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# No slice for solicitors: High Court draws the line on CFOs

**BY ROSS FOREMAN - OCT 10, 2025 8:35 AM AEDT**

## SNAPSHOT

- The Federal Court has power to make a common fund order in class actions on settlement or judgment.
- However, in NSW, a common fund order cannot be made in favour of a solicitor.
- Victoria is the only jurisdiction which permits a solicitor to receive a percentage of a settlement or judgment in a class action.

Almost 20 years ago, the High Court held in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 that litigation funding was permissible. Since then, class actions financed by third-party litigation funders have become routine. It has also become routine for the court to make what has become known as a 'common fund order' ('**CFO**') on the settlement of class actions.

A CFO is an order which requires all group members—including those who have not entered into a funding agreement—to contribute equally to a payment to a litigation funder in respect of the funder's commission. It involves group members who have not signed a funding agreement being required to pay a percentage commission to the litigation funder.

In *Kain v R&B Investments Pty Ltd* [2025] HCA 28 ('***Kain***'), the High Court considered two important issues:

1. First, does the Federal Court have power to make a CFO on settlement or judgment?
2. Second, if so, can a CFO be made in favour of a solicitor (as opposed to a litigation funder)?

The High Court held the Federal Court *does* have power to make a CFO on settlement or judgment, but is *not* able to make a CFO in favour of a solicitor (referred to in the judgment as a '**Solicitors' CFO**').

## *Brewster*

*Kain* was the second time the High Court considered CFOs. The first was *BMW Australia Ltd v Brewster* [2019] HCA 45 ('***Brewster***').

*Brewster* considered whether there was power to make a CFO at an early stage of the proceedings. A majority held there was no such power, and in particular that section 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) ('***FCA Act***') (and its equivalent in section 183 of the *Civil Procedure Act 2005* (NSW)) did not empower the Federal Court (or the NSW Supreme Court) to make an *early* CFO (referred to as a 'commencement CFO' or an 'interim CFO') in favour of a litigation funder at the start of proceedings (and before there was any settlement or judgment).

*Kain* considered a CFO at a different stage of proceedings and under different statutory provisions. In this regard:

- *Brewster* considered whether there was power to make a commencement CFO under section 33ZF(1) of the *FCA Act*; whereas
- *Kain* considered whether there was power to make a CFO at the time of settlement or judgment under sections 33V(2) or 33Z(1)(g) of the *FCA Act*.

In *Kain*, the Court found *Brewster* did not determine whether the Court could make a CFO on settlement or judgment (and, therefore, *Brewster* did not prevent a CFO being made at that later time). The majority (Gordon, Steward, Gleeson and Beech-Jones JJ) said:

> '*Brewster* did not address, let alone resolve, the power of the Federal Court under s 33V(2) or s 33Z(1)(g) of the FCA Act to make a settlement CFO or a judgment CFO in favour of a litigation funder, or a Solicitors' CFO' (at [66]; see also at [15]).

The High Court also rejected the application by the respondents (who were the class action applicants in the first instance proceedings) to re-open *Brewster* (see e.g. at [12], [68] and [170]-[176]; cf at [120]). Consequently, *Brewster* remains a prohibition on early CFOs.

## Power to make a CFO?

Having established that *Brewster* was not determinative of the issue in the appeal, the Court considered the text of sections 33V(2) and 33Z(1)(g) of the *FCA Act*.

### *Section 33V*

Section 33V relates to a class action coming to an end by settlement. Section 33V(1) provides that a representative proceeding may not be settled or discontinued without the approval of the Court. Section 33V(2) provides that '[i]f the Court gives such an approval, it may make such orders as are *just* with respect to the distribution of any money paid under a settlement or paid into the Court' (emphasis added).

### *Section 33Z(1)(g)*

Section 33Z(1)(g) relates to a class action coming to an end by judgment. Section 33Z(1)(g) provides that the Court may, in determining a matter in a representative proceeding, do various things including 'make such other order as the Court thinks *just*' (emphasis added).

### *No limitation preventing a CFO … to a litigation funder*

In *Kain*, the Court noted the well-known principle from *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* [1994] HCA 54 that it is 'inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words' (*Kain* at [16], [69] and [206]).

The Court considered and rejected various arguments to the effect that sections 33V(2) and 33Z(1)(g) of the *FCA Act* did not empower a CFO. For example, the Court rejected the argument that section 33V(2) was limited to payments to group members or those to whom a pre-existing legal obligation was owed (at [17]-[22] and [71]). Gageler CJ said that '[w]hat is "just" for the purposes [of] ss 33V(2) and 33Z(1)(g) is not confined to what is independently required at law or in equity' and '… can encompass recognising and compensating from the settlement or judgment to be distributed amongst group members those whose efforts have resulted in the coming into existence of the settlement or judgment that is to be distributed amongst group members' (at [21]).

Thus, the Court held that sections 33V(2) and 33Z(1)(g) of the *FCA Act* empowered the Federal Court to make a CFO to a litigation funder (see e.g. at [22], [69]-[79], [135], and [174]).

## Can the Federal Court make a Solicitors' CFO?

However, the Court also held the Federal Court was *not* able to make a Solicitors' CFO. Such an order could never be relevantly 'just', and hence was not within sections 33V(2) and 33Z(1)(g) of the *FCA Act*. In this regard, the High Court unanimously overturned the decision of the Full Federal Court in *R&B Investments Pty Ltd v Blue Sky* [2024] FCAFC 89.

### *Section 183*

Central to the High Court's conclusion was section 183(1) of the *Legal Profession Uniform Law* (NSW) ('***LPUL***') which provides:

> 'A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates'.

A law practice that has entered into a costs agreement in contravention of s 183 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received (section 185(4) and *Kain* at [88]). A costs agreement that contravenes section 183 is void (section 185(1) and at [89]).

### *Legislative history and framework*

The Court accepted the appellants' arguments based on *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44 ('***APLA***') and the *Judiciary Act 1903* (Cth) ('***Judiciary Act***').

Under the *Judiciary Act*, the entitlement of a legal practitioner to practise and appear in a federal court ordinarily depends on the legal practitioner being admitted and having a current entitlement to practise in a supreme court of a state or territory (*Kain* at [24] and [208]). The *FCA Act* is framed on the assumption of the continuing application of state-based laws to legal practitioners (at [24]).

As was noted in *APLA*, state-based regulation of the legal profession forms 'part of the context in which federal jurisdiction is exercised, and [has] an impact upon the practical circumstances in which the rule of law is maintained' (*Kain* at [81]). For that reason, the Federal Court exercises power in its federal jurisdiction against the background of the scheme of regulation of the legal profession in the state or territory in which the solicitors in the proceeding are practising (at [81]).

### *Not 'just' to contravene section 183*

In light of that legislative history and framework, the Court construed the word 'just' in sections 33V(2) and 33Z(1)(g).

The majority held:

> 'If the Solicitors' CFO were made, the Court would be giving effect to an agreement that was entered into contrary to s 183 of the LPUL and would be enabling the Solicitors to recover amounts which they are disentitled from recovering under s 185 of the LPUL. Such an order cannot be within the power of the Federal Court under s 33V(2) or s 33Z(1)(g). It cannot be "just" to make an order that gives effect to an agreement that was unlawfully entered into and to enable a solicitor to recover amounts to which they are not entitled. Put another way, the Court cannot authorise what the LPUL forbids' (at [96]).

Gageler CJ reached the same ultimate outcome by slightly different means, stating:

> 'An order, the seeking of or giving effect to which would involve contravention of a State or Territory law regulating the legal profession in that State or Territory, although not beyond power, would not properly be thought of as "just"' (at [25]).

Edelman J noted that a coherent application of the policy on which section 183 was based precluded the making of a Solicitors' CFO from the broad concept of justice in sections 33V(2) and 33Z(1)(g) (at [149]). Jagot J held sections 33V(2) and 33Z(1)(g) did not permit the Federal Court to make an order that would give effect to an agreement in contravention of section 183 (at [211]).

## Comparison with Victoria

The Court noted that the sole exception to the nation-wide prohibition on contingency fees was in Victoria, which permitted a 'group costs order' ('**GCO**') to be made in a group proceeding in the Victorian Supreme Court (at [91]). A GCO is:

> 'an order that the legal costs payable to the law practice representing the plaintiff and group members in a group proceeding be calculated as a specified percentage of the amount of any award or settlement recovered in the proceeding and that liability for payment of those legal costs be shared amongst the plaintiff and group members' (at [91]).

The majority observed that a GCO, once ordered, is the sole mechanism for the recovery of all legal costs, whereas the Solicitors' CFO sought in this case was to be *in addition to* a law practice's usual recovery of costs and disbursements (at [91]).

## Implications

*Kain* has provided clarity in relation to the funding mechanisms available in class actions in the Federal Court. As noted at the outset, prior to *Kain*, it was commonplace for the Court to make a CFO on settlement. Despite this, and despite the weight of intermediate appellate authority favouring the existence of the power to make a CFO on settlement or judgment, the decision in *Brewster* left some residual uncertainty as to how the High Court might approach the question. That has been resolved, enabling third party litigation funders to fund with confidence.

It has also been resolved that Victoria is the only Australian jurisdiction in which a solicitor in a class action can receive a percentage-based contingency fee. Expansion beyond Victoria will require legislative reform.

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**Ross Foreman SC is a barrister at PG Hely Chambers. Ross appeared with Ryan Jameson for the appellant in *Kain*.**

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