lawyers may owe to AFP”;⁷⁴⁹
- (v) “disclosing the sources of all fees or other income [AFP] and the lawyers may receive in relation to your funded litigation”;⁷⁵⁰
- (vi) “disclosing any material relationship between [AFP] and the lawyers or any claimant in accordance with the Conflicts Management Policy”;⁷⁵¹
- (vii) “providing, in the funding agreement, the procedure that will be applied in deciding whether to accept any settlement offer in relation to your claims”.⁷⁵²

329 Clause 13.3 of the Funding Agreement⁷⁵³ provides:

“Except in relation to Settlement, which is dealt with below, if the Lawyers notify [AFP] 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 [AFP] and those they owe to the Plaintiff, the Plaintiff and [AFP] 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 [AFP];

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 [AFP]’s interests; and

13.3.3 refrain from giving [AFP] advice and acting on [AFP]’s instructions, where that advice is, or those instructions are, or may be, contrary to the Plaintiff’s interests.”

330 Clause 13.5 of the Funding Agreement⁷⁵⁴ provides:

“In recognition of the fact that [AFP] has an interest in the Resolution Sum, if the Plaintiff:

⁷⁴⁹ [AFP.006.001.0001], Disclosure Statement, para [4.27.e].

⁷⁵⁰ [AFP.006.001.0001], Disclosure Statement, para [4.27.f].

⁷⁵¹ [AFP.006.001.0001], Disclosure Statement, para [4.27.g].

⁷⁵² [AFP.006.001.0001], Disclosure Statement, para [4.27.h].

⁷⁵³ [AFP.006.001.0014].

⁷⁵⁴ [AFP.006.001.0014].

13.5.1 wants to Settle the Class Action for less than [AFP] considers appropriate; or

13.5.2 does not want to Settle the Class Action when [AFP] considers it appropriate to do so,

then the Plaintiff agrees that [AFPL] 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."

331 Clause 13.6 of the Funding Agreement⁷⁵⁵ provides:

"If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and [AFPL] 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."

332 The following contextual matters are noteworthy:

- (a) The Funding Agreement, Conflicts Management Policy and Disclosure Statement prescribed processes for managing conflicts of interest (**Conflict Policies**) as part of a statutory scheme which exempted AFP from the need to hold an Australian Financial Services Licence, **provided** it had adequate processes for managing conflicts.
- (b) The Conflict Policies existed to protect Mr Bolitho and other group members.
- (c) Mr Bolitho and the Lawyer Parties represented (and owed duties to) **all** group members, only some of whom had signed the Funding Agreement.
- (d) The Funding Agreement purported to empower AFP to give instructions in the litigation which affected the rights of **all** group members (including group members who did not sign the Funding Agreement).

333 The Funding Agreement, and particularly the Conflict Policies, were therefore a critical component of the Lawyer Parties' retainer agreements. Notably, Mr

⁷⁵⁵ [AFP.006.001.0014].

Zita/Portfolio Law appeared to concede as much in their opening, having regard to the submission by their counsel that:⁷⁵⁶

“although Mr Zita did act and doesn't seek to shy away from the fact that he acted on the instructions of Mr Elliott, he did that in his view based on Mr Elliott wearing the hat of the funder pursuant to his contractual right, **and in fact we would say that if Mr Zita refused to follow a direction of Mr Elliott that would have given rise to a contractual breach of the funding agreement**, and provided that Mr Zita felt that the instructions provided to him by Mr Elliott were not inconsistent with his duties to Mr Bolitho or his duties to the court there was no reason for him not to follow those instructions.”

334 In that context, it is submitted that the Court should find that:

- (a) AFP owed a duty to group members to monitor costs and budgets.
- (b) Each of AFP, the Lawyer Parties and Alex Elliott owed a duty to Mr Bolitho and/or other group members to:
 - (i) provide budgets for all estimated costs and expenses up to the conclusion of the trial in the Bolitho Proceeding;
 - (ii) bring to the attention of AFP, Mr Bolitho and group members conflicts of interest which arose during the course of the Bolitho Proceeding;
 - (iii) inform Mr Bolitho and group members of their rights when conflicts of interest arose during the course of the Bolitho Proceeding.
- (c) The Lawyer Parties owed duties to advise Mr Bolitho and/or other group members in a manner that was consistent with the Lawyers' Duties and the Paramount Duty in relation to all such matters, including in relation to any settlement of the claims in the Bolitho Proceeding and the terms of any such settlement.⁷⁵⁷

⁷⁵⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 738:30-739:10.
⁷⁵⁷ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], paras [27] and [178A].

E. Inferences available from the manner in which AFP, Mr **O'Bryan**, Mr Symons and Alex Elliott conducted the case

E1. Jones v Dunkel inferences from failure to give evidence

335 An unexplained failure by a party to call a witness in appropriate circumstances will permit the following inferences to be drawn:

- (a) that the uncalled evidence would not have assisted the party's case;⁷⁵⁸ and/or
- (b) any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.⁷⁵⁹

336 The failure by a party to deny or explain facts which it is within that party's power to explain or deny "gives a colour to the other evidence against him".⁷⁶⁰ Further, "when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box, a court is entitled to be bold".⁷⁶¹

E2. Failure to provide an explanation or answer

337 The Court may draw adverse inferences from the failure of a party to provide an "explanation or answer" as might be expected if the truth were consistent with innocence.⁷⁶²

E3. Lies as admissions by conduct

338 Lies may amount to an admission by conduct.⁷⁶³ In a civil case, a lie may be used as evidence in that way if that is the more probable inference to be drawn.⁷⁶⁴

⁷⁵⁸ *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320–1.

⁷⁵⁹ See eg *ASIC v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201, [102].

⁷⁶⁰ *Boyle v Wiseman* (1855) 156 ER 598, 600 per Baron Alderson.

⁷⁶¹ *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 49 per Rich J.

⁷⁶² *Council of the NSW Bar Association v Power* (2008) 71 NSWLR 451, [20] – [26], citing *Azzopardi v The Queen* (2001) 205 CLR 50.

⁷⁶³ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [82].

⁷⁶⁴ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [88].

E4. Conduct in the litigation as admissions by conduct

339 In *Amalgamated Television Services Pty Ltd v Marsden*,⁷⁶⁵ the NSW Court of Appeal endorsed the following statement of principle:

“... the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieved in his own case, may be proved and used as evidence against him.

The principle is well stated by Sir Alfred Wills, until lately Wills J, in his edition of his father's work upon circumstantial evidence, '[a]mongst the most forcible of presumptive indications may be more than all attempts to pollute or distort the current of truth and justice or to prevent a fair and impartial trial, by endeavours to intimidate, suborn, bribe, or otherwise tamper with the prosecutor, or the witnesses, or the officers or ministers of justice, the concealment, suppression, destruction, or alteration of any article of real evidence; any of which acts clearly brought home to the prisoner or his agents, are of a more prejudicial effect as denoting on his part a consciousness of guilt, and a desire to evade the pressure of facts tending to establish it.'”

E5. Duty of candour

340 The CPA imposes strict, positive obligations on the participants in a civil proceeding, including parties, lawyers, and litigation funders. Those duties intersect with the existing duty of candour owed by legal practitioners.

341 The duty of candour fortifies the inferences that may be drawn by the Court in circumstances where persons subject to that duty fail to give evidence when a prima facie case is established. If a legal practitioner wishes the Court to accept some explanation for their conduct, then “*he has an obligation to meet the situation by explanation on oath*” and should enter the witness box at the hearing.⁷⁶⁶ If a legal practitioner declines to give an explanation on oath of the matters raised against him, he cannot complain if the Court holds against him that the facts as alleged are substantially true.⁷⁶⁷ The duty of candour is thus part of the evidentiary matrix which informs the fact-finding exercise of the Court. A legal practitioner can be expected to provide a full and frank explanation for apparent irregularities in the course of practice, **particularly** if an innocent explanation exists.

⁷⁶⁵ [2002] NSWCA 419, [81].

⁷⁶⁶ *New South Wales Bar Assn v Meakes* [2006] NSWCA 340, [70], citing *Coe v NSW Bar Association* [2000] NSWCA 13 at [21].

⁷⁶⁷ *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN(NSW) (Part 1) 136, 141.

F. The duty to the Court in relation to discovery

342 A solicitor has a duty to the Court to ensure that their client makes proper discovery. In *Guss v Law Institute of Victoria Ltd*,⁷⁶⁸ a case concerning a solicitor's deliberate failure to discover a relevant document, Maxwell P said:

"It is difficult to overstate the importance to the administration of justice of the paramount duty of a legal practitioner not to mislead the court. Where there is any conflict, or risk of conflict, between that duty and what the practitioner perceives to be his/her duty to the client, the duty to the court must always prevail. Nowhere is the risk of conflict more likely to arise than in relation to the obligation to make discovery. Discovery is, of course, the obligation of the client, but the client inevitably depends upon the advice of the legal practitioner as to what is, and what is not, discoverable and as to the availability of any claim for privilege. As Giles A.J.A. said in *Law Society of New South Wales v Foreman*:

'It is of the greatest importance in the conduct of the profession of a solicitor, and never more so than in relation to litigation where the court relies upon the solicitor in matters such as discovery of documents, that other legal practitioners should be able to accept without question the honesty of their colleagues and the court should be able to accept without question the honesty of its officers'."

343 The solicitor's duty to the Court requires the solicitor to advise their client as to what documents are material and must therefore be disclosed to the adversary. The obligation is a heavy one.⁷⁶⁹ In *Myers v Elman*,⁷⁷⁰ Lord Myers described it as follows:

"The order for discovery requires the client to give information in writing on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. **If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw**

⁷⁶⁸ [2006] VSCA 88, [39] - [40].

⁷⁶⁹ *Rockwell Machine Tool Co Ltd v FP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693; *El Du Pont De Nemours & Co v Cmr of Patents* (1987) 16 FCR 423, 425-6.

⁷⁷⁰ [1940] AC 282 at 322.

from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.”

- 344 The solicitor is obliged to make an appraisal of the case and form an opinion as to what documents probably are in existence and actively to seek out from the client whether or not those documents exist.⁷⁷¹
- 345 A party and their solicitor are not entitled to rely on their unrefreshed recollection of the existence and whereabouts of relevant documents. Both are required to undertake appropriate searches and make appropriate inquiries for documents that would assist the case for the party as well as for those that would not.⁷⁷²
- 346 The solicitor for a party also has a duty to advise the client not to lose or destroy relevant documents which might need to be disclosed.⁷⁷³
- 347 These principles are fortified by section 26 of the CPA, which provides:
- “(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
- (a) of which the person is aware; and
- (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
- (2) Disclosure under subsection (1) must occur at—
- (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
- (b) such other time as a court may direct.
- ...
- (4) The overarching obligation imposed by this section—
- (a) is an ongoing obligation for the duration of the civil proceeding; and
- (b) does not limit or affect a party's obligations in relation to discovery.”

⁷⁷¹ *Ferguson v Mackaness Produce Pty Ltd* [1970] 2 NSW 66; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 435, [8].

⁷⁷² *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2008] NSWCA 216, [41]

⁷⁷³ *Rockwell Machine Tool Co Ltd v FP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693, 694.

G. Standard of proof

348 There should be clear and cogent proof of serious allegations.⁷⁷⁴ This does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct.⁷⁷⁵

⁷⁷⁴ See *Evidence Act 2008* (Vic), s 140 and *Briginshaw v Briginshaw* (1938) 60 CLR 336.
⁷⁷⁵ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, [2].

PART 4: CONTRAVENTIONS AND RELIEF

A. BACKGROUND FACTS

A1. Commencement of proceedings

349 In **October 2012**, Banksia Securities Limited (**Banksia**) collapsed, owing debenture holders more than \$600 million. Receivers were appointed.

350 In **November 2012**, Mr Mark Elliott (who was a solicitor) and Mr Norman O'Bryan (who was a senior counsel) decided to commence a class action against various defendants arising out of the collapse. Mark Elliott and Mr O'Bryan travelled to Kyabram and found a representative plaintiff (Mr Bolitho). On **24 December 2012**, Mark Elliott filed the writ, with Bolitho representing the interests of the 16,000 debenture holders who suffered losses arising from Banksia's collapse.

A2. **Receivers' examinations**

351 In **July, August and December 2013, September 2014, and March 2015**, the Receivers conducted examinations of **21 individuals** and sought production of documents from various persons,⁷⁷⁶ generating **21 volumes of documents** (the **Receivers' Court Book**).⁷⁷⁷

A3. Incorporation of AFP and Bolitho No 4 Decision

352 In **December 2013**, Mark Elliott and Mr O'Bryan decided to incorporate a litigation funder in connection with the class action. On 20 January 2014, the second named plaintiff in this remitter proceeding (**AFP**) was incorporated, with entities associated with Mark Elliott (AMEO Investments Pty Ltd) and Mr O'Bryan (Noysue Pty Ltd) each subscribing for **500,000** shares at **\$1 per share**.⁷⁷⁸ Subsequently, Mr O'Bryan identified⁷⁷⁹ some additional investors, Willjo Pty Ltd (associated with Will Crothers), 4Tops Investments Pty Ltd (associated with Simon Tan) and Fleming

⁷⁷⁶ [SPR.005.001.2499] at .2503, para [16.b].

⁷⁷⁷ See [NOB.500.012.3839].

⁷⁷⁸ [AID.010.027.0001]; [AID.010.021.0001_2].

⁷⁷⁹ [NOB.500.009.7870].

International (associated with Stephen Hill), each of which subscribed for small shareholdings at **\$10 per share**.⁷⁸⁰

353 Immediately after AFP was incorporated, Mark Elliott and Mr O'Bryan drafted a litigation funding agreement between AFP and Mr Bolitho (**Funding Agreement**),⁷⁸¹ which they provided to Mr Crow, personal solicitor for Mr Bolitho.⁷⁸² Mr Bolitho signed the Funding Agreement on 6 February 2014,⁷⁸³ and immediately thereafter, on **7 February 2014, Noysy Pty Ltd**⁷⁸⁴ (another entity associated with Mr O'Bryan) invested **\$500,000** in AFP by way of subscription of the shares taken by **Noysue**.⁷⁸⁵

A4. SPR Proceeding and McKenzie Proceeding

354 In **June 2014**, liquidators were appointed to Banksia to investigate claims against Trust Co.⁷⁸⁶

355 In **September, October and November 2014**, the liquidators examined various officers of Trust Co.⁷⁸⁷ **Three volumes of documents** were produced in connection with those examinations (the **Liquidators' Court Book**).⁷⁸⁸

356 In **March 2015**, the liquidators of Banksia issued writs to commence the SPR Proceeding and the McKenzie Group Proceeding against Trust Co.⁷⁸⁹

357 The McKenzie Group Proceeding was a group proceeding that substantially mirrored the claims in the Bolitho Proceeding. It was commenced by the SPRs as they were concerned about the ability of the Bolitho camp to properly manage the Bolitho Proceeding.⁷⁹⁰

⁷⁸⁰ [AID.010.027.0001]; [AID.010.021.0001_2].

⁷⁸¹ [NOB.500.009.7697] [NOB.500.009.7698] [NOB.500.009.7719].

⁷⁸² Email from Mr Elliott to Mr Crow dated 22 January 2014, with attachments [NOB.500.009.7657] [NOB.500.009.7659] [NOB.500.009.7661], which was settled by Mr O'Bryan [NOB.500.009.7657].

⁷⁸³ [NOB.500.009.7049].

⁷⁸⁴ See company search [CCW.025.001.0098] and relevant Trust Deed [NOB.503.011.0008].

⁷⁸⁵ [NOB.501.001.0006].

⁷⁸⁶ Mr Sloan's 8 September 2015 Affidavit [SPR.005.001.2499] at .2504, para [22], referring to Mr Hayes' 11 June 2014 Affidavit [SPR.005.001.2499] at .2702, .2709 – .2711 [27.b] – [32]; Further SPR Opinion [CCW.022.001.0460], para [29.c]; see also Mr Crow's fee entry for 27 June 2014 [CCW.031.001.0047] at .0796 ("*Banksia now in liquidation. Liquidator threatening to sue Harwood Andrews and Morrison & Sawers, and also Trustco as well as other defendants.*")

⁷⁸⁷ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], [37].

⁷⁸⁸ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], [37.b].

⁷⁸⁹ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], [36], [74].

⁷⁹⁰ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], [42] – [44].

A4.1 Mark Elliott, Mr O'Bryan and Mr Symons saw the liquidators' proceedings as a threat to AFP's commercial interests

358 Mark Elliott, Mr O'Bryan and Mr Symons saw the proceedings commenced by the liquidators as a potential threat to AFP's commercial interests in their conduct of the Bolitho Proceeding. They knew that a competing proceeding could erode AFP's funding commission from any settlement or judgment in relation to the claims against Trust Co, the defendant with the "deep pockets".

359 Mark Elliott said to Mr Symons (in an email that was also copied to Mr O'Bryan): *"Liquidator will arm wrestle us for any \$ recovered from Trustco but we get all the interest.ie \$70M. We will claim our 30% on all proceeds received from all defendants we have sued (but particularly Trustco) and will try and resist sharing with anyone else particularly the Liquidator re Trustco receipts"*.⁷⁹¹

360 Mr Zita conceded in cross-examination that he knew that Mark Elliott and Mr O'Bryan were not happy about the McKenzie Proceeding.⁷⁹² He did not agree that he knew Mark Elliott and Mr O'Bryan saw it as a threat to AFP's commercial interests or that he knew AFP's commercial interests lay in obtaining the highest commission as it could,⁷⁹³ but the Court should reject that evidence as implausible and contrary to common sense.

A4.2 Mark Elliott, Mr O'Bryan and Mr Symons also saw the liquidators' proceedings as an opportunity to mitigate AFP's funding risk

361 Although Mark Elliott and Mr O'Bryan saw the liquidators' claims against Trust Co as a threat, they also saw an opportunity: namely, the opportunity to shift the expenses of the litigation to the liquidators/SPRs, which AFP embraced.

362 Mr O'Bryan arranged for Portfolio Law to brief counsel to appear for Mr Bolitho in support of the SPRs' application to Justice Black for funds to be set aside for the

⁷⁹¹ [SYM.002.001.0566].

⁷⁹² Transcript of hearing on 14 August 2020 [TRA.500.008.0001] T794:18-24.

⁷⁹³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] T795:31-796-2; see also T849:28-850:6.

conduct of the SPR Proceeding.⁷⁹⁴ Justice Black made orders setting aside \$10 million of Banksia's funds for that purpose.⁷⁹⁵

363 Thereafter, the SPRs undertook substantially all the work to progress the two proceedings to trial. The Court should accept the unchallenged evidence of Mr Kingston and Mr Newman that:

(a) The evidence preparation work was undertaken by Maddocks and their counsel with assistance from the SPRs themselves.⁷⁹⁶

(b) The extent of the assistance provided by the Bolitho team was limited to some comments provided by Mr O'Bryan on advanced drafts on **3** witness outlines and **5** expert reports,⁷⁹⁷ and attendance at **2** of the **145** expert conferrals conducted by Maddocks, both of which occurred in September 2015,⁷⁹⁸ prior to the Relevant Period.

364 The evidence shows that Mr Symons, who was Mr O'Bryan's junior, was not involved in evidence preparation at all. Mr O'Bryan did not confer with Mr Symons about the comments he provided on advanced drafts of the evidence that Mr Redwood sent to him.⁷⁹⁹ He conferred only with Mr Redwood.

365 Mr Zita conceded that the SPRs had "*the infrastructure to do the evidence*", including expert witnesses, whereas Portfolio Law did not have that capacity.⁸⁰⁰

366 In internal emails exchanged between Mark Elliott, Mr O'Bryan, Mr Zita, Alex Elliott, and Mr Symons in October 2017, Mark Elliott said: "*Do we need to follow up on the*

⁷⁹⁴ [CBP.004.001.4549].

⁷⁹⁵ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [94]; *In the matter of Banksia Securities Limited (in liquidation) (receivers and managers appointed)* [2016] NSWSC 357 [SPR.005.001.0676].

⁷⁹⁶ Mr Kingston's 2 June 2020 Affidavit [SPR.006.001.0004], paras 10-15; Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001] at paras [60.e], [61] – [71], [81] – [91].

⁷⁹⁷ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [89] (namely, the outlines of Mr Smoker [NOB.500.013.2098] [NOB.500.013.2099], Mr Silavecky [NOB.500.013.1507] [NOB.500.013.1508] and Mr Britton [NOB.500.013.1522], the two expert reports of Mr Hardy [NOB.500.002.2786] [NOB.500.002.2787] [NOB.500.002.0639] [NOB.500.002.0640], the first expert report of Mr Story [NOB.500.002.0192], and the first and third expert reports of Mr Hall [NOB.500.001.8278] [NOB.500.007.7166] [NOB.500.007.7167]).

⁷⁹⁸ The two expert conferrals attended by Mr O'Bryan are identified in Mr Kingston's "Consolidated Chronology" [SPR.100.001.0001] at .0018 - .0019. They occurred on 10 and 29 September 2015.

⁷⁹⁹ [NOB.500.002.0612] [NOB.500.002.0640]; [NOB.500.002.0612] [NOB.500.002.0640];

⁸⁰⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [104].

*progress of our reply evidence?” and Mr O’Bryan replied: “Redwood tells me it is all in hand.”*⁸⁰¹

367 In internal emails exchanged between Mark Elliott and Mr O’Bryan on 15 May 2018, Mr O’Bryan said that *“the bulk of all legal work done”* comprised *“the expert evidence for trial”*.⁸⁰² His contention in that email exchange that *“Michael & I contributed fully”* to that work⁸⁰³ is no longer maintained by him or anyone else, and is contrary to the evidence in the remitter. Critically, in that email exchange, Mr O’Bryan conceded:⁸⁰⁴

“JL paid for most of it, but that was only because he had got \$10M of debentureholders’ money from Black J and it made perfect sense to spend that money first, rather than AFP’s money, since AFP would simply ask for a much larger lit. fund. fee if it had had to spend those additional \$millions.”

368 This admission confirms that Mr O’Bryan and Mark Elliott were keenly aware that:

- (a) the SPRs had assisted to significantly defray AFP’s litigation funding risk by paying for most of the evidence;
- (b) this was directly relevant to its commission; and
- (c) the claim for excessive legal costs was intended to bolster AFP’s claim for its commission.

369 **Section 14.7** below (paragraphs 1277 to 1283) addresses the fact that AFP could not possibly have sought a *“much larger [litigation funding fee]”*, and that Mark Elliott had in fact sought the full 30% that he felt he was entitled to under the Funding Agreement.

801 [NOB.500.001.8590].

802 [NOB.500.004.6582].

803 [NOB.500.004.6582].

804 [NOB.500.004.6582].

B. CIRCUMVENTING THE RULING IN BOLITHO NO 4

B1. Overview of contraventions

370 The Court should find that AFP, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott contravened:

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

(b) the Paramount Duty,

by their conduct in connection with the arrangements they made and thereafter implemented by which Mark Elliott/AFP, Alex Elliott and Mr O'Bryan continued to maintain the dual interests of funder and legal representative, and which circumvented the Bolitho No 4 Decision and the assurances they had provided to the Court that those conflicts had been resolved (**Continuing Conflict Contraventions**).⁸⁰⁵

B2. Concessions and admissions

371 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,⁸⁰⁶ and do not contest findings being made against them on the basis of those allegations.⁸⁰⁷

372 AFP admits the following:

(a) AFP's Register of Members records that, on 14 December 2014, following the Bolitho No 4 Decision, Noysue (the entity through which Mr O'Bryan's spouse held shares in AFP) transferred its shares in AFP to an entity controlled by Mark Elliott, Regent Support Pty Ltd (now MCM (Mt Buller) Developments Pty Ltd) (Regent Support).⁸⁰⁸ A share transfer form was executed by Noysue and Mark Elliott dated 14 December 2014.⁸⁰⁹ The

⁸⁰⁵ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [39].

⁸⁰⁶ RLOI dated 21 July 2020: [PLE.010.002.0001].

⁸⁰⁷ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

⁸⁰⁸ [AFP.003.001.1062].

⁸⁰⁹ [AFP.003.001.1061].

Register of Members and share transfer form record that the consideration for the transfer was **\$500,000**.⁸¹⁰

- (b) Following the Partial Settlement of Mr Bolitho's claims against certain defendants which was approved by the Court on 25 August 2016, AFP received a proportion of the settlement proceeds and paid various service providers, but paid Mr O'Bryan only **\$800,000** of the **\$1.7 million** that Mr O'Bryan had charged up to that time.⁸¹¹ AFP's financial statements do not record any liability in respect of this sum.⁸¹²
- (c) Mr O'Bryan acted in the proceeding without seeking payment in respect of his fees until settlements were reached.⁸¹³
- (d) Mark Elliott/AFP arranged for Mr Bolitho and group members to be represented by a solicitor on the record, namely Portfolio Law. Mr Zita and Portfolio Law had no experience in class actions.⁸¹⁴
- (e) Alex Elliott was copied to a large number of emails exchanged between AFP and the Bolitho Lawyers in the Relevant Period, provided instructions to Mr Zita,⁸¹⁵ operated an email address and telephone line established to receive enquiries from group members,⁸¹⁶ and filed some documents that were said to have been filed by Portfolio Law.⁸¹⁷ Sometimes, Mr Zita referred enquiries from group members to Alex Elliott.⁸¹⁸
- (f) In around April 2017, at Mark Elliott's and/or Mr O'Bryan's direction, Mr Zita arranged for the General Class Action Email Account the Bolitho Class Action Email Account to be created, to which each of Mark Elliott, Mr O'Bryan, Mr Symons, Mr Zita and Alex Elliott had access (directly or

⁸¹⁰ [PLE.020.001.0001], para [40.a.i].

⁸¹¹ [PLE.020.001.0001], para [40.a.ii]. See RLOI dated 21 July 2020: [PLE.010.002.0001], para [37] and [AFP.005.001.0296] [SYM.002.004.3331] [SYM.002.004.3332] [CBP.001.012.0164] [CBP.001.012.0165].

⁸¹² [PLE.020.001.0001], para [40.a.ii].

⁸¹³ [PLE.020.001.0001], para [40.a.iii].

⁸¹⁴ [PLE.020.001.0001], para [40.b.i].

⁸¹⁵ [CBP.001.006.5811].

⁸¹⁶ [CBP.001.006.4733] [CBP.001.006.4734].

⁸¹⁷ [PLE.020.001.0001], para [40.b.ii] (see [CBP.004.004.1652]).

⁸¹⁸ [PLE.020.001.0001], para [40.b.ii] (see eg [CBP.001.006.5815] [CBP.001.006.7752], [CBP.001.006.4725] [CBP.001.013.3413 and attachments]).

indirectly) and through which they corresponded with each other for the purposes of conducting the litigation.⁸¹⁹

- (g) Mark Elliott continued to direct and control the day-to-day aspects of the conduct of the Bolitho Proceeding, such as giving instructions as to what correspondence was to be drafted and sent.⁸²⁰
- (h) Mark Elliott required Mr Zita/Portfolio Law to copy Mark Elliott on all correspondence or forward on to Mark Elliott all correspondence that Mr Zita/Portfolio Law received.⁸²¹
- (i) Mark Elliott considered that AFP was empowered under the Funding Agreement to "run the litigation" as AFP saw fit.⁸²²
- (j) Mark Elliott controlled all settlement negotiations relating to the claims of Mr Bolitho and group members, and exercised that control to refuse to settle the Bolitho Proceeding on otherwise reasonable terms unless the settling parties (including the SPRs) agreed that AFP would be entitled to recover substantial sums from the settlement by way of costs and commission.⁸²³

373 Prior to opening their case, Mr Zita/Portfolio Law adopted AFP's admissions.⁸²⁴ During the opening of their case, Mr Zita/Portfolio Law relevantly offered the following further concession:⁸²⁵

"We say that the principal failing of Mr Zita was his failure to exercise sufficient independent judgment when acting for Mr Bolitho. He acknowledges, and the documentary record clearly shows, that he was guided and followed the instructions of Mr Elliott, Mr O'Bryan and Mr Symons.

The contradictors describe that conduct as that of a postbox. Your Honour, the expression 'postbox' has no fixed meaning, but insofar as the contradictors use that expression to contend that Mr Zita dutifully followed

⁸¹⁹ [PLE.020.001.0001], para [40.b.iv].

⁸²⁰ [PLE.020.001.0001], para [40.c.i] (see for example [CBP.004.005.5544], [CBP.001.006.4733] [CBP.004.001.0237] [CBP.004.001.0238] [CBP.001.006.3311]).

⁸²¹ [PLE.020.001.0001], para [40.c.ii] (see for example [CBP.004.003.5364] [CBP.004.005.7912] [CBP.004.005.5544]).

⁸²² [PLE.020.001.0001], para [40.c.iii] [NOB.500.004.4522 at page 36].

⁸²³ [PLE.020.001.0001], para [40.c.iv] (see eg [CBP.004.004.8528], [CBP.004.005.5249], [CBP.004.008.4529], [CBP.004.004.6285], [CBP.004.008.4451], [CBP.004.006.2249], [CBP.004.008.0837], [CBP.004.001.9880], [CBP.004.007.8528], [CBP.004.007.5344], [CBP.004.007.0707]; [CBP.004.008.0851]; see also [NOB.500.004.4522 at pages 36, 48-50]).

⁸²⁴ [PLE.070.001.0001_2].

⁸²⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-730:9.

the directions of other members of the Bolitho legal team, which included Mr Elliott, Mr Zita does not resist that characterisation.

That said, Mr Zita never considered himself limited in his role as that of a postbox, and to be clear, your Honour, Mr Zita certainly had no intention when he became involved in this proceeding to provide postbox-like services to the other members of the litigation team...

But it is acknowledged, your Honour, that Mr Zita made no substantive, independent forensic decisions. He worked as directed by other members of the Bolitho legal team, and that is acknowledged.”

374 Under cross-examination, Mr Zita gave the following evidence:⁸²⁶

“But you accept you were the postbox lawyer; is that right?---**No, I accept in hindsight looking at what's happened I accept that, but that wasn't my intention at the time.** And I wasn't a postbox lawyer; I did work in this matter.”

375 Prior to opening his case, Alex Elliott made similar admissions to those made by AFP, including the admissions that:

- (a) he was copied to a large number of emails exchanged between AFP and the Bolitho Lawyers in the Relevant Period; and
- (b) sometimes, Mr Zita referred enquiries from group members to Alex Elliott,⁸²⁷

but curiously did **not** adopt the admission that he operated an email address and telephone line established to receive enquiries from group members, despite then conceding in his evidence in chief that he **did** handle those enquiries.⁸²⁸

376 Alex Elliott further admits that he knew of the Bolitho No 4 Decision “*in general terms*”.⁸²⁹

B3. The Bolitho No 4 Decision

377 In **June 2014**, one of the defendants to the proceeding (Mr Godfrey) filed an application to restrain Mr Bolitho from retaining Mark Elliott and Mr O'Bryan on the basis that they had a conflict of interest by reason of their financial interest in AFP and in the outcome of the proceeding.⁸³⁰

⁸²⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 769:4-8.

⁸²⁷ [PAR.080.001.0001], para [40.b.ii].

⁸²⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:31-1736:20.

⁸²⁹ [PAR.080.001.0001], para [42A.a].

⁸³⁰ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [21.a].

378 On **26 November 2014**, the Court found that Mark Elliott and Mr O’Bryan should not continue to act for Mr Bolitho as solicitor and counsel respectively in circumstances where they each had an interest in AFP,⁸³¹ including by reason of the following findings:

- (a) The fair-minded, reasonably informed member of the public (**the Observer**) would form the view that it was important for the proper administration of justice and the judicial process that the Court can rely upon the independence of the lawyers for the parties and that the lawyers will bring a degree of objectivity to the task when advising their clients and presenting the case to the Court.⁸³²
- (b) The Observer would know that the legislature has seen fit to place a 25 per cent limit on the uplift fee that may be charged by solicitors acting on a “no win no fee” basis and has banned contingency fees, such that a solicitor may not charge as a fee a percentage of the amount obtained by the client from the litigation.⁸³³
- (c) Although the litigation funding agreement success fee payable under the Funding Agreement would not be payable to Mark Elliott in his capacity as a solicitor, nevertheless it is a contingency fee that would benefit him. The Observer would likely take the view that where the legal practitioner’s interest in the funder is sizeable, it would be inimical to the appearance of justice for lawyers to skirt around the prohibition on contingency fees by this means.⁸³⁴
- (d) The Observer would note that there was a greater likelihood for conflict because of the numerous capacities in which Mark Elliott acted. He was the solicitor for Mr Bolitho. He was a director and secretary of AFP. AFP stood to make a substantial gain or loss from the litigation. Whilst the CPA requires parties, litigation funders and the court to deal with litigation efficiently and cost effectively, another key requirement is the just resolution of disputes. Justice requires practitioners to observe their ethical duties and obligations to the Court. The Court relies upon practitioners to apply an

⁸³¹ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 [ATH.600.006.0001] (**‘Bolitho No 4’**) [ATH.600.006.0001].

⁸³² *Bolitho No 4* at [48.z].

⁸³³ *Bolitho No 4* at [50].

⁸³⁴ *Bolitho No 4* at [51].

independent and objective mind when conducting a case on behalf of the client. There is a risk that that objectivity might be compromised to some degree where there is a “no win no fee” arrangement because of the fees which the practitioner may have at stake. The more that was at stake, the greater the risk that the lawyer will not bring or will not be seen to be bringing to bear the requisite degree of objectivity that the role of lawyer demands.⁸³⁵

- (e) Similarly, the Observer would form the view that Mr O’Bryan may be influenced by his family’s substantial financial interest in the outcome of the case, which might be seen to colour his ability to perform his obligations.⁸³⁶
- (f) Although the evidence disclosed that AFP was paying Mr O’Bryan’s fees, his family had a significant interest in AFP that placed Mr O’Bryan in a compromised position so that the Observer would consider there was a risk that he would be perceived to be unable to apply the necessary independence required as an officer of the Court.⁸³⁷
- (g) The prospect of Mr O’Bryan’s stance that he would not take any part in advising about settlement did not diminish the risk sufficiently.⁸³⁸

379 The Court found that the appropriate orders were ones directed towards Mark Elliott and Mr O’Bryan, but that because no relief had been sought against them, and because they were not represented at the hearing, the Court would initially refrain from making orders, and the Court directed that a copy of the reasons be provided to them for their consideration.

B4. Events following the Bolitho No 4 Decision

380 On around **3 or 4 December 2014**, Mark Elliott met with Mr Zita, a university acquaintance, to discuss Mr Zita’s firm Portfolio Law being retained as solicitor on the record. Mr Zita told Mark Elliott he had no experience in class actions.⁸³⁹ Mark Elliott told Mr Zita that counsel were retained and would be “*on tap for you*”.⁸⁴⁰ Mr Zita agreed to act,⁸⁴¹ and the implication was that Mark Elliott would still be there

⁸³⁵ *Bolitho No 4* at [53].

⁸³⁶ *Bolitho No 4* at [62].

⁸³⁷ *Bolitho No 4* at [62].

⁸³⁸ *Bolitho No 4* at [62].

⁸³⁹ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [20.g].

⁸⁴⁰ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [20.i].

⁸⁴¹ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [24].

to help out if Mr Zita needed his help, and all correspondence needed to be sent to Mark Elliott for his information and approval.⁸⁴²

- 381 On around **5 December 2014**, a number of the defendants to the Bolitho Proceeding made a settlement offer of **\$11 million**.⁸⁴³
- 382 On **7 December 2014**, Mark Elliott emailed Mr Zita with a draft letter to the settling defendants,⁸⁴⁴ which he instructed Mr Zita to send “blind copying” Mark Elliott,⁸⁴⁵ and Mr Zita confirmed in cross-examination that he complied with that instruction.⁸⁴⁶ The letter was set out in an indented style and in such a way as to suggest it was drafted by O’Bryan. The letter referred to a “*number of concerns arising out of these documents*”, which included: “*why is no allowance made for the plaintiff’s costs to date (in excess of \$2M)*”, and “*why is no allowance made for the litigation funder’s fee (up to 30% of the settlement sum) and for the parties to covenant to support the necessary application to Court for approval to its payment*”.
- 383 The draft letter concluded: “*I will need to seek instructions from Mr Bolitho and give him advice about all these matters.*” On **8 December 2014**, Portfolio Law filed a notice of change of solicitor.⁸⁴⁷ Later on **8 December 2014**, Portfolio Law sent the letter in the terms drafted by Mark Elliott and Mr O’Bryan.⁸⁴⁸ Mr Zita confirmed in cross-examination that he did not seek to verify any of the statements in the letter,⁸⁴⁹ and did not seek any instructions from Mr Bolitho or give him any advice about the matters set out in the letter.⁸⁵⁰
- 384 At that time in **December 2014**, Mr O’Bryan drafted various other correspondence and orders for Portfolio Law to issue.⁸⁵¹ He instructed Portfolio Law to conceal his involvement in drafting those documents behind the scenes; and he was evidently frustrated when Portfolio Law provided draft orders to Court in a word format that

⁸⁴² AFP’s admissions [PLE.020.001.0001], para [40.c.ii] (see for example [CBP.004.003.5364] [CBP.004.005.7912] [CBP.004.005.5544]).

⁸⁴³ [CBP.004.005.7912].

⁸⁴⁴ [CBP.004.007.2195].

⁸⁴⁵ [CBP.004.005.7912].

⁸⁴⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 774:31-775:12.

⁸⁴⁷ [CBP.004.001.0599].

⁸⁴⁸ [CBP.004.006.6990].

⁸⁴⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 778:21-780:5.

⁸⁵⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 780:6-9.

⁸⁵¹ [CBP.004.007.9352] [CBP.004.007.9353].

revealed Mr O’Bryan as the author, scolding Mr Mizzi, *“This was supposed not to show me as the author but it does!”*⁸⁵²

B5. Orders consequent on the Bolitho No 4 Decision

385 On **11 December 2014**, the legal representatives for Mr Godfrey conferred with Mr O’Bryan and Portfolio Law about the orders they would seek arising from the Bolitho No 4 Ruling.⁸⁵³

386 On **11 December 2014**, Mr O’Bryan drafted a letter for Mr Zita/Portfolio Law to send to the parties which stated: *“Noysue Pty Ltd has disposed of its shares in the litigation funder. Accordingly the plaintiff does not consider your proposed orders necessary and will oppose them”*.⁸⁵⁴ Portfolio Law sent a letter in those terms.⁸⁵⁵ Mr Zita conceded that he did not undertake any independent enquiries to satisfy himself as to the truthfulness of the letter.⁸⁵⁶

387 In response, on **11 December 2014**, the solicitors for Mr Godfrey wrote to Portfolio Law requesting *“a copy of all written contracts, transfers and communications evidencing the disposal by Noysue Pty Ltd (‘Noysue’) of its shares in the litigation funder”*.⁸⁵⁷

388 On **12 December 2014**, Mr O’Bryan warned counsel for Mr Godfrey that:⁸⁵⁸

“If any party wants me joined to an application or seeks any other relief affecting me, I will insist on being properly served and given an opportunity to defend the application. I will also have to engage my own solicitors and counsel. As I also confirmed a few minutes ago, last night, after she returned from Borneo (where she has been in the jungle & uncontactable for the past three weeks), my wife agreed to sell her interest in the litigation funder. That has now occurred. Having regard to Justice Ferguson’s reasons for decision, my wife will not again fund any action in which I appear as counsel. Mark Elliott has been replaced as solicitor by Portfolio Law (Tony Zita). Accordingly I do not consider there is any need for orders joining Elliott or me, or granting injunctions against either of us.”

852 [CBP.004.007.1831].

853 [CBP.004.005.8721] [CBP.004.005.8723] [CBP.004.005.8726].

854 [CBP.004.007.8509].

855 [CBP.004.001.4217] [CBP.004.001.4218].

856 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 769:30-772:27.

857 [CBP.004.008.6236].

858 [CBP.004.001.9616].

389 The intimation of this message was plain: those acting for Mr Godfrey were told to accept the word of senior counsel that he had disposed of any interest in the litigation funder, and on that basis, to let the matter go.

390 Notwithstanding that invitation, Mr Godfrey persisted with seeking some orders to give effect to the Bolitho No 4 Decision.⁸⁵⁹ Accordingly, Mr O'Bryan instructed Mr Symons to draft submissions resisting the orders, and to appear at a hearing before Justice Ferguson and make those submissions.⁸⁶⁰ Mr Symons drafted submissions and provided them to Mark Elliott and Mr O'Bryan to review and settle.⁸⁶¹ Portfolio Law filed the submissions.⁸⁶²

391 Those submissions stated:⁸⁶³

*“Upon delivery of the Ruling, Mr Elliott and Mr O'Bryan ceased to act for the plaintiff... Mr O'Bryan's wife has now disposed of her interest in the Litigation Funder. **As Mr O'Bryan has no ongoing financial interest in the proceeding, beyond his fees, there is no reason why the plaintiff's new solicitor should be restrained from engaging Mr O'Bryan as counsel in the proceeding**”.*

392 On **14 December 2014**, Mark Elliott and Ms Sue Noy, the director of Noysue Pty Ltd (the entity through which the O'Bryan family interests held shares in AFP) executed a share transfer form to transfer the **500,000** shares in AFP held by Noysue Pty Ltd to **Regent Support Pty Ltd** – an entity associated with Mark Elliott.⁸⁶⁴ The consideration for the transfer was recorded on the form as **\$500,000**. Nothing was paid by Regent Support Pty Ltd or any other entity associated with Mark Elliott to Noysue Pty Ltd at that time. Indeed, there is no evidence of **any** payment at **any** time in respect of that transfer of shares.

393 On **15 December 2014**, the parties appeared before Justice Ferguson. Mr Symons appeared for Mr Bolitho. Counsel for Mr Godfrey informed her Honour what he had been told by Mr O'Bryan: namely, that Noysue had disposed of its interest in the funder.⁸⁶⁵ On that basis, Justice Ferguson concluded that there was no utility in making the orders.⁸⁶⁶

⁸⁵⁹ [CBP.004.005.8721] [CBP.004.005.8723] [CBP.004.005.8726] [CBP.004.002.2620].

⁸⁶⁰ [CBP.004.002.0943].

⁸⁶¹ [CBP.004.002.0943].

⁸⁶² [CBP.004.004.1384] [CBP.004.004.1385].

⁸⁶³ [CBP.004.004.1384] [CBP.004.004.1385].

⁸⁶⁴ [AFP.003.001.1062] [AFP.003.001.1061].

⁸⁶⁵ [CCW.004.001.0001] at p 0016 (lines 23 – 27).

⁸⁶⁶ [CCW.004.001.0001] at p 0017 (lines 9 – 12).

394 The transcript of the hearing provides a useful illustration as to the Court's reliance upon the honesty and integrity of legal practitioners. Countless judicial acts, many of them important, are daily done by the courts upon unsupported statements of fact by lawyers; and the business of the courts could be done in no other way.⁸⁶⁷ Time does not permit proof by writing or by witness of every fact upon which the courts must act.⁸⁶⁸ Courts must be able to rely upon counsel, and they do so, because the lawyer is acting as an officer of the Court under the sanction and responsibilities of an official oath, mindful of their paramount duty to the Court.⁸⁶⁹

B6. **Mr O'Bryan retained** a stake in AFP

395 The Court should find that Mr O'Bryan did not dispose of his stake in AFP, but rather, had an arrangement or understanding with Mark Elliott pursuant to which he continued to maintain an interest in AFP and/or the litigation funding enterprise conducted by AFP, pursuant to which:

- (a) Regent Support held the shares as bare trustee for Noysue; and
- (b) Mr O'Bryan had an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge).⁸⁷⁰

396 That is evident from the following matters.

397 **First**, Mr O'Bryan (via Noysy Pty Ltd) invested **\$500,000 of real money** into AFP;⁸⁷¹ yet Noysue Pty Ltd and Noysy Pty Ltd received nothing for the shares that were transferred to Regent Support Pty Ltd on 14 December 2014.

398 **Second**, Mr O'Bryan's original investment came at a cheaper price compared with other investors – a price that recognised the intellectual capital he was contributing.⁸⁷² If he really divested his interest, he would have sought the higher price paid by Mr Crothers, Mr Tan and Mr Hill.

⁸⁶⁷ Benton, J. H. (1909). *The Lawyer's Official Oath and Office*. Boston: Boston Book Co, p 7.

⁸⁶⁸ Benton, J. H. (1909). *The Lawyer's Official Oath and Office*. Boston: Boston Book Co, p 7.

⁸⁶⁹ Benton, J. H. (1909). *The Lawyer's Official Oath and Office*. Boston: Boston Book Co, p 7.

⁸⁷⁰ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], paras [39] and [40.a].

⁸⁷¹ [NOB.501.001.0006].

⁸⁷² Noysue's subscription of shares is recorded in AFP's share register [AFP.003.001.1062]. The register shows that, on 20 January 2014, Noysue Pty Ltd subscribed for 500,000 shares at \$1 each. Noysue is a company of which Mr O'Bryan's wife Ms Noy is the sole shareholder [CCW.025.001.0045]. AMEO Investments Pty Ltd and Decoland Holdings Pty Ltd, referred to in the register as the trustee for the MEE Superannuation Trust, together subscribed for 500,000 shares at \$1 each. The other shareholders which subscribed for shares at the start of 2014 paid a higher price. For example: 4Tops Investments subscribed for 20,000 shares at

- 399 **Third**, the purported transaction involved Mr O’Bryan divesting a valuable interest in the litigation funder, apparently for the same price that Mr O’Bryan paid for his original investment, mere days after an **\$11 million** settlement offer was received in respect of which Mark Elliott and Mr O’Bryan considered AFP was entitled to **30%**.⁸⁷³ In view of the settlement offer, the value of the shareholding had increased. It is highly improbable that Mr O’Bryan relinquished that significant value for nothing, or for his entry price, in order to benefit Mark Elliott, merely so that Mr O’Bryan could continue to act as senior counsel in the case, earning counsel’s fees – particularly when he was not paid the full fees that he charged.⁸⁷⁴
- 400 **Fourth**, in relation to the Camping Warehouse v Downer class action, in **May 2016**, AFP paid Mr O’Bryan only **\$1 million** of the **\$1.32 million** in fees that he billed to the matter,⁸⁷⁵ despite fully recovering Mr O’Bryan’s \$1.32 million in fees from the settlement.⁸⁷⁶ In that matter, as in Banksia, Mr O’Bryan stamped all of his invoices as “PAID”.⁸⁷⁷ On 1 March 2017, Mark Elliott emailed Mr O’Bryan stating:⁸⁷⁸

“Hi Norman,

Can I please trouble you for a statement re your Downer fees showing me that you billed \$1.32m incl GST on 4/3/2016.

\$1M has been paid and \$320K is owing.

You are a creditor as at 30/06/2016.

All the invoices I got from you have a paid stamp on them!”

\$10 per share, and therefore invested \$200,000. The differential investments are referred to in AFP’s FY2015 accounts [CCW.022.001.0100] at .0113.

⁸⁷³ AFP’s admissions [PLE.020.001.0001], para [68.b].

⁸⁷⁴ AFP’s admissions [PLE.020.001.0001], para [40.a.ii]; [AFP.014.001.0046]; [NOB.503.003.0029] at .0034.

⁸⁷⁵ See [CCW.038.001.0005_2], being the Contradictors’ summary of Mr O’Bryan’s bills in other matters, which can be filtered for the Camping Warehouse matter, and his invoices at [ABL.001.0312.00096], and a bank statement for Noysy Pty Ltd which received the payment of \$1 million on 26 May 2016: [NOB.503.003.0029].

⁸⁷⁶ See the Trimbos Report in the Camping Warehouse matter [CCW.060.001.0001], the decision in *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784, [182] – [187] [ATH.600.007.0001]; and the order dated 3 May 2016 attaching terms of settlement [CCW.007.001.0001]. Note that, under the terms of settlement, the settlement sum was to be paid within 21 days (ie, 24 May 2016).

⁸⁷⁷ See [CCW.038.001.0005_2], being the Contradictors’ summary of Mr O’Bryan’s bills in other matters, which can be filtered for the Camping Warehouse matter, and his invoices at [ABL.001.0312.00096].

⁸⁷⁸ [SYM.008.001.0022].

- 401 On 1 March 2017 at 9.51am, Mr O'Bryan replied, copying Florence Koh and Alex Elliott, stating: "***My clerk must have made a mistake!***"⁸⁷⁹
- 402 In cross-examination, Alex Elliott conceded that it did "***look a little bit odd***" that only \$1 million had been paid to Mr O'Bryan when his invoices were all stamped as "PAID" and his fees had been fully recovered.⁸⁸⁰ He said that he had no recollection of the email, and that he "*only realised that \$320,000 was still outstanding this year*".⁸⁸¹
- 403 Tellingly, two days prior to the **\$1 million** payment in respect of fees, Decoland made a separate and additional payment of **\$300,000** to Ms Sue Noy.⁸⁸² The Court should infer that this \$300,000 payment was Mr O'Bryan's share of the funding commission, to which he was entitled by reason of his secret arrangement with Mark Elliott.
- 404 **Fifth**, Mr O'Bryan had been acting without receiving payment of fees, and continued to do so;⁸⁸³ an arrangement which is commercially inexplicable in circumstances where (1) AFP was a litigation funder; (2) the purpose of a litigation funder is to pay litigation costs; and (3) Mr O'Bryan did not have any agreement to charge an uplift fee.
- 405 **Sixth**, there is some evidence that, at the time of preparing his bills in around 1 July 2016, Mr O'Bryan **reduced** his daily rate from the fees he had planned to charge at some earlier point in time, in order to ensure that his fees would be approved by Trimpos and the Court.⁸⁸⁴
- 406 **Seventh**, at the reduced rate of **\$9,900** per day including GST which Mr O'Bryan thought would be approved by Mr Trimpos, Mr O'Bryan issued bills for **\$1.7 million**.⁸⁸⁵ AFP recovered a sum of approximately **\$1.2 million** in respect of the fees of Mr O'Bryan. Yet it paid him the sum of only **\$800,000**, which was **\$900,000 less** than the amount he charged.⁸⁸⁶ And at AFP's request,⁸⁸⁷ in **November 2017**, Mr O'Bryan issued an invoice to AFP to match that sum,

⁸⁷⁹ [SYM.008.001.0022].

⁸⁸⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2114:13-20.

⁸⁸¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2114:5-12.

⁸⁸² [NOB.503.010.0001].

⁸⁸³ AFP's admissions [PLE.020.001.0001], para [40.a.iii].

⁸⁸⁴ [AFP.001.001.1475].

⁸⁸⁵ Second Trimpos Report [CCW.031.001.0047], para 56.

⁸⁸⁶ AFP's admissions [PLE.020.001.0001] at [40.a.ii].

⁸⁸⁷ [NOB.500.001.7342].

backdated to **1 July 2016** and described as “*Counsel's fees for the period ended 30 June 2016*”.⁸⁸⁸

407 On any view, this arrangement bespeaks a wider business relationship between Mark Elliott, Mr O'Bryan and AFP, the full extent of which Mr O'Bryan chose not to explain in evidence. It does not reflect a normal fee arrangement between a litigation funder and senior counsel. The Court should find that Mr O'Bryan accepted payment of a lower sum than the amount charged in order to provide working capital for AFP, in which he continued to hold an interest.

B7. AFP, **Mr O'Bryan**, Mr Symons and Mr Zita/Portfolio Law misled Justice Ferguson

408 The Court should find that the position that was conveyed to the Court on 15 December 2014 was misleading. Justice Ferguson was led to believe that the conflicts of interest identified in the Bolitho No 4 Decision and the Bolitho Court Undertakings had been properly addressed, when in fact they had not been properly addressed, and two of the Court's officers, namely Mr O'Bryan and Mark Elliott, had deliberately set about to deceive the Court that they had acted in accordance with the Court's ruling in Bolitho No 4.⁸⁸⁹

409 Mr Zita/Portfolio Law contend that they were entitled to rely upon the instructions provided to them by Mr O'Bryan that Noysue Pty Ltd had disposed of its interest in AFP and the conflict of interest had been resolved. But while Mr Zita/Portfolio Law asked Mr O'Bryan for a copy of the share transfer form, it does not appear that Mr O'Bryan provided them with a copy of it,⁸⁹⁰ and nor did Mr Zita/Portfolio Law undertake any critical inquiries to satisfy themselves that the commercial arrangements between AFP and Mr O'Bryan had in fact been properly resolved.⁸⁹¹ It was incumbent on Mr Zita/Portfolio Law to make proper inquiries about these matters before assuring the parties and the Court that the matter had been addressed.

410 Equally, one can accept that Mr Symons relied upon the instructions provided to him by Mr O'Bryan and Mark Elliott that Noysue Pty Ltd had disposed of its interest

⁸⁸⁸ [CCW.019.001.0001].

⁸⁸⁹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para, [43.a].

⁸⁹⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 770:13-30; Mr Zita's June 2020 Affidavit [CCW.034.006.0001], para [15].

⁸⁹¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 771:2-772:27.

in AFP.⁸⁹² But there is also no evidence that Mr Symons sought to verify that for himself. His submissions also asserted that Mr O’Bryan and Mark Elliott had ceased to act in the matter following the Bolitho No 4 Decision,⁸⁹³ in circumstances where Mr O’Bryan and Mark Elliott had not ceased acting and in fact settled those submissions.⁸⁹⁴

411 Section 21 of the CPA establishes a norm of conduct in the conduct of civil proceedings that persons to whom the overarching obligations are owed shall not engage in misleading or deceptive conduct, whether or not that was their intention.⁸⁹⁵

412 The Court should find that AFP, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct that was misleading or deceptive or likely to mislead or deceive.

B8. Mark Elliott, Alex **Elliott and Elliott Legal acted as the “real”** solicitor

413 The Court should find that:

(a) Mark Elliott/AFP arranged for Mr Bolitho and group members to be represented by a solicitor on the record, namely Portfolio Law, who would not (and did not) independently represent the interests of Mr Bolitho and group members, but rather, permitted Mark Elliott/AFP and Mr O’Bryan to continue doing so;⁸⁹⁶

(b) Mark Elliott, Alex Elliott and Elliott Legal acted as the “de facto” solicitor.

414 That is evident from the following matters.

415 **First**, Mark Elliott arranged for Mr Zita/Portfolio Law to commence acting for Mr Bolitho as solicitor on the record in circumstances where they had no experience in class actions and had inadequate resources, skills, and experience.⁸⁹⁷ Mr Zita’s inexperience and ineptitude commended him to Mark Elliott, because Mark Elliott

⁸⁹² [CBP.004.002.0943].

⁸⁹³ [CBP.004.004.1384] [CBP.004.004.1385].

⁸⁹⁴ [CBP.004.002.0943].

⁸⁹⁵ *Hudspeth No 8* at [190], [194].

⁸⁹⁶ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [40.b].

⁸⁹⁷ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [91] – [95]; see also [SYM.002.001.6176] [TRI.001.006.1912] [TRI.001.006.1914] [TRI.001.006.1916].

wanted a solicitor who would not bring an independent judgment to bear in the conduct of the litigation.⁸⁹⁸

416 **Second**, Mr Zita/Portfolio Law permitted Mark Elliott to retain control of the litigation, particularly when it mattered the most for Mr Bolitho and group members to have independent representation – namely, in relation to the two settlements reached in the proceeding.⁸⁹⁹ Mr Zita conceded that he did whatever Mark Elliott, Mr O’Bryan and Mr Symons told him to do, all the way through the litigation, and did not exercise any independent judgment.⁹⁰⁰

417 **Third**, in about March 2016, Mark Elliott involved his son Alex Elliott in the conduct of the matter. Alex Elliott was a solicitor employed by (and at various times has been a director of) Elliott Legal, Mark Elliott’s incorporated legal practice. Alex Elliott was involved in providing legal services in connection with the Bolitho Proceeding. The Court should find that he was at all times a lawyer, and not a “personal assistant”, that he attended conferences, and was part of the legal team, albeit a junior solicitor on that team, and was involved in providing legal services in connection with the proceeding (see paragraphs 176 to 196 above). The Court should find that the attempt to define him as a “personal assistant”, both in ABL’s 12 April 2019 letter⁹⁰¹ and in evidence to this Court,⁹⁰² was a ruse designed to divert the Contradictors’ gaze away from his engagement in the matter. The Court should find that the intention was for Mark Elliott and his firm Elliott Legal to continue to act as the “real” solicitor, and that Alex Elliott was the junior solicitor acting under the direction of his father on the matter.

418 **Fourth**, Mr Zita/Portfolio Law established email accounts under the domain of “*portfoliolaw.net.au*” (compared to his firm’s domain, “*portfoliolaw.com.au*”). Those addresses were deceptive; they were not truly “Portfolio Law” email accounts, but in fact were accessed by Mark Elliott, Alex Elliott, Mr O’Bryan and Mr Symons. This facilitated Mark Elliott/AFP, Mr O’Bryan, Mr Symons and/or Alex Elliott in controlling the litigation by ensuring that they each received all correspondence in connection with the litigation without the need for Mr Zita/Portfolio Law to

⁸⁹⁸ See transcript of hearing on 14 August 2020 [TRA.500.007.0001], 728:16-27.

⁸⁹⁹ Transcript of hearing on 14 August 2020 [TRA.500.007.0001], 788:4-813:19 (Partial Settlement); transcript of hearing on 17 August 2020 [TRA.500.008.0001], 813-852 (Trust Co Settlement).

⁹⁰⁰ Transcript of hearing on 17 August 2020 [TRA.500.008.0001], 848:10-14.

⁹⁰¹ [AFP.005.001.0374].

⁹⁰² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1656:6-1657:6; transcript of hearing on 8 December 2020 [TRA.500.001.0001], 1887:11-23.

independently and without direction from one or other of them take charge of that correspondence.

419 **Fifth**, Mr Zita did not seek to involve himself in discussions around the terms of the Trust Co Settlement.⁹⁰³ In contrast, Alex Elliott **was** involved in those discussions and in examining the terms of the Trust Co Settlement.⁹⁰⁴

420 **Sixth**, the totality of the evidence supports the conclusion that Mr Zita/Portfolio Law acted virtually as a “post box”.⁹⁰⁵ They were not expected to, and did not, discharge the function of an independent and competent solicitor.⁹⁰⁶

B8.1 Mr Zita/Portfolio Law lacked relevant skills, resources and experience

421 Mr Zita concedes that he and Portfolio Law lacked experience in class actions and the practical resources to attend to evidence preparation for trial,⁹⁰⁷ and that he was largely dependent on Mark Elliott, Mr O’Bryan and Mr Symons.⁹⁰⁸

422 Mr Zita said in his April 2020 affidavit:⁹⁰⁹

“In this remitter proceeding, I have spent a lot of time reflecting on my involvement in the Bolitho Group Proceeding. I say that because Mark offered me the opportunity to become involved as solicitor on the record for Bolitho after he could no longer act in circumstances where:

(a) I had no experience in class actions and was therefore reliant on experienced class action barristers (which I told Mark at our meeting at Syracuse restaurant on 4 December 2014);

(b) Mark had not previously asked me to do any legal work for him; and

(c) there were many experienced class action solicitors out there who could have taken over and who would have been far more qualified than me.”

423 The clear implication is that Mark Elliott arranged for Mr Zita to act **by virtue** of his inexperience and ineptitude. Mark Elliott and Mr O’Bryan wanted a solicitor who

⁹⁰³ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], [207] – [228], [442]-[443];
Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 821:16-828:10, 851:25-30;
Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1348:24-1349:23

⁹⁰⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

⁹⁰⁵ See eg Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [91] – [95];

Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:20-730:9;

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 813:11-15;

Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:28-6.

⁹⁰⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 728:2-5; 730:6-7.

⁹⁰⁷ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [20.g], [42], [93], [104].

⁹⁰⁸ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [92].

⁹⁰⁹ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [93].

would do as he was told. Mr Zita conceded in cross-examination that Mark Elliott and Mr O'Bryan adopted a strong and demanding approach to their dealings with him.⁹¹⁰

B8.2 Mark Elliott and Mr O'Bryan used Mr Zita to advance AFP's interests and their own interests in connection with the Partial Settlement

424 Mark Elliott and Mr O'Bryan directed Mr Zita to make unsubstantiated and/or unwarranted demands for costs and commission, and to demand that the SPRs agree never to serve the writ in the McKenzie Group Proceeding or apply for its renewal, as conditions of Mr Bolitho agreeing to the Partial Settlement, as set out below.

Unsubstantiated and unwarranted demands for costs and commission

425 On **7 December 2014**, the day before Portfolio Law filed a notice of solicitor acting, Mark Elliott directed Mr Zita to send a letter in relation to a settlement offer which stated: "*Why is no allowance made for payment of the plaintiffs costs to date (in excess of \$2M)?*"⁹¹¹ Mr Zita sent that letter⁹¹² without asking to see evidence of those costs,⁹¹³ and without seeking instructions from Mr Bolitho or providing him with any advice.⁹¹⁴

426 On **15 April 2015**, following a mediation, Mr Newman emailed Mr Zita copied to Mark Elliott raising for discussion various considerations relating to any funding commission that might be payable to AFP from any settlement.⁹¹⁵ His email flagged the prospect that there would need to be consideration both of "*costs incurred to date and the commission*", noting his view that AFP was likely to be entitled to "*a fee much less than the maximum 30% or a lesser percentage of the overall settlement sum being applied to settlement of the class action claim*". Mr Newman noted that AFP was only entitled to a funding commission from those group members who had signed the funding agreement. Notably, in this trial, AFP ultimately never sought to prove the proportion of group member who signed the funding agreement, despite expressing an intention to call Mr Ben Horne of

⁹¹⁰ [TRA.500.008.0001] T792:22-26.

⁹¹¹ [CBP.004.007.2195].

⁹¹² [CBP.004.006.6990].

⁹¹³ [TRA.500.007.0001] T777:7-778:29.

⁹¹⁴ [TRA.500.007.0001] T780:6-9.

⁹¹⁵ [CBP.004.003.0631].

Georgeson to give evidence about that issue. The Court should find that the evidence would not have assisted AFP.

- 427 On **27 April 2015** at **5.39pm**, Mr Newman sent an email to Mr Zita and Mr Sloan (Ashurst, solicitor for the receiver) relating to settlement discussions with RSD.⁹¹⁶ At **8.35pm**, Mr O’Bryan replied to Mr Zita and Mark Elliott, stating: **“No dialogue: \$1M by way of costs or no deal”**.⁹¹⁷ At **9.02pm**, Mr Zita replied to Mr O’Bryan and Mark Elliott, stating: **“I did say a ‘bit of dialogue’ and I think ‘\$1M by way of costs or no deal’ qualifies. I am happy to communicate our position subject to what you guys say. We can discuss the matter in the morning.”**⁹¹⁸ At **10.20pm**, Mr O’Bryan replied: **“I am in court tomorrow. We should not compromise our \$1M by one cent.”**⁹¹⁹ On **28 April 2015** at **8.39am**, Mark Elliott replied: **“I was thinking that we should ask for more!”**⁹²⁰
- 428 Mr Zita conceded that he had not seen any invoices or documentation to verify the **\$1 million** in costs.⁹²¹ It is also noteworthy that, **5 months earlier**, Mr O’Bryan and Mark Elliott drafted a letter for Mr Zita that demanded **\$2 million** in costs.⁹²² Mr Zita said that he did not turn his mind to the discrepancy between those demands,⁹²³ though he conceded he should have.⁹²⁴
- 429 It is clear on the evidence (and the Court should find) that Mr Zita did not challenge Mr O’Bryan and Mark Elliott about the arbitrary demands they instructed him to make for legal costs.⁹²⁵ The Court should reject Mr Zita’s suggestion that he might have done so orally.⁹²⁶ The Court should prefer the documentary evidence which shows that Mr Zita’s invariable practice was to send without question the correspondence that Mark Elliott and Mr O’Bryan drafted for him to send.⁹²⁷

⁹¹⁶ [CBP.004.004.8528].

⁹¹⁷ [CBP.004.005.5249].

⁹¹⁸ [CBP.004.005.5249].

⁹¹⁹ [CBP.004.005.5249].

⁹²⁰ [CBP.004.005.5249].

⁹²¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 790:20-791:17.

⁹²² [CBP.004.007.2195].

⁹²³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 791:18-792:1.

⁹²⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 792:2-4.

⁹²⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 793:6-794:17.

⁹²⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 794:3-17.

⁹²⁷ [CBP.004.008.4451]; [CBP.004.006.2249]; [CBP.004.008.0837]; [CBP.004.007.5344]; [SPR.005.001.0190]; [CBP.004.007.0707],

- 430 Mr Zita also conceded that he never asked to see evidence to verify the proportion of group members who had signed the Funding Agreement.⁹²⁸
- 431 On **8 March 2016**, Mark Elliott and Mr O'Bryan instructed Mr Zita/Portfolio Law to demand that the SPRs support Mr Bolitho's application for "reimbursement" of legal costs and disbursements of **\$2.55 million**, and his application for a funding commission to AFP of 25% of the settlement proceeds.⁹²⁹
- 432 Mr Zita made those demands without requesting a breakdown of the costs claimed or asking to see evidence of them.⁹³⁰
- 433 In contrast, Mr Newman **did** ask to see evidence of the legal costs and disbursements. Mark Elliott instructed Mr Zita to respond to that request in the following way:⁹³¹

"Dear Mr Newman

Our client will accept the position of your client that it does not/will not oppose his application for reimbursement of legal costs and disbursements on the basis that he will provide the necessary supporting material to the court.

Our client requires the suggested wording in clause 7.5.3 in respect of the reduced litigation funding fee of 25% payable to BSLLP.

Up yours

PL, TZ"

- 434 The extent of independent judgment that Mr Zita brought to bear in the matter was to omit Mark Elliott's proposed closing salutation from the email, otherwise sending it in the terms drafted for him by Mark Elliott.⁹³² Mr Zita conceded that he did not seek instructions from Mr Bolitho, even though he knew that Mr Bolitho and the group members had an interest in ensuring the legal costs were properly substantiated.⁹³³

⁹²⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 788:13-790:14.

⁹²⁹ [CBP.004.003.6578] [CBP.004.005.4636];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 797:5-24; 798:11-30.

⁹³⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 798:9-802:10.

⁹³¹ [CBP.004.001.3635].

⁹³² [CBP.004.006.6135];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 798:31-801:20.

⁹³³ Transcript of hearing on 14 August 2020 [TRA.500.008.00001], 801:24-802:10.

McKenzie Group Proceeding

435 Mark Elliott instructed Mr Zita/Portfolio Law to adopt the position that Mr Bolitho would not agree to settle unless the SPRs agreed (in the settlement deed) never to serve the writ in the McKenzie Group Proceeding or apply for its renewal.⁹³⁴

436 Mr Zita/Portfolio Law obligingly sent the communications that Mark Elliott instructed them to send adopting that position,⁹³⁵ without considering the interests of Mr Bolitho or other group members,⁹³⁶ and without seeking Mr Bolitho's instructions.

437 On **16 March 2016**, Mark Elliott and Mr Zita exchanged text messages about Mr Zita's communications with Mr Newman on this topic:

- (a) At 6.35pm Mr Zita sent a text message to Mark Elliott: *"Mark exchange of text messages with Newman:*

Dave that Mckenzie claim is going to be an issue. It must be agreed that it will lapse and not be revived by any application to extend the time for service. Sorry to text you as I know you are at a function. However I thought I should let you know so you can at least address this issue overnight. Cheers Tony Zita.

I'll need you to explain why it's an issue - I can't see how it's an issue for Bolitho."⁹³⁷

- (b) At 6.35pm Mark Elliott sent a text message to Mr Zita in response: *"Get fucked"*.⁹³⁸ A short time later he sent a further text, stating: *"Call me"*.⁹³⁹
- (c) At 6.56pm Mark Elliott sent an email to Mr Zita stating: *"Tell him the deal is off"*.⁹⁴⁰
- (d) At 7.20pm Mr Zita sent a text message to Mark Elliott in response: *"It would still assist me if I understood why this issue is non-negotiable?"*⁹⁴¹

⁹³⁴ [CBP.004.003.6080];
Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 796:31-798:10.

⁹³⁵ [CBP.004.002.5550];
Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 802:28-803:804:6; 806:14-20.

⁹³⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 804:7-805:24.

⁹³⁷ [CBP.004.010.0170]; and see also [TRA.500.008.0001] T809:11-810:24.

⁹³⁸ [CBP.004.010.0170].

⁹³⁹ [CBP.004.010.0170].

⁹⁴⁰ [CBP.004.002.5550].

⁹⁴¹ [CBP.004.010.0170].

(e) At 8.32pm, Mark Elliott sent an email to Mr Zita instructing him to “*issue summons first thing tomorrow*”⁹⁴² (namely, a summons drafted by Mr O’Byrne on around 2 March 2016⁹⁴³ to strike out the McKenzie Proceeding as an abuse of process).⁹⁴⁴

438 Despite the erratic and aggressive nature of these instructions and the fact that Mr Zita himself evidently did not understand their rationale, it never occurred to Mr Zita that he ought to critically examine Mark Elliott’s instructions, or exercise his own independent judgment in the interests of his clients.⁹⁴⁵

439 The interests of Mr Zita’s clients were better served by the SPRs and their legal team taking responsibility for the legal actions that were underway, without exposure to duplicative legal costs and deduction of a funding commission.

440 Mr Zita was unable to offer any sensible explanation as to why it was in the interests of Mr Bolitho or group members for him to demand that the McKenzie Proceeding be abandoned in favour of the Bolitho Proceeding,⁹⁴⁶ particularly in circumstances where Mr Zita conceded that he lacked expertise, experience, and resources,⁹⁴⁷ and the SPRs were doing the heavy lifting with respect to evidence preparation anyway.⁹⁴⁸

441 Mr Zita’s contention that the claim in the Bolitho Proceeding was preferable to the claim in the McKenzie Proceeding because it included the former holders of debentures in Statewide⁹⁴⁹ ought not be accepted in circumstances where:

(a) the Statewide debenture holders appear to have suffered no loss and accordingly would have been unable to recover in any judgment obtained in the Bolitho Proceeding;⁹⁵⁰ and

⁹⁴² [CBP.004.003.0089].

⁹⁴³ [CBP.004.003.0603] [CBP.004.003.0604].

⁹⁴⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 812:30-813:4.

⁹⁴⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 810:29-812:14.

⁹⁴⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 807:13-808:3

⁹⁴⁷ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [20.g] and [93];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 806:21-807:2.

⁹⁴⁸ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [102] – [104];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 807:3-12.

⁹⁴⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 806:9-11, T807:22-808:1.

⁹⁵⁰ Further SPR Opinion [CCW.022.001.0460] paras [165], [170]. Note that this complication arguably affected the direct claims by the debenture holders themselves in the group proceeding, though it may not have prevented Statewide debenture holders from participating in the proceeds of a distribution from a settlement of a claim brought by Banksia as a separate entity against Trust Co.

- (b) having regard to all of the evidence, the Court should find that Mr Zita did not bring to bear on the proceeding any independent thought or judgment at the relevant time, but rather, simply did as he was told to do by Mark Elliott.⁹⁵¹

B8.3 Alex Elliott was involved in providing legal services

- 442 Mark Elliott's son Alex Elliott, a legal practitioner and director of Elliott Legal,⁹⁵² became involved in the conduct of the Bolitho Proceeding from about March 2016.
- 443 The Court should reject Alex Elliott's evidence that he had a "non-legal" or "administrative" role in the Banksia matter, and that there was any relevant distinction between the roles of Elliott Legal in the Murray Goulburn matter as opposed to the Banksia matter.
- 444 On the Banksia matter, Alex Elliott:
- (a) filed documents;⁹⁵³
 - (b) regularly attended court;⁹⁵⁴
 - (c) was included in emails as if he was another solicitor acting on the matter,⁹⁵⁵ which emails his father expected him to read,⁹⁵⁶ and which he did read;⁹⁵⁷
 - (d) assisted with the establishment of the Bolitho Class Action Email Account and the General Class Action Email Account to which he thereafter had access,⁹⁵⁸ by which third parties were led to believe they were corresponding with Portfolio Law, when in fact, those email accounts were

⁹⁵¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 808:4-809:9; 813:5-10.

⁹⁵² [CCW.025.001.0010].

⁹⁵³ [CBP.004.004.1652] [CBP.004.004.1653].

⁹⁵⁴ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1329:4-6; 1333:13-20;

Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1648:21-24;

Transcript of hearing on 3 December 2020 [TRA.500.018.0001] 1788:2-3;

Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1915:24-1916:13;

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:10-19;

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:3-24, 2075:5-25.

⁹⁵⁵ See the hundreds of emails referred to in [AID.010.026.0001_3]. By way of example only see [CBP.004.004.7694]; [CBP.004.006.9410]; [CBP.001.006.0292]; [CBP.001.006.4026]; [CBP.004.004.3691].

⁹⁵⁶ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:19-23;

Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:19-20.

⁹⁵⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:15-17.

⁹⁵⁸ [CBP.001.001.6342]; [CBP.001.001.6345]; [CBP.001.001.5820]; [CBP.001.007.3869]; [CBP.001.008.1167];

Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1684:12-1686:27.

established to allow the litigation to be conducted with minimal reliance on Portfolio Law;⁹⁵⁹

- (e) had a general practice of printing most correspondence that was sent to the Bolitho Class Action Email Account and the General Class Action Email Account for discussion with his father;⁹⁶⁰
- (f) reviewed and considered documents, such as the Trust Co Settlement Deed,⁹⁶¹ the Third Trimbos Report (which he received in both draft and final form),⁹⁶² and the First Bolitho Opinion (though he denied that he read them in any detail, or that he did so in a professional legal capacity),⁹⁶³
- (g) was involved in procuring evidence from Mr Trimbos to support the fee and commission claims advanced by Mr Bolitho/AFP at the time of the Partial Settlement and the Trust Co Settlement,⁹⁶⁴ including collating the folder of invoices for Mr Trimbos for the Third Trimbos Report;⁹⁶⁵
- (h) understood the difference between a funding equalisation order and a common fund order, and was across the principles in *Money Max*;⁹⁶⁶
- (i) was invited to the “**Banksia Wrap Up Meeting**” on 14 November 2017 with Mark Elliott, Mr O’Bryan and Mr Symons, which the Court should find he attended;⁹⁶⁷
- (j) worked up the script for Mr Zita/Portfolio Law to follow in their dealings with group members;⁹⁶⁸

⁹⁵⁹ See Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [47] – [50]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:27-869:19.

⁹⁶⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:7-18.

⁹⁶¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

⁹⁶² [NOB.500.005.2485] [NOB.500.005.2487]; [NOB.500.005.2312] [NOB.500.005.2314] [NOB.500.005.2354] [NOB.500.005.2457] [NOB.500.005.2458].

Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2095:11-13.

⁹⁶³ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:6-20, 1707:18-1709:3;

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:13-18, 2075:5-13.

⁹⁶⁴ See eg [TRI.001.005.0169] [TRI.001.005.0171] [SYM.001.003.0235] [AFP.001.001.2224]

[AFP.001.001.2225]; [SYM.001.003.3453] [SYM.001.003.3454] [SYM.001.003.3457];

[SYM.001.002.8281]; [SYM.001.002.5447]; [SYM.001.002.5449]; [SYM.002.001.5568];

[AFP.001.001.2531]; [NOB.500.001.7272] [NOB.500.001.7273]; [AFP.001.001.2548]

[AFP.001.001.2550]; [AFP.001.001.3137] [AFP.001.001.3138]; [TRI.001.006.0063]

[TRI.001.006.0064] [TRI.001.006.0067]; [ABL.001.0602.00009] [ABL.001.0602.00011].

[TRI.001.006.0001].

⁹⁶⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2087:11-2094:21.

⁹⁶⁶ [SYM.001.001.4401].

⁹⁶⁷ [ABL.001.0594.00005] [ABL.001.0594.00006]; [ABL.001.0627.00038] [ABL.001.0627.00039]

⁹⁶⁸ [ABL.001.0627.00040].

- (k) received enquiries from group members, who were told in the opt out notice issued to them and in other written communications to contact “**Portfolio Law**” using contact details **which were in fact contact details for Alex Elliott**;⁹⁶⁹
- (l) critically analysed legal issues and expressed his own independent views, and conferred with his father about his father’s views on legal issues;⁹⁷⁰
- (m) undertook legal research;⁹⁷¹
- (n) attended conferences in counsel’s chambers to discuss legal issues.⁹⁷²

445 By way of contrast, Mr Zita/Portfolio Law:

- (a) often forgot to promptly attend to correspondence and court documents, which prompted Mr O’Byran and Mark Elliott to set up the Bolitho Class Action Email Account and the General Class Action Email Account which could be monitored by them with minimal reliance on Mr Zita/Portfolio Law;⁹⁷³
- (b) drafted no correspondence of any substance, but rather, sent correspondence that was drafted by others (which he did not carefully read or check before sending);⁹⁷⁴

⁹⁶⁹ [CCW.061.001.0001], [MSC.020.014.0001]; Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1336:7-1337:21.

⁹⁷⁰ [AEL.100.058.0001]; [AEL.100.030.0001]; [ABL.001.0643.00243]; [ABL.001.0615.00020]; [AEL.100.038.0001]; [AEL.100.066.0001]; [AEL.100.069.0001]; [AEL.100.032.0001]; [AEL.100.041.0001]; [AEL.100.043.0001]; [AEL.100.056.0001]; Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1784:1-1786:20, 1787:19-1803:15, 1806:16-1807:9, 1809:1- 1820:13; Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1986:24-2033:7; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2034:4-2073:11.

⁹⁷¹ [AEL.100.048.0001]; transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1784:1-31; Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1987:3-1988:28.

⁹⁷² Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1457:23-1461:2, 1488:25-1494:19; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24 – 1770:3, 1772:19-1774:10.

⁹⁷³ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [47] - [50]; Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1684:28-1685:6; See also [CBP.004.001.1833] (“*These important things are taking us far too long to progress*”); [SYM.001.002.3761] (“*Why are we receiving this 4 days later via the judge and not directly? What is wrong with our communication system?*”); [CBP.001.007.0001]; [SYM.002.002.9133] (“*Tony, Why am I receiving the letter from Corrs of 25/3 today for the first time?*”).

⁹⁷⁴ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [91], [141], [154] – [164] (referring to [CBP.001.013.0245], [CBP.001.002.2929], [CBP.001.013.0245], [CBP.001.013.0245], [CBP.001.013.0252], [CBP.001.011.5727], [CBP.001.011.5729] [CBP.001.011.3217], [CBP.001.011.3218], [CBP.001.012.0165]); [CBP.004.007.2195] [CBP.004.006.6990] and

- (c) accordingly, cannot have spent the significant time that he claimed to have spent reading correspondence that was sent to the Bolitho Class Action Email Account and the General Class Action Email Account;
- (d) was often excluded from analytical discussions about legal issues which were conducted between Mark Elliott, Alex Elliott, Mr O'Bryan, and Mr Symons;⁹⁷⁵
- (e) was left out of communications about the terms of the Trust Co Settlement Deed, and did not seek to involve himself in those communications;⁹⁷⁶
- (f) on his own admission, only "*skim read*" the Third Trimbos Report;⁹⁷⁷
- (g) was not provided with the various drafts of the First Bolitho Opinion, save for the final version when he was asked to file it;⁹⁷⁸
- (h) on his own admission, did not read the First Bolitho Opinion before he filed it;⁹⁷⁹
- (i) had no skills or experience in class actions;⁹⁸⁰
- (j) was unfamiliar with the Money Max principles referred to in the First Bolitho Opinion;⁹⁸¹
- (k) was not invited to the "Banksia Wrap Up Meeting" on 14 November 2017;⁹⁸²

Transcript of hearing 13 August 2020 [TRA.500.007.0001], 777:7-778:29, 780:6-9;

Transcript of hearing on 14 August 2020 [TRA.500.008.0001] T869:11-13, 17-19;

Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1307:16-18.

⁹⁷⁵ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1356:15-1357:22.

⁹⁷⁶ Mr Zita's April 2020 affidavit [CCW.036.001.0001], [207] – [228], [442]-[443];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 821:16-828:10, 851:25-30;

Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1348:24-1349:23

⁹⁷⁷ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [168] and [243];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:21-22, 893:23-25.

⁹⁷⁸ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [303] – [307], [320], [323] – [324], [333].

⁹⁷⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:2.

⁹⁸⁰ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [91] - [93].

⁹⁸¹ Mr Zita's April 2020 affidavit [CCW.036.001.0001], para [310].

⁹⁸² [SYM.001.001.4401].

- (l) was told what to say in his dealings with group members in a script drafted for him by Alex Elliott,⁹⁸³ and/or was told to direct such enquiries to Alex Elliott;⁹⁸⁴
- (m) undertook no legal research or analysis at all;⁹⁸⁵
- (n) prepared no memorandum of advice⁹⁸⁶ or other legal analysis;⁹⁸⁷
- (o) by his own admission, exercised no independent judgment on the matter;⁹⁸⁸
- (p) was unable to plausibly describe any substantive contribution he made to the case as solicitor on the record.⁹⁸⁹

446 Notably, **Mr Zita was directed to send enquiries received from group members to Alex Elliott**, and in written communications, group members were provided with contact details for “Portfolio Law”, but their telephone calls and emails were in fact routed directly or indirectly to Elliott Legal.⁹⁹⁰ In cross-examination, Mr Zita was taken to documentary evidence of enquiries that were received at Portfolio Law’s own offices, which were sent to him by **administrative staff**, and which he **forwarded to Alex Elliott**.⁹⁹¹ When asked why one of his administrative employees did not handle those enquiries, Mr Zita said: “**that wasn’t her role, she was just the receptionist**”.⁹⁹² He agreed that group members expected their queries to be handled by someone from Portfolio Law⁹⁹³ within the legal team⁹⁹⁴ – not by a “**personal assistant**”.⁹⁹⁵

⁹⁸³ [ABL.001.0594.00005] [ABL.001.0594.00006]; [ABL.001.0627.00038] [ABL.001.0627.00039] [ABL.001.0627.00040].

⁹⁸⁴ [CBP.001.006.4733];

Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1334:6-1339:22.

⁹⁸⁵ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1351:23-1352:10.

⁹⁸⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 906:10.

⁹⁸⁷ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1355:25-1356:14.

⁹⁸⁸ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-16.

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 848:10-14.

⁹⁸⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:847:17, 905:28-23.

⁹⁹⁰ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1334:6-1338:23, 1343:1-1344:31.

⁹⁹¹ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1337:8-1344:31; [CBP.001.006.4734] [CBP.001.006.5841] [CBP.001.006.5815] [CBP.001.006.8095] [CBP.001.006.7752] [CBP.001.006.4725] [CBP.001.006.8056] [CBP.001.006.5844] [CBP.001.006.5845] [CBP.001.006.7200] [CBP.001.006.8220].

⁹⁹² Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1340:2-6.

⁹⁹³ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:28-31.

⁹⁹⁴ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:10-13.

⁹⁹⁵ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1344:7-9.

B8.4 The “Portfolio Law” Email Accounts

- 447 The most striking example of Mark Elliott’s control over Mr Zita is the use of the “Portfolio Law” email accounts, which allowed the rest of the team to undertake the solicitor role, and to give the impression to the parties and the Court that Portfolio Law was the plaintiff’s solicitor in charge of the proceeding.
- 448 Mr Zita gave evidence that, in April 2017, at the suggestion of Mark Elliott and/or Mr O’Bryan,⁹⁹⁶ and with Alex Elliott’s assistance,⁹⁹⁷ he established the Bolitho Class Action Email Account and the General Class Action Email Account, which were operated under the guise of “Portfolio Law”, but which were also controlled by Mark Elliott, Alex Elliott, Mr O’Bryan and Mr Symons.⁹⁹⁸
- 449 This assisted Mark Elliott/AFP, Mr O’Bryan, Mr Symons and Alex Elliott to control the litigation by ensuring that they each received all correspondence without the need for Mr Zita/Portfolio Law to independently and without direction from one or other of them take charge of that correspondence.⁹⁹⁹
- 450 Alex Elliott conceded that he assisted to create the email accounts,¹⁰⁰⁰ and that they were created because of Mr Zita’s inattention to correspondence and documents he received.¹⁰⁰¹ Alex Elliott confirmed that he had access to both accounts.¹⁰⁰² He thought that only Mr Zita could send emails from the Bolitho Class Action Email Account,¹⁰⁰³ but conceded that anyone with access to the General Class Action Email Account could send emails from it.¹⁰⁰⁴ He thought that “*no one*” sent emails from the General Class Action Email Account, but he was mistaken;

⁹⁹⁶ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [50].

⁹⁹⁷ [CBP.001.001.5820]; [CBP.001.007.3869]; [CBP.001.008.1167].

⁹⁹⁸ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [47] – [50] and AFP and Alex Elliott’s admissions, [PLE.020.001.0001] & [PAR.080.001.0001], paras [40.a.iii]. AFP and Mr Symons have also admitted in correspondence that Mr Elliott, Mr O’Bryan, Mr Symons, Mr Zita, and Alex Elliott had “read and write” access to the General Class Action Email, and that Portfolio Law’s email system was set up so that emails sent to or from the Bolitho Class Action Email were automatically replicated in and/or forwarded to the inbox or sent items of the General Class Action Email, so that Mr Elliott, Mr O’Bryan, Mr Symons and Alex Elliott had immediate access to such emails: see [AFP.005.001.1394]; [CCW.005.001.0001].

⁹⁹⁹ See transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:27-869:19, 872:4-873:4.

¹⁰⁰⁰ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1685:10-1686:16..

¹⁰⁰¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1684:23-1685:6.

¹⁰⁰² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1686:17-27.

¹⁰⁰³ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1686:28-1687:1.

¹⁰⁰⁴ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1687:2-5.

the documentary evidence shows that Mark Elliott and Mr O'Bryan both sent emails from that account.¹⁰⁰⁵

- 451 The Court should find that the purpose of the email accounts was to bypass the need for Mr Zita to deal with the correspondence on the matter at all, beyond sending the letters, emails and other documents he was told to send, virtually all of which were drafted by Mark Elliott, Mr O'Bryan and Mr Symons.
- 452 This practice highlights the lengths to which Mark Elliott and Mr O'Bryan went in order to conceal their control over the litigation, in spite of the ruling in *Bolitho No 4*. It also shows the complicity of Mr Zita, Mr Symons and Alex Elliott in this deceptive arrangement.

B8.5 Mr Zita was excluded from discussions about the Trust Co Settlement

- 453 Mr Zita did not seek to involve himself in the discussions about the terms of the Trust Co Settlement.¹⁰⁰⁶ He did not seek to satisfy himself that the terms sought reflected Mr Bolitho's instructions, or that they were in the interests of Mr Bolitho and other group members. He did not seek to provide Mr Bolitho with any advice.¹⁰⁰⁷
- 454 In cross-examination, Mr Zita agreed that the Court had expressed concerns in the *Bolitho No 4* Decision about Mark Elliott having too much control over the settlement negotiations as both solicitor and funder.¹⁰⁰⁸ Mr Zita acknowledged he read the judgment shortly after he commenced acting as solicitor on the record.¹⁰⁰⁹ His attention was drawn to passages of the judgment which revealed the Court's concern that Mr Bolitho and group members should have the benefit of independent, objective advice in connection with any settlement,¹⁰¹⁰ and that it would be inappropriate for Mark Elliott to provide such advice having regard to his interest as funder.¹⁰¹¹ In that context, Mr Zita was asked how he could have thought it was appropriate for him to leave Mark Elliott in charge of the settlement

¹⁰⁰⁵ See eg [CBP.001.003.3487]; [CBP.001.007.0857]; [CBP.001.001.2902].

¹⁰⁰⁶ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [207] – [228], [443].

¹⁰⁰⁷ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [228], [442] – [443].

¹⁰⁰⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 823:19-22.

¹⁰⁰⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 767:9-768:27.

¹⁰¹⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 823:23-826:13; *Bolitho No 4* at [23], [42].

¹⁰¹¹ *Bolitho No 4* at [53].

negotiations and to not seek to involve himself in those discussions.¹⁰¹² Mr Zita was unable to provide a satisfactory answer.¹⁰¹³

455 Mr Zita conceded that Mr Bolitho and group members expected him to bring an independent and objective mind to bear in the proceeding,¹⁰¹⁴ and that he was charged with the responsibility of safeguarding their interests.¹⁰¹⁵ Though he accepted that he allowed Mark Elliott, Mr O'Bryan and Mr Symons to manipulate him,¹⁰¹⁶ he did not concede that he was a convenient front for Mark Elliott and Mr O'Bryan to get around the Court's ruling that Mark Elliott should cease to be the solicitor.¹⁰¹⁷ But that is precisely what he was and the Court should so find.

456 Mr Zita also said that he was not aware of any conflict between the interests of Mark Elliott/AFP and the interests of group members in connection with the Trust Co settlement.¹⁰¹⁸ He claimed not to have appreciated that Mark Elliott was seeking to maximise AFP's funding commission.¹⁰¹⁹ Mr Zita's evidence on this point was contradictory and unsatisfactory and should not be accepted as reliable in circumstances where:

- (a) He conceded that he knew that AFP was seeking a commission on the whole settlement sum, which related to both the Bolitho Proceeding and the SPR Proceeding.¹⁰²⁰
- (b) He said that he did not turn his mind to the fact that AFP was only entitled to claim commission on the proceeds of the case it had funded (and not on the proceeds of the SPR Proceeding).¹⁰²¹
- (c) He said that he thought AFP was seeking only to enforce its contractual rights under the Funding Agreement to a 30 per cent funding commission.¹⁰²²

¹⁰¹² Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 826:14-827:8.

¹⁰¹³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 826:17-19; 827:7-831:31.

¹⁰¹⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 831:28-31.

¹⁰¹⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 832:1-5.

¹⁰¹⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 831:25-27.

¹⁰¹⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 831:12-16.

¹⁰¹⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 848:18-849:11.

¹⁰¹⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 849:28-850:6.

¹⁰²⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 850:12-13.

¹⁰²¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 850:14-18.

¹⁰²² Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 850:7-11.

(d) He conceded that the Funding Agreement conferred rights on AFP to recover a funding commission only from group members who signed it,¹⁰²³ and he acknowledged that AFP was seeking its commission by way of a common fund order.¹⁰²⁴ In the face of those concessions, he nonetheless maintained that AFP was seeking to enforce its contractual rights, rather than seeking to maximise its profits.¹⁰²⁵

457 The Court should reject Mr Zita's evidence that he thought that he was acting in the best interests of Mr Bolitho and group members in connection with the Trust Co settlement.¹⁰²⁶

458 No self-respecting solicitor mindful of his paramount duty to the Court and his duties to his clients should have allowed himself to be controlled by Mark Elliott, AFP, Mr O'Bryan and Mr Symons as Mr Zita so obviously was. Mr Zita brought no independent or reflective mind to his role as a solicitor on the record in this proceeding, and his abrogation of his duty to the Court and to his clients should be strongly condemned. One asks rhetorically: what value did Mr Zita's engagement bring to this case on behalf of his clients. The Contradictors would respectfully submit: none whatsoever, other than to line his own pockets with money for the little or no work that he performed in the interests of those clients, and in breach of his paramount duty to the Court to properly conduct himself in the practice of the law.

B8.6 Mr Zita virtually conceded that he acted as a postbox solicitor

459 Mr Zita said in his first affidavit:¹⁰²⁷

"The dynamic of Norman and/or Mark making decisions persisted for the entire time of me acting as solicitor on the record for Laurie in the Bolitho Group Proceeding. Either Norman or Mark would work out the strategy and tell me what to do, when to do it and how to do it. I did not make any strategic decisions. A large part of the correspondence I sent was authored by Mark, Norman or Michael.

¹⁰²³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 850:24-27.

¹⁰²⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 851:13-17.

¹⁰²⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 851:18-852:11.

¹⁰²⁶ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [425], [447].

Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 751:2-8;

Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 848:15-17; 851:25-852:14.

cf Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 987:27-990:27 [CBP.001.011.2154].

¹⁰²⁷ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [91], [93], [95].

...I effectively provided Mark, Norman and Michael with the ability to have a solicitor on the record and undertake the work they instructed the firm to do, but without taking charge of the case and making them accountable to me. I know now that I did not act with sufficient rigour as solicitor on the record for Laurie in the Bolitho Group Proceeding.”

460 The clear implication of this evidence is that Portfolio Law’s role was to act as a postbox solicitor. Mark Elliott, Mr O’Bryan and Mr Symons told Mr Zita what to do, and he did it.¹⁰²⁸ He sent the letters they asked him to send, even when the letters were factually wrong or misleading,¹⁰²⁹ and even when they asserted a position that was contrary to the interests of Mr Bolitho and group members.

461 Mr Zita said that he became aware that Mark Elliott was seeking \$4.75 million plus GST for legal costs and \$12.8 million plus GST for commission “at about the time of the mediation”.¹⁰³⁰ He did not ask Mark Elliott to provide documentation to substantiate those claims.¹⁰³¹ Mr Zita did not raise any questions when he was asked to file the Third Trimbos Report, which annexed all the invoices of Mr O’Bryan and Mr Symons and marked to the attention of Mr Zita and which appeared to have been issued monthly. He did not query the fact that he had never seen those invoices, or that the fees charged by Mr O’Bryan and Mr Symons were charged at rates that had never been disclosed to him or to Mr Bolitho; indeed, Mr Zita said that he did not even look at the cost disclosure documents that Mr O’Bryan and Mr Symons sent to Mr Trimbos copied to him in December 2017.¹⁰³² Nor did Mr Zita raise any concerns about Portfolio Law’s own failure to comply with its costs agreement by failing to inform Mr Bolitho of the counsel fees charged to his account.¹⁰³³

462 At best, Mr Zita and Portfolio Law demonstrated a wilful blindness to the misconduct of Mark Elliott, Mr O’Bryan, and Mr Symons. Mr Zita never questioned Mr O’Bryan or Mr Symons when he was asked to send letters that contained statements that he knew were untrue. He simply sent out the letters that they drafted for him.¹⁰³⁴

¹⁰²⁸ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [94].

¹⁰²⁹ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [142], [154] – [164].

¹⁰³⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 832:14-17.

¹⁰³¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 832:18-19.

¹⁰³² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 958:10-960:10.

¹⁰³³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001] T745:9-13 (Mr Zita/Portfolio Law conceded in opening that Mr Zita did not discuss counsel’s fees with Mr Bolitho, he did not obtain Mr Bolitho’s permission before engaging counsel, and he did not consult with Mr Bolitho about the terms on which counsel were retained).

¹⁰³⁴ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], paras [142], [154] – [164].

463 In cross-examination, Mr Zita conceded that he could not point to a single instance in the course of the whole proceeding where he stood up to Mark Elliott in the interests of his clients and told Mark Elliott he wouldn't go along with his instructions.¹⁰³⁵ The Court should reject Mr Zita's suggestion that he might have done so orally,¹⁰³⁶ and should prefer the documentary evidence which reveals that Mr Zita's invariable practice was to do as he was told by Mark Elliott, Mr O'Bryan and Mr Symons.

464 A striking example of Mr Zita's acquiescent and compliant demeanour is his involvement in Mrs Botsman's appeal. Mr Zita's evidence was as follows:

- (a) He disavowed every aspect of the strategy pursued by AFP and the Lawyer Parties in respect of Mrs Botsman's appeal, yet conceded that he readily went along with the strategy devised by Mark Elliott, Mr O'Bryan and Mr Symons without questioning them.¹⁰³⁷
- (b) He conceded that he knew that Mark Elliott had a personal interest in AFP's commission claim¹⁰³⁸ and that Mr O'Bryan had a personal interest in his claim for fees.¹⁰³⁹ And yet he said it never occurred to him to exercise his independent judgment or to question the instructions provided to him.¹⁰⁴⁰
- (c) He agreed that it was for that very reason that the Court had ruled in Bolitho No 4 that Mr Bolitho and group members needed to be represented by an independent solicitor.¹⁰⁴¹
- (d) He said he never turned his mind to Mark Elliott's and Mr O'Bryan's obvious conflicts of interest,¹⁰⁴² even though his attention was **specifically** drawn to those conflicts in an email from Mr Botsman on 29 May 2018,¹⁰⁴³ which invited Mr Zita to explain "*on what basis the approach taken by the applicant at the approval hearing and on appeal is considered by your firm and your counsel to be appropriate and consistent with their obligations,*

¹⁰³⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 813:11-15.

¹⁰³⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 813:14-15.

¹⁰³⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] 979:23-980:4, 980:19-29, 983:9-15, 984:4-985:1, 986:4-17, 990:15-991:16, 992:14-993:7, 994:17-996:31.

¹⁰³⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 986:18-20.

¹⁰³⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 986:23-29.

¹⁰⁴⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 986:30-987:15.

¹⁰⁴¹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 987:16-18.

¹⁰⁴² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 987:19-22.

¹⁰⁴³ [CBP.001.011.2154]; [TRA.500.009.0001] T987:23-988:14, 991:17-31.

acknowledged by Mr Bolitho to Ferguson JA, to act in the best interests of the Applicant and group members?" Mr Zita dealt with that email in the same way he dealt with all other emails: by deferring to Mark Elliott, Mr O'Bryan and Mr Symons, and sending the response they drafted for him¹⁰⁴⁴ without reflecting on whether it was appropriate,¹⁰⁴⁵ and without exercising any independent judgment.¹⁰⁴⁶

465 And in connection with the remitter, Mark Elliott instructed Mr Symons to draft an email for Mr Zita to send to the Court attaching the Contradictors' invoices.¹⁰⁴⁷ Mr O'Bryan expressly agreed.¹⁰⁴⁸ Mr Symons presumably drafted that email for Mr Zita to send. Mr Zita conceded that he agreed with the course proposed by Mark Elliott and sent the email.¹⁰⁴⁹ He conceded that Mark Elliott told him that he hoped by sending the Contradictors' invoices to the Court it would assist in shutting down the Contradictors.¹⁰⁵⁰ It was highly improper for Mr Zita to involve himself in such an underhand communication to the Court. Mr Zita said that his complicity in that course was *"an absolute error of judgment which I regret"*.¹⁰⁵¹

B9. Breach of the Paramount Duty

466 The arrangements that Mark Elliott and Mr O'Bryan implemented were designed to ensure that they could both continue acting as solicitor and counsel for the class, while also continuing to maintain their financial interest in the litigation above the fees they were properly entitled to charge. They pursued this course in the face of the Court's ruling that they could not act. The Court should find, on the evidence, that they refused to stand down because to do so would have compromised their control over the case and their ability to seek excessive profits for themselves.

B9.1 Mr Zita/Portfolio Law

467 Mr Zita claimed to have read the judgment in Bolitho No 4 shortly after he was retained to act.¹⁰⁵² He therefore knew that the Court was concerned about prejudice to the administration of justice arising from Mr O'Bryan's and Mark

¹⁰⁴⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 990:15-991:16.

¹⁰⁴⁵ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 992:15-16.

¹⁰⁴⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 992:20-993:7.

¹⁰⁴⁷ [CBP.001.002.1745].

¹⁰⁴⁸ [CBP.001.002.1745].

¹⁰⁴⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 997:19-28.

¹⁰⁵⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 998:3-8.

¹⁰⁵¹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 998:9-10.

¹⁰⁵² Transcript of hearing on 17 August 2020 [TRA.500.007.0001], 767:9-768:27.

Elliott's financial interests in the outcome of the case, which could conflict with the interests of their clients or their duties to the court in respect of any settlement or trial of the proceeding.¹⁰⁵³ Justice Ferguson said: ***“the Court relies upon practitioners to apply an independent and objective mind when conducting a case on behalf of a client.”***¹⁰⁵⁴

468 Mr Zita/Portfolio Law never made any attempt to apply an independent and objective mind to the case. Mr Zita/Portfolio Law acted as a puppet solicitor who did the bidding of Mark Elliott, Mr O'Bryan and Mr Symons. They used him to their full advantage, knowing that Mr Bolitho and group members were thereby deprived of the benefit of an independent solicitor acting in their interests.

469 The use of a “post box” solicitor to enable a conflicted solicitor to remain in control behind the scenes constitutes a breach of the paramount duty to the Court and warrants strong condemnation. That is illustrated by the High Court's decision in *Incorporated Law Institute of New South Wales v Meagher*.¹⁰⁵⁵ That case concerned Mr Meagher's application for readmission to practice as a solicitor after being struck off the role. There was evidence that Mr Meagher had been involved in corrupt dealings with one Mr Willis, both of them being members of the Legislative Assembly, involving them as “land agents” accepting bribes to procure favourable leases from the Minister for Lands.

470 Letters signed by Mr Meagher in connection with land matters were frequently sent from Mr Willis's office at 21 Bligh Street, Sydney. Mr Meagher's explanation was as follows:

“In reference to letters addressed from 21 Bligh Street I unreservedly say that I cannot call to mind actually writing a letter from Bligh Street in my life. Mr McNair, Willis's manager, has on several occasions presented written or typed letters to me for signature on matters where I consented to appear as agent. In most instances I have appended my signature to letters purporting to be addressed from Bligh Street in the writing room for members at Parliament House. In the afternoon, while attending to heavy correspondence with Progress Associations and country constituents, Mr Willis has approached me with typewritten communications on land matters wishing me to act as agent. In the pressure of business I have merely asked him for a verbal precis of such communications, and have signed them in good faith and without the slightest suspicion of any mala fides, and kept no

¹⁰⁵³ Bolitho No 4, [6], [8], [12], [23], [42], [48.x], [48.y], [53], [57.s], [57.t], [57.v], [57.w].

¹⁰⁵⁴ Bolitho No 4, [19].

¹⁰⁵⁵ (1909) 9 CLR 655 (*Meagher*).

record or note of such communications which probably were headed Bligh St.”

471 This and other evidence invited the conclusion that Mr Meagher ***“lent his name to be used by Willis exactly as the latter pleased, and signed anything that Willis put before him”***.¹⁰⁵⁶

472 There was evidence that, in some instances, Mr Willis asked Mr Meagher to sign his name to a lease application in order to *“deceive future possible clients by making it appear”* that Mr Willis was not acting in the transaction, and Mr Meagher abetted Mr Willis in this attempt to deceive.¹⁰⁵⁷ Griffiths CJ said:¹⁰⁵⁸

“In my opinion the word ‘reprehensible’ is not adequate to describe the conduct of a man who deliberately lends his name for the purpose of putting the man to whom it is lent in a position to deceive intending clients. According to Meagher’s version of the facts, Willis, who had received a fee of £1000 for services of some extraordinary and unexplained nature to be rendered desired to be in a position to obtain further fees from other persons who would employ him to take action in conflict with the interests of his client, and Meagher assented. This explanation is cynically offered to the court, not as accounting for an error into which he fell many years ago, and of which he has now repented, but as a vindication of his action as he now regards it. This, to my mind, is the worst feature of the matter, for it shows the respondent’s notion of the moral obligations of a practitioner of the class to which Willis and he belonged in 1903, and which he obviously regards as equally applicable to the honourable obligations of a solicitor.”

473 On another occasion, Mr Meagher signed a letter asking the Minister for Lands to accept security from a person whom he had never met and about whom Mr Meagher had made no enquiries. Griffiths CJ said:¹⁰⁵⁹

“Without the bonds this transaction could not have been carried through. It is plain that the letter of 24th July was written that it might be acted upon as a personal assurance by Meagher, a member of the Legislature, that Scott was a proper person to be accepted as surety. It is equally manifest that he did not know whether what he said about him was true or false, and in my opinion it is equally clear that he did not care whether it was true or not... In any view of the facts the frequent dating of his letters from that office leads to only one conclusion — that **he was in these transactions a tool of Willis, to whom he lent his name, and his signature when desired, to carry out Willis’ projects, of whatever nature. The explanation that he was a simple innocent person who unwittingly**

¹⁰⁵⁶ Meagher at 669.

¹⁰⁵⁷ Meagher at 672.

¹⁰⁵⁸ Meagher at 673.

¹⁰⁵⁹ Meagher at 675.

allowed himself to be made use of as an instrument of fraud cannot be accepted.”

474 Mr Meagher’s application for restoration to the roll of solicitors failed. Higgins J said:¹⁰⁶⁰

“If it be said that the respondent’s admissions are a sign of frankness, I must say they are to me a sign of moral atrophy. The respondent seems to be unconscious of anything wrong or dangerous in such transactions; and how then can it be said, in the words of the Charter of Justice, that he — this ‘dummy’ of Willis — is a ‘fit and proper’ person to be a solicitor, stamped by the court with its approval, put by the court into a position of privilege, held out as being worthy of the confidence of clients, and fitted to assist in the administration of justice?”

475 Isaacs J said:¹⁰⁶¹

“The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the court — a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future.”

476 Similarly here, Mr Zita was the “dummy” of Mark Elliott, Mr O’Byrne and Mr Symons. He lent his name to be used by them, exactly as they pleased, and he signed anything that they put before him. His evidence, at best, demonstrated moral atrophy. Until he was exposed to a substantial liability in this remitter, he seemed unconscious of anything wrong or dangerous in allowing himself to be used in this way. He was recklessly lax in his attention to the accuracy of the documents that went out under his hand. He did not know whether the letters he sent and the documents he filed were true or false; and it is equally plain he did not care whether they were true or false.

¹⁰⁶⁰ *Meagher* at 681.

¹⁰⁶¹ *Meagher* at 691.

B9.2 Alex Elliott

477 Alex Elliott claimed he did not read the Bolitho No 4 decision, but he conceded he was aware of it. He knew that the Court had ruled that he could not act as the solicitor in the Bolitho Proceeding in circumstances where he had a significant financial interest in AFP.

478 By virtue of Alex Elliott's position as:

- (a) a solicitor employed by Elliott Legal working under the direction of his father, copied into most correspondence exchanged between AFP and the Lawyer Parties on the matter; and
- (b) his father's right hand man,

the Court should find that Alex Elliott knew that his father continued to act, in substance, as the solicitor on the matter, concealing that role from the parties and the Court, including by means of the "Portfolio Law" email accounts. Alex Elliott was a party to all the email traffic in and out of those accounts, and therefore saw first-hand the control exercised over Mr Zita, and Mr Zita's willingness to act as the postbox solicitor, merely sending the letters that were written for him to send, and otherwise providing no substantive legal input into the matter.

479 Alex Elliott permitted himself to be drawn into that scenario. A short time after his admission to practise, he assisted Mr Zita to create the deceptive "Portfolio Law" email accounts. That was itself a highly irregular arrangement, which permitted Mr Zita/Portfolio Law to pay even less attention to the matter than they had paid to it up to that time, and to become even more dependent upon Elliott Legal/AFP, Mr O'Bryan and Mr Symons to run the litigation without intervention or oversight by Mr Zita/Portfolio Law.

480 Alex Elliott saw how that scenario played out in the context of the Trust Co Settlement, where Alex Elliott provided assistance in reviewing the settlement documentation, and Mr Zita/Portfolio Law did not. Alex Elliott said that he thought the agreement to make the whole settlement conditional upon the approval of AFP's commission was "*just a robust negotiation between grown men*".¹⁰⁶² But he knew that Mr Zita was not involved in those negotiations, because Alex Elliott was

¹⁰⁶² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2078:2-6.

copied to the emails, whereas Mr Zita was not.¹⁰⁶³ Alex Elliott saw first-hand how Mr Zita permitted himself to be bypassed.

481 The Court should find that Alex Elliott breached his Paramount Duty to the Court by allowing himself to become involved in a situation where a “dummy” solicitor¹⁰⁶⁴ was installed to overcome the Court’s ruling in Bolitho No 4, while his father, Mr O’Bryan, Mr Symons and himself provided the real substantive legal input into the litigation behind the scenes.

B9.3 Conclusion

482 The Court should find that Mark Elliott/AFP, Alex Elliott, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law all breached their Paramount Duty to the Court by their respective involvement in the matters set out above.

¹⁰⁶³ [SYM.001.001.0894]; [SYM.001.003.1463] [SYM.001.003.1467]; [AFP.001.001.2053] [AFP.001.001.2057]; [SYM.001.003.0920] [SYM.001.003.0925] [SYM.001.003.0942].

¹⁰⁶⁴ *Meagher* at 681.

C. FEE ARRANGEMENT CONTRAVENTIONS

C1. Overview of contraventions

483 The Contradictors allege that, by their conduct in connection with entering into and documenting their arrangements in relation to fees, and by failing to ensure that the fees claimed were properly incurred:

- (a) AFP, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly;
- (b) AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive;
- (c) AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that costs were reasonable and proportionate; and
- (d) AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty.

484 The essence of the claim is that AFP and the Lawyer Parties entered into irregular arrangements to recover fees from group members, and which involved each of them, to varying degrees, in creating or proffering sham documentation to recover those fees. This was unfair and improper. Legal practitioners owe fiduciary duties both in respect of making a costs agreement, and in carrying out a costs agreement already made.¹⁰⁶⁵ In the context of a representative proceeding where costs were sought to be recovered from the whole class, the Fee Arrangement conduct amounted to a breach of the Paramount Duty and the relevant Overarching Obligations by AFP and each of the Lawyer Parties.

485 The fee arrangement conduct involved the following **eight elements**.

486 **First**, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not disclose to Mr Bolitho or group members their costs or the basis upon which they would charge their fees. Although they did create costs agreements and disclosure statements

¹⁰⁶⁵ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 435E.

at various times, they charged their costs on a basis that was different from the basis specified in each of those documents.

- 487 **Second**, the fee arrangements of Mr O'Bryan and Mr Symons were not accurately recorded in the costs agreements and cost disclosure documents which they created for the purpose of obtaining approval of their costs. Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not adhere to their costs agreements or disclosure documents, and they quantified and charged the substantial majority of their costs only when there was a settlement.
- 488 **Third**, Mr O'Bryan and Mr Symons created invoices that did not accurately reflect the liability of Mr Bolitho, Mr Zita/Portfolio Law and/or AFP for the fees of O'Bryan and Mr Symons. Mr O'Bryan and Mr Symons made out their invoices to Mr Zita/Portfolio Law, but they did not issue those invoices to Mr Zita/Portfolio Law. All of the invoices of Mr O'Bryan, and most of the invoices of Mr Symons, were (1) marked with the words "Processed Date" and stated a particular date therein identified, and the date generally suggested that the invoice was issued at or around the end of the month after the work was undertaken;¹⁰⁶⁶ and (2) marked with the words "Due By" and stated a particular date therein identified, being a date that generally suggested that the invoice was due for payment a month after it was issued (**Monthly Invoice Representation**).
- 489 **Fourth**, Mr O'Bryan and Mr Symons agreed with AFP not to issue regular interim invoices, and did not provide AFP, Portfolio Law or Mr Bolitho with regular interim statements of the costs they had incurred.
- 490 **Fifth**, AFP did not monitor or manage the costs incurred on the Bolitho Proceeding by the Bolitho Lawyers as required by the Funding Agreement, and Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law did not maintain proper records of the time they spent on the matter.
- 491 **Sixth**, there was an arrangement or understanding between AFP and each of Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law with respect to AFP's liability for their fees, which in substance or effect meant that AFP would not be liable to pay some or all of their fees unless there was a successful financial outcome in the proceeding and their fees were approved by the Court.

¹⁰⁶⁶ Save for one of Mr Symons' invoices, which related to a three-month period from September 2016 to November 2016.

492 **Seventh**, Mr O’Bryan and Mr Symons determined the rates at which they would charge their fees after an “in principle” settlement with Trust Co was reached.

493 **Eighth**, the fee arrangements of Mr O’Bryan and Mr Symons were, in substance or effect, illegal contingency fee arrangements, whereby part of the amount payable to each of Mr O’Bryan and Mr Symons was referable to the payments to be received by AFP from the Trust Co Settlement.

C2. Concessions and admissions

494 Mr O’Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,¹⁰⁶⁷ and do not contest findings being made against them on the basis of those allegations.¹⁰⁶⁸

495 AFP admits the following:

- (a) Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law did not disclose to Mr Bolitho or group members their costs or the basis upon which they would charge their fees. Although they did create costs agreements and disclosure statements at various times, they charged their costs on a basis that was different from the basis specified in each of those documents (**Para 47(a) Allegation**).¹⁰⁶⁹
- (b) The fee arrangements of Mr O’Bryan and Mr Symons were not accurately recorded in costs agreements and cost disclosure documents which they created for the purpose of obtaining approval of their costs.¹⁰⁷⁰
- (c) Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law did not adhere to their costs agreements or disclosure documents, and they charged the substantial majority of their costs only when there was a settlement.¹⁰⁷¹
- (d) Mr O’Bryan and Mr Symons made out their invoices to Mr Zita/Portfolio Law.¹⁰⁷²

¹⁰⁶⁷ RLOI dated 21 July 2020: [PLE.010.002.0001].

¹⁰⁶⁸ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

¹⁰⁶⁹ [PLE.020.001.0001], para [47.a].

¹⁰⁷⁰ [PLE.020.001.0001], para [47.b].

¹⁰⁷¹ [PLE.020.001.0001], para [47.c].

¹⁰⁷² [PLE.020.001.0001], para [47.d].

- (e) Mr O'Bryan and Mr Symons agreed with AFP not to issue regular interim invoices, and did not provide AFP, Portfolio Law or Mr Bolitho with regular interim statements of the costs they had incurred.¹⁰⁷³
- (f) AFP did not sufficiently monitor or manage the costs incurred on the Bolitho Proceeding by the Bolitho Lawyers as required by the Funding Agreement.¹⁰⁷⁴
- (g) The Fee Arrangements were not disclosed and/or explained to Mr Bolitho or group members (**Para 48(a) Allegation**).¹⁰⁷⁵
- (h) The Fee Arrangements were inconsistent with the Portfolio Law Costs Agreement, the Symons/Portfolio Law February 2015 Costs Agreement, the Symons June 2016 Costs Disclosure Statement and the O'Bryan/Portfolio Law July 2016 Costs Agreement, insofar as any of those costs agreements were valid and binding.¹⁰⁷⁶
- (i) The Fee Arrangements were inconsistent with the obligations imposed under the Funding Agreement for the Bolitho Lawyers' fees to be regulated by "*a retainer agreement [which] explains in detail how the lawyers are paid and how their fees are calculated*" and for AFP to monitor costs and budgets.¹⁰⁷⁷

496 Mr Zita/Portfolio Law adopted those admissions, **save for** the Paragraphs 47(a) and 48(a) Allegations.

497 Prior to opening his case, Alex Elliott adopted AFP's admissions in Section C.¹⁰⁷⁸ (Section C does not make allegations against Alex Elliott).

C3. **Mr O'Bryan and Mr Symons**

C3.1 Symons February 2015 Costs Agreement

498 On **11 February 2015**, Mr Symons created two costs agreements, one with Mark Elliott for the period from 3 September 2014 to 7 November 2014 while he was the

¹⁰⁷³ [PLE.020.001.0001], para [47.e].

¹⁰⁷⁴ [PLE.020.001.0001], para [47.f].

¹⁰⁷⁵ [PLE.020.001.0001], para [48.a].

¹⁰⁷⁶ [PLE.020.001.0001], para [48.b].

¹⁰⁷⁷ [PLE.020.001.0001], para [48.c].

¹⁰⁷⁸ [PAR.080.001.00001], paras [46] – [50].

solicitor on the record for the plaintiff, and one with Portfolio Law relating to work allegedly undertaken following Portfolio Law's appointment as solicitor in December 2014 and in respect of future work, which Mr Symons sent to Portfolio Law on 11 February 2015.¹⁰⁷⁹ The Symons / Portfolio Law February 2015 Costs Agreement stated:

- (a) *"My legal costs will be calculated by reference to my hourly rate and daily rate as set out below: \$250 per hour (or part thereof) (inclusive of GST), and \$2,500 per day (inclusive of GST)."*
- (b) *"These rates may be reviewed during the period of the retainer and I will notify you in writing as soon as practicable following such review."*
- (c) *"I (or my clerk) will forward to you an account for work done at the following intervals: (a) once the Work set out above has been completed, or (b) at the end of each calendar month, or (c) at the end of each week in which I have undertaken work on the Matter."*
- (d) *"The Solicitor will be liable for my fees in this matter"*.

C3.2 O'Bryan July 2016 Costs Agreement

499 On **1 July 2016**, Mr O'Bryan sent an email to Mark Elliott attaching a fee agreement, which Mark Elliott sent to Mr Trimbos on the same day.¹⁰⁸⁰ The fee agreement provided:

- (a) Legal costs would be charged at the rate of \$990 per hour (including GST) or \$9,900 per day (including GST).
- (b) Mr O'Bryan's estimated fees were unknown but *"not presently expected to exceed \$500,000"*.
- (c) *"Should there be any substantial change proposed to anything included in the Disclosure Statement above, the Barrister will notify the Client by his instructing solicitor as soon as practicable of such proposed change. No change will be implemented without the Client's consent."*

¹⁰⁷⁹ [CBP.004.009.0069] [CBP.004.009.0070].

¹⁰⁸⁰ [AFP.001.001.1475] and [TRI.001.005.0200] [TRI.001.005.0201] [TRI.001.005.0204].

- (d) *“If the Client accepts this offer it will be liable to pay to the Barrister the fees and charges set out in the Disclosure Statement once the relevant services have been rendered by the Barrister.”*

C3.3 Mr Symons’ and Mr O’Bryan’s Costs Agreements did not reflect their real arrangements

- 500 These costs agreements did not reflect the real fee arrangements between AFP, Mr O’Bryan and Mr Symons. The Contradictors rely upon the following matters.
- 501 **First**, Mr O’Bryan and Mr Symons both expressly confirmed in writing to AFP that their fee arrangement was different from their *“various pro forma”* retainer agreements on the various class action matters in which AFP was the litigation funder and, in particular, that they were retained on the basis of *“no win no fee”* arrangements.¹⁰⁸¹
- 502 **Second**, Mr O’Bryan and Mr Symons said in the First Bolitho Opinion that they were engaged on their *“usual terms”*.¹⁰⁸²
- 503 **Third**, the evidence plainly shows (and the Court should find) that Mr O’Bryan was on a *“no win no fee”* arrangement with AFP with respect to all of his fees, and Mr Symons was on a *“no win no fee”* arrangement with AFP with respect to part of his fees.¹⁰⁸³
- 504 **Fourth**, the evidence plainly shows (and the Court should find) that the real fee arrangements between AFP, Mr O’Bryan and Mr Symons involved an illegal contingency fee arrangement.¹⁰⁸⁴
- 505 **Fifth**, pursuant to the contingency fee arrangements they had agreed with AFP, Mr O’Bryan and Mr Symons did not issue regular invoices. Rather, Mr O’Bryan issued all of his invoices and Mr Symons issued most of his invoices only after settlements were reached.¹⁰⁸⁵ Mr O’Bryan and Mr Symons also did not notify Mr

¹⁰⁸¹ [SYM.008.001.0017]; [ABL.001.0685.00008] [ABL.001.0685.00009]; [AFP.015.001.0001].

¹⁰⁸² [SYM.005.001.1400] at para [116]; see also [CCW.032.001.0001] at para [124.b].

¹⁰⁸³ [SYM.008.001.0017]; [ABL.001.0685.00008] [ABL.001.0685.00009]; [AFP.015.001.0001].

¹⁰⁸⁴ This is to be inferred from the totality of the evidence referred to in **Sections B, C and F**; and see in particular [SYM.008.001.0013] (*“TBA % share if/when we recover more than 40 hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?”*).

¹⁰⁸⁵ Mr O’Bryan and Mr Symons admit this: see [SYM.002.002.8881] [SYM.002.002.8882] at paras [4], [9] and [11] – *“The AcCounsel invoices were all prepared and issued at the same time”*.

Bolitho or Portfolio Law of any proposed change to their fee rates or the cost estimates they had purported to provide.¹⁰⁸⁶ When Mr Symons wanted to retrospectively increase his rates to reach his fee target as set out in the Banksia Expenses Spreadsheet, he simply issued new disclosure statements purporting to be contemporaneous disclosure statements, which he purported to address to Portfolio Law and which purported to give Portfolio Law contemporaneous notice of an increase in his fee rate, without drawing anyone's attention to the fact that he was applying those fee rate increases several months after the event and in circumstances where he had not given notice of those increases to anyone.¹⁰⁸⁷ On the basis of the documentary evidence, the Court should find that Mark Elliott invited Mr Symons to increase his fee rates in this way.¹⁰⁸⁸ Mr O'Bryan likewise adopted retrospective increases to his fee rates at the time of the Trust Co Settlement, without informing Portfolio Law.¹⁰⁸⁹

C3.4 Mr O'Bryan and Mr Symons confirmed in writing that their retainer agreements did not reflect their real arrangements

506 On **11 March 2017**, at Mark Elliott's request, Mr O'Bryan sent an email to Mark Elliott,¹⁰⁹⁰ which stated:

"Dear Mr Elliott,

I confirm that, notwithstanding any term to the contrary contained in my various pro forma retainer arrangements, I am providing my services as senior counsel in respect of the various legal cases for which BSL Litigation Partners Ltd is acting as the litigation funder, on the basis of a 'no win/no fee' arrangement in each case."

507 Mr O'Bryan followed this up with a formal letter sent to Mark Elliott on **14 March 2017** but which purported to be dated **1 July 2014** and which stated:¹⁰⁹¹

"Dear Mr Elliott,

*I confirm that, **notwithstanding any term to the contrary contained in my various pro forma retainer arrangements**, I am providing my services as senior counsel in respect of the various legal cases for which BSL*

¹⁰⁸⁶ [PLE.020.001.0001], paras [47.a], [47.b], [68.z], [68.aa], [68.bb], [72.f], [72.g].

¹⁰⁸⁷ [AFP.002.001.0074]. Mr Symons did not provide this document to Portfolio Law.

¹⁰⁸⁸ [SYM.001.003.0235] and AFP's admissions, [PLE.020.001.0001], para [70.n].

¹⁰⁸⁹ [PLE.020.001.0001], para [47.a], [47.b], [68.z], [68.aa].

¹⁰⁹⁰ [SYM.008.001.0017].

¹⁰⁹¹ [ABL.001.0685.00008] [ABL.001.0685.00009].

Litigation Partners Ltd is acting as the litigation funder, on the basis of a no win/no fee arrangement in each case."

508 It is therefore plain that Mr O'Bryan was engaged on the basis of a "no win no fee" arrangement, and that the "pro forma" cost agreements he issued did not reflect his real fee arrangements.

509 On **5 April 2017**, at Mark Elliott's request, Mr Symons sent an email to Mark Elliott in identical terms to that provided by Mr O'Bryan, which stated:¹⁰⁹²

"I confirm that, notwithstanding any term to the contrary contained in my various pro forma retainer arrangements, I am providing my services in respect of the various legal cases for which BSL Litigation Partners Ltd is acting as the litigation funder, on the basis of a 'no win/no fee' arrangement in each case."

510 It is therefore equally plain that Mr Symons was engaged on the basis of a "no win no fee" arrangement, and that the "pro forma" cost agreements he issued did not reflect his real fee arrangements.

511 The "no win/no fee" letters were not discovered until shortly before trial, in July 2020,¹⁰⁹³ despite being critical documents. They were within the scope of the 1 February 2019 discovery orders which required AFP to discover any costs agreements with counsel.¹⁰⁹⁴

512 On **29 November 2017**, Mark Elliott exchanged emails with AFP's accountant in which he confirmed that the "no win no fee" agreement with Mr O'Bryan and Mr Symons provided to the auditors in the prior financial year remained in place.¹⁰⁹⁵

C3.5 The "usual terms" on which Mr O'Bryan and Mr Symons agreed to act in matters involving Mark Elliott

513 Mr O'Bryan and Mr Symons said in the First Bolitho Opinion that they were engaged on their "*usual terms*".¹⁰⁹⁶

514 This was a deceptive drafting trick intended to convey the misleading impression to Justice Croft that Mr O'Bryan and Mr Symons were engaged on ordinary terms.

¹⁰⁹² [AFP.015.001.0001].

¹⁰⁹³ [MSC.010.018.0001].

¹⁰⁹⁴ [ORD.500.005.0001], para [11.a].

¹⁰⁹⁵ [ABL.001.0703.00068].

¹⁰⁹⁶ [SYM.005.001.1400] at para [116]; see also [CCW.032.001.0001] at para [124.b].

The Court should find that what Mr O’Bryan and Mr Symons had in their own minds was that they were engaged on the basis of **their** usual terms and practices in matters involving Mark Elliott, which were secret arrangements which they concealed from the Court. They were anything but ordinary; in fact they were both extraordinary and audacious.

515 Mr O’Bryan, Mr Symons and Mark Elliott were involved in several class action matters together over the period from about 2014 to the end of 2019,¹⁰⁹⁷ including:

- (a) Camping Warehouse Australia Pty Ltd v Downer EDI Limited;
- (b) Webster v Murray Goulburn Co-operative Co Limited & Ors;
- (c) Melbourne City Investments Pty Ltd v Myer Holdings Limited;
- (d) TPT Patrol Pty Ltd v Myer Holdings Limited;
- (e) Walsh v WorleyParsons Limited;
- (f) Melbourne City Investments Pty Ltd v WorleyParsons Limited; and
- (g) Hayward v Sirtex Medical Limited.

516 In each of those matters, Mr O’Bryan was senior counsel, and Mr Symons was junior counsel. In each of those matters, Mark Elliott was involved either as solicitor or through his interest in AFP as litigation funder, or both.

517 In the Camping Warehouse matter, Mr O’Bryan issued invoices for fees of approximately **\$1.3 million**. The invoices had a “Processed Date” and a “Due By” date that made the invoices appear as if they had been issued monthly and paid monthly.¹⁰⁹⁸ AFP’s records,¹⁰⁹⁹ and emails between Mark Elliott and Mr O’Bryan on 1 March 2017,¹¹⁰⁰ indicate that Mr O’Bryan’s invoices in the Camping Warehouse matter were issued only on **4 March 2016** after there was a settlement in that matter. Likewise, Mr Symons issued invoices for most of his fees in the

¹⁰⁹⁷ [SYM.001.003.2057] [SYM.001.003.2059]; [CCW.038.001.0005_2]; [CCW.038.001.0001_3]; [AFP.005.001.1428].

¹⁰⁹⁸ [ABL.001.0312.00096].

¹⁰⁹⁹ [ABL.001.0685.00204].

¹¹⁰⁰ [SYM.008.001.0022].

Camping Warehouse matter on **4 March 2016**, only after there was a settlement in that matter.¹¹⁰¹

- 518 In the Banksia matter, Mr O'Bryan issued invoices on **1 July 2016** only after the Partial Settlement was reached in April 2016, though the invoices had a "Processed Date" and a "Due By" date that made the invoices appear as if they had been issued monthly and paid monthly.¹¹⁰² Likewise, in the Banksia matter, Mr Symons issued invoices on **30 June 2016** for most of his fees up to that date only after the Partial Settlement was reached in the Banksia matter in April 2016, though the invoices had a "Processed Date" and a "Due By" date that made the invoices appear as if they had been issued monthly and paid monthly.¹¹⁰³
- 519 In the Sirtex matter, Mr O'Bryan and Mr Symons issued invoices on **13 and 17 June 2019** respectively for all or most of their fees, only after there was a settlement in that matter.¹¹⁰⁴
- 520 In the Webster v Murray Goulburn matter, Mr O'Bryan and Mr Symons both issued invoices on **31 October 2019** for all or most of their fees, only after there was a settlement in that matter.¹¹⁰⁵

¹¹⁰¹ [SYM.004.001.1180].

¹¹⁰² [AFP.001.001.1478] [AFP.001.001.1479] [AFP.001.001.1485] [AFP.001.001.1489] [AFP.001.001.1490] [AFP.001.001.1496] [AFP.001.001.1500] [AFP.001.001.1506] [AFP.001.001.1512] [AFP.001.001.1516] [AFP.001.001.1520] [AFP.001.001.1526] [AFP.001.001.1532] [AFP.001.001.1538] [AFP.001.001.1542] [AFP.001.001.1546] [AFP.001.001.1550] [AFP.001.001.1551] [AFP.001.001.1555] [AFP.001.001.1559] [AFP.001.001.1563] [AFP.001.001.1567] [AFP.001.001.1573] [AFP.001.001.1579] [AFP.001.001.1583] [AFP.001.001.1587] [AFP.001.001.1591] [AFP.001.001.1597] [AFP.001.001.1601] [AFP.001.001.1607] [AFP.001.001.1608] [AFP.001.001.1614] [AFP.001.001.1620] [AFP.001.001.1630] [AFP.001.001.1634] [AFP.001.001.1640] [AFP.001.001.1646] [AFP.001.001.1652] [AFP.001.001.1656] [AFP.001.001.1660] [AFP.001.001.1664] [AFP.001.001.1668] [AFP.001.001.1669] [AFP.001.001.1673] [AFP.001.001.1681] [AFP.001.001.1687] [AFP.001.001.1691].

¹¹⁰³ [AFP.002.001.0056] [AFP.002.001.0069] [AFP.002.001.0071] [AFP.002.001.0077] [AFP.002.001.0080] [AFP.002.001.0082] [AFP.002.001.0084] [AFP.002.001.0086] [AFP.002.001.0088].

¹¹⁰⁴ [SYM.004.001.1475]; [NOB.503.001.0063] [NOB.503.001.0065] [NOB.503.001.0067] [NOB.503.001.0069] [NOB.503.001.0071] [NOB.503.001.0073] [NOB.503.001.0075] [NOB.503.001.0077] [NOB.503.001.0079] [NOB.503.001.0081] [NOB.503.001.0083] [NOB.503.001.0085] [NOB.503.001.0087] [NOB.503.001.0089] [NOB.503.001.0091] [NOB.503.001.0093] [NOB.503.001.0095] [NOB.503.001.0097] [NOB.503.001.0099] [NOB.503.001.0101] [NOB.503.001.0103] [NOB.503.001.0105] [NOB.503.001.0107] [NOB.503.001.0109] [NOB.503.001.0111] [NOB.503.001.0113] [NOB.503.001.0115] [NOB.503.001.0117] [NOB.503.001.0119] [NOB.503.001.0121] [NOB.503.001.0123].

¹¹⁰⁵ [SYM.004.001.1301]; [NOB.503.001.0182] [NOB.503.001.0184] [NOB.503.001.0186] [NOB.503.001.0188] [NOB.503.001.0190] [NOB.503.001.0192] [NOB.503.001.0194] [NOB.503.001.0196] [NOB.503.001.0198] [NOB.503.001.0200] [NOB.503.001.0202] [NOB.503.001.0204] [NOB.503.001.0206] [NOB.503.001.0208] [NOB.503.001.0210] [NOB.503.001.0212] [NOB.503.001.0214] [NOB.503.001.0216] [NOB.503.001.0218] [NOB.503.001.0220] [NOB.503.001.0222] [NOB.503.001.0224] [NOB.503.001.0226]

521 Having regard to the concessions, admissions and evidence outlined in paragraphs 494 to 520 above, the Court should find that Mr O'Bryan, Mr Symons, Mark Elliott and AFP deliberately engaged in an improper and unlawful scheme in matters involving AFP as a funder, which included the following features:

- (a) Mr O'Bryan had a common practice in matters where Mark Elliott and AFP were involved of issuing his invoices only after settlements had been agreed in those matters (**Deferred Invoice Practice**).
- (b) Mr Symons was aware of, and adopted, the Deferred Invoice Practice in matters where Mark Elliott and AFP were involved.
- (c) Prior to the settlement in the Sirtex matter in June 2019, Mr O'Bryan had a common practice in relation to matters where Mark Elliott and AFP were involved to make his invoices appear as if they had been issued monthly (**Monthly Invoice Practice**).
- (d) Mr Symons was aware of, and adopted, the Monthly Invoice Practice in relation to the Partial Settlement in the Banksia matter in mid 2016 and the Trust Co Settlement in the Banksia matter in November/December 2017.
- (e) Mr O'Bryan had a common practice in the Banksia matter of preparing costs agreements to support the fees claimed at the time that approval was sought for the settlement and the deduction of costs and commission (**Costs Agreement Practice**).
- (f) Mr Symons was aware of, and adopted, the Costs Agreement Practice in the Banksia matter by issuing after-the-event cost disclosure statements at the time that approval was sought for the Partial Settlement and the Trust Co Settlement and the deduction of costs and commission.
- (g) In the Banksia matter, in around November/December 2017 at the time of preparing his bills, Mr O'Bryan applied retrospective fee rate increases to his fees since the Partial Settlement, including by changing his rate to a

[NOB.503.001.0228] [NOB.503.001.0230] [NOB.503.001.0232] [NOB.503.001.0234]
[NOB.503.001.0236] [NOB.503.001.0238] [NOB.503.001.0240] [NOB.503.001.0242]
[NOB.503.001.0244] [NOB.503.001.0246] [NOB.503.001.0248] [NOB.503.001.0250]
[NOB.503.001.0252] [NOB.503.001.0254] [NOB.503.001.0256] [NOB.503.001.0258]
[NOB.503.001.0260] [NOB.503.001.0262] [NOB.503.001.0264] [NOB.503.001.0266].

GST-exclusive rate to add 10 per cent to the total amount charged (**Retrospective Rate Increase Practice**).

- (h) Mr Symons was aware of, and adopted, the Retrospective Rate Increase Practice in the Banksia matter when preparing his bills in around November/December 2017. He also applied retrospective fee rate increases to his fees since the Partial Settlement, including by changing his rate to a GST-exclusive rate to add 10 per cent to the total amount charged.
- (i) Each of Mr O'Bryan and Mr Symons was aware of the practices and arrangements of the other with respect to fees.
- (j) Each of Mr O'Bryan and Mr Symons knew that the other was retained on a "no win no fee" basis in all matters in which AFP acted as litigation funder.
- (k) Each of Mr O'Bryan and Mr Symons knew that the "various pro forma" costs agreements and cost disclosure documents issued by the other did not reflect their true arrangements in respect of fees.

"No win no fee" arrangements

Mr O'Bryan

522 Mr O'Bryan did not issue invoices on Mark Elliott's matters unless there was a successful financial outcome.¹¹⁰⁶ Further, in relation to the Webster v Murray Goulburn matter, Mark Elliott confirmed in an email to Mr Crothers, copied to Mr O'Bryan, that "*Norman and I are on a no win/no fee arrangement and therefore, remain hungry!*"¹¹⁰⁷

Mr Symons

523 In February/March 2018, Mark Elliott invited Mr Symons to enter into a "*retainer*" arrangement pursuant to which AFP would pay Mr Symons a quarterly payment fee of \$200,000 plus GST, with specified adjustments, including the potential to

¹¹⁰⁶ Minter Ellison advised on 23 April 2020 [AFP.005.001.1428] that "*The following proceedings were struck out as an abuse of process. Our client considered it would be inappropriate for him to render a bill in those circumstances, and did not do so: (a) Melbourne City Investments Pty Ltd v Myer Holdings Limited; (b) Walsh v WorleyParsons Limited; and (c) Melbourne City Investments Pty Ltd v WorleyParsons Limited.*" The only Elliott Matters involving a successful financial outcome were: Camping Warehouse v Downer; Banksia; Hayward v Sirtex Medical; and Webster v Murray Goulburn, and Mr O'Bryan issued invoices in those matters only after settlements were reached. See the invoices summarised in [CCW.038.001.0005_2].

¹¹⁰⁷ [AFP.010.001.0001].

obtain “*bonus points*” and a percentage share of inflated cost recoveries when settlements were reached on Mark Elliott’s class action matters.¹¹⁰⁸ Mr Symons accepted that arrangement and was paid the quarterly fee in 2018.¹¹⁰⁹ He did not disclose that arrangement to his clients in the Bolitho Proceeding. The Court should find that this is a clear example of a breach of fiduciary duty by Mr Symons.

524 Mark Elliott sought this arrangement with Mr Symons to “*make the paperwork easier*”.¹¹¹⁰ The Court should find that the arrangement between Mark Elliott and Mr Symons, involving a “no win no fee” arrangement with a retainer, was consistent with the existing arrangement between them since about 2015.

525 Mr Symons was effectively a full time employee of Mark Elliott. He was fully occupied on class action cases for Mark Elliott from 2014 to 2019.¹¹¹¹ The evidence shows that Mr Symons issued bills for small amounts on each of those matters every three or four months to obtain cashflow.¹¹¹² Each round of small payments was akin to a retainer payment, whilst Mr Symons awaited the “*bonus points*” that came with a settlement. The “*bonus point*” fees were contingent on success.

526 In *Breen v Williams*,¹¹¹³ Gaudron and McHugh JJ said:

“The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that ‘[n]o man can serve two masters’ (Matthew 6:24). Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve. In *Bray v Ford* [1896] AC 44 at 51–2, Lord Herschell said:

‘It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent’s, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon

¹¹⁰⁸ [SYM.008.001.0013].

¹¹⁰⁹ [AFP.014.001.0074] (AFP’s bank statement for 29 January 2018 to 27 April 2018; see entry for 11 April 2018 – PAYMENT MICHAEL SY – MS Q1 RETAINER in the sum of \$176,000); [AFP.014.001.0080] (AFP’s bank statement for 27 April 2018 to 27 July 2018; see entry for 6 July 2018 – PAYMENT MICHAEL SY- MS JUNE QTR 2018 in the sum of \$220,000); [AFP.014.001.0086] – bank statement for 27 July 2018 to 29 October 2018; see entry for 15 October 2018 – payment to Michael Symons, Q2 FY19 in the sum of \$220,000).

¹¹¹⁰ [SYM.008.001.0013].

¹¹¹¹ [SYM.001.003.2057] [SYM.001.003.2059].

¹¹¹² See the Contradictors’ aide memoire on Mr Symons’ payment arrangements, [CCW.038.001.0001_3].

¹¹¹³ (1996) 186 CLR 71.

principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.”

527 The conduct of Mr Symons in entering into a lucrative retainer arrangement with AFP, which he concealed until a short time prior to the trial of this remitter, stands in stark contrast with his statement to the Court through his senior counsel on 29 May 2019 that he “**recognises his duty to the court and seeks to ensure that the court is in possession of all the assistance reasonably required for the conduct of the remitter.**”¹¹¹⁴ The artifice that Mr Symons was an inexperienced junior counsel unwittingly drawn into the misconduct of more senior practitioners cannot survive the revelation of his secret retainer deal, pursuant to which he agreed to take a substantial annual fee and additional commissions, at the expense of his clients in various class actions, in exchange for promising AFP his “*undivided attention*” and for assisting AFP in “**seeking cost recovery when we win a case!**”¹¹¹⁵ That retainer agreement at **\$800,000 per annum** plus his “*% share*” was a significant sum for a **fourth year barrister**. It helps to explain why Mr Symons was eager to advance the interests of AFP at the expense of his clients, the group members, and cements the conclusion that his conduct was dishonest and driven by personal greed. Against this background, Mr Symons’ refusal to apologise for his conduct¹¹¹⁶ was all the more remarkable.

The cheque for \$608,031

528 Mr Symons’ “no win no fee” success fee arrangement is demonstrated by the evidence of payment of his fees in the Banksia matter.

529 In **November/December 2017**, following “in principle” agreement being reached with Trust Co to settle the proceeding, Mr Symons issued invoices for **\$577,711.75**.¹¹¹⁷ AFP did not pay those invoices at that time. The Court should find that AFP was waiting for settlement to be approved and the proceeds to be received.

¹¹¹⁴ Transcript of hearing on 29 May 2019 [TRA.510.001.0001], 156:22-25.

¹¹¹⁵ [SYM.008.001.0013].

¹¹¹⁶ [MSC.010.083.0001].

¹¹¹⁷ Invoices 7-72 to 7-86 set out in the Contradictors’ aide memoire on Mr Symons’ payment arrangements, [CCW.038.001.0001_3] at Rows 91 to 103.

- 530 In **March 2018**, Mrs Botsman filed her application for leave to appeal (**Botsman Appeal**), so the settlement proceeds remained unpaid, and Mr Symons' invoices likewise remained unpaid.
- 531 On **10 June 2018**, after Whelan JA had asked questions of Mr O'Bryan in the Court of Appeal about the Third Trimbos Report and counsel's invoices, Mr O'Bryan sent an email to Mark Elliott stating that it was "*vitaly important*" for AFP to pay Mr Symons and Portfolio Law in case Mr O'Bryan was asked whether they had been paid.¹¹¹⁸
- 532 Mark Elliott, who was overseas from 8 June 2018¹¹¹⁹ to 22 June 2018,¹¹²⁰ then instructed Alex Elliott to draw a cheque to Mr Symons, but to forward-date it, to sign it with Mark Elliott's signature, and to put it in an envelope instructing Mr Symons not to open it before discussing it with Mark Elliott.¹¹²¹ Alex Elliott drew a cheque to Mr Symons for **\$608,031** dated **1 July 2018**.¹¹²² Notably, this sum included invoices that had already been paid by AFP.¹¹²³ This supports the view that the cheque was a sham payment intended to assist Mark Elliott, Mr O'Bryan and Mr Symons to maintain their deception in the Court of Appeal when the hearing resumed on **19 June 2018**.
- 533 Mr Symons confirmed that "*Mark Elliott gave me the cheque in about July 2018*" and "*asked me not to present it until he told me otherwise*".¹¹²⁴ He implausibly contended that he did not know why he was told not to present the cheque.¹¹²⁵
- 534 The Court should find that Alex Elliott delivered the cheques on or about **18 or 19 June 2018**, for the following reasons:
- (a) AFP evidently decided on around **18 June 2018** not to terminate the Settlement Deed, because Trust Co and the SPRs had called its bluff.¹¹²⁶

¹¹¹⁸ [ABL.001.0601.00003]; [AEL.100.013.0001].

¹¹¹⁹ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1788:7-9.

¹¹²⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1751:7.

¹¹²¹ [ABL.001.0601.00003].

¹¹²² [AFP.003.001.0386].

¹¹²³ Invoices 7-37 and 7-38 set out in the Contradictors' aide memoire on Mr Symons' payment arrangements, [CCW.038.001.0001_3] at Rows 71 to 72.

¹¹²⁴ [SYM.007.001.0005_ext] at .0007, paras [13] – [15].

¹¹²⁵ [SYM.007.001.0005_ext] at .0007, para [14].

¹¹²⁶ Clayton Utz's 18 June 2018 letter: [CBP.001.011.4903] [CBP.001.011.4905].

Maddocks' 18 June 2018 letter: [SYM.001.001.1276].

- (b) When AFP decided not to pursue the strategy of terminating the Settlement Deed, the position reverted to where it was before: ie, the cheques needed to be delivered in case Mr O'Bryan was asked by the Court of Appeal on **19 June 2018** whether the fees had been paid.
- (c) There is nothing in the evidence to suggest that Mr O'Bryan became **less** concerned about the prospect of his deception being unveiled by questioning in the Court of Appeal following his 11 June 2018 email. To the contrary, tensions had escalated in the days since that email, having regard to the letters from Maddocks and Clayton Utz on 18 June 2018. That makes it all the more probable that cheques were delivered on 19 June 2018.
- (d) It was not simply a matter of Mr O'Bryan deciding whether or not he was prepared to run the risk of telling a bald-faced lie to the Court of Appeal that the fees had been paid. As he said in his 10 June 2018 email, he was concerned about the fact that Mr Symons and Mr Zita would be sitting in court.¹¹²⁷ That situation could not readily be resolved except by delivery of the cheques.
- (e) Mr Symons admitted in his affidavit that he received his cheque on "*about*" 1 July 2018.¹¹²⁸
- (f) The express rationale for delivering the cheques to Mr Symons and Portfolio Law in June 2018 was to avoid placing Mr Symons and Mr Zita in an embarrassing position if the Court of Appeal asked Mr O'Bryan whether their fees had been paid. Accordingly, Mr Symons must have received his cheque **prior to 19 June 2018** (the return date of the Court of Appeal hearing).
- (g) It was illogical for one of the cheques to be delivered, but not the other. If Mr Symons received his cheque in mid 2018, Portfolio Law must also have received its cheque at that time.
- (h) Mr Zita had no actual recollection of when he received his cheque in any event. His belief that he received the cheque at around the time it was

¹¹²⁷ [ABL.001.0601.00003].
¹¹²⁸ [SYM.007.001.0005_ext] at .0007

banked was based on the fact that it was Portfolio Law's usual practice to bank cheques within a few days of receiving them.¹¹²⁹

- (i) Alex Elliott was well aware of Mr O'Bryan's insistence that the payment be attended to before the resumption of Court on 19 June 2018.¹¹³⁰
- (j) Alex Elliott confirmed in cross-examination that he attended the hearing in the Court of Appeal on 19 June 2018.¹¹³¹ He also said that it was his usual practice to meet at counsel's chambers prior to and/or after court.¹¹³² He therefore would have had the opportunity to deliver the cheques to Mr Symons and Portfolio Law prior to court on 19 June 2018 if he had not already done so on 18 June 2018.
- (k) Alex Elliott did not expressly deny that he delivered the cheques prior to the hearing on 19 June 2018. He said: *Definitely not before the 14th. I don't recall before the 19th.*¹¹³³ That evidence leaves open the possibility that Alex Elliott might have delivered the cheques between 14 and 19 June 2018. Having regard to Alex Elliott's inability to recall most of the events in issue in this remitter, his evidence on this issue is of limited assistance to the Court in evaluating the probabilities.

535 The Court should further find that Mr Symons should not be believed that he did not know why he was told not to present the cheque, because:

- (a) Mr Symons was complicit in the plan, and had to give his consent to it. That must be so, or else he would have presented the cheque.
- (b) Mr Symons was in Court during the exchange between Whelan JA and Mr O'Bryan. He must likewise have been concerned about the deception unravelling on 19 June 2018.
- (c) The totality of the evidence reveals that Mr Symons was a willing and active recruit in the dishonest scheme masterminded by Mark Elliott and Mr O'Bryan.

¹¹²⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 945:3-22.

¹¹³⁰ [ABL.001.0601.00003]; [AEL.100.013.0001].

¹¹³¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:18-26.

¹¹³² Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

¹¹³³ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:6-11.

(d) It defies belief that Mr Symons did not understand why a sham payment was being made to him.

536 In **December 2018**, the Contradictors circulated their first iteration of the List of Issues. Issue 5(b)(v) was: *“Has AFP paid the Legal Costs in respect of which it claims reimbursement, and if so, when?”*¹¹³⁴

537 On **21 January 2019**, Mark Elliott told Mr Symons to present his cheque¹¹³⁵ and Mr Symons did so.¹¹³⁶ It is noteworthy that, on the very same day, Portfolio Law presented its cheque (which was also dated 1 July 2018).¹¹³⁷ In respect of this payment, Mr Symons gave the following implausible evidence:¹¹³⁸

“I presented the cheque on 21 January 2019. I assume, having regard to Mr Elliott’s earlier request, that shortly before this date, Mr Elliott communicated to me that he was happy for me to present the cheque. However, I have no recollection of this occurring.”

538 It is also noteworthy that, on 21 January 2019, Mr Symons and Mr Zita had their cheques, and neither of them provided an adequate explanation as to when and from whom they received the cheques, and why they were not presented until 21 January 2019. Mr Zita’s purported explanation that he did not press for payment because he was in no urgent need of the funds was unsatisfactory and is addressed in paragraph 683 below.

539 The Court should find that:

(a) The payment to Mr Symons of \$608,031 was not a payment made in the ordinary course, but rather, was a payment made in response to the issues that arose in the Court of Appeal and then in the remitter. The fees were not payable in the ordinary course, and that is why Mr Symons was told not to present his cheque when Alex Elliott gave it to him on around 18 or 19 June 2018.

(b) The only credible version of events is that alleged by the Contradictors.

1134 [SYM.001.003.1799].

1135 [SYM.004.001.1206].

1136 [AFP.007.001.0003].

1137 [CBP.004.009.0215].

1138 [SYM.007.001.0005_ext] at .0007, para [15].

Fees in relation to the settlement approval application

540 It is noteworthy that Mr Symons did not seek payment in respect of any fees in connection with the settlement approval application. He issued a bill for those fees in **January 2019**, after Mark Elliott asked him to deliver a bill.¹¹³⁹ It is also noteworthy that Mr Symons informed Mark Elliott in **April 2018** that he had spent **10 days** on the Banksia matter in **January 2018**, and adjusted his retainer fee accordingly.¹¹⁴⁰ However, in the bill he submitted in **late January 2019** (but backdated to November 2018), Mr Symons claimed fees in respect of January 2018 for approximately **18 days** of work.¹¹⁴¹

The position Mr Symons adopted in the remitter

541 Mr Symons has conceded the case against him, including all the allegations in **Section C**, and including the allegation that he acted on a “no win no fee” basis with respect to part of his fees. The Court should give no weight to the attempt by Mr Symons, through his senior counsel, to establish the terms of Mr Symons’ fee arrangement through cross-examination of the expert accountant Mr Samuel on the eve of his departure from the case, particularly in circumstances where Mr Symons gave no evidence himself and was not cross-examined.¹¹⁴²

542 The Court should find that Mr Symons was engaged on a “no win no fee” basis with respect to the substantial proportion of his fees – that is, the part of his fees that he did not bill until there was a win. Insofar as the cross-examination of Mr Samuel was intended to elicit that AFP had recognised a liability to pay the small bills that Mr Symons was allowed to issue from time to time,¹¹⁴³ that cross-examination leads nowhere and is not inconsistent with a finding that Mr Symons was on a “no win no fee” agreement with respect to the substantial proportion of his fees. The critical point is that Mark Elliott and Mr Symons agreed that Mark Elliott would pay small amounts on the whole suite of matters Mr Symons was working on from time to time, but the lucrative “*bonus point*” bills were conditional upon a successful cost recovery.¹¹⁴⁴

1139 [SYM.004.001.0283].

1140 [ABL.001.0370.01028] [SYM.009.001.0003] [AFP.014.001.0074].

1141 See the Fourth Trimbo Report, Annexure K - [EXP.020.005.0001] at .0075.

1142 [TRA.500.006.0001] T597:30-601:25.

1143 [TRA.500.006.0001] T600:18-601:7.

1144 [AEL.100.070.0001].

543 The Court should find that Mr Symons and Mark Elliott agreed upon a dishonest and improper arrangement which Mr Symons chose to conceal from the Court all through the remitter, never proffering a proper explanation to the Court, withholding critical documents relating to his fee arrangements until the very last minute prior to trial;¹¹⁴⁵ and only conceding liability midway through the trial¹¹⁴⁶ without stepping into the witness box to face cross-examination for his conduct. It reflects poorly on Mr Symons that he attempted to defend the allegations against him for a period of time by cross-examination of other witnesses¹¹⁴⁷ in circumstances of the late discovery of critical document and where he must have known at the time of that cross-examination that he had no intention of entering the witness box, because he conceded the case two days later.¹¹⁴⁸

C3.6 Contingency fee arrangements in the Bolitho Proceeding

Partial Settlement

544 In connection with the Partial Settlement, in **March 2016**, Mark Elliott instructed Mr Zita to seek recovery of **\$2.55 million** in respect of costs from the settlement sum,¹¹⁴⁹ which Mr Zita did, without any proper regard as to how that sum was arrived at.

545 On **8 May 2016**, Mark Elliott sent an email to Mr O'Bryan in which he suggested that Mr O'Bryan should bill **\$1 million plus GST**.¹¹⁵⁰ In that email, Mark Elliott said: ***"I should stay low profile as I was removed as the solicitor and Robson hates me so I will bill say \$200K plus GST=\$220K. MS can bill \$100K and so can Tony =\$220K."*** Mark Elliott concluded: ***"If you agree can you start on your bills. I will talk to MS and Tony and get Trimboss lined up."***

546 Mr O'Bryan replied, stating: ***"Bills for much more than \$1M will be ready by end of the week. I will discount them down to \$1M to reflect the non-recovery of TrustCo etc."***¹¹⁵¹

1145 [MSC.010.018.0001].

1146 [MSC.010.083.0001];

Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

1147 Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 597:31-601:10, 634:10-649:7.

1148 [MSC.010.083.0001].

1149 [CBP.004.003.6578] [CBP.004.005.4636] [CBP.004.001.3635] [CBP.004.006.6135].

1150 [NOB.500.011.8020]. It should be noted that this email was belatedly discovered by Mr O'Bryan on **7 July 2020**.

1151 [NOB.500.011.8020].

- 547 This email exchange shows that Mr O'Bryan had not quantified his fees as at 8 May 2016. Mark Elliott suggested to Mr O'Bryan that he "*bill \$1.1 million*" and, if Mr O'Bryan agreed with that figure, to "*start on your bills*". Mr O'Bryan confirmed in his response that he was in the process of doing his bills, which shows that they had not been done at that stage.
- 548 A short time after this email exchange Mark Elliott sent an email asking Mr Zita for his indicative bill.¹¹⁵² That shows that Mr Zita also had not quantified his fees as at 8 May 2016.
- 549 On **2 June 2016**, Alex Elliott issued a summons seeking approval of the Partial Settlement and AFP's claim for "reimbursement" of legal costs in the sum of \$2.55 million.¹¹⁵³ At that time, Mr O'Bryan was yet to finally quantify his fees, which he did not finalise until **1 July 2016**.¹¹⁵⁴
- 550 Also on **1 July 2016**, Mark Elliott submitted a claim for legal costs in respect of his work as solicitor on the matter for **\$797,500**¹¹⁵⁵ – nearly **four times** the sum he had said he would charge in his **8 May 2016** email to Mr O'Bryan.¹¹⁵⁶ No additional work had been undertaken by Mark Elliott to account for the significant increase in his fees.
- 551 Mr O'Bryan and Mr Symons assisted Mark Elliott to justify those fees by:
- (a) assisting him to justify his assertion that he had had spent significant time undertaking discovery review;¹¹⁵⁷

1152 [CBP.004.003.3215].

1153 [CBP.004.004.1652] [CBP.004.004.1653].

1154 See Mr O'Bryan's email to Mr Elliott dated 1 July 2016 [AFP.001.001.1475], and his subsequent email attaching his invoices stamped as "PAID": [AFP.001.001.1478] [AFP.001.001.1479] [AFP.001.001.1485] [AFP.001.001.1489] [AFP.001.001.1490] [AFP.001.001.1496] [AFP.001.001.1500] [AFP.001.001.1506] [AFP.001.001.1512] [AFP.001.001.1516] [AFP.001.001.1520] [AFP.001.001.1526] [AFP.001.001.1532] [AFP.001.001.1538] [AFP.001.001.1542] [AFP.001.001.1546] [AFP.001.001.1550] [AFP.001.001.1551] [AFP.001.001.1555] [AFP.001.001.1559] [AFP.001.001.1563] [AFP.001.001.1567] [AFP.001.001.1573] [AFP.001.001.1579] [AFP.001.001.1583] [AFP.001.001.1587] [AFP.001.001.1591] [AFP.001.001.1597] [AFP.001.001.1601] [AFP.001.001.1607] [AFP.001.001.1608] [AFP.001.001.1614] [AFP.001.001.1620] [AFP.001.001.1630] [AFP.001.001.1634] [AFP.001.001.1640] [AFP.001.001.1646] [AFP.001.001.1652] [AFP.001.001.1656] [AFP.001.001.1660] [AFP.001.001.1664] [AFP.001.001.1668] [AFP.001.001.1669] [AFP.001.001.1673] [AFP.001.001.1681] [AFP.001.001.1687] [AFP.001.001.1691].

1155 [SYM.002.001.1890] at paras [28] – [38], Annexure F.

1156 [NOB.500.011.8020]. It should be noted that this email was belatedly discovered by Mr O'Bryan on **7 July 2020**.

1157 RLOI [PLE.010.002.0001] and [PLE.010.005.0001], paras [32.d], [32.f], [32.g], [32.h], [32.i]; [TRI.001.005.0169] [TRI.001.005.0171]; [TRI.001.005.0557] [TRI.001.005.0558]

- (b) agreeing upon and implementing a strategy whereby Mr Symons prepared the “Elliott Attendance Records” using Mr O’Bryan’s fee slips as a precedent.¹¹⁵⁸ It was self-evidently improper to manufacture attendance records for Mark Elliott on the basis of Mr O’Bryan’s records in order to justify Mark Elliott’s fees; and
- (c) asserting in the opinion they proffered to the Court that the costs of Mr Bolitho’s solicitors and counsel were reasonable given (inter alia) “*the voluminous documentary and other evidence which has been reviewed as a result of the Receivers’ examinations in 2013 and the liquidators’ examinations in 2014*”.¹¹⁵⁹

552 Mr Trimbos opined in the First and Second Trimbos Reports that Mark Elliott’s fees were reasonable on the premise that Mark Elliott had reviewed all of the discovery in the Liquidators’ Court Book and the Receivers’ Court Book.¹¹⁶⁰ Having regard to the evidence set out above, the Court should find that Mark Elliott had not undertaken that work. That Mr Trimbos was not astute to this deception points to his lack of objective enquiry into reviewing the fees of Mark Elliott. A comparison of Mr Trimbos’s report in the *Camping Warehouse v Downer* matter¹¹⁶¹ with the First Trimbos Report¹¹⁶² shows that Mr Trimbos used his report in the *Camping Warehouse* matter as a template, deploying a formulaic methodology to justify the fees charged by reference to the volume of the discovery. That formula enabled him to generate the First Trimbos Report in the *Banksia* matter in a short space of time, approving legal fees of **\$3.6 million** only **4 days** after he was formally retained.

553 This evidence in relation to the Partial Settlement reveals the attitude of Mark Elliott, Mr O’Bryan and Mr Symons with respect to the recovery of costs. The approach was to pitch a figure and then work out how to split it up; and to workshop

[TRI.001.005.0561] [TRI.001.005.0577] [TRI.001.005.0578]; [TRI.001.005.0586] [TRI.001.005.0587]; First Trimbos Report [SYM.001.002.3421] at paras [31] – [35]; Partial Settlement Opinion [CBP.004.004.7480] [CBP.004.004.7481], para [124], [130]; [NOB.500.012.3839], [AFP.001.001.1697], [CBP.004.005.1761] [AFP.001.001.1697] [AFP.001.001.1699] [AFP.001.001.1751] [AFP.001.001.1752].

¹¹⁵⁸ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [36], especially [AFP.001.001.1912] [SYM.001.002.1429]; see also [AFP.001.001.1919] [AFP.001.001.1996], [SYM.001.002.2208] [SYM.001.002.2209] [SYM.001.002.2235]; and the Second Trimbos Report [CCW.031.001.0047].

¹¹⁵⁹ [CCW.032.001.0001], para [124.a].

¹¹⁶⁰ First Trimbos Report [SYM.002.001.1890], paras [28] to [38].

¹¹⁶¹ [CCW.060.001.0001], particularly at .0009ff, [23] – [30], [39], [44].

¹¹⁶² [SYM.002.001.1890].

the documentation so that the numbers would tally up. Mark Elliott padded out his claim for fees to reach the target that he aspired to recover of **\$2.55 million**, and Mr O'Bryan and Mr Symons tinkered with the confidential opinion they proffered to Justice Robson *"in order for the maths to work"*.¹¹⁶³ That reveals Mark Elliott's business model, in which Mr O'Bryan and Mr Symons joined, and which they each pursued, on a grander scale, at the time of the Trust Co Settlement.

Trust Co Settlement

- 554 Following a mediation with Trust Co on **9 November 2017**, Mark Elliott, Mr O'Bryan and Mr Symons exchanged emails in relation to the **\$64 million** settlement offer in which Mr O'Bryan said: *"Provided Mark can do a satisfactory and enforceable deal with Lindholm on the division of these spoils (which will be confirmed between them tomorrow), we can do this deal"*.¹¹⁶⁴
- 555 On **10 November 2017**, Mark Elliott procured Mr Lindholm's agreement to include in the Trust Co Settlement Deed a term for AFP to recover **\$12.8 million plus GST** in respect of commission (**\$14.08 million including GST**) and **\$4.75 million plus GST** in legal costs (**\$5.225 million including GST**).¹¹⁶⁵ Mr Lindholm initialed a document to confirm the SPRs agreed that those amounts could be inserted in the settlement deed,¹¹⁶⁶ and Mark Elliott circulated that document to Mr O'Bryan, who forwarded it to Mr Symons.¹¹⁶⁷
- 556 The amount sought by AFP in respect of costs and commission (**\$19.3 million**) was approximately **30 per cent** of the total Trust Co Settlement Sum (**\$64 million**). It is no coincidence that the Funding Agreement also refers to a maximum commission rate of **30 per cent**.¹¹⁶⁸ Mark Elliott/AFP and Mr O'Bryan thought that

¹¹⁶³ See Mr Symons' email to Mr Trimpos cc Mr Elliott dated 7 July 2016 attaching the draft opinion [SYM.002.001.1824; SYM.002.001.1825]; Mr Elliott's email to Mr Symons and Mr O'Bryan of 8 July 2016 instructing them to change their opinion in order for the maths to work [SYM.002.001.1864]; the final opinion, altered in the manner directed by Mr Elliott [CCW.032.001.0001] at .0053, para [129]; and the emails they exchanged with Mr Trimpos to procure evidence from him in support of their cost recovery claim [NOB.500.012.2154] [NOB.500.012.2156]; [SYM.001.002.4043].

¹¹⁶⁴ [SYM.001.001.5479].

¹¹⁶⁵ See Mr Lindholm's 29 March 2019 Affidavit [SPR.006.001.0005], paras [12], [15], and [20], and Mr Lindholm's 2 June 2020 Affidavit [SPR.006.001.0003], para [12], [20] – [22], [25].

¹¹⁶⁶ Mr Lindholm's 29 March 2019 Affidavit [SPR.006.001.0005], para [16].

¹¹⁶⁷ [SYM.001.001.4885] [SYM.001.001.4887].

¹¹⁶⁸ Funding Agreement [AFP.006.001.0014], clause 12.1.2.

AFP should be entitled to **30 per cent** of the **total settlement sum**,¹¹⁶⁹ that was the basis for Mark Elliott's demand to Mr Lindholm.

557 At that time, Mr O'Bryan had not prepared any invoices for the Relevant Period and had not quantified his fees. Mr Symons had issued invoices for July 2016 to November 2016, but had not quantified his fees for the 2017 calendar year.

Invitation to charge and the Banksia Expenses Spreadsheet

558 Thereafter, Mark Elliott worked out how to divide up the sum that he had sought from Mr Lindholm, to which Mr Lindholm had agreed. On 19 November 2017, Mark Elliott invited Mr O'Bryan to submit bills for **\$2.65 million (O'Bryan Fee Target)**.¹¹⁷⁰ At the same time, he invited Mr Symons to submit bills for **200 days'** work until Christmas 2017¹¹⁷¹ - which, at the hourly rate of **\$300 per hour** at which Mr Symons had at that time been charging his fees,¹¹⁷² would enable Mr Symons to reach a fee target of **\$600,000 (Symons Fee Target)**. In that email, Mark Elliott invited Mr Symons to withdraw one bill, being bill 7-58 for a small sum which Mr Symons billed in October 2017 as part of his fee arrangement with Mark Elliott, being an arrangement akin to a retainer arrangement.¹¹⁷³ The Court should find that Mark Elliott invited Mr Symons to withdraw invoice 7-58 in order to substitute it with a larger bill. And though Mr Symons chose not to alter his existing invoice, he nonetheless fully complied with Mark Elliott's invitation to charge **\$600,000** until Christmas 2017.

559 In the days that followed, Mark Elliott and his sons Max Elliott and Alex Elliott produced a spreadsheet, the **Banksia Expenses Spreadsheet**,¹¹⁷⁴ setting out Fee Targets for Mr O'Bryan, Mr Symons and Portfolio Law for the Relevant Period, as follows:

- (a) the **O'Bryan Fee Target** was revised to **\$2.56 million plus GST**;
- (b) the **Symons Fee Target** was revised to **\$600,000 plus GST**;

¹¹⁶⁹ [SYM.001.002.2689] [SYM.001.002.2690] at point [2.c]; transcript of hearing in AFP v Botsman on 25 May 2018 [CCW.005.003.0001] at .0047 - .0048; [ABL.001.0594.00006] at 00006_3.

¹¹⁷⁰ [NOB.500.001.7553].

¹¹⁷¹ [SYM.001.001.7228].

¹¹⁷² See Mr Symons' invoices in the Murray Goulburn matter issued on 10 and 24 October 2017 [SYM.006.001.0001] – the work was charged at \$300/hour.

¹¹⁷³ [SYM.001.001.7228].

¹¹⁷⁴ See the version produced as at 21 November 2017 [AFP.007.001.0001] [AFP.007.001.0002].

(c) the **Portfolio Law Fee Target** was set at **\$377,000 plus GST**.

560 Together with various other sundry expenses, those sums totalled the **\$4.75 million plus GST** that Mark Elliott had demanded from Mr Lindholm, and that Mr Lindholm had agreed to.

561 The Court should find that, on **21 November 2017** at 4.07pm, Mark Elliott sent the Banksia Expenses spreadsheet to Mr O'Bryan and Mr Symons (copied to Alex Elliott),¹¹⁷⁵ and that the version that was attached to that email (which none of the parties to that email was able to produce) is the same version that Max Elliott sent to Mark Elliott and Alex Elliott two minutes before, at 4.05pm.¹¹⁷⁶

562 The Court should find that the figures in the Banksia Expenses Spreadsheet had no proper basis, and in the case of Mr O'Bryan and Mr Symons, the sums that Mark Elliott meant for them to recover (approximately **\$2.65 million** and **\$660,000** respectively) represented lucrative, illegal contingency fees, because:

- (a) the documentary evidence paints a compelling picture of the dishonest process by which Mr O'Bryan and Mr Symons concocted their fee claims in November/December 2017 (see paragraphs 565 to 641 below);
- (b) the documentary evidence shows that Mr O'Bryan and Mr Symons were not focused on the matter during the Relevant Period, and generated hardly any work product;¹¹⁷⁷
- (c) there was an anomalous disparity between the fees charged by Mr O'Bryan and Mr Symons and the fees charged by counsel for the SPRs,¹¹⁷⁸ and yet the SPRs' legal team did virtually all the work;¹¹⁷⁹ and

¹¹⁷⁵ [NOB.500.001.7495].

¹¹⁷⁶ [AFP.007.001.0001] [AFP.007.001.0002].

¹¹⁷⁷ See the Contradictors' oral opening submissions on 30 July 2020 [TRA.500.004.0001], 355:31 – 409:27 as to the inadequacy of the documentary evidence to substantiate the fees charged by Mr O'Bryan and Mr Symons.

¹¹⁷⁸ In the Relevant Period, the SPRs incurred counsel fees of **\$1,257,859 plus GST**: Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [99]. It is noteworthy that, of that sum, Mr Redwood charged **\$883,444.55**, but approximately **20%** of that amount related to the proceedings against Banksia's insurers and insurance broker Insurance House: Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [100.e] – [102]. Accordingly, the fees of Mr Redwood excluding fees for the insurance claims were approximately the same as the fees charged by Mr Symons, in circumstances where Mr Redwood appears to have had the primary conduct of the matter, and Mr Symons appears to have done very little.

¹¹⁷⁹ In the Relevant Period, Mr Bolitho's legal team filed 1 single 12-page reply expert report, whereas the SPRs filed 26 expert reports, witness statements and witness outlines: Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], paras [64] and [67]; see also Further SPR Opinion [CCW.022.001.0460], paras [38] and [40]-[43], [52], [54], [59]-[60], [77], [79].

- (d) none of AFP, Mr O'Bryan, Mr Symons and Alex Elliott was able to discover the 4.07pm Banksia Expenses Email, and the Court should find that it was deleted by Mark Elliott from his own computer and from Alex Elliott's computer, and by Mr O'Bryan and Mr Symons, because it was a damaging document which revealed the process by which the fees had been quantified.

563 The Court should find that:

- (a) AFP knew the fees it invited Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law to charge were unreasonable and excessive, particularly in the circumstances where it had not sighted fee slips and invoices at the time AFP instructed the Lawyer Parties what to charge.
- (b) Mr O'Bryan and Mr Symons knew that their own fees (individually, respectively, and in the aggregate) were excessive, particularly in the circumstances where the fees were dictated to them, and agreed to by them with AFP, at a time when they had not properly quantified the time they had spent working on the matter, and did not reflect their work product. Each must have known roughly how much time the other was spending on the Bolitho Proceeding. Mr O'Bryan, for instance, cannot have been in any doubt that his junior Mr Symons had done nothing to develop the Court Book throughout the Relevant Period, which ultimately required a second junior to be retained – it was Mr O'Bryan's idea to retain her. Mr O'Bryan and Mr Symons occupied chambers in the same building during the Relevant Period and worked on several matters together.¹¹⁸⁰ Accordingly each must each have had a reasonably good idea of how the other was spending his time.
- (c) AFP, Alex Elliott, Mr O'Bryan and Mr Symons knew that Portfolio Law had acted as a post box, sending the letters that they drafted for Portfolio Law to send. Portfolio Law had essentially undertaken an administrative role, so that while their fees might have been reasonable compared to what a solicitor would normally charge in a class action, their fees were in fact

The SPRs undertook the vast majority of interlocutory steps to get the proceedings ready for trial: Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [60]; Further SPR Opinion [CCW.022.001.0460], para [73], [74].

unreasonable in light of the role they actually undertook. At the time Mr Zita agreed to charge \$377,000, Mr Zita had not recorded his time and had not quantified his fees, and told Alex Elliott he could not estimate the sum that was owing to him.¹¹⁸¹

564 The Banksia Expenses Spreadsheet resembles a sales target plan for a consumer oriented business where employees are assigned targeted sales goals with commission incentives. For counsel and a litigation funder to act in this manner is shameful.

The Lawyer Parties, with AFP's assistance, workshopped their fees to reach their targets

565 The evidence shows that the Lawyer Parties produced bills proximate to their Fee Targets set out in the Banksia Expenses Spreadsheet. In the case of Mr O'Bryan and Mr Symons, this was done dishonestly, with dishonest assistance from AFP and Alex Elliott (see **Section F** below).

566 No allegation of dishonest overcharging is made against Mr Zita/Portfolio Law. Rather, the Contradictors contend – and Mr Zita conceded – that his bills were based on guesswork, which was wholly unreliable, and for which debenture holders should not be asked to pay.¹¹⁸²

Mr O'Bryan

567 When Mr O'Bryan produced a first draft of his invoices and fee slips on around **14 or 15 November 2017**, they totalled approximately **\$1 million**¹¹⁸³ – significantly less than the sum Mark Elliott and Mr O'Bryan evidently had in mind. Thereafter Mr O'Bryan, to the knowledge of Mark Elliott and with his encouragement, increased his bills by a combination of increasing his daily rate,¹¹⁸⁴ converting his rate to a “GST exclusive” rate,¹¹⁸⁵ and adding hundreds of hours to his bills. The evidence demonstrating these matters is set out below.

¹¹⁸¹ [ABL.001.0599.00009].

¹¹⁸² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 880:7-17, 882:4-883:21, 884:28-886:20.

¹¹⁸³ [NOB.500.001.7516] [NOB.500.001.7517] [NOB.500.001.7519] [NOB.500.001.7521] [NOB.500.001.7523] [NOB.500.001.7525] [NOB.500.001.7527] [NOB.500.001.7529] [NOB.500.001.7531] [NOB.500.001.7533] [NOB.500.001.7535] [NOB.500.001.7537] [NOB.500.001.7539] [NOB.500.001.7541] [NOB.500.001.7543] [NOB.500.001.7545] [NOB.500.001.7547] [NOB.500.001.7549] [NOB.500.001.7551].

The total of the 18 invoices is set out in the Contradictors' aide memoire, [AID.010.029.0001].

¹¹⁸⁴ [NOB.500.001.7504]; [NOB.500.001.7508]; [NOB.500.001.7506].

¹¹⁸⁵ [NOB.500.001.7504].

- 568 As already noted, on **19 November 2017** at **5.19pm**, Mark Elliott sent an email to O'Bryan stating: "*Norm, I need your invoices and a table of their totals on a month by month basis from 1/7/16 to Xmas 2017. I confirm that they total \$2.65M plus GST. Please advise*".¹¹⁸⁶
- 569 On **19 November 2017** at **7.09pm**, Mr O'Bryan replied, stating: "*I will send you some drafts. They need more work – also need to go back to collect the missing portion from round one (25%)?*"¹¹⁸⁷ A moment later, at **7.09pm**, he emailed Mark Elliott attaching draft invoices that his secretary had prepared and sent to him on **15 November 2017**, at a rate of \$1,100 per hour and \$11,000 per day **including** GST, which totalled approximately **\$1 million**.
- 570 On **19 November 2017** at **8.42pm**, Mark Elliott sent an email to Mr O'Bryan stating: "***Suggest you up your rate to \$15K per day***".¹¹⁸⁸
- 571 The Court should find that Mark Elliott intended to convey that Mr O'Bryan's fees were not high enough to arrive at the Fee Target, and that an easy way for Mr O'Bryan to increase his claim for fees and get them closer to the target was for Mr O'Bryan to increase his hourly rate. Mark Elliott and Mr O'Bryan plainly knew that Mr O'Bryan did not have a fee agreement that permitted him to charge \$15,000 per day. This was reprehensible conduct on the part of Mark Elliott, who was seeking to defraud the debenture holders by urging Mr O'Bryan to charge his fees at a higher hourly rate.
- 572 Evidently Mr O'Bryan thought Mark Elliott's idea had merit. On **19 November 2017** at **8.45pm**, Mr O'Bryan forwarded Mark Elliott's email to his secretary Ms Koh, stating: "*Dear Florence, please redraw these accounts accordingly: \$1500/hr & \$15,000/day plus GST. Mark will check & confirm*".¹¹⁸⁹
- 573 On **20 November 2017** at **11.01am**, Ms Koh emailed Mr O'Bryan, stating:¹¹⁹⁰

“Just re-confirming that your rates are PLUS GST as per your email below (as opposed to inclusive of GST which was what we have been

¹¹⁸⁶ [NOB.500.001.7553]. Note, Mr O'Bryan was in Sri Lanka at this time, and the time stamp on Mr Elliott's email is the time that it was received by Mr O'Bryan in Sri Lanka.

¹¹⁸⁷ [NOB.500.001.7553].

¹¹⁸⁸ [NOB.500.001.7504].

¹¹⁸⁹ [NOB.500.001.7508].

¹¹⁹⁰ [NOB.500.001.7504].

doing). That is, for instance, fees for month of June 2016 is \$109,500 – plus GST it will be \$120,450. Kindly advise.”

- 574 On **20 November 2017** at **11.36am**, Mr O’Bryan replied, copying Mark Elliott, and stating: “*Yes please Florence.*”¹¹⁹¹
- 575 This exchange shows that Mr O’Bryan made a deliberate and conscious decision to alter his fee rate to a GST-exclusive rate, thereby increasing the total fee claim by 10 per cent. He did this in an effort to reach the Fee Target. He did this with Mark Elliott’s knowledge and assent, and without any discussion with his purported instructing solicitor.
- 576 On **20 November 2017** at **11.32am**, Mr O’Bryan emailed Ms Koh copied to Mark Elliott, stating: “*I also need to compute more time for **evidence preparation for trial**. I don’t have adequate computer access to do this for the next few days, so please proceed with the current work and I will increase later*”.¹¹⁹²
- 577 The documentary evidence and unchallenged evidence of the SPRs shows that Mr O’Bryan had hardly any involvement in the preparation of evidence for trial,¹¹⁹³ and what work he had undertaken in trial preparation from mid-September 2017 onwards was already reflected in the draft bills that he and Ms Koh had prepared on about 14 and 15 November 2017.¹¹⁹⁴ Accordingly, Mr O’Bryan had no proper basis to “*compute more time for evidence preparation for trial*”. What Mr O’Bryan really had in mind in this email was that he needed to add more time to his bills to meet the Fee Target.
- 578 As already noted, on **21 November 2017** at **4.07pm**, Mark Elliott emailed Mr O’Bryan and Mr Symons cc Alex Elliott,¹¹⁹⁵ attaching (the Court should find) the Banksia Expenses Spreadsheet that Max Elliott had sent to Mark Elliott and Alex

¹¹⁹¹ [NOB.500.001.7504].

¹¹⁹² [NOB.500.001.7506].

¹¹⁹³ Mr Kingston’s 2 June 2020 Affidavit [SPR.006.001.0004], paras [10]-[15]; Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001] at paras [60.e], [61] – [71], [81] – [91]. The evidence shows that the extent of assistance Mr O’Bryan provided was limited to providing some comments on advanced drafts on 3 witness outlines and 5 expert reports, and attendance at 2 of the 145 expert conferrals conducted by Maddocks, both of which occurred in September 2015, prior to the Relevant Period. See further [NOB.500.013.2098] [NOB.500.013.2099] (Mr Smoker), [NOB.500.013.1507] [NOB.500.013.1508] (Mr Silavecky); [NOB.500.013.1522] (Mr Britton), [NOB.500.002.2786] [NOB.500.002.2787] [NOB.500.002.0639] [NOB.500.002.0640] (Mr Hardy), [NOB.500.002.0192] (Mr Story), [NOB.500.001.8278] [NOB.500.007.7166] [NOB.500.007.7167] (Mr Hall).

¹¹⁹⁴ See further paragraphs 766 - 773 and 921 - 923 below.

¹¹⁹⁵ [NOB.500.001.7495].

Elliott two minutes earlier, in which the O'Bryan Fee Target was revised to **\$2.56 million plus GST**.¹¹⁹⁶

579 On **21 November 2017** at **7.10pm**, Mr O'Bryan replied, stating:¹¹⁹⁷

*"Looks good. I will correct my invoices via Florence over the next few days and **issue them as 'paid' for Trimbos's purposes (as per the mini settlement). He will find it much easier to justify a rate of \$1100/hr & \$11,000/day, so I will calculate accordingly & increase hours as appropriate.**"*

580 On **21 November 2017** at **7.14pm**, Mark Elliott replied, stating:¹¹⁹⁸

"You will struggle for days! Could you charge a cancellation fee as you were expecting 6 months work next year and cleared your diary! Let's discuss."

581 On **21 November 2017** at **7.25pm**, Mr O'Bryan replied, stating: *"Maybe we could do a retainer for the trial, payable upfront?"*¹¹⁹⁹ This email shows that Mr O'Bryan was conscious of the fact that AFP could only recover those costs that it had paid.

582 On **21 November 2017** at **8.11pm**, Mark Elliott replied, stating:¹²⁰⁰

"My recollection is that your costs agreement has a cancellation clause. Estimate of 100 days at \$15K per day x 20% = \$300K. You reasonably need notice for us to cancel the trial booking? Should I ask Trimbos?"

583 On **21 November 2017** at **9.21pm**, Mr O'Bryan replied, stating:¹²⁰¹

"Yes, good idea. Alternatively (or as well), include the outstanding \$1M from the mini settlement in the costs claim for the main settlement. That would look generous & work out the same from our point of view. What is Portfolio receiving? They also need to look respectable."

584 These email exchanges show that:

- (a) Mark Elliott thought that Mr O'Bryan would *"struggle for days"* trying to add hours to his bills in order to reach the Fee Target. The Court should find

¹¹⁹⁶ [AFP.007.001.0001] [AFP.007.001.0002].

¹¹⁹⁷ [NOB.500.001.7495].

¹¹⁹⁸ [NOB.500.001.7495].

¹¹⁹⁹ [NOB.500.001.7495].

¹²⁰⁰ [NOB.500.001.7495].

¹²⁰¹ [NOB.500.001.7495].

that Mark Elliott and Mr O'Bryan knew that Mr O'Bryan had not undertaken anywhere near the volume of work to justify the Fee Target.

- (b) Mark Elliott and Mr O'Bryan actively contemplated the idea of charging a fictitious cancellation fee, knowing that Mr O'Bryan's fee agreement did not permit him to charge such a fee, and intending that, if such a fee were to be charged, it could be substantiated by a fabricated costs agreement containing a cancellation clause.
- (c) Even after Mr O'Bryan told Mark Elliott that he did not think Mr Trimbos would consider a fee rate of \$15,000 per day to be unreasonable, Mark Elliott continued to press Mr O'Bryan to charge his fees at that rate.
- (d) It was Mark Elliott's idea to claim that the trial would run for 100 days.
- (e) Both Mark Elliott and Mr O'Bryan were focused on ensuring that AFP recovered the \$4.75 million plus GST in legal costs that Mark Elliott had demanded from Mr Lindholm. They both saw the claim for costs as a claim in furtherance of their joint enterprise. Mr O'Bryan thought it would "*work out the same from our point of view*" to add in the \$1 million in fees allegedly incurred up to the time of the Partial Settlement instead of, or as well as, him charging a cancellation fee.
- (f) Mr O'Bryan knew that Portfolio Law had done very little on the matter in terms of real work, but thought that it was important to the credibility of the whole scheme for Portfolio Law's fees to "*look respectable*" – ie, he thought Portfolio Law's fees needed to convey **the appearance** that they were a bona fide instructing solicitor, which he knew they were not.
- (g) Mark Elliott knew that Mr O'Bryan intended to issue his invoices as "PAID" for Trimbos's purposes, as per the Partial Settlement.¹²⁰²

¹²⁰²

In relation to the Partial Settlement, see Mr O'Bryan's emails to Mr Elliott dated 1 July 2016 attaching his invoices stamped as "PAID": [AFP.001.001.1478] [AFP.001.001.1479] [AFP.001.001.1485] [AFP.001.001.1489] [AFP.001.001.1490] [AFP.001.001.1496] [AFP.001.001.1500] [AFP.001.001.1506] [AFP.001.001.1512] [AFP.001.001.1516] [AFP.001.001.1520] [AFP.001.001.1526] [AFP.001.001.1532] [AFP.001.001.1538] [AFP.001.001.1542] [AFP.001.001.1546] [AFP.001.001.1550] [AFP.001.001.1551] [AFP.001.001.1555] [AFP.001.001.1559] [AFP.001.001.1563] [AFP.001.001.1567] [AFP.001.001.1573] [AFP.001.001.1579] [AFP.001.001.1583] [AFP.001.001.1587] [AFP.001.001.1591] [AFP.001.001.1597] [AFP.001.001.1601] [AFP.001.001.1607] [AFP.001.001.1608] [AFP.001.001.1614] [AFP.001.001.1620] [AFP.001.001.1630] [AFP.001.001.1634] [AFP.001.001.1640] [AFP.001.001.1646] [AFP.001.001.1652]

- (h) None of the above matters was canvassed with Mr O'Bryan's instructing solicitor Portfolio Law, let alone with the client, Mr Bolitho and/or other group members.
- 585 On **22 November 2017** at **8.40am** (Melbourne time), Mark Elliott emailed Mr O'Bryan forwarding an exchange of emails with Mr Trimbos in which Mr Trimbos confirmed his availability to prepare a report. Mark Elliott said: *"Should I ask him (1) attitude towards a cancellation fee by you (2) if \$15K per day is ok?"*¹²⁰³
- 586 On **22 November 2017** at **11.49am**, Mr O'Bryan replied, stating: *"Sure, but I reckon he will say no to both. **Better that I increase the hours to the max extent possible at the \$11k rate (which he will accept)**".*¹²⁰⁴
- 587 This email exchange provides further direct evidence of the complicity of Mark Elliott and Mr O'Bryan and their scandalous and fraudulent endeavour to increase billable hours to the maximum extent possible to meet the Fee Target.
- 588 On **22 November 2017 at 11.09pm**, Mr O'Bryan emailed his secretary Ms Koh¹²⁰⁵ directing her to *"add the following narrative to the following memoranda of attendances in the new set of memoranda you prepared"*:

"Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial' - 1 day for each entry

on each of the following dates please:

Sept 2016: 11, 12, 13, 22, 25, 27 and 30

Oct 2016: 11, 12, 13, 25, 26, 28, 29 and 31

Dec 2016: 11, 12, 14, 17, 18 and 19

Jan 2017: 3, 4, 7, 8, 9, 13, 15, 16, 18, 19, 22, 23 and 25

[AFP.001.001.1656] [AFP.001.001.1660] [AFP.001.001.1664] [AFP.001.001.1668]
[AFP.001.001.1669] [AFP.001.001.1673] [AFP.001.001.1681] [AFP.001.001.1687]
[AFP.001.001.1691].

¹²⁰³ [NOB.500.001.7493].

¹²⁰⁴ [NOB.500.001.7493].

¹²⁰⁵ [NOB.500.001.7442] [NOB.500.001.7444] [NOB.500.001.7446] [NOB.500.001.7447]
[NOB.500.001.7451] [NOB.500.001.7453] [NOB.500.001.7456] [NOB.500.001.7458]
[NOB.500.001.7460] [NOB.500.001.7463] [NOB.500.001.7465] [NOB.500.001.7470]
[NOB.500.001.7472] [NOB.500.001.7475] [NOB.500.001.7480] [NOB.500.001.7481]
[NOB.500.001.7484] [NOB.500.001.7486] [NOB.500.001.7487]

Feb 2017: 1, 2, 3, 4, 6, 18 and 19

March 2017: 20, 21, 22, 23, 25, 26 and 27

April 2017: 8, 9, 10, 12, 13, 14 and 30

May 2017: 3, 4, 6, 7, 13, 14, 15, 17 and 18

June 2017: 2, 5, 9, 17, 18 and 25

August 2017: 1, 2, 16, 17, 18 and 24

& please recalculate”.

589 Notably, that email specified **76 days** on which Ms Koh was to add the entry for “*reviewing discovered documents*” etc. Mr O’Bryan later revised that down to **65 days**.

590 The Court should find that Mr O’Bryan added the “trial preparation” time to his bills in order to achieve his strategy of “*increasing the hours to the max extent possible*” in order to reach the Fee Target, and with Mark Elliott’s knowledge and assent, in circumstances where they both knew that Mr O’Bryan had not spent that time working on the matter in the Relevant Period.

591 On **23 November 2017** at **1.04pm**, Mr O’Bryan emailed Mark Elliott attaching a “*Table of fees - \$1500 & 15000 (WITH HOURS)*” prepared by Ms Koh, calculating his fees at the rate of \$1,500 per hour plus GST totalling **\$2,584,500 plus GST**.¹²⁰⁶ Mr O’Bryan said: “*I don’t think Trimbos will accept this rate.*”

592 On **23 November 2017** at **1.05pm**, Mr O’Bryan emailed Ms Koh asking her to “*calculate at the \$1100/\$11000 rate?*”¹²⁰⁷

593 On **23 November 2017** at **3.29pm**, Ms Koh emailed Mr O’Bryan attaching a “*table for \$1100/\$11000 rate*”.¹²⁰⁸

594 On **23 November 2017** at **3.37pm**, Mr O’Bryan emailed Mark Elliott attaching “*Table of fees - \$1100 & \$11000 (WITH HOURS)*” prepared by Ms Koh, calculating his fees at the rate of \$1,100 per hour plus GST totalling **\$1,895,300 plus GST**.¹²⁰⁹ Mr O’Bryan said:

¹²⁰⁶ [NOB.500.001.7435] [NOB.500.001.7438].

¹²⁰⁷ [NOB.500.001.7416].

¹²⁰⁸ [NOB.500.001.7416].

¹²⁰⁹ [NOB.500.001.7427] [NOB.500.001.7431] (\$2,084,830 including GST).

*“This will be **more appropriate for Trimbo**s, I reckon. **If he will allow a cancellation fee, this is close to the mark.** There will be more work in December (and January too if we don’t get approval before Xmas).”*

595 Accordingly, on **23 November 2017** at **5.13pm**, Mark Elliott sent an email to Mr Trimbo copied to Alex Elliott, stating:¹²¹⁰

*“I have encountered 2 issues that I need your preliminary advice on please. Senior Counsel was booked for the **100 day trial** of this matter starting Feb 12 2018 onwards. **He has asked for a cancellation fee** if the matter settles. **I have negotiated him down to \$200K. Junior counsel also wants \$100K.** I will pay them both. Do you think that that is ‘fair and reasonable’ and able to be included in the court costs award? Secondly, both senior and junior counsel want fees on account for December 2017. Can you accept an estimate of their fees (with proper description included) and opine on if it is ‘fair and reasonable’ for me to have paid them albeit, in advance? Please consider and revert asap so that I can finalise their invoices.”*

596 Meanwhile, Mr O’Bryan decided to make one last audacious effort to manipulate his bills to achieve his Fee Target.

597 On **23 November 2017** at **4.49pm**, Mr O’Bryan emailed Ms Koh with “one last request”, namely, to calculate “from 1/7/17 at \$1250/hr, \$12,500/day?”¹²¹¹

598 On **23 November 2017** at **5.51pm**, Ms Koh replied, attaching a table setting out his fees at that increased rate from 1 July 2017 onwards, totalling \$1,956,050 plus GST or **\$2,151,655 including GST.**¹²¹²

599 On **23 November 2017** at **11.03pm**, Mr O’Bryan forwarded that email and the table to Mark Elliott, stating: “*This is close to correct. Ask Trimbo whether he will accept these rates.*”¹²¹³

600 This email shows that, by retrospectively increasing his rates to \$12,500 per day plus GST from 1 July 2017, Mr O’Bryan was able to get quite close to the Fee Target, and that he expected that he would get closer still to the target by the time of the settlement approval hearing, because he proposed to bill another \$150,000 up to the time of the settlement approval application.¹²¹⁴

1210 [TRI.001.006.0072].

1211 [NOB.500.001.7423].

1212 [NOB.500.001.7416] [NOB.500.001.7421].

1213 [NOB.500.001.7416] [NOB.500.001.7421].

1214 [NOB.500.001.7509].

601 This astonishing documentary trail, which was deliberately destroyed by Mark Elliott but not by Mr O'Bryan, provides compelling and direct evidence of the fraudulent conduct of Mr O'Bryan and Mark Elliott. Of course, Mark Elliott took his account to his grave, and his passing occurred at a time when he was destroying documents and falsely sowing the seed of an alleged long standing document destruction policy. But throughout the remitter, Mr O'Bryan knew what his own documents revealed. It is not evident why Mr O'Bryan maintained his defence despite the damning documentary evidence against him, only conceding the case against him when those documents had been presented in four days of opening.

Mr Symons

602 As already noted, on **19 November 2017 at 5.17pm, two minutes** before emailing Mr O'Bryan and inviting him to charge \$2.65 million plus GST, Mark Elliott sent an email to Mr Symons, informing him of the Symons Fee Target, in the following terms:

"MS, You have already billed me to end November 2016. I confirm that you have /will have done 200 days work on this matter since then until Xmas? Do you want to withdraw Invoice 7-58, lets discuss. When will I get your invoices?"¹²¹⁵

603 On **19 November 2017 at 8.45pm**, Mr Symons replied, stating: *"I'm starting this now – I'll let you know as soon as possible"*.¹²¹⁶

604 The Court should find that Mr Symons dishonestly workshopped his bills to achieve the Symons Fee Target. The Court should find that Mr Symons quantified his fees by the following process:

- (a) Mr Symons entered fee entries into an excel spreadsheet¹²¹⁷ that he had created as a "timesheet",¹²¹⁸ and which he used to create his bills.¹²¹⁹

¹²¹⁵ [SYM.001.001.7228].

¹²¹⁶ [SYM.001.001.7228].

¹²¹⁷ [SYM.003.001.0001]. To display the whole spreadsheet, click on CELL I4 and select "Clear Filter" from the dropdown arrow.

¹²¹⁸ [SYM.003.001.0001]. Cell D372 adds up all the hours that Mr Symons entered into the spreadsheet and multiplies it by an hourly rate. The formula bar shows that Mr Symons calculated his fees at \$375 per hour plus GST.

¹²¹⁹ (1) See the Contradictors' aide memoire comparing Mr O'Bryan's draft fee slips dated 14/15 November 2017 with Mr Symons' charges as per (A) his spreadsheet and (B) his invoices [AID.010.002.0001]. Column I of that spreadsheet identifies whether the narration in Mr Symons' spreadsheet matches the narration in Mr Symons' fee slips. This shows that Mr Symons made a very small number of changes to the narrations in the final bills he issued.

- (b) To work up that spreadsheet and arrive at the Symons Fee Target, Mr Symons used Mr O'Bryan's draft fee slips which Mr O'Bryan's secretary had sent to him on 15 November 2017 to work out the activities for which he would charge.¹²²⁰ Wherever Mr O'Bryan's fee slips made reference to "junior counsel", Mr Symons entered a like charge for that activity.¹²²¹
- (c) Mr Symons tinkered with the hours charged for various activities, sometimes allocating much more time to an activity than Mr O'Bryan had charged in his first draft bills.
- (d) Mr Symons dishonestly added numerous days and hours for discovery review and working on the Court Book, particularly throughout January, February, July, August, September, October and November 2017, when in fact no such work was undertaken.¹²²²
- (e) In working up the spreadsheet Mr Symons presumably also went through his emails with a view to crafting a relevant work description for the days charged, as some of Mr Symons' work descriptions are different from Mr O'Bryan's work descriptions. The time that Mr Symons charged for his work did not reflect any honest attempt by him to estimate the time he had actually spent on the matter. Rather, Mr Symons' approach reflected a **dishonest** and fraudulent attempt to charge \$600,000 to thereby meet the

(2) Mr Symons' spreadsheet [SYM.003.001.0001] charged a fee rate of \$375/hour plus GST for the whole of 2017; whereas in the bills that Mr Symons ultimately issued, he charged a rate of \$330/hour plus GST from 1 January 2017 to 30 June 2017 and \$375/hour plus GST from 1 July 2017 to 8 December 2017.

(3) The spreadsheet [SYM.003.001.0001] calculates Mr Symons' fees for the 2017 calendar year including **12 days in December 2017** "on account". Mr Symons issued bills for the 2017 calendar year totalling **\$572,830.50** and **separately** issued a bill "on account" for **\$110,000** for December 2017/January 2018. See the summary of Mr Symons' invoices in the Third Trimbo Report, [CBP.001.010.9597] at 6230.

¹²²⁰ [SYM.010.001.0001] [SYM.010.001.0249] [SYM.010.001.0251] [SYM.010.001.0252] [SYM.010.001.0256] [SYM.010.001.0258] [SYM.010.001.0261] [SYM.010.001.0263] [SYM.010.001.0265] [SYM.010.001.0268] [SYM.010.001.0270] [SYM.010.001.0275] [SYM.010.001.0277] [SYM.010.001.0280] [SYM.010.001.0285] [SYM.010.001.0286] [SYM.010.001.0289] [SYM.010.001.0291] [SYM.010.001.0292].

¹²²¹ See [AID.010.002.0001], the Contradictors' aide memoire which compares the work descriptions used in the fee slips issued by Mr O'Bryan and Mr Symons in the fee slips they issued for the 2017 calendar year. The comparisons show that Mr Symons prepared his "timesheet" by slavishly copying the fee entries of Mr O'Bryan in the draft fee slips Mr O'Bryan's secretary sent to Mr Symons on 15 November 2017, rather than on the basis of his own contemporaneous records.

¹²²² See the charges described as "*Reviewing Receivers' Court Book*", "*Reviewing Liquidators' Court Book*", "*Reviewing Trust Co's complete discovery*", reviewing various other discovered documents, and working on the Court Book.

Symons Fee Target. That is evident from an analysis of the work Mr Symons actually did relative to what he charged (as set out in **Section F**).

- (f) Mr Symons retrospectively increased his fee rates to make it easier to achieve the Symons Fee Target. As late as 24 October 2017, Mr Symons was charging his fees on one of Mark Elliott's matters at **\$300/hour including GST**.¹²²³ Mark Elliott had that rate of **\$300/hour** in mind when he invited Mr Symons to submit bills for **200 days'** work,¹²²⁴ though Mark Elliott evidently thought that GST should be added on top of that hourly rate.¹²²⁵ Mr Symons' spreadsheet refers to a figure of **\$330/hour plus GST**,¹²²⁶ but the formula he used to calculate the fees in the spreadsheet applied a rate of **\$375/hour plus GST**.¹²²⁷
- (g) Mr Symons continued to dishonestly and fraudulently add hours and days to the spreadsheet until his fees reached at least **\$600,000**.

605 No proper explanation was ever offered to the Court by Mr Symons as to the manner he arrived at his fees, either himself or through his counsel, before his senior counsel conceded the case that the Contradictor pleaded against Mr Symons after two years of obfuscation and denial. That officers of this Court should be so unwilling to be frank with the Court, and engage in obfuscation as Mr Symons did is unworthy of the trust which the Court and the community places in legal practitioners. Mr Symons' behaviour should be condemned in the strongest terms possible.

Mr O'Bryan and Mr Symons fabricated invoices to support their fee claims

606 When Mr O'Bryan and Mr Symons were satisfied that they had reached their respective Fee Targets, they fabricated invoices and fee slips to charge the sums they had arrived at.¹²²⁸ They produced their invoices using Mr O'Bryan's privately owned billing system, rather than through a clerk, as was the usual practice for their billing arrangements.¹²²⁹ In common parlance, it would appear that Mr

¹²²³ [CCW.038.001.0001].

¹²²⁴ [SYM.001.001.7228].

¹²²⁵ The Banksia Expenses spreadsheet refers to fees of \$600,000 **plus** GST for Mr Symons [AFP.007.001.0002].

¹²²⁶ [SYM.003.001.0001] at Cell B372 and B373.

¹²²⁷ [SYM.003.001.0001] at Cell D372 – D375.

¹²²⁸ The invoices are attached to the Third Trimbo Report [CBP.001.010.5957] at 6155 - 6284.

¹²²⁹ See [SYM.002.002.8881] [SYM.002.002.8882] at [9] - [11], being a document drafted by Mr O'Bryan which stated that his invoices and those of Mr Symons were "*generated from the*

O'Bryan at least kept two sets of books – one administered by his clerk, and the other despatched under his own name and hand, and without reference to his clerk. The invoices contained the Monthly Invoice Representation; they appeared as if they had been issued monthly and were due for payment within 30 days. The invoices were marked attention to Portfolio Law. Mr O'Bryan and Mr Symons did not send them to Portfolio Law, and Mr Zita never asked to see them.¹²³⁰ These matters are demonstrated by the following documentary evidence.

607 On **14 November 2017 at 2.30pm**, there was a meeting between Mr O'Bryan, Mr Symons, Mark Elliott and Alex Elliott re "*Banksia wrap up*".¹²³¹ The Court should find the meeting occurred, particularly in circumstances where:

- (a) the calendar invitation was issued by Mr O'Bryan, inviting Mr Symons, Mark Elliott and Alex Elliott to attend the meeting. The calendar invitation was a contemporaneous document, which is more reliable than Mr O'Bryan's recollection three years after the event, particularly in circumstances where Mr O'Bryan's evidence should be given little or no weight given his conduct as a whole; and
- (b) the case had settled, and Mr O'Bryan was to travel the very next day to Sri Lanka for holiday. AFP and the Lawyer Parties intended to seek approval of the settlement prior to Christmas, or as soon as possible thereafter. The Court should find that it is more likely than not that a wrap up meeting occurred in order to assign tasks and to discuss the general parameters of how the claims for costs and commission would be advanced, including the briefing of Mr Trimbos and the key matters to be addressed in counsel's opinion.

AcCounsel accounting system, which was originally developed for List T when Terry Hawker was the clerk of List T at Melbourne Chambers. That accounting system is still owned and maintained by NOB. The AcCounsel invoices were not rendered through the clerking system because NOB & MS's clerk (still Terry Hawker, now the chief clerk at Howell's List) had agreed with the barristers that, because of the arrangements that had been entered into with the litigation funder, the clerk would not expect the barristers' fees for the class action to pass through the clerks' accounting system." In contrast, invoices that Mr O'Bryan issued for matters that did not involve Mr Elliott were issued through Mr O'Bryan's clerk: see eg [NOB.503.003.0058].

¹²³⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [38], [40], [94], [130], [132], [150], [153], [154], [288] – [291].

¹²³¹ [SYM.001.001.4401].

608 On **14 November 2017** at **6.18pm**, Ms Koh sent an email to Mr O’Bryan re “*PDF Bolitho tax invoices*”, stating:¹²³²

“Norman, Please see attached. I have described ‘Attendances for the month of X as per attached memorandum’. Also, I accidentally set the processed date for invoices June and July 2016 as 15 November 2017 and the rest of the invoices defaulted to today’s date (14 Nov). Does that matter?”

609 On **14 November 2017** at **10.39pm**, Mr O’Bryan replied to Ms Koh, stating:¹²³³

“Thanks, Florence, but I need each tax invoice to have the same sorts of dates as the original set (i.e. between 5 and 14 days into the following month please). Can you redo them with those dates on them?”

610 This email exchange shows that:

- (a) Ms Koh sent Mr O’Bryan draft invoices for the Bolitho Proceeding on 14 November 2017 at 6.18pm.
- (b) In Mr O’Bryan’s private billing system which he used to generate his bills, the “default date” was “today’s date”. To backdate the invoices required a deliberate effort.
- (c) Ms Koh knew that this might not be what Mr O’Bryan wanted.
- (d) Mr O’Bryan instructed Ms Koh to make the invoices appear as if they had been issued monthly throughout the litigation, with a date for each invoice that was “*between 5 and 14 days into the following month*” so that (the Court should find) the deception would appear more believable.

611 On **14 November 2017** at **10.41pm**, Mr O’Bryan sent an email to Ms Koh copied to Mr Symons stating:¹²³⁴

“Florence, can you please send all of my fee memoranda in Banksia to Michael, so he will know what mine look like?”

612 The Court should find that Mr O’Bryan wanted Ms Koh to send his fee memoranda to Mr Symons so that Mr Symons would align his own fee entries with Mr O’Bryan’s. It is also noteworthy that the email to which Mr Symons was copied forwarded Ms

¹²³² [NOB.500.001.7416].

¹²³³ [NOB.500.001.7581].

¹²³⁴ [NOB.500.001.7416].

Koh's earlier email in which she drew attention to the invoice dating issue and asked "*does that matter*". From his receipt of that email, Mr Symons knew that how the invoices were dated was a matter that required attention.

613 On **15 November 2017** at **8.58am**, Ms Koh sent Mr O'Bryan's fee memoranda to Mr Symons.¹²³⁵ Notably, Mr O'Bryan had not at that time added his entries for "*reviewing discovered documents*" and "*conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial*".

614 On **15 November 2017** at **10.14am**, Ms Koh sent an email to Mr O'Bryan stating:¹²³⁶

"Please see attached with different dates. As for attendances for the month of Nov, I dated the tax invoice 14 November as not realistic to date in December. Ta"

615 Mr O'Bryan replied: "*Thanks Florence*".¹²³⁷

616 On **15 November 2017** at **10.30am**, Ms Koh emailed Mr O'Bryan stating:¹²³⁸

*"Hi Norman, Just wondering whether I am to generate tax invoice (like what I emailed you earlier) for the memo of attendances from Nov 2012 to May 2016. If so, **FYI, the invoice number will be from 6-151 onwards (as the Nov 2017 invoice number is 6-150)**. Does that matter?"*

*Also, we need to ensure that tax invoice address reflects Melbourne Chambers until we moved here in January 2016. **May need Nathan to amend the address for the template invoice for that period (that's he did for us previously)**. Ta*

Safe travels and enjoy Sri Lanka!

Regards, Florence"

¹²³⁵ [SYM.010.001.0001] [SYM.010.001.0251] [SYM.010.001.0252] [SYM.010.001.0256] [SYM.010.001.0258] [SYM.010.001.0261] [SYM.010.001.0263] [SYM.010.001.0265] [SYM.010.001.0268] [SYM.010.001.0270] [SYM.010.001.0277] [SYM.010.001.0280] [SYM.010.001.0285] [SYM.010.001.0286] [SYM.010.001.0289] [SYM.010.001.0291] [SYM.010.001.0292].

¹²³⁶ [NOB.500.001.7581].

¹²³⁷ [NOB.500.001.7581].

¹²³⁸ [NOB.500.001.7577].

617 On **15 November 2017** at **10.47am**, Mr O'Bryan replied:¹²³⁹

“The invoices need to follow the number sequence and the date sequence all the way from beginning to November 2017 please Florence.”

618 On **15 November 2017** at **10.57am**, Ms Koh replied:¹²⁴⁰

“Hi Norman, okay will redo from Nov 2012. Kindly advise whether the total amount on each invoice for attendances from Nov 2012 to May 2016 will be exactly the same as what you billed Bolitho v Banksia & Ors last year OR I am to calculate per your rates - \$990 per hour and \$9,900 per day. Ta”

619 On **15 November 2017** at **12pm**, Mr O'Bryan sent a further email stating:¹²⁴¹

“No need to redo the ones already done last year, Florence – leave all of them as is. Just do new ones (following the same number & date sequence) since May 2016 please (at the rate of \$1100/hr and \$11,000/day). Make sure they are all showing the correct address for Dawson Chambers.”

620 These emails show that:

- (a) Mr O'Bryan's secretary drew his attention to the prospect that the invoice numbers that she had used were not sequential across date ranges, so that it might be evident to someone closely examining the invoices that the invoices numbers for the later period – the post June 2016 period – were out of sequence with the invoice numbers used for the earlier period.
- (b) Mr O'Bryan deliberately sought to number and date his invoices in a way that would deceive third parties into believing that they had been issued monthly.
- (c) Mr O'Bryan had fabricated invoices before. On the previous occasion, Mr O'Bryan and his secretary asked their IT consultant Mr Wright to *“amend the address for the template invoice”*.¹²⁴²
- (d) Mr O'Bryan's secretary drew his attention to the fact that his rate on the matter was \$990 per hour and \$9,900 per day, and he instructed her to increase it to \$1,100 per hour and \$11,000 per day.

¹²³⁹ [NOB.500.001.7577].

¹²⁴⁰ [NOB.500.001.7577].

¹²⁴¹ [NOB.500.001.7577].

¹²⁴² [NOB.500.001.7577].

(e) Mr O'Bryan was on holiday in Sri Lanka from 15 November 2017 to 8 December 2017.¹²⁴³ (Accordingly, for emails sent from that date onwards, it is necessary to consider the time zone from which they were sent to ensure that the documentary evidence can be placed in its proper sequence).

621 This was a remarkable and trusting arrangement between Mr O'Bryan and his secretary. The Court should find that **one reason** Mr O'Bryan issued the invoices for all the Elliott class action matters in his own name and not through his clerk is that a clerk would never have involved themselves in a deception of the kind evidenced by these emails. It goes without saying that a member of counsel and an officer of the Court should not involve themselves in a deception of this kind, let alone a member of the inner Bar of many years of standing.

622 By issuing his invoices in this way, Mr O'Bryan **intended to deceive** the persons who would examine his invoices. That conclusion is fortified by other documentary evidence: for instance, when the Contradictors sought orders in the remitter for discovery of documents revealing when the invoices were issued, Mr O'Bryan's response was: "*THE BILLS ARE ALL DATED*".¹²⁴⁴ That response shows that Mr O'Bryan wanted the Contradictors to rely upon the dates stated on his bills.

623 The invoices that Mr O'Bryan and Mr Symons issued were in identical form. The evidence set out above reflects badly on both of them: the only available inference is that they both deliberately perpetrated the same deception.

Mr O'Bryan directed his secretary to falsely stamp his invoices as "PAID"

624 All of Mr O'Bryan's invoices attached to the Third Trimbo's Report were stamped as "PAID",¹²⁴⁵ when they had not been paid. Likewise, all of Mr O'Bryan's invoices attached to the Second Trimbo's Report were stamped as "PAID",¹²⁴⁶ when they had not been paid.

625 In the draft affidavit he prepared and sent to Mr Trimbo's on 1 April 2019, Mr O'Bryan said:¹²⁴⁷

¹²⁴³ [NOB.500.002.0161]; [SYM.001.002.5337].

¹²⁴⁴ [SYM.001.001.5424], [SYM.001.001.5425].

¹²⁴⁵ Third Trimbo's Report [CBP.001.010.5957] at .6155 onwards.

¹²⁴⁶ [CCW.031.001.0047] at ._0152 onwards.

¹²⁴⁷ [CCW.016.001.0006] [CCW.016.001.0007], para [5].

“5. All of my fee invoices prepared during the class action were stamped as ‘paid’ following their creation by my secretary on my instruction, in order to make it clear that, as between me and the solicitors, Portfolio Law (to whom they were addressed and sent), they were to be treated as paid and as not creating any liability for payment by either Portfolio Law or their client, Mr Bolitho.”

626 The explanation Mr O’Bryan was proposing to give to the Court is false: Mr O’Bryan never provided the invoices to Portfolio Law. He sent them straight to AFP and Mr Trimbos.¹²⁴⁸ The Court should find that, in sending the draft to Mr Trimbos, Mr O’Bryan was seeking to align his evidence with Mr Trimbos, knowing that Mr Trimbos would be called as a witness in the same trial where Mr O’Bryan was going to give his own account.

627 The affidavits that Mark Elliott swore in response to the Court’s orders of 29 March 2019 were also false. Mark Elliott claimed: *“I do not know why Mr O’Bryan’s invoices were stamped ‘PAID’ when the invoices had not been paid. I do not know who stamped Mr O’Bryan’s invoices as ‘PAID’.”*¹²⁴⁹

628 The Court should find that Mark Elliott lied in his sworn affidavit which AFP filed in response to the Court’s orders. The documentary evidence reveals that Mr O’Bryan and Mark Elliott discussed Mr O’Bryan stamping his invoices as “PAID”; Mr O’Bryan specifically asked Mark Elliott: ***“Do you want the invoices shown as paid or unpaid? I prefer paid & so will Trimbos”***.¹²⁵⁰ Mr O’Bryan’s practice of falsely stamping his invoices as “PAID” extended back to the Camping Warehouse matter.¹²⁵¹ On 1 March 2017, Mark Elliott asked Mr O’Bryan for an invoice to provide to AFP’s auditor in relation to unpaid fees on that matter and said: ***“All the invoices I got from you have a paid stamp on them!”***.¹²⁵² Mr O’Bryan replied, copying Ms Koh and Alex Elliott: ***“My clerk must have made a mistake!”***¹²⁵³ The jesting between Mark Elliott and Mr O’Bryan is repugnant. The Court should find that the cavalier and brazen way in which they joked about what they had done was purely driven by greed, and without any regard for their clients, their obligations towards them, or their paramount duties to this Court. Mr O’Bryan’s invoices on the Camping Warehouse matter were issued using his own private

¹²⁴⁸ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [39] – [40]; [CBP.001.011.5464].

¹²⁴⁹ Mr Elliott’s 9 May 2019 Affidavit [CBP.004.010.0033], [4] – [5].

¹²⁵⁰ [NOB.500.001.7495]; [NOB.500.005.2262].

¹²⁵¹ [ABL.001.0312.00096].

¹²⁵² [SYM.008.001.0017].

¹²⁵³ [SYM.008.001.0017].

billing software, rather than through his clerk;¹²⁵⁴ and Mr O'Bryan's fees on that matter were paid only after the settlement proceeds were received.¹²⁵⁵

- 629 The Court should find that Mr O'Bryan directed his secretary to stamp his invoices as "PAID" in order to assist him in concealing his contingency fee arrangement, and to assist AFP in recovering a substantial funding commission by the deception that it had taken a substantial funding risk.

Mr O'Bryan and Mr Symons fabricated fee agreements/disclosure statements to justify their bills

- 630 On **18 and 19 December 2017**, in response to a request from Mr Trimbo dated 18 December 2017 requesting copies of Mr O'Bryan's and Mr Symons' costs agreement for the Relevant Period,¹²⁵⁶ Mr Symons produced a series of documents purporting to be "Disclosure Statements" under the Uniform Law, which purported to be documents giving Portfolio Law notification of increases in Mr Symons' fee rates from time to time, as well as updated cost estimates,¹²⁵⁷ as follows:

No	Period	Rate	Estimate
1	1/9/2016 to trial	\$275 per hour including GST	\$660,000 incl GST ¹²⁵⁸
2	1/1/17 to trial	\$330 per hour plus GST	\$800,000 plus GST ¹²⁵⁹

¹²⁵⁴ [NOB.503.001.0005]; [NOB.503.001.0007]; [NOB.503.001.0009]; [NOB.503.001.0011]; [NOB.503.001.0013]; [NOB.503.001.0015]; [NOB.503.001.0017]; [NOB.503.001.0019]; [NOB.503.001.0001]; [NOB.503.001.0021]; [NOB.503.001.0003]; [NOB.503.001.0023]; [NOB.503.001.0025]; [NOB.503.001.0027]; [NOB.503.001.0029]; [NOB.503.001.0031]; [NOB.503.001.0033]; [NOB.503.001.0035]; [NOB.503.001.0037]; [NOB.503.001.0039]; [NOB.503.001.0041]; [NOB.503.001.0043]; [NOB.503.001.0045].

¹²⁵⁵ The orders in the Camping Warehouse matter provided for the settlement sum to be paid within 21 days of Court approval of the settlement [CCW.007.001.0001]. Elliott Legal received the settlement proceeds on 23 May 2016 [WES.001.001.0184]. In the Camping Warehouse matter, Mr O'Bryan billed \$1.3 million [CCW.038.001.0005]. On 26 May 2016, AFP paid \$1 million to a company that Mr O'Bryan jointly controlled with his wife, Noysy Pty Ltd [NOB.503.003.0029]. At about the same time, on 24 May 2016, Mr Elliott's company Decoland Holdings Pty Ltd paid \$300,000 to Mr O'Bryan's wife [NOB.503.010.0001].

¹²⁵⁶ [SYM.001.003.2854].

¹²⁵⁷ See Mr Symons' email of 18 December 2017 [SYM.001.003.2842] [SYM.001.003.2844] and 19 December 2017 [SYM.001.003.0372] [SYM.001.003.0375].

¹²⁵⁸ [SYM.001.003.0375] at .0378.

¹²⁵⁹ [SYM.001.003.2844] at .2844.

3	1/7/17 to trial	\$375 per hour plus GST	\$700,000 plus GST ¹²⁶⁰
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631 Mr Symons did not tell Mr Trimbo he had created those documents in response to the request from Mr Trimbo.

632 It should be noted that Mr Symons had issued a purported “cost disclosure statement” in similar form on **30 June 2016** (at about the time of the application for approval of the Partial Settlement) to justify a fee rate increase from 1 January 2016.¹²⁶¹ Mr Symons’ purported “cost disclosure statements” were all calculated to mislead:

- (a) They stated: “***the Barrister is required to notify the law practice of any significant change***” (para 3), and yet Mr Symons created them after all the costs had been billed.
- (b) They stated: “***the Barrister is required to provide ongoing disclosure to the law practice as soon as practicable after there is a significant change in the previously provided information***”, yet the “*previously provided information*” was as set out in Mr Symons’ 11 February 2015 costs agreement with Portfolio Law which provided that he would charge \$250 per hour,¹²⁶² and the “disclosure statements” were issued much later, after the matter settled.
- (c) They purported to be addressed to Portfolio Law, but Mr Symons did not deal with Portfolio Law in relation to his fees.¹²⁶³
- (d) They purported to provide estimates of Mr Symons’ total fees for acting in the matter at various points in time, fortifying the deception that they were issued at different times in advance of the costs being incurred, rather than at the end of the matter, once costs had been billed.

¹²⁶⁰ [SYM.001.003.2844] at .2847.

¹²⁶¹ [AFP.002.001.0074].

¹²⁶² [CBP.004.009.0070].

¹²⁶³ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [291] [**check this reference**].

633 On **20 December 2017**, in response to the email from Mr Trimbos, Mr O'Bryan produced a fee agreement which he backdated to 31 May 2016, signed, and sent to Mr Trimbos,¹²⁶⁴ stating:

"I believe Mark Elliott signed the counterpart of this for the litigation funder, but I have not been able to locate the signed counterpart. I will continue searching for it".

"[M]y work on the Banksia class action continued and my accounts were duly paid by the litigation funder."

"I increased my fees on 1 July 2017 to \$1,250/hr; \$12,500/day by notification to my clients, including BSL Litigation Partners Ltd. My fees were paid at that amended rate from that date onwards. No new agreement was signed."

634 That email was untrue in every respect. The fee agreement attached to that email was prepared by Mr O'Bryan on or about the date that he sent it to Mr Trimbos, and not on 31 May 2016.¹²⁶⁵ Mark Elliott had not signed the counterpart for the agreement, because it was a document that Mr O'Bryan had created shortly before sending it to Mr Trimbos. Mr O'Bryan had not even issued accounts, let alone been paid. He did not notify anybody of an increased rate of \$1,250 per hour in July 2017. His fees were not paid at that amended rate or any other rate because they hadn't been paid at all – indeed they had only been invoiced a week or so prior to sending the email to Mr Trimbos.

635 The fee agreement¹²⁶⁶ that Mr O'Bryan backdated, signed, and sent to Mr Trimbos was a sham document that did not reflect his true arrangement in relation to fees:

(a) The fee agreement provided: *"The Barrister will render an itemised monthly fee slip for payment by the Litigation Funder following the completion of each month during which any legal services were provided."* That never occurred; the real arrangement was that Mr O'Bryan would not issue any bills unless and until there was a settlement.

(b) The fee agreement also provided: *"If the Litigation Funder accepts this offer it will be liable to pay to the Barrister the fees and charges set out in the Disclosure Statement once the relevant services have been rendered by*

¹²⁶⁴ [SYM.001.003.0203] [SYM.001.003.0204].

¹²⁶⁵ This was confirmed in a letter from Portfolio Law dated 19 March 2019 in response to a request from Corrs [CBP.001.007.5081] [CBP.001.007.5083]. That letter was drafted by Mr O'Bryan and Mr Symons [SYM.002.004.3331] [SYM.002.004.3332].

¹²⁶⁶ [SYM.001.003.0204].

the Barrister.” The real arrangement was that Mr O’Bryan was engaged on a “no win no fee” agreement under which AFP was not liable to pay Mr O’Bryan’s fees unless and until there was a successful cost recovery.

- (c) The fee agreement also purported to provide a cost estimate for the Relevant Period of **\$2 million**, which was generally consistent with the fees actually charged in Mr O’Bryan’s invoices for the Relevant Period (**\$2.5 million**), therefore conveying the impression that Mr O’Bryan provided notification of a change in his estimated legal costs as required by his costs agreement.

Emails exchanged between Mark Elliott and Mr Symons about the contingency fee arrangement

636 Emails exchanged between Mr Symons and Mark Elliott in February and March 2018, which were discovered by Mr Symons a short time prior to the start of the trial, provide further evidence of his contingency fee arrangement in the Banksia matter.¹²⁶⁷ It should be noted that this evidence was provided nearly two years after the remitter began, and after AFP and Mr Symons had forcefully contended throughout the remitter that was no proper basis for the Contradictors’ allegations. This exemplifies the conduct of AFP and the Lawyer Parties throughout the remitter, which has caused substantial costs associated with the remitter, and delay in distributing the settlement funds, which must have caused stress to all of those debenture holders, many of whom are elderly.

637 Those emails show that, on **26 February 2018**, Mark Elliott wrote to Mr Symons, stating:¹²⁶⁸

“I would like to talk to you about a retainer arrangement with AFP.

You will get paid for Banksia this week-spend it wisely.

Are you interested in working for AFP for say, \$800k pa payable quarterly for the next 2 years?

I would seek your undivided attention to all matters as directed-24/7/365.

If you work for anyone else you must rebate me \$2:\$1 for all fees rendered.

I would ask for you reasonable assistance in seeking cost recovery when we win a case!

¹²⁶⁷ [SYM.008.001.0013].

¹²⁶⁸ [SYM.008.001.0013].

It would certainly make the paperwork easier and give you certainty of income and regular cashflow.”

638 On 1 March 2018, Mr Symons responded:¹²⁶⁹

“I would like to accept, subject to the following...

(d) I still have a considerable amount of time to recover in re: work in 2017 on the ongoing proceedings (MGC, SRX, MYR). I’d like to discuss how that will work with you.

*(e) I also note that the suggested \$800k (which I assume is not inclusive of GST) is equivalent to me working 5 days a week for 40 weeks in the year **at a rate which Trimbos has regarded as justifiable** based on my experience etc. to date. While I have not always historically billed as much time as I have worked – in part because not all the work has been directly related to a particular matter, I’m likely to work closer to 6 days a week and for say 48 weeks a year. I’m very comfortable with the retainer being set at \$800k, but **I’d like to discuss what will happen in the event of a successful cost recovery** which actually reflects my time worked.”*

639 On 3 March 2018, Mark Elliott replied:¹²⁷⁰

*“(d). Not included. SRX-suggest that you **defer till later for bonus points**. Myer and MGC-ok to charge. For 2018 , any MGC fees to be netted off against \$800K until AFP assumes funding role-need to discuss!*

*(e) Plus GST. **TBA % share if/when we recover more than 40 hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?**”*

640 The Court should find that:

- (a) In paragraph (d) of the 3 March 2018 email, Mark Elliott was suggesting to Mr Symons that he should defer issuing his bills on the Sirtex matter so that he could claim “bonus points” – that is, he could increase his claim for fees once there was a settlement.
- (b) In paragraph (e) of the 3 March 2018 email, Mark Elliott agreed with Mr Symons that they would share the spoils if and when they were able to successfully inflate Mr Symons’ claims for costs at the time of settlement on any of the class action matters they were working on together. Mark Elliott invited Mr Symons to agree that this approach had worked well for Mr Symons on the Banksia matter.

¹²⁶⁹ [SYM.008.001.0013].

¹²⁷⁰ [SYM.008.001.0013].

- (c) Mark Elliott and Mr Symons both understood that Mr Symons had not done the work to earn the fees that he charged in the Banksia matter; rather, Mr Symons' claim for fees on the Banksia matter reflected his contingency fee arrangement with Mark Elliott.

Mr Symons' fee claim for January 2018

- 641 Pursuant to the retainer, Mr Symons informed Mark Elliott in April 2018 that he had spent **10 days** on the Banksia matter in January 2018, and adjusted his retainer fee accordingly.¹²⁷¹ However, the bill that Mr Symons submitted in respect of January 2018 claimed fees for approximately **18 days** of work.¹²⁷² These matters were expressly alleged against Mr Symons in the RLOI.¹²⁷³ He offered the Court no explanation for them, and by the conceding the case against him, the Court should find that there is no answer to the allegations made against him.¹²⁷⁴
- 642 The Court should find that Mr Symons' fee claim for January 2018 provides further evidence of his dishonest fee arrangements pursuant to which he sought to claim fees for sums that bore no relationship to the work he undertook.

Mr O'Bryan's draft affidavit prepared in response to the 31 March 2019 Orders

- 643 The draft affidavit that Mr O'Bryan prepared¹²⁷⁵ and sent to Mr Trimbos on 1 April 2019¹²⁷⁶ (shortly following the Court's orders of 29 March 2019) contained the following purported explanation for Mr O'Bryan's email of 20 December 2017 and his backdated fee agreement:

"(e) Why did senior counsel for Mr Bolitho inform the expert witness Mr Trimbos that fees had been duly paid, when they had not been paid?"

7. My email to Mr Trimbos dated 20 December 2017 was sent in response to a question that Mr Trimbos had asked me during the course of a discussion about my fee arrangements, namely whether I or any other member of the class action legal team was acting on a contingent or other conditional fee basis. The email confirmed the due payment of my invoices, following the entry into of the most recent (May 2016) fee agreement, as had occurred. In the course of this discussion, Mr Trimbos informed me that it was irrelevant to his costs report whether counsels' fees (or any other legal costs or disbursements) had been paid; the relevant question for him

¹²⁷¹ [ABL.001.0370.01028] [SYM.009.001.0003] [AFP.014.001.0074].

¹²⁷² see the Fourth Trimbos Report, Annexure K - [EXP.020.005.0001] at .0075.

¹²⁷³ RLOI dated 21 July 2020: [PLE.010.002.0001], para [47.g] particular (K).

¹²⁷⁴ [MSC.010.083.0001] and transcript of hearing on 13 August 2020.

¹²⁷⁵ [CCW.016.001.0007].

¹²⁷⁶ [CCW.016.001.0006].

was whether they had been properly and reasonably incurred and the client or the funder was unconditionally liable for them. I told Mr Trimbos that I considered my fees had been properly and reasonably incurred, that the funder (as opposed to the solicitors or client) was unconditionally liable for their payment and that I was confident, based on my previous experience, that all amounts then outstanding would be paid.

(f) Why were fee agreements created in December 2017 after Mr Trimbos asked for them, and why were they provided to Mr Trimbos?

8. I was informed that Mr Trimbos required for the purpose of his costs report a written record of the costs arrangements that had been entered into between counsel, Portfolio Law and the litigation funder. In the course of my discussion with Mr Trimbos, I told him that, following the introduction of the Legal Profession Uniform Law and the abolition of the previous requirement for written costs disclosures and agreements as between barristers and solicitors or litigation funders, no written fee agreements had been created as between me, Portfolio Law and/or the funder. My fee agreement was prepared to satisfy Mr Trimbos' request for a written record of what had been agreed between me, Portfolio Law and the litigation funder in May 2016."

644 This explanation was false, and was an egregious attempt by Mr O'Bryan to narrate and/or tailor the evidence to be given by Mr Trimbos, so that it would align with Mr O'Bryan's then own account. That senior counsel, when ordered by the Court to file an affidavit explaining his conduct, albeit when not yet a party, should seek to influence the evidence of another witness defies belief, and should be the subject of the strongest rebuke and comment by this Court. Mr O'Bryan's 20 December 2017 email to Mr Trimbos attaching his fee agreement and stating that his fees had been paid cannot be reconciled with any alleged oral conversation occurring at that time in which Mr O'Bryan might have told Mr Trimbos that he had no fee agreement, or in which Mr Trimbos could have told Mr O'Bryan that it was irrelevant whether or not fees had been paid. Moreover, Mr O'Bryan ultimately did not seek to give evidence of any such alleged conversation, and Mr Trimbos confirmed in his evidence that he believed the fee agreement sent to him by Mr O'Bryan was authentic, and he relied on it.¹²⁷⁷

645 The false explanation that Mr O'Bryan floated with Mr Trimbos in his draft affidavit fortifies the conclusion that **one** reason why Mr O'Bryan deceived Mr Trimbos was to conceal the fact that he was acting on the basis of a "*contingent or other conditional fee basis*".

¹²⁷⁷ Fifth Trimbos Report [EXP.020.008.0001], para [8.b].

646 Mr O'Bryan's draft affidavit also asserted:

*“My fee invoices in respect the post-1 July 2016 period were prepared, in accordance with the arrangements which had been made between me, the instructing solicitors and the funder, **by reference to my detailed monthly work summaries** and so as to specify a total sum due each month, **by reference to the monthly intervals of the work summaries which were prepared throughout the course of the proceeding. Because the work summaries were prepared at monthly intervals and the funder's liability accrued monthly, I considered it appropriate to prepare invoices corresponding with each monthly summary.**”*

647 In fact, the draft fee slips that Ms Koh prepared on 14 – 15 November 2017 were drastically different to Mr O'Bryan's final bills for nearly every month of the Relevant Period. Accordingly, the explanation that Mr O'Bryan proposed to give to the Court in response to the 29 March 2019 Orders was false.

648 The fact that Mr O'Bryan was unable to conceive of a satisfactory and honest explanation for the questions that he was ordered to answer on 29 March 2019 confirms that there is no satisfactory and honest explanation.

649 The Court should find that Mr O'Bryan (and Mr Symons) prepared their invoices to make them appear as if they had been issued monthly in order to conceal their contingency fee arrangements, and to assist AFP to recover an excessive funding commission by deceptively overstating its funding risk.

C4. Portfolio Law

C4.1 Portfolio Law Costs Agreement

650 On **5 February 2015**, Mr Zita/Portfolio Law created a Costs Agreement with Mr Bolitho (**Portfolio Law Costs Agreement**), which Portfolio Law sent to Mr Crow (on behalf of Mr Bolitho) on **8 April 2015**.¹²⁷⁸ The Portfolio Law Costs Agreement stated that:

- (a) *“Our fees and disbursements may be in the range of \$80,000 to \$200,000”.*
- (b) *“Our fees will be calculated as follows. Those members of the firm that work on your matter will record the time they spend and charge account to [specified] hourly rates.”*

¹²⁷⁸ [CBP.004.004.8309] [CBP.004.004.8310].

- (c) *“The firm’s fees are determined by applying these hourly rates to the units of time recorded by each staff member on your matter.”*
- (d) *“In the course of your matter it may be necessary to incur disbursements”, including “barrister’s fees”. “These are payable as and when they fall due for payment. We will not incur any substantial expense without first obtaining your position.”*
- (e) *“Each month we will render interim accounts and ask that you pay them promptly.”*
- (f) *“Briefing counsel or other experts. It may be necessary for us to engage, on your behalf, the services of another lawyer or expert to provide specialist advice or services, including advocacy services. We will consult you as to the terms of that lawyer’s engagement, but you may be asked to enter into a costs agreement directly with the other lawyer. We estimate the amount payable as likely to be in the range of \$20,000 to \$40,000.”*

C4.2 Portfolio Law did not attempt to provide oversight of counsel’s retainers or fees

651 Mr Zita conceded that, contrary to the Portfolio Law Costs Agreement, he never discussed counsel fees or the terms of counsel’s retainer with Mr Bolitho, and did not obtain his permission before counsel fees were incurred, and never consulted with Mr Bolitho about the terms on which counsel were retained.¹²⁷⁹

C4.3 Portfolio Law’s fees charged on the basis of speculative guesswork, rather than a proper assessment of work actually undertaken

652 Mr Zita conceded that, contrary to the Portfolio Law Costs Agreement with Mr Bolitho, Portfolio Law did not render regular accounts.¹²⁸⁰ Portfolio Law issued two interim accounts in **March** and **July 2015**, but then issued no further accounts until after settlements were reached, namely: an invoice dated **1 July 2016** issued at the time of the Partial Settlement for 18 months of work, and an invoice dated **8 December 2017** issued at the time of the Trust Co Settlement, again for 18 months of work.

¹²⁷⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 745:7-14; Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [38].

¹²⁸⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 744:23-28.

- 653 Portfolio Law also did not keep contemporaneous records of their time¹²⁸¹ (contrary to the Portfolio Law Costs Agreement). For this reason, when Portfolio Law issued a bill at the time of the Partial Settlement, the bill was prepared on the basis of the LPRO (Practitioner Remuneration Order) scale.¹²⁸²
- 654 However, at the time of the Trust Co Settlement, Portfolio Law adopted a different approach.
- 655 On **21 November 2017**, Mark Elliott and his sons produced the “Banksia Expenses Spreadsheet” which provided for Portfolio Law to charge **\$377,000 plus GST (\$414,700 including GST)**.¹²⁸³
- 656 In cross-examination, Mr Zita initially resisted the idea that Mark Elliott determined what sum Mr Zita should charge in respect of his fees,¹²⁸⁴ but that is plainly what occurred: the documentary evidence reveals that Mark Elliott was in full control of deciding how much the Lawyer Parties should charge,¹²⁸⁵ and as at 21 November 2020, Mr Zita had not started work on his bills.¹²⁸⁶
- 657 Mr Zita ultimately agreed under cross-examination that Mark Elliott told him to charge \$377,000 and “*I just accepted it*”.¹²⁸⁷ He said that the figure that he and Mark Elliott agreed upon was “*just based on what I thought was fair and reasonable for the work I had done*”.¹²⁸⁸ Whilst Mr Zita may well have subjectively held that view that he was entitled to some remuneration for being a post-box and aiding Mark Elliott’s ruse for working around the Bolitho No 4 Decision, it was objectively unreasonable in circumstances where Mr Zita/Portfolio Law had no contemporaneous records of their time spent on the matter,¹²⁸⁹ and had to create bills long after the event in late November 2017/early December by arbitrarily allocating time to emails sent or received by Portfolio Law, notwithstanding that they were drafted and attended to by AFP and the Lawyer Parties, leaving Portfolio Law to function essentially as a post box.

¹²⁸¹ Mr Zita’s April 2020 affidavit [CCW.036.001.0001], para [115] onwards.
¹²⁸² [TRI.001.005.1096].

¹²⁸³ [AFP.007.001.0001] [AFP.007.001.0002].

¹²⁸⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 863:10-864:23.

¹²⁸⁵ [NOB.500.011.8020]; [NOB.500.001.7553]; [SYM.001.001.7228]; [AFP.007.001.0001] [AFP.007.001.0002].

¹²⁸⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 860:15-18.

¹²⁸⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 865:6-13.

¹²⁸⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 862:29-31.

¹²⁸⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 863:1-9.

658 The Court should not countenance such activity on the part of a solicitor, in circumstances where the evidence reveals that Mr Zita/Portfolio Law paid no regard to the interests of their client when billing in this way, or at all, and simply acted as directed by the Lawyer Parties, and hence became deserving of the soubriquet “post box”.

Portfolio Law’s billing spreadsheet

659 Thereafter, on about **23 November 2017**, Mr Zita and Mr Mizzi set about to produce invoices to reach that agreed figure.¹²⁹⁰ Significantly, they purported to charge on the basis set out in the Portfolio Law Costs Agreement, which provided for work to be charged at specified hourly rates and for Portfolio Law to keep records of the time spent for that purpose.

660 Portfolio Law had not kept contemporaneous records of time spent. Mr Zita and Mr Mizzi sought to reconstruct the time they guessed they had spent on the matter in a spreadsheet (**Portfolio Law Spreadsheet**) into which they entered an assortment of activities,¹²⁹¹ predominated by:

- (a) reading emails;¹²⁹²
- (b) reading discovery and other documents;¹²⁹³ and
- (c) attendances upon counsel, for which Mr Zita/Portfolio Law relied not on their own records, but rather on Mr Symons’ draft fee slips which were themselves totally unreliable as set out in **Section F**.¹²⁹⁴

661 Mr Zita/Portfolio Law produced several drafts of the Portfolio Law Spreadsheet, dated **6 December 2017**,¹²⁹⁵ **29 December 2017**¹²⁹⁶ and **2 January 2018**.¹²⁹⁷

662 The “Total” worksheet in the Portfolio Law Spreadsheet summarises the fees charged for each category of activity. Further detail for each category is set out in separate worksheets.

¹²⁹⁰ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], [117];
 Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 865:19-29, 867:9-11.
¹²⁹¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:13-16.
¹²⁹² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:27-875:6.
¹²⁹³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 875:7-886:15.
¹²⁹⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 731:1-11.
¹²⁹⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 867:12-13.
¹²⁹⁶ [CBP.001.013.0965].
¹²⁹⁷ [TRI.001.006.1964].

Charges for reading emails

663 The Portfolio Law Spreadsheet calculated fees for “Generic Received Emails”. The time charged for “Received Emails” was revised in each version of the spreadsheet, as follows:

Version	Mr Zita hours	Mr Zita fees	Mr Mizzi hours	Mr Mizzi fees
6/12/17 ¹²⁹⁸	185.1	\$101,805	185.1	\$61,083
29/12/17 ¹²⁹⁹	177	\$97,350.00	149.5	\$49,335
2/1/18 ¹³⁰⁰	187.3	\$103,015	63.8	\$21,054

664 Mr Zita agreed that:

- (a) the fees charged for “Received Emails” related to emails sent to the Bolitho Class Action Email Account and the General Class Action Email Account;¹³⁰¹
- (b) those email accounts were set up so the emails would automatically go to Mark Elliott, Mr O’Bryan, Mr Symons and Alex Elliott;¹³⁰²
- (c) that arrangement was implemented so that Mark Elliott, Mr O’Bryan and Mr Symons could immediately consider the correspondence and work out how to respond to it;¹³⁰³
- (d) that arrangement reduced any real need for Mr Zita/Portfolio Law to reflect on the emails and write a response;¹³⁰⁴
- (e) Mark Elliott, Mr O’Bryan and Mr Symons drafted all the responsive correspondence;¹³⁰⁵ and

¹²⁹⁸ [CBP.001.002.8213].

¹²⁹⁹ [CBP.001.013.0965].

¹³⁰⁰ [TRI.001.006.1964].

¹³⁰¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:27-30.

¹³⁰² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 868:31-869:2.

¹³⁰³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 869:3-7.

¹³⁰⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 869:14-16.

¹³⁰⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 869:17-19.

- (f) he never drafted a response of any substance of his own accord to any emails on the matter,¹³⁰⁶ and thus was dependent on Mark Elliott, Mr O'Bryan and Mr Symons to direct the course of the litigation.

665 The Court should find that Mr Zita allowed the appearance to be established and maintained that Portfolio Law was the active solicitor on the record, when in fact all the evidence points to the contrary. The Court should reject Mr Zita's oral evidence that he was "*simply flat-chat running the class action claim*",¹³⁰⁷ which he was unable to plausibly explain when pressed, as follows:¹³⁰⁸

"What were you flat-chat doing? You weren't supervising the barristers. You weren't making any notes of the work that you were doing allegedly in reviewing transcripts. You weren't writing any of the letters that you were sending out. What were you flat-chat doing - your words - in the context of this case?---Running a legal practice.

No, no, no, no, no, no, no, you said you were flat-chat running the class action?---Yes, and running a legal practice.

What were you doing?---Working.

What were you doing? You didn't write a letter. O'Bryan and Elliott and Symons wrote every letter you sent. You didn't make a memorandum about anything you read. Did you proof a witness?---**No**.

Did you write a memorandum of advice about anything?---**No**.

What were you flat-chat doing then?---**Monitoring the cases and running them.**

What were you doing monitoring? You didn't even ask to look at counsel's fees?---Yes, I understand that.

What were you doing monitoring? You're lying, I suggest to you, Mr Zita?--
-I'm not lying.

Mr Zita, what were you doing monitoring in this case?---**I was working on the matters.**

What? Tell me. Tell his Honour what were you doing?---**I was perusing emails, dealing with emails, looking at documentation, perusing documentation.**

But you've got not one single work product to support the assertion that you've just made, have you?---No."

¹³⁰⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 869:11-13.

¹³⁰⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 905:24-27.

¹³⁰⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 905:28-906:23

666 On any view, group members should not be asked to pay the costs of Mr Zita/Portfolio Law passively reading emails in circumstances where Mr Zita frankly conceded that he did not apply any independent judgment in the matter but left it all to others.¹³⁰⁹ Having regard to the role that he undertook, there was no need for him (let alone Mr Mizzi) to read the emails. The Court should reject Mr Zita's evidence that "*it required two people to do the task*" of "*perusing the emails and going through them*".¹³¹⁰ Mr Zita did not offer a credible explanation as to why this was necessary in circumstances where Mr Zita/Portfolio Law acquiesced in having no active role in dealing with correspondence, and positively deferred to being directed by Elliott Legal, Mr O'Bryan and Mr Symons, in a way that saw Mr Zita/Portfolio Law abdicate any responsibility as solicitor for Mr Bolitho and the class action without informing them of that course and seeking their consent.¹³¹¹

667 In that regard, it should be noted that, insofar as Mr O'Bryan and Mr Symons directed Mr Zita/Portfolio Law, they did so as the delegate and agent of AFP and Elliott Legal,¹³¹² in breach of their fiduciary duties which required their loyalty to their clients. The Court should find that this egregious breach of fiduciary duties by lawyers and officers of this Court should be the subject of the strongest condemnation, lest it be thought that lawyers can ignore their fiduciary duties with impunity and act in this way.

668 The manner in which Mr Zita/Portfolio Law quantified their fees for reading emails was also unsound. The process was as follows:

- (a) Mr Zita and Mr Mizzi copied all emails from the inbox for the Bolitho Group Proceeding and pasted them into the spreadsheet.¹³¹³
- (b) Mr Zita and Mr Mizzi "*assessed how long it would have taken*" to read each email and entered that time estimate into the spreadsheet to derive a fee.¹³¹⁴

¹³⁰⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:14-19.

¹³¹⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 872:14-22; see also 869:11-13.

¹³¹¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 872:23-873:4.

¹³¹² AFP admits that Mr O'Bryan and Mr Symons acted as its agents: [PLE.020.001.0001], para [51.a], [51.b], [51.n]; Transcript of hearing on 4 August 2020 [TRA.500.006.0001_2], 540:8-11.

Mr O'Bryan and Mr Symons have conceded the case against them, including the allegation that they acted as agents for AFP: RLOI [PLE.010.002.0001] para [51].

¹³¹³ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [120].

¹³¹⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 870:15-21.

- (c) The first iteration of the Portfolio Law Spreadsheet provided that Mr Zita and Mr Mizzi had each spent an identical amount of time reading each email.¹³¹⁵
- (d) After the first iteration of the Portfolio Law Spreadsheet was produced, Mr Zita and Mr Mizzi “*kept reviewing*” the time they had allocated for the activities in the spreadsheet “*because we couldn’t charge that amount of money because we couldn’t claim it*”.¹³¹⁶ That is, the Portfolio Law Spreadsheet needed to match the invoice for \$377,795 that Portfolio Law had already issued on 8 December 2017.¹³¹⁷
- (e) It did not appear to be Mr Zita’s position that *either* the first version *or* the subsequent versions of the Portfolio Law Spreadsheet accurately quantified the time Mr Zita/Portfolio Law had spent reading emails.¹³¹⁸ Mr Zita conceded that there were no contemporaneous records to substantiate his time estimates.¹³¹⁹

669 Ultimately Mr Zita conceded that his time estimates were speculative reconstructions and they should not be relied upon,¹³²⁰ and that group members should not be asked to pay fees on the basis of his “guesstimates”.¹³²¹

670 The unreasonableness of the fees charged in the Portfolio Law Spreadsheet was highlighted in cross-examination by reference to a particular example, being an email from Clayton Utz dated 28 September 2017 attaching Trust Co’s witness statements.¹³²² Mr Zita charged **4 hours** for reading those documents.¹³²³ He made that assessment **2 months** after allegedly undertaking the work.¹³²⁴ He agreed that after such a lapse of time his recollection was faulty.¹³²⁵ He agreed that nobody asked him to look at the witness statements.¹³²⁶ The idea of Mr Zita

¹³¹⁵ [CBP.001.002.8213], “Bolitho Received Generic” worksheet, columns D and G.

¹³¹⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 874:21-30.

¹³¹⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 875:1-6; 880:7-11; 883:22-885:29.

¹³¹⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 873:5-25 (as to the 6 December 2017 version) and 874:23-875:5 (as to the 29 December 2017 version); see also T879:1-16.

¹³¹⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 880:12-17.

¹³²⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 885:25-29.

¹³²¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 886:16-20.

¹³²² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 875:9-876:14 and [CBP.001.009.3597].

¹³²³ [TRI.001.006.1964] at .1989.

¹³²⁴ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], [117]; [TRA.500.008.0001] T865:19-29, 867:9-11.

¹³²⁵ [TRA.500.008.0001] T877:17-30.

¹³²⁶ [TRA.500.008.0001] T876:10-11.

studiously reviewing Trust Co's evidence¹³²⁷ is incongruous with the balance of his evidence, particularly his evidence that he was not expected to (and did not) have any strategic input into the case.¹³²⁸ Moreover, Mr Zita said that he did not highlight or annotate the documents or make any notes to distil or analyse their content.¹³²⁹ The work, if undertaken, was valueless.

671 This Court should not countenance solicitors charging on the basis of reconstructed guess-work.

Reading discovery and other documents

672 The Portfolio Law Spreadsheet calculated Mr Zita's fees for "Perusals", "ASIC Transcript" and "Discovery", as follows.

Version	Perusals		ASIC Transcript		Discovery	
	Mr Zita hours	Mr Zita fees	Mr Zita hours	Mr Zita fees	Mr Zita hours	Mr Zita fees
6/12/17 ¹³³⁰	68.5	\$37,675	25	\$13,750	40	\$22,000
29/12/17 ¹³³¹	59	\$32,450	13	\$7,150	40	\$22,000
2/1/18 ¹³³²	56.5	\$31,075	23.4	\$12,870	40.5	\$22,275

673 Mr Zita said that he looked at the ASIC transcripts on his computer screen, and made no notes following his review of them.¹³³³ Again, the work was valueless; and again, the notion of Mr Zita studying the ASIC transcripts of his own accord is hard to reconcile with the rest of the evidence, particularly his own evidence that:

(a) he left it to Mark Elliott and counsel to run the litigation, and only did what they told him to do;¹³³⁴ and

¹³²⁷ [TRA.500.008.0001] T876:12-878:15.

¹³²⁸ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [91].

¹³²⁹ [TRA.500.008.0001] T876:20-877:12.

¹³³⁰ [CBP.001.002.8213].

¹³³¹ [CBP.001.013.0965].

¹³³² [TRI.001.006.1964].

¹³³³ [TRA.500.008.0001] T881:7-883:21.

¹³³⁴ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [91] – [95].

(b) he did not carefully read documents and correspondence he was asked to file and send,¹³³⁵ and on his own concession, was often careless in his inattention to the accuracy of such material.

674 Mr Zita conceded that, in revising the time charged for reviewing the ASIC transcripts, he was seeking to tailor the spreadsheet to the sum that he had agreed with Mark Elliott that Portfolio Law would charge.¹³³⁶ AFP did not seek to cross-examine Mr Zita to rebut that concession.

Charges for discovery – **Receivers’ Court Book**

675 Mr Zita conceded that his charges for discovery review were a “wild stab” made without the benefit of contemporaneous records and in circumstances where he made no notes of the discovery that he claimed to have reviewed.¹³³⁷

Charges for attendances on counsel

676 Mr Zita/Portfolio Law used Mr Symons’ fee slips to add in various conferrals with counsel.¹³³⁸ This was a flawed approach in circumstances where:

- (a) Mr Symons’ own fee slips were fabricated (see **Section F** below); and
- (b) Mr O’Bryan and Mr Symons said they were “*conferring*” whenever they sent or received an email. Thus, the “*conferrals*” recorded in Portfolio Law’s bills were no more than emails that might have been copied to Mr Zita. Such emails were also the subject of a separate fee as “correspondence received”.

677 Mr Zita/Portfolio Law conceded that, insofar as Mr Symons’ records of those attendances were inaccurate, those inaccuracies flowed through to the spreadsheets which Mr Zita prepared.¹³³⁹

¹³³⁵ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [168], [190], [204], [217], [243], [281]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:21-22, 893:24-25; transcript of hearing on 17 August 2020 [TRA.500.009.0001], 953:4-9, 953:28-954:16, 975:6-27.

¹³³⁶ [TRA.500.008.0001] T883:22-885:29.

¹³³⁷ [TRA.500.008.0001] T885:30- T886:15.

¹³³⁸ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [118]; [CBP.004.009.0034] and [CBP.004.009.0001]; Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 731:1-13.

¹³³⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 731:1-13.

C4.4 “No win no fee” arrangement between AFP and Portfolio Law

- 678 The Court should find that Portfolio Law was engaged on a “no win no fee” basis with respect to their fees, for the reasons that follow.
- 679 **First**, apart from two small bills that Mr Zita/Portfolio Law issued in March and June 2015, the fact is that Mr Zita/Portfolio Law did not issue any bills until settlements were reached.¹³⁴⁰ Following the Partial Settlement, on **1 July 2016**, Portfolio Law issued a bill for **\$177,993**, covering an 18 month period.¹³⁴¹ Portfolio Law issued no further bills until after the Trust Co Settlement was reached. On **8 December 2017**, Portfolio Law issued a bill for **\$377,795**, again covering an 18 month period.
- 680 Mr Zita said that this was a reflection of his hopelessness with his billing practices, rather than an arrangement with Mark Elliott.¹³⁴² The fact is that Mark Elliott’s business model involved an arrangement with the Lawyer Parties not to issue bills until there was a settlement. The Court should not accept Mr Zita’s evidence that he followed that business model by accident rather than by design.¹³⁴³
- 681 **Second**, the bill that Mr Zita/Portfolio Law issued at the time of the Trust Co Settlement was a large bill relative to Portfolio Law’s overall fee revenue at that time.¹³⁴⁴ Mr Zita said that his firm’s fee revenue, excluding the Banksia matter, was about **\$1.5 million** or **\$1.6 million** in FY2018.¹³⁴⁵ It is unclear why Mr Zita/Portfolio Law would be prepared to let such a large liability accumulate, particularly in circumstances where a litigation funder was involved, whose function it was to pay legal costs. Mr Zita said that he was “*simply flat-chat running the class action claim and doing other things*” and he “*didn’t have time*” to do his bills.¹³⁴⁶ That contention is impossible to reconcile with the evidence of what Mr Zita/Portfolio Law actually did on the matter. He did not proof any witnesses.¹³⁴⁷ He did not prepare any memoranda of advice.¹³⁴⁸ He did not supervise the barristers.¹³⁴⁹ He did not make notes on the work he allegedly undertook in

¹³⁴⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 900:21-902:2, 903:27-904:1.

¹³⁴¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 900:21 – 901:20.

¹³⁴² Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 902:11-18, 904:4-6, 904:19-28.

¹³⁴³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 905:2-23;

Transcript of hearing on 17 August 2020 [TRA.500.009.0001] 948:25-31, 949:8-11.

¹³⁴⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 896:31-897:3.

¹³⁴⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 896:19-21.

¹³⁴⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 905:24-27.

¹³⁴⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 906:8-9.

¹³⁴⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 905:10.

¹³⁴⁹ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [42], [94], [95], [119].

reviewing documents. He did not write the letters he sent. When challenged about these matters, Mr Zita could not give a satisfactory answer.¹³⁵⁰ It boiled down to an assertion that Mr Zita was so frenetically busy perusing documents¹³⁵¹ that he was unable to send a bill for all that reading; even though, on his own concession, he often did not read documents carefully.¹³⁵² At no stage did AFP seek to cross-examine Mr Zita to support AFP's claim for Portfolio Law's fees, despite having notice of the Contradictors' allegations in the RLOI, opening statement, and the documents tendered.

682 **Third**, in one of the versions of the spreadsheet that Mr Zita/Portfolio Law produced in developing Portfolio Law's bills in December 2017, namely the version dated 29 December 2017, Mr Zita inserted a formula to calculate a 25 per cent uplift fee.¹³⁵³ Such an uplift is consistent with a "no win no fee" agreement. Mr Zita did not offer a convincing explanation for the proposed uplift fee in cross-examination.¹³⁵⁴ He said that *"the situation was put to me that some class actions get an uplift fee, and I just thought what it was going to look like"*.¹³⁵⁵ He evasively claimed he could not recall who suggested the uplift fee to him, but ultimately conceded that it was *"most likely"* Mark Elliott, who was the only person that Mr Zita knew who operated in the field of class actions.¹³⁵⁶

683 **Fourth**, Mr Zita conceded that he did not press AFP to pay Portfolio Law's December 2017 bill at any time after issuing it.¹³⁵⁷ Mr Zita was asked why he would not press a litigation funder to pay his outstanding bill for a lengthy period of time. He said: *"I just made a call that, you know, from my point of view this is a good client, likely to be a long-term client, and I didn't press payment for that reason, that's all"*.¹³⁵⁸ But it makes no sense for a solicitor to voluntarily assume the burden of providing credit or a form of litigation funding to a litigation funder, **particularly** a litigation funder seeking as lucrative a fee as AFP was seeking. It is difficult to

1350 [TRA.500.008.0001] T905:28-906:23.

1351 [TRA.500.008.0001] T906:19-21.

1352 Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [168], [190], [204], [217], [243], [281]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:21-22, 893:24-25; transcript of hearing on 17 August 2020 [TRA.500.009.0001], 953:4-9, 953:28-954:16, 975:6-27.

1353 [CBP.001.013.0965].

1354 Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 894:4-895:23.

1355 Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 894:19-22.

1356 Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 894:26-895:23.

1357 Mr Zita's June 2020 Affidavit [CCW.034.006.0001], para [26]; Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 940:6-30.

1358 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 940:15-22.

reconcile Mr Zita's evidence that "*I was going to be paid by the funder regardless of the settlement proceeds*" with his decision not to press for payment before receipt of the settlement proceeds.¹³⁵⁹

684 **Fifth**, AFP did not pay Portfolio Law's 8 December 2017 bill in the ordinary course. To the contrary, AFP paid Portfolio Law in response to issues that arose in the Court of Appeal and in the remitter. The evidence concerning payment of Portfolio Law's 8 December 2017 bill is as follows:

- (a) On **10 June 2018**, following the first day of hearing in the Court of Appeal, Mr O'Bryan sent an email to Mark Elliott which stated: "*Having regard to what Whelan said on Friday about our bills & legal costs, I think it is vitally important that AFP pays MS & PL in respect of the accounts that Trimbos has opined on, so that I can confirm to the court when asked (which I now think highly probable) that they have been paid. If I am asked on 19/6, I will need to be able to answer yes very quickly, since **MS & TZ will be in court**. Let me know if this causes any problem.*"
- (b) On **11 June 2018**, Mark Elliott forwarded that email to Alex Elliott and directed him to "*draw cheques to MS and PL*" using the "*old BSL cheque book*", to "*date cheques 1 August 2018*", to "*put in envelopes marked 'do not open until you talk to MEE'*" and to "*give to each of TZ and MS before 19 June.*"¹³⁶⁰
- (c) Cheques were drawn to Mr Symons and Portfolio Law. **Both cheques are dated 1 July 2018**. The cheque to Portfolio Law was for \$377,795. The cheque to Mr Symons was for \$608,031.
- (d) Mr Symons admitted in his affidavit that he received his cheque in "*about*" July 2018 (the Court should find it was in fact given to him before 19 June 2018 as per the direction from Mr O'Bryan and Mark Elliott).¹³⁶¹

¹³⁵⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 948:8-20.

¹³⁶⁰ [ABL.001.0601.00003].

¹³⁶¹ [SYM.007.001.0005_ext] at .0007

- (e) Despite these matters, Mr Zita claimed he did not receive the cheque in mid 2018, but rather, received it on **21 January 2019**¹³⁶² - being the date on which **both** Portfolio Law **and** Mr Symons presented their cheques.¹³⁶³
- (f) Alex Elliott gave evidence that he could not recall delivering the cheques to Portfolio Law and Mr Symons.¹³⁶⁴ But in the circumstances where Mr Symons conceded that he received his cheque in “*about*” July 2018,¹³⁶⁵ and where the contemporaneous documentary evidence shows that Mr O’Bryan was adamant that the cheques be delivered prior to the second day of hearing in the Court of Appeal,¹³⁶⁶ Alex Elliott’s evidence is of no weight and should be disregarded. Alex Elliott’s evidence that he prepared the cheques and signed them with his father’s signature while his father was overseas¹³⁶⁷ corroborates the fact that Mark Elliott was determined to comply with Mr O’Bryan’s pressing demand that the cheques be drawn and delivered prior to the second day of the hearing in the Court of Appeal, so that if asked by Whelan JA, Mr O’Bryan could respond that the solicitor and junior counsel had been paid.¹³⁶⁸
- (g) Mr Zita confirmed he had no independent recollection of receiving the cheque on or around 21 January 2019,¹³⁶⁹ and the Court should find that, at best, he was mistaken as to when the cheque was received.¹³⁷⁰ The most likely scenario is that Mr Symons and Portfolio Law received their cheques from Alex Elliott at about the same time, on about **18 or 19 June 2018**, prior to the parties appearing in the Court of Appeal for the second day of hearing (as per the direction from Mr O’Bryan and Mark Elliott), and were both told to present their cheques on the same day.¹³⁷¹
- (h) Irrespective of when Portfolio Law received the cheque, the fact is that Portfolio Law did not present the cheque for payment until **21 January 2019**

¹³⁶² Mr Zita’s June 2020 Affidavit [CCW.034.006.0001], para [23];
Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 935:31-936:3.

¹³⁶³ [AFP.007.001.0003].

¹³⁶⁴ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:3-8, 1733:27-30, 1734:6-11.

¹³⁶⁵ [SYM.007.001.0005_ext] at .0007, paras [13] – [15].

¹³⁶⁶ [ABL.001.0601.00003].

¹³⁶⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:3-1729:26.

¹³⁶⁸ [ABL.001.0601.00003]; [AEL.100.013.0001].

¹³⁶⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T945:3-22.

¹³⁷⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T939:19-29; .

¹³⁷¹ [ABL.001.0601.00003].

– more than **1 year** after the bill was issued, and in respect of fees going all the way back to **August 2016**.¹³⁷² The Court should find that the catalyst for that payment was an issue raised by the Contradictors in **December 2018** in the first iteration of the List of Issues, namely: *“Has AFP paid the Legal Costs in respect of which it claims reimbursement, and if so, when?”*¹³⁷³ It was not a payment made by AFP in the ordinary course.

- (i) Whilst no allegation of dishonest overcharging is made against Mr Zita/Portfolio Law in respect of Portfolio Law’s December 2017 bill, the evidence as to how that bill was arrived at shows that Mr Zita dramatically overestimated the value of his own work. Whilst Mr Zita might have subjectively thought that he was entitled to some measure of compensation for his post-box duties as the “nominal” solicitor on the record, it is objectively unlikely that Mark Elliott would have been prepared to pay nearly \$400,000 for the services that Mr Zita provided from his (or AFP’s) own funds, and without the benefit of the settlement approval. This explains why Mark Elliott directed Alex Elliott to deliver the cheque in an envelope stating ***“Do not open until you talk to MEE”***.¹³⁷⁴
- (j) All of those matters suggest that the arrangement between AFP and Portfolio Law was that AFP would only pay Portfolio Law once funds were received from the settlement.

685 **Sixth**, Mr Zita/Portfolio Law relies on the fact that, unlike Mr O’Bryan and Mr Symons, Mr Zita did not supply any correspondence for AFP’s auditor about acting on a “no win no fee” basis.¹³⁷⁵ However, it would appear that the request for Mr O’Bryan and Mr Symons to provide their “no win no fee” letters arose in relation to the misleading way they issued their invoices in matters involving AFP, leading the auditors to specifically ask for “no win no fee” agreements with Mr O’Bryan and Mr Symons in support of excluding those alleged liabilities from the accounts.¹³⁷⁶ The auditors did not specifically request a “no win no fee” agreement with Portfolio Law.¹³⁷⁷ The documentary evidence shows that Mark Elliott was frustrated by the

¹³⁷² Transcript of hearing on 17 August 2020 [TRA.500.009.0001] 942:16-18.

¹³⁷³ [SYM.001.003.1799] (see issue 5(b)(v)).

¹³⁷⁴ [ABL.001.0601.00003].

¹³⁷⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001] 747:3-12.

¹³⁷⁶ [SYM.008.001.0022]; [MAZ.004.001.0720].

¹³⁷⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1620:30-1621:7.

auditor's enquiries and wanted the auditors to do the "bare minimum".¹³⁷⁸ In reaction to the auditor's requests for information, Mark Elliott complained to Mr De Bono: *"I cannot answer all of this! I want a new auditor please... I just need a better auditor who makes my life easy and **doesn't act like a cop**".*¹³⁷⁹ In that context, the fact that Mark Elliott did not supply a "no win no fee" agreement with Portfolio Law reflects no more than the fact that the auditor did not specifically ask for it, and is of no evidentiary value to Mr Zita/Portfolio Law.

686 **Seventh**, AFP admits that it intended to pay Portfolio Law only when the fees were recovered from the settlement proceeds.¹³⁸⁰

C5. **Contraventions of the CPA by AFP, Mr O'Bryan and Mr Symons**

687 AFP entered into contingency fee arrangements with Mr O'Bryan and Mr Symons, which they all joined in concealing by fabricating documentation that did not reflect their true arrangements with each other, knowing and intending that the documentation would be relied upon by Mr Trimbos and thereafter (directly or indirectly) the Court. They did so with the intention of improperly benefiting themselves and each other at the expense of Mr Bolitho and group members, who were their clients.

688 This conduct contravened the overarching obligation to act honestly, the overarching obligation not to mislead or deceive, the overarching obligation to ensure that costs were reasonable and proportionate, and the Paramount Duty.

C6. Contraventions of the CPA by Mr Zita/Portfolio Law

C6.1 Failure to ensure their own costs were reasonable and proportionate

689 Mr Zita/Portfolio Law appeared to claim that they could not be accused of contravening the obligation to ensure that their own legal costs were reasonable and proportionate in circumstances where no allegation of overcharging was advanced against them.¹³⁸¹

¹³⁷⁸ [MAZ.004.001.0720];
Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1621:16-1622:1623:6.
¹³⁷⁹ [MAZ.004.001.0720].
¹³⁸⁰ AFP's admissions [PLE.020.001.0001], para [109].
¹³⁸¹ [TRA.500.007.0001] T747:19-748:3.

690 That misconceives the position. Dishonest overcharging is a very serious allegation. The fact that no such allegation was made against Mr Zita/Portfolio Law does not amount to a concession that Mr Zita/Portfolio Law's fees were reasonable and properly incurred.

691 To the contrary, the Contradictors' case is that the sum of \$377,795 charged by Portfolio Law was excessive. The evidence reveals that:

- (a) Mark Elliott decided how much Portfolio Law should charge, and Mr Zita "*just accepted it*".¹³⁸²
- (b) Mr Zita/Portfolio Law then produced bills to justify that sum.¹³⁸³
- (c) The "reconstruction" that Mr Zita/Portfolio Law undertook to produce those bills was demonstrably unreliable and showed his complicity in agreeing to prepare bills in the amount nominated by Mark Elliott/AFP and shown in the Banksia Expenses Spreadsheet that Alex, Max and Mark Elliott developed.¹³⁸⁴
- (d) Mr Zita charged substantial fees for reading the witness statements and expert reports. Under cross-examination, he insisted he had read those materials "*on the system*", but conceded that he did not annotate or highlight any of the materials, and that he did not make any notes, that reading the documents was of no real utility, and that, two months later, he would have no real recollection of what he had read.¹³⁸⁵

C6.2 Failure to ensure that counsel's fees were properly incurred, reasonable and proportionate

692 Mr Zita conceded that he owed an obligation to monitor the terms of counsel's engagement and counsel's fees.¹³⁸⁶ However, Mr Zita claimed that:

¹³⁸² [TRA.500.008.0001] T865:6-13.

¹³⁸³ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [117]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001] 865:19-29, 868:13-16, 867:9-11; 874:19-875:6.

¹³⁸⁴ [AFP.007.001.0001] [AFP.007.001.0002].

¹³⁸⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 876:6-878:15.

¹³⁸⁶ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [38], [42], [281], [288] – [289]; see also [PLE.020.001.0001] & [PAR.080.001.0001], para [72.d] and [PLE.070.001.0001_2]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 852:18-854:25.

- (a) there was nothing to put him on notice that the fees charged by Mr O'Bryan and Mr Symons were excessive;¹³⁸⁷ and
- (b) even if had queried counsel's fees, he could not have discovered the fraudulent conduct of Mark Elliott, Mr O'Bryan and Mr Symons.¹³⁸⁸

693 Those submissions should not be accepted. Mr Zita was the solicitor on the record. He had a strict, positive obligation to ensure that the legal costs were properly incurred, reasonable and proportionate. He did nothing to discharge that obligation. He did nothing to inform himself of the fee arrangements in place with counsel, or the fees charged by counsel. He did nothing to advise Mr Bolitho or other group members about those matters. It is not open to Mr Zita to say that there was nothing to put him on notice that counsel's fees were excessive when he did not even ask to see their fee slips; and Mr Zita ultimately conceded as much in cross-examination.¹³⁸⁹ Nor did Mr Zita seek to monitor counsel's fees during his time as solicitor on the record to ensure that they were fair and reasonable. The total abrogation of his duties to his clients in that respect should not be countenanced by the Court. The Court should find that Mr Zita turned a willing blind eye to counsel's fee arrangements, and that this is further proof of his willingness to cede control of the litigation to AFP and the Lawyer Parties.

C6.3 Misleading conduct

- 694 In opening, Mr Zita/Portfolio Law mischaracterised the Contradictors' case against them in Section C of the RLOI as a case based on breach of the Portfolio Law Costs Agreement.¹³⁹⁰
- 695 It may be accepted that, **of itself**, breach of a costs agreement is unlikely to give rise to a contravention of the overarching obligations. But the Contradictors' case is not one of mere breach of a fee agreement. Rather, the focus of **Section C** is:
- (a) the entry into and/or implementation of irregular and unfair arrangements in relation to fees which exposed group members to the risk of abuse; and

¹³⁸⁷ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [183] – [184].

¹³⁸⁸ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 748:27-750:4.

¹³⁸⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 854:26-858:17.

¹³⁹⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 742:29-743:13.

- (b) the proffering of documentation that misleadingly obscured those arrangements.

696 Mr Zita conceded that:

- (a) the Portfolio Law Costs Agreement provided that Portfolio Law would be responsible for monitoring the terms of counsel's engagement and counsel's fees;¹³⁹¹
- (b) from the outset of the matter, Mr Zita never involved himself in the terms of counsel's engagement or counsel's fees;¹³⁹²
- (c) the Portfolio Law Costs Agreement allowed Portfolio Law to charge at hourly rates only on the basis of contemporaneous records of time spent;¹³⁹³
- (d) since Mr Zita/Portfolio Law did not keep such records, they could not charge their fees on that basis;¹³⁹⁴
- (e) Mr Zita never told Mr Bolitho or other group members that he was proposing to depart from the Portfolio Law Costs Agreement;¹³⁹⁵
- (f) Mr Zita did not send a copy of the Third Trimbos Report to Mr Bolitho;¹³⁹⁶
- (g) Mr Zita did not send Portfolio Law's 8 December 2017 invoice to Mr Bolitho;¹³⁹⁷ and
- (h) Mr Zita did not draw to the attention of Mr Trimbos, Mr Bolitho, other group members or the Court the fact that he charged significant fees for reading emails that went to a common email account accessed by Mark Elliott, Mr O'Bryan and Mr Symons.¹³⁹⁸

697 In those circumstances, it was misleading or deceptive for Mr Zita/Portfolio Law to proffer to Mr Bolitho, Mr Trimbos, and the Court documentation that did not reflect

¹³⁹¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 745:7-14.

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 852:18-854:25.

¹³⁹² Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [42], [131] - [132], [152], [154], [184], [289]; Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 745:7-14.

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 855:30-856:2.

¹³⁹³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:7-9.

¹³⁹⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:10-11.

¹³⁹⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:12-16.

¹³⁹⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:17-18.

¹³⁹⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:19-20.

¹³⁹⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:25-888:1.

Portfolio Law's real arrangement in respect of fees or the role Portfolio Law performed in the litigation, and to sit by in silence and say nothing in the various courts where approval of the settlement and contests arising therefrom arose for consideration. That failure to inform Mr Bolitho, Mr Trimbos, and the Court of the real position with respect to Portfolio Law's fee and billing arrangements and its failure to provide any oversight in respect of counsel's fees should not be countenanced, and should be the subject of strong condemnation. Mr Zita is an officer of the Court, and whilst he did not make oral submissions himself before Justice Croft, he was nevertheless in Court and aware of the misleading oral and written submissions and documentary material which was filed by his firm in support of his own fees and the fees charged by counsel. Mr Zita did nothing to correct these matters.

- 698 The Court should find that Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that the cost disclosure documents and invoices that they issued did not accurately reflect their fee arrangements, the work actually performed, and the fees they were properly entitled to charge.

C6.4 Breach of the Paramount Duty

- 699 Mr Zita/Portfolio Law concede that they were careless in their failure to enquire into counsel's fees; but say that their carelessness fell short of a breach of the overarching obligation to further the administration of justice.¹³⁹⁹
- 700 That is a jarring submission in the events that occurred. The Portfolio Law Costs Agreement provided that Portfolio Law would consult Mr Bolitho as to the terms of counsel's engagement, and obtain Mr Bolitho's consent to counsel fees incurred. Mr Zita/Portfolio Law conceded that they were responsible for managing counsel's fees. Portfolio Law did none of these things, and yet proffered to the Court a claim for fees totalling millions of dollars without having the slightest idea what work had been undertaken, and in circumstances where the fee claim was supported by fabricated invoices addressed to Mr Zita/Portfolio Law and made to appear as if they had been issued monthly, but which Mr Zita/Portfolio Law had never received.

¹³⁹⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 750:11-17.

- 701 All of these matters would have been evident to Mr Zita/Portfolio Law if Mr Zita had so much as glanced at the invoices exhibited to the Third Trimbo Report which was filed by his firm. Yet Mr Zita sat by and did nothing to draw to the Court's attention to the serious discrepancies and inaccuracies in the report, and the irregularities with respect to fees.
- 702 In relation to the fees charged by Portfolio Law, Mr Zita and Mark Elliott agreed what Mr Zita should charge, and Mr Zita then backed it up with reconstructed bills which he created at the end of the matter after a settlement had been reached in order to justify the figure he had agreed with Mark Elliott. The debenture holders were entitled to expect better of the solicitors engaged on their behalf to conduct their litigation. Moreover, the Court is entitled to expect its own officers will well and truly demean themselves in the practice of the law on their clients behalf, and in the interests of justice generally.
- 703 The Court should find that Mr Zita/Portfolio Law failed in both respects. In particular, the Court should find that Mr Zita/Portfolio Law failed to act professionally, fairly, and with integrity in connection with the arrangements to recover fees from the group members whose claims they represented. That is sufficient to constitute a breach of the Paramount Duty, and ought to be sufficient to disentitle any recovery of fees from the settlement proceeds in respect of the work of Mr Zita/Portfolio Law.

D. **AFP'S VICARIOUS LIABILITY**

704 AFP admits that:

- (a) The Lawyer Parties advanced the interests of AFP and their own interests in connection with the matters the subject of the RLOI.¹⁴⁰⁰
- (b) AFP expressly or impliedly consented to the Lawyer Parties acting to advance its interests in respect of the application for commission and costs.¹⁴⁰¹
- (c) Mr O'Bryan and Mr Symons acted for AFP in recovering the costs and commission it claimed from the Trust Co Settlement.¹⁴⁰²
- (d) Mr O'Bryan and Mr Symons acted as agents for AFP.¹⁴⁰³

705 Accordingly it is vicariously liable for their conduct.

706 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020, including **Section D** and **Section M**, and do not contest findings being made against them on the basis of those allegations.¹⁴⁰⁴

707 The impropriety of the agency relationship between AFP and the Lawyer Parties is addressed in **Section M** below.

¹⁴⁰⁰ AFP's admissions [PLE.020.001.0001], para [51.a].

¹⁴⁰¹ AFP's admissions [PLE.020.001.0001], para [51.b].

¹⁴⁰² [PLE.020.001.0001] and [PAR.080.001.0001], para [51.n].

¹⁴⁰³ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 489:12-16;

Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 540:8-14;

Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1589:9-17.

¹⁴⁰⁴ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

E. SETTLEMENT NEGOTIATION CONTRAVENTIONS

E1. Overview of contravention

708 The Court should find that, by their conduct in connection with negotiating the terms of the Trust Co Settlement:

- (a) AFP contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive; and
- (b) AFP, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott contravened the Paramount Duty,

(together **Settlement Negotiation Contraventions**).¹⁴⁰⁵

E2. Concessions and admissions

709 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020, and do not contest findings being made against them on the basis of those allegations.¹⁴⁰⁶

710 AFP admits that:

- (a) Between 9 and 10 November 2017, Mr Bolitho, AFP, the SPRs and Trust Co negotiated and agreed an "in principle" agreement to settle the Bolitho Proceeding and the SPR Proceeding against Trust Co (**Trust Co Settlement**).¹⁴⁰⁷
- (b) In the course of those negotiations, Mr O'Bryan and Mark Elliott required the SPRs to agree to a "*division of the spoils*" of the Trust Co Settlement, whereby they "*sought to have*"¹⁴⁰⁸ the SPRs agree to support payments to AFP of \$12.8 million plus GST in respect of commission and \$4.75 million plus GST in respect of legal costs.¹⁴⁰⁹

¹⁴⁰⁵ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [58].

¹⁴⁰⁶ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

¹⁴⁰⁷ [PLE.020.001.0001], para [54].

¹⁴⁰⁸ [PLE.020.001.0001], para [55] and [SYM.001.001.6313] [SYM.001.001.6715]. AFP does not admit that Mr O'Bryan and Mark Elliott "*procured*" the SPRs' agreement to support those payments.

¹⁴⁰⁹ See also Mr Lindholm's 29 March 2019 Affidavit [SPR.006.001.0005], [12] – [20].

- (c) AFP did not disclose to the SPRs the following matters (**Undisclosed Matters**):
- (i) substantially all the legal costs that AFP sought to recover from the settlement in respect of the Relevant Period had not been paid by AFP, Portfolio Law, or Mr Bolitho;¹⁴¹⁰
 - (ii) as at 10 November 2017, substantially all of the legal costs that AFP sought to recover in respect of the Relevant Period had not been invoiced, fee slips had not been issued, and proper documentation and records had not been kept by Mr O'Bryan, Mr Symons, or Portfolio Law to substantiate those charges;¹⁴¹¹
 - (iii) Mr O'Bryan and Mr Symons claimed that their fees for the Relevant Period were approximately \$2.5 million and \$700,000 respectively, even though they had not provided any relevant cost estimates to Mr Bolitho, Portfolio Law, or AFP in respect of the Relevant Period in the manner prescribed by the Uniform Law and/or the LPA and/or in accordance with any valid costs agreement;¹⁴¹²
 - (iv) the invoices that Mr Symons issued on 24 November 2017 charged his fees at escalating rates that had not been disclosed to Mr Bolitho, Portfolio Law, or AFP prior to that time;¹⁴¹³
 - (v) the invoices that Mr O'Bryan issued in December 2017 charged his fees at escalating rates that had not been disclosed to Mr Bolitho, Portfolio Law, or AFP at any time prior to about mid to late November 2017.¹⁴¹⁴
- (d) Between 10 November 2017 and about 1 December 2017, the parties and/or their legal representatives negotiated the terms of a settlement deed to record the Trust Co Settlement. Mr O'Bryan, Mr Symons and AFP drafted, settled, directed and/or recommended those terms to Mr Bolitho.¹⁴¹⁵ The terms included the following:

¹⁴¹⁰ AFP admits that this was not disclosed to the SPRs: [PLE.020.001.0001], para [60.a].
¹⁴¹¹ AFP admits that this was not disclosed to the SPRs: [PLE.020.001.0001], para [60.b].
¹⁴¹² AFP admits that this was not disclosed to the SPRs: [PLE.020.001.0001], para [60.c].
¹⁴¹³ AFP admits that this was not disclosed to the SPRs: [PLE.020.001.0001], para [60.d].
¹⁴¹⁴ AFP admits that this was not disclosed to the SPRs: [PLE.020.001.0001], para [60.e].
¹⁴¹⁵ [PLE.020.001.0001], para [56].

CI	Substance of term	Other points
2.1.3	The Deed was made subject to the making of “Approval Orders”, defined as “the making of the orders sought in the “Bolitho Approval Application” and the “BSL Approval Application”.	Mr O’Bryan and Mr Symons contended in the Court of Appeal that the court could not approve the Settlement Sum but decline to approve the payments to AFP. They submitted that the Deed recognised “the commercial and... legal reality that the funder's application will be part and parcel of the Bolitho approval application and is therefore bound up with the approval of the settlement”. ¹⁴¹⁶
2.1.4	The Deed was made subject to the expiry of any appeal period from the making of the Approval Orders (if the Approval Orders were made without an appeal being commenced) and/or the final determination of such an appeal the result of which was that the Approval Orders were made or confirmed.	
2.2	If the Approval Orders were not made, the Deed ceased to have any effect and was to be treated for all purposes as if it had never been made.	
2.4	If the Approval Orders were not made by reason of AFP’s commission, the parties were required in good faith to seek to negotiate an alternative commission, but if the parties were unable to agree, AFP could, in its sole discretion, give notice that the conditions in clause 2.1 had not been met.	
3.9	AFP agreed to engage a “suitably qualified external costs consultant” to prepare a report concerning whether the legal costs and disbursements incurred by AFPL had been reasonably incurred and were of a reasonable amount. The parties agreed that the expert report	AFP and Mr Bolitho’s legal representatives ultimately required the settlement terms to provide that the expert costs consultant report be filed on a confidential basis.

CI	Substance of term	Other points
	would be filed on a confidential basis.	
3.10	At the settlement approval application, Banksia, the SPRs and Trust Co agreed to instruct their legal representatives to support AFP's application for payment of \$12.8 million plus GST by way of a funder's commission.	<p>Mr Bolitho's legal representatives and AFPL rejected a clause proposed by the SPRs which:</p> <p>(1) expressed AFP's commission as "20% of the Settlement Sum" (instead of the quantified figure of \$12.8 million plus GST);</p> <p>(2) provided for the SPRs and Trust Co to instruct their legal representatives to "take all reasonable steps (consistent with their representatives' professional obligations)" to support AFP's application for payment;</p> <p>(3) provided for the Deed to continue to operate if the court determined that AFP was entitled to an amount less than 20 per cent of the Settlement Sum.</p>
3.11	At the settlement approval application and subject to the external cost consultant report filed pursuant to clause 3.9 confirming that the costs and disbursements claimed by AFP were incurred by AFP, had been reasonably incurred and were of a reasonable amount, Banksia, the SPRs and Trust Co agreed to instruct their legal representatives to support AFP's application for payment of \$4.75 million plus GST in costs and disbursements.	Mr Bolitho's legal representatives and AFP rejected a clause proposed by the SPRs which provided for the SPRs and Trust Co to instruct their legal representatives to support AFP's application for payment of "the reasonable legal costs and disbursements" incurred by AFP in the conduct of the Bolitho Proceeding.

(e) The Settlement Deed was executed on or about 4 December 2017.¹⁴¹⁷

- (f) Mr Zita/Portfolio Law had limited if any involvement in the settlement negotiations.¹⁴¹⁸
- (g) Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Mark Elliott/AFP did not:¹⁴¹⁹
- (i) advise Mr Bolitho and/or other group members that the terms were unreasonable;
 - (ii) inform AFP that they considered that the terms were unreasonable;
 - (iii) take steps to trigger (or advise Mr Bolitho or any other group member to take steps to trigger) clause 13.3 or 13.5 of the Funding Agreement;
 - (iv) inform Mr Bolitho and Mr Crow and/or other group members of all conflicts between (1) their own interests or the interests of AFP and (2) their duties to Mr Bolitho and/or other group members.

711 Mr Zita/Portfolio Law adopted those AFP admissions.¹⁴²⁰

712 Prior to opening his case, Alex Elliott adopted the AFP admissions as to the allegations made against AFP and the Lawyer Parties, but denied any allegations directed at him.¹⁴²¹

E3. Evidence establishing the contraventions

E3.1 Unwarranted demands for costs and commission

713 The Court should find that there was no proper basis for AFP and the Lawyer Parties to claim payments of **\$12.8 million plus GST** in respect of commission and **\$4.75 million plus GST** in respect of legal costs¹⁴²² or procure the SPRs' agreement to those sums,¹⁴²³ for the following reasons.

¹⁴¹⁸ [PLE.020.001.0001], para [62].

¹⁴¹⁹ [PLE.020.001.0001], para [63].

¹⁴²⁰ [PLE.070.001.0001_2].

¹⁴²¹ [PAR.080.001.00001], paras [54] – [65].

¹⁴²² [SYM.001.001.6313] [SYM.001.001.6715]; Mr Lindholm's 29 March 2019 Affidavit [SPR.006.001.0005], [12] – [20].

¹⁴²³ This allegation is not admitted by AFP, Alex Elliott, or Mr Zita: [PLE.020.001.0001], para [55]; [PAR.080.001.0001], para [55]; [PLE.070.001.0001_2], para [1].

714 **First**, AFP and the Lawyer Parties acted contrary to Mr Bolitho's instructions in respect of the demands they made for costs and commission. In particular:

- (a) Following the mediation on **9 November 2017**, Mr Crow informed Mark Elliott that Mr Bolitho's instructions were to settle on the basis that the settlement represented a return of not less than **10 cents** in the dollar.¹⁴²⁴ A settlement of 10 cents in the dollar translated to about \$65 million.¹⁴²⁵
- (b) Mark Elliott informed Mr Crow on 10 November 2017 that the "*headline figure is approx. \$85M and the debenture holders will get at least 10 cents each*".¹⁴²⁶ That was manifestly false.
- (c) Instead Mark Elliott, Mr O'Bryan and Mr Symons drafted a settlement that gave Mr Bolitho and the debenture holders substantially less than that, because it provided for substantial deductions on account of funding commission and legal costs and it sought to make the whole settlement conditional upon those deductions.
- (d) On Mr Crow's own evidence, Mark Elliott informed him only on **16 November 2017**, **after** concluding negotiations with the SPRs in respect of the Adverse Settlement Terms, that "*the class action would receive its share of the Trustco settlement, pay associated costs and expenses and then distribute to debenture holders 6 to 7 cents in the dollar and the liquidator would then keep his part of the money until settled with Insurance House and then distribute another 3 to 4 cents in the dollar*".
- (e) Mr Zita likewise conceded that he was not aware of any discussion with Mr Bolitho at or around the time of the mediation in which Mr Bolitho was informed that AFP would be seeking \$4.75 million plus GST in respect of costs or \$12.8 million plus GST in respect of commission,¹⁴²⁷ or that the whole settlement was to be conditional upon AFP receiving those sums.¹⁴²⁸

¹⁴²⁴ [CBP.001.010.5957] at .6134;

Mr Crow's 12 May 2020 Affidavit [CCW.036.001.0098_2], para [20].

¹⁴²⁵ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:25-26.

¹⁴²⁶ [BOL.001.001.0004].

¹⁴²⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 834:18-23.

¹⁴²⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 834:23-25.

- (f) It was not open to AFP and the Lawyer Parties to present those claims to the other parties to the settlement on a “*take it or leave it*” basis,¹⁴²⁹ procure that they be recorded in the settlement deed, and then present the settlement deed to Mr Bolitho for signature as an “in principle” agreement – especially when his express instructions were for a settlement of not less than 10 cents in the dollar.

715 **Second**, AFP procured the SPRs’ agreement to those sums by deceiving them as to material facts.¹⁴³⁰ The Court should accept Mr Lindholm’s unchallenged evidence that:

- (a) At a meeting at **2pm** on **10 November 2017**, Mark Elliott told Mr Lindholm and Mr Newman that AFP would only settle if the settlement deed entitled AFP to receive \$12.8 million plus GST for its commission and \$4.75 million plus GST for costs.
- (b) At that meeting, Mark Elliott made it clear that AFP’s commission was a “*take it or leave it*” figure.¹⁴³¹
- (c) Mark Elliott did not disclose to Mr Lindholm, and Mr Lindholm was not aware, of any of the irregularities and deficiencies in the fee arrangements and substantiation of the work performed by the Lawyer Parties in the Relevant Period as set out in the RLOI.¹⁴³²

716 On the basis of this evidence, and in the circumstances where AFP chose to call no evidence to rebut it, the Court should find that, in procuring the SPRs’ agreement to the Adverse Settlement Terms, AFP **intentionally withheld** the Undisclosed Matters from Mr Lindholm.

717 It is noteworthy that, at the conclusion of the first day in the Court of Appeal in the Botsman Appeal, Mark Elliott sought to persuade Mr Lindholm to remove Mr Redwood as the SPRs’ counsel on the premise that he and they had breached the terms of the Settlement Deed requiring the SPRs to support AFP’s claim for commission and costs.¹⁴³³ In the end, AFP’s bullying conduct amounted to nothing,

¹⁴²⁹ [SYM.001.001.4885] [SYM.001.001.4887].

¹⁴³⁰ Mr Lindholm’s June 2020 Affidavit [SPR.006.001.0003], [10] – [13], [21].

¹⁴³¹ Mr Lindholm’s 29 March 2019 Affidavit [SPR.006.001.0005], paras [15], [20]; Mr Lindholm’s 2 June 2020 Affidavit [SPR.006.001.0003], para [12].

¹⁴³² Mr Lindholm’s 2 June 2020 Affidavit [SPR.006.001.0003], para [12].

¹⁴³³ [SYM.002.002.7509] [SYM.001.002.1429].

because Mr Lindholm's evidence in this Court went unchallenged. The fact that those threats were made in an endeavour to cover the SPRs and their counsel into submission is a contravention of the CPA for which AFP should be sanctioned. Mr O'Bryan, Mr Symons and Alex Elliott were complicit in that conduct. These matters are addressed in **Section L** below.

718 **Third**, the Lawyer Parties made a combined effort to charge **\$3.5 million** in circumstances where it is plain from the documentary evidence that they hardly worked on the Bolitho Proceeding in the Relevant Period following the Partial Settlement. This is addressed in more detail in **Section F** below. **Notably**, Alex Elliott's direct recollection of events was that the Lawyer Parties had begun their trial preparation work only in the **second half of 2017**.¹⁴³⁴

719 **Fourth**, the exorbitant claim for costs was designed to justify the commission. The figures that Mark Elliott demanded in respect of costs and commission added up to \$19.2 million – approximately 30 per cent of the total settlement sum paid in respect of the two proceedings. Mark Elliott and Mr O'Bryan felt they were entitled to that sum by virtue of the Funding Agreement,¹⁴³⁵ notwithstanding that (1) not all group members signed the Funding Agreement, (2) the figure of 30 per cent specified in clause 12 of the Funding Agreement¹⁴³⁶ was expressed as a **maximum** figure referable to AFP's "financing" of the Case, and (3) AFP had provided virtually no "financing" for the Case. **Notably**, Alex Elliott admits that the Lawyer Parties' fees comprised the significant proportion of the legal costs and disbursements that AFP sought to recover from the Trust Co Settlement, **and upon which its claim for a commission was predicated**.¹⁴³⁷

720 **Fifth**, AFP and the Lawyer Parties sought to recover a commission on the **whole** of the settlement sum, including the part of the settlement sum that was properly treated as referable to the SPR Proceeding. They advanced a claim for a common fund order arguing that this prevented free riding by group members who did not sign the Funding Agreement, when in fact it was they who were free riding off the work undertaken by the SPRs, which was paid for by all debenture holders.

¹⁴³⁴ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23.

¹⁴³⁵ [SYM.002.001.0566].

¹⁴³⁶ [AFP.006.001.0014].

¹⁴³⁷ [PAR.080.001.0001], para [74(2)].

E3.2 The Adverse Settlement Terms

Evidence relating to settlement negotiations

- 721 The relevant documentary evidence is set out in **Attachment 1** to the Revised List of Issues. In addition, Mr Lindholm,¹⁴³⁸ Mr Crow,¹⁴³⁹ Mr Zita,¹⁴⁴⁰ and Alex Elliott¹⁴⁴¹ gave some evidence about the settlement negotiations and documentation of the settlement deed.
- 722 The Court should find as follows on the basis of that evidence:
- (a) On **9 November 2017**, the parties to the Trust Co Proceeding and the SPR Proceeding attended a mediation before Associate Justice Efthim. Mr Zita paid little attention to the mediation or the terms that were negotiated and documented to record the settlement.¹⁴⁴² In contrast, Alex Elliott followed the course of the mediation¹⁴⁴³ and was involved with the subsequent documentation of the settlement deed.¹⁴⁴⁴ Mark Elliott trusted and relied upon his own son, and not upon Mr Zita, to assist with documenting the deed.
 - (b) On **9 November 2017 at 6.55pm**, Mr Symons (on behalf of Mr Bolitho and the SPRs) sent an email to Clayton Utz offering to settle the claims in the proceeding for \$64 million on terms that included Trust Co supporting the application for settlement approval, *“including the plaintiff’s claims for legal fees and the litigation funder’s fee as agreed between the plaintiffs”*.¹⁴⁴⁵
 - (c) On **9 November 2017 at 8.17pm**, Clayton Utz counter-offered on terms that included *“An undertaking from Norman O’Bryan and Mark Elliott and their associated entities that they will not fund, assist, procure, encourage or otherwise be involved in any proceedings against Perpetual Limited in connection with Perpetual Limited not indemnifying Trust Co”*.¹⁴⁴⁶

¹⁴³⁸ Mr Lindholm’s 29 March 2019 Affidavit [SPR.006.001.0005], paras [10] – [20]; Mr Lindholm’s 2 June 2020 Affidavit [SPR.006.001.0003], paras [15] – [23].

¹⁴³⁹ Mr Crow’s May 2020 Affidavit [CCW.036.001.0098], paras [15] – [30]; transcript of hearing on 3 August 2020 [TRA.500.005.0001], 516:26-522:28.

¹⁴⁴⁰ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], paras [43.g], and [208] – [228].

¹⁴⁴¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1707:18-1710:12, 1752:7-21; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2073:12-2084:31.

¹⁴⁴² Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [228].

¹⁴⁴³ See, eg, transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1752:7-21.

¹⁴⁴⁴ See, eg, transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1708:1-16.

¹⁴⁴⁵ [SYM.002.001.3019].

¹⁴⁴⁶ [SYM.002.001.3019].

- (d) On **9 November 2017** at **10.10pm**, Mr O'Bryan emailed Mr Symons and Mark Elliott stating: *"Provided Mark can do a satisfactory and enforceable deal with Lindholm on the division of these spoils (which will be confirmed between them tomorrow), we can do this deal."*¹⁴⁴⁷
- (e) On **10 November 2017**, Mr Crow spoke with Mark Elliott twice by telephone. In the first call, Mark Elliott said that negotiations were continuing and there was a possibility of a settlement which would represent **10 cents in the dollar for each debenture holder. One cent represented approximately \$6.6 million,**¹⁴⁴⁸ **and 10 cents translated to a settlement of about \$65 million.**¹⁴⁴⁹ Mr Crow said he thought Mr Bolitho would give instructions to settle on that basis.¹⁴⁵⁰ In the second call, Mark Elliott said that a settlement looked likely and Mark Elliott would seek instructions from Mr Bolitho before agreeing to the settlement.¹⁴⁵¹
- (f) On **10 November 2017** at **5.20pm**, Mark Elliott emailed Mr Crow stating: *"We are agreed, its just come through. **The headline figure is approx.\$85 M and the debenture holders will get at least 10 cents each(possibly by Xmas). Can you please let LB know about the terms (and about his fee!)**"*. He forwarded an earlier email chain setting out the terms agreed with Trust Co, including *"**Trust Co will support the application for approval, including the plaintiffs' claims for legal fees and the litigation funder's fee as agreed between the plaintiffs**"*.¹⁴⁵² Mark Elliott's email was manifestly false. The "headline figure" was not \$85 million. **Mark Elliott did not inform Mr Crow or Mr Bolitho that the 10 cents in the dollar settlement sum was to be subject to deduction in respect of costs and commission,**¹⁴⁵³ **and neither Mr Crow nor Mr Bolitho were consulted about whether the whole settlement should be conditional upon approval of AFP's funding commission.**
- (g) On **13 November 2017**, Mr Crow spoke to Mr Bolitho. He said he had received a telephone call from Mr O'Bryan over the weekend to tell him that

1447 [SYM.001.001.6715].

1448 Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:11-13.

1449 Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 520:25-26.

1450 Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [17].

1451 Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [18].

1452 [BOL.001.001.0004].

1453 Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 522:16-20.

they had reached an agreement for settlement and that Mr Crow would be in touch with him to explain the agreement to him in detail. Mr Bolitho also said that Mr O'Bryan had explained the terms of the proposed settlement to him, and ***“he confirmed to me that he was happy to settle on the basis that the settlement sum represented not less than 10 cents in the dollar for all debenture holders”***.¹⁴⁵⁴

- (h) On **12 November 2017**, the SPR circulated a draft settlement deed which provided for the liquidators and Trust Co to instruct their legal representatives ***“to take all reasonable steps (consistent with their representatives’ professional obligations) to support BSLLP’s application for payment of 20% of the Settlement Sum; provided, however, that Bolitho and [AFP] acknowledge and agree that the terms of this Deed will continue to operate if the Court determines that [AFP] is entitled to payment of an amount less than 20% of the Settlement Sum.”***¹⁴⁵⁵
- (i) On **12 November 2017**, Mark Elliott, Mr O’Bryan and Mr Symons rejected those terms.¹⁴⁵⁶ They required the deed:
- (i) to provide for the liquidators and Trust Co to support AFP’s application for \$12.8 million plus GST by way of funding commission and \$4.75 million plus GST in legal costs;
 - (ii) to contain no qualification as to the professional obligations owed by the legal representatives acting for the liquidators and Trust Co;
 - (iii) to provide for the settlement deal to fail if the Court rejected AFP’s funding commission.
- (j) When Mr Redwood pushed back on the terms sought by AFP and the Lawyer Parties,¹⁴⁵⁷ Mark Elliott, Mr O’Bryan and Mr Symons decided upon

¹⁴⁵⁴ Mr Crow’s 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [20].

¹⁴⁵⁵ [SYM.001.001.2064] [SYM.001.001.2065].

¹⁴⁵⁶ [SYM.001.001.0894]; [SYM.001.003.1463] [SYM.001.003.1467]; [SYM.001.003.1182] [SYM.001.001.1420] [SYM.001.001.1722] [SYM.001.003.1182] [SYM.001.001.1420] [SYM.001.003.1182] [SYM.001.001.1420] [SYM.001.001.0929] [SYM.001.001.0933] [SYM.001.001.0894]; [SYM.001.003.0920] [SYM.001.003.0925] [SYM.001.003.0942] [SYM.001.001.0635]; [SYM.001.001.0492] [SYM.001.001.0494].

¹⁴⁵⁷ [SYM.001.002.2318] [SYM.001.002.2322].

a strategy whereby they would ignore him, and deal directly with Mr Lindholm and Maddocks.¹⁴⁵⁸

- (k) When Maddocks pushed back on the terms sought by AFP and the Lawyer Parties,¹⁴⁵⁹ Mark Elliott threatened to terminate the settlement discussions.¹⁴⁶⁰
- (l) Mark Elliott and the Lawyer Parties deliberately devised a term in which the obligation on the liquidators and Trust Co to support the claims for costs and commission would be triggered by the filing of a report from a “suitably qualified costs consultant”, which they protected under a contractual veil of confidentiality.¹⁴⁶¹
- (m) All this time, neither AFP nor the Lawyer Parties consulted Mr Bolitho or Mr Crow about the settlement negotiations that they were conducting with the SPRs. For instance, Mr Crow said he knew that there was a provision in the settlement deed which said that the claim for costs had to be supported by an independent cost consultant, but he did not know (because nobody told him) that the SPRs had insisted upon that clause.¹⁴⁶²
- (n) By **16 November 2017**, the SPRs agreed to the terms sought by AFP and the Lawyer Parties.¹⁴⁶³
- (o) Only then did Mark Elliott revert to Mr Bolitho for instructions. On **16 November 2017**, Mr Crow called Mark Elliott, *“who then told me that the SPRs still wanted to proceed against Insurance House, who had been Banksia's insurance brokers, and explained how the settlement would work if that claim did not settle. He told me that in those circumstances the class action would receive its share of the Trustee settlement, pay associated costs and expenses and then distribute to debenture holders 6 to 7 cents in the dollar and the liquidator would then keep his part of the money until*

¹⁴⁵⁸ [NOB.500.001.7618]; [SYM.001.002.2263] [SYM.001.002.2267]; [SYM.001.002.2146].

¹⁴⁵⁹ [SPR.003.013.0038] [SPR.003.013.0044] [SPR.003.013.0091]; [SPR.003.013.0097]; [AFP.001.001.2143].

¹⁴⁶⁰ [SPR.003.013.0085]; [SPR.003.013.0097]; [AFP.001.001.2143].

¹⁴⁶¹ [SYM.001.001.9152]; [SYM.001.001.8995] [SYM.001.001.8996] [SYM.001.001.9013]; [SYM.001.001.1970]; [SYM.001.001.1496] [SYM.001.001.2054].

¹⁴⁶² Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 529:8-15.

¹⁴⁶³ [SYM.001.001.8212] [SYM.001.001.8215].

settled with Insurance House and then distribute another 3 to 4 cents in the dollar".¹⁴⁶⁴

- (p) On **17 November 2017**, Mark Elliott sent Mr Crow a draft Settlement Deed.¹⁴⁶⁵
- (q) On **24 November 2017**, Clayton Utz on behalf of Trust Co circulated a further revised settlement deed, which substantially replicated the Adverse Settlement Terms devised by AFP and the Lawyer Parties.¹⁴⁶⁶ However, Trust Co sought to impose an obligation on AFP to negotiate in good faith if its funding commission was rejected by the Court. AFP and the Lawyer Parties required the provision to expressly reserve AFP's "*sole discretion*" to terminate the settlement if a satisfactory (to it) funding commission was not agreed.¹⁴⁶⁷
- (r) On **1 December 2017**, Mark Elliott sent Mr Crow a revised draft Settlement Deed.¹⁴⁶⁸
- (s) On **4 December 2017**, Mr Crow met with Mr Bolitho to review the Settlement Deed, and Mr Bolitho signed it.¹⁴⁶⁹

Relative roles of AFP, Mark Elliott, Alex Elliott and the Lawyer Parties in relation to the settlement

723 The Court should find that:

- (a) Mark Elliott controlled the settlement discussions. He purported to do so on behalf of Mr Bolitho and group members,¹⁴⁷⁰ but neither he nor the Lawyer Parties sought instructions from Mr Bolitho or group members about the position adopted by AFP and the Lawyer Parties in the settlement discussions (as set out in para 722 above).

¹⁴⁶⁴ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [21].

¹⁴⁶⁵ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [23]; [BOL.001.001.0010].

¹⁴⁶⁶ [SYM.001.001.4841] [SYM.001.001.4843] [SYM.001.001.4868] [SYM.001.001.4871].

¹⁴⁶⁷ [SYM.001.001.4837]; [SYM.001.001.4702] [SYM.001.001.4378]; [SYM.001.001.3649]; [SYM.001.001.2194].

¹⁴⁶⁸ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], para [24].

¹⁴⁶⁹ Mr Crow's 12 May 2020 Affidavit: [CCW.036.001.0098_2], paras [27] – [30]; Trust Co Settlement Deed [SYM.002.001.4695].

¹⁴⁷⁰ [AFP.001.001.2112] [AFP.001.001.2122]; [AFP.001.001.2145].

- (b) Mr Symons drafted the Adverse Settlement Terms.¹⁴⁷¹
- (c) Mr O'Bryan settled the Adverse Settlement Terms.¹⁴⁷²
- (d) Mark Elliott and Mr O'Bryan procured Mr Bolitho's agreement to the Adverse Settlement Terms.¹⁴⁷³
- (e) Alex Elliott reviewed the various iterations of the Settlement Deed,¹⁴⁷⁴ and knew of the Adverse Settlement Terms that were being proposed.¹⁴⁷⁵
- (f) Mr Zita/Portfolio Law had limited if any involvement in the settlement negotiations, but delegated responsibility for the settlement negotiations to Mr O'Bryan, Mr Symons and Mark Elliott/AFP and/or Alex Elliott.¹⁴⁷⁶

724 Prior to opening his case, Alex Elliott refused to concede that he had reviewed the various iterations of the Settlement Deed.¹⁴⁷⁷ However, that denial is contrary to the documentary evidence which clearly shows that he received the various iterations of the deed,¹⁴⁷⁸ and in the witness box, he conceded that he *did* review each iteration of the deed.¹⁴⁷⁹

¹⁴⁷¹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [59.a].
AFP, Alex Elliott and Mr Zita/Portfolio Law admit that Mr Symons drafted the terms: [PLE.020.001.0001], para [59.a]; [PAR.080.001.0001], para [59.a]; [PLE.070.001.0001_2], para [1].

¹⁴⁷² RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [59.a].
AFP, Alex Elliott and Mr Zita/Portfolio Law admit that Mr O'Bryan settled the terms: [PLE.020.001.0001], para [59.b]; [PAR.080.001.0001], para [59.b]; [PLE.070.001.0001_2], para [1].

¹⁴⁷³ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [59.b], [59.c], [59.d].
AFP, Alex Elliott and Mr Zita/Portfolio Law admit this, save that they say it was subject to advice from Mr Crow: [PLE.020.001.0001], para [59]; [PAR.080.001.0001], para [59]; [PLE.070.001.0001_2], para [1].

¹⁴⁷⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

¹⁴⁷⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:14-2078:24.

¹⁴⁷⁶ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [62].
AFP, Alex Elliott and Mr Zita/Portfolio Law admit that Mr Zita/Portfolio Law had limited if any involvement in the settlement negotiations: [PLE.020.001.0001], para [62]; [PAR.080.001.0001], para [62]; [PLE.070.001.0001_2], para [1].
Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:14-19 (Mr Zita/Portfolio Law concede that Mr Zita's "*principal failing*" was "*his failure to exercise sufficient independent judgment when acting for Mr Bolitho... he was guided and followed the instructions of Mr Elliott, Mr O'Bryan and Mr Symons*"); transcript of hearing on 14 August 2020 [TRA.500.008.0001], 834:26-852:14.

¹⁴⁷⁷ [PAR.080.001.0001], para [59.c].

¹⁴⁷⁸ See eg [SYM.001.001.4697]; [AFP.001.001.2053]; [SYM.001.001.0635]; [SYM.001.001.0894]; [SYM.001.001.8964]; [SYM.001.001.8995]; [SYM.001.002.1383]; [SYM.001.002.1553]; [SPR.500.001.5873]; [AFP.001.001.2141]; [AFP.001.001.2167]; [AFP.001.001.2170]; [SPR.003.013.0138]; [SYM.001.001.4837]; [SYM.001.001.3649].

¹⁴⁷⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1707:18-1709:3; 2075:2-2081:14, 2082:10-2083:26.

725 The Court should find that the limited involvement of Mr Zita/Portfolio Law in negotiating and documenting the Settlement Deed reflected the fact that Portfolio Law had effectively sub-contracted its role to Elliott Legal. Alex Elliott, rather than Mr Zita/Portfolio Law, reviewed the various iterations of the Settlement Deed.¹⁴⁸⁰

E3.3 Failure to properly advise Mr Bolitho and group members

726 The negotiations and discussions with respect to the settlement deed were conducted almost entirely by Mark Elliott, with the assistance from Mr O'Bryan and Mr Symons, who abused their privileged position as counsel for the group members to advance the interests of AFP and their own interests in recording the substantial claims for costs and commission.

727 Mr Zita was hardly involved in the negotiations at all. He was not copied to most of the relevant emails. He was content to leave everything to Mark Elliott, Mr O'Bryan and Mr Symons.¹⁴⁸¹ It is a remarkable position for the solicitor for the class to seek no involvement in the negotiations upon which the class members' rights may be settled.¹⁴⁸²

728 Mr Zita accepted that he abrogated his responsibilities as solicitor for the class.¹⁴⁸³ To the extent that he was involved, it was simply to send the correspondence that he was told by the others to send. The Court should find, on the evidence, that Mr Zita/Portfolio Law's true role was to enable Mark Elliott to continue controlling the litigation and the settlement negotiations. Mr Zita never sought to properly and independently represent the group members, even though he knew that the Court had ruled that Mark Elliott could not continue acting because of his financial interest in the litigation.¹⁴⁸⁴

729 Mr Zita agreed that he was not aware of any discussion with Mr Bolitho in which Mr Bolitho was told what terms would be included in the settlement deed in respect of AFP's claims for costs and commission.¹⁴⁸⁵ Mr Zita claimed that he read the draft settlement deed that Mr Newman circulated, though not in detail.¹⁴⁸⁶ He said

¹⁴⁸⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

¹⁴⁸¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 816:1-4 (Mr Zita referred to his reliance on counsel, but the documentary evidence shows that in fact Mr Elliott was in charge of the settlement discussions); 826:23-29.

¹⁴⁸² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 821:25-823:9.

¹⁴⁸³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 816:5-21.

¹⁴⁸⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 823:10-22.

¹⁴⁸⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 834:23-25.

¹⁴⁸⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 814:17-19.

that he did not have any discussions with Mr Bolitho, Mark Elliott, Mr O'Bryan or Mr Symons about the terms proposed by the SPRs¹⁴⁸⁷ compared with the terms sought by AFP.¹⁴⁸⁸

- 730 The Court should reject Mr Zita's suggestion that he gave consideration to whether the terms sought by AFP were in the interests of Mr Bolitho and group members.¹⁴⁸⁹ It is plain from the totality of the documentary evidence and Mr Zita's own evidence¹⁴⁹⁰ that he brought no independent judgment to the terms of the Trust Co Settlement Deed. To contend that Mr Zita brought any independent mind to the consideration of any aspect of the conduct of this litigation is farcical when one has regard to the totality of the documentary evidence and the evidence that Mr Zita gave in chief and in cross-examination. The undeniable conclusion drawn from that evidence is that Mr Zita had never before conducted a class action, and was content to sit back and be directed at every turn by AFP/Elliott Legal, Mr O'Bryan, and Mr Symons.
- 731 Mr Zita sought to defend his position by claiming that it was Mr Crow's responsibility to advise Mr Bolitho about the settlement terms.¹⁴⁹¹ Mr Crow was not the solicitor on the record. He was not involved in the negotiations or discussions about the settlement deed. He did not see the competing terms advanced by the SPRs. He had limited knowledge of the litigation. It is extraordinary for Mr Zita to suggest that he was relieved of his responsibilities as solicitor on the record because Mr Bolitho had a personal solicitor who was separately providing him with some advice.¹⁴⁹²

E3.4 Failure to trigger the processes in the Funding Agreement

- 732 Clause 13.3 of the Funding Agreement¹⁴⁹³ provides:

“Except in relation to Settlement, which is dealt with below, if the Lawyers notify [AFP] 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 [AFP] and those they owe to the Plaintiff, the Plaintiff and [AFP] agree that, in order to resolve that conflict, the Lawyers may:

¹⁴⁸⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 814:20-815:12.

¹⁴⁸⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 816:31-818:2.

¹⁴⁸⁹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 819:13-820:30; 834:26-29.

¹⁴⁹⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [218].

¹⁴⁹¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 818:5-819:3.

¹⁴⁹² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 835:10-31; T844:28-845:5.

¹⁴⁹³ [AFP.006.001.0014].

13.3.1 seek instructions from the Plaintiff, whose instructions will override those that may be given by [AFP];

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 [AFP's] interests; and

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

733 Clause 13.5 of the Funding Agreement¹⁴⁹⁴ provides:

"In recognition of the fact that [AFP] has an interest in the Resolution Sum, if the Plaintiff:

13.5.1 wants to Settle the Class Action for less than [AFP] considers appropriate; or

13.5.2 does not want to Settle the Class Action when [AFP] considers it appropriate to do so,

then the Plaintiff agrees that [AFP] 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."

734 Clause 13.6 of the Funding Agreement¹⁴⁹⁵ provides:

"If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and [AFP] 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."

735 Clause 13.6 thereby recognised the important role of counsel for the class in circumstances where the interests of group members diverged from the interests of AFP.

736 These terms offered group members the protection that, in the event there was a conflict between their interests and the interests of AFP, their "Lawyers" would ensure that their interests prevailed. The Funding Agreement defined the "Lawyers" to encompass Portfolio Law; and plainly, the protections afforded to the group members under clauses 13.3, 13.5 and 13.6 of the Funding Agreement could and should have been exercised by Portfolio Law and/or by counsel. That was the contractual expectation that group members had of their lawyers.

¹⁴⁹⁴ [AFP.006.001.0014].

¹⁴⁹⁵ [AFP.006.001.0014].

737 As noted above, AFP, Alex Elliott and Mr Zita/Portfolio Law admit that AFP and the Lawyer Parties did not take steps to trigger (or advise Mr Bolitho or any other group member to take steps to trigger) clauses 13.3 or 13.5 of the Funding Agreement.¹⁴⁹⁶

Documentary evidence of discussions between **Mark Elliott, Mr O'Bryan** and Mr Symons about the conflict provisions

738 Internal emails exchanged between Mr O'Bryan and Mr Symons in June 2018 reveal that Mr Symons knew that, as counsel for the class, he and Mr O'Bryan had the power and duty to protect the class in relation to AFP's unreasonable conduct in the pursuit of its own interests, which he flagged with Mr O'Bryan.¹⁴⁹⁷ Mr O'Bryan scornfully but unconvincingly refuted those concerns.¹⁴⁹⁸ Mr O'Bryan and Mr Symons did not attempt to discharge their duties to protect group members in the face of the obvious conflict between their interests and AFP's interests. When Mr Symons thought that group members' interests might be prejudiced by the actions of AFP, he did not ensure that his client was properly advised, but merely suggested that AFP use a different lawyer to take those actions.¹⁴⁹⁹

Mr Zita's evidence

739 Mr Zita conceded that he owed duties under the Funding Agreement, not only to Mr Bolitho but also to other group members.¹⁵⁰⁰ He accepted that the Funding Agreement conferred on him an important duty to protect the group members in relation to matters where the interests of group members diverged from the interests of AFP.¹⁵⁰¹

740 Though Mr Zita conceded he knew of these provisions, he said that he did not turn his mind to whether these provisions might be called into play in circumstances where AFP sought to make the Trust Co settlement conditional upon approval of the payments to AFP.¹⁵⁰² He gave the following answers for his failure to do so:

(a) He left everything to Mark Elliott, Mr O'Bryan and Mr Symons.¹⁵⁰³

¹⁴⁹⁶ [PLE.020.001.0001] and [PAR.080.001.0001], para [63.c].

¹⁴⁹⁷ [SYM.001.001.2229]

¹⁴⁹⁸ [SYM.001.001.2229]

¹⁴⁹⁹ [SYM.001.001.2146].

¹⁵⁰⁰ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 841:13-842:18.

¹⁵⁰¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 844:24-27.

¹⁵⁰² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 843:9-844:23.

¹⁵⁰³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 843:16-18, 846:14-16.

- (b) He thought that group members' interests were sufficiently protected from Mark Elliott because Mr Bolitho received advice from Mr Crow.¹⁵⁰⁴
- (c) He relied on the fact that the settlement was subject to court approval.¹⁵⁰⁵

741 Mr Zita said that he did not read counsel's opinions before the hearing before Justice Croft.¹⁵⁰⁶ He therefore had no idea whether Justice Croft's attention was drawn to matters that called for scrutiny in the Court's protective jurisdiction. He conceded that Justice Croft's attention "*probably*" was not drawn to the fact that Mark Elliott had taken the position in the settlement negotiations that Mr Bolitho would not settle unless AFP's claim for commission was approved.¹⁵⁰⁷

742 The Court should find that the failure of Mr Zita/Portfolio Law to identify and properly manage the conflict that clearly arose at the time of the Trust Co Settlement between the interests of AFP and the interests of the group members was a breach of the Paramount Duty, which was all the more egregious because Mr Zita/Portfolio Law showed not the slightest interest in involving himself in the documentation of the settlement terms, totally abdicating his duties to the group members, **despite** knowing that the Court in Bolitho No 4 had expressed a specific concern relating to the situation where **Mark Elliott had too much control** over the settlement negotiations as both solicitor and funder.¹⁵⁰⁸

Alex Elliott's evidence

743 Alex Elliott reluctantly conceded that he must have read the conflict provisions in the Funding Agreement only when he was confronted with documentary evidence revealing that he had analysed those clauses in April 2018 in the context of AFP v Botsman.¹⁵⁰⁹ Internal emails he exchanged with his father on 14 June 2018 reveal that he was acutely aware of the conflict between AFP's interests and the interests of the group members.¹⁵¹⁰ He said in cross-examination that he could appreciate the conflict between the interests of AFP and the interests of group members in mid 2018 in the context of AFP's threat to terminate the settlement because he

¹⁵⁰⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 844:28-845:1.

¹⁵⁰⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:10-12; 846:3-6.

¹⁵⁰⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 845:23-846:6.

¹⁵⁰⁷ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 847:5-7.

¹⁵⁰⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 823:6-830:29; Bolitho No 4 [ATH.600.600.0001], paras [23], [42], [53].

¹⁵⁰⁹ [AEL.100.030.0001];

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2048:29-2049:23.

¹⁵¹⁰ [AEL.100.058.0001].

*“had the benefit of, I guess, a counter argument from another party”*¹⁵¹¹ (namely Mrs Botsman and her son Mr Botsman who acted for her). Alex Elliott said that the Trust Co Settlement *“was just a robust negotiation between grown men”* and his involvement in the settlement deed was as an observer without much to contribute.¹⁵¹²

744 It may be accepted that Alex Elliott was a junior solicitor in connection with the Trust Co Settlement Deed. But he was fully qualified and admitted to practice. In circumstances where (as the Court should find):

- (a) Alex Elliott assumed an adumbral role of assisting in the conduct of the litigation and assisting AFP and Elliott Legal in their business;
- (b) Mr Zita/Portfolio Law acted as little more than a post box solicitor;
- (c) Elliott Legal continued to act as the “real” solicitor and Alex Elliott was his father’s right hand man;¹⁵¹³
- (d) it must have been evident to Alex Elliott that Mr Zita was not consulted about or even copied to the various iterations of the Settlement Deed,

the Court should also find that Alex Elliott owed duties to the group members to ensure that the litigation funder and Lawyer Parties adhered to the litigation funder’s policy in relation to conflicts of interest.

745 It is not unreasonable to expect that a practising solicitor should be capable of identifying conflicts of interest, and nor should the Court accept that the conflict between the interests of AFP and the interests of the group members at the time of the Trust Co Settlement was difficult to identify except with the benefit of hindsight. It was a glaring conflict of the kind that was explicitly recognised in AFP’s Conflicts Management Policy and in the Funding Agreement. Having regard to the fact that the class action concerned the rights of 16,000 group members, the Court should find that Alex Elliott breached his Paramount Duty.

¹⁵¹¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2077:11-16, 2081:6-9.

¹⁵¹² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2077:16-2079:16.

¹⁵¹³ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

F. OVERCHARGING CONTRAVENTIONS

F1. Overview of contraventions

746 By their conduct in connection with seeking to recover from group members fees for Mr O'Bryan and Mr Symons that exceeded a fair and reasonable amount **(Overcharging Contraventions)**:¹⁵¹⁴

- (a) Mr O'Bryan and Mr Symons contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that they each represented to any person who read their invoices that:
 - (i) all the work charged by Mr O'Bryan and Mr Symons had been undertaken by them; and
 - (ii) they were entitled to charge fees at the rates charged,
 when those matters were untrue;
- (b) AFP and Alex Elliott contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that they encouraged, assisted or acquiesced in Mr O'Bryan and Mr Symons charging for fees that exceeded a fair and reasonable amount;
- (c) Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive, in that it permitted a representation to be conveyed to Mr Trimbos, the Court, and any other person who read the invoices of Mr O'Bryan and Mr Symons that:
 - (i) the invoices had been issued monthly to Mr Zita/Portfolio Law;
 - (ii) Mr Zita/Portfolio Law had satisfied themselves as to the fees charged;
 - (iii) the invoices had been paid by Mr Zita/Portfolio Law,
 when those matters were untrue;

¹⁵¹⁴ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], paras [66], [71] and [72].

- (d) AFP, Alex Elliott, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly, in that they sought recovery of the fees claimed by Mr O'Bryan and Mr Symons from Mr Bolitho and other group members in circumstances where:
- (i) they must have known the fees were excessive, or alternatively, where they had no honest belief that the fees were reasonable; and
 - (ii) they did so with the purpose and/or effect of justifying AFP's funding commission;
- (e) each of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law, Alex Elliott and AFP contravened the overarching obligation to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the Bolitho Proceeding were reasonable and proportionate;
- (f) each of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law, Alex Elliott and AFP contravened the Paramount Duty to the Court by failing to act professionally, fairly, and with integrity in connection with the fees they sought to recover (through the processes of the Court) from the group members whose claims they represented.

F2. Concessions and admissions

747 Prior to trial, AFP made various admissions relevant to Section F of the RLOI. Significantly, it admitted the following:

- (a) AFP entered into the Fee Arrangements with Mr O'Bryan and Mr Symons pursuant to which Mr O'Bryan and Mr Symons were not to deliver invoices or fee slips until after any settlement with Trust Co as alleged in paragraph 47 of the RLOI.¹⁵¹⁵
- (b) AFP's Conflict Management Policy and Disclosure Statement stated that AFP would monitor costs and budgets,¹⁵¹⁶ but AFP did not ask Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law to provide budgets or cost estimates or any documentary evidence of costs incurred from time to time.¹⁵¹⁷

¹⁵¹⁵ [PLE.020.001.0001], para [70.b].

¹⁵¹⁶ [AFP.006.001.0001] at .0007, para [3.10].

¹⁵¹⁷ [PLE.020.001.0001], para [70.a]; [CBP.001.002.1535].

- (c) Mark Elliott/AFP and Mr O’Bryan considered that AFP was entitled to 30 per cent of any settlement.¹⁵¹⁸
- (d) On 9 November 2017, in the course of negotiating the settlement with Trust Co, Mr O’Bryan stated in an email to Mr Symons, copied to Mark Elliott: *“Provided Mark can do a satisfactory and enforceable deal with Lindholm on the division of these spoils (which will be confirmed between them tomorrow), we can do this deal”*.¹⁵¹⁹
- (e) On 10 November 2017, AFP demanded that the SPR and Trust Co agree to support a claim by AFP to recover \$4.75 million plus GST in respect of legal costs, in circumstances where AFP had received no invoices from Mr O’Bryan, Mr Symons or Mr Zita/Portfolio Law.¹⁵²⁰
- (f) The figure of \$12.8 million plus GST for commission and \$4.75 million plus GST for legal costs amounted to a total sum of \$19.3 million.¹⁵²¹ (AFP does **not** admit the obvious fact that this was closely proximate to 30 per cent of the total settlement sum, to which Mark Elliott felt he was entitled).
- (g) On 19 November 2017 at 5.17pm, Mark Elliott invited Mr Symons to submit invoices for 200 days’ work.¹⁵²² (AFP does **not** admit the obvious reality that Mark Elliott had no belief that Mr Symons had done work for the 200 days).
- (h) On 19 November 2017 at 5.19pm, Mark Elliott emailed Mr O’Bryan stating *“Norm, I need your invoices and a table of their totals on a month by month basis from 1/7/16 to Xmas 2017. I confirm that they total \$2.65M plus GST”*.¹⁵²³ (AFP does **not** admit the obvious reality that Mark Elliott had no belief that Mr O’Bryan had undertaken \$2.65 million worth of work).
- (i) Between 14 and 15 November 2017, Mr O’Bryan together with his secretary Florence Koh worked on producing Mr O’Bryan’s draft invoices and fee slips for the Relevant Period. They prepared a draft which quantified Mr

¹⁵¹⁸ [PLE.020.001.0001], para [68.b]; [SYM.001.002.2689] [SYM.001.002.2690] at point [2.c]; Transcript of hearing in AFP v Botsman on 25 May 2018 [CCW.005.003.0001], p142-143; [ABL.001.0594.00006] at p.3.

¹⁵¹⁹ [PLE.020.001.0001], para [68.c]; [SYM.001.001.6715].

¹⁵²⁰ [PLE.020.001.0001], para [70.d], [68.d] and [68.e]; [SYM.001.001.4885] [SYM.001.001.4887].

¹⁵²¹ [PLE.020.001.0001], para [68.f].

¹⁵²² [PLE.020.001.0001], para [68.h].

¹⁵²³ [PLE.020.001.0001], para [68.i]; [NOB.500.001.7553].

O'Bryan's fees at approximately \$1,049,300.¹⁵²⁴ On 19 November 2017 at 7.09pm, Mr O'Bryan emailed those draft invoices and fee slips to Mark Elliott. Mark Elliott replied to that email stating: "*Suggest you up your rate to \$15K per day.*"¹⁵²⁵

- (j) Thereafter, Mr O'Bryan instructed his secretary Ms Koh to calculate his fees at different rates for his consideration which he shared with Mark Elliott.¹⁵²⁶
- (k) AFP knew that Mr O'Bryan's first draft of his invoices and fee slips quantified his fees at only **\$1,049,300**. In response to the draft invoices that AFP received from Mr O'Bryan quantifying Mr O'Bryan's fees at that sum, AFP invited Mr O'Bryan to charge \$15,000 per day, and AFP and Mr O'Bryan discussed various other ideas for claiming more fees. AFP knew that neither AFP nor Portfolio Law had entered into a written fee agreement with Mr O'Bryan permitting Mr O'Bryan to charge his fees at that rate (or at the rate of \$11,000 plus GST from 1 June 2016 and \$12,500 plus GST per day from 1 July 2017).¹⁵²⁷
- (l) AFP knew that, in November 2017, Mr O'Bryan instructed his secretary to alter his fee rate for the whole of the Relevant Period to a GST-exclusive rate, with the effect of increasing his fees for the Relevant Period by 10 per cent.¹⁵²⁸
- (m) AFP invited Mr O'Bryan to charge a \$200,000 cancellation fee on account of the matter settling,¹⁵²⁹ in circumstances where there is no evidence that any fee agreement with Mr O'Bryan permitted him to charge a \$200,000 cancellation fee.¹⁵³⁰
- (n) AFP requested Mr Symons to charge a \$100,000 cancellation fee on account of the matter settling,¹⁵³¹ in circumstances where there is no

¹⁵²⁴ [PLE.020.001.0001], para [68.j]; [NOB.500.001.7416].

¹⁵²⁵ [PLE.020.001.0001], para [68.j]; [NOB.500.001.7504].

¹⁵²⁶ [PLE.020.001.0001], para [68.k]; [NOB.500.001.7427] [NOB.500.001.7431] [NOB.500.001.7416] [NOB.500.001.7421] [NOB.500.001.7435] [NOB.500.001.7438].

¹⁵²⁷ [PLE.020.001.0001], para [68.k].

¹⁵²⁸ [PLE.020.001.0001], para [68.l].

¹⁵²⁹ [NOB.500.005.2262].

¹⁵³⁰ [PLE.020.001.0001], para [70.l].

¹⁵³¹ [SYM.001.003.0235].

evidence that any fee agreement with Mr Symons permitted him to charge a \$100,000 cancellation fee.¹⁵³²

- (o) AFP requested Mr Symons to charge his fees at the rate of \$450 per hour / \$4,500 per day¹⁵³³ when Mr Symons had not given notice of any increase in his fees to such a rate.¹⁵³⁴
- (p) On 24 November 2017, Mark Elliott provided the Banksia Expenses spreadsheet to Mr Trimbos, under cover of a letter which said that the schedule was “*a schedule of disbursements incurred by Mr Bolitho and paid by BSLLP directly on his behalf*”.¹⁵³⁵
- (q) Mr O'Bryan's fees were not calculated and charged in accordance with the O'Bryan/Portfolio Law July 2016 Costs Agreement (being an agreement prepared by Mr O'Bryan in July 2016 but which he dated December 2014 and issued to AFP on 1 July 2016). That Costs Agreement specifies that Mr O'Bryan's fees would be charged at the rate of \$990 per hour or \$9,900 per day including GST. Mr O'Bryan's fees were not calculated at those rates.¹⁵³⁶
- (r) Even assuming that Mr O'Bryan could charge fees at the rates of \$11,000 per day (GST inclusive) from 30 May 2016 as per his backdated 30 May 2016 fee agreement, he did not calculate and charge his fees at that rate. Rather, he calculated and charged his fees at the rate of \$11,000 per day plus GST from 1 June 2016.¹⁵³⁷
- (s) Mr Symons' fees for the 2017 calendar year were charged at rates that exceeded the rate he was entitled to charge pursuant to the Symons/Portfolio Law February 2015 Costs Agreement.¹⁵³⁸
- (t) AFP was involved in all aspects of the Bolitho Proceeding in the Relevant Period.¹⁵³⁹

¹⁵³² [PLE.020.001.0001], para [70.m].

¹⁵³³ [SYM.001.003.0235].

¹⁵³⁴ [PLE.020.001.0001], para [70.n].

¹⁵³⁵ [PLE.020.001.0001], para [82]; [AFP.001.001.2226] [AFP.001.001.2227] [AFP.001.001.2230]

¹⁵³⁶ [PLE.020.001.0001], para [68.z].

¹⁵³⁷ [PLE.020.001.0001], para [68.aa].

¹⁵³⁸ [PLE.020.001.0001], para [68.bb].

¹⁵³⁹ [PLE.020.001.0001], para [70.h].

- (u) AFP knew that the O’Bryan December 2017 Costs Agreement and the Symons December 2017 Cost Disclosure Documents had been created in December 2017 and not at the times stated or implied by those documents.¹⁵⁴⁰
- (v) A large proportion of the fees of each of Mr O’Bryan and Mr Symons for the Relevant Period relates to reading documents.¹⁵⁴¹
- (w) At the First Approval Application, Mr O’Bryan and Mr Symons submitted to the court that the evidence was “a joint exercise”,¹⁵⁴² that “it was beneficial for us to cooperate with the liquidators throughout the preparation”,¹⁵⁴³ that “there was the utmost coordination throughout, in particular in relation to the preparation and the filing of all the evidence”,¹⁵⁴⁴ when the evidence of the SPRs¹⁵⁴⁵ is that Mr Bolitho’s legal representatives had only limited involvement in the preparation of the evidence.¹⁵⁴⁶
- (x) Mr Symons has said¹⁵⁴⁷ that his principal work in the period from July 2017 to October 2017 (a four month period when he charged \$365,000 in total) was “*reviewing the extensive documents produced as part of discovery in the proceeding, and preparing an index for the court book in the proceeding*”.¹⁵⁴⁸ AFP knew that Mark Elliott had already recovered fees for hundreds of hours of work for reviewing discovery out of the proceeds of the Partial Settlement, including for review of the “Liquidators’ Court Book” and the “Receivers’ Court Book”.¹⁵⁴⁹
- (y) The invoices issued by Mr O’Bryan and Mr Symons exhibited to the Third Trimbo Report were addressed to Mr Zita/Portfolio Law, and appeared as if they had been issued to him on a monthly basis and (at least in the case of Mr O’Bryan’s fees) had been paid by him.¹⁵⁵⁰

¹⁵⁴⁰ [PLE.020.001.0001], para [70.c].

¹⁵⁴¹ [PLE.020.001.0043], para [68.r].

¹⁵⁴² Transcript of hearing on 30 January 2018 [SYM.001.001.5122], 5:13.

¹⁵⁴³ Transcript of hearing on 30 January 2018 [SYM.001.001.5122], 5:20-22.

¹⁵⁴⁴ Transcript of hearing on 30 January 2018 [SYM.001.001.5122], 5:26-28.

¹⁵⁴⁵ Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001], paras [88]-[90].

¹⁵⁴⁶ [PLE.020.001.0001], para [68.u].

¹⁵⁴⁷ [AFP.005.001.1420].

¹⁵⁴⁸ [PLE.020.001.0001], para [68.s].

¹⁵⁴⁹ [PLE.020.001.0001], para [70.i].

¹⁵⁵⁰ [PLE.020.001.0001], para [72.a].

- (z) This conveyed the false impression to the Court and anyone else reading the report that Mr Zita/Portfolio Law had satisfied themselves as to the fees charged, and that in the case of Mr O'Bryan, the invoices had been paid by Mr Zita/Portfolio Law (**Solicitor Costs Scrutiny Representation**).¹⁵⁵¹
- (aa) Mr Zita/Portfolio Law filed the report with the exhibits and did nothing to correct the Solicitor Costs Scrutiny Representation.¹⁵⁵²
- (bb) Mr Zita/Portfolio Law failed to take any steps to satisfy himself that the fees charged by Mr O'Bryan and Mr Symons were fair and reasonable.¹⁵⁵³
- (cc) Mr Zita/Portfolio Law made no enquiries about the costs charged by Mr O'Bryan and Mr Symons.¹⁵⁵⁴
- (dd) The rates charged by Mr Symons exceeded the rates set out in the February 2015 Symons/Portfolio Law Costs Agreement which Mr Zita/Portfolio Law had received.¹⁵⁵⁵
- (ee) Mr Symons had not notified Mr Zita/Portfolio Law of any increase in his rates (save insofar as the First Trimbo's Report stated that Mr Symons had increased his rates to \$275/hour (including GST) from 1 January 2016).¹⁵⁵⁶
- (ff) Mr Zita/Portfolio Law did nothing to protect the interests of Mr Bolitho or group members in respect of the fees charged by Mr O'Bryan and Mr Symons.¹⁵⁵⁷

748 However, AFP continued to deny the core allegation that Mr O'Bryan and Mr Symons charged more than a fair and reasonable amount, or that AFP procured and/or encouraged them to do so.¹⁵⁵⁸

749 In their opening submissions filed in July 2020, AFP submitted that *"the lawyer parties have deposed to having done work, and there is a large volume of documentary evidence demonstrating that work was done"* (ie, the 46 folders, which if AFP had examined in the same way that the Contradictors had examined

¹⁵⁵¹ [PLE.020.001.0001], para [72.b].

¹⁵⁵² [PLE.020.001.0001], para [72.c].

¹⁵⁵³ [PLE.020.001.0001], para [72.d].

¹⁵⁵⁴ [PLE.020.001.0001], para [72.e].

¹⁵⁵⁵ [PLE.020.001.0001], para [72.f].

¹⁵⁵⁶ [PLE.020.001.0001], para [72.g].

¹⁵⁵⁷ [PLE.020.001.0001], para [72.h].

¹⁵⁵⁸ [PLE.020.001.0001], para [68].

would have discovered to be patently false).¹⁵⁵⁹ On the basis that Mr O’Bryan and Mr Symons continued to deny the allegation of overcharging, AFP continued to press for their costs.¹⁵⁶⁰ AFP submitted that *“the precise sum of costs”* payable to the Lawyer Parties *“should be determined after the Court makes its findings, whether by taxation or reference to the Costs Court or after further evidence as to quantum”*.¹⁵⁶¹

750 On 4 August 2020, AFP abandoned its application for referral to the Costs Court.¹⁵⁶²

751 Mr O’Bryan and Mr Symons now offer no defence to the allegations in the RLOI dated 21 July 2020, and do not contest findings being made against them on the basis of those allegations.¹⁵⁶³ They have expressly abandoned any claim for unpaid fees.¹⁵⁶⁴

752 AFP has likewise now abandoned any claim for the fees of Mr O’Bryan and Mr Symons.¹⁵⁶⁵ AFP did not seek to call Mr O’Bryan or Mr Symons as witnesses in its own case, and it did not seek to tender Mr O’Bryan’s 46 hard copy folders.

753 In circumstances where the conduct of Mr O’Bryan and Mr Symons in relation to fees was central to the allegations of impropriety against AFP and the Lawyer Parties in the remitter, AFP, Mr O’Bryan, and Mr Symons should be taken to have conceded that there was no proper basis for the fees they sought to recover from the Trust Co Settlement.

754 It causes one to ponder about the complicit nature of the understanding or arrangement between Mr O’Bryan, Mr Symons, and AFP, whereby each agreed to hold out for the payment of counsel’s fees until the last possible moment, which saw each of them capitulate in early August 2020, when neither a mediation nor a settlement appeared possible. Each of them has always been cognisant of the true facts, but would appear to have been determined to force the Contradictors to

¹⁵⁵⁹ AFP’s opening submissions [SBM.020.002.0001], paras [80] and [89].

¹⁵⁶⁰ AFP’s opening submissions [SBM.020.002.0001], paras [80] and [89].

¹⁵⁶¹ AFP’s opening submissions [SBM.020.002.0001], para [2.3].

¹⁵⁶² Transcript of hearing on 4 August 2020 [TRA.500.005.0001], 540:17-20.

¹⁵⁶³ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

¹⁵⁶⁴ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

¹⁵⁶⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 665:25-666:4.

prove what they always knew. That conduct is the very conduct the CPA was designed to stamp out.¹⁵⁶⁶ The Court should reject AFP's submission¹⁵⁶⁷ that it was in no position to make admissions and concessions until after Mr O'Bryan and Mr Symons publicly capitulated. It was Mark Elliott who invited Mr O'Bryan and Mr Symons to charge fees that he determined based on a "*division of the spoils*" (including cancellation fees). And even after Mark Elliott's death, AFP inexplicably continued to maintain its claim for legal costs, only seeking an updated report from Mr Trimbos shortly prior to the trial. It should be borne in mind that AFP is no ordinary litigant. AFP was a litigation funder and a professional user of the Court's services.

755 As to Mr Zita/Portfolio Law:

- (a) Mr Zita conceded in his affidavit filed in April 2020 that he did not scrutinise the costs sought to be recovered.¹⁵⁶⁸
- (b) At trial, Mr Zita/Portfolio Law adopted AFP's admissions, save that Mr Zita/Portfolio Law denied making the Solicitor Costs Scrutiny Representation and/or failing to correct that representation.¹⁵⁶⁹

756 Prior to opening his case, Alex Elliott largely adopted AFP's admissions as to the allegations made against AFP and the Lawyer Parties, but did not make any admissions as to his own complicity in any wrongdoing.¹⁵⁷⁰ **Alex Elliott made an important additional admission.** He admits that the fees of the Lawyer Parties comprise the significant proportion of the legal costs and disbursements that AFP has sought to recover from the Settlement Sum, **and upon which its claim for commission is predicated.**¹⁵⁷¹

757 Under cross-examination, Alex Elliott conceded that:

- (a) His father did not ever tell him that he had scrutinised the fee slips of the Lawyer Parties for the purposes of the Trust Co Settlement Approval Application before it was approved by Justice Croft.¹⁵⁷²

¹⁵⁶⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010.
¹⁵⁶⁷ AFP's opening submissions [SBM.020.002.0001], paras [80] and [89].
¹⁵⁶⁸ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [42].
¹⁵⁶⁹ [PLE.070.001.0001_2], para [1.ff].
¹⁵⁷⁰ [PAR.080.001.00001], paras [66] – [74].
¹⁵⁷¹ [PAR.080.001.00001], paras [74].
¹⁵⁷² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2162:26-29.

- (b) Alex Elliott did not review the fee slips to scrutinise the fees sought to be recovered by the Lawyer Parties.¹⁵⁷³
- (c) After issues arose in the Botsman Appeal as to whether the legal costs claimed by AFP and the Lawyer Parties were excessive, Alex Elliott did not revisit the fee slips or stop to wonder about the quantum of the legal fees charged.¹⁵⁷⁴
- (d) **To this day, he still has not read the fee slips.**¹⁵⁷⁵

758 These concessions are significant to the allegation that Alex Elliott contravened the overarching obligation to act honestly, in that he assisted AFP to advance a claim for recovery of the fees claimed by Mr O'Bryan and Mr Symons from Mr Bolitho and group members in circumstances where **he had no honest belief that the fees were reasonable.**¹⁵⁷⁶

F3. **The excessive fee claims made by Mr O'Bryan and Mr Symons**

759 In or around late November 2017 and early December 2017, Mr O'Bryan and Mr Symons issued invoices claiming payment for approximately **\$3.4 million** in legal costs in respect of the Relevant Period.

760 The Court should find that the fee claims were grossly excessive.

F3.1 The "division of the spoils" approach to legal costs

761 As set out in paragraphs 554 to 623 above, the evidence demonstrates that:

- (a) the fees to be charged by Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law was advanced on the basis of a sum that would "*divide the spoils*"¹⁵⁷⁷ of the Trust Co Settlement and derivatively support AFP's claim for commission, rather than on the basis of defensible time records and hourly rates;
- (b) Mark Elliott invited Mr O'Bryan and Mr Symons to submit bills for the sums charged by them in respect of the Relevant Period, and they thereafter fabricated their bills to support those fee targets.

¹⁵⁷³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:15.

¹⁵⁷⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1994:13-29.

¹⁵⁷⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2165:12-16.

¹⁵⁷⁶ RLOI [PLE.010.005.0001], para [73.d].

¹⁵⁷⁷ [SYM.001.001.5479] at .5482.

762 This evidence is inconsistent with a conclusion that the fees charged by Mr O’Bryan and Mr Symons could have been fair and reasonable.

F3.2 Enormous fees for reading documents

763 Large parts of the fees claimed by Mr O’Bryan and Mr Symons are for reading documents. About half of Mr O’Bryan’s charges relate to “*reviewing discovered documents*” and various other sundry charges for reading documents.¹⁵⁷⁸ A very significant proportion of Mr Symons’ charges relate to “*reviewing*” the discovery, witness statements, witness outlines, and expert reports. Evidence of work product is conspicuously absent.

764 The fee slips of Mr O’Bryan and Mr Symons sought to promote a narrative involving each of them sitting in their chambers, studying the 21 volumes of the Receivers’ Court Book and the 3 volumes of the Liquidators’ Court Book for months on end with nothing to show for it. The Court should conclude that that story is a lie. Legal work leaves a trail, and there is no trail to be found in this case of work undertaken by those two barristers.

765 If a legal team is hard at work preparing for trial, the expectation is that there will be emails between members of the team that evidence work product relating to the work undertaken. That arises from the fact that the process of working up a case for trial gives rise to questions that need to be investigated and answered, and ideas that need to be discussed. Trial preparation is all about that: preparation. Understanding discovery, proofing witnesses, and preparing for cross-examination is an exhaustive and precision-based exercise. If the Lawyer Parties were hard at work on preparing the matter for trial, it would be evident in emails they exchanged asking questions, setting tasks, requesting documents, and discussing ideas about case theory and lines of cross-examination. This case is bereft of such a trail.

766 The trail with respect to Mr O’Bryan reveals that he worked on the case only sporadically for most of the Relevant Period, only turning his attention to it from about mid-September 2017.¹⁵⁷⁹ When he did turn his attention to the matter, that attention manifested itself in emails to his juniors Mr Symons and Ms Jacobson,

¹⁵⁷⁸ See eg charges dated 2/11/16, 3/11/16, 18-20/11/16, 3-4/12/16, 12/3/17, 3-5/4/17, 11/5/17, 6-8/7/17, 14-17/7/17, 23/7/17, 15/8/17, 24/9/17 in the Third Trimbo Report [CBP.001.010.5957] at .6177 onwards.

¹⁵⁷⁹ As set out in [AID.010.026.0001_3], showing brief and sporadic email traffic until about the middle of September 2017.

requesting documents, asking questions, and setting out ideas.¹⁵⁸⁰ The documentary trail in the period from mid-September 2017 onwards stands in contrast to the documentary trail up to that time. The Court should find that Mr O'Bryan hardly worked on the matter prior to mid-September 2017.

767 In the case of Mr Symons, a large part of his fees related to “*reviewing the extensive documents produced as part of discovery in the proceeding, and preparing an index for the court book in the proceeding*”.¹⁵⁸¹ Even if the Court were to assume (which the Court should not) that Mr Symons spent the hundreds of hours for which he charged reviewing the discovery in the “Receivers’ Court Book” and the “Liquidators’ Court Book”, Mr Symons must have known it was unreasonable for Mr Bolitho and group members to pay for him to do so, in circumstances where he knew that the fees that Mark Elliott had recovered for acting as solicitor from the proceeds of the Partial Settlement included fees for hundreds of hours of work reviewing that same discovery.¹⁵⁸²

768 The fact is that Mr Symons did not do this work, a point developed further below.

F3.3 Charges for trial preparation work that Mr O’Bryan did not undertake

769 The Court should find that Mr O’Bryan achieved his Fee Target by adding charges for hundreds of hours for “trial preparation” work to his bills, which he did not undertake.

770 The “trial preparation” charges are described in Mr O’Bryan’s bills as follows:

“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial.”

771 On 22 November 2017, Mr O’Bryan directed his secretary to add **76 days** to his bills in respect of this charge.¹⁵⁸³ It is noteworthy that Mr O’Bryan copied Mark Elliott to that email. It is also noteworthy that Mr O’Bryan later revised this charge down to **65 days** – compelling evidence that it was an arbitrary charge designed to meet the Fee Target.

¹⁵⁸⁰ All of which are summarised in [AID.010.026.0001_3].

¹⁵⁸¹ [AFP.005.001.1420].

¹⁵⁸² RLOI [PLE.010.002.0001] and [PLE.010.005.0001], paras [32.d], [32.f], [32.g], [32.h], [32.i].

¹⁵⁸³ [NOB.500.001.7416].

772 These charges, described by Mr Trimbos as “trial preparation” charges, are implausible even on the most superficial consideration, for the following reasons:

- (a) No like conferrals appeared in the invoices and fee slips of Mr Symons, despite a high degree of overlap between the fee entries of Mr O’Bryan and Mr Symons.¹⁵⁸⁴ That reflects a flaw in the deception by which Mr O’Bryan and Mr Symons documented their charges: Mr Symons prepared his fee slips on the basis of an earlier draft of Mr O’Bryan’s fee slips – before Mr O’Bryan instructed his secretary to add “trial preparation” fees to his bills.¹⁵⁸⁵ Accordingly, Mr Symons worked up his fees to reach his own target without knowing that he was supposed to have extensively conferred with Mr O’Bryan in relation to opening submissions and evidence for tender and cross-examination at trial.
- (b) The charges first appear in Mr O’Bryan’s fee slips in **September 2016**, when Trust Co’s evidence had not yet been filed.¹⁵⁸⁶ Common experience tells one that senior counsel is unlikely to prepare cross-examination of witnesses before the opponent’s evidence has been filed.
- (c) Mr O’Bryan also charged significant time in respect of this work in **December 2016** and **January 2017**, at a time when (1) no trial date was listed,¹⁵⁸⁷ (2) the Court had informed the parties that the trial would be listed for the end of 2017 or the start of 2018 – ie, at least a year away, and (3) Trust Co’s evidence still had not been filed. It is most improbable that senior counsel would spend his summer vacation period working up cross-examination in those circumstances. Alex Elliott confirmed in his evidence that the Lawyer Parties started preparing for trial “*in the second half of 2017*”.¹⁵⁸⁸

¹⁵⁸⁴ See the Contradictors’ aide memoire comparing Mr O’Bryan’s and Mr Symons’ fee narrations: [AID.010.002.0001].

¹⁵⁸⁵ [NOB.500.001.7416]; [SYM.010.001.0001] [SYM.010.001.0249] [SYM.010.001.0251] [SYM.010.001.0252] [SYM.010.001.0256] [SYM.010.001.0258] [SYM.010.001.0261] [SYM.010.001.0263] [SYM.010.001.0265] [SYM.010.001.0268] [SYM.010.001.0270] [SYM.010.001.0275] [SYM.010.001.0277] [SYM.010.001.0280] [SYM.010.001.0285] [SYM.010.001.0286] [SYM.010.001.0289] [SYM.010.001.0291] [SYM.010.001.0292].

¹⁵⁸⁶ Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001], para [50] (he states that Trust Co’s evidence was filed in July 2017).

¹⁵⁸⁷ Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001], para [59.b] (he states that the trial date had been vacated on 5 December 2016).

¹⁵⁸⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23.

- (d) Mr O'Bryan was already well-acquainted with the Receivers' Court Book and the Liquidators' Court Book (which substantially comprised the relevant discovery)¹⁵⁸⁹ and the transcripts of the Receivers' and Liquidators' examinations, as he had charged for attending those examinations and/or reading the transcripts of them prior to the Relevant Period,¹⁵⁹⁰ and he had arranged for junior barristers or law students to prepare summaries of the transcripts.¹⁵⁹¹ And most of the transcripts of the ASIC examinations were produced to Portfolio Law in **October 2017**¹⁵⁹² – such that Mr O'Bryan cannot have been studying those transcripts in the preceding 12 month period.

773 The Court should find on the basis of the documentary evidence that Mr O'Bryan had barely commenced to undertake his “trial preparation” activities by the time the matter settled on **9 November 2017**. The evidence shows that:

- (a) On **25 July 2017**, Mr O'Bryan drafted a factual chronology totalling **14 paragraphs** in length, which he sent to Mr Symons, Mark Elliott and Alex Elliott stating: “*Here is a **small start** on the chronology of key events that we will need for the trial. **Lots to do here! Do we need more hands on deck? If so, whose?***”¹⁵⁹³
- (b) On around **14 or 15 August 2017**, Mr O'Bryan and Mr Redwood discussed how to divide the work of cross-examining Trust Co's witnesses. It was agreed that Mr O'Bryan would take the principal running of Mr Silavecky, Mr Lefort and Mr Godfrey.¹⁵⁹⁴

¹⁵⁸⁹ [SYM.002.004.0184] [SYM.002.004.0185] (Email from Mr O'Bryan to Mr Elliott, Mr Symons and Mr Zita dated 4 August 2015 with an attachment which states “A. *Documentary evidence [all to assist; Maddocks to manage & compile] (i) **Trial court book – will be largely based on the examination court books prepared by the receivers and liquidators...***”); Mr Kingston's 2 June 2020 Affidavit [SPR.006.001.0004], para [25]; [TRA.500.001.0001] T65:11-30.

¹⁵⁹⁰ See eg Second Trimbo's Report [CCW.031.001.0047] at ._0200 (fee entries for 22 and 23 July 2013), ._0204 (fee entries for 8 and 15 August 2013), ._0259 (fee entry for 16 September 2014), ._0265 (fee entry for 15 October 2014), ._0268 (fee entry for 7 November 2014)

¹⁵⁹¹ [TRI.004.001.0219] [TRI.004.001.0221] [TRI.004.001.0222] [TRI.004.001.0228] [TRI.004.001.0232] [TRI.004.001.0240] [TRI.004.001.0245] [TRI.004.001.0246] [TRI.004.001.0252] [TRI.004.001.0254] [TRI.004.001.0257] [TRI.004.001.0270] [TRI.004.001.0271] [TRI.004.001.0279] [TRI.004.001.0282] [TRI.004.001.0285] [TRI.004.001.0288] [TRI.004.001.0289] [TRI.004.001.0294] [TRI.004.001.0301] [TRI.004.001.0303] [TRI.004.001.0309] [TRI.004.001.0311] [TRI.004.001.0318] [TRI.004.001.0322].

¹⁵⁹² [CBP.001.003.4658].

¹⁵⁹³ [NOB.500.002.1037] [NOB.500.002.1038].

¹⁵⁹⁴ [NOB.503.001.2358].

- (c) On around **26 September 2017**, Mr O’Bryan took the witness outline of Mr Silavecky that the SPRs’ legal team had prepared in **November 2016** and rebadged it as “STENIC SILAVECKY XXN NOTES”.¹⁵⁹⁵
- (d) There is no other evidence before the Court that Mr O’Bryan advanced the cross-examination of any other witness.
- (e) On **13 October 2017**, Mr O’Bryan created a document entitled “Banksia trial opening submissions”, containing **two sentences of rough notes** with a paragraph from a journal article cut and pasted from LexisNexis or another similar source.¹⁵⁹⁶
- (f) On **24 October 2017**, Mr O’Bryan drafted a document, **9 paragraphs long**, entitled “Causation, loss and recovery”.¹⁵⁹⁷

The Response Document

774 In a document that Mr O’Bryan prepared in **April 2019** and shared with Mr Zita (**Response Document**)¹⁵⁹⁸ after they were both ordered to file affidavits, Mr O’Bryan claimed:¹⁵⁹⁹

*“In summary, over the period in question we **closely analysed the pleadings and particulars**, drew up trial issues papers on facts and law, researched the applicable law and prepared submissions about all important legal principles, studied the documentary record carefully (which was voluminous, drawn from more than 100 volumes of discovered documents, transcripts of Corporations Act examinations and other sources), selected the relevant documents for trial and prepared the index for the court book, identified the documents for tender in Mr Bolitho’s case in chief, prepared the opening submissions for trial (with all relevant documentary evidence intended for tender in opening), selected the documents which were proposed to be used in cross-examination and prepared the topics and the lines of questions for cross-examination.”*

775 This explanation was false. The documentary evidence shows that:

¹⁵⁹⁵ Compare Mr O’Bryan’s “STENIC SILAVECKY XXN NOTES” at [NOB.503.001.3012] with the witness outline prepared in November 2016 by Mr Redwood on which Mr O’Bryan provided some “minor comments” [NOB.500.013.1507] [NOB.500.013.1508].

¹⁵⁹⁶ [NOB.503.001.0882]. As to the date of the document, see the metadata.

¹⁵⁹⁷ [NOB.503.001.1166]. As to the date of the document, see the metadata.

¹⁵⁹⁸ [CBP.001.002.8464]; Mr Zita’s July 2020 Affidavit [LAY.070.002.0001], para [9].

¹⁵⁹⁹ [CBP.001.002.8464] at .8471.

- (a) It was Ms Jacobson who reviewed the voluminous documentary record to develop the Court Book index.
- (b) Mr O'Bryan made a start on the other work described in the Response Document from about **mid-September 2017**, and it was not well advanced by the time the matter settled. Mr O'Bryan did not spend hundreds of hours on that work "*over the period in question*".

776 From the falsity of the account set out in the Response Document, the Court should infer that Mr O'Bryan is unable to give a truthful explanation consistent with innocence in relation to the substantial legal fees that the Lawyer Parties sought to recover.

F3.4 Charges for discovery review and working on the Court Book that Mr Symons did not undertake

777 The centrepiece of Mr Symons' dishonest fee claims comprised his charges for reviewing the discovery and developing the Court Book. The Court should find that Mr Symons did not undertake this work, a finding clearly supported by the following evidence.

Documentary evidence

- 778 On **29 July 2016**, Mr O'Bryan asked his secretary Ms Koh to check off "*the Trust Co discovery index*" against the Liquidators' Court Book with a view to thereafter deciding "*what else to print and include in our trial bundle*".¹⁶⁰⁰ Ms Koh made a note on a copy of that email which stated that Mr O'Bryan had asked Ms Koh to undertake that task, and that she had undertaken it as directed, arriving at the conclusion that virtually all of the documents in the Liquidators' Court Book were in the Trust Co discovery index.¹⁶⁰¹
- 779 On **8 September 2016**, the Court made orders for the timetabling of the proceeding, including for preparation of the Court Book.¹⁶⁰² The orders provided for the SPRs to serve the draft index to the Court Book and for the other parties to provide comments.¹⁶⁰³

¹⁶⁰⁰ [NOB.503.004.4887_ext].

¹⁶⁰¹ [NOB.503.004.4887_ext].

¹⁶⁰² [SPR.005.001.3728], paras [11] – [14].

¹⁶⁰³ [SPR.005.001.3728], para [12].

- 780 On **15 November 2016**, Mr O'Bryan obtained a soft copy of the index to the Receivers' Court Book¹⁶⁰⁴ and sent it to Mr Symons and Ms Koh.¹⁶⁰⁵
- 781 On **18 November 2016 at 5.06pm**, Mr Symons emailed Mr O'Bryan and Ms Koh attaching "*a first cut of a merged index*", which merged together the index to the Receivers' Court Book and the index to Trust Co's discovery which comprised the Liquidator's Court Book (**Merged Index**).¹⁶⁰⁶
- 782 On **18 November 2016 at 5.25pm**, Mr O'Bryan asked Ms Koh to cross-check the Merged Index against the pleadings in both the Bolitho Proceeding and the SPR Proceeding to ensure that all documents referred to were in the list.¹⁶⁰⁷ Ms Koh confirmed she would do so.¹⁶⁰⁸ The Court should find that Ms Koh undertook that task, because:
- (a) **First**, a critical document evidencing this work was produced in the remitter, being a copy of the Merged Index with handwritten annotations (**Marked Up Merged Index**).¹⁶⁰⁹ Many of the handwritten annotations in the Marked Up Merged Index read "*UNSURE MUST CHECK*". The same handwriting appears on Ms Koh's record of the task she undertook on 29 July 2016¹⁶¹⁰ referred to at paragraph 778 above.
 - (b) **Second**, the Marked Up Merged Index appears to have been the basis for a typed document discovered in the remitter which cross-references the pleadings against the Merged Index (**Cross-Referenced Index**).¹⁶¹¹ The metadata for the Cross-Referenced Index reveals that it was authored by Ms Koh.¹⁶¹²
 - (c) **Third**, Mr Symons confirmed in an email sent in January 2017 that the work for the Cross-Referenced Index was undertaken by Ms Koh.¹⁶¹³

¹⁶⁰⁴ [CBP.004.005.9076] [CBP.004.005.9077].

¹⁶⁰⁵ [NOB.500.013.4233] [NOB.500.013.4234].

¹⁶⁰⁶ [NOB.500.013.4337] [NOB.500.013.4338].

¹⁶⁰⁷ [NOB.500.007.0922].

¹⁶⁰⁸ [NOB.500.002.2851].

¹⁶⁰⁹ See eg [SYM.001.003.2606] at .2620, .2622, .2636, .2637, .2638, .2640, .2641, .2645, .2649, .2651.

¹⁶¹⁰ [NOB.503.004.4887_ext].

¹⁶¹¹ [CCW.049.001.5420]. For instance, **row 4** refers to Doc ID [V4.064], and cross-refers to Page 36 of the Merged Index with the comment "*unsure must check*". The same document and comment appears in the Marked Up Merged Index [SYM.001.003.2606] at .2641, **row 6**.

¹⁶¹² [CCW.049.001.5420].

¹⁶¹³ [NOB.500.002.2587].

(d) **Fourth**, in an email Ms Jacobson sent to Mr Symons on 12 January 2017, she described the Cross-Referenced Index as *“Florence’s list”*.¹⁶¹⁴

783 On **29 January 2017**, Mr O’Bryan asked Mr Symons to *“have a look at the Banksia Court book index first thing tomorrow so we can discuss later in the day what else needs to be done to complete it for circulation”*. Mr Symons replied, advising Mr O’Bryan (and Mark Elliott) that:¹⁶¹⁵

“Aside from creating a merged list of documents based on the receivers’ and liquidators’ court books, and Florence cross-referencing documents in the pleadings, development of the Court Book index has not progressed. In particular, I haven’t started the task of going through the actual documents (in the folders in your room) to remove those for which we have no need.”

784 Mr Symons said that he did not then have time to work on it as he was preparing for another trial.¹⁶¹⁶ Mr O’Bryan and Mr Symons decided not to *“spend too much time deciding what to remove from the index”* and to *“do a quick & dirty for the time being”*.¹⁶¹⁷

785 Yet Mr Symons charged several days for reviewing documents and working on the Court Book from **30 January 2017 to 3 February 2017**.¹⁶¹⁸ Given that Mr O’Bryan directed Mr Symons that it was not necessary to undertake the task of *“going through the actual documents... and working out what can be removed from the merged list”*, it is not evident why Mr Symons would undertake that work.

786 If Mr Symons had reviewed the discovery in January/February 2017, or ever, he would have some work product to show for it. But it is clear that no such work product exists, because:

(a) The Contradictors specifically asked Mr Symons’ solicitors if Mr Symons prepared a chronology or other document setting out his notes from his review of the documents.¹⁶¹⁹ Mr Symons declined to answer that letter, and never produced such a document.

¹⁶¹⁴ [CCW.049.001.5418] [CCW.049.001.5420].

¹⁶¹⁵ [NOB.500.002.2587].

¹⁶¹⁶ [NOB.500.002.2587].

¹⁶¹⁷ [NOB.500.002.2587].

¹⁶¹⁸ See Mr Symons’ fee slips for January and February 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6240 - .6243.

¹⁶¹⁹ [AFP.005.001.1415].

(b) Significantly, on **19 December 2017**, Mr Symons sent an email to Mr Trimbos in which he passed off as his own work the Marked Up Merged Index which (the Court should find) comprises **Ms Koh's** work product. He said to Mr Trimbos: *“Attached is a scan of the copy of a print-out of the index I was working on in late January / early February”*.

787 On **9 May 2017**, Mr O'Bryan sent an email to Mr Symons stating: *“I suggest we move Nick Montgomery off the Vocation train asap and onto finalising the Banksia court book”*.¹⁶²⁰ The reference to “Vocation” is a reference to another class action that Mark Elliott, Mr O'Bryan and Mr Symons worked on.¹⁶²¹

788 On **11 May 2017**, Mr Symons emailed Mr O'Bryan suggesting that Mr Zita send an email to Maddocks *“asking for the present version of their draft Court Book so that we can do this process efficiently”*.¹⁶²² Mr O'Bryan agreed.¹⁶²³ Mr Symons drafted an email for Mr Zita to send,¹⁶²⁴ and Mr Zita sent it.¹⁶²⁵

789 It is therefore implausible that Mr Symons spent the time he charged on **10 and 11 May 2017** reviewing documents and working on the Court Book. Mr O'Bryan and Mr Symons envisaged that the SPRs' legal team would perform the lion's share of the work, and any work that needed to be done in the Bolitho Proceeding would be delegated down.

790 In **July and August 2017**, Mr Symons charged extraordinarily large sums for reading documents and working on the Court Book.¹⁶²⁶ The fees charged were not substantiated by any work product.

Ms Jacobson's retainer to act in the matter to review the discovery and develop the Court Book index

791 **Critically**, on **11 September 2017**, Mr O'Bryan decided that it was necessary to bring a second junior on board to assist with discovery review and development of the Court Book.¹⁶²⁷ Ms Jacobson was briefed for that purpose. On **12 September 2017**, Mr Symons sent Ms Jacobson the pleadings and the Merged Index that he

¹⁶²⁰ [NOB.500.002.2038].

¹⁶²¹ [SYM.001.003.2057].

¹⁶²² [NOB.500.002.2038].

¹⁶²³ [NOB.500.002.2038].

¹⁶²⁴ [NOB.500.002.2036].

¹⁶²⁵ [CBP.001.001.1059].

¹⁶²⁶ See Mr Symons' fee slips for July and August 2017 in the Third Trimbos Report [CBP.001.010.5957] at .6240 - .6265.

¹⁶²⁷ [NOB.500.002.0499].

had prepared in November 2016.¹⁶²⁸ Ms Koh sent Ms Jacobson the documents that she had prepared in November 2016 to cross-check the merged index “*against our pleading and Banksia’s pleading to ensure all the documents referred to in them are in these lists*”.¹⁶²⁹ Ms Jacobson then emailed Mr Symons setting out her understanding of her task:¹⁶³⁰

“THE TASK: COMPILING A LIST OF DOCS TO BE RELIED ON BY PLT IN DATE ORDER) THAT WILL FORM THE COURT BOOK / HYPERLINKED COURT BOOK INDEX.

USE FORMAT OF MERGED MASTER LIST – delete empty columns but add column where doc is referred to or purpose relied on (Maddocks to compile the CB)

STEP 1 – CHECK OFF ALL ITEMS IN SOC ARE INCLUDED – MARK UP IN COLOUR ON MASTER INDEX and inc cross reference

(Refer to Florence’s list by reference to V numbers, and search up V number in Master List ,and marry up to Master List doc reference)

(If there are docs that do not appear in Master List – then make a list of those and email to MS)

STEP 2- CHECK OF ALL ITEMS IN WITNESS STATEMENTS – COMPRISING PLT’S WITNESS STATEMENT (3p), BS’S WIT STATEMENTS AND TRUST COS WIT STS

STEP 3- CHECK ALL DOCS IN EXPERT EVIDENCE REPORT (TBA) ARE INCLUDED

STEP 4? – CHECK DOCS IN FOLDERS and TRUST CO DOCS and also LIQ Docs if anything else is to be relied upon re breaches by Trust Co.”

792 On **13 September 2017**, Ms Jacobson sent another email to Mr O’Bryan and Mr Symons which stated:¹⁶³¹

“The existing Master index* done a year ago seems to include all the Ashurst and Clayton Utz documents, but not all the Liquidator documents. The process as discussed with Michael is to colour highlight the documents in the existing Master index which are referred to in the SOCs (for Bolitho and Banksia) and the Defence, as well as the witness statements and expert witness statements and add cross-references in the index. I don’t propose to delete anything for our purposes, and added documents will be in another colour. I have started with the pleadings and working through the index, and then after that will go through the

¹⁶²⁸ [CCW.049.001.2220] [CCW.049.001.2222] [CCW.049.001.2436]; [CCW.049.001.2650] [CCW.049.001.2652].

¹⁶²⁹ [CCW.049.001.1034] [CCW.049.001.1035].

¹⁶³⁰ [CCW.049.001.5418] [CCW.049.001.5420]; [CCW.044.001.0013].

¹⁶³¹ [NOB.500.002.0193].

witness statements and expert statements (will need a usb of them from Michael)”).

793 On **21 September 2017 at 3.49pm**, Ms Jacobson sent an email to **Mr O’Bryan** stating:¹⁶³²

“Florence is adding reference to the docs in the Liq CB index (the 3 volumes – from which we found the missing TC docs yesterday). Some of these docs have hand written notes/mark-ups by you and/or have asterixes – should I infer that the ones marked up or which have asterixes on the tabs are docs you want in the CB; or you might want to look through again?”

794 Mr O’Bryan replied, saying: **“I will look through them all again”**.¹⁶³³

795 On the basis of this evidence, the Court should make the following findings:

- (a) **First**, Ms Jacobson was asked by Mr O’Bryan and Mr Symons to work on the Merged Index that Mr Symons prepared in November 2016 and which nobody had touched since then.
- (b) **Second**, Ms Jacobson's job was to cross-check that Merged Index against the pleadings, witness statements and expert reports, and make sure all of the documents referred to in the pleadings, witness statements, and expert reports were included in the Court Book index.
- (c) **Third**, nobody had done any work on narrowing documents for tender at that stage. It was Ms Jacobson's job to develop a list of all the documents from all the possible document sources. That list might be narrowed down, but that had not happened yet.
- (d) **Fourth**, the Merged Index that Mr Symons created in November 2016 was incomplete, and did not include critical documents, namely, the documents in the Liquidators’ Court Book.
- (e) **Fifth**, nobody had noticed that the Merged Index was incomplete until Ms Jacobson was briefed, because nobody had advanced the development of the Court Book index in the intervening period.

¹⁶³² [CCW.049.001.3785].

¹⁶³³ [CCW.049.001.3785].

- (f) **Sixth**, and most significantly, Mr Symons had not done any work in reviewing the documents in the Liquidators' Court Book and the Receivers' Court Book and developing the Court Book index for trial. If he had done that work, Ms Jacobson would have been briefed with a work product that had been developed and advanced, rather than with the Merged Index that was prepared in **November 2016** and, it appears, was inaccurate or incomplete.
- (g) **Seventh**, Mr O'Bryan had examined the documents in the Liquidators' Court Book at some point in time, but Mr Symons had not. Mr O'Bryan had made annotations on the documents; Mr Symons had not.
- (h) **Eighth**, Mr O'Bryan proposed to look at the Liquidators' Court Book documents again himself. He did not give that task to Mr Symons. That fortifies the conclusion that Mr Symons was not across the documents.

Ms Jacobson's work on discovery review and developing the Court Book is evidenced by work product, which is lacking from Mr Symons

796 After Ms Jacobson was briefed on around **12 September 2017**, Ms Jacobson worked up and developed the Court Book index by:

- (a) cross-referencing documents in the Merged Index to pleadings and evidence;
- (b) adding documents that were not in the Merged Index; and
- (c) colour coding the documents with green and yellow highlighting.¹⁶³⁴

797 The time that Ms Jacobson spent on the matter is evident in her work product. In contrast, Mr Symons discovered no documents to substantiate his significant fees charged for reviewing discovery throughout 2017. The only conclusion reasonably open is that he did not do that work.

¹⁶³⁴ Compare Ms Jacobson's document at [SYM.004.001.0033] with the merged index prepared in November 2016 [NOB.500.013.4338].

Mr Symons had little or no input into deciding what documents should be included in the Court Book

798 In September 2017, Mr O’Bryan sent some emails to Ms Jacobson with documents that he thought should be included in the court book index.¹⁶³⁵ Mr Symons sent no such emails, even though one would ordinarily expect junior counsel to take charge of deciding what documents to include in the court book. If Mr Symons had reviewed the discovery, he would have had his own thoughts about which documents should be included in the Court Book.

Mr O’Bryan and Ms Jacobson engaged with Trust Co’s trial documents, but Mr Symons did not

799 On **20 September 2017**, Clayton Utz circulated a preliminary list of documents that Trust Co proposed to include in the Court Book.¹⁶³⁶

800 On **21 September 2017 at 6.50am**, Ms Jacobson emailed Mr O’Bryan and Mr Symons with her analysis of Trust Co’s preliminary list.¹⁶³⁷ There is no email from Mr Symons setting out any such analysis. That shows that he was not across the documents, as he had never really looked at them. An active and engaged junior counsel will seek to contribute their knowledge of the documents and the evidence towards the forensic challenges of the case. “As anyone who has practised as leading counsel will know, senior counsel places great reliance on junior counsel for all aspects of the preparation of a case for trial.”¹⁶³⁸ There is little evidence of such active engagement by Mr Symons.

801 On **21 September 2017**, Mr O’Bryan sent a number of emails to Mr Symons, Ms Jacobson and Mr Redwood about Trust Co’s draft court book index,¹⁶³⁹ including an email to Ms Jacobson identifying the documents in Trust Co’s index that he wanted to look at.¹⁶⁴⁰ There is no evidence of such engagement with Trust Co’s documentary evidence by Mr Symons.

¹⁶³⁵ [NOB.500.002.0165]; [NOB.500.002.0158] [NOB.500.002.0159]; [NOB.500.002.0149] [NOB.500.002.0150]; [NOB.500.001.9858] [NOB.500.001.9859]. See also Mr O’Bryan’s email dated 26 September 2017 stating “***I will try to complete our list by end of week***” [NOB.500.001.9440]

¹⁶³⁶ [NOB.500.001.9717] [NOB.500.001.9720].

¹⁶³⁷ [NOB.500.001.9588].

¹⁶³⁸ *Yates Property Corp Pty Ltd (in liq) v Boland* (1998) 85 FCR 84, 111E.

¹⁶³⁹ [NOB.500.001.9582] [NOB.500.001.9584]; [NOB.500.001.9580]; [NOB.500.001.9561] [NOB.500.001.9563].

¹⁶⁴⁰ [NOB.500.001.9564] [NOB.500.001.9565].

Mr Symons' contribution to the Court Book was to collate Ms Jacobson's work into an excel spreadsheet on 20-21 September 2017

802 The documentary evidence shows that Mr Symons did nothing on the Court Book in September 2017 until **20 September 2017**, when Ms Jacobson asked him for “a *comprehensive index from Trust Co*”, and Mr Symons replied that he was “*putting these together now*” and asked for Ms Jacobson’s “*current version of the master list*”.¹⁶⁴¹ It took Mr Symons no more than **about a day** to convert Ms Jacobson’s list to excel form¹⁶⁴² and amalgamate it with other lists of documents, with automatic formulas to flag missing documents.¹⁶⁴³

803 On **21 September 2017 at 5.37pm**, Mr Symons sent an email to Mr O’Bryan and Ms Jacobson which attached an excel document which collated Ms Jacobson’s document and the various lists and indexes of documents, including the receivers’ documents, the liquidators’ documents, the Trust Co discovery, and the Trust Co court book index.¹⁶⁴⁴ His excel document used automatic formulas to identify documents in Trust Co’s court book index which appeared to be missing from the discovery. Mr Symons observed that:

*“Yellow are documents **which Simone** has identified should be included in our Court Book index. Green are documents **which Simone** has identified in another party’s pleading. Light blue are documents in Trust Co’s Court Book index for which we do not at this stage appear to have a copy from amongst Trust Co’s discovery, the receivers’ documents and the liquidators’ documents.”*

804 Ms Jacobson replied, stating:¹⁶⁴⁵

*“Thanks Michael. **The highlighting task is ongoing** – this document includes references to all pleadings, Norman’s emails re docs and to the extent possible docs referred to in Potter and Morris reports. I still propose to highlight Liquidator docs we want in, and additional docs that were in the second old SOC folder (but not previously highlighted) as well as other docs. I also will search this list for some of the docs in Trust Cos draft index that Norman wants to view.”*

805 This email exchange provides further proof that Ms Jacobson was doing most or all of the work of physically looking at the documents, and Mr Symons was not.

¹⁶⁴¹ [CCW.049.001.6562] [CCW.049.001.6564].

¹⁶⁴² [SYM.004.001.1103] [SYM.004.001.1104].

¹⁶⁴³ [SYM.004.001.1095] [SYM.004.001.1096].

¹⁶⁴⁴ [SYM.004.001.1095] [SYM.004.001.1096].

¹⁶⁴⁵ [SYM.004.001.1087].

- 806 On **20 and September 2017**, Clayton Utz and Maddocks circulated Trust Co's and Banksia's draft court book indices.¹⁶⁴⁶
- 807 On **26 September 2017**, Mr Symons sent an email to Ms Jacobson attaching an updated excel court book index which "*automatically matched the documents in our court book index to the draft Banksia CB Index*" and flagged missing documents with an "*automatch fail*".¹⁶⁴⁷ Ms Jacobson's fee slips indicate that she thereafter undertook the work of "*looking through indexes, and usb as to all discovery. Following up missing docs – XXN doc. Review Master against [Banksia's] index manually re duplication issues and all automatch fail documents; saving as needed... checking rest of [Banksia's] index against de-duplicated list, and comments, noting docs which are in – errors in list.*"¹⁶⁴⁸
- 808 This evidence shows that Mr Symons' main contribution was to collate various lists of documents in excel and to use formulas to cross-check those lists against each other. The forensic analysis of the documents was undertaken by Ms Jacobson and Mr O'Bryan, and not by Mr Symons.

Ms Jacobson encountered a password protection issue for the first time, which Mr Symons would have discovered if he had reviewed the documents

- 809 On **22 September 2017**, Mr Symons sent an email to Mr Redwood and Maddocks, raising as an issue the fact that numerous discovered documents were inaccessible as they were protected by password.¹⁶⁴⁹ Ms Jacobson's fee notes for 22 September 2017 reveal that Ms Jacobson drafted that email.¹⁶⁵⁰
- 810 If Mr Symons had reviewed the discovery at an earlier point in time, he would have encountered the password issue. The fact that the password issue remained undetected until 22 September 2017 provides further proof of the falsity of Mr Symons' charges for reviewing the discovery and developing the court book throughout 2017, and highlights the egregious and rapacious overcharging that Mr Symons was purporting to get away with in his billing practices. The honesty and integrity of barristers is no more apparent than in their billing practices. Trial

¹⁶⁴⁶ [SPR.001.002.0042] [CBP.001.007.8444]; Mr Kingston's 2 June 2020 Affidavit [SPR.006.001.0004], para [29].

¹⁶⁴⁷ [SYM.004.001.0902] [SYM.004.001.0904].

¹⁶⁴⁸ Third Trimbos Report [CBP.001.010.5957] at .6292 (Ms Jacobson's entry for 26 September 2017).

¹⁶⁴⁹ [SPR.001.002.0056] [SPR.500.002.0283].

¹⁶⁵⁰ Ms Jacobson's fee note for 22 September 2017 refers to "*Draft email to BA solicitors – re discovery.*" [CBP.001.010.5957] at .6291.

preparation is an exacting and time consuming endeavour; but when it comes to billing, those endeavours can only record what work was honestly undertaking.

Mr Symons had limited ability to resolve Ms Jacobson's queries about the evidence

811 On **27 September 2017**, Mr O'Bryan created the "STENIC SILAVECKY XXN NOTES" document, which was, in fact, a rebranded version of the witness outline for Mr Silavecky that the SPRs' legal team had drafted in November 2016.¹⁶⁵¹ Ms Jacobson searched for the documents referenced in that document, and sent an email to Mr Symons with various queries.¹⁶⁵² Mr Symons replied: "*I'm going through these now to the best of my ability*".¹⁶⁵³

812 This email exchange shows that:

- (a) Mr O'Bryan sought the assistance of Ms Jacobson, and not Mr Symons, in performing the legwork to find documents in order to begin working up the cross-examination of Mr Silavecky.
- (b) Mr Symons conceded he had limited ability to resolve the queries raised by Ms Jacobson. That reflects that he was not across the documents.

F3.5 Month-by-month analysis of purported fees and alleged work

813 A detailed comparison of the activities of Mr O'Bryan and Mr Symons against their email traffic and the key events in the Bolitho Proceeding is set out in the Contradictors' chronology, prepared as an aide memoire for the Court.¹⁶⁵⁴

814 The following points should be noted:

- (a) Mr Zita/Portfolio Law discovered all documents in their possession relating to the Bolitho Proceeding pre-dating 24 December 2017;¹⁶⁵⁵
- (b) Mr O'Bryan was ordered to discover emails with Mr Symons and other documents evidencing his work product for the period from 1 January 2017

¹⁶⁵¹ [NOB.503.001.3012].

¹⁶⁵² [SYM.004.001.0943].

¹⁶⁵³ [SYM.004.001.0943].

¹⁶⁵⁴ [AID.010.026.0001_3].

¹⁶⁵⁵ [CCW.053.001.0018].

to 30 October 2017,¹⁶⁵⁶ and otherwise voluntarily discovered a range of emails and documents purportedly evidencing his work product;

- (c) Mr Symons was ordered to discover all documents recording or evidencing his work product on the Bolitho Proceeding for the period 1 July 2017 to 31 October 2017;¹⁶⁵⁷
- (d) the SPR also discovered evidence of cooperation between the legal representatives acting in the Bolitho Proceeding and the SPR Proceeding, including emails between Mr O'Bryan and Mr Redwood.

815 That documentary evidence supplies a detailed picture of the activities of the Lawyer Parties during the Relevant Period.

816 It emerges clearly from that picture that Mr O'Bryan and Mr Symons could not have spent the time they charged to the Bolitho Proceeding during the Relevant Period. Their charges were substantially fabricated. Mr O'Bryan gave the matter some attention of the Relevant Period, but he invented charges for trial preparation work, and inflated the time allocated for various other activities. Mr Symons billed a defensible sum for **July – November 2016**, but he invented and/or inflated most of the fees he charged in the **2017 calendar year**. Their capitulations, and the concessions each of them made through their respective senior counsel, permit no other inference than that they acknowledge that their charges were substantially fabricated.

June 2016

817 Mr O'Bryan's initial draft of his bill for June 2016 charged **73 hours**; he increased that to **111 hours** in his quest to reach his Fee Target.¹⁶⁵⁸

818 That was achieved by increasing the hours charged for a range of different activities on a range of different dates in June 2016. Alterations to fee entries made **17 months after the event** bespeak guesswork at best. For instance, for 16 June 2016, Mr O'Bryan increased his time entry for "*Conferring with Jonathon Redwood re: expert reports, reading same*" from **3 hours** to **1 day**. Plainly, Mr O'Bryan had

¹⁶⁵⁶ Orders dated 24 April 2020 [ORD.500.022.0001], paras [2.h] and [2.i].

¹⁶⁵⁷ Orders dated 24 April 2020 [ORD.500.022.0001], paras [4.a].

¹⁶⁵⁸ [AID.010.003.0001] (Contradictors' aide memoire comparing Mr O'Bryan's June 2016 bill [CBP.001.010.5957] at .6156 against his first draft prepared on around 15 November 2017 [NOB.500.001.7444]).

no record to support the extra fees charged. If his records indicated **1 day**, it would have been reflected in the first iteration of his bill.

July 2016

819 Mr O'Bryan's initial draft of his bill for July 2016 charged **106 hours**.¹⁶⁵⁹ He did not alter the bill in subsequent iterations.¹⁶⁶⁰

820 However, the documentary evidence reveals that Mr O'Bryan prepared his July 2016 bill through the same unreliable process as his other bills.

821 This is best demonstrated by way of an example. Mr O'Bryan charged **1 day** on 12 July 2016 for:

“Conferring with Mr Elliott, Alex Elliott and junior counsel re: email from Wendy Botsman with questions regarding class action notice to group members, advising; conferring with Kate Anderson re: confidential and privileged joint opinion for the plaintiff, advising; conferring with Tony Zita and Mr Elliott re: email from Clayton Utz enquiring whether plaintiff will be serving any non-confidential submissions in support of his s.33V application / email from Maddocks whether plaintiff will be filing any submissions (including confidential submissions) pursuant to the orders of Robson J made 2 June 2016, advising; reviewing draft response to Wendy Botsman; conferring with junior counsel, Mr Elliott and Alex Elliott re: same, advising; conferring with Kate Anderson re: will issue a supplementary opinion withdrawing paragraph 113 of joint settlement opinion, advising; conferring with Tony Zita and Mr Elliott re: same, advising.”

822 The documentary evidence reveals the following matters with respect to Mr O'Bryan's work in connection with the fees he charged for **12 July 2016**:

- (a) On **12 July 2016** at **10.05am**, Mrs Botsman sent an email to info@banksiaclassaction.com with questions about the claims for legal costs and commission from the Partial Settlement, which Alex Elliott forwarded to Mark Elliott, Mr O'Bryan, Mr Symons.¹⁶⁶¹
- (b) On **12 July 2016** at **5.04pm**, Mr O'Bryan replied to Alex Elliot, Mark Elliott and Mr Symons, stating: *“I suggest MS prepares a response by cut & paste from our joint advice”*, and Mr Symons replied *“Ok”*.¹⁶⁶²

¹⁶⁵⁹ [NOB.500.001.7447].

¹⁶⁶⁰ See Mr O'Bryan's July 2016 bill in the Third Trimbo's Report [CBP.001.010.5957] at .6160.

¹⁶⁶¹ [SYM.002.001.1957].

¹⁶⁶² [SYM.002.001.1984].

- (c) On **12 July 2016** at **9.33pm**, Mr Symons circulated a draft response. **Three minutes later**, at **9.36pm**, Mr O'Bryan replied: "*Yes, I agree, thx M. Tony, pls dispatch tomorrow*".¹⁶⁶³
- (d) On **12 July 2016** at **4.37pm**, Mr Zita sent an email to Mark Elliott, Mr O'Bryan, Mr Symons and Alex Elliott forwarding an email from Clayton Utz enquiring as to "*whether your client will be serving any non-confidential submissions in support of his s 33V application*."¹⁶⁶⁴ Mr O'Bryan replied: "*The answer is no. Our submissions are our joint opinion & vice versa*".¹⁶⁶⁵
- (e) On **22 July 2016**, Mr O'Bryan prepared a supplementary submission totalling **4 paragraphs** in length which withdrew paragraph 113 of the joint settlement opinion that Mr O'Bryan and Mr Symons prepared in connection with the Partial Settlement. Based on that supplementary opinion, the conferral with Ms Anderson on **12 July 2016** cannot have taken much time.
- (f) It would appear that Mr O'Bryan was in Sydney working on another case in early or mid-July 2016.¹⁶⁶⁶

823 This documentary evidence does not substantiate a charge for **1 day** working on the matters described in Mr O'Bryan's fee entry for 12 July 2016.

824 This example shows that the Court cannot even rely upon the first iteration of Mr O'Bryan's bills, which he and his secretary prepared prior to Mr O'Bryan's endeavour to "*increase the hours to the max extent possible*".¹⁶⁶⁷

August 2016

825 Mr O'Bryan's initial draft of his bill for August 2016 charged **85 hours**; he increased that to **127 hours** in his quest to reach his Fee Target.¹⁶⁶⁸

826 That was achieved by increasing the hours charged for a range of different activities on a range of different dates in August 2016.

¹⁶⁶³ [SYM.002.001.1991].

¹⁶⁶⁴ [CBP.004.006.6251].

¹⁶⁶⁵ [CBP.004.006.6251].

¹⁶⁶⁶ [CBP.004.007.5191]

¹⁶⁶⁷ See the reference to this language in [NOB.500.001.7493].

¹⁶⁶⁸ [AID.010.005.0001] (Contradictors' aide memoire comparing Mr O'Bryan's August 2016 bill [CBP.001.010.5957] at .6165 against his first draft prepared on around 15 November 2017 [SYM.010.001.0286]).

827 These alterations occurred **15 months after the event**, when Mr O’Bryan prepared his bills in **November 2017**. No honest hypothesis is open for those revisions. If Mr O’Bryan had a record of having spent **1 day** on the matter on **3 August 2016** (to take an example), he would not have charged **4 hours** in the first draft bill he prepared on about 14 or 15 November 2017.

828 That is also borne out by a detailed analysis of the charges. Again, to take a single example, in his first draft bill, Mr O’Bryan charged **2 hours** on **26 August 2016** for:

*“Conferring with W Crothers, M Hill, S Hill and S Tan re: outcome of hearing before Robson J, advising; **amending statement of claim to remove director and auditor claims, conferring with Mr Elliott, junior counsel, Sam Kingston and David Newman re: same, advising.**”*

829 In the final version of his August 2016 bill, Mr O’Bryan charged **5 hours** for that activity, and also added a new charge for **1 day** on **27 August 2016** for *“Further drafting amended pleadings, conferring”*.

830 The documentary evidence reveals that Mr O’Bryan completed the amendments to the pleading on **Friday 25 August 2016** and sent them to Mr Newman and Mr Kingston on that day.¹⁶⁶⁹ Thereafter, Mr O’Bryan exchanged some emails with Maddocks, Mr O’Bryan and Mr Symons about the pleading amendments.¹⁶⁷⁰ The charge for **1 day** on **Saturday 27 August 2016** for *“further drafting”* the pleading amendments and *“conferring”* about them were fabricated. In this way Mr O’Bryan turned **2 hours** of work into **13 hours**.

September 2016

831 Mr O’Bryan’s initial draft of his bill for September 2016 charged **61 hours**; he increased that to **131 hours** in his quest to reach his Fee Target.¹⁶⁷¹

832 That was achieved by adding **70 hours** for:

“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel

¹⁶⁶⁹ [NOB.500.012.6823] [NOB.500.012.6824].

¹⁶⁷⁰ [NOB.500.012.6921] [NOB.500.012.7017].

¹⁶⁷¹ [AID.010.019.0001] (Contradictors’ aide memoire comparing Mr O’Bryan’s September 2016 bill [CBP.001.010.5957] at .6168 against his first draft prepared on around 15 November 2017 [NOB.500.001.7472]).

concerning opening submissions and evidence for tender and cross-examination at trial.”

833 The documentary evidence reveals that Mr O’Bryan sent only a few short emails on the matter in September 2016, and was mostly concerned with the interests of AFP in minimising its exposure to security for costs.¹⁶⁷² That documentary evidence does not support the thesis that Mr O’Bryan and his team were hard at work in preparing for trial. Nor do the objective facts: the trial was at that time fixed for **1 May 2017**, which was still a long way off;¹⁶⁷³ the pleadings were in a state of flux;¹⁶⁷⁴ and the evidence had not been filed.

October 2016

834 Mr O’Bryan’s initial draft of his bill for October 2016 charged **36 hours**; he more than tripled that to **116 hours** in his quest to reach his Fee Target.¹⁶⁷⁵

835 That was achieved by adding **80 hours** for:

“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial.”

836 The documentary evidence reveals that Mr O’Bryan sent only a few short emails on the matter in October 2016.¹⁶⁷⁶ There is no evidence of any activity in respect of opening submissions and cross-examination; indeed, the evidence shows that Mr O’Bryan did not start thinking about opening submissions until **a year later**, in **October 2017**.

November 2016

837 Mr O’Bryan’s initial draft of his bill for November 2016 charged **81 hours**; he increased that to **131 hours** in his quest to reach his Fee Target.¹⁶⁷⁷

¹⁶⁷² See the documentary evidence for September 2016 summarised in [AID.010.026.0001_3]. See in particular [CBP.001.006.5391] [CBP.001.006.5394].

¹⁶⁷³ [NOB.500.013.0096].

¹⁶⁷⁴ [NOB.500.013.0707].

¹⁶⁷⁵ [AID.010.018.0001] (Contradictors’ aide memoire comparing Mr O’Bryan’s October 2016 bill [CBP.001.010.5957] at .6173 against his first draft prepared on around 15 November 2017 [NOB.500.001.7470]).

¹⁶⁷⁶ See the documentary evidence for October 2016 summarised in [AID.010.026.0001_3].

¹⁶⁷⁷ [AID.010.015.0001] (Contradictors’ aide memoire comparing Mr O’Bryan’s November 2016 bill [CBP.001.010.5957] at .6177 against his first draft prepared on around 15 November 2017 [NOB.500.001.7460]).

838 This was achieved by tinkering with the hours charged for a range of activities on a range of dates. That tinkering occurred **1 year** after the event, in the course of Mr O'Bryan workshopping his bills in **November 2017**. Plainly Mr O'Bryan did not have a record to suggest that he (for instance) spent **1 day** on reading a witness outline, drafting a letter, and conferring with Mark Elliott about various matters on 28 November 2016; if he did, he would not have charged **2 hours** for those activities in his first draft bill.

839 To take a significant example, Mr O'Bryan charge of **30 hours** from **Sunday 20 November 2016 to Tuesday 22 November 2016** for "*Conferring with junior counsel re: draft court book index, review of court book documents, advising*". The documentary evidence demonstrates that:

- (a) Mr Symons sent Mr O'Bryan "*a first cut of a merged index*" on **18 November 2016**, which amalgamated the indices of the Receivers' Book and the Liquidators' Court Book.¹⁶⁷⁸
- (b) Mr O'Bryan then directed his secretary to "*cross-check against our pleading and Banksia's pleading to ensure all the documents referred to in them are in these lists*".¹⁶⁷⁹
- (c) Mr O'Bryan did not review any documents himself for that purpose, and nor did Mr Symons. **Two months later**, in **January 2017**, Mr Symons confirmed that: "*Aside from creating a merged list of documents based on the receivers' and liquidators' court books, and Florence cross-referencing documents in the pleadings, **development of the Court Book index has not progressed***".¹⁶⁸⁰ And at about the same time Mr O'Bryan sent an email to Mr Redwood which referred to "*the version of the Court Book **which we were working on late last year***".¹⁶⁸¹

December 2016

840 Mr O'Bryan's initial draft of his bill for December 2016 charged **36 hours**; he nearly tripled that to **96 hours** in his quest to reach his Fee Target.¹⁶⁸²

¹⁶⁷⁸ [NOB.500.007.0922]; [NOB.500.013.4337] [NOB.500.013.4338].

¹⁶⁷⁹ [NOB.500.007.0922].

¹⁶⁸⁰ [NOB.500.002.2587].

¹⁶⁸¹ [NOB.500.002.2598].

¹⁶⁸² [AID.010.007.0001] (Contradictors' aide memoire comparing Mr O'Bryan's December 2016 bill [CBP.001.010.5957] at .6182 against his first draft prepared on around 15 November 2017 [NOB.500.001.7486]).

841 That was achieved by adding **60 hours** for:

“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial.”

842 In **November 2016**, Justice Croft vacated the trial that was fixed for May 2017. On **5 December 2016**, Justice Croft’s associate advised the parties that the trial would commence no earlier than **term 4 of 2017** or **term 1 of 2018**.¹⁶⁸³ It would be astonishing for senior counsel to spend the lead up to the Christmas vacation period preparing for a trial that was then at least a year away; and the documentary evidence does not support that proposition. There is virtually no evidence of any activity at all by Mr O’Bryan in December 2016.¹⁶⁸⁴

January 2017

Mr O’Bryan

843 Mr O’Bryan’s initial draft of his bill for January 2017 charged **3 hours**; he increased that to **93 – 113 hours** in his quest to reach his Fee Target.¹⁶⁸⁵

844 All of the additional hours charged relate to:

“Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial.”

845 Mr O’Bryan’s initial instruction to Ms Koh directed her to add **13 days** to his January 2017 bill in respect of this work.¹⁶⁸⁶ Evidently he subsequently deleted charges for some of the nominated dates, presumably in an effort to make the bill more plausible. Ultimately the bill included charges for **9 days** of trial preparation work, but charged for **11 days**.¹⁶⁸⁷

¹⁶⁸³ [CBP.001.006.0693].

¹⁶⁸⁴ See the documentary evidence for December 2016 summarised in [AID.010.026.0001_3].

¹⁶⁸⁵ [AID.010.009.0001] (Contradictors’ aide memoire comparing Mr O’Bryan’s January 2017 bill [CBP.001.010.5957] at .6184 against his first draft prepared on around 15 November 2017 [NOB.500.001.7446]).

¹⁶⁸⁶ [NOB.500.001.7416].

¹⁶⁸⁷ [CBP.001.010.5957] at .6186 (the total of 11 days was used as the basis for calculating the fee; but only 9 days appear in the fee slip).

846 The Court should find that the trial preparation charges were fabricated. The Court should find that Mr O'Bryan did not spend half of January 2017, or any of January 2017, on reviewing discovery and working on his opening submissions on a matter with no trial date. Nor was he preparing to cross-examine Trust Co's witnesses whose evidence he had not seen, or the witnesses that might or might not be called by Banksia, which was Mr Bolitho's co-plaintiff. Mr O'Bryan was on holiday in January 2017, in accordance with the usual practice of the Victorian Bar. This is borne out by the fact that, on **25 January 2017**, he advised Mr Redwood that he would be "**back on deck next week**".¹⁶⁸⁸ There is no evidence of any activity on the matter by Mr O'Bryan until **late January 2017**.¹⁶⁸⁹

Mr Symons

847 Mr Symons charged **23 hours** in January 2017, principally for document review and working on the Court Book on **30 and 31 January 2017**.¹⁶⁹⁰ The Court should find that those charges were fabricated, for the reasons set out at paragraphs 777 to 786 above.

February 2017

848 Mr O'Bryan's initial draft of his bill for February 2017 charged **33 hours**; he increased that to **73 hours** in his quest to reach his Fee Target.¹⁶⁹¹

849 Mr Symons charged **96.5 hours** in February 2017, largely for document review and working on the Court Book and for attending to a directions hearing held on 24 February 2017.¹⁶⁹²

850 The Court should find that those charges were fabricated or inflated as set out below.

851 **First**, there is hardly any documentary evidence of work product by Mr O'Bryan and Mr Symons in February 2017.¹⁶⁹³ Mr Symons' only real engagement with the

¹⁶⁸⁸ [NOB.500.002.2598].

¹⁶⁸⁹ See the documentary evidence for January 2017 summarised in [AID.010.026.0001_3].

¹⁶⁹⁰ See Mr Symons' fee slip for January 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6240. The reference to "33 hours" appears to be an error.

¹⁶⁹¹ [AID.010.008.0001] (Contradictors' aide memoire comparing Mr O'Bryan's February 2017 bill [CBP.001.010.5957] at .6187 against his first draft prepared on around 14 November 2017 [NOB.500.001.7487]).

¹⁶⁹² See Mr Symons' fee slip for February 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6242.

¹⁶⁹³ See the documentary evidence for February 2017 summarised in [AID.010.026.0001_3].

matter was his attendance at a directions hearing on 24 February 2017.¹⁶⁹⁴ Mr O'Bryan sent only a few short emails on the matter.

- 852 **Second**, Mr O'Bryan did not read the discovery, work up cross-examination, develop the opening submissions in February 2017 for the reasons set out in paragraphs 769 to 776 above.
- 853 **Third**, Mr Symons could not have spent the time he charged for reviewing discovery and working on the Court Book on 1, 2 and 3 February 2017 for the reasons set out in paragraphs 777 to 812 above.
- 854 **Fourth**, Banksia discovered some additional documents in February 2017. Mr O'Bryan took a quick glance at them and formed the view that they "*Appeared to be a lot of junk*" and asked his team whether anyone else had the time to look at them.¹⁶⁹⁵ Mr Symons charged **2 days** for (inter alia) reviewing those documents.¹⁶⁹⁶ There is no evidence that he undertook any analysis of those documents.
- 855 **Fifth**, the documentary evidence reveal that Mr O'Bryan and Mr Symons were not engaged with interlocutory issues in February 2017. Mr O'Bryan's edits to a position paper for a directions hearing drafted by Maddocks mostly stated: "*Mr Bolitho agrees with the proposed orders*".¹⁶⁹⁷ That passive role does not justify the time Mr Symons charged in connection with the directions hearing, position paper and proposed orders.¹⁶⁹⁸
- 856 **Sixth**, Mr O'Bryan and his team were not seeking any further discovery in February 2017.¹⁶⁹⁹ When a legal team is hard at work on a case, it usually results in requests for documents. Indeed, when Mr O'Bryan *did* turn his attention to the case in September and October 2017, he began asking for more documents.¹⁷⁰⁰

¹⁶⁹⁴ [CBP.001.006.0810].

¹⁶⁹⁵ [CBP.001.006.0280].

¹⁶⁹⁶ See Mr Symons' fee slip for February 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6242, entries for **13 and 14 February 2017**.

¹⁶⁹⁷ [NOB.500.002.2429] [NOB.500.002.2430]; [NOB.500.002.2409]; [CBP.001.006.3918] [CBP.001.006.3926].

¹⁶⁹⁸ See Mr Symons' fee slip for February 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6242, entries for **9 to 26 February 2017**.

¹⁶⁹⁹ [CBP.001.006.1704].

¹⁷⁰⁰ [NOB.500.001.8702]; [SYM.004.001.0679] [SYM.004.001.0681].

857 **Seventh**, Mr O'Bryan was interstate on another matter for parts of February 2017, including from about 13 to 16 February 2017¹⁷⁰¹ and from about 24 February 2017 onwards.¹⁷⁰² His attention was on that other matter.

March 2017

858 Mr O'Bryan's initial draft of his bill for March 2017 charged **17 hours**; he more than quadrupled that initial assessment to **70 hours** in his quest to reach his Fee Target.¹⁷⁰³ Most of the additional time charged relates to reading documents.

859 Mr Symons charged **37.5 hours** in March 2017.¹⁷⁰⁴

860 The Court should find that those charges were fabricated or inflated, as set out below.

861 **First**, there is virtually no email traffic from Mr O'Bryan or Mr Symons in March 2017,¹⁷⁰⁵ and the logical inference is that they were not working on the matter.

862 **Second**, the evidence reveals that Mr O'Bryan and Mr Symons sought to avoid interlocutory issues that arose in March 2017. Mr O'Bryan advised his team to avoid the special referee appointed by Justice Croft as much as possible, and to adopt an attitude of "*diplomatic nothingness*" in relation to the special referee.¹⁷⁰⁶

863 **Third**, Mr O'Bryan was in Cambodia for most of March 2017.¹⁷⁰⁷ Mr O'Bryan was not working on this matter while on holiday in Cambodia. The Court should find that he did not take any of his lever arch folders with him. He did not even take a laptop with him: he told his secretary that he had "***no access to materials to enable me to create any documents here***".¹⁷⁰⁸ The Court should find that he was not reading discovery, and was not preparing for trial.

¹⁷⁰¹ [NOB.500.002.2458].

¹⁷⁰² [CBP.001.006.0689]; [NOB.500.002.2461]; [NOB.500.002.2387]; see also [NOB.503.001.0317].

¹⁷⁰³ [AID.010.013.0001] (Contradictors' aide memoire comparing Mr O'Bryan's March 2017 bill [CBP.001.010.5957] at .6191 and against his first draft prepared on around 14 November 2017 [NOB.500.001.7456]).

¹⁷⁰⁴ See Mr Symons' fee slip for March 2017 in the Third Trimbo's Report [CBP.001.010.5957] at .6245 - .6247.

¹⁷⁰⁵ See the documentary evidence for March 2017 summarised in [AID.010.026.0001_3].

¹⁷⁰⁶ [CBP.001.006.0534]; see also [CBP.001.006.5902]; [NOB.500.002.2340]; [CBP.001.006.5906].

¹⁷⁰⁷ [SPR.001.003.0020].

¹⁷⁰⁸ [SYM.008.001.0022].

864 **Fourth**, and in any event, the Court should find that Mr O'Bryan did not undertake any work in relation to trial preparation in March 2017, for the reasons set out in paragraph 769 to 776 above.

April 2017

865 Mr O'Bryan's initial draft of his bill for April 2017 charged **15 hours** and more than **tripled that** to charge **89 hours** in his quest to reach his Fee Target.¹⁷⁰⁹ Most of the additional time charged relates to reading documents and preparing for trial.

866 Mr Symons charged **37.5 hours** in April 2017, principally in relation to a directions hearing before the special referee held on 26 April 2017.¹⁷¹⁰

867 The Court should find that those charges were fabricated or inflated, as set out below.

868 **First**, there is virtually no email traffic from Mr O'Bryan or Mr Symons in April 2017,¹⁷¹¹ and the logical inference is that they were not working on the matter.

869 **Second**, Mr Bolitho was not seeking any further discovery of documents, which shows they were not thinking about the case.¹⁷¹² They were content to leave that to the SPRs, whose legal team *was* thinking about the case and seeking further discovery.¹⁷¹³

870 **Third**, internal emails exchanged between the Lawyer Parties and Mark Elliott in April 2017 confirm that they were not interested in interlocutory issues at that time: Mr O'Bryan suggested that Mr Symons attend a directions hearing on his own "*so we don't appear too interested in it (which we are not)*".¹⁷¹⁴ Mr O'Bryan again instructed his team to steer clear of the special referee appointed to determine interlocutory disputes.¹⁷¹⁵

¹⁷⁰⁹ [AID.010.004.0001] (Contradictors' aide memoire comparing Mr O'Bryan's April 2017 bill [CBP.001.010.5957] at .6194 and against his first draft prepared on around 14 November 2017 [NOB.500.001.7480]).

¹⁷¹⁰ See Mr Symons' fee slip for March 2017 in the Third Trimbo's Report [CBP.001.010.5957] at .6245 - .6247.

¹⁷¹¹ See the documentary evidence for April 2017 summarised in [AID.010.026.0001_3].

¹⁷¹² [CBP.001.002.0144] [CBP.004.007.8716] [CBP.004.008.3797].

¹⁷¹³ [NOB.500.002.2164]

¹⁷¹⁴ [CBP.004.002.0351] [NOB.500.002.2140].

¹⁷¹⁵ [NOB.500.002.2083] [NOB.500.002.2086].

871 All of this hardly bespeaks a barrister feverishly working away on the matter, preparing cross-examination of scores of witnesses and working up his cross examination in a trial that was nearly a year away.

872 **Fourth**, the Court should find that, in April 2017, Mr O'Bryan was busy on other pursuits: documentary evidence reveals that he was working on another matter the trial of which was then imminent or underway, and which "*fell over*" at around that time.¹⁷¹⁶

873 **Fifth**, the Court should find that Mr O'Bryan did not undertake any work in relation to trial preparation in April 2017, for the reasons set out in paragraph 769 to 776 above.

May 2017

874 Mr O'Bryan's initial draft of his bill for May 2017 charged **20 hours**. His final bill for May 2017 charged 110 hours – more than 5 times that much and increased that by a multiple of more than 5 to charge **110 hours** in his quest to reach his Fee Target.¹⁷¹⁷

875 Mr Symons charged **32.5 hours** in May 2017, including numerous hours for reviewing documents and working on the Court Book.¹⁷¹⁸

876 The Court should find that those charges were fabricated or inflated, for the reasons set out below.

877 **First**, there is virtually no email traffic from Mr O'Bryan or Mr Symons in May 2017,¹⁷¹⁹ and the logical inference is that they were not working on the matter.

878 **Second**, the documentary evidence reveals that Mr O'Bryan and Mr Symons remained detached from interlocutory issues in May 2017.¹⁷²⁰ The major event in May 2017 was Trust Co's announcement that it would be delayed in filing its

¹⁷¹⁶ [NOB.500.002.2187]

¹⁷¹⁷ [AID.010.014.0001] (Contradictors' aide memoire comparing Mr O'Bryan's April 2017 bill [CBP.001.010.5957] at .6197 and against his first draft prepared on around 14 November 2017 [NOB.500.001.7458]).

¹⁷¹⁸ See Mr Symons' fee slip for May 2017 in the Third Trimbos Report [CBP.001.010.5957] at .6252, entries for **10 and 11 May 2017**.

¹⁷¹⁹ See the documentary evidence for May 2017 summarised in [AID.010.026.0001_3].

¹⁷²⁰ [NOB.500.002.2041] [CBP.001.001.0956]

evidence.¹⁷²¹ Mr O'Bryan's principal contribution was to draft some correspondence for Portfolio Law to send objecting to that delay.¹⁷²²

879 **Third**, the Court should find that Mr O'Bryan did not undertake any work in relation to trial preparation in May 2017, for the reasons set out in paragraph 769 to 776 above.

880 **Fourth**, for the reasons set out in paragraph 777 to 812 above, the Court should find that Mr Symons did not undertake any work on discovery review and developing the Court Book in May 2017. The documentary evidence shows that Mr O'Bryan and Mr Symons intended to obtain the SPRs' draft Court Book index¹⁷²³ and then delegate to Nick Montgomery any further work in reviewing documents and identifying Mr Bolitho's additional documents.¹⁷²⁴ Mr Symons did not review any documents himself.

881 **Fifth**, on 24 April 2020, Mr O'Bryan was ordered to discover and produce:

- (a) one invoice for each matter that Mr O'Bryan worked on in the period 1 January 2017 to 30 June 2017;¹⁷²⁵
- (b) all invoices issued in five specified class action with Mark Elliott in the period 1 October 2013 to 31 December 2019.¹⁷²⁶

882 The picture of Mr O'Bryan's billing practices conveyed by those documents, though necessarily incomplete, nonetheless reveals Mr O'Bryan's egregious billing practice most starkly for the month of May 2017,¹⁷²⁷ when Mr O'Bryan charged more than **\$300,000** to other matters. Self-evidently, it was impossible for Mr O'Bryan to have spent **110 hours** on the Banksia matter in May 2017.

883 Mr O'Bryan's practice of running two books of account enabled him to camouflage the discrepancy between his legitimate barrister's practice billed through his clerk and the class action practice billed through his personal assistant at his direction. That barristers, let alone members of the inner Bar, should conduct themselves in

1721 [NOB.500.002.1949].

1722 [NOB.500.002.1971]; [NOB.500.002.1949]; [NOB.500.002.1940].

1723 [NOB.500.002.2038].

1724 [NOB.500.002.2038].

1725 Orders dated 24 April 2020 [ORD.500.022.0001], para [2.c].

1726 Orders dated 24 April 2020 [ORD.500.022.0001], para [2.j].

1727 [CCW.038.001.0005_2].

this manner, is abhorrent to the proud practices and traditions of the Victorian Bar, and should be the subject of the strongest judicial condemnation.

June 2017

- 884 Mr O'Bryan's initial draft of his bill for June 2017 charged **43 hours**; he more than doubled that to charge **112 hours** in his quest to reach his Fee Target.¹⁷²⁸
- 885 Mr Symons charged **78 hours** in June 2017.¹⁷²⁹
- 886 The Court should find that those charges were fabricated or inflated, for the reasons set out below.
- 887 **First**, there is virtually no email traffic from Mr O'Bryan or Mr Symons in June 2017,¹⁷³⁰ and the logical inference is that they were not working on the matter. The evidence of work product comprises a few short emails,¹⁷³¹ a contribution to a position paper,¹⁷³² and a submission, less than **1.5 pages** in length, which Mr Symons took **1 hour** to draft and Mr O'Bryan took **16 minutes** to settle, opposing an extension of time for Trust Co to file its evidence.¹⁷³³
- 888 **Second**, that evidence of work product, such as it is, confirms that Mr Symons charged manifestly excessive sums. For example:
- (a) Mr Symons charged a cumulative total of about **25 hours**¹⁷³⁴ in respect of the special referee conference on **6 June 2017**, yet the evidence reveals it lasted less than **1 hour**¹⁷³⁵ and traversed **3 matters** which were addressed in a position paper of **1.25 pages in length**.¹⁷³⁶

¹⁷²⁸ [AID.010.012.0001] (Contradictors' aide memoire comparing Mr O'Bryan's June 2017 bill [CBP.001.010.5957] at .6201 and against his first draft prepared on around 14 November 2017 [NOB.500.001.7453]).

¹⁷²⁹ See Mr Symons' fee slip for June 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6255.

¹⁷³⁰ See the documentary evidence for June 2017 summarised in [AID.010.026.0001_3].
¹⁷³¹ [NOB.500.002.1875] [NOB.500.002.1854] [NOB.500.002.1855] [NOB.500.002.1836] [NOB.500.002.1775] [NOB.500.002.1785] [CBP.001.011.0991] [CBP.001.002.0059] [NOB.500.002.1771].

¹⁷³² [NOB.500.002.1865] [NOB.500.002.1866].

¹⁷³³ [NOB.500.002.1806]; [CBP.001.001.6342] [CBP.001.001.6345].

¹⁷³⁴ See Mr Symons' fee slip for June 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6255, entries for **1 – 8 June 2017**.

¹⁷³⁵ The conference was at **5pm**: [NOB.500.002.1859]. Mr Symons reported on the conference at **5.53pm**: [NOB.500.002.1855].

¹⁷³⁶ [NOB.500.002.1865] [NOB.500.002.1866].

- (b) Mr Symons charged **1 day**¹⁷³⁷ for 14 June 2017 when the only evidence of any activity by him on that day is a **1.5 page** submission he drafted opposing an extension of time for Trust Co's evidence to be filed, which he took **1 hour** to draft and Mr O'Bryan took **16 minutes** to settle.¹⁷³⁸
- (c) Mr Symons charged heavily for matters that he was not involved in - which reflects the fact that he slavishly copied Mr O'Bryan's fee slips to prepare his own bills, without regard to whether he actively contributed to the work for which Mr O'Bryan had charged.¹⁷³⁹
- (d) On **13 June 2017**, in relation to correspondence about Trust Co's delay in filing its evidence, Mr O'Bryan suggested to his team that "*we just let this run its course and don't comment further on the timetable before Friday (unless something happens that compels us to do otherwise)*".¹⁷⁴⁰ Mr Symons' mere receipt of that email was chalked up as **6 hours** for "*conferring*" and "*advising*".
- (e) On **26 June 2017**, in relation to Banksia's application to join Insurance House, Mr O'Bryan said: "*We will stay out of this one, lads.*"¹⁷⁴¹ Mr Symons' mere receipt of that email was chalked up as **3 hours** for "*conferring*" and "*advising*" about the application for leave to join Insurance House.

889 **Third**, all of the additional hours charged by Mr O'Bryan following the first iteration of his bill related to alleged work on:

"Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial".

890 The Court should find that Mr O'Bryan did not undertake any work in relation to trial preparation in June 2017, for the reasons set out in paragraph 769 to 776 above.

¹⁷³⁷ See Mr Symons' fee slip for June 2017 in the Third Trimbos Report [CBP.001.010.5957] at .6255, entry for **14 June 2017**.

¹⁷³⁸ [NOB.500.002.1806]; [CBP.001.001.6342] [CBP.001.001.6345].

¹⁷³⁹ See eg Mr Symons' fee slip for June 2017 in the Third Trimbos Report [CBP.001.010.5957] at .6255, entry for **13 June 2017**. Mr Symons simply adopted Mr O'Bryan's fee description for **13 June 2017**, but the documentary evidence reveals that Mr Symons was not even copied to most of the emails for which Mr O'Bryan charged on **13 June 2017** [NOB.500.002.1775].

¹⁷⁴⁰ [NOB.500.002.1836].

¹⁷⁴¹ [NOB.500.002.1772].

- 891 **Fourth**, in June 2017, Mr O'Bryan was busy with another case that he was running in Sydney.¹⁷⁴²
- 892 **Fifth**, there are direct inconsistencies between Mr O'Bryan's time charged to the Bolitho Proceeding and his appearances in the Federal Court (Victorian registry)¹⁷⁴³ and the Victorian Court of Appeal¹⁷⁴⁴ on other matters in June 2017.

July 2017

Mr O'Bryan

- 893 Mr O'Bryan's initial draft of his bill for July 2017 charged **71 hours**; he increased that to **88 hours** in his quest to reach his Fee Target.¹⁷⁴⁵
- 894 He achieved that by adjusting the hours charged for various activities on various dates, and by adding in some additional hours for reading documents.
- 895 The documentary evidence shows that Mr O'Bryan gave some sporadic attention to the case in **early and late July 2017**.¹⁷⁴⁶ Mr O'Bryan's charges for reflecting on Mr Silavecky's witness statement on **2 July 2017**, and for reading and reflecting on Trust Co's evidence from **23 July 2017 onwards**,¹⁷⁴⁷ are evidenced by his email communications. Having read the materials, Mr O'Bryan sent emails to the other lawyers working on the case with ideas, case theories, and requests for documents.¹⁷⁴⁸ Conversely, the paucity of such communications at other times evidences the fact that Mr O'Bryan was not working on the matter at other times.
- 896 That documentary evidence illustrates the legal process at work. Law is a thinking profession; and particularly in a complex commercial case involving several lawyers working as a team, the process of thinking about a case generates a documentary trail. It is that documentary trail that is missing for most of the fees charged.

¹⁷⁴² [NOB.500.002.1875]; [NOB.500.002.1854].

¹⁷⁴³ *ACCC v Meriton Property Services Pty Ltd* [2017] FCA 1305 (5 June 2017).

¹⁷⁴⁴ *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187 (9 June 2017).

¹⁷⁴⁵ [AID.010.011.0001] (Contradictors' aide memoire comparing Mr O'Bryan's July 2017 bill [CBP.001.010.5957] at .6206 against his first draft prepared on around 15 November 2017 [NOB.500.001.7543]).

¹⁷⁴⁶ [NOB.500.002.1754] [NOB.500.007.8821] [NOB.500.007.8822]; [NOB.500.002.1617]

[NOB.500.002.1314] [NOB.500.002.1316] [NOB.500.002.1337].

¹⁷⁴⁷ [NOB.500.002.1314]; [NOB.500.002.1286] [NOB.500.002.1287].

¹⁷⁴⁸ [CBP.001.001.5744] [CBP.003.002.0493] [NOB.500.002.1070] [NOB.500.002.1071] [NOB.500.002.0794].

Mr Symons

897 Mr Symons charged **192 hours** in July 2017, totalling **\$79,200**.¹⁷⁴⁹

898 The Court should find that the whole bill was fabricated. Mr Symons did nothing on the Bolitho Proceeding in July 2017. Neither he nor anyone else produced a **single document** evidencing or recording any work product by Mr Symons in July 2017 in response to the Court's orders requiring discovery of same. He was copied to some emails, but did not send any himself. Charges for discovery review and working on the Court Book comprise the substantial proportion of the bill, and as set out at paragraph 777 to 812 above, the Court should find that Mr Symons did not undertake this work.

August 2017

Mr O'Bryan

899 Mr O'Bryan's initial draft of his bill for August 2017 charged **42 hours**; he increased that to **102 hours** in his quest to reach his fee target.¹⁷⁵⁰ All of the additional hours charged related to alleged work on:

"Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial".

900 There is no documentary evidence to support the additional **60 hours** that Mr O'Bryan charged for "trial preparation" in August 2017.

901 The documentary evidence shows, in August 2017, Mr O'Bryan followed up on an earlier discovery request;¹⁷⁵¹ he settled a letter of instructions to an expert that Mr Redwood had drafted,¹⁷⁵² he provided some comments on the second expert report of Mr Hardy which Mr Redwood sent to him as an advanced draft;¹⁷⁵³ he settled a list of discovery requests that Mr Redwood prepared,¹⁷⁵⁴ he asked

¹⁷⁴⁹ See Mr Symons' invoice for July 2017 in the Third Trimbos Report [CBP.001.010.5957] at .6258.

¹⁷⁵⁰ [AID.010.006.0001] (Contradictors' aide memoire comparing Mr O'Bryan's August 2017 bill [CBP.001.010.5957] at .6209 against his first draft prepared on around 15 November 2017 [NOB.500.001.7484]).

¹⁷⁵¹ [NOB.500.002.0792].

¹⁷⁵² [NOB.500.002.0787].

¹⁷⁵³ [NOB.500.002.0612] [NOB.500.002.0640].

¹⁷⁵⁴ [NOB.500.002.0664] [NOB.500.002.0665].

Maddocks to look into a discovery question,¹⁷⁵⁵ and he looked at Mr Redwood's proposed amended pleading.¹⁷⁵⁶

902 All of this work was reflected in Mr O'Bryan's **initial** draft bill, **before** he added 60 hours for trial preparation; and even the initial draft bill seems generous compared with the evidence of the work that Mr O'Bryan actually undertook.

903 To take an example, Mr O'Bryan charged **1 day** on 19 August 2017 for:

“Considering Clynton Hardy’s second report, conferring with Jonathon Redwood re: commenting on same / Charlesworth Nominees Pty Ltd v Charlesworth [2017] VSC 445, advising; conferring with Mr Elliott, junior counsel and Jonathon Redwood re: letter from Clayton Utz enclosing documents requested – para 11 of P J Godfrey’s witness statement, advising.”

904 Mr Redwood sent an advanced draft of Mr Hardy's second report to Mr O'Bryan on 19 August 2017 at **12.39pm**, seeking comments; and Mr O'Bryan provided comments at **3.18pm**.¹⁷⁵⁷ At **3.37pm**, Mr O'Bryan forwarded Mr Redwood the decision of Justice Croft in *Charlesworth Nominees Pty Ltd v Charlesworth* [2017] VSC 445 – a relatively short judgment, 24 pages in length.¹⁷⁵⁸ At **3.46pm**, he directed Mr Symons to look at some discovery provided by Trust Co that day; Mr Symons replied a moment later advising *“there’s almost nothing in it”*.¹⁷⁵⁹

905 Those email exchanges account for no more than a few hours of work at most, compared with the **1 day** charged by Mr O'Bryan.

906 The documentary evidence therefore does not support Mr O'Bryan's initial draft bill, let alone the inflated bill he ultimately issued.

Mr Symons

907 Mr Symons charged **184 hours** in July 2017, totalling **\$75,900**.¹⁷⁶⁰

¹⁷⁵⁵ [NOB.500.002.0706] [NOB.500.002.0707].

¹⁷⁵⁶ [NOB.500.002.0532] [NOB.500.002.0534].

¹⁷⁵⁷ [NOB.500.002.0612] [NOB.500.002.0640].

¹⁷⁵⁸ [NOB.500.002.0612].

¹⁷⁵⁹ [SYM.004.001.1143].

¹⁷⁶⁰ See Mr Symons' invoice for August 2017 in the Third Trimpos Report [CBP.001.010.5957] at .6262.

908 The Court should find that these charges were fabricated. There is virtually no evidence of work product by Mr Symons in August 2017 despite the Court's orders requiring discovery of same. The following matters are noteworthy.

Reviewing Trust Co's additional discovery

909 On **9 August 2017** at **6.37pm**, Clayton Utz provided discovery of some additional documents.¹⁷⁶¹

910 On **9 August 2017** at **6.45pm**, Mr O'Bryan emailed Mr Symons and Ms Koh stating: *"We need to have a close look at this stuff. Florence, are you able to download & organize the documents whilst Michael & I are in Sydney?"*¹⁷⁶²

911 On **11 August 2017**, Mr Symons emailed Mr O'Bryan copied to Ms Koh attaching an index of the additional discovery, which he evidently exported using database software.¹⁷⁶³ The index listed **64 documents**; reviewing those documents cannot have taken Mr Symons **18 hours**,¹⁷⁶⁴ particularly when Mr Symons evidently produced no written analysis of the documents.

912 On **12 August 2017** at **9am**, Mr O'Bryan sent an email to Mr Symons copied to Ms Koh asking whether *"any of these documents relate to the First Legal or Hedon Investments mergers with Banksia in 1999 (see Godfrey para 10)?"*¹⁷⁶⁵ Mr Symons charged **2 hours** for *"conferring"* and *"advising"* about this question,¹⁷⁶⁶ but he did not actually answer it; instead, at **5.20pm**, Mr O'Bryan directed the same question to Mr Kingston and Mr Redwood,¹⁷⁶⁷ and Mr Redwood answered it.¹⁷⁶⁸

913 Mr O'Bryan later sent an email to Mr Symons stating *"remind me to discuss with you the additional discovery"*,¹⁷⁶⁹ which suggests that Mr O'Bryan looked at the discovery himself when Mr Symons failed to do so.

¹⁷⁶¹ [CBP.001.001.4157] [CBP.001.001.4158].

¹⁷⁶² [NOB.500.002.0713].

¹⁷⁶³ [SYM.004.001.1146] [SYM.004.001.1150].

¹⁷⁶⁴ See Mr Symons' fee slip for August 2017 in the Third Trimpos Report [CBP.001.010.5957] at .6263, charges for **10 – 12 August 2017**.

¹⁷⁶⁵ [NOB.500.002.0713].

¹⁷⁶⁶ See Mr Symons' fee slip for August 2017 in the Third Trimpos Report [CBP.001.010.5957] at .6263, charges for **12 August 2017**.

¹⁷⁶⁷ [NOB.500.002.0669].

¹⁷⁶⁸ [CBP.001.002.0064].

¹⁷⁶⁹ [NOB.500.002.0556]

- 914 On **18 August 2017** at **5.25pm**, Clayton Utz provided discovery of further documents.¹⁷⁷⁰
- 915 On **19 August 2017** at **3.46pm**, Mr O'Bryan emailed Mark Elliott and Mr Symons about that discovery, stating: "*We need to look at this stuff.*"¹⁷⁷¹ **One minute later**, at **3.47pm**, Mr Symons replied, stating: "*There's almost nothing in it.*"¹⁷⁷² Yet Mr Symons charged **1 day** on **18 August 2017** for reviewing that discovery.¹⁷⁷³

Banksia's pleading amendments

- 916 On **23 August 2017** at **10.46am**, Mark Elliott emailed Mr O'Bryan and Mr Symons attaching Banksia's proposed amended statement of claim. Less than **30 minutes later**, at **11.13am**, Mr O'Bryan replied to Mark Elliott and Mr Symons, stating:¹⁷⁷⁴

*"Attached are my notes on **the first few pages of this ridiculous piece of nonsense. I think the proposed amendments (apart from part G, which I note with interest has a different set of authors) are crazy.** They will almost certainly provoke an explosive reaction from Trustco and with justification because there is simply not enough time left between now and February 2018 for all the necessary interlocutory steps be taken for the additional evidence to be assembled to enable these new issues to be tried. I have looked at our pleading recently and I do not see any need to amend it. But if anyone else thinks we should make amendments, we had better do so very, very quickly. If we do apply to amend it we also will threaten the trial date. I don't want to do that for obvious reasons."*

- 917 **Nine minutes later**, at **11.22am**, Mr Symons replied, stating: "*The particulars to [59(d)] are pure fantasy.*"¹⁷⁷⁵ For this "work", Mr Symons charged **1 day**, which was described in his fee slip as "*conferring*" and "*advising*".¹⁷⁷⁶
- 918 On **30 August 2017**, Clayton Utz wrote to Maddocks complaining about Banksia's proposed pleading amendments.¹⁷⁷⁷ At **4.10pm**, Mark Elliott forwarded the letter

¹⁷⁷⁰ [CBP.001.009.2889] [CBP.001.009.2901].

¹⁷⁷¹ [NOB.500.002.0586] [NOB.500.002.0590] [NOB.500.002.0591] [NOB.500.002.0592] [NOB.500.002.0593] [NOB.500.002.0594] [NOB.500.002.0595] [NOB.500.002.0596] [NOB.500.002.0598]

¹⁷⁷² [NOB.500.002.0556].

¹⁷⁷³ See Mr Symons' fee slip for August 2017 in the Third Trimbo Report [CBP.001.010.5957] at .6264, entry for **17 August 2017**. The charge for 17 August 2017 also includes a charge for "*reviewing documents contained in Liquidators' Court Book for inclusion in Court Book*" which the Court should find was fabricated, for the reasons set out in paragraphs 777 to 812.

¹⁷⁷⁴ [NOB.500.002.0532] [NOB.500.002.0534].

¹⁷⁷⁵ [SYM.004.001.1140].

¹⁷⁷⁶ Mr Symons' August 2017 fee slip in the Third Trimbo Report [CBP.001.010.5957] at .6264, entry for 23 August 2017.

¹⁷⁷⁷ [CBP.001.001.4913] [CBP.001.001.4914].

to Mr O'Bryan, Mr Symons and Alex Elliott.¹⁷⁷⁸ At **4.55pm**, Mr O'Bryan replied, stating: "*No surprise*".¹⁷⁷⁹ Mr Symons charged **1 day** for "*conferring*" and "*advising*" about this letter.¹⁷⁸⁰

Discovery review

919 Most of Mr Symons' fees charged for August 2017 relate to discovery review and working on the Court Book. As set out at paragraph 777 to 812 above, the Court should find that Mr Symons did not undertake this work.

Reading evidence

920 Much of Mr Symons' fees charged for August 2017 relate to reading evidence. Neither he nor any other party discovered any document evidencing or recording any analysis of the evidence that he allegedly reviewed, and the Court should find that he did not undertake this work.

September 2017

921 For September 2017, Mr O'Bryan charged **103 hours (\$141,625)**¹⁷⁸¹ and Mr Symons charged **267 hours (\$110,137.50)**.¹⁷⁸² The hours charged by Mr O'Bryan are defensible, but the hours charged by Mr Symons are not. The following matters are noteworthy.

922 **First**, the documentary evidence shows that Mr O'Bryan turned his attention to the matter in about **mid-September 2017** and thereafter began to prepare for the trial that was listed to commence in February 2018. The sudden flurry of emails communications from Mr O'Bryan in September 2017¹⁷⁸³ is in striking contrast to the paucity of such communications in earlier months, and confirms that Mr O'Bryan had given the case little attention until then.

923 **Second**, by September 2017, the trial date appeared on the horizon, and Mr O'Bryan decided that he needed a second junior to assist him with the considerable

¹⁷⁷⁸ [NOB.500.002.0519].

¹⁷⁷⁹ [NOB.500.002.0519].

¹⁷⁸⁰ Mr Symons' August 2017 fee slip in the Third Trimbo's Report [CBP.001.010.5957] at .6264, entry for 30 August 2017.

¹⁷⁸¹ Mr O'Bryan's September 2017 bill in the Third Trimbo's Report, [CBP.001.010.5957] at .6213 - .6223.

¹⁷⁸² Mr Symons' September 2017 bill in the Third Trimbo's Report, [CBP.001.010.5957] at .6213 - .6226.

¹⁷⁸³ See the documentary evidence for September 2017 summarised in [AID.010.026.0001_3].

work that was yet to be done. Accordingly, on **11 September 2017**, Mr O'Bryan arranged for Ms Jacobson to be retained to provide assistance "*for several weeks, if not months*".¹⁷⁸⁴ Ms Jacobson was briefed to develop the Court Book from scratch, in circumstances where nothing had been done since November 2016.

924 **Third**, Mr Symons charged substantial fees for working on the Court Book index in September 2017 when the evidence demonstrates that he simply sent her the pleadings and the Merged Index that he had prepared in November 2016 and told her what needed to be done.¹⁷⁸⁵ He did not spend **1 day on 5 September 2017** "*compiling existing sources of electronic documents*" and "*identifying possible missing documents*". He did not spend **1 day on 6 September 2017** "*reviewing steps necessary to prepare court book index for circulation*". He did not spend **1 day on 7 September 2017** "*reviewing status of Court Book index and approach to achieving Court-ordered deadline for production of court book index*". He did not spend **1 day on 11 September 2017** undertaking "*further work in re document management for purpose of providing documents to Simone Jacobson*". His fees for **12, 13, 14, 15, 16, 17, 18 and 19 September 2017** were likewise wholly or substantially fabricated.

925 The documentary evidence shows that Mr Symons did nothing on the Court Book in September 2017 until **20 September 2017**, when Ms Jacobson asked him for "*a comprehensive index from Trust Co*", and Mr Symons replied that he was "*putting these together now*" and asked for Ms Jacobson's "*current version of the master list*".¹⁷⁸⁶ It took Mr Symons no more than about a day to convert Ms Jacobson's list to excel form¹⁷⁸⁷ and amalgamate it with other lists of documents, with automatic formulas to flag missing documents.¹⁷⁸⁸

926 **Fourth**, Ms Jacobson charged **\$29,040 including GST** for her work in September 2017 in connection with document review and developing the Court Book.¹⁷⁸⁹ The sum charged by Mr Symons is out of all proportion with the sum charged by Ms Jacobson, **particularly** in circumstances where the evidence demonstrates that it was Ms Jacobson and not Mr Symons who did the work.

¹⁷⁸⁴ [NOB.500.002.0499].

¹⁷⁸⁵ [CCW.049.001.2650] [CCW.049.001.2652]; [CCW.049.001.2220] [CCW.049.001.2222] [CCW.049.001.2436].

¹⁷⁸⁶ [CCW.049.001.6562] [CCW.049.001.6564].

¹⁷⁸⁷ [SYM.004.001.1103] [SYM.004.001.1104].

¹⁷⁸⁸ [SYM.004.001.1095] [SYM.004.001.1096].

¹⁷⁸⁹ Third Trimbos Report, [CBP.001.010.5957] at .5991, para [127].

927 **Fifth**, Mr Symons charged substantial fees in September 2017 for reading evidence. Neither he nor any other party discovered any document evidencing or recording any analysis of the evidence that he allegedly reviewed, and the Court should find that he did not undertake this work.

928 **Sixth**, Mr Symons charged **2 days** and Mr O'Bryan charged **1 day** for reviewing documents which they only glanced at briefly in order to determine that they were irrelevant, showing their propensity to grossly overcharge their clients for a few minutes' work. That arises from the following:

(a) On **22 September 2017** at **6pm**, Clayton Utz provided a download link to some documents relied upon by Trust Co.¹⁷⁹⁰ On **23 September 2017**, Mr O'Bryan sent an email to Mr Symons and Ms Jacobson, copied to Mark Elliott and Alex Elliott, stating: "*We need to work out what we do with all this stuff*".¹⁷⁹¹

(b) On **24 September 2017** at **6.34pm**, Mr Symons replied:¹⁷⁹²

*"Maybe not much. They show the inadequacies of RSD's audit processes – as they seem to be the complete audit working papers. From a **high level review**, they seem to show that the audit was a process of paper-generation and checking of electronic processes rather than a serious process."*

(c) Mr O'Bryan replied **11 minutes later**, at 6.45pm, stating: "***Do we care about the audit?***"¹⁷⁹³

(d) On **25 September 2017** at **8.42am**, Mr O'Bryan sent a further email to Mr Symons and Ms Jacobson copied to Mark Elliott and Alex Elliott, saying: "***I have reviewed these now & agree they are irrelevant to us. I will delete them from the Dropbox as they take up far too much space***".¹⁷⁹⁴

¹⁷⁹⁰ [NOB.500.001.9469] [NOB.500.001.9470].

¹⁷⁹¹ [NOB.500.001.9469] [NOB.500.001.9470].

¹⁷⁹² [SYM.004.001.1079] [SYM.004.001.1080].

¹⁷⁹³ [NOB.500.001.9464].

¹⁷⁹⁴ [NOB.500.001.9464].

October 2017

- 929 For October 2017, Mr O'Bryan charged **96 hours**¹⁷⁹⁵ and Mr Symons charged **242 hours**.¹⁷⁹⁶
- 930 The hours charged by Mr O'Bryan are substantiated by the work he evidently undertook, but the hours charged by Mr Symons are not, by reason of the matters set out below.
- 931 **First**, in October 2017, Mr O'Bryan kept up a steady flow of emails to Mr Redwood, Mr Symons and Ms Jacobson about his thoughts and ideas in the course of preparing the case for trial.¹⁷⁹⁷ This flurry of email traffic proves that Mr O'Bryan was hard at work at that time, and (conversely) was not before then.
- 932 **Second**, the responses to those emails principally came from Mr Redwood and Ms Jacobson.¹⁷⁹⁸ There is only limited evidence of engagement by Mr Symons with the matter.¹⁷⁹⁹
- 933 **Third**, Mr Symons brazenly charged for work that was principally undertaken by Mr Redwood and Ms Jacobson, rather than by him. For instance:
- (a) Mr Symons charged **2 days**¹⁸⁰⁰ for (inter alia) investigating a question asked by Mr O'Bryan as to how Banksia accounted for rollovers,¹⁸⁰¹ but there is

¹⁷⁹⁵ See Mr O'Bryan's October 2017 bill attached to the Third Trimbos Report, [CBP.001.010.5957] at .6213 - .6223.

¹⁷⁹⁶ See Mr Symons' bill slip for October 2017 [CBP.001.010.5957] at .6272 – .6278.

¹⁷⁹⁷ [NOB.500.001.9288]; [NOB.500.001.9179] [NOB.500.001.9180]; [NOB.500.001.9282] [NOB.500.001.9283]; [NOB.500.001.9122] [NOB.500.001.9162]; [NOB.500.001.9122]; [NOB.500.001.9150]; [NOB.500.001.9143]; [NOB.500.001.9066]; [NOB.500.001.9043]; [NOB.500.001.9038]; [NOB.500.001.9036]; [NOB.500.001.8959] [NOB.500.001.8960]; [NOB.500.001.8940] [NOB.500.001.8942]; [NOB.500.001.8879] [NOB.500.001.8881]; [SPR.002.001.0603]; [NOB.500.001.8854]; [NOB.500.001.8837]; [NOB.500.001.8754] [NOB.500.001.8756]; [NOB.500.001.8697]; [SPR.501.001.0679]; [NOB.500.001.8702]; [NOB.500.002.6323] [NOB.500.002.6326]; [SPR.002.001.0624] [SPR.002.001.0625].

¹⁷⁹⁸ [NOB.500.001.9032]; [NOB.500.001.9029]; [NOB.500.001.8940] [NOB.500.001.8942]; [NOB.500.001.8897]; [NOB.500.001.8879]; [NOB.500.001.8870]; [SPR.002.001.0584] [SPR.501.001.0659]; [NOB.500.001.8692]; [NOB.500.001.8699]; [SPR.002.001.0608]; [NOB.500.001.8626]; [SYM.004.001.0656]; [NOB.500.001.8630].

¹⁷⁹⁹ [SYM.004.001.0667] [SYM.004.001.0676]; [SYM.004.001.0679] [SYM.004.001.0681]; [SYM.004.001.0656] [SYM.004.001.0658]; [SYM.004.001.0650]; [SYM.004.001.0630] [SYM.004.001.0631] [SYM.004.001.0639].

¹⁸⁰⁰ See Mr Symons' fee slip for October 2017 [CBP.001.010.5957] at .6273, charges for **4 and 5 October 2017**.

¹⁸⁰¹ [NOB.500.001.8940] [NOB.500.001.8942]; [SPR.002.001.0603]; [SPR.002.001.0582]; [SPR.002.001.0584]; [SPR.002.001.0604]; [NOB.500.001.8697]; [SPR.002.001.0604].

no evidence of any engagement by Mr Symons with that question.¹⁸⁰²
Rather, Mr Redwood assisted Mr O'Bryan with that enquiry.¹⁸⁰³

- (b) Mr Symons charged **1 day**¹⁸⁰⁴ for (inter alia) investigating a question asked by Mr O'Bryan about changes in interest rates offered by Banksia to debenture holders,¹⁸⁰⁵ when the evidence reveals that it was principally Ms Jacobson and Mr Redwood who assisted Mr O'Bryan with that question,¹⁸⁰⁶ with only limited engagement by Mr Symons;¹⁸⁰⁷
- (c) Mr Symons charged **1-2 days**¹⁸⁰⁸ for (inter alia) considering the admissibility and use of examination transcripts, when in fact, it was Ms Jacobson and Mr Redwood who worked on that issue and conferred with Mr O'Bryan about it, and not Mr Symons.¹⁸⁰⁹

934 **Fourth**, Mr Symons charged in relation to activities where he was merely copied to emails by Mr O'Bryan. For instance, Mr Symons charged **5 hours** on **9 October 2017** for (inter alia) "*Conferring with Jonathon Redwood, Sam Kingston and senior counsel re: \$50 million of 'unknown payments', advising*".¹⁸¹⁰ Mr Symons provided no advice in connection with any such matter. He was merely copied to an email exchange between Mr O'Bryan and Mr Redwood, to which he made no contribution at all.¹⁸¹¹

935 **Fifth**, these matters reveal the obvious reality that Mr Symons fabricated his bills by slavishly copying Mr O'Bryan's bills, so that he charged for any activity that Mr O'Bryan charged for, irrespective of whether he was involved in that work.

936 **Sixth**, the documentary evidence reveals that Mr Symons had little or no involvement in the tasks that one would ordinarily expect junior counsel to do. For instance, it was Mr O'Bryan, and not Mr Symons, who drafted Mr Bolitho's

¹⁸⁰² See the Contradictors' chronology [AID.010.026.0001_3], entries for October 2017.

¹⁸⁰³ [NOB.500.001.8940] [SPR.002.001.0579].

¹⁸⁰⁴ See Mr Symons' fee slip for October 2017 [CBP.001.010.5957] at .6273, charge for **6 October 2017**.

¹⁸⁰⁵ [NOB.500.001.8870].

¹⁸⁰⁶ [NOB.500.001.8699]; [NOB.500.001.8697]; [SPR.002.001.0604]; [SPR.501.001.0679].

¹⁸⁰⁷ [NOB.500.001.8672]; [SYM.004.001.0676].

¹⁸⁰⁸ See Mr Symons' fee slip for October 2017 [CBP.001.010.5957] at .6274 - .6275, charges for **6 and 12 October 2017**.

¹⁸⁰⁹ [NOB.500.001.8879]; [NOB.500.001.8651]; [SPR.002.001.0608]; [NOB.500.001.8626]; [NOB.500.001.8642].

¹⁸¹⁰ See Mr Symons' fee slip for October 2017 [CBP.001.010.5957] at .6273.

¹⁸¹¹ [SPR.002.001.0582].

objections to the witness statement of Mr Silavecky.¹⁸¹² Objections to evidence are almost invariably the responsibility of junior counsel.

937 **Seventh**, it was Ms Jacobson who assisted Mr O'Bryan with the forensic analysis of the documents to aid him in preparing for trial. Ms Jacobson worked up a detailed chronology of key documents relating to the case against Trust Co.¹⁸¹³ Such a document is indispensable to junior counsel's role in reviewing documentary evidence. Junior counsel's review of documents is of no utility at all without some note, chronology, or other work product which summarises or synthesizes those documents for senior counsel.

938 Mr Symons produced no like document. This shows that he cannot have done the work. How did Mr Symons think that it would assist Mr O'Bryan for Mr Symons to read thousands of documents for hours on end, without producing any analysis or summary of them, or feeding them into a line of questions for cross-examination purposes? Information stored in junior counsel's head cannot assist senior counsel; and Mr Symons could have no useful recollection of what he read in the documents without making some kind of record.

939 The Court should find that Mr Symons did not undertake the work he alleged in his bills for reading documents.

F3.6 Mr O'Bryan's bills on other matters

940 The evidence before the Court reveals inconsistencies between the fees charged by Mr O'Bryan to the Bolitho Proceeding and his work on other matters.¹⁸¹⁴

941 Further, as already noted, on 24 April 2020, Mr O'Bryan was ordered to discover:

- (a) one invoice for each matter that Mr O'Bryan worked on in the period 1 January 2017 to 30 June 2017;¹⁸¹⁵

¹⁸¹² [NOB.500.001.8610] [NOB.500.001.8611].

¹⁸¹³ [NOB.503.004.5954_ext] [NOB.503.001.3035] [NOB.503.001.3036].

¹⁸¹⁴ *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* [2017] FCA 1305 (5 June 2017) (compare Mr O'Bryan's bill for that matter [NOB.501.001.0002] with his bill for the Bolitho Proceeding [CBP.001.010.5957] at .6202); *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 (1 and 2 August 2017) (compare Mr O'Bryan's bill for that matter [NOB.501.001.0001] with his bill for the Bolitho Proceeding [CBP.001.010.5957] at .6209); *Goldfields Gas Transmission Pty Ltd v Economic Regulation Authority* [2018] WASC 104 (10 and 11 October 2017) (compare Mr O'Bryan's bill for that matter [NOB.501.001.0004] with his bill for the Bolitho Proceeding [CBP.001.010.5957] at .6220-.6221).

¹⁸¹⁵ Orders dated 24 April 2020 [ORD.500.022.0001], para [2.c].

- (b) all invoices issued in five specified class action with Mark Elliott in the period 1 October 2013 to 31 December 2019.¹⁸¹⁶

942 The picture of Mr O'Bryan's billing practices conveyed by those documents, though necessarily incomplete, nonetheless reveals Mr O'Bryan's egregious billing practice most starkly for the month of May 2017,¹⁸¹⁷ when Mr O'Bryan charged more than **\$300,000** to other matters. Self-evidently, it was impossible for Mr O'Bryan to have spent **110 hours** on the Banksia matter in May 2017.

F3.7 Mr O'Bryan and Mr Symons thought it necessary to mislead the Court about their contribution to the evidence, revealing that they knew their fees were excessive

- 943 On **10 January 2018**, Mr O'Bryan, Mr Symons and Mark Elliott exchanged emails in which they discussed their intention to submit to the Court *"that the preparation and filing of the evidence for BSL and Bolitho was a joint exercise"*.¹⁸¹⁸ In fact, Mr Bolitho's legal representatives had only limited involvement in the preparation of the evidence.¹⁸¹⁹ The SPR's evidence and submissions¹⁸²⁰ to that effect went unchallenged by AFP and the Lawyer Parties in this trial.
- 944 On **19 January 2018**, Mr O'Bryan and Mr Symons issued the First Bolitho Opinion for the settlement approval application before Justice Croft, which asserted that the evidence was *"commissioned co-operatively"*,¹⁸²¹ and implied that Mr Bolitho and the SPRs had contributed evenly to the evidence filed in the proceedings.
- 945 At the First Approval Application on **30 January 2018**, Mr O'Bryan submitted to the Court that the evidence was *"a joint exercise"*,¹⁸²² that *"it was beneficial for us to cooperate with the liquidators throughout the preparation"*,¹⁸²³ that *"there was the utmost coordination throughout, in particular in relation to the preparation and the filing of all the evidence"*.¹⁸²⁴

¹⁸¹⁶ Orders dated 24 April 2020 [ORD.500.022.0001], para [2.].

¹⁸¹⁷ [CCW.038.001.0005_2].

¹⁸¹⁸ [NOB.500.005.2480].

¹⁸¹⁹ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], paras [88]-[90].

¹⁸²⁰ Further SPR Opinion [CCW.022.001.0460], paras [20], [31] to [79] and Annexure A [CCW.022.001.0539]; Transcript of hearing on 27 July 2020 [TRA.500.001.0001], 75:9-84:13; Transcript of hearing on 28 July 2020 [TRA.500.002.0001], 75:9-84:13.

¹⁸²¹ First Bolitho Opinion [SYM.005.001.1400], footnote 37.

¹⁸²² Transcript of hearing of First Approval Application [SYM.001.001.5122], T5:13.

¹⁸²³ Transcript of hearing of First Approval Application [SYM.001.001.5122], T5:20-22.

¹⁸²⁴ Transcript of hearing of First Approval Application [SYM.001.001.5122], T5:26-28.

- 946 In the Court of Appeal, Mr O'Bryan submitted to the Court of Appeal that the SPRs' submission that they had done "*the bulk of the work*" was a submission "*which we were unaware of*",¹⁸²⁵ which "***would have been answered by evidence and submissions to the contrary***".¹⁸²⁶ When Whelan JA said to him: "*You seem to spend a lot of time reading their witness statements*", Mr O'Bryan answered: "***No. We spent a lot of time in preparation of their witness statements, Your Honours.***"¹⁸²⁷
- 947 The fact that Mr O'Bryan and Mr Symons thought it necessary to mislead the Court about the extent of their contribution to the evidence shows that they knew their fees were excessive. And the fact that they maintained that lie from January 2018 before Justice Croft through until August 2018 before the Court of Appeal makes their conduct all the more wilful and egregious, and highlights the unbecoming nature of their conduct when they were acting as officers of Court, to whom they owed a paramount duty. The passage of the transcript from the hearing in the Court of Appeal extracted above shows that Mr O'Bryan sought to deflect the Court's inquiries about the fees of the Lawyer Parties with a bald faced lie. None of Mr Symons, Mr Zita, Alex Elliott and AFP sought to correct that error in the Court of Appeal or subsequently, until capitulation in this Court.
- 948 This conduct deserves the strongest condemnation.
- F4. The overcharging was a means of securing an excessive commission
- 949 The Court should find that the conduct of AFP, Alex Elliott, Mr O'Bryan and Mr Symons had the purpose and/or effect of providing derivative support for AFP's commission, and thereby advanced the interests of AFP (and Alex Elliott) as well as the interests of Mr O'Bryan and Mr Symons.
- 950 **First**, in connection with the application for approval of the Partial Settlement including the claim for deduction of a funding commission to AFP, Trust Co filed submissions dated 1 August 2016 which submissions were distributed to AFP, Alex

¹⁸²⁵ Transcript of hearing on 8 June 2020 [SYM.001.001.7683] at .7808 - .7810, T125:24-127:19.
¹⁸²⁶ [CBP.001.007.7222], para [28].

¹⁸²⁷ Transcript of hearing on 8 June 2020 [SYM.001.001.7683] at .7808 - .7810, T125:24-127:19.

Elliott and the Lawyer Parties.¹⁸²⁸ Those submissions stated that AFP was seeking a common fund order,¹⁸²⁹ to which the following matters were relevant:

- (a) AFP did not become involved in the proceeding until 13 March 2014;¹⁸³⁰
- (b) it appeared that only some, and not all, of the disbursements incurred by Mr Bolitho had been paid by AFP;¹⁸³¹
- (c) the work done by Mr Bolitho in prosecuting the claims appeared to have been minimal (at least compared to the work done by the receivers and SPRs);¹⁸³²
- (d) AFP had effectively been “free-riding” on the work done by Banksia (through the receivers and SPRs);¹⁸³³
- (e) given that group members had themselves paid for the vast majority of the work done to prosecute the claims against the settling defendants, it was not evident why they should be asked to pay a further 25 per cent of any sum that may otherwise be available for distribution to them in the Banksia Proceeding.¹⁸³⁴

951 Accordingly, each of AFP, Mr O’Bryan, Mr Symons and Alex Elliott knew that those matters were likewise relevant to AFP’s entitlement to a funding commission from the Trust Co Settlement, and that the Court was being apprised of same. They could have been in no doubt that it was critical for each of them to ensure that accurate information was placed before the Court in relation to those matters, both at the time of the Partial Settlement and then again at the time of the Trust Co Settlement.

952 That was particularly so in circumstances where, as they each knew, the evidence, opinions and submissions filed in support of the claims for costs and commission were largely kept secret, heightening the need for accuracy. Neither the group members nor the Court were privy to the time spent on the matter by the class action lawyers and the reasonableness of the fees charged, such that the group

¹⁸²⁸ [SYM.001.001.7989] [SYM.001.001.7990].

¹⁸²⁹ [SYM.001.001.7990], para [14].

¹⁸³⁰ [SYM.001.001.7990], para [17].

¹⁸³¹ [SYM.001.001.7990], para [17].

¹⁸³² [SYM.001.001.7990], para [18].

¹⁸³³ [SYM.001.001.7990], para [19].

¹⁸³⁴ [SYM.001.001.7990], para [20].

members and the Court were totally dependent upon the veracity of the lawyers and funder.

- 953 **Second**, when Mr O’Bryan and Mr Symons appeared before Justice Robson on 4 August 2016, they submitted to Justice Robson that a common fund order to AFP of \$1.3 million, comprising 25 per cent of the Bolitho settlement sum in the Partial Settlement, would “*provide a return to the funder which is commensurable with the risk accepted by it*”.¹⁸³⁵
- 954 The submissions Mr O’Bryan and Mr Symons made to Justice Robson on behalf of AFP show that AFP, Mr O’Bryan and Mr Symons knew that the quantum of AFP’s return should be based on its risk. It is noteworthy that they invited Justice Robson to believe that legal costs had been paid “*in the ordinary way by the litigation funder*”,¹⁸³⁶ notwithstanding that, at that time, AFP had paid nothing to Mr O’Bryan, and had only paid small sums to Mr Symons and Portfolio Law. Neither they, AFP, nor Zita did anything to correct that statement.
- 955 **Third**, after the time of the Partial Settlement, the Full Federal Court published the decision in *Money Max*.¹⁸³⁷ Mr O’Bryan sent an email to Mark Elliott and other investors in AFP on 27 October 2016 about the decision, drawing attention to the *Money Max* decision and noting that Court’s approach to making a “common fund order” set out in that decision involved assessing the funder’s total return based on **the risks undertaken by the funder**.¹⁸³⁸
- 956 Under cross-examination, Alex Elliott said that he knew that AFP was seeking a common fund order¹⁸³⁹ and that funding risk was relevant to the Court’s assessment of that claim.¹⁸⁴⁰ He had read the decision in *Money Max*¹⁸⁴¹ and other relevant decisions.¹⁸⁴² He described the *Money Max* decision as “*a big moment in time*” in the litigation funding industry.¹⁸⁴³ He can therefore be taken to have known that one of the *Money Max* factors was “***the legal costs expended and to be expended... by the funder***”.¹⁸⁴⁴

¹⁸³⁵ [SYM.001.001.4500] at .4575, lines 15 – 17.

¹⁸³⁶ Transcript of hearing on 4 August 2016 [CCW.005.001.0015], T73:21-27.

¹⁸³⁷ [ATH.600.010.0001].

¹⁸³⁸ [CBP.004.001.8881].

¹⁸³⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.

¹⁸⁴⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

¹⁸⁴¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.

¹⁸⁴² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.

¹⁸⁴³ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.

¹⁸⁴⁴ *Money Max*, para [80.f].

- 957 **Fourth**, emails exchanged between Mr O'Bryan and Mark Elliott on 19 May 2018 in connection with Mrs Botsman's appeal reveal that they were acutely aware that it was relevant to the assessment of a fair commission to AFP for the Court to consider how much funding had been provided by AFP vis a vis how much funding had been provided by the debenture holders themselves, via the fund established for the SPRs.¹⁸⁴⁵ In that email, Mr O'Bryan conceded that the SPRs had paid for most of the evidence "*because he had got \$10M of debentureholders' money from Black J*", and suggested that "*it made perfect sense to spend that money first, rather than AFP's money, since AFP would simply ask for a much larger lit. fund. fee if it had had to spend those additional \$millions.*"
- 958 **Fifth**, the most compelling evidence of the dishonest intent of Mark Elliott, Mr O'Bryan and Mr Symons arises from the materials they assembled to support their claims for costs and commission, as follows. The Court should find that Alex Elliott was totally indifferent to whether the Court was presented with accurate and correct information about the claims for costs and commission, and indeed, he knew there were irregularities in the presentation of those claims, but chose to do nothing.
- 959 The **Summons**¹⁸⁴⁶ and **Notice to Group Members**¹⁸⁴⁷ referenced a claim for "*reimbursement*" of legal costs, conveying the impression that costs had been paid which were not paid. Indeed, the costs were not even incurred: virtually no invoices had been issued at the date of the summons, and Mr O'Bryan and Mr Symons were on a "no win no fee" arrangement.
- 960 Alex Elliott read the summons seeking approval of the settlement in draft form, and therefore must be taken to have known that it referred to a claim for "*reimbursement*" of legal costs.¹⁸⁴⁸ He conceded that, at least in hindsight, **the summons was misleading**.¹⁸⁴⁹ A week prior to receiving the draft summons, on 29 November 2017, Alex Elliott was copied into an email with Mr De Bono and Mark Elliott, forwarding an email from the auditor, in which the auditor referred to the "no win no fee" agreements received from Mr O'Bryan and Mr Symons and sought confirmation that those arrangements remained in place, and Mr De Bono advised: "*I expect the arrangements to stay in place as was last year*".¹⁸⁵⁰ Alex

1845 [NOB.500.004.6582]

1846 [SYM.002.001.5313] at .5314.

1847 [SYM.002.003.2274] at .2285 (at the foot of the page).

1848 [SYM.001.001.8817] [SYM.001.001.8840].

1849 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2173:12-14.

1850 [ABL.001.0703.00068]; [MAZ.004.001.0423].

Elliott claimed to have no recollection of the email and inexplicably contended that *“I didn’t think Michael or Norman were on a no win no fee”*.¹⁸⁵¹

- 961 The **instructions provided to Mr Trimbos for the Third Trimbos Report**, annexed to the report,¹⁸⁵² stated that AFP had incurred and paid all the legal costs and disbursements in the case, and that AFP had paid Mr O’Bryan’s fees of \$2.3 million plus GST, Mr Symons’ fees of \$600,000 plus GST, and Portfolio Law’s fees of \$377,000 plus GST.¹⁸⁵³
- 962 Alex Elliott was copied to those instructions to Mr Trimbos. He conceded that, at least in hindsight, **the instructions were misleading**¹⁸⁵⁴ but said that he did not appreciate the significance that it was a misleading representation to Mr Trimbos.¹⁸⁵⁵
- 963 The **invoices of Mr O’Bryan and Mr Symons annexed to the Third Trimbos Report**¹⁸⁵⁶ were issued by Mr O’Bryan and Mr Symons personally, not through their clerk; they had a “Processed Date” and a “Due By” date which made the invoices appear as if they had been issued monthly on 30 day payment terms; they were all marked to the attention of Portfolio Law; and in the case of Mr O’Bryan, they were all stamped as “PAID”.
- 964 This created a deception that AFP was entitled to a substantial funding commission because it appeared to have paid substantial legal costs. In fact the costs hadn’t been paid and nor had they been properly or honestly incurred. Mark Elliott, Mr O’Bryan and Mr Symons had invented the figures that should be charged in respect of legal costs, and then Mr O’Bryan and Mr Symons had produced their bills to get to that figure.
- 965 Alex Elliott compiled the folder of invoices for Mr Trimbos and delivered it to him on about 12 or 13 December 2017,¹⁸⁵⁷ in circumstances where he knew that he and his father had been chasing the Lawyer Parties for invoices throughout

¹⁸⁵¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1698:1-1701:3; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2105:6-2108:16.

¹⁸⁵² [CBP.001.010.5957] at .6003, para [5].

¹⁸⁵³ [CBP.001.010.5957] at .6003, para [9].

¹⁸⁵⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2142:10-22.

¹⁸⁵⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2136:16-2137:4.

¹⁸⁵⁶ [CBP.001.010.5957].at .6155 onwards.

¹⁸⁵⁷ [TRI.001.006.0001].

November and December 2017¹⁸⁵⁸ and that, accordingly, no interim invoices had been issued. It cannot have escaped Alex Elliott's attention that Mr O'Bryan and Mr Symons produced all of their invoices to appear as if they had been issued monthly.¹⁸⁵⁹ He likewise must have noticed that Mr O'Bryan's invoices were stamped as "PAID".¹⁸⁶⁰ He therefore knew that the invoices conveyed a false impression. He was completely indifferent to these irregularities.

966 The **language used in the Third Trimbo Report** distinguished between "*costs incurred to date*" or "*fees marked to date*" (on the one hand), and "*anticipated*" or "*prospective*" fees "*to finalise the matter*" (on the other).¹⁸⁶¹

967 Mr O'Bryan and Mr Symons, having the benefit of the Third Trimbo Report, dishonestly deployed that language in the **First Bolitho Opinion** in order to deliberately mislead the Court into believing that the costs had been paid save for the "*anticipated or prospective*" costs to attend to the settlement approval application. The First Bolitho Opinion contained the following statements:

- (a) Paragraph 134 stated that AFP's services "in financing the proceeding" included "*paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*".¹⁸⁶²
- (b) Paragraph 145 stated that "[AFP] paid legal costs and disbursements, or will be liable for **anticipated costs and disbursements**, in the order of \$7.8 million. **This is a very significant expenditure on the costs of the proceeding**".¹⁸⁶³
- (c) Paragraph 183 stated that: "*The plaintiff's legal costs and disbursements, while regarded as reasonable represent a significant expense to [AFP]. The legal costs and disbursements paid by [AFP] or for which it will become liable are in the order of \$7.8 million. It must of course be noted that after*

¹⁸⁵⁸ [ABL.001.0599.00009]; [SYM.001.002.8281]. Alex Elliott only conceded that it was "possible" that his father was pressing for the invoices in that email, but the Court should find that is the plain meaning of the email. See transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2154:29-2155:24.

¹⁸⁵⁹ [CBP.001.010.5957] at .6155 - .6282.

¹⁸⁶⁰ [CBP.001.010.5957] at .6155 - .6244.

¹⁸⁶¹ [CBP.001.010.5957], paras [55], [71], [82], [100]-[101], [121]-[122], [164]-[168].

¹⁸⁶² [SYM.005.001.1400], para [134].

¹⁸⁶³ [SYM.005.001.1400], para [145].

*the partial settlement the fees for which [AFP] has not been reimbursed are in the order of \$5.3 million. Had the proceeding continued to trial, the costs and disbursements incurred in running the plaintiffs case would have been significantly higher. **The magnitude of this funding risk justifies the Funder's Commission now sought.***"¹⁸⁶⁴

968 The choice of language reveals a deliberate and calculated deception by Mr O'Bryan and Mr Symons (who drafted the opinion), in which Mark Elliott and Alex Elliott acquiesced, having reviewed the opinion. They each knew that Justice Croft read the Third Trimbos Report and would see that all of counsel's invoices appeared to have been issued monthly throughout the Relevant Period, and would assume the invoices had been paid, because:

- (a) all of Mr O'Bryan's invoices were stamped as "PAID";
- (b) the instructions to Mr Trimbos annexed to the report stated that all the costs had been paid; and
- (c) the purpose of a litigation funder is to pay the legal costs.

969 Alex Elliott read the Third Trimbos Report.¹⁸⁶⁵ Alex Elliott must be taken to have read the statements in the Third Trimbos Report drawing a distinction between "*costs incurred to date*" or "*fees marked to date*" (on the one hand), and "*anticipated*" or "*prospective*" fees "*to finalise the matter*" (on the other),¹⁸⁶⁶ and the statements in the First Bolitho Opinion (which he also read)¹⁸⁶⁷ which implied that AFP had paid those costs apart from the "anticipated" or "prospective" costs of attending to the settlement approval.¹⁸⁶⁸ He must be taken to have read the statements in the First Bolitho Opinion that the legal costs were "**a significant expense to [AFP]**" and that "**the magnitude of this funding risk justifies the Funder's Commission now sought.**"¹⁸⁶⁹

¹⁸⁶⁴ [SYM.005.001.1400], para [183].

¹⁸⁶⁵ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12.

¹⁸⁶⁶ [CBP.001.010.5957], paras [55], [71], [82], [100]-[101], [121]-[122], [164]-[168].

¹⁸⁶⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:11-14 (he only conceded that he read "parts" of the opinion).

¹⁸⁶⁸ [SYM.005.001.1400], paras [134], [145], [183].

¹⁸⁶⁹ [SYM.005.001.1400], para [183].

970 Alex Elliott conceded the obvious point that AFP had a duty to group members to scrutinise the legal costs.¹⁸⁷⁰ But he did not scrutinise the fee slips himself.¹⁸⁷¹ He said that he regarded it as the role of the expert cost assessor to determine whether the fees were fair and reasonable.¹⁸⁷² But he knew that the cost assessor relied upon the integrity of the invoices and fee slips provided to him.¹⁸⁷³ Alex Elliott provided the cost assessor with the invoices and fee slips in circumstances where **he knew there were irregularities in the way those fees had been quantified**, and where **neither he nor his father cared about the veracity of those fees**, because (as he knew) AFP had not been required to pay them.¹⁸⁷⁴

971 The Court should find that Mr O'Bryan, Mr Symons, Mark Elliott/AFP and Alex Elliott deployed the misleading impression created by the Third Trimbos Report to their full advantage in seeking to justify the significant funding commission that AFP sought. AFP (and in turn the Elliott family) stood to make enormous financial gains from the deception crafted by Mr O'Bryan and Mr Symons in their opinion, which went unchallenged by Mark and Alex Elliott, who read it prior to settling it.

F5. **AFP and Alex Elliott procured counsel's overcharging**

972 On the basis of the evidence and admissions, the Court should find that:

- (a) Mark Elliott encouraged Mr O'Bryan and Mr Symons in their dishonest scheme to charge excessive fees, and indeed, he was the mastermind of that scheme.¹⁸⁷⁵
- (b) An effect and/or purpose of the inflation of legal fees was to derivatively support AFP's funding commission.¹⁸⁷⁶

¹⁸⁷⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2131:20-21.

¹⁸⁷¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:16.

¹⁸⁷² Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2171:14-21.

¹⁸⁷³ Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2171:22-24.

¹⁸⁷⁴ The Court should find that Alex Elliott knew that AFP had not paid the costs in circumstances where: (1) he knew the invoices were issued only in November/December 2017; (2) he was involved in discussions with Mr De Bono on 18-20 November 2017 in which Mr De Bono made it plain that the only costs that had been expensed (paid) in FY2017 were the costs billed up to the time of the Partial Settlement; (3) he was his father's right hand man and would have been privy to the details of his father's business model, which affected the financial interests of his whole family; and (4) his evidence that he did not know whether or not the Lawyer Parties had been paid was given evasively and lacked credibility. These matters are addressed in **Section F5.2** (paragraphs 982 - 996 below).

¹⁸⁷⁵ See **Section C3.6** above.

¹⁸⁷⁶ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [71].

- (c) Alex Elliott was complicit in that misconduct, in circumstances where he assisted in advancing and maintaining the claim for recovery of fees in circumstances where he must have known the fees were excessive, or alternatively, where he had no honest belief that the fees were reasonable.¹⁸⁷⁷

F5.1 AFP

- 973 The Court should find that **AFP** was dishonest for the following reasons.
- 974 **First**, AFP's own admissions as set out in paragraph 747 above are sufficient to establish its dishonesty, notwithstanding that AFP refused to concede the inevitable legal conclusion that follows from the admitted facts. It was dishonest for AFP to demand that Mr Lindholm agree to an arbitrary sum for legal costs of \$4.75 million plus GST,¹⁸⁷⁸ and to then encourage the Lawyer Parties to submit bills to meet that arbitrary sum¹⁸⁷⁹ (particularly in circumstances where, as the Court should find, AFP knew it could not justify that sum). It was dishonest for AFP to invite Mr O'Bryan and Mr Symons to achieve that arbitrary sum (and the Fee Targets Mark Elliott set for them) by charging higher hourly rates and cancellation fees.¹⁸⁸⁰ It was dishonest for AFP to acquiesce in Mr O'Bryan sending a fabricated fee agreement to Mr Trimbo to support his fees.¹⁸⁸¹
- 975 **Second**, the documentary evidence provides direct evidence of Mark Elliott, Mr O'Bryan and Mr Symons conspiring to overcharge their clients, as follows:¹⁸⁸²
- (a) on **19 November 2017**, Mark Elliott invited Mr O'Bryan to charge **\$2.65 million** plus GST in fees¹⁸⁸³ and Mr Symons to charge **\$600,000**¹⁸⁸⁴ (200 days' work at \$3,000 per day);¹⁸⁸⁵

¹⁸⁷⁷ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [73.d].

¹⁸⁷⁸ AFP's admissions [PLE.020.001.0001], paras [68.c] – [68.d].

¹⁸⁷⁹ AFP's admissions [PLE.020.001.0001], paras [68.h] – [68.i].

¹⁸⁸⁰ AFP's admissions [PLE.020.001.0001], paras [68.j] – [68.o], [70.c].

¹⁸⁸¹ AFP's admissions [PLE.020.001.0001], paras [70.c].

¹⁸⁸² See **Section C3.6** above.

¹⁸⁸³ [NOB.500.001.7553].

¹⁸⁸⁴ [SYM.001.001.7228].

¹⁸⁸⁵ See Mr Symons' invoices in the Murray Goulburn matter issued on 10 and 24 October 2017 [SYM.006.001.0001] – the work was charged at \$300/hour.

- (b) on **19 November 2017** at **7.09pm**, Mr O’Bryan sent Mark Elliott draft bills totalling only about **\$1 million**;¹⁸⁸⁶
- (c) on **19 November 2017** at **7.09pm**, Mark Elliott emailed Mr O’Bryan, suggesting that he increase his rates to \$15,000 per day;¹⁸⁸⁷
- (d) from **19 to 23 November 2017**, Mr O’Bryan, to the knowledge of Mark Elliott and with his encouragement, increased his bills by a combination of increasing his daily rate,¹⁸⁸⁸ converting his rate to a “GST exclusive” rate,¹⁸⁸⁹ and adding hundreds of hours to his bills;¹⁸⁹⁰
- (e) on **21 November 2017**, Mark Elliott and his sons prepared and circulated the Banksia Expenses Spreadsheet, encouraging Mr O’Bryan to charge **\$2.56 million** plus GST in fees and Mr Symons to charge **\$600,000** plus GST in fees;¹⁸⁹¹
- (f) on **22 November 2017** at **7.14pm**, Mark Elliott emailed Mr O’Bryan stating **“You will struggle for days! Could you charge a cancellation fee as you were expecting 6 months work next year and cleared your diary!”**¹⁸⁹²
- (g) on **22 November 2017** at **8.40am**, Mark Elliott asked Mr O’Bryan whether he should ask Mr Trimbos **“(1) attitude towards a cancellation fee by you (2) if \$15K per day is ok?”**;¹⁸⁹³
- (h) on **22 November 2017** at **11.49am**, Mr O’Bryan replied: **“Sure, but I reckon he will say no to both. Better that I increase the hours to the max extent possible at the \$11k rate (which he will accept)”**.¹⁸⁹⁴

976 **Third**, Mark Elliott destroyed all of that documentary evidence (see paragraphs **94 to 175** above), revealing his consciousness of his own guilt.

1886 [NOB.500.001.7516] [NOB.500.001.7517] [NOB.500.001.7519] [NOB.500.001.7521] [NOB.500.001.7523] [NOB.500.001.7525] [NOB.500.001.7527] [NOB.500.001.7529] [NOB.500.001.7531] [NOB.500.001.7533] [NOB.500.001.7535] [NOB.500.001.7537] [NOB.500.001.7539] [NOB.500.001.7541] [NOB.500.001.7543] [NOB.500.001.7545] [NOB.500.001.7547] [NOB.500.001.7549] [NOB.500.001.7551].
The total of the 18 invoices is set out in the Contradictors’ aide memoire, [AID.010.029.0001].

1887 [NOB.500.001.7504].

1888 [NOB.500.001.7504]; [NOB.500.001.7508]; [NOB.500.001.7506].

1889 [NOB.500.001.7504].

1890 [NOB.500.001.7416].

1891 [AFP.007.001.0001] [AFP.007.001.0002] [NOB.500.001.7495].

1892 [NOB.500.001.7495].

1893 [NOB.500.001.7493].

1894 [NOB.500.001.7493].

- 977 **Fourth**, Mark Elliott cannot have believed that the Lawyer Parties had performed \$3.5 million worth of work in the Relevant Period, because he was involved in all aspects of the Bolitho Proceeding throughout the litigation,¹⁸⁹⁵ and therefore knew that the work of the Lawyer Parties during the Relevant Period had been minimal.¹⁸⁹⁶
- 978 **Fifth**, Mark Elliott and Mr Symons exchanged emails between 26 February 2018 and 1 March 2018 about Mr Symons' retainer. In that email discussion:¹⁸⁹⁷
- (a) Mark Elliott told Mr Symons: ***"I would ask for [your] reasonable assistance in seeking cost recovery when we win a case!"***
 - (b) Mr Symons asked Mark Elliott: ***"what will happen in the event of a successful cost recovery"*** in excess of the retainer payments.
 - (c) Mark Elliott replied: ***"TBA % share if/when we recover more than 40hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?"***
 - (d) Mr Symons said: ***"I still have a considerable amount of time to recover in re: work in 2017 on the ongoing proceedings (MGC, SRX, MYR)."***
 - (e) Mark Elliott replied: ***"SRX – suggest that you defer till later for bonus points. Myer and MGC-ok to charge."***
- 979 The Court should find that this email demonstrates that Mark Elliott knew that Mr Symons had charged excessive fees on the Banksia matter, and that Mr Symons' excessive fee claim in that matter reflected his illegal contingency fee arrangement.
- 980 **Sixth**, AFP stood to gain from counsel's overcharging, because the inflated claims for legal costs appeared to derivatively support AFP's claim for a commission, by making it appear as if AFP had taken a significant funding risk. Mark Elliott knew that this was significant to any application for a common fund order following the decision in Money Max.¹⁸⁹⁸

¹⁸⁹⁵ AFP's admissions [PLE.020.001.0001], para [70.h].

¹⁸⁹⁶ See **Section F3.5** above.

¹⁸⁹⁷ [AEL.100.070.0001].

¹⁸⁹⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:12-2089:31; [CBP.004.001.8881]; *Money Max* at [80] [ATH.600.068.0001].

981 **Seventh**, AFP would not allow the SPR or group members to see the Third Trimbos Report.¹⁸⁹⁹ It should be inferred that AFP knew it was vulnerable if scrutinised.

F5.2 Alex Elliott

982 The Court should find that **Alex Elliott** was dishonest for the following reasons.

983 **First**, Alex Elliott knew that on 10 November 2017, the day after the mediation, his father had agreed a figure of \$4.75 million plus GST in legal costs and \$12.8 million plus GST in respect of commission.¹⁹⁰⁰

984 **Second**, Alex Elliott assisted to advance the claim for legal costs. Significantly, he briefed Mr Trimbos with the invoices and fee slips comprising that claim. Alex Elliott conceded that Mr Trimbos relied upon the invoices and fee claims as evidence, and did not have any direct knowledge of the work undertaken.¹⁹⁰¹

985 **Third**, Alex Elliott thereafter assisted to advance the claim to recover those legal costs, by (1) assisting his father to produce and maintain the Banksia Expenses Spreadsheet, (2) assisting in briefing Mr Trimbos, and (3) reviewing the material that was filed for the purpose of the First Approval Application, including the Third Trimbos Report and the First Bolitho Opinion.

986 **Fourth**, the Court should find that, from his involvement in those activities and from his wider involvement in the business affairs of AFP as his father's right hand man,¹⁹⁰² Alex Elliott knew that the Lawyer Parties issued their invoices in respect of the Relevant Period only in **November/December 2017**. The Court should reject Alex Elliott's evidence to the contrary,¹⁹⁰³ for the following reasons:

- (a) On **18-20 November 2017**, Alex Elliott was involved in discussions with AFP's accountant Mr De Bono from which he knew that **the only invoices recognised in AFP's draft FY2017 accounts were those issued by the Lawyer Parties at the time of the Partial Settlement**.¹⁹⁰⁴

¹⁸⁹⁹ See eg [TRI.001.006.0661] [SYM.002.002.0505] [SYM.001.002.8843].

¹⁹⁰⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2073:21-25.

¹⁹⁰¹ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:22-24.

¹⁹⁰² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

¹⁹⁰³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2127:11-20, 2128:8-11, 2135:15-2136:1.

¹⁹⁰⁴ [ABL.001.0600.00007]; [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024; Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26;

- (b) Max Elliott thereafter prepared and circulated to Mark and Alex Elliott the “Banksia Expenses Spreadsheet”,¹⁹⁰⁵ which included an “**INVOICE YES/NO**” column which stated that no invoices had been received for Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law. Max Elliott was at that time a university student who was not in the office day-to-day,¹⁹⁰⁶ and it should be inferred that he was less closely engaged with the Banksia Expenses Spreadsheet than Alex Elliott who thereafter assisted in updating it.
- (c) On **24 November 2017**, Alex Elliott emailed his father about chasing Portfolio Law for invoices.¹⁹⁰⁷
- (d) On **24 November 2017**, Alex Elliott updated the Banksia Expenses Spreadsheet to record Mr O’Bryan’s fees in a sum that was quite different from that shown in the first iteration of the Banksia Expenses Spreadsheet, and thus knew that the figure inserted in the **21 November 2017** version of the spreadsheet was not the final figure and had changed since then.¹⁹⁰⁸
- (e) On **24 November 2017**, Alex Elliott was copied to an email from Mr O’Bryan in which he said he would ask his secretary to “***amend accounts accordingly***”.¹⁹⁰⁹
- (f) **All this time, Alex Elliott was preparing a tabulated, hard copy folder of invoices**¹⁹¹⁰ to brief to Mr Trimbos.¹⁹¹¹ He therefore knew which invoices were missing and when they were received.
- (g) As late as **8 December 2017**, Mark Elliott copied Alex Elliott to an email in which he pressed Mr Symons, Mr Zita and Mr O’Bryan for their invoices.¹⁹¹²

Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:20-28; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:21-2110:30 (Alex Elliott did not deny that the meeting occurred, but said he could not recall it).

¹⁹⁰⁵ [AFP.007.001.0001] [AFP.007.001.0002].

¹⁹⁰⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2117:4-16.

¹⁹⁰⁷ [ABL.001.0599.00009].

¹⁹⁰⁸ [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011].

¹⁹⁰⁹ [SYM.001.001.4890].

¹⁹¹⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:8-15, 2135:7-10.

¹⁹¹¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2130:8-13.

¹⁹¹² [SYM.001.002.8281]. Alex Elliott only conceded that it was “possible” that his father was pressing for the invoices in that email, but the Court should find that is the plain meaning of the email. See transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2154:29-2155:24.

- (h) On about **11 December 2017**, Alex Elliott finally received invoices for Mr O'Bryan¹⁹¹³ and Portfolio Law.¹⁹¹⁴
- (i) On **12 or 13 December 2017**, Alex Elliott delivered the folder to Mr Trimbo.¹⁹¹⁵

987 **Fifth**, Alex Elliott therefore knew that AFP had *first*, agreed to a total figure in respect of legal costs with Mr Lindholm;¹⁹¹⁶ *second*, prepared a spreadsheet with a list of expenses which together matched that agreed figure,¹⁹¹⁷ *third*, sent that spreadsheet to Mr O'Bryan and Mr Symons for their "*information*" and "*comments*",¹⁹¹⁸ and *fourth*, thereafter received invoices from the service providers closely proximate to the final figures used in the spreadsheet. **An honest solicitor in Alex Elliott's position would think that this sequence of events was highly irregular.**

988 **Sixth**, the Court should find that Alex Elliott knew that AFP had not paid most of the costs it sought to recover, and should reject his evidence to the contrary,¹⁹¹⁹ because:

- (a) Alex Elliott knew the invoices were issued only in November/December 2017 (as set out above);
- (b) Alex Elliott was involved in discussions with Mr De Bono on 18-20 November 2017 in which Mr De Bono made it plain that the only costs that had been expensed (paid) in FY2017 were the costs billed up to the time of the Partial Settlement (as set out above);¹⁹²⁰

¹⁹¹³ Alex Elliott said he received Mr O'Bryan's invoices that he gave to Mr Trimbo "*some time in early or mid-December*" (transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2133:15-18). The documentary evidence shows that Mr O'Bryan finalised his invoices on **11 December 2017**, as per the metadata for the following documents: [NOB.503.001.0162] [NOB.503.001.0159] [NOB.503.001.0154] [NOB.503.001.0148] [NOB.503.001.0142] [NOB.503.001.0139] [NOB.503.001.0138] [NOB.503.001.0130] [NOB.503.001.0128] [NOB.503.001.0125] [NOB.500.001.7273] [NOB.500.001.7272].

¹⁹¹⁴ [SYM.001.002.5447] [SYM.001.002.5449];
¹⁹¹⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2152:3-26.
 [TRI.001.006.0001].

¹⁹¹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2073:21-25.

¹⁹¹⁷ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2118:2-16.

¹⁹¹⁸ [NOB.500.001.7495]; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2120:8-31.

¹⁹¹⁹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:8-2102:25, 2136:24-2137:2.

¹⁹²⁰ [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024;
 Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26;

- (c) Alex Elliott was his father's right hand man¹⁹²¹ and would have been privy to the details of his father's business model, which affected the financial interests of his whole family; and
- (d) Alex Elliott's evidence that he did not know whether or not the Lawyer Parties had been paid was given in a manner that was evasive and lacking in credibility: he repeatedly offered oblique rather than direct responses, saying "*I'd never really discussed it with dad*", "*I just didn't deal with that side of the business*".¹⁹²²

989 **Seventh**, it follows that Alex Elliott knew that there were irregularities in the way the claim for legal costs had been constructed. And he knew that AFP had not been required to pay the fees, and would not be required to pay them, in circumstances where invoices were issued simultaneously with AFP seeking "*reimbursement*" of the fees from the settlement proceeds. Alex Elliott read the summons seeking approval of the settlement in draft form, and therefore must be taken to have known that it referred to a claim for "*reimbursement*" of legal costs.¹⁹²³

990 **Eighth**, Alex Elliott conceded the obvious point that AFP had a duty to group members to scrutinise the legal costs.¹⁹²⁴ But he did not scrutinise the fee slips himself,¹⁹²⁵ and was **completely indifferent to whether there was a proper basis for the costs sought to be recovered**,¹⁹²⁶ in circumstances where it must have been obvious to him that his father was, **at best**, likewise indifferent to the scrutiny of the costs. The idea that a solicitor or litigation funder would seek to pass the reasonableness of counsel's fees to a cost assessor, without taking any responsibility for scrutinising them, should not be countenanced – all the more so when (the Court should find) the cost assessor was regarded by AFP and the Lawyer Parties as a "tame" expert who could be relied upon to provide a favourable report.

1921 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:4-28;
 1922 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:17-2110:30.
 1923 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.
 1924 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:19-31.
 1925 [SYM.001.001.8817] [SYM.001.001.8840].
 1926 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2131:20-21.
 1925 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:16.
 1926 See eg transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:14-21.

- 991 **Ninth**, Alex Elliott knew that his father had invited counsel to maximise their fees by charging cancellation fees, to the detriment of group members.¹⁹²⁷ An honest solicitor in Alex Elliott's position would have thought it irregular and improper for AFP to support a cancellation fee which was not provided for in counsel's fee agreements. Mark Elliott's desire to pay gratuitous, uncontracted-for cancellation fees revealed that his interests lay in rewarding Mr O'Bryan and Mr Symons, and not in containing their claim for costs.
- 992 **Tenth**, Alex Elliott said that he regarded it as the role of the expert cost assessor to determine whether the fees were fair and reasonable.¹⁹²⁸ But he knew that the cost assessor relied upon the integrity of the invoices and fee slips provided to him.¹⁹²⁹ Alex Elliott provided the cost assessor with the invoices and fee slips in circumstances where **he knew there were irregularities in the way those fees had been quantified**, and where **neither he nor his father cared about the veracity of those fees**, because (as he knew) AFP had not been required to pay them.
- 993 **Eleventh**, Alex Elliott read the Third Trimbo Report.¹⁹³⁰ He must therefore be taken to have read the statements in the Third Trimbo Report about Mr O'Bryan charging 65 days in trial preparation time. He knew that the Lawyer Parties had begun their trial preparation work only in the second half of 2017.¹⁹³¹ **He did not seek to critically examine Mr O'Bryan's trial preparation charges at that time,**¹⁹³² **or indeed, at any time.**¹⁹³³
- 994 **Twelfth**, it was integral to AFP's claim for commission to make it appear as if AFP had taken a substantial funding risk. Alex Elliott admits that the fees of the Lawyer Parties comprised the significant proportion of the legal costs and disbursements that AFP sought to recover from the Settlement Sum, **and upon which its claim for commission was predicated.**¹⁹³⁴ He conceded that he knew that AFP was seeking a common fund order¹⁹³⁵ and that funding risk was relevant to the Court's

1927 [TRI.001.006.0072];
Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1741:29-1742:10;
Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2144:21-2145:10.

1928 Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:14-21.

1929 Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2171:22-24.

1930 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12.

1931 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23.

1932 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:15.

1933 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2165:12-16.

1934 [PAR.080.001.00001], para [74].

1935 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.

assessment of that claim.¹⁹³⁶ He had read the decision in Money Max¹⁹³⁷ and other relevant decisions.¹⁹³⁸ He described the Money Max decision as “*a big moment in time*” in the litigation funding industry.¹⁹³⁹ He can therefore be taken to have known that one of the Money Max factors was “*the legal costs expended and to be expended... by the funder*”.¹⁹⁴⁰

995 **Thirteenth**, Alex Elliott conceded that the funding commission sought by AFP was a very good outcome for AFP, and indeed, for his family,¹⁹⁴¹ which held 76 per cent of the shares in AFP via corporate entities including Decoland, which was the trustee of two trusts¹⁹⁴² of which Alex Elliott was and remains a beneficiary.¹⁹⁴³

996 **Fourteenth**, Alex Elliott’s actions after the First Approval Application provide compelling evidence of his state of mind at the time of the First Approval Application. For instance, Alex Elliott was in the Court of Appeal when Whelan JA pointedly questioned Mr O’Bryan about the fee notes annexed to the Third Trimbo Report. His father thereafter sent him Mr O’Bryan’s email conveying his concern that, having regard to Whelan JA’s questions, it was “*vitaly important that AFP pays MS & PL*”.¹⁹⁴⁴ His father asked him to address those concerns by drawing sham cheques to Mr Symons and Portfolio Law – a highly irregular request¹⁹⁴⁵ about which he rightly felt uneasy.¹⁹⁴⁶ **An honest solicitor would at that point revisit the fee notes annexed to the Third Trimbo Report to form their own view about whether there was any substance to the issue raised by Mrs Botsman.** Yet on Alex Elliott’s own evidence, he did not do so at that time,¹⁹⁴⁷ even though he had to consult the Third Trimbo Report anyway, for the purpose of identifying the sum for which he should draw the sham cheques.¹⁹⁴⁸ His actions are not consistent with his position that he held an honest belief in the veracity of the claim for costs and commission advanced at the time of

1936 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

1937 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.

1938 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.

1939 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.

1940 Money Max, para [80.f].

1941 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:6-15.

1942 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:16-31.

1943 Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1599:3-12, 1601:23-1602:1; [MAZ.005.001.0001].

1944 [ABL.001.0601.00003].

1945 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:2.

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:5-14.

1946 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2023:7-18.

1947 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1994:13-29.

1948 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:22-31.

the First Approval Application. **Rather, they are consistent with an unwavering indifference to the veracity of that claim.**

- F6. Mr Zita/Portfolio Law acquiesced in the overcharging
- 997 Mr Zita conceded that he was remiss in his failure to scrutinise the fees charged by Mr O'Bryan and Mr Symons.¹⁹⁴⁹ He conceded that he did not consider or cross check the rates charged by Mr O'Bryan and Mr Symons in their invoices against the fee agreements that had been given to Mr Trimbos and what Mr Trimbos had approved in the Third Trimbos Report,¹⁹⁵⁰ or give any consideration to their rates at all.¹⁹⁵¹ He accepted that he was responsible for doing so,¹⁹⁵² and that it was an important responsibility owed by an instructing solicitor to protect his client's interests.¹⁹⁵³ He admitted that he was grossly derelict in his duty to his clients.¹⁹⁵⁴
- 998 Mr Zita initially claimed that there was nothing to put him on notice that the fees charged by Mr O'Bryan and Mr Symons were excessive.¹⁹⁵⁵ That contention ignores the reality that Mr Zita did not show the slightest interest in counsel's fees. It is not open to Mr Zita to say that there was nothing to put him on notice that counsel's fees were excessive when he did not even ask to see their fee slips; and Mr Zita ultimately conceded as much in cross-examination.¹⁹⁵⁶
- 999 On the basis of the evidence and Mr Zita/Portfolio Law's own concessions, the Court should find that Mr Zita/Portfolio Law acquiesced in Mr O'Bryan and Mr Symons charging more than a fair and reasonable amount in circumstances where:
- (a) the invoices issued by Mr O'Bryan and Mr Symons exhibited to the Third Trimbos Report were addressed to Mr Zita/Portfolio Law, and appeared as if they had been issued to him on a monthly basis and (at least in the case of Mr O'Bryan's fees) had been paid by him;
 - (b) this conveyed the impression to the Court and anyone else reading the report that Mr Zita/Portfolio Law had satisfied themselves as to the fees

¹⁹⁴⁹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [42], [131] - [132], [152], [154], [184], [289]; Transcript of hearing on 14 August 2020 [TRA.500.008.0001] T855:30-856:2.
¹⁹⁵⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [301].
¹⁹⁵¹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [288], [291].
¹⁹⁵² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 852:23-27.
¹⁹⁵³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 853:17-20.
¹⁹⁵⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 858:18-19.
¹⁹⁵⁵ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [183] - [184].
¹⁹⁵⁶ [TRA.500.008.0001] T854:26-858:17.

charged, and that in the case of Mr O'Bryan, the invoices had been paid by Mr Zita/Portfolio Law;

- (c) in fact, Mr Zita/Portfolio Law had no involvement at all in counsel's fees or fee arrangements, and counsel did not send their invoices to him for review or payment;¹⁹⁵⁷
- (d) Mr Zita/Portfolio Law filed the report with the exhibits¹⁹⁵⁸ and did nothing to correct the misleading impression it conveyed;
- (e) Mr Zita/Portfolio Law failed to take any steps to satisfy himself that the fees charged by Mr O'Bryan and Mr Symons were fair and reasonable;¹⁹⁵⁹
- (f) Mr Zita/Portfolio Law made no enquiries about the costs charged by Mr O'Bryan and Mr Symons;¹⁹⁶⁰
- (g) the rates charged by Mr Symons exceeded the rates set out in the February 2015 Symons/Portfolio Law Costs Agreement which Mr Zita/Portfolio Law had received;
- (h) Mr Symons had not notified Mr Zita/Portfolio Law of any increase in his rates¹⁹⁶¹ (save insofar as the First Trimbos Report stated that Mr Symons had increased his rates to \$275/hour (including GST) from 1 January 2016);¹⁹⁶²
- (i) Mr Zita/Portfolio Law concedes that he did not know whether Mr O'Bryan's fees were calculated in accordance with his costs agreement, because he never asked Mr O'Bryan for a costs agreement, and he concedes that he should have done so;¹⁹⁶³
- (j) Mr Zita did not obtain a copy of Mr O'Bryan's fee agreement at any time prior to 20 December 2017,¹⁹⁶⁴ when he was copied to an email from Mr

¹⁹⁵⁷ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [38], [40], [94], [130], [132], [150], [153], [154], [288] – [291].

¹⁹⁵⁸ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [242] – [244], [295] – [296]

¹⁹⁵⁹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [150], [154], [156] – [157].

¹⁹⁶⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [38] – [42], [132], [148], [150], [288] – [291], [301].

¹⁹⁶¹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], [38].

¹⁹⁶² [SYM.002.001.1890] at .1909, para [64].

¹⁹⁶³ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [131] – [132].

¹⁹⁶⁴ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [131] – [132].

O'Bryan to Mr Trimbos attaching the O'Bryan December 2017 Costs Agreement purportedly signed and dated 31 May 2016,¹⁹⁶⁵ but which Mr Zita had never seen before;

- (k) Mr Zita/Portfolio Law did nothing to protect the interests of Mr Bolitho or group members in respect of the fees charged by Mr O'Bryan and Mr Symons;¹⁹⁶⁶
- (l) Mr Zita/Portfolio Law effectively delegated his responsibilities for acting as solicitor for Mr Bolitho and group members to Mark Elliott/AFP, Alex Elliott, Mr O'Bryan and Mr Symons,¹⁹⁶⁷ and accordingly he is responsible for their failure to monitor counsel's fees and ensure that those fees were not excessive.

¹⁹⁶⁵ [SYM.001.003.0203] [SYM.001.003.0204].

¹⁹⁶⁶ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [42], [131] - [132], [152], [154], [184], [289], [291].

¹⁹⁶⁷ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 729:13-26.

G. SUMMONS AND NOTICE CONTRAVENTIONS

G1. Outline of contraventions

1000 The Court should find that, by their conduct in connection with preparing and issuing a summons and notice to group members which stated that AFP was seeking “*reimbursement*” of legal costs when AFP had not in fact paid substantially all of the legal costs for which it claimed “*reimbursement*”:

- (a) AFP, Mr O’Bryan and Mr Symons contravened the overarching obligation to act honestly;¹⁹⁶⁸
- (b) AFP, Mr O’Bryan, Mr Symons, Mr Zita/Portfolio Law, and Alex Elliott contravened the overarching obligation not to mislead or deceive;¹⁹⁶⁹
- (c) AFP, Mr O’Bryan, Mr Symons, Mr Zita/Portfolio Law, and Alex Elliott contravened the overarching obligation to only make claims that have a proper basis.¹⁹⁷⁰

1001 Further, the Court should find that Alex Elliott contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive by his conduct in drafting a script for Mr Zita/Portfolio Law to follow in their dealings with debenture holders in connection with the Trust Co Settlement (**Script**)¹⁹⁷¹ in which Mr Zita/Portfolio Law were directed to inform debenture holders that:¹⁹⁷²

- (a) *“Subject to approval by the Supreme Court and an external costs consultant report filed in the settlement approval application, the legal costs and disbursements are \$4.75M (+GST)”.*
- (b) *“How do I know if the legal costs are fair and reasonable? No legal costs can be paid without from the settlement proceeds without the approval of the Supreme Court of Victoria. The Plaintiff has engaged a suitably qualified external costs consultant to prepare an expert report to be filed in the*

¹⁹⁶⁸ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [75.a]

¹⁹⁶⁹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [75.b]

¹⁹⁷⁰ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [75.c]

¹⁹⁷¹ [ABL.001.0594.00005] [ABL.001.0594.00006] [ABL.001.0627.00038] [ABL.001.0627.00039] [ABL.001.0627.00040].

¹⁹⁷² RLOI [PLE.010.005.0001], para [78A].

settlement application concerning whether the legal costs and disbursements incurred and claimed have been reasonably incurred and are of a reasonable amount.”

- (c) *“Why does the litigation funder receive \$12.8M? The litigation funder will not receive any payment without approval of the Supreme Court. The Plaintiff and a majority of debenture holders by face value have entered into a litigation funding agreement with BSL Litigation Partners Ltd (Litigation Funder) entitling BSLLP to 30% of any settlement proceeds. **The funder has paid all legal costs and disbursements**, provided security for costs and indemnified the Plaintiff against all adverse costs in the event that the class action claims do not succeed. The Plaintiff will submit that the payment is just and equitable in **remunerating the funder for the significant financial expense** and adverse exposure undertaken in commencing and maintaining the Plaintiffs class action claims.”*

G2. Admissions and concessions

- 1002 Mr O’Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,¹⁹⁷³ and do not contest findings being made against them on the basis of those allegations.¹⁹⁷⁴
- 1003 The admissions of AFP, Alex Elliott and Mr Zita/Portfolio Law are addressed where relevant below.

¹⁹⁷³ RLOI dated 21 July 2020: [PLE.010.002.0001].

¹⁹⁷⁴ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

G3. Evidence establishing contraventions

G3.1 Issuing the Summons and Notice

1004 Between 27 November 2017 and 12 December 2017, Mr O’Bryan and Mr Symons drafted and settled,¹⁹⁷⁵ Alex Elliott and AFP reviewed,¹⁹⁷⁶ AFP gave instructions to file or issue,¹⁹⁷⁷ and Portfolio Law caused to be filed or issued:

- (a) a summons dated 7 December 2017 (**Summons**) seeking approval of the settlement including the claim for the sum of \$4.75 million plus GST for legal costs and disbursements incurred by AFP to be paid directly to AFP by way of “*reimbursement*” for legal costs;¹⁹⁷⁸
- (b) a notice to debenture holders/group members (**Notice**) informing them that AFP was seeking “*reimbursement*” of legal costs.¹⁹⁷⁹

1005 AFP and Portfolio Law admit this allegation, save that Alex Elliott denied reviewing the Summons.¹⁹⁸⁰ However, at trial, he conceded that he reviewed the draft Summons before it was filed.¹⁹⁸¹

G3.2 The Summons and Notice were misleading

1006 AFP, Alex Elliott and Portfolio Law admit that AFP had not paid \$4.75 million plus GST in legal costs and disbursements as suggested by the Summons and Notice.¹⁹⁸²

¹⁹⁷⁵ [SYM.001.002.4689] [SYM.001.002.4690] [SYM.001.002.4694] [SYM.001.002.4697] [SYM.001.002.4704] [SYM.001.001.8552] [SYM.001.001.8817] [SYM.001.001.8818] [SYM.001.001.8825] [SYM.001.001.8827] [SYM.001.001.8834] [SYM.001.001.8836] [SYM.001.001.8840].

¹⁹⁷⁶ [NOB.500.005.2485] [NOB.500.005.2487]; [SYM.001.002.7586] [SYM.001.002.7587]; [SYM.001.002.6152] [SYM.001.002.6154]; [SYM.002.001.4176]; [CBP.004.010.0006]; [SYM.001.001.8817] [SYM.001.001.8827] [SYM.001.001.8818] [SYM.001.001.8836] [SYM.001.001.8840]; [CBP.001.013.3423] [CBP.001.013.3438] [CBP.001.013.3451]; [ABL.002.0006.00022] [ABL.002.0006.00023].

¹⁹⁷⁷ [SYM.001.002.3621] [SYM.001.002.3491].

¹⁹⁷⁸ [SYM.002.001.5313].

¹⁹⁷⁹ [SYM.002.003.2274].

¹⁹⁸⁰ AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [76]; [PLE.070.001.0001_2].

¹⁹⁸¹ [SYM.001.001.8817] [SYM.001.001.8840].

¹⁹⁸² AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [77.b]; [PLE.070.001.0001_2].

1007 The Court should find that:

- (a) The Summons and Notice which referenced the “*reimbursement*” of the sum of \$4.75 million plus GST in respect of legal costs and disbursements conveyed to the court, the group members, and the parties that those costs had in fact been paid by AFP. That was so because the ordinary meaning of the word “reimbursement” is pay back, refund, or repay.¹⁹⁸³
- (b) That was misleading.¹⁹⁸⁴
- (c) The misleading impression was fortified by the Third Trimbos Report and the First and Second Bolitho Opinion.¹⁹⁸⁵

1008 Notably, whilst AFP, Alex Elliott and Mr Zita/Portfolio Law formally denied the allegation that the Summons and Notice were misleading,¹⁹⁸⁶ under cross-examination, Alex Elliott conceded that, at least in hindsight, **the Summons was misleading**.¹⁹⁸⁷

1009 Accordingly, the Court should find that AFP, Alex Elliott and the Lawyer Parties contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive by their conduct in issuing the Summons and Notice.

G3.3 Script for Mr Zita/Portfolio Law

1010 In evidence, Alex Elliott conceded that he drafted the Script, but said that he merely took the statements in it from other sources.¹⁹⁸⁸ The fact that he obtained the contents of the script from other sources is irrelevant to the question whether it was misleading – which is clearly was.

1011 It is telling that, despite a leading question from his senior counsel designed to elicit evidence that Alex Elliott thought it important to “*stick to the substance and detail*

¹⁹⁸³ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [77.a].

¹⁹⁸⁴ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [77.b].

¹⁹⁸⁵ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [77.c].

¹⁹⁸⁶ AFP, Alex Elliott and Portfolio Law deny this: [PLE.020.001.0001] & [PAR.080.001.0001], para [77.a]; [PLE.070.001.0001_2].

¹⁹⁸⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2173:12-14.

¹⁹⁸⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1718:18-1721:6.

of what the notice to group members had said”, Alex Elliott said: “I never really turned my mind to, I guess, the content of it that much”.¹⁹⁸⁹

1012 That answer exemplified his cavalier and indifferent approach to the accuracy of information he was involved in publishing, and his lack of candour in the witness box in wanting to portray himself as a “personal assistant” who did not reflect upon or consider the communications that he drafted as a solicitor to be conveyed to group members.

G3.4 State of mind of AFP, Mr O’Bryan and Mr Symons – breach of the overarching obligation to act honestly

1013 The Court should find that AFP, Alex Elliott, Mr O’Bryan and Mr Symons acted dishonestly in relation to the Summons and Notice in circumstances where:

- (a) they each knew that AFP had not paid \$4.75 million plus GST in costs;
- (b) they involved themselves in issuing a misleading Summons and Notice in order to advance their scheme to obtain excessive amounts in respect of costs and commission.

1014 The evidence establishing those finding is as follows.

1015 **First**, AFP admits that it knew it had not paid \$4.75 million plus GST in costs.¹⁹⁹⁰ It admits that it knew what payments it had made in the course of the litigation.¹⁹⁹¹ It admits that it knew of the Fee Arrangements it had entered into.¹⁹⁹²

1016 **Second**, self-evidently, Mr O’Bryan and Mr Symons each knew that their own fees had not been paid.

1017 **Third**, Mark Elliott, Mr O’Bryan and Mr Symons all knew that AFP sought to recover legal costs as a component of the “*division of the spoils*” of the Trust Co Settlement.¹⁹⁹³ A necessary element of that plot is that legal fees would be quantified at the end of the matter, when the settlement sum was known, and that the fees therefore necessarily had not been paid.

¹⁹⁸⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1721:7-12.

¹⁹⁹⁰ [PLE.020.001.0001], para [77.e].

¹⁹⁹¹ [PLE.020.001.0001], para [77.e.i].

¹⁹⁹² [PLE.020.001.0001], para [77.e.ii].

¹⁹⁹³ [SYM.001.001.5479].

- 1018 **Third**, on 20 November 2017, Mr Symons created a series of documents which he invited Mr Zita/Portfolio Law to use as the basis for generating fee memoranda.¹⁹⁹⁴ Mr Zita confirmed that he told Mr O’Bryan and Mr Symons that he did not have contemporaneous records of the time he had spent on the matter.¹⁹⁹⁵ Accordingly, Mr O’Bryan and Mr Symons knew that Mr Zita/Portfolio Law had not been paid.
- 1019 **Fourth**, Mr Symons was forwarded an email from Mr O’Bryan to his secretary on 14 November 2017 which made it plain that Mr O’Bryan and his secretary were at that time in the process of preparing Mr O’Bryan’s bills, such that Mr Symons must have known that Mr O’Bryan had not been paid.¹⁹⁹⁶
- 1020 **Fifth**, it is plain from the documentary evidence that Mr O’Bryan knew full well that Mr Zita and Mr Symons had not been paid.¹⁹⁹⁷
- 1021 **Sixth**, the Court should find that Alex Elliott knew that the Lawyer Parties issued most of their invoices for the Relevant Period only in November 2017/December 2017, and had not been paid as at the date the Summons was issued, because (as set out at paragraphs 986 above):
- (a) On **18-20 November 2017**, Alex Elliott was involved in discussions with AFP’s accountant Mr De Bono from which he knew that the only invoices recognised in AFP’s draft FY2017 accounts were those issued by the Lawyer Parties at the time of the Partial Settlement.¹⁹⁹⁸
 - (b) Alex Elliott thereafter assisted his father to prepare the “Banksia Expenses Spreadsheet”,¹⁹⁹⁹ which included an “**INVOICE YES/NO**” column which stated that no invoices had been received for Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law.

¹⁹⁹⁴ [SYM.001.001.6272] [SYM.001.001.6273] [SYM.001.001.6275] [SYM.001.001.6277] [SYM.001.001.6278] [SYM.001.001.6279] [SYM.001.001.6281] [SYM.001.001.6283] [SYM.001.001.6284] [SYM.001.001.6286] [SYM.001.001.6288] [SYM.001.001.6290] [SYM.001.001.6291] [SYM.001.001.6292] [SYM.001.001.6294] [SYM.001.001.6295] [SYM.001.001.6296] [SYM.001.001.6298] [SYM.001.001.6300].

¹⁹⁹⁵ [TRA.500.008.0001] T859:2-31.

¹⁹⁹⁶ [NOB.500.001.7416].

¹⁹⁹⁷ [ABL.001.0601.00003] (Mr O’Bryan’s 10 June 2018 email to Mark Elliott).

¹⁹⁹⁸ [ABL.001.0600.00007]; [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024; Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:20-28; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:21-2110:30 (Alex Elliott did not deny that the meeting occurred, but said he could not recall it).

¹⁹⁹⁹ [AFP.007.001.0001] [AFP.007.001.0002].

- (c) On **24 November 2017**, Alex Elliott emailed his father about chasing Portfolio Law for invoices.²⁰⁰⁰
- (d) On **24 November 2017**, Alex Elliott updated the Banksia Expenses Spreadsheet to record Mr O’Bryan’s fees in a sum that was quite different from that shown in the first iteration of the Banksia Expenses Spreadsheet, and thus knew that the figure inserted in the **21 November 2017** version of the spreadsheet was not the final figure and had changed since then.²⁰⁰¹
- (e) On **24 November 2017**, Alex Elliott was copied to an email from Mr O’Bryan in which he said he would ask his secretary to “*amend accounts accordingly*”.²⁰⁰²
- (f) **All this time, Alex Elliott was preparing a tabulated, hard copy folder of invoices**²⁰⁰³ to brief to Mr Trimbo.²⁰⁰⁴ He therefore knew which invoices were missing and when they were received.
- (g) On **29 November 2017**, Alex Elliott was copied into another email with Mr De Bono and Mark Elliott, forwarding an email from the auditor, in which the auditor referred to the “no win no fee” agreements received from Mr O’Bryan and Mr Symons and sought confirmation that those arrangements remained in place, and Mr De Bono advised: “*I expect the arrangements stay in place as was last year*”.²⁰⁰⁵ Alex Elliott claimed to have no recollection of the email and inexplicably contended that “*I didn’t think Michael or Norman were on a no win no fee*”.²⁰⁰⁶
- (h) As late as **8 December 2017**, Mark Elliott copied Alex Elliott to an email in which he pressed Mr Symons, Mr Zita and Mr O’Bryan for their invoices.²⁰⁰⁷

²⁰⁰⁰ [ABL.001.0599.00009].

²⁰⁰¹ [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011].

²⁰⁰² [SYM.001.001.4890].

²⁰⁰³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15.

²⁰⁰⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2130:8-13.

²⁰⁰⁵ [ABL.001.0703.00068]; [MAZ.004.001.0423].

²⁰⁰⁶ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1698:1-1701:3; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2105:6-2108:16.

²⁰⁰⁷ [SYM.001.002.8281]. Alex Elliott only conceded that it was “possible” that his father was pressing for the invoices in that email, but the Court should find that is the plain meaning of the email. See transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2154:29-2155:24.

- (i) **On about 11 December 2017**, Alex Elliott finally received invoices for Mr O'Bryan²⁰⁰⁸ and Portfolio Law,²⁰⁰⁹ and on **12 or 13 December 2017**, he delivered the folder to Mr Trimbo,²⁰¹⁰ as soon as it was complete.

1022 **Seventh**, having regard to the fact that the fees of Mr O'Bryan and Mr Symons comprised illegal contingency fees rather than fees for work honestly and properly undertaken,²⁰¹¹ AFP, Mr O'Bryan and Mr Symons knew that AFP had not even "incurred" a liability to pay those sums. Accordingly, on any view of the matter, AFP, Mr O'Bryan and Mr Symons knew that the Summons and Notice were misleading.

1023 **Eighth**, it was integral to AFP's claim for commission to make it appear as if AFP had taken a substantial funding risk. Alex Elliott admits that the Lawyer Parties' fees comprised the significant proportion of the legal costs and disbursements that AFP sought to recover from the Settlement Sum, **and upon which its claim for commission was predicated**.²⁰¹² He conceded that he knew that AFP was seeking a common fund order²⁰¹³ and that funding risk was relevant to the Court's assessment of that claim.²⁰¹⁴ He had read the decision in Money Max²⁰¹⁵ and other relevant decisions.²⁰¹⁶ He described the Money Max decision as "*a big moment in time*" in the litigation funding industry.²⁰¹⁷ He can therefore be taken to have known that one of the Money Max factors was "*the legal costs expended and to be expended... by the funder*".²⁰¹⁸

1024 As legal practitioners, Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons must have known that it was their duty to disclose the true position with respect to "*the legal costs expended and to be expended*" by the funder; and it can only be

²⁰⁰⁸ Alex Elliott said he received Mr O'Bryan's invoices that he gave to Mr Trimbo "*some time in early or mid-December*" (transcript of hearing on 11 December 2020 [TRA.500.001.0001], 2133:15-18). The documentary evidence shows that Mr O'Bryan finalised his invoices on **11 December 2017**, as per the metadata for the following documents: [NOB.503.001.0162] [NOB.503.001.0159] [NOB.503.001.0154] [NOB.503.001.0148] [NOB.503.001.0142] [NOB.503.001.0139] [NOB.503.001.0138] [NOB.503.001.0130] [NOB.503.001.0128] [NOB.503.001.0125] [NOB.500.001.7273] [NOB.500.001.7272].

²⁰⁰⁹ [SYM.001.002.5447] [SYM.001.002.5449];
²⁰¹⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2152:3-26.
²⁰¹¹ [TRI.001.006.0001].

²⁰¹² See **Section C3.6**.
²⁰¹³ [PAR.080.001.00001], paras [74].

²⁰¹⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.

²⁰¹⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

²⁰¹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.

²⁰¹⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.

²⁰¹⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.

²⁰¹⁸ *Money Max* at [80.f].

concluded that they deliberately concealed those matters so that they could each earn for themselves and each other the substantial profits that they and AFP stood to gain from the transaction.²⁰¹⁹

- 1025 Alex Elliott conceded that the funding commission sought by AFP was a very good outcome for AFP, and indeed, for his family,²⁰²⁰ which held 76 per cent of the shares in AFP via corporate entities including Decoland, which was the trustee of two trusts²⁰²¹ of which Alex Elliott was and remains a beneficiary.²⁰²²
- 1026 The Court should find that AFP, Mr O’Bryan and Mr Symons contravened the overarching obligation to act honestly.²⁰²³

G3.5 No factual basis for the statements in the Summons and Notice

- 1027 The Summons was filed to institute the application for approval of the Trust Co Settlement and, critically, deductions from the settlement sum on account of costs and commission.
- 1028 Having regard to the evidence set out above, the Court should find that AFP, Mr O’Bryan, Mr Symons and Alex Elliott did not have a proper basis to cause the Summons and Notice to be issued claiming “*reimbursement*” of legal costs.
- 1029 Mr Zita conceded that he issued the Summons and Notice without knowing whether the legal costs claimed had been reasonably incurred, or whether they had been paid.²⁰²⁴ He conceded that he knew his own fees had not been paid.²⁰²⁵ He conceded that did not examine counsel’s fee slips,²⁰²⁶ and that he did not sought to satisfy himself that fees claimed were substantiated by work undertaken.²⁰²⁷ He knew nothing about the fee arrangements between AFP, Mr O’Bryan and Mr Symons.²⁰²⁸ He conceded that he sent the Summons and Notice

²⁰¹⁹ cf *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, [56], [62].

²⁰²⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:6-15.

²⁰²¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:16-31.

²⁰²² Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1599:3-12, 1601:23-1602:1; [MAZ.005.001.0001].

²⁰²³ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [75.a].

²⁰²⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T952:7-12.

²⁰²⁵ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [202].

²⁰²⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T952:13.

²⁰²⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T952:14-17.

²⁰²⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T952:18-953:3

as draft by counsel to the other parties without verifying the accuracy of the statements in those documents.²⁰²⁹ He conceded that this was careless.²⁰³⁰

1030 Accordingly, the Court should find that AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to only make claims that have a proper basis.

²⁰²⁹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [204].

²⁰³⁰ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [204].

H. EXPERT WITNESS CONTRAVENTIONS

H1. Overview of contraventions

1031 The Court should find that, by their conduct in connection with the Third Trimbos Report:

- (a) AFP, Alex Elliott, Mr O'Bryan and Mr Symons contravened the overarching obligation to act honestly;
- (b) AFP, Alex Elliott, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Mr Trimbos contravened the overarching obligation not to mislead or deceive;
- (c) AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs are reasonable and proportionate; and
- (d) AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty,

(together, **Expert Witness Contraventions**).

H2. Concessions and admissions

1032 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,²⁰³¹ and do not contest findings being made against them on the basis of those allegations.²⁰³²

1033 AFP has made very extensive admissions in relation to **Section H**. It admits the contraventions alleged against it and the Lawyer Parties (including the allegations of dishonesty), and most of the underlying alleged facts.²⁰³³

²⁰³¹ RLOI dated 21 July 2020: [PLE.010.002.0001].

²⁰³² [MSC.050.005.0001]; Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001]; Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

²⁰³³ AFP's admissions [PLE.020.001.0001], paras [79] – [98].

1034 Prior to opening their case, Mr Zita/Portfolio Law adopted AFP's admissions, **save for** the admissions that.²⁰³⁴

- (a) Mr Zita/Portfolio Law contravened the overarching obligation not to mislead or deceive;
- (b) Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs are reasonable and proportionate;
- (c) Mr Zita/Portfolio Law contravened the Paramount Duty.

1035 Prior to opening his case, Alex Elliott filed admissions in similar but not identical form to AFP's admissions, but denied any complicity in the alleged misconduct.²⁰³⁵

1036 Notably, AFP, Alex Elliott and Mr Zita/Portfolio Law each admit that:

- (a) the Third Trimbos Report commissioned by AFP and filed with the Court by Portfolio Law was misleading, both of itself and in conjunction with other materials that were filed;²⁰³⁶
- (b) Mr O'Bryan, Mr Symons and AFP each contravened the overarching obligation to act honestly, in that **they each knew that, or were reckless as to whether, the Third Trimbos Report was misleading by reason of the information supplied to him by them.**²⁰³⁷

1037 Alex Elliott's refusal to concede any responsibility for misleading Mr Trimbos and the Court should not be countenanced. As a solicitor, he assembled and delivered the brief to Mr Trimbos, the expert witness retained by AFP.²⁰³⁸ The Court should reject Alex Elliott's evidence that he did not understand that the information he conveyed to Mr Trimbos was misleading.²⁰³⁹ The Court should find that he knew that invoices had been issued at the end of the matter, and had not been paid.

1038 Alex Elliott made one significant additional admission. He admits that, if the Third Trimbos Report had been accurate and not misleading, and if it had been disclosed to the SPRs and and/or their legal representatives, the SPRs would have been

²⁰³⁴ Mr Zita/Portfolio Law's admissions [PLE.070.001.0001_2], para [1.ff].

²⁰³⁵ Alex Elliott's admissions [PAR.080.001.0001], paras [79] – [98].

²⁰³⁶ [PLE.020.001.0001] and [PAR.080.001.0001], paras [91] – [93]; [PLE.070.001.0001_2].

²⁰³⁷ [PLE.020.001.0001] and [PAR.080.001.0001], para [94]; [PLE.070.001.0001_2].

²⁰³⁸ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:8-15.

²⁰³⁹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:8-2102:25, 2127:11-20, 2128:8-11, 2132:10-30, 2135:15-2136:1, 2136:16-2137:4.

well-placed to assist the Court in assessing the reasonableness of the claimed costs and disbursements.²⁰⁴⁰

1039 It follows (and the Court should find) that, in those circumstances, one of the miscarriages of the First Approval Application (ie, approval of the costs and disbursements on 30 January 2018 without proper scrutiny) would not have occurred.

H3. AFP, Alex Elliott and the Lawyer Parties provided Mr Trimbos with misleading information

H3.1 Background to Mr Trimbos's retainer

1040 The following contextual matters are highly relevant to the assessment of the conduct of AFP, Alex Elliott, the Lawyer Parties and Mr Trimbos with respect to the allegations in **Section H** of the RLOI.

1041 Clause 3.9 of the Settlement Deed²⁰⁴¹ provided:

"[AFP] agrees to engage a suitably qualified external costs consultant to prepare an expert report to be filed in the Bolitho Approval Application concerning whether the legal costs and disbursements incurred by BSLLP and claimed in clause 3.11 below have been reasonably incurred and are of a reasonable amount. The Parties agree that the external costs consultant's report will be exhibited to the costs consultant's affidavit as a confidential exhibit."

1042 Clause 3.11 of the Settlement Deed²⁰⁴² provided:

"At the hearing of the Bolitho Approval Application and subject to the external cost consultant's expert report filed pursuant to clause 3.9 above confirming that the legal costs and disbursements claimed were incurred by [AFP], have been reasonably incurred and are of a reasonable amount, BSL, the Liquidators and Trust Co agree to instruct their legal representatives to support [AFP's] application for payment of legal costs and disbursements incurred by [AFP] in the conduct of the Bolitho Proceeding in the sum of \$4.75 million (plus GST)..."

1043 On **24 November 2017**, AFP retained Mr Peter Trimbos as a "suitably qualified external costs consultant" to prepare a report to be filed with the Court providing

²⁰⁴⁰ Alex Elliott's admissions [PAR.080.001.0001], para [98], particular (5).

²⁰⁴¹ [SYM.002.001.4695].

AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [80].

²⁰⁴² [SYM.002.001.4695].

AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [81].

his independent opinion as a legal costs expert on the reasonableness of the costs claimed and incurred by AFP.²⁰⁴³

1044 On **26 November 2017**, Mr Symons sent an email to Mr O’Bryan, Mark Elliott and Alex Elliott, in which he referred to the draft Settlement Deed and said:²⁰⁴⁴

“I think that the expert report should be confidential, but the affidavit should not. I think Trimbos needs to say in his affidavit ‘the legal costs and disbursements claimed were incurred by BSLLP, have been reasonably incurred and are of a reasonable amount’ and the affidavit (but not the exhibit) needs to be provided to the other parties to ensure that they are obliged to provide the support referred to in cl 3.11.”

1045 Mark Elliott and Mr O’Bryan both agreed with that position.²⁰⁴⁵ This shows (and the Court should find) that AFP, the Lawyer Parties and Alex Elliott were acutely aware of the contractual significance of the Trimbos Report in ensuring that the other parties were obliged to support the claim for legal costs.

H3.2 Misleading instructions

1046 On **24 November 2017**, Mark Elliott sent an email to Mr Trimbos, copied to Alex Elliott, attaching a letter of instructions which stated that *“Legal costs and disbursements incurred by Mr Bolitho and paid by [AFP] from 1 July 2016 to date”* included Mr O’Bryan’s fees of \$2,306,500 plus GST, Mr Symons’ fees of \$600,000 plus GST, and Portfolio Law’s fees of \$377,000 plus GST.²⁰⁴⁶

1047 AFP and Alex Elliott admit²⁰⁴⁷ that, as at 24 November 2017 when the instructions were issued:

- (a) No invoices had been issued by Portfolio Law or Mr O’Bryan.²⁰⁴⁸
- (b) Only three invoices had been issued by Mr Symons as at that date, for a sum of approximately \$35,000,²⁰⁴⁹ and AFP had paid only approximately that sum to Mr Symons in respect of the Relevant Period.²⁰⁵⁰

²⁰⁴³ AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [82]. See further [AFP.001.001.2226] [AFP.001.001.2227] [AFP.001.001.2230].

²⁰⁴⁴ [SYM.001.001.1970].

²⁰⁴⁵ [SYM.001.001.2054] [SYM.001.001.1496].

²⁰⁴⁶ [AFP.001.001.2230] [AFP.001.001.3179].

²⁰⁴⁷ [PLE.020.001.0001] & [PAR.080.001.0001], para [85.a].

²⁰⁴⁸ Mr Elliott’s 9 May 2019 Affidavit [CBP.004.010.0033], para 9.

²⁰⁴⁹ Being the total of invoice 7-37 (\$8,662.50), 7-38 (\$21,656.25) and 7-80 (\$4,881.25).

²⁰⁵⁰ [AFP.005.001.0296]; [AFP.001.001.4583].

- (c) AFP had not paid anything to Portfolio Law or Mr O’Bryan in respect of the Relevant Period.

State of mind with respect to instructions to Mr Trimbo

1048 The letter of instructions to Mr Trimbo was based on an earlier letter of instructions that AFP issued to Mr Trimbo on 4 July 2016 in connection with the application for approval of the Partial Settlement,²⁰⁵¹ which Mark Elliott and Mr O’Bryan had jointly formulated and which they both agreed should say that AFP had “***incurred and paid all of the legal costs and disbursements in the case to date***”.²⁰⁵²

1049 AFP admits that, at the time of the earlier instructions, substantially all of the legal costs and disbursements that AFP was seeking to recover had not been paid.²⁰⁵³

1050 The Court should find that:

- (a) In the 4 July 2016 instructions to Mr Trimbo, Mark Elliott and Mr O’Bryan made a conscious and deliberate decision to falsely assert that AFP had **actually paid** the costs sought it sought to recover.²⁰⁵⁴
- (b) Both Mark Elliott and Mr O’Bryan knew that was false when they settled those instructions.
- (c) Mark Elliott and Mr O’Bryan knew and intended that the 24 November 2017 instructions should make the same false assertion.
- (d) Mr Symons was well aware that the instructions to Mr Trimbo falsely represented that costs were paid in circumstances where:
- (i) self-evidently he knew his own fees had not been paid;
- (ii) by reason of his close association with Mr O’Bryan, Mr Symons would have been aware that Mr O’Bryan had not been paid;

²⁰⁵¹ [TRI.001.005.0557] [TRI.001.005.0558] [TRI.001.005.0561] [TRI.001.005.0577] [TRI.001.005.0578].

²⁰⁵² [AFP.001.001.1736] [AFP.001.001.1737] (see in particular paras [1], [5], [6] and [8] of the letter).

²⁰⁵³ AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [37].

²⁰⁵⁴ [AFP.001.001.1736] [AFP.001.001.1737]. Mr O’Bryan’s edits include that he wanted AFPL to tell Mr Trimbo that AFP had “***incurred and paid all of the legal costs and disbursements in the case to date***”. Mark Elliott’s draft already included a statement that the “*legal costs incurred by Mr Bolitho and paid by [AFP] to date*” included Mr O’Bryan’s fees of \$1.7 million. Mr O’Bryan did not correct that in this draft. Instead, he changed it to “*legal costs and disbursements incurred by Mr Bolitho and paid by [AFP] to date*”.

- (iii) the totality of the evidence demonstrates that Mr Symons was an active participant in the dishonest scheme that Mark Elliott and Mr O'Bryan had conceived, and was in their "inner circle";
- (iv) the First and Second Bolitho Opinions, both drafted by Mr Symons, made the same false representation that costs had been paid, as set out in paragraphs 1213 to 1219 below;
- (v) Mr Symons did not give evidence in the remitter, and abandoned his defence to the allegations against him.

1051 Alex Elliott denies that he contravened any overarching obligation with respect to the instructions to Mr Trimbos,²⁰⁵⁵ notwithstanding that he was copied to the letter of instructions to Mr Trimbos²⁰⁵⁶ and that, as a solicitor, he was responsible for assembling the brief to Mr Trimbos.²⁰⁵⁷

1052 Alex Elliott gave the following evidence:

- (a) He agreed that it was important to give accurate information to an expert witness retained to provide a report to be relied upon by the Court.²⁰⁵⁸
- (b) He agreed that the letter of instructions contained numerous incorrect statements.²⁰⁵⁹
- (c) When he was asked why he did not raise those issues with his father, he variously said that:
 - (i) he had no recollection of reading the letter (though he conceded he "*would have skimmed through it*");²⁰⁶⁰
 - (ii) he did not know "*what had been paid, what hadn't been paid*";²⁰⁶¹
 - (iii) he "*didn't appreciate the significance that it was a misleading representation to Mr Trimbos*".²⁰⁶²

²⁰⁵⁵ [PAR.080.001.0001], para [85].

²⁰⁵⁶ [AFP.001.001.2230] [AFP.001.001.3179].

²⁰⁵⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15.

²⁰⁵⁸ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2142:5-9.

²⁰⁵⁹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2133:29-2137:4, 2141:18-25.

²⁰⁶⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2134:29-2135:1.

²⁰⁶¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2137:1-2.

²⁰⁶² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2137:3-4.

- (d) He initially suggested that he might have thought that the letter was seeking to inform Mr Trimbo merely that *“these disbursements are paid directly by [AFP]”*.²⁰⁶³ However, he retracted that evidence when he said *“I don’t recall at the time thinking anything of that sentence”*.²⁰⁶⁴

1053 The Court should reject Alex Elliott’s attempt to characterise himself as a personal assistant who read nothing, and who unknowingly and in an unquestioning matter did as he was told, without applying any critical thought to the tasks he was asked to perform. The 2018 Documents show that characterisation to be false. The Court should find that Alex Elliott was an astute and engaged solicitor at all relevant times, and paid close attention to what was happening in relation to the Trust Co Settlement, just as he did in relation to the Botsman Appeal in 2018.

H3.2 Misleading invoices and fee slips

Mr O’Bryan’s and Mr Symons’ invoices and fee slips were misleading

- 1054 Mr O’Bryan and Mr Symons’ invoices and fee slips provided to Mr Trimbo were misleading for the following reasons, most of which are admitted by AFP, Alex Elliott, and Mr Zita/Portfolio Law.²⁰⁶⁵
- 1055 **First**, the invoices and fee slips represented that the work set out in those fee slips had been undertaken by them, and the hourly and daily amounts there recorded were properly charged. That was false as set out in **Section F**.²⁰⁶⁶
- 1056 **Second**, the invoices and fee slips were addressed to Mr Zita/Portfolio Law. In fact, Mr O’Bryan and Mr Symons issued their invoices directly to AFP and/or Mr Trimbo.²⁰⁶⁷ They had not sent their invoices to Mr Zita/Portfolio Law and Mr Zita/Portfolio Law had not sought the fee invoices and/or satisfied themselves that the fees claimed were reasonable.²⁰⁶⁸

²⁰⁶³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2142:17-20.

²⁰⁶⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2142:23-25.

²⁰⁶⁵ AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [85], and Mr Zita/Portfolio Law’s admissions [PLE.070.001.0001_2], para [1].

²⁰⁶⁶ AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [85.d], [85.g], [85.h], [85.i], [85.j], [85.k], [85.l], [85.m], [85.n], [85.o].

²⁰⁶⁷ AFP and Alex Elliott’s admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [85.c].

²⁰⁶⁸ Curiously, this is admitted by AFP but not by Alex Elliott: [PLE.020.001.0001] & [PAR.080.001.0001], para [85.c], despite the fact that Mr Zita himself conceded this: see Mr Zita’s April 2020 Affidavit [CCW.036.001.0001] at paras [38] – [42], [150] – [152]; Transcript of hearing on 13 August 2020 [TRA.500.007.001], 750:10-13, 752:23-753:5.

1057 **Third**, they conveyed the impression that the invoices had been issued on a monthly basis and paid by AFP, the litigation funder, in the ordinary course. In fact, most of Mr Symons' invoices²⁰⁶⁹ and all of Mr O'Bryan's invoices were issued in late November 2017/early December 2017, after an "in principle" agreement had been reached with Trust Co to settle the proceeding, and had not been paid.²⁰⁷⁰

1058 **Fourth**, Mr O'Bryan's invoices were also stamped as "PAID" when they had not been paid.²⁰⁷¹

1059 **Fifth**, the Court should find that:

- (a) all of those matters conveyed an implicit assurance that AFP and Portfolio Law had satisfied themselves as to the work undertaken and charged to their account (**Costs Scrutiny Representation**);²⁰⁷²
- (b) the Costs Scrutiny Representation was relevant to anyone reviewing the costs claimed, and was likely to inform the assessment of whether the costs claimed were likely to be reasonable;²⁰⁷³
- (c) that assurance was false or misleading given that:²⁰⁷⁴
 - (i) AFP had not paid the costs and had not taken any real risk in respect of them; and
 - (ii) the invoices were issued only after a significant settlement had been reached, and it was intended that the costs would be paid from the settlement proceeds.

1060 In *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)*,²⁰⁷⁵ Gordon J granted leave to a litigation funder ("CLF") to intervene in an application for approval of reimbursement of legal costs, observing:

²⁰⁶⁹ Mr Symons' invoices numbered 7-72, 7-73, 7-74, 7-75, 7-76, 7-77, 7-78, 7-79, 7-81 and 7-82 were issued in late November 2017/early December 2017.

²⁰⁷⁰ AFP and Alex Elliott's admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [85.d].

²⁰⁷¹ AFP and Alex Elliott's admissions [PLE.020.001.0001] & [PAR.080.001.0001], para [85.e].

²⁰⁷² AFP and Alex Elliott admit that the invoices conveyed the impression that Mr Zita/Portfolio Law had satisfied themselves as to the fees charged: [PLE.020.001.0001] & [PAR.080.001.0001], para [72.b]. Mr Zita/Portfolio Law concede that "a reader of those invoices which were rendered by counsel would form the impression that they had been rendered to Portfolio Law": transcript of hearing on 13 August 2020 [TRA.500.007.0001], 752:28-31.

²⁰⁷³ AFP and Alex Elliott deny this: [PLE.020.001.0001] & [PAR.080.001.0001], para [85.f].

²⁰⁷⁴ AFP and Alex Elliott deny this: [PLE.020.001.0001] & [PAR.080.001.0001], para [85.f].

²⁰⁷⁵ [2013] FCA 1163, [137].

“For present purposes, it is sufficient to record that the evidence now discloses that CLF not only had an interest, but a role, in reviewing the fees and disbursements charged by Slater & Gordon. That is not unsurprising. That role and task is undertaken by any client, especially a sophisticated client. But, in the present proceedings, the Applicant and the other group members, not CLF, were the clients. **Although the court can, and should, in appropriate circumstances assess the reasonableness of the fees and disbursements charged by a solicitor in light of the role and task of an entity such as CLF**, the existence of them and the role played by them does not replace the function of the court.”

1061 Thus, while finding that the role of the Court is not supplanted by the scrutiny of a litigation funder who is required to pay legal costs in the first instance, Gordon J recognised that **a litigation funder’s own scrutiny of the costs claimed is relevant to the Court’s task in assessing the reasonableness of the fees and disbursements charged**. The assumption is that a litigation funder has an interest in scrutinising the fees charged because the litigation funder is asked to pay in the first instance. The deception executed by AFP, Mr O’Bryan and Mr Symons exploited that assumption to their advantage.

AFP, Alex Elliott, Mr O’Bryan and Mr Symons knew the invoices and fee slips were misleading

1062 The Court should find that AFP, Alex Elliott, Mr O’Bryan and Mr Symons knew that the invoices and fee slips of Mr O’Bryan and Mr Symons were misleading, for the following reasons.

1063 **First**, self-evidently, Mr O’Bryan and Mr Symons each knew that their own invoices and fee slips were misleading.

1064 **Second**, the Court should find that each of Mr O’Bryan and Mr Symons knew that the invoices and fee slips of the other were misleading in circumstances where:

- (a) the invoices were produced using the same billing software and prepared in the same misleading way;²⁰⁷⁶
- (b) they occupied chambers in the same building throughout the Relevant Period and worked on various matters together during that time,²⁰⁷⁷ such that they each must have known that the other had done only a fraction of the work for which they charged to the Bolitho Proceeding;

²⁰⁷⁶ [SYM.002.002.8881] [SYM.002.002.8882] at paras [4], [9] and [11].

²⁰⁷⁷ [PLE.020.001.0001] & [PAR.080.001.0001], para [69.b].

- (c) having regard to the matters in **Section F**, each knew that the other's fees were charged on a contingency fee basis, and not on the basis of time spent.

1065 **Third**, the Court should find that Mark Elliott knew that Mr O'Bryan's and Mr Symons' invoices and fee slips were misleading, because:

- (a) Mark Elliott was the mastermind of the dishonest scheme and he determined their contingency fees (see **Sections C3.6 and F**).
- (b) The evidence shows that Mark Elliott wanted Mr O'Bryan and Mr Symons to generate their invoices to appear as if they had been issued monthly. In the Camping Warehouse matter, Mr Symons generated his invoices with an accurate "Processed Date",²⁰⁷⁸ but by the time of the Partial Settlement in the Banksia matter, he had adopted the practice of making his invoices appear as if they had been issued monthly.²⁰⁷⁹ The only rational inference is that Mark Elliott asked him to do so. That conclusion is fortified by an email from Mr Zita to Mark Elliott sent on 11 December 2017 in which Mr Zita said that he would convert his attendances "*to monthly accounts if necessary*".²⁰⁸⁰
- (c) Mark Elliott was intimately involved in all aspects of the Bolitho Proceeding in the Relevant Period,²⁰⁸¹ and must have known that the fees he invited Mr O'Bryan and Mr Symons to charge were unreasonable having regard to his knowledge of their work product in the Relevant Period, including significant fees charged in relation to cross-examination at a time when evidence was yet to be exchanged and the proceedings were not listed for trial.²⁰⁸²

²⁰⁷⁸ [SYM.004.001.1180].

²⁰⁷⁹ [AFP.002.001.0056] [AFP.002.001.0057] [AFP.002.001.0063] [AFP.002.001.0069] [AFP.002.001.0071] [AFP.002.001.0074] [AFP.002.001.0077] [AFP.002.001.0080] [AFP.002.001.0082] [AFP.002.001.0084] [AFP.002.001.0086] [AFP.002.001.0088].

²⁰⁸⁰ [CBP.001.013.5043] [CBP.001.013.5045].

²⁰⁸¹ AFP and Alex Elliott admit this: [PLE.020.001.0001], para [70.h] & [PAR.080.001.0001], para [70.m].

²⁰⁸² AFP and Alex Elliott deny this: [PLE.020.001.0001], para [70.h] & [PAR.080.001.0001], para [70.m], but at trial, Alex Elliott conceded that the Lawyer Parties had begun their trial preparation work only in the **second half of 2017**: Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23. He further conceded that, as a solicitor, he would not expect counsel to start preparing for a case that had just been pushed out for at least a year: transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2168:20-28.

- (d) Mark Elliott knew that Mr O'Bryan's charges for conferring with Mr Zita and Mr Symons about opening submissions and cross-examination at trial were unlikely to be accurate in circumstances where he knew that Mr Zita/Portfolio Law effectively acted as a "post box", and Mr O'Bryan would not have conferred with Mr Zita/Portfolio Law about such matters;²⁰⁸³
- (e) Mark Elliott had himself already recovered fees for hundreds of hours of work for reviewing discovery out of the proceeds of the Partial Settlement, including for review of the "Liquidators' Court Book" and the "Receivers' Court Book". The evidence shows that Mark Elliott fraudulently inflated his own fees at the time of the Partial Settlement and that he had not undertaken this work.²⁰⁸⁴ The Court should find that he cynically and dishonestly encouraged Mr Symons to pursue the same strategy.²⁰⁸⁵
- (f) Mark Elliott knew from reading the Third Trimpos Report that Mr Trimpos was able to justify Mr O'Bryan's fees as reasonable only because (1) Mr O'Bryan had instructed him that the trial would run for 120 days,²⁰⁸⁶ contrary to court orders and the agreed trial framework pursuant to which the trial was set down for only 45-50 days, and (2) Mr Trimpos had accordingly assumed the trial would run for at least 100 days,²⁰⁸⁷ leading to the obvious conclusion that the fees charged by Mr O'Bryan were unreasonable. Thereafter AFP continued to seek the full amount claimed by Mr O'Bryan.

1066 **Fourth**, the Court should find that Alex Elliott knew that Mr O'Bryan's and Mr Symons' invoices and fee slips were misleading, on the basis of the following findings that should be made by the Court:

²⁰⁸³ AFP and Alex Elliott deny this: [PLE.020.001.0001], para [70.i] & [PAR.080.001.0001], para [70.n]. However at trial Mr Zita conceded that nobody ever asked him to read the evidence in the proceeding, that he did not proof any witnesses, and that he did not provide strategic input into legal issues: Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 876:10-11, 906:6-10; Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1351:23-1352:10, 1356:2-1357:19; Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [91], [348.a], [381].

²⁰⁸⁴ Compare [NOB.500.011.8020] with [SYM.002.001.1890] at Annexures D and F, whereby Mark Elliott's claim for fees morphed from "**\$220K**" on 8 May 2016 to **\$797,500** on 4 July 2016, including on the basis of alleged work including "*Discovered documents(Receivers/Liquidators Hearings + other material)-approx:55,000 folios -perusal (20,000 folios) /scan (25,000 folios) /examine 10,000 pages*".

²⁰⁸⁵ [SYM.002.001.5568]; [SYM.001.003.3390] [AFP.001.001.2561] [AFP.001.001.2708].

²⁰⁸⁶ Third Trimpos Report [CBP.001.010.5957], para [95] and [NOB.500.005.2298].

²⁰⁸⁷ Third Trimpos Report [CBP.001.010.5957], para [95] – [96].

- (a) On **18-20 November 2017**, Alex Elliott was involved in discussions with AFP’s accountant Mr De Bono in which Mr De Bono explained that the only invoices recognised in AFP’s draft FY2017 accounts were those issued by the Lawyer Parties at the time of the Partial Settlement, and those were also the only invoices which had been expensed (paid) in FY2017.²⁰⁸⁸
- (b) Alex Elliott thereafter assisted his father to prepare the “Banksia Expenses Spreadsheet”,²⁰⁸⁹ which included an “**INVOICE YES/NO**” column which stated that no invoices had been received for Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law.
- (c) On **24 November 2017**, Alex Elliott emailed his father about chasing Portfolio Law for invoices.²⁰⁹⁰
- (d) On **24 November 2017**, Alex Elliott updated the Banksia Expenses Spreadsheet to record Mr O’Bryan’s fees in a sum that was quite different from that shown in the first iteration of the Banksia Expenses Spreadsheet, and thus knew that the figure inserted in the **21 November 2017** version of the spreadsheet was not the final figure and had changed since then.²⁰⁹¹
- (e) On **24 November 2017**, Alex Elliott was copied to an email from Mr O’Bryan in which he said he would ask his secretary to “*amend accounts accordingly*”.²⁰⁹²
- (f) **All this time, Alex Elliott was preparing a tabulated, hard copy folder of invoices**²⁰⁹³ to brief to Mr Trimbos.²⁰⁹⁴ He therefore knew which invoices were missing and when they were received.
- (g) On **29 November 2017**, Alex Elliott was copied into another email with Mr De Bono and Mark Elliott, forwarding an email from the auditor, in which the

²⁰⁸⁸ [ABL.001.0600.00007]; [ABL.001.0599.00008]; [AEL.100.065.0001]; [MAZ.001.001.0021] at .0024; Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1513:26; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1697:1-8, 1701:20-28; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2108:21-2110:30 (Alex Elliott did not deny that the meeting occurred, but said he could not recall it).

²⁰⁸⁹ [AFP.007.001.0001] [AFP.007.001.0002]; [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011].

²⁰⁹⁰ [ABL.001.0599.00009].

²⁰⁹¹ [ABL.001.0599.00009] [ABL.001.0599.00010] [ABL.001.0599.00011].

²⁰⁹² [SYM.001.001.4890].

²⁰⁹³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:2-9; 2130:14-15.

²⁰⁹⁴ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2130:8-13.

auditor referred to the “no win no fee” agreements received from Mr O’Bryan and Mr Symons and sought confirmation that those arrangements remained in place, and Mr De Bono advised: *“I expect the arrangements stay in place as was last year”*.²⁰⁹⁵ Alex Elliott claimed to have no recollection of the email and inexplicably contended that *“I didn’t think Michael or Norman were on a no win no fee”*.²⁰⁹⁶ The Court should reject Alex Elliott’s attempt to characterise himself as someone with no recollection or little understanding of the emails he received, which is inconsistent with his own evidence that his father expected him to read all correspondence he received,²⁰⁹⁷ and the objective evidence that his father was seeking to involve him in AFP’s financial affairs in November 2017 by including him in discussions with Mr De Bono.

- (h) As late as **8 December 2017**, Mark Elliott copied Alex Elliott to an email in which he pressed Mr Symons, Mr Zita and Mr O’Bryan for their invoices.²⁰⁹⁸
- (i) **On about 11 December 2017**, Alex Elliott finally received invoices for Mr O’Bryan²⁰⁹⁹ and Portfolio Law,²¹⁰⁰ and on **12 or 13 December 2017**, he delivered the folder to Mr Trimbos,²¹⁰¹ as soon as it was complete.
- (j) It follows (and the Court should find) that **Alex Elliott knew that the Lawyer Parties issued their invoices in respect of the Relevant Period only in November/December 2017**. The Court should reject Alex Elliott’s evidence to the contrary.²¹⁰²

²⁰⁹⁵ [ABL.001.0703.00068]; [MAZ.004.001.0423].

²⁰⁹⁶ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1698:1-1701:3; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2105:6-2108:16.

²⁰⁹⁷ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1675:19-23; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2106:13-15, 2106:19-20.

²⁰⁹⁸ [SYM.001.002.8281]. Alex Elliott only conceded that it was “possible” that his father was pressing for the invoices in that email, but the Court should find that is the plain meaning of the email. See transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2154:29-2155:24.

²⁰⁹⁹ Alex Elliott said he received Mr O’Bryan’s invoices that he gave to Mr Trimbos “*some time in early or mid-December*” (transcript of hearing on 11 December 2020 [TRA.500.001.0001], 2133:15-18). The documentary evidence shows that Mr O’Bryan finalised his invoices on **11 December 2017**, as per the metadata for the following documents: [NOB.503.001.0162] [NOB.503.001.0159] [NOB.503.001.0154] [NOB.503.001.0148] [NOB.503.001.0142] [NOB.503.001.0139] [NOB.503.001.0138] [NOB.503.001.0130] [NOB.503.001.0128] [NOB.503.001.0125] [NOB.500.001.7273] [NOB.500.001.7272].

²¹⁰⁰ [SYM.001.002.5447] [SYM.001.002.5449]; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2152:3-26.

²¹⁰¹ [TRI.001.006.0001].

²¹⁰² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2127:11-20, 2128:8-11, 2132:10-30, 2135:15-2136:1.

- (k) The Court should reject Alex Elliott’s evidence that he was unaware that Mr O’Bryan’s invoices had not been paid,²¹⁰³ because:
- (i) given Mr O’Bryan’s invoices were only issued on around 11 December 2017, Alex Elliott must have known that they had not been paid, contrary to the “PAID” stamp on the invoices; and
 - (ii) Alex Elliott was his father’s right hand man²¹⁰⁴ and would have been privy to the details of his father’s business model, which affected the financial interests of his whole family.
- (l) Based on the matters set out above, Alex Elliott knew that AFP had **first**, agreed to a total figure in respect of legal costs with Mr Lindholm;²¹⁰⁵ **second**, prepared a spreadsheet with a list of expenses which together matched that agreed figure,²¹⁰⁶ **third**, sent that spreadsheet to Mr O’Bryan and Mr Symons for their “*information*” and “*comments*”, and **fourth**, received invoices from the service providers closely proximate to the final figures used in the spreadsheet. **An honest solicitor in Alex Elliott’s position would think that this sequence of events was highly irregular.**
- (m) Alex Elliott conceded the obvious point that AFP had a duty to group members to scrutinise the legal costs.²¹⁰⁷ But he did not scrutinise the fee slips himself,²¹⁰⁸ and was **completely indifferent to whether there was a proper basis for the costs sought to be recovered**,²¹⁰⁹ in circumstances where it must have been obvious to him that his father was, **at best**, likewise indifferent to the scrutiny of the costs. Indeed, he knew that his father had invited counsel to maximise their fees by charging cancellation fees, to the detriment of group members.²¹¹⁰ An honest solicitor in Alex Elliott’s position would have thought it irregular and improper for AFP to support a cancellation fee which was not provided for in counsel’s fee agreements.

²¹⁰³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2101:8-2102:25, 2137:1-2.

²¹⁰⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

²¹⁰⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2073:21-25.

²¹⁰⁶ Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2118:2-16.

²¹⁰⁷ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2131:20-21.

²¹⁰⁸ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:15.

²¹⁰⁹ See eg transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2171:14-21.

²¹¹⁰ [TRI.001.006.0072];

Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1741:29-1742:10;

Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2144:21-2145:10.

- (n) Alex Elliott said that he regarded it as the role of the expert cost assessor to determine whether the fees were fair and reasonable.²¹¹¹ But he knew that the cost assessor relied upon the integrity of the invoices and fee slips provided to him.²¹¹² Alex Elliott provided the cost assessor with the invoices and fee slips in circumstances where **he knew there were irregularities in the way those fees had been quantified**, and where **neither he nor his father cared about the veracity of those fees**, because (as he knew) AFP had not been required to pay them.²¹¹³
- (o) Alex Elliott knew that the Lawyer Parties had begun their trial preparation work only in the second half of 2017.²¹¹⁴ The quantum of the Lawyer Parties' fees alone was sufficient to put him on notice of a disparity between the work charged and the work actually undertaken. **Alex Elliott did not examine the fee slips at that time,²¹¹⁵ or indeed, at any time.²¹¹⁶**

1067 The Court should find that Alex Elliott was either complicit in his father's illegal scheme, or else chose to turn a blind eye to the irregularities which were readily apparent to anyone, particularly a qualified and practising legal practitioner. His youth ought not diminish his responsibility for matters which were glaringly obvious, and which he chose to ignore.

H3.3 Misleading costs agreements

1068 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that:

- (a) Mr O'Bryan provided Mr Trimbos with the O'Bryan December 2017 Costs Agreement,²¹¹⁷ and Mr Symons provided Mr Trimbos with the Symons December 2017 Cost Disclosure Statements (together, the **Fee**

²¹¹¹ Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2171:14-21.

²¹¹² Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2171:22-24.

²¹¹³ The Court should find that Alex Elliott knew that AFP had not paid the costs in circumstances where: (1) he knew the invoices were issued only in November/December 2017; (2) he was involved in discussions with Mr De Bono on 18-20 November 2017 in which Mr De Bono made it plain that the only costs that had been expensed (paid) in FY2017 were the costs billed up to the time of the Partial Settlement; (3) he was his father's right hand man and would have been privy to the details of his father's business model, which affected the financial interests of his whole family; and (4) his evidence that he did not know whether or not the Lawyer Parties had been paid was given evasively and lacked credibility. These matters are addressed in section **F5.2** below.

²¹¹⁴ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1738:19-23.

²¹¹⁵ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2164:25-2165:15.

²¹¹⁶ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2165:12-15.

²¹¹⁷ [SYM.001.003.0203] [SYM.001.003.0204].

Documents),²¹¹⁸ which they brought into existence in December 2017 when Mr Trimbos asked for them.²¹¹⁹

- (b) Those documents falsely purported to justify the fees claimed by Mr O'Bryan and Mr Symons.²¹²⁰
- (c) AFP knew that the Fee Documents had been created in December 2017 and not at the times stated or implied by those documents.²¹²¹

1069 It was plainly dishonest for Mr O'Bryan and Mr Symons to fabricate Fee Documents to substantiate their fees and provide those fabricated documents to the cost expert retained to evaluate their fees. Mr Trimbos relied upon the fabricated Fee Documents, and assumed that they had been issued in advance of work being performed.²¹²²

H3.4 Misleading information about the length of trial

1070 On 29 December 2017, Mr O'Bryan informed Mr Trimbos that the trial was likely to run for over 120 sitting days.²¹²³ He forwarded that email to Mark Elliott, Mr Symons, and Mr Zita.²¹²⁴

1071 Mr Symons and Mr Zita sent the trial plan to Mr Trimbos,²¹²⁵ but did not seek to challenge Mr O'Bryan's statement to Mr Trimbos that the trial would run for significantly longer than the length shown in the trial plan.²¹²⁶ Mr Zita conceded that he should have been more vigilant in ensuring that Mr Trimbos relied upon the trial timetable that had been agreed between all counsel, rather than on Mr O'Bryan's inconsistent assertion as to the length of the trial.²¹²⁷

²¹¹⁸ See Mr Symons' email of 18 December 2017 [SYM.001.003.2842] [SYM.001.003.2844] and 19 December 2017 [SYM.001.003.0372] [SYM.001.003.0375].

²¹¹⁹ [PLE.020.001.0001] & [PAR.080.001.0001], para [85.g]; [PLE.070.001.0001_2]. See further [SYM.001.003.2854].

²¹²⁰ See [PLE.020.001.0001] & [PAR.080.001.0001], paras [85.h], [85.i], [85.j], [85.k], [85.l], [85.m], [85.n], [85.o]; [PLE.070.001.0001_2].

²¹²¹ [PLE.020.001.0001] & [PAR.080.001.0001], para [70.c]; [PLE.070.001.0001_2].

²¹²² Fifth Trimbos Report [EXP.020.008.0001], paras [8.b], [8.m].

²¹²³ [SYM.001.003.2828]; see also Third Trimbos Report [CBP.001.010.5957], para [95]; Further SPR Opinion [CCW.022.001.0460], para [99].

²¹²⁴ [NOB.500.005.2298].

²¹²⁵ [SYM.001.002.1615] [SYM.001.002.1622] [SYM.001.002.1623] [SYM.001.002.1625] [SYM.001.002.1628] [SYM.001.002.1630] [SYM.001.002.1633] [SYM.001.002.1635]; [SYM.001.003.2832]; [CBP.001.013.4462] [CBP.001.013.4470] [CBP.001.013.4471] [CBP.001.013.4473] [CBP.001.013.4476] [CBP.001.013.4478] [CBP.001.013.4481] [CBP.001.013.4483].

²¹²⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 955:14-958:9.

²¹²⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 957:15-958:9.

1072 On 3 January 2018, Mr Trimbos issued his report in draft form to Mark Elliott, Alex Elliott, Mr O'Bryan, Mr Symons, and Mr Zita.²¹²⁸ It specifically noted that Mr O'Bryan had charged 65 days in total for "reviewing discovered documents" etc, and stated:²¹²⁹

"I am instructed by Mr O'Bryan SC that the group proceeding is currently fixed for a 50 day trial, However, I am instructed by Mr O'Bryan SC that in his opinion, the trial will occupy significantly more than 50 days. In Mr O'Bryan SC's opinion, if all the principal claims, third party claims and cross-claims run their full course then the trial is likely to run for at least 120 days. For the purposes of this report, I will assume that the trial occupies 100 sitting days.

The work undertaken by Mr O'Bryan SC and described at paragraph 93 hereinabove in effect is preparation for the trial. In my experiences in taxation in the Costs Court, this work would be treated by taxing officials as preparation for trial. A claim of 65 days of preparation for a 100 day trial is very reasonable and in my opinion would be allowed by the Costs Court on a solicitor own client basis."

1073 The Court should find that each of Mark Elliott, Alex Elliott, Mr O'Bryan, Mr Symons, and Mr Zita knew that the trial had been set down for 45-50 sitting days for hearing by the trial judge under the agreed trial plan and framework made by the Court after consultation with Mr O'Bryan and the other parties' counsel.²¹³⁰

H3.5 Misleading information about Mr O'Bryan's fee arrangement

1074 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that:

- (a) On **1 January 2018** at 5.40pm, in response to a query by Mr Trimbos about Mr O'Bryan's January 2017 invoice, Mr O'Bryan sent an email to Mr Trimbos (which he blind copied to Mark Elliott) informing Mr Trimbos that "**[AFP] has paid the full amount of the tax invoice (they should hire you as their auditor!), so I will reimburse BSLLP \$22,000 for the 2 days overcharged**".²¹³¹

²¹²⁸ [NOB.500.005.2312] [NOB.500.005.2314].

²¹²⁹ [NOB.500.005.2314], paras [93] – [96].

²¹³⁰ On 25 September 2017, Mr Redwood and Mr O'Bryan both sent emails to the special referee Mr Nolan contributing to the discussions about the trial framework [CBP.001.008.0248] [CBP.001.008.0252]; [NOB.500.001.9457]. Thereafter, Mr Nolan emailed the parties and the Court attaching the trial timetable prepared after consultation with the parties: [CBP.001.008.0666] [CBP.001.008.0668]. The trial framework was revised in early October 2017: [CBP.001.007.8186] [CBP.001.007.8194]; [CBP.001.007.2821]. All of those emails were copied to Mr Symons and Bolitho Class Action at Portfolio Law (and were accordingly received by Mark Elliott, Alex Elliott, and Mr Zita).

²¹³¹ [NOB.500.001.7237].

- (b) That statement was false, as AFP had not paid the invoice.²¹³²
- (c) At 5.56pm, Mark Elliott replied to Mr O'Bryan: "**Thanks Norm. Just send the cheque when able!**"²¹³³
- (d) At 5.57pm, Mr O'Bryan replied: "**It's in the mail... Happy new year to you & yours. Are you at the beach?**"²¹³⁴
- (e) At 5.59pm Mark Elliott replied: "**I will check the box daily. However things do go missing...**".²¹³⁵

1075 These emails show that Mr O'Bryan and Mark Elliott deliberately misled the expert witness retained to opine upon his fees. Mr O'Bryan told Mr Trimbos his fees had been paid when they had not, and then joked about it with Mark Elliott.

1076 Mark Elliott, Mr Symons and Mr Zita knew that Mr O'Bryan had made those statements, because Mr O'Bryan copied and/or forwarded his email to Mr Trimbos to them.²¹³⁶

1077 None of them sought to correct the false statement made to Mr Trimbos.²¹³⁷

H3.6 Misleading omission to draw attention to work done in the SPR Proceeding

1078 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that the instructions to Mr Trimbos did not draw his attention to the existence of the SPR Proceeding or the fact that the SPRs had paid for substantially all of the evidence in the proceedings.²¹³⁸

²¹³² [PLE.020.001.0001] & [PAR.080.001.0001], para [85.r]; [PLE.070.001.0001_2].

²¹³³ [NOB.500.001.7237].

²¹³⁴ [NOB.500.001.7237].

²¹³⁵ [NOB.500.001.7237].

²¹³⁶ [SYM.001.003.2825]; [NOB.500.001.7237].

²¹³⁷ [SYM.001.003.2825] [NOB.500.001.7237].

²¹³⁸ [PLE.020.001.0001] & [PAR.080.001.0001], para [85.s]; [PLE.070.001.0001_2].

H4. AFP, Alex Elliott, Mr Trimbos and the Lawyer Parties permitted a misleading report to be filed and relied upon by the Court

H4.1 Filing of the report

1079 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that:

- (a) On 18 December 2017, AFP instructed Mr Trimbos to exhibit all the invoices briefed to him, including the invoices of Mr O’Bryan and Mr Symons, to his report.²¹³⁹
- (b) On 3 January 2018, Mr Trimbos sent a draft report to AFP, Mr O’Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott.²¹⁴⁰ Mr O’Bryan and Mr Symons reviewed the draft report and provided feedback.²¹⁴¹
- (c) Mr Zita/Portfolio Law filed the Third Trimbos Report on instructions from AFP.²¹⁴²
- (d) On 26 January 2018, Mr Zita/Portfolio Law emailed a copy of the Third Trimbos Report together with all of its annexures to Mark Elliott, Mr O’Bryan, Mr Symons and Alex Elliott.²¹⁴³

1080 Mr Zita conceded that he “*skimmed through*” the report²¹⁴⁴ before the hearing on 30 January 2018.²¹⁴⁵ He knew that the Third Trimbos Report relied upon the Portfolio Law Spreadsheets, and that they were annexed to the report.²¹⁴⁶ He conceded that he had an obligation to satisfy himself as to the factual matters contained in the Third Trimbos Report, and that he was careless in failing to do so.²¹⁴⁷

²¹³⁹ [PLE.020.001.0001] & [PAR.080.001.0001], para [86]; [PLE.070.001.0001_2]; [TRI.001.006.0661].

²¹⁴⁰ [PLE.020.001.0001] & [PAR.080.001.0001], para [87]; [PLE.070.001.0001_2]; [NOB.500.005.2312] [NOB.500.005.2314][NOB.500.005.2354] [NOB.500.005.2457][NOB.500.005.2458] [SYM.001.003.2295] [SYM.001.003.2297] [SYM.001.003.2333] [SYM.001.003.2336] [SYM.001.003.2337] [SYM.001.003.2439] [SYM.001.003.2440].

²¹⁴¹ [PLE.020.001.0001] & [PAR.080.001.0001], para [87]; [PLE.070.001.0001_2]; [SYM.001.002.9173] [SYM.001.002.9527].

²¹⁴² [SYM.001.002.3119].

²¹⁴³ [PLE.020.001.0001] & [PAR.080.001.0001], para [89]; [PLE.070.001.0001_2]; [SYM.001.001.8488] [SYM.001.001.8489] [SYM.001.001.7601] [SYM.001.001.7602] [SYM.001.001.6623] [SYM.001.001.6624] [SYM.001.001.6623] [SYM.001.001.6624].

²¹⁴⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:21-22.

²¹⁴⁵ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 891:22-27.

²¹⁴⁶ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:23-31.

²¹⁴⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 953:30-954:16.

1081 Alex Elliott likewise said that he “*might have skimmed over*” the report but that he “*didn’t make any substantive comment or do anything in particular to it*”.²¹⁴⁸ He sought to take some evidentiary advantage from the fact that counsel’s fee slips were not attached to the draft report²¹⁴⁹ – and yet he had seen the fee slips, because he collated them, at his father’s direction, and then delivered them to Mr Trimbos.²¹⁵⁰

H4.2 The Third Trimbos Report was misleading

1082 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that:

- (a) the Third Trimbos Report was misleading, both of itself and in conjunction with other materials that were filed;²¹⁵¹
- (b) having reviewed the report, AFP, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law:²¹⁵²
 - (i) failed to ensure that it was accurate and not misleading;
 - (ii) failed to draw Mr Trimbos’s attention to the fact that he had relied upon the misleading and/or unreliable information they had given him;²¹⁵³
 - (iii) failed to correct any of the false or misleading statements in the report at any time prior to the hearing on 30 January 2018 or at all.

1083 However, Alex Elliott denies that he had any responsibility for the accuracy of the report.²¹⁵⁴

²¹⁴⁸ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:6-20.

²¹⁴⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:6-9.

²¹⁵⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2112:7-9, 2130:8-23, 2135:4-28.

²¹⁵¹ [PLE.020.001.0001] & [PAR.080.001.0001], para [91]; [PLE.070.001.0001_2].

²¹⁵² [PLE.020.001.0001] & [PAR.080.001.0001], para [90]; [PLE.070.001.0001_2]; [SYM.001.001.8488] [SYM.001.001.8489] [SYM.001.001.7601] [SYM.001.001.7602] [SYM.001.001.6623] [SYM.001.001.6624] [SYM.001.001.6623] [SYM.001.001.6624].

²¹⁵³ Mr Zita conceded in evidence that he did not write to Mr Trimbos to inform him that he had made an error in providing the Portfolio Law Spreadsheets to Mr Trimbos and letting him believe that they were accurate and reliable and drawn from contemporaneous records: Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:16-20.

²¹⁵⁴ [PAR.080.001.0001], para [90A].

1084 The issues with the Third Trimbo's can be divided into two categories:

- (a) Defects with the report arising from the false or misleading information and instructions provided to Mr Trimbo's by AFP and the Lawyer Parties.
- (b) Defects with the report arising from the misleading or deceptive representations that Mr Trimbo's himself conveyed.

Defects with the report arising from the false or misleading information and instructions provided to Mr Trimbo's by AFP and the Lawyer Parties

The report exhibited or relied upon false or misleading information and documents

1085 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that the Third Trimbo's Report was misleading in circumstances where it exhibited and/or relied upon the false and misleading information and documents provided by AFP, Alex Elliott, Mr O'Bryan and Mr Symons, including AFP's letter of instructions, the invoices and fee slips of Mr O'Bryan and Mr Symons, the O'Bryan December 2017 Costs Agreement, the Symons December 2017 Costs Disclosure Statements, and the information they had provided to him in the course of him preparing his report.²¹⁵⁵

1086 Mr Zita said that he did not even glance at the Fee Documents that Mr O'Bryan and Mr Symons sent to Mr Trimbo's on 18-20 December 2017.²¹⁵⁶

The report did not disclose that the legal costs were not calculated and charged in accordance with the Funding Agreement

1087 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that the Third Trimbo's Report was misleading in circumstances where it did not disclose that the legal costs were not calculated and charged in accordance with the Funding Agreement,²¹⁵⁷ which provided that AFP was entitled to be paid out of the Settlement Sum "the Case Costs **paid** by [AFP]".²¹⁵⁸

1088 The Court should find that the Third Trimbo's Report thereby conveyed the implicit assurance that this condition was satisfied.

²¹⁵⁵ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.a]; [PLE.070.001.0001_2].

²¹⁵⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001] T959:6-17, 960:6-10.

²¹⁵⁷ Funding Agreement [AFP.006.001.0014], cl [12.1.1].

²¹⁵⁸ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.b]; [PLE.070.001.0001_2].

The report concealed Mr O'Bryan's and Mr Symons' Fee Arrangements

1089 AFP, Alex Elliott and Mr Zita/Portfolio Law admit, and the Court should find, that the Third Trimbos Report was misleading in circumstances where:

- (a) The report did not disclose any of the Fee Arrangements in place between AFP, Mr O'Bryan and Mr Symons.²¹⁵⁹
- (b) The report did not disclose that the rates charged by Mr O'Bryan and Mr Symons were not supported by valid cost disclosures.²¹⁶⁰
- (c) Mr Trimbos relied upon the Fee Documents provided to him by Mr O'Bryan and Mr Symons in December 2017, and believed they were genuine documents.²¹⁶¹ The Fee Documents purported to provide cost estimates that were consistent with fees charged by Mr O'Bryan and Mr Symons.²¹⁶² Mr Trimbos was not told that those cost estimates were prepared after their costs had already been quantified.²¹⁶³
- (d) The report stated that *"the hourly rates provided for in the O'Bryan costs agreements are reasonable"*.²¹⁶⁴ The report did not disclose the fact that, even assuming that Mr O'Bryan could charge his fees at the rates of \$11,000 per day (GST inclusive) from 1 July 2016 (as per the O'Bryan December 2017 Costs Agreement which Mr O'Bryan had provided to Mr Trimbos), Mr O'Bryan had not calculated and charged his fees at those rates. Rather, he had calculated and charged his fees at the rate of \$11,000 per day **plus GST** from 1 July 2016 and \$12,500 **plus GST** from 1 July 2017.²¹⁶⁵

²¹⁵⁹ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.c]; [PLE.070.001.0001_2].

²¹⁶⁰ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.d]; [PLE.070.001.0001_2].

²¹⁶¹ Fifth Trimbos Report [EXP.020.008.0001], paras [8.b], [8.m].

²¹⁶² See Mr Symons' email of 18 December 2017 [SYM.001.003.2842] [SYM.001.003.2844] and 19 December 2017 [SYM.001.003.0372] [SYM.001.003.0375]; [SYM.001.003.0203] [SYM.001.003.0204].

²¹⁶³ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.e]; [PLE.070.001.0001_2].

²¹⁶⁴ Third Trimbos Report [CBP.001.010.5957], para [87].

²¹⁶⁵ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.f]; [PLE.070.001.0001_2].

The report was misleading as to Mr Zita/Portfolio Law's fees and fee arrangements

1090 Mr Zita/Portfolio Law conceded that the Third Trimbo's Report was misleading in that it:

- (a) stated that Mr Trimbo's has been advised by Mr Zita that Portfolio Law charged for the work billed in the 8 December 2017 account pursuant to the Portfolio Law Costs Agreement, which was attached to the report;²¹⁶⁶
- (b) relied upon the Portfolio Law Spreadsheets,²¹⁶⁷ and in particular, proceeded on the basis of an assumption that the spreadsheets contained reliable records of the work undertaken and time spent by Mr Zita/Portfolio Law;²¹⁶⁸
- (c) did not disclose that Mr Zita/Portfolio Law had not calculated and charged their fees in accordance with the Portfolio Law Costs Agreement, in that Portfolio Law had charged according to the hourly rates specified in that cost agreement but without making any contemporaneous records of the time Portfolio Law had actually spent on the activities for which they charged time;²¹⁶⁹
- (d) did not address the fact that Mr Zita/Portfolio Law had previously informed Mr Trimbo's that, in March 2015, Mr Zita/Portfolio Law had agreed to charge according to the LPRO scale, rather than on the basis of hourly rates under the Portfolio Law Costs Agreement.²¹⁷⁰

1091 Under cross-examination, Mr Zita/Portfolio Law conceded that the Portfolio Law Spreadsheets were speculative reconstructions at best.²¹⁷¹ He conceded that he could not charge on the basis of the hourly rates specified in the Portfolio Law Costs Agreement without keeping proper contemporaneous records.²¹⁷² He conceded that he never informed Mr Bolitho that he was proposing to depart from that Costs Agreement, and that he did not send his invoice or the Third Trimbo's Report to Mr Bolitho.²¹⁷³

²¹⁶⁶ Third Trimbo's Report [CBP.001.010.5957], para [32] and Annexure C.

²¹⁶⁷ Third Trimbo's Report [CBP.001.010.5957], paras [31] and [41] – [54], and Annexures B & C.

²¹⁶⁸ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 889:11-20.

²¹⁶⁹ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.h]; [PLE.070.001.0001_2];

Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 890:1-16.

²¹⁷⁰ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.h]; [PLE.070.001.0001_2]; [CBP.004.005.5753].

²¹⁷¹ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 885:28-29.

²¹⁷² Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:7-11.

²¹⁷³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 887:12-20.

- 1092 A point of contention that arose at trial relates to whether any representation was conveyed to Mr Trimbos and/or by Mr Trimbos to the Court by the Third Trimbos Report that the Portfolio Law Spreadsheets were contemporaneous records (or based on contemporaneous records).²¹⁷⁴
- 1093 Mr Trimbos claims that he assumed the Portfolio Law Spreadsheets were based on contemporaneous records.²¹⁷⁵ As noted below, it is not apparent why Mr Trimbos assumed that Portfolio Law's time records were made contemporaneously in circumstances where he was provided with two different iterations of the spreadsheet, with different times allocated to the various activities.²¹⁷⁶
- 1094 Whether or not Mr Trimbos ought to have, or did, suspect that the Portfolio Law Spreadsheets were based on contemporaneous records, the fact is that Mr Zita/Portfolio Law procured a misleading report from Mr Trimbos in circumstances where they prepared the Portfolio Law Spreadsheets and proffered them to him, and permitted him to rely upon them in his report.

The report was based on misleading information about the length of the trial

- 1095 AFP, Alex Elliott and Mr Zita/Portfolio Law admit that the Third Trimbos Report was misleading in circumstances where it exhibited and/or relied upon the false and misleading information provide to Mr Trimbos, including the information provided about the length of trial.²¹⁷⁷
- 1096 The Third Trimbos Report stated: *"I am instructed by Mr O'Bryan SC that the group proceeding is currently fixed for a 50 day trial, however, I am instructed by Mr O'Bryan SC that in his opinion, the trial will occupy significantly more than 50 days. In Mr O'Bryan SC's opinion, if all the principal claims, third party claims and cross-claims run their full course then the trial is likely to run for at least 120 days. For the purposes of this report, I will assume that the trial occupies 100 sitting days."*²¹⁷⁸
- 1097 On that premise, Mr Trimbos concluded that Mr O'Bryan's "trial preparation" fees were reasonable.²¹⁷⁹

²¹⁷⁴ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 890:1-891:31.

²¹⁷⁵ Fifth Trimbos Report [EXP.020.008.0001], paras [8.w], [8.x].

²¹⁷⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], T682:11-683:5. Compare the 29 December 2017 spreadsheet [CBP.001.013.0964] [CBP.001.013.0965] with the 2 January 2018 spreadsheet [TRI.001.006.1963] [TRI.001.006.1964].

²¹⁷⁷ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.a]; [PLE.070.001.0001_2].

²¹⁷⁸ Third Trimbos Report [CBP.001.010.5957], para [95].

²¹⁷⁹ Third Trimbos Report [CBP.001.010.5957], para [96].

- 1098 As noted above, Mr Symons and Mr Zita sent the trial plan to Mr Trimbo,²¹⁸⁰ but did not seek to challenge Mr O'Bryan's statement to Mr Trimbo that the trial would run for significantly longer than the length shown in the trial plan.²¹⁸¹ Mr Zita conceded that he should have been more vigilant in ensuring that Mr Trimbo relied upon the trial timetable that had been agreed between all counsel, rather than on Mr O'Bryan's inconsistent assertion as to the length of the trial.²¹⁸²
- 1099 It suited the collective interests of Mark Elliott/AFP, Alex Elliott, Mr O'Bryan and Mr Symons to support Mr O'Bryan's inflated trial estimate, because they each knew from reading Mr Trimbo's draft report that the length of the trial was directly relevant to the reasonableness of the costs sought to be recovered, which in turn supported the funding commission.

The report did not disclose duplicative charges for discovery review

- 1100 The Court should find that the Third Trimbo Report was misleading in circumstances where it did not draw attention to the fact that Mr Symons had charged significant time for reviewing the "Receivers' Court Book" and the "Liquidators' Court Book", for which Mark Elliott had also charged significant fees prior to the Partial Settlement.
- 1101 In cross-examination, Mr Trimbo conceded that duplicated work is prima facie unreasonable.²¹⁸³ He agreed that for numerous lawyers to review the same set of documents was an "*obvious case of unreasonable work*".²¹⁸⁴ In his affidavit, however, Mr Trimbo contended that "*simply because Mr Elliott had reviewed certain documents, that does not mean that Mr Symons should not review them. It can be reasonable for junior counsel to review the same documents, particularly if significant time has elapsed since those documents were first reviewed by the instructing solicitor*".²¹⁸⁵

²¹⁸⁰ [SYM.001.002.1615] [SYM.001.002.1622] [SYM.001.002.1623] [SYM.001.002.1625] [SYM.001.002.1628] [SYM.001.002.1630] [SYM.001.002.1633] [SYM.001.002.1635]; [SYM.001.003.2832]; [CBP.001.013.4462] [CBP.001.013.4470] [CBP.001.013.4471] [CBP.001.013.4473] [CBP.001.013.4476] [CBP.001.013.4478] [CBP.001.013.4481] [CBP.001.013.4483].

²¹⁸¹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 955:14-958:9.

²¹⁸² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 957:15-958:9.

²¹⁸³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 724:19-23.

²¹⁸⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 724:24-725:1.

²¹⁸⁵ Mr Trimbo's 21 September 2020 Affidavit [LAY.090.001.0001], para [104].

1102 But the fact is:

- (a) Mr Trimbos sought no evidence of any work product by either Mark Elliott or Mr Symons to substantiate their fees charged for that work, and adopted a formulaic approach which essentially involved applying a multiplication factor to the word count of the discovery to quantify the time they might have reasonably spent reading the discovery, without interrogating on his own account by making enquiries to satisfy himself that the time was actually spent or that it was reasonably spent;²¹⁸⁶
- (b) the evidence demonstrates that **neither** Mark Elliott **nor** Mr Symons undertook the discovery review work for which they charged²¹⁸⁷ – a conclusion which is fortified by the fact that AFP has abandoned its claim for the fees of Mark Elliott and Mr Symons;
- (c) Mr Trimbos did not draw attention to the duplicative charges in his report so as to expose the issue for the Court's consideration.

The report was prepared without reference to the SPR Proceeding

1103 AFP and Alex Elliott admit that the Third Trimbos Report was misleading in circumstances where it was prepared without reference to the SPR Proceeding, and Mr Trimbos was not told that there was a parallel proceeding in which another legal team had undertaken substantial work for the benefit of the Bolitho Proceeding, nor instructed to consider whether the costs claimed by AFP and Mr Bolitho were reasonable having regard to the work that was undertaken by the SPRs and their legal team for the benefit of both proceedings.²¹⁸⁸

1104 Mr Zita/Portfolio Law does not adopt that admission.²¹⁸⁹

²¹⁸⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 702:17-703:3, 704:3-10; [TRI.001.005.0169]; [TRI.001.005.0076]; [NOB.500.012.3839]; [AFP.001.001.1697]; [AFP.001.001.1751] [AFP.001.001.1752].

²¹⁸⁷ See **Section F**; and compare [NOB.500.011.8020] with [SYM.002.001.1890] at Annexures D and F, whereby Mark Elliott's claim for fees morphed from "**\$220K**" on 8 May 2016 to **\$797,500** on 4 July 2016, including on the basis of alleged work including "*Discovered documents(Receivers/Liquidators Hearings + other material)-approx:55,000 folios -perusal (20,000 folios) /scan (25,000 folios) /examine 10,000 pages*".

²¹⁸⁸ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.i].

²¹⁸⁹ [PLE.070.001.0001_2], para [1.h].

- 1105 The Third Trimbo Report repeatedly opined that costs were reasonable having regard to the **nature, scale and complexity** of the Bolitho Proceeding.²¹⁹⁰ That conveyed the impression that Mr Bolitho’s legal team had been required to expend significant intellectual effort to advance the case to trial.
- 1106 The Third Trimbo Report did not disclose that a significant feature of the “*nature, scale and complexity*” of the group proceeding was that it was being managed together with another parallel proceeding raising the same issues, in which another legal team had undertaken substantial work for the benefit of the group proceeding.
- 1107 Similarly, the Third Trimbo Report considered the issue of duplication of costs as between the various lawyers acting in the Bolitho Proceeding,²¹⁹¹ without drawing attention to the possibility of duplication as between the respective legal teams acting in the Bolitho Proceeding and the SPR Proceeding.
- 1108 The Court should find that it was at the forefront of the minds of AFP and the Lawyer Parties that the SPR legal team had undertaken and paid for substantially all the legal work necessary to advance the matter for trial, for the following reasons.
- 1109 **First**, in his evidence, Mr Zita confirmed that there was a deliberate strategic decision to give the bulk of the work to the SPRs. He said:²¹⁹²

“I understood that Maddocks had more resources than Portfolio Law to prepare and file expert reports and witness statements. I had a discussion with Norman about the SPRs undertaking the work in relation to the witnesses. I cannot remember when this conversation was. It was a discussion in the context of getting ready for trial. Norman told me that he had had discussions with Redwood about how to split the workload and Norman said that he would give the bulk of that work to the SPRs. Norman said that the SPRs have the infrastructure to do the evidence, including expert witnesses, and that I (as in Portfolio Law) did not have that capacity. That was true. I also remember that Norman said that he had discussions with Sam Kingston (Kingston), a solicitor at Maddocks, about them undertaking the majority of the witness work. Because of these discussions, I understood that one of the reasons why the SPRs filed most of the evidence was practical resourcing.”

²¹⁹⁰ Third Trimbo Report [CBP.001.010.5957], paras [37], [38], [53], [66], [70], [72], [87], [98], [117], [132].

²¹⁹¹ Third Trimbo Report [CBP.001.010.5957], paras [34] – [35], [119] – [120], [130].

²¹⁹² Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [104].

- 1110 **Second**, the Bolitho team intervened in the SPRs' funding application made to the NSW Supreme Court to set aside funds for them to conduct the litigation.²¹⁹³ In that regard, on 27 November 2015, Mr O'Bryan sent an email to Mr Kingston copied to Mr Zita, Mr Symons and Mark Elliott, stating that *"the debenture holders have a substantial interest in this issue and will appear to support the application"*.²¹⁹⁴
- 1111 **Third**, in September 2017, Mark Elliott sent an email to Mr O'Bryan and Mr Symons in relation to the trial framework, stating: *"Banksia are claiming our experts as their own!"* Mr O'Bryan replied: *"They're paying for everyone they name so I'm not objecting!"*²¹⁹⁵
- 1112 **Fourth**, on 10 January 2018, Mr Symons sent an email to Mr O'Bryan stating that *"the liquidators claim witness statements and expert reports filed by Bolitho as their own (including Laurie Bolitho's witness statement!)"*.²¹⁹⁶ Mr O'Bryan replied: *"Yes, but I am not inclined to complain about this because **it makes it easier for us to justify our submission that the preparation and filing of the evidence for BSL and Bolitho was a joint exercise. Obviously so in the case of Bolitho and inferentially so in respect of all other evidence intended to be jointly relied upon**"*.²¹⁹⁷
- 1113 **Fifth**, on 15 May 2018 in the context of the Botsman Appeal, Mr O'Bryan sent an email to Mark Elliott²¹⁹⁸ asking him to encourage Mr Lindholm to:

"confirm, in court and outside (ie, in Botsman's ear), that all the work done on the expert evidence for trial (which is the bulk of all legal work done) was shared (i.e. Michael & I contributed fully to all briefings to experts, settling instructions and questions, reviewing reports, finalising the evidence & reply evidence etc.)."

JL paid for most of it, but that was only because he had got \$10M of debentureholders' money from Black J and it made perfect sense to spend that money first, rather than AFP's money, since AFP would simply ask for a much larger lit. fund. fee if it had had to spend those additional \$millions.

I reckon Botsman has the idea that Maddocks did all the work from an inside source. I want JL to give clear instructions to his legal team not to support this nonsense."

²¹⁹³ [CBP.004.005.2132] [CBP.004.005.5497] [SYM.001.002.8693].

²¹⁹⁴ [CBP.004.001.4549].

²¹⁹⁵ [NOB.500.001.9852].

²¹⁹⁶ [NOB.500.005.2480].

²¹⁹⁷ [NOB.500.005.2480].

²¹⁹⁸ [NOB.500.004.6582].

1114 Self-evidently, it was relevant to the assessment of the reasonableness of the costs claimed in the Bolitho Proceeding that another legal team (funded by the debenture holders) had undertaken most of the work, allowing Mr Bolitho's legal team to coast along without much effort, and Mr Trimbos conceded as much.²¹⁹⁹ The omission of that critical matter from the Third Trimbos Report rendered the report misleading.

The report did not disclose Mr Trimbos's prior retainers to act for Mark Elliott

1115 AFP, Alex Elliott and Mr Zita/Portfolio Law admit,²²⁰⁰ and the Court should find, that the Third Trimbos Report was misleading in circumstances where it did not disclose Mr Trimbos's prior retainers to act for or on behalf of Mark Elliott and his associated entities, including *Camping Warehouse v Downer* and *Webster v Murray Goulburn Cooperative Co Limited*, *Melbourne City Investments v Treasury Wine Estates* (in which Mr O'Bryan and Mr Symons also acted).

1116 Mr Trimbos conceded in his evidence that, when he was retained in June 2016 for the First Trimbos Report, he had been retained in matters involving AFP and/or Mark Elliott on five occasions,²²⁰¹ and between 2016 and 2020, he was retained by or on behalf of Mark Elliott in four further matters.²²⁰²

The conclusions in the Third Trimbos Report were based on false premises

1117 AFP, Alex Elliott and Mr Zita/Portfolio Law admit, and the Court should find, that on the bases set out above, the Third Trimbos Report falsely opined that:

- (a) costs "incurred to date" by Mr O'Bryan of \$2,326,775, by Mr Symons of \$608,031 and by Portfolio Law of \$377,795 were fair and reasonable;²²⁰³ and
- (b) opined that "anticipated future costs" to finalise the settlement of \$400,796 for professional fees and \$354,260.44 for disbursements were fair and reasonable.²²⁰⁴

²¹⁹⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 724:19-725:6.
²²⁰⁰ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.j]; [PLE.070.001.0001_2].
²²⁰¹ Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], paras [13] – [16].
²²⁰² Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], para [17].
²²⁰³ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.k.i];
 Third Trimbos Report [CBP.001.010.5957], paras [78] and [164].
²²⁰⁴ [PLE.020.001.0001] & [PAR.080.001.0001], para [92.k.ii].
 Third Trimbos Report [CBP.001.010.5957], para [168].

1118 In the Fifth Trimbos Report which was filed on 29 June 2020, Mr Trimbos recanted his earlier opinions and said that he had been misled.²²⁰⁵

The cumulative misleading effect of the Third Trimbos Report in conjunction with other misleading materials

1119 AFP, Alex Elliott and Mr Zita/Portfolio Law largely admit, and the Court should find, that the Third Trimbos Report and other materials that were filed in conjunction with it were misleading in that:

- (a) The First Bolitho Opinion stated: *“The Court may be reassured by the role of the plaintiff’s litigation funder, a sophisticated participant in this litigation with access to significant knowledge and experience of litigation, in providing oversight in respect of the engagement of solicitors and counsel on reasonable terms”*.²²⁰⁶ That fortified the assurance that AFP had satisfied itself as to the reasonableness of the costs charged to its account.²²⁰⁷
- (b) The Third Trimbos Report drew a distinction between costs *“incurred to date”* and *“anticipated future costs”* to finalise the settlement.²²⁰⁸ The First Bolitho Opinion drawn by Mr Symons and settled with Mr O’Byrne drew a similar distinction in encouraging the court to approve the funding commission because of the funding risk said to have been taken by AFP as a result of *“paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million”*.²²⁰⁹ That is, the Third Trimbos Report and the First Bolitho Opinion together created a misleading impression that AFP had paid legal costs incurred to date in accordance with the due dates stated on the invoices, when in fact, as at the date of the First Bolitho Opinion, AFP had not paid those costs.²²¹⁰

²²⁰⁵ [EXP.020.008.0001], paras [8.b], [8.h], [8.i], [8.j], [8.k], [8.l], [8.m], [8.n], [8.q], [8.s], [8.t], [8.v], [8.w], [8.x], [8.y], [10], [12].

²²⁰⁶ First Bolitho Opinion [SYM.005.001.1400], para [116.b].

²²⁰⁷ AFP and Mr Zita/Portfolio Law admit this, but **Alex Elliott curiously denies it**: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.a]; [PLE.070.001.0001_2].

²²⁰⁸ [CBP.001.010.5957], paras [55], [71], [82], [100]-[101], [121]-[122], [164]-[168].

²²⁰⁹ First Bolitho Opinion [SYM.005.001.1400], paras [134], [145], [183].

²²¹⁰ AFP, Alex Elliott and Mr Zita/Portfolio Law admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.b]; [PLE.070.001.0001_2].

- (c) The Second Bolitho Opinion stated²²¹¹ that AFP had paid Mr Bolitho’s costs and disbursements when that was untrue.²²¹²
- (d) The Summons and Notice referred to “reimbursement” of legal costs in the sum of \$4.75 million plus GST. The Court should find that AFP, Alex Elliott, Mr O’Bryan, Mr Symons knew and intended the word “reimbursement” to be understood as conveying its ordinary meaning – to pay back, refund, or repay.²²¹³
- (e) The First Bolitho Opinion invited the Court to apply the principles set out by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at para 80²²¹⁴ (**Money Max principles**).²²¹⁵
- (f) The Money Max principles include “*the legal costs expended and to be expended*” by the funder.²²¹⁶
- (g) The reference to costs “*to be expended*” is properly to be understood as a reference to the costs that would have been expended by the funder until the conclusion of the trial, if the matter had proceeded to trial.²²¹⁷
- (h) In relation to “*the legal costs expended and to be expended*”, the First Bolitho Opinion stated:²²¹⁸ “*The plaintiff’s legal costs and disbursements, while regarded as reasonable represent a significant expense to BSLLP. The legal costs and disbursements paid by BSLLP or for which it will become liable are in the order of \$7.8 million. It must of course be noted that after the partial settlement the fees for which BSLLP has not been reimbursed are in the order of \$5.3 million. Had the proceeding continued to trial, the costs and disbursements incurred in running the plaintiffs case*

²²¹¹ Second Bolitho Opinion [SYM.005.001.1534], para [13].

²²¹² AFP, Alex Elliott and Mr Zita/Portfolio Law admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.d]; [PLE.070.001.0001_2].

²²¹³ AFP, Alex Elliott and Mr Zita/Portfolio Law **deny this**: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.c]; [PLE.070.001.0001_2].

²²¹⁴ First Bolitho Opinion [SYM.005.001.1400], para [165].

²²¹⁵ AFP, Alex Elliott and Mr Zita/Portfolio Law admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.e]; [PLE.070.001.0001_2].

²²¹⁶ AFP, Alex Elliott and Mr Zita/Portfolio Law admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.f]; [PLE.070.001.0001_2].

²²¹⁷ AFP, Alex Elliott and Mr Zita/Portfolio Law admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.g]; [PLE.070.001.0001_2].

²²¹⁸ First Bolitho Opinion [SYM.005.001.1400], para [183].

would have been significantly higher. The magnitude of this funding risk justifies the Funder's Commission now sought."

- (i) The real amount "expended" by AFP was very low, because AFP had entered into deferred and/or conditional fee arrangements with Mr Bolitho's legal representatives.²²¹⁹ In relation to the claims against Trust Co in the Bolitho Proceeding, AFP had "expended" an amount in the order of no more than about **\$500,000**²²²⁰ out of the total costs claimed of **\$5.225 million**.²²²¹

Findings the Court should make – contraventions of the CPA by AFP, Alex Elliott and the Lawyer Parties

1120 On the basis of the concessions, admissions, and evidence, the Court should find as follows:

- (a) By their conduct in procuring the Third Trimbos Report and causing or permitting it to be filed and relied upon, each of Mr O'Bryan, Mr Symons, AFP and Alex Elliott contravened the overarching obligation to act honestly, in that they each knew that, or were reckless as to whether, the Third Trimbos Report was misleading by reason of the information supplied to him by them.²²²²
- (b) AFP, Mr O'Bryan and Mr Symons deliberately concealed their Fee Arrangements from Mr Trimbos by the false and misleading cost disclosure documents and invoices they issued to him.²²²³
- (c) AFP, Alex Elliott, Mr O'Bryan and Mr Symons knew that Mr O'Bryan's invoices for the Relevant Period and Mr Symons' invoices for the 2017 calendar year had not been issued on a monthly basis throughout the litigation and had not been paid.²²²⁴

²²¹⁹ AFP and Alex Elliott admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.i], but Mr Zita/Portfolio Law denies it: [PLE.070.001.0001_2], para [1.i].

²²²⁰ AFP has discovered a document purporting to be a summary of costs that it has paid in the course of the litigation [AFP.001.001.4583]. On the basis of that document, it appears that, as at 30 January 2018, AFPL's "out of pocket" expenses (ie, amounts it had paid for which it had not already been "reimbursed" at the time of the Partial Settlement) were around \$500,000.

²²²¹ AFP and Alex Elliott admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [93.i], but Mr Zita/Portfolio Law denies it: [PLE.070.001.0001_2], para [1.i].

²²²² RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [94].

²²²³ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.a].

²²²⁴ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.b].

- (d) Mr O'Bryan and Mr Symons deliberately deceived Mr Trimbo by consciously and deliberately making their invoices appear as if they had been issued on a monthly basis.²²²⁵
- (e) Mr O'Bryan and AFP deliberately deceived Mr Trimbo by providing Mr Trimbo with Mr O'Bryan's invoices stamped as "PAID".²²²⁶
- (f) AFP, Mr O'Bryan and Mr Symons deliberately deceived Mr Trimbo by issuing false Fee Documents to him.²²²⁷
- (g) AFP, Alex Elliott, Mr O'Bryan and Mr Symons knew that the assumption made by Mr Trimbo as to the likely length of trial was inconsistent with court orders and the agreed trial framework, which had been agreed in consultation with Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott.²²²⁸
- (h) AFP, Alex Elliott, Mr O'Bryan and Mr Symons knew that the fees sought to be recovered by AFP and Mr Bolitho were excessive and unreasonable.²²²⁹
- (i) Alex Elliott owed a duty to, and failed to:²²³⁰
- (i) bring to the attention of the Court of his own volition the fact that the report was misleading and/or had been procured by misleading information and instructions being provided to Mr Trimbo;
 - (ii) ensure that counsel briefed by Elliott Legal to appear for AFP at the First Approval Application (Mr Loxley) brought to the attention of Justice Croft that the report was misleading, so that his Honour would not be misled.
- (j) The conduct of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law, Alex Elliott and AFP contravened the Paramount Duty because that conduct:²²³¹

²²²⁵ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.c].

²²²⁶ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.d].

²²²⁷ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.e] – [95.f].

²²²⁸ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.h]. See [CBP.001.013.4462] [CBP.001.013.4470] [CBP.001.013.4471] [CBP.001.013.4473] [CBP.001.013.4476] [CBP.001.013.4478] [CBP.001.013.4481] [CBP.001.013.4483].

²²²⁹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [95.i].

²²³⁰ RLOI [PLE.010.005.0001], para [90A].

²²³¹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [97].

- (i) invited and caused an expert witness, who owed duties to the Court, to prepare a misleading report;
- (ii) invited the Court to rely (and in fact the Court did rely) on misleading evidence, such that the Court was invited to (and did) proceed on an incorrect basis;
- (iii) amounted to an abuse of the practices and procedures of the Court established in connection with the settlement of representative proceedings, in which material is often filed on a confidential basis and the Court relies heavily on the solicitors and counsel seeking approval of the settlement to put before it all matters relevant to the Court's assessment of the matter;
- (iv) undermined the Court's trust and confidence in the honesty and candour of the solicitors and counsel appearing before it;
- (v) caused the Court not only to approve the costs claimed by AFP in an excessive amount, but also to approve the commission claimed by AFP in an excessive amount;
- (vi) was inimical to the administration of justice.

Defects with the report arising from misleading or deceptive representations by Mr Trimbos

Misleading representations conveyed by Mr Trimbos

1121 In proffering his opinion set out in the Third Trimbos Report in respect of the claim for Mr Bolitho's claim for costs in the Bolitho Proceeding, Mr Trimbos represented to the Court that:

- (a) he understood and agreed to be bound by the Expert Code of Conduct **(Code)**;²²³²
- (b) he was independent of AFP;²²³³
- (c) he was not an advocate for AFP;²²³⁴

²²³² Third Trimbos Report [CBP.001.010.5957] at .5964, [2].

²²³³ Third Trimbos Report [CBP.001.010.5957] at .5964, .5968, [2], [23] and Code, section 2.

²²³⁴ Third Trimbos Report [CBP.001.010.5957] at .5964, [2] and Code, section 2.

- (d) he applied an objective process in his independent assessment of the claim for costs that enabled him to opine that claimed items of costs had been reasonably incurred and were of a reasonable amount;²²³⁵
- (e) his opinions involved the application of specialised knowledge based on his training, study or experience;²²³⁶
- (f) he had identified the facts, matters and assumptions on which each opinion expressed in his reports was based;²²³⁷
- (g) he had made all the inquiries which he believed were desirable and appropriate, and that no matters of significance which he regarded as relevant had, to his knowledge, been withheld from the Court,²²³⁸

(together, the **Expert Witness Representations**).

1122 Further, Mr Trimbos did not comply with his duty to forthwith provide a supplementary report disclosing any change to the opinions expressed in his prior reports on material matters.²²³⁹ He waited an inordinately long time to revisit his opinions, despite being aware of the issues in this remitter and their impact on his reports. Accordingly, until he served his Fifth Report on 29 June 2020, Mr Trimbos conveyed a continuing representation that he continued to hold the opinions in his Third Report (which opinions were repeated in his Fourth Report) (**Continuing Opinion Representation**).

1123 The Expert Witness Representations and the Continuing Opinion Representations were misleading or deceptive in breach of section 21 of the CPA.

1124 Further, by the conduct described below, Mr Trimbos breached his paramount duty to the Court under section 16 of the CPA.

²²³⁵ Third Trimbos Report [CBP.001.010.5957] at 5965, .5968-.5969, .5973 - .5993.

²²³⁶ Third Trimbos Report [CBP.001.010.5957] at .5965 - .5966, [11], [13].

²²³⁷ Third Trimbos Report [CBP.001.010.5957] at .5965, [9].

²²³⁸ Third Trimbos Report [CBP.001.010.5957] at .5966, [14].

²²³⁹ Code, section 4.

The Expert Witness Representations were false or misleading

- 1125 The Court should find that the Expert Witness Representations were false or misleading for the following reasons.
- 1126 **First**, Mr Trimbos appears not to have considered himself bound by the Expert Witness Code of Conduct, for the reasons that follow.
- 1127 **Second**, Mr Trimbos was not independent of AFP. At the time of preparing the Third Trimbos Report, Mr Trimbos had been retained by Mark Elliott and/or his associated entities on **six** prior occasions.²²⁴⁰ This was not disclosed to the Court in the Third Trimbos Report. The Court should reject Mr Trimbos's assertion in his affidavit that his prior work for Mark Elliott did not compromise his independence.²²⁴¹
- 1128 Irrespective of whether Mr Trimbos's approach in the Banksia litigation was consistent with his approach in other matters,²²⁴² the objective evidence acutely shows that Mr Trimbos did not see it as his duty to "*to assist the Court impartially*"; rather, he appears to have seen his role as assisting AFP by producing reports that were favourable to AFP without proper independent objective assessment of the facts, bringing no independent expert judgment to the matter.
- 1129 To that end, Mr Trimbos provided Mark Elliott and the Lawyer Parties with "*kerbside*" advice outside the terms of his retainers when requested to do so.²²⁴³ For instance:
- (a) Mr Trimbos advised Mark Elliott as to whether he would opine that it was "fair and reasonable" for counsel to charge a cancellation fee,²²⁴⁴ before any such fee had been charged, and in circumstances where he must have known that counsel's fee agreements (which he had previously examined) did not allow for such a fee. In his affidavit, Mr Trimbos did not deny advising Mark Elliott about the cancellation fee, but claims that he did not advise Mark Elliott of the amount that could be charged.²²⁴⁵ The Court

²²⁴⁰ See Fourth Trimbos Report [EXP.020.001.0001] at .0009 [25], where this was disclosed for the first time; and Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], paras [13] – [17].

²²⁴¹ Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], para [20].

²²⁴² Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], para [20].

²²⁴³ [SYM.001.003.0019].

²²⁴⁴ [NOB.500.001.7493]; [SYM.001.003.0235] [AFP.001.001.2224] [AFP.001.001.2225].

²²⁴⁵ Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], paras [72] – [73].

should prefer the contemporaneous documentary evidence²²⁴⁶ to Mr Trimbos's uncorroborated and untested assertion.

- (b) In advance of preparing his Second Report, Mr Trimbos advised Mark Elliott as to what material and instructions Mark Elliott should provide to Mr Trimbos so that Mr Trimbos could produce a report saying that the costs claimed were reasonable.²²⁴⁷ The Court should place no reliance upon Mr Trimbos's attempt in his affidavit to recharacterise this advice as a mere "request for information".²²⁴⁸ That interpretation is not supported by the contemporaneous documentary evidence, which should be preferred whenever it conflicts with Mr Trimbos's evidence.

1130 All of this does not bespeak a process of independent evaluation by an expert witness cognisant of his duties under the Code.

1131 **Third**, those matters and the matters set out below reveal that, contrary to his denial in the witness box,²²⁴⁹ Mr Trimbos acted as an advocate for AFP rather than as an independent expert witness.

1132 **Fourth**, Mr Trimbos did not apply an objective process of independent assessment of the claim for costs so as to provide him with a proper basis to opine that claimed items of costs had been reasonably incurred and were of a reasonable amount.

1133 Rather, the process that Mr Trimbos described in cross-examination involved uncritical acceptance of whatever he was told by Mark Elliott, Mr Zita, Mr O'Bryan, and Mr Symons, not only as to the time they had allegedly spent, but also as to the reasonableness of the time spent and the fees charged. Mr Trimbos's oral evidence did not support his assertion that he undertook a process of proper analysis to work out if the time charged by the Lawyer Parties was reasonable.²²⁵⁰ The following examples are most striking:

- (a) Mr O'Bryan charged 65 days for *"Reviewing discovered documents and witness statements and outlines, transcripts of public and ASIC examinations and other source evidentiary documents, and conferring with*

2246 [AFP.001.001.2224].

2247 [AFP.001.001.1912].

2248 Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], paras [61] – [65].

2249 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 718:11-12.

2250 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 700:15-19.

instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial". Mr Trimbos opined in his report that this charge might appear to be prima facie unreasonable,²²⁵¹ but he concluded that the charge was reasonable, because Mr O'Bryan told Mr Trimbos the trial would run for 120 days²²⁵² (rather than the 50 days for which it had been set down as shown in the agreed trial framework that was provided to Mr Trimbos, which had evidently been agreed on about 6 October 2017, only a month before the matter settled).²²⁵³ Mr Trimbos did not seek to interrogate the apparent conflict between what he was told by Mr O'Bryan and what all counsel on the matter including Mr O'Bryan had evidently agreed between themselves and with the Court as to the length of the trial one month before the matter settled.²²⁵⁴ Mr Trimbos did not raise the inconsistency with Mr Zita, Mr O'Bryan, Mr Symons or AFP, and did not seek to critically evaluate the matter.²²⁵⁵

- (b) In reaching his opinion that Mr O'Bryan's fees for "*reviewing discovered documents... and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross-examination at trial*" were reasonable, Mr Trimbos relied solely on Mr O'Bryan's fee slips asserting that he had undertaken the work.²²⁵⁶ It is evident that he similarly relied upon the fee slips of Mr Symons asserting that he had spent significant time reviewing discovery and working on the court book. Mr Trimbos did not ask to see any draft opening submissions.²²⁵⁷ He did not ask to see any draft cross-examination notes.²²⁵⁸ He did not ask for any advice on evidence.²²⁵⁹ He did not ask to see any chronology prepared by either Mr O'Bryan or Mr Symons setting out an analysis or summary of documents reviewed.²²⁶⁰ In short, he did not seek to review any work product to support the fees. There is also no evidence that he sought to interrogate counsel's instructing solicitors to

2251 Third Trimbos Report [CBP.001.010.5957] at .5985 [94].

2252 Third Trimbos Report [CBP.001.010.5957] at .5985 [95] – [97].

2253 [CBP.001.013.4462].

2254 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 696:30 – 699:21.

2255 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 696:30 – 699:21.

2256 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 693:16-694:2.

2257 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 703:1.

2258 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 702:20-22.

2259 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 703:2-3.

2260 Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 702:30-31.

satisfy himself that Mr Zita/Portfolio Law had kept a watchful eye on counsel's fees and was satisfied that those bills were an accurate record of work performed.

- (c) The process of “sampling” undertaken by Mr Trimbos in cross-examination and in his affidavit was hopelessly inadequate in circumstances where he could have, but did not, ask to see any evidence of the work that comprised the substantial proportion of the fees charged by both Mr O’Bryan and Mr Symons, when it is plain that no such evidence existed – a matter that Mr Trimbos would have quickly discovered if he had so much as asked.²²⁶¹ Testing Mr O’Bryan’s charges of 6 hours for reading the expert report of Campbell Jackson²²⁶² seems pointless when Mr Trimbos simply accepted at face value the hundreds of hours charged by Mr O’Bryan for “*reviewing discovered documents... and conferring with instructing solicitors and junior counsel concerning opening submissions and evidence for tender and cross examination at trial*”.²²⁶³
- (d) Equally, in the case of Mr Symons, Mr Trimbos referred in his report to three pieces of work evidently undertaken by Mr Symons and on that basis concluded that the fees charged by Mr Symons were reasonable.²²⁶⁴ Mr Trimbos undertook no scrutiny of the time charged by Mr Symons for discovery review and working on the Court Book,²²⁶⁵ even though (1) that work comprised a significant proportion of Mr Symons’ total fees charged²²⁶⁶ and (2) Mr Trimbos knew that Mark Elliott had already recovered significant fees for reviewing those same documents at the time of the Partial Settlement,²²⁶⁷ which should have meant that the process of identifying and analysing critical documents ought to have been well advanced. Mr Trimbos also saw nothing to substantiate Mr Symons’ significant fees charged for reading witness statements and expert reports – indeed, having regard to the discovery made by Mr Symons in this remitter

²²⁶¹ See the Contradictors’ oral opening submissions on 30 July 2020 [TRA.500.004.0001], 355:31 – 409:27 as to the inadequacy of the documentary evidence to substantiate the fees charged by Mr O’Bryan and Mr Symons.

²²⁶² Third Trimbos Report [CBP.001.010.5957] at [90].

²²⁶³ Third Trimbos Report [CBP.001.010.5957] at [93] – [96].

²²⁶⁴ Third Trimbos Report [CBP.001.010.5957] at [113] – [118].

²²⁶⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], T702:30-31.

²²⁶⁶ See Mr Symons’ fee entries for this work in the Third Trimbos Report [CBP.001.010.5957] at .6240, .6242, .6252, .6259 -.6261, .6263-.6265, .6267-.6271, .6273-.6278, .6280.

²²⁶⁷ First Trimbos Report [SYM.002.001.1890] at [28] – [38] and Annexures C and D.

in response to the Court's orders,²²⁶⁸ it is plain that no such documents exist.

- (e) The Court should reject Mr Trimbos's assertion in his affidavit that his process of sampling was adequate or that he "*did like to choose the bigger items*".²²⁶⁹ For the substantial part of the fees of Mr O'Bryan and Mr Symons, Mr Trimbos saw nothing to substantiate the work undertaken.
- (f) Mr Trimbos did not examine the work undertaken by Ms Jacobson relative to the work undertaken by Mr Symons. He said in his report: "*My review of Mr Symons' memoranda of fees shows that during the period of time Ms Jacobson was briefed he was occupied on almost every day for most of the day on preparing for the mediation and trial and that he did not have sufficient capacity to undertake the work that Ms Jacobson was doing*".²²⁷⁰ Mr Trimbos said that he examined the fees charged by Ms Jacobson against the fees charged by Mr Symons **for the same time period** (12 September 2017 to 9 November 2017) and "*did not identify any significant duplication of work between the two junior counsel*".²²⁷¹ Mr Trimbos did **not** draw the Court's attention to the fact that, even based on a mere review of the fee slips, there **was** significant duplication of work between the two junior counsel in circumstances where Mr Symons had charged **significant** fees for reviewing discovery and working on the Court Book throughout 2017 **before** Ms Jacobson was briefed.²²⁷² And further, it was incorrect to say there was no duplication of work evident from a comparison of the fee slips of Mr Symons and Ms Jacobson. Their fee slips in fact reveal significant overlap in the work charged.²²⁷³ Mr Trimbos evidently did not properly examine the fee slips, let alone the underlying work product. The basis for the statements he made in his Third Report is not apparent.
- (g) Mr Trimbos asserted in his evidence that there was an established "tradition" of accepting, at face value, counsel's assertions as to the time

²²⁶⁸ [ORD.500.022.0001].

²²⁶⁹ Mr Trimbos's 21 September 2020 Affidavit [LAY.090.001.0001], paras [47.g], [78] and [80] – [91].

²²⁷⁰ Third Trimbos Report [CBP.001.010.5957] at .5992 [131].

²²⁷¹ Third Trimbos Report [CBP.001.010.5957] at .5992 [130].

²²⁷² As to which, see the transcript of the Contradictors' oral opening submissions on 30 July 2020 [TRA.500.004.0001], T379-409.

²²⁷³ Contradictors' Chronology Section E-K-Relevant Period from 1 June 2016 to 30 January 2018 [AID.010.026.0001_2].

they had spent on the matter.²²⁷⁴ It would appear that Mr Trimbo saw his role as simply regurgitating what he was told by the Lawyer Parties. But in undertaking that role, Mr Trimbo misled the Court into believing that an experienced cost consultant had undertaken an independent review of the costs claimed, and had objectively and independently satisfied himself that the costs claimed were reasonable.²²⁷⁵ That was clearly not the case.

1134 **Fifth**, Mr Trimbo's opinions did not involve the application of specialised knowledge based on his training, study or experience and his 10 years' experience (at the time of his Third Report) as a costs consultant.

1135 In oral evidence, Mr Trimbo drew a distinction between a "taxation" and an "assessment".²²⁷⁶ An assessment was a process in which "*we go through the whole file*" to ascertain "*what would be a reasonable amount of time to have spent on particular tasks*".²²⁷⁷ Mr Trimbo's experience in undertaking "assessments" is unclear;²²⁷⁸ but what *is* certain is that he did not undertake any such process in relation to any of his reports prepared in connection with the Bolitho Proceeding, because in his Fifth Report he opined that such a process would need to be undertaken and there was insufficient time for him to undertake it.²²⁷⁹

1136 Mr Trimbo asserted in evidence that the expertise that he was applying in preparing the Third Trimbo Report was his expertise in taxations before the Costs Court.²²⁸⁰ But that cannot be so. Mr Trimbo said:

*"with a taxation there is a breakdown of the fees and you can actually challenge particular items. Once again with taxation most bills are reduced; it's a question of to what extent they are reduced, whether it's 10 per cent, 20 per cent 30 per cent. Very rarely would you get 100 per cent allowed on a bill of cost."*²²⁸¹

1137 Mr Trimbo did not challenge any of the items charged by Mr O'Bryan, Mr Symons or Portfolio Law, and he opined in the Third Trimbo Report that "*no significant portion of the fees charged*" by Mr O'Bryan, Mr Symons or Portfolio Law was

²²⁷⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 695:1-17; Mr Trimbo's 21 September 2020 Affidavit [LAY.090.001.0001], paras [92] – [100].

²²⁷⁵ Third Trimbo Report [CBP.001.010.5957] at [97].

²²⁷⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 711:6-25.

²²⁷⁷ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 708:21-30.

²²⁷⁸ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 709:15-17, 711:26-28.

²²⁷⁹ Fifth Trimbo Report [EXP.020.008.0001] at 0006 – 0007, 0009 – 0010 at [8.k], [8.y], [36].

Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 708:13-24.

²²⁸⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 711:29-712:2.

²²⁸¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 711:19-25.

“inappropriately or unnecessarily incurred”.²²⁸² Mr Trimbos opined that none of the fees should be reduced. It is not apparent how Mr Trimbos’s experience in taxations translated to the opinions he expressed in his report or on what basis he could arrive at his stated conclusion, in the circumstances where he had not sought to inquire about the substantial part of the work the Lawyer Parties said they undertook.

- 1138 The evidence set out in Mr Trimbos’s affidavit confirms that, for the purposes of both a taxation and an assessment, it is critical to review the entire file, which must convey examining the work product referable to the fees charged.²²⁸³ In contrast, for the purposes of his reports in the Bolitho Proceeding, Mr Trimbos saw nothing more than the fee slips for the substantial proportion of the fees charged, and relied on the word of counsel.²²⁸⁴
- 1139 Accordingly, it is not evident what expertise Mr Trimbos applied in expressing the views in his Third Report. The process that he undertook for the purposes of his Third Report appeared to be more lax, to a very significant degree, than the “assessment” and “taxation” processes he described; and yet his report was intended to fulfil a similar purpose. The looseness of the process undertaken by Mr Trimbos is striking in relation to the First Trimbos Report, where Mr Trimbos was retained by AFP on 4 July 2016 and prepared his report only **4 days later**, on 8 July 2016.²²⁸⁵ It emerged in Mr Trimbos’s oral evidence that he had experience on only one other occasion in preparing a report opining upon the reasonableness of fees charged in a group proceeding, and that report was prepared for Mark Elliott/AFP.²²⁸⁶
- 1140 Finally, Mr Trimbos confirmed he had no real knowledge of the work involved in running a large, complex class action.²²⁸⁷ It is therefore not evident upon what basis he could opine that the time charged by Portfolio Law and counsel was reasonable. He should at least have drawn this to the Court’s attention so that the Court could weigh the evidence accordingly.

²²⁸² Third Trimbos Report [CBP.001.010.5957] at [54], [97], [116].

²²⁸³ Mr Trimbos’s 21 September 2020 Affidavit [LAY.090.001.0001], paras [33] – [39].

²²⁸⁴ Mr Trimbos’s 21 September 2020 Affidavit [LAY.090.001.0001], para [47].

²²⁸⁵ See the First Trimbos Report [SYM.002.001.1890], including the letter of instructions dated 4 July 2016 [SYM.002.001.1890] at .1921at .

²²⁸⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 704:22-705:5.

²²⁸⁷ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 708:31-709:8.

- 1141 **Sixth**, Mr Trimbos did not identify the facts, matters and assumptions on which the opinions expressed in his Third and Fourth Reports were based.
- 1142 Mr Trimbos said that, if he had known that Portfolio Law’s time records as set out in their spreadsheets were not made contemporaneously, then he would need to do *“a completely different exercise than what I did”*.²²⁸⁸ Mr Trimbos did not draw the Court’s attention to his assumption that Portfolio Law’s spreadsheets were drawn from proper contemporaneous records.²²⁸⁹ Mr Trimbos conceded in oral evidence that he should have identified that assumption in his report.²²⁹⁰ The Court had no way of knowing that, based on that assumption, Mr Trimbos had undertaken only a cursory assessment of Portfolio Law’s fees, in which he uncritically accepted that Portfolio Law’s time assessments were reliable.²²⁹¹
- 1143 Nor is it apparent why Mr Trimbos assumed that Portfolio Law’s time records were made contemporaneously in circumstances where he was provided with two different iterations of the spreadsheet, with different times allocated to the various activities.²²⁹²
- 1144 Mr Trimbos likewise did not draw the Court’s attention to his assumption that the fee slips of Mr O’Bryan and Mr Symons were prepared contemporaneously, nor to his view that the “sampling approach” he undertook was appropriate only on the assumption that the time marked was recorded contemporaneously.²²⁹³ Nor did Mr Trimbos draw the Court’s attention to his evident assumption that anything counsel said was to be accepted at face value.²²⁹⁴
- 1145 Nor is it apparent that “tradition” dictated that such an assumption be made in the case of counsel; the fact is that Mr Trimbos displayed a disturbing willingness to accept whatever he was told by Mark Elliott, Mr Zita, Mr Symons and Mr O’Bryan.²²⁹⁵ There is no evidence that Mr Trimbos asked to see file notes produced by Portfolio Law to verify the time charged by Portfolio Law on various

²²⁸⁸ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 690:7-24.

²²⁸⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 690:25-691:9.

²²⁹⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 690:25-691:9.

²²⁹¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 689:24-690:5.

²²⁹² Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 682:11-683:5. Compare the 29 December 2017 spreadsheet [CBP.001.013.0964] [CBP.001.013.0965] with the 2 January 2018 spreadsheet [TRI.001.006.1963] [TRI.001.006.1964].

²²⁹³ Fifth Trimbos Report [EXP.020.008.0001] at [8.h], [8.i], [8.j], [8.s], [8.t].

²²⁹⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 695:2-26, T697:21-24.

²²⁹⁵ Mr Trimbos’s 21 September 2020 affidavit [LAY.090.001.0001], paras [92] – [100].

attendances.²²⁹⁶ There is also no evidence that Mr Trimbos asked to see Mark Elliott's records in connection with the significant fees Mark Elliott charged and recovered at the time of the Partial Settlement.²²⁹⁷ The upshot of Mr Trimbos's first four reports, which were proffered to the Court in order to obtain recovery of fees totalling millions of dollars, appears to be that the proceeding was complex and the discovery was voluminous, and therefore, the fees were reasonable; and the Lawyer Parties' word should be accepted without any critical evaluation.

1146 **Seventh**, by reason of his uncritical acceptance of the material that was presented to him and his failure to interrogate it as set out above, Mr Trimbos did not make all the inquiries which were desirable and appropriate for an expert, and more particularly, an expert who was a solicitor and officer of the Court. In particular:

- (a) Mr Trimbos made no enquiries to verify the time recording practices of Mr O'Bryan, Mr Symons or Portfolio Law – despite the significance he placed on this factor in his Fifth Report²²⁹⁸ and the oral evidence he gave to the Court.²²⁹⁹
- (b) Mr Trimbos did not draw attention to the fact that, for the purposes of preparing his First Report in connection with the Partial Settlement, Mr Trimbos was told that, with effect from March 2015, Portfolio Law had changed the basis upon which it charged fees to LPRO Scale,²³⁰⁰ only for Portfolio Law to then revert to its costs agreement and charge on the basis of the hourly rates in that agreement at the time of the Trust Co Settlement.²³⁰¹
- (c) Mr Trimbos made insufficient inquiries to substantiate the fees charged by Mr O'Bryan, Mr Symons and Portfolio Law by reference to their work product.
- (d) Mr Trimbos did not draw attention to the fact that Mark Elliott had recovered significant fees for reviewing the Receivers' Court Book and the Liquidators' Court Book at the time of the Partial Settlement,²³⁰² in circumstances where

²²⁹⁶ cf Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 695:7-10.

²²⁹⁷ See the First Trimbos Report [SYM.002.001.1890] at [28] to [38].

²²⁹⁸ Fifth Trimbos Report [EXP.020.008.0001] at [8.h], [8.i], [8.j], [8.s], [8.t].

²²⁹⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], T688:1-691:9.

²³⁰⁰ First Trimbos Report [SYM.002.001.1890] at .1938.

²³⁰¹ Third Trimbos Report [CBP.001.010.5957] at .5971 - .5973 [32], [36], [39].

²³⁰² First Trimbos Report [SYM.002.001.1890] at [28] – [38] and Annexures C and D.

Mr Symons sought to recover substantial fees for that same work, and in circumstances where Mr Trimbos conceded that it is unreasonable to recover fees for work that was duplicated.²³⁰³

- (e) Mr Trimbos did not draw attention to the fact that he had made no inquiries to establish whether there was unnecessary duplication of work as between the legal teams acting in the Bolitho Proceeding and the SPR Proceeding respectively,²³⁰⁴ or the fact that he was not instructed to consider the SPR Proceeding and the work undertaken and costs incurred in that proceeding for the purposes of preparing his report.²³⁰⁵

1147 These were all significant matters that were withheld from the Court.

Mr Trimbos failed to revisit his opinion when it became apparent that his Third and Fourth Reports were misleading

1148 At all times until he served his Fifth Report on 29 June 2020, Mr Trimbos conveyed a continuing representation that he continued to hold the opinions in his Third Report (which opinions were repeated in his Fourth Report) (**Continuing Opinion Representation**). That is so because, if he revised his opinion, he was required under the Code to inform the parties forthwith.²³⁰⁶

1149 That Continuing Opinion Representation was misleading for the reasons that follow.

1150 Mr Trimbos knew by no later than February 2019 that there were irregularities with respect to the dealings of AFP and the Lawyer Parties with Mr Trimbos relative to his Third Report and yet he did nothing. On 15 February 2019 he was instructed that:

“All costs incurred by AFP under the indemnity and on which you are asked to give your opinion in your Report are now paid other than:

(a) invoices issued by Crow Legal, Portfolio Law, and Michael Symons for work performed in December 2017 and January 2018; and

²³⁰³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 724:22-23.

²³⁰⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 723-725.

²³⁰⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 722:6-20.

²³⁰⁶ Code, section 4.

*(b) all invoices issued by Norman O'Bryan since the partial settlement for the period 1 July 2016 to 31 January 2018.*²³⁰⁷

1151 At or around that time, Mr Trimbos was provided, for the first time, with a set of invoices for Mr O'Bryan which, critically, were not stamped as "PAID".²³⁰⁸ Mr Trimbos was asked in his oral evidence whether he was concerned at the time of receiving these instructions that he might have misled the Court in his Third Report by exhibiting Mr O'Bryan's invoices stamped as "PAID".²³⁰⁹ He answered: *"I suppose I was",*²³¹⁰ but evidently was of the view that *"it was clear at this time that, and the Court was aware that, Mr O'Bryan's fees weren't paid"*, because this was obliquely adverted to in the letter of instructions.²³¹¹ But nonetheless Mr Trimbos took no steps to directly advert to that fact in his report, or to highlight the change in his previous instructions or the distinction between the set of invoices stamped as "PAID" annexed to his Third Report and the new set which were not stamped as "PAID" annexed to his Fourth Report. The mere fact that new invoices were provided to him ought to have raised suspicions. For an expert and officer of the Court not to directly confront these matters to ensure that the Court and all relevant parties were made aware of the changed circumstances and the fact that apparently misleading information had been provided is itself damning, particularly in circumstances where Mr Trimbos must have known that his Third Report had been relied upon not only before Justice Croft but also in the Court of Appeal. In circumstances where he had provided a report to be relied upon directly by the Court, it was his duty to correct the misleading information directly with the Court.

1152 Mr Trimbos contended in oral evidence that, in his Fourth Report, he corrected the misleading representation in his Third Report that counsel's fees had been paid by stating in his Fourth Report:²³¹²

"249. I am instructed at paragraph 19 of ABL's letter of instructions that the following costs incurred by the plaintiff's solicitors in the period from 1 July 2016 to 31 January 2018 are yet to be paid:

a. Invoices rendered by Crow Legal, Portfolio Law and Mr Symons of counsel for work performed in December 2017 and January 2018; and

²³⁰⁷ [EXP.020.002.0001] at [19].

²³⁰⁸ [EXP.020.004.0001] at .0003.

²³⁰⁹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 713:27-31.

²³¹⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 713:30-31.

²³¹¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 713:17-714:18.

²³¹² Fourth Trimbos Report, [EXP.020.001.0001] at [249], [251].

b. All fee slips issued by Mr O'Bryan SC since the partial settlement for the period 1 July 2016 to 31 January 2018.

...

251. My review of the itemised accounts and memoranda of fees particularising the work undertaken by Portfolio Law, Crow Legal, Mr Symons and Mr O'Bryan SC, as outlined above in this report, shows that the outstanding costs relate to the group proceedings and have been properly incurred by the plaintiff. I am instructed that AFP has an undisputed liability to pay all costs incurred by the plaintiff, including the outstanding costs, pursuant to the indemnity granted by AFP in the plaintiff's favour in the group proceedings."

- 1153 These statements sought to gloss over and place no weight at all on the changed factual substratum that underlay his Third Report in relation to Mr O'Bryan's fees. The new facts meant that misleading information had been provided to Mr Trimbos and the Court. Mr Trimbos must have known this was a significant matter which needed to be directly drawn to the Court's attention to ensure that the Court was in a position to consider and correct any mischief that had been caused by its reliance on a misleading report. The manner in which Mr Trimbos addressed the issue did not amount to a realisation of his paramount duty to the Court as an expert witness and a legal practitioner.
- 1154 Mr Trimbos conceded in oral evidence that he did not ask any questions about the change in instructions at the time of the Fourth Report as to whether counsel's fees had been paid.²³¹³ And the serious irregularity evidently did not cause Mr Trimbos to revisit the extent to which he had blindly and uncritically accepted the veracity of other aspects of the information he had been given about the fee claims. Instead, Mr Trimbos simply repeated in his Fourth Report the opinions he had expressed in his Third Report in relation to those matters.²³¹⁴
- 1155 On 29 March 2019, AFP and the Lawyer Parties were ordered to file affidavits. Immediately after the directions hearing at which those orders were made, Mr O'Bryan emailed Mr Trimbos, attaching a copy of the orders outlining the questions he had been ordered to answer, and requesting a discussion.²³¹⁵ Mr Trimbos could have been in no doubt from the questions that Mr O'Bryan was ordered to answer that grave issues had arisen with respect to the information that AFP and the

²³¹³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 716:27-717:4.

²³¹⁴ See, for example, the Fourth Trimbos Report [EXP.020.001.0001] at [99] – [112].

²³¹⁵ [CCW.016.001.0001] [CCW.016.001.0002].

Lawyer Parties provided to Mr Trimbos, and the manner in which they had thereafter deployed his Third Report.

- 1156 Despite those questions and the Court's orders being drawn to his attention, Mr Trimbos did not revisit the opinions he had expressed in any of his reports. Rather, the documentary evidence reveals that Mr Trimbos and Mr O'Bryan spoke on the telephone on 29 March 2019, and Mr Trimbos provided some advice or guidance to Mr O'Bryan.²³¹⁶ Mr Trimbos claimed in his oral evidence and in his affidavit that he has limited recollection of that conversation.²³¹⁷ His evidence was evasive and reflects poorly on his credibility. Any legal practitioner, expert witness or costs consultant in Mr Trimbos's position would recall a conversation that occurred only a year ago about serious matters of the kind raised in the 29 March 2019 Orders, particularly in circumstances where the matters raised in the Court's orders went directly to the integrity of his reports, and ultimately led to his Fifth Report served on 29 June 2020 in which Mr Trimbos recanted his earlier opinions.²³¹⁸
- 1157 On 1 April 2019, Mr O'Bryan sent his draft affidavit to Mr Trimbos.²³¹⁹ Mr Trimbos claims he did not read it.²³²⁰ This seems unlikely given the matters referred to in paragraph 1156 above. Mr Trimbos has produced no file note recording that he did not read the affidavit, nor any email to Mr O'Bryan conveying that he thought it was inappropriate for him to receive it, let alone read it. He did not advise the Court in his Fifth Report that this material had been forwarded to him with an invitation by Mr O'Bryan to respond to it.²³²¹
- 1158 In any case, Mr Trimbos conceded that he knew that Mr O'Bryan was trying to ensure that the versions of events to be given by Mr Trimbos and Mr O'Bryan were aligned.²³²² Mr Trimbos conceded that it was wrong for an expert witness to participate in such communications.²³²³ He agreed that this conduct was

²³¹⁶ [CCW.016.001.0006].

²³¹⁷ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 718:28-720:6; Mr Trimbos's 21 September 2020 affidavit [LAY.090.001.0001], paras [132] – [133].

²³¹⁸ [EXP.020.008.0001], paras [8.b], [8.h], [8.i], [8.j], [8.k], [8.l], [8.m], [8.n], [8.q], [8.s], [8.t], [8.v], [8.w], [8.x], [8.y], [10], [12].

²³¹⁹ [CCW.016.001.0006] [CCW.016.001.0007].

²³²⁰ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 720:15-16; Mr Trimbos's 21 September 2020 affidavit [LAY.090.001.0001], para [135].

²³²¹ Mr Trimbos's 21 September 2020 affidavit [LAY.090.001.0001], para [136].

²³²² Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 720:10-12.

²³²³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 720:7-9.

egregious.²³²⁴ And he conceded that, as an expert witness, he ought to have informed the Court about his communications with Mr O'Bryan.²³²⁵

1159 Mr Trimbos conceded in his oral evidence that he ought to have revisited his earlier reports once he became aware of the irregularities in relation to the information and instructions provided to him by AFP and the Lawyer Parties.²³²⁶ But it was only when ABL specifically asked him on 2 June 2020²³²⁷ to consider the allegations made by the Contradictors in the RLOI that Mr Trimbos recanted his earlier opinions.²³²⁸

1160 In his affidavit, Mr Trimbos claimed that he thought it was inappropriate for him to contact anyone in order to revisit his reports after allegations of misconduct surfaced in the remitter.²³²⁹ That is a highly unsatisfactory response. As an expert witness, it was incumbent upon him to revisit his earlier opinions, set out in reports which had been filed with the Court, when he became aware of facts that might lead him to have a different view.

1161 The Fifth Trimbos Report was served on 29 June 2020, four weeks prior to trial. It precipitated AFP's extensive admissions which were served two weeks later, on 14 July 2020.²³³⁰ AFP had little choice but to make admissions in circumstances where its own expert had recanted his earlier opinions. Imagine the costs that could have been saved if Mr Trimbos had discharged his paramount duty to the Court and his duties under the Code as and from 29 March 2019 when, at the very latest, he was put on inquiry about the integrity of the instructions provided to him for his reports.²³³¹

Relief sought from Mr Trimbos

1162 Mr Trimbos accepted in oral evidence that he knew that the SPRs and the Court were relying upon the Third Trimbos Report to satisfy themselves as to whether legal costs of more than **\$5 million** should be deducted from the Trust Co

²³²⁴ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 720:13-14.

²³²⁵ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 720:17-29; Mr Trimbos's 21 September 2020 affidavit [LAY.090.001.0001], para [136].

²³²⁶ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 721:5-27.

²³²⁷ See the instructions for the Fifth Trimbos Report [EXP.020.008.0001] at .0020.

²³²⁸ Fifth Trimbos Report [EXP.020.008.0001].

²³²⁹ Mr Trimbos's 21 September 2020 affidavit [LAY.090.001.0001], para [138].

²³³⁰ [PLE.020.001.0001].

²³³¹ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 721:5-27.

Settlement Sum.²³³² Moreover, he knew that his report was to be filed on a confidential basis,²³³³ such that it was not subject to scrutiny by the SPRs.

1163 If the Third Trimbos Report filed in January 2018 had been accurate and not misleading with respect to the matters outlined above:

- (a) that report would have revealed in January 2018 that the costs claimed by the Lawyer Parties were excessive on the basis of proper inquiries that would have been undertaken by Mr Trimbos in the discharge of his duties as an independent expert;
- (b) Mr Trimbos would not have opined in January 2018 that the fees claimed by AFP at the First Approval Application were fair and reasonable;
- (c) the Court would have approved those fees in a substantially lower sum than was approved by the Court on 30 January 2018, or not at all;
- (d) consequently, the Court could not have approved a funding commission of \$14.1 million and by reason of an accurate report from Mr Trimbos the Court would have either:
 - (i) appointed a contradictor of its own motion or upon the urging of the SPRs; or
 - (ii) invited the SPRs to address a fair and appropriate funding commission that properly reflected the funding risk that AFP had actually undertaken.

1164 The contradictor or the SPRs (who would have been under no contractual obligation to support AFP's claim for commission in the absence of a report opining that the legal costs were fair and reasonable²³³⁴) would have:

- (a) advocated for the Trust Co Settlement Sum to be apportioned as between the Bolitho Proceeding and the SPR Proceeding for the purposes of ascertaining a fair and reasonable funding commission for AFP;

²³³² Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 725:26-29.

²³³³ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 725:22-25.

²³³⁴ Trust Co Settlement Deed [SYM.002.001.4695], clauses 3.10 and 3.11.

- (b) advocated for AFP's commission to be calculated on the basis of a funding equalisation basis, rather than on a common fund basis;
- (c) drawn the Court's attention to AFP's diminutive funding risk reflected in what would have been a diminutive claim for legal costs, favouring a commission rate lower than the maximum rate of 30 per cent expressed in the Funding Agreement.

1165 A significant aspect of Mrs Botsman's appeal concerned the Court's approval of excessive sums for costs and commission, in respect of which the Third Trimbo's Report played a central role. Mr Trimbo's breaches of his overarching obligations materially contributed to the costs and delay associated with the appeal.

1166 Finally, as noted above, if Mr Trimbo had complied with his duties by revisiting his earlier reports as soon as his attention was alerted to the irregularities that had contaminated them, much time and expense could have been saved in the remitter.

1167 In those circumstances, the misconduct that is the subject of this remitter would have been revealed in 2018, rather than in 2020; and much of that misconduct could not have occurred if Mr Trimbo had acted as an independently expert properly scrutinising the fees sought to be recovered.

1168 Accordingly, Mr Trimbo's breaches of the overarching obligations materially contributed to:

- (a) the miscarriage of the First Approval Application;
- (b) the wasted costs of the First Approval Application;
- (c) the costs of the appeal;
- (d) the costs of the remitter; and
- (e) the delay in debenture holders/group members receiving their proper entitlement to the Settlement Sum, in respect of which group members ought to be compensated by an order for payment of interest for the delay and loss in use of their proper entitlement to the Settlement Sum to be measured by penalty interest rates, or such other rate as to the Court considers just in the circumstances.

1169 The Contradictors seek orders under sections 28 and 29 of the CPA against Mr Trimbos for recovery of these sums.

I. SETTLEMENT OPINION CONTRAVENTIONS

I 1. Outline of contraventions

1170 The Court should find that:

- (a) AFP, Mr O'Bryan, Mr Symons and Alex Elliott misled the Court in connection with the First Bolitho Opinion (and did so in circumstances where they knew the opinion was deficient, or were reckless as to whether it was deficient);
- (b) AFP, Mr O'Bryan and Mr Symons misled the Court in connection with the Second Bolitho Opinion (and did so in circumstances where they knew the opinion was deficient, or were reckless as to whether it was deficient);
- (c) they thereby contravened the Paramount Duty, the overarching obligation to act honestly, and the overarching obligation not to mislead or deceive,

(Settlement Opinion Contraventions).

1171 As against Alex Elliott, the Contradictors press the allegations that he knew that the First Bolitho Opinion was deficient (or was reckless as to whether it was deficient) in relation to:

- (a) the statements it made about funding risk (RLOI section I.2.1);
- (b) the statements it made about the Trust Co Remuneration Claim (RLOI section I.2.5).

1172 The Contradictors do not otherwise press allegations of dishonesty against Alex Elliott in relation to the First Bolitho Opinion.

1173 Further, the Contradictors do not press any allegations against Alex Elliott in relation to the Second Bolitho Opinion in circumstances where his evidence at trial was that he was overseas at the time the Second Bolitho Opinion was drafted, and did not read it.²³³⁵

I 2. Concessions and admissions

1174 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,²³³⁶ and do not contest findings being made against them on the basis of those allegations.²³³⁷

1175 Shortly prior to trial, AFP made extensive and significant admissions with respect to the Settlement Opinion Contraventions, which are addressed below under the relevant subheadings.

1176 Prior to opening his case, Alex Elliott substantially replicated AFP's admissions in relation to the Settlement Opinion Contraventions, but did not admit his own complicity in that misconduct.²³³⁸

I 3. Background to the First and Second Bolitho Opinions

I 3.1 AFP and Alex Elliott's relevant admissions

1177 AFP and Alex Elliott admit that:

- (a) Mr O'Bryan and Mr Symons prepared the First and Second Bolitho Opinions²³³⁹ in support of the settlement approval application pursuant to section 33V and 33ZF of the *Supreme Court Act 1986 (Vic)*. Those opinions were attached to affidavits sworn by Mr Zita as confidential exhibits and filed with the court by Portfolio Law. It is to be inferred that this was done on instructions from AFP.²³⁴⁰
- (b) A purpose of the First Bolitho Opinion was to seek court approval of the settlement and to justify the payments to AFP in respect of commission and legal costs (including the costs claimed by Mr O'Bryan and Mr Symons, which AFP had not yet paid).²³⁴¹ The purpose of the Second Bolitho

²³³⁶ RLOI dated 21 July 2020: [PLE.010.002.0001].

²³³⁷ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

²³³⁸ [PAR.080.001.0001], paras [99] – [149].

²³³⁹ First Bolitho Opinion [SYM.005.001.1400] and Second Bolitho Opinion [SYM.005.001.1534].

²³⁴⁰ [PLE.020.001.0001] and [PAR.080.001.0001], para [100]. See eg [NOB.500.005.2485] [NOB.500.005.2487]; [SYM.001.002.3778]; [NOB.500.001.7090] [NOB.500.001.7091]; [NOB.500.003.3024] [NOB.500.003.3027] [NOB.500.003.3031].

²³⁴¹ [PLE.020.001.0001] and [PAR.080.001.0001], para [101]. See the First Bolitho Opinion [SYM.005.001.1400]: pages 1 – 8, 10 – 11 and 15 – 25 are directed at the reasonableness of the settlement sum Counsel for Mr Bolitho submitted that it was unnecessary to analyse the reasonableness of the settlement sum at length because Trust Co was giving all of its

Opinion was to respond to debenture holders' objections to the settlement and payments to AFP.²³⁴²

- (c) Mr Symons and Mr O'Bryan provided AFP with drafts of the First and Second Bolitho Opinions before they were finalised.²³⁴³
- (d) In each relevant respect, Mr O'Bryan AM SC, Mr Symons and AFP knew the true position, and therefore knew that the opinions were deficient (or were reckless as to whether the opinions were deficient).²³⁴⁴

13.2 Alex Elliott reviewed the First Bolitho Opinion

1178 The Court should find that Mark and Alex Elliott reviewed the First Bolitho Opinion for the purposes of approving its substantive content, insofar as it related to the interests of AFP, on the basis of the following evidence:

- (a) On **Sunday 7 January 2018**, Mr Symons emailed Mark Elliott stating: *"I'm aiming to have a draft of the opinion to Norman by the end of Tuesday"*.²³⁴⁵
- (b) On **7 January 2018**, Mark Elliott emailed Mr Symons asking if he was *"available for a chat about a few things"*.²³⁴⁶ Mr Symons replied advising that he had *"[j]ust landed in Melbourne"*.²³⁴⁷
- (c) On **8 January 2018**, Mark Elliott and Mr Symons exchanged emails about various matters evidently relating to the content of the settlement opinion.²³⁴⁸
- (d) On **10 January 2018**, Mr Symons sent Mr O'Bryan a first draft of the opinion.²³⁴⁹

financial resources to settle the case. The remainder of the 97 page opinion is mostly directed at the payments to AFP.

²³⁴² [PLE.020.001.0001] and [PAR.080.001.0001], para [101].

See the Second Bolitho Opinion [SYM.005.001.1534].

²³⁴³ [PLE.020.001.0001] and [PAR.080.001.0001], para [102].

[SYM.001.002.5099] [SYM.001.002.5101] [NOB.500.005.2485] [NOB.500.005.2487] [NOB.500.005.2619] [NOB.500.005.2621] [SYM.001.002.6694] [SYM.001.002.6695] [SYM.001.002.4785] [SYM.001.002.4787] [SYM.001.002.4921] [SYM.001.002.3120] [SYM.001.002.3121] [SYM.001.002.1826] [SYM.001.002.1828] [SYM.001.002.2697] [SYM.001.002.2698] [SYM.001.002.2151] [SYM.001.002.2153] [SYM.001.002.2157].

²³⁴⁴ [PLE.020.001.0001] and [PAR.080.001.0001], para [104].

²³⁴⁵ [SYM.001.001.7599].

²³⁴⁶ [SYM.001.001.5418].

²³⁴⁷ [SYM.001.001.5418].

²³⁴⁸ [SYM.001.001.5119]; [SYM.001.001.0001]; [SYM.001.001.4376].

²³⁴⁹ [NOB.500.005.2485] [NOB.500.005.2487].

- (e) On **10 January 2018**, Mark Elliott emailed Mr Symons attaching information about the Trust Co Remuneration Claim.²³⁵⁰ Shortly thereafter, Mark Elliott forwarded that email to Alex Elliott.²³⁵¹
- (f) On **12 January 2018 at 6.37pm**, Mr O'Bryan emailed Mr Symons copying in Mark and Alex Elliott, attaching a draft of the First Bolitho Opinion and stating: "**We need to check all the facts & figures and the internal cross-references carefully.**"²³⁵²
- (g) In cross-examination, Alex Elliott said that he had on other occasions checked internal cross-references, and it was possible that his father asked him to look at the draft opinion to check the internal cross-referencing, though he could not recall doing so.²³⁵³
- (h) On **14 January 2018 at 4.33pm**, Mark Elliott emailed Mr Symons regarding the settlement opinion, stating: "**Looks very good. When can I get the SDS? Para 206-I am holding \$1.75M. Let me see a final draft when ready.**"²³⁵⁴
- (i) On **14 January 2018 at 4.37pm**, Mark Elliott emailed Mr Symons copying Alex Elliott, stating: "**MS, Lots to do this week**" including "**Finalise Banksia opinion. SDS for Banksia.**"²³⁵⁵
- (j) On **16 January 2018 at 9.27am**, Mark Elliott emailed Mr Symons stating "**Please send latest draft of Banksia opinion.**"²³⁵⁶
- (k) On **17 January 2018 at 7.32am**, Mr O'Bryan emailed Mr Symons copying Mark and Alex Elliott regarding the settlement opinion, stating: "**How is this progressing, lads?**"²³⁵⁷
- (l) On **17 January 2018 at 8am**, Mark Elliott replied to Mr O'Bryan and Mr Symons, copied to Alex Elliott, stating: "**Very well. MS has done a great job.**"

2350 [AFP.001.001.3429].

2351 [AFP.001.001.3429].

2352 [NOB.500.005.2485] [NOB.500.005.2487].

2353 Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2095:13-30.

2354 [SYM.002.001.8375].

2355 [AFP.001.001.3438].

2356 [ABL.002.0006.00022].

2357 [SYM.001.002.3778].

We have provided minor comments. SDS very close. TZ ready to file on Friday.²³⁵⁸

- (m) In cross-examination, Alex Elliott denied that he had provided any comments on the First Bolitho Opinion.²³⁵⁹ He contended that when his father said “**we**” have provided comments, he was referring to himself, and not to Alex Elliott.²³⁶⁰ Alex Elliott sought to substantiate his position by referring to the fact that he was overseas on **17 January 2018**.²³⁶¹ But he conceded that he did not go overseas until **16 January 2018, four days** after he received the draft opinion.²³⁶²
- (n) On **18 January 2018 at 12.26pm**, Mr Symons emailed Mr O’Bryan copying Mark Elliott attaching a “*further version of the settlement opinion*”.²³⁶³
- (o) On **18 January 2018 at 7.35pm**, Mr O’Bryan emailed Mr Symons copying Mark Elliott attaching “*suggested edits*” to the settlement opinion.²³⁶⁴
- (p) On **18 January 2018 at 11.07pm**, Mr Symons emailed Mr O’Bryan copying Mark Elliott attaching a further revised draft of the settlement opinion.²³⁶⁵
- (q) On **19 January 2018 at 6.41am**, Mr O’Bryan emailed Mr Symons copying Mark Elliott confirming he was happy with the opinion and stating “*Will you ensure Tony knows exactly what to do with this & our affidavit?*”²³⁶⁶
- (r) On **19 January 2018 at 7.43am**, Mark Elliott emailed Mr O’Bryan and Mr Symons confirming his approval of the settlement opinion.
- (s) On **19 January 2018**, Mr Zita swore an affidavit exhibiting the settlement opinion, which was filed by Portfolio Law that day.²³⁶⁷

1179 The Court should reject Alex Elliott’s self-serving evidence that “*I didn’t make any comment on the opinion of counsel*”, that “*I didn’t have... any sort of contributing*

²³⁵⁸ [SYM.001.002.3778].

²³⁵⁹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2097:12-18, 2098:6-11.

²³⁶⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2097:18.

²³⁶¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2097:22-23.

²³⁶² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2098:3.

²³⁶³ [SYM.001.002.6987] [SYM.001.002.6988] [SYM.001.002.7122] [SYM.001.002.7267] [SYM.001.002.7410].

²³⁶⁴ [SYM.001.002.6694] [SYM.001.002.6695].

²³⁶⁵ [SYM.001.002.4785] [SYM.001.002.4787].

²³⁶⁶ [NOB.500.001.7150].

²³⁶⁷ [CBP.001.003.3080].

*aspect to this settlement*²³⁶⁸ and that, because it was the opinion of counsel, he had no ability or duty to correct statements in the opinion²³⁶⁹ that were clearly wrong and known by him to be so.

13.3 Heightened duty of candour in opinions to the Court

- 1180 In an application for approval of a settlement and deductions from the settlement sum, the Court assumes a protective role in relation to group members' interests (extending to both the settlement itself and deductions from the settlement).²³⁷⁰
- 1181 This protective role arises from the fact that many affected parties, namely the group members, other than the representative plaintiff, are not before the Court.²³⁷¹ The group members rely heavily on the representative plaintiff, his lawyers, and the funder to act with absolute integrity, transparency and honesty.
- 1182 It is axiomatic that, in such an application, the Court expects solicitors and counsel acting for the class to be mindful of their duties and obligations not only to their clients, but also to the Court.²³⁷²
- 1183 There is a heavy burden on solicitors and counsel seeking approval of the settlement to make full disclosure to the Court of all matters relevant to the Court's consideration of the matter.²³⁷³
- 1184 In that respect, a settlement approval application is akin to an ex parte application, particularly where no contradictor is appointed by the Court.
- 1185 Counsel are expected to be candid and frank in their confidential opinion that counsel is expected to supply in connection with a settlement approval

²³⁶⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2084:10-21; Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2099:17-2100:16.

²³⁶⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1713:21-1714:17.

²³⁷⁰ *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [7] – [8].

²³⁷¹ *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8];

Botsman v Bolitho (2018) 57 VR 68 [300].

²³⁷² *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [150]; *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678, 42-670.

²³⁷³ *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678, 42-670; *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 [3].

application.²³⁷⁴ Counsel are under an obligation to bring to the Court's attention all facts and issues which might bear upon the order to be made.²³⁷⁵

1186 Mr O'Bryan and Mr Symons were acutely aware of these matters. In the First Bolitho Opinion, they said:²³⁷⁶

"A confidential and privileged opinion from the counsel acting for the class action plaintiff as to whether a proposed settlement is fair, proper and appropriate, and likely to be in the interest of the group members as a whole, has become a standard step in class action settlement approval processes in recent years."

1187 They included a footnote which referred to various authorities including the judgment of Finkelstein J in *Lopez v Star World Enterprises Pty Ltd*²³⁷⁷ *"in relation to the court's reliance upon information placed before it by counsel for the plaintiff in deciding an application pursuant to s 33V"*.²³⁷⁸

1188 In the relevant passage in *Lopez*, Finkelstein J said:

"Accordingly, the task of the court in considering an application under s 33V is indeed an onerous one especially where the application is not opposed. It is a task in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter. In this regard there would be few cases where the court can properly exercise its power under s 33V without evidence from the solicitor supported by counsel that the proposed compromise is in the interests of the group members. I appreciate that, on occasion, this will place the solicitor and counsel in a difficult position. The interests of their client will not always be coincident with the interests of the members of the group. But, in my view, that is no more than a necessary consequence of their client instituting a representative action."

1189 Mr O'Bryan and Mr Symons therefore knew that *"a necessary consequence"* of accepting a brief to act in a representative action was that they became subject to onerous duties as counsel for the class, whereby the Court was entitled to *"rely*

²³⁷⁴ *Murillo v SKM Services Pty Ltd* [2019] VSC 663, [33]; *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678, 42-670; *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 [3]; *Tredrea v KPMG* [2019] NSWSC 640, [62]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 [287].

²³⁷⁵ *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678, 42-670; *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 [3]; *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10, [26].

²³⁷⁶ [SYM.005.001.1400], para [1].

²³⁷⁷ [1999] FCA 104 (*'Lopez'*) at [16].

²³⁷⁸ [SYM.005.001.1400], footnote 1.

heavily” on them to “*put before it all matters relevant to the court's consideration of the matter*”.

1190 Their footnote²³⁷⁹ also referred to *Downie v Spiral Foods Pty Ltd*²³⁸⁰ where J Forrest J said: “[i]t is to be remembered that in reaching this opinion, counsel owed a duty not only to the plaintiff but also to the group members as well as the court. I am therefore fortified in my conclusion that the settlement is fair and reasonable by the opinion of counsel experienced in this area and very familiar with the issues in the case.”

1191 Mr O’Bryan and Mr Symons therefore knew that the Court placed weight on their opinions in the belief that they were provided in the discharge of their duties both to the Court and to all group members.

1192 As with any other ex parte hearing, the Court and the group members relied upon counsel to provide the Court with a **balanced view** of the matter in their opinions: drawing attention to the relevant considerations, both favourable and unfavourable. In a case that settles prior to trial, the Court knows far less about the issues in the case than the legal representatives acting for the parties. The Court expects that objective assistance from counsel, who are officers of the court, and who owe duties to act with independence, so that the Court can discharge its protective duty.

13.4 Mr O’Bryan and Mr Symons did not seek to provide the Court with a frank, independent and objective opinion

1193 The fact that Mr O’Bryan and Mr Symons provided AFP and Alex Elliott with drafts of the First and Second Bolitho Opinions before they were finalised²³⁸¹ of itself indicates the partisan and conflicted approach of Mr O’Bryan and Mr Symons to their opinions. It is not evident why a litigation funder should have input into the opinions drafted by counsel to assist the Court.

²³⁷⁹ [SYM.005.001.1400], footnote 1.

²³⁸⁰ [2015] VSC 190, [150].

²³⁸¹ [SYM.001.002.5099] [SYM.001.002.5101] [NOB.500.005.2485] [NOB.500.005.2487] [NOB.500.005.2619] [NOB.500.005.2621] [SYM.001.002.6694] [SYM.001.002.6695] [SYM.001.002.4785] [SYM.001.002.4787] [SYM.001.002.4921] [SYM.001.002.3120] [SYM.001.002.3121] [SYM.001.002.1826] [SYM.001.002.1828] [SYM.001.002.2697] [SYM.001.002.2698] [SYM.001.002.2151] [SYM.001.002.2153] [SYM.001.002.2157].

- 1194 Nor did Mr O'Bryan and Mr Symons seek to discharge their duties to act in the interests of the group members: the opinions were prepared to advance the interests of AFP and themselves, at the expense of their own clients.
- 1195 Mr O'Bryan and Mr Symons did not draw to the Court's attention any issue about how the settlement was negotiated, or the potential unfairness to group members in being required to pay a litigation funding commission of \$12.8 million plus GST and legal costs of \$4.75 million plus GST. In particular:
- (a) Mr O'Bryan and Mr Symons did not inform the Court that, in the course of the negotiations for the settlement deed, AFP demanded that the SPRs enter into an enforceable agreement for "*the division of these spoils*", by which AFP and the Lawyer Parties sought to ensure that the settlement was conditional upon the Court approving AFP's application for a commission of \$12.8 million plus GST.
 - (b) Mr O'Bryan and Mr Symons did not draw to the attention of the Court that the commission sought from group members was unfair, because under the Funding Agreement, AFP was only entitled to a commission on Mr Bolitho's claims against Trust Co in the Bolitho Proceeding, and not on Banksia's claims against Trust Co in the SPR Proceeding.
 - (c) Mr O'Bryan and Mr Symons did not draw to the attention of the Court that AFP was entitled only to a maximum of 30 per cent on those claims, and only from those group members who signed the Funding Agreement – asserted by AFP to be 55 per cent of group members, but which AFP failed to prove despite indicating in the running of the trial that it would call evidence from Mr Horne of Georgeson to purportedly establish this fact. That evidence was never led. The Court should infer that the evidence would not have assisted AFP. Further, the Court should find that neither Mr O'Bryan, Mr Symons nor Mr Zita/Portfolio Law ever sought to satisfy themselves as to the proportion of group members who signed the Funding Agreement, despite this being a critical integer affecting the funding commission and the rights of all debenture holders who were their clients.
 - (d) The First and Second Bolitho Opinions do not contain **any** reference to **any** countervailing considerations weighing against approval of the costs and commission sought by Mr Bolitho/AFP should be approved.

1196 That is consistent with the reality that Mr O'Bryan and Mr Symons saw AFP as their real client. They acted to serve the interests of AFP and their own interests. When conflicts arose, such as at the time of settlement, they sacrificed the interests of Mr Bolitho and group members (and their duties to the Court) and pursued the interests of AFP, and in turn, themselves. Tellingly, at the First Approval Application where AFP was separately represented by Mr Loxley of counsel (whose conduct is not impugned in any way in this remitter), Mr Loxley simply adopted what Mr O'Bryan and Mr Symons said in their opinions in support of his submission that the funding fee should be approved.²³⁸²

14. The opinions were misleading

1197 AFP admits that the opinions were misleading, and that in each relevant respect, Mr O'Bryan, Mr Symons and AFP knew the true position and therefore knew that the opinions were deficient (or were reckless as to whether the opinions were deficient).²³⁸³

1198 Alex Elliott admits that the opinions were misleading, but denies that he knew them to be so.²³⁸⁴

14.1 Misleading statements about funding risk

Statements inviting the Court to rely upon the Third Trimbo's Report

1199 AFP and Alex Elliott admit that:

- (a) In the First Bolitho Opinion, Mr O'Bryan and Mr Symons stated that the fees sought to be recovered by AFP and Mr Bolitho on account of legal fees were reasonable,²³⁸⁵ and invited the Court to rely upon the Third Trimbo's Report, including the annexures.²³⁸⁶ They expressly invited the Court to examine their invoices and fee slips to satisfy itself that their costs were reasonable.²³⁸⁷

²³⁸² Transcript of hearing on 30 January 2018 [SYM.001.001.5122], T52:27-53:2.

²³⁸³ [PLE.020.001.0001], paras [104], [106], [109], [112], [115].

²³⁸⁴ [PAR.080.001.0001], paras [104], [106], [109], [112], [115].

²³⁸⁵ First Bolitho Opinion [SYM.005.001.1400], para [104] – [118], [183].

²³⁸⁶ First Bolitho Opinion [SYM.005.001.1400], para [104] – [118].

²³⁸⁷ [PLE.020.001.0001] and [PAR.080.001.0001], para [105].

See First Bolitho Opinion [SYM.005.001.1400], para [109] where Mr O'Bryan and Mr Symons referred to the "expert opinion and material before the Court" and said "Mr Trimbo's engagement to provide these opinions is not intended to usurp the Court's function, and Mr Trimbo has been careful to ensure that sufficient material is put before the Court to reach its

- (b) In the Second Bolitho Opinion, Mr O’Bryan and Mr Symons again invited the Court to rely upon the Third Trimbo Report, and stated that: *“The assertion that the lawyers for the plaintiff are to receive ‘an exorbitant premium’ is inconsistent with the independent expert review of the legal fees and disbursements conducted by Mr Trimbo.”*²³⁸⁸
- (c) Those statements were misleading in circumstances where the Third Trimbo Report and its annexures were misleading by reason of the matters set out at **Section H** above.

1200 The Court should find that those statements were dishonest in circumstances where AFP, Alex Elliott, Mr O’Bryan and Mr Symons knew the claim for legal costs was excessive as set out in **Section F** and knew that the Third Trimbo Report was misleading as set out in **Section H**.

1201 Notably, Mr O’Bryan and Mr Symons said in the opinion:²³⁸⁹

“We are not in a position to do more than adopt Mr Trimbo’s opinion that the costs incurred are reasonable, the work was undertaken efficiently and appropriately, and that the charges of the plaintiff’s solicitor and counsel were reasonable and appropriate for practitioners of their standing.”

1202 But they **were** in a position to do more. They were each under a duty to ensure that the Court did not rely on the false and misleading invoices and fee slips that they had produced. They were each under a duty to ensure that the Court did **not** rely upon the report of Mr Trimbo, which was false and misleading because of the false and misleading information that he had been given. They were under a duty to inform the Court that, not only had the work not been undertaken efficiently and appropriately, but substantial parts of it **had not been undertaken at all**.

Statements which egregiously deceived the Court about the Fee Arrangements between AFP and the Lawyer Parties

1203 The First Bolitho Opinion stated at para 116(b):

“[T]he solicitors and counsel engaged by the plaintiff have been engaged on their usual terms. The Court may be reassured by the role of the plaintiff’s

own conclusions concerning the legal costs and disbursements”. By that they meant all of their invoices and fee slips.

²³⁸⁸ [PLE.020.001.0001] and [PAR.080.001.0001], para [105].
See Second Bolitho Opinion [SYM.005.001.1534], para [26].

²³⁸⁹ [PLE.020.001.0001] and [PAR.080.001.0001], para [106].
See First Bolitho Opinion [SYM.005.001.1400], para [115].

litigation funder, a sophisticated participant in this litigation with access to significant knowledge and experience of litigation, in providing oversight in respect of the engagement of solicitors and counsel on reasonable terms.”

1204 By this statement, Mr O’Bryan and Mr Symons invited the Court to believe that:

- (a) Mr O’Bryan, Mr Symons and Portfolio Law were engaged on ordinary terms;
- (b) AFP had played the constructive role that one would expect from a litigation funder – and, in particular, had monitored and managed the costs of the litigation.

1205 AFP and Alex Elliott admit that statement was misleading.²³⁹⁰ Further, the Court should find that statement was dishonest in light of the documentary evidence revealing that:

- (a) Mr O’Bryan and Mr Symons were engaged on extraordinary terms as set out in **Section C**, and in particular, on the basis of illegal contingency fee arrangements.
- (b) Mark Elliott encouraged Mr O’Bryan and Mr Symons to inflate their bills after the Trust Co Settlement was reached, and struck a deal with Portfolio Law about how much Portfolio Law was to charge without having any reference to the work that Portfolio Law had actually undertaken or what it was properly entitled to charge.
- (c) Mr O’Bryan and Mr Symons knew that AFP’s principal “oversight” of their engagement was to mastermind the gouging of fees as set out in the Banksia Expenses Spreadsheet.
- (d) AFP’s obligation to pay the fees of Portfolio Law, Mr O’Bryan and Mr Symons was deferred until the settlement with Trust Co was approved,²³⁹¹ and/or was contingent upon the outcome of that approval application.
- (e) It was intended by AFP and the Lawyer Parties that the fees charged by Portfolio Law, Mr O’Bryan and Mr Symons would be recovered out of the settlement proceeds,²³⁹² so that AFP had little or no incentive to monitor

²³⁹⁰ [PLE.020.001.0001] and [PAR.080.001.0001], para [109].

²³⁹¹ AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [109.a].

²³⁹² AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [109.b].

and manage the costs (in fact, it was in AFP's interests to maximize the costs in order to justify a substantial commission fee).

1206 The statement at para 116(b) of the First Bolitho Opinion was reproduced in the judgment of Justice Croft.²³⁹³ His Honour said that he was satisfied of the matters set out in para 116(b) on the basis of the Third Trimbos Report and the annexed source materials.²³⁹⁴

1207 Mr O'Bryan and Mr Symons stated in the First Bolitho Opinion at para 131(e) that, at the time of inviting group members to enter into a Funding Agreement with AFP, Mark Elliott informed them that “[AFP] would pay for disbursements (such as Counsel’s fees and witness expenses)”. They continued: “Mr Elliott ceased to act as solicitor for the plaintiff in late 2014, and for the last approximately 19 months Mr Bolitho has been represented by Portfolio Law Pty Ltd. Portfolio Law Pty Ltd does not act on a ‘no win / no fee’ or conditional costs basis. The costs incurred by [AFP] have therefore been significantly greater than those expected at the time that Mr Elliott wrote to group members.”

1208 AFP and Alex Elliott admit that this statement was misleading.²³⁹⁵ The Court should so find on the basis of the following matters, which the Court should find were known to each of Mr O'Bryan, Mr Symons, AFP and Alex Elliott, and which were not disclosed to the Court in the First Bolitho Opinion or the Second Bolitho Opinion:²³⁹⁶

- (a) Mr O'Bryan, Mr Symons and Portfolio Law were engaged on “no win no fee” arrangements with respect to some or all of their fees.²³⁹⁷
- (b) Even if the Mr O'Bryan, Mr Symons and/or Portfolio Law were not engaged on “no win no fee” arrangements, the fee arrangements that AFP had struck with them were practically indistinguishable from “no win no fee” arrangements in circumstances where fees were to be recovered out of the settlement proceeds once costs were approved. They all knew that

²³⁹³ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2)* [2018] VSC 47 [ATH.600.144.0001], para [71].

²³⁹⁴ AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [110].

²³⁹⁵ AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [112].

²³⁹⁶ AFP and Alex Elliott admit some of these matters, and admit they were known to AFP, Mr O'Bryan and Mr Symons: see [PLE.020.001.0001], para [112]. Alex Elliott denies they were known to him: [PAR.080.001.0001], para [112].

²³⁹⁷ [ABL.001.0685.00008] [ABL.001.0685.00009]; [AFP.015.001.0001]; [ABL.001.0703.00068]; [MAZ.004.001.0423].

AFP/Mark Elliott's business model was to avoid paying money out of its own pocket, and to have the group members pay up-front through the SPRs' work in funding and doing the bulk of the work in trial preparation, and for the Lawyer Parties to themselves provide a form of litigation funding by not seeking payment of their fees until settlements were reached.

- (c) In the Relevant Period, Portfolio Law had not issued any bills to AFP. Mr O'Bryan and Mr Symons knew that, because:
- (i) On 20 November 2017 Mr Symons arranged for Mr O'Bryan's secretary to prepare draft fee memoranda for Mr Zita for the entirety of the Relevant Period.²³⁹⁸
 - (ii) Mr Symons was copied to Mark Elliott's response to Mr Zita in which he pressed Mr Zita to deliver his bill.²³⁹⁹
 - (iii) On 21 November 2017, Mr O'Bryan asked Mark Elliott: "*What is Portfolio receiving? They also need to look respectable*"²⁴⁰⁰ which shows that he knew not only that Portfolio Law was yet to be paid, but that in fact, the quantum of Portfolio Law's fees might be manipulated to assist in selling the story of a legal team hard at work over the Relevant Period.
- (d) By reason of the Fee Arrangements between AFP, Portfolio Law, Mr O'Bryan and Mr Symons, AFP had not paid any of their costs since 1 July 2016,²⁴⁰¹ and had only paid costs in respect of all or most of the pre-1 July 2016 period at or about the time that AFP received settlement proceeds from the Partial Settlement in respect of those costs.²⁴⁰²

²³⁹⁸ [SYM.001.001.6272] [SYM.001.001.6273] [SYM.001.001.6275] [SYM.001.001.6277] [SYM.001.001.6278] [SYM.001.001.6279] [SYM.001.001.6281] [SYM.001.001.6283] [SYM.001.001.6284] [SYM.001.001.6286] [SYM.001.001.6288] [SYM.001.001.6290] [SYM.001.001.6291] [SYM.001.001.6292] [SYM.001.001.6294] [SYM.001.001.6295] [SYM.001.001.6296] [SYM.001.001.6298] [SYM.001.001.6300].

²³⁹⁹ [SYM.001.001.6247].

²⁴⁰⁰ [NOB.500.001.7495].

²⁴⁰¹ The Court should find that Mr O'Bryan and Mr Symons both knew that the fees of each other and the fees of Portfolio Law had not been paid. This necessarily follows from the evidence as to how the fees were arrived at. Further, on 10 June 2018, Mr O'Bryan sent an email to Mr Elliott stating: "*Having regard to what Whelan said on Friday about our bills & legal costs, I think it is vitally important that AFP pays MS & PL in respect of the accounts that Trimbo's has opined on, so that I can confirm to the court when asked (which I now think highly probable) that they have been paid*" [ABL.001.0601.00003].

²⁴⁰² AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [112.b].

- (e) AFP had been able to significantly defray the costs of the litigation, because the SPRs had assumed the burden of conducting the litigation, and had paid substantially all of the expenses of preparing evidence,²⁴⁰³ retaining experts, attending to interlocutory issues, and ensuring the litigation was properly prepared.²⁴⁰⁴ AFP and the Lawyer Parties had been able to sit back and coast along while the SPRs did all the work. The SPRs were in fact the litigation funder, which meant that the group members were directly funding the litigation. The scandal is that Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law, and Mark and Alex Elliott/AFP all knew this, and yet they sought to gouge legal fees to the tune of **\$3.5 million** from the group members by claiming fees for work that had not been done, and thereby depriving group members from money that was rightfully theirs. It was manifestly wrong to say that *"the costs incurred by [AFP] have been significantly greater than those expected"* in June 2014 – to the contrary, the appointment of the SPRs and the litigation funding they provided was a windfall gain for AFP.

1209 The statement at para 131(e) of the First Bolitho Opinion was reproduced in the judgment of Justice Croft.²⁴⁰⁵

Misleading statements that the costs claimed had been incurred in the conduct of the proceeding on behalf of group members

1210 Mr O'Bryan and Mr Symons stated in the First Bolitho Opinion at para 116(c) that *"all legal costs have been incurred in respect of (i) the conduct of this proceeding on behalf of group members; and (ii) the advancement of common questions on behalf of the plaintiff and group members (other than to the relatively minor extent necessary for pleading the plaintiff's claim in the various iterations of the statement of claim) and defending interlocutory applications which, had they been successful, might have derailed the entirety of the claim and prevented group members from benefitting from its prosecution."*

²⁴⁰³ AFP and Alex Elliott admit that the SPRs had retained substantially all the witnesses and had paid substantially all the witness expenses: [PLE.020.001.0001] and [PAR.080.001.0001], para [112.c].

²⁴⁰⁴ See footnote 21 to the Further SPR Opinion [CCW.022.001.0460] and Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], paras [61]-[68] and [98]-[99].

²⁴⁰⁵ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2)* [2018] VSC 47 [ATH.600.144.0001], para [77.e].

1211 However the Court was not informed that the fees charged by Mr O'Bryan and Mr Symons included:

- (a) charges for work undertaken in the pursuit of AFP's interests (and/or the interests of Mr Bolitho's legal representatives), rather than Mr Bolitho's interests and/or other group members;²⁴⁰⁶
- (b) significant charges for work they did not do.

1212 The statement at para 116(c) of the First Bolitho Opinion was reproduced in the judgment of Justice Croft.²⁴⁰⁷

Misleading statements which implied that AFP had paid legal costs and disbursements, which justified its commission

1213 The language used in the Third Trimbos Report distinguished between "*costs incurred to date*" or "*fees marked to date*", and "*anticipated*" or "*prospective*" fees "*to finalise the matter*".²⁴⁰⁸

1214 Mr O'Bryan and Mr Symons deployed that language in the First Bolitho Opinion in order to mislead the Court into believing that the costs had been paid save for the "*anticipated or prospective*" costs to attend to the settlement approval application. The First Bolitho Opinion contained the following statements:

- (a) AFP's services "in financing the proceeding" included "*paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*".²⁴⁰⁹
- (b) "[AFP] paid legal costs and disbursements, or will be liable for **anticipated costs and disbursements**, in the order of \$7.8 million. **This is a very significant expenditure on the costs of the proceeding**".²⁴¹⁰

²⁴⁰⁶ AFP and Alex Elliott admit this: [PLE.020.001.0001] and [PAR.080.001.0001], para [115]. Eg, a significant proportion of the costs they were seeking to recover in relation to approval of the Trust Co Settlement related to their advocacy of AFP's interests in recovering a commission. Further, the claim for fees included significant costs charged by Mr Lee SC (as his Honour then was), Ms Rao, and Mr Stewart Peters defending the application to restrain Mr O'Bryan and Mr Elliott from acting in the proceeding.

²⁴⁰⁷ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2)* [2018] VSC 47 [ATH.600.144.0001], para [71.c].

²⁴⁰⁸ [CBP.001.010.5957], paras [55], [71], [82], [100]-[101], [121]-[122], [164]-[168].

²⁴⁰⁹ [SYM.005.001.1400], para [134].

²⁴¹⁰ [SYM.005.001.1400], para [145].

- (c) *“The plaintiff’s legal costs and disbursements, while regarded as reasonable represent a significant expense to [AFP]. **The legal costs and disbursements paid by [AFP] or for which it will become liable are in the order of \$7.8 million.** It must of course be noted that after the partial settlement the fees for which [AFP] has not been reimbursed are in the order of \$5.3 million. Had the proceeding continued to trial, the costs and disbursements incurred in running the plaintiffs case would have been significantly higher. **The magnitude of this funding risk justifies the Funder’s Commission now sought.**”²⁴¹¹*

1215 The choice of language reveals a deliberate and calculated deception by Mr O’Bryan and Mr Symons (who drafted the opinion) and Mark Elliott/AFP (who settled it). They knew that Justice Croft would read the Third Trimbo Report and would see that all of their invoices appeared to have been issued monthly throughout the Relevant Period. They knew that Justice Croft would assume that all their invoices had been paid, because:

- (a) all of Mr O’Bryan’s invoices were stamped as “PAID”;
- (b) the instructions to Mr Trimbo annexed to the report stated that all the costs had been paid; and
- (c) the purpose of a litigation funder is to pay the legal costs.

1216 Mr O’Bryan, Mr Symons and Mark Elliott/AFP deployed the misleading impression created by the Third Trimbo Report to their full advantage in seeking to justify the significant funding commission that AFP sought. The documentary evidence confirms that they were acutely aware that it was material for the Court to know what funding had actually been provided by AFP.²⁴¹²

1217 The Court should find that Alex Elliott likewise knew that this was a material matter, and that the statements in the First Bolitho Opinion were misleading, and should

²⁴¹¹ [SYM.005.001.1400], para [183].

²⁴¹² See Trust Co’s submissions filed on 1 August 2016 in connection with the Partial Settlement [SYM.002.001.2005] [SYM.002.001.2006], paras [14] – [21]; Mr O’Callaghan’s submissions in the same application [SYM.002.001.2042], paras [11] – [13] and [25]; the transcript of the hearing of the Partial Settlement Approval Application on 4 August 2016 [SYM.001.001.4500] T75:15-17; and Mr O’Bryan’s email to the shareholders of AFP dated 27 October 2016 [CBP.004.001.8881].

reject his evidence that he only “*skimmed over*” the First Bolitho Opinion²⁴¹³ and did not appreciate that it was misleading, for the following reasons:

- (a) Mark Elliott valued Alex Elliott’s opinion and expected him to carefully read court documents such as submissions.²⁴¹⁴ Likewise, Mark Elliott would have expected Alex Elliott to review the First Bolitho Opinion and express his views.
- (b) Mark Elliott said in an email to Mr O’Byrne and Mr Symons copied to Alex Elliott on 17 January 2018 that “*we have provided minor comments*” on the First Bolitho Opinion.²⁴¹⁵ In the circumstances, the “*we*” can only be read as including Alex Elliott.
- (c) Alex Elliott knew that AFP was seeking a common fund order²⁴¹⁶ and that funding risk was relevant to the Court’s assessment of that claim.²⁴¹⁷ He had read the decision in Money Max²⁴¹⁸ and other relevant decisions.²⁴¹⁹ He described the Money Max decision as “*a big moment in time*” in the litigation funding industry.²⁴²⁰ He can therefore be taken to have known that one of the Money Max factors was “*the legal costs expended and to be expended... by the funder*”.²⁴²¹
- (d) Alex Elliott was a practising solicitor, and therefore can be taken to have known that it was the duty of AFP and the Lawyer Parties to provide the Court with accurate information. He agreed that he knew that counsel’s opinions would be relied upon by the Court for approval of the settlement.²⁴²²

²⁴¹³ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1712:30-1713:17.

²⁴¹⁴ See eg [AEL.100.009.0001] [ABL.001.0643.00243] [AEL.100.070.0001].

Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1883:1-1884:3 (Alex Elliott denied that his father valued his input and views about matters relevant to the Banksia case).

Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:25-1999:27 (Alex Elliott denied that the “My Thoughts” Document was his “*analysis*” of issues in the appeal).

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2047:11-2048:28 (Alex Elliott refused to concede that his father was asking for his opinion about Mr Bolitho’s submissions in an email where his father said: “*what do you think of them?*”), 2083:24-26 (Alex Elliott denied that his father asked for his views).

[SYM.001.002.3778].

²⁴¹⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.

²⁴¹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

²⁴¹⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.

²⁴¹⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.

²⁴¹⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.

²⁴²⁰ Money Max, para [80.f].

²⁴²¹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1713:31-1714:5.

²⁴²²

- (e) Alex Elliott knew that the Lawyer Parties had issued their invoices at the end of the matter, and that they had not been paid by AFP (as set out at paragraph 193 above). Alex Elliott delivered those invoices to Mr Trimbos.
- (f) It cannot have escaped Alex Elliott's attention that Mr O'Bryan and Mr Symons produced all of their invoices to appear as if they had been issued monthly.²⁴²³ He likewise must have noticed that Mr O'Bryan's invoices were stamped as "PAID".²⁴²⁴ He therefore knew that the invoices conveyed a false impression. He was completely indifferent to these irregularities.
- (g) In this context, Alex Elliott knew that the statements in the First Bolitho Opinion about "*legal costs expended and to be expended*" were misleading, and all the more so having regard to the misleading contents of the Third Trimbos Report, which Alex Elliott had also read.²⁴²⁵
- (h) The Court should find that Alex Elliott was completely indifferent about the accuracy of the First Bolitho Opinion. If he observed that the Court was being misled, he did not regard it as his duty to correct it.²⁴²⁶ He was completely indifferent to the veracity of the claim presented to the Court.

1218 In the Second Bolitho Opinion, Mr O'Bryan and Mr Symons said:²⁴²⁷

*"Without the plaintiff's hard-work on this case over more than 5 years since 2012, the claims could not have been brought. **Without the Funder paying the plaintiff's legal costs and disbursements**, bearing the considerable adverse costs risk, and paying security for the defendants' costs, this proceeding could not have been maintained on behalf of debenture-holders. That the plaintiff and the **litigation funder should be fairly remunerated by orders of the Court for their outlays, assumption of considerable risks, and efforts**, which have resulted in what is in our opinion the best settlement possible, is entirely consistent with legal principle and precedent and cannot on any reasonable view of the matter be said to 'beggar belief'".*

1219 The language in the Second Bolitho Opinion was all the more brazen in its deceit.

²⁴²³ [CBP.001.010.5957] at .6155 - .6282.

²⁴²⁴ [CBP.001.010.5957] at .6155 - .6244.

²⁴²⁵ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12.

²⁴²⁶ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1713:18-30, 1714:6-17.

²⁴²⁷ Second Bolitho Opinion [SYM.005.001.1534], para [13].

Justice Croft relied upon the misleading conduct

1220 In his Honour’s judgment in respect of the First Approval Application, Justice Croft accepted that, in financing the Bolitho Proceeding, AFP “*paid legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*”.²⁴²⁸

14.2 Misleading statements about AFP’s role in facilitating access to justice

1221 The First Bolitho Opinion stated at para [165]:

“It is of primary importance that, absent the provision of litigation funding by [AFP], this proceeding would have stalled as a result of no established litigation funder being willing to finance the proceeding, orders for security for costs being made by the Court, and the plaintiff’s and group members’ inability to finance the proceeding themselves.”

1222 The Second Bolitho Opinion stated at para [13]:

“Without the plaintiff’s hard work on this case over more than 5 years since 2012, the claims could not have been brought. Without the Funder paying the plaintiff’s legal costs and disbursements, bearing the considerable adverse costs risk, and paying security for the defendants’ costs, this proceeding could not have been maintained on behalf of debenture-holders.”

1223 Those statements overstated the position. In fact, Mr O’Bryan, Mr Symons and AFP knew that debenture holders could have obtained a remedy via the McKenzie Group Proceeding, **without** having to pay a funding commission and duplicative legal costs, had AFP and the Lawyer Parties not strong-armed the SPRs into dropping that proceeding.²⁴²⁹

1224 This provides another example of Mr O’Bryan and Mr Symons putting only one side of the story to Justice Croft – the side of the story that advanced AFP’s interests, and not the side of the story that advanced the interests of the debenture holders, for whom they acted. This was scandalous behaviour by counsel.

²⁴²⁸ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2)* [2018] VSC 47 [ATH.600.144.0001], para [82.c].

²⁴²⁹ See [CBP.004.007.8770] [CBP.004.007.8771]; [CBP.004.003.0603] [CBP.004.003.0604]; [CBP.001.006.5509]; [CBP.004.003.6578]; [CBP.004.005.4636]; see also the settlement deed executed in respect of the Partial Settlement [CBP.004.001.3964], clause [5.8]; ; transcript of hearing on 14 August 2020 [TRA.500.008.0001], 802:28-813:19; Mr Newman’s 3 June 2020 Affidavit [SPR.006.001.0002], para [16].

14.3 Misleading statements about adverse cost risk

1225 The First Bolitho Opinion stated at para [144]:

“In agreeing to finance the group proceeding [AFP] accepted a very significant adverse cost risk. We have set out above at [117] the costs of Trust Co from the commencement of the proceeding until December 2017 which are said to be in the sum of \$13 million, of the sixth to ninth defendants which were expected to be \$6.33 million by 30 August 2016, and BSL’s costs of \$7.7 million, although we note that BSL’s reported legal costs and disbursements are unlikely to incorporate all of the legal costs and disbursements incurred by the receivers from the commencement of the proceeding. These figures alone sum to approximately \$27 million in legal fees, without taking into account BSL’s own costs of its defence of the claims made against it in the group proceeding or the fourth and fifth defendants’ costs of the proceeding.”

1226 The First Bolitho Opinion stated at para [182]:

“The quantum of adverse costs exposure is addressed at [144] above. We consider it is likely that [AFP] was exposed to a risk of adverse costs in the order of \$15 million.”

1227 Mr O’Byran and Mr Symons did not draw the Court’s attention to any of the following matters:²⁴³⁰

- (a) Trust Co’s legal costs included costs incurred in:
 - (i) defending the claims in the Bolitho Proceeding;²⁴³¹
 - (ii) defending the claims in SPR Proceeding;²⁴³²
 - (iii) prosecuting third party claims;²⁴³³
 - (iv) pursuing additional remuneration (including the separate question before Croft J and in the Court of Appeal);²⁴³⁴
 - (v) other matters, such as the public examinations of Trust Co’s and Banksia’s officers and issues relating to Trust Co’s potential conflict of interest in remaining as trustee after Banksia’s collapse;²⁴³⁵

²⁴³⁰ This is largely admitted by AFP and Alex Elliott: [PLE.020.001.0001] and [PAR.080.001.0001], para [126].

²⁴³¹ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³² Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³³ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³⁴ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³⁵ Further SPR Opinion [CCW.022.001.0460], para 252(a).

- (b) the adverse cost risk assumed by AFP was limited to Trust Co's costs of defending the claims in the Bolitho Proceeding, in respect of which the security for costs that Mr Bolitho/AFP was ordered to provide was likely to be a reliable guide;²⁴³⁶
- (c) the expense incurred by Trust Co in defending the claims against it in the Bolitho Proceeding and the SPR Proceeding was predominantly incurred in responding to the evidence filed by the SPRs²⁴³⁷ - as the SPRs observed in opening, when one looks at the expert reports of Trust Co and the evidence it assembled, it is apparent from the most cursory review that Trust Co's efforts were directed at responding to Banksia's evidence;²⁴³⁸
- (d) the SPRs made substantial provision in the orders obtained before Black J for significant adverse costs exposure in respect of Trust Co and other parties (\$10 million);²⁴³⁹
- (e) the costs of the sixth to ninth defendants of \$6.33 million were primarily referable to the claims against those defendants (including the claims and public examinations brought by the receivers on behalf of Banksia against those defendants), which were settled in the Partial Settlement, in respect of which AFP had already obtained a commission;²⁴⁴⁰
- (f) Banksia's costs of \$7.7 million were primarily attributable to the SPR Proceeding, and no part of those costs would ever have been recoverable from Mr Bolitho/AFP;²⁴⁴¹
- (g) in connection with the application for approval of the Partial Settlement, Justice Robson had rejected the contention that adverse costs risk was relevant to the assessment of AFP's commission on the basis that:
 - (i) the commercial risks would have been taken into account by AFP in determining whether to fund the Bolitho Proceeding;

²⁴³⁶ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³⁷ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴³⁸ Transcript of hearing on 28 July 2020 [TRA.500.002.0001], 95:13-18.

²⁴³⁹ Further SPR Opinion [CCW.022.001.0460], para 252(a).

²⁴⁴⁰ Further SPR Opinion [CCW.022.001.0460], para 252(b).

²⁴⁴¹ Further SPR Opinion [CCW.022.001.0460], para 252(c).

- (ii) the Funding Agreement provided AFP with a right to terminate the agreement at any time;²⁴⁴²
- (h) AFP did not have sufficient assets to meet adverse cost exposure of the magnitude that counsel for Mr Bolitho said that it faced. AFP had been formed to insulate against adverse cost risk against a background where, prior to AFP's incorporation, Mark Elliott had been providing litigation funding, and the defendants had indicated an intention to seek security for costs from him personally.²⁴⁴³

1228 The key point is that AFP, Mr O'Bryan and Mr Symons knew that, since the appointment of the SPRs, the SPRs had taken the primary conduct of the proceeding, and substantially all of Trust Co's costs had been expended in responding to the case advanced by the SPRs.

1229 AFP, Mr O'Bryan and Mr Symons knew that Mr Bolitho would not be ordered to pay costs that were not occasioned by the conduct of his claim against Trust Co. That obvious point is borne out by a letter that Mr O'Bryan drafted for Portfolio Law to send to Clayton Utz on 19 September 2016 in relation to security for costs.²⁴⁴⁴ The letter stated:

*"Further, a number of the matters referred to in paragraph 3.2 of your letter are obviously wrong. Our letter dated 31 August 2016 stated that Mr Bolitho intends to rely upon only 18 witness statements and expert reports at the trial, far less than the 43 referred to in paragraph 3.2 (c) of your letter. **All of those are statements and reports which will also be relied upon by the liquidators, so there is no additional cost burden imposed upon Trust Co by Mr Bolitho.***

Secondly, only a relatively small part of the 12 weeks which have been set aside for the hearing will relate to the plaintiff's claim against Trust Co; we estimate no more than 2 weeks and probably less. We doubt that any witnesses whom Trust Co may call will attend to give evidence only in respect of the class action...

As a matter of principle, the plaintiff does not accept that the class action should be required to provide security for the costs of any aspect of Trust Co's defence of the liquidators' case, nor in respect of Trustco's 8 third-party claims against the directors, solicitors and auditors of Banksia. The plaintiff considers that the Court will be sympathetic to his position in respect of the various matters described

²⁴⁴² *Re Banksia Securities Ltd (Rec & Mgr Apptd)* [2017] VSC 148 [110]; Funding Agreement [AFP.006.001.0014], clause 18.

²⁴⁴³ First Bolitho Opinion [SYM.005.001.1400], paras [130], [139] and [145].

²⁴⁴⁴ [CBP.001.006.5391] [CBP.001.006.5394].

above and most unlikely to order that security be given in the amount sought by Trust Co in your letter.”

1230 Tellingly, Mr O’Bryan and Mr Symons did not seek any breakdown from Trust Co about the costs that it had incurred in the litigation, despite the fact that they asked the SPRs and Trust Co to provide a range of other information to support the approval application.²⁴⁴⁵ It would have been a simple matter for them to make enquiries to substantiate any statement about AFP’s adverse cost risk.

1231 AFP, Mr O’Bryan and Mr Symons all must have known that AFP would never have satisfied an adverse costs order in the vicinity of \$15 million. Mr O’Bryan retained a secret stake in AFP, and therefore must have known about AFP’s financial affairs. And Mr O’Bryan and Mr Symons knew that AFP had only limited funds available to it, because in each of Mark Elliott’s class action matters in which they were retained, AFP did not pay their fees in the ordinary way. AFP paid nothing to Mr O’Bryan and only small amounts to Mr Symons on an interim basis. Mr O’Bryan and Mr Symons knew that AFP was not like a regular funder, with a large balance sheet from which it actually pays the costs of the litigation it funds. AFP was just a notional funder. All the funding was provided by the SPRs, and to a lesser extent by Mr O’Bryan, Mr Symons and Portfolio Law, who provided their legal services without seeking payment. Mr O’Bryan described the proceeding as being “*only lightly funded*”.²⁴⁴⁶

1232 The Court should find that Mr O’Bryan, Mr Symons and AFP deliberately misled the Court by their statements in the First Bolitho Opinion about AFP’s entitlement to a commission on the basis of its adverse cost risk.

14.4 Misleading statements about security for costs

1233 The First Bolitho Opinion stated at para [134]:

“In financing this proceeding [AFP] paid or agreed to pay security for costs in excess of \$1.5 million.”

1234 The First Bolitho Opinion stated at para [141]:

“Having been established for the purpose of financing this proceeding [AFP] has given (or agreed to give) the following security for costs for the benefit generally of all group members:

²⁴⁴⁵ See eg [SYM.001.002.7622], [SYM.001.002.7632].

²⁴⁴⁶ [CBP.004.003.8293].

- (a) *giving security in the sum of \$80,632.27 in respect of an application by the fifth defendant pursuant to consent orders made in March 2014;*
- (b) *giving security in the sum of \$80,632.27 for the sixth to ninth defendants' costs pursuant to orders made by Ferguson J on 17 March 2014;*
- (c) *giving initial security in the sum of \$90,000 to Trust Co;*
- (d) *pursuant to orders made on 19 September 2017 paying security in the sum of \$480,000 in respect of Trust Co's costs and incidental to the Trial Preparation Phase by 9 October 2017; and*
- (e) *pursuant to the 19 September 2017 orders, being obliged to give \$720,000 by way of security for Trust Co's costs of and incidental to the Trial Phase of the proceeding by 31 January 2018. "*

1235 In making these statements, Mr O'Bryan and Mr Symons sought to embellish AFP's funding risk in providing security for costs. They did not draw Justice Croft's attention to the more salient facts, namely that:

- (a) security for costs provided in favour of defendants other than Trust Co had been brought to account in the commission AFP obtained at the time of the Partial Settlement;
- (b) with respect to the claim against Trust Co, AFP had only provided security in the sum of \$570,000;
- (c) on their own assessment, the security for costs that Trust Co had sought from AFP was "*an unexpected bargain*".²⁴⁴⁷

1236 AFP, Mr O'Bryan and Mr Symons knew that it was relevant for the Court to assess the relative risk undertaken by AFP in providing security for costs. It was incumbent upon them to draw the Court's attention to the fact that, insofar as security for costs was concerned, AFP had undertaken a relatively low risk, and this favoured a lower funding commission.

Justice Croft relied upon the misleading conduct

1237 The statements at para [134] and [141] extracted above were reproduced in the judgment of Justice Croft.²⁴⁴⁸

²⁴⁴⁷ [NOB.500.002.0507].

²⁴⁴⁸ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2)* [2018] VSC 47 [ATH.600.144.0001], para [82.a] and [83].

14.5 Misleading statements about Trust Co Remuneration Claim

1238 The First Bolitho Opinion stated at paragraph [55.b]:

“The settlement also achieves a release of Trust Co’s claims for the reimbursement of its expenses incurred since October 2012 and for additional remuneration in respect of Banksia’s receivership. At present, those claims amount to at least \$3.9 million, which would otherwise be expected to diminish the available return to debenture-holders. However, as the period of Trust Co’s claim in respect of which there has been a quantification runs only from October 2012 to February 2014 (ie approximately 16 months), there are an additional 47 months of potential costs for which there has been no quantification. Applying a simple multiplication factor, the benefit to debenture-holders of the elimination of that claim may be in the order of \$12 to \$15 million in total. However, we consider it appropriate to adopt the more conservative estimate calculated at [84.d] and [85] below that the benefit to debenture-holders is likely to be around \$11 million.”

1239 The First Bolitho Opinion stated at paragraph [84.d]:

“While we are not aware of any quantification of the costs of the receivership incurred by Trust Co to which it might seek to recover had the release and discharge not been given, the only available proxy for the approximately 48 months from February 2014 to 30 January 2018 is the expenditure rate of \$900,000 per half-year incurred from September 2013 to February 2014. This rate is more reasonably adopted than simply pro-rating the \$3,960,163 expense incurred in the first 15 or 16 months as it may be expected that significant non-recurring costs were incurred in the first few months of the receivership. Therefore, for the 8 further half-years in the period from February 2014 to 30 January 2018, it is not unreasonable to expect that Trust Co might make a further claim for reimbursement in the order of \$7.2 million.”

1240 The First Bolitho Opinion stated at paragraph [85]:

“In the absence of Trust Co having provided any quantification of its claim for reimbursement for the period from February 2014 to 30 January 2018, it is reasonable to expect that the release and discharge given under cl 5.4.3 of the Deed might effect the release of a total claim in the order of the quantified \$3.96 million and the estimated (but unquantified) \$7.2 million. The claim from which BSL and its Creditors are to be released might therefore be in the order of \$11.16 million.”

1241 The First Bolitho Opinion stated at paragraphs [87]-[88]:

“We are instructed that the liquidators (acting as special purpose receivers) of BSL at present hold approximately \$14 million of cash. We are instructed that, if the settlement is approved, the liquidators intend to retain a sum in the order of \$3 million for the conduct of the BSL Insurance Claims. The

remaining \$11 million is expected to be made available for distribution to debenture holders.

While it may be merely coincidental that the sum the liquidators will apparently seek to distribute if the settlement is approved equates broadly with the quantum estimated in [85] above, it seems unlikely that the liquidators would not already have sought to undertake a further distribution to debenture-holders if that sum had not been required to meet a possible claim upon BSL by Trust Co.”

1242 The First Bolitho Opinion stated at paragraph [120] that, by reason of (inter alia) the release of the additional remuneration claim, *“it is likely to be misleading to simply characterise the agreed \$12.8 million (plus GST) Funder’s Commission as a fraction of the \$64 million Settlement Sum”.*

1243 The Court should find that:

- (a) AFP, Mr O’Bryan and Mr Symons knew that the Trust Co remuneration claim could not possibly be worth **\$11 million**. They deliberately overstated the value of the release of the Trust Co remuneration claim in order to justify AFP’s excessive commission.
- (b) Alex Elliott knew that the First Bolitho Opinion opined that AFP’s funding commission should be assessed on the basis that the total settlement value was **\$75 million**, including an asserted value for the release of the Trust Co Remuneration Claim of **\$11 million**.²⁴⁴⁹ That figure conflicted with information that his father had given him about the value of the claim.²⁴⁵⁰ He was indifferent to resolving the discrepancy,²⁴⁵¹ even after he learned that Trust Co’s junior counsel had confirmed that **“\$3.96m is the maximum figure for the reimbursement claim which he regards as reasonable”** and that **“in reality the claim would be lower”**.²⁴⁵²
- (c) AFP, Mr O’Bryan, Mr Symons and Alex Elliott thereby breached the Paramount Duty, the overarching obligation not to engage in conduct which is misleading or deceptive, and the overarching obligation not to act dishonestly.

²⁴⁴⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:6-22.

²⁴⁵⁰ [ABL.001.0627.00039] (third page);

²⁴⁵¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:2-9.

²⁴⁵² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:3-31, 2056:29-2057:23.

[SYM.001.001.2205].

- 1244 The evidence establishing these matters is as follows.
- 1245 **First**, Clause 12.1.2 of Funding Agreement provides that AFP is entitled to a payment calculated as a percentage on the “Resolution Sum”, defined as “any **money received or payment made** to settle, compromise or resolve one or more or all of the Claims” – ie, the Funding Agreement provided for AFP’s commission to be calculated on a monetary sum.
- 1246 **Second**, Mark Elliott was on the debenture holder committee that considered proposals submitted by Trust Co for additional remuneration in 2013 and 2014.²⁴⁵³ He shared information that he obtained from his role on that committee with Mr O’Bryan.²⁴⁵⁴ Mark Elliott and Mr O’Bryan therefore had a detailed understanding of the Trust Co remuneration claim.
- 1247 **Third**, Trust Co had never suggested that it was entitled to a remuneration of materially more than the \$3.96 million for work performed subsequent to February 2014 in the directions sought before Croft J or in its counterclaim to Banksia’s claim for declaratory relief on the issue. Nor did it particularise any work that it had performed after February 2014.
- 1248 **Fourth**, Mark Elliott, Mr O’Bryan and Mr Symons knew that Trust Co had obtained advice of counsel that Trust Co could only claim fees that were commensurate with any additional duties and responsibilities performed by the trustee while Banksia was in receivership.²⁴⁵⁵ It was self-evident that, by February 2014, the major assets of Banksia had been sold, and there was very little left for Trust Co to do. Trust Co had conceded as much.²⁴⁵⁶ Trust Co’s role was largely superseded and

²⁴⁵³ See the documentary material set out in Mr Pitman’s Affidavit [CCW.036.001.0395], paras [9] – [22].

²⁴⁵⁴ [NOB.500.009.7931] [NOB.500.009.7933] [NOB.500.009.7936] [NOB.500.009.7940]; [NOB.500.009.7870] [NOB.500.009.7888]; [NOB.500.009.7648]; [NOB.500.009.7483]; [NOB.500.009.6108]; [NOB.500.009.3489]; [NOB.500.011.3373].

²⁴⁵⁵ [SYM.002.001.0635] [SYM.002.001.0637].

²⁴⁵⁶ [CCW.023.001.0923] [CCW.023.001.0506] (Affidavit of Joseph Hayes sworn 16 December 2015, para [134]) and exhibit JH-35); [NOB.500.009.7931] [NOB.500.009.7933] [NOB.500.009.7936] [NOB.500.009.7940] (email from Mr Hayes to committee members including Mr Elliott dated 10 January 2014, stating: “*We also note that an hourly rate regime has now been agreed with Trustee with respect to future remuneration, with no uplift associated with the ‘value add’ time as mentioned in Counsel’s advice. Subject to the approach taken to Banksia litigation, we expect the Trustee’s future costs will be significantly lower than the costs for the first year, given the major asset sale campaigns are behind us and there is more certainty in likely returns*”, see also [NOB.500.009.7870] [NOB.500.009.7888] (email from Mr Hayes dated 15 January 2014 stating: “*having regard to the resolution of many of the major receivership issues, the Trustee’s involvement and remuneration will reduce in line with the expected decrease in workload*”).

replaced by the independent liquidators in June 2014. Trust Co had said that it had implemented a “time based” charging system for charging fees after February 2014, and proposed that its monthly fees from January 2014 onwards would be capped at the lesser of \$30,000 and the amount of any time based costs.²⁴⁵⁷

1249 **Fifth**, in December 2017/January 2018, Alex Elliott drafted the Script for Mr Zita/Portfolio Law to follow in their dealings with debenture holders in connection with the Trust Co Settlement.²⁴⁵⁸ The Script stated:

“How much did the defendants pay?”

To settle the claims made in both the Banksia Group Proceeding and the Liquidators’ proceeding, the trustee will:

- *pay \$64 million;*
- *release Banksia from an existing claim for \$3.96m for additional remuneration in respect of additional work performed by the trustee in a period of 16 months from 25 October 2012 to February 2014; and*
- *release Banksia from any further claims for remuneration (not unquantified) but say \$30k pcm from March 2014 to date = over \$1M.”*

1250 Thus, Alex Elliott recognised that the Trust Co Remuneration Claim **could not possibly be worth more than the \$30,000 per month** that Trust Co had said that it would charge.

1251 In cross-examination, Alex Elliott confirmed that **“what was in the script came from my father”**.²⁴⁵⁹ He maintained that it was not his role as a first year solicitor to raise with his father or with counsel any discrepancy between the information his father gave him about the value of the claim, and the value attributed to the claim by counsel.²⁴⁶⁰

1252 Alex Elliott’s case appears to be that as a junior lawyer it was not his role to point out egregious errors and falsehoods of which he became aware, or of which he should have been aware, had he not been indifferent to what was placed before him. It appears to be his case that it was not his role to question the senior lawyers

²⁴⁵⁷ [CCW.023.001.0923] (Affidavit of Joseph Hayes sworn 16 December 2015, paras [142] and [175]); Mr Pitman’s Affidavit [CCW.036.001.0395], para [15]; [NOB.500.009.3489].

²⁴⁵⁸ [ABL.001.0627.00038] [ABL.001.0627.00039]. The Script is addressed in **Section G**.

²⁴⁵⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:24-25.

²⁴⁶⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:29-2054:5, 2056:29-2058:2.

who were on the legal team. This completely undermines his role as a member of that legal team, and his duties to the Court and to the debenture holders. At its base, his case appears to be that he should be permitted by this Court to engage in the wrongs alleged because he was a junior lawyer overborne, not by his duties to the Court and the debenture holders, but by his father and the Lawyer Parties whose conduct he admired.²⁴⁶¹

1253 On any view, based on the information they had to hand, Mark and Alex Elliott knew that the Trust Co Remuneration Claim was not worth \$11 million.

1254 **Sixth**, notwithstanding that Trust Co had said it had implemented a time based charging system which implies that any claim for additional remuneration beyond February 2014 would be readily ascertainable, AFP and the Lawyer Parties made no enquiries with Trust Co or the SPRs as to whether there was any basis for suggesting that the remuneration claim was worth **\$11 million** or any amount more than **\$3.96 million**.

1255 **Seventh**, the quantum of **\$3.96 million** claimed by Trust Co was contested, including by Mr Bolitho.²⁴⁶² The debenture holder committee including Mark Elliott did not and would not support Trust Co's proposals for additional remuneration.²⁴⁶³ Even the Receivers, who were perceived to be "friendly" to Trust Co, said that Trust Co should be paid the lesser sum of \$2,767,931, as opposed to \$3.9 million.²⁴⁶⁴

1256 **Eighth**, Mark Elliott, Mr O'Bryan and Mr Symons considered Trust Co's claim for additional remuneration to be unmeritorious. In an email to Mark Elliott, Mr O'Bryan described it as a "*scam*".²⁴⁶⁵ Mr O'Bryan considered that the advice purporting to substantiate Trust Co's right to additional remuneration was irrelevant because counsel was not instructed to consider the fact that "*TrustCo laboured under a*

²⁴⁶¹ Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1664:23-1665:19, 1665:25-1666:8, 1667:10-21, 1668:5-13, 1670:6-23, 1644:17-23.

²⁴⁶² Mr Pitman's 3 June 2020 Affidavit [CCW.036.001.0395], paras [19] – [22]; [SPR.005.001.5871] (Mr Bolitho's outline of submissions dated 24 March 2016 in the Trust Co Remuneration Application, para [30]); Transcript of hearing on 12 May 2016 [SPR.005.001.3960], page 31, lines 2 – 21.

²⁴⁶³ [CCW.023.001.0923] (Affidavit of Joseph Hayes sworn 16 December 2015, para [135]).

²⁴⁶⁴ Mr Pitman's 3 June 2020 Affidavit [CCW.036.001.0395], paras [19] – [25].
²⁴⁶⁴ [SYM.002.001.0665, SYM.002.001.0670, SYM.002.001.0674] ("*The Receivers' view is that the appropriate amount that BSL pay for additional remuneration be a lesser amount of \$2,767,931 for this period*").

²⁴⁶⁵ [NOB.500.009.7870].

*basic conflict of interest and duty at all times”, disentitling it to any commission.*²⁴⁶⁶
 Mr Zita confirmed that had discussions with Mr O’Bryan and Mr Symons to the effect that *“they did not regard the claim for remuneration by TrustCo against Banksia post February 2014 as having any great merit”.*²⁴⁶⁷

1257 **Ninth**, Trust Co itself evidently considered that its claim for additional remuneration was unmeritorious. Trust Co offered, in open correspondence and in open court, to withdraw its claim for additional remuneration if Banksia/the SPRs would withdraw Section G of their amended statement of claim.²⁴⁶⁸

1258 **Tenth**, Trust Co’s remuneration claim was made against Banksia. It had relevance to the Bolitho Proceeding only if the claim was successful and Trust Co succeeded in obtaining an order for the remuneration claimed, in which case both Banksia²⁴⁶⁹ and Mr Bolitho claimed that Trust Co should disgorge its additional remuneration. On that basis, the Trust Co remuneration claim was simply another potential head of damages in the Bolitho Proceeding, which was compromised by the \$64 million settlement sum. It was inappropriate to treat it separately from the \$64 million settlement sum.

1259 **Eleventh**, the documentary evidence reveals that it was Mark Elliott who conceived the idea of inflating Trust Co’s remuneration claim in order to justify AFP’s commission, and Mr Symons obediently went along with it. On 11 November 2017, Mark Elliott and Mr Symons exchanged emails in which:²⁴⁷⁰

(a) Mark Elliott instructed Mr Symons that, when Mr Symons was describing the benefits obtained from the settlement in the settlement deed he was drafting, the ***“Trustco fees must be for \$3.9M award plus ANY other claim -let Sam K advise and confirm”***.

(b) Mr Symons queried this, stating: *“Just so I don’t misunderstand, what do you mean by ‘Trustco fees must be for \$3.9M award plus ANY other claim’?”*

²⁴⁶⁶ [CBP.004.007.4602]; [CBP.004.003.6416];
 [SPR.005.001.5871] at paras [9], [21] – [22], [29] – [31].

²⁴⁶⁷ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [344].

²⁴⁶⁸ [SPR.003.001.0017] (Letter from Clayton Utz to Maddocks dated 14 September 2017; and transcript of hearing on 26 September 2017 [SPR.005.001.6584] at .6616 (T32:7-30).
 Mr O’Bryan and Mr Symons were both present in court on 26 September 2017.

²⁴⁶⁹ [PLE.550.002.0001] (Banksia’s amended and restated statement of claim, paras [80] to [90].

²⁴⁷⁰ [SYM.001.001.2106].

- (c) Mark Elliott replied: “Cof A confirmed Trust entitlement but claim was only to 2016 and more to come was threatened. **It grosses up \$64M figure and blurs my 20% calculation if we sort of add it in**”.
- (d) Mr Symons replied, stating: “OK, I understand. The \$64m is effectively \$68m or \$71m”.
- (e) Mark Elliott replied stating: “It’s definitely (sic) \$70M or more. I would like Maddocks to gross up the \$64M at least in words to include the release from Trustco for say \$6M of fees plus the IH settlement if possible”.
- (f) Mr Symons replied stating: “OK, I understand what I’m doing.”
- (g) Mark Elliott replied stating: “Maddocks will pushback but we must insist.”

1260 **Twelfth**, the Court should accept Mr Kingston’s unchallenged evidence that Mr Symons did not ask him to “advise and confirm” about the value of the Trust Co remuneration claim.²⁴⁷¹ On that basis, the Court should find that Mr Symons knew that such an inquiry would not yield information that would assist AFP.

1261 **Thirteenth**, the fact that Mark Elliott knew (as stated in the 11 November 2017 emails) that Maddocks would “push back” on the suggestion that the release of the Trust Co Remuneration Claim was worth \$6 million (let alone \$11 million) shows that Mark Elliott knew that the suggestion was spurious.

1262 **Fourteenth**, Mr O’Bryan and Mr Symons expressly invited the Court to assess AFP’s funding commission by adding the asserted \$11 million value of the release of Trust Co’s remuneration claim to the \$64 million settlement sum. That reveals their motive.²⁴⁷²

1263 **Fifteenth**, Mark Elliott would not allow the SPRs or their legal advisers to see the First and Second Bolitho Opinions.²⁴⁷³ The Court should find that Mark Elliott knew the assertions in the opinions were vulnerable if scrutinised by the SPRs.

1264 **Sixteenth**, Mr O’Bryan and Mr Symons maintained their contention that the Trust Co remuneration claim was worth \$11 million in the appeal. Mark Elliott directed Mr O’Bryan and Mr Symons to make reference to the remuneration claim “as it

²⁴⁷¹ Mr Kingston’s 2 June 2020 Affidavit [SPR.006.001.0004], para [45] – [46].
²⁴⁷² First Bolitho Opinion [SYM.005.001.1400], paras [120], [122.b] and [122.c].
²⁴⁷³ [SYM.001.002.4556]; [SYM.001.002.4516]; [SYM.001.002.8843]; [SYM.001.002.3098].

increases the denominator and reduces % fee below 20%.²⁴⁷⁴ On **17 June 2018**, Mr Symons conveyed to Mark Elliott and Mr O'Bryan the substance of a conversation that he had with Trust Co's counsel Mr Liondas about the remuneration claim, which was to the effect that "**\$3.96m is the maximum figure for the reimbursement claim which he regards as reasonable, and he also seems to think that in reality the claim would be lower**".²⁴⁷⁵ Mark Elliott responded: "**What an idiot!**"²⁴⁷⁶ He separately forwarded the email to Alex Elliott.²⁴⁷⁷

1265 Despite receiving that information directly from Trust Co, Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons persisted with the farce that the release of the claim meant that the total settlement value was \$75 million including the \$11 million they had attributed to the Trust Co remuneration claim. At the hearing in the Court of Appeal on **19 June 2018**, Mr O'Bryan invited the Court of Appeal to rely upon the extrapolation methodology in the First Bolitho Opinion.²⁴⁷⁸ None of them ever sought to correct the statements in their opinion. Alex Elliott said that he did not think it was important to go back to Justice Croft and rectify what he had been told as to the value of the claim,²⁴⁷⁹ that he did not regard it as his role to raise with his father or with counsel the disparity between what counsel had said the claim was worth (**\$11 million**), what his father had said the claim was worth (**\$5 million**), and what Trust Co's junior counsel said the claim was worth (**\$3.96 million**).²⁴⁸⁰

1266 **Seventeenth**, Mr O'Bryan and Mr Symons offered a deceitful defence for their opinion about the value of the Trust Co remuneration claim in the Further Bolitho Opinion they prepared in March 2019 which was filed in this remitter.²⁴⁸¹ They said that their assessment of the value of the Trust Co remuneration claim was "*based on the limited information then available to us*".²⁴⁸² In fact they had a wealth of

²⁴⁷⁴ [SYM.001.003.0018].

²⁴⁷⁵ [SYM.001.001.2205].

²⁴⁷⁶ [SYM.001.001.2205].

²⁴⁷⁷ [AEL.100.008.0001].

²⁴⁷⁸ See the transcript of the hearing on 19 June 2018 [CBP.001.011.1948] at .2012 from line 27, where Mr O'Bryan referred to the Trust Co remuneration claim and submitted: "*That had a value, unquestionably, and the current litigation that was on foot was claiming \$4m down to the end of 2014 and that's the figure which we extrapolated in the settlement opinion to arrive at the value which it might potentially have.*"

²⁴⁷⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:17-2054:5.

²⁴⁸⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:6-8, 2054:22-2055:21, 2056:22-2058:2.

²⁴⁸¹ [CCW.032.001.0253].

²⁴⁸² [CCW.032.001.0253], para [68].

information available to them, and the Court should find that they knew the claim was not even worth the **\$3.96 million** that Trust Co had claimed.

Justice Croft relied upon the misleading statements

1267 In his Honour’s judgment on the First Approval Application, Justice Croft stated:
*“The settlement of the proceeding is in the sum of \$64 million, plus the benefit of the release and discharge granted by Trust Co which was suggested by counsel for the Plaintiff to be likely to have a value to debenture holders in the order of \$11.16 million.”*²⁴⁸³

14.6 Misleading statements about relative contributions of evidence

1268 The First Bolitho Opinion stated at footnote 37:

“That is not to say that there has not been significant advantage to the group members through the co-operative approach taken to the preparation of the evidence by the plaintiff in the group proceedings and the liquidators. We note in particular the list of witness statements and expert reports referred to at [13] of the 9 January 2018 affidavit of Lindholm. The expert evidence was commissioned co-operatively, and the lay witness statements were of mutual relevance. It may be noted, for instance, that BSL includes the witness statements of the plaintiff, Mr Bolitho, amongst the evidence upon which it was to rely.”

1269 This statement was misleading. As counsel for the SPRs observed in their Further SPR Opinion:²⁴⁸⁴

“With all due respect, we consider aspects of this paragraph distort the true position. Whilst it properly recognises the relevance of the lay witness statements, solely prepared and filed by the SPRs and Receivers on behalf of Banksia, to the Bolitho claim and the ‘significant advantage’ to the Bolitho claim of the ‘co-operative approach’ taken to the preparation of evidence, the last two sentences, without more, do not accurately reflect the true position. The relative division of work otherwise is apparent from Exhibit SPR-1 tendered without objection in the Court of Appeal. To say the expert evidence was ‘commissioned cooperatively’ could be interpreted as implying an evenness of contribution when it is incontrovertible that substantially all of the expert evidence was ‘commissioned’, prepared and paid for by the SPRs. The last sentence also inverts the more salient fact that Bolitho had indicated it intended to rely on most or all of the 43 witness outlines, witness statements and expert reports filed by Banksia. As noted,

²⁴⁸³ *Re Banksia Securities Limited (Rec & Mgr Apptd) (in liq) (No 2) [2018] VSC 47 [ATH.600.144.0001], para [92].*

²⁴⁸⁴ Further SPR Opinion [CCW.022.001.0460], para [79].

the witness statement of Mr Bolitho was irrelevant to Banksia's case against Trust Co."

1270 The Court should find that AFP, Mr O'Bryan and Mr Symons deliberately misled Justice Croft about their contribution to the evidence. That is evident from the objective facts, the unchallenged evidence of the SPRs, and the documentary evidence.

1271 **First**, the objective facts are that:

- (a) in the course of the whole proceeding, Mr Bolitho filed only 1 witness statement and 3 expert reports, whereas the SPRs filed 26 witness statements/witness outlines and 16 expert reports;²⁴⁸⁵
- (b) in the Relevant Period, Mr Bolitho filed only a single reply expert report, whereas in that same period, the SPRs filed 15 witness statements/witness outlines and 11 expert reports;²⁴⁸⁶
- (c) in the course of the whole proceeding, Mr Bolitho paid for only approximately \$58,475 of the expert evidence necessary in the proceedings,²⁴⁸⁷ whereas the SPRs incurred expert witness expenses totalling \$1.9 million.²⁴⁸⁸

1272 **Second**, the unchallenged evidence of the SPRs is that:

- (a) The extent of assistance by Mr Bolitho's legal representatives in respect of evidence preparation was limited to some comments provided by Mr O'Bryan on advanced drafts of a total of 3 witness outlines and 5 expert reports (which were commissioned by the SPRs).²⁴⁸⁹

²⁴⁸⁵ Further SPR Opinion [CCW.032.001.0287], paras [34] – [41] and Annexure A [CCW.032.001.0287].

²⁴⁸⁶ Further SPR Opinion [CCW.032.001.0287], paras [34] – [41] and Annexure A [CCW.032.001.0287].

²⁴⁸⁷ See the Fourth Trimbo Report [EXP.020.001.0001], paras [166] (\$4,950 in respect of Mr Sutherland) and [168] (\$20,525 in respect of Mr McCann), and the First Trimbo Report [SYM.002.001.1890], para [107] (\$33,000 in respect of Mr Sutherland). The First Trimbo Report refers to other costs incurred in respect of Grant Thornton and Frontier Economics, but it does not appear that any expert report prepared by those organisations was filed in the proceeding: see Further SPR Opinion [CCW.032.001.0287], paras [34] – [41] and Annexure A [CCW.032.001.0287].

²⁴⁸⁸ Further SPR Opinion [CCW.022.001.0460], footnote 21; Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], para [98] (which refers to a GST-exclusive figure of \$1,685,184.73).

²⁴⁸⁹ Mr Newman's 25 March 2019 Affidavit [SPR.006.001.0001], paras [89] – [90].

(b) Throughout the entire period of the litigation, the SPRs' legal team attended **145** conferrals with experts (**101** in the Relevant Period). Mr O'Bryan attended **2** of those conferrals (**none** in the Relevant Period).²⁴⁹⁰

1273 **Third**, the evidence shows that Mr Symons was not involved in evidence preparation (see **Section F** above).

1274 **Fourth**, the SPRs' unchallenged evidence is confirmed by the documentary evidence. On 18 October 2017, Mark Elliott, Alex Elliott and the Lawyer Parties exchanged emails in which Mark Elliott said: "*Do we need to follow up on the progress of our reply evidence?*" and Mr O'Bryan replied: "**Redwood tells me it is all in hand.**"²⁴⁹¹

1275 **Fifth**, the culpable state of mind of Mr O'Bryan and Mr Symons is evident from emails they exchanged on 10 January 2018, in which Mr Symons noted that an affidavit filed by Mr Lindholm "*claimed witness statements and expert reports filed by Bolitho as their own (including Laurie Bolitho's witness statement!)*". Mr O'Bryan replied stating:

*"Yes, but I am not inclined to complain about this because **it makes it easier for us to justify our submission that the preparation and filing of the evidence for BSL and Bolitho was a joint exercise.** Obviously so in the case of Bolitho and inferentially so in respect of all other evidence intended to be jointly relied upon."*²⁴⁹²

1276 This email reveals Mr O'Bryan's and Mr Symons' intention to deceive the Court that the preparation and filing of all the evidence was a "*joint exercise*".

1277 The Court should find that Mr O'Bryan and Mr Symons knew of the significance of the financing provided by the SPRs,²⁴⁹³ and yet they did not disclose it to the Court; and worse still, they deceived the Court about their own contribution to the work undertaken and paid for by the SPRs.

²⁴⁹⁰ Mr Kingston's 2 June 2020 Affidavit [SPR.006.001.0004], para [15] and his "Consolidated Chronology" [SPR.100.001.0001]. See further [TRA.500.002.0001] T94:28-95:13.

²⁴⁹¹ [NOB.500.001.8590].

²⁴⁹² [NOB.500.005.2480].

²⁴⁹³ See eg [NOB.500.004.6582]; [NOB.500.002.2587]; [NOB.500.001.9852].

14.7 Misleading statements about the funding commission rate

1278 The First Bolitho Opinion stated at paragraph [173] – [174]:

“Three different funding arrangements have now been disclosed to group members at different times.

- (a) *In the 6 June 2014 letter, which enclosed a copy of the litigation funding agreement, group members were told that a funding fee of 30% would be sought.*
- (b) *In the opt-out notice and notice to group members sent according to orders of the Court made on 2 June 2014, group members were told that the plaintiff and BSLLP would seek a ‘common fund’ payment of \$1.3 million (or 25% of the sum for which the partial claim was settled). After making this disclosure, only 5% of group members opted-out.*
- (c) *In the notice to group members sent according to orders of the Honourable Justice Croft made on 8 December 2017, a litigation funding fee of \$12.8 million plus GST.*

*In Money Max at [79(b)] this is referred to as being possibly ‘important to understand the extent to which class members were informed when agreeing to the funding commission rate’. Those group members who accepted the terms of the litigation funding agreement were well aware that a 30% rate could be charged under the litigation funding agreement. Some 5% of group members opted out of the proceeding when the first common funding fee of 25% below. **A significantly lower percentage funding fee is now proposed...**”*

1279 The First Bolitho Opinion stated at paragraphs [187] – [188]:

“For those group members who had agreed to the terms of the litigation funding agreement, the terms of the litigation funding agreement provided that the consideration payable to BSLLP would be up to 30% of the ‘resolution sum’ payable upon the settlement of the proceeding: see [127] above. Proceeding conservatively by treating the Settlement Sum of \$64 million as the limit of the ‘resolution sum’ and had all group members agreed to the terms of the litigation funding agreement, this would have given BSLLP an entitlement of:

$$\$64 \text{ million} \times 30\% = \$19.2 \text{ million}$$

There is necessarily a significant benefit to the group members who have signed the litigation funding agreement to pay only two thirds of the consideration to BSLLP that they might have expected to pay had BSLLP sought to enforce the strict terms of the litigation funding agreement.”

1280 The First Bolitho Opinion stated at paragraphs [179] and [193] that the funding commission sought was at the “*low end*” or “*near to the bottom of the range*” of acceptable and justifiable payments.

1281 These statements involved a cynical and dishonest strategy of divorcing “*the percentage funding fee*” from the proper denominator. Mr O’Bryan and Mr Symons knew, and did not inform the Court, that:

- (a) AFP had demanded that Mr Lindholm agree to a “*division of the spoils*” from the Trust Co Settlement that ensured that AFP and the Bolitho Team receive approximately **30 per cent** of that settlement, being the amount that AFP and Mr O’Bryan considered they were entitled to under the Funding Agreement. The Court should find that Mr O’Bryan and Mr Symons knew that AFP’s demand for costs and commission was made on this basis.²⁴⁹⁴
- (b) There was not a “*significant benefit*” or any benefit at all to group members who had signed the Funding Agreement under the common fund order sought by Mr Bolitho/AFP.
- (c) The funding commission sought by AFP in fact involved a significant detriment to group members who signed the Funding Agreement, because it involved them paying more than **30 per cent** on the proportion of the settlement proceeds that was referable to the Bolitho Proceeding.

1282 Mark Elliott, Mr O’Bryan and Mr Symons knew that the commission claim was excessive in circumstances where it treated the whole of the settlement sum as referable to the Bolitho Proceeding. The documentary evidence shows that they each thought that AFP’s funding commission could be justified only if the SPRs’ claims against Trust Co were hopeless and worthless:

- (a) On **13 June 2018**, on connection with Mrs Botsman’s appeal, Mark Elliott sent an email to Mr Symons copied to Alex Elliott stating “*It must be inferred that the SPRs valued their case at near nil if they willingly agreed to the funders fee we demanded*”.²⁴⁹⁵

²⁴⁹⁴ It was always the strategy for Mr Elliott, Mr O’Bryan and Mr Symons to seek to “*claim our 30% on all proceeds received from all defendants we have sued (but particularly Trustco) and will try and resist sharing with anyone else particularly the Liquidator re Trustco receipts*”: see [SYM.002.001.0566].

²⁴⁹⁵ [SYM.001.002.2406].

(b) Also on **13 June 2018**, Mr O'Bryan sent an email to Mark Elliott and Mr Symons stating: *"The recognition by the Special Purpose Receivers of the proposition that the funding fee should be assessed on the basis of the whole of the \$64M was no doubt reflective of... the view which the SPRs took of the relative strengths and weaknesses of the class action and their own case"*.²⁴⁹⁶

1283 But on **21 May 2017**, Mark Elliott told Mr O'Bryan and Mr Symons that the SPRs had been advised by their senior counsel that their case was *"60:40 at best"*.²⁴⁹⁷ Accordingly, even assuming (favourably to Mark Elliott, Mr O'Bryan and Mr Symons) that it was appropriate to apportion the settlement sum on the basis of relative prospects without regard to relative contributions (or funding actually provided), they knew there was no proper basis for the funding commission AFP had sought.

²⁴⁹⁶ [SYM.001.002.2689] [SYM.001.002.2690].
²⁴⁹⁷ [NOB.500.002.1971].

J. SETTLEMENT DISTRIBUTION SCHEME

J1. Outline of contravention

1284 The Court should find that, by their conduct in connection with seeking excessive fees for AFP and Portfolio Law to administer a settlement distribution scheme (**SDS Contravention**):

- (a) each of AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to act honestly;
- (b) each of AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty;
- (c) each of AFP, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott the overarching obligation not to mislead or deceive; and
- (d) each of AFP, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott the overarching obligation to ensure that legal costs were reasonable and proportionate.

1285 The Contradictors do not press any allegation of dishonesty or breach of the Paramount Duty against Alex Elliott in relation to the Bolitho Scheme.

J2. Concessions and admissions

1286 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,²⁴⁹⁸ and do not contest findings being made against them on the basis of those allegations.²⁴⁹⁹

1287 The admissions of AFP, Alex Elliott and Mr Zita/Portfolio Law in relation to **Section J** are relevantly addressed below.

J3. Breach of trust

1288 AFP, Alex Elliott and Portfolio Law admit that, in respect of the Partial Settlement, Portfolio Law transferred to AFP the net settlement proceeds of \$1.75 million that

²⁴⁹⁸ RLOI dated 21 July 2020: [PLE.010.002.0001].

²⁴⁹⁹ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

it was required to hold in its trust account for group members pursuant to the Funding Agreement and the terms of settlement entered into in respect of the Partial Settlement.²⁵⁰⁰

1289 The Court should find that those funds were transferred in breach of trust. The Funding Agreement provides that the Lawyers for the Plaintiff (ie Portfolio Law) are to **immediately pay settlement proceeds into a trust account** and **hold them on trust** to be **dispensed to group members** in accordance with the Funding Agreement or **any court order**.²⁵⁰¹ That must convey a trust account held by Portfolio Law.

1290 Notably:

- (a) in the First Bolitho Opinion, Mr O'Bryan and Mr Symons referred to the fact that AFP "*was left holding*" the net proceeds of the Partial Settlement,²⁵⁰² without expressly drawing to the Court's attention that the funds had been transferred out of Portfolio Law's trust account to AFP without any direction from the court permitting that to occur;
- (b) after the Contradictor made enquiries with AFP and Portfolio Law about this matter, AFP transferred the settlement proceeds back to Portfolio Law.²⁵⁰³

J4. Seeking excessive scheme costs

1291 In the First Bolitho Opinion²⁵⁰⁴ and at first approval hearing on 30 January 2018, Mr Symons, Mr O'Bryan, Mr Zita/Portfolio Law and AFP sought orders from the court for a settlement distribution scheme with Portfolio Law as "Scheme Administrator" and AFP as "Scheme Co-ordinator" (**Bolitho Scheme**) which provided for scheme costs of **\$1 million** (clause 6), comprising:

- (a) Portfolio Law's costs of **at least \$354,046**;
- (b) AFP's costs of **\$48,000** plus GST per month for 11 months (**\$528,000**);

²⁵⁰⁰ AFP & Alex Elliott's admissions: [PLE.020.001.0001] and [PAR.080.001.0001], para [154]; [PLE.070.001.0001_2].

²⁵⁰¹ Funding Agreement [AFP.006.001.0014], clauses [9.1] and [9.2]; see also clause [10.1].

²⁵⁰² First Bolitho Opinion [SYM.005.001.1400], para [207].

²⁵⁰³ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [375] – [376].

²⁵⁰⁴ The First Bolitho Opinion [SYM.005.001.1400] referred to the Bolitho Scheme at paras [204] to [208]. Para [205.e] stated: "**The Scheme addresses the payment of the costs of distribution**, determination of questions by an expert, and further applications to the Court." The Scheme was attached to the First Bolitho Opinion at .1521

- (c) the “Administration Disbursements”, which were not quantified in the Bolitho Scheme but which were defined to include “*barrister’s fees*”.²⁵⁰⁵

1292 At the first approval hearing on 30 January 2018, Mr O’Bryan, Mr Symons and Portfolio Law sought to have orders made in terms of the Bolitho Scheme on instructions from AFP.²⁵⁰⁶

1293 The evidence shows that Alex Elliott assisted his father in connection with the Bolitho Scheme.²⁵⁰⁷

1294 The Court should find that AFP, Mr O’Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott knew that the scheme costs sought were excessive and/or that there was no proper basis for the costs sought, for the following reasons.

1295 **First**, AFP admits that it was Mark Elliott and not Mr Zita who quantified Portfolio Law’s costs of administering the settlement distribution scheme,²⁵⁰⁸ and Mark Elliott conceived of that role in the course of his discussions with Mr O’Bryan about ideas for **maximising claims for costs from the Trust Co Settlement**:²⁵⁰⁹

- (a) On 24 November 2017, Mark Elliott sent an email to Mr O’Bryan that stated: **“Another idea is for Portfolio Law to charge \$20 per holder to manage the distribution of \$ etc and to handle inquiries. PT would say he can’t comment on it. You could put comment in your submissions. Makes TZ look better as well. He will need help to perform and we could redirect mail and queries”**.²⁵¹⁰
- (b) Mr O’Bryan replied stating: **“We definitely need TZ to charge more. His fees look ridiculously low compared to his competitors”**.²⁵¹¹
- (c) Mr Zita conceded that he **“just relied on what was... told to me by the funder in terms of the costs associated with the scheme”**.²⁵¹²

²⁵⁰⁵ [SYM.005.001.1400] at .1524 (clause 2.1) and .1531 (clause 11.1(g)).

²⁵⁰⁶ [SYM.001.002.3778]; Transcript of hearing on 30 January 2018 [SYM.001.001.5122], T21:21-22:7; Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 960:13-26.

²⁵⁰⁷ [SYM.001.002.8251]; [SYM.001.002.3872].

²⁵⁰⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 972:14-19.

²⁵⁰⁹ [PLE.020.001.0001], paras [152.a] & [152.i].

²⁵¹⁰ [NOB.500.001.7413].

²⁵¹¹ [NOB.500.001.7413].

²⁵¹² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 961:21-24.

1296 **Second**, the evidence shows that it was Mr Symons and not Mr Zita who purported to substantiate the cost of **\$20 per holder** to undertake the scheme:

- (a) On **8 December 2017**, Mark Elliott sent an email to Mr Symons, copied to Alex Elliott, stating that Portfolio Law would undertake the settlement distribution at \$20 per holder including disbursements, at a total cost of \$321,860 plus GST.²⁵¹³
- (b) On **10 December 2017**, Mr Symons emailed Mark Elliott, copying Alex Elliott, attaching a letter purporting to be a letter from Portfolio Law providing a cost estimate for undertaking the settlement distribution on the basis of the instructions provided by Mark Elliott.²⁵¹⁴ The letter drafted by Mr Symons stated that this cost estimate included the following tasks: (1) answering all queries from debenture holders by telephone or written correspondence; (2) providing assistance to them where required; (3) bringing the register up to date; (4) managing and monitoring website communications and (5) liaising with the SPRs.
- (c) Mr Zita conceded that he had no discussions with Mr Symons about that letter.²⁵¹⁵ The Court should find that it was a fictional document that Mr Symons crafted to justify the fees claimed. Mr Zita conceded in cross-examination that the letter was inaccurate.²⁵¹⁶
- (d) On **11 December 2017**, Mr Zita/Portfolio Law sent the letter drafted by Mr Symons to AFP on Portfolio Law's letterhead.²⁵¹⁷ The final version of the letter included an additional task, namely establishing and maintaining a call centre to answer debenture holder enquiries. The evidence does not expose the process which led to this alteration to the letter.
- (e) Mr Zita conceded that he blindly adopted the letter drafted for him by Mr Symons and sent it out, without making any enquiries to satisfy himself that its contents were accurate.²⁵¹⁸

²⁵¹³ [SYM.001.002.8251].

²⁵¹⁴ [SYM.001.002.5405] [SYM.001.002.5407].

²⁵¹⁵ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 975:10-20.

²⁵¹⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 976:4-23.

²⁵¹⁷ [AFP.001.001.2527] [AFP.001.001.2528].

²⁵¹⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 974:21-975:11.

- (f) That letter, contrived by Mr Symons and blindly adopted by Mr Zita, was attached to the Third Trimbos Report and filed with the Court as evidence in support of the costs of the scheme.²⁵¹⁹

1297 **Third**, the evidence shows that Mark Elliott then contrived a plan for AFP to make some additional profits from the settlement distribution scheme, and Mr Symons willingly assisted him to implement that plan:

- (a) On **8 January 2018**, Mark Elliott instructed Mr Symons: *“BSL signed up over 6000 holders and has the contractual /fiduciary relationships with all holders. **BSL wants a fee of \$30k pcm +GST for period ended 31/12/2018 to administer /oversee/co-ordinate and supervise the distribution scheme. Please prepare a suitable scheme, make JL pay all disbursements of LINK and include it in your opinion**”*.²⁵²⁰
- (b) On **12 January 2018**, Mr Symons and Mark Elliott exchanged emails about the costs of the settlement distribution scheme, in which Mark Elliott said that Mr Zita had advised that *“over 1000 envelopes”* had been returned to sender from the notice to group members issued in December 2017, and Mr Symons responded: *“It’s actually very valuable information – **it makes it seem like there could well be a great deal more work in the settlement than might otherwise be assumed**”*.²⁵²¹ Mark Elliott replies *“Yes, lots to do. **Increase BSL fee to \$48,000 pcm plus disbursements of approx. \$70k to LINK**”*.²⁵²²
- (c) Mr Symons then drafted the Bolitho Scheme²⁵²³ and Mr O’Bryan settled it. The Bolitho Scheme that Mr Symons drafted provided for scheme costs of up to **\$1 million**, comprising the costs of Mr Zita/Portfolio Law as “Scheme Administrator”, the costs of AFP as “Scheme Co-ordinator”,²⁵²⁴ and the “Administration Disbursements”, which were not quantified in the Bolitho Scheme but which were defined to include *“barrister’s fees”*.²⁵²⁵

²⁵¹⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 975:24-25; [CBP.001.010.5957] at .6122 - .6124.

²⁵²⁰ [SYM.001.001.0001].

²⁵²¹ [SYM.001.002.5099].

²⁵²² [SYM.001.002.5084].

²⁵²³ [SYM.001.002.4025] [SYM.001.002.4026].

²⁵²⁴ [SYM.005.001.1400] at .1531 (clause 11.1(a) & (b)).

²⁵²⁵ [SYM.005.001.1400] at .1524 (clause 2.1) and .1531 (clause 11.1(g)).

1298 **Fourth**, AFP admits that there is no evidence that Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law sought to satisfy themselves that there was a proper basis for the costs sought,²⁵²⁶ and the Court should find that none of them made any attempt to do so:

- (a) Mr Zita said that he did not even read the scheme or asked to see a copy of it before seeking orders that Justice Croft approve it.²⁵²⁷ He did not check what was specified in the scheme with respect to the costs of the scheme.²⁵²⁸ He did not seek to satisfy himself that the costs sought by AFP were reasonable or make any enquiries about the work AFP would be undertaking on the scheme.²⁵²⁹
- (b) Likewise, it appears that the first time Mr Symons made enquiries about the basis for the costs sought was on **5 February 2019** in the course of the remitter.²⁵³⁰

1299 **Fifth**, Mr Zita did not credibly explain the work that he was to undertake under the Bolitho Scheme:

- (a) In his June 2020 affidavit, Mr Zita sought to justify the fees he had attempted to recover from the Bolitho Scheme by magnifying the work involved in effecting payment. He said: *“Portfolio Law was to send information out to debenture holders, receive the documents back, authorise the cheques for debenture holders and do whatever other work was required (as further outlined in the Bolitho Scheme, in particular clause 1.3). **The cheques were to be issued from the Portfolio Law trust account; Portfolio Law would have had to individually type each cheque in, and I would have had to sign each cheque and Portfolio Law would then have to post the cheque to the intended recipient or deposit the cheque into their account.**”*²⁵³¹ He thus appeared to assert that the simple act of issuing the cheques substantiated the fees he sought to recover.

²⁵²⁶ AFP’s admissions [PLE.020.001.0001], para [152.f].

²⁵²⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 960:27-30.

²⁵²⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 961:11-13.

²⁵²⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 969:21-970:12.

²⁵³⁰ [CBP.001.007.5438].

²⁵³¹ Mr Zita’s June 2020 Affidavit [CCW.034.006.0001], para [38].

- (b) However, the **11 December 2017** letter²⁵³² that Mr Zita/Portfolio Law sent purported to justify Portfolio Law's fees on the basis of six tasks: (1) answering all queries from debenture holders by telephone or written correspondence; (2) providing assistance to them where required; (3) establishing a call centre; (4) bringing the register up to date; (5) managing and monitoring website communications and (6) liaising with the SPRs.
- (c) Under cross-examination, Mr Zita gave evidence that he and Mark Elliott discussed establishing a call centre.²⁵³³ He said that the call centre was not going to be conducted from Portfolio Law's office. It would be "*A number. A direct number.*"²⁵³⁴
- (d) The fact that Mr Zita and Mark Elliott decided to establish an external call centre fortifies the conclusion that Portfolio Law had minimal responsibility in relation to **the first two tasks** described in the 11 December 2017 letter. Just as Mark Elliott had arranged for queries to be directed to Georgeson²⁵³⁵ and/or Alex Elliott²⁵³⁶ in connection with the Partial Settlement and Trust Co Settlement, he proposed to "**redirect mail and queries**"²⁵³⁷ away from Portfolio Law in connection with the Bolitho Scheme. The Court should reject Mr Zita's evidence that he was going to take "*some [of] the calls that came in, the more difficult calls and all that sort of stuff*",²⁵³⁸ which cannot be reconciled with (1) Mr Zita's own concession that he lacked the expertise and experience to conduct a settlement distribution scheme,²⁵³⁹ (2) the evidence showing that Mark Elliott and Mr O'Bryan had no faith in Mr Zita's skill and competence,²⁵⁴⁰ and (3) Mark Elliott's 24 November 2017 email in which he said he proposed to "**redirect mail and queries**".²⁵⁴¹

2532 [AFP.001.001.2527] [AFP.001.001.2528].

2533 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 977:31-978:1.

2534 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 978:4-5.

2535 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2044:30-2045:15; [MSC.020.012.0004].

2536 [CBP.001.006.4733];

Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:31-1736:20.

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2045:16-25.

2537 [NOB.500.001.7413].

2538 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:5-7.

2539 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 961:6-10, 966:30-967:6, 967:17-18, 968:11-17, 978:7-11.

2540 See eg [NOB.500.001.7413]; [SYM.001.001.4902] ("*into the abyss!*"); [NOB.500.001.6829]; Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [50].

2541 [NOB.500.001.7413].

- (e) Mr Zita and Alex Elliott conceded that Portfolio Law was not going to be responsible for bringing the register up to date.²⁵⁴² Alex Elliott said that he understood he would be involved in the work of updating the register.²⁵⁴³ Accordingly, the Court should find that Mr Zita/Portfolio Law did not have any real responsibility for the **fourth task** referred to in the 11 December 2017 letter – ie, bringing the register up to date.
- (f) Mr Zita conceded that maintaining and monitoring the Banksia website was AFP’s responsibility.²⁵⁴⁴ Accordingly, Mr Zita/Portfolio Law did not have any real responsibility for the **fifth task** referred to in the 11 December 2017 letter.
- (g) In relation to the **sixth task** referred to in the 11 December 2017 letter (liaising with the SPRs), Mr Zita said: *“that was in relation to obviously they had done distributions before so they could help us in relation to any queries that came in or any updating of the register that happened. So I saw this as a cooperative approach rather than us and them”*.²⁵⁴⁵ Accordingly, the Court should find that the **sixth task** did not involve any real work for Portfolio Law, but rather, reflected the expectation that AFP and Portfolio Law would rely upon the SPRs in relation to the Scheme, just as they had relied upon the SPRs in relation to the litigation generally.
- (h) It follows that Mr Zita properly conceded in cross-examination that most of the matters in the 11 December 2017 letter:²⁵⁴⁶
- (i) were not going to be done by him; and
 - (ii) were beyond his capabilities and that of his firm,
- and the Court should find that this concession was not disturbed by his counsel’s attempt to improve that evidence in re-examination.²⁵⁴⁷

²⁵⁴² Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [39];
Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 1002:14-21.

²⁵⁴³ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2178:29-2179:6, 2179:29-31.

²⁵⁴⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 1002:22-31.

²⁵⁴⁵ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 1003:3-7

²⁵⁴⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 978:7-11.

²⁵⁴⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 999:23-1003:8.

- (i) The Court should find that Mr Zita’s **only** focus was on the money his firm would be paid for their negligible effort.²⁵⁴⁸ Despite Mr Zita’s denial that the fees payable to Mr Zita/Portfolio Law amounted to “money for jam”,²⁵⁴⁹ the Court should find that is precisely what it was.

1300 **Sixth**, on 1 February 2018, Mark Elliott emailed Mr Symons directing that he make changes to the Bolitho Scheme because it “**Looks busier and justifies fees**”. Mr Symons replied on the same day: “**Will do**”.²⁵⁵⁰

1301 **Seventh**, Mark Elliott told Mr Zita that it would be necessary to go back to Court on numerous occasions and that there would be further work for counsel in the administration of the Bolitho Scheme.²⁵⁵¹ This fortifies the conclusion that the Bolitho Scheme was another cynical cash grab. In the *Camping Warehouse v Downer* matter, where Elliott Legal was appointed “Scheme Administrator” of the settlement distribution scheme, Elliott Legal paid Mr O’Byrne a “monthly retainer” of \$9,900 per month.²⁵⁵² There is every reason to expect that Mark Elliott intended to implement similar arrangements in the Bolitho Scheme.

1302 **Eighth**, in the period between 31 January 2018 and 22 May 2019, AFP progressively decreased its estimate of the “Administration Costs” from \$1 million to \$690,800 plus GST, and ending at \$396,000 plus administration costs and disbursements of \$110,000.²⁵⁵³ These reductions give rise to the inference that there was no proper basis for the sum initially sought.

1303 **Ninth**, the evidence conclusively demonstrates that there was no good reason for AFP and the Lawyer Parties to promote the Bolitho Scheme in preference to the SPRs distributing the funds:

- (a) Mr Zita claimed in his affidavit that he thought his involvement in the scheme reflected Mr Bolitho’s desire for “*a personalised approach*”,²⁵⁵⁴ but he conceded in cross-examination that he had no discussions with Mr Bolitho about Mr Zita administering the settlement proceeds to achieve “a

²⁵⁴⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 961:14-20.

²⁵⁴⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 975:3-5.

²⁵⁵⁰ [SYM.002.002.1704].

²⁵⁵¹ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [361].

²⁵⁵² [NOB.503.001.0047] [NOB.503.001.0049] [NOB.503.001.0051] [NOB.503.001.0053] [NOB.503.001.0055] [NOB.503.001.0057] [NOB.503.001.0059].

²⁵⁵³ AFP & Alex Elliott’s admissions: [PLE.020.001.0001] and [PAR.080.001.0001], para [152.j].

²⁵⁵⁴ Mr Zita’s April 2020 Affidavit [CCW.036.001.0001], para [355].

personalised approach".²⁵⁵⁵ When asked how he would achieve a "*personalised approach*" in circumstances where he had no skills, he said "*well, by taking – you know, addressing any debenture holders' calls*".²⁵⁵⁶ But his evidence was that calls were to be directed to a call centre external to his firm.²⁵⁵⁷

- (b) Mr Zita asserted in his affidavit that he sought a role in the scheme arising from a concern about "*unpresented cheques as a result of previous distributions*".²⁵⁵⁸ However, he conceded in cross-examination that he had not distributed the proceeds of the Partial Settlement to debenture holders but instead had paid the whole sum over to AFP,²⁵⁵⁹ and had thereafter made no enquiries about distributing the funds to group members – which he conceded would have been in the interests of his clients.²⁵⁶⁰ He conceded that he had no personal knowledge of the process the SPRs had undertaken to distribute their share of the proceeds of the Partial Settlement.²⁵⁶¹
- (c) In cross-examination, Mr Zita conceded that he did not think that he could do a better job than the SPRs of distributing the Trust Co settlement proceeds.²⁵⁶² He conceded that he had no idea how to undertake a settlement scheme.²⁵⁶³ He conceded that the SPRs were better qualified for the role.²⁵⁶⁴ He conceded that he did not seek to compare what the SPRs would charge for the task with the costs of the Bolitho Scheme.²⁵⁶⁵ It would appear the first time he made that enquiry was shortly prior to trial, when he was told that the SPRs had incurred costs of **\$181,000** to undertake the distribution.²⁵⁶⁶

1304 In circumstances where it was manifestly unreasonable for AFP and the Lawyer Parties to agitate for Mr Zita/Portfolio Law to distribute the settlement proceeds

2555 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 962:21-963:3.
 2556 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 967:27-968:10.
 2557 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 977:31-978:5.
 2558 Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [356].
 2559 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 965:27-966:13.
 2560 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 966:4-13.
 2561 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 965:13-966:29.
 2562 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 966:30-967:2.
 2563 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 967:3-6.
 2564 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:11-17.
 2565 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:18-25, 970:13-16.
 2566 [CCW.058.001.0001].

instead of the SPRs, the Court should find that their purpose in seeking that role was to obtain the lucrative (and excessive) fees they sought to recover.

J4.1 Dishonesty

1305 The Court should find that, in promoting the Bolitho Scheme, AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to act honestly, in that:

- (a) they had no honest and reasonable basis for seeking the costs of the Bolitho Scheme;
- (b) they advanced the Bolitho Scheme for the purposes of obtaining for themselves and/or each other excessive scheme administration costs.²⁵⁶⁷

1306 Mr Zita/Portfolio Law's case appears to be that Mr Zita cannot be said to have acted dishonestly in circumstances where he did not read the Bolitho Scheme before the hearing of the First Approval Application before Justice Croft. The Court should reject that contention.

1307 Dishonesty encompasses recklessness – that is, a statement made not caring whether it be true or false, or without an honest belief as to its truth;²⁵⁶⁸ an indifference to, or disregard of, whether a statement be true or false.²⁵⁶⁹

1308 The evidence demonstrates that Mr Zita was totally indifferent to the content and terms of the Bolitho Scheme and the costs to be charged pursuant to the scheme. He conceded that, in relation to the Bolitho Scheme, he did whatever Mark Elliott told him to do.²⁵⁷⁰ Like Mr Meagher in *Incorporated Law Institute of New South Wales v Meagher*,²⁵⁷¹ Mr Zita lent his name to be used by Mark Elliott exactly as the latter pleased, and signed, endorsed, or adopted anything that Mark Elliott put before him, not caring whether there was a proper basis for what he thereby endorsed.²⁵⁷²

²⁵⁶⁷ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [158].

²⁵⁶⁸ *Derry v Peek* (1889) 14 App Cas 337.

²⁵⁶⁹ *R v Staines* (1974) 60 Cr App R 160.

²⁵⁷⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:28-969:6, 971:2-7.

²⁵⁷¹ (1909) 9 CLR 655.

²⁵⁷² (1909) 9 CLR 655, 669.

1309 The observations of Griffiths CJ in *Meagher* are apt: ²⁵⁷³

“[H]e did not know whether what he said about him was true or false, and in my opinion it is equally clear that he did not care whether it was true or not... he was in these transactions a tool of Willis, to whom he lent his name, and his signature when desired, to carry out Willis' projects, of whatever nature. The explanation that he was a simple innocent person who unwittingly allowed himself to be made use of as an instrument of fraud cannot be accepted.”

1310 Mr Zita conceded that the costs of the Bolitho Scheme of up to \$1 million were to be deducted from his clients' settlement proceeds.²⁵⁷⁴ Mr Zita stood to recover fees in excess of \$300,000 under the Bolitho Scheme, in circumstances where the evidence shows that he had very little real responsibility under the Scheme. He conceded that it was in the interests of his clients for him to assess the costs of the Bolitho Scheme against the costs that the SPRs would charge for distributing the settlement proceeds,²⁵⁷⁵ which (Mr Zita also conceded) they were better qualified to do.²⁵⁷⁶ He conceded that he did not undertake any such assessment.²⁵⁷⁷

1311 It is not open to Mr Zita to seek to excuse himself on the basis that he was unwittingly and innocently used as an instrument of fraud in circumstances where he lent his name to Mark Elliott's scheme, without the slightest interest in scrutinising it or the costs to be charged to his clients under it. By any objective standard, his conduct was not honest, and the Court should find the contravention of section 17 of the CPA established.

J4.2 Failure to ensure that costs are reasonable and proportionate

1312 Having regard to the objective facts, which are conceded by Mr Zita, that the SPRs could distribute the settlement proceeds more efficiently, more cheaply, and more competently than he could, the Court should find that each of AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to ensure that legal costs were reasonable and proportionate in connection with their conduct in advancing the Bolitho Scheme.

²⁵⁷³ (1909) 9 CLR 655, 675.

²⁵⁷⁴ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 970:17-29.

²⁵⁷⁵ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:23-25.

²⁵⁷⁶ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 968:11-17.

²⁵⁷⁷ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 969:19-970:16.

J4.3 Misleading or deceptive conduct

1313 The Court should find that AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation not to engage in conduct that was misleading or deceptive or likely to mislead or deceive, in that:

- (a) they promoted the Bolitho Scheme, which included a role for both Mr Zita/Portfolio Law as "Scheme Administrator" and for AFP (who was the real client of Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott) as "Scheme Co-ordinator";
- (b) they represented that Mr Zita/Portfolio Law would act as Scheme Administrator, when in fact AFP and Mr Zita/Portfolio Law intended to "*redirect mail and enquiries*" to a call centre;
- (c) they represented that the costs of the Bolitho Scheme were reasonable, in circumstances where the costs were unreasonable and excessive, and they had not made proper enquiries about those fees;
- (d) they did not inform the Court that, in respect of the Partial Settlement, at AFP's direction, Portfolio Law, in breach of trust, had transferred to AFP the net settlement proceeds of \$1.75 million that it was required to hold in its trust account for group members pursuant to the Funding Agreement and the terms of settlement entered into in respect of the Partial Settlement, in circumstances where that was a material fact for the Court to know in evaluating whether it was appropriate for Mr Zita/Portfolio Law to be entrusted with the responsibility of distributing the Trust Co Settlement proceeds.

K. NO CONTRADICTION CONTRAVENTION

K1. Outline of contravention

1314 The Court should find that Mr O'Bryan and Mr Symons contravened the overarching obligation not to mislead or deceive by their conduct in submitting to the court that there was no conflict and that the appointment of a contradictor was unwarranted (**No Contradictor Contravention**).

K2. Concessions and admissions sufficient to establish contraventions

1315 Mr O'Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020,²⁵⁷⁸ and do not contest findings being made against them on the basis of those allegations.²⁵⁷⁹

1316 AFP admits the following incontrovertible facts:

- (a) After the Notice was issued, Mrs Botsman (a debenture holder) objected to the settlement and contended that the payments to AFP should not be approved and that a contradictor should be appointed.²⁵⁸⁰
- (b) At the hearing of the First Approval Application on 30 January 2018, Mr Pitman appeared and contended that the payments to AFP should not be approved and that a contradictor should be appointed.²⁵⁸¹
- (c) Mr O'Bryan and Mr Symons positively submitted to the court at the First Approval Application, both in the Second Bolitho Opinion²⁵⁸² and in oral submissions on 30 January 2018,²⁵⁸³ that there was no conflict and that the appointment of a contradictor was therefore unwarranted. The Second

²⁵⁷⁸ RLOI dated 21 July 2020: [PLE.010.002.0001].

²⁵⁷⁹ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

²⁵⁸⁰ [PLE.020.001.0001], para [160]; [SYM.001.002.3056] [SYM.001.002.3057] [SYM.001.002.3058].

²⁵⁸¹ [PLE.020.001.0001], para [161]; see Mr Pitman's May 2020 Affidavit [CCW.036.001.0395], paras [30] – [62] and [SYM.001.001.5122] at page 24 onwards.

²⁵⁸² Second Bolitho Opinion [SYM.005.001.1534], paras [19] – [22].

²⁵⁸³ Transcript of hearing on 30 January 2018 [SYM.001.001.5122], 36:5-9.

Bolitho Opinion was attached to an affidavit sworn by Mr Zita and filed by Portfolio Law.²⁵⁸⁴

- (d) That submission was incorrect and misleading in circumstances where there were numerous actual or potential conflicts between the interests of Mr Bolitho/other group members and the interests of AFP and/or Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law in that:²⁵⁸⁵
- (i) The Fee Arrangements that AFP entered into with Mr O'Bryan, Mr Symons and Portfolio Law left AFP with little or no incentive to manage costs and fees, particularly in circumstances where greater fees appeared to magnify the funding risk assumed by AFP, thereby inflating the funding commission to which it might be entitled (and diminishing the funds from the settlement available to be returned to debenture holders).
 - (ii) The Adverse Settlement Terms were in the interests of AFP, but were detrimental to the interests of Mr Bolitho and/or other group members.
 - (iii) Mr O'Bryan, Mr Symons and Portfolio Law had a direct financial interest in the payments sought by AFP in respect of legal costs, because AFP had not paid those costs.
 - (iv) The claim for what was, in effect, a common fund order and the claim for legal costs gave rise to a potential conflict of interest between AFP and group members.
 - (v) There was a powerful interest on the part of AFP, with respect to its commission, to treat all of the settlement sum as referable to the Bolitho Proceeding and to minimise the significance of the SPR Proceeding. Given that the SPR Proceeding was brought for the benefit of, and paid for by, the debenture holders there was a significant potential for conflict.

²⁵⁸⁴ [PLE.020.001.0001], para [163].

²⁵⁸⁵ [PLE.020.001.0001], para [164].

- (vi) It was not in the interests of debenture holders/group members for them to pay excessive amounts in respect of legal costs and disbursements, commission, or scheme administration costs

1317 Those concessions, admissions, and incontrovertible facts are sufficient to establish the No Contradictor Contravention.

L. APPEAL CONTRAVENTIONS

L1. Outline of contraventions

1318 The Court should find that, by their conduct as set out below in connection with Mrs Botsman's appeal which was filed on **20 March 2018**²⁵⁸⁶ (together the **Appeal Contraventions**):

- (a) AFP, Alex Elliott, Mr O'Bryan and Mr Symons contravened the overarching obligation not to mislead or deceive;
- (b) AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the overarching obligation to only take steps that are reasonably necessary to facilitate the resolution or determination of the proceeding;
- (c) AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law contravened the Paramount Duty.²⁵⁸⁷

1319 In particular, the Court should find that:

- (a) AFP, Alex Elliott, Mr O'Bryan and Mr Symons contravened the overarching obligation not to mislead or deceive and the Paramount Duty by their conduct in connection with Mrs Botsman's appeal.²⁵⁸⁸
- (b) AFP, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law, contravened the Paramount Duty and/or the overarching obligation to only take steps that were reasonably necessary to facilitate the resolution or determination of the dispute, by attempting to prevent or dissuade Mrs Botsman from pursuing her appeal and by attempting to prevent or dissuade the SPRs and/or their counsel from making submissions to assist the Court of Appeal in Mrs Botsman's appeal.²⁵⁸⁹

²⁵⁸⁶ [CBP.001.001.0483].

²⁵⁸⁷ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [168].

²⁵⁸⁸ RLOI [PLE.010.002.0001], paras [171] & [172].

RLOI [PLE.010.005.0001], para [171], [171A] & [172].

²⁵⁸⁹ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [169].

L2. Concessions and admissions

1320 Mr O’Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020, and do not contest findings being made against them on the basis of those allegations.²⁵⁹⁰

1321 AFP admits that:

- (a) AFP, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law attempted to (1) prevent or dissuade Mrs Botsman from pursuing her appeal, and (2) prevent or dissuade the SPRs and/or their counsel from making submissions to the Court of Appeal in support of Mrs Botsman’s appeal.²⁵⁹¹
- (b) In the appeal, AFP:²⁵⁹²
 - (i) submitted that the primary judge’s discretion to approve the distribution to AFP was properly exercised;²⁵⁹³
 - (ii) adopted the contention that the value of the settlement included both the cash component and the benefit of the release from Trust Co’s remuneration claim which was submitted to hold a value of \$11.16 million;²⁵⁹⁴
 - (iii) submitted that *“as the primary judge recognised, AFPL assumed significant risks, including substantial adverse costs exposure, in funding the proceedings”*, which AFP submitted comprised the following: *“AFP: (a) paid or agreed to pay security for costs in excess of \$1.5 million; (b) accepted liability for adverse costs against all defendants, with the quantum of that possible liability likely to exceed \$15 million; (c) paid legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million”*;²⁵⁹⁵

²⁵⁹⁰ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

²⁵⁹¹ [PLE.020.001.0001], para [169].

²⁵⁹² [PLE.020.001.0001], para [171].

²⁵⁹³ [SYM.001.001.0251] para [15].

²⁵⁹⁴ [SYM.001.001.0251] paras [3], [12] and [13].

²⁵⁹⁵ [SYM.001.001.0251] para [15].

- (iv) did not otherwise correct any of the misleading conduct referred to in paragraphs 67 - 73, 76-77, 85, 92, 93, 100 to 148 and 163 to 164 of the RLOI (much of which is also admitted by AFP).

1322 However, AFP does not admit that it misled the Court of Appeal²⁵⁹⁶ or breached its overarching obligations.²⁵⁹⁷

1323 Prior to opening his case, Mr Zita/Portfolio Law **did not** adopt AFP's admission that they attempted to prevent or dissuade Mrs Botsman from pursuing her appeal, and prevent or dissuade the SPRs and/or their counsel from making submissions to the Court of Appeal in support of Mrs Botsman's appeal.²⁵⁹⁸

1324 However, under cross-examination, Mr Zita conceded that he regretted sending the correspondence²⁵⁹⁹ that Mark Elliott, Mr O'Bryan and Mr Symons directed him to send to Mrs Botsman, and that he should have exercised better judgment.²⁶⁰⁰ He conceded that the correspondence he sent to Mr Botsman was very threatening in its tone, and the threat should not have been made.²⁶⁰¹ **In cross-examination, he publicly apologised to Mrs Botsman²⁶⁰² and Mr Botsman.²⁶⁰³**

1325 Prior to opening his case, Alex Elliott adopted AFP's admissions as to the allegations made against AFP and the Lawyer Parties.²⁶⁰⁴ In relation to allegations made specifically against him, Alex Elliott:

- (a) admits that he knew the Court of Appeal had been provided with the Third Trimbos Report;²⁶⁰⁵
- (b) admits that, on 11 June 2018, his father had directed him to draw cheques to Mr Symons and Portfolio Law from the "*old BSL cheque book*", to date them 1 August 2018, to place them in envelopes marked "*Do not open until you talk to MEE*", and to give them to Mr Symons and Mr Zita;²⁶⁰⁶

²⁵⁹⁶ [PLE.020.001.0001], para [171.e].

²⁵⁹⁷ [PLE.020.001.0001], para [168], [169].

²⁵⁹⁸ [PLE.070.001.0001_2], para [1.n].

²⁵⁹⁹ [ABL.001.0588.00364]; [CBP.001.013.2763].

²⁶⁰⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 980:19 – 986:17.

²⁶⁰¹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 984:16-17, 986:5-14..

²⁶⁰² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 983:14-15.

²⁶⁰³ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 986:15-17.

²⁶⁰⁴ [PAR.080.001.00001], paras [166], [167], [168], [169], [170], [171], [172], [173].

²⁶⁰⁵ [PAR.080.001.00001], para [171A.a].

²⁶⁰⁶ [PAR.080.001.00001], para [171A.c]; [ABL.001.0601.00003].

- (c) admits that he did not draw to the attention of the Court of Appeal any impropriety in relation to the cheques;²⁶⁰⁷
- (d) admits that he knew of the submissions that were made to the Court of Appeal by AFP and by Mr O'Bryan in about August 2018, as alleged at paragraphs 171 and 172 of the RLOI;²⁶⁰⁸
- (e) admits that he did not correct any misleading conduct referred to in paragraphs 67 - 73, 76-77, 85 to 96, 100 to 148, 163 to 164, 171 and 172 of the RLOI;²⁶⁰⁹
- (f) otherwise denies the allegations against him.

1326 In re-examination, following **eight days** of his evidence, and after consulting with his senior counsel before his re-examination commenced,²⁶¹⁰ Alex Elliott ultimately conceded that the direction from his father to draw the cheques to make sham payments to Mr Symons and Portfolio Law **involved a deception or misleading of the Court, and that he had enough information available to him to identify that deception.**²⁶¹¹ Alex Elliott drew the cheques and signed them with his father's signature, despite feeling "**uneasy**" about doing so.²⁶¹²

L3. Summary of evidence

1327 The evidence in relation to the Appeal Contraventions is set out below.

Application for leave to appeal

1328 On **20 March 2018**, Mrs Botsman filed an application for leave to appeal against the approval decision, contending (inter alia) that the funding commission and legal costs were excessive and had not been properly scrutinised.²⁶¹³

²⁶⁰⁷ [PAR.080.001.00001], para [171A.f].

²⁶⁰⁸ [PAR.080.001.00001], para [171A.g].

²⁶⁰⁹ [PAR.080.001.00001], para [171A.h].

²⁶¹⁰ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2185:20-23.

²⁶¹¹ Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

²⁶¹² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2023:10-18.

²⁶¹³ [PLE.010.002.0001] and [PLE.010.005.0001], para [166].

AFP and Alex Elliott admit this: [PLE.020.001.0001] & [PAR.080.001.0001], para [166].

Mr Zita/Portfolio Law adopts AFP's admission: [PLE.070.001.0001_2], para [1].

Security for costs application

- 1329 On **21 – 26 March 2018**, Mr O’Bryan, as senior counsel for the class, directed his team to make an application for security for costs against Mrs Botsman immediately following service of the application for leave to appeal, to ensure that Mr Botsman was “*nervous before the end of the day*”.²⁶¹⁴
- 1330 The documentary evidence shows that Alex Elliott was included in correspondence in connection with the security for costs application,²⁶¹⁵ and undertook legal research to assist the application.²⁶¹⁶ The Court should reject Alex Elliott’s self-serving evidence that his work in finding a relevant legal case and sending it to Mr O’Bryan was “*just out of general interest*”²⁶¹⁷ and did not constitute “*research*”.²⁶¹⁸ The Court should find that Alex Elliott’s conduct in this regard was completely consistent with that of a solicitor pursuing the interests of his client (AFP). The Court should reject any suggestion that Alex Elliott’s conduct is consistent with that of a personal assistant or law graduate, or who had no professional role in the conduct of the proceeding.
- 1331 On **26 March 2018**, Mr O’Bryan, Mr Symons and Mark Elliott conceived of an argument that Mrs Botsman could be restrained from pursuing her application for leave to appeal by provisions of the Funding Agreement.²⁶¹⁹ Mr O’Bryan advised AFP to engage “***Minter Ellison (or similar high fee firm & barristers) to enforce its rights under the LFA***” and to “*issue a separate proceeding in the SCV for an injunction to stop the appeal & damages & costs*”.²⁶²⁰
- 1332 The documentary evidence shows that Alex Elliott was included in correspondence in connection with that strategy,²⁶²¹ and provided assistance with it.²⁶²²

²⁶¹⁴ [SYM.001.002.7751] [NOB.500.004.8063] [NOB.500.004.5785].

²⁶¹⁵ [AFP.001.001.4182] [AFP.001.001.4183]; [NOB.500.004.8063];

²⁶¹⁶ [AFP.001.001.4188].

²⁶¹⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1758:31.

²⁶¹⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1987:3-6.

²⁶¹⁹ [SYM.001.001.3590] [SYM.001.001.3591]; [SYM.001.003.2062] [SYM.001.003.2063]; [SYM.001.003.2056]; [SYM.001.003.1457]; [NOB.500.004.2732].

²⁶²⁰ [NOB.500.004.2732].

²⁶²¹ [NOB.500.004.2747] [NOB.500.004.2748]; [NOB.500.004.2732]; [SYM.001.003.1485] [SYM.001.003.1486];.

²⁶²² [SYM.001.003.2062] [SYM.001.003.2063].

- 1333 On **26 March 2018**, Mr Symons drafted,²⁶²³ Mr O’Bryan settled,²⁶²⁴ and Mark Elliott approved²⁶²⁵ a letter for Portfolio Law to send to Mrs Botsman to put her on notice of Mr Bolitho’s costs and the “*significant additional costs being incurred by the sixteen other parties to the application for leave to appeal*” which the letter said would be in the range of **\$500,000 to \$1 million**, foreshadowing that an application for security for costs would be made against her, and enquiring about her assets to meet a costs order. Mark Elliott was doubtful about the optics of seeking security for costs from “*an individual with no \$ doing it for the greater good*”,²⁶²⁶ but Mr O’Bryan urged that the letter be issued quickly to “*spook her on SFC ASAP*”.²⁶²⁷
- 1334 The documentary evidence shows that Alex Elliott was included in correspondence in connection with that strategy.²⁶²⁸
- 1335 On **26 March 2018**, Mr Symons suggested that an additional letter be sent by Portfolio Law to Mr Botsman and Mrs Botsman in respect of their anticipated failure to file documentation in compliance with section 41 and 42 of the CPA.²⁶²⁹ Mr O’Bryan²⁶³⁰ and Mark Elliott²⁶³¹ agreed with that course.
- 1336 The documentary evidence shows that Alex Elliott was included in correspondence in connection with that strategy.²⁶³²
- 1337 On **27 March 2018**, Mark Elliott sent an email to Mrs Botsman, notwithstanding that he had been told to direct all correspondence to Mr Botsman, her son. In *AFP v Botsman*, Justice Robson found that in sending that email Mark Elliott intended to intimidate Mrs Botsman.²⁶³³
- 1338 On **27 March 2018**, Mr Zita/Portfolio Law sent the letter to Mrs Botsman²⁶³⁴ and Mr Botsman²⁶³⁵ threatening security for costs.

2623 [NOB.500.004.2747] [NOB.500.004.2748].

2624 [NOB.500.003.3350] [NOB.500.003.3351].

2625 [SYM.001.003.2083].

2626 [NOB.500.004.2695].

2627 [NOB.500.004.2695].

2628 [NOB.500.003.3350] [NOB.500.003.3351]; [NOB.500.004.8101]; [SYM.001.001.6867]; [NOB.500.003.3194] [NOB.500.003.3198]; [ABL.001.0588.00363] [ABL.001.0588.00364]; [ABL.001.0588.00363] [ABL.001.0588.00364]; [ABL.001.0588.00362].

2629 [SYM.001.001.6867].

2630 [SYM.001.001.6867].

2631 [NOB.500.004.2685].

2632 [ABL.001.0588.00362].

2633 *Australian Funding Partners Ltd v Botsman (No 3)* [2018] VSC 507, [18] – [21].

2634 [ABL.001.0588.00363] [ABL.001.0588.00364].

2635 [ABL.001.0588.00363] [ABL.001.0588.00364].

- 1339 On **9-10 April 2018**, Mr Symons drafted, Mr O’Bryan settled and Mr Zita/Portfolio Law filed an application for security for costs.²⁶³⁶ Mark Elliott remained concerned about the strategy of seeking security for costs *“from an **individual (old lady) doing it for the class?**”*.²⁶³⁷ Mr O’Bryan dismissed that concern, stating in an email to Mark Elliott and Mr Symons: *“She is not ‘doing it for the class’. **She is doing it because her idiot son asked/told her to, so as to give him some work to do & (he hopes) make him famous.**”*²⁶³⁸
- 1340 Mr Zita conceded that he obediently did as he was told²⁶³⁹ without ever questioning Mr O’Bryan and Mark Elliott,²⁶⁴⁰ and admitted that, if he had exercised his own independent judgment, he *“wouldn’t have adopted that strategy”*.²⁶⁴¹ He expressed his regret at sending the letter to Mrs Botsman, and publicly apologised to her.²⁶⁴²
- 1341 On **30 April 2018**, the application for security for costs was heard.²⁶⁴³ Ahead of the application, Mr Symons sent an email to Mr O’Bryan expressing his concern that:²⁶⁴⁴

*“It seems unlikely that Mrs Botsman would be able to mortgage her house to satisfy an adverse costs order if **she is a retired nurse** as no bank could lend to her while complying with the Code of Banking Practice. **Her only option would be to sell. It must be pretty unpalatable to the Court to put a retired nurse into a position of possibly being forced to sell.**”*

- 1342 Mr O’Bryan replied stating: *“As there is no evidence before the court concerning either of these points, I don’t propose to raise them.”*²⁶⁴⁵
- 1343 It should be recalled that Mrs Botsman had signed the Funding Agreement in which she agreed to retain *“the Lawyers”* – Portfolio Law, with Mr O’Bryan and Mr Symons as counsel. The Lawyer Parties involved themselves in a campaign of intimidation against their own client, in order to protect the interests of AFP (which was not their client) and their own interests. At this time, Mr Symons was engaged by AFP under a retainer at a fee of \$800,000 per year, which he did not reveal to his client, and

²⁶³⁶ [NOB.500.004.5785] [NOB.500.003.3350] [NOB.500.003.3351] [NOB.500.004.2268] [NOB.500.004.2269] [NOB.500.003.3396] [NOB.500.003.3397] [NOB.500.004.8264].

²⁶³⁷ [SYM.001.003.0019].

²⁶³⁸ [SYM.001.003.0121].

²⁶³⁹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], T979:16-30.

²⁶⁴⁰ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], T980:25-29.

²⁶⁴¹ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], T979:31-980:4.

²⁶⁴² Transcript of hearing on 17 August 2020 [TRA.500.009.0001], T983:9-15.

²⁶⁴³ [SYM.001.001.4480].

²⁶⁴⁴ [SYM.001.001.5192].

²⁶⁴⁵ [SYM.001.001.5089].

which goes some way to explaining why his loyalties were so tied to AFP which was his paymaster.

1344 This was a gross breach of the Paramount Duty.

AFP v Botsman

1345 On **29 March 2018**, AFP commenced a proceeding against Mrs Botsman to restrain her from pursuing her application for leave to appeal.²⁶⁴⁶ In that proceeding, AFP claimed by way of damages from Mrs Botsman interest at the penalty interest rate on the sum of \$5.225 million in respect of costs and \$12.8 million plus GST in respect of commission. The statement of claim alleged that AFP's loss was "**\$5,289.04 per day**".²⁶⁴⁷

1346 The documentary evidence shows that Mr O'Bryan and Mr Symons provided significant assistance with that proceeding, which evidently included drafting and/or settling the pleadings and submissions.²⁶⁴⁸

1347 The documentary evidence shows that Alex Elliott was closely involved in that proceeding.²⁶⁴⁹ He provided a witness statement in AFP v Botsman.²⁶⁵⁰ In a contemporaneous email Mr Symons sent to Mark Elliott in connection with that proceeding, Mr Symons described Alex Elliott as "**AFP's solicitor**".²⁶⁵¹

1348 On **18 April 2020**, Alex Elliott sent his father an email with the subject line "*comments on defence -let me know when you want to go through them*".²⁶⁵² That email set out his comments on Mrs Botsman's defence in AFP v Botsman. The comments reveal Alex Elliott's sophisticated analysis of, and strategic insight into, the issues raised in AFP v Botsman.

²⁶⁴⁶ [NOB.500.004.5413]; [SYM.005.001.0028]; [CCW.024.001.0001]; [CCW.024.001.0042].

²⁶⁴⁷ [CCW.024.001.0042], para [15].

²⁶⁴⁸ See the highlighted entries in the Contradictors' Aide Memoire [AID.010.031.0001] at .0011 - .0031

²⁶⁴⁹ See the highlighted entries in the Contradictors' Aide Memoire [AID.010.031.0001] at .0011 - .0031; [AFP.100.011.0001]; [AEL.100.030.0001]; [SYM.005.001.0028]; see also [SYM.005.001.0028], [SYM.001.003.2062] [SYM.001.003.2063]; [NOB.500.004.2732]; [SYM.001.003.1485] [SYM.001.003.1486]; [SYM.001.003.0001] [SYM.001.003.0003] [SYM.001.003.0004].

²⁶⁵⁰ [AFP.100.011.0001].

²⁶⁵¹ [SYM.005.001.0028].

²⁶⁵² [AEL.100.030.0001].

1349 **Significantly**, Alex Elliott's email noted:

"Para 5(a) - it is contrary to public policy for AFP to provide binding instructions on behalf of WB- (this must be read on conjunction with 13.2 and 13.3... doesn't it?) -see 6.3.1 LFA."

1350 The relevant clauses of the Funding Agreement provide as follows:²⁶⁵³

Clause 6.3.1: *"For the duration of [this Agreement], the Plaintiff instructs the Lawyers to - subject to clause 13, comply with all instructions given by [AFP] or as is set out in [this Agreement]."*

Clause 13.2: *"[AFP] 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 [AFP] in so far as it concerns any Claim of the Plaintiff by the Plaintiff giving instructions to the Lawyers."*

Clause 13.3: *"Except in relation to Settlement, which is dealt with below, if the Lawyers notify [AFP] 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 [AFP] and those they owe to the Plaintiff, the Plaintiff and [AFP] 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 [AFP];

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 [AFP's] interests; and

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

1351 The Court should find that:

- (a) It was a serious breach of fiduciary duty for the Lawyer Parties to attack Mrs Botsman who was their client in this way.
- (b) AFP and Alex Elliott were knowingly involved in that breach of fiduciary duty from which they sought to secure millions of dollars for AFP and thereby for the entities associated with the Elliott family.
- (c) AFP brought the proceeding against Mrs Botsman to seek to prevent her from pursuing the Botsman Appeal in circumstances where AFP, Alex Elliott and the Lawyer Parties all knew that there was merit in the issues she raised

in the Botsman Appeal. Insofar as Alex Elliott is concerned, the Court should reject his evidence that he was ignorant of any impropriety in connection with the Trust Co Settlement for reasons which have already been addressed.

Written case

1352 On **19 April 2018**, Mr Symons drafted submissions in opposition to the appeal, which he sent to Mr O'Bryan, Mark Elliott and Alex Elliott.²⁶⁵⁴ Mr O'Bryan settled those submissions.²⁶⁵⁵ The submissions stated at para [1.f] that:

*“As concerns ground 5, the assertion concerning the Special Purpose Receivers (SPRs) shouldering most of ‘the practical, evidentiary and financial burden of the conduct of the proceedings’ is identified in the reasons for judgment at [22] as a submission made by the SPRs, not as a finding; and (ii) **all of the matters in Ground 5 were the subject of the parties’ submissions below.** The judge did not act upon a wrong principle, nor did he take account of extraneous or irrelevant matters, **mistake the facts or fail to take into account a material consideration. The settlement approval is not unreasonable or plainly unjust.** On settled principles, the Court ought not disturb the exercise of a trial judge’s discretion in these circumstances: see [21]-[31] below.”*

1353 Appeal Ground 5 was as follows:²⁶⁵⁶

“Having found: (a) a high degree of interrelationship between the Bolitho Proceeding and the Banksia Proceeding (RFJ[34]-[36]); and (b) that the legal and insolvency practitioners prosecuting the Banksia Proceeding shouldered most of the practical, evidentiary and financial burden of the conduct of the proceedings (RFJ[22d]), it was an error to approve the commission of the funder and legal costs and disbursements of the Bolitho Proceeding (amounting to \$17.55 million):

a. Without having proper regard to the relative contributions to the settlement of the of the Banksia and Bolitho proceedings;

b. On the assumption that the entire Settlement Sum was attributable to the Bolitho proceeding;

c. Without regard to the formula employed by Robson J in the partial settlement in Re Banksia Securities Limited [2017] VSC 148 at [104]; and

d. In circumstances where no common fund order had been made.”

²⁶⁵⁴ [ABL.001.0643.00052] [ABL.001.0643.00053].

²⁶⁵⁵ [CBP.001.007.7220] [CBP.001.007.7222].

²⁶⁵⁶ [CBP.001.001.0483].

1354 The submission made by Mr O'Bryan and Mr Symons in their written case was utterly misleading:

- (a) The matters in Ground 5 were **not** the subject of proper submissions before Justice Croft. To the contrary, Mr O'Bryan and Mr Symons had seriously and deliberately misled Justice Croft in their opinion, and they and AFP had sought to contractually silence the SPRs.
- (b) Whether it was a submission or a finding that the SPRs had shouldered most of the practical, evidentiary and financial burden of the conduct of the proceedings, Mr O'Bryan and Mr Symons knew, as a fact, that they had.
- (c) Justice Croft **had** mistaken the facts, because Mr O'Bryan and Mr Symons had misled him about the facts.
- (d) Justice Croft **had** failed to take into account material considerations, because Mr O'Bryan and Mr Symons had not drawn his attention to those material considerations.
- (e) The settlement approval **was** unreasonable and plainly unjust. It involved debenture holders paying \$20 million to AFP and the Lawyer Parties in circumstances where the Lawyer Parties had done hardly any work and AFP had provided hardly any funding.

1355 Mr O'Bryan and Mr Symons submitted at paragraph [2] that:

- (a) *"no substantial injustice will be done if the decision stands"*; and
- (b) debenture holders would be worse off if the appeal was allowed, because the only recourse would be a full trial against Trust Co which would exhaust Trust Co's limited assets.

1356 That was misleading. The settlement approval involved the substantial injustice of debenture holders being cheated out of millions of dollars. And Mr O'Bryan and Mr Symons did not address the fact that there would likely be another settlement. Self-evidently, Trust Co wanted to settle. It would not have troubled Trust Co to settle on terms that involved AFP and the Lawyer Parties receiving less money.

1357 Mr O'Bryan and Mr Symons submitted at paragraph [28] that:

*“At the core of Ground 5 is the erroneous assertion that the primary judge found that ‘the legal and insolvency practitioners prosecuting the Banksia Proceeding shouldered most the practical, evidentiary and financial burden of the conduct of the proceedings’. This ‘finding’ is said to be recorded at [22(d)] of the Reasons. The introductory words to [22], however, record that the matters set out in [22] **were not findings, but the SPRs’ submissions.***

*Had the submission been disclosed to the First Respondent below (it was not, as it was made confidentially), **it would have been answered by evidence and submissions to the contrary.**”*

1358 On the basis of the incontrovertible and unchallenged evidence led in the remitter, it is plain that the SPRs and their legal team **did** shoulder most of the practical, evidentiary and financial burden of the proceedings.²⁶⁵⁷ It was misleading and false for Mr O'Bryan and Mr Symons to suggest that there was some answer they could have given to the contrary.

1359 Mr O'Bryan and Mr Symons submitted at paragraph [29] that:

“The Applicant’s assertion is therefore wrong. This supposed ‘finding’ appears to underpin the allegation of error in approving the payment of commission to the funder and the payment of legal costs and disbursements, on the asserted basis that there would be a logical fallacy in, using Ground 5(b) as an example, assuming ‘that the entire Settlement Sum was attributable to the Bolitho proceeding’ if the SPRs had done all the work and the First Respondent’s lawyers and litigation funder had done none. Grounds 5(a) and 5(c) operate similarly, while Ground 5(d) suggests error in approving the payment of the commission to the funder and of legal costs where no common fund order had been made. As the judge noted, the terms of settlement comprehensively addressed the distribution of the settlement sum, which was at the heart of the approval application.”

1360 That submission sought to convey the misleading impression that counsel for the SPRs were wrong when they said that the SPRs had done most of the work. Mr O'Bryan and Mr Symons knew that the SPRs **had** done most of the work.

1361 Mr O'Bryan and Mr Symons submitted at paragraph [31] that:

*“The Applicant has identified no basis upon which the exercise of discretion below has miscarried. **The Court may be fortified in this conclusion by the matters addressed in the Bolitho counsel opinion and the SPR counsel opinion.** The application for leave to appeal should be dismissed.”*

²⁶⁵⁷ Mr Kingston’s 2 June 2020 Affidavit [SPR.006.001.0004], paras 10-15; Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001] at paras [60.e], [61] – [71], [81] – [91].

1362 Here Mr O'Bryan and Mr Symons **expressly invited** the Court of Appeal to rely upon the First and Second Bolitho Opinion, which were replete with misleading statements (as set out in **Section I**).

Threat of personal costs orders

1363 On **26 April 2018**, Mr O'Bryan directed that a letter be sent threatening "*personal costs orders against Botsman & Withers*".²⁶⁵⁸ Mark Elliott agreed.²⁶⁵⁹ Mr Symons drafted and Mr O'Bryan settled that letter (ultimately seeking threatening personal costs against Mr Botsman but not Mr Withers),²⁶⁶⁰ and Mr Zita sent it.²⁶⁶¹

1364 In cross-examination, Mr Zita conceded that he exercised no independent judgment in sending that letter,²⁶⁶² expressed regret for sending it, and publicly apologised to Mr Botsman.²⁶⁶³

1365 The documentary evidence shows that Alex Elliott was included in correspondence in connection with the strategy of threatening Mr Botsman with personal costs orders,²⁶⁶⁴ and that he did nothing to prevent that letter being sent.

Emails between Mr O'Bryan and Mr Redwood ahead of hearing in the Court of Appeal on 8 June 2018

1366 On **7 June 2018**, Mr Redwood emailed Mr O'Bryan, Mr Withers, Mr Liondas, Ms Shand, Ms Bindon and Mr Symons attaching a document setting out all the evidence filed in the proceeding by Mr Bolitho and the SPRs respectively, and informing the parties that he intended to hand it up to the Court of Appeal at the hearing the following day.²⁶⁶⁵

1367 On **8 June 2018**, Mr O'Bryan replied to Mr Redwood, stating: "*Please ensure the court understands that we worked together and co-operatively on much of this evidence, especially the experts*".²⁶⁶⁶

²⁶⁵⁸ [NOB.500.003.4094].

²⁶⁵⁹ [NOB.500.003.4117].

²⁶⁶⁰ [NOB.500.004.7557] [NOB.500.004.7560] [SYM.001.002.1758] [SYM.001.002.1759].

²⁶⁶¹ [CBP.001.013.2762] [CBP.001.013.2763] [CBP.001.013.2765].

²⁶⁶² [TRA.500.009.0001] T983:16-985:1.

²⁶⁶³ [TRA.500.009.0001] T986:9-17.

²⁶⁶⁴ [NOB.500.003.4094]; [NOB.500.004.7422]; [NOB.500.003.4117] [NOB.500.003.4119];

[NOB.500.004.7557] [NOB.500.004.7560]; [SYM.001.002.1888].

²⁶⁶⁵ [CCW.021.001.0001].

²⁶⁶⁶ [NOB.500.004.6685].

1368 In fact, the evidence shows that, whilst Mr O’Bryan had assisted with the expert evidence prior to the Relevant Period (ie, before June 2016), he had done little on evidence preparation in the Relevant Period.²⁶⁶⁷ In the Relevant Period, the SPRs had done virtually all of the hard work on evidence preparation.

Day 1 of the Court of Appeal hearing on 8 June 2018

1369 On **8 June 2018**, the parties to the Botsman Appeal appeared before the Court of Appeal for the first day of the hearing.

1370 By way of general overview, the evidence establishes the following:

- (a) **Mr Withers** and **Mr Botsman** appeared for Mrs Botsman.²⁶⁶⁸
- (b) **Mr O’Bryan** and **Mr Symons** appeared for Mr Bolitho,²⁶⁶⁹ with **Mr Zita** instructing them.
- (c) **Mr Redwood** and Ms Bindon appeared for the SPRs.²⁶⁷⁰
- (d) **Mr Withers** made submissions first, concluding shortly after lunch.²⁶⁷¹
- (e) **Mr O’Bryan** made submissions next.²⁶⁷²
- (f) **Mr Redwood** made submissions last.²⁶⁷³

²⁶⁶⁷ Mr Kingston’s 2 June 2020 Affidavit [SPR.006.001.0004], paras 10-15; Mr Newman’s 25 March 2019 Affidavit [SPR.006.001.0001] at paras [60.e], [61] – [71], [81] – [91]. The Court should accept the unchallenged evidence of Mr Kingston and Mr Newman that the extent of the assistance provided by the Bolitho team was limited to some comments provided by Mr O’Bryan on advanced drafts on 3 witness outlines and 5 expert reports, and attendance at 2 of the **145** expert conferrals conducted by Maddocks, both of which occurred in September 2015. See further: [NOB.500.013.2098] [NOB.500.013.2099] (Mr Smoker), [NOB.500.013.1507] [NOB.500.013.1508] (Mr Silavecky); [NOB.500.013.1522] (Mr Britton), [NOB.500.002.2786] [NOB.500.002.2787] [NOB.500.002.0639] [NOB.500.002.0640] (Mr Hardy), [NOB.500.002.0192] (Mr Story), [NOB.500.001.8278] [NOB.500.007.7166] [NOB.500.007.7167] (Mr Hall).

²⁶⁶⁸ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] (transcript cover sheet).

²⁶⁶⁹ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] (transcript cover sheet).

²⁶⁷⁰ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] (transcript cover sheet).

²⁶⁷¹ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7685 (T2) & .7762 - .7771 (T79-88).

²⁶⁷² Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7772 - .7816 (T89–133).

²⁶⁷³ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7817 (T134-148).

Alex Elliott's evidence about the hearing on 8 June 2018

Alex Elliott was at the hearing for the submissions of Mr Withers and Mr O'Bryan

1371 Alex Elliott said that he and his father attended the hearing on 8 June 2018 and sat next to one another in the courtroom.²⁶⁷⁴ He said that he left at around **3.15pm**²⁶⁷⁵ to drive to his family's ski resort in Mt Buller for the opening weekend of the ski season.²⁶⁷⁶ He said that he recalled Mr O'Bryan's submissions,²⁶⁷⁷ but was not present for Mr Redwood's submissions.²⁶⁷⁸ The evidence shows that Mark Elliott was present for the entirety of the day.²⁶⁷⁹ Alex Elliott said that Mark Elliott departed for a holiday to Europe later that night.²⁶⁸⁰

"My Thoughts" Document

1372 Alex Elliott prepared a contemporaneous note arising out of the hearing on 8 June 2018 entitled "*my thoughts*", which he sent to his father by email on **12 June 2018** ("**My Thoughts**" Document).²⁶⁸¹

1373 The "My Thoughts" Document was produced following the forensic examination of Mark Elliott's computer. It was one of few internal emails exchanged between Mark and Alex Elliott relevant to the issues in this remitter which Mark Elliott had not deleted, and as set out above, the Court should find that this was inadvertent of Mark Elliott, who otherwise comprehensively and deliberately destroyed all of his private emails with Alex Elliott after the Contradictors began to make enquiries about Alex Elliott's role.

1374 Alex Elliott said that the "My Thoughts" Document was a "*rolled up summary*" of "*the day*", including "*Mr O'Bryan's submissions*", "*the submissions of Mrs Botsman*", "*what fell out of the Court of Appeal on that day*" and "*what dad had told me at the time*".²⁶⁸²

²⁶⁷⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1998:16-23, 28.

²⁶⁷⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:10-19.

²⁶⁷⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2009:1-2.

²⁶⁷⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2003:6-19.

²⁶⁷⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2008:25-29.

²⁶⁷⁹ Mr Newman's 2 June 2020 Affidavit [SPR.006.001.0002], para [19].

²⁶⁸⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1992:18-20, 2009:16-21.

²⁶⁸¹ [ABL.001.0643.00243].

²⁶⁸² Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:29-1990:5, 1991:15-27, 1998:24-29, 1999:6-8.

1375 Alex Elliott prepared the “My Thoughts” Document without the benefit of the transcript, which did not become available until **15 June 2018**.²⁶⁸³ The “My Thoughts” Document therefore contained Alex Elliott’s direct observation and interpretation of what had occurred at the hearing on 8 June 2018 while he was present at that hearing.

1376 The “My Thoughts” Document stated as follows (with emphasis as per the original):

“My thoughts:

1. Apportionment seems very necessary and unavoidable;

*2. What happens if the SRPs and Trust Co submit to the Court that it has the power to remit the funding commission and legal costs for reapproval—**how do we retain control of the funding commission so that we do not end up with \$3.2M?** Insist on apportionment? What if SRPs do not want to apportion?*

3. The funding commission needs to be directly referable to the Bolitho proceeding (ie 25% of \$50m) otherwise the funding commission will be attacked as unreasonable due to the lack of evidence filed by Bolitho, SRPs shouldering the burden, special purpose vehicle etc;

4. If the Court accepts our submission that they do not have the power under 33ZF and 33V to remake the Deed or remit certain clauses, then the Court will likely set aside the approval orders, having the effect of terminating the Deed:

a. Is terminating the Deed a better outcome than a \$3.2M funding commission?

b. Will it force the SRPs to apportion the settlement sum more favourably to Bolitho if they refuse to apportion favourably now?

c. Will Trust Co still be willing to settle on similar terms? Maybe not

5. Does having a clause to ‘negotiate in good faith the funding commission’ alleviate the suggestion that the Court is being held at ransom?

6. What is the denominator? \$64M, \$68M, \$70M

Key take-aways from Botsman’s appeal submission:

1. No evidence was filed on how the funding commission was derived

2. No evidence was filed explaining why the parties did not apportion the settlement sum

²⁶⁸³

[CBP.001.009.0137]; [CBP.001.008.1247];
Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1990:6-26.

3. *The funding commission is inconsistent with amount of evidence filed by the SPRs*
4. *Independence of Peter Trimbo*
5. *No instructions to Peter Trimbo regarding the parallel proceedings and duplication of work*
6. *Legal costs and disbursements should be \$1M*
7. *Legal costs should be referred to a Court Referee or Associate*
8. *Court should set aside approval order unless it has the power to alter funding commission and legal fees*
9. *The Court can not be held to ransom by the CPs of the Deed*
10. *Group members should not be disadvantaged by a failure to apportion the settlement sum between the parties*
11. *Funding fee should be revised to \$3,283,000*
12. *The Court has the power under 33ZF and 33V to alter the funding commission*
13. *The Court must strive to interpret the Deed so far as possible in a way to avoid any provision being found to be void, invalid or unenforceable.*

1377 Alex Elliott's evidence about the "My Thoughts" Document revealed his tendency to skew his evidence to suit his own perceived forensic advantages. In particular:

- (a) In examination in chief, he claimed that his purpose in sending the document was "*just trying to show an interest*" because it was "*an interesting application*" and "*it was just to show an interest, or show that I was turning my mind to some of those issues that were raised at that point*" which were "*very interesting and quite novel points that I was, you know, quite interested in*".²⁶⁸⁴
- (b) He was remarkably resistant to the suggestion that the "My Thoughts" Document contained his "*analysis*" of the issues in the appeal.²⁶⁸⁵ He gave the astonishing evidence that "*I just didn't really look at it as my account*",²⁶⁸⁶ despite the fact that it was entitled "*my thoughts*",²⁶⁸⁷ and despite the fact

²⁶⁸⁴ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1790:11-23.

²⁶⁸⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1989:28-1990:5, 1991:19-23.

²⁶⁸⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1999:9-11.

²⁶⁸⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1999:12.

that, on the face of the email, it was not merely a “*regurgitation*” of things that had been said.²⁶⁸⁸

- (c) He said: “*I never like considered myself, I guess, as working as a lawyer when I did this document.*”²⁶⁸⁹
- (d) He disputed the suggestion that the independence of Mr Trimbos and the integrity of his report were “*key*” points in the appeal, despite the fact that those points appeared under his own heading “*Key takeaways*”.²⁶⁹⁰
- (e) He denied that he and his father were concerned at the prospect that the commission could drop from \$12.8 million plus GST to \$3.2 million,²⁶⁹¹ despite specifically emphasising this issue in the “My Thoughts” Document.

1378 The Court should reject Alex Elliott’s evidence about these matters, all of which was inherently improbable, and which reflects poorly on his credibility and his veracity. It should be remembered that, as an officer of this Court, it was incumbent on Alex Elliott to provide this Court with an honest and forthright account of his recollections and his involvement. His failure to accept that he was acting as a lawyer is patently false when one has regard to the “My Thoughts” Document, prepared at his father’s request, summarising the main aspects of the day’s hearing in the Court of Appeal. It is alarming that a lawyer would so seek to underplay his role when giving sworn testimony in a hearing whose focus is on the ethical standards of lawyers. The complete failure to acknowledge his role and responsibility as a lawyer in this matter, and his patently false attempt to hide behind the descriptor “personal assistant”, lacks credibility. It also shows a defiance and disregard for the processes of the law, and a complete lack of self-awareness of the candour of persons who hold office as legal practitioners.

1379 The Court should find that:

- (a) Alex Elliott attended the hearing in the Court of Appeal and prepared the “My Thoughts” Document in his capacity as:
 - (i) a junior solicitor on the Banksia matter, and

²⁶⁸⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1991:19-23, 1993:17-20.

²⁶⁸⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1999:19-25.

²⁶⁹⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1993:21-27.

²⁶⁹¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1999:26-2001:9.

- (ii) a solicitor acting for AFP;
- (b) the “My Thoughts” Document, in its content, format, and language, reveals the true nature of Alex Elliott’s role relative to the Banksia matter from December 2016 onwards.

Exchange between Whelan JA and Mr O’Bryan during argument about apportionment

1380 Alex Elliott said that the issue of apportionment of the Trust Co Settlement Sum between the Bolitho Proceeding and the SPR Proceeding for the purposes of calculating AFP’s funding commission “*became quite an interesting issue*”²⁶⁹² and a “*critical element of the appeal*”.²⁶⁹³

1381 In the course of Mr O’Bryan’s submissions about that issue, a tense exchange occurred between Mr O’Bryan and Whelan JA, which is recorded in the transcript as follows:²⁶⁹⁴

“TATE JA: Yes, but it is not just a matter of mathematics, is it, because really the premise of that revised paragraph 6 of the objection is that there ought to be an apportionment with respect to the commission between the two proceedings because the commission only ought to relate to the class action. So it is a question of whether or not it would be appropriate to engage in some form of apportionment of the settlement sum, 64 million, how ought that to be divided, and then have the appropriate commission rate apply only to the class action. Is that dealt with anywhere in his Honour’s reasons, that question of the possibility of apportionment and therefore the application of a commission rate?”

MR O’BRYAN: Only insofar as his Honour compares the two cases in some detail and describes their differing features. He does not say explicitly, but it must follow from his Honour’s reasoning, we submit, that his Honour has reached the conclusion that **there is no sensible way in which the \$64m can be divided.**

TATE JA: But he does not say that, does he, anywhere?

MR O’BRYAN: No.

TATE JA: And he does not say it even implicitly anywhere, does he? He recognises that they are overlapping proceedings. He notes the argument that it is the special, the SPRs and their legal team who have done the burden of the work, but at no point does he actually address that point as to whether it would have been appropriate to apportion the \$64m sum.

²⁶⁹² Transcript of hearing on 3 December 2020 [TRA.500.018.0001], Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1793:31-1794:1, 1990:27-1991:7, 1997:6-21, 1997:30-1998:3.

²⁶⁹³ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1810:8-9.

²⁶⁹⁴ Transcript of hearing on 8 June 2020 [SYM.001.001.7683] at .7808 - .7810, T125:24-127:19.

MR O'BRYAN: He does not. **Could I just go back one step. He does not recognise that they have done the bulk of the work, your Honour.**

TATE JA: No, I accept that.

MR O'BRYAN: **He recognises their submission.**

TATE JA: Yes, of course, no - - -

MR O'BRYAN: **He recognises that submission which we were unaware of. Had we been aware of it things might have been different,** but in any event that was the submission that they made.

WHELAN JA: **There is no doubt they compiled most of the evidence.**

MR O'BRYAN: **Compiled in a sense that their name appears on the cover of the file.**

WHELAN JA: **I have read the file, I have read the fee notes. There is no doubt they compiled most of the evidence.**

MR O'BRYAN: **I have not read their fee notes, your Honours.**

WHELAN JA: **You seem to spend a lot time reading their witness statements.**

MR O'BRYAN: No. **We spent a lot of time in preparation of their witness statements, your Honours.** Mr Redwood will confirm – he will not be able to confirm the number of hours, but we jointly were involved in the preparation in particular of the expert evidence. The lay evidence of course had to be different because the lay witnesses were only witnesses which the special purpose receivers had access to and not us, but a large quantity of the evidence that was filed was expert evidence which was a joint venture.”

1382 Mr O'Bryan had earlier also submitted to the Court of Appeal that:

- (a) Justice Croft had read the Third Trimbo Report *“for the purpose of satisfying himself that all of the costs had been properly incurred and were reasonable”*, which conveyed the impression to the Court of Appeal that the Third Trimbo Report could be relied upon for that purpose.²⁶⁹⁵
- (b) the Third Trimbo Report was *“a road map for every step taken by Mr Bolitho in the context of the litigation”*,²⁶⁹⁶ which implied that the Third Trimbo Report accurately set out the work undertaken by the Lawyer Parties.

²⁶⁹⁵ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7801-.7802 (T118:31-119:5).

²⁶⁹⁶ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7802 (T119:12-14).

1383 Alex Elliott:

- (a) agreed that one of the issues that arose in the hearing was the question whether the claimed legal costs were excessive in view of the amount of work that the Bolitho team had done;²⁶⁹⁷
- (b) conceded that he had a general recollection of Mr O'Bryan's submissions on the issue of apportionment, and could recall Mr O'Bryan saying "*there's no sensible way in which the 64 million could be divided*".²⁶⁹⁸ **That confirms that he was present for the exchange between Whelan JA and Mr O'Bryan set out above.**

1384 The Court should find that:

- (a) Mr O'Bryan's submissions to the Court of Appeal were misleading, and deliberately so. The evidence summarised in **Section F** shows that the fee notes attached to the Third Trimpos Report grossly overstated the work undertaken, and the Lawyer Parties had not "*spent a lot of time in preparation of [the] witness statements*", and indeed, they had hardly worked on the matter throughout the Relevant Period.
- (b) Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons knew that the Court of Appeal had read the Third Trimpos Report and the invoices and fee slips attached to the report.
- (c) The comments made by Whelan JA could have left Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons in no doubt that the Court of Appeal was dubious about the veracity of the fees charged based on the fee notes attached to the Third Trimpos Report.
- (d) Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons knew from that exchange that serious issues had arisen with respect to the veracity of the fee claims.

²⁶⁹⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1993:28-1994:1.

²⁶⁹⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2003:6-9, 2006:30-2007:25; see also [AEL.100.008.0001].

The Botsman Appeal did not prompt Alex Elliott to revisit fee notes

1385 As noted above, Alex Elliott agreed that one of the issues that arose in the hearing was the question whether the claimed legal costs were excessive in view of the amount of work that the Bolitho team had done.²⁶⁹⁹ In that context, he gave the following evidence:²⁷⁰⁰

“So having been raised in the appeal, did you stop to wonder about the quantum of the legal fees charged by O'Bryan, Symons and Zita?---No.

Did it not occur to you at that point to think, 'I've never actually looked at their invoices and fee slips'?---No.

Did it not occur to you to think, 'Oh God, I don't know if dad's even looked at their invoices and fee slips'?---No.

Had you seen any fee slips from these three lawyers in this matter?--- Definitely hadn't seen Norman's. I don't think I'd seen Michael's either and I think Tony might have sent his to me but - - -

But by this time had you not seen some fee slips that were appended to Mr Trimbo's affidavit?---I don't recall seeing the fee slips, no.

You don't recall at this stage seeing any fee slips appended to Mr Trimbo's report?---I don't recall going through them, no.”

1386 The Court should find that:

- (a) Alex Elliott knew that he had never scrutinised Mr O'Bryan's invoices and fee slips. He must have known that his father had, at best, a limited opportunity to scrutinise Mr O'Bryan's invoices and fee slips, in circumstances where Mr O'Bryan produced his invoices on or around 11 December 2017²⁷⁰¹ and Alex Elliott delivered them to Mr Trimbo²⁷⁰² **shortly thereafter, on about 13 December 2017,**²⁷⁰³ evidently without taking a copy of them.²⁷⁰⁴

²⁶⁹⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1993:28-1994:1.

²⁷⁰⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 1994:13-29.

²⁷⁰¹ Alex Elliott said he received Mr O'Bryan's invoices that he gave to Mr Trimbo “*some time in early or mid-December*” (transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2133:15-18). The documentary evidence suggests that Mr O'Bryan finalised his invoices on **11 December 2017**, as per the metadata for the following documents: [NOB.503.001.0162] [NOB.503.001.0159] [NOB.503.001.0154] [NOB.503.001.0148] [NOB.503.001.0142] [NOB.503.001.0139] [NOB.503.001.0138] [NOB.503.001.0130] [NOB.503.001.0128] [NOB.503.001.0125] [NOB.500.001.7273] [NOB.500.001.7272].

²⁷⁰² Transcript of hearing on 11 December 2020, [TRA.500.001.0001], 2133:26-27.

²⁷⁰³ [TRI.001.006.0001].

²⁷⁰⁴ [CBP.001.011.5464].

- (b) In circumstances where an issue had arisen as to whether the fees were excessive, an ordinary person – let alone a solicitor and/or litigation funder – would revisit the invoices and fee slips to examine for themselves whether there might be any substance to the issue raised. Alex Elliott’s evidence that he did not do so is consistent with a wilful blindness to the veracity of the fees charged, a recklessness to the integrity of the Third Trimbo Report, and a complete failure to honestly acknowledge his responsibilities and duties as a lawyer and officer of the Court. **At best, he did not care whether the Third Trimbo Report and annexed invoices and fee slips were truthful.**²⁷⁰⁵
- (c) This evidence should inform the Court’s findings in relation to the allegations of dishonesty against Alex Elliott in **Sections F and H of the RLOI**.

Misleading conduct as to the First and Second Bolitho Opinion

1387 At the hearing on 8 June 2018, Mr O’Bryan submitted that the confidentiality regime in respect of the First and Second Bolitho Opinion was justified having regard to the need to *“compare and contrast the legal and factual substrata of the class action claim as compared to the special purpose receivers claim for the purposes of explaining to a judge why the particular legal costs and funding fees were reasonable in the case which we were bringing, and in particular to describe the comparison that should be drawn between amounts of funding commissions at the various percentage rates that might be applied to the \$64 million settlement sum”*.²⁷⁰⁶

1388 The Court should find that Mr O’Bryan’s submission to the Court of Appeal conveyed the impression that the opinions provided a reliable explanation as to why the claimed *“legal costs and funding fees were reasonable”*, when in fact, the regime of secrecy arose **because the opinions were unreliable** and Mark Elliott did not want them to be subjected to scrutiny and criticism, particularly by Mr Redwood, who was aware of the true facts as to the relative work contributions of the two legal teams, and was unaware of what Mr O’Bryan and Mr Symons had told Justice Croft about that issue.²⁷⁰⁷

²⁷⁰⁵ RLOI para [94] alleges that Alex Elliott contravened the overarching obligation to act honestly in that he knew that, or was reckless as to whether, the Third Trimbo Report was misleading.
²⁷⁰⁶ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7805 - .7806 (T122:24-123:9).
²⁷⁰⁷ [SYM.001.002.4556].

Mr Redwood's submissions to the Court of Appeal

1389 Late in the day on 8 June 2018, Mr Redwood made submissions to the Court of Appeal about the following matters:

- (a) the confidentiality of the Third Trimbos Report – Mr Redwood said:
 - (i) *“there could not possibly, to my mind, be anything confidential. We are on the same team working together. I cannot presently conceive of anything that could be confidential as against us”*;²⁷⁰⁸
 - (ii) *“it would have been preferable if we had have had access to it at the settlement approval, you know, and we were unconstrained to make submissions”*;²⁷⁰⁹
 - (iii) *“The confidentiality over the costs report went too far on principle. The affidavit was close to worthless to a debenture holder without the report, and it was difficult to reconcile with the notice given to debenture holders”*;²⁷¹⁰
- (b) relative contributions of evidence – Mr Redwood handed up SPR-1;²⁷¹¹
- (c) the confidentiality of counsel opinions – Mr Redwood said it was a “good question” as to why two legal teams kept their respective counsel opinions confidential from one another;²⁷¹²
- (d) the funding commission – Mr Redwood said: *“The need for apportionment does arise because they are wanting a funding commission, and the funding commission has to be referable to something. So, we do say that if the proposition is – and we do not know because we have not seen, ourselves, the reasoning. But if the proposition is that at least an integer or the key integer of the funding commission is 64 million – that is, the entire settlement sum – then it would have to be justified on some basis”*;²⁷¹³
- (e) the need for a contradictor – Mr Redwood said:

²⁷⁰⁸ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7716 (T33:21-27).

²⁷⁰⁹ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7820 (T137:22-30).

²⁷¹⁰ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7823 (T140:3-12).

²⁷¹¹ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7724 (T41:6-43:5).

²⁷¹² Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7727 (T44:27-45:11).

²⁷¹³ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7819 (T136:14-137:26).

- (i) *“In relation to the contradictor, it would have been better had a contradictor been appointed, as with the partial settlement”*;²⁷¹⁴
- (ii) *“whatever the Bolitho camp did or did not do, and we do not know because we have not seen, obviously, the submissions, but on our side, we were acutely conscious of our duties of candour to the court in the absence of a contradictor and we made a concerted effort in relation to the fairness and reasonableness of the settlement sum to identify competing considerations”*;²⁷¹⁵
- (f) the failure to properly consider Mrs Botsman’s objection – in relation to the question whether a common fund order was appropriate or preferable over a funding equalization order, Mr Redwood said: *“It is difficult to conclude the judge gave adequate consideration to those matters”*;²⁷¹⁶
- (g) clause 3.10 of the Settlement Deed – Mr Redwood said: *“It must be said 3.10, that kind of provision places counsel in a difficult position. It does have an inhibiting or chilling effect. At the very least, as we have said, we strive to put all factual and legal material before your Honours but it does on one view inhibit a candid opinion on the ultimate question, for example; is the funding commission fair and reasonable? If that is the expectation of the courts and of the regime, that counsel be in a position to express a view on that matter, then 3.10 is problematic”*;²⁷¹⁷
- (h) clause 2.4 of the Settlement Deed – Mr Redwood said: *“2.4, the condition precedent. It does have the problematic effect of placing the Court having to make a binary choice. As I have indicated, the combination of the two provisions, 2.4 and 2.10 [3.10] is problematic”*.²⁷¹⁸

8-9 June 2018: AFP and the Lawyer Parties’ reaction to Mr Redwood’s submissions

1390 Mr Newman was not present in the Court of Appeal in the afternoon, but said that he had telephone discussions with Mr Lindholm, Mr Kingston and Mr Gashi of

²⁷¹⁴ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7823 (T140:14-23).

²⁷¹⁵ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7824 (T141:6-15).

²⁷¹⁶ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7825 (T142:28 – 143:15).

²⁷¹⁷ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7828 (T145:29 – 146:7).

²⁷¹⁸ Transcript of hearing on 8 June 2018 [SYM.001.001.7683] at .7829 (T146:23-26).

Maddocks who conveyed to him that Mark Elliott had complained about Mr Redwood's submissions.²⁷¹⁹

1391 Alex Elliott confirmed in his evidence that his father was troubled by the submissions Mr Redwood had made.²⁷²⁰ He recalled his father "*being upset*".²⁷²¹

1392 On **8 June 2018** at **6.57pm**, Mr O'Bryan sent a text message to Mr Newman stating: "*Why have you decided to blow up the settlement?*"²⁷²²

1393 On **8 June 2018** at **8.20pm**, Mark Elliott sent an email to Mr Lindholm copied to Mr O'Bryan and Mr Newman, stating:²⁷²³

"John,

*Thanks for the chat and your confirmation that **Redwood went rogue** and acted against your instructions*

We now need to fix the mess by:

1. Sacking Redwood

2. You appointing a serious Senior Counsel to show and tell the Cof A that you support the deal, disapprove of what JR did and to declare that his personal opinion is just that

3. Agreeing between ourselves what our submissions will say next week about Court powers to approve/change the deal.

4. Disavow the Court of any notion that they can rejig the deal as they see fit

5. File an Affidavit by you supporting the deal, the funders fee and the implied apportionment of the settlement sum

Both Bolitho and AFP cannot standby and watch the SPR's through their counsel breach the deed and risk the Court deciding the terms of a new deal and imposing it on us against our will

We will act to avoid that if the above steps are either not taken or prove unsuccessful.

Please have DN confer with Norm on how to fix this mess."

²⁷¹⁹ Mr Newman's 2 June 2020 Affidavit [SPR.006.001.0002], para [19].
²⁷²⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2008:30-31.
²⁷²¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2009:24.
²⁷²² Mr Newman's 2 June 2020 Affidavit [SPR.006.001.0002], para [20].
²⁷²³ [SYM.002.002.7509] [SYM.001.002.1429].

1394 On **9 June 2018 at 7.55am**, Mr Lindholm replied to Mark Elliott copied to Mr O'Bryan and Mr Newman, stating: *"I had a good chat with Dave last night along the lines you've outlined below. Let's catch up Tuesday am if you're around"*.²⁷²⁴

1395 Mark Elliott forwarded that email to Mr Symons, who sent it on to Mr O'Bryan stating: *"I have no idea whether it means he will help or not"*.²⁷²⁵

10-11 June 2018: The direction to draw cheques to make sham payments to Mr Symons and Portfolio Law

1396 On **10 June 2018 at 6.59am**, Mr O'Bryan sent an email to Mark Elliott, stating:²⁷²⁶

"Having regard to what Whelan said on Friday about our bills & legal costs, I think it is vitally important that AFP pays MS & PL in respect of the accounts that Trimbo's has opined on, so that I can confirm to the court when asked (which I now think highly probable) that they have been paid. If I am asked on 19/6, I will need to be able to answer yes very quickly, since MS & TZ will be in court. Let me know if this causes any problem."

1397 On **11 June 2018**, Mark Elliott forwarded that email to Alex Elliott, stating:²⁷²⁷

"Alex, I think we should draw cheques to MS and PL. Use old BSL cheque book. Date cheques 1 August 2018. Use Trimbo's report to get \$ amounts correct. Put in envelopes marked 'do not open until you talk to MEE'. Give to each of TZ and MS before 19 June. Let's discuss."

1398 The email that Mark Elliott forwarded to Alex Elliott included Mark Elliott's email of 8 June 2018 to Mr Lindholm setting out his demands to ***"fix this mess"***. The email chain, in its totality, should have been highly disturbing to a solicitor in Alex Elliott's position, particularly in circumstances where his father was abroad and he was left in Melbourne as the litigation funder's sole legal representative.

1399 On **11 June 2018**, Alex Elliott replied to Mark Elliott, setting out *"the past/future costs of PL and MS"*.²⁷²⁸ In his evidence in chief, he confirmed that he obtained the figures set out in that email from the Third Trimbo's Report.²⁷²⁹

²⁷²⁴ [SYM.002.002.7509].

²⁷²⁵ [SYM.002.002.7509].

²⁷²⁶ [ABL.001.0601.00003].

²⁷²⁷ [ABL.001.0601.00003].

²⁷²⁸ [ABL.001.0601.00003].

²⁷²⁹ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:25-27.

1400 Alex Elliott drew cheques to Mr Symons (in the sum of \$608,031)²⁷³⁰ and Portfolio Law (in the sum of \$377,795),²⁷³¹ both of which he dated **1 July 2018**, and both of which he signed with his father's signature.²⁷³²

1401 Of these events, Alex Elliott gave the following evidence:

- (a) He said he had a "*vague recollection*" of reading his father's email of **8 June 2018** and Mr O'Bryan's email of **10 June 2018** when both were forwarded to him on 11 June 2018.²⁷³³
- (b) He agreed it was "*a pretty important email*".²⁷³⁴
- (c) He claimed that he did not think at the time that Mr O'Bryan was expressing concerns to his father about the questions that Whelan JA had been asking Mr O'Bryan in the Court of Appeal on Friday 8 June 2018.²⁷³⁵
- (d) He claimed that "*it didn't come across to me as something that was wrong*".²⁷³⁶
- (e) He said that "*Mr O'Bryan had asked my father to do something. He was a 30 year QC, his father was a judge, his grandfather's a judge. I didn't expect that he would be putting me in a position to mislead the Court of Appeal.*"²⁷³⁷
- (f) He claimed he thought the request was "*almost procedural*" in that "*Norman needed something done before court*".²⁷³⁸
- (g) He claimed "*I never thought that there was to be misleading the court.*"²⁷³⁹
- (h) He claimed he did not appreciate the significance of the fact that Justice Croft and the Court of Appeal had been told that AFP had actually paid the legal costs for which it was seeking reimbursement.²⁷⁴⁰

²⁷³⁰ [AFP.003.001.0386].

²⁷³¹ [CBP.004.009.0215].

²⁷³² Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:28-1729:26.

²⁷³³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2011:20-26.

²⁷³⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2011:27.

²⁷³⁵ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2012:31-2013:6.

²⁷³⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2012:31-2013:6.

²⁷³⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2018:7-10.

²⁷³⁸ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2018:2-12.

²⁷³⁹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2018:13.

²⁷⁴⁰ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2013:25-2014:9.

- (i) He said his father had never asked him to sign a cheque in his name on any prior occasion,²⁷⁴¹ yet he initially denied thinking the request to do so was unusual.²⁷⁴²
- (j) He said he *“may have spoken on the phone at some point”* with his father about the request to draw the cheques,²⁷⁴³ but claimed he could not actually recall any discussion.²⁷⁴⁴ It was odd for Alex Elliott’s recollection of this event to be so poor in circumstances where the relevant event was an unusual and irregular event.²⁷⁴⁵
- (k) Somewhat inconsistently, he said he could specifically recall that his father orally told him to sign the cheques with his signature.²⁷⁴⁶
- (l) He said he could not recall why his father wanted him to forward-date the cheques.²⁷⁴⁷
- (m) He said he *“didn’t put two and two together”* from the request to use the *“old BSL cheque book”*.²⁷⁴⁸
- (n) He said: *“Looking at it now I can appreciate, you know, with the I guess facts of this case, it doesn't look good. But I don't know, maybe I was just naive to it, I'm not sure.”*²⁷⁴⁹
- (o) In examination in chief, he said: *“The cheques, they didn't seem like a big deal to me at the time and I never, I never really understood, I guess, the gravity of what was going on. I mean, like it's probably a little bit inexplicable looking at it now... I just - I can't, I can't really I guess explain, explain what went on there.”*²⁷⁵⁰

2741 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:2.
 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:5-14.

2742 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:9-10.

2743 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2016:7-9.

2744 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2016:10-22.

2745 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1730:2.
 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2015:5-14.

2746 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2016:23-26.

2747 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2016:1-4.

2748 Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2019:8-22;
 [AFP.003.001.0386]. The cheques were drawn in the name of BSL Litigation Partners, which had changed its name to Australian Funding Partners Limited on 16 January 2018).

2749 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1732:13-16.

2750 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1732:27-11.

- (p) But under cross-examination, he said ***“I didn’t like the idea of signing the cheques... I recall feeling uneasy about it.”***²⁷⁵¹

1402 The Court should reject Alex Elliott’s evidence that he did not appreciate that there was anything untoward about the request to draw the cheques to Mr Symons and Portfolio Law. That evidence is implausible against the background of:

- (a) the hearing on 8 June 2018, particularly the exchange between Whelan JA and Mr O’Bryan;
- (b) the explosive and angry stir caused by Mr Redwood’s submissions, which had prompted Mark Elliott to write to Mr Lindholm setting out a highly unethical list of demands, including a demand that Mr Lindholm sack his counsel;
- (c) the 10 June 2018 email from Mr O’Bryan, which made it abundantly clear that he was concerned about the questions Whelan JA had asked him and the questions the Court of Appeal might ask him on 19 June 2018, by reason of which he needed AFP to urgently make payments totalling **\$1 million** to Mr Symons and Portfolio Law;
- (d) the 11 June 2018 email from his father, which made it abundantly clear that the payments totalling **\$1 million** were to be **sham payments** provided with instructions to ensure the recipients **did not present the cheques**.

1403 As set out below, the Court should find that Alex Elliott delivered the cheques on about 18 or 19 June 2018.

12 June 2018: O’Bryan and Symons discuss holding back the First Bolitho Opinion if the SPRs continue to retain Mr Redwood

1404 On **12 June 2018 at 10.44pm**, Mr Symons sent an email to Mr O’Bryan in the context of a discussion about whether to provide Mr Botsman with the First and Second Bolitho Opinions, in which he said:²⁷⁵²

“If Lindholm puts on an affidavit which ascribes most of the value to the Bolitho claim, I would simply give the opinions to Botsman subject to a confidentiality undertaking. If that becomes common ground, I don’t see that there’s anything particularly prejudicial in Botsman having them. If

²⁷⁵¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2023:7-18.
²⁷⁵² [SYM.001.002.3098].

Lindholm doesn't do so and it turns out that Redwood will really be retained, then I would continue to oppose."

1405 This email exchange confirms that Mr Symons was complicit in the campaign of intimidation against Mr Redwood.

13 June 2018: Mr O'Bryan follows up about the cheques

1406 On **13 June 2018**, Mr O'Bryan emailed Mark Elliott asking: "*Is the costs question squared away?*"²⁷⁵³

1407 On **13 June 2018** at **2.18pm**, Mark Elliott replied to Mr O'Bryan, copying Alex Elliott, and stating: "***It will be by Tuesday***".²⁷⁵⁴

1408 This email exchange confirms that:

- (a) Mr O'Bryan was very concerned to ensure that the cheques were delivered to Mr Symons and Portfolio Law **before** 19 June 2018.
- (b) Mark Elliott understood the need to ensure the cheques were delivered, and had agreed to put in place a strategy to address Mr O'Bryan's concerns about questions he might be asked in the Court of Appeal.
- (c) Alex Elliott was complicit in his father's conduct, and understood the gravity and urgency of what his father had asked him to do, not only because of the email exchanges, but also because he had witnessed first-hand the exchange between Whelan JA and Mr O'Bryan in the Court of Appeal, and prepared the "My Thoughts" Document following on from that hearing.

13 June 2018: Research and analysis of *Caason v Cao* in the context of issues raised in the Botsman appeal

1409 On **13 June 2018** at **5.27pm**, Alex Elliott emailed his father providing an analysis of the decisions in *Earglow* and *Caason* relevant to the propriety of including a condition precedent in a settlement deed which required the Court to approve a particular funding commission to the funder.²⁷⁵⁵ His email noted:

²⁷⁵³ [AEL.100.013.0001].

²⁷⁵⁴ [AEL.100.013.0001].

²⁷⁵⁵ [AEL.100.048.0001].

*“If the COA does not have the power to sever/alter a clause in the Settlement Deed, what do they do? If it gets sent back for re-approval, with the current CPs in the Deed, any primary judge will have to refuse approval(on Caason analysis). ... **The risk to group members appears too great!**”*

1410 Alex Elliott said that:

- (a) *“it became an issue that the court wanted to know about [the] court’s powers to sever parts of the settlement or what they did with, I guess, these conditions precedents in the settlement deed”;*²⁷⁵⁶
- (b) in a telephone call after his father left for Europe, his father asked him to *“look at”* the issue and he did.²⁷⁵⁷

14 June 2018: Mark Elliott decides to terminate the Settlement Deed

1411 On **14 June 2018**, Mark Elliott emailed Mr O’Bryan, Mr Symons and Alex Elliott, stating:²⁷⁵⁸

*“All, I think it’s time we try and double cross the SPR’S. **We should approach Trustco and offer to settle for \$50M + costs.** We should close the class and bind all class members to the deal-no one can appeal the deal as the Notice will advise them that under the LFA they are not allowed. If Trustco want the Undertakings from me and Norm we can provide them at no extra charge.*

If Trustco insist that the SPR's also settle (they may not given recent Yates J decision)we give them 7 days to obtain a separate agreement or else we go to trial

JL will agree to settle. He can go and get his own approval separate to us.

He cannot/will not fight the case. He gets all his costs back

Irrespective of Trustco response the Deed is dead

Only question is do we pull the Deed before 22 June or wait for Court to overturn Croft?

Via Redwood the SPR's have breached the Deed

MS-please draft a show cause letter to be sent tomorrow and give them till Monday to reply if we are all in agreement.

I say pull now if Norm says we will lose and avoid the precedent

²⁷⁵⁶ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2029:11-15.

²⁷⁵⁷ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2029:16-21.

²⁷⁵⁸ [SYM.001.002.2361].

Comments please.”

1412 Mr O’Bryan agreed with that strategy²⁷⁵⁹ and provided directions and advice for AFP to send a letter to the effect that *“Redwood’s submissions on Friday constitute a breach of the obligation to support the deed (both express and implied terms)”* and that *“AFP remains willing to settle, but only on a basis that reflects the terms earlier agreed; otherwise Bolitho will go to trial as soon as possible”*.²⁷⁶⁰

1413 Alex Elliott said that the settlement his father outlined would have been a better settlement for the subset of group members who had signed the Funding Agreement if AFP had been able to close the class,²⁷⁶¹ but he noted that Mr O’Bryan said that class closure was *“a bridge too far as we have always said we’d run an open class and so I doubt the court would allow closure now”*.²⁷⁶² He agreed that he knew that Mr O’Bryan and Mr Symons, who were counsel for the entire class, were being tasked with the job of drafting the letter to terminate the deed.²⁷⁶³

1414 On **14 June 2018 at 7.28am**, Mark Elliott sent a separate email to Alex Elliott stating:²⁷⁶⁴

“Don’t worry about cheques for PL and MS. We are terminating. Talk later.”

1415 On **14 June 2018 at 10.12am**, Alex Elliott replied to his father’s earlier email telling him not to worry about the cheques, saying: **“No worries.”**²⁷⁶⁵

1416 The Court should find that the emails exchanged privately between Mark and Alex Elliott fortify the conclusion that Alex Elliott knew he had been asked to make sham payments to Mr Symons and Portfolio Law. Once a decision had been made to terminate the Settlement Deed, the cheques no longer needed to be delivered. Clearly the delivery of the cheques was required **only** for the purpose of maintaining the deception in the Court of Appeal, in circumstances where the settlement was still active and had not been terminated.

²⁷⁵⁹ [NOB.500.003.9557].

²⁷⁶⁰ [SYM.001.002.2361].

²⁷⁶¹ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2030:7-24.

²⁷⁶² [NOB.500.003.9557] and Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2030:21-23.

²⁷⁶³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2030:25-27.

²⁷⁶⁴ [AEL.100.047.0001].

²⁷⁶⁵ [AEL.100.047.0001].

14 June 2018: Mr Symons and Mr O'Bryan draft the termination letter

1417 On **14 June 2018** at **11.57am**, Mr Symons emailed Mr O'Bryan attaching a draft letter from AFP to Mr Lindholm in the terms that Mr O'Bryan had suggested.²⁷⁶⁶ Mr O'Bryan settled the letter²⁷⁶⁷ and they provided it to Mark Elliott and Alex Elliott.²⁷⁶⁸

1418 On **14 June 2018** at **3.25pm**, Mark Elliott sent the letter to Mr Lindholm, copied to Mr Newman, Mr Kingston, Clayton Utz, and the Bolitho Class Action Email Account.²⁷⁶⁹

1419 The letter stated:²⁷⁷⁰

*“The making of submissions contrary to the express and implied obligations arising under the Deed constitutes a breach of the Deed by the SPRs. **AFP is giving consideration to whether it should act to terminate the Deed and commence proceedings against the SPRs to recover its losses caused by the SPRs’ failure to comply with the express and implied obligations to support the Deed.***

There are two further critical matters:

*(a) AFP is not represented in the Appeal Proceeding, but it understands that, including as a result of the submissions made on the SPRs’ behalf, the Court of Appeal is giving consideration to altering the entitlement of AFP to receive the benefit to which it is entitled under the Deed. It appears likely that **the only way in which AFP can now protect its interests is by terminating the Deed; and***

*(b) While the ordinary result of a failure to make the Approval Orders is stated by cl 2.2 of the Deed, AFP considers that, in circumstances where a condition precedent is not satisfied as a result of the actions of the SPRs, **its rights against the SPRs are preserved.***

...

*Should the Deed be terminated, **AFP remains willing to enter into a new settlement, but only on a basis which will achieve returns at least equivalent to those previously agreed for group members represented by Mr Bolitho and to AFP.** Otherwise, AFP will seek that Mr Bolitho obtain the earliest possible trial date from the Court.*

AFP invites the SPRs to show cause by 10am Monday 18 June 2018 as to why it should not act to terminate the Deed.”

²⁷⁶⁶ [NOB.500.003.9554] [NOB.500.003.9555].

²⁷⁶⁷ [NOB.500.004.6850] [NOB.500.004.6851].

²⁷⁶⁸ [NOB.500.004.6850] [NOB.500.004.6851]; [SYM.001.002.2297] [SYM.001.002.2299]; [NOB.500.004.6847] [NOB.500.004.6848].

²⁷⁶⁹ [NOB.500.003.5728] [NOB.500.003.5729].

²⁷⁷⁰ [NOB.500.003.5729].

1420 Mr Zita conceded that he knew of the strategy pursued by Mark Elliott, Mr O'Bryan and Mr Symons of attempting to prevent or dissuade the SPRs and/or their counsel from making submissions in the Court of Appeal.²⁷⁷¹ In relation to the letter to Mr Lindholm threatening to terminate the Settlement Deed, Mr Zita sent an SMS to Mark Elliott stating: "**Good letter. We need to put pressure on these guys!**"²⁷⁷² Mr Zita conceded that he "*probably*" knew that the letter was going to be sent before he was copied to it on 14 June 2018.²⁷⁷³ He conceded that he did not inform Mr Bolitho of AFP's threat to terminate the settlement deed or consult him about it.²⁷⁷⁴

14 June 2018: Alex Elliott's ethical concerns about the termination letter

1421 On 14 June 2018, Alex Elliott emailed his father, stating: "*Are you convinced on this letter? I do not have a good feeling about it at all.*"²⁷⁷⁵

1422 When asked by his father to explain, Alex Elliott elaborated:

"1. It draws a clear line in the sand between SPRs and AFPL

2. AFPL is representing 5,600 group members interests pursuant to the LFA- it is not acting in their interests by terminating the Deed? I have concerns about AFPLs control/self interest and how that may be exploited by Botsman and Co

3. The Courts reaction to terminating the Deed will not be favourable

4. What if TC do not want to deal anymore."

1423 Alex Elliott gave the following evidence in relation to this email:

- (a) He said he didn't look at it as an "*ethical problem*" but rather "*I looked at it as, 'It's a pretty good deal, dad. You want to make sure you can do a better deal if you want to cancel this one.*"²⁷⁷⁶
- (b) He agreed that he knew that, before Justice Croft, AFP had sought a common fund order on the basis that it had brought the proceeding on behalf of all 16,000 group members and for their benefit.²⁷⁷⁷

²⁷⁷¹ [TRA.500.009.0001] T995:1-7.

²⁷⁷² [CBP.004.010.0170] at .0175; [TRA.500.009.0001] T995:25-996:31.

²⁷⁷³ [TRA.500.009.0001] T997:1-10.

²⁷⁷⁴ [TRA.500.009.0001] T997:11-18.

²⁷⁷⁵ [AEL.100.058.0001].

²⁷⁷⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2035:18-27.

²⁷⁷⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2037:31-2038:13.

- (c) He said: *“it seemed a little bit unusual that the funder could, I guess, blow up the deal on behalf of, you know, two proceedings and 16,000 debenture holders and I was just saying to dad, you know, that just doesn't really sit that well, you know, have a think about that.”*²⁷⁷⁸
- (d) When his father replied directing him to send the letter, Alex Elliott replied: *“Hmmm”*.²⁷⁷⁹ He agreed that this was *“possibly”* a *“continuing expression of reservation”* about the position his father had arrived at to send the letter.²⁷⁸⁰
- (e) He said he did not think about the ethical position of Mr O’Bryan and Mr Symons in assisting AFP to terminate the deed.²⁷⁸¹
- (f) He agreed that he knew Mr O’Bryan and Mr Symons represented all 16,000 group members.²⁷⁸²
- (g) He said it never crossed his mind that there was a conflict in Mr O’Bryan and Mr Symons assisting AFP to terminate the Settlement Deed.²⁷⁸³
- (h) He acknowledged that contemporaneous documentary evidence showed that he had examined the conflict provisions in the Funding Agreement only two months earlier in the context of AFP v Botsman,²⁷⁸⁴ but he said *“Actually thinking about the consequence of that clause with Michael and Norman and them drafting letters about terminations of settlement deeds is not something I recall triggering in my mind as a breach of the LFA”*.²⁷⁸⁵

1424 The Court should reject Alex Elliott’s evidence that he did not perceive an ethical problem about the termination of the Settlement Deed, which is contrary to his statement in his email that he *“did not have a good feeling”* about the letter.

1425 The 14 June 2018 shows that Alex Elliott:

- (a) was concerned about AFP’s attack on the SPRs;

²⁷⁷⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2040:17-26.
²⁷⁷⁹ [AEL.100.058.0001].

²⁷⁸⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2046:28-2047:1.

²⁷⁸¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2037:16-19.

²⁷⁸² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2037:23-27.

²⁷⁸³ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2037:28-30.

²⁷⁸⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2048:25-2050:23;
 [AEL.100.030.0001].

²⁷⁸⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2050:18-22.

- (b) **was alive to the impropriety** of the course being charted by his father;
- (c) **advised AFP against that course**, contrary to his assertion that he did not have a legal role within AFP and that his father did not value his opinion;
- (d) notwithstanding that his father rejected that advice, **maintained a continuing expression of reservation**, contrary to Alex Elliott's evidence that he was not in a position to seek to influence AFP's actions.

1426 These matters must be considered in the context where Alex Elliott conceded that he had examined the conflict provisions in the Funding Agreement only two months earlier. There was a glaring conflict between the interests of AFP and the group members, and the Court should find that Alex Elliott ultimately chose to ignore the conflict and allow his father's views to continue to prevail.

17 June 2018: Conferral between Mark and Alex Elliott about prospects and strategy

1427 On **17 June 2018**, Mark and Alex Elliott exchanged emails about the potential outcomes of the Botsman Appeal and AFP's strategy for securing its own financial interests in the funding commission.²⁷⁸⁶ In that context, Mark Elliott forwarded Alex Elliott an email from Mr Symons stating:

"I spoke to Liondas as requested.

(a) \$3.96m is the maximum figure for the reimbursement claim which he regards as reasonable, and he also seems to think that in reality the claim would be lower;

(b) Trust Co continues to support the settlement;

(c) In answering the questions put by the Court, they are likely to see a distinction between the Court's power and the consequences under the deed. I don't regard this as being particularly different from our position. Essentially, the Court might have power to 'approve' or say that it is happy with a funding commission which differs from that contemplated by the Deed, but that would have consequences for the operation of the Deed.

In addition, he wondered how helpful the letter sent last Thursday would be when resolving the situation requires

Bolitho/SPRs to work together and didn't think that Redwood's submissions had gone so far as the letter made out."

1428 In relation to the value of the Trust Co Remuneration Claim, Alex Elliott gave the following evidence:

- (a) He agreed that he knew that Mr O'Bryan and Mr Symons had submitted to Justice Croft that the Trust Co Remuneration Claim had a value of up to \$11 million, such that the total settlement value was \$75 million.²⁷⁸⁷
- (b) He said that he had read "*parts*" of the First Bolitho Opinion.²⁷⁸⁸
- (c) He acknowledged that he drafted the Script which he sent to Mr Zita for dealing with enquiries about the settlement,²⁷⁸⁹ and that his Script valued the Trust Co Remuneration Claim at \$3.96 million up to February 2014, and in respect of any claims beyond February 2014: "*unquantified but say \$30k pcm from March 2014 to date = over \$1M*".²⁷⁹⁰
- (d) He acknowledged that this figure was quite different to the sum referred to in the First Bolitho Opinion,²⁷⁹¹ and from the sum Trust Co itself evidently thought the claim was worth.²⁷⁹²
- (e) He said that he did not think it was important to go back to Justice Croft and rectify what he had been told as to what the Trust Co Remuneration Claim was worth.²⁷⁹³ He said it was a matter for Mr O'Bryan and Mr Symons, who had "*full information of the trustee remuneration claim*" whereas he said he had "*zero information about the trustee remuneration claim*".²⁷⁹⁴
- (f) Somewhat inconsistently, he then gave evidence revealing that he had a good understanding of the Trust Co Remuneration Claim. He said: "*it was highly complicated. I mean there was... even a point in time where the trustee could potentially have had a claim over the whole fund and charged some sort of percentage over the whole fund*".²⁷⁹⁵

²⁷⁸⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:6-22.

²⁷⁸⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:11-14.

²⁷⁸⁹ [ABL.001.0627.00038] [ABL.001.0627.00039];

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:27-31.

²⁷⁹⁰ [ABL.001.0627.00039] (third page);

Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:2-9.

²⁷⁹¹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:10-11.

²⁷⁹² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:29-2054:2.

²⁷⁹³ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:3-5.

²⁷⁹⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:6-31.

²⁷⁹⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2055:5-12.

- (g) When asked why he did not at least raise the disparity with his father or Mr O'Bryan or Mr Symons at the time, he said: *"I'm a first year lawyer. Are you telling me I'm supposed to go to Norman O'Bryan and say, 'Norman, your figures and how you calculate a trustee remuneration is wrong', when I don't have any of the facts? I haven't been involved in the case since its commencement. It's not my position to do so... If that's what they thought the figure was, that's the figure."*²⁷⁹⁶

1429 The Court should reject Alex Elliott's evidence that he did not owe any obligation, or have any capacity, to investigate the discrepancies regarding the value of the Trust Co Remuneration Claim. He was aware of three inconsistent values being accorded to that claim. In the circumstances, his evidence that he did not think it was important to go back to Justice Croft and rectify what he had been told as to what the Trust Co Remuneration Claim was worth defies belief, given that he was a lawyer acting in the matter.

1430 The notion that a solicitor, no matter his seniority, can become aware of the discrepancies of the kind exposed in relation to the Trust Co Remuneration Claim and do nothing about it completely undermines the role of a lawyer, and is inconsistent with Paramount Duty to the Court. Youth is no impediment to a legal practitioner's duty to **never mislead the Court**, which is so fundamental to the professional conduct of a legal practitioner. The notion that a first year lawyer should be excused from that obligation should not be countenanced.

1431 At the end of the day, the Court and the public are entitled to expect that all legal practitioners, regardless of age, will act with integrity.

18 June 2018: discussion between Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons about terminating

1432 On **18 June 2018**, Mark Elliott, Alex Elliott, Mr O'Bryan and Mr Symons exchanged several emails about terminating the Settlement Deed.²⁷⁹⁷ The general tenor of that correspondence is that Mr Symons was concerned about drafting a letter to terminate the Settlement Deed, but Mr O'Bryan wanted to press ahead with it.²⁷⁹⁸ Mr Symons sent two further emails to Mark Elliott and Mr O'Bryan suggesting that

²⁷⁹⁶ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2056:29-2057:23.

²⁷⁹⁷ [SYM.001.002.2146].

²⁷⁹⁸ [SYM.001.002.2146].

it would be unwise to terminate prior to the hearing the following day and stating: “If AFPL wants to take that step now, I think it would need to engage somebody else (Minters / ABL?) to assist”.²⁷⁹⁹

1433 Also on **18 June 2018**, Maddocks and Clayton Utz wrote to AFP on behalf of the SPRs and Trust Co respectively in response to AFP’s letter of 14 June 2018.²⁸⁰⁰ Both letters stated that the SPRs and Trust Co would regard any purported termination of the Settlement Deed by AFP as a repudiation of the deed and they would take steps to protect their clients’ interests.²⁸⁰¹ The Clayton Utz letter stated:

“3. Further, Trust Co considers that the labelling of your letter as being ‘without prejudice’, and the attempt thereby to cloak your letter with without prejudice privilege, is both inappropriate and ineffective. The letter does not contain any genuine offer by AFPL to compromise the dispute AFPL has created, and nor is it a genuine attempt by AFPL to engage in communications to settle that dispute. Accordingly, should AFPL purport to terminate the Deed, Trust Co will rely on your letter and this response (which, for the avoidance of doubt, is sent on an open basis) in any proceedings arising out of any wrongful termination of the Deed by your client. Trust Co also reserves its rights to bring your letter to the attention of the Court at the resumed hearing on 19 June 2018 if it considers that to be necessary.

*4. Finally, Trust Co reminds you that it is in the interests of the debenture holders, the funder and each of the respondents to work together constructively in the context of the Court of Appeal proceeding to retain the settlement approved by Croft J, or if that is not possible, to reach a result that preserves as much of that settlement as possible (whether by order of the Court or in a renegotiation between the parties). Notwithstanding Trust Co’s ongoing support for the settlement that has been reached, if the Deed comes to an end for any reason, then the parties should not assume that Trust Co will be prepared to settle the proceeding for an amount of \$64 million in any future negotiation (and should appreciate the potential for that amount to be eroded, given that Trust Co continues to be forced to incur costs in relation to the Banksia proceedings, which costs would inevitably increase sharply if issues such as those raised by your letter are escalated). Among other things, we have of course also closely studied the recent decision in *Oztech Pty Ltd v Public Trustee of Queensland (No 15) [2018] FCA 819* to which you refer, which decision clearly illustrates the difficulties that all plaintiffs in the proceedings against Trust Co will face, particularly in relation to establishing liability and causation.”*

1434 The evidence discloses no further action by AFP to terminate the Settlement Deed following receipt of that correspondence. The Court should find that Mark Elliott

²⁷⁹⁹ [SYM.001.001.2146]; [SYM.001.001.2182].

²⁸⁰⁰ Clayton Utz’s 18 June 2018 letter: [CBP.001.011.4903] [CBP.001.011.4905].
Maddocks’ 18 June 2018 letter: [SYM.001.001.1276].

²⁸⁰¹ [SYM.001.001.1276] [CBP.001.011.4905].

abandoned his idea of terminating the Settlement Deed on or around 18 June 2018 after receiving the correspondence from Maddocks and Clayton Utz.

18 June 2018: Alex Elliott's summary of the submissions filed by the SPRs and Trust Co

1435 On **18 June 2018**, Alex Elliott sent his father concise summaries of the submissions filed by the SPRs and Trust Co in the Botsman Appeal.²⁸⁰²

18 or 19 June 2018: Delivery of cheques

1436 Alex Elliott was asked whether he delivered the cheques to Mr Symons and Portfolio Law. He said:²⁸⁰³

"No, not that I can recall, not at that time. Definitely not before the 14th. I don't recall before the 19th."

1437 The Court should find that Alex Elliott delivered the cheques on or about **18 or 19 June 2018**, for the following reasons:

- (a) AFP evidently decided on around **18 June 2018** not to terminate the Settlement Deed, because Trust Co and the SPRs had called its bluff.
- (b) When AFP decided not to pursue the strategy of terminating the Settlement Deed, the position reverted to where it was before: ie, the cheques needed to be delivered in case Mr O'Bryan was asked by the Court of Appeal on **19 June 2018** whether the fees had been paid.
- (c) There is nothing in the evidence to suggest that Mr O'Bryan became **less** concerned about the prospect of his deception being unveiled by questioning in the Court of Appeal following his 11 June 2018 email. To the contrary, tensions had escalated in the days since that email, having regard to the letters from Maddocks and Clayton Utz on 18 June 2018. That makes it all the more probable that cheques were delivered on 19 June 2018.
- (d) It was not simply a matter of Mr O'Bryan deciding whether or not he was prepared to run the risk of telling a bald-faced lie to the Court of Appeal that the fees had been paid. As he said in his 10 June 2018 email, he was

²⁸⁰² [AEL.100.019.0001] [AEL.100.021.0001].

²⁸⁰³ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:6-11.

concerned about the fact that Mr Symons and Mr Zita would be sitting in court.²⁸⁰⁴ That situation could not readily be resolved except by delivery of the cheques.

- (e) Mr Symons admitted in his affidavit that he received his cheque on “*about*” 1 July 2018.²⁸⁰⁵
- (f) The express rationale for delivering the cheques to Mr Symons and Portfolio Law in June 2018 was to avoid placing Mr Symons and Mr Zita in an embarrassing position if the Court of Appeal asked Mr O’Bryan whether their fees had been paid. Accordingly, Mr Symons must have received his cheque **prior to 19 June 2018** (the return date of the Court of Appeal hearing).
- (g) It was illogical for one of the cheques to be delivered, but not the other. If Mr Symons received his cheque in mid 2018, Portfolio Law must also have received its cheque at that time.
- (h) Mr Zita had no actual recollection of when he received his cheque in any event. His belief that he received the cheque at around the time it was banked was based on the fact that it was Portfolio Law’s usual practice to bank cheques within a few days of receiving them.²⁸⁰⁶
- (i) Alex Elliott was well aware of Mr O’Bryan’s insistence that the payment be attended to before the resumption of Court on 19 June 2018.²⁸⁰⁷
- (j) Alex Elliott confirmed in cross-examination that he attended the hearing in the Court of Appeal on 19 June 2018.²⁸⁰⁸ He also said that it was his usual practice to meet at counsel’s chambers prior to and/or after court.²⁸⁰⁹ He therefore would have had the opportunity to deliver the cheques to Mr Symons and Portfolio Law prior to court on 19 June 2018 if he had not already done so on 18 June 2018.

2804 [ABL.001.0601.00003].

2805 [SYM.007.001.0005_ext] at .0007

2806 Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 945:3-22.

2807 [ABL.001.0601.00003]; [AEL.100.013.0001].

2808 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:18-26.

2809 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1767:24-1768:31.

- (k) Alex Elliott did not expressly deny that he delivered the cheques prior to the hearing on 19 June 2018. He said: *Definitely not before the 14th. I don't recall before the 19th.*²⁸¹⁰ That evidence leaves open the possibility that Alex Elliott might have delivered the cheques between 14 and 19 June 2018. Having regard to Alex Elliott's inability to recall most of the events in issue in this remitter, his evidence on this issue is of limited assistance to the Court in evaluating the probabilities.

19 June 2018: Second day of hearing in the Court of Appeal

1438 On **19 June 2018**, the parties appeared in the Court of Appeal for the second day of the hearing.²⁸¹¹ Alex Elliott attended so that he could report back to his father, who was still overseas.²⁸¹²

1439 After the hearing on **19 June 2018**, the Court of Appeal joined AFP to the proceeding, and made orders providing for AFP to file submissions.²⁸¹³

1440 On **20 June 2018**, Alex Elliott sent his father two emails reporting on the hearing.²⁸¹⁴ In cross-examination, he objected to these being described as "*my analysis*". He said: "*I think it is what was submitted by Norman*".²⁸¹⁵

24 June 2018: Sunday night meeting at Elliott family home

1441 On the evening of **Sunday 24 June 2018**, there was a meeting attended by Mark Elliott, Alex Elliott, Mr O'Bryan, Mr Symons and Mr Zita at the Elliott family home to discuss the Botsman Appeal.²⁸¹⁶ This followed Mark Elliott's return from his holiday overseas on about **22 June 2018**.²⁸¹⁷

1442 In relation to this meeting, Mr Zita gave the following evidence:

- (a) Mr Zita initially said that Alex Elliott was there "*pouring the wines*".²⁸¹⁸ He then changed his answer to: "*He was just sitting there like he usually does*"

²⁸¹⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:6-11.

²⁸¹¹ Transcript of hearing in the Court of Appeal on 19 June 2018 [CBP.001.011.1948].

²⁸¹² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:18-26.

²⁸¹³ *Botsman v Bolitho (No 1)* (2018) 57 VR 68, [23] – [25].

²⁸¹⁴ [AEL.100.066.0001] [AEL.100.007.0001].

²⁸¹⁵ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:11-17.

²⁸¹⁶ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [434];

Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1323:27-1326:20.

²⁸¹⁷ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1751:3-7.

²⁸¹⁸ Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:25-26.

in a meeting".²⁸¹⁹ Oddly, Mr Zita then changed his answer again – when asked whether it was Mr Zita's evidence that Alex Elliott "*just poured the wine and thereafter he just sat there*", Mr Zita answered: "No."²⁸²⁰ This puzzling exchange undermined the credibility of Mr Zita's evidence as to the role of Alex Elliott.

- (b) Mr Zita said that Alex Elliott "*wasn't an active participant*".²⁸²¹ He could not recall Alex Elliott taking notes.²⁸²²
- (c) Mr Zita said that did not take any notes himself at the meeting,²⁸²³ and nor did he issue a memo after the meeting summarizing what had happened.²⁸²⁴
- (d) Mr Zita agreed that the purpose of taking notes at a meeting is to keep a record of what was said, and to action activity as a consequence of the meeting.²⁸²⁵ He said he could not recall any activity that he actioned as a consequence of the meeting.²⁸²⁶

1443 Following the meeting, Alex Elliott sent his father an email setting out a concise summary of the points discussed.²⁸²⁷ This highlights Mr Zita's limited insight into Alex Elliott's role and the work Alex Elliott undertook, and shows the contrast between Alex Elliott's role (which involved substantive legal work) and Mr Zita's role (which did not).

July – August 2018: AFP develops its arguments in the appeal

1444 On **19 July 2018**, Mark Elliott sent an email to ABL about the Botsman Appeal and the submissions filed by the other parties concerning the Court's power to vary the funding commission.²⁸²⁸ Alex Elliott was copied to that email exchange. In that email exchange:

2819 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:27-28.
 2820 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1324:29-31.
 2821 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:5-6.
 2822 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:7-8.
 2823 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:9-10.
 2824 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:11-14.
 2825 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:15-23.
 2826 Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1325:24-25.
 2827 [AEL.100.020.0001].
 2828 [TRI.006.001.0004].

- (a) Mark Elliott set out some comments on the question of “Court power”, relevant to questions that had arisen about the proper construction of the Settlement Deed.
- (b) He concluded: ***“We will develop this argument further and provide draft submissions for your consideration mid next week. Nothing further required from either Counsel in the interim.”***

1445 On **24 July 2018**, Alex Elliott emailed his father setting out important definitions and clauses in the Settlement Deed relevant to the construction arguments.²⁸²⁹

1446 On **27 July 2018**, ABL sent an email to Mark Elliott copied to Alex Elliott stating:²⁸³⁰

“I also now appreciate that our side is considering and planning for a possible special leave application. If that becomes necessary, depending upon the outcome, there may be a real question mark as to whether Bolitho can bring that special leave application.

If the Court of Appeal keeps the settlement intact, but forces AFPL to seek approval in relation to its commission and costs, it may expose a conflict if Bolitho was to seek special leave.”

1447 On **2 August 2018**, Mark Elliott sent an email to Mr Symons, which he subsequently forwarded to Alex Elliott, raising a number of questions for discussion in relation to AFP’s position on the appeal, and the arguments to be advanced.²⁸³¹

1448 Alex Elliott acknowledged that Mr Loxley, rather than Mr Symons, was briefed for AFP.²⁸³² He said that Mr Symons was at that time still acting for Mr Bolitho.²⁸³³ He said that his father *“often consulted Michael [Symons] on a number of things”*.²⁸³⁴

1449 From these emails, the Court should find that Mr O’Bryan and Mr Symons continued to act for and assist AFP in the Botsman Appeal, even after AFP was added as a party, and AFP obtained separate representation in the form of Mr Loxley, in circumstances where Mark and Alex Elliott knew (and were advised by ABL)²⁸³⁵ that there was a conflict between the interests of AFP and the interests of Mr Bolitho and group members in relation to the issues in the appeal.

2829 [AEL.100.032.0001].

2830 [TRI.006.001.0001].

2831 [AEL.100.041.0001].

2832 Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2069:27-31.

2833 Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2070:1.

2834 Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2069:29-30.

2835 [TRI.006.001.0001].

1450 On **7 August 2018**, Mark Elliott sent an email to Alex Elliott stating:²⁸³⁶

“Alex, Do me 3 lists please. 1. List of procedural issues that Botsman / Pitman complain of that they say we’re unfair. 2. Our response to each issue. 3. Reasons why we should get greater % of \$64M.”

1451 On **7 August 2018**, Alex Elliott replied, providing a summary of the issues arising in the appeal, the way AFP should respond, and the key points that could be made in favour of the Bolitho Proceeding getting a higher proportion of the settlement sum for the purposes of calculating AFP’s funding commission.²⁸³⁷

1452 Alex Elliott gave the following evidence about the *“three lists”* his father requested and he provided on 7 August 2018:

- (a) He said that he prepared the *“three lists”* for the purpose of his father providing it to Mr Loxley for submissions.²⁸³⁸
- (b) He said he reviewed the parties’ submissions filed in the appeal for the purpose of preparing the three lists.²⁸³⁹
- (c) He said the arguments he set out as to why AFP should get a higher proportion of the settlement sum were *“commonly discussed reasons between, I guess, dad and I and others that I’ve just outlined there”*.²⁸⁴⁰

1453 The July and August 2018 correspondence is telling as to Alex Elliott’s role. They reveal him as engaged in the matter in a professional legal context, acting as solicitor for AFP, and assisting in briefing Mr Loxley. That evidence exposes the lie that Alex Elliott was a *“personal assistant”*.

16 August 2018: AFP’s submissions in the Court of Appeal

1454 On **16 August 2018**, AFP filed written submissions in the Botsman Appeal which:

- (a) submitted that the primary judge’s discretion to approve the distribution to AFP was properly exercised;²⁸⁴¹

²⁸³⁶ [AEL.100.043.0001].

²⁸³⁷ [AEL.100.043.0001].

²⁸³⁸ Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2070:26-2071:5.

²⁸³⁹ Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2071:30-2073:4.

²⁸⁴⁰ Transcript of hearing on 10 December 2020, [TRA.500.021.0001], 2073:8-11.

²⁸⁴¹ [SYM.001.001.0251], paras [9] and [28].

- (b) adopted the contention that the value of the settlement included both the cash component and the benefit of the release from Trust Co's remuneration claim which was submitted to hold a value of \$11.16 million;²⁸⁴²
- (c) submitted that "*as the primary judge recognised, **AFP assumed significant risks**, including substantial adverse costs exposure, in funding the proceedings*", which AFP submitted comprised the following: "*AFP: (a) paid or agreed to pay security for costs in excess of \$1.5 million; (b) accepted liability for adverse costs against all defendants, with the quantum of that possible liability likely to exceed \$15 million; (c) paid legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*";²⁸⁴³
- (d) did not otherwise correct any of the misleading conduct referred to in **Sections B to K**.

1455 Alex Elliott admits that he knew those submissions were made.²⁸⁴⁴

30 August 2018: O'Bryan/Symons submissions "in reply" to AFP

1456 On **30 August 2018**, Mr Bolitho filed submissions "in reply" to AFP, drafted by Mr O'Bryan and Mr Symons, which submitted that AFP's "**invested capital**" was \$8.6 million to \$9.3 million "*in respect of the proceeding as a whole*" (depending on whether account was taken of the staging of agreed security for costs).²⁸⁴⁵

1457 Those figures:

- (a) assumed that AFP had actually invested or allocated capital in respect of the liabilities it said it had incurred;
- (b) sought to collapse any distinction between the claims that were settled in the Partial Settlement and the claims that were settled against Trust Co, conflating both the costs and the commission in order to, effectively, rewrite the Partial Settlement;

²⁸⁴² [SYM.001.001.0251], paras [3], [12] and [13].

²⁸⁴³ [SYM.001.001.0251], para [15].

²⁸⁴⁴ [PAR.080.001.0001], para [171A.g].

²⁸⁴⁵ [TRI.003.012.0009], paras [3] – [10].

- (c) excluded GST from the commission (the numerator) but included GST in the “invested capital” (the denominator);

1458 Mr O’Bryan and Mr Symons also endorsed AFP’s submissions as to the proper construction of the Settlement Deed, submitting that no other alternative construction was available.²⁸⁴⁶

1459 Mr O’Bryan and Mr Symons did not otherwise correct any of the misleading conduct referred to in **Sections B to K**.

1460 Alex Elliott admits that he knew those submissions were made.²⁸⁴⁷

L4. Findings the Court should make

1461 On the basis of the evidence set out above, the Court should find that:

- (a) Mark Elliott/AFP, Alex Elliott, Mr O’Bryan, Mr Symons and Mr Zita/Portfolio Law pursued a strategy of:
- (i) seeking to eliminate Mr Redwood and procure the SPRs to replace him with a counsel who would collude with AFP and the Lawyer Parties in submissions and evidence in the Court of Appeal;
 - (ii) seeking to intimidate the SPRs and threatening to terminate the Settlement Deed and sue them for damages in order to secure their cooperation;
- (b) their conduct was a breach of the Paramount Duty and the overarching obligation to only take steps reasonably necessary to resolve a dispute;
- (c) Mark Elliott/AFP, Alex Elliott, Mr O’Bryan and Mr Symons misled the Court of Appeal by:
- (i) the misleading submissions they were each involved in making, and the misleading information they were each involved in providing, to the Court of Appeal on behalf of AFP and Mr Bolitho;

²⁸⁴⁶ [TRI.003.012.0009], para [11].

²⁸⁴⁷ [PAR.080.001.0001], para [171A.g].

- (ii) their failure to correct any of the misleading conduct that had occurred before Justice Croft;
- (d) Alex Elliott actively participated in the deception perpetrated on the Court of Appeal, by the cheques he prepared for and (the Court should find) delivered to Mr Symons and Mr Zita/Portfolio Law to give effect to sham payments;
- (e) they each contravened the overarching obligation not to engage in conduct which is misleading or deceptive or likely to mislead or deceive.

M. FIDUCIARY DUTY CONTRAVENTIONS

M1. Outline of contraventions

1462 The Court should find that, by their conduct alleged in each of the preceding **Sections B to L**, each of AFP, Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law and Alex Elliott contravened the Paramount Duty by:

- (a) failing to meet duties they each owed to manage and/or avoid conflicts of interest; and
- (b) pursuing their own interests and the interests of each other in seeking to secure for themselves and/or each other payments that exceeded a fair and reasonable amount in respect of (1) legal costs, (2) commission and/or (3) scheme administration costs, to detriment of the interests of debenture holders/group members,

(together, **Fiduciary Duty Contraventions**).

M2. Legal principles

1463 It is submitted that conduct in flagrant breach of a lawyer's fiduciary duties, and conduct by a funder which procures those breaches, can, in appropriate circumstances, constitute a breach of the Paramount Duty.²⁸⁴⁸ The integrity of the justice system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice.²⁸⁴⁹

1464 The scheme of Part 4A is that the representative plaintiff or applicant owes fiduciary duties to group members.²⁸⁵⁰ The representative plaintiff's duty is sometimes

²⁸⁴⁸ DA Ipp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 93, 104, citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; *Black v Taylor* [1993] 3 NZLR 403; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Keys v Boulter* [1971] 1 QB 300 at pp 306, 309; *Everingham v Ontario* (1992) 88 DLR (4th) 755.

²⁸⁴⁹ DA Ipp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 93, 104, citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; *Black v Taylor* [1993] 3 NZLR 403; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Keys v Boulter* [1971] 1 QB 300 at pp 306, 309; *Everingham v Ontario* (1992) 88 DLR (4th) 755.

²⁸⁵⁰ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, [40]; *Dyczynski v Gibson* (2020) 381 ALR 1, [209].

expressed as “fiduciary duty not to act contrary to the interests of group members”.²⁸⁵¹

- 1465 The applicant’s lawyers also owe obligations to class members but how far those obligations extend is not settled.²⁸⁵² The applicant’s lawyers at least have a duty to act in the class members’ interests.²⁸⁵³
- 1466 Further, fiduciary duties arise where group members directly agree to retain a class action lawyer to act in the proceeding²⁸⁵⁴ (eg, where they sign a funding agreement pursuant to which they agree to retain the lawyers).
- 1467 A fiduciary relationship is characterised by trust and confidence, where the fiduciary undertakes or agrees to exercise a power or discretion on behalf of another person that will affect their interests in “a legal or practical sense”.²⁸⁵⁵ The fiduciary is given a special opportunity to exercise this power or discretion to the detriment of the other person who is, accordingly, vulnerable to abuse by the fiduciary of their position.
- 1468 It is submitted that the lawyers acting for the class owe fiduciary duties to all class members. The lawyers acting for the class have enormous power to affect the interests of group members, who are vulnerable, because their rights are dealt with in the representative proceeding, often without their knowledge. It is submitted that a representative proceeding is a paradigm case for fiduciary duties to arise.²⁸⁵⁶

²⁸⁵¹ *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [69]; *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 [33], [40].

²⁸⁵² *Dyczynski v Gibson* (2020) 381 ALR 1, [209], citing *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, [220] and [308].

²⁸⁵³ *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, [220], citing *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [57]; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480, [24] and [27]; *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [15].

²⁸⁵⁴ *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719, [36]; *Dyczynski v Gibson* (2020) 381 ALR 1, [208].

²⁸⁵⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J), 142 (Dawson J) (**‘Hospital Products’**).

²⁸⁵⁶ As per the test in *Hospital Products* at 96-7, 142; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 200–1 (Toohey J); *Breen v Williams* (1996) 186 CLR 71, 133–4 (Gummow J). See Degeling and Legg, “Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties” (2014) 37 University of New South Wales Law Journal 914 and Legg M, “Class Action Settlements in Australia — the Need for Greater Scrutiny” (2014) 38(2) Melbourne University Law Review 590, 596; Cashman and Simpson, “Research Paper #5: Costs and Funding Commissions in Class Actions” (2020) UNSW Law Research Paper No. 20-87, p 49-68.

- 1469 Fiduciary duties are duties of “absolute and disinterested loyalty”.²⁸⁵⁷ A fiduciary must not permit any conflict to arise between their loyalty to their principal and their own personal interests (or duties owed to others).
- 1470 Knowing participation in a dishonest and fraudulent breach of fiduciary duty includes **knowingly assisting** the fiduciary in the execution of a “**dishonest and fraudulent design**” on the part of the fiduciary to **engage in the conduct that is in breach of fiduciary duty**.²⁸⁵⁸ The requisite **element of dishonesty** and fraud on the part of the fiduciary is met where the conduct which constitutes the breach **transgresses ordinary standards of honest behaviour**.²⁸⁵⁹ Correspondingly, the requisite element of knowledge on the part of the participant is met where the participant has knowledge of **circumstances which would indicate the fact of the dishonesty** on the part of the fiduciary to an **honest and reasonable person**.²⁸⁶⁰
- 1471 Conduct which transgresses ordinary standards of honest behaviour is conduct which no honest person in the circumstances would undertake.²⁸⁶¹ It is not necessary to demonstrate that the person thought about what those standards were.²⁸⁶² In some circumstances, “a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards”.²⁸⁶³

M3. Admissions and concessions

- 1472 Mr O’Bryan and Mr Symons offer no defence to the allegations in the RLOI dated 21 July 2020, and do not contest findings being made against them on the basis of those allegations.²⁸⁶⁴

²⁸⁵⁷ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1 [67] (**Foresters**); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 104; *Phelan v Middle States Oil Corporation* (1955) 220 F 2d 593 at 602. See also *Bristol and West Building Society v Mothew (t/as Stapley & Co)* [1998] Ch 1, 18; [1996] 4 All ER 698; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [174].

²⁸⁵⁸ *Foresters* at [71], citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [160] (**Farah**).

²⁸⁵⁹ *Foresters* at [71], citing *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at [160].

²⁸⁶⁰ *Foresters* at [71], *Farah* at [174]–[177].

²⁸⁶¹ *Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4, [114].

²⁸⁶² *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, [124].

²⁸⁶³ *Farah* at [173].

²⁸⁶⁴ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

1473 AFP admits that:

- (a) The Lawyer Parties advanced the interests of AFP and their own interests in connection with the matters the subject of the RLOI.²⁸⁶⁵
- (b) AFP expressly or impliedly consented to the Lawyer Parties acting to advance its interests in respect of the application for commission and costs.²⁸⁶⁶
- (c) Mr O'Bryan and Mr Symons acted for AFP in recovering the costs and commission it claimed from the Trust Co Settlement.²⁸⁶⁷
- (d) Mr O'Bryan and Mr Symons acted as agents for AFP.²⁸⁶⁸
- (e) There were numerous actual or potential conflicts between the interests of Mr Bolitho/other group members and the interests of AFP and/or Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law in that:²⁸⁶⁹
 - (i) The Fee Arrangements that AFP entered into with Mr O'Bryan, Mr Symons and Portfolio Law as alleged in paragraph 484 above left AFP with little or no incentive to manage costs and fees, particularly in circumstances where greater fees appeared to magnify the funding risk assumed by AFP, thereby inflating the funding commission to which it might be entitled (and diminishing the funds from the settlement available to be returned to debenture holders).
 - (ii) The Adverse Settlement Terms were in the interests of AFP, but were "**possibly**" detrimental to the interests of Mr Bolitho and/or other group members.
 - (iii) Mr O'Bryan AM SC, Mr Symons and Portfolio Law had a direct financial interest in the payments sought by AFP in respect of legal costs, because AFP had not paid those costs.

²⁸⁶⁵ AFP's admissions [PLE.020.001.0001], para [51.a].

²⁸⁶⁶ AFP's admissions [PLE.020.001.0001], para [51.b].

²⁸⁶⁷ [PLE.020.001.0001] and [PAR.080.001.0001], para [51.n].

²⁸⁶⁸ Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 489:12-16;
Transcript of hearing on 4 August 2020 [TRA.500.006.0001], 540:8-14;
Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1589:9-17.

²⁸⁶⁹ [PLE.020.001.0001] and [PAR.080.001.0001], para [164].

- (iv) The claim for what was, in effect, a common fund order and the claim for legal costs gave rise to a potential conflict of interest between AFP and group members.
 - (v) There was a powerful interest on the part of AFP, with respect to its commission, to treat all of the settlement sum as referable to the Bolitho Proceeding and to minimise the significance of the SPR Proceeding. Given that the SPR Proceeding was brought for the benefit of, and paid for by, the debenture holders there was a significant potential for conflict.²⁸⁷⁰
 - (vi) It was not in the interests of debenture holders/group members for them to pay excessive amounts in respect of legal costs and disbursements, commission, or scheme administration costs.
- (f) AFP failed to comply with the Funding Agreement, Conflicts Management Policy and Disclosure Statement, in that:²⁸⁷¹
- (i) AFP's Conflict Management Policy and Disclosure Statement stated that AFP would monitor costs and budgets, but there is no evidence that AFP asked Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law to provide budgets or advance cost estimates or any documentary evidence of costs incurred from time to time;²⁸⁷²
 - (ii) AFP entered into the Fee Arrangements with Mr O'Bryan and Mr Symons as alleged in paragraph 47 of the RLOI;
 - (iii) there is no evidence that AFP ever informed Mr Bolitho and/or other group members of the numerous conflicts of interest that arose in relation to the Fee Arrangements and the Trust Co Settlement.

1474 Prior to opening his case, Alex Elliott adopted most of these admissions,²⁸⁷³ though he did not concede that the Adverse Settlement Terms were detrimental to the interests of Mr Bolitho and group members.²⁸⁷⁴

²⁸⁷⁰ *Botsman v Bolitho* [2018] VSCA 278 [332] - [333].

²⁸⁷¹ [PLE.020.001.0001] and [PAR.080.001.0001], para [178.b], [178.c] and [178.d].

²⁸⁷² [CBP.001.011.5669] [CBP.001.011.5670] [SYM.001.001.4116] [SYM.001.001.4119] [CBP.001.011.5464] [CBP.001.002.1535].

²⁸⁷³ [PAR.080.001.0001], paras [51], [164] and [178].

²⁸⁷⁴ [PAR.080.001.0001], para [164.b].

M4. Significant breaches of fiduciary duty by the Lawyer Parties
with AFP and Alex Elliott’s knowledge and assistance

M4.1 Breaches of fiduciary duty

- 1475 The Court should find that the Lawyer Parties acted to pursue AFP’s interests and their own interests at the expense of Mr Bolitho and group members, in clear breach of their fiduciary duties, all under the purview and control of AFP and Alex Elliott.
- 1476 **First**, it is plain on the totality of the evidence, and reinforced by the admissions and concessions made by the parties, that the Lawyer Parties all saw AFP as their real client. When situations of conflict arose, the Lawyer Parties chose to advance the interests of AFP at the expense of the group members. Each of the Lawyer Parties was involved with Mark Elliott on various other matters.²⁸⁷⁵ The Lawyer Parties permitted their own financial and commercial interests, including their commercial relationship with AFP, to subvert their fiduciary duties to their client.
- 1477 **Second**, and contrary to the ruling in Bolitho No 4, Mr O’Byrne had an arrangement or understanding with Mark Elliott/AFP pursuant to which he continued to maintain an interest in AFP and/or the litigation funding enterprise conducted by AFP, and pursuant to that arrangement or understanding had an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge) (as set out in **Section B**).
- 1478 **Third**, the Lawyer Parties entered into irregular Fee Arrangements with AFP as set out in **Section C**. It was a fundamental element of those Fee Arrangements that costs were **not** to be quantified and billed to AFP throughout the matter, but rather, were to be billed only when the matter settled. That removed an important “check and balance” ordinarily present in commercial class action litigation, where a litigation funder pays the legal fees and has a real interest and role in reviewing the fees and disbursements.²⁸⁷⁶

²⁸⁷⁵ See eg [SYM.001.003.2057] [SYM.001.003.2059]; [CCW.038.001.0005_2]; [ABL.001.0312.00096]; [AFP.010.001.0001]; [AFP.005.001.1428].

²⁸⁷⁶ See eg *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)* [2013] FCA 1163, [137].

1479 The conflict of interest that this presented was expressly recognised in AFP’s own Conflicts Management Policy, **which was drafted by Mark Elliott and settled by Mr O’Bryan**. That Policy stated:²⁸⁷⁷

“ASIC considers that a divergence of interests may arise because:

- (a) *[AFP] wishes to keep the legal and administrative costs of the funded litigation low to maximize its return;*
- (b) ***the lawyers may be seen to have an interest in maximizing their fees; and***
- (c) ***you have an interest in minimizing the returns of both [AFP] and the lawyers.***”

1480 The Fee Arrangements served the interests of AFP, by limiting the costs AFP had to pay out of its own pocket; and they gave free rein to the Lawyer Parties to maximise their fees at the end, when there was a settlement, particularly in circumstances where larger claims for fees derivatively supported a larger funding commission. There was a clear conflict between the interests of the group members on the one hand, and the interests of AFP and the Lawyer Parties on the other.

1481 The Fee Arrangements were unreasonable and unfair. The unfairness of it was exacerbated by the fact that there was no interim or ongoing disclosure of the costs of the litigation. Mr O’Bryan, Mr Symons and Portfolio Law did not maintain proper contemporaneous records of their time, and AFP did not require them to.

1482 **Fourth**, Mr Symons entered into a formal retainer agreement with AFP on around 1 March 2018 at \$800,000 per year (plus GST), on terms that are set out in an email chain between Mark Elliott and Mr Symons between 26 February 2018 and 1 March 2018.²⁸⁷⁸ In that email chain:

- (a) Mark Elliott told Mr Symons: ***“I would seek your undivided attention to all matters as directed – 24/7/365.”***
- (b) Mr Symons responded: ***“I am comfortable with turning down appearance work / time-sensitive work on the basis that it is***

²⁸⁷⁷ [AFP.006.001.0001] (see Disclosure Statement, clause 4.2).

²⁸⁷⁸ [AEL.100.070.0001].

inconsistent with the proposed retainer – and I have taken on less and less of that work over the last two years for that reason.”

- (c) Mark Elliott told Mr Symons: ***“I would ask for [your] reasonable assistance in seeking cost recovery when we win a case!”***
- (d) Mr Symons asked Mark Elliott: ***“what will happen in the event of a successful cost recovery”*** in excess of the retainer payments.
- (e) Mark Elliott replied: ***“TBA % share if/when we recover more than 40hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?”***
- (f) Mr Symons said: ***“I still have a considerable amount of time to recover in re: work in 2017 on the ongoing proceedings (MGC, SRX, MYR).”***
- (g) Mark Elliott replied: ***“SRX – suggest that you defer till later for bonus points. Myer and MGC-ok to charge.”***
- (h) Mark Elliott concluded: ***“the retainer is not meant to enrich me at your expense. Its simply my way of recognizing your valuable contribution, focusing your efforts and dissuading you from seeking work elsewhere.”***

1483 This was a highly unethical and improper arrangement, in which Mr Symons assumed a duty to AFP which was in direct conflict with his duties to the group members in various class actions including the Bolitho Proceeding. Mr Symons was incentivised to pursue the interests of AFP at the expense of his clients, by reason of the ***“TBA % share”*** that Mr Symons was to obtain from excessive fee claims, and by reason of the ***“bonus points”*** contingency fee uplift that both conspirators understood Mr Symons would be entitled to charge at the time of any settlement. The retainer impermissibly compromised Mr Symons’ independence, which is so fundamental to the office of counsel. It also shocks and offends by virtue of its brazenness and its financial scope for a junior counsel of three years’ standing at the time the retainer was brokered.

1484 **Fifth**, the Lawyer Parties in fact did charge excessive sums pursuant to the Fee Arrangements they entered into with AFP. Following the mediation on 9 November 2017, Mark Elliott met with Mr Lindholm and demanded that he agree to the

settlement deed providing for AFP to recover \$4.75 million plus GST in respect of costs and \$12.8 million in respect of commission. Mark Elliott then agreed fee targets with each of the Lawyer Parties (**Fee Targets**), and they each then set about generating documentation to support those sums. It was not in the interests of their clients for their legal fees to be quantified in this way, and for this process to thereby directly assist AFP in inflating its commission claim.

1485 **Sixth**, as set out in **Section E**, the Lawyer Parties drafted and procured terms in the Trust Co Settlement Deed²⁸⁷⁹ that were adverse to the interests of Mr Bolitho and group members,²⁸⁸⁰ including terms that sought to make the whole settlement conditional upon the approval of payments to AFP in respect of costs and commission, and that required the SPR to support those payments to AFP (despite the duties the SPR owed to the debenture holders). They could have, but did not, trigger the processes in clauses 13.3, 13.5 and 13.6 of the Funding Agreement to achieve the settlement without those adverse terms.²⁸⁸¹ They did not do so, as that would have adversely affected their personal interests and the interests of AFP. AFP had sufficient knowledge of those facts, because Mark Elliott himself drove the settlement negotiations and the drafting of the settlement terms.²⁸⁸²

1486 **Seventh**, as set out in **Section H**, the Lawyer Parties, AFP and Alex Elliott were each involved, to varying degrees, in misleading Mr Trimbos and/or procuring a misleading report from him to support their claim for fees. That subverted the interests of their clients in ensuring the fees were properly scrutinised to their own interests in recovering the fees. To take an example: each of the Lawyer Parties, AFP and Alex Elliott knew that Mr O'Bryan had informed Mr Trimbos that the trial would run for 120 days,²⁸⁸³ and each of them knew that was incorrect. It was in the interests of their clients to ensure that Mr Trimbos proceeded on the correct basis, but it was in their own interests to ensure that their claims for fees were approved. There was a clear conflict, which they exploited, to the knowledge of AFP.

²⁸⁷⁹ [SYM.002.001.4695].

²⁸⁸⁰ See AFP's admissions [PLE.020.001.0001], paras [55] and [59]. Note that AFP does not admit that the terms were "Adverse" but concedes that they were "*possibly*" detrimental to the interests of Mr Bolitho and group members: see para [164].

²⁸⁸¹ See AFP's admissions [PLE.020.001.0001], para [63.c].

²⁸⁸² See AFP's admissions [PLE.020.001.0001], paras [55], [56], and [59].

²⁸⁸³ This was referenced in Mr Trimbos's draft report: see [NOB.500.005.2312] [NOB.500.005.2314] at paras [93] – [96]; see also [NOB.500.005.2298].

- 1487 **Eighth**, as set out in **Section I**, in the First and Second Bolitho Opinions, Mr O'Bryan and Mr Symons advocated for the interests of AFP in securing a substantial funding commission, contrary to the interests of the group members whose claims they represented. They provided their opinions to Mark and Alex Elliott for review before they finalised them to ensure that AFP, their real client, approved their content.²⁸⁸⁴
- 1488 **Ninth**, in advising AFP to commence a proceeding against Mrs Botsman for an injunction “& **damages & costs**”, Mr O'Bryan and Mr Symons were advancing AFP's interests, rather than the interests of group members, who were after all their clients. Their advice was calculated to damage the interests of Mrs Botsman, who (as Mark Elliott put it) was an “*old lady doing it for the class*”.²⁸⁸⁵
- 1489 **Tenth**, in the Botsman Appeal, the Lawyer Parties contended that, if the payments to AFP were not approved, the whole settlement would cease to have any effect.²⁸⁸⁶ They explicitly rejected the notion that the settlement could be approved without also approving the payments to AFP.²⁸⁸⁷ That was contrary to the interests of Mr Bolitho and group members. AFP knew that the Lawyer Parties had made those submissions because Alex Elliott was in Court during oral submissions and reported back to Mark Elliott,²⁸⁸⁸ and AFP was joined to the proceeding and given the transcript and the parties' submissions.²⁸⁸⁹ On his return from overseas in late June 2018,²⁸⁹⁰ Mark Elliott convened a Sunday night meeting at his home on 24 June 2018 to discuss the events that led to AFP's joinder, and the manner in which it should conduct itself thereafter.²⁸⁹¹
- 1490 **Tenth**, the disgraceful campaign of intimidation that AFP and the Lawyer Parties directed at the SPRs and their junior counsel following the first day of hearing in

²⁸⁸⁴ [SYM.001.002.3778].

²⁸⁸⁵ [SYM.001.003.0019].

²⁸⁸⁶ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [149.c]; Transcript of hearing on 8 June 2018 [SYM.001.001.7683], 76:15-79:28. [SYM.001.002.8072] [SYM.001.002.8073] and [AFP.001.001.4473] [AFP.001.001.4474], being a letter **drafted by Mr Symons** with collaboration from Mr Elliott on 17-18 May 2018 **and sent by AFP** expounding this position.

²⁸⁸⁷ See the submissions of Mr O'Bryan and Mr Symons in “reply” to AFP dated 30 August 2018, [11] – [14].

²⁸⁸⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2058:18-26.

²⁸⁸⁹ Transcript of hearing on 19 June 2018, [TRA.550.001.0001] 140:6-11; *Botsman v Bolitho* [2018] VSCA 278 [23] – [25].

²⁸⁹⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1751:3-7.

²⁸⁹¹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], para [434]; [AEL.100.020.0001]; Transcript of hearing on 26 November 2020 [TRA.500.013.0001], 1323:27-1326:20.

the Court of Appeal had the express purpose of ensuring that the SPRs adopted a different position on the second day of hearing (of supporting AFP's claims for costs and commission, contrary to the interests of the group members). It was not in the interests of Mr Bolitho or group members for the SPR (who owes duties to act in their interests),²⁸⁹² AFP and the Lawyer Parties to "agree between ourselves" to file submissions in the Botsman Appeal aimed at dissuading the Court of Appeal from approving the settlement but not the payments to AFP, nor to file affidavits aimed at upholding a commission that was excessive.

1491 **Eleventh**, the Lawyer Parties were given express power under the Funding Agreement to protect group members in the event of conflicts of interest arising. Under cross-examination, Mr Zita agreed that he knew of the terms of the Funding Agreement, including the terms relating to management of conflicts.²⁸⁹³ None of them ever sought to use those powers to protect the interests of their clients.

M4.2 The breaches of fiduciary duty were serious, and AFP actively procured them

1492 It is submitted that it is useful to examine the Lawyer Parties' breaches of their fiduciary duties through the prism of *Barnes v Addy* accessory liability. If a breach of fiduciary duty by a legal practitioner can constitute a breach of the practitioner's paramount duty to the Court, so too should a litigation funder's knowing assistance in that breach be capable of constituting a breach of the funder's Paramount Duty.

The Lawyer Parties' breaches of fiduciary duty transgressed ordinary standards of honest behaviour

Mr O'Bryan and Mr Symons

1493 Mr O'Bryan and Mr Symons have themselves accepted that their conduct renders them unfit to remain on the roll of practitioners. No honest legal practitioner would conduct themselves in the way that Mr O'Bryan and Mr Symons did. The plain inference from the totality of the evidence and their concessions is that they intended by their conduct to secure large financial rewards for themselves, each other, and AFP, at the expense of their clients.

²⁸⁹² *Botsman v Bolitho* (2018) 57 VR 68 [260].

²⁸⁹³ Transcript of hearing on 14 August 2020 [TRA.500.008.0001], 805:14-22.

Mr Zita/Portfolio Law

1494 Only one allegation of dishonesty is maintained against Mr Zita/Portfolio Law (see **Section J**). However, **equitable dishonesty in the *Barnes v Addy* sense is broader than fraud or dishonesty at common law**. As noted above, in a claim for accessorial liability it must be shown that the fiduciary's conduct transgressed ordinary standards of honest behaviour. Establishing equitable fraud "does not require that an actual intention to cheat must always be proved".²⁸⁹⁴

1495 It is submitted that the conduct of Mr Zita/Portfolio Law fell short of ordinary standards of honest behaviour. In particular:

- (a) No honest solicitor should permit himself to be used as a "post box", or abrogate their duties to his client to others – **particularly** in the context where Mr Zita/Portfolio Law knew that they were appointed to act following the ruling in *Bolitho No 4* that Mark Elliott had a conflict of interest which made it inappropriate for him to act as solicitor.
- (b) No honest solicitor should allow the litigation funder to demand unreasonable conditions from the settlement of group members' claims, or issue correspondence advancing the funder's position (as Mr Zita did at the time of the Partial Settlement).
- (c) No honest solicitor should enter into a Fee Arrangement which involved deferring the delivery of invoices and maintaining no records of time actually spent on the matter, and then purport to charge on the basis of hourly rates by reconstructing bills to support a legal costs claim arbitrarily agreed with the litigation funder.
- (d) No honest solicitor should file a report purporting to support a claim for substantial legal costs out of settlement funds belonging to their clients without properly reading the report or counsel's invoices exhibited thereto.
- (e) No honest solicitor should seek to promote a under a settlement distribution scheme which he had not read, did not understand, and could not competently undertake, and which sought to impose fees on his clients which he had not scrutinised.

²⁸⁹⁴ *Polyaire Pty Ltd v K-Aire Pty Ltd* (2005) 221 CLR 287, [35]; *Nadinic v Drinkwater* (2017) 94 NSWLR 518, [22].

- (f) No honest solicitor should support a funder's campaign of intimidation against his own client to prevent her from raising legitimate concerns about claims for costs and commission which (the solicitor knew) he had never bothered to assess himself.

1496 Further, as set out above at **Section J4** (paragraphs 1291 to 1311), the Court should find that Mr Zita's conduct in relation to the settlement distribution scheme was dishonest, in that he had no honest and reasonable basis for seeking costs totalling **\$1 million** in respect of the Bolitho Scheme.

Alex Elliott

1497 Alex Elliott knew of the ruling in Bolitho No 4, and yet assumed an adumbral role of assisting in the legal conduct of the matter and assisting AFP and Elliott Legal in their business, in circumstances where the Court should find that it was readily apparent that Mr Zita/Portfolio Law acted as little more than a post box solicitor and that Elliott Legal continued to act as the "real" solicitor.

1498 The submissions set out at paragraph 1495 above apply to Alex Elliott with equal force. In addition, Alex Elliott actively perpetrated the deception on the Court in June 2018 when, at the request of Mr O'Bryan and his father, he drew sham cheques to maintain that deception.²⁸⁹⁵

1499 The Court should find that Alex Elliott assumed fiduciary duties as solicitor on the matter, which he breached by assisting his father to achieve AFP's commercial ends at the expense of group members. Alex Elliott's youth and inexperience, and his mentors' lack of integrity, ought not stand in the way of that finding. Alex Elliott was, at all relevant times, a solicitor. The class members dealing with him were entitled to expect from him the same standard of care and propriety of any and all legal practitioners. Age does not qualify, shape, or define the nature of a legal practitioner's duties. He was admitted to practice at the time of the events in issue. The evidence discloses that Alex Elliott paid closer attention to the matter than Mr Zita/Portfolio Law, and had a more sophisticated understanding of the legal and ethical issues in the case.

²⁸⁹⁵ [ABL.001.0601.00003]; [AFP.003.001.0386]; [CBP.004.009.0215];
Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1728:25-1729:26.

1500 The Court should find that Alex Elliott's dual roles of solicitor on the matter and solicitor for AFP gave rise to conflicts of interest, and that his conduct fell short of the standard expected of an honest and reasonable solicitor.

Dishonesty by the third party: AFP and Alex Elliott

AFP

1501 AFP has admitted to its own dishonesty, which is in any event overwhelmingly proved on the evidence. It should be noted that:

- (a) The evidence establishes that Mark Elliott, together with Mr O'Bryan, was the mastermind of the dishonest and fraudulent scheme executed by the Lawyer Parties.²⁸⁹⁶ That scheme involved a business model that extended beyond the Bolitho Proceeding and encompassed other class action matters, as set out in paragraph 521.
- (b) AFP admits that the Lawyer Parties advanced the interests of AFP.²⁸⁹⁷
- (c) AFP admits that it expressly or impliedly consented to the Lawyer Parties acting to advance the interests of AFP in the application for commission and legal costs.²⁸⁹⁸
- (d) AFP admits that the Lawyer Parties acted as agents for it.²⁸⁹⁹

1502 The Court should find that AFP had sufficient knowledge of that design to fix it with accessorial liability for their breaches of fiduciary duty.

Alex Elliott

1503 In addition to (and separately from) the contention that Alex Elliott owed fiduciary duties to the group members, it is submitted that he too had sufficient knowledge of the Lawyer Parties' dishonest and fraudulent design, for the following reasons.

1504 **First**, Alex Elliott attended the mediation. He agreed that his father saw the funding commission as a very good outcome for AFP, and that it was a good outcome for

²⁸⁹⁶ See **Section C3.6**.

²⁸⁹⁷ AFP's admissions [PLE.020.001.0001] at .0027, para [51.a].

²⁸⁹⁸ AFP's admissions [PLE.020.001.0001] at .0027, para [51.b].

²⁸⁹⁹ AFP's admissions [PLE.020.001.0001] at .0029 - 0031, paras [51.n] and [51.p]; transcript of hearing on 3 August 2020 [TRA.500.005.0001], 489:14-16; transcript of hearing on 1 December 2020 [TRA.500.016.0001], 589:9-17.

his family as well.²⁹⁰⁰ He agreed that entities associated with his family held 76 per cent of the shares in AFP, including Decoland, which was the trustee of the Elliott Equity Investment Trust and the Elliott Family Trust.²⁹⁰¹ Alex Elliott was and remains a beneficiary under both of those trusts.²⁹⁰²

1505 **Second**, Alex Elliott was “*across the various iterations*” of the Settlement Deed.²⁹⁰³ He knew that the position of AFP **and the Bolitho team** was that the claim for the funding commission had to be approved at the same time as the settlement was approved by the Court.²⁹⁰⁴

1506 **Third**, Alex Elliott said that he did not think that there was a problem about a conflict of interest arising, because (1) he was just an observer;²⁹⁰⁵ (2) the SPRs, Mr Crow, and counsel for Mr Bolitho agreed to the terms sought by AFP;²⁹⁰⁶ (3) “*this wasn’t my deal*”;²⁹⁰⁷ and (4) “*I didn’t really think about conflicts at that time and whether it was a good or bad thing for debenture holders*”.²⁹⁰⁸ But on any view, Alex Elliott had a role in the litigation, albeit a junior role. He was involved in the litigation as a solicitor. And he was assisting in the affairs of AFP, which had a duty to manage conflicts. The Court should find that Alex Elliott had notice of a conflict of interest at the time of the Trust Co Settlement.

1507 **Fourth**, Alex Elliott knew of the terms of the Funding Agreement, including the terms which empowered the Lawyer Parties to protect group members when conflicts of interest arose. The Court should reject Alex Elliott’s attempt in his evidence to downplay his level of understanding of the terms of the Funding Agreement,²⁹⁰⁹ because:

(a) The Funding Agreement for the Banksia litigation was evidently used as a template for funding agreements in other class actions funded by AFP, including the TPT Patrol v Myer class action. In December 2016, Alex Elliott was copied to emails about the terms of that funding agreement and the

2900 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:6-15.

2901 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2074:16-31.

2902 Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1599:3-12, 1601:23-1602:1; [MAZ.005.001.0001].

2903 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:5-13.

2904 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:14-17.

2905 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:26-2076:2.

2906 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2075:26-2076:6.

2907 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2078:16-17.

2908 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2078:21-24.

2909 Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1866:30-1868:8; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2040:27-2045:7.

Conflicts Management Policy,²⁹¹⁰ though he denied any awareness of the terms of the conflict provisions of the Banksia Funding Agreement or the Conflicts Management Policy arising from those discussions.²⁹¹¹

- (b) Alex Elliott signed a witness statement in AFP v Botsman in May 2018 in which he referred to the Funding Agreement,²⁹¹² which was included in the court book in that case. In his evidence in chief in this proceeding, Alex Elliott said that he “*went through the court book with ABL*” and that he recalled “*looking at it before I signed the witness statement*”.²⁹¹³ Under cross-examination he sought to distance himself from that evidence by asserting “*I would have looked through it, but like line and verse I wouldn’t have, I guess, considered it word for word*”.²⁹¹⁴
- (c) Alex Elliott was ultimately forced to concede that he must have reviewed the Funding Agreement in detail, only when he was confronted with documentary proof that he had done so in connection with AFP v Botsman.²⁹¹⁵

1508 **Fifth**, Alex Elliott knew that AFP was seeking a funding commission on the basis of a common fund order.²⁹¹⁶ He had read the decision in Money Max²⁹¹⁷ and other relevant decisions.²⁹¹⁸ He described the Money Max decision as “*a big moment in time*” in the litigation funding industry.²⁹¹⁹ Alex Elliott readily confirmed that **he knew risk was a factor in the Court’s assessment of a fair and reasonable funding commission.**²⁹²⁰

1509 **Sixth**, Alex Elliott said that he “*skimmed over*” the Third Trimbo’s Report in draft form before it was filed.²⁹²¹ He also delivered to Mr Trimbo’s all of the invoices of the Lawyer Parties, including Mr O’Byrne’s invoices,²⁹²² which were stamped as

2910 [SYM.001.001.7313].

2911 Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1866:30-1868:8.

2912 [AFP.100.011.0001], para [3] and [6].

2913 Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1658:18.

2914 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2043:29-2044:2.

2915 [AEL.100.030.0001]; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2048:29-2049:23.

2916 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:1-11.

2917 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:30-31.

2918 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2088:16-2089:7.

2919 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2089:14-22.

2920 Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

2921 Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1689:10-12.

2922 Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2133:26-27.

“PAID”. The Third Trimbos Report drew a distinction between (1) costs “incurred to date” and (2) “anticipated” or “prospective” costs of attending to the settlement approval.

1510 **Seventh**, Alex Elliott could recall reading the First Bolitho Opinion in draft form.²⁹²³ He said that he read “*parts*” of the opinion.²⁹²⁴ The Court should find that:

- (a) Alex Elliott at least read those parts of the opinion that related to AFP’s interests (which comprised substantially all of the opinion).
- (b) He therefore knew of the statements that Mr O’Bryan and Mr Symons made in the opinion which sought to justify AFP’s funding commission because of the risk it had undertaken in “*paying legal costs and disbursements (or, looking prospectively, being expected to pay such costs and disbursements up to the effective conclusion of the proceeding) of approximately \$7.8 million*”.²⁹²⁵
- (c) He was on notice of the fact that the opinion conveyed the misleading impression that the legal costs had been paid, save for the “anticipated” or “prospective” costs of attending to the settlement approval.

1511 **Ninth**, on **3 March 2018**, Mark Elliott sent an email to Alex Elliott and Max Elliott, forwarding his earlier communications with Mr Symons between 26 February 2018 and 1 March 2018 in which they negotiated a retainer agreement between Mr Symons and AFP. In that email chain, Mr Symons asked Mark Elliott “***what will happen in the event of a successful cost recovery***” in excess of the retainer payments. Mark Elliott replied: “***TBA % share if/when we recover more than 40hrs per week. I trust that you will agree that it worked well for you on the Banksia matter?***” It also contained discussion of deferring the delivery of invoices on existing matters “***till later for bonus points***”.²⁹²⁶ Alex Elliott replied to that email: “***Agreed***”. In cross-examination, Alex Elliott denied that his father consulted him about the retainer agreement²⁹²⁷ and glibly contended that, in his response, he

²⁹²³ [NOB.500.005.2485] [NOB.500.005.2487];
 Transcript of hearing on 11 December 2020, [TRA.500.022.0001], 2095:11-13.
²⁹²⁴ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:11-14.
²⁹²⁵ [SYM.005.001.1400], para [134].
²⁹²⁶ [AEL.100.070.0001].
²⁹²⁷ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1882:28-1883:28.

was **“just being agreeable”**.²⁹²⁸ The Court should reject this evidence, and should find that:

- (a) Mark Elliott consulted Alex Elliott about the financial affairs of the family business in which he held a significant role, including Mr Symons’ retainer;²⁹²⁹
- (b) Alex Elliott was on notice of the irregular and improper arrangements between AFP and Mr Symons, which on any objective view, were wholly inconsistent with Mr Symons’ fiduciary duties.²⁹³⁰

1512 **Tenth, on 11 June 2018**, in connection with the Botsman Appeal, Mark Elliott forwarded Alex Elliott an email chain revealing serious impropriety by AFP and Mr O’Bryan,²⁹³¹ including Mark Elliott’s email to Mr Lindholm of 8 June 2018 about **“sacking Redwood”** and Mr O’Bryan’s 10 June 2018 email to Mark Elliott telling him that it was **“vitaly important”** that AFP pay Mr Symons and Portfolio Law before the next hearing in the Court of Appeal on 19 June 2018. In that context, Mark Elliott directed Alex Elliott to draw cheques to make sham payments to Mr Symons and Portfolio Law. **Alex Elliott ultimately conceded in re-examination that what was being suggested involved a deception or misleading of the Court, and that he had enough information available to him to identify that deception.**²⁹³² Alex Elliott drew the cheques and signed them with his father’s signature, despite feeling **“uneasy”** about doing so.²⁹³³

1513 As noted at paragraph 1402 above, the Court should reject Alex Elliott’s evidence that he did not put **“two and two together”** and remained ignorant of the deception perpetrated on the Court.²⁹³⁴ But in any event, what matters for accessorial liability is knowledge of facts which would indicate dishonesty to an honest and reasonable person. On Alex Elliott’s own evidence, that requirement is satisfied.

²⁹²⁸ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1883:5-15.

²⁹²⁹ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1883:19-1884:3.

²⁹³⁰ cf Alex Elliott’s evidence that *“I didn’t see an issue with it... How he deals with his fiduciary obligations is up to him. The funder pays counsel every day in class actions anyway, I didn’t see it was that far removed”*: Transcript of hearing on 8 December 2020 [TRA.500.019,0001], 1884:4-17.

²⁹³¹ [ABL.001.0601.00003].

²⁹³² Transcript of hearing on 11 December 2020 [TRA.500.022.0001], 2186:8-30.

²⁹³³ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2023:10-18.

²⁹³⁴ Transcript of hearing on 9 December 2020 [TRA.500.020.0001], 2018:30-2019:28.

- 1514 **Eleventh**, on **14 June 2018**, Alex Elliott identified (and raised for his father’s consideration) a conflict between the interests of AFP and the interests of group members in connection with his father’s desire to terminate the Settlement Deed to protect AFP’s commercial interests.²⁹³⁵ But having identified that conflict, he prepared the letter of termination for his father to send anyway.²⁹³⁶
- 1515 **Twelfth**, on **17 June 2018**, Mark Elliott forwarded Alex Elliott an email chain containing an email from Mr Symons to Mark Elliott copied to Mr O’Byrne in which he said that he had spoken to Trust Co’s junior counsel, who had told him that the Trust Co Remuneration Claim could not reasonably be valued at any greater sum than the **\$3.96 million** that Trust Co had actually quantified, and that *“in reality the claim would be lower”*.²⁹³⁷ Alex Elliott knew that the First Bolitho Opinion asserted that the claim had a value of **\$11 million**.²⁹³⁸ Yet Alex Elliott said in cross-examination that he did not think it was important to go back to Justice Croft and rectify what he had been told about the value of the claim.²⁹³⁹ He contended that: *“If they valued it at \$11 million or whatever they valued it at, that was for them to value it at that... If that’s what they thought the figure was, that’s the figure”*.²⁹⁴⁰ Yet at the time of the Trust Co Settlement, his father had evidently suggested to him that it was worth no more than **\$5 million in total**,²⁹⁴¹ and on 17 June 2018, Trust Co’s own counsel informed Mr Symons that the claim was worth no more than **\$3.96 million**. Plainly then, the information that was given to Justice Croft was wrong, and it needed to be corrected. Alex Elliott conceded that he knew the denominator affected AFP’s funding commission.²⁹⁴²
- 1516 Alex Elliott clearly had enough information to know that this too was a deception or misleading of the Court, and yet he did nothing. That is not what the Court expects of one of its officers, or what the debenture holders were entitled to expect of Alex Elliott, whether as solicitor for the group members or solicitor for the funder. His conduct was not that of an honest and reasonable solicitor.

²⁹³⁵ [AEL.100.058.0001].

²⁹³⁶ Transcript of hearing on 3 December 2020 [TRA.500.018.0001], 1807:23-30.

²⁹³⁷ [AEL.100.008.0001].

²⁹³⁸ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2052:6-22.

²⁹³⁹ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2053:3-5.

²⁹⁴⁰ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:27-29, 2057:22-23.

²⁹⁴¹ [ABL.001.0627.00038]; [ABL.001.0627.00039]; Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2054:22-31.

²⁹⁴² Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2039:19-2040:6.

M4.3 Findings the Court should make

1517 The Court should find that, by reason of the matters set out in **Sections B to L** above and the concessions made by AFP, Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law and Alex Elliott:

- (a) the Lawyer Parties and Alex Elliott acted to pursue the interests of AFP and/or their own interests in a manner that gave rise to actual conflicts with the duties they each owed to Mr Bolitho and other group members;²⁹⁴³
- (b) the Lawyer Parties and Alex Elliott failed to act in good faith and in the interests of Mr Bolitho and other group members, but rather, sacrificed the interests of Mr Bolitho and/or other group members in favour of their own interests and the interests of AFP (in the manner set out in **Sections B to L**);
- (c) the conduct of the Lawyer Parties and Alex Elliott transgressed ordinary standards of honest behaviour,²⁹⁴⁴ and all the more alarmingly so when one remembers that those fiduciaries are officers of the Court;
- (d) AFP and Alex Elliott had sufficient knowledge of circumstances that would indicate the fact of dishonesty on the part of the Lawyers Parties to an honest and reasonable person,²⁹⁴⁵ and in fact Mark Elliott was the mastermind of much of the misconduct;²⁹⁴⁶
- (e) AFP and Alex Elliott facilitated, assisted and/or procured those significant breaches of fiduciary duty.

M5. **AFP's failure to comply with Funding Agreement, Conflicts Management Policy and Disclosure Statement**

M5.1 AFP

1518 Having regard to the statutory context in which litigation funders operate,²⁹⁴⁷ it is submitted that the Paramount Duty of a litigation funder ought properly be regarded

²⁹⁴³ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [176] and [##].

²⁹⁴⁴ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [152], especially [152.d] – [152.e].

²⁹⁴⁵ RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [153].

²⁹⁴⁶ See **Section C3.6.**

²⁹⁴⁷ *Corporations Regulations* 2001 (Cth) r7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB; *Civil Procedure Act* 2010 (Vic) s 10.

as encompassing a duty to adhere to its own policy in relation to the management of conflicts of interest.

1519 The Court should find that, in breach of its Paramount Duty, AFP failed to comply with the Funding Agreement, Conflicts Management Policy and Disclosure Statement, in that:

- (a) AFP circumvented the Bolitho No 4 Decision and the Bolitho Court Undertakings as alleged in **Section B**;
- (b) AFP's Conflict Management Policy and Disclosure Statement stated that AFP would monitor costs and budgets, but AFP has admitted²⁹⁴⁸ (and the documentary evidence shows)²⁹⁴⁹ it did not ask Mr O'Bryan, Mr Symons or Mr Zita/Portfolio Law to provide budgets or advance cost estimates or any documentary evidence of costs incurred from time to time;
- (c) AFP entered into the Fee Arrangements with Mr O'Bryan and Mr Symons as alleged in **Section C** above, arrangements which were unreasonable and unduly exposed group members to the risk of excessive charging (which was the tacit purpose of those arrangements);
- (d) there is no evidence that AFP ever informed Mr Bolitho and/or other group members of the numerous conflicts that AFP and the Lawyer Parties allowed to arise (a fact which AFP admits);²⁹⁵⁰
- (e) AFP induced or assisted Mr O'Bryan, Mr Symons and Mr Zita/Portfolio Law to breach their professional and fiduciary duties to Mr Bolitho and/or other group members, contrary to express provisions in the Funding Agreement and AFP's Conflicts Management Policy and Disclosure Statement, which stated that the safeguards in place to manage conflicts of interest included that *"the lawyers are to act for you and not [AFP] (and you should be aware that the lawyers owe fiduciary and ethical duties to their clients)"*²⁹⁵¹ and that *"we seek to ensure that your interests are adequately protected by acknowledging and accepting that the professional and fiduciary duties*

²⁹⁴⁸ AFP's admissions, [PLE.020.001.0001] at 0099, para [178.b].

²⁹⁴⁹ [CBP.001.011.5669] [CBP.001.011.5670] [SYM.001.001.4116] [SYM.001.001.4119] [CBP.001.011.5464] [CBP.001.002.1535].

²⁹⁵⁰ AFP's admissions, [PLE.020.001.0001] at 0099, para [178.d].

²⁹⁵¹ AFP's Disclosure Statement [AFP.006.001.0001], para [4.7.b].

*owed to you by the lawyers (being funded by [AFP] to pursue your claim) take precedence over any duties or obligations those lawyers may owe to [AFP]”.*²⁹⁵²

M5.2 Alex Elliott

1520 Having regard to the statutory context in which litigation funders operate,²⁹⁵³ it is submitted that the Paramount Duty of a lawyer acting for a litigation funder ought properly be regarded as encompassing a duty to ensure that the litigation funder adheres to its own policy in relation to conflicts of interest.

1521 Further, in circumstances where (as the Court should find):

- (a) Alex Elliott assumed an adumbral role of assisting in the legal conduct of the matter and assisting AFP and Elliott Legal in their business;
- (b) Mr Zita/Portfolio Law acted as little more than a post box solicitor;
- (c) Elliott Legal continued to act as the “real” solicitor,

the Court should also find that Alex Elliott owed duties to the group members to ensure that the litigation funder and Lawyer Parties adhered to the litigation funder’s policy in relation to conflicts of interest.

1522 The Court should find that Alex Elliott was complicit in AFP’s breaches of the Funding Agreement. He had an important, albeit junior, role within AFP and Elliott Legal. Although he was young, he was competent and astute.²⁹⁵⁴ His father valued his opinion.²⁹⁵⁵ His father consulted him about the terms of Mr Symons’ retainer,²⁹⁵⁶ and involved him in discussions with AFP’s accountant about legal costs.²⁹⁵⁷ The Court should find that Alex Elliott was his father’s “right hand man”²⁹⁵⁸ – a trusted family member. Alex Elliott had analysed the Funding

²⁹⁵² AFP’s Disclosure Statement [AFP.006.001.0001], para [4.27.e].

²⁹⁵³ *Corporations Regulations* 2001 (Cth) r7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB; CPA s 10.

²⁹⁵⁴ See eg [ABL.001.0643.00243]; [AEL.100.058.0001]; [AEL.100.008.0001].

²⁹⁵⁵ See eg [AEL.100.008.0001]; [AEL.100.009.0001].

²⁹⁵⁶ [AEL.100.070.0001].

²⁹⁵⁷ [ABL.001.0599.00008]; [MAZ.001.001.0021]; [ABL.001.0600.00007]; [AEL.100.065.0001] Transcript of hearing on 30 November 2020 [TRA.500.015.0001], 1511:15-1512:12, 1513:21-2, 1517:30-1518:22; Transcript of hearing on 1 December 2020 [TRA.500.016.0001], 1602:11-1611:26; Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1696:9-1701:28.

²⁹⁵⁸ Transcript of hearing on 17 August 2020 [TRA.500.009.0001], 934:18-24.

Agreement, including the clauses relating to conflicts of interest.²⁹⁵⁹ It was part of his role to liaise with debenture holders.²⁹⁶⁰

1523 The Court should find that, in breach of his duties arising under or in relation to the Funding Agreement, Alex Elliott failed to:²⁹⁶¹

- (a) ensure that the Lawyer Parties provided budgets for all estimated costs and expenses up to the conclusion of the trial in the Bolitho Proceeding;
- (b) bring to the attention of AFP, Mr Bolitho and/or other group members conflicts of interest which arose during the course of the Bolitho Proceeding;
- (c) inform Mr Bolitho and/or other group members of their rights when conflicts of interest arose during the course of the Bolitho Proceeding;
- (d) advise Mr Bolitho and/or other group members in a manner that was consistent with the Lawyers' Duties and the Paramount Duty in relation to all such matters, including in relation to any settlement of the claims in the Bolitho Proceeding and the terms of any such settlement.

M6. The conflicts of interest amounted to breaches of the Paramount Duty

1524 The Court should find that the conduct of AFP, Alex Elliott and the Lawyer Parties contravened the Paramount Duty, because:

- (a) that conduct undermined the Court's expectation that it should have the assistance of independent legal representation for the litigating parties, acting with good faith, untainted by divided loyalties, which is central to the preservation of public confidence in the administration of justice;²⁹⁶²
- (b) that conduct denied group members the benefits and protections of the procedure established by Part 4A of the *Supreme Court Act* 1986 (Vic), in that it resulted in Mr Bolitho – a representative plaintiff with duties to represent the interests of 16,000 debenture holders/group members –

²⁹⁵⁹ [AEL.100.030.0001]; transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2048:29-2049:23. See also [AFP.100.011.0001], para [3] and [6] and [SYM.001.001.7313].

²⁹⁶⁰ Transcript of hearing on 2 December 2020 [TRA.500.017.0001], 1734:31 – 1736:20.

²⁹⁶¹ RLOI [PLE.010.005.0001], para [178A].

²⁹⁶² DA Ipp "*Lawyers' Duties to the Court*" (1998) 114 LQR 63, 93, citing *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, 360.

failing to discharge those duties by (1) agreeing to the Adverse Settlement Terms that were not in the interests of group members as a whole and (2) seeking to recover excessive payments from group members;

- (c) it was inimical to the administration of justice for AFP and the Lawyer Parties to misuse their positions and the processes of the Court to seek to obtain for themselves payments which exceeded a fair and reasonable amount at the expense of vulnerable group members who had little or no ability to contradict the payments and who relied heavily upon Mr Bolitho, his lawyers, and AFP.

N. REMITTER – MISLEADING DISCOVERY

N1. Overview of contraventions

1525 The Court should find that AFP and Alex Elliott contravened:

- (a) the overarching obligation not to mislead or deceive;
- (b) the overarching obligation to ensure that legal costs are reasonable and proportionate; and
- (c) the Paramount Duty,

by their conduct in connection with:

- (d) discovering the O’Byran December 2017 Costs Agreement and the Symons December 2017 Cost Disclosure Statements, which documents were discovered by AFP and Mr Bolitho on or about 13 February 2019 in a manner that suggested they were created in advance of costs being incurred, without any explanation that the documents were in fact created after-the-event, in December 2017; and
- (e) resisting the Contradictors’ efforts at ascertaining when the documents had been created and served on AFP.

N2. Admissions

1526 AFP and Alex Elliott admit the incontrovertible facts set out in **Section N** of the RLOI,²⁹⁶³ but not the legal conclusions of contravention which inevitably follow.

1527 In addition, Alex Elliott does not admit his own complicity in any misconduct.²⁹⁶⁴ But at trial, Alex Elliott conceded that he was involved in AFP’s response to the discovery orders in February and March 2019²⁹⁶⁵ (and the documentary evidence confirms that to be so).²⁹⁶⁶

²⁹⁶³ [PLE.020.001.0001] & [PAR.080.001.0001], para [182] – [191].

²⁹⁶⁴ [PAR.080.001.0001], para [184].

²⁹⁶⁵ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1849:31-1851:16.

²⁹⁶⁶ [CBP.001.011.5464]; [CBP.001.011.2378]; [CBP.001.002.5894]; [CBP.001.002.1535]; [SYM.001.003.1440] [SYM.001.003.1441] [SYM.001.003.1447]; [SYM.005.001.1546]; [SYM.005.001.1549].

N3. Discovery in the remitter in February 2019

1528 Prior to the directions hearing on 1 February 2019 in this remitter, the Contradictors proposed orders²⁹⁶⁷ which included orders for AFP and Mr Bolitho to discover and produce:

- (a) any costs agreements with Mr O'Bryan or Mr Symons or cost disclosure statements issued by them;
- (b) documents evidencing or recording case budgets prepared by, for, or on behalf of Mr Bolitho;
- (c) all communications between Mr O'Bryan or Mr Symons and AFP or the solicitors for Mr Bolitho relating to the costs incurred by counsel or expected to be incurred by counsel in conducting the Bolitho Proceeding.

1529 AFP and Mr Bolitho (via his representatives, the Lawyer Parties) consented to that order, and on 1 February 2019, orders were made for AFP and Mr Bolitho to discover those documents (**1 February 2019 Orders**).²⁹⁶⁸

1530 Between 8 and 11 February 2019, in connection with the 1 February 2019 Orders for discovery, Mr O'Bryan and Mr Symons provided AFP and Alex Elliott with copies of the O'Bryan December 2017 Costs Agreement and the Symons December 2017 Disclosure Statements.²⁹⁶⁹

1531 On or about 13 February 2019, ABL on behalf of AFP provided a joint list on behalf of AFP and Mr Bolitho of documents falling within the discovery categories ordered by the court,²⁹⁷⁰ which Mr Zita/Portfolio Law confirmed was "*a complete list of Mr Bolitho's discoverable documents and consistent with his discovery obligations*",²⁹⁷¹ and which included the following documents²⁹⁷² (together the **Fee Documents**):

²⁹⁶⁷ [SYM.001.001.5424] [SYM.001.001.5425].

²⁹⁶⁸ [ORD.500.005.0001].

²⁹⁶⁹ [CBP.001.011.5464] [SYM.001.001.0058] [SYM.001.001.0060] [SYM.001.003.1440]

[SYM.001.003.1441] [SYM.001.003.1447].

²⁹⁷⁰ [AFP.003.001.1289].

²⁹⁷¹ [CBP.001.011.5240] [CBP.001.011.5241] [CBP.001.013.4646].

²⁹⁷² [CBP.001.014.1219].

No	Date	Document
3	30 May 2016	Costs Agreement between Norman O'Bryan and Laurie Bolitho
6	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 January 2016 (for Mr Symons)
7	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 September 2016 (for Mr Symons)
8	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 January 2017 (for Mr Symons)
9	Undated	Barrister's Disclosure Statement estimating charges and disbursements from 1 July 2017 (for Mr Symons)

1532 On 18 February 2019, the Contradictors requested Portfolio Law and AFP to produce the covering emails by which the Fee Documents were sent to AFP and/or Portfolio Law.²⁹⁷³

1533 On 22 February 2019, ABL on behalf of AFP refused to provide the covering emails.²⁹⁷⁴

1534 Accordingly, the Contradictors made an application to the Court for discovery of those documents, and on 1 March 2019, AFP and Mr Bolitho were ordered to produce them.²⁹⁷⁵

1535 On or about 8 March 2019, in response to the 1 March 2019 Orders, ABL on behalf of AFP and Mr Bolitho discovered the email communications between Mr O'Bryan, Mr Symons, Mr Zita/Portfolio Law, AFP and Mr Trimbo dated 18 to 20 December

²⁹⁷³ [SYM.001.003.1964] [CBP.001.013.4666].

²⁹⁷⁴ [SYM.001.002.9315].

²⁹⁷⁵ [ORD.500.031.0001].

2017 (**December 2017 Trimbos Communications**)²⁹⁷⁶ by which Mr O'Bryan and Mr Symons sent their misleading after-the-event Fee Documents to Mr Trimbos.

1536 On 19 March 2019, after several rounds of correspondence,²⁹⁷⁷ Portfolio Law finally admitted that Mr O'Bryan's and Mr Symons' Fee Documents in respect of the period between the 2016 settlement and the settlement hearing on 30 January 2018 were prepared in **December 2017**, in response to the request from Mr Trimbos.²⁹⁷⁸

N4. AFP knew the Fee Documents were misleading

1537 The Court should find that, at the time AFP discovered the Fee Documents in response to the 1 February 2019 Orders, Mark Elliott knew that they were misleading documents. That must be so, because:

- (a) It is clear from the evidence that Mark Elliott knew precisely what Fee Documents had been issued to him and when.²⁹⁷⁹ He could have been under no illusion that the Fee Documents were created in December 2017.
- (b) It is clear from the evidence that Mark Elliott knew of, devised, and approved the strategy of issuing sham documentation to obtain approval of costs.²⁹⁸⁰
- (c) Mark Elliott knew how the costs had been arrived at, namely by the "*division of the spoils*"²⁹⁸¹ set out in his invitations to charge²⁹⁸² and the Banksia Expenses Spreadsheet.²⁹⁸³
- (d) Mark Elliott and Mr O'Bryan discussed how Mr O'Bryan could alter his fee rate to achieve his fee targets.²⁹⁸⁴ Accordingly Mark Elliott knew that Mr

²⁹⁷⁶ [SYM.002.002.8943] [SYM.002.002.8946] [SYM.002.002.8955] [SYM.002.002.8959] [SYM.002.002.8937] [SYM.002.002.8939].

²⁹⁷⁷ [SYM.001.002.3065] [SYM.001.002.1920] [SYM.001.002.1921] [SYM.001.001.8314] [SYM.001.001.8316].

²⁹⁷⁸ [CBP.001.012.0164] [CBP.001.012.0165].

²⁹⁷⁹ See eg [CBP.001.002.5894]; [CBP.001.011.5464]; [CBP.001.002.1535].

²⁹⁸⁰ See eg [NOB.500.001.7342] (email from Mr Elliott to Mr O'Bryan dated 28 November 2017 requesting an invoice dated 1 July 2016 to provide to AFP's auditor); [AFP.001.001.1475] (emails exchanged between Mr Elliott and Mr O'Bryan on 1 July 2016 in which Mr O'Bryan attached a fee agreement and directed him to "*delete the earlier ones*", albeit it appears that the "*earlier ones*" were at a higher rate).

²⁹⁸¹ [SYM.001.001.5479].

²⁹⁸² [NOB.500.001.7553]; [SYM.001.001.7228].

²⁹⁸³ See the version produced as at 21 November 2017 [AFP.007.001.0001] [AFP.007.001.0002].

²⁹⁸⁴ [NOB.500.001.7404]; [NOB.500.001.7427] [NOB.500.001.7431] [NOB.500.001.7416] [NOB.500.001.7421] [NOB.500.001.7435] [NOB.500.001.7438].

O'Bryan's fee rate was not set out in any fee agreement Mr O'Bryan had issued in advance of costs being incurred.

- (e) Mark Elliott knew that Mr Symons had been charging his fees on the Elliott Matters at the rate of \$300/hour.²⁹⁸⁵ Accordingly Mark Elliott knew that the higher fee rates at which Mr Symons actually charged his fees were not set out in any disclosure statement that Mr Symons had issued in advance of costs being incurred;
- (f) Mark Elliott knew that the real fee arrangements between AFP, Mr O'Bryan and Mr Symons were quite different from the Fee Documents.²⁹⁸⁶

1538 In those circumstances, the conduct of AFP in respect of discovering the Fee Documents without any explanation or qualification as to the timing and circumstances of their creation was deceptive and improper. AFP sought to maintain the deception by resisting orders for further discovery to reveal when the Fee Documents were created.

N5. Relevant law

1539 Similar conduct was in issue in *Law Society of New South Wales v Foreman*,²⁹⁸⁷ which Kirby P described in these terms:²⁹⁸⁸

“However, unfortunately, the solicitor's deception was compounded. It came to involve employees of the solicitor's firm. It was extended to her partners. It roped in counsel appearing for the firm and other advisers. Most seriously, by a second re-writing of the time sheets, to be produced on discovery in what was by then a litigated contest between the firm and Ms Weiss (as Mrs Avidan had again become), the deception was extended to Ms Weiss and her new legal representatives. Most importantly of all, it was extended, uncorrected, to the Family Court of Australia by the action of the solicitor in permitting, indeed facilitating, the production to that court of a further copy of the re-written time sheet. This pretended to be genuine. It was produced at considerable pains to make it appear genuine. It was put forward to

²⁹⁸⁵ [SYM.006.001.0001] at 0008 and .0010 (invoices issued by Mr Symons in October 2017 at \$300/hour **including GST**); [SYM.001.001.7228] (email from Mr Elliott to Mr Symons dated 19 November 2017 inviting him to bill for 200 days' work); [AFP.007.001.0001]

[AFP.007.001.0002] (Banksia Expenses Spreadsheet dated 21 November 2017 inviting Mr Symons to bill \$600,000 **plus GST**, ie 200 days' work at \$300/hour **plus GST**). Mr Elliott appears to have seen the GST as a readily adjustable integer in the quest for fees.

²⁹⁸⁶ [SYM.008.001.0017]; [ABL.001.0685.00009] [ABL.001.0685.00008]; [SYM.008.001.0021] [SYM.008.001.0016]; [ABL.001.0703.00068].

²⁹⁸⁷ (1994) 34 NSWLR 408.

²⁹⁸⁸ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 411F.

practitioners, opponents and the Family Court as genuine. The solicitor knew that it was false.”

1540 Mahoney JA described the conduct as follows:²⁹⁸⁹

“Therefore, the effect of what Miss Foreman had done included, inter alia, the following: she had (in the sense to which I have referred) further falsified the affidavit of discovery which she had sworn and had to that extent defeated the purpose of it; she had falsified the records of the firm in that she had created time sheets to show that a notation had been made (of delivery of the costs agreement form) on a date 7 September 1989, when it had not been made on that date; she allowed falsified documents to be produced to the Family Law Court on subpoena and, indeed, contemplated that they would be; and she allowed the costs proceedings before that court to proceed upon a basis which she knew to be false, viz, that on 7 September 1989 a time sheet had been prepared which recorded that a costs agreement form had been given to Mrs Avidan. She did these things, I infer, knowing the significance of them. She confessed to them only when she was found out.”

1541 Mahoney JA concluded that the conduct was “*most serious in itself... a contempt of court, an interference with the course of justice, and perhaps more*”.²⁹⁹⁰ His Honour continued:²⁹⁹¹

“It was the more serious because of the way it was done and because of those to whom it was directed. I have described the elaborate and calculated way in which it was done. In doing it she deceived those who — in one sense or another — should have been able to trust her. What she did was directed to deceiving the Court; indeed, this was the purpose of it. In this she disregarded the first and primary obligation of a solicitor practising before the courts. A practitioner must not merely not deceive the court before which she practises; she must be fully frank in what she does before it. This obligation takes precedence over the practitioner's duty to her client, to other practitioners and to herself: *Meek v Fleming* [1961] 2 QB 366 at 382, 383. The justice system will not work if a practitioner is, for her own purposes, free to put to the court that which she knows to be false.

...As I have indicated, the administration of justice can proceed only on the basis that practitioners can, within appropriate limits, place reliance upon the honesty of the practitioners with whom they deal; at least, they are not expected to act on the assumption that the documents which practitioners prepare and put before them are falsified.”

1542 AFP's conduct was worse: it sought to maintain the deception that AFP/Mark Elliott, Mr O'Bryan and Mr Symons had earlier implemented for their own gain. In contrast,

²⁹⁸⁹ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 432G-433A.

²⁹⁹⁰ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 447C.

²⁹⁹¹ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 447D-E.

in *Foreman*, the deception involved falsification of a document to make it accord with the solicitor's asserted recollection of what had actually occurred.²⁹⁹²

1543 The only inference reasonably open is that AFP intended for the Contradictors to accept the veracity of the Fee Documents, and to rely upon the Fee Documents in considering AFP's claim for recovery of legal costs and making submissions to the Court. AFP must have expected that the Contradictors would do so. The Fee Documents appeared to support the costs claimed. It is ordinarily unthinkable that counsel would deliberately fabricate their fee documents.

N6. **Alex Elliott's liability** for the contraventions

1544 Alex Elliott assisted AFP in providing discovery in response to the February and March 2019 discovery orders. The Court should find that he did so in his capacity as a solicitor acting for AFP.

1545 The solicitor's duty to the Court requires the solicitor to advise their client as to what documents are material and must therefore be disclosed to the adversary. The obligation is a heavy one.²⁹⁹³ A solicitor must probe their client, and ensure that accurate and complete discovery is provided, or else withdraw from the case.²⁹⁹⁴ By his own concession, Alex Elliott left everything to his father, and exercised no independent judgment in relation to discovery.²⁹⁹⁵ Notwithstanding his relatively junior role, Alex Elliott was a practising solicitor in 2019. He was involved in providing instructions to ABL, who acted on those instructions in their dealings with the Contradictors. It is inexcusable for a practising solicitor to turn a blind eye to the adequacy of their client's discovery or the veracity of the representations they convey to their opponents in litigation.

N7. Contraventions established on the evidence

1546 The Court should find that the conduct of AFP and Alex Elliott:

- (a) contravened the overarching obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive;

²⁹⁹² *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 411B-E.

²⁹⁹³ *Rockwell Machine Tool Co Ltd v FP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693; *El Du Pont De Nemours & Co v Cmr of Patents* (1987) 16 FCR 423, 425–6.

²⁹⁹⁴ *Myers v Elman* [1940] AC 282, 322.

²⁹⁹⁵ Transcript of hearing on 8 December 2020 [TRA.500.019.0001], 1853:2-22.

- (b) contravened the overarching obligation to ensure that legal costs were reasonable and proportionate, in that there was no proper basis to resist informing the Contradictor that the Fee Documents were in fact created in December 2017 and not on the dates stated or implied by the documents;
- (c) contravened the Paramount Duty, in that it carried the risk that the Court would again be misled in the assessment of the claims by AFP and Mr Bolitho for recovery of legal costs.

O. LOSSES OCCASIONED BY CONTRAVENTIONS

- 1547 It is convenient to identify here the consequences that flow from the contraventions established in each section of the RLOI.
- 1548 **Part B. Conduct in relation to the Bolitho No 4 Decision.** Mr Bolitho and group members were deprived of independent and objective solicitors and counsel acting in their interests. This persisted throughout the entire proceeding and materially contributed to the misconduct which followed. Independent and objective solicitors and counsel would not have aligned themselves with Mark Elliott, and an independent solicitor would have monitored costs. Independent and objective solicitors and counsel would have negotiated the best deal for group members, and would have kept AFP to its contractual rights. Further, group members should not have to pay for the “post box” solicitor appointed to replace Mark Elliott who handed the reins back to Mark Elliott as soon as he was appointed.
- 1549 **Part C. Fee Arrangement Contraventions.** The contraventions involved AFP and the Lawyer Parties entering into unfair and unreasonable fee arrangements which exposed group members to the risk of excessive charging. Further, AFP’s Fee Arrangements with Mr O’Byrne and Mr Symons were illegal contingency fee arrangements. AFP breached its own Conflicts Management Policy and Disclosure Statement, in which it undertook to properly regulate legal costs. The consequences of the matters alleged in **Section C** are that AFP should recover nothing in respect of the fees of Mr O’Byrne, Mr Symons, and Portfolio Law, a position that AFP now accepts with respect to Mr O’Byrne and Mr Symons, but resists with respect to Portfolio Law.
- 1550 **Part E. Negotiation of Trust Co Settlement.** Independent and objective solicitors and counsel would have protected group members from the Adverse Settlement Terms, and would have ensured that (1) the settlement was not itself conditional upon AFP’s claim for commission and (2) AFP’s claim for commission was limited to a fair and reasonable amount. It is noteworthy that the Adverse Settlement Terms directly caused AFP’s application for special leave to the High Court, which itself involved months of additional delay in debenture holders obtaining any part of the settlement proceeds.
- 1551 **Part F. Overcharging Contraventions.** The claim for excessive costs was calculated to derivatively support AFP’s claim for excessive funding commission.

Just as the excessive claim for costs derivatively supported an excessive claim for commission, an honest and accurate claim for costs would have derivatively supported a modest funding commission. Mr Zita conceded that he knew at the time of the Trust Co settlement that the quantum of the legal costs that AFP sought to recover was a key integer in the recovery of the commission it sought.²⁹⁹⁶ Alex Elliott conceded that he knew that funding risk was relevant to the Court's assessment of AFP's application for a common fund order.²⁹⁹⁷

1552 **Part G. Summons and Notice Contraventions.** The Summons and Notice contributed to the deception that AFP had taken a substantial funding risk. There should have been no deception, and AFP's funding commission should have been based on its real funding risk.

1553 **Part I. Settlement Opinion Contraventions.** Justice Croft relied heavily on counsel's opinions; his Honour's reasoning on the appropriateness of the commission payment was largely taken verbatim from the First Bolitho Opinion.²⁹⁹⁸ Plainly his Honour assumed that counsel were satisfying their duty of candour to the Court. That trust was misplaced; the opinions were grossly misleading. If Mr O'Bryan and Mr Symons had discharged their duties to the Court, they would have drawn all relevant considerations to the Court's attention, and assisted the Court to ensure that costs and commission were approved in an amount that was fair and reasonable. The Court apprised of the true facts would have approved a negligible or low funding commission.²⁹⁹⁹

1554 **Part J. Settlement distribution scheme.** Mr Zita conceded in cross-examination that the SPRs were better qualified than he was to distribute the settlement proceeds. If AFP and the Lawyer Parties had discharged their duties to the Court, they would have readily acknowledged that at the time. Accordingly the settlement proceeds would have been distributed promptly by the SPRs once the appeal period expired on **21 March 2018**.

1555 **Part K. No Contradictor Contraventions.** AFP admits that there were conflicts of interest justifying the appointment of a contradictor, and that the assertion by Mr O'Bryan and Mr Symons to the contrary was incorrect and misleading. If Mr

²⁹⁹⁶ [TRA.500.008.0001] T864:30-865:5.

²⁹⁹⁷ Transcript of hearing on 10 December 2020 [TRA.500.021.0001], 2090:12-23.

²⁹⁹⁸ *Botsman v Bolitho* (2018) 57 VR 68, [296].

²⁹⁹⁹ See eg *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.

O'Bryan and Mr Symons had discharged their duties to the Court, they would have drawn those conflicts to the Court's attention, with the result that the Court would have appointed a contradictor. The evidence suggests that the Botsman camp would not have appealed the orders approving the settlement if the settlement was scrutinised by a contradictor.³⁰⁰⁰ Accordingly, debenture holders would have received their settlement proceeds shortly after the appeal period expired on **21 March 2018**.

- 1556 ***Part L. Appeal Contraventions.*** The mischief during the Botsman Appeal was calculated by AFP and the Lawyer Parties to secure the spoils of their misconduct, and prevent its exposure. They compounded their prior impropriety by continuous, repeated, and flagrant breaches of their duties. There was no proper basis for Mr Bolitho or AFP to resist the appeal. The duty of candour that AFP and the Lawyer Parties owed should have compelled them to correct their misleading conduct by disclosing the true facts and consenting to orders setting aside the approval of the amounts sought by AFP in respect of costs and commission. This would have resulted in an earlier distribution to debenture holders.
- 1557 ***Part M. Fiduciary Duty Contraventions.*** The Fiduciary Duty Contraventions are constituted by the conduct and contraventions set out above, with the consequences that flowed from those contraventions as set out above.
- 1558 ***Part N. Misleading discovery in the remitter.*** The conduct in Part N is a subset of AFP's egregious conduct as a litigant in the remitter. AFP's abuse of the Court's processes with respect to discovery produced weeks of expense and delay. The entirety of AFP's conduct should be taken into account in making orders as to costs.

³⁰⁰⁰ Mr Pitman's May 2020 Affidavit [CCW.036.001.0395], paras [63] – [64]; Transcript of hearing on 30 January 2018 [SYM.001.001.5149], 27:17-23.

P. RELIEF SOUGHT

P1. Summary of relief sought

1559 Debenture holders have been held out of their funds by the misconduct of AFP, Mark Elliott, Alex Elliott, the Lawyer Parties and Mr Trimbos; and they have paid significant costs in the dispute with AFP and the Lawyer Parties over the claims for costs and commission. The Contradictors seek on behalf of the debenture holders damages for the loss of use of funds, and full indemnity costs.

P2. Legal principles

P2.1 Statutory provisions

1560 Section 29 of the CPA provides:

“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) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;
- (b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;
- (c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—
 - (i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or
 - (ii) an order for no interest or reduced interest;
- (d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;
- (e) an order that the person not be permitted to take specified steps in the civil proceeding;
- (f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.”

P2.2 Principles guiding the relief that may be granted under section 29

- 1561 The Court's jurisdiction to make orders, being undefined in terms, is as broad, wide and deep as the statutory context and the particular circumstances demand.³⁰⁰¹ The statutory framework in which it sits primarily conditions the discretion.³⁰⁰²
- 1562 Section 8 is important as it expressly emphasises the question: will the making of an order under s 29 of the CPA give effect to the overarching purpose?³⁰⁰³ Section 29(1) then sets out the objects that may further the overarching purpose in making an order and s 29(2) sets out the matters to which the court may have regard, although s 29(3) provides that the statutory list is not an exclusive list.³⁰⁰⁴ The Court may take account of any matter that arises out of the circumstances of the application, whether that is arising out of the proceeding, or is a matter personal to the person who is subject to the overarching obligation.³⁰⁰⁵
- 1563 The orders the Court might make under section 29 include:³⁰⁰⁶
- (a) an order that the contraveners compensate a person for any financial loss or other loss which was materially contributed to by a contravention;
 - (b) an order that the fees, costs, and expenses to which the contraveners might otherwise be entitled in the proceeding be disallowed in whole or in part;
 - (c) an order that the contraveners indemnify a person in whole or in part in respect of costs ordered by the Court to be paid by them;
 - (d) an order that the contraveners pay the costs of a party;
 - (e) an order referring the matter to a disciplinary body.

Compensatory principle

- 1564 In opening submissions, AFP emphasised aspects of the compensatory principle,³⁰⁰⁷ said to govern the assessment of damages under section 29 of the

³⁰⁰¹ Hudspeth No 8 at [256].

³⁰⁰² Hudspeth No 8 at [257].

³⁰⁰³ Hudspeth No 8 at [257].

³⁰⁰⁴ Hudspeth No 8 at [257].

³⁰⁰⁵ Hudspeth No 8 at [257].

³⁰⁰⁶ See Hudspeth No 8 at [258].

³⁰⁰⁷ AFP's opening submissions [SBM.020.002.0001], paras [104] – [108].

CPA by reason of the words “*compensate... for any financial loss or other loss*” in section 29(1)(c).³⁰⁰⁸

1565 It is true that an order for payment of compensation or costs is not a penalty.³⁰⁰⁹ However, AFP’s opening submissions gloss over the fact that, under section 29 of the CPA, the Court is armed with both compensatory and disciplinary powers.³⁰¹⁰ In a practical sense, the disciplinary function may not always be disentangled from the compensatory function;³⁰¹¹ both objectives may be pursued in appropriate circumstances.³⁰¹²

Analogy: exemplary damages

1566 Having regard to the disciplinary function of the CPA, it is submitted that section 29 does not foreclose the possibility of an award of damages akin to exemplary damages in appropriate circumstances.

1567 Exemplary damages are intended to punish the defendant for “conscious wrongdoing in contumelious disregard of another’s rights.”³⁰¹³ In addition to punishment, an award of exemplary damages may demonstrate the Court’s disapproval of the conduct and act as a deterrent to the defendant and others from engaging in similar behaviour.³⁰¹⁴

1568 Depending on the circumstances, exemplary damages may be available in actions for deceit³⁰¹⁵ and reckless negligence.³⁰¹⁶ Deceit is constituted by a false representation made knowingly or without belief in its truth, or with reckless disregard as to whether it be true or false.³⁰¹⁷

1569 Exemplary damages can be awarded severally against one or more joint wrongdoers.³⁰¹⁸ When an award of exemplary damages is made against a joint

³⁰⁰⁸ AFP’s opening submissions [SBM.020.002.0001], para [104].

³⁰⁰⁹ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653, [224].

³⁰¹⁰ *Dura No 5* at [102].

³⁰¹¹ *Dura No 5* at [102], citing *Hudspeth No 8*.

³⁰¹² *Dura No 5* at [102].

³⁰¹³ *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 77.

³⁰¹⁴ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 158; *New South Wales v Ibbett* [2005] NSWCA 445.

³⁰¹⁵ *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251.

³⁰¹⁶ *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

³⁰¹⁷ *Derry v Peek* (1889) 14 App Cas 337, 374.

³⁰¹⁸ *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 459-461, 465-470 (*‘XL Petroleum’*).

wrongdoer, it may be necessary to specify in the judgment the respective amounts assessed as exemplary damages and as compensatory damages.³⁰¹⁹

1570 The considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages.³⁰²⁰ There is no necessary proportionality between the assessment of the two categories.³⁰²¹ “In a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?”³⁰²²

Penalty interest

1571 Section 29(1)(c) expressly contemplates a delay claim “*for penalty interest in accordance with the penalty interest rate*”.

1572 Penalty interest includes a penalty component over and above the compensatory function of the award of interest.³⁰²³ It is submitted that, in assessing the nature of an award of penalty interest, equity provides a useful analogy, where an award for interest at a higher rate in cases of gross breach of trust is said to be neither compensation nor punishment, but to reflect instead equity’s generous approach to causation in such cases, and its deterrent and prophylactic function.³⁰²⁴

1573 Whether it is appropriate for interest to be calculated at the penalty rate depends on the circumstances of the case.³⁰²⁵

1574 In *Robert Deutsch v Erwin Deutsch (No 3)*,³⁰²⁶ Hargrave J awarded interest at the penalty rate in circumstances where the defendant did not make a realistic assessment of his liabilities prior to the trial, and made belated concessions only at trial.³⁰²⁷ Those concessions were made only when the defendant had little choice but to make them; they were obviously called for, and were preceded by

³⁰¹⁹ *XL Petroleum* at 470.

³⁰²⁰ *XL Petroleum* at 471.

³⁰²¹ *XL Petroleum* at 471.

³⁰²² *XL Petroleum* at 471, citing *Merest v Harvey* (1814) 5 Taunt. 442, 128 ER 761.

³⁰²³ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2003] VSC 244, [60] – [61] (*‘Johnson Tiles’*); *Love v Thwaites (No 4)* [2012] VSC 521, [92].

³⁰²⁴ *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [304] – [307] and the authorities there cited, especially *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1987) 11 ACLR 818, 848, *Hagan v Waterhouse* (1992) 34 NSWLR 308, 393 and *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45, 47.

³⁰²⁵ *Johnson Tiles* at [72].

³⁰²⁶ [2014] VSC 494.

³⁰²⁷ *Robert Deutsch v Erwin Deutsch (No 3)* [2014] VSC 494, [38] – [39].

years of denial of the indefensible.³⁰²⁸ The concessions ought to have been made at an early stage, which would have thus enabled the proceeding to progress more expeditiously.³⁰²⁹

P3. **Contradictors'** interest claim

1575 The Contradictors' claim for interest is calculated as follows:

	A	Settlement Sum	\$64,000,000
less	B	AFP's remaining undisputed costs	\$234,375
less	C	AFP's fair and reasonable commission	\$0*
equals	D	Principal available for distribution on 21/3/18	\$63,765,624
less	E	Distribution made on 13/6/19	\$42,000,000
equals	F	Principal available for distribution on 13/6/19	\$21,765,624
	G	Interest on \$63,765,624 @ 10% from 21/3/18 – 13/6/19	\$7,861,515
	H	Interest on \$21,765,624 @ 10% from 14/6/19 – 26/2/21	\$3,715,064
	I	TOTAL INTEREST CLAIM	\$11,576,579

1576 The key inputs are **quantum**, **timing**, and **interest rate**, and they are addressed below.

P3.1 Quantum

Costs

1577 In awarding damages, the Court should take into account only AFP's undisputed costs, comprising the costs of Ms Jacobson, Mr O'Callaghan, the special referee, two expert witnesses, and various website, advertising and registry costs.

³⁰²⁸

Robert Deutsch v Erwin Deutsch [2012] VSC 227, [36].

³⁰²⁹

Robert Deutsch v Erwin Deutsch (No 3) [2014] VSC 494, [38] – [39].

1578 **No allowance** should be made for the costs of Mr O'Bryan, Mr Symons and Portfolio Law, where:

- (a) Mr O'Bryan and Mr Symons were retained on illegal contingency fee arrangements and accordingly could never recover their fees;
- (b) Portfolio Law was a postbox solicitor who exercised no independent judgment in the interests of group members, but instead functioned as a ruse for allowing Mark Elliott to continue to control the litigation, contrary to the ruling in Bolitho No 4.

Commission

1579 AFP abandoned its claim for commission. Further, it was unable to prove it had signed Funding Agreements with group members. No allowance should be made in the assessment of damages due to group members for any funding commission that AFP might have recovered in the absence of misconduct.

1580 If, contrary to that submission, in an allowance **is** made, it should be limited to the range of **\$959,000 to \$1.7 million**.

1581 The lower sum of **\$959,000** is the sum propounded by Mr McGing in his evidence, which the Court should accept. The higher sum of **\$1.7 million** is the sum set out in the Contradictors' skeleton opening, assessed in a manner that is consistent with the evidence of AFP's expert Mr Houston – namely, by identifying the part of the settlement sum that is properly referable to the Bolitho Proceeding and then choosing a percentage rate on a sliding scale of rates having regard to the degree of AFP's funding risk.³⁰³⁰ Of the two methodologies, only Mr McGing's is rationally defensible, and it should be preferred.

1582 Authority demonstrates that Justice Croft should and would have determined AFP's claim for a funding commission having regard to AFP's funding risk, if informed of the true position.

1583 For instance, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)*,³⁰³¹ the litigation funder had passed the costs and risks that would normally be borne by the funder back on to class members. For instance, under the terms

³⁰³⁰ See also AFP's opening submissions [SBM.020.002.0001], paras [117] – [126].
³⁰³¹ (2018) 132 ACSR 258 (*'Petersen'*).

of the funding agreement, the funder was entitled to recover its “after the event” legal costs expense insurance premium. The funder was also entitled to recover the costs of obtaining its own legal advice incurred in the pursuit of its own interests. It was unusual for a litigation funder to be entitled to recover these costs.³⁰³² Furthermore, the funder had secured an arrangement whereby, beyond a specified limit, the solicitors were required to act on a no-win no-fee basis.

1584 Murphy J held that these matters were “relevant to the level of risk [the funder] assumed and what constitutes a reasonable reward for that risk.”³⁰³³ All of these matters pointed to a low funding commission.³⁰³⁴ His Honour decided that the funder should only be permitted to recover a funding rate of 13.7 per cent of the net settlement (equivalent to 8.3 per cent of the gross settlement).³⁰³⁵

1585 And in *Cantor v Audi Australia Pty Limited (No 5)*,³⁰³⁶ another case dealing with parallel proceedings (the “BL Proceedings” and the “MB Proceedings”), Foster J was “prepared to accept that the continued existence of the BL proceedings added some value to the applicants’ side of the record although it was minimal”,³⁰³⁷ but found that, in circumstances where another legal team “did most of the work and took most of the risk as to costs”,³⁰³⁸ the funding arrangements procured in the BL Proceedings were “unfavourable” and “totally unnecessary given that the MB proceedings were still on foot and adequately protected group members’ interests”.³⁰³⁹ Foster J held that, if there was power under s 33V(2) of the *Federal Court of Australia Act 1976* (Cth) to make a common fund order, that power is only appropriately exercised where the funder has consistently acted in the interests of group members, has not unduly enlarged the costs of the proceedings, and has materially contributed to the outcome of the claims.³⁰⁴⁰ Foster J found that the funder’s conduct of the BL Proceeding did not meet that standard.³⁰⁴¹ His Honour concluded that the funder’s conduct “should not now be rewarded by the making of the CFO which it seeks”, as the Court “should not sanction such entrepreneurial activity entered into solely for the financial benefit of [the funder] and in complete

3032 *Petersen* at [215].

3033 *Petersen* at [202], [209], [214] - [216], [254].

3034 *Petersen* at [250] – [252].

3035 *Petersen* at [231].

3036 [2020] FCA 637 (*‘Cantor’*).

3037 *Cantor* at [462].

3038 *Cantor* at [463].

3039 *Cantor* at [466].

3040 *Cantor* at [468].

3041 *Cantor* at [468].

disregard of the interests of group members”.³⁰⁴² Notably, **his Honour also declined to make a funding equalisation order.**³⁰⁴³

P3.2 Timing

1586 The Contradictors’ interest claim is advanced on the premise that:

- (a) absent misconduct, there would have been no appeal from the orders approving the settlement; and
- (b) debenture holders would have received their proper entitlement to the settlement proceeds following the expiry of the appeal period on **21 March 2018**.

1587 AFP asks the Court to find that Mrs Botsman would have sought leave to appeal regardless of any disentitling conduct. However, at the hearing before Justice Croft on 30 January 2018, Mr Pitman informed Justice Croft that *“I will withdraw my objection and Mr Botsman will too, if a contradictor considers that the settlement is fair and reasonable to debenture holders”*.³⁰⁴⁴ The evidence suggests that Mr Botsman assented to that statement.³⁰⁴⁵ While it is true that Mrs Botsman was not bound by Mr Pitman’s submission,³⁰⁴⁶ the evidence reveals that the Botsman camp’s chief concern related to the evident double-dealing of AFP and the Lawyer Parties, and the inadequate scrutiny that had been given to the settlement.

1588 AFP admits that there were numerous conflicts of interest affecting the settlement, and that the assertion by Mr O’Bryan and Mr Symons to the contrary was incorrect and misleading.³⁰⁴⁷ It was incumbent upon them to draw those conflicts to the Court’s attention. The Court should find that:

- (a) absent the misleading conduct of Mr O’Bryan and Mr Symons, a contradictor would have been appointed;

³⁰⁴² *Cantor* at [472].

³⁰⁴³ *Cantor* at [475] – [476].

³⁰⁴⁴ Transcript of hearing on 30 January 2018 [SYM.001.001.5122] at .5148 (T27:21-23).

³⁰⁴⁵ [SYM.001.001.6090]; and see also Mr Pitman’s 3 June 2020 Affidavit [CCW.036.001.0395], para [63].

³⁰⁴⁶ AFP’s submissions dated 22 July 2020 [SBM.020.002.0001] at paras [127] – [128], referring to *In the matter of Banksia Securities Ltd (in liq) (receivers and managers appointed)* [2019] NSWSC 136, [36].

³⁰⁴⁷ [PLE.020.001.0001], para [163] – [164].

- (b) the contradictor would not have found fault with the settlement sum itself – the idea that Mr Bolitho should have rejected Trust Co’s settlement offer to pursue its parent company does not commend itself;³⁰⁴⁸
- (c) with the benefit of assistance from the contradictor, the court would have approved costs and commission in a fair and reasonable amount;
- (d) the Botsman camp would have been satisfied by the contradictor’s independent scrutiny, and would not have appealed the Court’s orders.

1589 It is submitted that the causative impact of the misconduct of AFP and the Lawyer Parties in producing the appeal is comfortably established on the evidence, even without the more flexible test for causation that is warranted where there has been dishonesty.³⁰⁴⁹

1590 In any event, it is wrong to suggest, as AFP does,³⁰⁵⁰ that an appeal by Mrs Botsman about the reasonableness of the settlement sum would have taken just as long as the appeal that was in fact heard and determined by the Court of Appeal on 1 November 2018. The Court of Appeal dealt with Mrs Botsman’s complaints about the reasonableness of the settlement sum in **10 paragraphs**.³⁰⁵¹ The Court should find that an appeal on this ground alone would have been dealt with expeditiously, within 4 weeks.

1591 The Court should find that the misconduct caused or materially contributed to the delay in debenture holders receiving their proper entitlement to their settlement proceeds on and from **21 March 2018, or alternatively, 21 April 2018**.

P3.3 Interest rate

1592 It is submitted that an award of penalty interest is appropriate in the present circumstances, for the following reasons.

1593 **First**, the terms of section 29 of the CPA expressly provide for the Court to award penalty interest.

³⁰⁴⁸ *Botsman v Bolitho* (2018) 57 VR 68, [338] – [347].

³⁰⁴⁹ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, [9], [16].

³⁰⁵⁰ AFP’s submissions dated 22 July 2020 [SBM.020.002.0001], paras [129] – [130].

³⁰⁵¹ *Botsman v Bolitho* (2018) 57 VR 68, [338] – [347].

- 1594 **Second**, the position that AFP, Mr O'Bryan and Mr Symons took in their defence of the allegations in the remitter was always untenable. They maintained their astonishing denials of any wrongdoing in the face incontrovertible evidence. To take a striking example, Mr O'Bryan even denied that his fee invoices were "*falsely stamped as paid*".³⁰⁵²
- 1595 **Third**, Mr O'Bryan and Mr Symons filed numerous affidavits in the course of the remitter, which sought to keep up with the documentary evidence that was uncovered against them, rather than to provide the Court with a frank explanation of events. In the end, neither counsel tendered their affidavits into evidence nor entered the witness box at the hearing. They did not recognise their duty of candour.
- 1596 **Fourth**, AFP put debenture holders to the substantial delay and expense of a trial on its claim for costs and commission, and Mr O'Bryan and Mr Symons put debenture holders to the substantial delay and expense of preparing for trial on the basis that they would give evidence. It should be recalled that Mr O'Bryan, through his senior counsel, warned the Court on 29 May 2019 that determining the allegations against Mr O'Bryan would involve a four-week trial;³⁰⁵³ the Contradictors at that time observed that the length of the trial depended upon whether Mr O'Bryan would give evidence.³⁰⁵⁴
- 1597 **Fifth**, after all of that expense had been incurred, AFP made significant admissions two weeks prior to trial.³⁰⁵⁵ Those admissions could and should have been made much earlier. Mr O'Bryan and Mr Symons abandoned their defences and consented to judgment against them mid-trial. AFP substantially abandoned its claim for recovery of costs and commission mid-trial.
- 1598 **Sixth**, the position ultimately taken by AFP is to be contrasted with the combative approach it adopted prior to the death of Mark Elliott.
- 1599 **Seventh**, Mr Zita/Portfolio Law made appropriate concessions and admissions in April 2020, but that was nonetheless 18 months after the start of this remitter. Before then, Mr Zita/Portfolio Law joined with Mr O'Bryan and Mr Symons in their

³⁰⁵² [CBP.001.002.8464] at .8476.

³⁰⁵³ Transcript of hearing on 29 May 2019 [TRA.510.001.0001], 135:28-31.

³⁰⁵⁴ Transcript of hearing on 30 May 2019 [TRA.510.012.0001], 269:26-31.

³⁰⁵⁵ [PLE.020.001.0001].

strategy to seek to stymie the remitter.³⁰⁵⁶ His disregard for his own professional duties was such that he willingly sent the letters that Mark Elliott, Mr O'Bryan and Mr Symons drafted for him to send in the course of this remitter, despite now conceding that they contained false and/or misleading statements.³⁰⁵⁷

1600 **Eighth**, the Court should find that Mr Trimbos hoped to avoid the scandal of this remitter and for that reason stood back and did nothing to correct the misleading statements in the earlier reports he had prepared for AFP. Only on the eve of trial, when he provided his Fifth Report on 29 June 2020, did Mr Trimbos recant his earlier opinions. Mr Trimbos accepted in oral evidence that he knew that the SPRs and the Court were relying upon the Third Trimbos Report to satisfy themselves as to whether legal costs of more than **\$5 million** should be deducted from the Trust Co Settlement Sum.³⁰⁵⁸ His willingness to lend his name and credentials to supporting such a large sum in circumstances where he had undertaken no real scrutiny of it warrants strong criticism, and justifies an award of penalty interest.

1601 **Ninth**, Alex Elliott's conduct of the litigation against him was egregious as set out in **Part 1, Sections A4 – A5** above. His combative and recalcitrant stance in this remitter resulted in needless expense and delay. He showed a concern for himself and his own position throughout this remitter, but no concern for the debenture holders who have been adversely affected by the conduct of AFP in which he played a role. Those circumstances are such as to warrant an award of penalty interest.

P4. Indemnity costs

1602 The Contradictors seek an order that AFP and the Lawyer Parties pay the costs of the Contradictors and SPR on an indemnity basis in respect of the remitter.

1603 Pursuant to s 24(1) of the SCA, the Court "has full power to determine by whom and to what extent the costs are to be paid".

1604 The usual order as to costs is an award to the successful party on a standard basis.³⁰⁵⁹

³⁰⁵⁶ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [89] – [90].

³⁰⁵⁷ Mr Zita's April 2020 affidavit [CCW.036.001.0001], paras [141] – [142], [154] – [164].

³⁰⁵⁸ Transcript of hearing on 13 August 2020 [TRA.500.007.0001], T725:26-29.

³⁰⁵⁹ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.31.

- 1605 In order for there to be a departure from the usual practice of costs on a standard basis, there must be some special or unusual feature of the case justifying such departure.³⁰⁶⁰
- 1606 Indemnity costs are generally reserved for cases where the losing party has “engaged in unmeritorious or deliberate improper conduct such as would warrant the court showing its disapproval and at the same time preventing the respondents being left out of pocket”.³⁰⁶¹
- 1607 Indemnity costs will ordinarily be granted “where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused”. Indeed, “costs are more frequently if not invariably awarded on an indemnity or like basis (such as that of solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay”.³⁰⁶²
- 1608 Misconduct in the litigation justifying indemnity costs may include the late discovery of documents without proper explanation.³⁰⁶³
- 1609 A clearer case for indemnity costs could scarcely be imagined. AFP, the Lawyer Parties and Alex Elliott strenuously fought the Contradictors all throughout the remitter. Mr Zita/Portfolio Law made concessions in April 2020, but that was after the remitter had been on foot for 18 months. AFP, Mr O’Bryan and Mr Symons held their positions until the trial, and Alex Elliott, once joined, made no concessions until the very weak concession he made in re-examination following eight days of oral evidence. Mark Elliott, Mr O’Bryan and Mr Symons produced a range of different sworn and unsworn versions of events and, in the end, none of them chose to reveal the truth to the Court. Mr O’Bryan and Mr Symons abandoned their affidavits and capitulated on the eve of their cross-examination, only once millions of dollars had been expended in proving the case against them.

³⁰⁶⁰ *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 233; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, [7] – [8].

³⁰⁶¹ *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, [57].

³⁰⁶² *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, [12].

³⁰⁶³ *National Australia Bank v Petit-Breuilh (No 2)* [1990] VSC 395.

P5. Proportionate liability

1610 AFP, Alex Elliott, Mr Trimbos and the Lawyer Parties have filed proportionate liability notices seeking orders apportioning their liability arising from any judgment entered against them.

1611 It is submitted that:

- (a) none of the claims which are made against the contraveners in this proceeding is a “claim for economic loss or damage to property in an action for damages... arising from a failure to take reasonable care” or “a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria)” within the meaning of s 24AF of the *Wrongs Act* 1958 (Vic) (**Wrongs Act**);
- (b) accordingly, the provisions of Part IVAA of the *Wrongs Act* have no application to the claims made against the contraveners in this proceeding;
- (c) it is not in the interests of justice for the Court to limit the liability of any of the contraveners, and to the contrary, it is in the interests of justice for judgment to be entered against them jointly and severally.

P5.1 Not a claim for failure to take reasonable care

1612 Leaving aside the debate as to whether a failure to take reasonable care must be a necessary element of the cause of action in order for the claim to be an apportionable claim,³⁰⁶⁴ it is submitted that the claim against the contraveners is clearly outside the regime of Part IVAA of the *Wrongs Act*, for the following reasons.

1613 **First**, the claim brought by the Contradictors is for contravention of their overarching obligations under the CPA. The CPA is a statutory regime regulating the conduct of participants in civil proceedings.

1614 **Second**, the principal duties that inform the claims pursued in this remitter are not duties of care, but duties to the Court.

³⁰⁶⁴ See *Demetrios v Lehmann* [2019] VSC 301, [15] – [65] and the authorities there canvassed.

1615 **Third**, the liabilities of the contraveners in the present case arise not from negligence but from misconduct. Insofar as Mr Zita/Portfolio Law is concerned, the observations of the NSW Court of Appeal in *Wentworth v Rogers* are apt:

“Mr Russo lent himself to a situation in which he allowed himself to be controlled by his client. It is one thing to take instructions but it is another thing to allow the client to have complete control of the litigation in the way that Ms Wentworth had control of this litigation. We do not mean to be unkind but the objective facts of the matter are open to the inference that Mr Russo acted as Ms Wentworth's lackey. He did her bidding and allowed her to conduct the various applications which were before the Court in whatever way she chose. He had no control over her and, **if what she was doing would have amounted to misconduct by a practitioner, he must bear responsibility for what she did.**”

1616 Each of the contraveners were involved in a deception on the Court in gross dereliction of their duties to the Court and to their clients. Each of the contraveners was an integral part of a fraudulent scheme which comprised AFP's business model. It is not open to Mr Zita to say that he was “a simple innocent person who unwittingly allowed himself to be made use of as an instrument of fraud”.³⁰⁶⁵ Mr Zita lent his name and that of his firm to be used by Mark Elliott, Mr O'Bryan and Mr Symons exactly as they pleased, and he signed, endorsed, sent and/or filed anything that they put before him, not caring whether there was a proper basis for what he thereby endorsed.³⁰⁶⁶ He consciously allowed himself to be used as a postbox solicitor, and abrogated all his duties and responsibilities to his clients and the Court into the hands of the cabal of lawyers whose directions and bidding he, without questioning, acceded to.

1617 **Finally**, it therefore follows that, even assuming that the operation of Part IVAA is to be determined not be reference to the cause of action brought in the proceeding but by an assessment at the conclusion of the trial as to whether the loss was occasioned by a failure to take reasonable care, the evidence before the Court excludes such a finding. Rather, the evidence shows that the losses were occasioned by the contraveners acting in conscious disregard of their professional duties, and by their pursuit of their own interests and the interests of each other in seeking to secure for themselves and/or each other payments that exceeded a fair

³⁰⁶⁵ Meagher at 675.

³⁰⁶⁶ Meagher at 675.

and reasonable amount in respect of (1) legal costs, commission, (2) commission, and/or (3) scheme administration costs, to the detriment of the group members.³⁰⁶⁷

P5.2 Not in the interests of justice to apportion liability

1618 AFP, Alex Elliott and the Lawyer Parties appear likely to have insufficient assets to satisfy judgment. In those circumstances, the Contradictors seek orders for relief against all contraveners on a joint and several basis, with rights of contribution as between the contraveners.³⁰⁶⁸ Debenture holders should be entitled to seek to fully recoup their losses from the persons who caused them, to the maximum extent possible. The risk of insolvency should be borne by the contraveners and not by the debenture holders.

1619 AFP, Alex Elliott, the Lawyer Parties and Mr Trimbo all sailed together as a flotilla throughout this litigation, until like flotsam they foundered on their misconduct and deception. They were a tight-knit group of scoundrels, working on numerous cases together over the eight year period of this litigation. AFP operated its business with the assistance of Alex Elliott, the Lawyer Parties and Mr Trimbo like a criminal cabal or enterprise: it was constructed on a business model of deception and gouging, on a scale unimaginable to honourable members of the legal profession. They adhered to a common stance even after the commencement of the remitter, when Mr Zita was only too willing to continue to send the letters drafted for him by Mr O'Bryan, Mr Symons and Mark Elliott.³⁰⁶⁹ They defiantly opposed any challenge to their claims for costs and commission for **two years**, in circumstances where they either knew the facts or, at best, consciously chose not to critically examine the facts, and refused to discharge their duty to correct the false and misleading information that had been placed before the Court.

1620 In the end, Mr O'Bryan, Mr Symons and AFP fell like dominoes, one after another, between 3 and 13 August 2020.

1621 They all now point variously to one another, asserting that the others are more liable than they. What distinguishes this case from the common case where rogues fall out is that all were members of our honourable profession. If each is not held fully responsible for the consequences for their actions, then the debenture holders

³⁰⁶⁷ As alleged in RLOI [PLE.010.002.0001] and [PLE.010.005.0001], para [174].

³⁰⁶⁸ cf *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 9)* [2014] VSC 622 at [42].

³⁰⁶⁹ Mr Zita's April 2020 Affidavit [CCW.036.001.0001], paras [164]

who were their clients will lose out. One asks rhetorically: why should that be allowed to happen?

1622 In *ASIC v Activesuper Pty Ltd (in Liq) (No 2)*,³⁰⁷⁰ White J said:

“The costs which were common to the claims against all defendants were incurred against each defendant even though also incurred in relation to other defendants. Accordingly, the prima facie position should be that ASIC be entitled to recover the whole of the costs it incurred in relation to each defendant from that defendant. The agreements which ASIC reached with each of the ActiveSuper defendants and with Mr Adamson recognised that was so.

To do otherwise would mean that each defendant would benefit from the presence of other defendants to the action. It would also mean that ASIC would then carry the risk that it would not achieve a proportional cost recovery from each defendant. A more just result is that it is the defendants who are prima facie liable for the whole of the costs incurred against them who should carry the risk of not being able to recover, by contribution, a rateable proportion of the costs which are common to all.”

1623 It is submitted that the Court should adopt a similar approach here.

1624 The pursuit of these individuals for the recovery of monies will be a task for the SPR, in time, and should be the subject of some oversight and/or reporting, to ensure maximum recovery for the benefit of debenture holders.

P6. Striking off

1625 Mr O’Bryan and Mr Symons have effectively placed before the Court consent orders to strike their names off the roll of practitioners. It is plainly appropriate that the Court should do so, as they recognised when they capitulated.³⁰⁷¹

26 February 2021

P JOPLING

J COLLINS

³⁰⁷⁰ (2015) 106 ACSR 302, [108] – [109], citing *City of Swan v Lehman Bros Australia Ltd (No 3)* [2009] FCA 1190, [14]–[15].

³⁰⁷¹ [MSC.050.005.0001] Transcript of hearing on 3 August 2020 [TRA.500.005.0001], 485:12-486:24; [MSC.010.083.0001] and Transcript of hearing on 13 August 2020 [TRA.500.007.0001], 660:27-662:8.

Annexure A

Settlement sum	Notes	\$64,000,000.00
Less costs		
Mr O'Bryan	1	\$0.00
Mr Symons	2	\$0.00
Zita / Portfolio Law	3	\$0.00
Ms Jacobson fees		\$65,340.00
Mr O'Callaghan (Contradictor at partial settlement)		\$46,750.00
Anthony Nolan SC (special referee)		\$16,713.75
Mr Sutherland (expert witness)		\$4,950.00
Mr McCann (expert witness)		\$20,475.00
Cost of compliance with subpoena		\$10,000.00
Website Services - NW Computing		\$3,965.50
Advertisement - Milligan De Lany Advertising		\$64,058.46
Advertisement - Lake Design		\$819.50
Registry services - Georgeson Shareholder Communications		\$1,303.50
AFP Commission	4	
Principal for distribution to debenture holders on 21 Mar 18		\$63,765,624.29
Less Distributions to debenture holders on 13 Jun 19		\$42,000,000.00
Principal for distribution to debenture holders on 13 Jun 19		\$21,765,624.29

Interest (21 Mar 18 - 13 Jun 19)		
Principal		\$63,765,624.3
Time	450 days	1.232876712
Rate		10%

Interest **\$7,861,515.323**

Interest (14 Jun 19 - 26 Feb 21) 5		
Principal		\$21,765,624.3
Time	623 days	1.706849315
Rate		10%

Interest **\$3,715,064.091**

Total (principal plus interest)
\$33,342,203.70

Notes

1. No adjustment for costs given Mr O'Bryan was retained on a contingency fee arrangement.
2. No adjustment for costs given Mr Symons was retained on a contingency fee arrangement.
3. No adjustment for costs in the circumstances described in Section B of the Revised List of Issues.
4. AFPL did not prove any entitlement to commission. It did not prove what proportion of group members signed the funding agreement.
5. Assumes no change to interest rate to 26 February 2021