



## HIGH COURT OF AUSTRALIA

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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  
Document filed: Form 27F - Ernst & Young: Outline of oral argument  
Filing party: Respondents  
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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

**FIFTH RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS  
(ERNST & YOUNG)**

**PART I: CERTIFICATION**

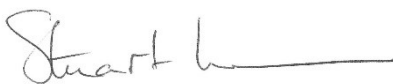
1. This outline is in a form suitable for publication on the internet.

**PART II: OUTLINE OF ARGUMENT**

2. **Common fund orders:** Ernst & Young expects to adopt the submissions of Mr Shand on why neither s. 33V(2) nor s. 33Z(1)(g) confers a power to make CFOs generally and on why leave to reopen *Brewster* should not be granted.
3. **Solicitors CFOs:** It is a rule of the common law that solicitors may not make arrangements of any kind with their clients so as to give themselves an interest in the subject matter of the litigation they are conducting: **EY [27]–[40]**; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 203 (**JBA, Tab 15**). The rule has been altered by statute in Victoria for representative proceedings commenced in the Supreme Court there (s. 33ZDA) but is otherwise reflected in the legislation governing solicitors' conduct in each State and Territory, including Victoria.
4. The purpose of the rule is to protect the administration of justice. The mischief at which the rule is directed is not the making of contracts or bargains; the mischief is the temptation (to depart from the highest standards of integrity) created by the prospect of sharing in the result if the litigation succeeds: *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110 at 111 (**JBA, Tab 50**).
5. That rule forms part of the context in which Part IVA was enacted and continues to operate. Two constructions of s. 33V(2) and s. 33Z(1)(g) are open, and the one that is consonant with the common law should be preferred: *Balog v ICAC* (1990) 169 CLR 625, 635-636; *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475, 487. The construction arrived at by the Full Court is inconsonant with the common law because it gives rise to the temptation, albeit by way of expectation rather than entitlement, that the common law prohibits.
6. **NOC Ground 4:** An order made under s. 33ZDA, if applied by s. 1337P(1), would not be an exercise of “statutory powers conferred within Pt IVA of the *Federal Court of Australia Act 1976* (Cth)”, as contemplated by the question reserved: **EYR, [9]**.

7. On its proper construction, s. 33ZDA does not permit the making of a retrospective group costs order after the “award or settlement” referred to in s. 33ZDA(1). An order under s. 33ZDA would not be an exercise of power “upon the settlement or judgment of a representative proceeding”.
8. If a group costs order is made, the percentage of the settlement or award payable to the plaintiff’s lawyer is payable as “legal costs”: s. 33ZDA(1). An order under s 33ZDA would therefore not be an order that would provide for the distribution of funds to a solicitor “otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding”: **EYR, [10]**.
9. The “rules” referred to in s. 1337P(1) are rules of court. That is why the power to choose is subjected to the rule-making powers referred to in ss. 1337S-1337U but not to statutes. It is also why the word “rules” has been used. That construction preserves the operation of s. 79 of the *Judiciary Act* (s. 1337A(3)) and avoids the surprising result of allowing a court to choose, for example, which limitation period should apply.
10. Further, having regard to its context, s. 1337P(1) on its proper construction is confined to a proceeding that has been transferred to the court exercising relevant jurisdiction. It does not oblige the Federal Court, in every civil corporations matter, to make a determination of which rules of evidence and procedure the court considers appropriate: **EYR, [12]–[16]**.

Dated: 4 March 2025



**Stuart Lawrance**



**Amelia Smith**