HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. Does the Federal Court of Australia have statutory power under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), upon settlement or judgment of a representative proceeding, to make a common fund order: (a) in favour of anyone (**CFO**); or (b) in favour of solicitors (**Solicitors' CFO**)?

PART III: NOTICE OF CONSTITUTIONAL MATTER

3. The appellant does not consider any notice is required under section 78B of the *Judiciary Act 1903* (Cth).

PART IV: DECISIONS OF THE COURT BELOW

4. The docket judge reserved a question to the Full Court of the Federal Court of Australia under s 25(6) of the FCA Act in *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Reserved Question)* [2023] FCA 1499 (Lee J) (**RQJ**) (Amended Core Appeal Book (**CAB**) **7-16**). The reasons of the Full Court of the Federal Court of Australia are reported in *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* (2024) 304 FCR 395 (Murphy, Beach and Lee JJ) (**J**) (**CAB 30-49**).

PART V: FACTS

5. **Background:** The first respondent (**R&B Investments**) and second respondent (**Furniss**) (**Class Action Applicants**) bring a securities class action against the third respondent (**Blue Sky**), some of Blue Sky's former directors (the fourth respondent, **Shand**, and the appellant, **Kain**) and Blue Sky's former auditor (the fifth respondent, **EY**) (**RQJ[1]; CAB 9-11**).[1]

6. Initially each of the Class Action Applicants commenced separate competing representative proceedings against Blue Sky, Shand, Kain and EY.[2] They each brought

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[1] Blue Sky and the sixth to ninth respondents (being the insurer respondents) did not take a position concerning the question of power to make a Solicitors' CFO when the question was reserved to the Full Court (**RQJ [7]; CAB 13**), or before the Full Court (**J[9]; CAB 23**).

[2] The proceedings commenced by R&B Investments were initially commenced against other director defendants, although the proceedings were discontinued as against those directors: *R&B Investments*

an interlocutory application seeking a stay of the other proceeding in a disputed carriage application.[3] The docket judge delivered a judgment on that application standing over the matter and directing the parties to report back as to their progress in settling upon a form of consolidated pleading and as to the terms of a cooperative litigation protocol.[4] Following some delay in finalising a consolidated pleading and proposed consolidation agreement,[5] the two proceedings were consolidated on 24 March 2023 (**J[10]; CAB 23**).[6]

7. The Class Action Applicants are represented by two firms of solicitors, Banton Group and Shine Lawyers (**Solicitors**). Banton Group had acted for R&B Investments and Shine Lawyers had acted for Furniss in their respective competing representative proceedings prior to consolidation.[7] As part of the consolidation process, the Class Action Applicants entered into a "cooperative litigation protocol" (**Protocol**) and the Solicitors entered into a "consolidation agreement" (**Agreement**) (**J[10]; CAB 23**). At cl 5.1, the Protocol provides that the Class Action Applicants will request the Federal Court (**J[11]; CAB 23**):

> a) at an appropriate stage of the proceedings – to make orders that or to the effect that:
>
> > i legal costs and disbursements be shared among the Applicants and Group Members (Claimants) on a costs-equalisation basis (for instance, but without limitation, under section 33ZJ of the Act); (sic)
> >
> > ii Banton and Shine be further remunerated for their risks in funding the legal costs and disbursements by payment of such percentage of the Resolution Sum[8] as may be approved by the Court (Solicitors' Common Fund Order or Solicitors' CFO).
>
> b) as early as practicable in the proceeding – order that notice be given to Claimants of the matters in (a) hereof.

Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (In Liq) (Carriage Application) [2022] FCA 1444 (**Carriage Application 1**) at [3], [23]-[30].

3 *Carriage Application 1* at [3]-[4].

4 *Carriage Application 1* at [91], [93].

5 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application No 2)* [2023] FCA 142 (**Carriage Application 2**) at [5]-[22].

6 See also *Carriage Application 1* and *Carriage Application 2* at [4].

7 *Carriage Application 1* at [7], [12].

8 Resolution Sum is not defined in the Protocol. It is defined in the proposed addendum to the Solicitors' costs agreement (referred to further below) as "*the sum recovered as a result of the Consolidated Proceeding*": **KFM 64**.

8. Pausing here, the type of order here contemplated is different to a group costs order (**GCO**) contemplated by s 33ZDA of the *Supreme Court Act 1986* (Vic). A GCO is an order that "*the legal costs payable to the law practice … be calculated as a percentage of any award or settlement that may be recovered in the proceeding…"*.[9] That is, a payment of "legal costs" calculated as a percentage.[10] In contrast, what is contemplated here is an order for *not only* the payment of legal costs calculated in the usual way (and to be "shared" among the Class Action Applicants and group members), *but also* (by way of a Solicitors' CFO) an additional amount of remuneration calculated as a percentage of the settlement or judgment.

9. The Protocol provides that, in default of an order giving notice under cl 5.1(b), the Class Action Applicants will seek: **(a)** orders to transfer the proceedings to the Supreme Court of Victoria, and upon such a transfer, a GCO; or alternatively **(b)** commercial litigation funding (**J[11]; CAB 23-24**).

10. **Opt Out Notice:** In order to give effect to cl 5.1(b) of the Protocol, the Class Action Applicants filed an Interlocutory Application (Kain Book of Further Materials (**KFM**) **5-9**) seeking orders under ss 33X and 33Y of the FCA Act to issue an opt out notice (**Opt Out Notice**) informing group members, amongst other things, as to the basis upon which remuneration for the funding and conduct of the proceedings will be sought (**J[14]; CAB 24**). The proposed wording of Opt Out Notice (below) is the genesis of the issues the subject of the present appeal:

> If a settlement or judgment in the Class Action results in compensation being payable to you, the Applicants will ask the Court (who has the power to make the below orders) to make an order that a portion of the compensation be used to remunerate the lawyers for the value of their work, the expenses and outgoings (disbursements) they incurred, and the financial risks they took, in running the Class Action (a Solicitors' CFO). If it makes a Solicitors' CFO, the Court has power to decide what portion of the compensation should be paid to the solicitors, and will set a proportion that the Court considers fair and reasonable in all the circumstances. The solicitors will not ask the Court to approve an amount that is greater than what a third party litigation funder would seek for funding this proceeding, which is up to 30% of the total recovery plus reimbursement of its out-of-pocket costs.[11]

11. **Solicitors' costs agreement:** If the proposed Opt Out Notice is approved, the Solicitors contemplate an amendment to their costs agreements (**J[14]; CAB 24**) by

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9 *Supreme Court Act 1986* (Vic), s 33ZDA.

10 "legal costs" is defined by reference to the Legal Profession Uniform Law (Victoria): s 33ZDA(5).

11 Opt Out Notice annexed to the Interlocutory Application dated 7 March 2023: **KFM 7-9**.

way of an addendum (**KFM 63-65**). In proposed cl 3A.2, the addendum records, amongst other things, that the clients have instructed the Solicitors[12] to seek orders of the kind referred to in cl 5.1(a) of the Protocol referred to above at paragraph 7. At cl 3A.4, the addendum provides that by entering into the costs agreement, the client "*agrees that [the Solicitors] are to seek orders*" of the kind referred to above (**KFM 64**).

12. **Reserved Question and decision of the Full Court:** When presented with an Opt Out Notice which contained a reference to the existence of power to make a Solicitors' CFO, the docket judge reserved a question to the Full Court under s 25(6) of the FCA Act (**RQJ[3]-[5], [12]; CAB 12-14**). The question was subsequently amended by the Full Court limiting it only to whether there is power under Part IVA (**J[6], Order 1; CAB 23, 50**) as follows (**Reserved Question**):[13]

> Is it a licit exercise of power, pursuant to statutory powers conferred within Pt IVA of the [FCA Act] for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a "common fund order", as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]-[30]) which would provide 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?

13. In answering the Reserved Question "yes", the Full Court relied upon the decision in ***Elliott-Carde*** *v McDonald's Australia Limited,*[14] in which case the Full Court construed s 33V as supporting the existence of power to make a CFO on settlement (**J[33]-[52], [55]-[56]; CAB 27-32**). The Full Court also found that the Federal Court has power to make a Solicitors' CFO under ss 33V(2) and s 33Z(1)(g) of the FCA Act (**J[53]-[133]; CAB 31-48)**. The Full Court erred in answering the Reserved Question: "yes".

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12 The addendum is in a form referable to the Banton Group's costs agreement with R&B Investments, although the evidence established that Shine Lawyers intends to enter into an updated costs agreement with Mr Furniss to substantially the same effect as is set out in the addendum: **KFM 16-17**.

13 See **J[4]-[5] CAB 22-23** as to the circumstances in which the question was amended, including because of the limited bases which were ultimately pressed by the Class Action Applicants.

14 (2023) 301 FCR 1.

PART VI: ARGUMENT

CFO at Settlement / Judgment under Part IVA

14. The question as to whether the Federal Court has power to make a CFO or Solicitors' CFO at settlement under s 33V(2), or on judgment under s 33Z(1)(g), is a question of statutory construction undertaken by applying orthodox principles of considering the text, context and purpose of the provisions.[15] Context must be regarded in its widest sense to include the state of the law prior to the enactment of those sections.[16] It is inappropriate to read provisions conferring jurisdiction or granting power to a court by making implications or imposing limitations not found in the express words.[17] However, that principle cannot be deployed to construe a section more liberally than its terms and context permit.[18] When that analysis is undertaken, there is no power to make a CFO at settlement or judgment pursuant to ss 33V(2) and 33Z(1)(g).

15. **Sections 33V and 33Z(1)(g):** Section 33V(1) provides that a "*representative proceeding may not be settled or discontinued without the approval of the Court*". Sub-section (2) provides that "*[i]f the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court*". The power to "*approve*" a settlement under s 33V(1) does not say anything about the manner in which the proceeds of a settlement are to be distributed. Thus, the power to make a CFO, if there be one, must come from s 33V(2). While s 33V(2) is in broad terms, it is not unfettered. The text requires that an order under s 33V(2) only be made if the Court gives approval under s 33V(1) and if the order is: **(a)** *"just"*; and **(b)** "*with respect to the distribution of any money paid under a settlement or into Court*".

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15 *BMW Australia v* ***Brewster*** (2019) 269 CLR 574 at 598 [43] (Kiefel CJ, Bell and Keane JJ), citing ***CIC Insurance*** *Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

16 *Brewster* at 598 [43] (Kiefel CJ, Bell and Keane JJ), citing *CIC Insurance* at 408.

17 *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

18 *Brewster* at 596 [36] (Kiefel CJ, Bell and Keane JJ); *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 (Brennan CJ, Gaudron and McHugh JJ); *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at 449 [41] (Gaudron, Gummow and Callinan JJ); ***Wong*** *v Silkfield Pty Ltd* (1999) 199 CLR 255 at 261 [12] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

16. Section 33Z(1) provides that the Federal Court may, in determining a matter in a representative proceeding, do any one or more of the things listed in sub-paragraphs (a) to (g). Sub-paragraph (g) provides that the Court may "*make such other order as the Court thinks just*". Insofar as s 33Z(1)(g) is concerned: **(a)** the order must be made in determining a matter in a representative proceeding; **(b)** the order must be characterised as "*such other*" order; and **(c)** any "*such other*" order must be one that the Court "*thinks just*".

17. **"Just"**: While the sections must be construed as a whole, it is instructive to consider the meaning of their constituent parts. Both ss 33V(2) and 33Z(1)(g) import the notion that the order be "*just*" as a precondition to power. The FCA Act itself does not provide any express criteria according to which the Court should assess what is "*just*". What is "*just*" is necessarily to be construed with regard to its context and purpose and in accordance with legal principle: it does not permit "palm tree justice".[19]

18. Sections 33V and 33Z are contained within Part IVA of the FCA Act, which was inserted in 1992.[20] The objectives of Part IVA are to enhance access to justice by allowing for the collectivisation of claims that might not be economically viable as individual claims, and to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple.[21] The Part aims to reduce the costs of proceedings and promote efficiency in the use of court resources.[22] It created new procedures and conferred upon the Federal Court "*new powers in relation to the exercise of jurisdiction with which it has been invested by another law made by the Parliament*."[23]

19. The procedures and powers under Part IVA do not stand alone; the Part "*is framed on the assumption it will operate concurrently with the procedures and powers of the*

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19 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257-258 (Barwick CJ, Gibbs, Stephen, Mason JJ); *Stanford v Stanford* (2012) 247 CLR 108 at 120-121 [38] (French CJ, Hayne, Kiefel and Bell JJ).

20 *Federal Court of Australia Amendment Act 1991* (Cth).

21 *Brewster* at 611 [82] (Kiefel CJ, Bell and Keane JJ), citing Australian Law Reform Commission, *Grouped Proceedings in the Federal Court,* Report No 46 (1988) (**ALRC 1998 Report**), ch 8, esp at [315]-[318].

22 *Brewster* at 615 [97] (Gageler J), citing Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991, p 3174.

23 *Wong* at 258 [1] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ), citing *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 364-365; ***BHP Group** Ltd v Impiombato* (2022) 276 CLR 611 at 619 [6] (Kiefel CJ and Gageler J).

Federal Court which relate generally to the exercise of jurisdiction conferred on it".[24] Like other Parts of the FCA Act, Part IVA is procedural, not substantive.[25] In this connection, the Explanatory Memorandum records that the bill was not intended to confer "*new legal rights*".[26]

20. At the time Part IVA was introduced, payments to a litigation funder were unlawful under the laws against champerty, except in Victoria.[27] It follows that, at the time Part IVA was introduced, it could not have been intended that a "*just*" order was one encapsulating a payment to a litigation funder at settlement or judgment (or at all). However, as was noted in *Brewster*,[28] the present task before this Court directs attention to whether the making of a CFO falls, on a fair construction, within the terms of ss 33V(2) and 33Z(1)(g) today, noting that maintenance and champerty has been abolished in most States and Territories.[29]

21. The Full Court below found there was such a power. In reaching that conclusion, the Full Court placed essential and determinative reliance upon the decision of *Elliott-Carde* (**J[45]-[52], [55]-[56]; CAB 29-32**). For the following key reasons, a CFO is not "*just*" and therefore not within the scope of the power conferred by ss 33V(2) and

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24 *BHP Group* at 619 [7] (Kiefel CJ and Gageler J).

25 *BHP Group* at 633 [54] (Gordon, Edelman and Steward JJ), citing *Brewster* at 628 [136] (Gordon J).

26 *Federal Court of Australia Amendment Bill 1991* (Cth), *Explanatory Memorandum* at [3]; *cf Elliott-Carde* at 20-21 [102] *"[t]he explanatory memorandum adds nothing to the language of Part IVA as enacted*".

27 *Brewster* at 598 [44], 614 [94] (Kiefel CJ, Bell and Keane JJ); *Abolition of Obsolete Offences Act 1969* (Vic), ss 2 and 4; *Crimes Act 1958* (Vic), s 322A; *Wrongs Act 1958* (Vic), s 32(2).

28 At 598 [44] (Kiefel CJ, Bell and Keane JJ).

29 It was abolished as a tort and crime in: South Australia on 6 July 1992, *Criminal Law Consolidation Act 1935* (SA) Schedule 11(3) (amended by the *Statutes Amendment and Repeal (Public Offences) Act 1992* (SA), Schedule); New South Wales on 12 May 1995, *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) (repealed); *Civil Liability Act 2002* (NSW) sch 2, s 2; *Crimes Act 1900* (NSW) sch 3; the ACT on 9 October 2002, *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), s 68 (amended by the *Law Reform (Miscellaneous Provisions) Amendment Act 2002* (ACT)); *Civil Law (Wrongs) Act 2002* (ACT) s 221; and Tasmania on 13 October 2015, *Civil Liability Act 2002* (Tas) s 28E (amended by the *Justice and Related (Miscellaneous Amendments) Act 2015* (Tas) s 24). It was already abolished in Victoria on 2 December 1969, see above at fn 27. The tort was abolished in Western Australia on 25 March 2023 (*Civil Procedure (Representative Proceedings) Act 2022* (WA) s 36) and the crime was not included in the *Criminal Code (WA)*. The tort has not been expressly abolished in Queensland or the Northern Territory (although the crime has not existed in Queensland since the commencement of the *Criminal Code Act 1899* (Qld)). This Court in *Clyne* (at 203) found that *"[i]t may be necessary some day to consider whether maintenance as a crime at common law ought not now to be regarded as obsolete*".

33Z(1)(g). *Elliott-Carde*[30] was wrong to find otherwise in relation to CFOs on settlement.

22. It was accepted in *Brewster* that a concern to prevent *"free riding"* was legitimate.[31] However, it was also said that: **(a)** a funding equalisation order (**FEO**) (which involves payments being made as between group members) deals with that concern;[32] **(b)** *"there is no reason why the amount taken from unfunded group members' awards should be directed to the litigation funder*";[33] and **(c)** unfunded group members have no contractual or other relationship with the funder nor any liability to the funder, and the funder has no right to that money.[34] These matters have the effect that a CFO is not "*just*" and is therefore beyond power.

23. An important premise underpinning the conclusion in *Elliott-Carde* as to why a CFO is "*just*" was that book-building was said to be undesirable. For example, in the course of discussing FEOs, Beach J said that it involved *"unnecessary, expensive and inefficient book-building"*[35] and referred to *"the fiasco associated with incentivised book-building"*.[36] His Honour asked, rhetorically, what should happen where no group members have signed a funding agreement (i.e. there has been no book build at all)[37] and said that *Brewster* did not consider let alone analyse how a FEO would work in such a case or where only a small number of group members could sign a funding agreement within a reasonable time frame.[38]

24. Dealing with the last point first, such a situation was specifically addressed by Kiefel CJ, Bell and Keane JJ in *Brewster* at 604 [62]-[65], where ss 33M and 33N were analysed and it was concluded that where (for example) it is too costly or difficult to identify group members *"the solution contemplated by the legislation is to halt the*

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30 The decision in *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493, which relied upon *Elliott-Carde* on the question of power to make a CFO at settlement (at 503 [32] (Murphy J); 524 [136] (Lee J); 525 [142] (Colvin J)), is also wrong.

31 *Brewster* at 612 [85]-[86] (Kiefel CJ, Bell and Keane JJ). See also at 626-627 [131]-[132] and 637 [167]-[169] (Gordon J).

32 *Brewster* at 612 [86] (Kiefel CJ, Bell and Keane JJ); at 637 [167]-[169] (Gordon J).

33 *Brewster* at 612 [87] (Kiefel CJ, Bell and Keane JJ). See also at 632 [149], 633 [152] (Gordon J).

34 *Brewster* at 612 [87] (Kiefel CJ, Bell and Keane JJ). See also at 632 [149], 633 [152] (Gordon J).

35 *Elliott-Carde* at 26-27 [146] (Beach J).

36 *Elliott-Carde* at 27 [147] (Beach J). See also at [411] (Lee J).

37 *Elliott-Carde* at 26 [140] (Beach J).

38 *Elliott-Carde* at 27 [149] (Beach J).

representative proceeding, not to make a CFO because the process of book building is proving too expensive or too difficult". [39]

25. More generally, the premise that it is "*just*" for the Court to order that a group member who has not signed a funding agreement nevertheless pay amounts to a funder – because the funder should not be required to reach an agreement with individual group members – is wrong. As this Court held in *Brewster,* there is no warrant to supplement the legislative scheme under Part IVA to ease the commercial anxieties of litigation funders, or relieve them of the need to book-build.[40] That was not the mischief that the Part was intended to confront.[41] Part IVA was not intended to provide a sufficient incentive for litigation funders to fund litigation,[42] nor do any of the provisions of Part IVA invite the court to address those concerns.[43]

26. The Part does not "*involve the court in any predictive exercise, or in a concern as to whether the litigation funder may be sufficiently satisfied with the prospective return on its investment to assume the financial risk of pursing the litigation*".[44] It may be expected that if the legislation was intended to enlist the court in a task of that kind, then the legislation would have provided for it.[45]

27. Indeed, as was held in *Brewster* (at 611 [84]), "*[i]t may well be that some claims cannot attract funding, either because of want of interest among group members or because the litigation funders' assessment of the prospects of the claims lead them to decline the risk.*" However that is not something that Part IVA was designed to remedy nor a reason to conclude that the legislation is not performing its function in permitting access to justice.[46]

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39 See also *Brewster* at 611 [84] (Kiefel CJ, Bell and Keane JJ); at 629 [138]-[140] (Gordon J).

40 *Brewster* at 606 [71], 614 [94] (Kiefel CJ, Bell and Keane JJ). See also at 627 [133]-[134], 636 [164], 637 [167]-[169] (Gordon J).

41 *Brewster* at 625 [126] (Nettle J).

42 *Brewster* at 611 [83] (Kiefel CJ, Bell and Keane JJ).

43 *Brewster* at 613-614 [91] (Kiefel CJ, Bell and Keane JJ).

44 *Brewster* at 606 [71] (Kiefel CJ, Bell and Keane JJ).

45 *Brewster* at 605 [69] (Kiefel CJ, Bell and Keane JJ).

46 *Brewster* at 611-612 [84] (Kiefel CJ, Bell and Keane JJ).

28. These contextual and purposive considerations set out by this Court in *Brewster* are applicable at the end of a representative action (such as a settlement or judgment) just as they are applicable at an early stage of such an action.[47]

29. A CFO also creates a complex relationship between group members and the funder where there would have otherwise been no such relationship.[48] That is inconsistent with the context and purpose of Part IVA, which was not intended to create new legal rights and is procedural (not substantive).[49]

30. **"Distribution"**: In addition, the select choice by the legislature of the word "*distribution*" in s 33V(2) is an additional matter pointing against power to make a CFO at settlement under s 33V(2).[50] The word "*distribution*" (or a variation of it) is used elsewhere in Part IVA. In each case it is directed towards payments to group members. In s 33M(b), it is used to describe the payment of money to group members in the context of the Federal Court's powers to direct that a proceeding no longer continue under Part IVA if there would be excessive cost to a respondent in making that distribution. In s 33Z(2), it is used the same way in the context of mandating that the Federal Court must, in making an order for an award of damages, make provision for the payment or distribution of the money to the group members entitled. Section 33ZA, which is related to s 33Z, uses "*distribution*" consistently with ss 33M and 33Z.

31. Each of ss 33M, 33Z and 33ZA employ the word "*distribution*" along with other specific language tethering it to payments to group members. The word "*distribution*" in its ordinary sense involves a payment to someone who is entitled to it (for example, a distribution by a trustee to a beneficiary). This discloses that the legislature intended persons receiving a "*distribution*" under s 33V(2) to have a pre-existing entitlement to it. So much is also clear from the use of the word in the context in which it appears in those other sections, and *a fortiori* when coupled with the proposition that Part IVA was not intended to create "*new legal rights*" as explained by the Explanatory Memorandum.[51] In that regard, s 33V(2) would not permit a "*distribution*" to a third

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47 See e.g. *Brewster* at 630 [141] (Gordon J).

48 *Brewster* at 604 [66] (Kiefel CJ, Bell and Keane JJ).

49 Above at paragraph 19.

50 *cf Elliott-Carde* at 20 [99] (Beach J).

51 Above at paragraph 19.

party funder in the form of a CFO where group members would otherwise have had no relationship at all with the funder.[52] The proper construction of "*distribution*", when construed in light of Part IVA as a whole, is in itself determinative of the proposition that there is no power to order a CFO under s 33V(2).

32. **"Such other order as the Court thinks just"**: There is an additional reason why s 33Z(1)(g) does not confer power to make a CFO at judgment. The court's power under that sub-paragraph is to make "*such other order as the Court thinks just*". However, the other sections within s 33Z concern orders affecting either: **(a)** the parties to the litigation (such as sub-paragraphs (a) to (d)); and/or **(b)** group members (such as sub-paragraphs (a)-(f) and ss 33Z(2)-(4)). In circumstances where the balance of s 33Z concerns parties and group members, the context requires that the general words "*such other order as the Court thinks just*" in sub-paragraph (g) be read consistently and subject to the same limitation. The power conferred under sub-paragraph (g) therefore does not extend to permit a CFO to a third party funder for that reason; they are neither a party to the proceeding nor a group member to which the section directs attention.

Solicitors' CFO at Settlement / Judgment under Part IVA

33. **Relationship with power to make a CFO:** If this Court finds there is no power to make a CFO under ss 33V(2) or 33Z(1)(g) at settlement or judgment respectively, then it follows that there is no power to make a Solicitors' CFO under those provisions. However, there are additional reasons why a *Solicitors'* CFO is not "*just*" and hence not within power.

34. **Inconsistent with long-standing High Court authority:** A Solicitors' CFO is inconsistent with the seriously considered dicta of this Court in ***Clyne*** *v Bar Association (NSW)*[53] as follows (emphasis added):

> … And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the

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52 See also *Brewster* at 604-605 [66] (Kiefel CJ, Bell and Keane JJ).

53 (1960) 104 CLR 186 at 203 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ).

> subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding: see Fleming, The Law of Torts (1957) p. 638, where it is pointed out that the position in the United States is different.

35. An order could not be "*just*", within the meaning of ss 33V(2) or 33Z(1)(g), if it places the Solicitors in a position inconsistent with the well-established and long-standing prohibition on contingency fees payable to a solicitor.

36. In this regard, the Full Court said that a Solicitors' CFO would not be pursuant to any "*bargain*" struck (on the basis that the payment would be made pursuant to a Court order from an identifiable settlement fund controlled by the Court: **J[86]; CAB 39**). That conclusion was, with respect, both erroneous and beside the point. In this case, it is the Class Action Applicants who will request the Court to order a Solicitors' CFO, and they will instruct their Solicitors to seek such an order.[54] In those circumstances the Solicitors and Class Action Applicants are plainly party to a "*bargain*". The fact that the "*bargain*" struck is subject to a condition that the Solicitors' interest in the subject-matter of the litigation be approved by the Court does not affect the conclusion that it remains a bargain struck between the solicitor and client; it is simply a bargain on terms. This is fortified by the fact that the bargain is recorded in the proposed addendum to the Solicitors' costs agreements (cl 3A at **KFM 63-64**).

37. Further, the means by which a solicitor obtains a proportionate interest in the amount of the proceeding is, with respect, beside the point. The relevant vice is in the solicitor having such an interest.

38. It is convenient to note here that the Full Court's references to "No Win-No Fee" arrangements (at **J[68]; CAB 34**) are also, with respect, beside the point. In *Clyne*, this Court expressly endorsed such arrangements, on condition that the solicitor did not receive "*remuneration proportionate to the amount which may be recovered by [their] client in a proceeding*".[55] It is this condition which is infringed by a Solicitors' CFO, and thus why such an order is not relevantly "*just*".

39. The prohibition on contingency fees in *Clyne* was not modified by the introduction of Part IVA, nor by the subsequent statutory abolition of the crime and tort of

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54 Above at paragraphs 7 and 11.

55 "*Conditional costs agreements*" are also permitted under, for example, ss 181-182 of the *Legal Profession Uniform Law* (NSW), provided they meet the statutory requirements.

maintenance and champerty in some States and Territories; it remains a determinative reason today why a Solicitors' CFO would never be relevantly "*just*".

40. The procedures adopted in Part IVA when it was introduced in 1992 follow the report of the Australia Law Reform Commission (**ALRC**), "*Grouped Proceedings in the Federal Court*", tabled in Parliament in December 1988. In that report, the ALRC recommended a regime pursuant to which the Court may, at any stage of proceedings, approve an agreement concerning the remuneration to be paid to a solicitor (at Appendix A, cl 33).[56] The recommendation was made on the basis that *"[f]ee agreements should not be permitted under which the solicitor's total remuneration or the 'premium' are calculated as a percentage of the amount recovered. If the law was changed to permit percentage contingent fees in civil litigation generally this recommendation could be reviewed*."[57]

41. Thus, the ALRC's proposed regime for the approval of solicitors' fee agreements expressly provided that the Court must not approve an agreement that provided for remuneration to be ascertained by reference to the amount recovered or ordered to be paid in the proceedings.[58] The ALRC's recommended regime in Appendix A, cl 33 of the ALRC Report, conferring upon the Court a discretion to approve a solicitor's fee agreement, was not adopted. This is clear from the text of Part IVA, and the Second Reading Speech which noted that not all of the ALRC's recommendations had been adopted, including what was referred to as the ALRC's "*proposal for contingency fees*".[59]

42. In short, even the (non-adopted) regime to permit Court approval of fee agreements preserved the prohibition on percentage-based fees in *Clyne*.

43. Relatedly, the fact that the crime and tort of maintenance and champerty has been abolished in most States and Territories does not affect that conclusion. In New South Wales, the statutory prohibition on contingency fees was introduced into the *Legal Profession Act 1987* (NSW) in 1993 and was expressly linked with the abolition of the

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56 The Full Court referred to the ALRC 1988 Report at **J[102]-[103] CAB 42**, however did not refer to this proposed regime.

57 ALRC 1988 Report at [297] (footnote omitted). See also [295] "*Lawyer should not have a financial interest*" and [296] "*Percentage fees not appropriate*".

58 ALRC 1988 Report, Appendix A, cl 33(1), (2).

59 Australia, House of Representatives, Parliamentary Debates (Hansard), 14 November 1991, p 3175.

crime and tort of maintenance and champerty.[60] The legislation abolishing the tort and/or crime of maintenance and champerty in Victoria in 1969,[61] South Australia in 1992,[62] and the ACT in 2002,[63] included similar wording preserving the aversion to contingency fees being charged by solicitors notwithstanding the broader abolition of maintenance and champerty.

44. Part IVA is framed on the assumption that it will operate concurrently with the procedures and powers of the Federal Court which relate generally to the exercise of jurisdiction conferred on it.[64] The legislative regimes regulating solicitors are part of the context in which the Federal Court's jurisdiction is to be exercised.[65] Each State and Territory has passed legislation prohibiting contingency fees.[66]

45. A Solicitors' CFO is not relevantly "*just*" where such an order is antithetical to a long-standing prohibition on contingency fees which is unmodified by Part IVA and which has otherwise been (and continues to be) enshrined in State and Territory legislation across the country (as to which see further below).

46. **Conflicts and potential conflicts:** It is also not within the meaning of "*just*" to make a Solicitors' CFO where such an order places a solicitor in a position of conflict or

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60 *Legal Profession Reform Bill 1993* (NSW), *Explanatory Memorandum*, at p 1 provides that "*The Maintenance and Champerty Abolition Bill 1993 is cognate with this Bill*", and at p 5 "*Conditional costs agreements, i.e. agreements where a fee is payable only if the matter is successful, will be allowed. In these circumstances, a premium of up to 25% may be charged. However, fees may not be charged as a proportion of an amount recovered.*" See also *Smits v Roach* (2004) 60 NSWLR 711 at 740-741 [46]-[48] (Sheller JA, with whom Ipp and Bryson JJA agreed), explaining (at [46]) that each of the New South Wales Acts were part of the one legislative reform.

61 *Abolition of Obsolete Offences Act 1969* (Vic) s 3 provided that: "*Notwithstanding the abolition by the Abolition of Obsolete Offences Act 1969 of the common law offence of maintenance a practitioner who enters into an agreement with a client to accept part of any amount received by the client in proceedings instituted or conducted by the practitioner on behalf of the client shall be guilty of misconduct to the same extent after the commencement of the said Act as before the said commencement.*"

62 *Criminal Law Consolidation Act 1935* (SA) Schedule 11, cl 3(2)(c) provided that: "*The abolition of criminal and civil liability for maintenance and champerty does not affect—(c) any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement.*"

63 *Law Reform (Miscellaneous Provisions) Amendment Act 2002* (ACT) s 71 provided that: "*This Act does not affect any rule of law relating to the misconduct of a lawyer who—(a) engages in conduct that would have been maintenance at common law; or (b) is a party to a champertous agreement.*"

64 *BHP Group* at 619 [7] (Kiefel CJ and Gageler J).

65 *APLA Ltd v Legal Service Commissioner (NSW)* (2005) 224 CLR 322 at 352 [32] (Gleeson CJ and Heydon J).

66 *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Uniform Law* (Vic) s 183; *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Act 2007* (Qld) s 325; *Legal Profession Uniform Law* (WA) s 183; *Legal Practitioners Act 1981* (SA) sch 3, cl 27; *Legal Profession Act 2006* (NT) s 320; *Legal Profession Act 2007* (Tas) s 309.

potential conflict of interest either under the *Australian Solicitors' Conduct Rules 2015* (NSW) (**Solicitors' Rules**) or in equity (*cf* **J[69]; CAB 35**). The conflicts arise principally in two ways: **(a)** the lack of independence or perceived lack of independence of solicitors who have a financial interest as a quasi-funder, which conflicts with their overarching duty to the Court;[67] and **(b)** by reason of the conflict between the solicitors' commercial interests and imperatives and their duty to their client to advance the client's interests in the proceedings.[68]

47. The Full Court approached this issue by stating that potential or actual conflicts are an inevitable by-product of representative proceedings and that they are addressed by the content of the duties owed to group members, the applicant and the Court (**J[67]; CAB 34**), as well as by the Court being alive to identifying any relevant conflicts and ensuring the rights of group members have been appropriately protected (**J[72]; CAB 37**). The Full Court held that if there was a suggestion that a professional duty had been breached, then that could be assessed at the time of making a Solicitors' CFO (**J[73]; CAB 37**).

48. It is one thing to say that there are existing conflicts in representative proceedings. It is another thing to say that a Court order creating a further conflict is relevantly "*just*". The fact of existing conflicts is a reason for caution, not a basis for concluding that a further conflict is "*just*".

49. The issues of whether the conflict or potential conflict can be managed, and that there are other conflicts inherent in representative actions, are subsidiary to the question of construction of ss 33V(2) and 33Z(1)(g). The fact that the effect of a Solicitors' CFO would put the Solicitors in a position of conflict under the Solicitors' Rules or in equity is determinative of the order not being "*just*" and therefore not within the scope of the power. This is fortified by the well-established proposition that duties of solicitors must "*manifestly and undoubtedly be seen to have been discharged,*"[69] which is essential to fostering public confidence in the profession. The proposition that Part IVA introduced a substantive right under ss 33V(2) or 33Z(1)(g) in a favour of a

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67 Solicitors' Rules rr 3.1.

68 Solicitors' Rules rr 4.1.1, 4.1.4 and 12; in equity, see *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

69 *Spector v Ageda* [1973] Ch 30 at 47 (Megarry J).

solicitor which undermines public confidence in the legal profession should not be accepted.

50. Further, the proposition that the conflict or potential conflict could be appropriately managed, particularly at the end of a proceeding when a Solicitors' CFO is sought, should also not be accepted (*cf* **J[72]-[73]; CAB 37**). The Court is not privy to the day-to-day conduct of the proceedings to assess whether decisions are being or have been made free and clear from conflicts of interest. Further, the possibility that a contradictor might be appointed by the court to scrutinise the conduct of the solicitors, *ex post*, only serves to emphasise the conflict created by the order. It is not a practicable or workable solution. It is difficult, time consuming, and costly for a contradictor to scrutinise such prior conduct (for example what occurred in settlement negotiations or a mediation). Even if the contradictor is able to uncover, after the fact, that a decision was made during the course of a proceeding which was infected by a conflict of interest, it may often be difficult to undo what has occurred.

51. The appointment of a contradictor after the event also fails to recognise that the applicants' solicitors are important protectors of the applicants and group members, and are charged with being alive to the possibility of conflicts between the interests of those parties and, for example, the commercial imperatives and demands of funders.[70] The solicitors cannot perform that function where they are the party in the position of conflict or potential conflict. In this respect, the Full Court recognised (at **J[63]-[65]; CAB 33-34**) that the applicant's solicitor owed fiduciary duties (no profit rule and no conflict rule) to group members at least at the time a settlement is being negotiated or has been reached, and at the time of a settlement application relating to group members' claims generally.[71] Indeed, the applicants' solicitor also has a duty to act consistently with the applicants' fiduciary duty to group members[72] which cannot be

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70 See, e.g., *Perera v GetSwift Limited* (2018) 263 FCR 1 at [32] (Lee J); *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at [47] (Murphy J). See also Class Actions Practice Note (GPN-CA) at [5.9]-[5.10].

71 See also e.g. *Gill v Ethicon Sarl (No 12)* [2023] FCA 902, quoted by the Full Court at **J[71]; CAB 35-37,** where it was said that *"The Court is entitled to expect that the applicant's solicitors will not act contrary to the interests of group members as a whole in advancing and dealing with the common aspects of their claims"* (at [137]) and that *"Whether or not a group member has retained the solicitor acting for the representative applicant, the solicitor has a duty not to act inconsistently with the interests of group members"* (at [140]).

72 *Dyczynski v Gibson* (2020) 280 FCR 583 at 636 [210] (Murphy and Colvin JJ); See also *Wigmans v AMP Ltd* (2021) 270 CLR 623 at 670 [117] (Gageler, Gordon and Edelman JJ).

exercised free of a conflict or potential conflict where they are to be remunerated by a Solicitors' CFO.

52. Finally, the making of a Solicitors' CFO would also place the solicitor in contravention of r 12.2 of the Solicitors' Rules as follows:

> **12 Conflict concerning a solicitor's own interests**
>
> …
>
> 12.2 A solicitor must not do anything—
>
> (i) calculated to dispose a client or third party to confer on the solicitor, either directly or indirectly, any benefit in excess of the solicitor's fair and reasonable remuneration for legal services provided to the client, or
>
> (ii) that the solicitor knows, or ought reasonably to anticipate, is likely to induce the client or third party to confer such a benefit and is not reasonably incidental to the performance of the retainer.

53. The Full Court held this rule was inapplicable on the basis that any benefit conferred will be conferred by the Court because it is just to do so (**J[88]; CAB 40**). In reaching that conclusion, the Full Court omitted the words *"directly or indirectly"*. The actions of the Solicitors, in (for example) the present application, proposing that a Solicitors' CFO be applied for, and ultimately making the application for a Solicitors' CFO, are doing something calculated to dispose the client (or, for that matter, a third party being the Court) to confer on the Solicitors – at least indirectly but probably also directly – a benefit (being a Solicitors' CFO) in excess of their fair and reasonable remuneration for legal services provided. It is not relevantly "*just*" for the Court to make a Solicitors' CFO in those circumstances.

54. **Section 183 of the LPUL:** It is not within the meaning of "*just*" to make an order that would result in the Solicitors infringing the statutory prohibition on contingency fees contained within s 183(1) of the *Legal Profession Uniform Law* (NSW) (**LPUL**) or would result in the Solicitors obtaining a benefit that they could not obtain by a lawful costs agreement entered into in accordance with the LPUL (being the rules that regulate a solicitor's conduct and practice).

55. In New South Wales, Part 4.3 Division 4 of the LPUL provides clients with a series of rights connected with costs agreements between them and a law practice, including

s 179 pursuant to which the client has a right to a negotiated costs agreement.[73] Section 182 in turn provides that a conditional costs agreement may provide for the payment of an "*uplift fee*", which relevantly must not exceed 25% of the legal costs (excluding disbursements) otherwise payable. Section 183(1) provides:

> **183 Contingency fees are prohibited**
>
> (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

56. The consequences of a contravention of this section are significant; it may amount to the imposition of a civil penalty or have professional ramifications in the form of a finding of unsatisfactory professional conduct or professional misconduct.[74] If a costs agreement is entered into in contravention of Division 4, it is void. Insofar as the contravention concerns s 183 of the LPUL, the law practice is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related (and must repay any amount received in respect of those services to the person from whom it was received).[75]

57. Properly construed, the LPUL *prohibits* the payment or charging of an amount calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in proceedings. Section 183 does not exist in a vacuum; it is part of a legislative regime in which a client of a solicitor has the right to a negotiated costs agreement with the solicitor (s 179). The solicitor must provide the client with information about the client's rights in this respect (s 174(2)(a)(i)). It is consistent with experience – and indeed ought to be encouraged – that applicants in class actions enter into costs agreements with their solicitors and those costs agreements should explicitly record the amount that might be payable to the solicitors. In any case in which the client exercises its right to have a costs agreement, the agreement cannot provide for the payment of an amount calculated by reference to an award (s 183). Hence, where there is a costs agreement, the solicitor cannot be paid an

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73 Section 181 permits "conditional costs agreements" (being a costs agreement which provides for the payment of some or all of the legal costs conditional upon the successful outcome of the matter to which the costs relate).

74 LPUL, s 183(1), (3).

75 LPUL, s 185(1), (4).

amount calculated by reference to an award (because this would be inconsistent with the costs agreement). This is reinforced by the heading to s 183 (i.e. "*Contingency fees are prohibited*"), which forms part of the LPUL and may therefore be used as an aid to construction.[76] The clear legislative intent is for solicitors not to be paid amounts calculated by reference to an award. For the contrary position to be correct, it is necessary to divine a legislative intention to permit solicitors to charge a contingency fee provided the solicitor can avoid the client exercising his/her right to have a costs agreement. This is highly unlikely to be the legislative intention.

58. Regardless, the proposed addendum contemplated in this case (if it is entered into) contravenes s 183. It is irrelevant that the addendum does not provide for an immediate interest in the award or settlement (noting that the interest in the proceeds is subject to the Court determining that it is "*just*"). The terms of s 183 make clear that a contravening costs agreement will be one under which the amount payable "*is calculated by reference to the amount of any award or settlement*". That is, the section is directed to the process by which the amount is calculated (*cf* **J[85]-[86]; CAB 39**).

59. Even if the addendum does not contravene the section directly, it is contrary to the implicit legislative policy tending against the payment of contingency fees fortified by the longstanding authority in *Clyne*.[77]

60. Finally, it would not be "*just*" and therefore not within power to make a Solicitors' CFO if to do so would result in the Solicitors obtaining a benefit that they could not obtain by a lawful costs agreement entered into in accordance with s 183. It is not relevantly "*just*" for the Court to make an order that would circumvent the rules governing solicitors' conduct and practice.

Notice of Contention

61. Two preliminary matters should be noted in respect of the Class Action Applicants' Notice of Contention (**NOC**).

62. **FCA Act s 23 and equity:** The NOC refers to a contention that there is power under s 23 of the FCA Act, or in equity, to make a CFO or Solicitors' CFO. However, the

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76 LPUL, s 7(1); *Interpretation of Legislation Act 1984* (Vic) s 36(2A).

77 *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 137 ACSR 441 at 446 [22] (Middleton and Beach JJ).

Full Court's decision below answered the Reserved Question, which was ultimately limited to whether there was statutory power under Part IVA of the FCA Act.[78]

63. **Corporations Act s 1337P and GCOs:** The Class Action Applicants do not seek a GCO or an order akin to GCO – which is a payment of "legal costs" as referred to above. Instead, they seek both reimbursement for legal costs incurred and (relevantly) a separate and independent percentage-based fee. This is apparent from the Reserved Question itself.

Part VII: ORDERS SOUGHT

64. (1) Appeal allowed; (2) Set aside orders 2 and 3 of the orders of the Full Court made on 5 July 2024; (3) The Reserved Question be answered: "No."; (4) The first and second respondents pay the appellant, fourth respondent and fifth respondent's costs of and incidental to the hearing of the Reserved Question; (5) The first and second respondents pay the appellant's costs of and incidental to this appeal.

Part VIII: ESTIMATE TIME

65. Kain estimates that 2.25 hours will be required for the presentation of oral argument.

Dated: 12 December 2024

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78 While power under s 23 of the FCA Act and in equity were raised in submissions, as recorded at **J[4] (CAB 22)** the Class Action Applicants limited their case to statutory power under Part IVA, thus the Reserved Question was ultimately amended to be so limited.

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

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Appellant sets out a list of the statutes and statutory instruments referred to in his submissions below.

No	Description	Version / Date	Provision(s)
1.	*Abolition of Obsolete Offences Act 1969* (Vic)	2 December 1969-5 January 1983	ss 2-4
2.	*Australian Solicitors' Conduct Rules 2015* (NSW)	Current	rr 3.1, 4.1.1, 4.1.4, 12
3.	*Civil Liability Act 2002* (NSW)	Current	Sch 2, s 2
4.	*Civil Liability Act 2002* (Tas)	Current	s 28E
5.	*Civil Law (Wrongs) Act 2002* (ACT)	Current	s 221
6.	*Civil Procedure (Representative Proceedings) Act 2022* (WA)	Current	s 36
7.	*Crimes Act 1900* (NSW)	Current	Sch 3
8.	*Crimes Act 1958* (Vic)	Current	s 322A
9.	*Criminal Code (WA)*	Current	-
10.	*Criminal Code Act 1899* (Qld)	Current	-
11.	*Criminal Law Consolidation Act 1935* (SA)	Current	Schedule 11, cl 3
12.	*Federal Court of Australia Act 1976* (Cth)	Current	ss 23, 25(6), Pt IVA, 33M, 33N, 33V, 33X, 33Y, 33Z, 33ZA
13.	*Federal Court of Australia Amendment Act 1991* (Cth) (and associated bill)	4 December 1991 - 09 March 2016	-
14.	*Interpretation of Legislation Act 1984* (Vic)	Current	s 36(2A)
15.	*Judiciary Act 1903* (Cth)	Current	s 78B

16.	*Justice and Related (Miscellaneous Amendments) Act 2015* (Tas)	Current	s 24
17.	*Legal Practitioners Act 1981* (SA)	Current	sch 3, cl 27
18.	*Legal Profession Act 1987* (NSW), amended by the *Legal Profession Reform Act 1993* (NSW) (and associated bill)	29 November 1993 - 1 October 2005	s 188
19.	*Legal Profession Act 2006* (ACT)	Current	s 285
20.	*Legal Profession Act 2006* (NT)	Current	s 320
21.	*Legal Profession Act 2007* (Qld)	Current	s 325
22.	*Legal Profession Act 2007* (Tas)	Current	s 309
23.	*Legal Profession Uniform Law* (NSW)	Current	ss 7, 179-183, 185
24.	*Legal Profession Uniform Law* (Vic)	Current	s 183
25.	*Legal Profession Uniform Law* (WA)	Current	s 183
26.	*Law Reform (Miscellaneous Provisions) Act 1955* (ACT)	1 November 2002 - 28 March 2007	s 68-72
27.	*Law Reform (Miscellaneous Provisions) Amendment Act 2002* (ACT)	9 October 2002 - 10 October 2002	ss 6, 71
28.	*Maintenance, Champerty and Barratry Abolition Act 1993* (NSW)	12 May 1995 – 7 July 2011	ss 3-6
29.	*Statutes Amendment and Repeal (Public Offences) Act 1992* (SA)	Current	Schedule
30.	*Supreme Court Act 1986* (Vic)	Current	s 33ZDA
31.	*Wrongs Act 1958* (Vic)	Current	s 32(2)