Equity Division
Supreme Court
New South Wales

Case Name:	TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed); Nakali Pty Ltd v SurfStitch Group Ltd (administrators appointed)
Medium Neutral Citation:	[2017] NSWSC 1755
Hearing Date(s):	11 December 2017
Date of Decision:	14 December 2017
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Common fund order should not be made at this stage
Catchwords:	PRACTICE AND PROCEDURE – representative proceedings – two overlapping shareholder open class actions against corporate defendant and in one case also against former officer of the corporate defendant – group members in each proceeding almost identical – claims made in both proceedings substantially the same – corporate defendant in administration – proceedings thus stayed against that defendant – no application in either proceedings for leave to proceed – administrators exploring means to deal within the external administration with claims of group members – whether common fund order should be made in one proceeding before those matters resolved and before decision made as to how in the best interests of group members the two cases are to proceed
Legislation Cited:	Civil Liability Act 2002 (NSW) Civil Procedure Act 2005 (NSW) Corporations Act 2001 (Cth) Federal Court of Australia Act 1976 (Cth)
Cases Cited:	McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947
Category:	Procedural and other rulings

Parties:	In proceedings 2017/193375: TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund (Plaintiff) SurfStitch Group Ltd (administrators appointed) (First Defendant) Justin Peter Cameron (Second Defendant) Vannin Capital Operations Limited (First Intervenor) Nakali Pty Limited (Second Intervenor) In proceedings 2017/347082: Nakali Pty Limited (Plaintiff) SurfStitch Group Ltd (administrators appointed) (Defendant)
Representation:	Counsel: In proceedings 2017/193375: L W L Armstrong QC with T J D Chalke (Plaintiff) M Izzo with J Grainger (First Defendant) C R C Newlinds SC with R Foreman (Intervenors) In proceedings 2017/347082: C R C Newlinds SC with R Foreman (Plaintiff) M Izzo with J Grainger (Defendant) Solicitors: In proceedings 2017/193375: Gadens (Plaintiff) King & Wood Mallesons (First Defendant) Arnold Bloch Leibler (Second Defendant) Johnson Winter & Slattery Lawyers (Intervenors) In proceedings 2017/347082: Johnson Winter & Slattery Lawyers (Plaintiff) King & Wood Mallesons (Defendant)
File Number(s):	SC 2017/193375; SC 2017/347082

JUDGMENT

1 The plaintiff, TW McConnell Pty Ltd, was a shareholder of the first defendant, SurfStitch Group Ltd (administrators appointed), on various dates in 2016.

2 McConnell brings these proceedings as a representative of other shareholders of SurfStitch on those dates pursuant to Pt 10 of the *Civil Procedure Act 2005* (NSW). The proceedings are brought against SurfStitch

itself, and also against the former chief executive officer and director of SurfStitch, Mr Justin Cameron.

3 The proceedings were commenced on 28 June 2017.

4 Shortly thereafter, on 24 August 2017, SurfStitch was placed into administration.

5 The proceedings are an open class action. All persons who held shares in SurfStitch on the nominated dates are group members for the purpose of the proceedings.

6 The proceedings are funded by International Litigation Partners No 17 Pte Ltd (“ILP”).

7 McConnell alleges that between the nominated dates in 2016, SurfStitch failed to advise the Australian Securities Exchange of information that was likely to have a material impact on the value of the shares in SurfStitch. It also alleges that SurfStitch and Mr Cameron made statements that misled or deceived the market about SurfStitch’s forecast earnings.

8 On one or more of the relevant dates, Nakali Pty Ltd was also a shareholder in SurfStitch.

9 It is now the lead plaintiff in another open class action brought against SurfStitch (but not against Mr Cameron).

10 The funder of the Nakali proceedings is Vannin Capital Operations Ltd.

11 The Nakali proceedings were commenced on 22 May 2017 in the Supreme Court of Queensland. They have been transferred to this Court and will be managed in the Commercial List with the McConnell proceedings.

12 The group members in the Nakali proceedings are, to a very large extent, the same as those in the McConnell proceedings. The claims made by Nakali in its proceedings are to the same effect as those in the McConnell proceedings.

13 McConnell has asked the Court to make, now, a "common fund order" in its proceedings.

14 The effect of the common fund order proposed by McConnell is (as set out in the notice McConnell proposes to send to group members) that:

> "…if you are a group member in the SurfStitch Class Action, and become entitled to compensation either as the result of the Court awarding you damages, or as part of any settlement, you will be required to pay to the Plaintiff's litigation funder, International Litigation Partners No 17 Pte Ltd (ILP):
>
> (a) an amount that represents your *pro rata* share of the plaintiff's legal costs of the proceedings; and
>
> (b) subject to further order of the Court, 30% of any amount that you become entitled to receive."

15 On 11 December 2017, I granted Nakali leave to intervene in the McConnell proceedings for the purpose of making submissions, in the interest of the group members in each proceeding, as to whether a common fund order should be made at this stage and, if so, as to its terms and the terms of the notice that McConnell proposed to send to group members.

16 Submissions before me on 11 December 2017 focused, primarily, on the question of whether it was premature to make a common fund order at this stage. Nakali did not suggest that, in due course, it would not be appropriate to make a common fund order in one or other of the proceedings.

17 Because of the appointment of the administrators, both the McConnell and the Nakali proceedings are stayed as against SurfStitch. Neither McConnell nor SurfStitch have any present intention of seeking leave under s 440D of the *Corporations Act 2001* (Cth) ("the Act") to proceed against SurfStitch.

18 The McConnell proceedings are proceeding against Mr Cameron and have reached the stage where Mr Cameron has filed a Commercial List Response.

19 One issue Mr Cameron raises in that Response is that the McConnell claim is an "apportionable claim" for the purposes of s 34 of the *Civil Liability Act 2002* (NSW) (and cognate legislation) and that various other parties (including SurfStitch's managing director, chief financial officer and auditor) are "concurrent wrongdoers".

20 In those circumstances, McConnell is currently contemplating whether it should join those (and perhaps other) parties as defendants to the proceedings.

21 Thus, although the McConnell proceedings are progressing against Mr Cameron, they are at an early stage. They are next listed for directions before me on 9 February 2018.

22 In the meantime, although both the McConnell and Nakali proceedings are stayed as against SurfStitch, matters relevant to the interests of the group members in both proceedings are developing within the administration.

23 Thus, on 7 December 2017, the administrators filed an Originating Process in this Court seeking, amongst other things, an order pursuant to s 439A(6) of the Act that the convening period in which the administrators must convene the second meeting of creditors of SurfStitch be extended to 31 March 2018. On 11 December 2017, Black J made such an order.

24 According to an affidavit filed in those proceedings by one of the administrators, Mr Joseph Hansell, one of the reasons that an extension of the convening period was sought was to:

> "…allow us further time to implement the steps to settle or discontinue the Class Action Proceedings as against [SurfStitch]. We expect that settlement or discontinuance of the Class Action Proceedings would make it easier to obtain a recapitalisation proposal, which we note is a pathway to implementing a recapitalisation of the Companies".

25 On 6 December 2017, the administrators sent a circular to, amongst other parties, the group members in the McConnell and Nakali proceedings.

26 In that circular, the administrators informed group members that:

(a) the Act provides that no payment is to be made to a person with a claim against SurfStitch that arises from the buying, holding, selling or otherwise dealing with SurfStitch shares (which the administrators called a "Subordinate Claim") until the claims of SurfStitch's creditors had been repaid in full;

(b) group members would be Subordinate Claimants;

(c) if the allegations made in the McConnell and Nakali proceedings are made out, the administrators anticipate that the quantum of those claims against SurfStitch "could be very substantial";

(d) the administrators have not yet formed a view as to whether to admit the claims of the group members against SurfStitch;

(e) the administrators have formed the view that creditors of SurfStitch (other than Subordinate Claimants) are likely to be repaid in full if a proposed recapitalisation process concludes successfully; and

(f) if admitted, Subordinate Claimants (including group member claimants), may have a financial interest in the administration of SurfStitch once its creditors have been repaid.

27 The administrators propose to take a series of steps to ensure that the interests of prospective Subordinate Claimants (including group members) are accounted for in any "prospective Recapitalisation Transaction". Amongst the steps the administrators propose to take is to seek an order pursuant to s 600H(1)(b) of the Act and s 90-15(1) of the Insolvency Practice Schedule

(Corporations) permitting Subordinate Claimants to vote in the external administration of SurfStitch.

28 As I understand it, these are matters that the administrators propose to pursue with, amongst others, the funders of both the McConnell and the Nakali proceedings between now and the date to which the convening period for the second meeting of creditors has been extended.

29 It is not possible to predict what the outcome of these matters will be. One outcome may be that the claims of group members in each of the McConnell and Nakali proceedings will be resolved within the external administration of SurfStitch and without the need for either McConnell or Nakali to further prosecute the proceedings against SurfStitch.

30 As I have mentioned, neither McConnell nor Nakali has made, or proposes to make, any application under s 440D of the Act for leave to proceed against SurfStitch. That is no doubt because those parties, and their funders, prefer to await the outcome of developments within the administration.

31 McConnell wants a common fund order now. If matters are not resolved within the administration, it may well be that Nakali will also seek a common fund order in due course.

32 I understand it to be common ground that it would not be practicable for both proceedings to continue to trial as open class proceedings.

33 I am confronted with a situation which is similar to, but perhaps more complex than that considered by Beach J in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947; namely, where there are pending two overlapping class proceedings against the same respondent agitating the same causes of action.

34 In *Bellamy*, Beach J said at [1]:

> "Two open class securities class actions have been brought against Bellamy's Australia Limited (the respondent) under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the Act) concerning the same subject matter and causes of action. They involve an almost complete overlap in the class memberships represented by the applicant in each case. Should either or both proceedings be allowed to continue? If one only, which one? And if both, as two open class proceedings or in some other configuration?"

35 At [6], Beach J asked himself the following hypothetical questions:

> "Should I stay one of the proceedings? Should I consolidate both proceedings? Should I allow one of the proceedings to continue as open class proceedings but make a s 33N(1) order in relation to the other, in essence a declassing order? If so, which proceedings? Should I allow one of the proceedings to continue as open class proceedings but close the class in the other proceedings, and then proceed with a joint trial of both? If so, which class in which proceedings should be closed? Or should I do nothing at this time and permit both proceedings to remain as open class proceedings, with potentially a joint trial of both? These questions neither permit of easy answers…".

36 The situation before me has the added complication that the corporate defendant is in administration and that, within that administration, matters have developed as I have described.

37 At some stage a decision of the kind discussed by Beach J will have to be made as to how, in the best interests of group members, the progress of the McConnell and the Nakali proceedings is to be managed.

38 I am not in a position to make any assessment about that matter at the moment. In any event, it would not be desirable to embark on that exercise until it is known how matters will play out within the administration of SurfStitch. There appears some prospect that, within the administration, matters will fall into place, one way or another, in the first few months of next year. The outcome may well inform the Court of the best way forward for these two proceedings (assuming they need to proceed at all: see [29] above).

39 In those circumstances, I have formed the same opinion as did Beach J in *Bellamy's*; namely, that although it will be necessary to form an opinion as to whether to make a common fund order "at an early point", "it is necessary to

resolve the appropriate constitution of each of the proceedings first before dealing with the common fund questions" (see *Bellamy's* at [22]).

40 I appreciate that, unlike the Nakali proceedings, the McConnell proceedings are also progressing against Mr Cameron. However, matters are still at a very early stage so far as concerns Mr Cameron and, as I have mentioned, there is a prospect (which I see as being significant) of those proceedings being reconstituted and further defendants joined (see [20] above).

41 There is a further matter which arises from the terms of the funding agreement proposed by ILP in the McConnell proceedings.

42 As the administrators have pointed out in correspondence with the solicitors for McConnell, the making of a common fund order in the terms presently sought by McConnell would require group members to pay to ILP any distribution made in the external administration of SurfStitch, from which ILP would deduct, amongst other things, its proposed commission.

43 In argument before me on 11 December 2017, senior counsel for McConnell informed me that it was not the intention of ILP that the making of the common fund order would affect rights of group members created in the administration of SurfStitch.

44 As I understood it, to avoid that consequence it would be necessary to vary either the terms of the funding agreement or the proposed order. Either way, that appears to me to be a further reason to decline to make a common fund order now.

45 I decline to make a common fund order at this stage.

46 McConnell's Amended Notice of Motion is to be dismissed.

47 I will hear any argument about costs on 9 February 2018, when the matter is again before me for directions.

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