

## **Sports Law Committee**

### **Monitor's Report by Peter Agardy**



The Sports Law Committee continues its joint initiatives with the corresponding committee of the Law Institute. The committees have regular joint meetings.

Liz Brimer's summary of her appearance before the Independent Sport Panel, following a joint submission with the Law Institute, is attached.

A case note by Justin Brereton on the decision of Harper J in *Whittlesea Juventus International Football Club v Football Federation of Victoria* is attached.

The Committee has arranged the following CPD session:

27 August 2009: "Racing Tribunals"  
Speakers Terry Forrest QC and Peter McMillan - Peter McMillan Consulting Pty Ltd.

### **Summary of Appearance before the Independent Sport Panel by Elizabeth Brimer**



On 15 April 2009, Paul Horvath and Penny Lording representing the LIV sports law committee and Elizabeth Brimer, representing the Victorian Bar Sports Law Committee attended the public forum on community sport conducted by the Independent Sport Panel. The Independent Sport Panel is investigating ways of ensuring that Australia's sporting system remains prepared for the challenges of the future.

Our submission was that an athlete legal assistance scheme should be established to assist athletes in certain circumstances. Many issues facing the various sporting and related groups were raised and discussed. Our submission was noted, but met with a fairly cool if not unsupportive response by the panel.

We will await the report of the panel.

***Whittlesea Juventus International Football Club v Football Federation of Victoria***  
**[2009] VSC 1231**

**Case note by Justin Brereton**



### **Introduction**

In late March 2009, the administrator of football (soccer) in the state of Victoria found itself before the Supreme Court defending an application for an urgent interlocutory injunction. On 27 March 2009, Harper J delivered judgment on the application.

Although his Honour's decision was made in the limited context of an interlocutory application,<sup>2</sup> the Court has nevertheless offered sports administrators, and those who advise them, important guidance on making decisions which impact on the rights of participant clubs. In particular, his Honour's judgment is striking for the emphasis it places on both the practical "realities" and the clarity required of any decision making processes.

### **The Facts**

#### ***Background***

In late 2006 two football clubs wished to merge.<sup>3</sup> These clubs, known as the Whittlesea Juventus International Football Club ("**Bulleen Zebras**") and the Thomastown Regent Inc ("**Whittlesea Stallions**") were both members of the Football Federation of Victoria ("**FFV**").

The motivation for the merger was simple. The Bulleen Zebras were struggling to raise junior teams in Melbourne's eastern suburbs and wished to have access to the fertile recruiting grounds in Melbourne's north. For their part, the Whittlesea Stallions did not have a senior men's team in the Premier League and the Bulleen Zebras could provide the Whittlesea Stallions with a ready-made team for that competition.

#### ***The Rules and the Act***

Both the FFV rules ("Rules") and the *Associations Incorporation Act 1981* ("Act") mandated certain requirements before a merger could occur.

The Rules<sup>4</sup> required the clubs to, inter alia, submit to the FFV a written application, copies of signed minutes of general meetings confirming approval of the proposed merger and copies of the proposed constitution or statement of purpose and rules for the new club.

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<sup>1</sup> 27 March 2009 per Harper J.

<sup>2</sup> See Judgement at paragraph 2 where his Honour sets out the relevant limitations and noted that his decision is in no way intended to inhibit the trial judge as the ultimate tribunal of fact.

<sup>3</sup> There was also a third party to the merger. That party took no active role in the dispute or the proceeding. The Court also did not consider the third party relevant for the purpose of its reasons or the relief granted.

The Act<sup>5</sup> contained substantially similar requirements, but also required the Bulleen Zebras and Whittlesea Stallions to pay a prescribed fee and mandated that, once satisfied that an amalgamation had occurred, the registration of the former clubs as incorporated associations would be cancelled and the new, merged, club would be separately registered.

Some, but not all of the requirements of the Rules<sup>6</sup> and Act<sup>7</sup> were complied with. Nevertheless, the Court was satisfied that the clubs had agreed to merge<sup>8</sup> and for the 2007 and 2008 seasons the FFV treated the Bulleen Zebras and the Whittlesea Stallions as though they had merged.<sup>9</sup> In doing so, the purportedly merged club became the Whittlesea Zebras and, in that form, competed in competitions administered by the FFV.<sup>10</sup>

### ***The Split***

In late 2008 a split occurred. At that time, three officials of the Whittlesea Zebras (who had previously been officials of the Whittlesea Stallions) claimed that the purported merger had not occurred in accordance with both the Rules and the Act and therefore no merger had in fact taken place.

Whilst the precise reason for the split is not known, the three former officials set about reviving the Whittlesea Stallions.<sup>11</sup> They did this by bringing the alleged deficiencies of the merger to the attention of the FFV, asking it to intervene and asserting that the Whittlesea Stallions should be placed in the position it was in, prior to the purported merger having occurred.

### ***The FFV's Response to the Split***

At first the FFV considered the dispute an internal club matter and told the parties it would not intervene. Over time however, it became clear that the parties could not resolve their differences and, as a result, the FFV was forced to intervene. At that time, the FFV met with both parties and conducted enquiries as to whether the merger had in fact occurred in accordance with the Rules and the Act.

From both the meetings and its enquiries, the FFV concluded that:

1. some, but not all of the Rules had been complied with;
2. the register of Incorporated Associations maintained by Consumer Affairs Victoria indicated that no merger had ever occurred.

### ***The FFV's decision***

After coming to these conclusions, the FFV made an executive decision, later ratified by the board, that:

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<sup>4</sup> Rule 6.  
<sup>5</sup> Section 31.  
<sup>6</sup> Judgment paragraph 16.  
<sup>7</sup> Judgment paragraph 13.  
<sup>8</sup> Judgment paragraph 7.  
<sup>9</sup> Judgment paragraph 7.  
<sup>10</sup> Judgment paragraph 8.  
<sup>11</sup> Judgment paragraphs 5 and 6.

1. no merger had occurred; and
2. as consequence, the FFV would, so far as was possible, return the pre-merger clubs to the positions they were in prior to the purported merger. As such:
  - (a) the Whittlesea Stallions would regain the junior teams the club had fielded prior to the merger;
  - (b) the Whittlesea (formerly Bulleen) Zebras would retain its position in the senior men's Premier League and therefore, under the 2009 Competition Rules, would be required to field at least five junior teams. Those teams however:
    - (i) would be considered "new entrants" for the purpose of the FFV's promotion and relegation rules;
    - (ii) would not be entitled to compete in the junior "super leagues" as a result of their "new entrants" status.

It was the classification of the Whittlesea Zebra's junior teams as "new entrants" that was at the centre of the dispute.<sup>12</sup>

### **The Application**

The Whittlesea Zebras applied to the Supreme Court of Victoria for an urgent interlocutory injunction. The effect of the injunction was to compel the FFV to register junior teams in the name of the Whittlesea Zebras in such a way that those teams be permitted to compete in the junior "super leagues".

The application alleged that the FFV had breached its contractual obligations to the Whittlesea Zebras by:

1. failing to properly apply the Rules;
2. denying the Whittlesea Zebras natural justice; and
3. breaching principles of good faith and fidelity.

The Whittlesea Zebras also submitted that, by being denied the opportunity to field junior "super league" teams, it would:

1. be unable to attract junior players as it is access to "super league" teams that motivate junior players to join a particular club;<sup>13</sup>
2. potentially threaten the club's ongoing viability, by depriving it a source of revenue in the form of junior membership and registration fees.

### **The Decision**

#### ***"Reality" v "Legal Niceties"***

The Court delivered its judgment on 27 March 2009. In granting the injunction,<sup>14</sup> Harper J emphasised the fact that the clubs had agreed to merge and that in 2007 and 2008 the FFV had treated the clubs as though they had merged. His Honour said:

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<sup>12</sup> Judgement paragraph 1.

<sup>13</sup> Judgement paragraph 26.

*“As a matter of reality, therefore, the merger was a fact both on and off the field. But, when it came to the crunch FFV made the mistake of ignoring the reality. It concentrated instead on legal niceties alone. This is always dangerous, and in this instance particularly so. If an analysis of the legal position leads to a result that is totally out of alignment with the real world, a re-analysis of the legal position is always wise, even if ultimately (as seldom, but sometimes, happens) the legal position prevails.”<sup>15</sup>*

In making this statement, his Honour was also critical of the emphasis the FFV had placed on the information it received from the database maintained by Consumer Affairs Victoria. According to his Honour, this was “*hardly reliable evidence of anything*,”<sup>16</sup> but rather, was just as likely the result of a generally poor record of compliance with reporting obligations, than it was evidence of a failure to comply with the requirements of the Act necessary to give effect to the merger.<sup>17</sup>

### ***The importance of clarity***

In addition to identifying this general proposition of the “reality” of the situation, the Court also provided guidance by identifying a number of deficiencies in the FFV’s handling of the matter. This guidance reinforces the importance of sports administrators adopting a level of clarity greater than that displayed by the FFV in relation to this matter.

In that regard, his Honour noted that, the FFV should have specifically informed the Whittlesea Zebras of:

1. the additional information or documentation it required to be satisfied that a merger had occurred;<sup>18</sup>
2. the nature of any defect in the documentation that had been provided to the FFV;<sup>19</sup>
3. any specific rule it considered had not been complied with;<sup>20</sup>
4. the possibility that the FFV would consider the Whittlesea Zebras junior teams “new entrants” in the event that it found that no merger had taken place.<sup>21</sup> The Court concluded that this specific failure and the associated failure to offer the Whittlesea Zebras an opportunity to make submissions on the matter constituted a denial of natural justice<sup>22</sup> and that such a denial, in the absence of some intervening factor such as a disciplinary consideration, could not be overcome (as the FFV submitted) by the application of any rule which allowed the FFV to determine the makeup of its junior competitions in its absolute discretion.<sup>23</sup>

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<sup>14</sup> The granting the injunction his Honour said at paragraph 32 “...*I do not intend by anything I do today to require the FFV to, as it were, deregister the [Whittlesea] Stallions from the right to compete in the Super League in 2009*”.

<sup>15</sup> Judgement paragraph 12.

<sup>16</sup> Judgement Paragraph 13.

<sup>17</sup> Ibid.

<sup>18</sup> Judgement paragraph 16.

<sup>19</sup> Judgement paragraph 17.

<sup>20</sup> Ibid.

<sup>21</sup> Judgement paragraph 25.

<sup>22</sup> Ibid.

<sup>23</sup> Judgement paragraph 27.

## **Conclusion**

Whilst, as noted at the outset, this was an interlocutory decision made with access to limited evidence, it is nevertheless important for providing guidance to sports administrators, and those who advise them. The focus placed on the “reality” of the situation; the criticism of the FFV for the emphasis it placed on the records maintained by Consumer Affairs Victoria; the guidance offered by the Court in relation to the level of clarity required when making decisions and the fact that a lack of such clarity cannot be overcome by an apparent absolute discretion, are all matters that should be considered by sports administrators, and those who advise them, when decisions are made which impact the rights of participant clubs.