
TRANSCRIPT OF PROCEEDINGS

S CI 2012 07185

SUPREME COURT OF VICTORIA

TRIAL DIVISION - COMMERCIAL COURT

MELBOURNE

MONDAY, 3 AUGUST 2020

(5th day of hearing)

BEFORE THE HONOURABLE JUSTICE JOHN DIXON

LAURENCE JOHN BOLITHO & ORS.

v

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

MR S.R. HORGAN QC with MR C. TRAN appeared on behalf of
Australian Funding Partners Pty Ltd.

MR P.J. JOPLING AM QC with MS J. COLLINS appeared on behalf of
the Contradictor.

MR D.J. BATT QC with MR M.P. COSTELLO appeared on behalf of
Mr O'Bryan.

MR R. DICK SC with MR J.A. REDWOOD and MR M. GRADY appeared on
behalf of the Special Purpose Receivers.

MR R.G. CRAIG SC with MR C. HIBBARD appeared on behalf of
Mr Symons.

MR C.G. JUEBNER with MS G.S.J BERLIC appeared on behalf of
Mr Zita and Portfolio Law.

1 HIS HONOUR: Yes, Mr Jopling.

2 MR JOPLING: Thank you, your Honour. We wanted to begin today
3 by looking at our seventh issue in our chronology.

4 HIS HONOUR: Just a minute, Mr Jopling. I've got no sound.
5 You were turned down. Speak again.

6 MR JOPLING: Good morning, your Honour. Can you hear me?

7 HIS HONOUR: Yes, that's much better. Thank you.

8 MR JOPLING: We wanted to begin today by looking at our seventh
9 issue, namely misleading the expert witness appointed to
10 assess costs. The documents that are relevant to this
11 issue are set out in our list of issues and in the
12 chronology document, and I give you this for noting,
13 your Honour, AID.010.026.0001 in relation to the period
14 from 9 November 2017 onwards. We have tendered all those
15 documents.

16 Mr Trimbos, as your Honour knows, is and was an
17 expert costs consultant. Mr Elliott had used him on a
18 number of occasions to prepare reports and provide
19 assistance in various class action matters that Mr Elliott
20 and Mr O'Bryan were conducting. Mr Trimbos in his fourth
21 report at paragraph 25 refers to acting for AFPL on eight
22 prior occasions.

23 Mr Elliott briefed him, that's Trimbos, in the
24 partial settlement against the directors, advisers and
25 auditors that was reached in this litigation in about
26 2016. Mr Trimbos prepared two reports, the first and
27 second Trimbos reports opining that the costs sought to be
28 recovered by AFPL from the partial settlement were fair
29 and reasonable. The first Trimbos report is at
30 SYM.002.001.1890 and the second Trimbos report is at
31 CCW.031.001.0047. We tender those reports and we also

1 tender, your Honour, the third Trimbo's report,
2 CBP.001.010.5957.

3 We note, your Honour, that the present
4 arrangement is for Mr Trimbo's to give evidence next week
5 rather than today as originally planned. In the event
6 that there are difficulties with Mr Trimbo's, we want to
7 reserve our rights to revisit which of his reports we
8 tender and rely upon and what use can be made of them.
9 I say that in the context, your Honour, of a prospect that
10 he doesn't turn up, but I know we're all acting on the
11 premise that he is coming. I think that's enough said at
12 this stage.

13 The costs that were recovered from the partial
14 settlement amounted to 2.55 million in total. In fact,
15 AFPL claim to have incurred costs of 3.575 million and
16 that much is made plain, your Honour, at paragraphs 58 to
17 59 of the second Trimbo's report, CCW.031.001.0047.
18 Your Honour, the lawyer parties asked Mr Trimbo's to assume
19 that 75 per cent of that sum was referable to the settling
20 defendants.

21 Your Honour, in that regard can we ask
22 your Honour to look at NOB.500.012.2154. Your Honour will
23 see Mr Trimbo's is writing to Mr Elliott and to Mr O'Bryan
24 on 8 July at 9.52 in the morning and advising, 'Dear
25 Norman, I propose to amend my report to include the
26 following at the end of the report.' And he notes at
27 124.1, 'I am instructed to assume that 75 per cent of
28 the plaintiff's costs in the group proceeding to date are
29 attributable of his conduct of the group proceeding
30 against the settling defendants (the 75 per cent
31 assumption).'

1 Then, your Honour, if we go to NOB.500.012.2156,
2 and if we can bring up p.2183, and if we could also bring
3 up on to the screen, Mr Operator, I'm sorry, the document
4 we were looking at before, NOB.500.012.2154, and
5 your Honour will see at the top of the page Mr O'Bryan
6 communicating with Mr Trimbos on 8 August advising he's
7 corrected a few typos 'and slightly altered the language
8 of the final paras. Please let me know if this accurately
9 expresses your opinion. If not, we should delete this
10 section.'

11 Your Honour will see those paras at 123 to 126
12 and your Honour will note at paragraph 124, 'I'm
13 instructed to assume that 75 per cent of the plaintiffs'
14 costs in the group proceeding to date are attributable to
15 this conduct of the group proceeding against the settling
16 defendants.' And then 125 and 126, the paragraphs that
17 I had noted in the email of Trimbos.

18 Finally and most relevantly, Mr Elliott briefed
19 him in relation to the Trust Co settlement in late 2017
20 and Mr Trimbos prepared a report, the third Trimbos
21 report, opining that the costs sought to be recovered by
22 AFPL from the partial settlement were fair and reasonable.
23 For noting, your Honour, that's at CBP.001.010.5957.

24 In the course of this remitter, Mr Trimbos
25 prepared a further report. That's the fourth Trimbos
26 report at CBP.001.010.4384, again in support of AFPL's
27 claim for costs. Then, your Honour, on 29 June 2020 AFPL
28 filed a further report from Mr Trimbos, his fifth report,
29 for noting EXP.020.007.0001, and in that report Mr Trimbos
30 confirms that he was in fact misled. He confirms that he
31 no longer holds the opinions expressed in his prior

1 reports, and he confirms that he no longer considers that
2 the fees claimed by AFPL in respect of the Bolitho Lawyers
3 are reasonable.

4 That fifth report essentially proves our case as
5 outlined in section H of the revised list of issues and in
6 relation to the Trimbo's report AFPL admits that it,
7 Mr O'Bryan and Mr Symons misled Trimbo's and that they did
8 so dishonestly. Your Honour will find that at
9 PLE.020.001.0001 at p.79 through to 96. We need just note
10 that at this point in time, your Honour.

11 If your Honour just bears with me for a moment.
12 Sorry, I think I may have been on mute. Mr Operator, if
13 we could go to p.0056. I apologise, your Honour.
14 Your Honour will see under the heading, 'H. Conduct in
15 relation to providing misleading information to an expert
16 witness and/or procuring a misleading report,' which is
17 referencing to our list of issues, 'By their conduct in
18 connection with the third Trimbo's report AFPL, Mr O'Bryan
19 and Mr Symons contravened the overarching obligations to
20 act honestly; AFPL, Mr O'Bryan, Mr Symons and Mr Zita
21 contravened the overarching obligation not to mislead or
22 deceive; and AFPL, Mr O'Bryan, Mr Symons and
23 Mr Zita/Portfolio Law contravened the overarching
24 obligations to ensure that legal costs were reasonable and
25 proportionate; and that AFPL, Mr O'Bryan, Mr Symons and
26 Mr Zita/Portfolio Law contravened the paramount duty.'

27 Your Honour, we'll come back to the balance of
28 the admissions that are contained through to paragraph 96
29 in closing, but I did want to draw your Honour to the
30 attention of that in the context of what we were talking
31 about this morning.

1 I want to take your Honour through the documents
2 that establish the conduct and state of mind of
3 Mr Elliott, Mr O'Bryan and Mr Symons with respect to the
4 third Trimbos report, and the documents that we intend to
5 take your Honour to now are intended to demonstrate six
6 matters, your Honour.

7 The first is that Mr Elliott and Mr O'Bryan
8 deliberately chose to tell Mr Trimbos that all the legal
9 costs had been paid by AFPL. That conveyed the implicit
10 assurance that AFPL had satisfied itself as to the costs
11 charged to its account. It also concealed the real no
12 win/no fee contingency fee arrangements from Mr Trimbos.
13 We'll be contending that by informing Mr Trimbos that the
14 fees had been paid, this ensured that the report produced
15 by Mr Trimbos could be used as a weapon to mislead the
16 court into believing that AFPL had funded the costs,
17 thereby assisting AFPL to recover its commission.

18 The second of the six points, your Honour, is
19 that Mr Elliott, Mr O'Bryan and Mr Symons arranged for
20 Mr Trimbos to be given backdated costs agreements and
21 disclosure statements to procure that he, Trimbos, would
22 approve their claims for the costs. They concealed their
23 real fee agreements from Mr Trimbos.

24 Thirdly, Mr Elliott, Mr O'Bryan and Mr Symons
25 furnished Mr Trimbos with misleading invoices that
26 appeared as if they had been issued monthly and paid by
27 AFPL throughout the litigation. They deliberately, we
28 will contend, created the impression that the fee slips
29 were prepared on the basis of proper contemporaneous
30 records.

31 Fourthly, Mr Elliott, Mr O'Bryan and Mr Symons

1 deliberately gave Mr Trimbos false and misleading
2 information about the work they had undertaken. In
3 connection with the Trust Co settlement, Mr Symons
4 provided Mr Trimbos with the work product of Mr O'Bryan's
5 secretary, Ms Koh, and deliberately passed it off as his
6 own. He sent all the discovery to Mr Trimbos, even though
7 he had not reviewed it himself, again, we will contend, to
8 deliberately suggest that he had done the work.

9 The three of them pursued exactly the same
10 strategy at the time of application for approval of
11 the partial settlement in mid-2016 when they invited
12 Mr Trimbos to assume that Mr Elliott had reviewed all of
13 the discovery and gave him information about how many
14 folios it comprised. The discovery in the proceeding was
15 treated as a licence to charge or print fees. Similarly
16 in connection with the Trust Co settlement, Mr O'Bryan
17 told Mr Trimbos to assume that the trial would run for 120
18 sitting days in order to justify the significant fees he
19 had charged in trial preparation.

20 Fifthly, Mr Elliott, Mr O'Bryan and Mr Symons did
21 not tell Mr Trimbos about the SPR proceeding or that
22 substantially all of the legal work to prepare the matter
23 for trial had been undertaken in that proceeding by the
24 SPRs.

25 Sixthly, Portfolio Law filed the report without
26 asking any question. It should have been readily apparent
27 to Mr Zita and Portfolio Law that the report was seriously
28 misleading. In particular, Mr Zita and Portfolio Law knew
29 that the report exhibited the invoices and fee slips of
30 Mr O'Bryan and Mr Symons that were marked to his attention
31 and which appeared as if they had been issued monthly to

1 Mr Zita and, in the case of Mr O'Bryan, had been paid.
2 Mr Zita knew that none of those invoices had been sent to
3 him. He knew that he had not paid any of them and, most
4 particularly, that he had not paid Mr O'Bryan's fee slips
5 despite the notation that appeared on them of 'paid'.

6 Now, your Honour, can we go then to the
7 instructions to Mr Trimbos. I ask your Honour to turn to
8 AFP.001.001.1736 and 1737. This, your Honour, at 1736 is
9 Mr O'Bryan's email to Mr Elliott of 4 July 2016. If
10 your Honour has the other page up, it's the edits he,
11 Mr O'Bryan, makes to the letter of instructions to
12 Mr Trimbos. Mr O'Bryan's edits include that he wanted
13 AFPL to tell Mr Trimbos that AFPL had incurred and paid
14 all of the legal costs and disbursements in the case, and
15 in that regard if your Honour turns to p.1738, at the top
16 of the page at point 5, your Honour will see the reference
17 to costs incurred in the case and likewise, your Honour,
18 you'll see it in paragraph 6, 'Legal costs and
19 disbursements incurred'. As at that date AFPL had not
20 paid any of Mr O'Bryan's fees or most of the fees of
21 Mr Symons or Portfolio Law.

22 Mr Elliott's draft already included a statement
23 that the legal costs incurred by Mr Bolitho and paid by
24 AFPL to date included Mr O'Bryan's fees of 1.7 million,
25 and that's in paragraph 6. He, O'Bryan, did not correct
26 that in his draft, the draft that you're now looking at on
27 the screen. He left it as it was. But, your Honour, he
28 added the words 'and disbursements', as your Honour will
29 see in paragraph 6, 'incurred by Mr Bolitho and paid by
30 BSLLP to date include' and your Honour will see the dot
31 points.

1 He obviously knew, we will contend, that that was
2 false when he settled the instruction because he knew AFPL
3 hadn't paid his fees. He must have known that it was a
4 material consideration to the court and the success of
5 AFPL's commission application whether or not his fees had
6 been paid.

7 The letter of instructions to Mr Trimbos that
8 Mr Elliott sent in November 2017 was based on this letter
9 and also conveyed the statement that the costs had been
10 paid. Can we ask your Honour to turn to AFP.001.001.226,
11 227 and 230. If we bring up 226 - sorry, I don't I think
12 read it out properly. AFP.001.001.2226. Your Honour will
13 see that's the email from Mr Elliott to Mr Trimbos. At
14 2227 your Honour will see that we have the letter of
15 instructions, and your Honour will see in paragraph 1 it
16 says, 'You will recall that on 24 March 2016 Bolitho
17 litigation partners, the litigation funder of the group
18 (indistinct) which has incurred and paid all of the legal
19 costs and disbursements'.

20 Then your Honour will see in paragraph 3(a),
21 'Under the settlement arrangements, the sum payable to
22 Bolitho in his capacity as plaintiff in the group
23 proceeding was 5.2 million. In respect of the group
24 proceeding, the plaintiff sought orders permitting the
25 payment of (b) 2.55 million from the Bolitho settlement by
26 way of reimbursement for approximately 70 per cent of the
27 legal costs and disbursements incurred by BSLLP on the
28 plaintiff's behalf in respect of the claims which are the
29 subject of the partial settlement.' I think that's
30 sufficient for the present purposes.

31 Then, your Honour, at the back of the document -

1 sorry, at p.2230 is the attachment which sets out the
2 Banksia expenses and your Honour will see it sets out the
3 expenses of counsel.

4 Your Honour, at paragraph 2229 of the letter it's
5 made plain that that schedule of disbursements incurred is
6 being sent. If we could just bring that up on the other
7 side of the screen, at p.2229. You'll see paragraph 10,
8 'A schedule of disbursements incurred by Mr Bolitho and
9 paid by BSLLP directly on his behalf is attached.' That's
10 the schedule we were just looked at before, your Honour,
11 which highlights the lawyer parties' fees.

12 The email traffic, your Honour, reveals a
13 calculated and deliberate plan by Mr O'Bryan and
14 Mr Elliott to create a deception that the invoices had
15 been paid. Your Honour, can I ask your Honour to bring up
16 NOB.500.001.7495. This is an email chain, your Honour. It
17 begins on p.7495, but I want to take your Honour to
18 p.7496. Your Honour will see the email from Mr O'Bryan of
19 21 November at 19.10 to Mr Elliott under the subject
20 matter of 'Banksia costs', 'Looks good. I will correct my
21 invoices via Florence over the next few days and issue
22 them as "paid" for Trimbos's purpose (as per the
23 mini-settlement). He will find it much easier to justify
24 a rate of \$1,100 an hour, \$11,000 a day, so I'll calculate
25 accordingly and increase the hours as appropriate.'

26 Then, your Honour, if we go to NOB.500.005.2262.
27 This is an email, your Honour, of 4 December from
28 Mr O'Bryan to Mr Elliott copying in his secretary,
29 Mr O'Bryan's secretary, Florence Koh, and your Honour will
30 see that he says, 'I will endeavour to complete these over
31 the next few days. Am in the bush at present with limited

1 wifi. Do you want the invoices shown as paid or unpaid?
2 I prefer paid and so will Trimbo's.'

3 Then, your Honour, if we could go to the invoices
4 in the Trust Co settlement that were also stamped as
5 'paid'. All of the invoices that were provided to
6 Mr Trimbo in the context of the Trust Co settlement were
7 stamped as 'paid' and your Honour can see them exhibited
8 to the third Trimbo report which is CBP.001.010.5957. It
9 begins, your Honour, at p.6155. It moves forward,
10 your Honour. I'll leave your Honour to look at them, but
11 there's the stamp.

12 It's also noteworthy, we say, that they also did
13 this at the partial settlement where the invoices were
14 also stamped as 'paid' and in that regard I just want to
15 take your Honour to the second Trimbo report,
16 CCW.031.001.0047 at p.0152. Your Honour will see the
17 similar 'paid' stamp and your Honour can look at the
18 balance of them at your Honour's leisure. It seems that
19 the practice of Mr O'Bryan issuing invoices marked as
20 'paid' harks, so far as we've been able to establish, all
21 the way back to the days of the Camping Warehouse matter.

22 Can I ask your Honour to turn up
23 SYM.008.001.0022. This is a document discovered by
24 Mr Symons on 13 July this year and if we go to the final
25 page at 0025, it's an email from Mr Elliott to Mr O'Bryan
26 of 1 March at 4.39 am, 'Hi Norman. Can I please trouble
27 you for a statement re your Downer fees showing me that
28 you billed 1.32 million' - Downer is Camping Warehouse as
29 your Honour will remember - inclusive GST on 4 March 2016.
30 1 million has been paid and 320,000 is owing. You are a
31 creditor as at 30 June 2016. All the invoices I got from

1 you have a paid stamp on them!'

2 We note, your Honour, the exclamation mark after
3 the word 'them', 'a paid stamp on them!'. One is
4 wondering whether the two of them thought this scam was
5 something of a hoot. We'll come back to that in the near
6 term, your Honour.

7 Mr O'Bryan, your Honour, replies to that and
8 says - this is quite remarkable, your Honour, the jesting
9 going on here - 'My clerk must have made a mistake!' This
10 is really odd, your Honour, because he wasn't using a
11 clerk in the context of these matters and it just shows
12 how he's acknowledging, we will contend, that a clerk
13 wouldn't have allowed such a practice to occur or have
14 made such a mistake. But it also shows the jesting nature
15 in which these two practitioners of the law, officers of
16 this court, thought that they could deal with these
17 matters as between themselves because they believed no-one
18 would ever uncover their nefarious conduct.

19 The invoices for the *Camping Warehouse v Downer*
20 matter that Mr O'Bryan discovered in this proceeding
21 appear to have been produced directly from his invoicing
22 system. We do not have the version that was provided to
23 Mr Elliott with the 'paid' stamp on them, but if
24 your Honour turns to look at one of the invoices, which is
25 at NOB.503.001.0005, again, your Honour, you'll see that
26 this is one issued personally by Mr O'Bryan and not
27 through his clerk.

28 This is one discovered directly from his system
29 and so therefore it doesn't have the 'paid' stamp on it,
30 but one can infer having regard to that reference, 'My
31 clerk must have made a mistake', that O'Bryan and Elliott

1 were joking with one another about the 'paid' stamp
2 reflecting a mistake on the part of the clerk. Really,
3 your Honour, they were joking about their misconduct.
4 We'll contend that this is but one of many examples of
5 their unbecoming conduct in the context of this
6 litigation.

7 Now, we note, your Honour, if we go to - I want
8 to deal with the admission Mr O'Bryan makes as to the
9 stamping of the documents. If we could go to
10 CCW.016.001.0006 and 0007, this is the draft affidavit
11 that O'Bryan prepared and sent to Trimbo's after
12 your Honour made orders requiring him to file an affidavit
13 on 29 March 2019, and we want to remind your Honour, if we
14 go to the document at 0007 and if we turn up paragraph 5
15 of that document, your Honour, on p.0008, there he was
16 telling Mr Trimbo's, 'All of my fee invoices prepared
17 during the class action were stamped as "paid" following
18 their creation by my secretary on my instruction in order
19 to make it clear that, as between me and the solicitors,
20 Portfolio Law (to whom they were addressed and sent), they
21 were to be treated as paid and as not creating any
22 liability for payment by either Portfolio Law or their
23 client, Mr Bolitho.'

24 This we say, your Honour, resolves the question
25 about who stamped the invoices as paid. Mr O'Bryan told
26 his secretary to do it. The explanation he was proposing
27 to give your Honour we'll be submitting is false because
28 Mr O'Bryan never provided the invoices to Portfolio Law.
29 He sent them straight to AFPL and Mr Trimbo's. Mr Zita's
30 evidence in the court, as we understand what he will give,
31 is that he didn't receive them.

1 Next, your Honour, if we can go to
2 SYM.001.003.2854. This is an email, your Honour, from
3 Mr Trimbos to Mr O'Bryan, Mr Symons and Mr Zita headed
4 'Costs lawyer's report'. 'Dear Norman, Michael and Tony,
5 can you please email to me your costs agreements that
6 relate to work you have undertaken in this matter from
7 1 July 2016 to date.'

8 Mr Symons responded to that email, your Honour,
9 and can I take your Honour to that document,
10 SYM.001.003.2842 and 2844. The response comes at 2842 on
11 18 December at 4.54 pm and he says, 'Hi Peter, I think
12 that the attached represents my revised cost disclosures
13 since last time around (there are three revised documents
14 in the PDF). Please let me know if you think anything's
15 missing, and I'll have a further look.'

16 He subsequently sent an email the next day,
17 your Honour, on 19 December. I should say, your Honour,
18 at 2844 is the barrister's disclosure statement. He
19 subsequently sent an email on 19 December. If I can take
20 your Honour to SYM.001.003.0372 and 0375. Your Honour
21 will see in this second email he's responding to a request
22 from Trimbos at the foot of the page, 'Dear Michael,
23 thanks,' and that's responding to what he got on the 18th,
24 your Honour. Then he says, 'Can you also forward to me
25 your costs agreement (disclosure statements for work you
26 undertook after 1 July 2016 at \$250 per hour (GST
27 exclusive) and after 1 September 2016 at \$275 per hour
28 (GST exclusive)).'

29 At the top of the page Symons's remarks, 'Hi
30 Peter, several points regarding your email. The work in
31 September to November 2016 (invoice 7-80) was also charged

1 at 275, 2,750 including GST. I think you should already
2 have my costs disclosures for the period 1 January 2016 to
3 the approval of the partial settlement. (c) I have now
4 included both of these costs disclosures in the attached
5 PDF (that is from 1 January 2016 and from 1 September
6 2016).'

7 These emails, your Honour, we'll be inviting
8 your Honour to find, from Symons on 18 and 19 December
9 attached a series of documents which purported to be
10 disclosure statements entitling Symons to increase his
11 fees from \$275 an hour inclusive of GST to the higher rate
12 of \$330 an hour plus GST and \$375 an hour plus GST, and
13 which purported to provide cost estimates for the relevant
14 periods ranging from \$600,000 including GST to \$800,000
15 plus GST. We now know, your Honour, that these cost
16 disclosure statements were prepared in December.

17 So, the fee estimates we'll be contending,
18 your Honour, that Symons specified in the documents were
19 generally consistent with the fees he actually charged in
20 his invoices for the relevant period. We'll be submitting
21 to your Honour that he wanted to convey the impression
22 that as at 1 September 2016 he had estimated that his
23 costs for trial would be \$600,000 and that much,
24 your Honour, is set forth in the document SYM.001.003.0375
25 at 0379. Your Honour will see that there. It's 60,000
26 including GST.

27 He wanted to convey the impression that as at
28 1 January 17 he had estimated his costs to trial would be
29 800,000 plus GST, and we say, your Honour, that's apparent
30 from SYM.001.003.2845. Your Honour will see that under
31 point 2. He wanted to convey the impression that as at

1 1 July 17 he had estimated that his costs up to trial
2 would be 700,000 plus GST. Your Honour will see that at
3 2848.

4 All of that, we'll be contending, your Honour,
5 was totally misleading. He hadn't given any cost
6 disclosures at any time to Portfolio Law or Mr Bolitho
7 and, as we understand the position of the evidence that
8 Mr Zita will be giving, he confirms in his first affidavit
9 that no such disclosure was given to him.

10 Next, your Honour, we now want to turn to
11 Mr O'Bryan. If your Honour can begin by going to
12 SYM.001.003.0203 and 0204. Now, in the first instance,
13 your Honour, at 0203, this is Mr O'Bryan's email to
14 Mr Trimbos on 20 December copied to Mr Mark Elliott and
15 Mr Symons and Mr Zita attaching Mr O'Bryan's December 2017
16 costs agreement and backdating it to 30 May 2016 and
17 stating, 'Dear Peter, my fee disclosure and costs
18 agreement dated 30 May 2016 is attached. I believe Mark
19 Elliott signed the counterpart of this for the litigation
20 funder, but I have not been able to locate the signed
21 counterpart. I will continue searching for it. My work
22 on the Banksia class action continued and my accounts were
23 duly paid by the litigation funder. I increased my fees
24 on 1 July 2017 to \$1,250 per hour and \$12,500 per day by
25 notification to my clients, including BSL Litigation
26 Partners Ltd. My fees were paid at that amended rate from
27 that date onwards. No new agreement was signed.'

28 We'll be inviting your Honour to conclude that
29 every aspect of this email is false. The fee agreement
30 that Mr O'Bryan attached to the email had not been
31 prepared and signed in May 2016. Secondly, Mr Elliott had

1 not signed a counterpart of the agreement. Mr O'Bryan has
2 admitted that he prepared the agreement shortly before
3 attaching it to the email and sending it. In that regard,
4 we note what has been said in his first affidavit at
5 paragraph 178(d).

6 Thirdly, Mr O'Bryan's accounts had not been paid
7 by AFPL; and, fourthly, Mr O'Bryan had not notified AFPL
8 or Portfolio Law of any increase in his rates to \$1,250 an
9 hour or \$12,500 a day on 1 July. The 20 December email
10 was discovered, your Honour, after we had returned to
11 court before your Honour on 1 March 2019 and seek orders,
12 your Honour, compelling the emails attaching the costs
13 agreement to be handed over.

14 Now, your Honour, I want to turn then to the
15 email of Mr O'Bryan of NOB.500.001.7237. This is
16 important, your Honour, in the context of the word
17 'reimbursement'. On 1 January 2018 in response to a query
18 by Mr Trimbos about Mr O'Bryan's January 2017 invoice,
19 Mr O'Bryan had this exchange with Mr Trimbos.

20 If we begin on p.7238 at 17.40, 'Dear Peter,
21 I have now checked my time records for January 2017, which
22 confirm that the memorandum of attendances is correct
23 (that is nine days, not 11) and the fee slip/tax invoice
24 (which shows 11 days) is incorrect. BSLLP has paid the
25 full amount of the tax invoice (they should hire you as
26 their auditor!)' because Trimbos has pointed out this
27 error, 'so I will reimburse BSLLP \$22,000 for the two days
28 overcharged.'

29 Then back comes the email, because Mr Elliott
30 must have been blind copied, your Honour, because back
31 comes the email from Elliott sitting directly above that,

1 'Thanks Norman. Just send the cheque when able!'

2 Then, your Honour, Mr O'Bryan at the foot of
3 p.7237 says, 'It's in the mail ... happy new year to you
4 and yours. Are you at the beach?' To which Elliott
5 replies, 'I will check the box daily. However things do
6 go missing.' And then O'Bryan confirms he's at
7 Blairgowrie for the summer until someone demands that he
8 returns to the big smoke.

9 This email exchange, your Honour, and my focus on
10 the word 'reimburse' shows that Mr O'Bryan well knew that
11 the word 'reimburse' conveys repayment of money that had
12 been advanced and we will contend coming from the mouth of
13 O'Bryan puts to bed the assertion made at one time in this
14 proceeding that 'reimburse' did not imply that fees had
15 been paid.

16 It's abundantly clear from that email chain that
17 we can see there, your Honour, that Mr O'Bryan and
18 Mr Elliott were joking about the lie Mr O'Bryan told
19 Mr Trimbos about 'AFPL has paid the invoice and I'll
20 reimburse the \$22,000 for the overcharge'. For Mr O'Bryan
21 and Mr Elliott to be having a joke about this fraudulent
22 scheme that they were running together, where they were
23 plainly seeking to mislead Trimbos to procure his expert
24 opinion, is alarming and should be troubling to the
25 debenture holders one and all, 16,000 of them.

26 Your Honour, it will be our case that the
27 documentary evidence reveals - and we'll be inviting
28 your Honour to conclude - that Mr Elliott, Mr O'Bryan and
29 Mr Symons brazenly misled Mr Trimbos about the work that
30 they undertook. We now want to focus in particular on the
31 Trust Co settlement as that is most relevant for our

1 purposes.

2 Can I invite your Honour to turn up
3 SYM.001.003.2828. On 29 November your Honour will see
4 Mr O'Bryan in the middle of the page writing to Mr Trimbo
5 telling him that the trial was likely to run for at least
6 120 sitting days. That's in response, your Honour, to a
7 question at the foot of the page from Mr Trimbo, 'Thanks
8 Norman, how long do you estimate the trial may have
9 taken?'

10 Your Honour, that, we will be inviting
11 your Honour to conclude, was a patently misleading
12 response, the reference to 120 sitting days, given that
13 the trial had been set down for 45 to 50 sitting days for
14 hearing by the trial judge under an agreed trial plan and
15 framework that Mr O'Bryan was a party to. Indeed, as you
16 would expect, Mr O'Bryan had been consulted about the
17 trial plan and had agreed with it at the time.

18 Can we show your Honour CBP.001.008.0248, which
19 is the email from Mr Redwood to Mr Nolan and all the over
20 parties. He says at the foot of 248, 'It can be discussed
21 tomorrow, but as far as timing of opening submissions,
22 Banksia merely indicates for the parties' benefit that its
23 position will be that the usual orders provide for mutual
24 exchanges and there may otherwise be practical
25 difficulties in requiring Banksia to file submissions in
26 mid-January.'

27 If we go to p.0252, your Honour will see the
28 framework of trial. That adds up to the relevant 120
29 sitting days, your Honour. Sorry, it doesn't. That's
30 just the framework. But then I want to take your Honour
31 to Mr O'Bryan's response and that's at NOB.500.001.9457.

1 'Dear Tony', he's writing to Mr Nolan, 'apologies but
2 I just noticed a minor error in the trial plan on p.3
3 under expert evidence. The Banksia witnesses shown there
4 should be identified as both Bolitho and Banksia as the
5 plaintiffs in the two actions are both calling the same
6 expert witnesses.'

7 If your Honour just bears with me for a moment.
8 The point is, your Honour, that trial framework is for 45
9 to 50 days and Mr O'Bryan is telling Mr Trimbos in
10 December 17 that it will be 120.

11 Now, it's important to note that Mr Symons and
12 Mr Zita didn't seek to correct the information that
13 O'Bryan gave to Trimbos about the number of days, even
14 when they were included in the email chain, and that
15 information formed the basis of Mr Trimbos's opinion that
16 all the trial preparation time that O'Bryan had charged
17 was reasonable and in that regard, your Honour, we note
18 the Trimbos report at CBP.001.010.5957 at p.5985, at
19 paragraphs 95 to 96. 'Further, I am instructed by
20 Mr O'Bryan that the group proceeding is currently fixed
21 for a 50-day trial. However, I am instructed by
22 Mr O'Bryan that in his opinion the trial will occupy
23 significantly more than 50 days. In Mr O'Bryan's opinion,
24 if all the principal claims, third party claims and
25 cross-claims run their full course, then the trial is
26 likely to run for at least 120 days. For the purpose of
27 this report I will assume that the trial occupies
28 100 days.'

29 Your Honour, Zita and Symons did send Trimbos
30 that trial framework, but they did not correct the email
31 from Mr O'Bryan. We will say, your Honour, it is

1 appalling that counsel could lie in this way and that
2 junior counsel and the instructing solicitor could be so
3 complicit in that conversation. But it shows how
4 confident these people were that they wouldn't be caught
5 out. It was critical to pump up the tyres, as it were,
6 for the sitting day because by pumping up the costs you're
7 pumping up the commission. Elliott's mate, O'Bryan, was
8 complicit in pumping up the legal costs so that the
9 commission would go up and of course O'Bryan had an
10 interest in the commission going up.

11 In relation to Symons, your Honour, I have
12 already taken your Honour to the email he sent to
13 Mr Trimbos on 19 December, but can we go back to it. It's
14 SYM.001.003.2605. We also need 2606. At 2605 he says,
15 'Dear Peter, attached is a scan of the copy of a printout
16 of the index I was working on in late January/early
17 February.' And there you have, your Honour, the merged
18 index document with the handwriting of Ms Koh to the
19 left-hand side. So here he is attaching a document
20 prepared by Mr O'Bryan's secretary, Ms Koh, that we have
21 taken your Honour to last week, passing it off as his own
22 work. Mr Symons also sent the whole discovery to
23 Mr Trimbos and various indexes of the discovery in support
24 of his claim for substantial fees for reviewing that
25 discovery.

26 Can we ask your Honour to turn up
27 AFP.001.001.2561 and 2708. At 2561 your Honour will see,
28 'As discussed earlier today please find attached' the
29 pleadings, the export PDF, and then he says, 'The export
30 PDF lists all the documents in the Dropbox folder which
31 I shared with you earlier this week. Unfortunately there

1 is no comprehensive index for the many sources of
2 discovered documents in the proceeding, although you'll
3 find some partial indices in the folder.' He then says,
4 'So there are in fact many more documents which have been
5 considered, reviewed, than the 19,154 listed and are
6 stored in the archive. Please let me know if there is
7 anything further with which I can assist you.'

8 Your Honour will see at 2708 there you've got the
9 listing of all the documents, but we have already
10 demonstrated to your Honour that that was false and shown
11 that it was Ms Jacobson who reviewed that discovery and
12 not Mr Symons. The documents in relation to the partial
13 settlement in mid-16 tell a similar story of Mr Elliott,
14 Mr O'Bryan and Mr Symons feeding Mr Trimbo's information
15 about the vast volume of documents there were in order to
16 help Mr Elliott record nearly \$800,000 in fees.

17 Can I ask your Honour to turn up
18 NOB.500.012.3839. This is an email that begins with
19 Elliott at the foot of the page to Michael Symons, 'Can
20 you please tell me the number of folios of discovered
21 documents in this case including the receivers'
22 investigation and the liquidators' hearing?' To which
23 Mr Symons replies to Mr Elliott and to Mr O'Bryan,
24 'Norman, have we ever got these electronically?'

25 Mr O'Bryan replies, 'I've got a disc with the
26 original 21 volumes of the receivers' examination court
27 book on it. It contains 1.63 gigabytes of data (all
28 document images). Many hundreds of documents in total,
29 which occupy the 21 folders in my room. I also have three
30 folders of liquidators' court book documents and at least
31 25 other folders of documents.' Your Honour has heard us

1 talk about this 49 volumes before.

2 Then I want to take your Honour to
3 AFP.001.001.1697. Mr Elliott is responding to that email
4 we just saw, your Honour, and being one who always, it
5 would appear, wanted to get to a quick outcome, he says,
6 'Is there any quick and easy way to provide an approximate
7 folio count?' That's at the foot of the page. A short
8 time later Mr O'Bryan emails Maddocks. This is
9 extraordinary. He emails Maddocks seeking to enlist their
10 assistance to obtain the information that Elliott wanted
11 to justify his fee count.

12 Can I ask your Honour to turn up
13 CBP.004.005.1761. Your Honour will see at the top of
14 the page Norman O'Bryan emailing Sam Kingston and David
15 Newman, copying in Zita and Marelda Hibberd, 'In response
16 to your last question, confirmed, Sam. Once we have the
17 information about insurance, et cetera, referred to in
18 your email below, we will finalise the advice and send it
19 to you confidentially on the same basis of common interest
20 privilege, probably on Monday.'

21 Separate issue: 'Do you have the liquidators'
22 examination court book documents available electronically?
23 If so, could you email them to me? Our costs expert has
24 asked us to verify the number and size of the documents we
25 have read for the purpose of running this case. An
26 electronic version is much easier to assess the size of
27 than the physical documents.'

28 Then, your Honour, Mr Symons comes to the rescue
29 on 4 and 6 July. Can I ask your Honour to turn up
30 AFP.001.001.1697 and 1699. Starting at 1697 you'll
31 remember, your Honour, we had Elliott saying, 'Is there

1 any quick and easy way to provide an approximate folio
2 count,' and that's at the foot of the page. Then we go up
3 the page and Symons replies on 4 July at 9.07 am, 'I had
4 some technical difficulties doing this on Friday
5 afternoon, but here's the word and folio count for the 21
6 volumes of the receivers' documents. The total is
7 25,269 folios. In relation to the other volumes of
8 materials, it might be appropriate to say that on average
9 there are approximately 1,200 folios per folder (being the
10 average from the 21 volumes of the receivers' documents).'

11 Then, your Honour, can I ask your Honour to turn
12 up p.1751 and 1752 - sorry, AFP.001.001.1751 and 1752.
13 There you have, your Honour, 'Here is the folio count from
14 the liquidator's court book which I understand to be three
15 volumes.' And there's an attachment which is at 1752, if
16 you put that up alongside, AFP.001.001.1752.

17 OPERATOR: Sorry, the attachment just seems to only be a place
18 holder but no actual native of it for the actual document
19 itself.

20 MR JOPLING: Is it not there, Mr Operator?

21 OPERATOR: No, sorry.

22 MR JOPLING: Your Honour, would you pardon me? Since the
23 announcement of the restrictions last evening we no longer
24 have solicitors with us, but they are online, I know. So,
25 if your Honour might indulge me, I'll ask them to upload
26 this document and we want to tender this document as well.
27 Your Honour, that's just a document that makes plain the
28 folios. Thank you, Mr Operator.

29 Then I ask your Honour to turn to the first
30 Trimbo's report, SYM.002.001.1890 at p.1936. We will be
31 going to p.1936. Your Honour, this is where Mr Elliott

1 used the information that was supplied to him by Mr Symons
2 to provide instructions to Mr Trimbos about the volume of
3 documents he'd allegedly reviewed. Your Honour will see
4 that. Thank you.

5 Now, next I want to invite your Honour to turn up
6 NOB.500.012.2360 and 2361. At 2360 we have the
7 correspondence from Mr Trimbos to Mr Elliott, Mr O'Bryan
8 and Mr Symons, 'Dear all, please find attached my draft
9 report for your comments. I will now finalise the
10 annexures and prepare a short affidavit exhibiting the
11 report. Subject to your comments on the draft report,
12 I should be able to have the affidavit and report sworn
13 this morning.' And your Honour will see at 2361 that is
14 the report.

15 So if we turn to p.12, your Honour, your Honour
16 will see - which is at p.2372 - it states that Mr Elliott
17 has spent hundreds of hours on discovery review.
18 Your Honour can see that at lines (h), (i) and (j).
19 Perusing discovered documents, 222 hours; scanning
20 discovered documents, 92 hours; and examining discovered
21 documents, 166 hours. Mr Trimbos relied upon the
22 information that Elliott had given him about the volume of
23 documents which had been provided to him by O'Bryan and
24 Symons.

25 Whilst we're there, your Honour, if we go to
26 paragraph 31 of the document on p.10 under the heading
27 'Estimate of reasonable time spent on reviewing discovered
28 documents by Mr Elliott', 'I am also instructed that
29 Mr Elliott perused approximately 20,000 folios (1 folio
30 equals 100 words or part thereof), he scanned
31 approximately 25,000 folios and he examined 10,000 pages

1 of discovered documents for the purpose of the group
2 proceeding.'

3 Then, your Honour, if we go to paragraph 32 on
4 p.11, if we scroll up, thank you, Mr Operator, 'Based on
5 my study of academic literature regarding document review
6 times, it is reasonable in my opinion to allow an average
7 of 150 words per minute for perusing certain parts of the
8 discovered documents. Mr Elliott instructs me that he
9 perused a total of 20,000 folios or 2 million words, which
10 at 150 words per minute equates to 222 hours of his time.'

11 Paragraph 33, your Honour, 'He equally notes that
12 Elliott instructed him that he scanned a total of
13 25,000 folios or 2,500,000 words, which at 450 words a
14 minute equates to 5,555 minutes or 92 hours of his time.'

15 Then at 34, your Honour, 'Mr Elliott instructs me
16 that he examined a total of 10,000 pages of discovered
17 documents. In my experience on average the discovered
18 documents contain 2 folios or 600 words per page.
19 Mr Elliott also instructs me that none of the documents
20 perused or scanned are included in this total. Therefore,
21 it is reasonable in my opinion to allow Mr Elliott
22 10,000 minutes or 166 hours to examine certain parts of
23 the discovered documents.'

24 It will be our case, your Honour, that plainly
25 Mr Elliott had not undertaken this discovery review or
26 else he wouldn't have needed to have asked Messrs O'Bryan
27 and Symons about the volume of documents involved, and
28 they must have known that Mr Elliott hadn't done this work
29 by reason of what they were asked to do on his behalf.
30 How our learned friends can continue to sit there
31 straight-faced and continue to seek to move this court to

1 send their clients' costs claim off to the Costs Court we
2 will say to your Honour is astounding. The brazenness of
3 this conduct requires your Honour to deal with this matter
4 in this hearing and not to countenance one iota the notion
5 of this matter going off to a Costs Court.

6 We want your Honour also to look at what
7 Mr O'Bryan and Mr Symons said in their opinion filed with
8 the court. Can I ask your Honour to go to
9 CCW.032.001.0001. Can I ask your Honour to turn up
10 paragraph 124. Thank you. 'It is the plaintiff's
11 submission, supported by the expert costs consultant's
12 report exhibited to the affidavit of Trimpos (a)' - and if
13 we drop almost to the bottom of (a), your Honour, you'll
14 see it says, 'The voluminous documentary and other
15 evidence which has been reviewed as a result of the
16 receivers' examination in 2013 and the liquidators'
17 examination in 2014.'

18 I should go back, your Honour, to the top, 'The
19 costs incurred by the plaintiff's solicitors and counsel
20 in the conduct of this proceeding over the last three and
21 a half years are reasonable, given the large number of
22 parties and resulting complexity of the proceeding, the
23 many interlocutory applications heard and determined in
24 the proceeding, the need for extensive case management of
25 this proceeding, including case management of this
26 proceeding, and the voluminous documentary and other
27 evidence which has been reviewed as a result of the
28 receivers' examinations in 13 and the liquidators'
29 examinations in 14.'

30 They both knew, we will contend, your Honour,
31 that this would lend support to the legal costs claim by

1 Elliott. They were both signatories, obviously, to their
2 opinions. That concludes what we want to say,
3 your Honour, on the seventh issue.

4 Could we turn then to the eighth issue.
5 Your Honour will recall that the eighth issue is
6 misleading of the court and that's in annexure A, sections
7 B, G, H, I, K, L and N. It was an integral element, we
8 will contend, of the misconduct of Messrs Elliott, O'Bryan
9 and Symons that they misled the court in ways that would
10 shock courts, all legal practitioners, the lay public and,
11 most particularly in that group of lay public, the 16,000
12 or so debenture holders.

13 It's our case, and we'll be inviting your Honour
14 to conclude, that they misled in the first instance
15 Justice Ferguson, as the Chief Justice then was,
16 thereafter Justice Robson, thereafter Justice Croft,
17 thereafter the justices of the Court of Appeal, and they
18 have sought to mislead your Honour in this remitter. We
19 will submit that, in all, seven justices of this
20 honourable court have been misled.

21 We think we can be relatively brief with respect
22 to the misleading conduct. Your Honour has all the
23 references to the position that was conveyed to the court.
24 We have set them out in annexure A to the list of issues.
25 Your Honour is well placed to determine whether the
26 conduct is misleading having read that. We are not going
27 to run through every aspect in detail in opening, but what
28 we would like to do, your Honour, is to focus on some
29 particular aspects of this particular misconduct, this
30 deeply troubling misconduct.

31 First, your Honour, one aspect of the misconduct

1 that we allege concerns the statements in the summonses
2 that were filed with the court on 2 June 2016 in relation
3 to the partial settlement and on 7 December 2017 in
4 relation to the Trust Co settlement, both of which claimed
5 and I quote the word 'reimbursement' of legal costs,
6 substantially all of which had not been paid by AFPL at
7 the time those summonses were issued.

8 Can we look in the first instance, your Honour,
9 at the summons in the partial settlement. That's at
10 CBP.004.004.1652. If we can bring that up on one side of
11 the screen and 1653 on the other. Your Honour, at 1653
12 you'll see this is an email from Tony Zita to Mark
13 Elliott, Michael Symons and Alex Elliott, who is the
14 solicitor at Elliott Legal. I point that out,
15 your Honour, because of what I'm now about to read.
16 'Gents', says Tony, 'Please find attached a copy of the
17 summons issued by Alex.' So Alex Elliott at Elliott Legal
18 is issuing the summons.

19 Then if we turn to the other side of the page,
20 your Honour, there's the summons. If the operator turns
21 the summons over to p.1654, your Honour will see at point
22 4, subparagraph (a), 'The plaintiff's claim for
23 reimbursement from the Bolitho settlement sum (as that
24 term is defined in the deed) be approved in the sum of
25 2.55 million for legal costs and disbursements in respect
26 of the claims which are the subject of the settlement
27 incurred by BSL Litigation Partners on behalf of the
28 plaintiff.'

29 Next, your Honour, we want to look at the
30 Trust Co summons and that appears, your Honour,
31 at - sorry, just going back, your Honour. Whilst that

1 summons has got the Portfolio Law details on it on p.1653,
2 as Mr Zita says in the email it was issued by Alex
3 Elliott.

4 Now, your Honour, if we go to 5313, that's the
5 summons in the Trust Co settlement. If we turn,
6 your Honour, to p.5314, your Honour will see at point 1,
7 and I say it's point 1 because on the previous page it
8 starts point 1 where it says that they are seeking
9 approval for, at (a), 'The plaintiff's claim for
10 reimbursement in the sum of 4.75 million (plus GST) for
11 legal costs and disbursements incurred.'

12 Now, your Honour, the notice that was issued to
13 group members in December 2017 also used those words
14 'reimbursement for costs incurred' and can I take
15 your Honour to page SYM.002.003.2274 and can I ask you,
16 Mr Operator, to turn up p.2285. If we just have that
17 page, 2285, and if we could also have 2274. I just want
18 to make it plain, your Honour, at 2274 this is the order
19 that is made that attaches to it the notice that goes out
20 to the group members.

21 If we go, your Honour, to the foot of the page on
22 p.2285, you'll see 'Distribution of the settlement sum'
23 and 'Legal costs and disbursements' is the heading. It
24 says, 'In conjunction with the application for the
25 approval of the proposed settlement, the plaintiff will
26 apply to the court for approval of the reimbursement of
27 legal costs and disbursements already incurred in the
28 sum' - and I have to take your Honour to the next page,
29 2286 - 'of 4.75 million (plus GST) attributable to the
30 claims made against the trustee. The legal costs and
31 disbursements include the costs of the plaintiff's

1 solicitors and barristers who have worked on the case
2 since its commencement in 2012 and various disbursements
3 that have been paid, including the fees of expert
4 witnesses.'

5 We say, your Honour, that any ordinary person
6 would understand the word 'reimbursement' to convey that
7 the costs have been paid. Any ordinary person would
8 assume that the costs have been paid from the fact that
9 AFPL was purporting to be a litigation funder. We
10 understand the argument advanced by AFPL and the lawyer
11 parties is to say that in tax law reimbursement simply
12 means a payment in relation to a liability that has been
13 incurred and we contend that that's a specious argument.

14 We simply want your Honour to note for present
15 purposes NOB.500.001.7237. We went to it a short time ago
16 and I won't go back to it, but that's the documentary
17 evidence that shows that Mr O'Bryan and Mr Elliott knew
18 and intended that the word 'reimbursement' should convey
19 to third parties that the costs have been paid. That was
20 the occasion, your Honour will recall, where, in the
21 correspondence with Trimbos, O'Bryan said he would
22 reimburse AFPL for moneys that had already been paid, the
23 22,000 that he was saying had already been paid.

24 Now, next, your Honour, I want to go to
25 NOB.500.001.7237 - sorry, no. We also note, your Honour,
26 in regard to this technical argument, if it is pursued,
27 that's referred to in the affidavit material of the lawyer
28 parties, that it falls apart completely once one has
29 regard to the documents discovered and produced by AFPL
30 two weeks out from trial, two to three weeks out from
31 trial, in which O'Bryan and Symons both confirm that they

1 were on a no win/no fee arrangement in relation to all
2 matters involving AFPL.

3 Now, continuing on with misleading the court and
4 zeroing in on certain aspects, in section I of the list of
5 issues we identify seven material respects in which the
6 opinions prepared by Messrs O'Bryan and Symons were
7 misleading and it's all set out in annexure A at paragraph
8 100 onwards and I don't want to go through all of them in
9 the opening, your Honour. Your Honour can read the
10 opinions and form your own view. But we will focus in
11 opening on those that can be usefully - we'll focus on
12 those that can usefully be developed further to what we
13 have included in the list of issues.

14 As a starting proposition, for each of the seven
15 aspects in which we say the opinions were misleading, the
16 effect, we say, your Honour, was to overstate AFPL's
17 funding risk or contribution to the settlement. The
18 effect was to overstate AFPL's entitlement to a
19 commission. The misconduct that we allege must be viewed
20 through the prism of all documentary evidence that has
21 come to light in the course of the remitter.

22 Before going to the opinions, can I ask
23 your Honour to return to SYM.008.001.0013. This is the
24 email exchange between Elliott and Symons in February and
25 March of 2018 about a retainer agreement between AFPL and
26 Mr Symons. Your Honour will remember that we looked at
27 the email last week from Elliott to Symons of 26 February
28 where he said, 'I'd ask for your reasonable assistance' -
29 and this is at 0015, your Honour - 'in seeking costs
30 recovery when we win a case.' That's really at the foot
31 of the page at 0015, your Honour, three or four lines

1 above the end.

2 Then there's an exclamation mark. Remember we
3 looked at the email from Elliott to Symons of 3 March
4 which is on p.0013 at clause E, where it says 'plus GST.
5 To be advised percentage share if/when we recover more
6 than 40 hours per week. I trust that you will agree that
7 it worked well for you on the Banksia matter? MS',
8 Michael Simon, 'the retainer is not meant to enrich me at
9 your expense. It's simply my way of recognising your
10 valuable contribution, focusing your efforts and
11 dissuading you from seeking work elsewhere.'

12 We have looked at the evidence of what Symons
13 actually did on the Banksia matter. We'll be inviting
14 your Honour to conclude that he did very little on the
15 matter in terms of substantive legal work. The valuable
16 contribution, we'll be inviting your Honour to conclude,
17 that Elliott refers to in that email at p.0013 of 3 March
18 is the contribution made in drafting the package of
19 material by which AFPL's claim for nearly \$20 million was
20 approved by Justice Croft, because that certainly ensured
21 that the riches were going to flow through to Elliott and
22 co, and the opinions were absolutely critical to obtaining
23 that approval. One asks rhetorically why should AFPL be
24 allowed to recover fees for this work which was clearly in
25 aid of the nefarious scheme to recoup large sums of fees
26 and commissions.

27 Now, I want to say something about the settlement
28 approval application which we will contend to your Honour
29 is akin to an ex parte application. Your Honour knows
30 well what the Court of Appeal said at paragraph 300 of
31 their judgment when they were commenting about a

1 settlement approval application and they said, and
2 I quote, 'The court is exercising a protective
3 jurisdiction in which many affected parties are not before
4 the court but rely on the plaintiff, his advisers and the
5 funders.'

6 We would contend that a settlement approval
7 application without a contradictor is really akin to an ex
8 parte application. When exercising its protective
9 jurisdiction in respect of approval of a group proceeding,
10 the court asks for a confidential opinion from counsel for
11 the class. The court relies upon that opinion from
12 counsel because the court implicitly trusts its officers.
13 It's mindful that its officers are aware of their
14 paramount duty to the court, and the court expects counsel
15 to be independent, to be objective and to be scrupulously
16 honest and mindful of that paramount duty that they owe.

17 There is a heavy burden on solicitors and counsel
18 seeking approval of the settlement to make full disclosure
19 to the court of all matters relevant to the court's
20 consideration of the matter. Counsel are expected to be
21 candid and frank in their confidential opinion that
22 counsel is expected to supply in connection with a
23 settlement and approval application. Counsel are under an
24 obligation, we will contend, to bring to the court's
25 attention all facts and all issues which might bear upon
26 the orders to be made.

27 In that context, we want to ask your Honour to
28 turn first to the first Bolitho opinion at
29 SYM.005.001.1400. We ask your Honour to go to paragraph
30 104. We ask your Honour to note in your Honour's own time
31 to look at paragraphs 104 to 118, but that comes under the

1 heading 'Legal fees and disbursements' and in the first
2 instance I want to take your Honour to what is said at
3 paragraph 106. If we could just blow that up,
4 Mr Operator, thank you. Paragraph 106, thank you, on
5 p.1455.

6 They say, 'Mr Trimbos has concluded that the
7 following legal costs and disbursements now claimed (a)
8 have been reasonably incurred by the plaintiff and are
9 fair and reasonable in amount,' and then they listed them
10 all, your Honour. They were inviting the court or they
11 invited the court to rely on the third Trimbos report.

12 Can I ask your Honour to look at what they said
13 at 106(a)(ii), they have been 'reasonably incurred by the
14 plaintiff and are fair and reasonable in amount',
15 'Disbursements totalling \$3,079,250.25 (GST inclusive)
16 billed to the plaintiff since 1 July by his
17 solicitors: Trimbos confidential report [167].' 'Billed
18 by his solicitor.'

19 Now, in fact Mr O'Bryan and Mr Symons had issued
20 their bills only a few weeks before they wrote this
21 opinion, your Honour, and they didn't send their bills to
22 Portfolio Law; they sent them straight to AFPL and
23 Mr Trimbos, and Portfolio Law had not billed the plaintiff
24 for their fees at all.

25 Now, in paragraph 106(b) they refer to 'fair and
26 reasonable anticipated future costs to finalise the
27 settlement', your Honour will see that at (b)(i); namely
28 \$400,796 for professional fees and \$354,260.44 for
29 disbursements, and then they quote the passage.

30 Mr Symons and Mr O'Bryan deployed this
31 distinction between costs incurred to date, your Honour,

1 and anticipated future costs in a very misleading and
2 calculated way. They intended that Justice Croft reading
3 this opinion should believe, we will be inviting
4 your Honour to conclude, that AFPL had paid all the legal
5 costs in the 'incurred to date' category. They intended
6 the impression to be created because that assisted AFPL in
7 the recovery of its commission. They also, your Honour,
8 deployed the concept of anticipated future costs at
9 paragraph 114 on p.1460. Your Honour will see, 'As
10 concerns anticipated costs and disbursements, Mr Trimbos
11 has also opined that they are fair and reasonable.'

12 Critically, your Honour, we want to go back to
13 paragraph 109 of the first report at SYM.005.001.1400 -
14 sorry, the first Bolitho opinion, where O'Bryan and Symons
15 at paragraph 109 say, 'We note that Mr Trimbos has opined
16 on whether the legal costs and disbursements are fair and
17 reasonable and whether they have been reasonably incurred
18 and are of a reasonable amount: third Trimbos affidavit,
19 paragraphs 7 and 8. Mr Trimbos was specifically engaged
20 to provide the opinion concerning whether the costs and
21 disbursements were reasonably incurred and are of a
22 reasonable amount pursuant to clause 3.11 of the deed as a
23 condition of the BSL, the liquidators and Trust Co
24 agreeing to instruct their legal representatives to
25 support [it]. Mr Trimbos's engagement to provide these
26 opinions is not intended to usurp the court's function,
27 and Mr Trimbos has been careful to ensure that sufficient
28 material is put before the court to permit the court to
29 reach its own conclusions concerning the legal costs and
30 disbursements.'

31 By that, your Honour, we will contend they meant

1 to suggest all of their own invoices and fee slips and the
2 invoices of Portfolio Law. It will be our case that they
3 were here expressly inviting the court to look at their
4 invoices and fee slips to satisfy itself that their costs
5 were fair and reasonable, but they knew that their
6 invoices and fee slips were highly misleading. In the
7 case of both O'Bryan and Symons they were falsely dated,
8 falsely marked 'Attention to Portfolio Law' and they
9 contained false accounts of the work done and time spent,
10 and in the case of O'Bryan they were all falsely stamped
11 as paid.

12 Now, at paragraph 115 of the first Bolitho
13 opinion they said, and I quote, 'We are not in a position
14 to do more than adopt Mr Trimbos's opinion that the costs
15 incurred are reasonable, the work was undertaken
16 efficiently and appropriately, and that the charges of the
17 plaintiff's solicitor and counsel were reasonable and
18 appropriate for practitioners of their standing.'

19 But, your Honour, they were in a position, we
20 will contend, to do more than that. Their paramount duty
21 to this court meant that each of them was under a clear
22 duty to ensure that the court did not rely on the false
23 and misleading invoices and fee slips that they produced
24 and each of them was under a clear duty to ensure that the
25 court did not rely upon the report of Trimbos which was
26 false and misleading because of the false and misleading
27 information that he had been given. And so too was Zita,
28 who not only filed the Trimbos report, but filed counsel's
29 opinion and was in court when counsel addressed Justice
30 Croft.

31 We will be contending that these statements in

1 the opinion prepared by O'Bryan and Symons were dishonest.
2 We will be contending and inviting your Honour to conclude
3 that they knew that the claim for legal costs was
4 excessive and that they knew that they had not done all
5 the work that they had charged for.

6 Now, I want to deal with the first Bolitho
7 opinion at paragraph 116(b) and the statement about being
8 engaged on their usual terms. Your Honour will see that
9 at the top of the page. 'The solicitors and counsel
10 engaged by the plaintiff have been engaged on their usual
11 terms. The court may be reassured by the role of the
12 plaintiff's litigation funder, a sophisticated participant
13 in this litigation with access to significant knowledge
14 and experience of litigation, in providing oversight in
15 respect of the engagement of solicitors and counsel on
16 reasonable terms.'

17 This statement, your Honour, we'll be contending
18 is totally misleading and totally dishonest. Mr O'Bryan
19 and Mr Symons wanted his Honour Justice Croft to believe
20 that they and Mr Zita and Portfolio Law were engaged on
21 ordinary terms when in fact their terms, we'll invite
22 your Honour to conclude, were anything but ordinary.

23 The arrangement between AFPL and O'Bryan and
24 Symons was an unusual and unfair arrangement that saw them
25 deferring the delivery of invoices so that they could
26 claim bonus points, the language of the lawyers, in the
27 form of larger fees at the end. We have already looked at
28 the documents which show that Elliott encouraged O'Bryan
29 and Symons to inflate their bills after the matter
30 settled. Imagine the chutzpah of these two barristers to
31 then encourage Justice Croft that he could, to quote them,

1 'be reassured' - do you see that on line 2,
2 your Honour - 'by the involvement of AFPL in these
3 circumstances.'

4 Now, Mr Symons's explanation for this statement,
5 if he gives one, is equally troubling and is to the effect
6 that he was unaware of the terms on which O'Bryan and
7 Portfolio Law had been retained. Well, we look forward to
8 him giving evidence and us exploring with him the evidence
9 he appears to want to give your Honour even at this last
10 moment.

11 But it will be our case, your Honour, that Symons
12 knew about the fee arrangements of O'Bryan. For instance,
13 your Honour, he is privy to the email from O'Bryan to
14 Elliott of 11 March. If your Honour looks at document
15 SYM.008.001.0017, this is the email from O'Bryan to
16 Elliott in which O'Bryan says - going out on 11 March,
17 your Honour. It says, 'I confirm that, notwithstanding
18 any term to the contrary in my various pro forma retainer
19 arrangements, I am providing my services as senior counsel
20 in respect of the various legal cases for which BSL
21 Litigation Partners is acting as the litigation funder, on
22 the basis of a no win/no fee arrangement in each case.'

23 If we look above, your Honour, there Symons gets
24 knowledge of that communication when Elliott emails him at
25 17.30, 'MS. See below.' So he's drawing it to his
26 attention. 'Can you please send me the same email,
27 otherwise the auditors will never sign off. Please let me
28 know if you want to discuss.'

29 We will be contending, your Honour, that the idea
30 that Symons didn't know about the fee arrangements of
31 O'Bryan is totally implausible in any event. Clearly they

1 both knew that their fee arrangements involved an
2 arrangement with AFPL not to issue any bills until a
3 settlement was reached. They discussed preparation of
4 their bills in November 17 after settlement and plainly,
5 we'll be contending, Symons knew O'Bryan, like Symons, was
6 on a contingency fee arrangement that saw them both
7 seeking to claim significant fees for the time they had
8 not spent. Symons plainly knew, we'll be contending, that
9 O'Bryan had not done \$2.5 million of work in the relevant
10 period. They were in the same chambers and worked on all
11 the AFPL Elliott class action cases together.

12 Equally, your Honour, we'll be contending that
13 O'Bryan knew that Symons had not done \$600,000 worth of
14 work in 2017. Your Honour will recall the evidence we
15 showed you last week showing that in July 2017 Symons
16 didn't send a single email or draft a single document
17 relating to the Banksia matter, despite billing nearly
18 \$80,000 in that month.

19 O'Bryan and Symons, we'll be contending, knew
20 that the impression they created about being engaged on
21 ordinary terms was highly material. They must have known
22 that what they did was grossly misleading and improper and
23 we will submit this is evident from a series of emails
24 they exchanged with their legal friend in March 2019 after
25 the hearing before your Honour on 1 March 2019.

26 If we could go, your Honour, to the email
27 SYM.004.001.1665 and if we begin, your Honour, at 1667.
28 At 8.57 Mr O'Bryan forwards the email to Symons, 'Please
29 have a look at JJ's questions before and draft some
30 answers to them as I am in court today.' At 9.20 O'Bryan
31 emails Symons, attaching a draft letter.

1 At 10.41 Symons replies to O'Bryan, 'I apprehend
2 that Jopling's complaint is that the time of generation of
3 fee slips/cost disclosures meant that charge out rates
4 could be altered; (b) AFPL and counsel were each motivated
5 to alter the charge out rates. For AFPL I understand the
6 alleged motivation to be the inflation of the liability
7 AFPL had incurred' - and he has an asterisk and we go to
8 the asterisk. 'The inflation of the AFPL liability only
9 seems relevant to the justification of a funding
10 commission on the basis of an ROIC calculation. Given
11 that we did not address this calculation in the 19 January
12 opinion and only did so later in the year in submissions
13 in the appeal after it had been addressed in another case,
14 it seems a difficult inference.'

15 Going back up to (b), 'and for counsel presumably
16 personal gain; and (c) the suggested contingent fee
17 arrangement meant that AFPL did not in truth bear any
18 liability.'

19 Then he says, 'It's possible that there is also
20 an allegation that the dates of the fee slips were
21 intended to mask a contingent fee arrangement, but
22 I understood what Jopling said in court to be directed to
23 the suggestion that the invoices were not generated until
24 after settlement for the reasons stated below. It does
25 not appear that there would be any problem under the
26 uniform law if there were a contingent fee arrangement
27 (see ss.170 and 181), but if there were found to be a
28 contingent fee arrangement, then perhaps it presents an
29 issue as to whether it should have been disclosed to the
30 court in relation to the initial approval.'

31 I revert to those words, your Honour, 'perhaps it

1 presents an issue as to whether it should have been
2 disclosed to the court in relation to the initial
3 approval.' Mr Symons and Mr O'Bryan knew very well that
4 it ought to have been disclosed. We'll be inviting
5 your Honour to conclude that they knew very well what they
6 were doing in creating a deception to conceal it.

7 And they could not even be honest with their
8 legal friend whose counsel they were seeking, because if
9 we go, your Honour, to p.1665 and at 1.30 in the
10 afternoon, look at the response Mr O'Bryan sends where he
11 says, 'I'm in court this week, but Michael has given his
12 best guesses below. I am quite relaxed about responding
13 to any such allegations, if they are made. My rates
14 throughout this class action have been well below those of
15 comparable counsel in Melbourne (e.g. Jopling himself and
16 all other senior counsel engaged in the case on the other
17 side of the record). Whilst I agreed to a more modest
18 rate due to the anticipated volume of work, I did not ever
19 agree to a contingent or conditional fee arrangement.'

20 Totally contrary to the documents we've now seen
21 in which both O'Bryan and Symons have confirmed to the
22 auditors they acted on a no win/no fee basis in all
23 matters involving AFPL. I don't think I need to take
24 your Honour back, but I'll remind your Honour that's at
25 ABL.001.0685.00009 in the case of O'Bryan and in the case
26 of Symons SYM.008.001.0021.

27 Look at the further response from Mr Symons,
28 your Honour, and I want to take your Honour back to the
29 email at SYM.004.001.1665. At 3.16 at the top he chimes
30 in, 'I referred to a contingent fee arrangement in my
31 email below in error. I meant to refer to the suggestion

1 that there was a conditional fee arrangement on both
2 occasions. The consequences of a contingent fee
3 arrangement are - a civil penalty of 100 penalty units is
4 listed in s.183(1) and is capable of constituting
5 unsatisfactory professional conduct or professional
6 misconduct under s.183(3); and the fees must be repaid
7 under s.185(4). I think the points which the contradictor
8 wants to make are, 1, some or all of the legal costs for
9 which the funder seeks reimbursement should not be
10 reimbursed because (a) there were not written costs
11 agreements and disclosure documents, which should have
12 been in place because of the nature of the case or which
13 the funder should have required to comply with the
14 founding agreement; (b) rates were increased once it was
15 expected that there would be a settlement; and, 2, the
16 funding commission should be less because (a) the funder
17 was not liable for the costs due to a conditional fee
18 arrangement and therefore did not bear risk (similarly if
19 there were a contingent fee arrangement and the fees had
20 to be repaid); and (b) of the funder having breached the
21 funding agreement.'

22 We will contend, your Honour, and we will invite
23 your Honour to conclude, that this email shows that
24 Mr Symons knew immediately following the hearing on
25 1 March 2019 that he'd been caught. He had no difficulty
26 appreciating that these were material issues and yet even
27 to this day he's not sought to apologise to this court for
28 his conduct or sought to take any responsibility for it or
29 to provide a fulsome account of what he was engaging in
30 despite his senior counsel when as junior counsel in May
31 of last year, 2019, on 29 May at transcript

1 TRA.510.001.0001 at p.0156 at lines 22 to 25 said, 'He
2 recognises his duty to the court and seeks to ensure that
3 the court is in possession of all of the assistance
4 reasonably required for the conduct of the remitter.'

5 I now want to take your Honour to some documents
6 that show that Mr Elliott and Mr O'Bryan and Mr Symons
7 were well aware that the extent to which AFPL had actually
8 provided funding in the proceeding was likely to be
9 relevant to the court's assessment of whether to make a
10 common fund order and the quantum of the commission. They
11 knew that, we will contend, because that issue had arisen
12 at the time of the partial settlement against the
13 directors and the auditors of RSD. So, they knew that it
14 was relevant how much funding had been provided because
15 they knew that that was going to pump up the commission.

16 Now I want to go, your Honour, to the Trust Co
17 submissions of the partial settlement. I want to go to
18 SYM.002.001.2005. Trust Co's submissions in the partial
19 settlement approval application were dated 1 August 16,
20 which Zita forwarded to Elliott, O'Bryan and Symons and
21 Alex Elliott. I want to take your Honour to p.2009 and
22 I want to take your Honour to (iii), 'Commission payable
23 to the funder' and I want to take you to paragraph 14.
24 'Several questions arise in relation to the entitlement of
25 the litigation funder to what has been termed a "common
26 funding fee". In particular (a) what is the justification
27 (legal and factual) for the litigation funder receiving
28 25 per cent of the entire settlement sum, thereby in
29 effect taking 25 per cent of the settlement proceeds that
30 would otherwise be payable to debenture holders who
31 declined to enter into a litigation funding agreement with

1 the litigation funder?'

2 Then, your Honour, going to paragraph 15, 'As to
3 the quantum of the fee (if one is approved), the following
4 additional matters arise: what matters should the court
5 take into account in determining the quantum of any
6 funding commission, noting the fact that the litigation
7 funding agreement itself does not set a fee (as opposed to
8 setting a maximum commission that may be payable)? What
9 is the justification for a funding fee of 25 per cent of
10 the entire settlement sum being payable, having regard to
11 the facts set out below?'

12 Then, your Honour, I want to go to paragraph 21.
13 Critically, 'As Trust Co has not seen the justification
14 put forward by the plaintiff for this payment, it is
15 difficult for it to make further submissions on these
16 matters. Nevertheless, the matters identified above are
17 likely to be relevant (a) to the question of whether a
18 "common funding fee" order should be made; and (b) if so,
19 the quantum of any funding fee paid to the litigation
20 funder.'

21 I want to also go back, your Honour, to paragraph
22 17 where they say, 'The litigation funder did not become
23 involved in the proceeding until 13 March 2014 (the
24 proceeding having commenced on 24 December 2012). It
25 appears that only some, and not all, of the disbursements
26 incurred by the plaintiff have been paid by the litigation
27 funder.'

28 Then 18, 'Secondly, the work done by the
29 plaintiff in prosecuting the claims against the settling
30 defendants appears to have been minimal (at least compared
31 to the work done by the SPRs). Orders have been made that

1 evidence in the receivers' proceeding also be evidence in
2 the Banksia proceeding. It appears that the plaintiff in
3 the Banksia group proceeding intended to conduct his case
4 by almost wholly relying on the evidence and work done by
5 the SPRs', and in this regard they refer to him only
6 filing three statements of his evidence in the proceeding
7 and they contrast that with Banksia who filed 41
8 statements and reports running to more than 6,000 pages,
9 whereas the expert report of Sutherland filed by the
10 plaintiff, as is said in (a) above, ran to only 71 pages.

11 Your Honour, for completeness, at paragraph 19
12 Messrs Finch and Liondas said, 'The plaintiff and
13 therefore the litigation funder in the Banksia Group
14 proceeding has effectively been free-riding on the work
15 done by Banksia through the SPRs. That work has been done
16 at a very substantial cost. That cost has already been
17 paid for by debenture holders because the costs of
18 preparing this evidence and preparing the cases against
19 the settling defendants generally have been paid out of
20 Banksia's funds, being moneys that would otherwise have
21 been available for distribution to debenture holders. In
22 circumstances where group members have themselves paid for
23 the vast majority of the work done to prosecute the claims
24 against the settling defendants, including the claims in
25 the Banksia Group proceeding, the question that arises is
26 why they should be asked to pay a further 25 per cent of
27 any sum that may otherwise be available for distribution
28 to them in the Banksia Group proceeding.'

29 So, Trust Co was saying in this submission that
30 the question whether any common fund order should be made
31 and the amount of that payment was informed by the degree

1 of financing provided by AFPL and the degree of work
2 undertaken by the lawyer parties. Mr O'Callaghan, as he
3 then was, acted as contradictor and made submissions along
4 similar lines which are outlined in our list of issues and
5 I don't need to take your Honour to those now.

6 The Trust Co submissions put the position most
7 strongly that the funding commission was referable to the
8 risks taken by AFPL and in particular what costs it had
9 paid and when. Indeed, when Mr O'Bryan and Mr Symons
10 appeared before Justice Robson on 4 August, nearly four
11 years ago tomorrow, your Honour, they submitted to Justice
12 Robson that a common fund order to AFPL of 1.3 million,
13 comprising 25 per cent of the Bolitho settlement sum in
14 the partial settlement, would provide a return to the
15 funder which was commensurable with the risk accepted by
16 it.

17 Can I ask for the transcript to be brought up,
18 SYM.001.001.4500 at 4575, at lines 15 to 17, 'and to
19 provide a return to the funder which is commensurable with
20 the risk accepted by it'.

21 After the time of the partial settlement,
22 your Honour, the Full Federal Court published its decision
23 in *Money Max*, which we have referred to in our list of
24 authorities. Mr O'Bryan sent an email to Mr Elliott and
25 other investors in AFPL on 27 October about that decision,
26 and I want to ask your Honour to look at the email
27 CBP.004.001.8881. It begins its life, the email that is,
28 with Ashurst sending O'Bryan an email headed, 'Class
29 action update. Game changer. Federal Court steps in to
30 regulate class action funding.' That's at the bottom of
31 the page, sorry, Mr Operator. You'll see the heading.

1 Scroll up and you've got it in the subject matter.

2 Then, your Honour, Mr O'Bryan sends that on to
3 his other investors, Mark Elliott, William Crothers, Steve
4 Hill, Peter Hill at Globe International Limited and Matt
5 Hill and his solicitor Tony Zita, 'Forward: class action
6 update. Game changer: Federal Court steps in to regulate
7 class actions'.

8 Then, your Honour, if we go back I think in the
9 email chain to the gentleman from Ashurst who has alerted
10 Mr O'Bryan to this, he says, 'In the QBE shareholder class
11 action' - I'm on p.8882 - 'the Full Federal Court has
12 endorsed a common fund order, which would require all
13 class action members of an open class action to contribute
14 to the funder's commission out of any settlement or
15 judgment even if they have not signed a funding agreement.
16 However, the court imposed important limitations which
17 give the court a central role in regulating the return to
18 the litigation funder, including: approving the total
19 return having regard to the risks undertaken by the
20 funder; secondly, capping the funder's return so that the
21 class members can be no worse off than they would have
22 been had the common fund not been permitted. This is a
23 potential game changer on litigation funding. Our
24 briefing discusses it further. Please contact us if you
25 have any questions.'

26 Mr O'Bryan and Mr Elliott knew that this
27 encompassed the legal costs of conducting the action, the
28 security for costs that the funder had to advance and the
29 potential adverse cost risks. That is why, your Honour,
30 at the subsequent time of the Trust Co settlement, knowing
31 the sort of submissions that might be made against a

1 substantial funding commission to AFPL, O'Bryan and
2 Symons, with the full knowledge and encouragement of
3 Elliott we'll be inviting your Honour to conclude, set out
4 to mislead the court about the risks undertaken by AFPL in
5 providing for the funding claims against Trust Co in this
6 proceeding.

7 Your Honour, we want to make plain that
8 his Honour Justice Croft relied upon the statements that
9 were made by counsel that justified the payment of AFPL's
10 fees. Can we take your Honour to His Honour's judgement
11 at CBP.001.001.0501. This is His Honour's judgment in
12 respect of the first approval application, and his Honour
13 at paragraph 82 accepts - it begins, 'In financing the
14 Bolitho Group proceeding, BSLLP' - paragraph (c), sorry.

15 Sorry, I'm at CBP.001.001.0543. Thank you,
16 Mr Operator. At paragraph 82, your Honour, 'In financing
17 the Bolitho Group proceeding, BSLLP' - moving to
18 subparagraph (c) - 'paid legal costs and disbursements
19 (or, looking prospectively, being expected to pay such
20 costs and disbursements up to the effective conclusion of
21 the proceeding) of approximately \$7.8 million.'

22 The other aspect of the first Bolitho opinion
23 that we want to focus on in opening concerns the
24 statements that Mr O'Bryan and Mr Symons made at the
25 encouragement of Mr Elliott that the court should assess
26 AFPL's claim for a commission on the premise that the
27 settlement value was \$75 million which included,
28 your Honour, \$11 million for the release of Trust Co's
29 claim for additional remuneration for acting as trustee
30 after the appointment of the receivers.

31 Can I take your Honour to paragraph 55 of

1 the first Bolitho opinion at SYM.005.001.1400. They
2 begin, your Honour, there by saying, 'While previously an
3 almost automatic approach might have been for a so-called
4 funding equalisation mechanism to be applied, recent
5 decisions of the Federal Court of Australia suggest that a
6 more nuanced consideration of the approval of commissions
7 to litigation funders is appropriate.'

8 Then I want to drop, your Honour, to
9 subparagraph (b), 'The settlement also achieves a release
10 of Trust Co's claims for the reimbursement of its expenses
11 incurred since October 2012 and for additional
12 remuneration in respect of Banksia's receivership. At
13 present those claims amount to at least \$3.9 million,
14 which would otherwise be expected to diminish the
15 available return to debenture holders. However, as the
16 period of Trust Co's claim in respect of which there has
17 been a quantification runs only from October 2012 to
18 February 2014 (approximately 16 months), there are an
19 additional 47 months of potential costs for which there
20 has been no quantification. Applying a simple
21 multiplication factor, the benefit to debenture holders of
22 the elimination of that claim may be in the order of 12 to
23 \$15 million in total. However, we consider it appropriate
24 to adopt the more conservative estimate calculated at
25 [84.(d)] and [85] below that the benefit to debenture
26 holders is likely to be around \$11 million.'

27 The concept that Messrs O'Bryan and Symons
28 introduce in this paragraph (b) is that the funding
29 commission AFPL sought of 12.8 million plus GST was fair
30 and reasonable because the settlement achieved a release
31 of Trust Co's remuneration claim, and in particular they

1 are saying here that the value of that release is around
2 \$11 million, and that should be added on to the cash
3 settlement sum of \$64 million to come up with an effective
4 settlement of \$85 million.

5 Now, your Honour, I want to take your Honour to
6 the first Bolitho opinion, SYM - we're still there, sorry.
7 I want to go to paragraph 84, your Honour, and I want to
8 look at what they said, 'While there has been no
9 adjudication upon the quantum to which Trust Co would be
10 entitled, \$3,050,812 was sought for the first 10 months of
11 the receivership: the trust company - (a) \$3,960,163 was
12 sought for the 15 or 16 months of work from 25 October to
13 February 2014, 17 December summons,' and then they go on
14 to talk about a raft of things.

15 But if we turn, your Honour, to paragraph (d),
16 'While we are not aware of any quantification of the costs
17 of the receivership incurred by Trust Co to which it might
18 seek to recover had the release and discharge not been
19 given, the only available proxy for the approximately
20 48 months from February 14 to January 18 is the
21 expenditure rate of \$900,000 per half year incurred from
22 September 13 to February 14. This rate is most reasonably
23 adopted and simply prorataing the \$3.96 million expense
24 incurred in the first 15 or 16 months as it may be
25 expected that significant non-recurring costs were
26 incurred in the first few months of the receivership.
27 Therefore, for the eight further half years in the period
28 from February 14 to January 18, it is not unreasonable to
29 expect that Trust Co might make a further claim for
30 reimbursement in the order of \$7.2 million.'

31 'In the absence' - moving to 85 - 'of Trust Co

1 having provided any quantification of its claim for
2 reimbursement for the period February 14 to January 18, it
3 is reasonable to expect that the release and discharge
4 given under clause 5.4.3 of the deed might effect the
5 release of a total claim in the order of the quantified
6 3.96 million and the estimated (but unquantified) sum of
7 \$7.2 million. The claim from which BSL and its creditors
8 are to be released might therefore be in the order of
9 11.16 million.'

10 We will be inviting your Honour to conclude that
11 the documentary evidence makes it clear that they
12 knew - they knew - there was no basis whatsoever for the
13 assertion that the Trust Co remuneration was worth
14 \$11 million. In fact, your Honour, the documentary
15 evidence shows that Mr Elliott encouraged them to make
16 this spurious argument for the express purpose of pumping
17 up and justifying his claim for commission.

18 Now, can I take your Honour to SYM.001.001.2106.
19 If we start at p.2107 and perhaps have the two pages up,
20 Mr Operator. Mark Elliott to Michael Symons, 'I suggest
21 you talk to JR. Liquidator has put a deal to IH and
22 Leggatt seven days to agree I think. Prefer that they be
23 in your deed. Trust Co fees must be for 3.9 million award
24 plus any other claim. Let Sam K advise and confirm.
25 Let's discuss.'

26 Symons writes at the top of the page, 'Just so
27 I don't misunderstand, what do you mean by Trust Co fees
28 must be for 3.9 million award plus any other claim?'
29 Elliott comes back, 'C of A confirmed trust entitlement
30 but claim was only to 2016 and more to come was
31 threatened. It grosses up 64 million figure and blurs my

1 20 per cent calculation if we sort of add it in.' There
2 you see it, your Honour, exposed. And Symons writes,
3 'Okay, I understand. The 64 million is effectively 68 or
4 71,' to which Elliott replies, going up the page, 'It's
5 definitely 70 million or more. I would like Maddocks to
6 gross up the 64 million at least in words to include the
7 release from Trust Co for say \$6 million of fees plus the
8 IH settlement if possible.' Symons replies, 'Okay,
9 I understand what I'm doing.' Ever the obedient, we would
10 interpret. Then Elliott replies to Symons, 'Maddocks will
11 push back but we must insist.'

12 These emails, your Honour, show that Mr Symons
13 had no idea what Mr Elliott was talking about with the
14 suggestion that the claim had some additional value beyond
15 the 3.9 million initially, but Symons didn't resist
16 Elliott's suggestion that he should define the settlement
17 benefits in the settlement deed in the manner Elliott had
18 suggested . That was so even though Elliott told Symons
19 that Maddocks would push back on it. Plainly Elliott knew
20 this was a baseless argument. But Symons - and I quote -
21 understood what he was doing; that is to say what he was
22 being asked to do at the urging of Mr Elliott.

23 We note also, your Honour, that Elliott
24 instructed Symons in that email to speak to Sam K, and
25 that's Sam Kingston, your Honour, of Maddocks. The
26 evidence of Mr Kingston in this case is going to be that
27 Symons never contacted him to ask him about that matter.
28 Your Honour will hear from him in due course.

29 If Elliott and O'Bryan and Symons were in any
30 doubt about the value of Trust Co's remuneration claim
31 they could easily have made enquiries with Maddocks or

1 with Clayton Utz. In that regard, your Honour, I want to
2 take your Honour to SYM.001.002.7622. This is an email
3 from Mr O'Bryan - sorry, Mr Elliott to Mr O'Bryan and
4 Mr Symons attaching the earlier confidentiality
5 undertaking from Clayton Utz regarding Trust Co's
6 insurance position, saying in the first instance at
7 9.39 am, 'Do we need to get this information so you can
8 write the opinion?' And Symons replies, 'We should get it
9 in the affidavit from Trust Co.'

10 Now, it will be our submission that they could
11 have suggested that Trust Co address the value of the
12 remuneration claim in their affidavit, but they didn't.
13 The documentary evidence shows that this argument that the
14 release of the Trust Co remuneration claim was worth
15 \$11 million was totally lacking in foundation.

16 Now, Mr Elliott, your Honour, was on the
17 debenture holding committee that considered proposals
18 submitted by Trust Co for additional remuneration in 2013
19 and 2014, and he shared the information that he obtained
20 from his role on that committee with Mr O'Bryan and that's
21 all made plain, your Honour, in our chronology at
22 AID.010.028.0001.

23 Trust Co had said, your Honour, that it had
24 implemented a time based charging system for charging fees
25 after February 2014, and Trust Co had said on numerous
26 occasions that their fees after the end of 2013 were
27 likely to be significantly lower than their fees claimed
28 up to the end of 2013. In that regard, your Honour,
29 I want to take you to NOB.500.009.7931.

30 This is an email, your Honour, from Mr Joe Hayes
31 from McGrath McNicol writing to the committee members.

1 They are the committee members of the debenture holder
2 committee that included Mr Elliott, and you'll see Elliott
3 Legal is just above the CC in the chain - sorry,
4 elliot@eastmelbourne. And you'll see it says, 'Dear
5 committee members.'

6 Then he says dropping down to almost the
7 penultimate paragraph, 'We also note that an hourly rate
8 regime has now been agreed with trustee with respect to
9 future remuneration, with no uplift associated with the
10 "value add" time as mentioned in counsel's advice.
11 Subject to the approach taken to Banksia litigation, we
12 expect the trustee's future costs will be significantly
13 lower than the costs for the first year, given the major
14 asset sale campaigns are behind us and there is more
15 certainty in likely returns. Subject to any final
16 comments, we propose to execute the attached "additional
17 remuneration agreement" with the trustee which reflects
18 the hourly rate regime, and intend for payment to occur
19 next week.'

20 Now, Mr Elliott and Mr O'Bryan will contend,
21 your Honour, both knew that Trust Co was seeking to claim
22 additional remuneration on the basis of advice from
23 Messrs Santamaria, Archibald and Ahern of counsel. That
24 advice was that Trust Co was entitled to recover fees
25 under the trust deed for particular tasks, some of which
26 could only be charged on the basis of hourly rates and
27 some of which could be charged on the basis of a value add
28 percentage based commission. I want to show you the
29 information conveyed to debenture holders - the committee
30 of the debenture holders in January 14.

31 Can your Honour turn up NOB.500.009.7870. I want

1 to have, your Honour, in front of you 7870 and 7871.

2 Again we have got Mr Hayes of McGrath Nicol writing to the
3 members of the committee on 15 January 2014. If we turn
4 the page we'll see, 'However, having regard to both the
5 advice received from senior counsel' - sorry, just go up
6 to the top there.

7 'We note, however, that as discussed with the
8 initial trustee fee request the trustee does not utilise a
9 time recording system in the same way in which
10 professional service firms do as the trustee's fee for
11 service work has historically been calculated on a
12 commission basis. However, having regard to both the
13 advice received from senior counsel and noting also the
14 committee's view, the trustee has agreed to review its
15 records and the time spent by its personnel to enable an
16 hourly rate calculation for its remuneration in this
17 matter.'

18 Then dropping four paragraphs, your Honour, to
19 the paragraph beginning, 'Following the December 2013
20 committee meeting where the trustee fees were discussed
21 hourly rates were determined by the committee as the most
22 appropriate method for calculating the trustee's
23 entitlement to additional remuneration. In that regard,
24 we have requested and the trustee has agreed to implement
25 a time recording system. Accordingly, as of 1 December
26 2013, the trustee fee requests will be submitted with an
27 additional level of detail to support the hours incurred.
28 We note that having regard to the resolution of many of
29 the major receivership issues, the trustee's involvement
30 and remuneration will reduce in line with the expected
31 decrease in workload.'

1 Now, the receivers had said in affidavits they
2 filed with the court that Trust Co should be paid the
3 lesser sum of 2.76 million as opposed to 3.9 million.
4 I want to refer your Honour in that regard to
5 NOB.500.011.3373. This is a circular to debenture holders
6 from McGrath Nicol, and your Honour will see the heading
7 on p.1, 'Trustee fee application'. Thank you.

8 Under that heading if your Honour goes down to
9 the end of the second paragraph, 'The receiver's view is
10 that the appropriate amount that BSL pay for additional
11 remuneration be a lesser amount of 2,767,931 for this
12 period. The receivers' basis for recommending this amount
13 is fully explained in the supporting affidavit sworn by
14 Joseph Hayes (one of the receivers (on 16 December 2015)
15 Hayes affidavit) and in particular in paragraphs 142-174
16 of that affidavit. The amount represents the lowest sum
17 offered by the trustee and included no calculated uplift
18 and 15 per cent discount on fees. It is important to note
19 that the trustee's offer was made on the basis that the
20 matter did not go to court and was accepted by the
21 debenture holder committee. The debenture holder
22 committee did not accept this offer. Therefore, the
23 receivers have determined to seek directions from the
24 court. Ultimately, it will be the court's decision what,
25 if any, direction is given to the receivers as to the
26 appropriate amount of additional remuneration to be paid.'

27 Turning the page, your Honour, to p.3374, in the
28 first full paragraph beginning, 'The work for which the
29 trustee is claiming remuneration is summarised in the
30 Hayes affidavit,' and then dropping into the body of that
31 paragraph, 'While the receivers understand that the

1 trustee has spent a significant amount of time dealing
2 with this matter since February 14, it has not charged any
3 additional remuneration for that subsequent period.
4 However, the trustee reserves its right to do so and the
5 receivers will be seeking orders from the court concerning
6 the process for negotiating and approving any further
7 remuneration (if any) claimed by the trustee.'

8 Your Honour, there are other documents that we
9 have referred to, and perhaps I'm not going to trouble
10 your Honour with those at this point in time, but they
11 make plain, your Honour, what the position was as we have
12 suggested.

13 I want to go forward, your Honour, and say that
14 by March 16 O'Bryan and Symons were preparing submissions
15 on behalf of Bolitho in relation to the Trust Co
16 remuneration application which contended in fact that
17 Trust Co was entitled to nothing.

18 Can I take your Honour to CBP.004.005.2530. On
19 21 March Mr O'Bryan emailed Mr Symons and copied in
20 Mr Zita and Mr Elliott instructing him to do the
21 submissions. You'll see the heading, 'Re
22 Bolitho - remuneration proceeding - our submissions on
23 form and constitution of proceeding due.' 'Thanks
24 Michael.' Symons says - confirmed he can do a draft and
25 he'll 'circulate it tomorrow'.

26 If we can then go to - sorry, I didn't read from
27 that, your Honour, and I should have. At the foot of the
28 page where he's being asked by O'Bryan to do a draft,
29 Symons is told, 'It needs to hit Trust Co very hard indeed
30 on the conflict point. It also needs to say that the
31 barristers' advice' - and that's the advice of

1 Messrs Santamaria, Archibald and Ahern - 'is irrelevant
2 because they were not instructed to consider the conflict
3 point or what effect it might have on their opinions. We
4 say the conflict disentitled Trust Co to act as trustee
5 after 2009 and therefore to earn any fees from either
6 trust thereafter.'

7 Mr Symons then drafts the submissions,
8 your Honour, and they appear at SYM.001.002.4225. If we
9 go, your Honour, in the first instance to paragraph 13
10 that makes it plain, 'If any remuneration is paid to
11 Trust Co in advance of the determination of the Banksia
12 class action, it will simply increase the claim made on
13 behalf of group members in the Banksia class action, who
14 allege that Trust Co is not entitled to retain any of the
15 remuneration it has received since the Statewide-Banksia
16 merger in 2009.'

17 Then, your Honour, moving to paragraph 21 on
18 p.4230 they say, 'A breach of trust will usually
19 disentitle a trustee to remuneration in whole or in part.'
20 Then they refer to the commentary in *Ford & Lee* under the
21 heading, 'Loss of commission' - prescient, we would say,
22 your Honour, 'A trustee entitled to receive commission who
23 commits a breach of trust, may lose some or all of that
24 commission. On the one hand it is clear that the trustee
25 cannot claim commission or disbursements for acting in
26 breach of trust. But on the other the trustee will not
27 necessarily be denied commission altogether merely for
28 having acted irregularly or even for having committed a
29 breach of trust.' 'The severity of the penalty imposed' -
30 they say in 22 - 'will depend upon whether there has been
31 a continuous breach of the trustee's duties.'

1 Then, your Honour, I want to go to the email
2 exchange at SYM.001.001.2205. I want to have up on the
3 screen also p.2206. Now, your Honour, at 7.36 on the
4 17th - if your Honour goes to p.2206 you'll see 7.36,
5 Symons is emailing Elliott and O'Bryan. He says, 'I spoke
6 to Liondas as requested.' He's the Trust Co junior
7 counsel. '(a). 3.96 million is the maximum figure for
8 the reimbursement claim which he regards as reasonable,
9 and he also seems to think that in reality the claim would
10 be lower.'

11 Then, your Honour, we need to look at
12 Mr Elliott's response up the page, 'Where does that
13 precise figure come from?' Then if we go up the page,
14 Elliott is told by Symons, '7. On 18 September the
15 applicant issued a demand to the respondent in the sum of
16 \$3,050,812 and advised that if the payment was not made
17 and the applicant was required to approach the court it
18 would seek additional remuneration totalling \$3,960,163
19 together with costs.' Then look at Elliott's response
20 back on p.2205 at the very bottom, 'What an idiot!'

21 Despite receiving this information directly from
22 Trust Co in the form of their junior counsel, Mr Elliott,
23 Mr O'Bryan and Mr Symons persisted with this farce that
24 the release of the claim meant that the total settlement
25 value was 75 million including the 11 million they
26 attributed to the Trust Co remuneration claim.

27 At the hearing in the Court of Appeal on 19 June
28 Mr O'Bryan invited the Court of Appeal to rely upon the
29 extrapolation methodology in the first Bolitho opinion,
30 and that, your Honour, can be found at CBP.001 - it begins
31 at 1948, the transcript, your Honour. But, your Honour,

1 we take you to p.2011, at line 25. This is Mr O'Bryan,
2 'Or it would be lost ultimately if those proceedings were
3 unsuccessful and they were obliged to pay costs to
4 Trust Co. And added to the diminution in the pot was the
5 fact that if you took Trust Co at face value and accepted
6 that the 64 million it was putting on the table was in
7 fact everything available to it, it necessarily must
8 deplete with any further conduct of a litigation. So,
9 whatever the outcome may be' - turning to the next
10 page - 'the debenture holders have to be worse off by
11 reason of all those three other considerations. Now we
12 can't look into the minds of the SPRs, but we do submit
13 that that is a rational, economic way to approach the
14 equation of settlement and also when one has regard to the
15 figures that were involved, the \$16 million of costs that
16 had been ordered to be paid to the SPRs in total for the
17 conduct of their proceeding; the 14 million which was held
18 back by reason of the need to have as it were a fighting
19 fund for the conduct of the SPRs' litigation; the
20 \$13 million which is referred to in the judgment that
21 Trust Co has spent in legal costs to the end of 17; and
22 the 7.7 million which the SPRs evidence showed they had
23 actually spent to the end of 17; that, we submit, amply
24 justifies a litigation funding fee of 12.8 million being
25 applied. Whether you treat it as 20 per cent of the 64 or
26 a lesser percentage of the 64 plus however you might value
27 the abandonment of Trust Co's claim for additional
28 remuneration. The claim that was the subject of this
29 court's decision back in 2016.'

30 None of them, we'll say, your Honour, with
31 respect ever sought to correct the statements that were

1 made in their opinion that had been furnished to the
2 court. It reaches its high point, your Honour, at the
3 foot of the page that we were looking at. They say, 'That
4 had a value unquestionably and the current litigation that
5 was on foot was claiming 4 million down to the end of 14,
6 and that's the figure which we extrapolated in the
7 settlement opinion to arrive at the value with which it
8 might potentially have.' That's the value that they put
9 on it of \$11 million, your Honour, and none of them sought
10 to correct that statement in the Court of Appeal.

11 Now, your Honour, that completes the detailed
12 analysis that we wanted to undertake by way of opening.
13 But there are some other matters that I wanted to refer
14 your Honour to. I won't complete them in the 10 minutes,
15 but I don't want to waste the court's time. I'm in
16 your Honour's hands.

17 HIS HONOUR: No, keep going, thank you, Mr Jopling.

18 MR JOPLING: Your Honour, I just want to come back and adopt
19 the submissions of Mr Redwood made on Tuesday of last week
20 about the proper construction of the funding agreement and
21 his submissions about AFPL's arguments on the court's
22 powers to determine a funding commission, and his
23 submissions about the constitutional point. We'll contend
24 that these ought not to be countenanced, having regard to
25 the facts of this case, the terms of the funding
26 agreement, and the court's wide powers in s.33ZF of the
27 *Supreme Court Act* and ss.28 and 29 of the *Civil Procedure*
28 *Act*.

29 We also adopt the submissions of Mr Dick and
30 Mr Redwood in response to the assertion that the
31 compensation claim against AFPL and the lawyer parties

1 engages probabilistic loss of chance principles, and we'll
2 address that in closing submissions. No doubt those kinds
3 of highly technical points will be advanced by those asked
4 to pay the compensation. But Justice Croft relied upon
5 the submissions and opinions of the Bolitho lawyers, both
6 oral and written, and the Trimbos report. He had nothing
7 else to rely upon. Is it really going to be suggested
8 that the deceit set forth in those documents didn't cause
9 loss suffered by the group members?

10 Next, your Honour, finally we want to address the
11 notion in this aspect in AFPL's opening submissions that
12 the costs set out in the schedule to AFPL's opening is not
13 disputed. That is incorrect. If your Honour turns to
14 SBM.020.002.0001 and we turn up p.0044 your Honour will
15 there see a schedule A which is headed, 'Costs schedule.
16 Costs about which there is no dispute.' We do not agree.

17 It's a total of 1.317 million including GST.
18 Working through the list, your Honour, item 1 - thank you,
19 Mr Operator - 'Balance of partial settlement costs
20 assessed as fair and reasonable in Trimbos report
21 18 August 2016 and implicitly accepted as such by Justice
22 Robson, 30 per cent of 3.575 equals \$1,025,114.82.'

23 We have addressed that in our skeleton outline,
24 your Honour. For reasons set out in that skeleton
25 outline, that sum should not be allowed. Those reasons
26 are briefly that they include a substantial amount of the
27 fees of Mr Elliott for work that he evidently, we'll be
28 contending, didn't undertake and a substantial amount of
29 the fees of O'Bryan in circumstances where Mr O'Bryan
30 evidently had a separate arrangement with AFPL pursuant to
31 which he claimed payment for a much lower sum than the

1 total amount of his invoices.

2 The second item, your Honour, the professional
3 fees of Mr Crow, we submit that AFPL cannot recover these
4 fees because it ought not to have been necessary for
5 Bolitho to have a second solicitor. Portfolio Law was his
6 solicitor.

7 Item 3, your Honour, Simone Jacobson, an amount
8 of \$65,340. We don't cavil with that, your Honour.

9 Item 4, Mr Loxley's fee for appearing at the
10 settlement approval application before Justice Croft.
11 We'll be contending that AFPL cannot recover these fees
12 because they were duplicative and unnecessary in
13 circumstances where AFPL has effectively admitted that
14 O'Bryan and Symons were the real lawyers for AFPL and made
15 all the submissions in favour of AFPL's interests at that
16 hearing. I want to be clear, your Honour, we don't in any
17 way mean any disrespect to Mr Loxley and his role.

18 Item 5, your Honour, contradictor at partial
19 settlement, Mr O'Callaghan. We don't contest that.

20 Item 6, the special referee, \$16,000-odd
21 Mr Nolan, we don't dispute that.

22 Items 7 and 8, expert witnesses. We don't
23 dispute these, but we want your Honour to note them. They
24 are the only witnesses that AFPL paid for in the relevant
25 period, approximately \$25,000 and a bit; compared, we want
26 your Honour to note, to the 1.9 million the SPRs paid in
27 the course of the proceeding.

28 Items 9 to 13 we don't dispute, your Honour.
29 Item 14 is cost expert, Mr Trimbos, for his fourth and
30 fifth reports. Your Honour, we contend that the costs of
31 Trimbos for the fourth and fifth reports should not be

1 paid by the debenture holders. The fourth report was
2 virtually a replica of the third report and relied upon
3 the same false and misleading information. The fifth
4 report comprised Mr Trimbo's recanting all of his opinions
5 expressed in his third and fourth reports, and we will
6 respectfully submit that there's absolutely no basis for
7 debenture holders to be asked to pay these costs.

8 HIS HONOUR: Excuse me, Mr Jopling, the document I'm looking at
9 refers to the third and fourth reports, not the fourth and
10 fifth reports.

11 MR JOPLING: Sorry, your Honour; your Honour is quite correct.

12 Perhaps that's an appropriate time for me to stop for
13 lunch and I'll come back on that, your Honour, after
14 lunch. I apologise.

15 HIS HONOUR: All right.

16 MR JOPLING: Thank you.

17 HIS HONOUR: Thank you, Mr Jopling. We'll resume at 2.15 then.

18 Thank you.

19 MR JOPLING: Thank you, your Honour.

20 LUNCHEON ADJOURNMENT

1 UPON RESUMING AT 2.15 PM:

2 HIS HONOUR: Thank you, Mr Jopling.

3 MR JOPLING: Thank you, your Honour. I alluded to the wrong
4 Trimbos reports. I meant the third and fourth as the
5 documents indicated and we contend there's no basis the
6 debenture holders should have to pay for those.

7 Your Honour, whilst we say the undisputed costs
8 come to an amount of roughly \$234,375, that's not of
9 course to say that we accept that AFPL should be entitled
10 to reimbursement of that sum. All of this is subject to
11 our claim for disentitling conduct and our counterclaim
12 for damages.

13 If I could then move to the list of issues,
14 your Honour, and just make certain we're all working from
15 the same document. We have filed a document, your Honour,
16 PLE.010.002.0001 dated 24 July. I just wanted to mention,
17 your Honour, that in the middle of July, shortly after the
18 case management conference on 30 June, we circulated a
19 minor revision to the list of issues. Shown in
20 highlighting in paragraph A there was a minor revision to
21 the manner in which we put the case in respect of
22 Mr O'Bryan's ongoing interest in an arrangement or
23 understanding with Elliott and AFPL. I said to the
24 parties that I would flag that in opening at the time we
25 served the amendment and the same appears in paragraph
26 51(f).

27 Then on 21 July we notified the parties of a
28 couple of other minor revisions at paragraph 43(b) where
29 we say the arrangements between the parties involving Zita
30 and Portfolio Law had the effect of circumventing the
31 *Bolitho* (No.4) decision, et cetera. Previously the word

1 used was 'sought' and we want to make it clear the
2 allegation is as to the effect of those arrangements, and
3 we also revised the particulars in paragraph 47(g) which
4 one sees on p.45 and those revisions were to take into
5 account documents that AFPL and Mr Symons discovered and
6 produced about three weeks ago, virtually on the eve of
7 the trial.

8 As Mr Horgan noted in opening, we revised a few
9 paragraphs of annexure A to refer to the *Legal Profession*
10 *Act*, for example paragraph 47(i) and paragraph 68. Really
11 the substantive effect of the amendment is to add the
12 words 'and/or the *Legal Profession Act*' in various places
13 in the list of issues where previously we had referred to
14 the Uniform Law. That's all I really want to say about
15 that, your Honour.

16 The other matter that I want to note is that at
17 p.11 of the revised list of issues of 21 July, it became
18 apparent to me over lunch that I've got some - adding up
19 was never my strong point, my late father would have said.
20 If we go to paragraph 4(b) it says, 'As to (a), AFPL's
21 register of members records that as at 25 July 2017
22 entities associated with Elliott held 1 million to
23 1,812,000' - that should be 1,312,000 and take off the 500
24 - 'or', and it should be 76 per cent of the issued shares.
25 I have given no one notice of that. It's only just become
26 apparent to me at lunchtime.

27 HIS HONOUR: Sorry, Mr Elliott held 1,312,000 - - -

28 MR JOPLING: One million of 1,312,000.

29 HIS HONOUR: I see.

30 MR JOPLING: Or 76 per cent of issued shares in AFPL. Then,
31 your Honour, there's a correction I want to make to the

1 transcript about a matter we addressed in opening on
2 Thursday, and I'm indebted to my friends for this.

3 At p.375 of the transcript I referred to an email
4 CBP.004.007.0604 which referred to Mr O'Bryan being away
5 from 1 to 21 April. In fact that email was in 2016 and
6 thus related to an earlier point in time. So that email
7 is irrelevant to the fees charged by Mr O'Bryan in April
8 2017 and I withdraw any reliance upon it for the fees
9 charged in April 2017 and I apologise to my friends and
10 Mr O'Bryan.

11 Next, your Honour, in respect of tender
12 your Honour notes that throughout the course of the
13 hearing we've been tendering documents. We referred to
14 numerous documents in the course of the oral opening and
15 insofar as there are any documents we've referred to in
16 our oral opening submission that were not included in the
17 subfolders and therefore not tendered at the start of the
18 opening, we tender those documents.

19 Your Honour will recall a discussion we had on
20 Thursday of last week about the documents referable to
21 Ms Jacobson. Your Honour will recall that the metadata of
22 one document looked to be unreliable because it appeared
23 to be a contemporary document. The document ID was
24 CCW.044.001.0003. We've gone back and looked at
25 Ms Jacobson's documents and we've identified some
26 documents that we will contend clarify the date issue and
27 otherwise supplement the picture with respect to what
28 Ms Jacobson was asked to do with respect to the court
29 book.

30 We notified the parties that we'll be tendering
31 those documents and they're listed in a separate list

1 we've uploaded to the court book at TDL.010.001.0001 and
2 we tender those, your Honour, but there's also one
3 additional document in there that we omitted from the list
4 which relates to the Botsman appeal, and that's the very
5 end one, your Honour, number 22. So that's 22 additional
6 documents we want to tender today. Everything I believe
7 ought to have been tendered on day 2 of the trial. If
8 they weren't tendered on day 2 because they aren't in the
9 subfolders we referred to in opening, then we tender them
10 now.

11 On that topic, your Honour, there are three
12 documents that we informed the parties we would tender
13 before the commencement of the trial, but we hadn't moved
14 them to one of the subfolders. If there is any doubt that
15 those documents are tendered, can I make plain what they
16 are. They are document NOB.502.001.0001. That's the
17 first. It relates to the Goldfields invoice, your Honour.
18 NOB.502.001.0003, which relates to the ACCC v Cornerstone
19 invoice. Next, your Honour, the invoice NOB.502.001.0005,
20 that's the ACCC v Meriton invoice. These are all invoices
21 in 2017. Then, your Honour, NOB.502.001.0001 and that's
22 the ERA and Goldfields invoice, and that's it. These
23 documents have now also been tagged to one of the
24 subfolders, your Honour.

25 Next, your Honour, can I simply comment about our
26 witnesses. Your Honour knows we'll be calling the expert
27 Mr McGing in a hot tub environment with Mr Houston. He'll
28 be opining upon the question of how one gives content to
29 clause 12 of the funding agreement which provides in
30 effect, we submit, that AFPL's funding commission is a
31 payment for the supply of a service, that is the provision

1 of funding.

2 Next we'll be calling Mr Samuel, an expert
3 accountant, and it appears that only one party wants to
4 cross-examine him, Mr Craig. He'll be opining on what
5 AFPL's accounts disclose with respect to the fees of
6 O'Bryan, Symons and Portfolio Law. He's prepared four
7 reports, your Honour, and the latest one came in whilst we
8 were in court this morning. It's been uploaded on the
9 system and of course I'll introduce those when the witness
10 goes into the box. Finally, your Honour, we'll be calling
11 Mr Pitman, a debenture holder who objected before
12 the Honourable Justice Croft.

13 Your Honour, we've had discussions with our
14 learned friends over the weekend and Friday and I think it
15 fair to say have reached some accord about the way in
16 which matters will proceed this week. I think perhaps
17 before I come to that, I'll put that under a rubric of
18 housekeeping matters, and if I can come back to that,
19 your Honour, because it's my understanding that before
20 I get to that my learned friend Mr Batt wants to say
21 something, if that's satisfactory to your Honour.

22 HIS HONOUR: Just before you do that and finish up, Mr Jopling,
23 did you want to say anything about Mr Horgan's client's
24 summons?

25 MR JOPLING: Yes, your Honour, I thought I had. That's the
26 Costs Court's referral summons?

27 HIS HONOUR: Yes.

28 MR JOPLING: Yes, I adopted the position - and I apologise if
29 I didn't make myself clear. I adopted the position of
30 Mr Dick and Mr Redwood. We don't think it should go to a
31 Costs Court. We think this matter should be dealt with

1 here and now. We think the notion of deferring misleading
2 and deceptive conduct and all the things we've been
3 talking about to a Costs Court is singularly
4 inappropriate.

5 HIS HONOUR: Yes.

6 MR JOPLING: Your Honour, that's consistent with what we've
7 said to your Honour on the many occasions when our learned
8 friends have sought to do this in the past, most recently
9 I think about a month ago - sorry, time flies - 30 June
10 when your Honour made plain at that time your Honour
11 didn't think it was appropriate and we'd urge your Honour
12 to hold to that line. We think it's singularly
13 inappropriate.

14 HIS HONOUR: It seems to me that it is the second issue in your
15 revised list of issues in any event.

16 MR JOPLING: True. True.

17 HIS HONOUR: Did you want to say anything, or you maybe want to
18 say something in final address rather than at this point,
19 but Mr Horgan made some submissions about the court's
20 power to interfere with a private contractual arrangement
21 for a funding commission, and at the conclusion of his
22 submission I did suggest to him that it might be useful
23 for me to hear submissions on the implications of the ASIC
24 Act in relation to that. I don't think it's a factual
25 matter; I think it's a matter of law.

26 MR JOPLING: Yes, your Honour.

27 HIS HONOUR: I don't know whether you want to pick that up, or
28 pick that up later.

29 MR JOPLING: We were intending to address your Honour about
30 that at the end in closing submissions, but it's clearly
31 our view that this court has the power to deal with it.

1 We hold very strong views and we'll be urging your Honour
2 in that regard to maintain the position that the court has
3 the power to deal with it.

4 HIS HONOUR: Yes. Thank you. Mr Batt, did you want to raise a
5 matter?

6 MR BATT: Yes, I do, your Honour. Thank you. Might I enquire
7 whether your Honour can hear me clearly before I proceed?

8 HIS HONOUR: Yes, I can, Mr Batt.

9 MR BATT: Thank you, and I'm grateful for my learned friend
10 Mr Jopling having indicated that I wished to address the
11 court.

12 Your Honour, we have received instructions of
13 significance which it is incumbent upon us to inform the
14 court of forthwith. Your Honour, we are instructed as
15 follows by Mr O'Bryan. First, Mr O'Bryan will not
16 maintain any further defence of the allegations that have
17 been made against him in this proceeding by the
18 contradictor in the revised list of issues dated 21 July
19 2020 and its particulars. In those circumstances,
20 Mr O'Bryan would not be entitled to, and he will not,
21 contend against the court making findings in respect of
22 him in accordance with those allegations.

23 Secondly, your Honour, Mr O'Bryan consents to the
24 entry of judgment against him (a) for money liability
25 under s.29 of the *Civil Procedure Act* in such amount as
26 the court determines on the evidence before it and (b)
27 otherwise on the terms the court sees fit.

28 Thirdly, your Honour, Mr O'Bryan will not oppose
29 this honourable court removing his name from the Supreme
30 Court roll. He accepts that that should occur.

31 Fourthly, Mr O'Bryan will not seek payment of any

1 of his unpaid fees in this matter. He abandons any right
2 to such payment.

3 Your Honour, our instructing solicitors will
4 shortly confirm these matters in writing in a letter to
5 all parties which will be provided to the court.

6 Your Honour, we are instructed to record that in
7 taking this course Mr O'Bryan seeks to convey and give
8 some measure of effect to his contrition and his very deep
9 regret at his actions and to do what he is now able to do
10 to assist in these proceedings being brought to
11 conclusion.

12 Consistently with the foregoing, (a) there will
13 be no cross-examination of any witness on behalf of
14 Mr O'Bryan; (b) Mr O'Bryan's affidavits will not be read
15 and he will not be giving evidence; and (c) no submissions
16 will be made on Mr O'Bryan's behalf in closing.

17 Finally, your Honour, those matters being the
18 case, Mr O'Bryan has no further part to play in the
19 proceeding. As a result, Mr O'Bryan has withdrawn our
20 instructions to appear hereafter for him in the proceeding
21 and Mr Costello and I would therefore ask to be excused
22 from further attendance when the court rises this
23 afternoon. Those are the remarks and instructions that
24 I wish to convey, if the court please.

25 HIS HONOUR: Yes, thank you, Mr Batt. That reshapes the
26 landscape somewhere. I will certainly grant you and
27 Mr Costello that leave to withdraw when you consider it
28 appropriate, and I thank you for the assistance that you
29 have provided to the court in the discharge of your
30 instructions.

31 MR BATT: Thank you, your Honour. If your Honour please, and

1 in light of the conclusiveness of that which I have
2 conveyed, if it's no disrespect to the court, Mr Costello
3 and I would seek to be excused at this juncture.

4 HIS HONOUR: Does anybody want to say something about why that
5 should not happen?

6 MR JOPLING: No, your Honour.

7 HIS HONOUR: Yes. In that case, Mr Batt, you and Mr Costello
8 are excused and may now leave the hearing.

9 MR BATT: Thank you.

10 HIS HONOUR: Did you say that what you've said - and what
11 you've said has been stated on the transcript in any event
12 - but it's going to be confirmed between solicitors by
13 correspondence.

14 MR BATT: Yes, your Honour, a letter will be sent very shortly
15 this afternoon which restates in terms all that I have
16 just conveyed to the court and recorded on transcript and
17 a copy of that letter will be provided to your Honour's
18 chambers.

19 HIS HONOUR: Yes. Is this possibly likely to lead to further
20 issues that might involve Mr O'Bryan such as costs or
21 things of that nature?

22 MR BATT: Your Honour, it's part of the consent to judgment
23 that we have given that - I'll rephrase it . Matters of
24 costs are part of the scope which is covered by the
25 consent to judgment that I have recited. Your Honour of
26 course has heard a lot from me in short compass. It will
27 be confirmed by the terms of the letter and of course on
28 transcript, but the consent to judgment, to be clear, is
29 consent to the entry of judgment first of all for monetary
30 liability under s.29 in such amount, if any, as the court
31 determines on the evidence before it; and, secondly, is

1 otherwise on all such terms as the court sees fit, which
2 would include, if it's your Honour's conclusion, orders
3 otherwise under s.29 or as to costs.

4 HIS HONOUR: I follow, yes. I haven't made any conclusions,
5 but I was just trying to be clear about whether you would
6 have to come back for any reason. You are saying, no, you
7 won't.

8 MR BATT: No, your Honour, it's the gravamen of what's been
9 done to bring to complete conclusion all involvement of
10 Mr O'Bryan in the interests of all concerned and to seek
11 to reduce the scope of the issues before the court in the
12 matter, and so it's an absolute consent in the terms that
13 I have read. There will be no submissions from Mr O'Bryan
14 in any respect on the matter and your Honour will see the
15 absoluteness of the instructions I have conveyed when
16 your Honour sees the transcript and the letter which will
17 be confirmatory in its terms.

18 HIS HONOUR: Yes, thank you very much, Mr Batt.

19 MR BATT: If the court please.

20 HIS HONOUR: Mr Jopling.

21 MR JOPLING: Your Honour, thank you, Mr Batt, and we will of
22 course study the letter. The only reason why I was
23 perhaps - I said I didn't have any - has Mr Batt gone?

24 HIS HONOUR: Yes.

25 MR JOPLING: I of course had no notice of this and I do want to
26 study the letter and be fully cognisant of what it's
27 conveying, but we'll receive it this afternoon. But it
28 seems a fulsome position adopted by them.

29 HIS HONOUR: Mr Batt's statement to the transcript seemed
30 fairly comprehensive.

31 MR JOPLING: Yes, it did, your Honour, but one always likes to

1 examine things with a little more time because - - -

2 HIS HONOUR: A bit of textual analysis, Mr Jopling.

3 MR JOPLING: Yes, given that was the first occasion on which
4 after nearly two years we'd heard that position
5 pronounced.

6 HIS HONOUR: I take it that that was probably something that
7 has caught all of the parties having no notice of it.

8 MR JOPLING: I doubt that, your Honour. I doubt that it's
9 caught everybody without notice.

10 HIS HONOUR: Mr Horgan, have you got your hand up? I just
11 can't quite see.

12 MR HORGAN: I've got my technical hand up in the corner, yes,
13 your Honour. If it's convenient, we had no notice of what
14 has just occurred and your Honour would realise because of
15 our admission as to the fact of agency that we may need to
16 get instructions on the import of what has just occurred.

17 Could I say that I wouldn't want to disrupt
18 Mr Crow giving his evidence because that does go to other
19 matters. But we would need to get instructions later this
20 afternoon, if your Honour pleases.

21 HIS HONOUR: Yes, thank you, Mr Horgan.

22 MR JUEBNER: Your Honour, can I just indicate for the record we
23 had no notice of what just occurred, so we are taken by
24 some surprise.

25 HIS HONOUR: All right. Well, I think we'll take Mr Crow's
26 evidence. I think, Mr Jopling, you've just got some
27 housekeeping matters and then we can take Mr Crow's
28 evidence and he's probably going to take most of the
29 afternoon and then that's it for the day.

30 MR JOPLING: That's correct, your Honour. I note we didn't
31 hear from Mr Craig.

1 MR CRAIG: Your Honour, on the housekeeping topic I do have an
2 objection - - -

3 MR JOPLING: No, I wasn't referring to the housekeeping.

4 MR CRAIG: I'm happy to record for my learned friend's benefit
5 that Mr Batt did provide me with a short amount of notice
6 in relation to that statement. So I'm happy to record
7 that on the transcript.

8 MR JOPLING: Your Honour, in terms of housekeeping, what we
9 were going to say to your Honour was that it would now
10 revert to the case of AFPL and Mr Crow, and then tomorrow
11 we would anticipate McGing and Houston and Samuel and,
12 your Honour, flowing on after that, Horne, Pitman,
13 Lindholm, Newman and Kingston. I'm just having a little
14 bit of reservation because I don't know how long Mr Crow
15 is going to be, your Honour, and that will impact what was
16 looking like a full day tomorrow for McGing, Houston,
17 Samuel, Horne, Pitman and Lindholm, but perhaps we can
18 revisit that once we see how Mr Crow has gone during the
19 course of today.

20 HIS HONOUR: I thought Mr Lindholm was for the following day,
21 Wednesday.

22 MR JOPLING: Yes. What's happened, your Honour, is over the
23 weekend the parties have made known who wants to
24 cross-examine and I think that sort of narrowed things
25 down. Why don't we give your Honour an update about that
26 tomorrow?

27 HIS HONOUR: Yes, obviously the whole trial program has
28 changed.

29 MR JOPLING: Yes.

30 HIS HONOUR: There's a week that's disappeared.

31 MR JOPLING: Exactly, your Honour, and a lot of the time

1 prepared for the cross-examination of someone has just
2 gone out the window. There we are.

3 HIS HONOUR: Can I just say this, that we do have to deal with
4 Mr Pitman turning up to the Ballarat court to give
5 evidence.

6 MR JOPLING: Yes.

7 HIS HONOUR: And it seems from the court's perspective that it
8 might be better to actually lock Mr Pitman in for a time
9 or fairly close to a time, like maybe 2.15.

10 MR JOPLING: Yes, your Honour. As we understand it,
11 your Honour, there's only one person who wants to
12 cross-examine Mr Pitman and that's Mr Juebner. I think
13 it's fair to say it's not going to be very long. Is that
14 right, Mr Juebner?

15 MR JUEBNER: Yes, Mr Jopling, that's correct. I'll be about
16 10 minutes, no more.

17 HIS HONOUR: Who is organising him? Would we be better off to
18 start with him and just get him out of the way at 10.30?

19 MR JOPLING: I think, your Honour, with the greatest of
20 respect, we've made arrangements with him for the
21 afternoon, just as an elderly person, he's in his 80s.
22 Could we say 2.15 as your Honour suggested before?

23 HIS HONOUR: Yes. The Ballarat court might be able to find him
24 a cup of tea if we've almost finished something.

25 MR JOPLING: Thank you, your Honour.

26 HIS HONOUR: All right.

27 MR JOPLING: Thank you.

28 HIS HONOUR: So we'll slot him in tentatively at 2.15 tomorrow
29 afternoon.

30 MR JOPLING: All right. Thank you, your Honour. Your Honour,
31 one of the matters that did I want to raise with you in

1 the context of outlining the protocol for the balance of
2 the week is that it's fair to say one of the items that we
3 haven't been able to reach an accord on relates to the
4 openings. It's fair to say that there's a difference of
5 opinion between ourselves and the lawyer parties as to
6 what they ought do in terms of their openings.

7 We are of the opinion, your Honour, that if
8 openings are to be given they should be given
9 consecutively and the preference of our opponents over the
10 weekend was that Mr O'Bryan should go first and then call
11 his evidence and then at the conclusion of his case
12 Mr Symons should go next and thereafter at the conclusion
13 of his case Mr Zita should go next.

14 Now, my submission to your Honour is that we can
15 now put Mr O'Bryan to one side, obviously, but in the
16 context of the remaining lawyer parties they should speak
17 one after the other and then go into their evidence so
18 that we know the case that they want to advance. They
19 have had more than an ample opportunity to understand our
20 case, and we don't know their case. We don't think that
21 they should be given the opportunity to cherry-pick, as it
22 were, to see how the evidence unfolds and then go into
23 giving an outline of their case. So, we think that would
24 be unsatisfactory and could lead to - - -

25 HIS HONOUR: So what you're suggesting is that when we get to
26 it, that Mr Craig should open his defence and then
27 Mr Juebner should open Mr Zita's defence.

28 MR JOPLING: Correct.

29 HIS HONOUR: And then Mr Craig calls his evidence and then
30 Mr Juebner calls his evidence.

31 MR JOPLING: Correct, your Honour.

1 HIS HONOUR: In each case the evidence is only the two
2 witnesses, isn't it?

3 MR JOPLING: No, in Mr Juebner's he had - - -

4 HIS HONOUR: Mr Juebner has a couple of other witnesses, yes.
5 Sorry, I forget about them.

6 MR JOPLING: He has three all up, Mr Mizzi and Ms Gaetano.

7 HIS HONOUR: Do you have a problem with that, Mr Juebner?

8 MR JUEBNER: No, your Honour. We had understood there was a
9 strong preference, certainly by Mr O'Bryan's team, that
10 the evidence be called first and sequentially the parties
11 give their evidence and provide their openings. But we
12 are content, your Honour, to provide an opening and then
13 hear thereafter the evidence of Mr Symons and then I will
14 call our three witnesses.

15 HIS HONOUR: Do you have an issue, Mr Craig, with Mr Juebner
16 opening his case in between your opening and your
17 evidence?

18 MR CRAIG: No, your Honour. There's just a question as to the
19 exact sequencing of those openings. As your Honour knows,
20 we are yet to hear from Mr Trimbos, and Mr Trimbos is a
21 witness central at least as to Mr Jopling's issue 7, that
22 is misleading the expert witness. So, in my respectful
23 submission, given that we quite clearly have enough space
24 in the trial timetable, I should open after Mr Trimbos
25 gives evidence, even if that means we don't use Thursday
26 of this week and Monday of next week, such that the order
27 would be I open following Mr Trimbos's evidence and then
28 call Mr Symons following Mr Juebner's opening.

29 HIS HONOUR: Mr Trimbos is one of Mr Horgan's witnesses.

30 MR CRAIG: Yes.

31 MR JOPLING: Your Honour - - -

1 HIS HONOUR: What is the situation with Mr Trimbos? Do we
2 know - - -

3 MR JOPLING: Your Honour, can I say I'm in complete agreement
4 with my learned friend Mr Craig and I'm not sure how he
5 could have been confused. We are ad idem that Trimbos
6 should go ahead of the lawyer parties' Symons and Zita
7 because Trimbos is part of the case of Mr Horgan and
8 should be heard before those lawyer parties give their
9 evidence.

10 HIS HONOUR: Mr Horgan, what is Mr Trimbos's situation? Do you
11 have any update that you're able to inform us about?

12 MR HORGAN: Your Honour, I had no update when I enquired of it
13 yesterday afternoon, but I'll have enquiries made this
14 afternoon to try to update your Honour by the end of
15 today.

16 HIS HONOUR: Yes, thank you. Is there any further
17 housekeeping, Mr Jopling, that you need to deal with?

18 MR JOPLING: No, your Honour.

19 MR CRAIG: There is one matter from my perspective,
20 your Honour, if your Honour would permit me to be heard.

21 HIS HONOUR: Yes, Mr Craig.

22 MR CRAIG: Thank you, your Honour. Paragraph 58 in the virtual
23 trial protocol at ORD.001.001.0001 provides that if a
24 document is not the subject of an objection by the
25 completion of the opening submission, it will be tendered
26 absolutely. By letter dated 1 August, which is at
27 MSC.060.014.0001, we gave notice of an objection to the
28 document at ABL.001.0703.00068, and if the operator could
29 remove the document on the left-hand side of the screen,
30 move the letter to the left and then the ABL document to
31 the right, and then if I could ask the operator to bring

1 up as well - thank you - with the objection up as well, so
2 with MSC.060.014.0001. Thank you.

3 If the De Bono document, that is the one ending
4 00068, is enlarged, your Honour will see there's a
5 statement 'Re item 4. I expect the arrangements to stay
6 in place as was last year - a statement from you to that
7 effect should suffice.' That's a statement made by
8 Mr De Bono. If the operator scrolls down another page,
9 your Honour will see item 4 there.

10 HIS HONOUR: Yes, I recall this.

11 MR CRAIG: Yes, 'In the prior year, we received no win/no fee
12 agreements from Elliott Legal, Norman O'Bryan and Michael
13 Symons.' Your Honour, that is self-evidently an out of
14 court representation made by a person not being called as
15 a witness. Now, we wrote to the contradictor and asked
16 whether it was being tendered as to the truth of its
17 contents. Your Honour will see that in the letter on the
18 left-hand side. The only reply we got was that our
19 objection was out of time, which cannot be right having
20 regard to paragraph 58 of the trial protocol. So, we
21 maintain our objection to those statements going in
22 absolutely as to the truth of their contents. If
23 your Honour pleases.

24 HIS HONOUR: Well, what I might do in the circumstances is note
25 that that particular document is the subject of objection
26 and at an appropriate point in time I'll hear submissions
27 and rule on it.

28 MR CRAIG: If your Honour pleases.

29 MR JOPLING: Thank you, your Honour, because we would be
30 maintaining that it's a document that should be admitted.
31 I note that it has been admitted against Mr O'Bryan, but

1 we'll come to address your Honour as to why it should be
2 admitted as against Mr Symons.

3 HIS HONOUR: Well, we'll probably end up having a few gaps in
4 the case and we'll keep that in our back pocket as
5 something that can be slipped in when there's a gap in the
6 case, if counsel can think about being prepared to argue
7 with it at some point in the future, not immediately.

8 MR JOPLING: Thank you, your Honour.

9 MR CRAIG: Thank you, your Honour.

10 HIS HONOUR: Is there also an issue of some supplementary
11 tender lists from you, Mr Redwood?

12 MR REDWOOD: Yes, your Honour, there is. I'm just
13 conscious - I'm happy to deal with these issues now if it
14 is convenient, your Honour.

15 HIS HONOUR: Do you think we should deal with Mr Crow and come
16 back to it? I'm happy to do that.

17 MR REDWOOD: I think so. I'm inclined to, your Honour. There
18 are a small number of housekeeping matters I would like to
19 address - - -

20 HIS HONOUR: All right.

21 MR REDWOOD: Either at the end of the day or first thing
22 tomorrow morning, particularly in light of this
23 afternoon's events. I don't think they're urgent.
24 I certainly do have two or three things I would like to
25 address by way of housekeeping.

26 HIS HONOUR: Okay, we'll come back to those. We'll take
27 Mr Crow's evidence, Mr Horgan. Is Mr Crow waiting in a
28 waiting room somewhere?

29 MR HORGAN: Could I call Robert Murray Crow.

30 HIS HONOUR: We just have to find him, Mr Horgan.

31 MR HORGAN: Yes, your Honour.

1 MR REDWOOD: Your Honour, while we're waiting, can I just
2 indicate that I'll be cross-examining Mr Crow. I've had
3 discussions with Mr Jopling to avoid unnecessary
4 duplication and multiplicity of cross-examining counsel.
5 So can I just indicate that I'll be cross-examining
6 Mr Crow.

7 HIS HONOUR: Mr Horgan, do you know whether your solicitors
8 have asked Mr Crow to respond to the invitation and join
9 the meeting?

10 MR HORGAN: I think they have, but we'll check again
11 immediately, your Honour.

12 HIS HONOUR: He just doesn't seem to have come into the waiting
13 room yet, otherwise we'd bring him in.

14 MR HORGAN: Yes, your Honour. My junior is attending to that
15 now.

16 HIS HONOUR: Mr Crow, is that you showing up under the title of
17 'Office 2'? Can you hear us?

18 MR CROW: Yes, your Honour, I can hear you and I have unmuted
19 myself. It is me and I'm sorry it's 'Office 2' but it's
20 just a new camera I've put on my desktop computer.

21 HIS HONOUR: That's all right.

22 <ROBERT MURRAY CROW, sworn and examined:

23 MR HORGAN: Mr Crow, Sam Horgan here. Would you state your
24 full name for the court, please?---Robert Murray Crow.
25 And your address, please?---930 Archer Road, Kialla West.
26 And your occupation?---I'm a solicitor.

27 Mr Crow, can I ask you to turn up your first affidavit. Could
28 I give the operator CCW.036.001.0098_2. Do you see the
29 screen, Mr Crow?---Yes, I do, Mr Horgan.

30 What we'll do is we'll get the operator to just slowly leaf
31 through the affidavit so you can confirm your affidavit.

1 It's a bit quick?---Yes, I confirm that's my affidavit.
2 Could I get you to have a look at the exhibits. They are last
3 four numbers 0306_2. Is that an 88-page paginated bundle
4 marked RC-1 that you refer to in your affidavit?---Yes, it
5 is.
6 Thank you. Could I now go to your second affidavit,
7 LAY.020.006.0001, and if the operator might slowly leaf
8 through that. Is that a copy of your second affidavit
9 sworn 22 July 2020?---It's a copy, yes.
10 And I think behind that the exhibits RC-2 to RC-5 can be found.
11 Are they there, operator?
12 OPERATOR: Yes.
13 MR HORGAN: And are those annexures annexures to your
14 affidavit, Mr Crow?---Well, what I'm looking at is, yes,
15 the interim tax invoice.
16 Would the operator just scroll through the others, please. The
17 partial settlement deed, Mr Crow?---Yes.
18 And your accounts?---Yes, that's my accounts. Yes, that email.
19 That's the last exhibit. Mr Crow, we have just shown you your
20 two affidavits, one sworn 12 May 2020, it may be updated,
21 and one sworn 22 July 2020. Have you read those
22 affidavits in your preparation for giving evidence
23 today?---Yes, I have.
24 Is there any error in those affidavits or anything you want to
25 change?---No, there's nothing I want to change. There are
26 no errors.
27 Thank you very much. Your Honour, I tender those, if I need to
28 say that. They are already sworn.
29 HIS HONOUR: Yes, thank you, Mr Horgan. They are in.
30 MR HORGAN: Thank you. That's the evidence that I wish to lead
31 from Mr Crow.

1 HIS HONOUR: Yes, thank you, Mr Horgan. Now, who wants to
2 cross-examine Mr Crow?

3 MR REDWOOD: Your Honour, Mr Redwood here. I propose to
4 cross-examine Mr Crow. Can I be heard clearly?

5 HIS HONOUR: Yes, you can.

6 <CROSS-EXAMINED BY MR REDWOOD:

7 Mr Crow, can you hear me clearly?---Yes, I can.

8 Mr Crow, I'm Redwood, counsel for the special purpose receivers
9 and I would like to ask you several questions about the
10 evidence that you've given in this proceeding. Can
11 I start out with some - and if at any point, Mr Crow, you
12 can't hear me or you want me to repeat the question,
13 please indicate and I will happily do so. Can I start out
14 by asking you some general matters, Mr Crow. Did you have
15 any experience prior to accepting the role of Mr Bolitho's
16 independent legal adviser in the Banksia proceedings in
17 class actions?---No, I didn't.

18 Thank you. And you would acknowledge that class actions are a
19 complex area of the law?---Yes, I would.

20 Are you able to assist his Honour understand why you were
21 selected to perform the role of Mr Bolitho's independent
22 legal adviser in the Banksia proceedings?---Mr O'Bryan
23 I think was referred to me as somebody - this is back in
24 2012 when Banksia collapsed - as somebody who had had some
25 dealings with Banksia, and I don't know whether he knew
26 that I was a debenture holder in Banksia or not. They
27 initially approached me to see if I'd be interested in
28 being the lead plaintiff, and I wasn't interested in being
29 the lead plaintiff. Then shortly afterwards I think they
30 located Mr Bolitho and arranged a meeting in my office at
31 what was Riordan Legal in those days, with Mr Bolitho

1 suggesting that I might be his independent lawyer
2 throughout the proceedings. He was happy for me to take
3 on that role and I agreed to take on that role.

4 Thank you for that. We might come back to that. Thank you for
5 that answer. Now, Mr Crow, I've looked at your statement
6 and exhibits carefully, including your various invoices
7 and narrations in support of the work that you performed.
8 Those narrations I suggest are detailed narrations and
9 whenever you had a conversation of substance with
10 Mr Elliott, Bolitho or O'Bryan you've been careful to
11 record that, properly record that in your time entries.
12 Do you accept that proposition?---Yes, I've certainly done
13 that. Those are not intended necessarily to be a full
14 record of what was said in those conversations, but they
15 certainly contain the substance of the work that I did,
16 yes.

17 Yes, thank you. Mr Crow, you're giving evidence - you
18 understand that you're giving evidence in support of the
19 funder's application for a substantial funding commission
20 in these proceedings?---Yes, I understand that.

21 Now, Mr Crow, are you aware that the contradictor has made a
22 number of allegations that the funder and others have
23 engaged in - and I emphasise allegations - fraudulent
24 conduct at the expense of debenture holders in connection
25 with the Trust Co settlement? Are you aware of those
26 allegations?---Yes, I am, Mr Redwood. I have read all the
27 material.

28 Thank you. In that regard do you understand that, as an
29 officer of the court, the court may be assisted about what
30 you know about certain matters relating to those
31 allegations?---Yes, I do, and that's why I'm here.

1 Thank you. So you've already mentioned that - at this juncture
2 if I could ask the operator to pull up Mr Crow's first
3 witness statement at CCW.036.001.0098.

4 MR HORGAN: Sorry, your Honour, underscore 2 is the sworn
5 version of his evidence.

6 MR REDWOOD: Thank you, Mr Horgan. Now, at paragraph 8 you
7 give evidence about when you were contacted by Mr Elliott
8 and I need not read that out. Then you say subsequently,
9 in paragraph 9, you were informed that Mr Bolitho had
10 tentatively agreed to act as lead plaintiff, but he
11 required independent legal advice, and you were asked
12 whether you would accept that position, which you did.
13 Now, did you understand in accepting that position that
14 Mr Bolitho's duties or concerns were directed to
15 adequately protecting the interests of debenture holders
16 as a whole?---Yes, I did.

17 And so did you regard your retainer, if you like, with him as
18 independent legal adviser to be directed at advising
19 Mr Bolitho as to the proper discharge of those duties to
20 act in the interests of debenture holders?---Yes, I did.

21 Now, could I ask you to - and before I take you to the
22 document, just to be clear, you understood that you were
23 not the solicitor on record for the class action;
24 correct?---Yes, of course I did. Yes.

25 And if I could take you or ask the operator to pull up
26 CCW.031.001.0047_0800. If I can ask you, Mr Crow, to
27 direct your attention to the entry you made on 27 November
28 2014, 'Telephone call in from Mark Elliott. Further
29 discussion. I don't wish to go on the record as Laurie's
30 solicitor in the class action but will remain as his
31 independent legal adviser. He's happy with that.' Then

1 it goes on. So you understood, did you not, that assuming
2 the responsibility of being the solicitor on record for
3 the class action would have been a substantially more
4 serious undertaking in terms of obligations?---Yes, of
5 course.

6 And you understood at all times that - well, you understood
7 that from November 2014 or thereabouts after the decision
8 of Justice Ferguson that the solicitor on record became
9 Mr Tony Zita; is that correct?---Yes, I did.

10 Now, at paragraph 12 you speak of a number of visits to
11 Shepparton, visiting upon yourself and Mr Bolitho by
12 Mr Elliott and Mr O'Bryan?---Yes.

13 Now, you agree with me that the decision of Justice Ferguson
14 was in November 2014 and prior to that point Mr Elliott
15 had been the solicitor on record; you agree with
16 that?---Yes, he had. Yes.

17 So I'm talking about the period then before that. Before that
18 time, I take it there were meetings of the kind or visits
19 of the kind you describe in paragraph 12?---This is
20 before - whilst Mr Elliott was the solicitor on the
21 record?

22 Yes, I see?---That's correct.

23 Now, at the time of those meetings, in what capacity did you
24 understand that Mr Elliott and Mr O'Bryan were meeting
25 with you and Mr Bolitho? Was it solicitor on record in
26 the case of Mr Elliott, barrister for the class action in
27 the case of Mr O'Bryan, or was it as business partners in
28 a common enterprise for a shared economic purpose or was
29 it all of those things?---It was Mr Elliott in his
30 capacity as the solicitor on the record, whilst he was the
31 solicitor on the record, and Mr O'Bryan as senior counsel

1 instructed by Mr Elliott to act for Mr Bolitho.
2 I see. Could I ask the operator to please turn up
3 CCW.031.001.0047_0797. These are your again detailed, if
4 I might respectfully say so, time entries. If we look at
5 the second one on that page, 29 August 2014, and just give
6 you a moment to read that again?---Which one are you
7 referring me to, Mr Redwood, I'm sorry?
8 It's the one starting with, 'Read email from Norman O'Bryan
9 with draft RMC affidavit.' It's the second entry on the
10 29th there?---Yes, I see it.
11 The one for \$141.67?---Yes, I see it.
12 You understood at this time that Mr O'Bryan and Mr Elliott had
13 a financial interest in the outcome of the
14 litigation?---I need to get the date clear, Mr Redwood.
15 That seems to be the import of your entry, is it
16 not?---Obviously I was aware at the time that I made that
17 entry, yes, that they had a shareholding in the funder.
18 Then if we move down to 1 September 2014, Mr Crow, which is
19 about halfway down the page, the entry for \$70.83. I'll
20 read it out. 'Telephone call in from Laurie B. Has
21 reviewed the draft affidavit. Discussed. Is happy with
22 it but also makes point that he's actually encouraged that
23 his and the group's lawyers have invested further money in
24 the outcome of the case. He takes the view they already
25 had a significant investment as they were doing the work
26 "no win/no fee". He certainly doesn't want to lose them.'
27 So was it your understanding at this time that the
28 arrangements with the lawyers, including Mr O'Bryan, for
29 the conduct of this class action were on a no win/no fee
30 arrangement?---It was my understanding that Mr Elliott was
31 operating on a no win/no fee basis. I can't recall ever

1 turning my mind to the question. I guess I assumed that
2 Mr O'Bryan was too, but I don't know that for a fact. But
3 I do know that Mr Elliott was, because I saw his costs
4 agreement with Mr Bolitho.

5 Thank you. If I could then ask you to go to another one of
6 your entries at CCW.031.001.0047_0796, and if I could
7 direct your attention to the entry on 14 July 2014 for
8 \$106.25, which is about three-quarters of the way down the
9 page?---I see it.

10 'Telephone call in from Laurie B. Is receiving numerous calls
11 in response to second letter from Mark Elliott. Again
12 explained debenture holders are at no risk on costs. If
13 they don't respond they won't be included in any
14 settlement.' Just pausing there, at this point can I show
15 you, Mr Crow, another document and if we could keep
16 that - operator, if we could keep that entry on the
17 left-hand side and then bring this document up on the
18 right-hand side. The second document is MSC.020.012.0003.
19 Now, if we could just go up to the beginning of that
20 letter, operator. Mr Crow, do you recognise this letter
21 from - it's a letter from Mr Elliott to the debenture
22 holders in June 2014?---Well, I can see what it is. No
23 doubt I did see it at the time, but - - -

24 And you'll see in the first paragraph he says, 'I last wrote to
25 you in November 2013 regarding the progress of the Banksia
26 class action,' and then - - -?---Yes, I see the letter to
27 debenture holders of 6 June 2014. I understand.

28 My question to you is do you understand the reference in your
29 entry to the second letter from Mark Elliott to be this
30 letter to debenture holders?---Yes, I guess it must be,
31 Mr Redwood.

1 Yes. I think that's right, but I just wanted to - - -?---Well,
2 I'm saying that on the basis I'm assuming it's about a
3 month later, so I wouldn't imagine there would have been
4 any other letters in that interim period. So that must be
5 the letter that I'm referring to.

6 Yes?---This is a sample letter, but I'm aware that a letter was
7 sent out, of course, around that time.

8 Thank you, Mr Crow. Now, the observation in your entry, 'If
9 they don't respond they won't be included in any
10 settlement', what did you understand was being conveyed by
11 that?---That was my mistake, Mr Redwood. I assumed at
12 that point in time, perhaps because of my lack of
13 experience in class actions, that that was the position.
14 But I became aware very shortly afterwards that that was
15 not correct, that the claim was made on behalf of all
16 debenture holders and I corrected that with Mr Bolitho.

17 Are you able to comment upon whether Mr Bolitho was able
18 to - or are you aware of whether Mr Bolitho had any
19 communications with debenture holders to the effect that
20 if they did not sign the funding agreement they wouldn't
21 participate in any settlement?---No, I'm not aware of
22 that. He didn't tell me that he did, but I'm not aware.

23 He'd been receiving a number of calls from debenture holders
24 subsequent to this letter from Mr Elliott; is that
25 correct? Is that your understanding?---Well, he told me,
26 as my entry of 14 July records, that he had been receiving
27 numerous calls prior to me having that conversation.

28 Now, Mr Crow, at about this time in June/July 2014 you were
29 aware, were you not, that liquidators for Banksia had been
30 appointed and were investigating a claim by Banksia on
31 behalf of debenture holders; is that correct?---I can't

1 recall. I became aware of that fact. As to exactly when
2 I became aware of that, I'm not sure.

3 As a debenture holder you were receiving circulars from McGrath
4 Nicol updating debenture holders as to the progress - -
5 -?---Yes, I was.

6 (Indistinct) administration?---Yes, I was, and I note on the
7 time entries, my time entries which are on my screen, in
8 the entry of 27 June I rang Elliott and I record that he
9 told me, 'Banksia are now in liquidation. Liquidator
10 threatening to sue Harwood Andrews, Morrison & Sawers,'
11 et cetera, and also Trust Co as well as other defendants.
12 So certainly by 27 June I was aware of it because he told
13 me that.

14 Are you aware from the point in time of the letter of 6 June
15 2014 from Mr Elliott until March 2015 as to whether
16 Mr Elliott had taken any steps to himself inform debenture
17 holders of the prospect of a claim by Banksia through the
18 liquidators?---I'm sorry, am I aware that Mr Elliott?
19 Yes, are you aware of whether Mr Elliott communicated
20 subsequent to the letter of 6 June 2014 to debenture
21 holders the fact of an alternative claim being considered
22 by the liquidators on behalf of Banksia?---No, I'm not
23 able to recall that now, Mr Redwood. I would imagine he
24 did, but I can't recall off the top of my head
25 whether - - -

26 And do you agree that that would be a material matter for
27 debenture holders to know in deciding whether to enter
28 into a funding agreement with AFPL?---Well, yes, it would
29 be a matter that the debenture holders would be interested
30 to know, of course.

31 I now, Mr Crow, would like to turn to your evidence as it

1 pertains to your interactions with Mr Pitman at the
2 time - at or around the time of the Trust Co settlement
3 and leading up to the settlement approval application. In
4 that regard, I think the most convenient course to assist
5 you would be to bring up document LAY.020.007.0003. These
6 are your entries for the relevant period that I would now
7 like to ask you some questions about. You'll see in the
8 very first entry there in essence you've received a
9 request from Mr Elliott to see if you can persuade
10 Mr Pitman to withdraw his objection. Does that fairly
11 encapsulate the situation?---Yes, that's correct.

12 And you then - we'll come to it - but you then go on to
13 approach Mr Pitman with a view to dissuading him from
14 objecting. Can I just ask you first: in so doing, in what
15 capacity were you contacting Mr Pitman? Were you doing so
16 as an investor of Banksia? Were you doing so as
17 Mr Bolitho's solicitor, advising him as to how to advance
18 and protect the interests of debenture holders, or were
19 you doing so on behalf of Mr Elliott in advancing his
20 interests to obtain substantial payments out of the
21 settlement sum? Which one was it or was it all of
22 them?---No, it wasn't all of them. I was doing so on
23 behalf of Mr Bolitho representing the debenture holders
24 and in fact I considered - and as a debenture holder
25 myself because I believe, for the reasons I have deposed
26 to in my affidavit, that that settlement was in the best
27 interests of the debenture holders. It had nothing to do
28 with representing the interests of AFPL.

29 And you say that even though you understood that AFPL were
30 seeking payments out of the settlement sum of
31 approximately \$20 million?---Yes, I understood that.

1 I was - obviously I was familiar with the terms of the
2 litigation funding agreement.

3 Now, if we then go to your second affidavit. Perhaps,
4 operator, if we could keep that on the left-hand side,
5 keep those narrations, and then if we could on the
6 right-hand side go to your second witness statement. If
7 we go to paragraph 5, you there give evidence recording
8 the substance of your discussion with Mr Pitman and in
9 subparagraph (a) you say that it was in your opinion that
10 the settlement was in the best interests of debenture
11 holders, that the Trust Co settlement should proceed
12 because otherwise if the case went to trial the available
13 Trust Co insurance funds would be dissipated very quickly.
14 Now could I take you, Mr Crow, to Mr Pitman's objection,
15 which is at SYM.002.002.0491. If we go to the first page,
16 please, operator. Thank you. Now, before I take you to
17 some aspects of it, Mr Crow, before you contacted
18 Mr Pitman, I take it that you had carefully read
19 Mr Pitman's objection ?---This letter, yes, I read that
20 letter.

21 And in the second paragraph in the third sentence you'll see
22 that he's writing to 'object to the huge amount of the
23 \$12.8 million that the funder is seeking.'?---I see that.
24 He then goes on to - and you were aware that he was a member of
25 the debenture holder committee?---I wasn't aware prior to
26 seeing this letter, but I became aware when I saw that
27 letter.

28 Okay. Thank you?---I had never heard of him before I saw that
29 letter.

30 Okay. Thank you. Then if we go to the top of p.2, he
31 emphasises that, 'This isn't a committee orchestrated

1 letter but one from a very concerned individual committee
2 member/investor'?---M-hmm.

3 And then in paragraph 3 he refers in the second to last line to
4 'the exorbitant \$12.8 million plus GST'. Then if you go
5 down, at 1 he says, 'Mr Elliott should only be paid
6 standard rates commensurate with his level of
7 qualifications based on time he has expended on this case.
8 Whilst he has no doubt added to the successful outcomes
9 and his efforts are appreciated, his claim for
10 \$12.8 million plus GST seems grossly excessive.' Now, did
11 you understand that Mr Pitman was objecting not to the
12 settlement with Trust Co, but to the proportion or amount
13 of that settlement that Mr Elliott was seeking by way of
14 funding commission?---Yes, I understood that.

15 What then was the purpose of your observation in subparagraph
16 (a) of paragraph 5?---I haven't got subparagraph (a) of
17 paragraph 5 in front of me.

18 Sorry, if we could pull that back up for Mr Crow?---Sorry,
19 Mr Redwood, your question is?

20 In this paragraph, in paragraph 5, you say that you said to him
21 that the Trust Co settlement should proceed because it was
22 in the interest of debenture holders?---Yes, I did.

23 Do you accept that Mr Pitman was not objecting to the Trust Co
24 settlement; he was objecting solely to the amount of the
25 settlement to go to AFPL?---Yes, but I also understood
26 that if he maintained that objection and the settlement
27 fell over, then the matter would proceed to trial, and
28 what I attempted to explain to Mr Pitman was first of all
29 that the claim for commission appeared to me to be within
30 the terms of the litigation funding agreement; secondly,
31 that - he was fixated on the fact that it was Mr Elliott

1 who was receiving this money, so I pointed out to him that
2 it was in fact a funding company. But, more to the point,
3 that the 12.8 commission would be the subject of an
4 inquiry by the court and ultimately the court would
5 determine whether or not that was a reasonable commission,
6 and it was better to let that happen rather than run the
7 risk of the matter go to trial. It was set down, I think
8 as you know, in February of 2018, because if it went to
9 trial - - -

10 Thank you, Mr Crow. Is there anything else you'd like to
11 add?---Well, I hadn't finished what I was saying.

12 Sorry, I should let you finish?---That if it went to trial,
13 then that limited fund that was available, the 64 million,
14 would disappear, and that was a matter that was of concern
15 to Mr Pitman, as I recall it.

16 Yes?---And as a result of that he - I can't remember whether
17 I suggested and he agreed or it was the other way round.
18 He told me that his solicitor was Peter Heinz, who I knew,
19 and he was comfortable for me to ring Mr Heinz, which I
20 did, and speak to him about it. But notwithstanding all
21 of that, of course, he maintained his objection, appeared
22 at the hearing before his Honour Justice Croft and
23 ultimately withdrew that objection.

24 Okay. We'll come to that. But focusing on his - you don't
25 anywhere address with him the substance of his concern
26 that the commission being sought by AFPL was excessive?
27 Did you address that topic with him at all?---I addressed
28 it with him in the sense that I pointed out to
29 him - I wasn't saying it was necessarily right, but
30 I pointed out to him that it was within the parameters of
31 the funding agreement and that ultimately the fact that we

1 were agreeing to this settlement didn't necessarily mean
2 that AFPL would receive a commission of \$12.8 million,
3 that ultimately that was a matter for the court.

4 Yes?---That's what I pointed out to him.

5 Okay. Now, when you say that you told him it was in line with
6 the terms of the funding agreement, before you made that
7 statement to him had you studied the terms of the funding
8 agreement?---I had.

9 Did you understand that the commission rate specified in the
10 funding agreement was a maximum of 30 per cent and that
11 the commission rate only applied in respect of those that
12 had signed a funding agreement which AFPL had asserted to
13 be 55 per cent of the class? Did you understand
14 that?---Yes, I did, yes.

15 And did you also understand that the funding agreement provided
16 that the consideration for the commission was in return
17 for the financing by AFPL in the conduct of the case? Did
18 you understand that?---Yes, I did.

19 And notwithstanding those matters you formed the view that the
20 14 million was consistent with the funding agreement; is
21 that correct?---Yes, it is.

22 Okay. Now, you say you explained to Mr Elliott - sorry, you
23 say you explained to Mr Pitman, and this is in paragraph 7
24 of your statement. Going on, you said words to the
25 effect, if we move down, that Mr Elliott was a part owner
26 in AFPL. You knew at this time that Mr Elliott was more
27 than a part owner, wasn't he, Mr Crow? He was the
28 majority shareholder holding approximately, I think,
29 76 per cent of the shares and he was the controlling mind
30 of AFPL. You knew that, didn't you?---No, I didn't know
31 that. Well, I knew he was a shareholder. I didn't look

1 at the extent of his shareholding. Was he the controlling
2 mind? I guess I understood that he was certainly the
3 managing director, I think, is how he titled himself and
4 that communications with the funder were with him.

5 Okay?---But I (indistinct).

6 You didn't tell Mr Pitman that he was the majority shareholder
7 of AFPL and that he stood to gain personally most of the
8 14 million sought by AFPL? You did not tell him
9 that?---No, I didn't tell him that. I told him that he
10 was a shareholder. Mr Pitman's view seemed to be that
11 Mr Elliott owned 100 per cent of AFPL.

12 Okay. Now, going back to the entry, the time entry, operator,
13 which was the one that was up on the left of the
14 screen - - -

15 HIS HONOUR: Have you got its number for the transcript,
16 Mr Redwood?

17 MR REDWOOD: Thank you, operator. Sorry, that's the one. As
18 we can see from these entries, you speak to Mr Pitman and
19 then you report back to Mr Elliott. That's the sort of
20 second entry. You then receive a call from Mr O'Bryan
21 querying how you went with your discussion with
22 Mr Pitman?---Yes.

23 Now, did you consider it usual to receive a query from the
24 barrister about how you were getting on trying to dissuade
25 a group member from raising concerns about the magnitude
26 of the deductions from a settlement sum? Did that strike
27 you as at all curious?---Look, it probably did at the
28 time, a little curious, but this was an unusual case.

29 Yes. And did Mr O'Bryan tell you at this point that as part of
30 the settlement he'd be seeking to recover 2.5 million in
31 unpaid, uninvoiced fees?---No.

1 Did he tell you that?---No, he didn't. He didn't say anything
2 about his fees at any stage to me.

3 Then you call Mr Pitman's lawyer; that's recorded in the first
4 19 January entry. Now I'd like to take you to an email
5 you received from Mr Elliott and that's at
6 BOL.001.001.0054. This is an email on 18 January from
7 Mr Elliott to you attaching a draft settlement opinion for
8 the settlement approval. He says, 'As discussed, draft
9 opinion attached. Share it with Hines).' Then he says to
10 you, 'Whatever it takes to get Pitman to FO is approved.'
11 Without disrespecting the court's processes, I take it the
12 reference to 'FO' is a reference to 'F-off'; is that how
13 you understood it?---I assume so, yes.

14 So he's telling you, 'Whatever it takes to get rid of Pitman,
15 you can do it'; is that how you understood it?---Well, I'm
16 not sure I paid too much attention to it. I wanted to
17 speak to Mr Pitman to try and understand why he thought
18 the settlement was not in the best interests of the
19 debenture holders, and because in my view it was in the
20 best interests of the debenture holders to convince him of
21 that fact. I wasn't really interested in what Mr Elliott
22 had in mind in terms of getting him to FO.

23 Now, you understood that, in objecting, Mr Pitman was
24 exercising his statutory rights as had been brought to his
25 attention in the notice to group members; did you
26 understand that?---Certainly.

27 And you understood he was an 82-year-old debenture holder that
28 served on the - well, you understood he was an elderly
29 debenture holder?---I had no idea how old he was. I knew
30 he wasn't young.

31 And you understood as we've gone through that the substance of

1 his objection was not opposing the settlement with
2 Trust Co, but his concerns about the magnitude of the
3 payments to be made to AFPL?---Yes.

4 And in that context you were instructed or directed by
5 Mr Elliott to do whatever it takes to get him to drop the
6 objection. You agree with that?---Well, yeah, I take
7 exception to the 'whatever it takes'. That might have
8 been Mr Elliott's thoughts. It wasn't my thoughts. The
9 only thing I was interested in doing was having a
10 discussion with Mr Pitman in an endeavour to persuade him
11 that the settlement in its entirety was in the best
12 interests of the debenture holders and that the commission
13 issue would be sorted out by the court.

14 Do you accept that the instruction or direction given to you by
15 Mr Elliott was wholly inappropriate?---The words in the
16 third paragraph are inappropriate, I agree, and I paid no
17 attention to them.

18 Thank you. Now, did you raise - we've gone through this
19 sequence of events and your narrations, and correct me if
20 I'm wrong, but I don't seem to see any reference to you
21 having any discussion with Mr Bolitho about this before
22 approaching Mr Pitman in accordance with Mr Elliott's
23 instructions. Is that correct?---No, I didn't speak to
24 Laurie about that, I don't believe, no.

25 Okay. Now, looking back on it, do you accept that Mr Pitman's
26 objection was a reasonable objection to be
27 making?---I understood fully that Mr Pitman was concerned
28 that the commission was too high. There was no question
29 about that. I understood he thought that. He had had
30 some misunderstandings in terms of his belief that it was
31 all going to Mark Elliott and I wanted to clarify that for

1 him and I attempted to do that.

2 Sorry, Mr Crow, by conveying to Mr Pitman that Mr Elliott was a
3 part owner?---Yes.

4 Of AFPL?---Yes, exactly. And that only became apparent when

5 I spoke to him on the telephone. Obviously I didn't get
6 that from his letter. But certainly when I spoke to him
7 on the phone his belief was that it was all going to Mark
8 Elliott and I explained to him that that was not the case.

9 But the main thrust of my discussion with Mr Pitman was,

10 'Don't do anything to jeopardise the settlement because
11 it's in the best interests of the debenture holders.

12 There's a limited pot of money. If this settlement falls
13 over, then we'll go to trial and that 64 million will be
14 dissipated very quickly indeed. So let the court sort out
15 whether or not AFPL is entitled to the commission that it
16 seeks.' I think I explained to him that on my
17 understanding of it it was calculated as 25 per cent of
18 \$51.2 million - - -

19 We'll come to that, thank you?---And the parameters of the
20 litigation funding agreement.

21 And in forming that view you assumed, did you, that if the
22 settlement - if the funding commission sought by AFPL
23 wasn't approved, then the whole deal would fall over; was
24 that your assumption, was it?---I was aware that the
25 settlement agreement said that. So I wasn't sure whether
26 that would hold up or not, but it was certainly a risk
27 that it might fall over. Certainly that was what the
28 funder was seeking and of course it's what the settlement
29 deed said, and that settlement deed of course had been
30 signed by all parties. So I had to assume that there was
31 a risk that the settlement would fall over and I didn't

1 consider that was in the best interests of the debenture
2 holders. It had nothing to do with AFPL.

3 And nothing to do with you then getting the instruction from
4 Mr Elliott?---No, it didn't. Mr Elliott had a robust way
5 of sending instructions, but I form my own view. I wasn't
6 just a lackey for Mr Elliott, and my own view was, for the
7 reasons that I've explained, that that settlement was in
8 the best interests of the debenture holders and if the
9 commission could not be supported by AFPL before the
10 court, then the court would take care of that. The last
11 thing the debenture holders needed was for that case to go
12 to trial.

13 And how would the court take care of it if, on your assumption,
14 the settlement would fall over if it wasn't
15 approved?---I'm not sure I understand your question.

16 You say that the court could deal with it. Does that mean that
17 you were satisfied that if the court scrutinised the
18 commission and considered it wasn't fair and reasonable,
19 that it had the power to reduce it? Was that your - -
20 -?---Yes, absolutely.

21 And would it have been relevant in that regard to know what the
22 views of Mr Pitman were as a committee member?---To the
23 court or to me?

24 For the court?---Of course, and Mr Pitman did express those
25 views.

26 Now, could we turn then to the mediation, going back in time,
27 which was in November 2017. You refer to this in your
28 first statement at paragraph 15. Just to clarify, why
29 were you there? I say that because the solicitor on
30 record, Mr Zita, was there on behalf of Mr Bolitho. Can
31 you just clarify to me and his Honour why were you at this

1 mediation?---I think Mr Bolitho asked me to be there.

2 Yes, okay?---I drove him down.

3 Okay. I take it you live near one another?---He lives in

4 Kyabram and I live in Shepparton, yes. I think he drove

5 to my house and I drove him to Melbourne.

6 You go on in the affidavit to give evidence that you spent

7 'most of the day in a shared conference room with the

8 special purpose receivers'. Now, you understood that the

9 special purpose receivers had their own room?---Yes,

10 I did. I've read Mr Lindholm's affidavit. I understand

11 he disagrees with me. My recollection of it is that we

12 arrived at around 10 o'clock, we had our own room. That

13 is, when I say 'we' I'm talking about Mr O'Bryan,

14 Mr Symons was there, Mr Zita was there, Mr Bolitho and

15 myself. We then had the joint session which went for some

16 time. I think we then went to lunch. Then after lunch we

17 were in a shared room with the SPRs and their legal team,

18 and I presume that included you, Mr Redwood, although

19 I can't remember.

20 No, I was not there, unfortunately. I was recovering from the

21 New York marathon. So you say this occurred in the

22 afternoon and, what, your evidence is that, what, the

23 whole or most of the afternoon - - -?---Well, most of the

24 day is probably an overstatement, I concede that. I mean,

25 we were there for two and a half hours, maybe three hours

26 before lunch, and then about two and a half, similar

27 period in the afternoon. And my recollection, just doing

28 the best I can, is that most of that afternoon certainly

29 we were in the same room.

30 You then go on to say that matters discussed included the

31 relative merits of the respective claims by Mr Bolitho and

1 the SPRs. Are you sure that that's correct or isn't it
2 the case that there was little or no discussion about the
3 merits because you were all focused on getting the best
4 offer from Trust Co?---There was no doubt that the focus
5 was on particularly the \$64 million cap issue. That was
6 the main concern of everybody, and whether or not that was
7 in fact - the fact that Perpetual wouldn't stand behind
8 their subsidiary obviously was a topic of discussion. But
9 we also discussed - whether Mr Lindholm was there, I can't
10 recall who was present when this discussion took place,
11 but I certainly remember talking about the relative
12 merits, not in any great detail, but my understanding
13 based on what I'd been told and what was being said that
14 day, certainly by our legal team, and I'm as sure as I can
15 be it was in that room, was that the debenture holders,
16 that is the class action claim against Trust Co, was a
17 much stronger claim than the company Banksia's claim
18 against Trust Co. That's my point, that and no more.

19 We'll come back to that?---Sure.

20 Thank you. Turning then to Banksia's claims, as we said, you
21 and Mr Bolitho were aware as far back as the middle of
22 2014 through to early 2015 that the liquidators were
23 investigating and considering claims by Banksia and that
24 those claims were ultimately brought by Banksia through
25 the liquidators in the interests of debenture holders, and
26 you were aware, were you not, that those claims by Banksia
27 would not be subject to the funding commission of
28 30 per cent, up to 30 per cent; you understood that,
29 didn't you?---Yes, I was aware of that.

30 And presumably as a debenture holder both you and Mr Bolitho
31 would have supported Banksia's claims because they

1 provided an alternative source of recovery and a source of
2 recovery that would not be subject to any deduction for a
3 funding commission; is that correct?---Certainly.

4 Sorry, you accept that?---Sorry, I said 'certainly'.

5 Thank you?---Yes.

6 If I can take you, Mr Crow, to the decision of the Court of
7 Appeal and it's at ATH.600.102.0001, and if we could go
8 down, operator, to paragraph 326. I'll just read it out
9 for you, Mr Crow, but the Court of Appeal here says, 'In
10 the unusual circumstances of this case, it was in
11 Mr Bolitho's personal interest to allocate or apportion
12 any settlement in a way that favoured the SPR proceeding
13 rather than his own proceeding. That was because, the
14 costs of the SPR apart, each dollar that was recovered by
15 the SPR was payable to the debenture holders of which he
16 was one, whereas each dollar of the settlement in the
17 group proceeding was liable to be made subject to the
18 funder's commission .' Now, you agree with that and did
19 you understand at the time of the - did you turn your mind
20 to that matter at the time of the settlement with
21 Trust Co, that is to say that the more of the settlement
22 sum that was apportioned to SPR, the more it was in the
23 interests of Mr Bolitho and yourself because a lower
24 amount would then be subject to a deduction and a funding
25 commission? Was that something you turned your mind
26 to?---I was certainly aware of it. I'm not sure what you
27 mean by turned my mind to it. There wasn't much I could
28 do about it.

29 Well, did you raise it and give your client, Mr Bolitho, any
30 advice in respect of it?---I'm sure I discussed it with
31 him, if that's what you mean.

1 And you don't have any contemporaneous note, though, Mr Crow,
2 of having discussed that with him?---No, I don't.

3 Now, if we could then move on to the topic of the apportionment
4 more generally. If I could ask you to go to - if I could
5 ask the operator to pull up the document CCW.036.001.0310.
6 This is an email from Mr Elliott to you on 10 November.
7 If we just read from the top, 'See below from Trust Co.
8 We are agreed, it's just come through. The headline
9 figure is approximately \$85 million and the debenture
10 holders will get at least 10 cents (possibly by
11 Christmas).' You understood, did you not, Mr Crow, that
12 one cent represented approximately \$6.6 million; did you
13 understand that?---Well, yes, I guess I did.

14 The 85 million that's referred to as the headline figure, that
15 doesn't represent the settlement sum, does it? It was in
16 fact 64 million?---Sixty-four was the settlement sum.
17 I didn't know what he meant by 85 million. I think
18 I assumed that he meant the partial settlement plus this
19 and - - -

20 Well, he then goes on and says, does he not, that 'debenture
21 holders will get at least 10 cents each'. In other words,
22 isn't he conveying to you and in turn Mr Bolitho that they
23 will in their hands receive 10 cents each possibly before
24 Christmas?---Yes.

25 And that 10 cents, you would agree with me, represents a little
26 bit more than \$65 million?---Yes, it does.

27 Okay. At paragraph 17 of your affidavit, that is your first
28 affidavit, you restate, if you like, in the second
29 sentence the effect of that email, that the proposed
30 settlement would represent 10 cents in the dollar for each
31 debenture holder. Then you go on in the following

1 paragraphs to describe what occurred. Again at
2 paragraph 20 you depose to a conversation that you had
3 with Mr O'Bryan to the effect that debenture holders
4 would - you say that the settlement sum represented not
5 less than 10 cents in the dollar for all debenture
6 holders. Now, at what point did you appreciate then that
7 the \$85 million reference did not represent the total
8 settlement sum for the settlement with Trust Co?---I can't
9 answer that. I didn't really focus on the 85 million.
10 What I was focused on was the 10 cents in the dollar.

11 Which per Mr Elliott's email you understood to be saying that
12 debenture holders themselves would receive 10 cents in the
13 dollar in their hands?---No, I can't say that. Yes,
14 I think - - -

15 Isn't that clearly what it says, Mr Crow?---Yeah, I'm sorry,
16 I might have misunderstood your question. Yes, that's
17 correct.

18 At paragraph 21 of your affidavit you describe certain things
19 and then you then say, 'He told me' - this is in the
20 second sentence, 'He told me that in those circumstances
21 the class action would receive its share of the Trust Co
22 settlement and then distribute to debenture holders six to
23 seven cents in the dollar and the liquidator would then
24 keep his part of the money until settled and then
25 distribute another three to four cents in the dollar.' Do
26 you see that?---Yes, I do.

27 So in fact from the class action he is now telling you that
28 debenture holders aren't going to receive 10 cents; they
29 are going to receive six to seven cents. Then he's
30 telling you that at a subsequent point in time to bring
31 you up to the 10 cents the liquidator will distribute the

1 balance; is that - - -?---No, what I understood that to
2 mean - this is where the Insurance House claim comes in.
3 The six to seven cents in the dollar I understood to be
4 the proceeds that would be distributed to debenture
5 holders from the \$64 million settlement with Trust Co, and
6 initially the 10 cents in the dollar was to have included
7 the third party claim against Insurance House. That
8 would, he told me, provide an extra three to four cents.
9 So that's where the 10 cents came from.

10 So he was telling you the Insurance House claim was going to -
11 or he had an expectation that it was going to settle for
12 about - three to four cents is about \$20 million; is that
13 what Mr Elliott - - -?---I didn't know what the figure
14 was, but he told me three to four cents in the dollar;
15 that's correct.

16 Okay. Did Mr Elliott ever tell you that - at this point in
17 time anyway did Mr Elliott tell you that in fact out of
18 the 10 cents he was seeking three cents in the dollar out
19 of the 10 cents in the dollar?---No, he didn't tell me
20 that.

21 At paragraph 22 of your statement - and you have already
22 touched on this, Mr Crow - you refer to an apportionment
23 and your understanding as to an apportionment between the
24 Banksia claim and Mr Bolitho's claim. Now, did you ever
25 check whether this understanding you say you had at the
26 time was reflected in the terms of the settlement
27 deed?---It's not - I knew it was not reflected in the
28 terms of the settlement deed.

29 And did you know that a contractual apportionment was reflected
30 in the terms of the partial settlement deed?---Which
31 settlement deed are we talking about?

1 That was the settlement deed earlier on that was attached to
2 one of your statements; I think the partial settlement
3 with the directors, the auditors and others?---I was
4 aware - yes, I was aware of the apportionment in the
5 partial settlement as between Banksia and the class action
6 in respect of the common defendants which, if I recall it
7 correct, was around about two-thirds to the class action
8 and one-third to the Banksia claim against those common
9 defendants.

10 Yes. And you understood that the terms of the settlement deed
11 with Trust Co in respect of the one and only common
12 defendant, Trust Co, recorded no apportionment as between
13 Banksia's claim and Bolitho's claim?---I was aware of
14 that, and that's why I asked the question, I think.

15 Yes. Now, you say that that was your understanding at the time
16 of this apportionment - - -?---That's what I was told.

17 That's what you were told, but that's not recorded at all in
18 any of your - there's no contemporaneous document to
19 support that and it's not referred to in any of your
20 entries?---No, that's correct. But I remember it because
21 I was trying to work out how they got to \$12.8 million,
22 and my first thought was it's 25 per cent of \$64 million,
23 but that can't be right because one part of this claim
24 must have been attributed to Banksia. But I was told
25 80 per cent/20 per cent, and I did the maths and realised
26 that 12.8 was 25 per cent of \$51.2 million. That's how
27 I remember it - - -

28 Did it ever - sorry, go on, Mr Crow?---I was just saying that's
29 how I remember that I was told that.

30 Did it ever occur to you that in fact what AFPL was seeking was
31 20 per cent of the entire settlement sum without any

1 attribution or apportionment to Banksia's claim?---Did it
2 occur to me?

3 Yes?---I think I just - as I just said, I think I was trying to
4 work out how they got 12.8 million, and I think probably
5 my first thought was it's 25 per cent of 64 million. But
6 that would have meant nothing had been attributed to the
7 Banksia claim, which is probably why I raised it with
8 Elliott; I can't recall. He then told me 80/20, and
9 I then did the maths as I just said and understood it to
10 be 25 per cent - sorry, 20 - 25 per cent of 51.2 million.
11 It was 20 per cent of 64 million.

12 And, what, Mr Elliott told you in response to your query in
13 this regard that he had had some discussion with the
14 liquidator to that effect, did he?---I can't recall the
15 detail, whether he said that or not.

16 Or was this just something just percolating in Mr Elliott's
17 mind only; do you know? You don't know whether he - if
18 you don't know, Mr Crow - - -

19 MR HORGAN: I object to the question, your Honour.

20 MR REDWOOD: Yes, I accept. I withdraw the question. Now at
21 paragraph 23 you observe in that paragraph relating to
22 this apportionment, you say that the Bolitho had the much
23 stronger claim. Now, were you aware that the Bolitho
24 claim had had successive difficulties throughout 2013 and
25 2014 in formulating a viable claim? Were you aware of
26 that fact?---I was certainly aware that there were a
27 number of iterations of the statement of claim, yes.
28 And were you aware that Bolitho had not filed any lay or expert
29 evidence as to loss and damage in support of its
30 claim?---No, I don't think I was aware of the detail of
31 that; no.

1 And were you aware that substantially all of the lay and expert
2 evidence that had been filed in the Banksia proceedings
3 was filed by the SPRs?---No, I wasn't aware of that.

4 And were you aware - - -?---The extent of my knowledge about
5 the contribution from the two respective claims, between
6 the two respective claims, basically what I understood is
7 that there was cooperation and had been for a number of
8 years between the two claims, but the detail of that was
9 something that I was never told.

10 Did you ever read Banksia's statement of claim?---I don't
11 believe I did.

12 Did you ever read any of the evidence in the proceeding?---In
13 the Banksia proceeding?

14 In both proceedings?---I read the evidence in the Trust Co
15 proceeding that was provided to me, yes.

16 Sorry, okay; we'll come to - - -?---Sorry, in the class action
17 proceeding.

18 Okay. All right. And are you aware of under what section of
19 the *Corporations Act* Banksia mounted its claim?---I was at
20 some stage, it was discussed with me, but I can't recall.

21 And do you know the amount of Banksia's claim?---No, I don't
22 think I do.

23 Okay. Can we go then to the - can I ask the operator to please
24 pull up CCW.021.0001.0001. Just to repeat that in case it
25 was unclear, CCW.021.001.0001. I may have given you the
26 incorrect reference, but I was wanting to pull up
27 that - if the court would just - if I could have the
28 court's indulgence for 30 seconds. I'm looking to pull up
29 the document that I showed the court the other day, the
30 colour coded document with the evidence filed in the
31 proceeding. If I could just get that. Excuse me for one

1 moment, your Honour. Sorry, I'll just get that reference.

2 It's at CCW - - -

3 HIS HONOUR: Why don't you try CCW.022.001.0539?

4 MR REDWOOD: That's it. Thank you, your Honour. I apologise.

5 Thank you. Mr Crow, this is a summary of the evidence
6 that was filed in the proceedings by Banksia and
7 Mr Bolitho. Under section A there's the evidence of
8 Banksia, the various witness statements and expert
9 reports. Were you familiar with or had you read any of
10 that evidence?---I'm just looking at the list.

11 Yes?---Which part are you referring to, Mr Redwood?

12 I'm referring to all of them?---All of them.

13 But take your time. You tell me whether you had read or were
14 familiar with any of that evidence?---Look, I don't think
15 so.

16 We can move on to the second page, Operator. You'll see under
17 B is the evidence filed by Mr Bolitho, and the first item
18 is the witness statement of your client, Mr Bolitho.

19 I take your evidence to be that you did read that?---Yes,
20 I did.

21 And did you read any of the expert reports?---I think I saw the
22 Sutherland reports. I don't recall a McCann report.

23 And did you understand that the class action lawyers had
24 conveyed to the court and to the SPRs and the other
25 parties that they were relying upon most or all of the
26 evidence of Banksia that is colour coded above? Did you
27 understand that?---No, I didn't.

28 Mr Crow, you would accept, wouldn't you, that the observation
29 made in paragraph 23 about the relative prospects of the
30 Bolitho and Banksia claim was from your perspective at
31 least uninformed by the pleadings or the evidence; you

1 would have to accept that, wouldn't you?---I would have to
2 accept that. Yes, it was informed by what I was told.
3 And by what you were being told by Mr Elliott?---Well, more by
4 Mr O'Bryan.
5 Okay. Did you regard those views as representing a balanced
6 and impartial view, having regard to their interest in the
7 litigation?---Look, all I can say in response to that is
8 it made some sense to me and it's my understanding that it
9 wasn't all that contentious as between the Banksia case
10 and the class action that the Banksia case had some
11 difficulties; I think they were referred to as some novel
12 points of law somewhere I read.
13 Yes?---Whereas the class action seemed to be a strong case.
14 Okay. But, as we said - - -?---That's the extent of it. I
15 can't take it any further - - -
16 That wasn't based upon any analysis or view of the pleadings or
17 evidence by you?---No, it wasn't.
18 Thank you?---I didn't attempt to undertake that exercise, no.
19 Thank you. Now, could I turn to the matter of cost, which you
20 then refer to at paragraph 27 of your affidavit. If we
21 scroll down a bit, please, Operator. The last
22 paragraph - sorry, the last two sentences there refer to
23 the legal costs of 4.7 - - -?---I see it.
24 And you say that you generally understood that a great deal of
25 work had been performed by the legal team to get to this
26 point. First of all, you would accept that this is a very
27 large amount; including GST, we are talking about
28 \$5.225 million?---Absolutely.
29 Yes. You are familiar with the Insurance House settlement. So
30 it's equal to approximately the entire Insurance House
31 settlement. So it's a significant amount, you

1 acknowledge?---I do.

2 Now, were you aware that of that amount 3.2 million was
3 attributable to counsel fees since the partial settlement
4 over the 18-month period from 1 July 2016 to November
5 2017?---No, I wasn't aware of that. I wasn't provided
6 with any break-up of that figure.

7 Did it occur to you on behalf of Mr Bolitho to ask for a
8 break-up?---No, it didn't because I wasn't the solicitor
9 on the record. He was represented by Mr Zita. He had a
10 costs agreement with Mr Zita, and I assumed with counsel
11 engaged by Mr Zita. It was a matter for him, really, not
12 for me. Again I was very conscious of the fact that
13 I didn't want to jeopardise the settlement because
14 I considered it to be in the best interests of the
15 debenture holders, and I was well aware that the costs
16 claim would have to be justified to the court firstly by
17 an independent cost consultant assessing the costs - I've
18 obviously had that done many times myself by costs
19 consultants in litigation - and ultimately scrutinised by
20 the court.

21 Yes?---And I must say, Mr Redwood, I was also - I don't quite
22 know what word to use, but let me say encouraged that it
23 wouldn't be too far out of the mark because the settlement
24 deed included those clauses whereby the SPR and for what
25 it's worth Trust Co, I was more interested in the SPR, had
26 agreed to support those claims. That was a matter of some
27 influence on me.

28 Okay. You understood these weren't the costs of the SPRs;
29 these are the costs - - -?---Yes, I understood that. But
30 I also understood that the SPR and his legal team were in
31 a much better position than I was to understand who had

1 done most of the work in this case.

2 And did you - - -?---I had never been told by the SPR - I was
3 never contacted by the SPR and I was never told, for
4 example, that most of the evidence had been provided by
5 the SPR and not by the class action.

6 Did you - - -?---I wasn't told it by Mr Bolitho's legal team
7 either.

8 Did you - were you aware of the fact that the SPRs had insisted
9 upon a costs report substantiating the fees from an
10 external cost consultant?---I wasn't aware that they had
11 insisted upon it, no. I was aware that there was a
12 provision in the agreement, which seemed to me to be a
13 very sensible provision, that it needed to be supported by
14 an independent cost consultant. But I didn't know because
15 nobody told me that the SPRs had insisted upon that.

16 And were you aware that that cost report was kept confidential
17 from the SPRs and they weren't allowed to see it?---No,
18 I wasn't. No, I wasn't.

19 Now, were you also aware that in terms of a great deal of work
20 that up until the partial settlement or as part of the
21 partial settlement legal fees of 2.55 million had been
22 recovered? Were you aware of that?---Yes, I was aware of
23 that. It's in the partial settlement deed and it was
24 approved by the court in that figure, if I remember
25 correctly.

26 Thank you. Now, I think, Mr Crow and your Honour, I should be
27 able to finish in the next five to 10 minutes. I might go
28 a little over, but I'll see how I go, your Honour. But
29 I'm concerned to - - -

30 HIS HONOUR: It would be good if you did, Mr Redwood.

31 MR REDWOOD: Yes, I'll try to do so because I want Mr Crow to

1 be able to sleep well tonight. There's a couple of
2 questions I want to ask you about - there's one thing
3 I want to ask you about Mr Bolitho's independence. Could
4 I take you to BOL.001.004.0001. Now, this is a letter
5 dated 6 December 2016 from yourself to Mr Bolitho
6 attaching a cheque for \$25,000. It's described as part
7 payment of the service of lead plaintiff; do you recall
8 that?---Yes, I recall it.

9 Was that part payment disclosed to the court when it approved a
10 payment of \$75,000 to Mr Bolitho as part of the Trust Co
11 settlement?---I don't know the answer to that. What I do
12 know is it was paid out of the money that I had been
13 holding in my trust account as provided as security for
14 costs, Mr Bolitho's costs, with me.

15 You agree it should have been disclosed to the court?---Yes,
16 I think it probably should have been disclosed to the
17 court.

18 And then if I could take you to another document,
19 BOL.001.004.0005. It's an email from you to Mr Elliott,
20 'Thanks for your email below. Laurie was very pleased to
21 receive his "Christmas present"!' Then it goes on. Now,
22 the question I want to ask you, Mr Crow, is are you
23 satisfied and do you remain satisfied that at all times
24 Mr Bolitho was acting independently in the interests of
25 debenture holders and at no times was he acting under the
26 influence of Mr Elliott and his interests?---I'm
27 completely satisfied of that, Mr Redwood. There's no
28 question in my mind about that at all.

29 And does that include in the Court of Appeal where Mr Bolitho
30 took a position that favoured the interests of AFPL rather
31 than debenture holders at every instance?---I can only

1 repeat that at all times as far as I know Mr Bolitho had
2 only the debenture holders' interests at heart.

3 Okay. Thank you. Your Honour, I don't have any further
4 questions for Mr Crow. Mr Crow, thank you for your
5 answers and dealing with things frankly?---Thank you.

6 HIS HONOUR: Yes, does any other counsel have questions for
7 Mr Crow?

8 MR JUEBNER: Your Honour, it's Mr Juebner. We do.

9 HIS HONOUR: Yes, Mr Juebner.

10 MR JUEBNER: I'm not sure whether I should be going next. I'm
11 not sure if anybody else does have questions. I'll only
12 be about 10 minutes, and I note the time. So I'm not sure
13 whether your Honour wants to finish it today.

14 HIS HONOUR: Do you have any re-examination, Mr Horgan?

15 MR HORGAN: Not presently, your Honour. Your microphone is
16 open, Mr Jopling.

17 HIS HONOUR: Whose microphone is open?

18 MR HORGAN: Mr Jopling's is open. We can hear Ms Collins's
19 comment.

20 HIS HONOUR: Mr Jopling, do you have questions for Mr Crow?

21 MR JOPLING: No, your Honour.

22 HIS HONOUR: Yes, all right. Let's see if we can get through
23 it, Mr Juebner. I won't sit past 4.30.

24 MR JUEBNER: No, I'll be done by then, your Honour. Thank you
25 very much.

26 <CROSS-EXAMINED BY MR JUEBNER:

27 Mr Crow, my name is Juebner. I'm counsel for Mr Zita and
28 Portfolio Law. Can we bring up on the screen, please,
29 your affidavit which you first made on 12 May 2020,
30 CCW.036.001.0098_2 I think is the version. If we could
31 bring that up - that's the version that's now sworn; that

1 was uploaded earlier today - and go to paragraph 8.
2 You'll see - do you see in paragraph 8 you say, 'I was
3 contacted by Mark Elliott, the solicitor proposing to
4 commence the class action, and Norman O'Bryan and had a
5 discussion with them concerning the proposed proceeding
6 and its prospects of success. I had never previously met
7 Mark Elliott and I knew of Mr O'Bryan AM SC only by
8 reputation.' Just pausing there for a moment, when you
9 say you knew him by reputation do you mean you knew him to
10 be a highly respected senior counsel at that time?

11 MR JOPLING: Your Honour, I object. I don't know how this is
12 relevant.

13 HIS HONOUR: Yes, what is the relevance of it, Mr Juebner?

14 MR JUEBNER: The relevance of this, your Honour, is the fact
15 that Mr Crow has been criticised for effectively relying
16 upon information given to him by Mr O'Bryan in
17 circumstances where it might now be said to be an
18 assessment of hindsight. I'm asking him about his
19 evidence that he says, 'I knew him only by reputation'.
20 I'm asking him to clarify what he means by that statement.

21 HIS HONOUR: The nature of Mr O'Bryan's reputation is not going
22 to be of any relevance, though, is it? You really want to
23 know the details of the information that the witness
24 received from Mr O'Bryan in order to evaluate the opinions
25 that he formed.

26 MR JUEBNER: Mr O'Bryan's perception at the relevant time is
27 relevant, not just from this witness but is generally
28 relevant, and it will be relevant to the assessment also
29 of the evidence of Mr Zita. If Mr Crow gives evidence
30 about his - presumably when he makes reference to his
31 reputation, Mr O'Bryan being a man of good reputation,

1 that is something that was well and generally understood
2 at the relevant time and therefore also relevant to
3 Mr Zita.

4 HIS HONOUR: But this question of apportionment is not going to
5 be decided on the basis that somebody formed an opinion on
6 the basis of hearsay from somebody of good reputation,
7 Mr Juebner. This is kind of way out on the fringes of the
8 kind of evidence that I'm going to take into account in
9 deciding this question.

10 MR JUEBNER: It's not simply relied upon for the purposes of
11 apportionment, though, your Honour. It's a question of
12 what may or may not have been known about what was going
13 on behind the scenes. So if Mr - - -

14 MR JOPLING: Your Honour, with the greatest of respect, as to
15 what was known going on behind the scenes, how that
16 impacts by reference to the character of O'Bryan is, with
17 great respect, irrelevant, particularly in light of events
18 this afternoon.

19 HIS HONOUR: Yes, there's something in that. If you've got
20 something specific that you want to put, Mr Juebner, just
21 put it; don't dance around it.

22 MR JUEBNER: I'll ask some different questions, your Honour.
23 I might come back to this point. Can I ask you this,
24 Mr Crow. It's right to say, isn't it, that at all times
25 it had been your understanding that Mr Elliott and
26 interests associated with Mr Elliott were responsible for
27 the payment of the fees in the Bolitho class action?---I'm
28 sorry, the question is when did I become aware of that?
29 No, I'm sorry. It's always been your understanding that it was
30 Mr Elliott or interests associated with Mr Elliott, namely
31 his funding company, that has been responsible for paying

1 all of the legal fees in the Bolitho class
2 action?---That's correct, after 2014 when Mr Elliott
3 ceased acting as solicitor on the record and the funder
4 was engaged.

5 Yes?---That's correct; from that time on.

6 And when Mr Elliott ceased acting as a solicitor on the record
7 Mr Zita became involved in the matter; you mentioned that
8 earlier?---That's correct.

9 And do you recall having a lunch with him in Shepparton in late
10 December 2014 - - -?---I'm sorry, I didn't hear the end of
11 the question. I do recall having the lunch, yes.

12 And that lunch was also attended by Mr O'Bryan and Mr Elliott
13 and Mr Bolitho?---Correct.

14 And do you recall in the course of the lunch Mr Elliott again
15 affirming to everybody that he was responsible for
16 covering all of the legal fees, including counsel's fees?

17 MR JOPLING: Your Honour, I object. How is it relevant as to
18 what this witness, who's not the solicitor on the record,
19 might think about these matters? We have not brought any
20 issues relevant to him forward in our list as
21 contradictor. He is not the solicitor on the record.

22 MR JUEBNER: Your Honour, Mr Zita gives evidence at paragraphs
23 26 to 28 - - -

24 MR JOPLING: I don't care what Mr Zita gives by way of
25 evidence, Mr Juebner. Your Honour, this witness, how can
26 he assist your Honour - - -

27 MR JUEBNER: Mr Jopling, I was responding. I don't wish to be
28 interrupted while I'm responding to your objection.

29 HIS HONOUR: Yes, all right, Mr Juebner. What's your point?
30 I don't understand your point either. Mr Jopling's
31 objection seems quite sound to me. What is the relevance

1 of this?

2 MR JUEBNER: The relevance of this is that in the presence of
3 Mr Crow Mr Zita was told that Mr Elliott would take care
4 of the counsel's fees. I'm simply asking him to confirm
5 the evidence that he heard Mr Elliott say that in the
6 presence of Mr Zita.

7 HIS HONOUR: What if he did?

8 MR JUEBNER: I'm not sure that it's accepted by the
9 contradictor that Mr Elliott's position was that he would
10 take care of all of the counsel's fees. If it is, then
11 the question doesn't have to be pursued.

12 HIS HONOUR: Well, even if that's not the contradictor's
13 position, the fact that Mr Crow - let's assume Mr Crow did
14 hear that. Where does that take your case? Then let's
15 assume that Mr Crow didn't hear that. Where does that
16 leave your case?

17 MR JUEBNER: The fact is it explains Mr Zita's position in not
18 asking counsel to provide him with the invoices because he
19 had been told, as he says in his affidavit, that
20 Mr Elliott would deal with all of the fees. That's the
21 short point, and Mr Crow can corroborate that position on
22 behalf of Mr Zita.

23 HIS HONOUR: Mr Zita can give his own evidence about what went
24 on, what discussions he had.

25 MR JUEBNER: He does in those paragraphs, your Honour. I'm
26 simply putting that position to Mr Crow and asking him
27 whether he agrees with it.

28 HIS HONOUR: Are you seeking to bolster the credit of your
29 witness through another witness? Because it's not really
30 a fact. It only goes to credit.

31 MR JUEBNER: Well, it goes to the conduct of Mr Zita in not

1 seeking copies of the invoices from Mr Elliott that were
2 issued by counsel. So it does go to a substantive issue.
3 It doesn't just go to the question of credit, in my
4 submission, your Honour.

5 HIS HONOUR: I didn't think there was any issue about that.

6 MR JUEBNER: If there isn't, I don't have to pursue that line
7 of questioning.

8 HIS HONOUR: Is somebody suggesting that the invoices did go to
9 your client; Mr O'Bryan's invoices went to your client?

10 MR JUEBNER: No. Mr Jopling is shaking his head.

11 MR JOPLING: I have never contended that the invoices went to
12 our client. Our case is that his client as the
13 instructing solicitor didn't receive the invoices, should
14 have attended to that as part of his duties and
15 obligations as the solicitor on the record. How this
16 gentleman in Shepparton can in any way assist your Honour
17 as to that issue bedevils me.

18 HIS HONOUR: Me too. I disallow the question, Mr Juebner.
19 Move on.

20 MR JUEBNER: Thank you, your Honour. Mr Crow, you gave
21 evidence about the fact that you explained the Trust Co
22 settlement deed to Mr Bolitho in late 2017?---Yes.
23 And you understood then that you had an obligation to provide
24 independent advice to Mr Bolitho in relation to the
25 settlement deed?---Yes, I did.

26 And you understood that you as independent solicitor were
27 particularly important - - -

28 MR JOPLING: Again, your Honour, I object to the question.
29 I don't know the relevance of this.

30 HIS HONOUR: What is the relevance of this, Mr Juebner?

31 MR JUEBNER: I'm going to ask Mr Crow about the fact - about

1 the comprehensiveness of the advice that he gave to
2 Mr Zita having regard to the criticism effectively that
3 Mr Bolitho was left without advice in respect of matters
4 by - sorry, I'll start that again; I'm sorry, your Honour.

5 I'm getting to the proposition that Mr Crow
6 provided comprehensive advice in relation to the
7 settlement to Mr Bolitho in circumstances where it is
8 effectively alleged by the contradictors that my client,
9 Mr Zita, failed to give comprehensive advice. So
10 Mr Bolitho did - - -

11 MR JOPLING: Your Honour, I object to the question. The
12 solicitor on the record for this gentleman was
13 Mr Juebner's client. What this gentleman in Shepparton
14 can give your Honour by way of evidence that might assist
15 in respect of this matter is irrelevant.

16 HIS HONOUR: Why isn't that so, Mr Juebner?

17 MR JUEBNER: Mr Zita has quite openly accepted in his affidavit
18 that he didn't give evidence - sorry, didn't give advice
19 to Mr Bolitho because he had understood that the advice
20 was being provided by Mr Crow. I'm simply asking Mr Crow
21 about the advice that he gave to Mr Bolitho to
22 ensure - for the proposition that Mr Bolitho was advised
23 and fully advised in respect of the matters that are the
24 subject of the settlement deed. That's the point.

25 HIS HONOUR: Mr Crow has given evidence of the advice that he
26 gave to Mr Bolitho.

27 MR JUEBNER: Yes, and there was no objection by Mr Jopling at
28 that point in time. But I'm asking similar questions and
29 for some reason I'm being objected - - -

30 HIS HONOUR: You just want him to restate it?

31 MR JUEBNER: No, your Honour, I don't seek to restate it.

1 I seek to ask a question on the same topic but I'm not
2 asking the same question. I'm not sure whether
3 your Honour has ruled on the objection, but I would like
4 to ask him a question in relation to the advice given to
5 Mr Bolitho on 4 December 2017 which is referred to at
6 paragraph 27 of the affidavit.

7 HIS HONOUR: What question do you want to ask him about that?

8 MR JUEBNER: Mr Crow, when you gave advice to Mr Bolitho on
9 4 December 2017 you did not leave out anything
10 material - - -

11 MR JOPLING: Your Honour, I object. That's not a question.
12 That's a statement.

13 HIS HONOUR: How can he answer that, Mr Juebner?

14 MR JUEBNER: I can take him through his affidavit paragraph by
15 paragraph and put the proposition. The proposition,
16 your Honour, is this: Mr Crow, you had no reason to
17 believe that someone other than you could have explained
18 the terms of the deed to Mr Bolitho in better terms; do
19 you agree - - -

20 MR JOPLING: Your Honour, I object to this. This is a question
21 that is completely irrelevant in the context of the case
22 that we seek to put to your Honour for determination .

23 HIS HONOUR: Yes, I think that's right, Mr Juebner. I rule
24 against the question. Does that make it clearer?

25 MR JUEBNER: Thank you. Your Honour, the last point is this.
26 Mr Crow, you were taken to an email sent to you by
27 Mr Elliott in which Mr Elliott used what I think you might
28 have described as forceful terms to discourage Mr Pitman.
29 Do you accept that Mr Zita at no point in time approached
30 you with any similar discouragement in respect of
31 Mr Pitman?---That's correct; Mr Zita didn't do that.

1 Thank you. I don't have any other questions, your Honour.

2 MR HORGAN: I still have no re-examination, your Honour.

3 HIS HONOUR: Yes. Nobody else has any questions?

4 MR CRAIG: No, your Honour.

5 HIS HONOUR: Thank you, Mr Crow. That completes your evidence
6 and we will now put you into the virtual waiting room and
7 terminate your involvement in the trial.

8 (Witness excused.)

9 <(THE WITNESS WITHDREW)

10 HIS HONOUR: I think at this point we'll adjourn until 10.30
11 tomorrow morning.

12 MR JOPLING: If the court pleases.

13 HIS HONOUR: Just before we do, who are we starting with
14 tomorrow morning? Is that Mr McGing and Mr Houston; is
15 that correct?

16 MR JOPLING: Yes, your Honour.

17 HIS HONOUR: Yes, all right. Thank you. We'll adjourn until
18 10.30 tomorrow.

19 MR JOPLING: If the court pleases.

20 ADJOURNED UNTIL TUESDAY, 4 AUGUST 2020

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