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 REPLY

Part I: CERTIFICATION

1. This reply is in a form suitable for publication on the internet.

Part II: ARGUMENT[1]

Solicitors' CFO

2. **Introduction & applicable principles:** Kain notes two introductory matters. *First*, the Respondents in this case seek orders that *both*: **(a)** the legal costs and disbursements of the Solicitors be shared among the group members on a cost-equalisation basis; and **(b)** the Solicitors be "*further remunerated*" for their "*risks*" in funding the legal costs and disbursements by payment of such percentage as may be approved by the Court (**KFM 25**). That is, as is further confirmed by the question reserved to the Full Court (KS [12]), the Solicitors' CFO involves a payment to the Solicitors "*otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding*" (emphasis added). In their submissions, the Respondents variously conflate these two distinct payments (e.g., RS [67], [88]).

3. *Second,* the question before this court is whether there is power to make a Solicitors' CFO under ss 33V(2) or 33Z(1)(g) of the FCA Act (an element of which is whether there is power to make a CFO at all: KS [14]-[32]). The question is to be approached by applying orthodox principles of statutory construction, including those in *Shin Kobe Maru*[2] and *PMT Partners*[3] to which Kain (KS [14]) and the Respondents (RS [5]) refer. The Respondents' contention that Kain identifies but does not apply these principles should be rejected. The essential requirement of ss 33V(2) and 33Z(1)(g) is that an order be "*just*" (KS [17]-[29], [34]-[60]). If the order is not "*just*", there is no power to make it. This is not by reason of some implied limitation or constraint on the operation of ss 33V(2) or 33Z(1)(g) (*cf* RS [5], [14]); rather, it is a conclusion which follows because an essential requirement of the provisions ("*just*") is not satisfied.[4] Matters relevant to the determination of what is "*just*" include (for example) whether such an order: **(a)** places a solicitor in a position of conflict or involves a contravention of r 12 of the Solicitors' Rules (KS [46]-[53]; [4]-[7] below); or **(b)** contravenes the

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1 Capitalised terms are defined in the KS unless otherwise defined in this Reply.

2 *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).

3 ***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).

4 See, e.g., *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (in Liq)* (2015) 325 ALR 539 at 558 [101] (Wigney J).

statutory prohibition on contingency fees under s 183 of the LPUL (KS [54]-[60]; [8] below) or the long-standing prohibition on contingency fees in *Clyne* (KS [34]-[45]; [8] below).

4. **Solicitors' Rules:** A Solicitors' CFO places a solicitor in contravention of the Solicitors' Rules (KS [46], [52]-[53]). Such a state of affairs is not relevantly "*just*". The Solicitors' Rules provide one of the critical sources of regulatory oversight of solicitors. Their stated objective is to "*assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules*".[5] One such well-established common law principle is that the Court has an inherent supervisory jurisdiction, to which solicitors are amenable, which is designed to impose on them higher standards than the law applies generally.[6] The Solicitors' Rules therefore serve the important function of ensuring the maintenance of high standards of solicitors; they should be afforded considerable weight in the analysis of whether an order which contravenes those rules is a "*just*" order.

5. The Respondents contend that r 12.2 of the Solicitors' Rules is not directed to a solicitor who receives a benefit under an agreement or arrangement to which their client has given fully informed consent (RS [66]). There are a number of responses to this. *First*, if the solicitor receives such a benefit under an agreement or arrangement with their client, the solicitor will be in breach of s 183 of the LPUL and the prohibition in *Clyne,* irrespective of whether informed consent is given.[7] *Second*, in any event, the Respondents have not established that informed consent is an exception to r 12.2 of the Solicitors' Rules (in circumstances where informed consent is not expressed to be an exception).[8] *Third,* further, while the Respondents submit that there is no allegation that the addendum would be entered into other than with the fully informed consent of the Respondents (RS [66]), under general law informed consent operates a defence in respect of which the fiduciary bears the onus.[9] *Fourth*, relatedly, the statutory

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5 Solicitors' Rules, r 2.1.

6 *Atanaskovic Hartnell v Birketu Pty Ltd - Supervisory Jurisdiction* [2020] NSWSC 573 at [29]-[30] (Hammerschlag J), cited with approval in *Hartnett Lawyers v Bell as Executor of Estate of late Deakin-Bell* (2023) 112 NSWLR 463 at 495 [123] (Bell CJ, with whom Adamson JA and Griffiths AJA agreed).

7 The same can be said of the Respondents' submission concerning r 12.2(ii) at RS [67].

8 Kain notes there is an obiter statement to the effect that r 12.1 of the Solicitors' Rules will not be breached if fully informed consent is given, although that statement is difficult to reconcile with the clear words of r 12.1 "*except as permitted by this Rule*": *Hartnell v Birketu Pty Ltd* (2021) 105 NSWLR 542 at 564 [101]-[108] (Gleeson JA, with whom Basten and McCallum JJA agreed).

9 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 638 [135] (Leeming JA, with whom Barrett and Gleeson JJA agreed).

relationship between representative party and group members does not extend to empowering the representative party to provide informed consent on behalf of group members (in the same way a representative party cannot give a release, indemnity or covenant which goes beyond dealing with the claim the subject of the Part IVA proceeding).[10]

6. The Respondents' further contention that the benefit from a Solicitors' CFO is part of the solicitors' fair and reasonable remuneration for "*legal services*" for the purpose of r 12.2(i) (RS [67]) should also be rejected. "*Legal services*" is defined to mean "*work done, or business transacted, in the ordinary course of legal practice*".[11] The payment for "*legal services*" is "*legal costs*".[12] As indicated above (at [2]), the Solicitors seek legal costs for their legal services *as well as* a further payment said to be in connection with the "*risks*" associated with funding the proceedings (the latter being the Solicitors' CFO). It follows that it is incorrect to characterise a Solicitors' CFO as "*fair and reasonable remuneration for legal services*"; the Solicitors already seek reimbursement for such remuneration (i.e. legal costs) over and above the Solicitors' CFO.

7. **Conflicts:** A Solicitors' CFO gives rise to a conflict as between the Solicitors' commercial interests and the client's interests, thus rendering a Solicitors' CFO not relevantly "*just*" (KS [46]). Whilst the Respondents accept that a Solicitors' CFO has "*at least the potential for conflict*" (RS [70]), they submit that it does not follow that such an order is not "*just*" because such potential conflicts are "*not unique*". They rely upon the existence of a solicitors' lien, and "no win no fee" arrangements under the LPUL, as support for that proposition (RS [71]-[73]). Those submissions should be rejected. *First,* as Kain submitted at KS [48], the existence of conflicts in representative proceedings is a reason for caution and not a basis for concluding a further conflict is "*just*". That same reasoning applies to the submissions at RS [71]-

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10 ***Santa Trade*** *Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491 at [22] (Lee J). The relationship between a representative party and group members is for a limited purpose (commonly referred to as a limited statutory agency): *Santa Trade* at [21]-[23]. The representative party only represents group members with respect to the claims the subject of that proceeding: *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212 at 236-237 [53]-[54] (French CJ, Kiefel, Keane and Nettle JJ).

11 Solicitors' Rules, Glossary of Terms; LPUL, s 6.

12 "Legal Costs" is relevantly defined as: *"(a) amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services; or (b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person—including disbursements but not including interest"*: LPUL, s 6.

[73]. *Second*, the solicitors' lien[13] and "no win no fee" arrangements are predicated upon an entitlement to legal costs for legal services (*cf* a Solicitors' CFO which is a separate and distinct payment unrelated to such costs). The solicitors' lien aims to protect solicitors' claims for such costs where property has been recovered as a result of their exertions; the purpose of the lien is to protect the solicitor from suffering because the property they obtained as a result of their exertion is unlikely to come into their hands (and to prevent the client from deflecting moneys away from the solicitor).[14] Further, a "no win no fee" arrangement is in effect a promise by the solicitor not to seek their fees if the proceedings are not successful. Thus, a solicitors' lien and "no win no fee" arrangement are materially different legal constructs to a Solicitors' CFO; the latter gives rise to a commercial interest in proceeds of the litigation beyond the legal fees charged in connection with legal services. It is commercially distinct to an interest in being paid pre-earned fees from the proceeds of the litigation.[15]

8. ***Clyne* & LPUL, s 183:** A Solicitors' CFO gives rise to a contingency fee which is prohibited by this court's decision in *Clyne* and s 183 of the LPUL. The Respondents place essential reliance upon the proposition that there must be a "*bargain*" and a costs agreement before either the prohibition in *Clyne* or under s 183 are engaged, and contend that there is no wider prohibition on contingency fees generally (RS [58], [63]-[65]). That submission has the effect that a solicitor may receive a percentage of the proceeds of the litigation, provided they do not agree with their client to do so. The proposition that there is not a wider prohibition on contingency fees should be rejected for that reason alone. In any event, in a practical sense, it is difficult to conceive of a scenario in which a solicitor will not "*bargain*" with their client as to the fees to be charged. Solicitors have a statutory obligation to: **(a)** disclose to the client the basis on which fees are charged under s 174(1) of the LPUL; and **(b)** take all reasonable steps to satisfy themselves that the client has understood "*and given consent to"* the

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13 See, e.g., *Federal Commissioner of Taxation v Government Insurance Office of New South Wales* (1992) 36 FCR 314 at 327 (Wilcox J).

14 *Akki Pty Ltd v Martin Hall Pty Ltd* (1994) 35 NSWLR 470 at 473-474, 483 (Windeyer J).

15 And that interest is improperly intermingled with the client's affairs: *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154 at 162 (Street CJ, on behalf of the Court). On one view, where a solicitor has a percentage-based interest in the outcome of the litigation, their role may be thought of as a co-plaintiff.

proposed costs under s 174(3). That process, in itself, contemplates a bargain between solicitor and client.[16]

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9. ***Brewster* is correct & indistinguishable:** *First,* the Respondents' submissions (RS [39]-[49]) fail to undertake the detailed textual and contextual analysis of s 33ZF undertaken by the majority[17] and Gordon J[18] and instead seek elevate the asserted purpose of Part IVA beyond that which the terms and context of s 33ZF permit. However, the section only applies "*in any proceeding*" to ensure justice is done "*in the proceeding*". These references assume a pending proceeding, and not a proceeding the economics of which prevent it from being commenced unless the anxieties of the funders are alleviated.[19] These textual matters provide determinative support for the reasoning of the plurality, and compel the conclusion that reopening *Brewster* is not warranted and that it should not be overruled.[20] *Second,* with respect, the majority's purposive analysis is, in any event, correct. The majority in *Brewster* correctly reasons against the proposition that book-building is undesirable (KS [23]-[27]). That conclusion is not antithetical to the purpose of Part IVA to enhance access to justice; it simply requires that there be sufficient interest in the claims and that litigation funders undertake ordinary commercial activities (*cf* RS [47]). *Third,* for the reasons given at KS [15]-[29], *Brewster* is also not relevantly distinguishable. The reasoning of the plurality applies equally to settlement and judgment CFOs (*cf* RS [38]).

Dated: 11 February 2025

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16 Further, a contingency fee is a form of conditional cost (in that it is conditional on the successful outcome of the matter). Such an agreement must be in writing pursuant to s 181(2) of the LPUL.

17 *BMW Australia v* ***Brewster*** (2019) 269 CLR 574 at 600-610 [49]-[81] (Kiefel CJ, Bell and Keane JJ).

18 *Brewster* at 628-632 [136]-[148] (Gordon J).

19 Such as when considered with ss 33M and 33N of the FCA Act: *Brewster* at 629 [138] (Gordon J).

20 Noting the strongly conservative principle that such a course, adopted in the interests of continuity and consistency in the law, should not lightly be taken: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [17] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), citing *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 352 [70] (French CJ).