HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S146/2024
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S146/2024

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 & Ors named in the Schedule

No S143/2024

BETWEEN: **ROBERT WARNER SHAND**
Appellant

and

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

DAVID FURNISS
Second Respondent & Ors named in the Schedule

No S144/2024

BETWEEN: **ERNST & YOUNG (A FIRM) ABN 75 288 172 749**
Appellant

and

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

DAVID FURNISS
Second Respondent & Ors named in the Schedule

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline of argument

2. ***Procedures for CFOs/GCOs/SCFOs.*** There are established procedures for the making of CFOs and GCOs which: **(a)** ensure that they are capable of being "just"; and **(b)** can guide the discretion to make an SCFO: *5 Boroughs NY Pty Ltd v Victoria (No 5)* [2023] VSC 682; *Elliott-Carde v McDonald's Australia Ltd* (2023) 301 FCR 1 (**Vol 8, Tab 40**)..

3. ***Principles of construction.***
   a. Sections 33V and 33Z(1)(g) (**Supp Vol 1, Tab 1**), as provisions conferring power on a superior court to be exercised judicially and under a broad standard of "*justice*", should be given as ample a construction as their terms permit: *Shin Kobe Maru* (1994) 181 CLR 404 (**Vol 5, Tab 23**); *Knight* (1992) 174 CLR 178 (**Vol 5, Tab 17**).
   b. As provisions governing the jurisdiction of a federal court, ss 33V and 33Z should not be read down by provisions of State statutes governing what solicitors can or cannot do, the more so when such provisions vary between states and may change over time: *P v P* (1994) 181 CLR 583 (**Vol 5, Tab 24**).
   c. Nor should they be read down by notions of common law public policy, as they are highly contestable, ephemeral and are not necessarily uniform across the federation.
   d. What federal Parliament did not do is irrelevant: **RS [6]-[8], [52], [61]**.

4. ***CFO on settlement or judgment.*** This Court should affirm the position which has now been comprehensively established at intermediate and trial level that s 33V(2) and s 33Z(1)(g) (**Vol 1, Tab 4**) authorise the making of a CFO at the stage of settlement or judgment. This conclusion is supported by:
   a. the text of ss 33V and 33Z (**RS [15]-[20], [31]-[37]**): *Elliott-Carde* (**Vol 8, Tab 40**);
   b. the object and context of Pt IVA, including the growth in litigation funding and the rise of GCOs (**RS [21]-[23]**): ALRC, Report No 46 (1988) (**Supp Vol 2, Tab 6**); *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 (**Vol 4, Tab 14**); *Simons v ANZ Bank New Zealand* [2024] NZCA 330 (**Vol 9, Tab 54**); and
   c. sufficient criteria for the making of the CFO (**RS [24]**): *Money Max* (2016) 245 FCR 191, [80] (**Vol 8, Tab 48**).

5. The submission that the "*creation of new rights*" cannot be "*just*" must be rejected, because:
   a. a significant number of well-accepted orders (eg FEOs) which create "*new rights*" could not validly be made under ss 33V(2) and 33Z(1)(g): **RS [27]-[28]**;
   b. the principle of legality is not relevant given that Pt IVA already makes a significant

alteration to the rights of group members: **RS [29]**; and

c. there are long-standing legal principles which authorise the creation of "*new rights*" in a common fund realised for the benefit of other persons, including solicitors and trustees: *Re New Zealand Midland Railway Co* [1901] 2 Ch 357 (**Vol 9, Tab 51**); *Boeing*, 444 US 472 (1980) (**Vol 7, Tab 33**); *Ex parte Patience* (1940) 40 SR (NSW) 96 (**Vol 8, Tab 41**); *Nissen v Grunden* (1912) 14 CLR 297 (**Vol 5, Tab 22**).

6. The Appellants' other attempts to constrict what may be "*just*" (concerning "*distribution*", s 33Z(1)(a)-(f)), "*matter*", s 33Z(2) and s 33ZJ) should also be rejected: **RS [31]-[37]**.

7. ***Brewster.*** *Brewster* does not stand in the way of the Respondents' case (**Vol 4, Tab 13**). Of the three justices who squarely confronted the questions under s 33V(2) and s 33Z(1)(g), there was a 2-1 split <u>in favour of</u> power to make a CFO at the stage of settlement/judgment: **RS [38]**. So far as *Brewster* decided that a commencement CFO is not available under s 33ZJ, it should be re-opened and held to be wrongly decided. The dissents of Gageler J and Edelman J should be preferred: **RS [38]-[43]**. The *John* criteria for reopening an earlier decision are amply met: **RS [44]-[49]**; see also ALFA's Submissions.

8. ***Public policy.*** The Appellants' various public policy arguments should be rejected:

a. ***Effect of state laws.*** **(1)** Starting at the correct place, which is the construction of the Commonwealth law, Pt IVA confers jurisdiction in terms conveying a legislative intent that its exercise is not to be confined by State laws regulating the conduct of solicitors. **(2)** The NSW statutory norms relied upon do not purport to regulate the exercise of jurisdiction and thus are not capable of being picked up under s 79(1) of the *Judiciary Act*: *Masson v Parsons* (2019) 266 CLR 554 (**Vol 5, Tab 18**). **(3)** In any event, such norms, if construed as the Appellants urge, would be inoperative under s 109 once the Commonwealth law is construed: **RS [6]-[7], [53], [62]**.

b. ***NSW statutory norms are inapplicable in terms.*** The Appellants over-read the NSW statutory norms in the LPUL and ASCR. They prohibit a solicitor <u>bargaining with the client</u> to obtain an interest in the subject matter of litigation. They have no application where the solicitor acquires an interest under an order and against a fund subject to the supervision of the Court: **J [86]**. Nor do they prevent a solicitor applying for such an order: *Australian Solicitors' Conduct Rules 2022: Commentary* (**Vol 10, Tab 68**); *Hartnell v Birketu Pty Ltd* (2021) 105 NSWLR 542 (**Vol 8, Tab 46**) (**RS [62]-[67]**).

c. ***No relevant common law public policy.*** **(1)** The *dicta* in *Clyne* (1960) 104 CLR 186 (**Vol 4, Tab 15**) were limited to a solicitor <u>bargaining with the client</u> to obtain an interest in the subject matter of litigation. There has never been a more general

"*common law prohibition of award-based contingency fees*". **(2)** Following the *Maintenance and Champerty Abolition Act 1993* (NSW) (**Vol 3, Tab 10**), there is no public policy rule that could prevent an SCFO: *Fostif* (**Vol 4, Tab 14**) (**RS [55]-[60])**.

9. ***Fiduciary duties.*** The Full Court correctly reasoned that, whilst the Representative Parties' solicitors were relevantly fiduciaries of Group Members, the potential for conflicts did not "in and of itself" preclude an SCFO from being a "*just*" order (**RS [26], [68]; J [67]**).
   a. ***Scope of duties.*** The Full Court's conclusions as to the scope of the fiduciary duty (**J [63]-[65]**) were at least sufficient for these appeals. Pt IVA (**Supp Vol 1, Tab 1**) is inconsistent with Shand's submission that a Representative Party or its solicitors are fiduciaries of Group Members for all purposes.
   b. ***Properly managed conflicts not "unjust".*** The potential conflict created by an SCFO is analogous to that which arises from remuneration granted in equity to a trustee on a percentage basis: *Bainbrigge v Blair* (1845) 8 Beav 588; 50 ER 231 (**Vol 4, Tab 29**); *Nissen* (**Vol 5, Tab 22**) (**RS [74]-[75]**). The law condones and endorses conflicts which are appropriately managed: *Foreman* (1994) 34 NSWLR 408 (**Vol 8, Tab 47**); *Fostif* (**Vol 4, Tab 14**) (**RS [59], [70]-[73]**).
   c. ***SCFO conflict can be managed.*** It has long been accepted that other potential conflicts can be managed by solicitors, such as by obtaining fully informed consent: *Maguire v Makaronis* (1997) 188 CLR 449 (**RS [78], [82]**). The court has ample powers to identify and manage conflicts and supervise and control a proceeding: *Perera v GetSwift Ltd* (2018) 263 FCR 1 (**Vol 9, Tab 49**); *Parkin v Boral Limited (Class Closure* (2022) 291 FCR 116.

10. Section 1337P of the *Corporations Act 2001* (Cth) (**Vol 1, Tab 3**) gives the Federal Court the freedom to apply s 33ZDA of the *Supreme Court Act 1986* (Vic) (**Vol 1, Tab 8**) and, having so chosen, ss 33V(2) and 33Z(1)(g) of the FCA Act would then authorise the making of an SCFO: EM, Corporations Legislation Amendment Bill 1990 (Cth) (**Vol 5, Tab 67**).

4 March 2025

Justin Gleeson SC
Banco Chambers

Sebastian Hartford-Davis
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