HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

JOHN BRUCE KAIN
Appellant

and

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR THE R&B PENSION FUND
First Respondent

DAVID FURNISS
Second Respondent

BLUE SKY ALTERNATIVE INVESTMENTS LIMITED ACN 136 866 236 (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
Third Respondent

ROBERT WARNER SHAND
Fourth Respondent

ERNST & YOUNG (A FIRM) ABN 75 288 172 749
Fifth Respondent

CHUBB INSURANCE AUSTRALIA LIMITED ACN 001 642 020
Sixth Respondent

DUAL AUSTRALIA PTY LTD ACN 107 553 257 ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S BEING: (I) LIBERTY MANAGING AGENCY LIMITED FOR AND ON BEHALF OF SYNDICATE 4473; (II) ASTA MANAGING AGENCY LTD FOR AND ON BEHALF OF SYNDICATE NO. 2786 EVE; AND (III) HARDY (UNDERWRITING AGENCIES) LIMITED, MANAGING AGENT FOR AND ON BEHALF OF LLOYD'S SYNDICATE HDU 382
Seventh Respondent

ZURICH AUSTRALIAN INSURANCE LIMITED ACN 000 296 640
Eighth Respondent

XL INSURANCE COMPANY SE ARBN 083 570 441
Ninth Respondent

FIFTH RESPONDENT'S SUBMISSIONS IN REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE REPLY

2. **Section 79 of the Judiciary Act**: Nothing turns on the assimilation of the tests under s 79(1) of the *Judiciary Act* and s 109 of the *Constitution*: **cf. 1/2RS, [7]**. Section 79(1) does not operate to insert provisions of State law into a Commonwealth legislative scheme which is "complete on its face" or, where the provisions of the Commonwealth scheme "have left no room" for the operation of State provisions on the subject matter: *Masson v Parsons* (2019) 266 CLR 554 at [45] (per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). It could not be said that the provisions of Part IVA "*leave no room*" for the operation of ss 183 and 185 of the LPUL, for they evince no intention to deal with the subject at all, notwithstanding that such matters relating to the conduct of lawyers appearing in federal courts are within federal legislative competence: **5RS, [23]-[25]**.

3. Given that legislative competence, the fact that ss 183 and 185 (along with the rest of the LPUL) was drafted by the federal government[1] for enactment by the States tends to suggest an intention on the part of the federal legislature to leave the regulation of solicitors and their fee arrangements to the States.

4. This process of construction (a) reveals that the provisions of Part IVA do not confer power to order an SCFO; and (b) results in ss 183 and 185 of the LPUL being picked up by s 79 for application in the Federal Court.

5. This is not to say that the construction, rather than the effect, of Part IVA differs as between Australia's States: **cf. 1/2RS, [7]**. Section 33V(2) confers a power that is shaped by the intention of the Commonwealth legislature not to trespass on State laws concerning the regulation of solicitors or their fee arrangements. That is a uniform construction. It is not undermined by any inconsistency between the State laws in question. The same can be said for the powers conferred by s 33Z(1)(g) and the other

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[1] New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 2014, (David Clarke, Parliamentary Secretary).

provisions of Part IVA. Contrary to the implication in the first and second respondents' submissions (**1/2RS, [7]**), the absence of power to make a SCFO in the present proceeding will not result in different outcomes for different group members.

6. As to whether s 185 is a law able to be picked up by s 79(1), if it is accepted that s 33ZDA of the *Supreme Court Act 1986* (Vic) is a procedural law (**RS1/2, [84]**), then it follows that s 185 of the LPUL (which pertains to the same subject matter but is to the opposite effect) is also procedural and a law apt to be picked up by s 79(1): **cf. 1/2RS, [53]**.

7. **Public policy**: The first and second respondents complain that the argument on public policy is insensitive to the potential for higher returns to group members: **1/2RS, [51]**. The competing interests have been considered by the ALRC and the legislature, both before the enactment of Part IVA and more recently. In its 1988 Report, the ALRC recommended that contingency fees not be permitted under the new regime, but said that this recommendation could be reviewed if the law were changed to permit contingency fees in civil litigation generally.[2] That report was the precursor to Part IVA and it is plain that the ALRC was alive to the importance, though not paramountcy, of access to justice. The Parliamentary Joint Committee on Corporations and Financial Services has recently given detailed consideration to the competing public policies impacted by a decision to permit contingency fees and has decided that the public benefit in promoting access to justice through representative proceedings is outweighed by the need to maintain the professional integrity, and the appearance of professional integrity, of those who appear before the courts: **5RS, [34], [41]-[45]**.

8. **Rule 12.2**: The first and second respondents' interpretation (**1/2RS, [66]**) is not reflected in the text of the rule or supported by its immediate context. Rule 12.2 expressly prohibits a solicitor doing anything which is calculated to dispose a client or which the solicitor knows will likely induce the client to confer a benefit on a solicitor over and above what the solicitor could reasonably charge for his or her legal work. Rule 12.4 contemplates three exceptions conditioned upon certain disclosures being made. The rule does not contemplate that disclosure more generally will prevent a

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2 Australian Law Reform Commission, Grouped Proceedings in the Federal Court (Report No 46, 1988), [297] (see also [296]).

contravention and there is no warrant to import principles associated with the general law concept of "undue influence".

9. **Section 1337P of the *Corporations Act***: Section 1337P does not answer the Reserved Question, which was directed to "*statutory powers conferred within Part IVA of the [FCA Act]*": **CAB 22-23**.

10. A GCO made under s 33ZDA applied as a federal law chosen by the court under s 1337P(1) would also not be an order that provided for the distribution of funds to a solicitor "otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding". A GCO made under s 33ZDA is an order for the payment of legal costs: s 33ZDA(1)(a).

11. Section 1337P therefore lies outside the scope of these appeals.

12. In any event, having regard to its text, context and purpose, s 1337P(1) applies only to proceedings that have been transferred from another court to the court exercising relevant jurisdiction.

13. Section 1337P appears in Part 9.6A of the Corporations Act, titled "Jurisdiction and procedure of Courts", within "Division 1—Civil jurisdiction", as part of "Subdivision C—Transfer of proceedings". It is appropriate to have regard to those headings in construing the Act: s 13(2)(d) of the *Acts Interpretation Act 1901* (Cth).

14. The purpose of Subdivision C is to "*enable proceedings to be transferred from one court to another where the interests of justice so require*."[3] Unsurprisingly, the other provisions of Subdivision C relate to the circumstances in which proceedings may be transferred between courts, and the manner in which such proceedings are to be dealt with. The context suggests that the purpose of s 1337P(1) is to facilitate the efficient transfer of proceedings.

15. If it were not so limited, the mandatory nature of s 1337P(1) would mean that in every civil matter arising under the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (Cth), the Federal Court would be required to make a positive determination as to which rules of evidence and procedure were appropriate for application in the circumstances. It is unlikely the Commonwealth legislature

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[3] Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth), [163].

intended to impose that burden on the Court, particularly without affording the parties a right of appeal: s 1337R.

16. A broad interpretation would also undermine the operation of s 79(1) of the *Judiciary Act.* Section 1337A(3) provides that Division 1 of Part 9.6A *"does not limit the operation of the Judiciary Act"* and thereby *"recognises the concurrent operation of s 79 of the Judiciary Act"*.[4] The first and second respondents' interpretation would mean that the laws of procedure in matters arising under the Corporations legislation would, in every case, depend on the criterion of "appropriateness" rather than on s 79(1). If that were the legislature's intention, one would expect it to be articulated expressly, given the express preservation of the operation of the Judiciary Act (save for s 39B) in s 1337A(3).

Dated: 11 February 2025

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[4] *Gordon v Tolcher* (2006) 231 CLR 334, [29] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).