Equity Division
Supreme Court
New South Wales

Case Name:	TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3); Nakali Pty Ltd v SurfStitch Group Ltd (subject to deed of company arrangement) (No 2)
Medium Neutral Citation:	[2018] NSWSC 1749
Hearing Date(s):	1 and 2 November 2018
Date of Decision:	15 November 2018
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	The Court does not have power under s 183 of the Civil Procedure Act 2005 to dispense with compliance with the requirements of ss 175(1)(a) and 162(1)
Catchwords:	CIVIL PROCEDURE – Representative Proceedings – whether Court has power to make an order under s 183 of the Civil Procedure Act 2005 dispensing with compliance with the requirements of ss 175(1)(a) and 162(1)
Legislation Cited:	Civil Procedure Act 2005 (NSW) Interpretation Act 1987 (NSW) Civil Proceedings Act 2011 (Qld) Corporations Act 2001 (Cth) Federal Court of Australia Act 1976 (Cth)
Cases Cited:	Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15 Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc (2016) 245 FCR 340; [2016] FCA 401 Commonwealth v Baume (1905) 2 CLR 405; [1905] HCA 11 Courtney v Medtel Pty Ltd (2002) 122 FCR 168; [2002] FCA 957 Ethicon Sárl v Gill [2018] FCAFC 137 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22

Kadam v MiiResorts Group 1 Pty Ltd (No 5) [2018] FCA 1086
Liverpool City Council v McGraw-Hill Financial, Inc [2018] FCA 1289
McMullin v ICI Australia Operations Pty Ltd (1998) 84 FCR 1
Money Max International Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148
Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq) [2013] FCA 970
Perera v GetSwift Ltd (No 2) [2018] FCA 909
Perera v GetSwift Ltd [2018] FCA 732
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Vernon v Village Life Ltd [2009] FCA 516
Webb v GetSwift Ltd [2018] FCA 783
Wileypark Pty Ltd v AMP Ltd [2018] FCAFC 143

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 (subject to deed of company arrangement) (First Defendant) Justin Peter Cameron (Second Defendant) In proceedings 2017/347082: Nakali Pty Limited (Plaintiff) SurfStitch Group Ltd (subject to deed of company arrangement) (Defendant)
Representation:	Counsel: In proceedings 2017/193375: L W L Armstrong QC with T J D Chalke (Plaintiff) M Izzo SC with J S Burnett (First Defendant) N M Bender (Second Defendant) G Donnellan with D Meyerowitz-Katz (Contradictor) G K J Rich SC with C M Tam (Intervenor) In proceedings 2017/347082: J Scarcella (solicitor) (Plaintiff) M Izzo SC with J S Burnett (Defendant) G Donnellan with D Meyerowitz-Katz (Contradictor) G K J Rich SC with C M Tam (Intervenor) Solicitors: In proceedings 2017/193375: Gadens (Plaintiff) King & Wood Mallesons (First Defendant)

Arnold Bloch Leibler (Second Defendant)

In proceedings 2017/347082:
Johnson Winter & Slattery Lawyers (Plaintiff)
King & Wood Mallesons (Defendant)

File Number(s): SC 2017/193375; SC 2017/347082

JUDGMENT

1 On various dates in 2016 TW McConnell Pty Ltd and Nakali Pty Ltd owned shares in SurfStitch Group Ltd ("SGL").

2 In 2017 McConnell and Nakali commenced representative proceedings against SGL. McConnell commenced its proceedings in this Court under Pt 10 of the *Civil Procedure Act 2005* (NSW) (the "CPA"). Nakali commenced its proceedings in the Supreme Court of Queensland under Pt 13A of the *Civil Proceedings Act 2011* (Qld). The Nakali proceedings have been transferred to this Court.

3 Each of the proceedings is an open class action. All persons who held shares in SGL on nominated dates are group members for the purposes of the proceedings. The group members in each proceeding are to a large extent the same.

4 McConnell, but not Nakali, also named as a defendant the former chief executive officer and director of SGL, Mr Justin Cameron.

5 The claims made by McConnell and Nakali are to the same effect. Those claims are that between nominated dates in 2016 SGL failed to advise the Australian Securities Exchange of information that was likely to have a material impact on the value of SGL's shares and that SGL (and in the case of McConnell, Mr Cameron) made statements to mislead or deceive the market about SGL's forecast earnings.

6 The McConnell proceedings are funded by International Litigation Partners No 17 Pte Ltd ("ILP"); the Nakali proceedings by Vannin Capital Operations Ltd.

7 There are some 3,000 to 3,500 group members overall. 48 have signed funding agreements with ILP in the McConnell proceedings and 168 have signed funding agreements with Vannin in the Nakali proceedings.

8 The group members that have entered funding agreements with ILP or Vannin represent approximately 5 per cent of the total group members and approximately 9-10 per cent of the total loss said to have been suffered by the entire group.

9 On 24 August 2017 the directors of SGL and of its wholly owned subsidiary, SurfStitch Holdings Pty Ltd ("SHPL"), resolved to place the companies into administration.

10 A significant factor informing the directors' decision was the commencement of the two proceedings.

11 Each of the proceedings has now settled in principle on the basis of a deed of company arrangement entered into by SGL and various others on 18 April 2018 ("the SGL DoCA"). Also on 18 April 2018 SHPL entered a deed of company arrangement.

12 All creditors of SGL, including all group members as subordinated creditors of SGL are now bound by the SGL DoCA: s 444D(1) of the *Corporations Act* (Cth).

13 McConnell and Nakali seek approval of the settlement pursuant to s 173 of the CPA.

14 Each seeks an order, in effect as a condition precedent to its application for approval of the settlement, that pursuant to s 183 of the CPA the Court dispense with the requirements in:

(a) s 175(1)(a) of the CPA that the group members be provided with notice of their right to opt of the proceedings before the date fixed under s 162(1); and

(b) s 162(1) of the CPA that the Court fix a date by which group members may opt out of the proceedings.

15 Alternatively, each of McConnell and Nakali seeks an order under s 183, again in effect as a condition precedent to its application for approval of the settlement, that any group member who opts out of the proceedings, and who becomes entitled to a distribution pursuant to the SGL DoCA, be bound by the costs and common fund orders sought as part of approval of the settlement.

16 The issue is whether there is power to make such orders and if so, whether that power should be exercised.

Decision

17 My conclusion is that s 183 is not available to make the orders set out at [14].

18 I doubt that s 183 is available to make the order set out at [15]. Assuming power exists, I would not exercise it.

Does the Court have power under s 183 to dispense with the setting of an opt out date and the giving of notice under ss 162(1) and 175(1)(a)?

19 Part 10 of the CPA deals with representative proceedings. Like its analogue in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("FCAA"), Pt 10 adopts an "opt out" model for representative proceedings. The consent of a group member is not required before proceedings are commenced (s 159).

Fixing an opt out date

20 Section 162(1) is expressed in mandatory terms. It provides:

> "**162 Right of group members to opt out**
>
> (1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court."

21 Section 162 also provides:

> "(2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.
>
> …
>
> (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings."

22 Part 10 of the CPA does not specify by what time the Court must fix an opt out date under s 162. The timing is at large. Section 162(4) contemplates the possibility that the opt out date might be a date after the commencement of the final hearing.

Right to opt out

23 The ability of a group member to opt out of representative proceedings is expressed in the legislation as a "right" in the heading of s 162 (see s 35 of the *Interpretation Act 1987* (NSW)) and in the body of s 175(1)(a).

24 The authorities emphasise the importance of the right to opt out of representative proceedings.

25 In *Perera v GetSwift Ltd* [2018] FCA 732 Lee J said at [368] that:

> "Fundamental to Part IVA is that each group member has a statutory right to opt out. The right represents a protection for group members in circumstances where consent is not required for an applicant to represent them. People may have an array of reasons for opting out, for example, scruples about being involved in any litigation, a corporate desire not to be involved in securities litigation, an unhappiness about the basis upon which the litigation is to be funded or conducted, and so on."

Notice of right to opt out

26 Section 175(1) is also in mandatory language. It provides that notice "must be given to group members" of "the right of the group members to opt out of the proceedings before a specified date". That is the date the Court "must" fix under s 162(1).

27 Further, notice “must” be given as soon as practicable after the event to which the required notice relates (s 175(6)).

28 However the legislation contemplates, in terms, one circumstance in which compliance with these mandatory steps may be dispensed with.

29 Thus, s 175(2) provides that where the relief sought in the representative proceedings does not include a claim for damages, the Court “may” dispense with any or all of the requirements of s 175(1); including the requirement that group members be notified of the date fixed under s 162(1) by which they must opt out.

30 Section 175(2) does not address the implications of such dispensation on the Court’s obligation to fix an opt out date under s 162(1).

Can the general power in s 183 be used to dispense with mandatory requirements?

31 The question, then, is whether the general power in s 183 can be used to dispense with the mandatory requirements in ss 162(1) and 175(1)(a) to fix an opt out date and give notice to group members of their right to opt out.

32 Section 183 provides:

> “**183 General power of the Court to make orders**
>
> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.”

33 The corresponding section in the FCAA is 33ZF. It has been held to:

(a) provide the Court with the “widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding (*McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4 (Wilcox J)); and

(b) accommodate “novel problems that might arise through a new statutory procedure for representative proceedings” (*Money Max International Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [165] (Murphy, Gleeson and Beach JJ) and to avoid the necessity for “frequent resort to Parliament for amendments to the legislation” (*McMullin* at [4]).

34 In *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957 Sackville J said at [48]:

> “There are good reasons to give s 33ZF a generous interpretation. The section is couched in broad terms. Moreover, the Court is given power to act on its own motion. The language, which is described in the Explanatory Memorandum as ‘wide’, doubtless reflects the drafter's perception that the new statutory procedure for representative proceedings was likely to throw up novel problems that would require close supervision by the Court.”

35 His Honour went on to say at [52] that:

> “While s 33ZF(1) of the Federal Court Act should be given a broad construction, that does not mean it can or should become a vehicle for rewriting the legislation.”

36 In *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc* (2016) 245 FCR 340; [2016] FCA 401, Wigney J said at [63] that s 33ZF is “intended to give the Court a wide and general power to make orders to resolve any issues or difficulties that might arise in representative proceedings that are not otherwise covered by specific provisions” in the relevant part of the FCAA.

37 More recently, s 33ZF has been described as a “deliberately general power which operates as a ‘gap–filler’ where specific powers in Part IVA are not apt to resolve the relevant issue which is presented” (*Perera* at [142] (Lee J)). Lee J again described s 33ZF as a “gap-filler” in *Perera v GetSwift Ltd (No 2)* [2018] FCA 909 at [27]; in *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 at [32]; in *Kadam v MiiResorts Group 1 Pty Ltd (No 5)* [2018] FCA 1086 at [79]; and in *Webb v GetSwift Ltd* [2018] FCA 783 at [20]. The Full Court of the Federal Court also used this language in *Ethicon Sárl v Gill* [2018] FCAFC 137 at [17] (Allsop CJ, Murphy and Lee JJ).

38 There was debate before me as to the utility of adopting such colloquial language to describe the ambit of s 183.

39 The expression does beg the question of how big the “gap” to be filled must be before s 33ZF (s 183) is not available.

40 But the expression reflects Sackville J’s observation in *Courtney v Medtel* that s 33ZF (s 183) cannot and should not “become a vehicle for rewriting the legislation” (see [35] above) and Wigney J’s observation in Ceramic Fuel Cells that the section is intended to deal with circumstances “not otherwise covered by specific provisions” (see [36]).

41 Acceptance of McConnell’s and Nakali’s submission concerning the ambit of s 183 would mean that the Court “may” dispense with the obligation to give notice under s 175(1)(a) in any circumstance where it thought it “appropriate or necessary to ensure that justice is done in the proceedings”.

42 However the mandatory language of ss 162 and 175(1)(a) combined with the specific dispensatory power under s 175(2) points against such a conclusion. Those provisions bespeak a legislative intention that the mandatory requirements may only be varied in the specific circumstance identified. To make an order under s 183 to dispense with the requirements because the Court thought it “appropriate or necessary” would amount to judicial “rewriting” of the express requirements in the legislation. It would interfere, dramatically, with a circumstance to which the legislature has specifically directed its attention.

43 Further, in *Perera No 2* Lee J held that the power in s 33ZF (s 183 in the CPA) could not be used to override the prohibition in s 43(1A) of the FCAA (s 181 in the CPA) against ordering costs against a party on whose behalf representative proceedings have been commenced (at [27]). I do not see how that decision could be reconciled with a conclusion that s 183 gives the Court power to override the mandatory provisions in ss 162 and 175(1)(a).

44 And, it is a principle of statutory interpretation that, when construing the whole of an Act, all words should be given some meaning and effect, and that a construction which renders any clause, sentence or word "surplusage", or "superfluous, void, or insignificant", should be avoided: *Commonwealth v Baume* (1905) 2 CLR 405; [1905] HCA 11 at 414-415 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 (McHugh, Gummow, Kirby and Hayne JJ) at [71].

45 To construe s 183 in the manner sought by McConnell and Nakali would be to render s 175(2) "surplusage".

46 On behalf of the funders, it was submitted that it must follow from a conclusion that s 183 is not available to override or dispense with the requirements of ss 162(1) and 175(1)(a) that the Court could never approve the settlement or discontinuance of proceedings under s 173 without fixing an opt out date and causing notice to be given. That is so. But that is what the legislation provides. To make an order dispensing with those requirements would be to rewrite that legislation.

47 In *Vernon v Village Life Ltd* [2009] FCA 516 Jacobson J concluded at [64] that the Court did have power under s 33ZF (s 183) to dispense with the requirements of s 33J (s 162) and s 33X(1)(a) (s 175(1)(a)).

48 The contrary position was not put to his Honour. The point was conceded in argument (see [72]). There was no contradictor.

49 Nonetheless, his Honour said he gave "careful consideration to the question of whether I ought to make an order dispensing with the requirement of Part IVA that the Court is to fix a date for group members to opt out of a representative proceeding" (at [57]), and concluded that there was such a power under s 33ZF (at [57] and [64]).

50 Jacobson J's decision is inconsistent with the more recent Federal Court authority to which I have referred (see [36] and [37] above). It is irreconcilable

with Lee J's decision in *Perera (No 2)* and with Sackville J's admonition in *Courtney v Medtel* (to which Jacobson J did not refer, although his Honour did refer to the decision) against rewriting the legislation.

51 However, the decision has not been overruled. I must follow it unless I conclude it is plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; [1993] HCA 15 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [135].

52 The more recent Federal Court authority persuades me that *Vernon* is plainly wrong and that I should not follow it.

53 For those reasons, I conclude s 183 does not give me power to dispense with the Court's obligation to set an opt out date under s 162(1) nor with the requirement that group members be given notice of the right to opt out by that date under s 175(1)(a).

Alternative orders sought

54 Alternatively, McConnell and Nakali seek an order that any group member who opts out and then becomes entitled to a distribution under the SGL DoCA, nonetheless be bound by the costs and common fund orders proposed as part of the settlement.

55 The effect of the proposed order would be to deprive a group member of the monetary benefit of opting out; namely to prove in the SGL DoCA free of any obligation to share the burden of the proposed costs and common fund orders sought.

56 As Mr Donnellan who appeared as contradictor submitted, such an order would strip the right to opt out of any substantial value. It would leave those who would elect to opt out if given notice of their entitlement to do so in the same position as if they had not been given such notice. It would, as a practical matter, deliver to McConnell and Nakali the same result as if the

requirements of ss 162(1) and 175(1)(a) had been dispensed with. It would render the mandatory process - of giving notice of the right to opt out - a charade.

57 To make such an order would also impose obligations on group members who had opted out and were thus no longer associated with the proceedings. Such persons would no longer be persons bringing the proceedings (see *Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq)* [2013] FCA 970 at [75]) nor persons on whose behalf the proceedings were brought (see *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143 at [68]).

58 Further, the order would apply to any former group member, regardless of when the group member opted out. It would apply to a person who has already opted out. It would impose upon such a party an obligation without affording that party the opportunity to be heard.

59 I doubt that I have power under s 183 to do this, even on the wide view urged on behalf of McConnell and Nakali.

60 Even if such power existed, having refused to dispense with the requirements of s 162(1) and s 175(1)(a), I can envisage no circumstances in which I would exercise it.

Conclusion

61 I decline to make either of the orders sought. I have no power to make the first order sought. If I have power to make the second order sought (which I doubt), I would not exercise it.

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