HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S146/2024
File Title:	Kain v. R&B Investments Pty Ltd as trustee for the R&B Pensi
Registry:	Sydney
Document filed:	Form 27F - proposed Intervener's Outline of oral argument
Filing party:	Intervener
Date filed:	04 Mar 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

Case S146/2024

BETWEEN:

JOHN BRUCE KAIN
Appellant

and

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR THE R&B PENSION FUND & ORS
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: (1) 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 (ID 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

OUTLINE OF ORAL ARGUMENT OF THE ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA
SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

PART I: CERTIFICATION

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

PART II: OUTLINE OF ORAL ARGUMENT

2. **Application for leave.** The Association has a sufficiently affected interest (Association's written submissions dated 11 February 2025 (**IS**), **[2]-[3]**; *Roadshow Films Pty Ltd v iiNet Limited (No 1)* (2011) 248 CLR 37, [2] (**JBA V 6, T 27**)). The proceedings have the potential to significantly impact the funding of class actions, including pending litigation involving the Association's members (**IS [3]**). Alternately, the Association seeks to be heard as *amicus curiae* (**IS [4]**). It intends to make substantially different submissions to the parties as to the possible re-opening of *BMW Australia Ltd v* ***Brewster*** (2019) 269 CLR 574 (**JBA V 4, T 13**) (**IS [4]**). The parties have indicated that they do not oppose the Association's application and have made accommodation for its oral submissions in the hearing timetable.

3. **Proposed oral submissions if granted leave.** The Association proposes to confine any oral submissions to the second factor in ***John*** *v Federal Commissioner of Taxation* (1989) 166 CLR 417 (**JBA V 4, T 16**) (and the related issue of the correctness of *Brewster*) and the third *John* factor.

4. **Admissibility of Walker Affidavit.** The parties (other than the first and second respondents) have indicated that they object to the Court receiving the Affidavit of Mr **Walker** filed 11 February 2025 on the basis of ***Eastman*** *v The Queen* (2000) 203 CLR 1. *Eastman* and this Court's earlier decision in *Mickelberg v The Queen* (1989) 167 CLR 259 (**JBA V 5, T 5**) are authority for the proposition that the appellate jurisdiction of the High Court under s 73 of the *Constitution* is confined to appeals in their "true sense" and (accordingly) is limited to determining whether the judgment of the court appealed from was right, based upon the materials before that court. That does not, however, prevent this Court from receiving material solely for the purpose of considering whether to re-open one of its own decisions, noting that the third *John* factor may require that the Court be supplied with an evidentiary basis for any conclusions contended for by the parties (*Vanderstock v Victoria* (2023) 98 ALJR 208, [131] (Kiefel CJ, Gageler and Gleeson JJ), and [939] (Jagot J)). That is the limited purpose for which the Association seeks to rely upon the Walker Affidavit.

Second John factor and the correctness of Brewster

5. **First broad strand of reasoning.** There are two distinct strands of reasoning amongst the majority in *Brewster* (**JBA V 4, T 13**). The first broad strand (adopted by Kiefel CJ, Bell and Keane JJ, but not Nettle and Gordon JJ) focused upon the ordinary meaning of the words in s 33ZF(1); which were said to make clear that it was limited to an order that could be said to be apt to ensure that justice is done in the proceeding by regulating "how" the matter is to proceed (as opposed to an order directed to whether the matter "can proceed at all") ([47], [50]-[54] (emphasis added); *cf* **IS [12]-[16]**).

6. The difficulty in that reasoning arises from the undoubted breadth of the terms used in s 33ZF(1). ***First***, the words, "any order" are obviously broad and flexible. ***Secondly***, the word, "thinks" implies a subjective state of satisfaction and acknowledges that Court orders develop through "time with experience" (*Brewster*, [100] (Gageler J); **IS [17]-[18]**; see also ***McMullin*** *v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4 (Wilcox J)). ***Thirdly***, the words, "ensure that justice is done in the proceeding" suggest a subjective state of satisfaction that is purposive and directed to a "proceeding" (and therefore "justice") that is of a specific kind (*Brewster*, [108]-[112] (Gageler J); **IS [19]-[21]**). Particularly when considered against the broader statutory purpose and the construction principles identified in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 (**JBA V 5, T 23**) (**IS [11] and [22]-[31]**), those immediate textual features of s 33ZF provide arid ground for any relevant constraint that would prevent the making of a CFO (as is implicitly recognised in the distinctly different reasoning of Nettle and Gordon JJ) ([112] and [203] respectively; **IS [15]-[23]**).

7. **Second broad strand of reasoning.** The second broad strand of reasoning in *Brewster* is founded upon the broader statutory context of Part IVA (**IS [14]**). While all of the majority Justices relied upon those contextual features to discern relevant constraints, their paths of reasoning differed. Justice Nettle held that those features engaged the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1. His Honour also understood that the authors of the joint reasons had sought to apply that principle (*Brewster*, [124]-[125], especially footnote 174); although the authors of the joint reasons expressly eschewed that approach: [48]; **IS [12]**. Instead, they ([46], [60], [70]) and Gordon J ([146]-[147) relied upon the statutory context surrounding s 33ZF to conclude that it was merely a "gap-filling" or

supplementary source of power and that the making of a CFO involved (impermissibly) giving s 33ZF an operation that went beyond the scope of operation of the provisions it supplemented. Even there, there were apparent differences between those two sets of reasons as to whether the making of a CFO was ever permissible (**IS [34]**; *Brewster*, [68], (Kiefel CJ, Bell and Keane JJ)), [135], [141], [143], and [149] (Gordon J)).

8. The answer to each of those forms of contextual reasoning is the same: it lies in the fact that Part IVA is replete with broadly expressed powers, and that s 33ZF takes its place alongside those powers. By reason of their very nature, those powers cannot be said to be so "limited and qualified" as to exclude the operation of other, more generally expressed, powers located within that Part via the application of *Anthony Hordern* (*Brewster*, [116] (Gageler J) and [207] (Edelman J)). Further, even if s 33ZF is properly characterised as a "gap filling" power those broadly expressed powers mean the 'gaps' are very wide and leave ample room for the making of a CFO, particularly if it is held that s 33V allows for the making of such an order at the end of the proceeding (*Brewster*, [117] (Gageler J), and [207]-[211] (Edelman J)).

9. If it is accepted that those aspects of the majority reasoning are wrong, and different in the respects identified, then this is a case like *John* where "special considerations" operate in favour of re-opening (which may outweigh even "powerful reasons" against, to the extent they exist) (*John*, 439-440 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ)).

The third John consideration – the inconvenience produced by Brewster

10. ***First***, *Brewster* has generated significant uncertainty, which has in turn limited access to capital, affecting access to justice (**IS [37]**; Walker [67]). ***Secondly***, the finding in *Brewster* that there is no power to make Commencement CFOs limits competition between funders and thereby inhibits downward pressure on funding rates (**IS [38]**). ***Thirdly***, *Brewster* has arguably led to 'forum shopping' in the pursuit of GCOs (**IS [39]**; Walker [47]). ***Fourthly***, this inconvenience is not alleviated by the availability of FEOs, which may not always be preferrable to CFOs (Walker [52]-[55]; see also **IS [27]-[31]**).

Dated: 4 March 2025

Craig Lenehan **Ryan Harvey**