HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Feb 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

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 27E - Reply by Shand
Filing party:	Respondents
Date filed:	11 Feb 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

FOURTH RESPONDENT'S REPLY

Part I: CERTIFICATION

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

Part II: REPLY

Notice of contention: Leave is required

2. **John Criteria.** Whether the Court should overrule one of its earlier decisions is informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law and should not be lightly taken.[1]

3. **Leave to reopen *Brewster* should be refused**. Since *Brewster*, nothing has changed and no unanticipated mischief or inconvenience has resulted from the decision: contra Respondents' Submissions (**RS**) [39] to [48]. A decision should not be re-opened merely to 'allow the re-agitation of arguments which did not prevail in the earlier decision'.[2]

4. **No error in the majority's decision.** The majority's decision in *Brewster* was not infected with error. At RS [40], the Respondents contend that the central concern of Pt IVA was to "facilitate access to legal remedies and to promote efficiency in the determination of legal rights and in court management" such that a commencement CFO are within the power of s.33ZF(1) of the Act. The majority considered and rejected that argument (see 611 to 612 [82]-[84], 614 [92]-[94] (Kiefel CJ, Bell and Keane JJ) and 624 [125]-[127] (Nettle J), 633-636 [153]-[165] and 638 [170] (Gordon J).

5. Similarly, it was put to the Court and the plurality considered (at [35], 596) the general presumption that the legislation is "always speaking" in that the application of the provision could vary over time: RS [42]. There is no error if the issue is one on which reasonable minds could differ. Additionally, the so-called "failure of 4 out of the 5 majority Justices to address distinctly and comprehensively the extent of the power" (RS [41]) to make a CFO at settlement or judgment could not render their Honours' reasoning incomplete in circumstances where that was not the issue.

6. **There were no differences between the reasons of the Justices constituting the majority**. While the majority was made up of the plurality (Kiefel CJ, Bell and Keane

---

[1] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71] (French CJ).
[2] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 629-630 (Keane J).

JJ) as well as separate judgments by both Nettle and Gordon JJ, each justice agreed that s.33ZF(1) of the Act did not empower a court to make a CFO, and reasoned the power was supplementary and were concerned with *how* a proceeding can proceed to justice, not whether the action can proceed at all: cf RS [44].

Ground 1

7. **Text of the statute.** The issue in this appeal is whether the specific powers granted by ss.33V(2) and 33Z(1)(g) includes the power to confer rights on a non-party against group members or against group members' property, not whether there is an implied limitation on powers: contra RS [15]. The framing of the issue by the Respondents assumes power, subject to an identified limitation. The Respondents have shorn the text of the sections of context.

8. The text of each of s.33V(2) and s.33Z(1)(g) is not conferring a general power to do what is "just" but rather in each case a specific power to do what is just in undertaking a specific task (providing for the distribution of settlement proceeds or determining a matter between the parties to the litigation). In each case, the task is concerned with the interests of the parties. The undertaking of the specific task might be a convenient point for a funder to seek payment, but the obtaining of a CFO is not necessary to the task nor for the benefit of the parties. The reasoning process of the Respondents would seemingly lead to the conclusion that s.23 of the *Federal Court of Australia Act 1976* (Cth) (which confers power where the Court has jurisdiction to make orders "as the Court thinks appropriate") or r 1.32 *Federal Court Rules 2011* (Cth) (which says "[t]he Court may make any order that the Court considers appropriate in the interests of justice") would also confer power to make a CFO.

9. To find the power for which the Respondents contend, it is necessary to conclude that if a Court is considering a settlement (under s.33V(2)) or resolving any matter in a class action proceeding (under s.33Z(1)(g)), the Court has the power to order money, to which a group member has a lawful entitlement be paid, to be paid to *anyone* if the Court considers it "just" to do so; it does not matter whether it advances the distribution of a settlement or the resolution of an issue. The principle in *Shin Kobe Maru* cannot be deployed to construe provisions beyond their text and context.

10. **Power under s.33V.** The power is to do what is just with respect to the distribution of any money paid. Any money paid is being paid by a respondent in discharge of the rights of group members against that respondent. The Court is charged, in its supervisory jurisdiction, with making orders for the distribution of that money to

which the applicants and group members are entitled. In that context, there is no issue with the kinds of "commonplace" payments identified in RS [28], insofar as they are necessary for the distribution of the settlement proceeds.

11. The appellants' construction does not constrict freedom of contract or restrain the types of settlements that litigants can reach: contra RS [33]. Litigants can reach any settlement they wish; but they cannot confer a power on the Court that it does not have, and that litigants might wish to settle on terms beyond the power of the Court is not a justification for reading s 33V without its textual context.

12. **Power under s.33Z.** Section 33Z is concerned with making orders in respect of a *matter* before the Court which necessarily involves the dispute between the parties. This is so even if the Respondents' construction of "matter" is accepted (i.e. that a "matter" should be understood as referring to a "justiciable issue"): RS [35]. It remains that s.33Z is concerned with the Court having certain powers to quell the justiciable issue relating to claim(s) and raised *by the parties*.

13. **FEOs do not create new legal rights for non-parties**. Contrary to RS [27], a FEO does not create a new legal right for a non-party. In circumstances where a FEO is made, the funder's entitlement to receive payment arises out of contract with the funded group members and that entitlement exists regardless of ss.33V or 33Z. Conversely, it does not follow that a Court in making an FEO is obliged to share with unfunded group members all of the costs that funded group members have committed themselves by contract to paying. An FEO operates *inter partes*. As the plurality in *Brewster* explained, a FEO is made to ensure the equitable sharing of the expense paid to the funder to ensure justice as between the group members who are parties to the proceedings.[3] In making a FEO, the court is able to apportion only so much of the costs to group members as the Court considers appropriate, ensuring that the FEO does not unfairly disadvantage group members:[4] contra RS [10]. By contrast, a CFO includes unfunded group members' award being paid *directly* to the funder in circumstances where there is no legal right of the funder to receive such an award and the award does not represent the actual cost incurred in funding the litigation as set out in any agreement.[5]

---

[3] *Brewster* at 612 [85]-[86] (Kiefel CJ, Bell and Keane JJ).
[4] *Brewster* at 612 [89] (Kiefel CJ, Bell and Keane JJ).
[5] *Brewster* at 612 [87] (Kiefel CJ, Bell and Keane JJ).

Ground 2

14. **State legislation:** State legislation and regulations inform the meaning of the particular conferral of power in ss.33V(2) and 33Z(1)(g) – being a power to do what is "just": contra RS [6]. Nothing in the text of the provisions precludes the notion of what is "just" being informed by State legislation and common law. There is no inconsistency so s 109 of the Constitution has no work to do. The Commonwealth legislation does not authorise a contingency fee agreement and the LPUL does not seek to preclude, override or render ineffective an actual exercise of Commonwealth jurisdiction conferred by Pt IVA.[6]

15. **Access to justice:** Contrary to RS [21] to [22], Pt IVA's objects do not support SCFOs. While the policy rationale underpinning the introduction of representative proceedings was to improve access to justice, orders are not within power merely because they might improve access to justice. The Respondents' submissions assume, but do not prove, that CFOs and SCFOs improve access to justice: contra RS [10]-[13]. Statements by Courts in other matters are not evidence in this matter.

16. **Breach of s.183 of the LPUL.** Contrary to RS [63] and [64], a necessary corollary of the seeking of a SCFO is that the solicitors have entered into a contingency fee agreement with their clients contrary to s.183 of the LPUL. For a solicitor to request the Court make an order for a SCFO, they must have instructions and an agreement from the clients to do so. A client's agreement to seek approval for payment of an amount that is calculated by reference to the amount of any award or settlement of the value of any property that may be recovered in the proceeding, is an agreement that constitutes a contingency fee agreement contrary to s.183 of the LPUL. That is the case in this matter: clauses 3A.2 and 3A.4 of the Addendum to the Costs Agreement (KFM 64) satisfies each of the elements of s.183 of the LPUL.

17. **Rule 12.2.** RS [66] contends that the provision is inapplicable because it is only intended to prohibit conduct which is 'intended or likely to confer a benefit on the solicitor'. But that is what a SCFO does.

18. **Conflicts and fully informed consent**. The Respondents appear to assume at RS [68] that providing an opt out notice to group members would be sufficient to obtain fully informed consent. That must assume that silence, from someone who may not have read the notice, is capable of being consent. It must also assume that, even if

---

[6] *P v P* (1984) 181 CLR 583 at 603 (Mason CJ, Deane, Toohey and Gaudron JJ); *Burns v Corbett* (2018) 26 CLR 304, 352 [86] (Gageler J).

read, the notice contains the full and frank disclosure required for fully informed consent.[7]

19. **Changes to policy and practice**. At RS [59] to [60], the Respondents identify that the State regulation of legal costs have changed over time including enabling time-based billing and allowing "no win no fee" arrangements since the decision in *Clyne*. However, States legislatures have maintained the prohibition on the conduct at the core of this Court's decision in *Clyne* and there has been no change at common law to the prohibition against contingency fee agreements. This is not a matter of placing the prohibition above access to justice based on a "hierarchy of public policy" (RS [51]) but rather an acknowledgement that the two policies can sit side by side.

Dated: 11 February 2025

Michael Hodge
Omnia Chambers
(02) 8039 7209
Michael.hodge@omniachambers.com

Thomas Bagley
Ninth Floor Selborne Chambers
(02) 8915 2142
bagley@selbornechambers.com.au

Georgina Westgarth
Omnia Chambers
(02) 8039 7204
Georgina.westgarth@omniachambers.com

[7] *Boardman v Phipps* [1966] UKHL 2; [1967] 2 AC 46 at 93, 98, 112; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 All ER 1222, 1227 (Lord Wilberforce).