



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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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
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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

S146/2024

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

**OUTLINE OF ORAL SUBMISSIONS
FOR THE APPELLANT (SHAND)**

Part I: INTERNET PUBLICATION

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

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground One in the Appeal

2. **Neither the text nor context of s.33V(2) and s.33Z(1)(g) suggest they should each be construed as conferring a general power to create new legal rights for a funder against unfunded group members.** Each section is concerned with undertaking a specific task in the resolution of a class action proceedings: the distribution of any money paid under settlement in a representative proceeding (s.33V(2)) and determining a matter in a representative proceeding (s.33Z(1)(g)): SS [5].
3. There might or might not be policy reasons for the funding of class actions in general to occur by CFOs or for CFOs to be one of the available funding methods. But answering that societal policy question is neither necessary nor relevant to the construction of either section; the text is not conferring a general power to do what is “just” having regard to the functioning of the market for class actions; each section is necessarily concerned with the individual proceedings.
4. **The purpose of Part IVA is not to create new legal rights.** The objective of Part IVA is to improve access to justice by allowing the collectivisation of claims. Part IVA was not intended to “confer new legal rights” (Explanatory Memorandum, Federal Court of Australia Amendment Bill 1991 (Cth), [3]): Kain Submissions (**KS**) [14]-[20] and [25] to [29] and Shand Submissions (**SS**) [18].
5. **Text of s 33V(2):** Section 33V(2) relates to the distribution of a settlement sum among group members. The power under s.33V(2) only comes to be exercised:
 - a. after the power conferred by s.33V(1), providing for a settlement to be approved, has been exercised;
 - b. if there is a fund.
6. It follows that at the point that the s.33V(2) power is to be exercised, the Court has approved a settlement between the applicant and the respondent that compromises

the rights of the applicant and group members against the respondent in exchange for a settlement fund.

7. In that context, and having regard to the supervisory jurisdiction of the Court, the power to do what is “just with respect to the distribution of any money paid under settlement or paid into Court” would, by its ordinary language, be understood as allowing for the Court to make such orders as are necessary to facilitate the distribution to the applicant and group members of the monies paid for the compromise of their collective rights, and to achieve a fair and reasonable distribution as between the applicant and group members: SS [19].
8. That might necessitate providing for the payment of administrators to bring about the distribution of the fund. It might also include the making of an FEO which reflects an existing legal liability of the applicant (and funded group members) incurred in the bringing in of the settlement sum, either because that is necessary to achieve a distribution that is “fair and reasonable” to all group members or because such expenditure is something that a court of equity could exercise a discretion to share with other beneficiaries of the fund. That is conceptually distinct from a power to confer a legal right on a non party based on what it is fair for that non party to receive in circumstances in which the non party has not established another source of a legal entitlement to receive the monies from unfunded group members: SS [21] to [22].
9. **Text of section 33Z(1)(g):** Section 33Z(1) provides for the powers of the Court to determine a “matter in a representative proceeding”. It can be accepted that “matter” there means something akin to “issue” (Respondents’ Submissions (**RS**) [35]). Nevertheless, the section is concerned with the powers to quell the justiciable matter between the parties. Such a construction is supported by the context of s.33Z which concerns orders affecting either parties to the litigation (sub-para.33Z(1)-(d)) and/or group members (sub-para.(1)(a)-(f) and ss.33Z(2)-(4)): KS [32]. Section 33Z(1)(g) is supplemental of the powers in (a)-(f) that are concerned with determining the issues between the parties. Section 33Z(1)(g) does not confer a power to confer new legal rights on a non party, based on a norm of what is just, such that unfunded group members should pay money to a person with whom they have no contractual or other relationship in law or equity and who is not a party to the proceedings: SS [28]-[29].

10. **This is not an issue of an implied limitation:** Sections 33V(2) and 33Z(1)(g) do not provide a power to make a CFO subject to an implied limitation such that the principle in *Shin Kobe Maru* has any work to do: Shand Submissions in Reply (SSR) [7]-[8].
11. **It is a matter for the legislature to provide a power to make CFOs.** Clear words are required to reveal an intention by Parliament to interfere with private property rights. Sections 33V(2) and 33Z(1)(g) should be read in a way that does the least harm to the property rights of group members: SS [25]. The legislature is best placed to weigh questions about CFOs, book building, and the broader economics of class actions, and to consider how different incentives for commercial operators might affect achieving the policy aim of the legislation.

Ground One of the Notice of Contention

12. **Key statements of principle in Brewster are applicable in this appeal:** KS [28] and contra RS [28]. The Respondents require leave to re-open *Brewster*: SSR [2].
13. **Leave to reopen Brewster should be refused** for four reasons. *First*, nothing has changed since *Brewster* was decided and there is no unanticipated mischief or inconvenience: SSR [3] and contra RS [39]-[48]. *Second*, there is no error in the majority's decision: SSR [4]-[5] and contra RS [39]-[43]. *Third*, there were no differences between the reasons of the justices constituting the majority: SSR [6] and contra RS [44]. *Fourth*, a strongly conservative principle should be adopted to reopening earlier decisions: SSR [2].

Dated: 4 March 2025



Michael Hodge



Georgina Westgarth