

# OUTCOME DETAILS

**Supreme Court - Civil  
at Supreme Court Sydney  
on 12 November 2019**

**2017/00347082-005 / Notice of Motion Civil - Nakali Pty Limited v Chubb Insurance  
Australia Limited**

This matter is listed for Motion (Commercial List) on 16 December 2019 10:00 AM before the Supreme Court - Civil at Supreme Court Sydney.

Estimated duration: 5 Minutes

HH makes orders in terms of short minutes of order initialled and dated today's date.

Short Minutes of Order

Leave to file amended notice of motion

1. The plaintiff is granted leave to file an amended notice of motion in the form sent to the Court on 8 November 2019 (amended notice of motion).

Evidence

2. Evidence filed in support of the application for approval of the settlement in TW McConnell Pty Ltd ACN 000 217 890 as trustee for the McConnell Superannuation Fund v SurfStitch Group Limited (Subject to Deed of Company Arrangement) and Ors (2017/00193375) (McConnell Proceeding) be evidence in this application and vice versa.

Opt out

3. Pursuant to s.162(1) of the Civil Procedure Act 2005 (CPA), the date by which group members may opt out of this proceeding is fixed as 4:00pm on 11 December 2019 (Participation Deadline).

4. Pursuant to ss.162(1) and 183 of the CPA, any group member wishing to opt out of the proceeding must, before the Participation Deadline, file a completed 'Notice of Opting Out' in the form set out in Annexure B to this notice of motion (Opt Out Notice) in the registry of the Supreme Court of New South Wales and serve a copy on the solicitors for the plaintiff (Johnson Winter & Slattery) or the solicitors for the plaintiff in the McConnell Proceeding (being Gadens).

5. If the solicitors for any party to the proceeding receive an Opt Out Notice, or a notice purporting to be an Opt Out Notice, on or or before the Participation Deadline:

(a) the solicitors will file any such notice with the registry of the Court within seven (7) days of the receipt of the said notice; and

(b) for the purposes of paragraphs 3 and 4 above the notice will be treated as an Opt Out Notice received by the Court at the time that it was received by the relevant solicitors.

6. The solicitors for the parties be granted leave to inspect the Court file and to copy any Opt Out Notices, or purported Opt Out Notices, provided by group members.

#### Registration of continuing group members (CGMs)

7. Pursuant to s.183 of the CPA, any group member wishing to participate in the settlement of the proceeding must by the Participation Deadline deliver to JWS or Gadens a completed 'Group Member Registration and DOCA Authorisation' form in the form set out in Annexure [A] to the plaintiff's amended notice of motion (CGM Form) (and group members who so register shall be the CGMs).

8. Any group member who neither opts out, nor submits a CGM Form, shall remain a group member in the proceeding and be bound by any settlement approved pursuant to this application, but shall not, without further order of the Court, be entitled to participate in the distribution of, or make any claim against, the monies recovered as part of the said settlement.

#### Notice to potential group members

9. Pursuant to ss.162(1) and 175(1)(a) and (4) of the CPA, the content of the notices to potential group members set out in:

- (a) Annexure D to the plaintiff's amended notice of motion (Personal Notice) as amended by deleting the second sentence of paragraph 9; and
- (b) Annexure E to the plaintiff's amended notice of motion (Newspaper Notice);

be approved (together and severally the Notice of Proposed Settlement).

10. Pursuant to ss.175(4) and 176 of the CPA, the Notice of Proposed Settlement be given to potential group members:

- (a) by Gadens, within 3 business days after the date of this order:
  - (i) where Gadens has an email address for a potential group member – sending the Personal Notice to the email address of the potential group member;
  - (ii) where Gadens does not have an email address but has a postal address for a potential group member – by sending the Personal Notice by ordinary pre-paid post to the postal address of the potential group member; and
  - (iii) causing the Personal Notices to be uploaded to the Gadens websites; and
  - (iv) causing the Newspaper Notice to be published in one (1) weekday edition of The Australian newspaper.
- (b) by the Registrar of the Supreme Court of New South Wales, within 3 business days of the date of this order – causing the Personal Notice to be:
  - (i) posted on the Court's website; and
  - (ii) available for inspection in each registry of the Court.

11. By 4:00pm on 13 December 2019, Gadens shall file and serve an affidavit deposing to:

- (a) compliance with order 10 above; and
- (b) the responses (if any) received from potential group members.

## Directions for further hearing

12. Save for any affidavit or written submissions in respect of which confidentiality orders are obtained in accordance with order 15, on or before 22 November 2019 the plaintiff file and serve (including by service on the Contradictor) any affidavit(s) and written submissions on which it proposes to rely in support of the application for approval of the settlement of this proceeding in accordance with this notice of motion (Settlement Approval Application).

13. By 4:00pm on 29 November 2019:

(a) the defendants file and serve any affidavit and written submissions in respect of the Settlement Approval Application;

(b) the Contradictor (to the extent that he wishes to object to the proposed settlement or any term of the Settlement Distribution Scheme (as defined below at paragraph 18(b) of the plaintiff's amended notice of motion) file and serve any written submissions in support of their objection; and

14. By 4:00 pm on 11 December 2019 any group member seeking to raise any objection to the proposed settlement or any term of the Settlement Distribution Scheme, file and serve any written submissions in support of their objection together with a 'Notice of Objection to Settlement Approval' in the form which is Annexure [C] to the plaintiff's amended notice of motion.

## Confidential materials

15. On or before 22 November 2019 the plaintiff file any confidential affidavit and/or confidential submissions on which it intends to rely in respect of the plaintiff's Settlement Approval Application and in relation to which it intends to seek a confidentiality order.

16. In relation to any confidential affidavit and/or confidential submissions on which the plaintiff proposes to rely in support of the Settlement Approval Application, the plaintiff is directed to, on or before 6 December 2019:

(a) provide to the Associate to the presiding judge the original and one copy of any such affidavit and/or submissions in an envelope marked with the details of the proceeding and a notation that it is a "Confidential [Affidavit or Submissions] for Purposes of the Settlement Approval Application – not to be opened other than by order of the Court or a Judge"; and

(b) to serve copies of such material on the Contradictor.

## Other matters

17. On the date of this order, the Deed Administrators are to provide Gadens with the contact details in its possession for shareholders of SurfStitch Group Limited (Subject to Deed of Company Arrangement) ACN 602 288 004 on any of 25 February 2016, 3 May 2016, or 9 June 2016, to enable dispatch of the Personal Notice by Gadens on behalf of the Plaintiffs.

## Adjournment

18. The balance of the Plaintiff's amended notice of motion filed 8 November 2019, being the Settlement Approval Application, be heard/listed for hearing at 10:00am on 16 December 2019.

19. The parties have liberty to apply on 48 hours' notice.

**2017/00347082-001 / Summons: Nakali Pty Limited v SURFSTITCH GROUP LIMITED**

This matter is listed for Motion (Commercial List) on 16 December 2019 10:00 AM before the Supreme Court - Civil at Supreme Court Sydney.

Estimated duration: 5 Minutes

The following hearing dates are vacated:

06 Dec 2019 09:15 AM

Reason: By Consent

Other Reason: Motion now listed before Ball J on 16 Dec 2019

HH makes orders in terms of short minutes of order initialled and dated today's date.

Short Minutes of Order

Leave to file amended notice of motion

1. The plaintiff is granted leave to file an amended notice of motion in the form sent to the Court on 8 November 2019 (amended notice of motion).

Evidence

2. Evidence filed in support of the application for approval of the settlement in TW McConnell Pty Ltd ACN 000 217 890 as trustee for the McConnell Superannuation Fund v SurfStitch Group Limited (Subject to Deed of Company Arrangement) and Ors (2017/00193375) (McConnell Proceeding) be evidence in this application and vice versa.

Opt out

3. Pursuant to s.162(1) of the Civil Procedure Act 2005 (CPA), the date by which group members may opt out of this proceeding is fixed as 4:00pm on 11 December 2019 (Participation Deadline).

4. Pursuant to ss.162(1) and 183 of the CPA, any group member wishing to opt out of the proceeding must, before the Participation Deadline, file a completed 'Notice of Opting Out' in the form set out in Annexure B to this notice of motion (Opt Out Notice) in the registry of the Supreme Court of New South Wales and serve a copy on the solicitors for the plaintiff (Johnson Winter & Slattery) or the solicitors for the plaintiff in the McConnell Proceeding (being Gadens).

5. If the solicitors for any party to the proceeding receive an Opt Out Notice, or a notice purporting to be an Opt Out Notice, on or or before the Participation Deadline:

(a) the solicitors will file any such notice with the registry of the Court within seven (7) days of the receipt of the said notice; and

(b) for the purposes of paragraphs 3 and 4 above the notice will be treated as an Opt Out Notice received by the Court at the time that it was received by the relevant solicitors.

6. The solicitors for the parties be granted leave to inspect the Court file and to copy any Opt Out Notices, or purported Opt Out Notices, provided by group members.

## Registration of continuing group members (CGMs)

7. Pursuant to s.183 of the CPA, any group member wishing to participate in the settlement of the proceeding must by the Participation Deadline deliver to JWS or Gadens a completed 'Group Member Registration and DOCA Authorisation' form in the form set out in Annexure [A] to the plaintiff's amended notice of motion (CGM Form) (and group members who so register shall be the CGMs).

8. Any group member who neither opts out, nor submits a CGM Form, shall remain a group member in the proceeding and be bound by any settlement approved pursuant to this application, but shall not, without further order of the Court, be entitled to participate in the distribution of, or make any claim against, the monies recovered as part of the said settlement.

## Notice to potential group members

9. Pursuant to ss.162(1) and 175(1)(a) and (4) of the CPA, the content of the notices to potential group members set out in:

- (a) Annexure D to the plaintiff's amended notice of motion (Personal Notice) as amended by deleting the second sentence of paragraph 9; and
- (b) Annexure E to the plaintiff's amended notice of motion (Newspaper Notice);

be approved (together and severally the Notice of Proposed Settlement).

10. Pursuant to ss.175(4) and 176 of the CPA, the Notice of Proposed Settlement be given to potential group members:

- (a) by Gadens, within 3 business days after the date of this order:
  - (i) where Gadens has an email address for a potential group member – sending the Personal Notice to the email address of the potential group member;
  - (ii) where Gadens does not have an email address but has a postal address for a potential group member – by sending the Personal Notice by ordinary pre-paid post to the postal address of the potential group member; and
  - (iii) causing the Personal Notices to be uploaded to the Gadens websites; and
  - (iv) causing the Newspaper Notice to be published in one (1) weekday edition of The Australian newspaper.

(b) by the Registrar of the Supreme Court of New South Wales, within 3 business days of the date of this order – causing the Personal Notice to be:

- (i) posted on the Court's website; and
- (ii) available for inspection in each registry of the Court.

11. By 4:00pm on 13 December 2019, Gadens shall file and serve an affidavit deposing to:

- (a) compliance with order 10 above; and
- (b) the responses (if any) received from potential group members.

## Directions for further hearing

12. Save for any affidavit or written submissions in respect of which confidentiality orders are obtained in accordance with order 15, on or before 22 November 2019 the plaintiff file and serve (including by service on the Contradictor) any affidavit(s) and written submissions on which it proposes to rely in support of the application for approval of the settlement of this proceeding in accordance with this notice of motion (Settlement Approval Application).

13. By 4:00pm on 29 November 2019:

(a) the defendants file and serve any affidavit and written submissions in respect of the Settlement Approval Application;

(b) the Contradictor (to the extent that he wishes to object to the proposed settlement or any term of the Settlement Distribution Scheme (as defined below at paragraph 18(b) of the plaintiff's amended notice of motion) file and serve any written submissions in support of their objection; and

14. By 4:00 pm on 11 December 2019 any group member seeking to raise any objection to the proposed settlement or any term of the Settlement Distribution Scheme, file and serve any written submissions in support of their objection together with a 'Notice of Objection to Settlement Approval' in the form which is Annexure [C] to the plaintiff's amended notice of motion.

#### Confidential materials

15. On or before 22 November 2019 the plaintiff file any confidential affidavit and/or confidential submissions on which it intends to rely in respect of the plaintiff's Settlement Approval Application and in relation to which it intends to seek a confidentiality order.

16. In relation to any confidential affidavit and/or confidential submissions on which the plaintiff proposes to rely in support of the Settlement Approval Application, the plaintiff is directed to, on or before 6 December 2019:

(a) provide to the Associate to the presiding judge the original and one copy of any such affidavit and/or submissions in an envelope marked with the details of the proceeding and a notation that it is a "Confidential [Affidavit or Submissions] for Purposes of the Settlement Approval Application – not to be opened other than by order of the Court or a Judge"; and

(b) to serve copies of such material on the Contradictor.

#### Other matters

17. On the date of this order, the Deed Administrators are to provide Gadens with the contact details in its possession for shareholders of SurfStitch Group Limited (Subject to Deed of Company Arrangement) ACN 602 288 004 on any of 25 February 2016, 3 May 2016, or 9 June 2016, to enable dispatch of the Personal Notice by Gadens on behalf of the Plaintiffs.

#### Adjournment

18. The balance of the Plaintiff's amended notice of motion filed 8 November 2019, being the Settlement Approval Application, be heard/listed for hearing at 10:00am on 16 December 2019.

19. The parties have liberty to apply on 48 hours' notice.

Justice M Ball

Signed

Date