



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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 OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS INTENDED TO BE ADVANCED IN ORAL ARGUMENT

2. **CFOs:** Mr Kain anticipates that: **(a)** Mr Shand will address the question of whether there is power to make a CFO generally and why *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 should not be reopened and overturned; and **(b)** EY will address issues of public policy and ground 4 of the Notice of Contention, including s 1337P of the *Corporations Act 2001* (Cth).
3. **Solicitors' CFOs:** **(a)** The question reserved to the Full Court concerned whether it is within power to make a CFO *to a solicitor*, otherwise than as payment for costs and disbursements: **J[1], [6]; CAB 22-23**. **(b)** This question of statutory construction requires consideration of the characteristics of the recipient (here, a solicitor), including the regulatory or ethical framework (**below [5]-[6], [8]-[9]**) and general law principles (**below [7], [10]**) which govern them.
4. **Context and purpose of Part IVA:** **(a)** The context and purpose of Part IVA can be ascertained from the Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) (**ALRC 1988 Report**). The objectives include enhancing access to justice by the collectivisation of claims that might not be economically viable as individual claims and increasing the efficiency of the administration of justice: ALRC 1988 Report at, e.g., [13], [18] (**Sup JBA 409, 411**); *Brewster* at 611 [82] (Kiefel CJ, Bell and Keane JJ); **KS [18]**. **(b)** However, access to justice was not to be achieved through the means of the provision of percentage-based fees to solicitors, which the ALRC disavowed: ALRC 1988 Report at [295]-[297] (**Sup JBA 523-524**); **KS [40]-[41]**. Part IVA was not intended to displace the long-standing prohibition referred to in *Clyne v Bar Association (NSW)* (1960) 104 CLR 186 at 203 (**JBA 1163**).
5. **Regulation of solicitors and its relevance:** **(a)** A solicitor is permitted to practice in the Federal Court by s 55B of the *Judiciary Act*: **Sup JBA 349-351**; see also the definition of “legal practitioner” in s 2 of the *Judiciary Act*: **Sup JBA 347-348**. Section 55B assumes the existence of provisions of State law entitling a person to practice as a solicitor: *APLA Ltd v Legal Service Commissioner (NSW)* (2005) 224 CLR 322 at

395-396 [185]-[186] (Gummow J) (**JBA 829-830**); see also at 347-348 [21]-[22] (Gleeson CJ and Heydon J) (**JBA 781-782**) and 487-488 [482]-[483] (Callinan J) (**JBA 922**). **(b)** Solicitors are regulated by State and Territory-based laws and rules which govern their ethics and professional obligations, including in a federal court: *APLA* at 347-349 [21]-[24] (Gleeson CJ and Heydon J) (**JBA 781-783**), see also at 426 [303] (Kirby J) (**JBA 860**). These schemes of regulation form part of the context in which federal jurisdiction is exercised: *APLA* at 352 [32] (Gleeson CJ and Heydon J) (**JBA 786**); **KS [44]**. **(c)** As a matter of construction, the powers conferred by ss 33V and 33Z(1)(g) were intended to be exercised conformably with the applicable prohibitions and requirements of the State and Territory-based laws and rules governing solicitors. Those State and Territory-based laws and rules are relevant to the proper construction of ss 33V and 33Z(1)(g).

6. **Clyne: (a)** The prohibition on percentage-based fees for solicitors is of long-standing and was recognised by this Court in *Clyne*. The seriously considered dicta of this Court is relevant to the question of what orders are “just”. **(b)** The Full Federal Court erred by dismissing *Clyne* on the basis that there was no “bargain”: **KS [36]**.
7. **LPUL, s 183: (a)** The prohibition on percentage-based fees, as referred to in *Clyne*, has statutory force by s 183 of the *Legal Profession Uniform Law* (NSW) (**LPUL**). **(b)** Properly construed, s 183 prohibits an amount payable to the solicitor being calculated by reference to any award or settlement: **KS [57]**. **(c)** A CFO to a solicitor which effects such a payment is therefore not “just”: **above [3], [5]**. **(d)** This is also the case even if s 183 only prohibits a solicitor entering into a costs agreement with a client for the payment of such an amount: **KS [58]**. **(e)** It is not “just” to make an order that would result in the solicitors obtaining a benefit they could not obtain by a lawful costs agreement: **KS [60]**.
8. **Solicitors’ Rules, r 12.2: (a)** Rule 12.2 of the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) (**Solicitors’ Rules**) is another aspect of the regulatory framework relevant to whether a CFO to a solicitor is “just”: **above [3], [5]**. **(b)** Rule 12.2 is predicated upon, and is consistent with, the express mandate under the LPUL that solicitors must, in charging legal costs, charge such costs that are no more than fair and reasonable in all the circumstances: *LPUL*, s 172(1); **JBA 517**.

9. (a) A CFO to a solicitor and the related steps to obtain it are things calculated to dispose the solicitor's client or a third party to confer on them, either directly or indirectly, a benefit in excess of their fair and reasonable remuneration for legal services: **KS [52]-[53]**. (b) That is clearly so in this case where the CFO to the solicitors which is proposed is expressly on top of the solicitors' claim for their legal costs: **KR [2]**.
10. **Conflicts:** (a) A CFO to a solicitor compromises their professional independence and conflicts with their duty to the court: *Solicitors' Rules*, rr 3.1, 4.1.4 (**Sup JBA 318**). (b) The solicitors' commercial interest in the judgment or settlement, which arises from the prospect of a CFO being made to them, conflicts with their duty to the client and their fiduciary (or other) duty to group members: **SS [37]-[40]**. Not only must solicitor's obligations be discharged, but they must be manifestly and undoubtedly discharged (which is essential to fostering public confidence in the profession): **KS [49]**. (c) The proposition that such conflicts can be managed should be rejected: **KS [49]-[50]**. The solicitors are ordinarily charged with being alive to the possibility of conflicts in representative proceedings as between litigation funders and group members. They cannot perform that function where they are in the position of conflict or potential conflict: **KS [51]**.

4 March 2025

R. Foreman

Ross Foreman



Ryan Jameson