

OUTCOME DETAILS

**Supreme Court - Civil
at Supreme Court Sydney
on 22 March 2021**

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

The Court Orders:

Settlement Approval

1. Pursuant to section 173 of the Civil Procedure Act 2005 (CPA):

(a) the settlement of the claims of the plaintiff and group members as against the defendants upon the terms set out in the settlement agreement that appears at pages 107 to 135 of exhibit GCM-15 to the affidavit of Glenn Charles McGowan affirmed on 23 October 2019 (Settlement Agreement), be approved;

(b) the proceeds of the settlement of this proceeding and proceeding number 2017/00193375 (McConnell Proceeding), together with any cash and Convertible Notes provided by the Deed Administrators to the administrator (SDS Administrator) of the amended settlement distribution scheme (that appears at Annexure D to these orders (SDS), in accordance with order 8 (together the CAS Pool), be distributed among the group members in this proceeding and the Nakali Proceeding (hereafter group members) in accordance with the procedure set out in the SDS.

2. Order 1(a) constitutes approval of the settlement of this proceeding on terms consistent with the deed of company arrangement executed by, among others, the First Defendant, on or around 18 April 2018.

3. Pursuant to s.179 of the CPA, the persons bound by these orders are the plaintiffs, the defendants and the group members.

4. Pursuant to s.183 of the CPA, the plaintiffs be authorised, nunc pro tunc, to enter the Settlement Agreement on behalf of the group members.

5. Glenn Charles McGowan be appointed as the SDS Administrator and to hold the CAS Pool on trust for the CGMs (as defined in the SDS) in accordance with these orders.

6. Pursuant to s.173(2) and s.183 of the CPA, the SDS Administrator's costs of administering the CAS Pool are approved in the amount of \$200,000.

Costs and funding equalisation order

7. Pursuant to s.173(2) and s.183 of the CPA:

(a) together with r.20.24 of the Uniform Civil Procedure Rules 2005:

(i) the report of Elizabeth Harris dated 19 November 2019 (Harris Report) be adopted as varied,

(ii) the plaintiffs' costs incurred since the provision of the Harris Report are approved, such that the plaintiffs' costs are approved in the amount of \$5,090,000 being the Reimbursable Costs.

(b) each CGM who registered to participate in the settlement pursuant to the orders of the Court made on 12 November 2019 or 23 March 2020, including those group members who entered into a litigation funding agreement (LFA) with either International Litigation Partners No 17 Pte Ltd (ILP) or Vannin Capital Operations Limited (Vannin) (together the funders), shall pay a share of the Reimbursable Costs, such share to be:

(i) calculated as the proportion that the final assessed entitlement of that CGM to the combined value of cash under the SDS bears to the total value of cash in the CAS Pool to which all CGMs are entitled (CGMs' shares); and

(ii) payable from the Chubb Payment only (as that expression is defined in the Settlement Agreement); and

(c) the obligations incurred by the FGMs to remunerate either funder out of compensation recovered in or as a result of the proceeding (FGM Obligations) shall be equalised among all CGMs (including CGMs who had not entered litigation funding agreements with either funder) (UGMs) by:

(i) the FGM Obligations, amended to provide that:

(A) the Funder's Commission (in the case of the ILP LFA) and Funder's Premium (in the case of the Vannin LFA) be reduced by consent of the Funders to 25% of the amount received by each FGM following the payment of the Reimbursable Costs, being an amount of \$1,210,000; and

(B) no group member will have any obligation to make any payment in accordance with:

(1) cl. 4 of the funding agreement entered into by FGMs with Vannin to pay an amount calculated as a multiple of the costs paid by Vannin in the proceeding; or

(2) cl. 7.1(d) of the funding agreement entered into by FGMs with ILP to pay a percentage of the Legal Costs (as defined in the LFA) incurred in the proceeding, being deducted from the cash available for distribution in the CAS Pool (after deduction of Reimbursable Costs) prior to any other distribution to CGMs, and

(ii) thereafter – the balance of the cash (plus the Convertible Notes) to which the CGMs are entitled being distributed among the CGMs in the CGMs' Shares.

8. Pursuant to s.183 of the CPA, each CGM entitled to any distribution from the CAS Pool shall, pursuant to the CGM Form (as defined in the orders made on 12 November 2019):

(a) in the case of any cash (CGM DoCA Cash) to which the CGM becomes entitled pursuant to the terms of the Surfstitch Group Limited Deed of Company Arrangement (SGL DOCA) – stand as having authorised and directed the Deed Administrators to pay their CGM DoCA Cash to the SDS Administrator (or as he directs) and the CGM DoCA Cash will form part of the CAS Pool;

(b) if the CGM is a FGM, in the case of any cash to which the CGM becomes entitled and which is sourced from the Chubb Payment (as that term is defined in the Settlement Agreement) (FGM Chubb Cash) – stand as having authorised and directed the SDS Administrator to pay to the SDS Administrator, upon trust for the funders, the FGM's share of so much of the FGM Obligations as is payable from FGM Chubb Cash (the allocations in (b) together equating to the FGM Obligations).

9. The Reimbursable Costs and the FGM Obligations are to be paid:

(a) in the case of Reimbursable Costs – to Gadens and Squire Patton Boggs in accordance with their approved costs, and

(b) in the case of the FGM Obligations – to Gadens upon trust for the funders, prior to any other distributions from the CAS Pool to CGMs.

Confidentiality

10. The following orders of the Court providing that material filed in this proceeding is confidential are vacated:

(a) order 2 of the orders made on 11 December 2017;

(b) order s 1 to 3 of the orders made on 2 November 2018;

(c) orders 15 and 16 of the orders made on 12 November 2019; and

(d) orders 5 and 6 of the orders made on 6 March 2020;

11. Pursuant to s.7 of the Court Suppression and Non-Publication Orders Act 2010, on the ground that the order is necessary to prevent prejudice to the proper administration of justice, until further order the:

(a) parts of the submissions filed by the contradictor; and

(b) parts of the submissions filed by the plaintiff; and

(c) parts of the affidavits filed by the plaintiff; and

(d) the Settlement Deed,

set out in Annexure A be, until the expiry of any appeal period in respect of these Orders, or determination of any appeal filed from these Orders:

(i) confidential and not be published or made available to any person without the prior leave of the Court to any person or entity other than the plaintiff, the plaintiff's legal advisers, the Contradictor, the Judge with the carriage of the matter from time to time, and officers of the Court to whom it is necessary to disclose the material, and in the case of the Settlement Deed the parties to that deed.

(ii) marked or designated as confidential;

(iii) held on the Court file in accordance with (i) and (ii) hereof.

12. Pursuant to s.7 of the Court Suppression and Non-Publication Orders Act 2010, on the ground that the order is necessary to prevent prejudice to the proper administration of justice, until further order:

(a) paragraph 61 of the submissions of the Contradictor dated 23 July 2020;

(b) the opinion of William Edwards dated 14 September 2018;

(c) the passages of the affidavits set out in Annexure C; and

(d) any unredacted versions of the documents referred to in order 11 or this order 12, be:

(i) confidential and not be published or made available to any person without the prior leave of the Court to any person or entity other than the plaintiff, the plaintiff's legal advisers, the Contradictor, the Judge with the carriage of the matter from time to time, and officers of the Court to whom it is necessary to disclose the material, and in the case of the Settlement Deed the parties to that deed.

(ii) marked or designated as confidential;

(iii) held on the Court file in accordance with (i) and (ii) hereof.

13. Upon the expiry of the appeal period in respect of these Orders, or determination of any appeal if filed, the plaintiff will forthwith file versions of the documents referred to in order 12 in which the passages set out in Annexure C to these orders have been redacted.

Late registrants

14. Pursuant to s 183 of the CPA, the people listed in Annexure B are each deemed to be a continuing group member for the purposes of the SDS, and to have registered in accordance with order 2 of the orders made by this Court on 23 March 2020.

Other matters

15. The second defendant release to the plaintiff the security provided to the second defendant pursuant to the orders dated 4 August 2017.

16. Subject to order 17, the proceeding be dismissed on the basis that each party bears their own costs.

17. The operation of order 16 be stayed until the completion of the administration of the SDS.

18. The parties have liberty to apply.

Justice J Stevenson

Signed

Date