

In the common law world, Australia is a global market leader in terms of intense litigation in class action and corporate collapse contexts. That intensity naturally brings a greater degree of attention to the prosecution of claims than plaintiffs and their financial benefactors might otherwise desire. It is, therefore, not surprising that contradictors are becoming more and more common in heavily contested litigation.

The Victorian Supreme Court (VSC)

In 2020, the Victorian Parliament passed a bill that permitted contingency fees to be paid to plaintiff law firms bringing class action proceedings in the VSC. All other Australian jurisdictions prohibit contingency fees in representative action contexts. Under the laws, contingency fees are intended to increase access to justice by allowing plaintiff firms to compete with independent litigation funders to bankroll claims for potential returns from the upside following successful prosecution or settlement.

The introduction of those laws led many to think there would be a significant increase in filings with the VSC and while there is some evidence of that, it has not exactly resulted in a tidal wave as yet. More importantly, those who might have thought the VSC would follow the Victorian Parliament's lead and facilitate greater or more intense litigation might have been surprised by the recent developments.

Group Costs Order (GCO) Applications in the VSC

GCO applications in the VSC have seen the appointment of contradictors, at the cost of the litigation funder (or plaintiff firm), to provide assistance to the court in determining potentially contentious but generally one-sided applications. The role of contradictors in GCO applications was examined in an [earlier part of our series](#).

This article continues our litigation funding series, whereby we focus on the court's power to appoint a contradictor in a settlement or fee approval context, or where approval is being sought for entry into a litigation funding agreement.

Settlement Approval Requirements

Under Australian laws, federal, state and territory supreme courts are normally required to approve settlements in representative action or corporate collapse contexts. Depending on the context, approval normally involves an assessment of the:

- Quantum of legal fees sought to be charged by lawyers and barristers
- Litigation funding fees or commission
- Proposed distribution methodology and how the above amounts are recovered from unfunded and funded group members
- The interests of creditors or stakeholders
- The alternatives to settlement or the proposed instrument

The *Banksia Securities* class action is a prime example of the important role contradictors play in representative action contexts.

Banksia Insecurities

Banksia Securities collapsed in 2012, resulting in losses to investors of more than AU\$660 million.¹ Australian Funding Partners funded a class action on behalf of debenture holders against Banksia. In 2018, the proceedings settled for AU\$64 million. The settlement was approved in December 2017 and a group member challenged the approval in the Court of Appeal.² In the appeal proceedings, the group members alleged that further scrutiny was required and a contradictor should be appointed to investigate and put the proposed fees under scrutiny. The Court of Appeal found that the primary judge erred in not appointing a contradictor.³ The application for approval of the legal fees and funding commission was sent back to the Supreme Court in November 2018.⁴ Australian Funding Partners sought AU\$5.2 million in legal fees and AU\$14.1 million in commission (approximately 30% of the total settlement).⁵

The VSC subsequently appointed contradictors⁶ and in March 2019, the contradictors made allegations of breach of the overarching obligations and paramount duty,⁷ fiduciary duty, professional conduct rules and funding agreement, such that the Australian Funding Partners ought not to be entitled to recover any funding commission.⁸

¹ *Laurence John Bolitho & Anor v Banksia Securities Ltd (receivers and managers appointed) (In liquidation) & Ors* [2021] VSC 666 (*Bolitho*), at [13]

² *Bolitho*, at [5]

³ *Bolitho*, at [53]

⁴ *Bolitho*, at [53]

⁵ *Bolitho*, at [54]

⁶ *Bolitho*, at [55]

⁷ *Bolitho*, at [6]

⁸ *Bolitho*, at [59]

Ultimately, the court determined that the collective conduct of the litigation funder, the lawyers and the barristers was “truly egregious and corrupted the proper administration of justice” in connection with a “fraudulent scheme” to establish a basis for the funder to receive amounts beyond any proper entitlement.⁹ The VSC also made serious adverse findings against a number of the lawyers involved in the proceedings.¹⁰

The VSC’s ultimate findings and the Court of Appeal’s determination that an error had occurred, with no contradictors being appointed to begin with, were compelling. In fact, they are of such force and significance that they might raise insecurities among some seeking approvals from, or litigation paths via, the VSC going forward. The intervention, investigation and role of the contradictors in *Banksia* was critical to uncovering the misconduct and disentitling conduct that occurred at the expense of group members and the proper administration of justice.

Disrupted Paths Not Limited to the VSC

The findings in *Banksia*, together with the attention to representative actions generally and the high thresholds under related legislation, mean plaintiff firms and their benefactors face similar challenges outside of the VSC. Although there are numerous examples of courts taking cautious approaches, one of the more obvious ones is the yet to be resolved litigation concerning *7-Eleven*, where, exercising its own discretion, the Federal Court has appointed contradictors to scrutinise a settlement and fee approval application.¹¹

Although contradictors will have an important role to play in many contexts going forward, there are legitimate bases upon which their appointment might be resisted, including in light of:

- The consequent delays to settlement
- The delays and complications to distribution schemes
- Increased costs and potentially prolonged (costly) further litigation
- Diminishing effects on returns to claimants or creditors
- Poor or diminished prospects of successful prosecution
- The potential need for reliance on independent expert evidence
- Increased reliance on court resources despite settlements

Contradictors Likely to Become More Prominent

Contradictors represent the interests of group members or stakeholders in any proposed action and may be appointed at any time by the court. The court holds ultimate discretion on whether to appoint contradictors, regardless of whether the parties consider it necessary or appropriate.

There is an increasing trend for the appointment of contradictors and we anticipate courts will continue to take the benefit of their interventions at early stages in proceedings. Contradictors are required to challenge the status quo and apply a level of scrutiny and investigative contradiction to what might be proposed by the proponents of a litigation financing instrument, action or settlement. The litigation funding reforms (discussed in our [previous article](#)) are likely to be revisited in the second half of 2022. In their current form, they seek to provide a greater degree of protection to group members and accountability for litigation funders and lawyers for the fees charged and sought to be recovered.

Proponents of representative actions or claims arising from corporate collapse contexts that are backed by funders should carefully assess, first, how a court might approach their approval applications and, second, what contradictors – paid for by the funders – might challenge and why. Absent that assessment occurring early and with a reasonable degree of diligence, claim proponents, including external administrators, might be in for unwelcome surprises in court, particularly in the VSC.



Masi Zaki

Partner, Sydney
T +61 2 8248 7894
E masi.zaki@squirepb.com



Kate Spratt

Associate, Sydney
T +61 2 8248 7841
E kate.spratt@squirepb.com



For the latest updates on managing business risk during Covid-19, subscribe to [Restructuring GlobalView](#)

⁹ *Bolitho*, at [1521] and [1554]

¹⁰ *Bolitho*, at [99]

¹¹ *Davaria Pty Ltd & Anor v 7-Eleven Stores Pty Ltd & Anor* Federal Court Proceeding No. VID180/2018, Court orders dated 16 September 2021, order 6