

FEDERAL COURT OF AUSTRALIA

Gill v Ethicon Sàrl (No 2) [2019] FCA 177

File number: NSD 1590 of 2012

Judge: **LEE J**

Date of judgment: 4 February 2019

Catchwords: **REPRESENTATIVE PROCEEDINGS** – application for “hard closure” of the class – appropriateness of “hard closure” orders – possibility of “soft closure” – likelihood of settlement offer being made to resolve whole of proceedings prior to judgment being delivered – interlocutory application dismissed – filing of large amounts of irrelevant material relevant to costs order

Legislation: *Evidence Act 1995* (Cth) s 131
Federal Court of Australia Act 1976 (Cth) Pt VB, s 33V, s 33Z(1)(f), s 33ZF

Cases cited: *Courtney v Medtel Pty Limited* [2002] FCA 957; (2002) 122 FCR 168
Dillon v RBS Group (Australia) Pty Limited [2017] FCA 896; (2017) 252 FCR 150
Ethicon Sàrl v Gill [2018] FCAFC 137
Jones v Treasury Wine Estates Limited (No 2) [2017] FCA 296
McMullin v ICA Operations Pty Ltd (1998) 84 FCR 1
Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited [2017] FCAFC 98; (2017) 252 FCR 1
Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148; (2016) 245 FCR 191
Regent Holdings Pty Ltd v State of Victoria [2012] VSCA 221; (2012) 36 VR 424

Morabito, V, “Judicial Responses to Class Action Settlements that Provide no Benefits to some Class Members” (2006) 32 Monash University Law Review 75

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Counsel for the Applicants:	Dr D E Graham SC with Mr A Naylor
Solicitor for the Applicants:	Shine Lawyers
Counsel for the Respondents:	Mr S Finch SC with Mr D T W Wong
Solicitor for the Respondents:	Clayton Utz

ORDERS

NSD 1590 of 2012

BETWEEN: **KATHRYN GILL**
First Applicant

DIANE DAWSON
Second Applicant

ANN SANDERS
Third Applicant

AND: **ETHICON SÁRL**
First Respondent

ETHICON INC
Second Respondent

**JOHNSON & JOHNSON MEDICAL PTY LIMITED ACN 000
160 403**
Third Respondent

JUDGE: **LEE J**

DATE OF ORDER: **4 FEBRUARY 2019**

THE COURT ORDERS THAT:

1. The interlocutory application by the respondents dated 12 December 2018 be dismissed.
2. The respondents pay 75% of the applicants' costs of the application, those costs not to include costs of the preparation of the confidential affidavit of Rebecca Lee Jancauskas dated 30 January 2019 (which was not read).
3. The applicants' solicitors are to file and serve an affidavit setting out the lump sum costs of the applicants calculated on the basis referred to at Order 2, above.
4. There be a further case management hearing which is to be conducted on a date to be fixed and the parties are to communicate to the Associate to Justice Lee mutually convenient dates when they believe the case management hearing could be most usefully conducted.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the Transcript)

LEE J:

A INTRODUCTION

- 1 The respondents in this class action seek a “hard closure” of the class. In the *lingua franca* of Part IVA practitioners, a “hard closure” is a closure of the class which extinguishes a group member’s rights to share in the fruits of a subsequent judgment unless the class member takes steps to register in the proceeding. By way of contrast, a so-called “soft closure”, refers to orders that are made to facilitate settlement, which provide for group members to come forward and register by a particular date (**registration date**) in order to participate in a settlement, provided such settlement takes place by a specified date in the future (usually a date chosen to allow enough time for a scheduled mediation to take place and for any prospective s 33V application to be determined) (**specified date**). All group members become bound by the settlement, but any group member who does not register by the registration date is barred from participating in the settlement. If there is no settlement, the closure is temporary (or “soft”), in that the class closure order is then spent and the class, as it were, “springs” open upon the passing of the specified date. This allows group members who fail to register by the registration date to continue to participate in the class action because their rights have not been extinguished by reason of a want of registration.
- 2 Class closure orders have been controversial. Aspects of the practice have been referred to by a leading expert in class actions, Professor Morabito, as “grossly unsatisfactory”. Professor Morabito contends that it fails to pay sufficient regard to the opt-out model adopted by Part IVA which has, at its heart, the notion that persons who fall within the description of the group will be included in the class action and be entitled to receive whatever relief is obtained by the group, without being required to indicate their desire to participate in the proceeding: see Morabito, V, “*Judicial Responses to Class Action Settlements that Provide no Benefits to some Class Members*” (2006) 32 Monash University Law Review 75 at 103-104.
- 3 Despite this controversy, “soft” class closure orders have become common. Their rationale, as the Full Court explained in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98; (2017) 252 FCR 1 at 22 [75], is that:

... a requirement for class members to register their claims will facilitate settlement, because it allows both sides to have a better understanding of the total quantum of class members' claims, permits the settlement amount to be capped by reference to the number of class members, and assists in achieving finality (to the extent the Pt IVA regime permits): see *Grave D, Adams K and Betts J, Class Actions in Australia* (2nd ed, Lawbook Co, 2012) at [14.410]. A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

4 In the decision the subject of appeal in *Melbourne City Investments*, the primary judge, Foster J, in *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296, expressed doubt that the Court had power to make an order before the initial trial of a Part IVA proceeding, that would extinguish a group member's rights to share in the fruits of a subsequent judgment unless the class member took steps to register (that is, a "hard" closure order). Despite expressing those doubts as to power, his Honour refused the application made on discretionary grounds: see [61]-[62] and *Melbourne City Investments* at 20-21 [71].

5 The Full Court agreed with the exercise of his Honour's discretion and, when it came to "hard" closure orders, said the following at 22 [76]:

... we share the views expressed by the primary judge in relation to a class closure order that also precludes class members from sharing in a subsequent judgment. In our view, the Court should be cautious before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim and share in a judgment. That is, the facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to an arbitrary deadline is not.

6 Like in many aspects of practice and procedure relating to representative proceedings, there is a danger in generalising and care must be taken to "avoid reading judgments on fact specific interlocutory issues of practice and procedure as if they were determinative of precepts and principles of general application": see *Regent Holdings Pty Ltd v State of Victoria* [2012] VSCA 221; (2012) 36 VR 424 at 429 [19] per Nettle, Redlich and Osborn JJA. Having sounded that note of caution, for my part, it is very difficult to see how it is appropriate for a court, exercising a protective and supervisory role in respect of group members, to take the step of extinguishing the property rights of persons on a final basis, unless it is in the context of approving a settlement prior to an initial trial. When this is appreciated, and it is understood that "soft" closure orders can be adapted to serve the admittedly desirable end of facilitating such a settlement, it is not evident to me why a "hard" closure order would ever be appropriate (at least in an open class proceeding or a closed class proceeding with a large number of group members).

- 7 The legislative foundation upon which class closure orders rest is s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**). As it has often been said, the purpose of s 33ZF is to equip the court with the “widest possible power” (*McMullin v ICA Operations Pty Ltd* (1998) 84 FCR 1 at 4 (Wilcox J)) and, like any other provision granting broad powers to a court, its operation should not be limited absent clear indication in its terms or by reason of context. In enacting Part IVA, Parliament was introducing an “entirely novel procedure” and “in order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties” (see *McMullin* at 4; *Courtney v Medtel Pty Limited* [2002] FCA 957; (2002) 122 FCR 168 at 182 [48]). There is no doubt that the power exists to make class closure orders to facilitate settlement. Having said that, the power to make “any order” is only enlivened where the court “thinks” the order is “necessary or appropriate” to ensure justice is done in the proceeding. Once the court reaches this level of satisfaction, it follows (subject to constitutional limitations) that the court has power to make an order under s 33ZF. The word “necessary” does not impose a requirement that the court must be satisfied that unless the order is made, the administration of justice will be undermined. Rather, it requires that the proposed order “be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding”: see *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191 at 224 [165].
- 8 It follows that in order for me to be able to make the order sought by the respondents, at the very least, I would need to “think”, in the present context of the Part IVA opt-out regime, that it is appropriate that the relevant group members’ claims be extinguished for all time in the event that they do not respond timeously to a court notice requiring them to take active steps to, in effect, “opt-in” to the proceeding. The whole point of class closure orders is to provide some certainty (or at least some guidance) to a respondent as to the nature and quantum of the case advanced against the respondent by non-parties in appropriate cases. As noted above, in circumstances where this information can be provided without extinguishing group member claims for all purposes, it is not self-evident to me how such a “hard” closure order could ever be either necessary or appropriate in the relevant sense (absent, perhaps, an outlier case of a very small sophisticated group conducting litigation as a common enterprise).
- 9 Before leaving these general observations I should make a final point: I have already referred to the undesirability of “fixed” rules when dealing with issues of practice and procedure. It should not be assumed that “soft” closure orders will *always* be appropriate as a pre-condition

to settlement discussions or prior to a Court approved mediation. It is case dependent. It is possible to imagine, for example, that such an order may not be utile when the claim made by an applicant is for an award of damages in an aggregate amount without specifying amounts awarded in respect of individual group members (see s 33Z(1)(f) of the Act).

B THE PRESENT APPLICATION

10 The respondents apply for orders that any group member who had a “Registrable Product” implanted and wishes to pursue a claim for compensation “in relation to that Registrable Product”, must register on a date to be fixed and deliver to the applicants’ solicitors, what is described as a “Claimant Registration Form”. A regime is then proposed which requires the solicitors for the applicant to file a confidential exhibit detailing the responses received from those who register. A further order is then sought in the following terms:

The claims of any group member who had implanted a Registrable Product and who is not listed in the confidential exhibit... are dismissed, on and from the day after the Registration Date. This dismissal will operate as a final determination of the rights of those group members to claim damages or other relief against the Respondents in relation to one or more Registrable Product (sic).

11 To understand the present application, it is necessary to appreciate what amounts to a Registrable Product. In *Ethicon Sàrl v Gill* [2018] FCAFC 137, the Full Court, at [1]-[2], described the class action as being “maintained on behalf of three representative applicants who, together with group members, were surgically implanted with medical devices”. These devices were manufactured by two overseas companies (which are the first two respondents) and were sold in Australia by the third respondent. As the Full Court noted at [2]:

In broad summary, it is alleged that the devices were defective and/or unfit for purpose and that representations were made about them which contravened norms contained in the *Trade Practices Act 1974* (Cth) and the *Competition and Consumer Act 2010* (Cth). It is further alleged the respondents were negligent. Monetary and non-monetary relief is sought.

12 The current group definition, the evolution of which was described by the Full Court at [7]-[13], defines the amended class by reference to group members satisfying three criteria: *first*, they had surgery performed on them in Australia to implant one or more of the devices specified; *secondly*, they were supplied with one or more of the devices for specified purposes; and *thirdly*, they have suffered from one or more complications, defined in the statement of claim, attributable to the devices and/or the consequences of surgical removal of the devices.

13 There are currently two subgroups being the “Mesh-Group members” and the “Tape-Group members”. The Registrable Products relate to three of the four mesh implants and one of the

five tape implants. It is unnecessary to go into the details, but it is common ground between the parties that an unknown number of group members may have been implanted with Registrable Products and also other implants. It is unknown how many group members fall into this category, partly because the number of group members is unknown.

14 Turning more generally to group composition, an estimate made by the applicants, which was not disputed by the respondents, is that there are approximately 5,649 group members. The pin-point nature of this figure gives a patina of accuracy which, on an examination of the evidence, is not justifiable. The best that can be said is that it represents a workable figure as to the likely number of group members for present purposes. Out of that group, 1,198 group members have “registered” with the solicitors for the applicants. By the process of registration, they have not become clients of the applicants’ solicitors, but presumably have provided them with some details. More specific details have been provided by 967 group members, who have participated in a survey.

15 It is necessary to highlight an unusual aspect of this application. In *Dillon v RBS Group (Australia) Pty Limited* [2017] FCA 896; (2017) 252 FCR 150 at 160-163 [49]-[61], I dealt with a recurring issue in class actions, which has been apt to cause confusion. At [50] I noted as follows:

It is important to bear in mind another fundamental concept which, although simple, is sometimes obscured: a group comprises *persons* and not the *claims of persons*. The best way of avoiding confusion is by imagining that a list of group members is always a list of names but, when actual names are not used, the “list” of persons is identified by a criterion (or more usually criteria) specified at the time the group is described. The identity of all persons is ascertainable and the characteristics describing membership, subject to leave under s 33K, will necessarily all be in existence immediately prior to the commencement of the proceeding on their behalf.

16 The claims which are the subject of the proceeding, are the entirety of each claim of each group member, which exist separately from the proceeding. The concept of a “claim” is basal to Part IVA proceedings, and as I explained in *Dillon v RBS* at 162 [53], it is used throughout Part IVA. The relevant claim of a person must have the characteristics identified in s 33C, that is, “sufficient commonality in the sense that it is one of seven or more claims of persons which are in respect of, or arise out of, the same, similar or related circumstances and give rise to at least one substantial common legal or factual question”: 162 [53]. It is this claim that is then the subject of the Part IVA regime until either opt-out, court-approved settlement, judicial determination at an initial or later “group” hearing, or judicial determination at an individual trial after “declassing”. What is suggested on the present application is highly unusual in that,

at least with regard to an indeterminate number of group members, there is a proposal that settlement occur in relation to only *part* of their claim against the respondents. The significance of this is obvious: even if the proposed class closure order was made, in respect of the group members who were implanted with a Registrable Product and also another implant, information would only be procured in respect of part of their claim and any settlement in relation to the Registrable Products would not quell the entire controversy between that group member and the respondents.

C EVIDENCE

17 The evidence of the solicitor on the record for the respondents details the constitution of the class action, the history of the proceedings, the awareness of (and notice about) the class action, the implants generally and the Registrable Products in particular, and then turns to the topic of what is described as “Further offer to RP Group Members”. The affidavit then continues:

The parties have attended a series of without prejudice meetings in an attempt to mediate issues in dispute. The parties have been unable to agree to terms of settlement or any settlement terms capable of obtaining the court’s approval...

The respondents wish to understand the number and size of claims in respect of the Registrable Products, **and to be in a position to make a further offer to the RP Group Members**. Before doing so, the respondents want to know:

- (a) the number of RP Group Members who are pursuing a claim;
- (b) what Registrable Product is the subject of their claim;
- (c) when their surgery took place; and
- (d) the nature and extent of their alleged complications and loss.

(Emphasis added)

18 What became evident, however, following the filing of submissions and cross-examination, was that the respondents have not reached any decision to make any further offer to what they describe as the “RP Group Members”. The solicitor for the respondents gave evidence, which I accept, that the current position is that depending upon the quality of the information obtained following any notification process, there is a “possibility” of a further offer being made to the RP Group Members but only in relation to their Registrable Product claim (that is, a subset of group members and, in relation to some of that subset, only as to part of their claim).

19 I accept the subjective view of those advising the respondents that they believe they do not currently have sufficient information to make such an offer. Having said that, the evidence of one of the solicitors for the applicants demonstrates that on 9 April 2018, the solicitors for the

respondents were provided with survey information collected from 967 individuals who had earlier returned questionnaires to the solicitors for the applicants. This information included details as to the types of implants those group members had received; the demographics (including age) at the time of index surgery, what was called “first revision surgery”; the outcomes after “index” surgery; data regarding revision surgeries, including a summary of the number of revision surgeries undergone; data regarding reported complications experienced by the group members after their index surgery, including the proportion of women who suffered various ailments; data regarding the impact of various complications on the group members’ daily activities including whether or not they required care and assistance with daily living; data regarding ongoing treatment; data regarding economic loss, including whether the group members were working at the time of their surgery; and data regarding out-of-pocket expenses.

20 This data was provided, of course, in relation to the entire claim of the group members who participated in the survey and was not directed only to the Registrable Products.

21 Although this material has been provided by quite a large number of the group members, it is common ground that it is incomplete and does not allow extrapolation with great accuracy as to the entire quantum of claims made by group members. Having said that, it is of a specificity, that at least in my experience, is considerably more detailed than has been provided in a large number of open class representative proceedings (and which has been provided prior to meaningful settlement discussions taking place).

22 As noted above, as presently advised, the respondents have no present intention of making an offer to resolve the entirety of the class action. It would be entirely inappropriate for me to criticise the respondents for adopting such a stance. They are represented by highly competent legal practitioners who, no doubt, have taken into account Part VB of the Act. They have no doubt explained to their clients that the parties to any civil proceeding before the court are required to conduct negotiations for the settlement of the dispute in a way that is consistent with the overarching purpose: see s 37N(1). The respondents’ lawyers are also, of course, under a personal obligation in the conduct of a civil proceeding before the court, including negotiations for settlement, to take account of the duty imposed pursuant to the overarching purpose and to assist their clients to comply with that duty. There is no basis for me to conclude that any party to the dispute has failed to comply with those important statutory obligations which are now fundamental to the conduct of civil litigation in this Court.

23 The conclusion that there is no present intention of making an offer to resolve the entirety of the class action, however, has consequences. I am not satisfied that there is any realistic likelihood that if I was to make the orders asked, that a settlement offer which would resolve the proceedings would be made prior to the docket judge, Katzmann J, being required to complete what, no doubt, is the very onerous task of producing the judgment which her Honour has reserved. Indeed, when I raised this during the course of oral argument, neither party contested the proposition that irrespective of the outcome of this application, her Honour will be required to deliver judgment.

24 It is against this background that I come to my consideration as to whether the relief sought should be granted.

D DISPOSITION

25 As might already be anticipated, a “hard” closure order is, in my view, wholly inappropriate. There is no basis upon which the court could be satisfied that it is necessary or appropriate for group member claims to be extinguished in the way sought. The first and most obvious point is that in the event that all is sought is certainty in order for settlement to be progressed, then a “soft” closure order of the type that I have indicated would be adequate.

26 Indeed, a curious aspect of this application is that during the course of the hearing today, it emerged that there may have been some misunderstanding between the parties as to what constitutes a “soft” closure and how it facilitates settlement. In any event, apart from the fact that I am not satisfied that the proposed “hard” closure orders are either necessary or appropriate to facilitate settlement, it is very difficult to see why the court would vex some of the group members with obtaining what appears to be quite detailed information relating to only part of their entire claims. Obtaining material in order to allow for settlement discussions to take place which would have the aim of settling the whole of a class action is one thing; what is proposed here is quite different. There is no certainty any offer will be made to even a subset of group members and no prospect at all of a more general offer being made to all group members in relation to all their claims at present.

27 It follows from the above, that the interlocutory application made by the respondents must be dismissed.

E WHERE TO FROM HERE: “SOFT” CLOSURE?

- 28 The respondents oppose a “soft” closure. The applicants embraced the notion of a registration, but it was unclear from the oral submissions today as to whether they consented to a “soft” closure order being made in the usual way.
- 29 Be that as it may, one of the important aspects of s 33ZF is that it is open to the Court, acting on its own account, to make orders which the judge thinks appropriate or necessary to ensure justice is done in a proceeding. I confess that when I first saw the application made by the respondents, it was difficult for me to understand why a “soft” closure order would not be appropriate. Already, vast amounts of public and private resources have been consumed in this litigation. The demands on the docket judge are both heavy and ongoing. Any step that could be taken to facilitate the possibility of settlement ought, it seemed to me, be encouraged.
- 30 As I have already outlined, my lamentable conclusion is that no offer will be made to resolve the whole proceeding without the court determining common issues in a judgment following the initial trial. A judgment may bring total success for the applicants, partial success for the applicants or the total defeat of the applicants, but the issue of registration will only arise in the event that at least some of the group member claims survive the determination by Katzmann J of common issues. The question, therefore, becomes: is it worth ordering a registration process now, when at least one of the possible outcomes of the initial trial is that registration will never need to occur?
- 31 On balance, I think the better course is to commence the process of seeking registration now even though no productive settlement discussions are likely to take place until after the delivery of judgment by her Honour or, perhaps even more pessimistically, after appeal rights have been exhausted. Although conscious of the fact that if the judgment is wholly adverse to the applicants there will be some waste of money involved in pursuing a registration scheme, it is clear that the identification of the group members and obtaining information is likely to be a time consuming and potentially difficult process. The quicker it starts, the better.
- 32 What I propose to do is stand the matter over before me for a case management hearing on a date to be fixed. Prior to that time, I will direct each party to provide draft orders as to how they propose the registration scheme should be conducted, including what orders should be made to bring home to the group members the importance of registration.

- 33 During the course of argument I discussed with the parties the need to have regard to novel ways to communicate with the group members, including the parties seeking the issue of compulsory process to third parties in order to obtain information which might better provide details as to group member identity. Apart from traditional modes of communication, the parties should also consider social media, including communication by way of Facebook, Twitter or similar fora. Also, the parties should give thought to whether or not the process of having a mediation conducted by a Court Registrar and a former judge of the court is the optimal way of conducting further formal mediation sessions. I am content to have regard to the parties' wishes in this regard, but some thought may be given as to whether or not an alternative course should be adopted.
- 34 The applicant seeks the costs of the interlocutory application on a party/party basis. The respondents did not wish to be heard in opposition to that order but it does not seem to me, notwithstanding the non-opposition, that I should make that order. A very large amount of irrelevant material was filed on the application and, in particular, affidavit evidence and submissions were served which contained material which was clearly subject to settlement privilege pursuant to s 131 of the *Evidence Act 1995* (Cth) and did not, and was not likely to, engage one of the exceptions to that privilege. Costs associated with the preparation of that affidavit material should not be allowed. In this regard, I note the parties have already agreed to take steps to remove that privileged material contained in the submissions from the court file, together with the relevant affidavit.
- 35 A further factor relates to the fact that I initially listed this matter for hearing in late December 2018. When the matter came before me I was told it was necessary for there to be affidavit evidence filed and hence the matter could not proceed on that date. I expressed my scepticism as to the utility of such affidavit material, but the respondents did not press for the hearing to take place at that time.
- 36 I have a broad discretion in relation to costs and the fair result is that 75% of the applicants' costs of the interlocutory application be payable by the respondents, those costs not including the costs of the preparation of the confidential affidavit which was not read. Prior to the matter coming before me at the next case management hearing, I direct the applicants' solicitors to file an affidavit setting out these costs on a lump sum basis and I will hear from the parties on that day as to whether or not a lump sum costs order should be made.

37 The case management hearing will be conducted on a date to be fixed and the parties are to communicate with my Associate regarding dates upon which it can be most conveniently and usefully conducted.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate: 

Dated: 20 February 2019